

OPINION
70-89

September 16, 1970(OPINION)

Mr. Eugene Kruger
States Attorney
Cass County

RE: Counties - Cemetery Maintenance - Obligatory

This is in reply to your letter of September 8, 1970, with regard to the sale of the county farm.

You inform us that adjacent to the property offered for sale is the county hospital. Three cemeteries are located upon the property offered for sale, which were established by the county for the burial of deceased patients from the hospital. One of these cemeteries continues to be used for this purpose. Your letter further indicates that in the bid specifications the commission required that bidders assume perpetual care of the three cemeteries.

Your question is stated as:

Whether the county can delegate or contract away in perpetuity its responsibility for cemetery maintenance and upkeep."

Your letter does not enclose any documentation showing the precise terms of the bid specification, or documentation showing formal dedication or registration of the cemeteries in question. While your letter does not go into detail on this point, we assume that the county hospital and farm to which you make reference, is a part of a county asylum for the poor established pursuant to chapter 50-04 of the North Dakota Century Code.

We note that section 50-04-14 of the North Dakota Century Code indicates that a county hospital may have paying patients, as well as absolute pauper patients. We would tentatively assume that all individuals buried in the cemeteries concerned are not necessarily inmates of the county farm prior to hospitalization.

We find no specific statutory provisions with regard to this particular type of cemetery in these circumstances. Also, we note n citations under the heading "Cemeteries" in Dakota Digest, on which basis we assume that there are no decisions of the Supreme Court of this state on this subject. It would appear, however, that there is extensive judicial precedent on the subject of cemeteries in other states.

In the circumstances you set forth we would assume that there has actually been a dedication of the premises occupied as cemeteries for this purpose, see 14 Am. Jur.2d. 717-719, Cemeteries Sections 14 and 15.

As the owner of the cemeteries, it seems doubtful that the county could do anything which interferes with the use of the land to the extent dedicated to these purposes. See 14 Am. Jur.2d. 719-721. It would appear that the county would not be in a position to disable itself from executing the trust of maintaining the burial place. See 14 Am. Jur.2d. 722-723 Cemeteries Section 18. While the statute is worded permissively, rather than mandatorily, in view of the provisions of section 23-06-30 of the North Dakota Century Code, we would assume that in the event of actual abandonment of the cemeteries, regardless of the origin of such cemeteries, the county or county park board would be the entity empowered to provide for their general upkeep and would be expected to do so. We do assume that the current project does not contemplate disinterment and removal of the bodies from these premises pursuant to the provisions of chapter 23-21 of the North Dakota Century Code.

Assuming as we do that these cemeteries were operated by the county as actually a part of its welfare program we doubt that there are funds derived from the sale of lots therein required to be utilized in upkeep

or maintenance. It seems probably that there has not been the degree of maintenance of these cemeteries that may exist in the case of nonwelfare cemeteries. Also, it seems doubtful that friends and relatives of the deceased would take the same interest in individual burial plots as may be the case with other cemeteries. On such basis, it seems doubtful that the county would necessarily be obligated to maintain these cemeteries on the same level as other cemeteries are maintained.

While your letter mentions bid specifications requiring that buyers assume "perpetual care" of the cemeteries we would assume that it is not intended to maintain these cemeteries as "perpetual care cemeteries" within the meaning of chapter 23-21.1 of the North Dakota Century Code. We are not suggesting that it would not be possible to make this requirement in the specification for bids, and if such were done, we would assume that the cemetery would be maintained sufficiently by the purchasers, and funds available from such establishment on a level that would prevent the county from being called upon in future to assume any further responsibility for maintenance of same. In the absence of such specification and assuming the bid specifications merely called for the purchaser to maintain such cemeteries on a level equivalent to that previously maintained by the county, perpetually, in the event of compliance by the purchaser with such requirement the county probably would not be called upon for further maintenance. In the absence of such compliance, we would assume that the county would not be held to have succeeded in dispensing with its initial responsibilities by conveying such premises to such purchaser. In the event of complete abandonment of the cemetery we would assume that the county might be expected under the provisions of section 23-06-30 to assume maintenance of the cemeteries.

In direct response to your question, it is our opinion that the county cannot delegate or contract away in perpetuity its responsibility for maintenance and upkeep of these cemeteries, though it would not be called upon to do so, in the event a purchaser did adequately maintain and keep up these premises.

HELGI JOHANNESON
Attorney General