

**LETTER OPINION**  
**96-L-55**

April 4, 1996

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

Dear Mr. Traynor:

Thank you for your letter asking two questions regarding public library services.

You first ask whether a county governing body is required to establish a public library and reading room if a majority of the qualified electors of the county in the last general election voted in favor of establishing a public library service pursuant to North Dakota Century Code (N.D.C.C.) § 40-38-01. Your letter indicates that a county public library service has been approved by a majority of the voters in Ramsey County.

Prior to its amendment in 1971, N.D.C.C. § 40-38-01 provided that a county governing body, "upon petition of not less than fifty-one percent of the voters of such . . . county . . . shall have power to establish and maintain public library service within its geographical limits by means of a public library and reading room or other public library service . . ." (Emphasis added). This office concluded that the underlined language gave the county governing body discretion to grant or refuse the petition. Letter from Attorney General Leslie Burgum to Bert Wilson (February 7, 1962).

As amended in 1971, N.D.C.C. § 40-38-01 currently provides that a county governing body "shall establish" a public library service. See 1971 N.D. Sess. Laws ch. 410, §1. The 1971 amendments also authorize the submission of this issue to the electors of the county as an alternative to a petition. Id. The deletion of the words "have power to" is significant. By itself, possessing the power to establish a public library service does not require that the power be exercised. See Letter to Wilson, supra. However, the word "shall" in a statute generally indicates a duty that is mandatory. Solen Pub. School Dist. No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986). "Shall" indicates a directory duty only "where it is necessary to effect the legislative intent." Id. Here, the clear legislative

Mr. J. Thomas Traynor, Jr.  
April 4, 1996  
Page 2

intent underlying the 1971 amendment to N.D.C.C. § 40-38-01 is consistent with the general rule that the word "shall" indicates a mandatory duty.

In conclusion, it is my opinion that a county governing body must establish a public library service if a majority of the qualified electors of the county in the last general election voted in favor of establishing a public library service.

You next ask whether a county governing body is required to establish a library fund under N.D.C.C. § 40-38-02 once a public library service is required under N.D.C.C. § 40-38-01.

N.D.C.C. § 40-38-02(1) provides that a county governing body "shall establish a library fund" which "shall consist" of a tax annually levied and collected in the same manner as other taxes are collected. Again, the use of the word "shall" in this section indicates a mandatory duty to both establish a library fund and levy a tax. Letter from Attorney General Nicholas Spaeth to James Yockim (November 27, 1989). Therefore, "once a public library service is established pursuant to N.D.C.C. ch. 40-38, the city or county governing body must levy the taxes authorized to be collected in establishing the library fund supporting that public library service." Id. (copy attached). See also Letter from Attorney General Helgi Johanneson to Mrs. Robert Geston (September 30, 1965).

Although N.D.C.C. § 40-38-02 requires that a tax be levied, that section does not establish a minimum tax levy. Letter to Geston, supra. "[T]he amount to be levied by the county would therefore appear to rest within the discretion of the county commissioners within the limits prescribed by statute," id., as long as the amount of tax levied is reasonable to maintain a sufficient balance in the library fund for supporting the public library service. Likewise, because this section does not specify a time period within which the tax must be levied, a county governing body should establish the library fund and levy the tax within a reasonable time after a public library service is required to be established by petition or election under N.D.C.C. § 40-38-01.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

jcf/vkk

Mr. J. Thomas Traynor, Jr.  
April 4, 1996  
Page 3

Enclosure