

LEGISLATIVE REFERENCE BUREAU

ROOM 641 MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120-0033

June 26, 1995

The Honorable Italo S. Cappabianca
House of Representatives
30 East Wing
Harrisburg, PA 17120

Dear Representative Cappabianca:

In response to your letter dated March 14, 1995, enclosed is the Bureau's opinion on the questions you raised on the issue of a statewide referendum to deal with legalizing river boat gambling in Pennsylvania.

The enclosed opinion is being issued to you and your staff for your own use.

Please let me know if we can be of further assistance to you in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Carl L. Mease".

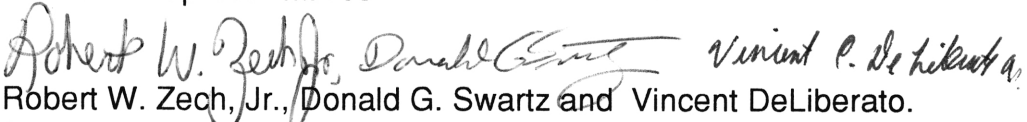
Carl L. Mease
Acting Director

CLM/erd

Enclosure

Subject: Constitutionality of binding and nonbinding referenda in Pennsylvania.

To: The Honorable Italo S. Cappabianca
House of Representatives

From: 
Robert W. Zech, Jr., Donald G. Swartz and Vincent DeLiberato.
Drafting Attorneys

By letter dated March 14, 1995, you requested that the Legislative Reference Bureau research and answer the following three questions:

1.) Can the legislature establish a binding or nonbinding statewide referendum without amending the Commonwealth's constitution?

2.) Is it constitutional for the legislature to pass river boat gambling legislation that gives a statewide referendum "veto" over the implementation of this program?

3.) Would it be necessary to split the referendum and the implementing legislation into two separate questions in order to make this legislation constitutional?

Your request was assigned to the attorneys listed for research and reply. The questions posed raise complex issues of constitutional law which will be discussed in detail to present a clear and understandable response. The discussion is presented in two parts; the first part addressing the issue of nonbinding referenda and the second part addressing the issue of binding referenda.

Nonbinding Referenda

Short Answer

Assuming that the General Assembly satisfies the usual constitutional

requirements for the passage of legislation, there are no constitutional or legal prohibitions on the enactment of nonbinding referenda.

In order to best utilize the nonbinding referenda, enactment of separate legislation which contains only the nonbinding referendum is recommended.

Discussion

Your first question in part asks whether it is constitutionally permissible to enact legislation creating a nonbinding referendum. The phrase "nonbinding referendum," as we interpret that phrase, means a referendum which does not seek electorate approval of or rejection of a particular legislative enactment or policy, but merely seeks to ascertain the opinions, viewpoints or desires of the eligible electorate that may be affected by that referendum. While not having the expediency of other legislative tools, such as public hearings, committee meetings or advisory groups, a nonbinding referendum is an appropriate means to obtain public input and viewpoints on matters which come before the General Assembly. Assuming that the legislation satisfies the usual constitutional requirements for the passage of legislation, there are no other constitutional or legal impediments which would prohibit or restrict the General Assembly from passing legislation which enacts a nonbinding referendum.

The second question is not relevant to this discussion because the very nature of a nonbinding referendum would prohibit any approval or rejection of any legislative enactment or activity.

In order to best serve the purposes of a nonbinding referendum, that is gathering opinions or viewpoints on a particular issue, the referendum question which is to be posed to the electorate should be enacted by the General Assembly in legislation which is separate from and prior to the enactment of any substantive legislation on the issue addressed in the referendum question.

While there are no constitutional or legal prohibitions on the use of nonbinding referenda, there are several practical considerations which must be addressed:

(1.) Pending the conduct of the referendum, it would be advisable not to enact any substantive legislation on the issue addressed in the referendum.

(2.) The results of the election on the referendum question, while nonbinding, should be seriously considered by the General Assembly prior to the enactment of any legislation which may be contrary to the will of the electorate expressed in the referendum.

Binding Referenda

Short Answer

Unless specifically permitted by an amendment to the constitution, the enactment of a statewide referendum which would limit or reverse policy choices made by the General Assembly is unconstitutional.

The answer to your second question is the same, that is, such legislation would be unconstitutional.

If the General Assembly desires to pursue legislation providing for a statewide veto by means of a binding referendum, then the General Assembly is advised to enact a single piece of legislation which is complete in all phases upon leaving the General Assembly and permits the affected electorate to make only two choices, namely the legislation shall apply to the entire state, or, that the legislation shall not apply to the entire state.

