

**OPINION
74-31**

June 26, 1974 (OPINION)

Mr. R. E. Lommen
State Land Commissioner
State Land Department
Sixth Floor, State Capitol
Bismarck, ND 58501

Dear Mr. Lommen:

This is in response to your letter of May 31, 1974, wherein your request an opinion of this office relative to a recent land sale of the Board of University and School Lands, conducted by and through the State Land Department and our interpretation of the application of Section 15-06-27 of the North Dakota Century Code. Insofar as your letter of inquiry makes specific mention of said Section 15-06-27 of the North Dakota Century Code, we assume that the lands which were the subject of sale and the subject of the specific land transaction referred to therein were, in fact, original grant lands. You submit the following factual situation and inquiry in your letter:

"Yesterday, the Board of University and School Lands held their monthly meeting and a question arose as to their authority on which they requested an Attorney General's Opinion. I will briefly try to relate to you the facts under which that question arose.

On April 4th, this department held land sales at Stanley, North Dakota. Mr. Art Harstad was the successful bidder on three quarters of land one for \$51,000.00, and one for \$54,000.00 and the other for \$61,000.00. Mr. Orville Harstad was the successful bidder on another quarter of land located in Mountrail County for \$61,000.00. Mr. Art Harstad gave a check for \$33,200.00 for the 20 percent down payment and Mr. Orville Harstad gave a check for \$12,200 for his 20 percent down payment. Both parties subsequently stopped payment on those checks. The Board then authorized the collection of a 10 percent penalty as provided in Section 15-06-27 of the North Dakota Century Code. Mr. Art Harstad's penalty amounts to \$16,600.00 for the three quarters and Mr. Orville Harstad's penalty amounts to \$6,100.00 for the quarter on which he was the successful bidder.

This department instituted negotiations with the parties involved and Mr. Ralph Bekken, Attorney at Law, Stanley, North Dakota, represents both parties. Mr. Bekken presented a compromise offer on this penalty provisions which amounted to 5 percent rather than 10 percent. Mr. Bekken presented a cashier's check for \$8,300.00 for Art Harstad's penalty and a cashier's check for \$3,050.00 for Mr. Orville Harstad's penalty.

This brings us to the specific question which we would propose to your office:

Does the Board of University and School Lands have the power, or is it within its authority, to compromise, or settle for

less than, the 10 percent penalty as provided in Section 15-06-27 of the North Dakota Century Code?"

Initially, we would note the provisions of Section 15-06-27 of the North Dakota Century Code, which provides as follows:

"15-06-27. Terms of sale - Sale to highest bidder - Penalty for failure to make first payment. The highest bidder for any tract of land offered for sale under this chapter shall be declared the purchaser thereof. The purchaser shall pay twenty percent of the purchase price at the time the contract is executed; thereafter annual payments shall be made of not less than six percent of the original purchase price. An amount equal to not less than three percent per annum of the unpaid principal shall be credited to interest and the balance shall be applied as payment on principal as credit on the purchase price. If the purchaser fails to pay the amount required to be paid at the time of sale, the commissioner or other person conducting the sale may reoffer the tract for sale immediately, but no bid shall be received from the person failing to pay as aforesaid. Any person refusing or neglecting to make such initial payment after purchase shall forfeit an amount equal to ten percent of the purchase price or final bid to be recovered for the benefit of the fund to which the land belongs by civil suit in the name of the state." (emphasis supplied)

It is to be noted that this statute, in governing the terms of sale, requirements, and penalty, is mandatory rather than permissive or directory in that the same provides "shall" rather than "may", or other similar permissive language. To this extent, it appears clear that the legislature intended the terms, requirements and penalty specified by the statute to be absolute. We cannot conclude other than that the same stands as a clear and absolute mandate governing the Board of University and School Lands as the same concerns the sales of original grant lands.

We would also note that the constitutional authority of the Board of University and School Lands is specifically limited to laws enacted by the legislative assembly. Section 156 of the Constitution of North Dakota provides as follows:

"Section 156. The superintendent of public instruction, governor, attorney general, secretary of state and state auditor shall constitute a board of commissioners, which shall be denominated the "board of University and School Lands", and, subject to the provisions of this article and any law that may be passed by the legislative assembly, said board shall have control of the appraisal, sale, rental, and disposal of all school and university lands, and the proceeds from the sale of such lands shall be invested as provided by law." (emphasis supplied)

Accordingly, the authority of the Board of University and School Lands is specifically limited to the laws enacted by the legislative assembly, one of which is Section 15-06-27 of the North Dakota Century Code. To the extent that the legislative mandate appears clear and uncompromising as the same applied to sales of original

grant lands and the penalty prescribed in Section 15-06-27, as hereinbefore noted, it appears that the board is without authority to negotiate or otherwise reduce the amount of penalty for failure of a purchaser to make the first payment.

The obvious purpose intended to be accomplished by the legislature in enacting Section 15-06-27, was to insure that bidding at such sales would be in good faith and free from fraudulent intents. While the legislature's specification of penalty may seem harsh in certain instances, we cannot question the sound discretion of the legislature and it does appear that the mandate of the statute does afford the insurance that bidding at such sales will be in good faith. In applying the factual situation described in your letter of inquiry, it appears that other bidders were undoubtedly in attendance and engaged in bidding whereby the sales price was established as specified in your letter. From that standpoint, it would appear unfair to other bidders if the successful bidder were assessed a reduced penalty upon failure to make the first payment since other bidders were, by such highest bid, deprived of the benefits of purchase upon their highest, but unsuccessful, bid. It would also appear unfair and contrary to the best interests of the funds to which the subject lands belong to the extent that a commitment made by the highest bidder is released, not only from his commitment to purchase, but also at a reduced penalty for failure to make the initial payment upon such purchase as provided by law.

In addition to the insurance against fraud which the penalty prescribed by Section 15-06-27 affords, the clear intent of the assessment provision of a specified penalty was to serve as a reparation for such contingent losses which may result to the trust funds.

Accordingly, and in direct response to your question, it is our opinion that the Board of University and School Lands does not have the power or authority to compromise, settle, or reduce the penalty of ten percent of the purchase as provided in Section 15-06-27 of the North Dakota Century Code.

Sincerely yours,

ALLEN I. OLSON

Attorney General