STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93076

NO.
STATE OF NEBRASKA
OFFICIAL
SEP 24 1993
DEPT. OF JUSTICE

DATE: September 24, 1993

SUBJECT: Necessity of Legislative Approval of Appointee to Office of Lieutenant Governor

REQUESTED BY: Senator LaVon Crosby

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

In order to determine whether clarifying legislation is necessary, you have requested the opinion of the Attorney General as to whether an appointment by the Governor to fill a vacancy in the office of Lieutenant Governor requires approval by the Legislature under Article IV, §§ 10, 11 of the Nebraska Constitution.

The recent announcement of the resignation of Nebraska's Lieutenant Governor has presented the question of how a new Lieutenant Governor is appointed. Prior to a 1980 constitutional amendment, the Governor did not have authority to fill a vacancy in the office of Lieutenant Governor under Article IV, § 11. *See* 1979 Rep. Att'y Gen. 7, 8 (Op. No. 5, 1-15-79). Since 1980, the Governor has clearly had such appointment power.[1] However, the

---

[1]Some confusion regarding the current situation is undoubtedly due to the fact the current version of Article IV, § 11 does not, for some unknown reason, appear in the 1989 Reissue of the Nebraska Revised Statutes. Normal research procedures reveal only the 1972 version. Likewise, the current Shepards does not note the 1980 amendment. One must look to the 1992 Cumulative Supplement of the Nebraska Revised Statutes to find the version which has been the law for thirteen years.

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Mary L. Hewitt
Lauren Lee Hill
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

Printed with soy ink on recycled paper

question of whether legislative approval of the Governor's appointee is required has never been addressed.

The Nebraska Constitution contains three sections on appointments and vacancies:

> Sec. 10. The Governor shall appoint with the approval of a majority of the Legislature, all persons whose offices are established by the Constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such person shall be appointed or elected by the Legislature. . . . (Amended, 1972).
>
> Sec. 11. If any elected state office created by this Constitution, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment, and the appointee shall hold the office until his successor shall be elected and qualified in such manner as may be provided by law. (Amended, 1962, 1972, 1980).
>
> Sec. 12. If any nonelective state office, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment. If the Legislature is in session, such appointment shall be subject to the approval of a majority of the members of the Legislature. If the Legislature is not in session, the Governor shall make a temporary appointment until the next session of the Legislature, at which time a majority of the members of the Legislature shall have the right to approve or disapprove the appointment.

Neb. Const. Art. IV, §§ 10, 11, 12 (emphasis added).

Rules of Construction for Constitutional Provisions

In order to determine whether legislative approval of an appointee to the office of Lieutenant Governor is required, it is necessary to examine the above relevant language of the Constitution in light of the rules for construing constitutional provisions.

First of all, constitutional provisions are not open to construction as a matter of course. ***In re Applications A-16027 et al.***, 242 Neb. 315, 328, 495 N.W.2d 23 (1993), *modified*, 242 Neb. 419, 499 N.W.2d 548. "Construction of a constitutional clause is appropriate only when it has been demonstrated that its meaning is not clear and that construction is necessary." *Id.* *Accord* ***State ex rel. Spire v. Conway***, 238 Neb. 766, 775, 472 N.W.2d 403 (1991).

When a constitutional provision is ambiguous, constitutional interpretation is necessary. In such cases, it is appropriate to search for intent. "`Effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions." ***In re Application A-16027 et al.***, 242 Neb. at 329 (*quoting* ***State ex rel. Western Tech. Com. Col. Area v. Tallon***, 196 Neb. 603, 606, 244 N.W.2d 183, 186 (1976)).

When a constitutional amendment is adopted as the result of an initiative petition effort, intent must be ascertained only from the language of the amendment.

> [T]his jurisdiction is committed to the rule that the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the amendment itself, because there is no meaningful way to determine the motivations for submitting the initiative to the electorate or to determine the intent of those voting for its enactment.

