

FORMAL OPINION
2001-F-04

DATE ISSUED: May 8, 2001

REQUESTED BY: John D. Olsrud, Director, North Dakota Legislative Council

QUESTION PRESENTED

Whether the Governor has authority to item veto section 7 of Senate Bill No. 2012.

ATTORNEY GENERAL'S OPINION

It is my opinion that the Governor has authority to item veto section 7 of Senate Bill No. 2012 because Article V, Section 9 of the North Dakota Constitution grants the Governor authority to item veto a section of an appropriation bill.

ANALYSIS

On April 28, 2001, Governor John Hoeven vetoed section 7 of Senate Bill No. 2012. The vetoed section provides:

Section 7. Amendment. Section 39-09-02 of the North Dakota Century Code is amended and reenacted as follows:

39-09-02. Speed limits.

1. Subject to the provisions of section 39-09-01 and except in those instances where a lower speed is specified in this chapter, it presumably is lawful for the driver of a vehicle to drive the same at a speed not exceeding:

. . . .

- h. ~~Seventy~~ Seventy-five miles [~~112.65~~ 120.70 kilometers] an hour on access-controlled, paved and divided,

multilane interstate highways, unless otherwise permitted, restricted, or required by conditions.

....

The North Dakota Constitution provides “[t]he governor may veto a bill passed by the legislative assembly. The governor may veto items in an appropriation bill. Portions of the bill not vetoed become law.” N.D. Const. art. V, § 9.

Section 9 was enacted as a part of a new Article V of the North Dakota Constitution proposed by the Fifty-fourth Legislative Assembly, and approved by the people on June 11, 1996. The new article became effective July 1, 1997. 1995 Sess. Laws ch. 646, § 9; 1997 Sess. Laws ch. 568, §§ 9, 14.¹ The North Dakota Supreme Court has never interpreted the veto authority granted in Section 9. The court, however, did interpret the predecessor to Section 9 in State ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979). That case is instructive regarding what constitutes an “item.”

State ex rel. Link v. Olson involved a partial veto exercised by Governor Link. Governor Link vetoed a section of a bill that created a federal aid coordinator office and assigned the duties of the office to the Lieutenant Governor or a temporary appointee of the Governor. The bill also, in a later section, appropriated approximately \$20 million to the federal aid coordinator office for the 1979-81 biennium. Governor Link did not veto the appropriation.

The court analyzed the availability of the item veto by asking whether the bill made appropriations of money or property and whether the appropriations embraced distinct items. The court stated that “[i]f the bill is not one ‘making appropriations of money or property embracing distinct items,’ the bill must be approved or disapproved in total.” *Id.* at 268. The court then held that in exercising the item or partial veto power, the Governor “may only veto items or parts in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill can stand

¹ The language in question is almost identical to language in the Proposed 1972 Constitution. 1973 Sess. Laws ch. 529, p. 1394. In the Proposed 1972 Constitution, however, the Governor would have been given authority to reduce, as well as to veto, legislative appropriations. North Dakota Constitutional Convention Interim Report at 28. The people disapproved the proposed constitutional amendments on April 28, 1972. 1973 Sess. Laws ch. 529. Similar language, but excluding authority for the Governor to reduce legislative appropriations, was proposed in 1985, and disapproved by the people on June 10, 1986. 1985 Sess. Laws ch. 710, § 9; 1987 Sess. Laws ch. 779. The language was again proposed in 1987, and again disapproved by the people on June 14, 1988. 1987 Sess. Laws ch. 782, § 9; 1989 Sess. Laws ch. 790.

as workable legislation which comports with the fundamental purpose the legislature intended to effect when the whole was enacted.” Id. at 270-71. The court further stated that the Governor “may not veto conditions or restrictions on appropriations without vetoing the appropriation itself.” Id. at 271.

The court concluded that the partial veto by Governor Link was not authorized by the Constitution and had no effect because the section of the bill was “not a separate and distinct provision which can be removed without affecting the others, as the bill which remains is not workable legislation and the primary purpose of the bill to create a federal aid coordinator office is destroyed.” Id.

