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MEMORANDUM

DATE: March 17, 2013

TO: Brenda J. Erdoes, Legislative Counsel

FROM: Kevin C. Powers, Chief Litigation Counsel KP

SUBJECT: Legislative rejection of statutory initiatives under Article 19, Section 2(3) of the Nevada Constitution.

You have asked for a brief answer and discussion on the following question regarding the rejection of statutory initiatives and the proposal of competing legislative measures under Article 19, Section 2(3) of the Nevada Constitution: Is the Legislature required to take any specific type of legislative action to "reject" a statutory initiative in order to propose a competing legislative measure under Article 19, Section 2(3)?

BRIEF ANSWER

When the plain, ordinary and common meaning of the term "reject" is construed consistently with the time-honored customs and practices of legislative bodies, the most reasonable interpretation of the term "reject" in Article 19, Section 2(3) is that the Legislature is not required to take any specific type of legislative action in order to reject a statutory initiative. Rather, if the Legislature simply postpones or ceases all proceedings on the statutory initiative in the regular course of its legislative business by, for example, refusing to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative, the Legislature has rejected the statutory initiative for purposes of Article 19, Section 2(3).

Furthermore, under well-established case law, because an interpretation of Article 19, Section 2(3) involves legislative procedure, the language of the constitutional provision must be construed in favor of the power of the Legislature to propose competing measures under it, and any uncertainty, ambiguity or doubt regarding the meaning of the constitutional provision must be resolved in favor of the Legislature. Moreover, in the three prior instances in which the Legislature has rejected statutory initiatives and thereafter passed competing measures, the Legislature has rejected each statutory initiative in a different manner by using a variety of methods and procedures. This legislative construction of the term "reject" in Article 19, Section 2(3) should be given great weight and deference by the courts, so that if there is any reasonable doubt as to the meaning of

the term "reject," the construction given to it by the Legislature should prevail. Lastly, because this issue involves the interpretation of constitutional provision affecting legislative procedure, the Legislature is entitled to follow an opinion of the Legislative Counsel which interprets the constitutional provision, and the judiciary will typically afford the Legislature deference in its counseled selection of that interpretation.

DISCUSSION

Your question requires the interpretation and application of Article 19, Section 2(3), which provides in relevant part:

> The Secretary of State shall transmit such [initiative] petition to the Legislature as soon as the Legislature convenes and organizes. The petition shall take precedence over all other measures except appropriation bills, and the statute or amendment to a statute proposed thereby shall be enacted or *rejected* by the Legislature without change or amendment within 40 days. . . . If the statute or amendment to a statute is *rejected* by the Legislature, or *if no action is taken thereon* within 40 days, the Secretary of State shall submit the question of approval or disapproval of such statute or amendment to a statute to a vote of the voters at the next succeeding general election. . . . If the Legislature *rejects* such proposed statute or amendment, the Governor may recommend to the Legislature and the Legislature may propose a different measure on the same subject, in which event, after such different measure has been approved by the Governor, the question of approval or disapproval of each measure shall be submitted by the Secretary of State to a vote of the voters at the next succeeding general election.

Nev. Const. art. 19, § 2(3) (emphasis added).

Because the Legislature's power to propose a competing measure under this constitutional provision arises if the Legislature "rejects" the statutory initiative, we must ascertain the meaning of the term "reject" as used in Article 19, Section 2(3). In addressing this legal issue, we are guided by several "well-established precepts of statutory and constitutional construction." We the People Nev. v. Miller, 124 Nev. 874, 880-81 (2008).

When a term in the Nevada Constitution is not defined, it must be given its plain, ordinary and common meaning. Strickland v. Waymire, 126 Nev. Adv. Op. 25, 235 P.3d 605, 608 (2010); Miller v. Burk, 124 Nev. 579, 590-91 (2008); Ex parte Ming, 42 Nev. 472, 492 (1919). Therefore, because Article 19, Section 2(3) does not define the term "reject," we may look to dictionary definitions to ascertain its plain, ordinary and common meaning. Rogers v. Heller, 117 Nev. 169, 173 & n.8 (2001); Cunningham v. State, 109 Nev. 569, 571 (1993).