State ex rel. Spire v. Public Emp. Ret. Bd., 226 Neb. 176, 183, 410 N.W.2d 463 (1987). However, when a constitutional amendment is proposed by the legislature, it is appropriate, when determining intent, to examine the legislative history of the resolution which placed the measure on the ballot. As the Nebraska Supreme Court has stated, "It is permissible to consider the facts of history in determining the meaning of language in the Constitution." ***State ex rel. State Railway Commission v. Ramsey***, 151 Neb. 333, 341, 37 N.W.2d 502 (1949). "It is also appropriate and helpful to consider . . . the objects sought to be accomplished. . . ." *Id.*

The Nebraska Supreme Court has often examined the records of constitutional conventions to help determine intent. *See, e.g.*, ***In re Applications A-16027 et al.***, 242 Neb. at 329. When an amendment is proposed by the legislature rather than by a constitutional convention, evidence of intent may be gathered from the legislative history. As the Nebraska Supreme Court held ninety years ago, "The legislature, in proposing an amendment to the constitution, acts in a capacity in strict analogy to that of a constitutional convention." ***Weston v. Ryan***, 70 Neb. 211, 221, 97 N.W. 347 (1903).

See ***Cummings v. Mickelson***, 495 N.W.2d 493, 498-499 (S.D. 1993) ("In the case of constitutional amendments, the legislative history and historical background can also be of assistance should there be an ambiguity in the constitutional language which requires interpretation by principles of construction."); ***Washington Economic Dev. Fin. Auth. v. Grimm***, 837 P.2d 606, 609 (Wash. 1992) ("To interpret a constitutional amendment, we examine the legislative history. . . .").

Analysis of Article IV, §§ 10, 11

Applying the foregoing rules of constitutional interpretation, we first look to the language of the constitution to determine whether the provision is clear on its face, or whether an ambiguity exists which requires construction.

When Article IV, sections 10, 11 and 12 are read together in context, it becomes clear that Article IV, § 10 applies only to initial appointments by the Governor of officials whose appointment or election is not otherwise provided for. Article IV, § 11 applies only to vacancies in elected state offices. Article IV, § 12 applies only to vacancies in nonelective state offices. Consequently, a vacancy in the office of the Lieutenant Governor is governed by Article IV, § 11. Section 10 is wholly inapplicable. Section 11 provides, "If any elected state office created by this Constitution . . . shall be vacated by . . . resignation . . . it shall be the duty of the Governor to fill that office by appointment. . . ." Unlike the adjacent sections 10 and 12, section 11 contains no requirement of legislative approval. It provides for appointment by the Governor without reference to legislative approval.

We conclude, therefore, Article IV, § 11 is not ambiguous on its face and would not be considered open to construction by a court. "Courts must apply and must enforce the Constitution as it is written." ***State ex rel. Spire v. Public Emp. Ret. Bd.***, 226 Neb. at 178. A court would not likely even consider the legislative history of this provision. "[E]xtrinsic evidence which attempts to establish legislative intent, can be used only in the case of an . . . amendment to a constitution which is ambiguous on its face. On the other hand, when a statute or amendment to a constitution is clear, then no extrinsic evidence may be admitted as to legislative intent." ***Whitcomb v. Young***, 279 N.E.2d 566, 574 (Ind. 1972).

We believe our conclusion is also supported by a previous decision of the Nebraska Supreme Court, ***Swanson v. State***, 132 Neb. 82, 93-95, 271 N.W. 264 (1937). In ***Swanson***, an action was brought to determine the legal status of the office of commissioner of

public lands and buildings after adoption of a constitutional amendment.

> A careful examination of the amendment thus submitted and adopted discloses that what was actually done and accomplished was so clear and certain as to preclude construction, so far as the question here presented for consideration is concerned. It effected the deletion of the words "commissioner of public lands and buildings" from section 1, art. IV of the state Constitution, as theretofore existing. The new section 1, art. IV, created by this amendment, upon its adoption became a new, complete section of the Constitution, as much as if originally incorporated in the Constitution, and is to be construed accordingly. If possible, it must be harmonized with all the other provisions of the Constitution. 1 Cooley, Constitutional Limitations (8th ed.) 129, The well-recognized rule applicable is that effect must be given, if possible, to the whole instrument and to every section and clause, in the light of the historical development of the principle involved and contained therein. The Constitution as amended must be construed as a whole.

