

## MEMORANDUM

TO: Ray Walton

FROM: Dan Kuntz *DK*

DATE: April 4, 1983

RE: Attorney General's Opinion re: sale of real estate  
by auction

*Keep  
put in file as well as AG's  
opinion file*

As per your request, I have examined the Attorney General's opinion dated January 2, 1976, on the question of whether an attorney or real estate broker must obtain an auctioneer's license to sell real estate by auction sale. It is my opinion that there is little basis for changing the conclusion reached in the January 2, 1976, opinion.

I was unable to find any specific case law on the question of whether real estate brokers or attorneys need an auctioneer's license to conduct a real estate sale. As might be expected, case law related to this issue indicates the question must be answered based upon the wording of the particular statute. Obviously, the Legislature has the power to exempt or require compliance with the license requirement by attorneys and real estate brokers. While Chapter 51-05.1, N.D.C.C., does not contain such a specific exemption, the chapter's definition of an auctioneer, as well as other provisions of the Code, give rise to good arguments that attorneys and real estate brokers are exempt from the license requirement.

1. The statute defines an auctioneer as a person who sells property at public auction as a whole or partial vocation. Attorneys and real estate brokers do not generally hold themselves out to the public as auctioneers. Rather, such sales would be conducted only as incident to their professional duties.
2. Most auctions conducted by attorneys or real estate brokers are not public auctions in the sense that only persons having previously submitted written bids are allowed to bid at the auction.
3. Section 51-05.1-04 contains a specific exemption for isolated transactions in selling property for another. Auctions conducted by attorneys and real estate brokers are generally isolated transactions for those persons.
4. Chapter 43-23, N.D.C.C., does not restrict a real estate broker from selling real estate by auction. Under section 43-23-07, an attorney does not even need a real estate license to make sales of real estate arising in the usual course of the practice of law.

Probably the most persuasive reason for not changing the conclusion reached in the Attorney General's opinion is that the Legislature has not seen fit to pass legislation that would alter the conclusion. The courts have generally held that a long standing construction of a statute placed thereon by officials in charge of executing it is indicative of legislative intent. State v. Reich, 298 N.W.2d 468 (N.D. 1980); Horst v. Guy, 218 N.W.2d 153 (N.D. 1974); Public Service Commission v. City of Williston, 160 N.W.2d 534 (N.D. 1968).



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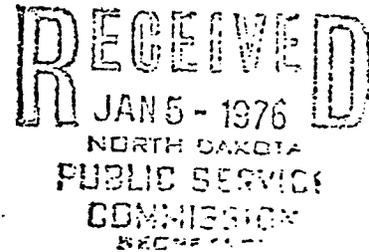
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DORMILEE DIEDE  
ADMINISTRATIVE ASSISTANT

January 2, 1976



Ms. Janet Sauter, Secretary  
Public Service Commission  
State Capitol  
Bismarck, ND 58505

Dear Ms. Sauter:

This is in response to your letter of 21 October 1975 with regard to Chapter 51-05.1 of the 1975 Supplement to the North Dakota Century Code having to do with auctioneers and clerks and the duties of each.

You indicate that the Public Service Commission (the licensing agency under the act) has been advised by a firm of attorneys in North Dakota that land sales conducted for the benefit of clients of long standing by the attorney in an auction sale format are exempt. You enclose a copy of that letter for our information.

You state that the Commission desires to know whether or not this type of sale would, in fact, be exempt from the provisions of the auctioneer's law.

The letter enclosed states that it is the opinion of the writer that these sales come within the exceptions mentioned in said Chapter 51-05.1, that they are isolated sales conducted for the benefit of clients of long standing, and that these are not sales at public auction apparently on the basis that the only persons that can bid are those that originally submitted sealed bids, and the general public is excluded.

