

Office of the Attorney General
State of North Dakota

Opinion No. 86-31

Date Issued: October 16, 1986

Requested by: Senator Jens J. Tennefos
District 46

--QUESTIONS PRESENTED--

I.

Whether the proposed amendment to N.D. Const. Art. XI, § 25, if enacted, will become effective without legislative action implementing the proposed constitutional provisions.

II.

Whether the Legislature may be mandated to enact legislation implementing the proposed amendments to N.D. Const. Art. XI, § 25, if enacted.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the proposed amendment to N.D. Const. Art. XI, § 25, if enacted, will not become effective without legislative action implementing the proposed constitutional provisions.

II.

It is my further opinion that the Legislature may not be mandated to enact legislation implementing the proposed amendment to N.D. Const. Art. XI, § 25, if enacted.

--ANALYSES--

I.

North Dakota voters will consider a proposed amendment to N.D. Const. Art. XI, § 25, at the November, 1986, general election. If that amendment is approved by the voters, the amended N.D. Const. Art. XI, § 25, (hereinafter referred to as 'Section 25') will provide as follows:

Section 25. The legislative assembly shall establish a state operated lottery for the purpose of providing tax relief for the

citizens of North Dakota in such a manner that sales to the public of the lottery shall commence no later than December 1, 1987. The legislative assembly shall also establish a North Dakota gaming regulatory commission which shall administer and regulate the state lottery and any other charitable gaming permitted by law.

With the exception of a state lottery, the legislative assembly shall not authorize any game of chance, or gift enterprises, under any pretense, or for any purpose whatever. However, the legislative assembly may authorize by law bona fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses.

The commission may authorize the use of any type of lottery game or games which will maximize the revenue objectives of the lottery consonant with the public good. Each lottery game shall consist of a procedure whereby prizes are distributed among persons who have paid, or unconditionally agreed to pay, for tickets or shares which provide the chance or other opportunity to win such prizes. The commission may enter into agreements, with any number of other states which have a state-operated or authorized lottery, to jointly operate a lottery game or games if it concludes that the lottery's net revenues to North Dakota will be enhanced by that action.

No prize shall be paid to, and no ticket or share in a lottery game shall be sold to or purchased by, anyone under the age of 18 years.

No Commissioner, employee of the lottery, or supplier to the lottery shall have been convicted of a felony; been determined to have engaged in embezzlement, fraud, or illegal gambling; been convicted of an offense involving a lottery drawing or procurement for any government-operated lottery; or been involved in such other violations as shall be specified by the legislative assembly by statute.

General fund monies cannot be used for funding the North Dakota gaming regulatory commission. Except for moneys necessary to temporarily fund the start up of the commission and the state lottery, the commission and the state lottery shall operate as a self-supporting, revenue-raising, and regulatory agency of state government. The legislative assembly shall establish a special fund for the administration and operation of the commission. This law must provide sufficient revenue to establish, administrate, and operate the North Dakota gaming regulatory commission, and must include, at a minimum, an amount equal to fifteen percent of the

gross sales received from the lottery and a tax of one percent of the gross proceeds of charitable gaming. The funds so derived must be appropriated for and may be used solely by that commission, as directed by the legislature. However, the legislative assembly may provide an initial operating loan to the North Dakota gaming regulatory commission, which loan must be repaid within two (2) years.

In addition, an amount equal to five percent of the gross sales of the lottery shall be appropriated as a fee to lottery vendors.

The state lottery shall pay all prizes and all of its expenses out of the revenue it receives from the sale of tickets or shares to the public and must turn over the net proceeds to a fund to be established by the legislative assembly from which the legislative assembly shall make appropriations for the purpose of providing tax relief for the citizens of North Dakota.

The first question presented here is whether the provisions of this amendment are 'self-executing,' that is, whether the proposed amendment will become automatically effective without any implementing legislation.

The general rule is that a constitutional amendment does not become effective on its own accord unless no legislation is needed to give the amendment effect. In State, ex rel., Vogel v. Garaas, 261 N.W.2d 914, 918 (N.D. 1978), the North Dakota Supreme Court stated:

[I]t is well-settled law that a constitutional provision becomes immediately operative only if it is a self-executing provision, and that it does not become operative without appropriate legislation to implement its objectives if it is a non-self-executing provision. A constitutional provision is self-executing if it establishes a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect. State ex rel. Ohlquist v. Swan, 1 N.D. 5, 44 N.W. 492 (1890). However, a constitutional provision is non-self-executing wherein it merely establishes general objectives, without setting forth rules by which those objectives can be accomplished such that the provision must remain inoperative until appropriate legislation is enacted to give it effect. Engstad v. Grand Forks County, 10 N.D. 54, 84 N.W. 577 (1900); Swan, supra.

