LETTER OPINION
2013-L-05

July 18, 2013

Mr. Fallon M. Kelly
Ransom County State's Attorney
PO Box 391
Lisbon, ND 58054-0391

Dear Mr. Kelly:

Thank you for your letter asking about the responsibility of a county recorder to record a deed or other recordable instrument requiring a legal description when the deed or other instrument does not contain a legal description but refers to a description contained in another document of record. For the reasons indicated below, it is my opinion that a county recorder may, but is not required to, record a deed or other recordable instrument that does not include a legal description but contains, instead, a reference to an adequate legal description found in another instrument already of record.

ANALYSIS

You ask about the responsibility of a county recorder to record a deed or other instrument otherwise recordable under N.D.C.C. ch. 47-19 if the instrument lacks a legal description but instead makes a reference to another instrument previously recorded in the recorder's office that contains an adequate legal description.

Section 47-19-08, N.D.C.C., provides that an "instrument is deemed to be recorded when, whether entitled to record or not, it is deposited with the proper officer for record, if such instrument is subsequently recorded."[1] Section 11-18-05(1)(a)(3), N.D.C.C., provides that "[e]ach real estate instrument must have a legal description considered to be adequate by the recorder before such instrument will be accepted for recording."[2] The real estate instrument referenced in this statute includes deeds, mortgages, and all other instruments to be recorded which affect title to real estate.[3] In addition to the legal description[4], a deed

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[1] N.D.C.C. § 47-19-08.
[2] N.D.C.C. § 11-18-05(1)(a)(3) (emphasis added).
[3] N.D.C.C. § 11-18-05(1).
[4] "Legal description" is defined as "[a] formal description of real property, including a description of any part subject to an easement or reservation, complete enough that a particular piece of land can be located and identified. The description can be made by reference to a government survey, metes and bounds, or lot numbers of a recorded plat." Black's Law Dictionary 903 (7th ed. 1999).

must also contain the post office and street address of the grantee named in the deed.[5] Curative affidavits are also required to contain a description of the real property in question in order to be recorded.[6] In addition to a legal description,[7] a mortgage must contain the post office address of the mortgagee to be recorded.[8] These statutes make no explicit exceptions for incorporating a legal description by reference.

In your letter, you set forth an example of a deed that does not contain a legal description, but instead refers to other instruments that are already recorded in the recorder's office that contain specific legal descriptions. I have found no North Dakota statute, court case, or opinion of this office that compels a county recorder to accept a deed or other instrument for recording under the circumstances you present. As you note in your letter, there is a North Dakota case that arose in a different context dealing with whether a legal description contained within a deed was sufficient or proper. In First Sec. Bank v. Enyart, the North Dakota Supreme Court noted that:

> In the context of a description in a deed, we have said that "the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property." . . . A liberal rule of construction will be applied, and "if a surveyor with the deed before him can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient." State v. Rosenquist, supra, 51 N.W.2d at 779.[9]

The Enyart case is distinguishable in that it discusses a situation involving a deficient legal description which was contained in a deed, and not the situation you raise which involves a deed containing no legal description whatsoever (even though N.D.C.C. § 11-18-05(1)(a)(3) requires a legal description to be included in an instrument in order for it to be recorded).[10] While, as discussed below, the Enyart case and similar authorities, by analogy, may provide some support for permitting a recorder to record the type of deed you describe, there is no requirement in those cases compelling a recorder to do so.

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[5] N.D.C.C. § 47-19-05.
[6] N.D.C.C. §§ 47-19-11 and 47-19-12.
[7] See N.D.C.C. §§ 35-03-01 and 35-03-05.
[8] N.D.C.C. § 35-03-04.
[9] First Sec. Bank v. Enyart, 439 N.W.2d 801, 807-08 (N.D. 1989) (emphasis added) (quoting State v. Rosenquist, 51 N.W.2d 767, 778 (N.D. 1952)). The general rule with regard to sufficiency of a legal description of mortgaged property is that the mortgage is void only if the legal description is so faulty that the land cannot be located. See Poyzer v. Amenia Seed and Grain Co., 381 N.W.2d 192 (N.D. 1986).
[10] Further, the Enyart case is addressing how a court or surveyor might piece evidence together to determine if a legal description is sufficient - not a county recorder. A county recorder is primarily a filing officer and may not be in the best position to make such legal and factual determinations.

In fact, in an earlier opinion discussing the tract index and grantor-grantee indexes maintained by the county recorders, this office concluded that:

> [B]ecause the tract index -- by necessity -- and because the grantor and grantee indexes -- by statute -- require a legal description, every document affecting title to real property filed with a register of deeds must contain, for it to be placed in either index, a legal description of the subject property. See also 1974 N.D. Op. Att'y Gen. 323, 326. ("We would conclude that a deed purporting to convey real property must contain a description of the real property to be conveyed in order to be entitled to record.") This view is supported by N.D.C.C. § 11-18-05(1)(a)(3) that says all documents "affecting title" to real estate "must have a legal description considered to be adequate by the register of deeds before such instrument will be accepted for recording."[11]

"Only instruments contemplated by the recording act are entitled to record under such statute. . . . [A] deed which, on its face, complies with all statutory requirements, is entitled to be recorded."[12] In the example you provide, the deed would not on its face comply with the statutory requirement since it lacks any legal description whatsoever.

