

CHAPTER 54-12 ATTORNEY GENERAL

54-12-01. Attorney general - Duties.

The attorney general shall:

1. Appear for and represent the state before the supreme court in all cases in which the state is interested as a party.
2. Institute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer.
3. Appear and defend all actions and proceedings against any state officer in the attorney general's official capacity in any of the courts of this state or of the United States. If both parties to an action are state officers, the attorney general may determine which officer the attorney general will represent and the other officer may employ counsel to represent that other officer.
4. Consult with and advise the several state's attorneys in matters relating to the duties of their office.
5. Attend the trial of any party accused of crime and assist in the prosecution when in the attorney general's judgment the interests of the state require it.
6. Consult with and advise the governor and all other state officers and when requested give written opinions on all legal or constitutional questions relating to the duties of such officers respectively.
7. Prepare, when necessary, proper drafts for contracts and other writings relating to subjects in which the state is interested.
8. Give written opinions, when requested by either branch of the legislative assembly, upon legal questions.
9. Enforce the proper application of funds appropriated to the public institutions of the state and prosecute breaches of trust in the administration of such funds.
10. Prosecute corporations and limited liability companies, when necessary, for failure or refusal to make the reports required by law.
11. Keep in proper books a register of all cases prosecuted or defended by the attorney general or the attorney general's assistants, in behalf of this state or its officers, and of all proceedings had in relation thereto, including a record of all actions wherein the state is a party, or is interested, prosecuted by the state's attorneys of the several counties and reported to the attorney general as provided by law, and deliver the same to the attorney general's successor in office.
12. Keep in the attorney general's office a book in which the attorney general shall record all the official opinions given by the attorney general during the attorney general's term of office, such book to be delivered by the attorney general to the attorney general's successor in office.
13. Pay into the state treasury all moneys received by the attorney general for the use of the state.
14. Serve as superintendent of the bureau of criminal investigation and perform all duties incident to the proper and efficient conduct of that office.
15. Attend to and perform any other duties which from time to time may be required by law.
16. Appoint the state fire marshal and supervise the operation of the state fire marshal department.
17. Give written opinions, when requested by the governing body or city attorney of a city in the state of North Dakota.
18. Repealed by S.L. 1991, ch. 637, § 9.
19. Give written opinions to public entities as defined in subdivision a or b of subsection 13 of section 44-04-17.1, when requested by an interested person under section 44-04-21.1.

Koppelman, Ben

From: Kramer, Samantha E.
Sent: Friday, January 15, 2021 10:54 AM
To: Koppelman, Ben
Subject: "Shall"

Good Morning Representative Koppelman,

I asked one of the interns to do some research and she came up with the following information.

The use of the word 'shall' in statute generally indicates a mandatory duty." 1999 N.D. Op. Atty. Gen. L-89. Thus, if a statute contains the word "shall," then it requires something as opposed to merely allowing something. *Id.* However, the word "shall" can be construed to the word "may" when it is "necessary to effect the legislative intent." *Id.* (quoting *Solen Pub. Sch. Dist. v. Heisler*, 381 N.W.2d 201, 203 (1986)). Furthermore, "[w]ords used in any statute are to be understood in their ordinary sense[.]" 1993 N.D. Op. Atty. Gen. L-228. According to Black's Law Dictionary (11th ed. 2019), "shall" is a verb that means "[h]as a duty to; more broadly, is required to."

The North Dakota Supreme Court has interpreted the word "shall" in accordance with its ordinary meaning. *Sweeny v. Sweeny*, 2002 ND 206, ¶ 18, 654 N.W.2d 407, 413. "Shall" is "generally imperative or mandatory ... excluding the idea of discretion, and ... operating to impose a duty." *Id.* at ¶ 17.

Opinions of both the North Dakota Attorney General and the North Dakota Supreme Court accord with the Legislative Council's 2021 drafting manual's section on "shall," which can be found on page 92.

Please let me know if our office can provide additional information.

Samantha E. Kramer

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Subject: Shall/Must/May Language

Date: Friday, January 8, 2021 at 5:21:33 PM Central Standard Time

From: Grossman, Jill A.

To: Koppelman, Ben

Representative Koppelman,

Per our Legislative Drafting Manual on pages 92-93:

USE OF SHALL, MUST, MAY, MAY NOT, AND IS ENTITLED TO

SHALL

Shall is used to qualify an active verb. Use **shall** when you are imposing a duty on a person or body that is the subject in the sentence. Use **shall** in a mandatory or imperative sense. Example:

"The **teacher shall** give the parent a copy of the signed report."