Therefore, a constitutional amendment is not self-executing if legislation must be enacted to give its provisions effect.

Section 25, if enacted, would require legislation to give its provisions effect. First, Section 25 provides that '[t]he legislative assembly shall establish a state operated lottery' This language shows that Section 25 itself does not establish a

lottery; the proposed amendment requires the Legislature to act to establish a lottery.

Further, Section 25 provides that '[t]he legislative assembly shall also establish a North Dakota gaming regulatory commission' to administer and regulate the lottery and other charitable gambling. Again, the language of Section 25 shows that the Legislature must act, here to establish a gaming commission, to give the proposed amendment effect. The Legislature would have to use its discretion to determine the exact composition of a gaming commission, including the number of members, the method for appointment of the members, the length of the members' terms, and other similar matters, before any gaming commission could sit or any lottery be held.

The proposed amendment also gives the gaming commission, once established by the Legislature, discretion as to the type and nature of the lottery game or games to be administered by the state. The proposed amendment itself does not contain these details necessary for a state-operated lottery.

In addition, although the proposed amendment requires the Legislature to establish a special fund for the administration and operation of the gaming commission, Section 25 leaves within the Legislature's discretion how that special fund may be established, how that fund may be administered, and the exact amount of the revenue to be provided to the gaming commission. Again, by its own terms, Section 25 requires legislative action to implement the proposed amendment.

Finally, Section 25 provides that net proceeds of the lottery shall be put in 'a fund to be established by the legislative assembly from which the legislative assembly shall make appropriations' giving North Dakotans tax relief. Once again, Section 25 requires the Legislature to act, here to establish a fund and then make appropriations, before the proposed amendment may be made effective.

Therefore, while Section 25 contains a number of special provisions concerning the lottery, the gaming commission, and funding, the major provisions of the proposed amendment require legislative action. Without such legislation establishing a lottery, a gaming commission, funding to administer the lottery, and a fund for proceeds, the provisions of Section 25 are of no effect. The Legislature must enact legislation to implement the provisions of Section 25, if the proposed amendment is approved by the voters, before any lottery or gaming commission would come into existence. Thus, the major provisions of Section 25 are not self-executing.

This conclusion is supported by several North Dakota Supreme Court decisions.

In the Garaas decision quoted above, for example, the North Dakota Supreme Court held that the constitutional amendment contained in section 97 of the then-existing North Dakota Constitution (concerning filling judicial vacancies) was not self-executing. *State, ex rel., Vogel v. Garaas*, 261 N.W.2d at 917-18. In that case, the constitutional amendment at issue, section 97, provided:

'A judicial nominating committee shall be established by law. Any vacancy in the office of supreme court justice or district court judge shall be filled by appointment by the governor from a list of candidates nominated by the committee, unless the governor calls a special election to fill the vacancy for the remainder of the term. An appointment shall continue until the next general election, when the office shall be filled by election for the remainder of the term.'

261 N.W.2d at 917 (quoting section 97). The supreme court held that because section 97 required the Legislature to establish a judicial nominating committee supplying the Governor with a list of candidates for judicial vacancies, that portion of the amendment was not self-executing. *Id.* at 918. Further, the court decided that because section 97 did not include the machinery for holding and conducting a special election, the provision of the amendment which authorized the Governor to call a special election was not self-executing. *Id.* at 919.

In addition, in *State, ex rel., Ohlquist v. Swan*, 1 N.D. 5, 44 N.W. 492 (1890), the North Dakota Supreme Court held that an article of the proposed state constitution prohibiting the manufacture and sale of intoxicating liquors (Article 20) was not self-executing. That provision of the proposed North Dakota Constitution provided that "[t]he legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article, and shall thereby provide suitable penalties for the violation thereof." 4 N.W. at 493 (quoting Article 20). The court held that Article 20 was not self-executing because it required legislative action providing penalties for violations of the article. *Id.* at 496. The court further held that because the Legislature had not provided such penalties, the article remained dormant until given life by legislation. *Id.*

As in *Garaas* and *Swan*, in this case, the Legislature must enact legislation to make the constitutional provisions effective. Here the Legislature must put in place statutes establishing a lottery, a gaming commission, and funding, before any lottery could be held. Therefore, under *Garaas* and *Swan*, Section 25, if enacted, would not be self-executing.

The cases in which the North Dakota Supreme Court has held that a constitutional provision was self-executing have concerned

constitutional provisions which were less similar to Section 25 than the provisions at issue in Garaas and Swan.

