

**OPINION
60-251**

December 19, 1960 (OPINION)

TAXATION

RE: Special Assessments - Tax Deed - Extinguishment of Lien

This is reply to your letter of October 21, 1960, concerning special assessments. We are sorry that it took this length of time to formulate our answer; however, the questions which you raised were complex. The following discussion contains our conclusions.

Question: When a county obtains a tax deed to city or village lots for both delinquent general taxes and delinquent special assessments is the lien for special assessments extinguished?

Answer: Our conclusion is that the lien for special assessments is extinguished and that no further installments of the assessment are collectible whether or not such installments have been certified to the county auditor by the city auditor or village clerk, as provided in section 40-2411 of the North Dakota Revised Code of 1943.

Section 40-2401 of the North Dakota Revised Code of 1943 provides in part that:

A special assessment, together with all interest and penalties which accrue thereon, shall be and remain a lien upon the property upon which the assessment is levied from the time the assessment list is approved by the governing body until the assessment is paid fully. Such lien shall have precedence over all other liens except general tax liens and shall not be divested by any judicial sale."

Section 40-2501, 1957 Supplement to the North Dakota Revised Code of 1943 provides in part as follows:

Real property shall be sold to enforce the collection of special assessments or installments of special assessments which have become delinquent at the same time and in the same manner as is provided in the title Taxation for the sale of real property for delinquent general taxes."

Section 57-0240(1) of the North Dakota Revised Code of 1943 provides that:

1. Taxes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state."

With respect to the rights of the county when the lot has been sold to it for taxes and not redeemed, sections 57-2805, 57-2807, 57-2808, and 57-2010 of the North Dakota Revised Code of 1943, and section 57-2809 of the 1957 Supplement to the North Dakota Revised Code of

1943 include the following provisions:

57-2805. * * * * The notice of the expiration of the period of redemption which the county auditor is required to serve by registered mail shall be in the following form: * * * * unless redemption is made from each of said tax sale certificates on or before October first, after the date of this notice, tax deeds will be issued to the county, granting to and vesting in it, the absolute title in fee to said real property, and foreclosing all rights of redemption, and all other rights of the owner mortgagees, and lienholders and other persons interested therein as may appear from the records of the register of deeds and the clerk of the district court of said county.* * * *" (Emphasis supplied).

57-2807. * * * * The notice of the expiration of the period of redemption to be served by publication shall be in the following form: * * * * and that unless redemption shall be made from such tax sale, on or before October first after the date of this notice, the same will become the absolute property in fee of this county, and the former owner thereof, mortgagees, lienholders, and other persons interested therein will be forever foreclosed and barred from asserting any further rights to such real estate whatsoever." (Emphasis supplied).

57-2808. * * * * The failure of the owner or any mortgagee, or other lienholder, to redeem such lands before the period of redemption expires, shall operate:

- 1) To pass all of the right, title, and interest of the owner, mortgagee, or lienholder in and to said premises, to the county by operation of law; * * *."

57-2809. TAX DEED TO BE ISSUED. After the expiration of the period of redemption, the county auditor shall issue a tax deed to the county, in the usual form, for all real estate which was not redeemed within the period of redemption. Such tax deed shall pass the absolute property in fee to the county, free from all encumbrances whatsoever.* * *." (Emphasis supplied).

57-2810. APPRAISAL FOR ANNUAL SALE. All real estate acquired by tax deed shall be appraised by the board of county commissioners at least thirty days prior to the annual sale provided by this chapter. The appraised price shall be sufficient to cover all general taxes, special assessments hail indemnity taxes, penalties, interest, and costs, which were levied or extended against the property at the time of the service of the notice of expiration of the period of redemption. If the fair market value of such property is less than such total amount, the board shall fix a fair and just minimum sale price for such property." (Emphasis supplied).

