

LETTER OPINION
2001-L-50

November 21, 2001

Honorable James M. Kasper
State Representative
1128 Westrac Drive
Fargo, ND 58103-2342

Dear Representative Kasper:

Thank you for your letter asking several questions about possible actions the Legislative Assembly may take in the upcoming special session regarding Senate Bill 2191, which has been referred and will be voted upon by the people at the June 2002 primary election. Senate Bill 2191, which deals with disclosure of financial information by financial institutions, was passed by the 57th Legislative Assembly and carried an emergency clause. Consequently, the referral of this bill did not cause it to be suspended pending the referral election. See N.D. Const. art. III, § 5.

You indicate in your letter that there is ongoing discussion in the state about Senate Bill 2191 and about what the Legislature can do during the upcoming special session; you also express concern that confusion may result, particularly if the Legislature enacts legislation regarding Senate Bill 2191 during the upcoming special session.

You first ask whether the Legislature may lawfully vote to suspend Senate Bill 2191 in the upcoming special session pending a vote of the people in the June 2002 primary election. The North Dakota Supreme Court has not had occasion to rule on this precise point. Case law from other jurisdictions is split on whether a legislative body has the authority to amend or repeal a referred measure prior to a vote of the people. See J. E. Macy, Annotation, *Power of Legislative Body to Amend, Repeal, or Abrogate Initiative or Referendum Measure, or to Enact Measure Defeated on Referendum*, 33 A.L.R.2d 1118, 1130-1134 (1954) (analyzing cases that hold that a legislative body may repeal or amend a law or ordinance pending a referendum election on the matter, e.g., Ginsberg v. Kentucky Utilities Co., 83 S.W.2d 497 (Ky. 1935), and those cases holding that a legislative body may not amend or repeal a law pending a referral election, e.g., In Re Opinion of Justices, 174 A. 853 (Me. 1933)). See also 42 Am.Jur.2d *Initiative and Referendum* § 51 (2000) ("Depending on the applicable provisions, while referendum

proceedings are pending a legislative body may have no power to amend or repeal an enactment, may continue to have jurisdiction of the enactment's subject but have no power to repeal the referred statute, or may be permitted to repeal the statute.”).

Similar questions were addressed in a previous opinion issued by this office. In 1975 N.D. Op. Att’y Gen. 32, 37-38, several questions were raised about the attempted referral of the biennial appropriation for the University of North Dakota. One of the questions raised was whether a special session of the Legislature could enact appropriations to fund the operations of the university after the filing of valid petitions but prior to the referral election. The opinion took more of a middle ground than most of the cases which either hold that a legislative body may amend or repeal a law or ordinance pending a referral vote or that prohibit a legislative body from doing so. See cases collected at 33 A.L.R.2d at 1130-1134. The opinion stated:

We adhere to the position that the Legislature may not take action to intentionally evade a referendum petition by repealing and reenacting it, or by making changes in the enactment, not in good faith, but only to accomplish the evasion thereof. However, we do believe the Legislature could enact appropriation measures which are temporary in nature, i.e., to fund the institution pending the outcome of the referendum petition. . . . Assuming that the only purpose of the referral is to reduce the appropriations, we believe the Legislature could, pending the outcome of the referral election, take action to fund the University for that period or could enact a new reduced appropriation if done in good faith and without the intent to evade a referendum.

Id.

Under the circumstances posed in your first question, the Legislature would not be repealing (and reenacting) Senate Bill 2191, but rather would be temporarily suspending its operation until a vote of the people. This is similar to what would have occurred had Senate Bill 2191 not carried an emergency clause. See N.D. Const. art. III, § 5. Since the only apparent purpose of the referral is to repeal Senate Bill 2191 and to revert to the state of the law prior to enactment of Senate Bill 2191 and since this temporary suspension would only be in place until the people have a chance to vote on the referral, presumably such a suspension would be an act done in good faith and not intended to evade the referendum¹ or would likely be taken in good faith to avoid objections to the original law.²

¹ 1975 N.D. Op. Att’y Gen. at 37-38; Ex parte Statham, 187 P. 986 (Cal. 1920); Gilbert v. Ashley, 209 P.2d 50 (Cal. 1949).