Swanson v. State, 132 Neb. at 93-94.

> So, also, it is a well-recognized canon of construction that, "when general and special provisions of a Constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply." 12 C.J. 709.
>
> It must also be remembered that, <u>while it is the duty of the courts to ascertain and carry into effect the intent and purpose of the framers of a Constitution, or of an amendment thereto, duly adopted, this intent must be that which they have embodied in the instrument itself</u>.

Id. at 94-95 (emphasis added).

> The adopted amendment is in the exact language of the original section except that the name "commissioner of public lands and buildings" is left out. We are of the opinion that these facts indicate a clear intent to eliminate the commissioner of public lands and buildings as a constitutional executive officer of this state.

Id. at 95-96. As with Article IV, § 11, the provision in question in ***Swanson*** had been amended by simply deleting reference to a particular constitutional office. Also, as in ***Swanson***, the more specific provision for vacancies in elected offices (Art. IV, § 11) controls over the general provision for initial appointments (Art. IV, § 10).

Thus, we conclude the appointment of a new Lieutenant Governor upon the resignation of the person elected to such office is governed by Article IV, § 11 of the Nebraska Constitution. Under this provision, it is the duty of the Governor to fill that office by appointment, and no legislative approval is required.

Alternative Analysis of Article IV, § 11

Although we believe Article IV, § 11 would be found by a court to be clear on its face and not subject to interpretation, we are mindful of the historic significance of the question you have presented and also of the fact that legislative history does exist which is contrary to our conclusion that no legislative approval is required. Consequently, we will set forth an alternative analysis of Article IV, § 11 under the assumption the provision is ambiguous and would be subject to construction, including an examination of its legislative history.

Article IV, § 11 provides for the filling of vacant state elective offices by the Governor. It is silent as to whether legislative confirmation is required. The current version of Article IV, § 11 is the result of an amendment to the Nebraska Constitution adopted at the 1980 primary by a vote of 203,135 to 114,254. The amendment was placed on the ballot by Legislative Resolution 5, as adopted by the Nebraska Legislature.

> "Sec. 11. If any elected state office created by this Constitution, except offices provided for in Article 7 of this Constitution, ~~or the office of Lieutenant Governor,~~ shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment, and the appointee shall hold the office until his successor shall be elected and qualified in such manner as may be provided by law."

1979 Neb. Laws LR 5, § 1. Section 2 of LR 5 described the amendment as a "Constitutional amendment to allow the Governor to fill a vacancy in the office of the Lieutenant Governor." It said nothing about legislative approval.

An Attorney General's Opinion to Nebraska State Senator Murphy prior to adoption of LR 5 concluded the effect of amending the old

Section 11 by striking the words "or the office of Lieutenant Governor," would be to "authorize the Governor to fill the Office of Lieutenant Governor by appointment should a vacancy occur." 1979-80 Rep. Att'y Gen. 7, 8 (Op. No. 5, dated 1-15-79). The opinion said nothing about approval of the appointment by the Legislature.

During legislative floor debate on LR 5, the subject of legislative confirmation of an appointed Lieutenant Governor was discussed several times.

> SENATOR RUMERY: Would we follow the same procedure here as we do now and that is the Legislature would approve the appointment to Lieutenant Governor?
>
> SENATOR MURPHY: The Governor makes his appointments with the advice and consent of the Legislature, Senator Rumery, and quite honestly I don't want to give you a positive answer on that because I am not certain. I believe what you are saying is true but subject to correction.
>
> . . .
>
> SENATOR MARSH: Thank you, Mr. Speaker. I would think that it is not necessary to be in compliance with the Legislature. When a Senator resigns or dies the appointment is made by the Governor and is not subject to a legislative okay. Therefore, I would assume this would be as are other appointments to elective positions and I would assume the Legislature does not interject itself in that proceeding.
>
> SENATOR LEWIS: Senator Fowler.
>
> SENATOR FOWLER: Senator Murphy, where is the copy on this constitutional amendment?
>
> SENATOR MURPHY: I beg your pardon.
>
> SENATOR FOWLER: Where is the copy of the resolution?
>
> SENATOR MURPHY: The first page of book one, Senator. And in answer to Senator Rumery, in checking that particular section of the Constitution, Senator, I find that the advice and consent is not expressed in that section so I would assume he could do it without the advice and consent of the Legislature.

