LETTER OPINION
2004-L-59

September 23, 2004

The Honorable Mary Ekstrom
State Representative
1450 River Road South
Fargo, ND 58103-4325

Dear Representative Ekstrom:

Thank you for your letter regarding the upcoming constitutional initiative to define the status of marriage in the state constitution. You ask whether the measure would prohibit a company in North Dakota from extending benefits to same sex couples or to cohabitating heterosexual couples. For the reasons indicated below, it is premature to issue an opinion at this point attempting to construe language in the initiated constitutional measure.

ANALYSIS

Initiated Constitutional Measure No. 1, which will appear on the November 2, 2004, ballot, provides as follows:

> Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

You ask whether the second sentence of Measure No. 1 would prohibit a company in North Dakota from extending benefits to same sex couples or cohabitating heterosexual couples.

By its express terms, the measure does not specifically prohibit a North Dakota company from extending employment benefits to same sex couples or cohabitating heterosexual couples. However, that is not to say that may not be the intent of the proponents of this measure or the people when voting upon it. In the absence of evidence of the intent of this measure, it would be difficult for this office or a court to construe it at this time.

Generally, the language of an initiated measure is interpreted and understood in its ordinary sense. See N.D.A.G. Letter to Dorgan (Dec. 20, 1978). Accord 1981-1982 Mich. Op. Atty Gen. 118, Opinion No. 5875 (Apr. 16, 1981) ("In construing the words of an initiated measure, as in a statute enacted by the legislature, the primary rule is that of 'common understanding' of the words employed in the initiated measure, which requires that a court should give effect to the plain meaning of words."); Or. Op. Atty. Gen. OP-6521 (Nov. 29, 1994) ("The objective is to determine the probable intent of the voters who pass the measure. The best evidence of that intent is the text and context of the measure itself, interpreted not upon narrow technical principles, but upon broad general lines, in order that the object intended may be accomplished.").

In this instance, a plain reading of the measure does not shed much light on the question you raise. Therefore, it is appropriate to look to other rules of statutory construction. See 42 Am. Jur. 2d Initiative and Referendum § 49 (2d ed. 2000) ("The basic rules of statutory construction apply with equal force to legislation by the people through the initiative process or by referendum."). There are statutory rules of construction which permit the use of extraneous sources when the measure is ambiguous or unclear. Section 1-02-39, N.D.C.C., provides that in determining the intent of legislation a court may consider, among other things, the "object sought to be attained"; the "circumstances under which the [measure] was enacted"; and the "legislative history." N.D.C.C. § 1-02-39(1), (2), and (3).

Unlike the situation in which the Legislature proposes an initiated constitutional measure by resolution, there is no legislative history when a measure is put on the ballot by an initiated petition. However, there are other sources which substitute for legislative history. For example, in N.D.A.G. 87-3, it was noted that "[t]he 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)."

Likewise, the Oregon Attorney General has noted that "[i]f available, we also may consider the relevant ballot title and voters' pamphlet material, but should be discriminating and cautious when considering the arguments of proponents and opponents of the measure. We may resort to statutory and judicially developed rules of construction to the extent they are germane." Or. Op. Atty. Gen. OP-6521 (Nov. 29, 1994).

In this case, the ballot title sheds no light on your question, nor am I aware of any voters' pamphlet materials or newspaper articles written about the constitutional measure which would aid in responding to your question. In the upcoming days before

the election, I anticipate there will be more exposition by the proponents of this initiated measure which will outline its meaning and intent. However, at this time, with the public discourse on the topic just beginning, there is not enough to aid in its interpretation and I must respectfully decline to issue an opinion.

Therefore, I believe the foregoing authorities caution against attempting to interpret a pending measure without the full written history to draw upon.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).