As defined in various dictionaries, the plain, ordinary and common meaning of the term "reject" includes the following definitions: "to refuse to hear, receive, or admit," and "to refuse to acknowledge, adopt, believe, acquiesce in, receive or submit to," and "to refuse to accept, consider, submit to, take for some purpose, or use." Webster's Third New International Dictionary 1915 (1993); Webster's Ninth New Collegiate Dictionary 993 (1990).

In addition, when a term in the Nevada Constitution is used in the context of the legislative process, the term "should be construed with reference to existing customs in legislative and parliamentary bodies." State ex rel. Cardwell v. Glenn, 18 Nev. 34, 40 (1883). Therefore, because the term "reject" is used in Article 19, Section 2(3) in the context of the legislative process, the term must be construed consistently with the customs and practices of legislative bodies, which for centuries have rejected proposed laws using a variety of methods and procedures.

In his renowned treatise on legislative procedure, Luther S. Cushing explains that the rejection of a bill "may be manifested in several ways." Luther S. Cushing, Elements of the Law & Practice of Legislative Assemblies § 2341 (1856) (hereafter "Cushing's Legislative Assemblies"). The usual method for a legislative body to reject a bill is simply to postpone or cease all proceedings on the bill in the regular course of its legislative business. Id. In its earlier years, the British Parliament occasionally would reject a bill by "a direct motion to reject the bill altogether," which sometimes included an order that the bill be torn apart or tossed on the floor of the House. Id. at § 2341 & n.1. However, since the early 1800s, it has not been a common custom or practice for legislative bodies in Great Britain or the United States to reject a bill by "a direct motion to reject the bill altogether." Id. at § 2341. Rather, the modern custom or practice in both nations is for legislative bodies to reject a bill by simply postponing or ceasing all proceedings on the bill in the regular course of their legislative business. Id.

Thus, when the plain, ordinary and common meaning of the term "reject" is construed consistently with the time-honored customs and practices of legislative bodies, the most reasonable interpretation of the term "reject" in Article 19, Section 2(3) is that the Legislature is not required to take any specific type of legislative action in order to reject a statutory initiative. Rather, if the Legislature simply postpones or ceases all proceedings on the statutory initiative in the regular course of its legislative business by, for example, refusing to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative, the Legislature has rejected the statutory initiative for purposes of Article 19, Section 2(3).

This interpretation of the term "reject" in Article 19, Section 2(3) is supported by several other rules of construction. It is well established that when a state constitution expressly provides the method or procedure for a legislative body to exercise a particular power, the legislative body may exercise that power only as prescribed by the constitution. Mason's Manual of Legislative Procedure § 7(1) (2010) (hereafter "Mason's Manual"). For example, because the Nevada Constitution expressly provides the methods and

procedures for the Legislature to enact a proposed law, the Legislature may exercise that power only as prescribed by the Nevada Constitution.

By contrast, when a state constitution does not expressly provide the method or procedure for a legislative body to exercise a particular power, the legislative body may exercise that power in any reasonable manner that it deems appropriate. Mason's Manual § 15(2) ("A legislative body having the right to do an act must be allowed to select the means of accomplishing such act within reasonable bounds."). For example, because the Nevada Constitution does not expressly provide the method or procedure for the Legislature to reject a proposed law, the Legislature may exercise that power in any reasonable manner that it deems appropriate.

Thus, when a proposed law is presented to the Legislature, it may refuse to hear, accept, consider, acquiesce in or otherwise adopt the proposed law. If the Legislature does any of these things, the proposed law has been "rejected" under the plain, ordinary and common meaning of the term "reject."

Furthermore, it is a traditional custom and practice of legislative bodies to refer proposed laws to committees. Mason's Manual §§ 378 & 381. When proposed laws are referred to committees, "[t]he practice of preventing the passage of [such] measures by leaving them in committee without taking action on them, or laying them on the table in committee, is well established in some legislatures." Mason's Manual § 635(3). Since its earliest sessions, the Nevada Legislature has followed this well-established custom and practice.