Thus, under State ex rel. Link v. Olson, the first inquiry is whether the bill made appropriations of money or property. The second inquiry is whether the material vetoed embraced distinct items. “[T]he Governor may exercise the line item veto only when the material vetoed is severable from the material approved, the material approved continues to be a workable bill, and the fundamental purpose of the legislation is not changed by the deletion.” 1993 N.D. Op. Att’y Gen. 5 at p. 18.

Senate Bill No. 2012 is clearly an appropriation bill. It is an “ACT to provide an appropriation for defraying the expenses of the various divisions under the supervision of the director of the department of transportation” and “to provide a contingent appropriation.” 2001 S.B. 2012. Section 7 of Senate Bill No. 2012 also embraces a distinct item. The rest of the bill continues to be a workable bill even if section 7 is severed. Also, the fundamental purpose of the bill is not changed by the deletion of section 7.

Unlike the section vetoed in State ex rel. Link v. Olson, section 7 of Senate Bill No. 2012 does not make an appropriation of money or property, or contain conditions or restrictions on appropriations.² Thus, the remaining question is whether the Governor has authority to veto an item in an appropriations bill when the vetoed item contains no appropriation or condition or restriction on appropriation.³ State ex rel Link v. Olson did not address this issue.⁴

² “It is not enough that a provision be related to the institution or agency to which funds are appropriated. Conditions and limitations properly included in an appropriation bill must exhibit such a connexity with money items of appropriation that they logically belong in a schedule of expenditures.” Henry v. Edwards, 346 So.2d 153, 158 (La. 1977). Section 7 of Senate Bill 2012 is a matter of substantive legislation bearing no relationship to the expenditure of funds.

³ Article IV, Section 13 of the North Dakota Constitution provides that “[n]o bill may embrace more than one subject, which must be expressed in its title” The one subject requirement mandates that all matters treated by one piece of legislation be reasonably

General principles of statutory construction apply when interpreting constitutional provisions. State v. Hagerty, 1998 ND 122, ¶ 13, 580 N.W.2d 139. Where constitutional provisions are clear and unambiguous, it is improper to construe provisions so as to create additional requirements that the words of the provision do not themselves provide. Haggard v. Meier, 368 N.W.2d 539, 541 (N.D. 1985). When interpreting the Constitution, the overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement. City of Bismarck v. Fettig, 1999 ND 193, ¶ 8, 601 N.W.2d 247. The intent and purpose of the people adopting the constitutional statement are to be found in the language of the Constitution itself. Id. See also Hagerty, 1998 ND 122, ¶ 17, 580 N.W.2d 139. Furthermore, when an ambiguity exists in the Constitution, the consequences of a particular construction may be considered. State ex rel. Link v. Olson, 286 N.W.2d at 269.

The plain and unambiguous language of Section 9 grants the Governor authority to “veto items in an appropriation bill.” Whether by circumstance or design, it does not limit the type of items that can be vetoed in an appropriation bill. Although an item vetoed must be severable from the material approved, see State ex rel. Link v. Olson, 286 N.W.2d at 270-71, nothing in Section 9 prohibits the Governor from vetoing substantive or non-appropriation items in an appropriation bill. If it was intended to limit the Governor’s item veto authority to “items of appropriation,” the Constitution could have so provided. Some state constitutions provide such a limitation. See Ariz. Const. art. 5, § 7 (when a bill “contains several items of appropriations of money,” the governor “may object to one or more of such items”); Cal. Const. art. 4, § 10(e) (“The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill.”); Fla. Const. Art. 3, § 8(a) (provides the governor “may veto any specific appropriation in a general appropriation bill”); Ga. Const. art. 3, § 5, ¶ XIII(e) (provides the governor “may approve any appropriation and veto any other appropriation in the same bill”); Ill. Const. art. 4, § 9(d)

germane to one general subject or purpose. SunBehm Gas, Inc. v. Conrad, 310 N.W.2d 766, 772 (N.D. 1981). This opinion need not and does not answer the question whether a substantive, unrelated provision may be included in an appropriation bill.

