

**LETTER OPINION
2007-L-04**

February 8, 2007

Mr. Thomas L. Fischer
Chairman
Southeast Cass Water Resource District
1201 Main Avenue West
West Fargo, ND 58078-1301

Dear Mr. Fischer:

Thank you for your letter asking me to interpret the public hearing requirements imposed by Section 23 of H.B. 1023, 2001 N.D. Leg. It is my opinion that Section 23 imposes a public hearing requirement on Fargo, Southeast Cass Water Resource District, and the State Water Commission. It is my further opinion that the hearing held in conjunction with various permits that may be needed for a flood control project would not satisfy the public hearing requirement of Section 23.

ANALYSIS

Section 23 was part of the State Water Commission's appropriation bill passed by the Legislature in 2001. It states, in part:

SECTION 23. FARGO FLOOD CONTROL – REQUIREMENTS.

Except for planning, the state water commission may not issue bonds or provide funding for Fargo flood control projects until applicable permits are issued, southeast Cass water resource district has approved the project, and a public hearing process is held on the approved project plan. . . .¹

Thus, three conditions must be met before the Water Commission can fund Fargo flood control projects: all project permits must be in place, the Southeast Cass Water Resource District must approve the project, and the project must be the subject of a "public hearing process." Finding uncertainty in some of these conditions, you ask for my opinion.

The objective in reviewing legislative directives is to ascertain legislative intent.² If possible, that is to be done by examining the language used by the Legislature.³ If that is not possible, extrinsic materials may be consulted.⁴

¹ 2001 N.D. Sess. Laws ch. 22, § 23.

² Zueger v. North Dakota Workers Comp. Bureau, 584 N.W.2d 530, 533 (N.D. 1998).

You ask about two of Section 23's three requirements. The Legislature requires, before the Water Commission may extend funding, that a "public hearing process" take place, but the Legislature did not expressly identify the entity responsible for this process. You ask who is responsible, suggesting as candidates the city of Fargo, the State Water Commission, and the Southeast Cass Water Resource District. The legislative history provides little to resolve the question.

The flood control projects referred to by Section 23 are proposed for the area south of Fargo.⁵ But the project is not without opposition.⁶ The Senate Appropriations Committee heard from a number of project opponents.⁷ It is likely that Section 23's public hearing requirement was imposed to provide opponents an opportunity to further express their concerns and to ensure that decision-makers consider those concerns so that a fully informed decision is made.⁸ In construing an ambiguous or unclear legislative enactment, the object sought to be attained and the circumstances under which the law was enacted may also be considered.⁹

While it may be unclear as to which public entity is to actually conduct the hearing or hearing process, what is important is that a hearing be held, that notice of the hearing be provided in a manner that interested persons have an opportunity to learn about the hearing and have time to prepare for it, that the hearing is held at a facility convenient for interested persons and adequate for the hearing's purposes, that the hearing be conducted fairly, and that all three entities consider remarks made at the hearing in carrying out their duties. Each of the three entities could hold independent hearings, but

³ Id.

⁴ Id.

⁵ Hearing on H.B. 1023 Before the Senate Comm. on Appropriations, 2001 N.D. Leg. (Mar. 14) (Statement of Interim State Engineer Dale Frink).

⁶ Id. ("I realize there are considerable local concerns about the project.").

⁷ Id. (e.g., Letter from Jeannette Stanton; Letter from city of Horace; Letter from city of Briarwood; Testimony of Terry Compson, Co-Chairman, Citizens for Responsible Flood Control). See also Hearing on S.B. 2022 Before the House Comm. on Appropriations, 2003 N.D. Leg. (Mar. 6) (Letter from Citizens for Responsible Flood Control) (complaining about a "lack of information from Fargo as it races ahead with a south-side dike project").

⁸ Section 23's public hearing and other requirements were added after the Senate Appropriations Committee's March 14, 2001, hearing and thus after it had heard opposition to the flood control project. See Minutes on H.B. 1023 Before the Senate Comm. on Appropriations, 2001 N.D. Leg. (Apr. 3).

⁹ See N.D.C.C. § 1-02-39(1) and (2); State v. Burr, 598 N.W.2d 147, 153 (N.D. 1999).

a joint or cooperative hearing would satisfy Section 23 and would probably be the most efficient and convenient way for all persons to be heard.

Thus, in answer to your specific question whether “the City of Fargo’s process [will] be sufficient for purposes of meeting the hearing requirements of Section 23,” the answer is that it certainly could be. But Fargo should not dictate the process. It should cooperate with the Water Commission and the water resource district so that the latter two entities are satisfied the public hearing will be properly conducted. If Fargo, the Water Commission, and the water resource district are unable to cooperate in conducting, or choose not to conduct, a single, joint hearing, each must either conduct its own independent hearing or conduct a hearing in conjunction with whichever of the other two entities wishes to participate in order to ensure compliance with Section 23. While finding that Section 23 imposes a duty on all three entities may seem excessive, where there is uncertainty, it is better to do what may be too much than what a court may find was too little. Where there is a choice among uncertainties, we must choose the least uncertain.¹⁰ And since each of the three entities has a decision-making role in the flood control project, there is reason to impose the public hearing requirement on all three rather than on one or two of them.

You state that the project may require permits, some of which may be within the Water Commission’s jurisdiction. Such permits, before being issued, may require public hearing. You ask if such hearings would satisfy Section 23’s public hearing requirement. It is my opinion that any permit hearings the Water Commission might hold for the project cannot double as the hearing required by Section 23.

Permit hearings are adjudicative proceedings. They differ greatly from a “public hearing” at which the general public is invited to express its views on an issue. Adjudicative proceedings are formal, governed by rules of evidence and rules of procedure. Rules of “standing” may limit participation. Adjudicative proceedings create rights of appeal and potential judicial oversight. The public hearing contemplated by Section 23 was intended to be far more flexible and informal. Combining these distinct kinds of hearings would create a hybrid process at which the procedures, rights, and consequences would be uncertain. A combined hearing may not satisfy either the purposes of Section 23 or the requirements of a permit hearing. The two hearing processes are best kept distinct.

Section 23 also requires that the Southeast Cass Water Resource District approve the project. You ask about the timing of this approval. You state that Fargo is considering four flood control proposals. You ask whether the water resource district could approve the project now or whether it must wait for Fargo to select its final project plan and then

¹⁰ Burnet v. Guggenheim, 288 U.S. 280, 288 (1933).

consider whether or not to approve it. You state that if the water resource district were to approve the project now, doing so would approve the “project concept.”

The requirement that the water resource district approve “the project” is ambiguous. The legislative history provides nothing to resolve the ambiguity. The Legislature likely wanted fully informed decision-making, which is most likely to occur at the end of a process rather than at the beginning or some intermediate stage. Once Fargo chooses a plan to control flooding, the water resource district can concentrate on evaluating a specific plan. If its decision is delayed until this point, it is more likely to be well-informed and thorough. It is my opinion that the Legislature intended that the water resource district evaluate a concrete plan, not a concept. No decision can be made until after the public hearing requirement of Section 23 has been satisfied.

Sincerely,

Wayne Stenehjem
Attorney General

cmc/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹¹

¹¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).