² Hitchins v. Mayor and City Council of Cumberland, 138 A.2d 359, 364 (Md. 1958).

Consequently, it is my opinion that the Legislature may vote in the upcoming special session to temporarily suspend Senate Bill 2191 until the measure is voted upon by the people in the June 2002 primary election.

You next ask whether the Legislature may enact legislation in the special session that would temporarily suspend Senate Bill 2191 and amend N.D.C.C. ch. 6-08.1 until the referral election. This question is more problematic. You do not provide information on what specific amendments to N.D.C.C. ch. 6-08.1 are contemplated and whether any of these amendments relate to the amendments contained in Senate Bill 2191, which your question indicates would be suspended. I assume from the way in which your question was worded, any such amendments would be intended to be temporary in nature since you indicate that it would become effective at the end of the special session and until the referral vote in June 2002. Since the receipt of your letter, I have been provided with one possible bill draft that may be introduced in the upcoming special session. The amendments in that bill draft would not be temporary in nature but, rather, would take effect after the official certification of the upcoming referendum vote results. Sections 1, 2, and 3 of the draft would become effective if the referred measure is approved; sections 4, 5, 6, and 7 of the bill would be effective if the referred measure is rejected. I will discuss the bill draft in more detail below in response to your third question. I have enclosed a copy of the bill draft for your information.

As noted above, 1975 N.D. Op. Att'y Gen. 32 indicated that some amendments may be made to measures that are up for a referral vote by the people if they are temporary in nature and are being done in good faith and without the intent to evade the referendum. But, the opinion also stated the Legislature has less flexibility in dealing with referred measures that amend substantive law than with referred measures involving only appropriation measures that expire at the end of the biennium. 1975 N.D. Op. Att'y Gen. at 38. Again, without knowing the substance of any temporary amendments, it is not possible to gauge whether they are being done with an intent to evade the referendum vote. In addition, I share your concern that if any amendments were made to N.D.C.C. ch. 6-08.1, particularly if they relate to the matters contained in Senate Bill 2191, there is a likelihood of voter confusion on the entire matter.

In 45 Mont. Op. Atty. Gen. No. 20 (1993), in discussing a similar situation, the Montana Attorney General noted the following:

The universe of potential amendments to existing . . . law is endless, and an attempt to evaluate all of them quickly enters the realm of speculation and conjecture. The legislature should be aware, however, that courts in other jurisdictions have held that amendments may not be used to infringe the

people's power of referendum. (Citing Citizens for Financially Responsible Gov't v. Spokane, 662 P.2d 845, 852 (1983)).

Id. at 4.

Even if any proposed amendments to N.D.C.C. ch. 6-08.1 were of a temporary nature and enacted in good faith with no intent to evade the people's right to refer legislation, the Legislature may not change the terms of the measure upon which the people will vote, i.e., any such amendments to N.D.C.C. ch. 6-08.1 may not change the question pending before the people by referendum. See Oklahoma Tax Commission v. Smith, 610 P.2d 794, 806 (Okla. 1980); 45 Mont. Op. Atty. Gen. No. 20 at p. 3.

Consequently, it is my opinion that the Legislature in a special session may enact legislation that would temporarily amend N.D.C.C. ch. 6-08.1 if it is done in good faith and not with an intent to evade the referendum process and if the amendments do not change the terms of the measure upon which the people will vote. It should be noted, however, that any legislation enacted by the Legislature during the special session is subject to the power of the people to refer such legislation in the same manner as a regular session of the Legislative Assembly. See State ex rel. Langer v. Olson, 176 N.W. 528 (1920).

