

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-15

Date issued: November 9, 1989

Requested by: M. K. Heidi Heitkamp
State Tax Commissioner

- QUESTION PRESENTED -

Whether a referred measure rejected by the voters becomes void the day after the election, at the time the State Canvassing Board determines the number of votes cast against the measure exceeds the number of votes cast in favor of the measure, or at some other date.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a referred measure rejected by the voters becomes void the day after the election. However, the only mechanism that the Legislature has provided for determining the outcome of an election on a referred measure requires the State Canvassing Board to determine and certify the election results. Therefore, whether a referred measure has been rejected by the voters will not be known officially until the time the State Canvassing Board determines the number of votes cast against the measure exceeds the number of votes cast in favor of the measure. If the State Canvassing Board determines a referred measure has been rejected by the voters, then the referred measure is void retroactive to the day after the election.

- ANALYSIS -

The power of the people to refer a legislative act is found in N.D. Const. art. III. "A referred measure may be voted upon at a statewide election or at a special election called by the governor." N.D. Const. art. III, ' 5. A "referred measure which is rejected [by the voters] shall be void immediately." N.D. Const. art. III, ' 8. Neither the North Dakota Supreme Court nor this office have addressed this language previously.

N.D. Const. art. II requires the Legislative Assembly to provide by law for the administration of elections. N.D. Const. art II, ' 1. There are a number of statutes providing for the canvassing of votes cast at a special election. Votes cast at a special election should be canvassed and returned as provided for inprimary and general elections. N.D.C.C. ' 16.1-13-13. The county auditor must forward the abstracts of votes cast at the special election to the Secretary of State within eight days of the election. Id. Within seventeen days following a special election, the State Canvassing Board must meet in the Office of Secretary of State to canvass and ascertain the results

of the election. N. D. C. C. ' 16.1-15-35. To canvass the votes and determine the results of an election, the State Canvassing Board must examine the statements received by the Secretary of State from the county auditors. N. D. C. C. ' 16.1-15-48. The Board must certify a statement indicating the number of votes cast for and against a proposition and determine whether the proposition has been approved or rejected by a majority of the electors voting thereon. Id. Thus, the State Canvassing Board's determination of the results of the votes cast upon that proposition is the official and only statewide determination of the results of that election.

Because of the time frames permitted under the statutory scheme for canvassing votes there is some ambiguity concerning the phrase "shall be void immediately." The phrase may refer to that time when the measure is declared rejected by the State Canvassing Board following its review of the election returns submitted by the various county auditors. N. D. C. C. ' 16.1-15-48. Alternatively, the phrase may refer to some other time following the election when the results generally become known.

An ambiguity also results from contemporaneous construction of the term "election" as used in N. D. Const. art. III, the Legislature's contemporaneous enactment to implement the constitutional provisions and a court interpretation of that term.

In resolving these ambiguities, a number of constitutional construction rules apply. Principles of construction applicable to statutes are generally applicable to constitutional provisions. Johnson v. Wells Cty Water Resource Bd., 410 N.W.2d 525, 529 (N.D. 1987); McCarney v. Meier, 286 N.W.2d 780, 783 (N.D. 1979); State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977); State ex rel. Walker v. Link, 232 N.W.2d 823, 825 (N.D. 1975). When statutory language is ambiguous or of doubtful meaning, the courts may consider extrinsic aids, including legislative history, along with statutory language, to ascertain and implement legislative intent. First Security Bank v. Enyart, 439 N.W.2d 801, 806 (N.D. 1989). The courts will also consider subsequent enactments and amendments as aids in arriving at the correct meaning of the statute. State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 904 (N.D. 1986); State v. Novak, 338 N.W.2d 637, 640 (N.D. 1983). In construing a constitutional provision, the courts may also consider the background facts concerning its adoption. State ex rel. Stockman v. Advisory, 184 N.W.2d 53, 57 (N.D. 1971); State v. Lohnes, 69 N.W.2d 508, 512 (N.D. 1955). Those who adopted a constitutional provision presumably intended a reasonable result and courts will, if possible, give the provision a construction that will produce that result. State v. Feist, 93 N.W.2d 646 (N.D. 1958). "The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it, and all rules of construction are subservient to and intended to effectuate, such object." Dawson v. Tobin, 24 N.W.2d 737, 745 (N.D. 1946). Finally, the principle of "contemporaneous construction" holds that great weight will be given to the construction placed upon a constitutional provision by those who implemented it through legislation or administration

when it was first adopted. State ex rel. Frederick v. Zimmerman, 254 Wisc. 600, 37 N.W. 2d 473 (1949).

The people approved the relevant phrase in N.D. Const. art. III, ' 8 in 1978 following a legislative resolution proposing the adoption of the provisions in question. N.D. Const. art. amd. 105 ' 1(a); 1977 N.D. Sess. Laws ch. 613, ' 8.

Available legislative history does not discuss the phrase "shall be void immediately." However, the constitutional provision in effect between 1918 and 1978 that discussed the rejection of a referred measure is helpful in determining the intent "of the framers and the people who adopted" art. III, ' 8.

N.D. Const. art. II, ' 25, which preceded N.D. Const. art. III, stated "[t]he result of the vote upon any measure shall be canvassed and declared by the board of canvassers." Pursuant to N.D. Const. art. II, ' 25, a rejected referred measure was declared repealed when the measure was rejected by a majority of the votes cast "allowing only for the elapsing of the normal fixed time for canvassing the votes and declaring the result." State v. Sherman, 245 N.W.2d 877, 882 (1932). Thus between 1918 and 1978, the constitutional provision concerning the powers of initiative and referendum required the votes cast upon any measure to be canvassed and the results declared by a statewide canvassing board before the measure took effect. Id.

