N.D.A.G. Letter to Lamb (Feb. 27, 1986)

February 27, 1986

Mr. Joseph S. Lamb
Executive Vice President
The Bank of North Dakota
Bismarck, ND 58502-5509

Dear Joe:

Thank you for your letter dated January 9, 1986, in which you ask whether the Bank may only take a first or a second mortgage as security for a loan from the revolving loan fund established under N.D.C.C. §6-09-15.5, or whether it would also be permissible for the Bank to take other collateral, such as an assignment of a vendee's interest in a contract for deed as security for a loan.

After reviewing the statute in question and relevant authorities, it appears that what you are really asking is whether an assignment of a vendee's interest in a contract for deed is equivalent to a second mortgage as security for a loan from the revolving loan fund.

N.D.C.C. §6-09-15.5(3) provides, in part, as follows:

> 6-09-15.5. BANK LOANS TO BEGINNING FARMERS -- REVOLV-
> ING LOAN FUND -- REQUIREMENTS.
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> 3.   . . . The Bank may do all things and acts, may take such security, and may establish additional terms and conditions as deemed necessary to make a loan under this section. The Bank may take a second mortgage as security for a loan from the fund if a beginning farmer's real estate financing involves a loan from a source other than the state. . . .
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> * * *

The provisions of the first sentence quoted above appear to give the Bank unlimited discretion in determining the necessary collateral to be taken as security for a loan from the revolving loan fund. However, by providing in the second sentence that the Bank must at least take a second mortgage as security for a loan if a borrower's financing involves a loan from a source other than the state, the Legislature apparently requires the Bank must take a first mortgage in all other circumstances.

It is my opinion that the Bank may take either an assignment of a vendee's interest in a contract for deed or a mortgage from a vendee as security for a loan made from the revolving loan fund.

A mortgage is defined in N.D.C.C. § 35-03-01.1 as "a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession, and includes a transfer of an interest in real property, other than a trust, made only to secure the performance of an act."

Under the above definition, a properly worded assignment of a vendee's interest in a contract for deed, which clearly provided that the assignee of the assignment was not assuming the obligation of the vendee to perform the contract but was taking the assignment solely for the purpose of securing the vendee's obligation to the assignee in their relationship as lender and borrower, would be a mortgage of the vendee's interest under the contract for deed.

The North Dakota Supreme Court has held that a purchaser in possession under a contract for deed has an equitable interest in the property which can be sold or mortgaged. Simonson v. Wenzel, 147 N.W. 804, 805 (N.D. 1914). The North Dakota Supreme Court has also held that where real estate is sold under a contract for deed, the relationship between the vendor and the vendee is also that of mortgagor and mortgagee. D.S.B. Johnston Land Co. v. Whipple, 234 N.W. 59 (N.D. 1930).

It follows from the foregoing that the Bank would be taking a second mortgage as security for a loan if it either received an assignment of a vendee's interest in a contract for deed or received a mortgage from the vendee under a contract for deed.

Finally, it is my opinion that the language in N.D.C.C. § 6-09-15.5 set out above should not be read literally to allow the Bank to take a second mortgage as security only when a borrower's financing involves a "loan" from a source other than the state. Instead, this statute should be read to allow the Bank to take a second mortgage as security for a loan if a borrower's financing involves a source other than the state including a vendor under a contract for deed with the borrower.

Sincerely,

Nicholas J. Spaeth

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