MUST

Must is used to qualify an inactive verb or an active verb in the passive voice. Use **must** in reference to a thing, rather than a person, and to express status requirements (i.e., statements about what people or things **must be** rather than what they must do). Examples:

"The **report must** contain a signature line."

"A **student must be** a resident of the county."

MAY

Use **may** to confer a power, privilege, or right. Examples:

"The applicant **may demand** (power) an extension of time."

"The applicant **may renew** (privilege) the application."

"The applicant **may appeal** (right) the decision."

MAY NOT

Whenever possible an obligation or discretion to act should be positively stated. However, if a right, privilege, or power is intended to be denied, **may not** should be used. Example:

"The applicant **may not submit** (active voice) more than one application."

SHALL NOT

Avoid use of **shall not** and **no person shall** because these phrases mean that **no one is required** to act. A statute that includes one of these phrases negates the obligation but not the permission to act. **A person may not** negates the permission to act and functions correctly as a complete prohibition.

CANNOT

Avoid use of **cannot** because **cannot** means the person referred to does not have the ability or capacity to act.

Will, Should, and Ought

Avoid using hortatory qualifiers, such as **will**, **should**, and **ought**, in the text of an Act. These terms may be more appropriate in a resolution instead of a bill.

Entitled To

Use **is entitled to** when describing a benefit or right a person may claim or exercise. Example:

"A state employee is entitled to expense reimbursement."

In these instances, using **shall receive** or similar mandatory phrasing would negate the option of not claiming or exercising a benefit or right.

Jill Grossman

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received
7-30-2020

July 28, 2020

Erik R. Johnson
 Fargo City Attorney
505 Broadway Street North #206
 Fargo ND 58102

Dear Mr. Johnson:

I am responding on behalf of the Attorney General to your recent letter requesting an opinion on the restrictions contained in one of the City's zoning ordinances.

Your letter included a research memorandum and legal advice to the city commission on the existing ordinance and proposed changes, and minutes of the June 15, 2020, meeting at which the commission heard public comment in support and opposition of the existing ordinance. The minutes indicate you advised the commission that you do not believe there are any statutory or constitutional concerns with the existing ordinance and you also provided commentary on the proposed amendments before the commission. From the other materials included with your letter, it appears to us that you have researched the issue and advised the city at length on its options and the legal positions. The Commission decided not to take final action but instead voted to request an Attorney General Opinion.

There are some situations that are unsuited for an opinion, including when the question calls for interpreting a local ordinance. The city attorney continues to be ultimately responsible for interpreting city ordinances and advising city officials on legal issues.

While we appreciate the deliberation involved in submitting the request, in view of the foregoing, I am sure you will understand why we must decline to provide an opinion on this issue.

Sincerely,

Troy Seibel
Chief Deputy Attorney General



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Wayne Stenehjem
ATTORNEY GENERAL

January 5, 2021

Rep. Ben Koppelman
District 16
2223 10th Court West
West Fargo ND 58078

Dear Representative Koppelman:

I am responding on behalf of the Attorney General to your December 31, 2020, request for an opinion. You indicate that a resident of the city of Fargo has attempted to obtain a federal firearm license from the ATF in order to process internet firearm sales from his residence in Fargo. The city of Fargo issued a decision in 2016 to Mr. Curtis that selling firearms out of his residence would violate the city's zoning ordinance. You ask this office to determine whether the city's municipal code violates state law.

Although a legislator may request an opinion from this office, there are several situations that are unsuited for an opinion. These include when the question presented calls for interpreting a local ordinance, and when the matter should be, or already has been, addressed by the political subdivision's legal advisor.

We are aware that this issue has been before the City of Fargo for several months, and that local city residents have protested both the existing zoning ordinance and, conversely, making any changes to the existing ordinance. A city attorney has a statutory duty to advise city officials on legal matters. The Fargo City Attorney conducted extensive legal research on the issue before the city commission and has provided a comprehensive legal analysis of the pros and cons of the existing ordinance and of proposed changes. We had an opportunity to review this legal research and analysis, and did not disagree with it.

Ultimately, however, it is up to the governing body to make a decision, not this office. State law already provides a method by which residents who disagree with a city's zoning decision or who may be affected by a city's zoning ordinance can challenge it, administratively or through the civil court process. As it appears that Mr. Curtis has been pursuing this issue against the city of Fargo for several years, he may wish now to consult an attorney in private practice who can advise him on his civil options.

In view of the foregoing, we must respectfully decline to issue an opinion on whether the Fargo Municipal Code Ordinance § 20-0403(C)(5)(e) violates state law.

Sincerely,

Troy Seibel
Chief Deputy