⁴ In State ex rel. Link v. Olson, the court did state that in exercising the item or partial veto power, the Governor “may only veto items or parts in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill can stand as workable legislation which comports with the fundamental purpose the legislature intended to effect when the whole was enacted.” 286 N.W.2d at 270-71. In that case, the court was addressing what constituted part of an appropriation item; it was not addressing the Governor’s authority to item veto substantive items in an appropriations bill. In that context, the court’s general language cannot be read as holding the Governor lacked authority to item veto non-appropriation items in an appropriation bill.

("The Governor may reduce or veto any item of appropriations in a bill presented to him."); Kan. Const. art. 2, § 14(b) (if a bill "contains several items of appropriation of money," the governor may disapprove "one or more of such items"); Me. Const. art. 4, Pt. 3, § 2-A (provides the governor "has power to disapprove any dollar amount appearing in an appropriation section or allocation section, or both"); Mich. Const. art. 5, § 19 ("The governor may disapprove any distinct item or items appropriating moneys in any appropriation bill."); Minn. Const. art. 4, § 23 (if a bill "contains several items of appropriation of money," the governor may "veto one or more of the items while approving the bill"); Neb. Const. art. IV, § 15 ("The Governor may disapprove or reduce any item or items of appropriation contained in bills passed by the Legislature"); Tenn. Const. art. 3, § 18 ("The Governor may reduce or disapprove the sum of money appropriated by any one or more items or parts of items in any bill appropriating money, while approving other portions of the bill."); Utah Const. art. 7, § 8 ("The governor may disapprove any item of appropriation contained in any bill while approving other portions of the bill.").

Section 9 does not limit the type of item that can be vetoed. Thus, the plain language of Section 9 authorizes the Governor to veto items in an appropriation bill, without distinguishing whether the items are items of appropriation or items containing substantive language in an appropriation bill. This conclusion is supported by the policy behind the item veto authority. It is also supported by well-reasoned case law from other jurisdictions.⁵

The veto is an integral part of the United States Constitution's checks and balances. On the federal level, the veto power is circumscribed by the limitation that the President may only approve or reject a bill in its entirety; the President may not select portions of a bill for his disapproval.

While the rule prohibiting selective exercise of the veto is unyielding in the federal system, most states have provided an exception for items of appropriation. Today a substantial

⁵ A thorough review of the history of the 1972 Constitutional Convention and the legislative history of 1995 HCR 3009 shed little insight on the pending issue. No discussion was found regarding whether the Governor has authority to item veto non-appropriation items in an appropriation bill. Statements indicated 1995 HCR 3009 was not intended to change the Governor's item veto power. Representative Brown said the resolution was to simplify language. Hearing on HCR 3009 Before the Joint Constitutional Revisions Comm. 1995 N.D. Leg. (Jan. 25) p.1. A Legislative Council attorney explained that the purpose of the resolution was to simplify, shorten, and update the language of the executive article. Id. at 2, 3. Referring to Section 9, she said it is "[v]ery similar to what we have currently in law." Id. at 2. Senator Andrist noted the testimony showed "this resolution really doesn't change anything but streamlines the language." Id. at 9.

majority of state constitutions contain such a provision. See The Council of State Governments, The Book of the States 101-02 (2000-01 ed.).

The North Dakota Supreme Court explained the purpose of the item veto in State ex rel. Link v. Olson. The purpose “is to prevent ‘logrolling,’ the practice of attaching riders of objectionable legislation to general appropriation bills in order to force the governor to veto the entire bill or approve the act with the objectionable parts intact.” 286 N.W.2d at 269. With the enactment of the item veto, “the governor could disapprove an item that was obnoxious and yet permit the proper items to stand.” Id. See also State ex rel. Sandaker v. Olson, 260 N.W. 586, 589 (N.D. 1935); Briffault, The Item Veto in State Courts, 66 Temp. L. Rev. 1171, 1177 (1993).

If the Governor does not have authority to veto substantive items in appropriation bills, the Legislature could attach substantive items to essential appropriation bills in order to force their passage. Because the substantive items would not be a separate and independent bill, the Governor would be denied the opportunity to simply veto the substantive provision, power granted to him by Article V, Section 9. Numerous courts have recognized this concern.