The foregoing statutes and authorities indicate that inclusion of a legal description in a deed or other recordable instrument is a prerequisite to recording such an instrument. As noted above, there is no language in the applicable law compelling a county recorder to record a deed or other instrument which lacks an adequate legal description. In the absence of a clear statutory or judicial mandate, determining that the county recorder must record an instrument which lacks the requisite legal description would not be reasonable, particularly since county recorders are accorded some discretion and leeway in determining whether to accept an instrument for recording.[13]

Although a county recorder is not compelled to record an instrument which lacks the requisite legal description, the statute does not preclude a county recorder from recording an instrument that only makes reference to another recorded document if the recorder is satisfied with the adequacy of the reference.[14] For example, in N.D.A.G. 74-323, it was noted that while the requirements for a tract index and a grantor-grantee index required a

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[11] N.D.A.G. 88-18.

[12] 26A C.J.S. Deeds § 161 (2011) (citations omitted); see generally N.D.C.C. ch. 47-19.

[13] See N.D.C.C. § 11-18-05(1)(a)(3) ("Each real estate instrument must have a legal description considered to be adequate by the recorder before such instrument will be accepted for recording.") (emphasis added); N.D.C.C. § 47-19-08 ("An instrument is deemed to be recorded when, whether entitled to record or not, it is deposited with the proper officer for record, if such instrument is subsequently recorded.").

[14] Id.

legal description of the property involved, this requirement might be satisfied by including a reference in the deed to another document which contained the description:

> These requirements clearly indicate that the Register of Deeds must have some source of determination as to the property involved or purported to be involved in the transfer. If the subject deed had in fact referred to other documents or instruments of record whereby some basis of determination could be had, a different result may be reached.[15]

Along the same lines, one authority (not discussing North Dakota law) has stated that:

> It is not essential that a deed in and of itself set out a complete description or designation of the land which it is intended to convey. On the principle that that is certain which may be made certain, real estate is sufficiently described in a deed by reference for identification to a map, another deed, or patent in which such land is sufficiently described to be identifiable. . . . Such a reference to another instrument for description of the subject matter has the effect of incorporating such instrument into the description so that that which is described will pass. When reference is made to a map or other document as describing the land, the description appearing in such map or document is made a part of the deed as fully and effectually as if copied therein, provided the deed and the document of reference together yield such description as would have been sufficient if set forth entirely in the deed.[16]

Similarly, in the context of the validity of a deed (again not analyzing North Dakota law), it has been noted that:

> In order for a deed instrument to constitute a valid conveyance, it is not necessary that a description of the land be contained in the deed, if it contains sufficient information so that by reference to some document or instrument referred to in the deed, a true and accurate description can be ascertained. This rule applies generally to a contemporaneous agreement; to other deeds or conveyances sufficiently identified; a mortgage; a sheriff's deed; a patent; public records; recorded deeds; or to government records containing a description of the property involved.[17]

And:

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[15] N.D.A.G. 74-323 (emphasis added); see also N.D.A.G. 95-L-289 (statutory requirement that mortgage contain an adequate statement of interest in order to be recorded may be satisfied by incorporating by reference interest rates found in other publicly available sources).

[16] 23 Am. Jur. 2d Deeds § 50 (2002) (citations omitted).

[17] 26A C.J.S. Deeds § 55 (2011) (citations omitted).

> By a proper reference in a deed to another instrument that contains a description of the property conveyed, the latter instrument may in many cases be considered as incorporated in the former and the two may be construed together for the purpose of identifying the particular property intended to be conveyed by the deed. Such a rule has been affirmed in the case of a reference to another deed, a mortgage, a government patent, a tax assessment roll, or a will. Incorporation of a deed by reference is as effective as if the deed referred to had been copied into the deed making the reference.[18]

In determining whether the statute of frauds relating to real property descriptions in land contracts has been satisfied, courts have also held that written agreements are sufficient if they refer to any record, extrinsic or not, which contains a sufficient description of the property.[19]

Thus, there is authority for a county recorder, acting in that official's reasonable discretion, to record a deed that incorporates a legal description by reference.

Based on the foregoing, it is my opinion that if a county recorder is presented with a deed or other recordable instrument that lacks a legal description but references another instrument already on file that adequately describes the property, the recorder may, but is not required to, accept the instrument for recording.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pab

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[20]

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[18] 26A C.J.S. Deeds § 270 (2011) (citations omitted) (emphasis added).

[19] See generally W.W. Allen, Annot., *Sufficiency of Description or Designation of Land in Contract or Memorandum of Sale, Under Statute of Frauds*, 23 A.L.R.2d 6 (1952); see also Rohrich v. Kaplan, 248 N.W.2d 801, 804 (N.D. 1977) ("in order [for a writing under the statute of frauds] to be sufficient, a memorandum need not be a complete contract in itself" and a description of the land can be sufficient if the writing intelligently identifies the subject matter involved); Goetz v. Hubbell, 266 N.W. 836 (N.D. 1936) (while parol evidence may not be considered to vary the terms of a writing, it may be introduced to supply proof in harmony with the provisions in the writing which show payment and a description of the real estate).

[20] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).