Discussion

Extensive research by the authors indicates that the question of a binding statewide referendum has not been directly addressed by any appellate court in Pennsylvania. The issue is one of first impression and our answer is an educated opinion on how an appellate court may rule on this question. Our answers to your questions are based on conclusions reached after examining the following areas:

(1.) Provisions of the Constitution of Pennsylvania which specifically permit the utilization of statewide referenda.

The Constitution of Pennsylvania makes three specific references to matters which are subject to approval through statewide referenda:

(i) Article III, Section 28 provides that "...No law changing the permanent location of the Capital of the State shall be valid until the same shall have been submitted to the qualified electors of the Commonwealth at a general election and ratified and approved by them..."

(ii) Article VIII, Section 7(a)(3) provides that "...No debt shall be incurred by or on behalf of the Commonwealth except by law and in accordance with the provisions of this section....(3) Debt may be incurred without limit for purposes specifically itemized in a law authorizing such debt, if the question whether such debt shall be incurred has been submitted to the electorate and approved by a majority of them voting on the question...."

(iii) Article 11, Section 1 provides for the adoption of regular and emergency amendments to the Constitution of Pennsylvania only on approval of a majority of the qualified electors voting thereon.

There are no other references in the Constitution of Pennsylvania relating to the right of the electorate statewide to specifically approve or disapprove legislative enactments. Therefore it must be assumed that the framers of our Constitution did not intend to extend to the electorate any additional statewide referenda powers.

(2). Constitutionality of binding referenda affecting a local area.

The Supreme Court of Pennsylvania has specifically ruled on the issue of binding referenda which merely affect a locality of the Commonwealth. The precise legal question before the court is a constitutional challenge to the legislative enactment as an unlawful delegation of legislative power violative of Article II, Section 1 of the Constitution of Pennsylvania which provides, ... " The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives...." This challenge usually arises because the legislative enactment permits the local electorate or directs an appointed body or the Chief Executive or an executive agency to determine a particular fact upon which the operation of the law is dependent. The Supreme Court, in a number of cases involving the power of the local electorate to determine an operative fact, has sustained the constitutionality of legislation which contains a binding local referendum from repeated challenges as unlawful delegations of legislative power. Beginning with Locke's Appeal, 72 PA.491 (1873), a case involving the constitutionality of legislation enacted in 1871 which permitted the electors of the Twenty-second Ward in the City of Philadelphia to determine whether or not to grant licenses in said ward which would permit the sale in intoxicating liquor, the Supreme Court reasoned as follows:

(i) the enacted legislation is complete when it leaves the halls of the General Assembly:

(ii) the people of the affected locality do not have any power to alter or amend the law:

(iii) the referendum is merely the legislative tool utilized to determine a particular fact, that is whether or not the residents of the affected locality deem the law expedient at this particular time; and

(iv) having ascertained the factual determination based on the results of the local referendum, the law, not the local electorate, determined the consequences of the factual determination.

The reasoning followed in Locke's Appeal, supra, has been reiterated in McGonnell's License, 209 PA 337 (1904), where the Supreme Court, reversing the Superior Court and reinstating the ruling of the Potter County Court of Common Pleas, found constitutional an 1899 act which repealed, upon the approval of the electorate of Potter County, an 1866 law which prohibited the sale of intoxicating liquor in Potter County and Young v Fetterolf, 320 PA 289 (1936), where the Supreme Court upheld the constitutionality of legislation which permitted the various types of municipalities at that time to determine whether or not to permit professional baseball or football to operate on Sunday. Similar statutory provisions exist today . See the local options provisions of Section 472 of the Act of April 12, 1951 (P.L. 90, No. 21), known as the Liquor Code and Section 14 of the Act of December 19, 1988 (P.L. 1262, No.156), known as the Local Option Small Games of Chance Act.

(3) The inherent powers retained by the people.

The provisions of Article I, Section 2 state that "...All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper...."The argument has been made that the provisions of this section authorize the people to have final say over any legislative action, that is a statewide veto. A more careful reading of this section shows that the

power of the people is limited to the ability to alter, reform or abolish their government. Having surrendered the legislative power to the General Assembly, the people only retain the right to amend the Constitution to effect the desired changes. Legislation enacted in 1967 which provided for a constitutional convention, subject to the approval of the electorate statewide, to propose amendments to the constitution was found to be an appropriate means of proposing amendments to our Constitution even though Article XI does not address this method of amendment. Sander v Kelley 433 PA. 406, 250 A.2d 474, (1969)

(4) Prior Bureau opinions on subject matter.

While the opinions of the Legislative Reference Bureau remain confidential, a review of previous opinions on this subject matter support the proposition that legislation which would propose a binding statewide referendum other than specifically permitted by our Constitution would be unconstitutional.