Consequently, when the Legislature refers a statutory initiative to a committee and the committee postpones or ceases all proceedings on the statutory initiative in the regular course of its legislative business by, for example, refusing to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative, the Legislature has, through its committee, rejected the statutory initiative for purposes of Article 19, Section 2(3). Undoubtedly, this is not the only method or procedure that the Legislature may use to reject a statutory initiative. However, because it is a traditional and reasonable method or procedure for the Legislature to reject a statutory initiative, it is a constitutionally acceptable method or procedure for rejecting a statutory initiative under Article 19, Section 2(3).

This interpretation of the term "reject" in Article 19, Section 2(3) is also supported by the three prior instances in which the Legislature has rejected statutory initiatives and thereafter passed competing measures. In each instance, the Legislature rejected the statutory initiatives by using different methods and procedures.

The constitutional process which authorizes the people to submit statutory initiatives to the Legislature was originally added to the Nevada Constitution in 1912, when the voters ratified a constitutional amendment proposed by the Legislature. See 1909 Nev.

Stat., file no. 16, at 347-49; 1911 Nev. Stat., file no. 3, at 446-47. Since then, the Legislature has rejected statutory initiatives and thereafter passed competing measures in only three legislative sessions—1921, 1981 and 2011. Because these prior legislative practices provide historical insight into the meaning of Article 19, Section 2(3), we have reviewed the Assembly and Senate Journals and any committee minutes that are available for those sessions for information regarding the methods and procedures followed by the Legislature in rejecting the statutory initiatives and passing the competing measures.

In each prior instance, when the Secretary of State transmitted the statutory initiative to the Legislature, it was delivered to the Assembly, and the Chief Clerk of the Assembly read the Secretary of State's message and the initiative to the members of the House. At that time, the Assembly either: (1) referred the initiative to a committee; or (2) placed the initiative on the Chief Clerk's desk. Assembly Journal, 30th Reg. Sess., at 9 (Nev. 1921) (referring statutory initiative to committee); Assembly Journal, 61st Reg. Sess., at 6-7 (Nev. 1981) (placing statutory initiative on the Chief Clerk's desk); Assembly Journal, 76th Reg. Sess., at 20-24 (Nev. 2011) (referring statutory initiative to committee). Thereafter, the Legislature rejected each statutory initiative in a different manner.

On January 19, 1921, the third day of the 30th regular session, the Secretary of State transmitted to the Legislature a statutory initiative relating to divorce. Assembly Journal, 30th Reg. Sess., at 9 (Nev. 1921). The initiative proposed eliminating "what are commonly known as short-term decrees in divorce cases," and it also proposed other matters relating thereto.[1] Id. The Assembly referred the initiative, designated as Assembly Bill No. 1, to a joint committee composed of the Committee on Judiciary and the Committee on Public Morals. Id. On February 8, 1921, the 23rd day of the session, the committee reported unfavorably on the initiative with the recommendation of "do not pass." Id. at 83. On that same day, the Assembly introduced a competing legislative measure designated as Assembly Bill No. 65. Id. at 84. On February 16, 1921, the 31st day of the session, the Assembly voted on the initiative, but it failed to receive a constitutional majority and was declared lost by a vote of 1 member in favor and 32 members opposed. Id. at 127. On March 17, 1921, the 60th and final day of the session, the Legislature passed A.B. 65 as its competing measure when both Houses adopted the report of the conference committee on the bill. Id. at 371-72; Senate Journal, 30th Reg. Sess., at 304 (Nev. 1921). The Governor approved A.B. 65 on March 28, 1921. See 1921 Nev. Stat., ch. 245, at 385. The bill was submitted to the voters as a competing measure at the 1922 general election where it prevailed over the statutory initiative. See Political History of Nevada, 375 (11th ed. 2006).

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[1] At the time, Nevada's divorce law provided that a party who was a resident of another state could bring a divorce action in Nevada after residing here for only 6 months. Because Nevada's residency requirement was a relatively short period compared to other states, Nevada gained the reputation as the Nation's divorce capital, and the divorce "industry" became an important part of Nevada's economy.

