Date Issued: February 13, 1987 (AGO 87-03)

Requested by: Senator Rolland W. Redlin

- QUESTION PRESENTED -

Whether the North Dakota Constitution requires a two-thirds vote of the members elected to each house of the Legislature to amend or repeal a measure that has been referred to and voted upon by the electorate.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the North Dakota Constitution does not require a two-thirds vote of the members elected to each house of the Legislature to amend or repeal a measure that has been referred to and voted upon by the electorate.

- ANALYSIS -

N.D. Constitution Article III, Section 8 ("section 8"), provides:

> SECTION 8. If a majority of votes cast upon an initiated or a referred measure are affirmative, it shall be deemed enacted. An initiated or referred measure which is approved shall become law thirty days after the election, and a referred measure which is rejected shall be void immediately. If conflicting measures are approved, the one receiving the highest number of affirmative votes shall be law. A measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house.

(Emphasis supplied.) The question presented is whether the underlined amendment and repeal restriction should be construed to apply to referred measures.

First, under the clear language of section 8, the amendment and repeal restriction applies only to those "measures" that have been "approved" by the voters. Therefore, that restriction would not apply to referred measures that have been disapproved by the electorate.

The next issue then is whether the restriction applies to those referred measures that have been approved by the voters. An examination of the history and context of this constitutional provision shows that the amendment and repeal restriction applies only to approved initiated measures and that it does not apply to referred measures that have been approved by the people.

The current language of section 8 was drafted by delegates at the 1972 Second Constitutional Convention as part of the Convention's revision of the Constitution's initiative and referendum provisions. See Debates of the North Dakota Constitutional Convention of 1972, at 1811, 1813. The proposed Constitution drafted at that Second Constitutional Conventional Convention was not approved by the voters, and, thus, the language in question did not become part of

the Constitution at that time. However, in 1977, the Legislature proposed a constitutional amendment that basically adopted the initiative and referendum provisions agreed upon at the 1972 Constitutional Convention, including the language of the last sentence of section 8. See 1977 N.D.S.L. 613. That constitutional amendment was approved by the voters in 1978 and is now Article III of the Constitution.

Because the constitutional amendment approved in 1978 was based upon the provisions drafted at the 1972 Constitutional Convention, the North Dakota Supreme Court has stated that in interpreting Article III, "the minutes of the 1972 Constitutional Convention are entitled to considerable weight as to objective and purpose." Haugland v. Meier 339 N.W. 2d. 100, 107-08 (N.D. 1983).

Those Constitutional Convention minutes show that the drafters of section 8 intended to have the amendment and repeal restriction apply only to initiated measures. Further, the debates demonstrate that the policy behind the amendment and repeal restriction is only applicable to initiated measures and that there is no policy reason to apply the restriction to referred measures that are subsequently approved.

The language in the last sentence of section 8 was added to the Constitution because delegates at the 1972 Constitutional Convention were concerned about protecting initiated measures from a "veto" by the Legislature. The original language proposed at the 1972 convention contained no provision restricting the amendment or repeal of initiated measures approved by the voters. Debates of the North Dakota Constitutional Convention of 1972, at 890. The restrictive language was added because some delegates believed that if no such restriction were in place, the Legislature could override an initiated measure immediately after the voters approved the measure, thereby making a mockery of the initiative process. Delegate Haugen stated at the 1972 Constitutional Convention:

> I believe we are all agreed that this right of initiative and referendum is a right of the people. I went along with the proposal to raise the number of signatures required to file an initiative or a referendum petition because I think it is reasonable under present conditions. But I do think there are an awful lot of electors that are going to wonder what is the use of initiative amendment or an initiative measure if the Legislature can change it immediately upon its passage. Now I believe it's important if we give the people a right to at least five years to be sure that their measure is going to stay in effect unless a two-thirds vote of the Legislature can be secured.