In Henry v. Edwards, 346 So.2d 153 (La. 1977), the court held the governor could veto a matter of general law included in an appropriation bill. It reasoned:

The Governor’s constitutional power to veto bills of general legislation cannot be abridged by the careful placement of such measures in a general appropriation bill, thereby forcing the Governor to choose between approving unacceptable substantive legislation or vetoing “items” of expenditure essential to the operation of government. The legislature cannot by location of a bill give it immunity from executive veto. . . . [W]hen the legislature inserts inappropriate provisions in a general appropriation bill, such provisions must be treated as “items” for purposes of the Governor’s item veto power over general appropriation bills. . . . [L]egislative control cannot be exercised in such a manner as to encumber the general appropriation bill with veto-proof “logrolling measures,” special interest provisions which could not succeed if separately enacted, or “riders,” substantive pieces of legislation incorporated in a bill to insure passage without veto.

Id. at 158 (citation omitted).

Similarly, in Colton v. Branstad, 372 N.W.2d 184, 190 (Iowa 1985), the court explained that “the legislature, by attaching an unrelated ‘rider’ as a contingency to an appropriation, cannot invade the governor’s constitutional power to veto bills of general legislation.” The

court held that an unrelated substantive piece of legislation incorporated in an appropriation bill is subject to the governor's item veto. Id. at 191.

To permit the Legislature to include general substantive provisions in appropriation bills, but not permit the Governor to veto those provisions, would disrupt an essential check and balance and violate the principle of separation of powers. “[I]f through the appropriation process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers . . . would be substantially undermined.” Opinion of the Justices, 428 N.E.2d 117, 120 (Mass. 1981); see also Opinion of the Justices, 425 N.E.2d 750, 754 (Mass. 1981) (“To maintain a constitutional balance and preserve the separation of powers, the gubernatorial partial veto power must extend to any separable provisions contained in a general appropriation bill. . . . [L]egislative control should not be exercised in such a manner as to encumber a general appropriations bill with veto-proof ‘log-rolling’ measures (special interest provisions which could not succeed if separately enacted) or riders (substantive pieces of legislation incorporated in a bill to ensure passage without veto).”).

A number of courts, interpreting constitutional provisions similar to Section 9, have held the item veto power exists with respect to portions of an appropriation bill not dealing with appropriations. See State ex rel. Turner v. Iowa State Highway Comm’n, 186 N.W.2d 141, 149 (Iowa 1971) (stating the “item veto amendment makes no reference to appropriations ‘of money’ in its provisions which enable a Governor to approve appropriation bills in whole or in part, and permits the disapproval of any ‘item’ of an appropriation bill”); State ex rel. Brown v. Fergulson, 291 N.E.2d 434, 438 (Ohio 1972) (concluding “that those provisions in an appropriation bill which are separate and distinct from other provisions in the same bill, insofar as the subject, purpose, or amount of the appropriation is concerned, are items within the meaning of [the item veto provision] of the Ohio Constitution”); Elmhurst Convalescent Center v. Bates, 348 N.E.2d 151, 155-56 (Ohio App. 1975) (Whiteside, J, concurring) (“Although the governor has no item veto with respect to substantive provisions included in a bill not making an appropriation of money, where the General Assembly elects to include substantive provisions in a bill making an appropriation of money, the governor’s veto power extends to the items of the substantive provisions as well as the items making appropriations.”); Management Council of Wyo. Legislature v. Greinger, 953 P.2d 839, 846 (Wyo. 1998) (holding “that the Governor has authority to veto substantive provisions of any bill making appropriations, even though the vetoed substantive provision does not appropriate money”).

Based upon the plain language of Section 9, as well as the purpose of the item veto, it is my opinion the Governor’s item veto power includes the power to veto portions of an

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appropriation bill not dealing with appropriations. Accordingly, it is my further opinion the Governor has authority to item veto section 7 of Senate Bill No. 2012.

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.

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