With respect to the rights of a private purchaser when the lot has been sold to him for taxes and not redeemed, section 57-2705 of the 1957 Supplement to the North Dakota Revised Code of 1943 provides in part as follows:

57-2705. TAX DEED TO BE ISSUED. At the expiration of the period of redemption, and after the filing of the proof of service of the notice of expiration of such period, the county auditor, if no redemption has been made, on surrender of the certificate of tax sale to him, shall execute to the owner of the certificate, his heirs and assigns, in the name of the state, a deed of the land, remaining unredeemed, which shall vest in the said certificate owner, his heirs and assigns, an absolute estate in fee simple in such lands, subject to claims of the state or other taxing districts on account of taxes or other liens or encumbrances. * * *." (Emphasis supplied).

Prior to the 1943 Code the underlined portion of the above section did not include the words "other taxing districts." These words were added by the 1943 code revisers with no explanation other than the single Reviser's Note which states: "This section has been divided into three sections for clarity. No change in meaning." Prior to the 1943 Code our Supreme Court in 1929 held in Baird v. Stubbins 58 N.D. 351, 355, 226 N.W. 529, 531, in reference to the underlined part of section 57-2705 as it appeared in Compiled Laws 1913, section 2206 (that is, without the words "other taxing districts") that:

The taxes or liens for which the state is given priority over a tax deed are only 'those coming into existence subsequent to the tax upon which the deed is issued.' Emmons County v. Bennett 9 N.D. 131, 133, 81 N.W. 22."

Since the code revisers added the words "other taxing districts" to section 57-2705 without any intention of changing the meaning, it must be assumed that the construction put on the provision by the Supreme Court was not changed and therefore still applies. Under this construction the deed issued pursuant to section 57-2705 to a private purchaser would have the effect, as will be explained, of extinguishing any claim by city or village for any unpaid installments of special assessments existing at the time the deed is issued regardless of whether or not the installments had been certified to the county auditor. This construction harmonizes section 57-2705 with sections in chapter 57-28 quoted above, which relate to the rights of a private purchaser when the land is not redeemed.

A special assessment levied by a city or village, to the extent the assessment or any installment of it is unpaid, is a lien against the property assessed and is therefore an "other" lien or encumbrance of a taxing district other than the state within the meaning of section 57-2705, which relates to private purchasers. Any part of an unpaid special is also a lien within the meaning of sections 57-2805, 57-2807, and 57-2808(1), and any rights based on the lien that the city or village might claim are forever foreclosed and barred by the failure to redeem from the tax sale. Similarly, the unpaid installments of a special assessment are an encumbrance within the meaning of section 57-2809, which lien is extinguished by the failure to redeem and by issuance of the tax deed.

An examination of the provisions of the special assessment law and of other statutes already quoted makes it clear beyond a doubt that the

entire amount of a special assessment, whether or not payable in installments, is a lien on property improved regardless of whether or not all of the installments were certified to the county auditor, which lien is inferior to the lien for general taxes against the improved property. This is because the entire amount of a special assessment, whether or not it is payable in installments, attaches as a lien on the property "from the time the assessment list is approved by the governing body until the assessment is fully paid" which "lien shall have precedence over all other liens except general tax liens." (Section 40-2401). Consistent with this priority provision is section 57-0240(1) which provides that "Taxes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state." "Persons" as used in section 57-0240(1) includes a city or village - see section 57-0201(5) which defines "person" as including a firm or corporation and section 1-0128 which provides that "The word 'person,' except when used by way of contrast, shall include not only a human being, but a body politic or corporate."

In *Halvorson v. Boehm* 76 N.W.2d. 178, 180 (N.D. 1956), our Supreme Court recognized that a lien for the entire assessment attached when the assessment list was approved, although an exception as between vendor and vendee was provided in section 40-2403 with respect to installments not certified to the county auditor.

