

OPINION
75-107

January 29, 1975 (OPINION)

The Honorable Wayne G. Sanstead
Lieutenant Governor
State Capitol
Bismarck, ND 58505

Dear Mr. Sanstead:

This is in reply to your letter of January 24, 1975, in which you state the following facts and questions:

"Senator Shirley Lee has requested that I seek an attorney general's opinion relative to Section 20.1-02-03.1 as contained in Senate Bill 2097 (page 15 line 6 following) of the Forty-fourth Legislative Assembly. Mr. David Niss of the Legislative Council staff indicated that the section in question had been voted on, I believe, by initiative in 1930. However, I note the revised list--memorandum of the Council dated January 3, 1975, which outlined the sections of the North Dakota Century Code which requires a two-thirds majority vote for amendment or repeal does contain the section, but not specifically the ".1" portion of the section.

"The question, then, is does this section require a two-thirds roll call vote?"

Section 16 of Senate Bill 2097 of the Forty-fourth Legislative Assembly enacts Section 20.1-02-03.1 of the N.D.C.C. The entire section reads as follows:

"SECTION 16.) Section 20.1-02-03.1 of the North Dakota Century Code is hereby created and enacted to read as follows:

20.1-02-03.1. COMMISSIONER OF NATURAL RESOURCES TO BE SUBSTITUTED FOR COMMISSIONER OF GAME AND FISH AND DEPUTY COMMISSIONER.) Wherever the terms "state game and fish commissioner", "commissioner", or "deputy commissioner", or any derivative of those persons, shall appear in the North Dakota Century Code, the term "commissioner of natural resources", or the term "commissioner", as the case may be, shall be substituted therefor. It is the intent of the legislative assembly that the commissioner of the department of natural resources shall be substituted for, take any action previously taken by, and shall perform any duties previously performed by the state game and fish commissioner or his deputy."

This section is not the same as Section 20.1-02-03 which is already a part of the statutes found in the 1973 Supplement to the North Dakota Century Code and which provides as follows:

"COMPENSATION AND EXPENSES OF COMMISSIONER - AUDIT AND PAYMENT. The biennial salary of the commissioner shall be the amount

appropriated therefor by the legislative assembly together with the actual and necessary expenses incurred by him in the performance of his duties. His salary and expenses shall be paid out of the game and fish fund and shall be audited and paid in the same manner as the salary and expenses of other state officers."

Section 20.1-02-03 and the proposed Section 20.1-02-03.1 are entirely separate sections. However the new section, 20.1-02-03.1, if enacted, would effectively amend each section in which the state game and fish commissioner is mentioned and substitute therefor the term "commissioner of natural resources." While each section is not set forth and amended in the bill individually, the effect is the same. We must, therefore, determine whether the section effectively amends any section which is the subject of an initiated or referred measure.

Section 20.1-02-03 of the 1973 Supplement to the N.D.C.C. would be one of the sections effectively amended by Section 16 of Senate Bill 2097 if enacted. The Legislative Council has, as you noted, listed Section 20.1-02-03 as one of those sections which were either initiated and enacted or referred and approved by the electorate under the provisions of Section 25 of the North Dakota Constitution. We do not, however, view the Memorandum of the Council as a legal determination of this fact but rather as an aid in determining those sections which might be subject to such a conclusion.

Section 20.1-02-03 of the N.D.C.C. has its source in Section 9 of Chapter 202 of the 1973 Session Laws.

Chapter 202 of the 1973 Session Laws resulted in a rather extensive revision of the game and fish laws of this state. One of the results of the bill was a repeal of Title 20 of the N.D.C.C. See Section 22 thereof. Section 20-02-03 of that Title was substantially the same as the present Section 20.1-02-03 of the 1973 Supplement to the N.D.C.C. Section 20-02-03 of the N.D.C.C., prior to its repeal, was the result of a measure referred to the electorate in 1930 (see page 582, 1931 Session Laws). While the present section is substantially the same as the one which was referred and approved, we must consider the effect of the repeal and reenactment.

Section 25 of the North Dakota Constitution provides in part:

"No measure enacted or approved by a vote of the electors shall be replaced or amended by the legislature, except upon a yeas and nays vote upon roll call of two-thirds of all members elected to each house."

In construing this provision, the North Dakota Supreme Court has held that where the legislative assembly amends and reenacts an initiated measure, its initiative character is not destroyed, and a subsequent amendment thereof, or of a portion thereof, is subject to the constitutional limitation placed on the assembly. See *State ex rel. Strutz v. Baker* 299 N.W. 574 (N.D. 1941) (two justices dissenting). The same rationale would, of course, be applicable to a referred measure approved by the electorate. In this instance, however, the original section was repealed by the 1973 Legislative Assembly. The bill (House Bill 1041) received a two-thirds vote in each house, and

therefore, Section 20-02-03 was repealed and the constitutional requirements of Section 25 were met.

In *State v. Baker* supra, the Court stated, page 578 of the reported case:

"A repeal destroys; an amendment keeps alive. The distinction between the terms is well stated in *State ex rel. Gamble v. Hubbard* 48 Ala. 391, 41 So. 903, 905."

At page 580 of the reported case, the Court stated:

"If, in the judgement of the legislature, the purpose of the measure has been accomplished, and changes of condition require alteration, the legislature has the right to repeal the initiated measure by the constitutional vote. When once repealed, the measure is dead. Then the legislature may, as its judgment dictates, substitute such legislation as the exigencies of the occasion require." (Emphasis ours)

The parallel tables indicate that all of Chapter 130 of the 1929 Session Laws was codified as part of Title 20 of the N.D.C.C. As such the entire Chapter was repealed by the enactment of Chapter 202 of the 1973 Session Laws which, among other things, repealed Title 20. In view of the fact that the referred measure of 1929 was repealed by the 1973 Legislature pursuant to the constitutionally required two-thirds vote of the Legislature, we would conclude that any further amendments or additions to the subject matter thereof do not require the two-thirds vote required by Section 25 of the North Dakota Constitution. We reach this conclusion even though the same bill which repealed the provision enacted a new section in substantially the same language. The 1973 bill was a result of a study by the Legislative Council. We note the Report of the Council for 1973 indicates, page 124, that the revision of game and fish laws was not to include substantive matters, but to revise and rearrange existing laws and to remove unused and archaic sections, and may be viewed by some as only changing the section number applied to the statutes in question. We must nevertheless stand by our conclusion since to do otherwise would lead to almost endless confusion in those instances in which an initiated or referred measure was repealed by the requisite vote and a part or all thereof again enacted.

In direct response to your question, it is our opinion that Section 16 of Senate Bill 2097 of the Forty-fourth Legislative Assembly, creating and enacting Section 20.1-02-03.1 of the N.D.C.C. does not require a two-thirds vote for passage but may be enacted by the simple majority.

Sincerely,

ALLEN I. OLSON

Attorney General