Id. at 917. Further, Delegate Rundle stated that the constitution should require a two-thirds vote of the Legislature to amend or repeal an initiated measure because, otherwise,

> the majority of the Legislature could override the people. And under the deal we are now offering under, or we will if everything passes, we have an eighty-day legislative session which might be recessed . Therefore, you could get a

> petition overridden by the Legislature the date after it was in effect. They could call the Legislature back in. This isn't a very great probability, but it certainly is a possibility. And we are just making a mockery of this if we don't have the two-thirds majority in.
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> Id. For these reasons, the Convention delegates added the seven-year amendment and repeal restriction to the proposed constitutional provisions.

Although there were certain offhand statements made during the 1972 Constitutional Convention debates and the 1977 legislative hearings implying that the amendment and repeal restriction applies to both initiative and referendum (see, e.g. Debates of the North Dakota Constitutional Convention of 1972, at 920 (statement of Delegate Dobson); Minutes of the Joint Committee on Constitutional Revision for March 16, 1977, concerning HCR 3088 (statement of Representative Kretschmar)), the substance of the discussion in both 1972 and 1977 dealt only with the need for the amendment and repeal protection when initiated measures are approved. Neither the 1977 legislative history nor the 1972 Constitutional Convention debates contain any discussion of the need for the two-thirds vote when a referendum has been approved. Also, the transcript of the Convention debates shows that the term "initiative" or the phrase "initiated measures" was generally used throughout the discussion of the language that is now contained in the last sentence of section 8. Therefore, despite a few offhand comments to the contrary, there is no indication in the discussion at the 1972 Constitutional Convention that the drafters of section 8 intended to provide amendment and repeal protection for referred measures.

As stated above, it is clear from the Constitutional Convention debates that the language in question was included in section 8 because the Convention delegates were concerned that without the amendment and repeal protection, a simple majority of the Legislature could override a mandate of the people reflected in the voters' approval of an initiated measure. These concerns raised by the delegates may be real concerns in the initiative process where an initiated measure is necessary only because the Legislature has failed or refuses to act, that is, where the Legislature is "hostile" to the initiated measure to at least some degree. See Baird v. Burke County 53 N.D. 140, 205 N.W. 17, 20 (1925) ("By the initiative, the people have provided against nonaction by their duly constituted representatives in the legislative branch ").

However, referred measures that are approved by the voters do not need that protection because there is no "hostile" Legislature. By definition, referred measures have been enacted by the Legislature before they are submitted to the voters for their consideration. See N.D. Constitution Article III, Section 1. When a referendum is approved by the voters, the voters are simply confirming an act already approved by at least a majority of the Legislature. See State ex rel., Wefald v. Meier, 347 N.W. 2d. 562, 566 (N.D. 1984). Thus, the policy reasons supporting the amendment and repeal protection for approved initiated measures do not apply to approved referred measures.

Indeed, applying the amendment and repeal restriction to referred measures that have been approved by the voters would lead to an absurd result. Whether or not a statute enacted by the Legislature could be amended or repealed by a majority vote or only by the two-thirds vote would depend simply upon whether someone chose to refer the statute. As discussed above, there is no policy reason to require a two-thirds vote to amend or repeal an approved referred statute. Therefore, a construction of the last sentence of section 8 allowing just twenty-five people (referendum sponsors) to trigger the two-thirds requirement just by filing referendum petitions bearing the requisite signatures would be absurd. The North Dakota Supreme Court has held that the constitution should not be construed to bring about an absurd result. Haugland v. Meier 339 N.W. 2d. 100, 105 (N.D. 1983). The last sentence of section 8 should not be construed to apply to referred measures that have been approved by the voters.

This construction is further supported by the language and analysis in several North Dakota Supreme Court decisions in which the supreme court has held that the referendum is a "negative" power which only gives voters the ability to approve or disapprove specific referred legislation. In those cases the court has shown that a referred statute is not entitled to any special status simply because the voters chose not to disapprove it.

