

**OPINION
68-277**

August 30, 1968 (OPINION)

Honorable Carl J. Freeman

Representative, District No. 6

RE: Real Property - Financing Statements - Description of Property

This is in response to your letter in which you ask for an opinion on the following questions:

1. If an abstractor uses the uniform certificate, does he become obligated to show financing statements covering fixtures which became attached to real estate:
 - (a) If the legal description of the land is included in the financing statement?
 - (b) If the legal description of the land is not included in financing statement?
2. If your answer to 1 (a) above is affirmative, is the term 'describe real estate concerned' limited to metes and bounds, rectangular survey system and record lot and block, or would some other reference by which the real estate might be identified such as street address be sufficient' or 'Near Bottineau'?
3. If the answer with respect to either 1 (a) or 1 (b) above is affirmative, do you have an suggestions to Registers of Deeds for indexing of the financing statements in real estate indices or otherwise, so that the abstractor may receive appropriate notice that an interest in land is involved?"

You also state that there has been discussion amongst abstractors in North Dakota regarding a need for amendments to the Uniform Commercial Code as pertaining to descriptions to be used in financing statements wherein real estate is described. You also advise that the Farmers' Home Administration and other use such descriptions as "Near Bottineau." It is also your understanding that the FHA has said that this meets the requirements of the law.

To answer the questions we must examine, to a degree, the duties and responsibilities of an abstractor. The statutory provisions relating to abstractors are contained in Chapter 43-01 of the North Dakota Century Code. The legal duties of the abstractor are not specifically set out therein but the North Dakota Supreme Court in *Morin v. Divide County Abstract Co.*, 183 N.W. 1006, 48 N.D. 214, had occasion to speak about the duties of an abstractor. In this case the Court said:

The duty of an abstractor is to make a painstaking examination of the records and set forth in the abstracts all the facts

relating to the title under investigation. He is not called on for professional opinions as to any of the matters reported. * * * It is not for him to determine whether instruments of record are valid or invalid, or whether they were or were not entitled to record. His duty is to set forth the facts relating to the title as shown by the records; and he is liable for 'any and all damages that may be sustained by or accrue to any person by reason or on account of any error, deficiency or mistake in any abstract or certificate of title * * * made and issued' by him."

The statutes pertaining to abstractors do not specifically provide as state above, but the inferences and implications that such duties exist are prevalent throughout the provisions of Chapter 43-01.

Under the Uniform Commercial Code, Section 41-09-10 of the North Dakota Century Code, (9-110, U.C.C.) provides as follows:

SUFFICIENCY OF DESCRIPTION. For the purposes of this chapter any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

The above section can be considered as a re-statement of the law on this subject. The North Dakota Supreme Court has said that, "The test of sufficiency in description of property is whether the description identifies the property and a description which is legally sufficient in a tax deed or upon assessment lists is sufficient in a deed between private parties." (Magnusson v. Kaufman, Jr., et al., 65 N.W.2d. 289, (1954).

The North Dakota Supreme Court also said:

'* * * A deed will not be declared void for uncertainty if it is possible, by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a void grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels.'"

The Court also said that where a description in a recorded deed is in some respects imperfect, ambiguous or undivided but the description in the deed is sufficient to put those who see it on an inquiry which duly pursued would disclose the identity of the land, the recorded instrument is notice to subsequent purchasers or encumbrancers. Hence, if notwithstanding the defect in the description the deed appears to be in line of title, then it is not only constructive notice of all the facts disclosed by the record of the deed, but it puts the assessor upon inquiry suggested by the facts disclosed and is notice to him of such facts as would have been disclosed by the inquiry. (State v. Rosenquist, 51 N.W.2d. 757.)

The North Dakota Supreme Court also said:

* * * Where an attempt is made to describe land sought to be conveyed by deed, it is the office of such description to furnish the means of identification of the land intended to be conveyed."

However, in this instance the Court found that the description, "'Two acres of land located on the northwest corner of the southwest quarter of section eighteen (18), township one hundred thirty-eight (138) west of range seventy-one (71)'" , was inadequate. But, in this instance were some other extrinsic facts which conclusively indicated that the two acres of land involved were not the two acres which the grantor had in mind to convey. (Mitchell v. Nicholson, 3 N.W.2d. 83.) In some respects this holding is not in complete harmony with the South Dakota Supreme Court and its holding in Ford v. Ford, 124 N.W. 1108, 24 S.D. 644.

Sections 41-09-40 and 41-09-41 of the North Dakota Century Code (9-401 and 9-402, Uniform Commercial Code), in substance, provide and set forth the pertinent requisites for the filing of financing statements. Section 41-09-40 (b), provides as follows:

The proper place to file in order to perfect a security interest is as follows:

- b. when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded; * * *."

This, in effect, means that it is to be filed in the office of the register of deeds.

Section 41-09-41 specifically provides when the financing statement covers crops growing or to be grown or goods which are to become fixtures, the statement must also contain a description of the real estate concerned.

With the foregoing in mind, it is our opinion that the answer to Question No. 1 (a) is "yes." Anytime a description of real property is included in the financing statement, it becomes the duty of the abstractor to include such entries on his abstract. It is not the duty of the abstractor to determine the legal results of such entry but merely to make the entry.

It is also our opinion that if the legal description of the land is not included or contained in the financing statement that the abstractor is not required to make a notation of same in the abstract. Consequently, our answer to Question No. 1 (b) is "no."

In response to Question No. 2, if the description meets the requirements of the rule of law as recited earlier herein, the description would be sufficient. However, we wish to emphasize that it is not the duty or responsibility of the abstractor to determine whether or not the description is sufficient, but it is his duty to enter same on an abstract. Whether the description is sufficient for

the purposes intended is a matter which will have to be resolved later between proper parties of interest.

It is conceivable that litigation might be necessary to determine the adequacy or sufficiency of the description, however, the abstractor cannot refuse to enter in his abstract or refuse to make notations in the abstract on any realty mentioned in the financing statement. If the abstractor fails to make the proper entries in the abstract, even though the description is inadequate or insufficient, he is exposing himself to legal liabilities. We are also aware that for certain purposes a description might be deemed adequate, whereas for other purposes the same description would be adequate.

As to the purpose of the Uniform Commercial Code and the filing of certain instruments, we are aware that such filing has as its purpose, amongst other things, to alert those of interest so that a further inquiry can be made if desirable or deemed necessary. Thus, on this basis, the mere fact that realty is described the entry should be made in the abstract and those who have occasion to make further inquiry have been alerted that further inquiry should be made.

As to Question No. 3, we must refrain from attempting to express an official opinion or any suggestions as to how the register of deeds should index or record such instruments. Any system which would make readily available the information desired would be appropriate. For that matter this also is an area in which appropriate legislation could be enacted to provide uniformity throughout the state.

HELGI JOHANNESON

Attorney General