N.D.A.G. Letter to Kirschenheiter (Nov. 19, 1987)

November 19, 1987

Mr. Frank Kirschenheiter
Chairman
Credit Review Board
State Capitol
Bismarck, ND 58505

Dear Mr. Kirschenheiter:

Thank you for your letter of October 23, 1987, concerning Credit Review Board policy on payment of interest subsidies.

N.D.C.C. § 6-09.10-05 states as follows:

> 6-09.10-05. Interest rate buydowns by board.
>
> 1. If the board, or its authorized agent, is unable to mediate a settlement in the negotiation of a farmer's debt, the board may approve the purchase, refinancing, or redemption of the farmer's home-quarter. If the board approves the purchase, refinancing, or redemption of the home-quarter, it shall subsidize the interest rate paid by the farmer after credit has been obtained by the farmer from any governmental or private financial institution or agency.
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> 2. The board may only approve an interest subsidy if the farmer has the financial ability to meet all payments and financial responsibilities, including the payment of principal and interest on loans subsidized under this chapter.

N.D.C.C. § 6-09.10-06 states, in part, as follows:

> 6-09.10-06. Fund -- Appropriation.
>
> 1. A revolving fund must be maintained at the Bank of North Dakota for the subsidy of interest rates on homequarter purchases, as provided in this chapter. All moneys transferred into the fund, interest upon moneys in the fund, and payments to the fund are hereby appropriated for the purpose of providing subsidies in accordance with this chapter.
>
> 3. The fund must be administered and supervised by the Bank of

> North Dakota. The Bank may deduct a service fee for administering the fund from payments received on the fund.

N.D.C.C. § 6-09.10-07 states, in part, as follows:

> 6-09.10-07. Interest rates -- Repayment -Loan qualification. An interest subsidy may only be approved on the first fifty thousand dollars of principal loaned to the farmer for the purchase or refinancing of the home-quarter. . . Loans approved by the board must be amortized and may have terms of up to forty years.

Although provisions of N.D.C.C. ch. 6-09.10 are not specific about under what circumstances a loan to an eligible farmer for an interest subsidy can be made, the provisions seem more naturally tailored to fit the conventional mortgage circumstances. Yet, financing methods such as a contract for deed are not excluded by statute or rule. Moreover, the Credit Review Board has specifically stated in its written policy, effective August 1, 1986, that the board may provide an interest subsidy to an eligible farmer on a contract for deed.

The board is authorized, pursuant to N.D.C.C. § 6-09.10-09, to adopt rules to implement N.D.C.C. ch. 6-09.10. The board, pursuant to rule is authorized to adopt written policies. See N.D. Admin. Code § 18.5-02-01-07. Additionally, the board appears to be the sole authority for approving interest buydowns or interest subsidies pursuant to N.D.C.C. §§ 6-09.10-05, 6-09.10-07, and 6-09.10-08. See, N.D. Admin. Code § 18.5-01-01-02. As long as an eligible farmer meets the other requirements of statute and rule and other factors and criteria to be considered by the board pursuant to N.D. Admin. Code § 18.5-02-01-06, the board has authority to provide an interest subsidy on a contract for deed.

Furthermore, it is my opinion that the language of N.D.C.C. § 6-09.10-06(3) which requires that the fund be "administered and supervised by the Bank of North Dakota" is ministerial language and does not give the Bank of North Dakota any policy making authority as to the types of loans which may be approved for funding.

Therefore, the Bank of North Dakota does not have authority to deny funding for an approved contract for deed for an interest subsidy to an eligible farmer from moneys in the home-quarter purchase fund.

The Board should be aware, however, of the fact that the vendee in a contract for deed does not have legal title to the real property which is being conveyed under the contract. The vendee does have an equitable interest in the real property, which is mortgageable, but a mortgage given by a vendee is subordinate to the interest of the vendor, who has legal title to the real property. In other words, a vendee can only give a second mortgage to the Board as security for an interest subsidy unless the vendor joins in the mortgage.

It is my understanding that the Bank did not deny funding of an interest subsidy because an eligible farmer was purchasing the real property under a contract for deed, but that the Bank was requiring a first mortgage on the real property as a condition of the funding. If the Board has a second mortgage as security for an interest subsidy and the vendee/eligible farmer defaults on the contract, the Board can only protect its interest by making good the vendee's default, that is, by purchasing or redeeming the real property from the vendor.

Sincerely,

Nicholas J. Spaeth

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