In Dawson v. Tobin 24 N.W. 2d. 737, 748 (N.D. 1946), for example, the supreme court stated that "the principal purpose to be served by the referendum is to enable the people to reject laws which they find to be unsatisfactory or undesirable."

Similarly, in Baird v. Burke County 205 N.W. 17, 23, (N.D. 1925), the supreme court wrote:

> The reserved power, known as the referendum, is negative; it is entirely distinct and fundamentally different from that of the initiative. Through the referendum a definite number of electors may have submitted to the people as a whole a specific act, or part of an act, for approval or disapproval. Nothing is before the electorate but the concrete proposition, as advertised in the election notices and as appearing on the ballot, whether a certain law, or a specified part of a certain law, shall be approved or disapproved.

Although in Baird the supreme court was considering the predecessor to N.D. Constitution Article III, the supreme court has recently quoted and apparently reaffirmed this language and reasoning in a case concerning the current provisions of Article III. See State ex rel., Wefald v. Meier 347 N.W. 2d. 562, 566 (N.D. 1984).

In Baird the court considered whether the remainder of a statute continued in effect when one section of the statute had been referred and disapproved. The court held that when the legislative purpose of the statute cannot be effectuated without the disapproved section, the entire statute is mullified by the disapproval. Baird 205 N.W. at 23-24. In its decision, the supreme court stated that the voters may use the referendum process only to disapprove referred statutes. The court held that the voters have not "taken an affirmative part" in enacting a statute merely because they have approved a referred

statute; an approved measure is not a "joint" act of the people and their agents in the Legislature. Id. at 23. The court further held that the electorate may "legislate" only through the initiative process, not by referendum. Id. at 24. The court wrote:

> By the initiative, the people have provided against nonaction by their duly constituted representatives in the legislative branch; and by the referendum, an appeal may be taken directly to the people from affirmative action by these representatives. In the one case affirmative legislation results, the people, without the intervention of representatives, declare what shall be law; in the other case, the people veto affirmative action by their agents; in the one instance we have a constructive exercise of legislative power; in the other, merely negation.

Id. at 20.

In its decision in Baird the supreme court did, in dictum, use some language implying that the repeal and amendment restrictions of section 8 apply to both initiated and referred measures. See Id. at 23. However, the other language and the analysis in Baird believe this dictum and support the argument that the last sentence of section 8 applies only to initiated measures.

The supreme Court's decision in Baird established that a referendum in which a statute is approved is merely a vote by the people to not disapprove an act of the Legislature. That vote grants the approved statute no special status. There is, therefore, no indication that a statute should be given special protection from repeal or amendment just because the voters decided not to disapprove that statute in a referendum.

Dicta in other supreme court cases also demonstrate that the amendment and repeal restriction of section 8 does not apply to referred measures.

In Hernett v. Meier 173 N.W. 2d. 907 (N.D. 1970), the North Dakota Supreme Court discussed the predecessor to N.D. Constitution Article III. In Hernett the supreme court held that the Secretary of State had properly approved the signatures on referendum petitions submitted to him. Id at 918. In the course of its decision, the supreme court implied that the amendment and repeal restriction applies only to initiated measures; the court wrote:

> The Legislature, on the one hand, and the people, on the other, are co-equal legislative bodies. The people, by the initiative and referendum processes, may amend or repeal an Act of the Legislature; and the Legislature, on its part, may amend or repeal an Act initiated by the people if it complies with the Constitutional restriction that no measure enacted or approved by a vote of the electors shall be repealed or amended except upon a yea-and-nay vote, upon rollcall of two-thirds of all of the members elected to each house.

Id. at 915 (Emphasis supplied).