On January 19, 1981, the first day of the 61st regular session, the Secretary of State transmitted to the Legislature a statutory initiative relating to public utilities. Assembly Journal, 61st Reg. Sess., at 6-7 (Nev. 1981). The initiative proposed creating a division in the office of the Attorney General for the protection of utility customers, and it also proposed other matters relating thereto. Id. At first, the Assembly placed the statutory initiative on the Chief Clerk's desk. Id. However, on January 22, 1981, the fourth day of the session, the Assembly referred the initiative to the Committee on Government Affairs. Id. at 29. The Committee on Government Affairs received extensive testimony regarding the initiative and several proposed competing measures through its Subcommittee on Consumer Advocacy. See Legislative History for A.B. 473, 61st Reg. Sess. (Nev. 1981). After receiving such testimony, the Committee on Government Affairs did not conduct any further proceedings on the initiative in the regular course of its legislative business, and the committee did not make any reports to the Assembly regarding the initiative.

On January 28, 1981 (10th day), January 30, 1981 (12th day), and April 8, 1981 (80th day), the Assembly introduced competing legislative measures designated as Assembly Bill Nos. 58, 85 and 473. Assembly Journal, 61st Reg. Sess., at 53, 65, 498 (Nev. 1981). On June 1, 1981, the 134th day of the session, the Legislature passed A.B. 473 as its competing measure when both Houses adopted the report of the conference committee on the bill. Id. at 1449-50; Senate Journal, 61st Reg. Sess., at 1571-72 (Nev. 1981). The Governor approved A.B. 473 on June 14, 1981. See 1981 Nev. Stat., ch. 692, at 1674. The bill was submitted to the voters as a competing measure at the 1982 general election where it prevailed over the statutory initiative. See Political History of Nevada, 404 (11th ed. 2006).

On February 7, 2011, the first day of the 76th regular session, the Secretary of State transmitted to the Legislature a statutory initiative relating to taxation to fund an arena. Assembly Journal, 76th Reg. Sess., at 21-24 (Nev. 2011). The initiative proposed establishing an arena taxing district in certain larger counties, and it also proposed other matters relating thereto. Id. The Assembly referred the initiative to the Committee on Taxation. Id. at 24. After referral, the Committee on Taxation did not conduct any further proceedings on the initiative in the regular course of its legislative business, and the committee did not make any reports to the Assembly regarding the initiative. On March 18, 2011, the 40th day of the session, the Legislature adopted Senate Concurrent Resolution No. 4, which expressed the Legislature's rejection of the initiative and its intent "to propose a competing measure for submission to the voters on the November 2012 general election ballot." Senate Daily Journal, 76th Reg. Sess., at 20-21 (Nev. Mar. 17, 2011); Assembly Journal, 76th Reg. Sess., at 260 (Nev. 2011); 2011 Nev. Stat., file no. 10, at 3815-16.

On March 28, 2011, the 50th day of the session, the Senate introduced a competing legislative measure designated as Senate Bill No. 495. Senate Daily Journal, 76th Reg. Sess., at 58 (Nev. Mar. 28, 2011). On May 23, 2011, the 106th day of the session, the Legislature passed S.B. 495 as its competing measure when the Assembly passed the bill

without making any amendments. Assembly Journal, 76th Reg. Sess., at 3749 (Nev. 2011). The Governor approved S.B. 495 on June 1, 2011. See 2011 Nev. Stat., ch. 207, at 921. However, because the initiative was removed from the ballot by the Nevada Supreme Court before the 2012 general election, the bill was not submitted to the voters as a competing measure. Id. at 923.

In light of these prior legislative practices, it is clear that in rejecting statutory initiatives, the Legislature has followed Cushing's maxim that such a rejection "may be manifested in several ways." Cushing's Legislative Assemblies § 2341. In each prior instance, the Legislature did not take the same type of legislative action to manifest its rejection of the statutory initiative. Nevertheless, in each prior instance, the end result was the same. The Legislature ceased all proceedings on the statutory initiative in the regular course of its legislative business by refusing to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative. By doing so, the Legislature rejected the statutory initiative in a manner consistent with the plain, ordinary and common meaning of the term "reject" and with the time-honored customs and practices of legislative bodies.

Despite the plain, ordinary and common meaning of the term "reject," it has been suggested that the framers of the constitutional provision intended the term "reject" to have a different meaning because the framers provided that if the statutory initiative "is *rejected* by the Legislature, or *if no action is taken thereon* within 40 days, the Secretary of State shall submit the question of approval or disapproval of [the initiative] to a vote of the voters at the next succeeding general election." Nev. Const. art. 19, § 2(3) (emphasis added).