In State v. Hall, 44 N.D. 459, 171 N.W. 213 (1919), for example, the North Dakota Supreme Court held that the 16th Amendment to the constitution (concerning how the constitution may be amended by initiative) was self-executing. In that case, however, the only reference to the Legislature or the need for a legislative act in the amendment related to how the proposed constitutional amendment or amendments should be published. The 16th Amendment provided that the proposed amendment or amendments "shall be published as the Legislature may provide." 171 N.W. at 214 (quoting the 16th Amendment). The remaining provisions of the 16th Amendment required no legislation. *Id.* The court held that the lack of direction in the 16th Amendment as to how publication should take place did not prevent the 16th Amendment from being self-executing. The court based this conclusion on the fact that a statute already in effect provided the mechanism for publishing a proposed amendment to the constitution. *Id.* at 217. The court held that, therefore, the 16th Amendment was self-executing. *Id.* at 220.

However, unlike the 16th Amendment, which was at issue in Hall, the provisions of Section 25 require legislation concerning a number of matters, and there are no existing statutes which could be applied to implement the provisions of Section 25. There is no existing legislation establishing a lottery and gaming commission or providing how a lottery and gaming commission would be administered.

A few North Dakota Supreme Court cases have held that appropriations contained in the constitution may be self-executing; however, those cases are not applicable to Section 25. In two of those decisions, the appropriations portions of the constitutional provisions at issue were phrased: 'there is hereby appropriated' the funds in question. See Ford Motor Co. v. Baker, 71 N.D. 298, 300 N.W. 435, 437 (1941); Langer v. State, 69 N.D. 129, 284 N.W. 238, 242 (1939). No such similar language is contained in Section 25. A third case, State, ex rel., Walker v. Link, 232 N.W.2d 823 (N.D. 1975), involved the constitutional provision which requires the Legislature to provide adequate funds to the State Board of Higher Education. That constitutional provision by its own terms is self-executing. See N.D. Const. Art. VIII § 6(8). Moreover, the Link case involved a question as to whether the Emergency Commission had acted properly in giving funds to the University of North Dakota, as required by the constitution, not whether without such action by the Emergency Commission, the funds would have been automatically appropriated. Thus, the Link case and the other appropriations cases are not on point here.

In conclusion, Section 25, if enacted, like the constitutional provisions at issue in the Swan and Garaas decisions, will become

effective only after the Legislature has enacted legislation implementing the provisions of the proposed constitutional amendment. Section 25 by its own terms is not self-executing and will remain dormant until the Legislature acts.

II.

The second issue presented here is whether the Legislature may be mandated to enact legislation putting the provisions of Section 25, if enacted, into effect.

'The constitution of the state is its paramount law. . . . [The] constitution must be so construed as to give effect to the intention of the people who adopted it.' Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245, 252-53 (N.D. 1960); see also Egbert v. City of Dunseith, 74 N.D. 1, 24 N.W.2d 907, 909 (1946). Yet, there are limitations on the power of the various arms of the state to enforce the provisions of the constitution.

The North Dakota Constitution establishes three separate branches of state government: the legislative, the executive, and the judiciary. N.D. Const. Art. IV, Art. V, Art VI. Under the separation of powers doctrine, each of these three branches has separate and distinct powers and is independent of the other branches. No branch of the government may intrude upon the domain of the other branches or upon any other branch's exercise of its constitutional functions. Shaw v. Burleigh County, 286 N.W.2d 792, 795 (N.D. 1979); City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969); State v. Kromarek, 78 N.D. 769, 52 N.W.2d 713, 714-15, cert. denied, 343 U.S. 968 (1952).

The legislative branch of state government has the exclusive authority to enact legislation. See N.D. Const. Art. IV, § 13. Therefore, under the separation of powers principle, neither the executive branch nor the judicial branch of the state may compel the legislative branch to exercise the powers and duties bestowed upon the Legislature by the constitution, including the Legislature's authority to enact legislation. In other words, the Legislature cannot be compelled to enact legislation, even when the enactment of such legislation is constitutionally mandated.

This conclusion is required by North Dakota Supreme Court decisions. The North Dakota Supreme Court has stated that when a constitutional provision requires legislation to become effective, the Legislature may not be compelled to fulfill its constitutional obligation to enact legislation. In State, ex rel., Ohlquist v. Swan, 1 N.D. 5, 44 N.W. 492 (1890), the North Dakota Supreme Court held that Article 20 of the proposed North Dakota Constitution (concerning prohibition of alcohol) was not self-executing. In its

discussion, the court stated that in the case of non-self-executing provisions of the constitution,

before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force. The legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted. . . .

We must not be understood to hold that article 20 does not act at once upon the legislature. It does so act. The moral obligation in that direction is complete, and no other or greater can ever be imposed upon a legislative body. For non-action there would be no remedy; but if the legislature act at all it must act in the line directed by the constitution, or its action will be void.

