

**LETTER OPINION
2000-L-39**

March 14, 2000

Mr. Doug Mattson
Ward County State's Attorney
P.O. Box 5005
Minot, ND 58702-5005

Dear Mr. Mattson:

Thank you for your letter regarding duties of a register of deeds pertaining to recording a notice of a contract for deed.

You advise that N.D.C.C. § 11-18-02 provides that a register of deeds shall not record certain instruments unless they bear the auditor's certificate of transfer stating that delinquent and current real estate taxes and special assessments on the property in question are currently paid. See also N.D.C.C. § 11-13-12 (prescribing the auditor's duties). N.D.C.C. § 11-18-02 specifies that a contract for deed, among other instruments, may not be recorded without the certificate. N.D.C.C. § 11-18-03 provides that certain instruments may be recorded without regard to the tax payment status of the property in question, but a notice of contract for deed is not among the specified instruments. Because recording of a notice of contract for deed is not covered by N.D.C.C. §§ 11-18-02 and 11-18-03, you advise that registers of deeds are treating a notice of contract for deed differently. You advise that an auditor's certificate of transfer is required by some registers of deeds on a notice, while others record a notice without the auditor's certificate of transfer. It has been argued that because a notice of contract for deed does not transfer any property rights, it does not need a certification regarding full consideration pursuant to N.D.C.C. § 11-18-02.2. You suggest that this argument might equally apply to N.D.C.C. § 11-18-02.

You further advise that a notice of contract for deed identifies parties that have entered into a contract for deed and describes the property covered by the contract for deed. "Any instrument affecting the title to or possession of real property may be recorded [pursuant to N.D.C.C. ch. 47-19]." N.D.C.C. § 47-19-01.

The purpose of the recording statutes is to give notice of and to protect rights, as against subsequent purchasers or encumbrances. Magnuson v. Breher, 284 N.W. 853 (N.D. 1939). "The record of any

Mr. Doug Mattson
March 14, 2000
Page 2

instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons." N.D.C.C. § 47-19-19. See, e.g., Hunter v. McDevitt, 97 N.W. 869 (N.D. 1903) (holding that one who purchases real estate with notice of an outstanding contract for sale takes it subject to such contract).

An unrecorded instrument is valid between the parties but not as to those who have no notice of it. N.D.C.C. § 47-19-46. Thus, an unrecorded grant is effective between the parties, but a purchaser or encumbrancer without notice of the grant can acquire a superior title or lien. N.D.C.C. § 47-10-08. See also Drewes v. Vatnsdal, 139 B.R. 472, 474 (Bankr. D.N.D. 1991).

Recording a notice of contract for deed is probably meant to counter N.D.C.C. § 47-19-41 which declares void any unrecorded conveyance as against a later recorded conveyance by a purchaser in good faith. The record notice of an unrecorded contract for deed will impugn the good faith of a later purchaser. City of Bismarck v. Casey, 43 N.W. 2d 372 (N.D. 1950); Gress v. Evans, 46 N.W. 1132 (Dak. 1877). Thus, the notice of contract for deed gives notice of a contract for deed without recording the contract for deed which cannot be done unless the delinquent and current real estate taxes and special assessments are paid. If a notice of contract for deed could be recorded without an auditor's certificate of transfer, there is no logical reason why a notice of quitclaim deed or warranty deed could not likewise be recorded without the auditor's certificate.

The Legislature has determined that documents transferring an interest in real property, such as a contract for deed, may not be recorded unless delinquent and current property taxes and special assessments have been paid and certified to by the county auditor. N.D.C.C. § 11-18-02. This legislative requirement obviously encourages the payment of real estate taxes and special assessments. It reflects a policy that property owners should not be afforded the protections recording provides if taxes and special assessments on the property are not currently paid.

In my opinion, recording a notice of a contract for deed without an auditor's certificate of transfer allows a party to a contract for deed to accomplish indirectly what that party may not accomplish directly. Such conduct is not to be encouraged.

Both the North Dakota Supreme Court and this office have consistently taken the view that legislative policy and statutes may not be finessed by doing indirectly what cannot be done directly. See, e.g., Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 124-25 (N.D. 1990) ("we recognize the familiar maxim that 'the law does not permit by indirection what cannot be accomplished directly.'"); Langenes v.

Mr. Doug Mattson
March 14, 2000
Page 3

Bullinger, 328 N.W.2d 241, 246 (N.D. 1982) (citing cases in support of the maxim); 1994 N.D. Op. Att'y Gen. 118, 120 (affirming the Attorney General's view that the Legislature did not intend that confidential student records "'could be made public indirectly through the open meeting statute but not directly by virtue of the open records statute.'"); Letter from Nicholas Spaeth to Lee Christensen (May 23, 1991) (rejecting a lease-purchase agreement to build a new home for the president of NDSU on the ground the "project attempts to do indirectly what would require legislative appropriation to do directly."); 1982 N.D. Op. Att'y Gen. 41, 43 (disapproving the initiation of policies by the State Personnel Board through the Central Personnel Division on the ground that what "the Board is precluded from doing directly, it may not do indirectly."); 1981 N.D. Op. Att'y Gen. 192, 193 (concluding a county commission could not withdraw from a health district without a vote of electors "thereby accomplishing indirectly what they cannot do directly"); 1960 N.D. Op. Att'y Gen. 46, 48 (March 30) (stating "[t]he general rule of law is that a person may not do indirectly what he is prohibited from doing directly" in finding a transfer from the poor relief fund to the general fund was invalid).

It is my opinion that registers of deeds should require an auditor's certificate of transfer before recording a notice of contract for deed. There is no basis under N.D.C.C. § 11-18-03 to record such an instrument without regard to the tax payment status of the property in question. If such a document is to be recorded without regard to the tax payment status, the Legislature should provide that direction.

Sincerely,

Heidi Heitkamp
Attorney General

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