

**LETTER OPINION
2011-L-10**

November 1, 2011

The Honorable Dan J. Ruby
State Representative
4620 46th Avenue NW
Minot, ND 58703

Dear Representative Ruby:

Thank you for your letter requesting my opinion on the effective date of Initiated Constitutional Measure No. 2 relating to elimination of property taxes and replacement of lost revenue, which will appear on the June 12, 2012, primary election ballot. The language in question appears in section 7 of the measure and provides as follows:

EFFECTIVE DATE. If approved by the voters, this measure becomes effective on January 1, 2012.

In your letter, you indicate you are one of the members of the sponsoring committee for this initiated constitutional measure. Your letter indicates you initially anticipated the measure would be on the November 2010 general election ballot, and, accordingly, that the measure included an effective date of January 1, 2012. Your letter indicates it was your intention the measure take effect on January 1 of the year following its passage, although the measure does not explicitly state this.¹ You ask what the effective date of

¹ In essence, you indicate the stated effective date language is an error. The Secretary of State and the Legislative Council have the authority to correct ministerial or clerical errors in the published laws. See N.D.C.C. § 46-03-11; see also N.D.C.C. § 1-02-06 (“Clerical and typographical errors shall be disregarded when the meaning of the legislative assembly is clear.”); Berg v. Berg, 490 N.W.2d 487, 492 (N.D. 1992) (trial court has authority to correct a clerical mistake at any time). I, however, have no such explicit authority, nor do I believe that if the effective date clause is an error, it can be reasonably characterized as a clerical or ministerial mistake based on the sparse record before me. References to the effective date are also embedded throughout the measure in section 2, in paragraphs 1 and 2, as well as in the petition title, which indicates the 2012 effective date is not an isolated clerical or typographical error.

Initiated Constitutional Measure No. 2 will be if passed by the people at the primary election on June 12, 2012.

Based on a plain reading of the effective date clause contained in Initiated Constitutional Measure No. 2, as well as other references to the year 2012 in the measure, it is my opinion that if passed by the people at the June 12, 2012, primary election, the measure is retroactively effective as of January 1, 2012.

ANALYSIS

Initiated Constitutional Measure No. 2 is a constitutional initiative. The North Dakota Supreme Court has provided guidance for interpreting constitutional measures:

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 objects. Primarily such intention and purpose are to be found in and deduced from the language of the Constitution itself but, if the language is ambiguous or the answer doubtful, them (sic) the field of inquiry is widened and the rules applicable to the construction of statutes are to be resorted to, and the court may look to the history of the times and examine the state of being existing when the question was framed and adopted by the people in order to ascertain the prior law, the mischief, and the remedy.²

“Generally, the language of an initiated measure is interpreted and understood in its ordinary sense.”³ The basic rules of statutory construction apply with equal force to legislation enacted by the people through the initiative process or by referendum.⁴

The effective date clause in Initiated Constitutional Measure No. 2 is not ambiguous or unclear. It simply provides that “[i]f approved by the voters, this measure becomes effective on January 1, 2012.” Applying the general rules of statutory construction to this constitutional initiative, it should be noted that “[g]enerally, the law is what the Legislature says, not what is unsaid.”⁵ Further:

It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made

² Newman v. Hjelle, 133 N.W.2d 549, 551 (N.D. 1965).

³ N.D.A.G. 2004-L-59.

⁴ Id. (citing 42 Am. Jur. 2d Initiative and Referendum § 49 (2d ed. 2000)).

⁵ Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the “court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.”⁶

If the wording of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.⁷ “Where the legislative intent is apparent from the face of the statute, there is no room for construction and the Court will follow the rule of literal interpretation in applying the words of the statute. . . . When a statute is unambiguous, it is improper for the Court to attempt to construe the provisions so as to legislate that which the words of the statute do not themselves provide.”⁸ “[W]hen the plain meaning of a statute is apparent, it is unwise and unnecessary to delve further.”⁹

Since the words of the effective date clause are not ambiguous, I may not resort to extrinsic aids to attempt to interpret it.¹⁰ Although in your letter, in your capacity as one of 25 members of the sponsoring committee, you indicate your belief as to the intent of the effective date clause, I lack the authority to consider such matters since the language is not ambiguous.¹¹

In your letter, you cite some authority concerning retroactivity¹² and then assert the effective date clause is not retroactive since the word “retroactive” does not appear in the clause. However, as the North Dakota Supreme Court noted:

⁶ Id. (quoting City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940)); see also N.D.A.G. 98-L-107.