Another supreme court decision, State, ex rel. Strutz v. Baker 299

N.W. 574, 576, 579 (N.D. 1941) (also construing the predecessor to N.D. Constitution Article III), contains very similar language:

> The people legislate through their agent known as the Legislature, or may legislate as prescribed by this section 25 of the Constitution as amended. When the people legislate by their agent, the Legislature has the power to amend and repeal its own acts when in its judgment it sees fit; but with reference to initiated measure may not repealed or amended "except upon a yea and nay vote upon roll call of two thirds of all the members elected to each house". See State ex rel. Traux et al. v. Smart et al., 48 N.D. 326, 184 N.W. 623; Boutrous et al. v. Thoresen et al., 54 N.D. 289, 209 N.W. 588.
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> Our Constitution places a limitation upon the right of the Legislature to repeal or amend an initiated measure.

(Emphasis supplied). This language also implies that only initiated measures require a two-thirds vote of the Legislature to amend or repeal the measure.

There is dictum in one North Dakota Supreme Court case implying that a two-thirds vote of the Legislature is required to amend or repeal referred measures that have been approved by the voters. See Boutrous v. Thoresen 209 N.W. 558, 560 (N.D. 1926). In that case the issue before the court concerned whether a 1925 law governing county tax reassessment procedures had amended a 1919 statute establishing the Office of the Tax Commissioner. The court held that the Legislature had not intended to amend or repeal the 1919 law by enacting the 1925 law. The court reasoned that because the 1925 law had passed by only a majority and not by a roll call vote to two-thirds of the members elected to each house, the 1925 Legislature had not intended to amend or repeal the 1919 provision. Id. The court, therefore, found it "unnecessary" to pass upon the constitutionality of the 1925 statute. 209 N.W. at 559-60. The supreme court's decision in Boutrous was based on a finding of legislative intent, and the court's language concerning the application of the two-thirds vote requirement to referred measures was merely dictum. In light of the history of the current constitutional provision and the arguments discussed above, this dictum in the Boutrous decision is not determinative here.

Finally, an interpretation that the last sentence of section 8 applies only to initiated measures is supported by the apparent public understanding of that language. Bismarck Tribune newspaper articles discussed the constitutional language in question when that language was first proposed by the Constitutional Convention in 1972 and again when the constitutional amendment was proposed by the Legislature in 1977. The North Dakota Supreme Court has considered such newspaper articles in its interpretation of constitutional provisions in the past. See, e.g., State, ex rel. Sanstead v. Freed 251 N.W. 2d. 898, 907 (N.D. 1977). In a January 29, 1972, article concerning the initiative and referendum constitutional provisions, the Bismarck Tribune wrote:

> Finally, one of the new provisions would allow the Legislature, by two-thirds vote in each house, to amend or repeal, after seven years, any measure put on the books by voter initiative.

(Emphasis supplied). On April 1, 1977, an article concerning these constitutional provisions appeared in the Bismarck Tribune stating:

> Also included in the amendment is a provision which would remove the present requirement that two-thirds of the Legislature must vote to change any initiated measure approved by the people. Kretschmar said the proposed amendment would require the two-thirds vote for seven years, but after that it would only take a simple majority in the Legislature to change initiated measures.

(Emphasis supplied). The language of both of these articles at least implies that the understanding of the drafters and the public was that the repeal and amendment requirements would apply only to initiated measures.

In conclusion, the last sentence of section 8 must be interpreted to apply only to initiated measures that have been approved by the voters. Application of the language in question to referred measures that have been approved by the electorate would not further the purposes of the constitutional provision, and, indeed, would lead to an arbitrary and absurd result. Moreover, it was the drafters' intent that the constitutional provision would apply only to initiated measures.

Therefore, only an initiated measure approved by the electors may not be repealed or amended by the Legislative Assembly for seven years from the measure's effective date, except by a two-thirds vote of the members elected to each house. That restriction does not apply to referred measures. Such referred measures, like any other law enacted by the Legislature, may be amended or repealed as otherwise provided by law.

- EFFECT -

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

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