Floor Debate on LR 5, 86th Neb. Leg., 1st Sess. 1676-1697 (March 19, 1979).

> SENATOR NEWELL: . . . One of the questions that I have is as I asked you earlier, does this allow, this constitutional amendment allow for the Legislature to approve the appointment of the Governor?
>
> SENATOR MURPHY: Senator Rumery led me through that on General File, Senator Newell, and this section, section 11, does not indicate that, however, section 10 of article 4, does explicitly say that the Governor shall appoint to fill constitutional offices which this would be and that he does that only with the approval of the Legislature, so the Legislature under article 10, or under section 10 of article 4, rather than 11, but under 10, we very definitely would have the authority to approve or disapprove.
>
> SENATOR NEWELL: Okay, now that is . . . The reason I ask this question is simply this. I wanted some legislative intent and I wanted to make sure that we have that kind of legislative intent. With that, I would, since I have these great assurances, right, Senator Murphy. One more time, just say yes.
>
> SENATOR MURPHY: Yes.

Floor Debate on LR 5, 86th Neb. Leg., 1st Sess. 3296 (April 11, 1979).

Thus, the sponsor of LR 5 initially stated, "I find that the advice and consent is not expressed in that section [Art. IV, § 11] so I would assume he could do it without the advice and consent of the Legislature." Then, before final passage of the resolution, he stated that the Legislature would have "authority to approve or disapprove" of the appointment.

An examination of the dialogue reveals the Senator's final conclusion was based on the language of Article IV, § 10 and not Article IV, § 11. As discussed previously, section 10 does not apply to vacancies, but rather to initial appointments. Thus, the premise of the Senator's statement was incorrect.

With the adoption of the 1980 amendment, the vacancy provision must be viewed in the context of article IV, § 11 in its entirety. "When an amendment to the constitution is legally adopted, it becomes a part of that instrument, and its application to subsequent transactions must be considered precisely as though it

had been originally adopted as a part thereof in its amended form." ***Sorensen v. Swanson***, 181 Neb. 205, 212, 147 N.W.2d 620 (1967) (*quoting* ***State ex rel. Mortensen v. Furse***, 89 Neb. 652, 131 N.W. 1030 (1911)). In other words, intent is to be determined not only from the legislative history, but from the language actually adopted. "While a practical interpretation of the constitution by the legislature will not be lightly disregarded in doubtful cases, yet, when the language of the constitution is free from ambiguity, an interpretation thereof by the legislative department cannot be invoked to nullify the fundamental law." ***State ex rel. Platte County v. Sheldon***, 79 Neb. 455, 462, 113 N.W. 208 (1907) (*quoting* ***State v. Cornell***, 60 Neb. 276, 83 N.W. 72 (1900)). "In construing a constitutional amendment to ascertain intent of the people in adopting it, courts must find such intent in the language of the amendment itself and must not hold that the people intended anything different than the language employed imports." ***Sorensen v. Swanson***, 181 Neb. at 212-213.

Furthermore, extrinsic evidence beyond the Legislative history also clearly supports the conclusion that legislative approval is not required. The ballot language used for the 1980 amendment stated, "A vote FOR this proposal will allow the Governor to fill by appointment a vacancy occurring in the office of the Lieutenant Governor <u>the same as he is now authorized to do in case of a vacancy in any other elected state office</u>. . . ." (Emphasis added). Thus, it is essential to view the language of Article IV, § 11 as it existed prior to 1980.

