



Finance Office

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November 29, 2022

Board of County Commissioners
Cass County Government
211 9th Street South
Fargo ND 58103

Re: Official County Newspaper Appointment

Dear Commissioners:

As per North Dakota Century Code, each County is required to have an official newspaper, which is voted on in four-year cycles. In the 2018 election cycle, the Fargo Forum was elected with ~73% of the vote, a margin commensurate with the previous four election cycles (2002, 2006, 2010 and 2014).

For 2022 neither the Fargo Forum nor the Cass County Recorder filed for candidacy; the Recorder believes it did submit a filing, but to date has not provided evidence of this, nor has any receipt of the filing been discovered in the Finance Office. The Finance Office did not identify the absence of an Official County Newspaper contest until just prior to the General Election, by which stage the ballots had been printed and received.

The Finance Office consulted with the State's Attorney and the State's Attorney, in return, has provided an opinion on how best to proceed (enclosed). In Summary, based on State Law and historical results, it is recommended that the Fargo Forum be appointed as the Cass County Official Newspaper through to the 2026 Election cycle.

Sincerely,

A handwritten signature in black ink that reads "B Madriga".

Brandy Madriga
Cass County Finance Director

Encl:
States Attorney Memorandum of November 28, 2022

SUGGESTED MOTION:

Move to appoint the Fargo Forum as the Official Newspaper of Cass County until the next four-year election cycle in 2026.



MEMORANDUM

TO: Brandy Madrigga
Cass County Finance Director

FROM: Birch P. Burdick
Cass County State's Attorney

DATE: November 28, 2022

RE: Official newspaper and election 2022

State's Attorney

Birch P. Burdick

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This documents our recent discussions about the Cass County "official newspaper".

Background information

Following is background information on the current situation.

1. A county needs an "official" newspaper for the purpose of publishing its proceedings and statutorily-required notices. NDCC §46-06-09.
2. Starting in 1978 and every four years thereafter voters shall select an official county newspaper. NDCC 46-06-01. That should have happened in the 2022 election cycle in order to select an official newspaper for the 2023-2026 period.
3. In order to initiate that process, a newspaper(s) must apply to be placed on the primary ballot. NDCC §46-06-03. The responsibility rests with the newspaper(s). In recent history, the Forum and Cass County Recorder have been on the ballot in 2002, 2006, 2010, 2014, and 2018, with the Forum selected by the voters in each election. However, in 2022 the Finance Department has no record of any newspaper applying to be on the ballot.
 - a. In my recent discussion with the attorney for the ND Newspaper Association, who I understand reached out to the Forum (as the current official newspaper), the Forum's lack of application was an administrative oversight.
 - b. In my communication with the publisher of the Cass County Reporter, they believe they timely submitted an application, but have been unable to provide documentation of such.
 - c. As a result, no newspaper was on the primary ballot, and so no newspaper was on the general election ballot. (I understand the Cass County Reporter discovered it was not on the primary ballot, but did not then reach out to Cass County government to enquire as to why. I am not sure that any remedy would have been available at that time, but

Cass County did not recognize the absence of the official newspaper from the ballot until just before the general election.)

Legal perspectives

Given the above, the question arises as to what should be done for an official newspaper for Cass County for the period 2023-2026. Following are some legal perspectives.

1. **Elected “until a successor is chosen”**: According to NDCC §46-06-06, a newspaper which wins the election becomes the official newspaper on the first Monday of January after the election, and acts as such for four years **“and until a successor is chosen and takes office”**. In 2018, the Forum won the election as official newspaper. Because no newspaper was on the ballot in 2022, it is my opinion the Forum should remain as official newspaper until the next four-year election cycle arrives in 2026. There is no case law nor attorney general opinions interpreting this provision as applied to our facts. However, there is a court case from 1919 that refers to the language “until a successor is chosen”. This provision alone seems a sufficient answer to the situation.
2. **Commission may fill a vacancy**: According to NDCC §46-06-08, if a newspaper ceases publication or no longer possesses the statutory qualifications for an official newspaper, a vacancy is deemed to exist and the county commission must designate another qualified newspaper to act as the official newspaper. The underlying statutory predicates do not apply to our situation. However, it is possible the Cass County Commission may wish to discuss the applicability as a method to address the current situation in Cass County. During the 2002, 2006, 2010, 2014, and 2018 elections, the voters selected the Forum over the Cass County Reporter by 72-75% of the vote. If commissioners wished to weigh in on this issue, and were they to decide the prior election results were important in appointing the Forum for the next four years, that might serve as a belt-and-suspenders approach (along with (1) above) to this issue. However, were commissioners to appoint a qualifying newspaper other than the Forum, then the appointment process may not stand legal scrutiny in light of (1) above.

