

OPINION
46-34

March 27, 1946 (OPINION)

CITIES

RE: Memorial Buildings - Leasing of

This will acknowledge the receipt of your letter of March 21, 1946, in which you say that the American Legion of Devils Lake has requested the privilege of leasing the memorial building erected in that city by the county and Devils Lake under the authority granted by chapter 174 of the Session Laws of 1929. I have read the opinion given by Attorney Mack V. Traynor to Mr. F. L. Coffman, commander of the Devils Lake Post of the American Legion. I also have before me the opinion given by Assistant Attorney General Brace under date of August 11, 1944, in which he said:

"It is my opinion that chapter 199 of the Laws of 1943 does not amend in any manner chapter 174 of the Laws of 1929. The memorial building was built under the authority of the 1929 laws. That law specifically provides that the property shall be held in trust jointly by the city and county for the purposes for which the building was erected, and the 1929 law specifically provides for the custody and control of the building. It is my opinion that the Board of County Commissioners cannot lease the building under the provisions of chapter 199 of the Laws of 1943."

Mr. Traynor bases his opinion on the legal theory that since chapter 174 of the 1929 Session Laws was omitted from the 1943 Revised Code, the provisions of said chapter are no longer in force and effect. The omission of chapter 174 from the Revised Code was undoubtedly due to inadvertence or mistake on the part of the code commission. In the reviser's note to title 11 of the mimeographed volumes of the code made available to the legislature in 1943 appears the following explanation:

"S.L. 1929, c. 174, which authorizes a city to join with a county in the establishment, erection, and maintenance of a community building as a memorial, has been omitted for it provides for the levy of tax by the county under the provisions of S.L. 1919, c. 181, as amended. This provision is obsolete and the county no longer has the power to levy a tax for this purpose."

The code commission overlooked the fact that although the counties no longer had the power to levy a tax for the establishment and erection of memorial buildings pursuant to the provisions of chapter 174 of the Session Laws of 1929, nevertheless, buildings which had been erected continued to remain the joint property of the counties and the cities. And it is my opinion that notwithstanding the omission of the provisions of chapter 174 of the 1929 Session Laws from the code, memorial buildings erected thereunder, or under the 1919 law, continue to remain the joint property of the counties and cities, and that the management and control thereof will be the joint

responsibility of the cities and counties until the legislature has by law provided otherwise. For as stated by Mr. Brace in his opinion, section 2 of chapter 174 of the 1929 Session Laws "specifically provides that the property shall be held in trust jointly by the city and county for the purposes for which the building was erected, - - -."

Section 4 of chapter 174 of the 1929 laws provides that, "the board of managers shall have the power to lease, temporarily, the assembly hall or other parts of the community building, when not in use for public purposes, for any reasonable and legitimate private use on such terms as may be deemed reasonable and proper. Provided, however, that no part of the building shall be leased for private purposes when it is needed for any public use or purpose."

Chapter 199 of the Session Laws of 1943 (sections 48-0806 and 48-0807 of the Revised Code of 1943) provides that, "the governing body of any county, city, village, or township may permit the use of or may lease any public building or part of a public building under its charge for any legal purpose, giving equal opportunity to all persons, and without religious or political distinctions on the use of such building as may be necessary, and shall fix proper rentals and fees for such use, ---."

Said chapter (section 48-0807 of the Revised Code of 1943) provides:

"No lease of any public building or part of any public building shall be for a longer term than one year, except as may be otherwise provided by city ordinance. Such lease shall be to a responsible party offering the highest return to the municipality and the use and occupation of the building shall not interfere with the use of such building for public purposes. The governing body may reserve the right to reject any and all bids."

After reading Mr. Traynor's opinion, I assume that it is his view that the provisions of chapter 199 of the 1943 Session Laws (sections 48-0806 and 48-0807 of the Revised Code) are applicable to memorial buildings erected under the 1919 and 1929 laws. I agree, however, with Mr. Brace that chapter 199 of the 1943 Session Laws did not amend chapter 174 of the 1929 Session Laws. For in the emergency clause (section 3) of chapter 199 it was declared, "whereas there is a doubt as to the present power of municipalities to permit the use of or lease public buildings, an emergency is hereby declared to exist and this act shall be in force and effect from and after its passage and approval." However, as stated above, section 4 of chapter 174 specifically authorized the board of managers of a memorial building, "to lease, temporarily, the assembly hall or other parts of the community building, when not in use for public purposes, for any reasonable and legitimate private use on such terms as may be deemed reasonable and proper.---" There was, therefore, no doubt when the legislature enacted chapter 199 of the 1943 Session Laws as to the power of the board of managers of a memorial building to lease the same in conformity with the 1929 law. It is my opinion that chapter 199 of the 1943 Session Laws applies to buildings owned in entirety by cities, counties, or villages and not jointly owned.

By failing to include chapter 174 of the 1929 Session Laws, the code commission created uncertainty and to some extent confusion. But the fact that the code commission failed to include said chapter in the revised code did not affect the ownership of memorial buildings, and certainly did not change the terms and conditions under which they were erected. The omission by the code commission did not change the status of such buildings as trust property.

It is therefore, my opinion that memorial buildings erected pursuant to the 1919 and 1929 Session Laws must be managed and used as trust property for the purpose for which they were erected until the legislature enacts legislation specifically authorizing counties and cities to jointly and cooperatively sell or lease such buildings.

NELS G. JOHNSON

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