

OPINION
56-81

March 12, 1956 (OPINION)

MEMORIALS

RE: Use of County Emergency Fund For

Your letter of March 6, 1956, requesting an opinion from this office reads, in part, as follows:

"A number of years ago Renville County levied a Memorial levy as provided in chapter 11-32 of the 1953 Supplement of the 1943 North Dakota Revised Code. Among the memorials constructed was a memorial building in Glenburn, North Dakota. This building was financed partly from the memorial funds and partly by local contributions. Unfortunately the building was not well constructed and after some time came to show evidence of deterioration which tended to make it dangerous for continued use. In the summer of 1955 it was condemned by the State Fire Marshal and ordered either repaired immediately or torn down. The building is county property and has not been conveyed.

The village of Glenburn and the school district of which it is a part badly needs a gymnasium. The school board has indicated a willingness of collaborating with the county to build a 'memorial' gymnasium on the school grounds. The proposal put forth for financing this is as follows:

The County Commissioners would, by authority of N.D.R.C. 57-1528 resolve that an emergency exists. They would then transfer about twelve thousand dollars from the Emergency Fund into the memorial fund and then allocate same to the construction of the 'memorial' gymnasium.

"My questions are: (1) Would this be a proper and lawful use of the Emergency Fund as defined by law? (2) Can the County lawfully and properly use general funds or other available funds for the purpose as outlined above?"

The pertinent provisions of section 57-1528 of the North Dakota Revised Code of 1943 read as follows:

** * *Each county may create an emergency fund, and all taxes levied for emergency purposes by any county, when collected shall be covered into such emergency fund and shall be used only for such emergency purposes as the governing body of the county, by resolution, shall determine, to meet the mandatory obligations of the county."

Section 11-3201 as amended by chapter 118 of the Session Laws of 1955 reads, in part, as follows:

** * * Such memorial, or memorials, or other suitable recognition shall be erected within the county at a place

determined upon by such board and when erected, shall be properly and permanently maintained. The board may provide for such maintenance or erection by necessary expenditures from the general fund of the county or from funds donated to the county therefor or from either or both such funds, or may enter into a written agreement with any public or private nonprofit agency or corporation for the assumption of part or all of such responsibility by such agency or corporation. Pursuant to such agreement, the county may acquire or divest itself of any title to or jurisdiction over such memorial or other suitable recognition."

Mandatory provisions as related to statues are discussed in twenty-six Words and Phrases 461. The following citation is included:

"Words commonly used in a permissive sense in a statute may be construed as 'mandatory' when such construction is necessary to give effect to the Legislature's intention. Appeal of Peschel, 4 N.W. 2d. 194, 197, 72 N.D. 14."

We believe that the words "shall be properly and permanently maintained" as provided in chapter 118 of the 1955 Session Laws are mandatory within the meaning of the above cited case. However, it must be noted that such duty to maintain a memorial can apply only to an existing memorial.

Your plan to join in the construction of a new building does not appear to result from authority provided by section 11-3201, although this section, as amended by chapter 118 of the 1955 Session Laws, authorizes the erection of a memorial to veterans of the Korean hostilities even though memorial commemorations have already been made for veterans of World War I and World War II.

In reply to your first question we do not believe that your county can properly and lawfully use the emergency fund in the manner purposed.

In reply to your second question, we believe that your county can use general funds or funds raised by a memorial levy pursuant to section 11-3201, as amended by chapter 118 of the 1955 Session Laws, in carrying out the proposed plan for construction of a "memorial" gymnasium in cooperation with the Village of Glenburn and the Glenburn School District.

LESLIE R. BURGUM

Attorney General