

**OPINION
74-136**

December 18, 1974 (OPINION)

Mr. John O. Garaas
State's Attorney
Cass County
10 1/2 Broadway
Fargo, ND 58102

Dear Mr. Garaas:

This is in reply to your letter of December 10, 1974, relative to section 57-15-28 of the N.D.C.C. You state the following facts and questions:

"The facts are briefly that the Cass County jail located in Fargo has been declared structurally unsafe by two competent structural engineering firms. As a result, the District Court Judges have refused to allow any prisoners to be placed in said jail and this was concurred also by the County Judge of Cass County.

"At the present time, Cass County is using the jail facilities at Hillsboro and Grand Forks, transporting prisoners back and forth when needed. There are no jail facilities whatsoever in Cass County to be used other than a small entrance to the county jail which is used chiefly for detoxification.

"As a result of the bond levy for the county jail being defeated in the main election in November, 1974, the county commissioners have by resolution advertised for bids for the construction of the addition to the present jail which would house approximately five prisoners in five cells, plus a holding area at a cost, according to the commissioners, not to exceed \$38,000.00. There has been some question raised as to whether the Emergency Fund could be used for such purpose in constructing the addition to the jail. The county has no other funds other than the Emergency Fund.

In reading *Brusegaard v. Schroeder*, 201 N.W.2d. 899 (Grand Forks County, 1972), the Supreme Court of North Dakota allowed Grand Forks County to supplement the financing of a County Road Shop by using emergency funds on the theory that there was impairment of county property and that an emergency existed necessitating the use of the emergency Fund.

"It would be my opinion that the same situation exists in Cass County with the jail as existed in Grand Forks County in 1972.

"I am asking your opinion as to whether the Emergency Fund could be used under the above circumstances assuming that the county commissioners by resolution declared that an emergency existed."

In your letter you refer to our letter of October 7, 1974, addressed to you, in which we concluded that section 57-15-28 of the N.D.C.C. might be applicable in this situation. That section provides in part:

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 emergency purposes caused by the destruction or impairment of any county property necessary for the conduct of the affairs of the county, emergencies caused by nature, or by the entry by a court of competent jurisdiction of a judgment for damages against the county."

We concluded there were three situations in which the county emergency fund could be used: (1) the destruction or impairment of any county property necessary for the conduct of the affairs of the county; (2) emergencies caused by nature; or (3) entry of a court order by a court of competent jurisdiction of a judgment for damages against the county. We stated it appeared to us the situation involving the Cass County Jail more logically came within the first category than the second. We noted the first category involves county property, which would include the jail since it is necessary for the conduct of the affairs of the county. See section 11-10-20 of the N.D.C.C., as amended, and also section 12-44-01 of the N.D.C.C. We cited the Brusegaard case referred to in your letter and noted the Supreme Court of North Dakota, in construing the provisions of section 57-15-28, stated, page 911 of the reported case:

"The record established the necessity for having a county shop building for the repair, maintenance and storage of county road equipment. The county was required to vacate the old county shop building with it was acquired by the urban Renewal Agency. A temporary shop building was arranged for on a rental basis but it appears that these quarters are inadequate and dangerous. We believe that there was an impairment of county property and that an emergency exists which necessitates the use of the Emergency Fund to pay the unappropriated balance after other available funds have been exhausted."

After citing the dictionary definition of impairment, we concluded that this provision could apply to the Cass County Jail situation. We adhere to that conclusion, assuming the record established the fact that the present county jail is impaired. While you state there has been some question raised as to whether the emergency fund could be used for such purposes as constructing the addition to the jail, you do not state the grounds for such question. We have been presented with no additional facts, other than the defeat of the bond issue, which would alter our position on the matter and we adhere to our previous statements on the matter.

Assuming the record established the actual impairment of the present county jail, a question of fact we are not authorized to determine, it is our opinion that emergency funds may be used for the purposes of constructing a jail addition.

Sincerely yours,

ALLEN I. OLSON

Attorney General