During the 1972 Constitutional Convention, the delegates discussed Proposal No. 1-112. It provided that a referred measure that had been rejected "shall be void immediately after the election." The proposal omitted language providing for the canvassing of the results by a statewide canvassing board. Despite this omission, Delegate Peters, in presenting the proposal to the convention, noted the proposal was a continuation of the existing constitutional provision. "And the referred measures that are defeated would become void immediately. Now this proposal is taken from the Section 25 of the present constitution, and the sentences are worded almost identical to the way they are in the present constitution." 1 Debates of the North Dakota Constitutional Convention of 1972 at 891 (1972) (statement of Delegate Peters). However, language in Proposal No. 1-112 and the language in the previous constitutional provision (art. III, ' 25), is substantially different.

The present constitutional provision found in N.D. Const. art. III, ' 8, is very similar to Proposal No. 1-112. It provides that referred measures that are defeated are void immediately. Furthermore, it omits language similar to the previous constitutional provision explicitly requiring the statewide canvassing of election results. I therefore take Delegate Peters' remarks to mean that although the procedural aspects of the referral process would not change, the timing of the effect of the vote on a measure that was rejected would change.

In light of the language used in Proposal No. 1-112 (as compared to the constitutional provision then in effect) and Delegate Peters' comments in

presenting the proposal to the 1972 Constitutional Convention, it is my opinion that a canvassing of the election results must occur so that an official determination of those results can be provided to the people.

Indeed, historically the canvassing of election results has been a part of the election process. State v. Sherman, 245 N.W. 877, 880 (N.D. 1932). In Sherman, the North Dakota Supreme Court quoted with approval from a Texas case considering the canvassing of election results:

"The canvassing of the returns of an election is necessary to the determination of the results; it is an integral part of the election itself, without which the election is a vain proceeding; and as such inheres as a right sanctioned by the political power, as absolute as the right of the electorate to vote or for the election to be held."

245 N.W. at 880 (quoting City of Dallas v. Dallas Consol. St. R. Co., 105 Tex. 337, 341, 148 S.W. 292, 294 (1912))

In North Dakota the word "election," as used in an earlier constitutional provision concerning initiated and referred measures, has been construed to include the canvass of the votes. State v. Sherman, 63 N.D. 9, 245 N.W. 877, 880 (1932). However, the phrase "thirty days after the election" in N.D. Const. art. III, '8, has been contemporaneously construed by executive officials to mean thirty days from the date the votes are cast. Thus, the executive branch has construed the term "election" to refer to the date on which the votes are cast. On the other hand, the legislative scheme for tallying the votes incorporates a time frame of up to seventeen days after the date on which the votes are cast.

The elapse of seventeen days does not conflict with the thirty-day requirement for approval of a referred measure. The lack of a different procedure to make an official determination of the results of a rejected referred measure evidences the Legislature's contemporaneous construction of art. III, '8 to allow a reasonable time for the canvass of the vote when a referred measure is rejected.

Additionally, the conclusion that the canvassing of election results needs to occur in determining the results of an election construes N.D. Const. art. III, '8 to produce a reasonable result. It is unreasonable to assume that in adopting the current constitutional provision, the people intended a legislative enactment would be voided based upon data that has not been compiled, certified and determined by a statewide canvassing board, created especially for this very purpose. "Such incongruities are avoided by attaching the ordinary meaning to the mandatory language that the result upon any measure shall be canvassed and declared by the board of canvassers." State v. Sherman, 245 N.W. at 881.

However, because of the language of art. III, '8 and the potential for delay

between the time of the election and the time the results of that election are declared (the State Canvassing Board must declare the results of that election no later than seventeen days following the election pursuant to N. D. C. C. ' 16.1-15-35), it is also my opinion that the declaration that a referred measure has been rejected is retroactive to the day after the election. This conclusion is supported by and implements the requirement that a rejected referred measure is "void immediately." See N. D. Const. art. III, ' 8.

It is therefore my opinion a rejected referral measure is void the day immediately after the vote is cast. However, the Legislature has provided a mechanism whereby the official results of the election will not be known until after the State Canvassing Board has met.

N. D. Const. art. III, ' 1 provides that laws may be enacted to "facilitate and safeguard" the powers of initiative and referendum. The Legislature is thus authorized by the constitution to provide methods for determining the results of an election on an initiated or referred election. As explained above, the Legislature has done so. However, the Legislature is free to address this issue again and may provide for a preliminary official determination of the results in order to facilitate or implement N. D. Const. art. III, ' 8. If such a preliminary procedure is established, the waiting period for an official declaration by the Statewide Canvassing Board may be greatly reduced.

In summary, the history surrounding the North Dakota constitutional provisions discussing the effect of a rejected referred measure suggests that the people have always intended, explicitly, or implicitly the canvass of election results to be the official declaration of the outcome of an election on an initiated or referred measure. The Legislature has evidenced this intent by enacting a statutory procedure for a canvass.

It is my opinion that a referred measure which has been rejected by the voters must become void on the day after the votes are cast to give effect to the word "immediately." However, because the Legislature has not provided otherwise, official notice of the result does not occur until the State Canvassing Board determines that the number of votes cast against the measure exceeds the number of votes cast in favor of the measure.

- 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 presented is decided by the courts.

ATTORNEY GENERAL' S OPINION 89- 15
November 9, 1989
Page 6

Nicholas J. Spaeth
Attorney General

Assisted by: Rosellen M Sand
Patricia M Moen
Assistant Attorneys General

ja