Options for next step(s)

It may be sensible to bring this “official newspaper” situation to the Commission’s attention. However, this is election-related and therefore I believe it is your call. I provide this memorandum as my opinion of where the law leads us, and as background information for your consideration

of if/how to address this with the Commission.

One approach may simply be to inform the Commission of the situation and advise that NDCC §46-06-06 leads to the Forum being the official newspaper for the new 4 years, without the Commission needing to take any action (Item (1) above). Commissioners could also choose to move/vote on Item (2) above, recognizing the statute may not specifically apply to our circumstances but as a statement of their thoughts on the topic (as a belt-and-suspenders approach).

I told the publisher of the Cass County Reporter that we (you) would advise her if/when this would appear on the Commission agenda. If you choose to put this on the Commission agenda, then please contact the publisher as follows: kelsey@mobridgetribune.com.

If you have any questions, please let me know.

Encl: NDCC Chapter 46-06

Cc: Murray Nash, Election Administrator
Kate Naumann, ASA

**CHAPTER 46-06
OFFICIAL NEWSPAPER**

★ 46-06-01. Selection of official newspaper.

At the general election starting with the year 1978 and every four years thereafter, in accordance with section 46-06-06, the qualified electors in each county shall select one newspaper in the county, or if there is no newspaper published in the county, then a newspaper published in an adjoining county with general circulation in the first county, to be the official newspaper within such county.

46-06-02. Qualifications required of an official newspaper.

A newspaper is qualified to serve as an official newspaper if it meets all the requirements of a legal newspaper set forth in section 46-05-01 and maintains its principal editorial office within the county in which it is a candidate for official newspaper. In a county in which no newspaper maintains its principal editorial office, a newspaper published in an adjoining county with general circulation in the first county is qualified to serve as that county's official newspaper.

★ 46-06-03. Application to place name on ballot at primary election.

The county auditor shall place the name of a newspaper upon the primary election ballot if the newspaper is qualified to serve as the official newspaper within the county and if, before four p.m. of the sixty-fourth day prior to the primary election, an application asking that the name of the newspaper be placed upon the ballot to be voted upon for nomination as official newspaper of the county and an affidavit indicating the newspaper meets all of the requirements of an official newspaper pursuant to sections 46-05-01 and 46-06-02 are filed with the county auditor by a person, partnership, corporation, or limited liability company owning or operating the newspaper. The county auditor shall endorse upon the application the name of the newspaper and the date upon which the application is filed.

46-06-04. Where name of newspaper placed on ballot.

The county auditor shall place the names of all newspapers to be voted upon for nomination as official newspaper of the county at the bottom of the ballot upon which appear the names of the candidates for county offices. The names of the newspapers must be rotated as is required for the names of candidates on the primary election ballot.

46-06-05. Names of two papers receiving highest number of votes to be placed on general election ballot.

The county auditor shall place the names of the two newspapers receiving the highest number of votes at the primary election on the general election ballot upon which appear the names of candidates for county offices. The names must appear in the same place and in the same manner as on the primary election ballot.

★ 46-06-06. Newspaper receiving highest number of votes elected - Canvass.

The newspaper receiving the highest number of votes at the general election must be declared elected. The county auditor, upon the canvass and return of the vote by the county canvassing board, shall issue a certificate of election to such newspaper, and it shall become the official newspaper beginning on the first Monday in January following the election, and shall act as the official newspaper for a period of four years and until a successor is chosen and takes office. The canvass of the votes for the official newspaper must be made by the county canvassing board at the time other election returns are canvassed.

46-06-07. Bond of official newspaper.

Repealed by S.L. 1987, ch. 551, § 1.

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46-06-08. Vacancy - How filled.

If a newspaper elected as the official newspaper suspends publication or ceases to possess the qualifications prescribed in section 46-06-02, a vacancy must be deemed to exist. The board of county commissioners at once shall designate another newspaper having the required qualifications to act as the official newspaper of the county until a successor is elected and takes office.

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46-06-09. Publications required to be made in official newspaper.

There must be published in the official newspaper:

1. All official proceedings of the board of county commissioners of the county in which it is elected.
2. All notices and publications which are required by law to be published by any county officer.
3. All publications of every nature which are required to be published within the county in which the newspaper is elected by any elective or appointive state officer.

46-06-10. When publication null and void.

A legal publication of any kind or character described in section 46-06-09 which is not published in the duly elected official newspaper is null and void.