



RECONVENED SESSION TO TERMINATE A STATE OF DISASTER OR EMERGENCY

INTRODUCTION

This memorandum addresses questions regarding considerations for a reconvened legislative session to terminate a state of disaster or emergency declared by a governor.

What is required to convene a special session? What is necessary to require action from one or both chambers to address the question of holding a special session should leadership of one or both resist?

Section 7 of Article IV of the Constitution of North Dakota imposes a cap of 80 natural days on the regular session of the Legislative Assembly during the biennium. A special session of the Legislative Assembly may be called only by the governor pursuant to Section 7 of Article V of the Constitution of North Dakota. Days spent in a special session convened at the call of the governor do not count toward the 80 natural day limit.

Although the Legislative Assembly may not call itself into special session, the Legislative Management may reconvene the Legislative Assembly following the close of business of the regular session. North Dakota Century Code Section 54-03-02 permits the Legislative Assembly to reconvene "as determined by the legislative management" for the number of remaining natural days that have not been used by that Legislative Assembly in regular session.

There is no provision in the constitution, Century Code, or legislative rules requiring the Legislative Management to reconvene the Legislative Assembly.

What is the shortest duration in which a concurrent resolution to end the state of emergency may be passed? Can it be done in one day?

Under Section 37-17.1-05, the Legislative Assembly may terminate a state of disaster or emergency declared by the governor by passing a concurrent resolution at any time. In past sessions, the Legislative Assembly has used a "zip" process whereby one house suspends its rules, reads a resolution or its title twice in a single floor session, passes the resolution, and messages it immediately to the other house where the same process is followed. The "zip" process could be accomplished in one day.

There are some legal issues to be considered before using the "zip" process. Section 13 of Article IV of the Constitution of North Dakota states each "bill" must be read on two separate natural days. Although there may be some question regarding whether the 2-day requirement applies to resolutions, Article IV makes a distinction between bills and resolutions and does not extend the 2-day requirement to resolutions. Legislative rules support the conclusion the constitutional 2-day rule does not apply to resolutions, although the rules impose a distinct 2-day requirement on some resolutions. Senate Rule 325 and House Rule 325 require the respective houses to read "every resolution proposing a change in the Constitution of North Dakota, or ratifying an amendment to the Constitution of the United States" to be read 2 separate times on 2 separate days but do not address other types of resolutions. Senate Rule 326 and House Rule 326 require other resolutions to be read once and referred to a committee unless otherwise ordered by a vote of the respective house. All these legislative rules indicate a resolution to terminate a declared state of emergency or disaster does not need to be read twice on 2 separate days.

The legislative rules requiring resolutions to be referred to committees also must be considered before the "zip" process can be used. Senate Rule 328 and House Rule 328 require each concurrent resolution to be referred to a committee upon the first reading of the resolution. Senate Rule 327 and House Rule 327 authorize the respective chambers to forego the referral to committee for certain resolutions during sessions called by the governor but not for reconvened sessions initiated by the Legislative Management. The houses would have to suspend Senate Rules 326 and 328 and House Rules 326 and 328 requiring referrals of a concurrent resolution

to committees if the "zip" process is to be used. Senate Rule 318 and House Rule 318 each require a vote of the majority of the members present to suspend rules.

What are the financial implications of ending the state of emergency in November or December, especially in regard to federal funding, such as Coronavirus Aid, Relief, and Economic Security (CARES) Act funding?

The Legislative Council is not aware of any federal funding that would end if the declaration of the Coronavirus (COVID-19) emergency is discontinued. A few federal funding programs will end when the federal emergency is terminated, but the funding programs are not tied to a state-declared emergency.

What are the practical logistics that must be addressed, especially in light of COVID-19 precautions and current structural modifications in the Capitol? Does having the special session during the Legislative Management meeting in November mitigate some concerns? Does having the special session during the organizational session in December mitigate some concerns or create others?

The Legislative Procedure and Arrangements Committee discussed potential changes to legislative operations for the 2021 legislative session due to the COVID-19 pandemic. The committee adopted a motion to recommend a set of legislative rule amendments permitting remote participation by legislators and the public in the session. To address COVID-19 precautions, both houses may wish to adopt the amendments for a reconvened session. Legislative leadership may wish to develop a system for voting or debate which would limit the number of individuals in the chamber at one time.

A reconvened session would require the hiring of temporary legislative employees. Even if legislative rules requiring committee hearings for resolutions were to be suspended for the reconvened session, legislative employees would need to be hired to staff the floor sessions, and printing services would need to be arranged.

The composition of the Legislative Assembly will change between the Legislative Management meeting and the organizational session. Under Section 7 of Article IV of the Constitution of North Dakota, legislators' terms of office "begin on the first day of December following their election." The newly elected legislators will be in office during the organizational session.

What must be included in a resolution to prevent the governor from reinstating a state of emergency for the same reason or emergency?