Finally, you ask whether the Legislature may enact legislation in the special session that would become effective contingent on the outcome of the referral vote. Generally, "[t]he power to enact laws includes the power to fix a future effective date. . . . A statute may take effect upon the happening of a contingency, such as . . . a vote of the people" 2 Sutherland, *Statutes and Statutory Construction* § 33.7 (6th ed. 2001). Further, every law enacted by a special session of the Legislature takes effect on the date specified in the Act. N.D. Const. art. IV, § 13.

However, even if the Legislature has the general authority to pass legislation to become effective upon the happening of a contingency such as a vote of the people, that power would be constrained, under the circumstances present here, by state constitutional requirements, as well as the law and opinions cited above. As noted above, for example, a bill draft has come to my attention which, if passed in the special session, would make a number of non temporary amendments to the law dealing with disclosure of financial information by financial institutions, depending on the outcome of the referral vote on Senate Bill 2191. Sections 1, 2, and 3 of the bill draft, if passed, would make several amendments to N.D.C.C. ch. 6-08.1 in the event Senate Bill 2191 is approved by the people. Section 5 of the bill draft would create a new section of the law setting out some 29 exceptions for which customer consent for disclosure of financial information would not be required. These exceptions would become effective only if the people reject Senate Bill 2191.

Article III, § 1 of the North Dakota Constitution provides in part that the powers reserved to the people in the article are “self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers.” (Emphasis supplied.) Included among these important reserved powers is the power “to approve or reject legislative Acts, or parts thereof, by the referendum.” Id.

It is my opinion that the net effect of such an enactment would be to alter substantially the question before the voters. Instead of a choice between approval of Senate Bill 2191 as passed by the Legislature or rejection of the measure and a consequent return to the previous law, the voters, in effect, would have a new question placed before them: If they vote to reject Senate Bill 2191, a new series of exceptions to the privacy law would take effect, some of which may be unacceptable to the opponents, or they can vote to approve Senate Bill 2191, in which case they also would be forced to accept any amendments thereto passed by the special session, some of which may be unacceptable to those in favor of Senate Bill 2191.

The Legislature may not take action to intentionally evade a referendum petition, nor may it pass laws that would hamper, restrict, or impair the power of referendum. See note 1 above; N.D. Const. art. III, § 1. If the proposed bill draft is passed and if the people were to reject Senate Bill 2191 in the referral election (thus triggering the effectiveness of section 5 of the bill draft), the Legislature would run the risk that it is evading the intent of the referendum to reject Senate Bill 2191 and to return to prior law by permitting a whole series of financial disclosures not requiring the express consent of the customer. Such a provision likely would have the effect of hampering, restricting, or impairing the people's right to expressly reject Senate Bill 2191. Although I acknowledge that the people could also refer the proposed bill draft, or any part of it, if passed, nevertheless, the problem remains that parts of the bill draft could be construed as an evasion or infringement upon the pending referendum and hamper, restrict, or impair the power of the people to refer Senate Bill 2191. If the people reject Senate Bill 2191, they are voting to return to the law prior to July 1, 2001, and to return to the limits on disclosure of financial information as then existed. If the Legislature passes such a bill draft, it will be expanding the circumstances under which financial institutions may disclose customer financial information and thereby infringe or frustrate the purpose of any successful referral.

Based on the foregoing, it is my opinion that the Legislature may not enact legislation in the upcoming special session to amend N.D.C.C. ch. 6-08.1 to become effective contingent on the approval of Senate Bill 2191 in the referral vote in June 2002, nor may it enact legislation to amend or change that chapter to become effective contingent on the rejection of Senate Bill 2191 in the referral vote, when the net effect of either is an evasion

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of the referral or when the net effect of the enactment is to hamper, restrict, or impair the people's power to refer a bill.

Sincerely,

Wayne Stenehjem
Attorney General

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Enclosure