When interpreting a constitutional provision, "such construction should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." Youngs v. Hall, 9 Nev. 212, 222 (1874). However, this rule of construction is not offended where the meaning given to a phrase does not "add very much" to the constitutional provision, even when the phrase serves only a very limited purpose as a result. Strickland v. Waymire, 126 Nev. Adv. Op. 25, 235 P.3d 605, 610 (2010). Under such circumstances, the limited purpose of the phrase "may not be very heavy work for the phrase to perform, but a job is a job, and enough to bar the rule against redundancy from disqualifying an otherwise sensible reading." Gutierrez v. Ada, 528 U.S. 250, 258 (2000).

By using the phrase "if no action is taken thereon," the framers likely contemplated a situation in which the Legislature takes no action whatsoever to introduce the initiative after receiving it from the Secretary of State. See Mason's Manual § 725(2) ("A bill is not regarded as having been introduced until it has been delivered to the chief legislative officer, given a number and read."). Under the traditional customs and practices of legislative bodies, "[t]he usual procedure on introduction of a bill is for the bill to be given a number, read the first time by title and referred by the presiding officer to the appropriate committee." Mason's Manual § 733(1). Because the act of introducing and reading a bill

for the first time is a form of legislative action, when the Legislature introduces a statutory initiative and reads it for the first time, the Legislature has taken action thereon.

Consequently, because the only situation in which "no action is taken thereon" is when the Legislature takes no action whatsoever to introduce the initiative after receiving it from the Secretary of State, it follows that the limited purpose of the phrase "if no action is taken thereon" is to ensure that the statutory initiative is submitted to the voters for approval or disapproval even if the Legislature takes no action whatsoever to introduce the initiative after receiving it from the Secretary of State. However, once the Legislature introduces the statutory initiative and reads it for the first time, the Legislature has taken action thereon. If, after that point, the Legislature refuses to hear, accept, consider, acquiesce in or otherwise adopt the statutory initiative, the Legislature has rejected the initiative within the plain, ordinary and common meaning of the term "reject" as used in Article 19, Section 2(3).

Finally, even if there were some uncertainty, ambiguity or doubt regarding the meaning of the term "reject" in Article 19, Section 2(3), that uncertainty, ambiguity or doubt would have to be resolved in favor of the Legislature. When the Nevada Constitution imposes limitations upon the Legislature's power, those limitations "are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question." In re Platz, 60 Nev. 296, 308 (1940) (quoting Baldwin v. State, 3 S.W. 109, 111 (Tex. Ct. App. 1886)). Thus, if the language of a constitutional provision is uncertain, ambiguous or doubtful, "[t]he language must be strictly construed in favor of the power of the legislature to enact the legislation under it." Id.

Additionally, a reasonable construction of a constitutional provision by the legislative branch should be given great weight and deference by the courts, especially when the constitutional provision involves legislative procedure. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). Thus, the Legislature's reasonable construction of a constitutional provision involving legislative procedure should be "treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 400 (1876). Because the Legislature's reasonable construction of a constitutional provision involving legislative procedure is usually given great weight and deference by the courts, the Legislature is entitled to follow an opinion of the Legislative Counsel which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 540 (2001).

Therefore, because an interpretation of Article 19, Section 2(3) involves legislative procedure, the language of the constitutional provision must be strictly construed in favor of the power of the Legislature to propose competing measures under it, and any uncertainty, ambiguity or doubt regarding the meaning of the constitutional provision must be resolved in favor of the Legislature. Moreover, in the three prior instances in which the Legislature has rejected statutory initiatives and thereafter passed competing measures, the Legislature has rejected each statutory initiative in a different manner by using a variety of methods and procedures. This legislative construction of the term "reject" in Article 19, Section 2(3) should be given great weight and deference by the courts, so that if there is any reasonable doubt as to the meaning of the term "reject," the construction given to it by the Legislature should prevail. Lastly, because this issue involves the interpretation of constitutional provision affecting legislative procedure, the Legislature is entitled to follow an opinion of the Legislative Counsel which interprets the constitutional provision, and the judiciary will typically afford the Legislature deference in its counseled selection of that interpretation.