44 N.W. at 494-96 (emphasis supplied). In Swan, thus, the North Dakota Supreme Court recognized that the judicial and executive branches do not have the authority to mandate the Legislature to enact legislation, even when the constitution requires that enactment.

This language of Swan was reaffirmed by the North Dakota Supreme Court more recently in State, ex rel., Vogel v. Garaas, 261 N.W.2d 914, 919 (N.D. 1978).

North Dakota law further provides that courts may not issue a writ of mandamus to compel a discretionary act. The enactment of legislation by the Legislature is such a discretionary act. In City of Fargo v. Cass County, 286 N.W.2d 494 (N.D. 1979), the North Dakota Supreme Court held that '[i]n matters which are discretionary, mandamus does not lie.' Id. at 501. In that case the supreme court held that the Cass County Commissioners had discretion to decide what monies to levy for a bridge fund and, further, that the court could not issue a mandamus to the commissioners directing such a levy. Id.

Similarly, here a court would not have the authority to issue a writ of mandamus to the Legislature to compel them to enact legislation implementing Section 25. Each legislator must exercise his or her discretion in considering and voting on any specific piece of legislation. The exercise of such discretion may not be mandated by a court.

A number of cases from other jurisdictions also hold that a legislature cannot be compelled to enact a law even if the state's constitution requires such enactment. As one court has stated,

The writ of mandamus cannot be issued to the legislature, even when the duty sought to be compelled is clear and unmistakable. . . .

The doctrine of separation of powers . . . has probably been the barrier to attempts to extend the reach of the writ to the legislature. Neither of the three separate departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the others in matters which have been confided by the constitution to such other department. . . . The legislature, under the separation of powers, can neither be coerced nor controlled by judicial power. . . .

The legislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, and the remedy is with the people, by electing other servants, and not through the courts. . . .

The matter is summarized concisely in an annotation appearing in 153 A.L.R. at p. 522, viz:

It is well settled that the courts have no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function.

Wells v. Purcell, 267 Ark. 456, 592 S.W.2d 100, 104 (1979); see also Jones v. Packel, 20 Pa. Commw. 606, 342 A.2d 434, 438 (1975) ('[W]e are aware of no decisions in which the judicial branch has mandated a legislative body to act in its purely legislative domain.');

Lamson v. Secretary of Commonwealth, 341 Mass. 264, 168 N.E.2d 480, 484 (1960) ('Mandamus of course does not lie against the Legislature.');

State v. Bachrach, 107 Ohio App. 71, 152 N.E.2d 311, 319, aff'd, 168 Ohio St. 268, 153 N.E.2d 671 (1958) ("The legislature cannot be . . . compelled to pass an act, even though the Constitution expressly commands it . . .");

Pelham Jewish Center v. Board of Trustees of Village of Pelham Manor, 9 Misc.2d 564, 170 N.Y.S.2d 136, 138 (1957), aff'd, 6 App.Div.2d 710, 174 N.Y.S.2d 957 (1958) (A mandamus proceeding 'does not lie to review action which is legislative in nature or to compel a legislative body to enact particular legislation.');

Jones v. Freeman, 193 Okl. 554, 146 P.2d 564, 572 (1943), appeal dismissed, 322 U.S. 717 (1944) ('The Legislature, being a co-ordinate branch of the government, may not be compelled by the courts to perform a legislative duty, even though

the performance of that duty be required by the Constitution.');

State, ex rel., Flanagan v. South Dakota Rural Credits Board, 45 S.D. 619, 189 N.W. 704, 706-07 (1922) ('[N]o rule of constitutional law is more firmly established than that which declares that the judicial department of the state government is without jurisdiction or authority to compel the Legislature, a co-ordinate branch of the government, to enact legislation required by constitutional provisions.').

If the Legislature does enact any legislation related to a constitutional provision, that legislation must comply with the requirements of the constitutional provision. State, ex rel., Ohlquist v. Swan, 1 N.D. 5, 44 N.W. 492, 496 (1890). However, decisions of the North Dakota Supreme Court establish that there is no constitutional method of compelling the North Dakota Legislature to enact legislation implementing Section 25, if Section 25 is enacted.

The constitution is the supreme law of this state. It establishes our state government and the rules by which that government must operate. However, there are limitations to what the constitution can do. Specifically, the constitution cannot compel individual legislators to write or vote for a statute that they oppose. These legislators must be allowed the freedom to vote for statutes which they believe are in the public interest and to vote against those statutes which they find to be contrary to the best interests of the public. Those decisions about specific pieces of legislation must be made by each member of the legislative assembly. The constitution cannot force a legislator to cast any certain vote. Therefore, even when the language of the constitution commands the Legislature to enact certain legislation, the Legislature cannot be forced to comply with that command.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question is decided by the court.

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