

N.D.A.G. Letter to Lamb (Feb. 9, 1990)

February 9, 1990

Mr. Joseph S. Lamb
President
Bank of North Dakota
Box 5509
Bismarck, ND 58502-5509

Dear Mr. Lamb:

Thank you for your January 11, 1990, letter requesting my opinion on whether the Bank of North Dakota may sell mortgaged real estate premises in parcels rather than as a single tract. The Bank may receive a greater value if it is able to designate smaller parcels of real estate at sheriff's sales.

Mortgages held by the Bank of North Dakota are generally foreclosed by advertisement in accordance with N.D.C.C. ch. 35-22. The mortgaged real estate is sold pursuant to N.D.C.C. § 35-22-09 which states as follows:

35-22-09. Sale as unit or by tracts. If the mortgaged premises consist of a single farm or tract, the property may be sold as a unit. If the premises consist of several distinct farms or tracts, the same must be sold separately, and only such farms or tracts may be sold as are necessary to satisfy the amount due on the mortgage at the date of the sale, including the costs and expenses allowed by law.

Similarly, in a foreclosure by action, N.D.C.C. § 28-23-07 provides that the mortgaged real estate shall be sold as follows:

[W]hen the sale is of real property consisting of several known lots or parcels they must be sold separately. The judgment debtor, if present at the sale, may direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff or other officer must follow such directions.

If the mortgaged premises consist of distinct tracts, therefore, N.D.C.C. §§ 35-22-09 and 28-23-07 require the premises to be sold in parcels. The foreclosure statutes do not specifically address whether the mortgaged premises may be sold as separate parcels if the premises consist of a single tract or farm.

N.D.C.C. § 35-22-09 provides, however, that "if the mortgaged premises consist of a single farm or tract, the property may be sold as a unit." (Emphasis supplied.) This

permissive language, when read in conjunction with the remainder of N.D.C.C. § 35-22-09, indicates that a single tract may be sold either as separate parcels or as a single unit. No other statute suggests a different conclusion. It is my opinion, therefore, that mortgaged premises consisting of a single tract may be sold as separate parcels in a foreclosure by advertisement.

I reach the same conclusion with respect to sales of mortgaged real property in foreclosures by action. N.D.C.C. § 28-23-07's mandate that mortgaged premises consisting of "several known lots or parcels" be sold separately implies that mortgaged premises consisting of a single tract may be sold either as a single unit or as separate parcels. Neither N.D.C.C. § 28-23-07 nor any other statute expressly or impliedly prohibits designating separate parcels of single tracts for sale in foreclosures by action. It is my opinion, therefore, that mortgaged premises consisting of a single tract may be sold as separate parcels in a foreclosure by action.

My conclusions are consistent with the purposes underlying foreclosure sales in general, and separate sales in particular, as stated by the North Dakota Supreme Court.

The object of requiring a separate sale of distinct farms or parcels covered by a mortgage is . . . to require only enough of the mortgaged premises to be sold to pay the indebtedness secured by the mortgage and leave the remainder to the mortgagor discharged of the mortgage lien. The further object is to afford the debtor (or those claiming under him) an opportunity to redeem any of the separate farms or parcels sold. (Citations omitted.)

. . . The mortgagee is entitled to have the sale conducted so, if possible, that his claim and costs will be paid in full, and the mortgagor and those claiming under him subsequent to the mortgage are entitled to have the officer conduct the sale in such a manner as to pay the just demands of the mortgagee without inflicting unnecessary loss upon the debtor or interfering with the rights of redemptioners. (Citations omitted.) In other words, it is the duty of the person conducting the sale to so conduct it as to obtain the most money, or so as to pay the full amount of the claim for the enforcement of which the foreclosure sale is held, together with costs, and leave as large a quantity of land as possible discharged of the lien of the mortgage.

Greene v. Newberry, 215 N.W. 273, 275 (N.D. 1927).

If the mortgaged premises is sold in parcels, each parcel may be redeemed by the judgment debtor or redemptioners. N.D.C.C. § 28-24-01. This factor may be relevant to the Bank in deciding whether to sell the mortgaged premises in separate parcels. In addition, a debtor may designate a homestead parcel to be separately sold and redeemed. 1989 N.D. Sess. Laws ch. 394 (effective through June 30, 1991).

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

dfm