Mr. Ray Walton, commerce counsel, came to our offices on date 22 December 1975 bringing a copy of a letter from apparently a licensed realtor, with somewhat the same type of problem, i.e. the writer is a real estate broker, who states that they are at times put in the position where they have been asked to sell listed property on bids, (meaning written bids are called for in paper advertising and when the bids are opened buyers are to be permitted to raise their bids and the sale is made to the highest bidder),

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and asked us to add same to material in the first letter. He indicated that advertisements in similar situations had been forwarded to this office but to the current date this writer has not seen same.

The first sentence of section 51-05.1-01 of the 1975 Supplement to the North Dakota Century Code provides:

"\* \* \* No person shall conduct a sale in this state as an auctioneer or clerk the same until he has filed with the public service commission an application for an annual auctioneer's or clerk's license. \* \* \* \* \*"

We would assume that the primary enforcement of that provision was intended to be under the provisions of section 51-05.1-07 of the 1975 Supplement to the North Dakota Century Code that:

"PENALTY.--Any person violating any of the provisions of this chapter shall be guilty of an infraction."

We assume that neither the attorney nor the real estate broker in question have filed the application referred to in the above quoted sentence of section 51-05.1-01.

The only express repeal contained in Chapter 449 of the 1975 Session Laws enacting said Chapter 51-05.1 is contained in Section 2 of said chapter stating:

"Section 2. REPEAL. - Chapter 51-05 of the North Dakota Century Code is hereby repealed."

We find in 75 Am Jur 2d 511, 512 Statutes Section 396 the following:

"Section 396. JUDICIAL POLICY. Repeals by implication are not favored. Thus, an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used, because the last or dominant statute admits of no other reasonable construction. Moreover, if two constructions are possible, that one will be adopted which operates to support the earlier act, rather than to repeal it by implication."

We would thus comment prior to going into detail on said Chapter 51-05.1-07, that repeal of the authority given to real estate brokers and salesmen to sell property under Chapter 43-23 of the North Dakota Century Code and authority given to attorneys to sell real property under Chapter 27-11 of the North Dakota Century Code would not be readily implied by reason of the enactment of these new statutes, unless the language thereof admits of no other construction. Both the letter from the real estate broker and the letter from the attorney you enclose do seem to indicate that such "sealed bid" sales have been a recognized part of their practice for quite a period of time. Whether they

would prove such to be a fact in the event of a prosecution under Section 51-05.1-07 is of course speculative at this time though in view of varying advertisements we have noted at various times in the past it does seem very possible that they could do so, and possibly a court might even take judicial notice of such fact pursuant to the authority specified in Section 31-10-02 of the North Dakota Century Code.

Section 51-05.1-05 of the 1975 Supplement to the North Dakota Century Code defines auctioneer as follows:

"51-05.1-05. DEFINITIONS.--

1. An auctioneer within the meaning of this chapter is a person, who for a compensation or valuable consideration, sells or offers for sale either real or personal property at public auction as a whole or partial vocation.

\*\*\*\*\*

3. A single act performed, or isolated transactions in the selling of property at auction for another shall not constitute the person performing, offering, or attempting to perform any of the acts enumerated herein, an auctioneer within the meaning of this chapter." (emphasis supplied by us).

We note further the provisions of Section 51-05.1-01 providing that:

"\* \* \*Nothing in this section shall require an executor or an administrator of an estate, any sheriff or other person selling property pursuant to execution or other court order, or any federal, state, or other public official to be licensed in order to conduct such sale in connection with their official duties, nor shall any state or national bank be required to be bonded as provided herein in order to conduct a sale in this state as a clerk, but shall otherwise comply with all other provisions of this chapter, nor shall the provisions of this chapter apply to the selling at auction of purebred or registered livestock."

As to attorneys they do have a definite function in the sale of real estate, as title examiners, in preparing necessary contracts, and other documentation and in acting for buyer or seller in some phases of the transactions. The term "attorney in fact" is of long standing and with appropriate "power of attorney" an "attorney in fact" can even convey real property - a function an auctioneer, as such, cannot perform. We would note also, that in the specific exceptions to the statute, in regard to executors or administrators sales, execution sales etc. the attorney normally performs at least a supervisory function and in addition, as the attorney normally maintains an appropriate secretarial staff, trust accounts etc. which are not so readily available to an executor or administrator, he may act more directly for such executor, administrator, sheriff etc. The attorney as such, is an officer of the court, and at least to the extent acting as such could be considered a "public official" as specifically exempted under the statute.