⁷ N.D.C.C. § 1-02-05.

⁸ Hayden v. N.D. Workers Comp. Bureau, 447 N.W.2d 489, 496 (N.D. 1989) (citations omitted).

⁹ Little, 497 N.W.2d at 705. See also N.D.A.G. 98-L-107 (“It is improper to construe a statute ‘so as to legislate that which the words of the statute do not themselves provide.’”) (quoting Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989)).

¹⁰ N.D.C.C. § 1-02-39.

¹¹ Id. I am also limited in considering scattered statements of legislative intent, especially where such statements are contrary to the plain provisions of the law. Further, you have not provided any evidence as to the interpretation of the effective date clause by the people who are to vote on the measure in June of 2012. See N.D.A.G. 2001-F-03; N.D.A.G. 2002-L-36; see also N.D.A.G. 2004-L-59 (it is difficult to attempt to interpret a pending initiated measure without the full written history to draw upon).

¹² State ex rel. Stutsman v. Light, 281 N.W. 777 (N.D. 1938) (constitutional amendments will not be considered retrospective in operation unless their terms clearly disclose such an intention); Gofor Oil, Inc. v. State, 427 N.W.2d 104 (N.D. 1988); N.D.C.C. § 1-02-10.

The rule of NDCC 1-02-10 is merely one of statutory construction. See *Gofor Oil, Inc. v. State*, 427 N.W.2d 104, 108 (N.D. 1988); *State v. Cummings*, 386 N.W.2d 468, 471-472 (N.D. 1986); *Caldis v. Board of County Commissioners*, 279 N.W.2d 665, 669 (N.D. 1979). The statute need not include an express declaration, using the word “retroactive,” but intent of retroactive application may be implied. *In re W.M.V.*, 268 N.W.2d 781, 783-784 (N.D. 1978) (“We do not interpret Section 1-02-10, N.D.C.C., to require that a statute or act contain the word “retroactive” in order for it to be applied to facts occurring prior to the effective date of the statute or act.”). As *Caldis*, 279 N.W.2d at 669, explained, rules of statutory construction are subservient to the main rule that the intent and purpose of the legislature must be given effect.¹³

Other references to the 2012 effective date are also contained in the measure in section 2, paragraph 1, and are consistent with the effective date provided in section 7 of the measure. Paragraph 1 states: “Taxes upon real property which were used before 2012 to fund the operations of [political subdivisions] . . . must be replaced with revenues from [certain state taxes].” Paragraph 2 likewise refers to “state revenue sources [providing education funding] before 2012.”¹⁴ The effective date clause and these other references indicate a retroactive intent. “Tax statutes may be retroactive if the legislature clearly so intends.”¹⁵

I am mindful of the difficulties the retroactive effective date of this measure, if it passes, may cause for political subdivisions which rely on property taxes. In enacting a statute, or in this case an initiated constitutional measure, it is presumed that a just and reasonable result is intended and a result feasible of execution is also intended.¹⁶ Read literally, as I must do here, the effective date provision may well result in a number of difficult administrative problems. If the measure does pass, the political subdivisions that rely on property taxes would lose a major source of revenue.

Nevertheless, the fact that there may be difficulties and problems created by the effective date is not a reason to ignore the plain language of the measure. It is within the purview of the Legislative Assembly and the Governor to pass contingency plans, if necessary in a special legislative session, to address the elimination of property taxes and the need for replacement revenues.

¹³ *State v. Davenport*, 536 N.W.2d 686, 688 (N.D. 1995); see also *Smith v. Baumgartner*, 665 N.W.2d 12, 14-15 (N.D. 2003).

¹⁴ Initiated Constitutional Measure No. 2, section 2, paras. 1 and 2.

¹⁵ 2 Sutherland *Statutory Construction* § 41:10 (7th ed. 2007).

¹⁶ N.D.C.C. § 1-02-38.

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Based on the foregoing and a plain reading of the effective date clause contained in Initiated Constitutional Measure No. 2, as well as other references to the 2012 effective date in the measure, it is my opinion that if passed by the people at the June 12, 2012, primary election, the measure is retroactively effective as of January 1, 2012.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pab

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.¹⁷

¹⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).