Century Code does not contain any provision prohibiting the governor from declaring a state of emergency or disaster immediately after the Legislative Assembly terminates a previous declaration for the same or similar set of circumstances. Under Section 37-17.1-05, the governor is required to declare a disaster or emergency "if the governor determines a disaster has occurred or a state of emergency exists." The governor could argue a state of emergency still exists after the Legislative Assembly terminates a previous declaration thereby requiring him to issue a new declaration.

To prohibit the governor from issuing a new declaration immediately after the Legislative Assembly acts, Century Code would have to be amended. Pursuant to Section 13 of Article IV of the Constitution of North Dakota, a bill would be required for the amendment. Unlike some resolutions, a bill would have to be read two times on two separate days under Section 13 of Article IV, and referred to a committee by each house under Senate Rule 328 and House Rule 328. To suspend Senate Rule 328 and House Rule 328 and allow a vote on the bill without referrals to committees, each house would have to suspend the rules by unanimous consent, pursuant to Senate Rules 318 and 324 and House Rules 318 and 324.

There are multiple ways a bill could accomplish the objective of prohibiting the governor from reinstating a disaster or emergency after the Legislative Assembly terminates it. One option is to amend Section 37-17.1-05(3) to read "The governor may not declare a disaster or emergency for an event or circumstances giving rise to a declaration of disaster or emergency terminated by the Legislative Assembly." Several other states have statutes providing time limits, such as 30 days, on declarations of emergency or disaster unless extensions are approved by their legislatures. Some of these statutes also require the governor to call the legislature into session to consider the extensions. A bill limiting the governor's authority to declare a state of emergency or disaster in North Dakota would be subject to a veto by the governor, and a veto override would require a vote of two-thirds of the members elected to each house.

Some state legislatures have tried to terminate their governors' declarations of emergency related to COVID-19. Resolutions to that effect failed in California, Minnesota, and Missouri. A concurrent resolution terminating the emergency in Pennsylvania was vetoed. Similar measures are pending in Kentucky and Louisiana. The Michigan Supreme Court recently ruled the statutory emergency powers of the governor are an unconstitutional delegation of legislative authority and a violation of separation of powers.

Does such a resolution require a simple majority, is it effective immediately, and is it subject to veto by the governor?

Under Section 37-17.1-05(3), the "Legislative Assembly by concurrent resolution may terminate a state of disaster or emergency at any time." The vote requirements for legislative actions are found in the legislative rules, specifically Senate Rule 318 and House Rule 318. Neither rule specifically addresses the vote requirement for resolutions other than resolutions proposing amendments to the Constitution of North Dakota or ratifying amendments to the Constitution of the United States. As a result, under Senate Rule 318(m) and House Rule 318(m), the resolution would have to be passed by a majority vote of the members present.

Under Section 13 of Article IV of the Constitution of North Dakota, laws enacted during a special session take effect on the date specified in the Act. However, the reconvened session would not be considered a special session under the constitution. Additionally, the resolution likely does not constitute a "law" under Article IV. Resolutions generally do not include effective dates. However, to ensure the termination of the governor's declaration would take effect immediately after passage of the resolution by both houses or upon filing of the resolution with the Secretary of State, the resolution could include specific language to that effect.

The governor does not have authority to veto resolutions. Under Section 9 of Article V of the Constitution of North Dakota, the governor's veto authority is limited to bills. Resolutions are not sent to the governor's desk for signature but are sent directly to the Secretary of State for filing.

CONCURRENT RESOLUTION NO.

Introduced by

Representative Becker

1 A concurrent resolution terminating the state of emergency in North Dakota declared by
2 Governor Doug Burgum on March 13, 2020, in response to the public health crisis resulting
3 from the SARS-CoV-2 pandemic, commonly known as COVID-19.

4 **WHEREAS**, North Dakota Century Code Section 37-17.1-05 authorizes the governor to
5 declare a state of disaster or emergency if the governor determines a disaster has occurred or a
6 state of emergency exists; and

7 **WHEREAS**, under Section 37-17.1-05, a state of disaster or emergency may be terminated
8 at any time by a concurrent resolution of the Legislative Assembly; and

9 **WHEREAS**, on March 13, 2020, Governor Burgum issued Executive Order 2020-03,
10 declaring a state of emergency in North Dakota in response to the public health crisis resulting
11 from COVID-19;

12 **NOW, THEREFORE, BE IT RESOLVED BY THE** **OF NORTH**
13 **DAKOTA, THE** **CONCURRING THEREIN:**

14 That the state of emergency in North Dakota declared by Governor Burgum on March 13,
15 2020, in response to the public health crisis resulting from COVID-19 is terminated, effective
16 upon the filing of this resolution with the Secretary of State; and

17 **BE IT FURTHER RESOLVED**, that the Secretary of State forward a copy of this resolution
18 to the governor of North Dakota.