A review of the earlier history of Article IV, § 11 reveals additional evidence to support the conclusion that Article IV, § 10 applies only to initial appointments, while § 11 applies to vacancies. Prior to enactment of the 1980 amendment, the existing version of Article IV, §§ 10 and 11 was the result of a 1972 amendment which was intended to "rearrange and clarify the sections on appointment, removal and filling vacancies." Report of the Nebraska Constitutional Revision Commission, pp. 35, 39-40 (1971). The Minutes of the Nebraska Constitutional Revision Commission reveal that "new Section 10 . . . refers to appointment . . . of all persons other than those filling vacancies of elected officials. Then when you go to Section 11 that is for the elected officers for which there is a vacancy. Then you go to Section 12 and that is for non-elected officers to fill a vacancy." *Id.* at 1630.

Thus, it is clear that only section 11 applies to the current situation, notwithstanding the comments made during legislative floor debate in 1979. Significantly, no mention of legislative approval under Article IV, § 11 was mentioned by the 1971 Constitutional Revision Commission. "I think Section 11 proposal

is fairly clear. It's talking about elected officers and filling vacancies." "If any elected office . . . shall be vacated . . . it shall be the duty of the Governor to fill that office by appointment." *Id.* at 1633. The omission of any requirement of legislative approval can hardly be said to be accidental in light of the express inclusion of such a requirement in sections 10 and 12 which were revised simultaneously. The provision in question applies not only to the Lieutenant Governor, but also to vacancies in other state offices. History reveals that appointments to the offices of State Treasurer and Attorney General, both since 1980, were not approved by the legislature.

Many constitutional provisions have parallel statutory provisions. In this case, Neb. Rev. Stat. § 32-1040 provides that "vacancies in office shall be filled in the following manner: "In state . . . offices . . . when no other method is especially provided, by the Governor. . . ." No legislative approval is required by the statute. See also 1949-50 Rep. Att'y Gen. 39-40 (1-10-49) (there is no requirement that the appointment to fill a vacancy in the membership of the Legislature be confirmed by the Legislature).

In conclusion, even when the legislative history and other extrinsic evidence are examined, our conclusion remains that Article IV, § 11 authorizes the Governor to appoint a new Lieutenant Governor upon the resignation of the person elected to such office, and no legislative approval is required.

Legislative Implications

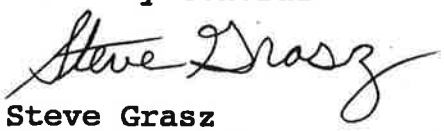
Your opinion request was made in the context of possible legislative action. In that regard, we would note that an amendment to Article IV, § 11 either expressly requiring or not requiring legislative approval of vacancy appointees would certainly prevent any future confusion. Also, Article IV, § 11 provides that the person appointed shall hold the office until his successor shall be elected and qualified in such manner as may be provided by law. This provision would permit legislation to establish a special election prior to the completion of the term of an appointed elective state officer. *See*, i.e., Neb. Rev. Stat. § 32-1042 which provides for an election to fill a portion of an unexpired legislative term after the appointment by the Governor in certain circumstances. Any such legislation would, of course, have to comply with any other relevant constitutional provisions.

Finally, we note that if legal certainty beyond this opinion is desired by the new Lieutenant Governor, she may seek a judicial determination pursuant to Neb. Rev. Stat. §§ 84-718, 719 (1987). Such actions are authorized "whenever an issue arises involving the

status . . . of an elective constitutional state officer. . . ." A hearing before the Nebraska Supreme Court is required to be set within ten days from the filing of the petition.

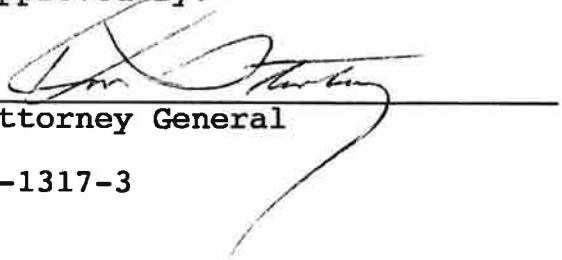
Sincerely yours,

DON STENBERG
Attorney General



Steve Grasz
Deputy Attorney General

Approved By:



Attorney General

3-1317-3