

**LETTER OPINION
2005-L-43**

December 8, 2005

Mr. J. Thomas Traynor, Jr.
Devils Lake City Attorney
PO Box 838
Devils Lake, ND 58301-0838

Dear Mr. Traynor:

Thank you for your letter requesting my opinion on whether, in acquiring a new water supply, the city of Devils Lake must obtain the approval of the voters as provided by N.D.C.C. § 40-33-16. For the reasons explained below, it is my opinion that under the scenario described in your letter, the city would not be required to obtain the approval of the voters under N.D.C.C. § 40-33-16.

ANALYSIS

You described the following scenario:

The City of Devils Lake owns the well site from which the water is pumped. The City of Devils Lake will have all permits necessary to allow the City to pump the water. The pipe line from the well site to the treatment plant will be owned by the City, and the City will hold any easements necessary for this water line. The water line from the treatment plant to the City of Devils Lake will be owned by the City, and again, any necessary easements will be in the name of the City of Devils Lake. The City of Devils Lake and Ramsey County Rural Utilities plan to enter into a cooperative arrangement in which they jointly treat the water which does come to the treatment plant. Ramsey County Rural Utilities will have its water coming into the treatment plant on lines separate from those owned by the City of Devils Lake, and the Ramsey County Rural Utilities water will be pumped from well sites different than those well sites owned by the City of Devils Lake.

The City of Devils Lake will not be purchasing the water from another entity. The City will either enter into a cooperative arrangement with Ramsey County Rural Utilities to share the cost of the treatment of the water, or

contract with Ramsey County Rural Utilities to have Ramsey County Rural Utilities . . . treat the water. The amount of water which will come to the City will be the same amount which is pumped from the City-owned well site, transmitted from the well site to the treatment plant on the City-owned lines, and transmitted from the treatment plant to the City on the City-owned lines.

You ask whether, under the above scenario, it is necessary for the City to obtain the approval of the voters under N.D.C.C. § 40-33-16. This law provides:

Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for such purposes from any person, firm, public or private corporation, or limited liability company able and willing to furnish the same, upon such terms and during such period, not exceeding forty years, as the city governing body shall deem appropriate. Any such contract shall be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. . . .¹

This law requires a vote only when a city is entering into a contract to purchase water. As you described, the City would own the water and would not be entering into a contract to purchase water, therefore, it is my opinion that in the scenario described above, it would not be necessary for the City to obtain the approval of the voters under N.D.C.C. § 40-33-16.²

It is possible, however, that the City may need to obtain the approval of the voters under N.D.C.C. § 40-33-02, which generally requires voter approval for the improvement or extension of a city's waterworks system.³ Section 40-33-02, N.D.C.C., also indicates that voter approval is not required under certain financing arrangements. Thus, voter approval may be required under N.D.C.C. § 40-33-02, depending on the manner of financing used by the City.

¹ N.D.C.C. § 40-33-16 (emphasis added).

² If the City decides to purchase water from another entity, N.D.C.C. § 40-33-16 would require voter approval; however, as discussed in the last paragraph of this opinion, the voter approval requirement could be superseded by adopting an ordinance, pursuant to home rule authority, specifically rejecting the voter approval requirement in N.D.C.C. § 40-33-16 and outlining the terms under which the water will be purchased. See N.D.C.C. §§ 40-05.1-05 and 40-05.1-06(2), (10), (15). Cf. N.D.A.G. 2003-L-25 and N.D.A.G. 2004-L-57.

³ See N.D.A.G. Letter to Berg (Mar. 9, 1988).

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However, if it is determined that N.D.C.C. § 40-33-02 would require voter approval, Devils Lake, as a home rule city with all of the powers listed in N.D.C.C. § 40-05.1-06 included in its home rule charter, could supersede the voter approval requirement by adopting an ordinance specifically rejecting the voter approval requirement in N.D.C.C. § 40-33-02 and outlining the means of financing the project.⁴

Sincerely,

Wayne Stenehjem
Attorney General

las/vkk

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.⁵

⁴ See N.D.C.C. § 40-05.1-05. Cf. N.D.A.G. 2003-L-25 and N.D.A.G. 2004-L-57.

⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).