The term "public auction" itself is not further defined in the statute. We note the phrase "public auction" is defined in Black's Law Dictionary, Revised Fourth Edition as:

"A sale of property at auction, where any and all persons who choose are permitted to attend and offer bids. The phrase imports a sale to the highest and best bidder with absolute freedom for competitive bidding." State vs. Miller, 52 Mont. 562, 160 P 513-515.

"Though the phrase is frequently used, it is doubtful whether the word 'public' adds anything to the force of the expression, since 'auction' itself imports publicity. If there can be such a thing as a private auction it must be one where the property is sold to the highest bidder, but only certain persons, or a certain class of persons, are permitted to be present or to offer bids."

We note that the letter from the attorney you enclose, does point out that at the "sales" involved the general public is excluded, and that the only persons that can bid are those that originally submitted sealed bids. It would appear to us, that, this is not the type of sale, that has normally been conducted by licensed auctioneers in this state in the past, or is normally being conducted by auctioneers in this state after the adoption of the new law.

In conclusion, as to attorneys, it is our viewpoint that the "whole or partial vocation" of the persons conducting the sales in question is not that of an auctioneer, but rather is that of an "attorney", duly licensed as such and that at least from the information submitted the sales conducted are as part of their vocation as attorneys and counselors at law.

A distinction between the vocation of "auctioneer" and "broker" has long been recognized. Thus we find in *4A Words and Phrases Permanent Edition* 575 under the definition of auctioneer:

"An 'auctioneer' differs from a 'broker' in that the latter both buys and sells, while an auctioneer only sells. By a charter of Henry VII, the business of selling by auction was confined to an officer called an "outroper" and all other persons were prohibited from selling goods or merchandise by public outcry. But long before, and at that time, brokers exercised their trade, so that the two characters were different at that time." Wilkes vs. Ellis 2 H.B. 555, 557.

The statutory definition of "real estate broker" and likewise the statutory definition of "real estate salesman" contained in Section 43-23-06 of the North Dakota Century Code also includes both buying and selling, without limitation as to whether such sale is public or private. (We note with interest that Section 43-23-07 excepts from the operation of the real estate broker licensing law "sales of real estate arising in the usual course of the practice of law" and "person selling real estate as an auctioneer, provided such

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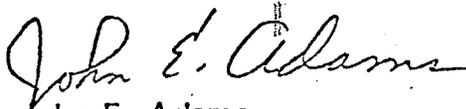
sale is advertised as a bona fide public auction"). We note that under Section 43-23-08 of the 1975 Supplement to the North Dakota Century Code the real estate broker and real estate salesman are required to show their competency in this field by passing an examination on the subject of their profession.

On this basis we would conclude that real estate brokers and salesmen conducting sales where written bids are called for in newspaper advertising, bidders are permitted to raise their bids at the time called for sale, and sales made to the highest bidder are not, on such basis, in violation of the new auctioneer's law.

In conclusion, it appears that there are currently at least three separate professions authorized to sell real estate for others as part of their profession and duly licensed to do such, i. e. auctioneers, attorneys, real estate brokers and real estate salesmen. We find no irreconcilable provisions in these laws in the factual situations you present and thus conclude, that the enactment of the new auctioneer's law did not impliedly repeal any part of the attorneys licensing statutes or the real estate broker and salesmen licensing statutes authorizing them to sell real property to the highest bidder. We are not suggesting that persons not licensed as auctioneers and not falling under any of the exceptions to the auctioneer's licensing laws can regularly advertise and conduct "public auction sales" and list themselves and act as "auctioneers" however, such a situation is not presented by the factual situations outlined in your letter and the enclosures thereto.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

  
John E. Adams  
Assistant Attorney General

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