

N.D.A.G. Letter to Lamb (Jan. 24, 1986)

January 24, 1986

Mr. Joseph S. Lamb
Executive Vice President
Bank of North Dakota
700 East Main
P. O. Box 5509
Bismarck, North Dakota 58502-5509

Dear Mr. Lamb:

Thank you for your letter of December 17, 1985, concerning the recordability of a sheriff's deed issued to the Bank of North Dakota on a Board of University and School Lands loan pool mortgage foreclosure. I understand from your letter that a sheriff's deed has been issued on land on which there are delinquent taxes due and the register of deeds has refused to record this sheriff's deed pursuant to N.D.C.C. § 11-18-02.

It is my opinion that the register of deeds must continue to refuse to record a sheriff's deed under the circumstances which you describe. Unfortunately, the statutes are clear and unless the Legislature provides for an exception to the recording law to cover the situation posed by your letter, the register of deeds must continue to refuse to record such a deed.

The duties of the register of deeds are specified in N.D.C.C. Ch. 11-18. These duties were thoroughly discussed in a recent Attorney General's Opinion on the question of whether or not a register of deeds could refuse to record a declaration of land patent. N.D. Op. Att'y. Gen. 85-41. This opinion made it clear that the duties of the register of deeds are specific and do not include the exercise of discretion in determining what to record.

N.D.C.C. §11-18-02 states:

11-18-02. REGISTER OF DEEDS NOT TO RECORD CERTAIN INSTRUMENTS UNLESS THEY BEAR AUDITOR'S CERTIFICATE OF TRANSFER. Except as otherwise provided in section 11-18-03, the register of deeds shall refuse to receive or record any deed, contract for deed, plat, replat, patent, auditor's lot, or any other instrument that changes the current property description unless there is entered thereon a certificate of the county auditor showing that a transfer of the lands described therein has been entered and that the delinquent taxes and special assessments or installments of special assessments against the land described in such instrument have been paid, or if the land has been sold for taxes, that the delinquent taxes and special assessments or installments of special

assessments have been paid by sale of the land, or that the instrument is entitled to record without regard to taxes.

N.D.C.C. §11-18-03 states:

11-18-03. INSTRUMENTS ENTITLED TO RECORD WITHOUT REGARD TO TAXES. The following instruments may be recorded by the register of deeds without the auditor's certificate referred to in section 11-18-02:

1. A sheriff's or referee's certificate of sale on execution or on foreclosure of a mortgage.
2. A mineral deed conveying oil, gas, and other minerals in or under the surface of lands.
3. A final decree of distribution or any order terminating joint tenancy or any judgment or decree affecting title to real estate, which must be presented to the auditor's office prior to being placed of record in order to allow the auditor to make such changes in the tax rolls of his office as may be necessary.
4. Any deed conveying to the state, or to any political subdivision or municipal corporation thereof, any right of way for use as a public street, alley, or highway.
5. Any plat, replat, or auditor's lot accompanied by a resolution requesting the recording of the plat, replat, or auditor's lot by the governing body of a political subdivision.

The circumstances under which the county auditor may certify the transfer of land and the payment of taxes are specified in N.D.C.C. Ch. 11-13. N.D.C.C. §11-13-12 specifies that the county auditor must determine from his records if there are any delinquent taxes or special assessments against the land described in a deed, contract for deed, or patent presented to him for transfer, or whether the conveyance can be recorded without regard to taxes.

N.D.C.C. §11-13-14 states:

11-13-14. AUDITOR'S CERTIFICATE ON CONVEYANCES TO BANK OF NORTH DAKOTA -- RECORDING CONVEYANCE. Whenever any sheriff's deed or other conveyance of real property acquired by the Bank of North Dakota as agent for the state treasurer as trustee of the state of North Dakota is offered for record, the county auditor shall enter such transfer and the register of deeds shall record the same without regard to

the payment of any taxes due thereon. The provisions of sections 11-13-12 and 11-13-13 shall not be applicable thereto. In such case, the county auditor shall enter on the sheriff's deed or other conveyance, over his official signature, the words "Transfer entered", and the register of deeds then shall receive and record the same. [Emphasis supplied.]

It is clear that a sheriff's deed is a deed. Therefore, pursuant to N.D.C.C. §11-18-02, the register of deeds must refuse to record the sheriff's deed if it is not exempt under N.D.C.C. §11-18-03 or if the deed does not carry a certification that the taxes are paid. The sheriff's deed is not one of the listed exemptions in N.D.C.C. § 11-18-03. In addition, the Legislature provided a special exemption for sheriff's deeds issued to the Bank of North Dakota as agent for the state treasurer as trustee of the state of North Dakota (N.D.C.C. §11-13-14).

We are aware of Article X, 5 of the North Dakota Constitution which provides that the property of the state of North Dakota is exempt from taxation. This provision, however, does not control the activities of a register of deeds. The constitutional exemption is a limitation upon the authority to tax. The statutory limitation in N.D.C.C. Ch. 11-18 is a limitation upon the powers of the register of deeds.

In my opinion, unless or until the Legislature revises the Code to provide that deeds such as the one in question are recordable without regard to taxes, the deed cannot be recorded.

Since the sheriff's certificate on this tract is recorded (a sheriff's certificate is one of the listed exceptions in N.D.C.C. §11-18-03), prospective purchasers are on notice of the state's interest. Further, the sheriff's certificate should indicate the end of the redemption period, so that parties are also put on notice that the time for redemption has expired. Finally, the deed is valid as between the parties, whether or not recorded. If the land is resold, the taxes should then be paid up and both the sheriff's deed and the state's conveyance to the purchaser can be recorded at that time.

If you are concerned about record title, I would advise you to file for record an affidavit citing the existence of the sheriff's deed with particularity.

If you have further questions, please feel free to contact this office.

Sincerely,

Nicholas J. Spaeth

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