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DATE: May 30, 1995

SUBJECT: Art. III, § 2 of the Nebraska Constitution; Priority of Proposed Amendments Affecting the Same Portions of the State Constitution

REQUESTED BY: Senator Dan Lynch
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Art. III, § 2 of the Nebraska Constitution deals with initiative measures proposed by the people of Nebraska for enactment of laws and amendment of the state constitution. With respect to such initiative measures, Art. III, § 2 provides, as is pertinent to our discussion:

> If conflicting [initiative] measures submitted to the people at the same election be approved, the one receiving the highest number of affirmative votes shall thereby become law as to all conflicting provisions.

Art. XVI, § 1 of the Nebraska Constitution, on the other hand, deals with the Legislature's ability to propose constitutional amendments. That section does not contain language similar to the language from Art. III, § 2 quoted above.

Your opinion request contains a lengthy hypothetical situation as a preface for the questions which you wish to ask us:

> Assume the Legislature duly adopted LR 93CA, dealing with a constitutional limitation on raising of revenues by

> taxes on real property and further assume a different proposal was placed before the voters by way of the initiative process, also dealing with taxes and real property. However, assume that the two proposals did not "match." That is the initiative proposal was in essence a "package" and contained provisions not totally reciprocated in LR 93CA. For example, assume the Legislative proposal dealt only with revenues produced from property taxes and while the initiative proposal dealt with that issue as well, it further had a constitutional limitation on a political subdivision's spending.

You then pose your initial question:

> . . . is the language quoted [above] from Article III, Section 2 [regarding conflicting provisions] truly a "winner take all" proposition? Stated another way, does one entire proposal prevail over the other, even though the components of one proposal are not entirely addressed in the other?

For the reasons discussed below, we believe that the answer to your first question is "no."

Before we discuss your initial question, we would note that our research has disclosed no Nebraska Supreme Court cases or previous opinions of this office which deal directly with the various questions raised in your opinion request. Nonetheless, the Nebraska Supreme Court has provided a number of rules for the application and construction of constitutional provisions which have some bearing on the questions which you have presented. The Nebraska Constitution must be read as a whole, and constitutional amendments become an integral part of the instrument which must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument. ***Jaksha v. State***, 241 Neb. 106, 486 N.W.2d 858 (1992); ***Banner County v. State Board of Equalization and Assessment***, 226 Neb. 236, 411 N.W.2d 35 (1987). Constitutional provisions relating to the same subject matter should be construed together, with a view to giving effect to each provision if possible. ***State ex rel. Randall v. Hall***, 125 Neb. 236, 249 N.W. 756 (1933). Constitutional provisions are repugnant to each other or conflicting only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. ***Swanson v. State***, 132 Neb. 82, 271 N.W. 264 (1937). Differences in constitutional provisions must, if possible, be reconciled. ***State ex rel. Randall v. Hall, supra.***

With those various rules in mind, we believe that there are two reasons why the language of Art. III, § 2 at issue does not create the "winner take all" situation which you described in your initial question. First, the application of that constitutional provision is clearly limited on its face to situations where two proposed constitutional amendments approved at the same election are "*conflicting*," and "conflicting" in that context must be narrowly defined on the basis of the cases cited above. As a result, in the hypothetical situation described in your letter, if two "non-matching" constitutional amendments were approved by the people, the prioritizing language in Art. III, § 2 would apply only to those provisions in those amendments which were directly "conflicting." All other provisions of both amendments would remain in effect including, in your hypothetical, the components of one proposal which were not entirely addressed in the other.

In addition, under the rules of construction noted above, we believe that courts would generally attempt to reconcile differing constitutional amendments if possible, and to give effect to all the portions of two amendments passed at the same election which were not directly in conflict. Consequently, the courts would not create a "winner take all" situation with respect to two competing constitutional amendments passed at the same election which did not "match". This is true even if the prioritizing language in Art. III, § 2 does not apply in the situation posited in your letter where one constitutional amendment is proposed by initiative and the other by legislative action. On the basis of the authorities above, we believe that courts would still try to reconcile and give effect to "competing" constitutional amendments passed by the people to the extent that they were not in direct conflict.

You next ask whether our answer to your initial question would change if the two competing but not "matching" constitutional amendments you hypothesized were placed on the ballot by two separate initiative efforts instead of by an initiative and separate legislative action. Under those circumstances, Art. III, § 2 would clearly apply, and for the reasons stated above, there would be no "winner take all" situation. Rather, to the extent that the two initiatives were in direct conflict as defined in the Nebraska case law, the initiative with the most votes would control. Otherwise, the non-conflicting provisions in both amendments would be left in effect.

Finally, you state:

> assume one of the initiative petitions contain (sic) the following language:
>
> Should other constitutional amendments be placed on the general election ballot in November of 1996 dealing with

> local and State taxes, spending and/or revenue limitations, and one or more of these ballot measures should be approved, the intent of the people is the measure receiving the highest number of affirmative votes shall become a part of the Constitution and such other proposed constitutional amendments shall be deemed to be rejected by the people.

You then ask, "[d]oes this language then make the process truly `winner takes all?' Is the language suggested constitutionally appropriate?"

We are not entirely sure from your letter whether your final scenario contemplates that the intent language above will be inserted in the initiative petitions themselves or in the Nebraska Constitution. Neither are we clear as to what you mean by "constitutionally appropriate." However, for purposes of this opinion, we will assume that the intent language concerning the priority of amendments on the same subject set out above will be placed in the initiative petitions which are circulated, and that it is not intended that such language actually be placed in the Nebraska Constitution.

It appears to us that the intent language which you propose with respect to the priorities of constitutional amendments on the same subject would, in effect, attempt an amendment of the Nebraska Constitution. That is, that language would purport to govern which constitutional amendment would be placed in the Nebraska Constitution under certain circumstances when the Constitution itself currently contains no provisions of that nature. Requirements in a constitution regulating its own amendment are mandatory, and strict observance of every substantial requirement is essential to the validity of the proposed amendment. 16 C.J.S. ***Constitutional Law*** § 6. Since the Nebraska Constitution contains no procedure for its amendment by means of insertion of particular intent language in an initiative petition, we do not believe that the constitution could be amended to add the provision which you propose through the inclusion of such language in the initiative petitions themselves.

Moreover, the Nebraska Supreme Court has indicated that the intent of the people in adopting an initiative amendment must be ascertained from the language of the amendment itself, and cannot be determined from the language of the initiative petition. In ***Omaha National Bank v. Spire***, 223 Neb. 209, 389 N.W.2d 269 (1986), the Court stated:

> There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the

> intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined -- except from the words of the enactment itself. Beyond that, all that can be known by the court is that the voters have been subjected to tornadolike winds in voting on this highly political question. We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself.

Id. at 224, 225, 389 N.W.2d at 279. On the basis of the holding in the ***Omaha National Bank*** case, it appears to us that inclusion of the intent language which you propose in the initiatives in question would be ineffective to make any changes in the process for amendment of the Nebraska Constitution. Such language could not be used to make the process "winner takes all," and the priority of differing amendments would still be determined based upon the general rules cited above.

Sincerely yours,

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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:

Attorney General