Section 40-2401, already quoted, refers to the fact that the entire amount of a special assessment is "levied" upon the property assessed. Section 57-2810, also quoted above, in providing for appraisal of land for annual sale which the county acquired by tax deed, provides that the appraised price shall be sufficient to cover, among other things, all special assessments which were levied against the property at the time of the service of the notice of the expiration of the period of redemption. This clearly indicates that all unpaid installments of special assessments, whether or not certified to the county auditor, are extinguished by the sale for delinquent general taxes; otherwise section 57-2810 would not include any requirement that the appraised value include the amount of special assessments that were levied against the property.

The foregoing construction of the statutes does not prejudice the rights of a city or village because the city or village has the right to redeem from tax sale or to purchase the taxes or the property at all times prior to sale of the property by the county after it has taken a tax deed. Section 57-2417 provides that "any person other than the county auditor, county treasurer, or any deputy or clerk of either, may become the purchaser at a tax sale." As already noted, "person" includes a city or village. See sections 57-0101(5) and 1-0128. If the county has purchased the tax sale certificates and they have not been assigned, the city or village can purchase the certificates from the county, as provided in section 40-2509 of the North Dakota Revised Code of 1943. See also section 40-2510. If a private person purchases the tax certificates, the city or village has a right to redeem prior to expiration of the period of redemption - see sections 57-2601 and 57-2602(1), which latter provision permits "any person or corporation" to redeem. If a tax deed is issued to the county pursuant to section 57-2809, the board of county commissioners must appraise the land at amount to cover, among other

things, "special assessments which are levied against the property" unless the fair market value is less than that amount - see section 57-2810. The governing body of any taxing district has a right to be heard at the hearing on the appraisal - see section 57-2811 - and can appeal the appraisal as finally determined by the board of county commissioners - see section 57-2812. After the appraisal is determined, the city or village has the right to purchase the property at the appraised price, which right is paramount to that of the former owner or his heirs - see section 57-2819 of the 1957 Supplement to the North Dakota Revised Code of 1943. Thus, the city or village has the right to purchase the tax certificates before expiration of the period of redemption or to purchase the property from the county after it has been issued a tax deed and before it is sold, which right protects the interest of the city or village.

If the city or village does not purchase or redeem the tax sale certificates or if it does not exercise its right under section 57-2819 to be the first purchaser from the county after tax deed has been issued to the county, the city or village is still entitled to share in the proceeds of the sale of the property when it is sold by the county if the proceeds are more than sufficient to cover the amount of the general taxes - see section 57-2820.

Thus it is evident that a city or village special assessment is at all times protected to at least the extent of the fair market value of the property assessed for the improvement, except that its rights are always inferior to the claim for general property taxes.

The foregoing construction of the statutes cited is in conflict with the ruling of the Attorney General, dated October 11, 1945, and published on pages 255-256 of the Report of the Attorney General for July 1, 1944, to June 30, 1946. It is also in conflict with the ruling of October 25, 1947, published on pages 57-58 of the Report of the Attorney General for July 1, 1946, to June 30, 1948. The latter ruling when read in conjunction with the letter of October 23, 1947, from Norbert J. Muggli, Stark County State's Attorney, who requested it, definitely implies that the county must pay the annual installments of special assessments certified to it on land acquired by the county through tax deed proceedings even though the special assessment out of which the installments arose was levied by the city before the county obtained its tax deed. It is submitted that both of these former rulings are in error and should be overruled.

On the basis of the conclusions reached in the opinion

- 1) If a city repurchased from the county before the thirty days notice provided by section 57-2819 of the 1957 Supplement to the North Dakota Revised Code of 1943 has expired, the unpaid installments of the special assessment, whether or not certified to the county, would not be reinstated. They were extinguished by failure to redeem and by issuance of the tax deed to the county.
- 2) If a person, other than a former owner, his executor or administrator or member of his immediate family purchases the property after thirty day period for repurchase has

expired, the unpaid installments of special assessment, whether or not certified to the county, would be extinguished.

- 3) If the former owner, his executor or administrator or member of his immediate family, repurchases after the thirty day period for the city to repurchase has expired, such a purchaser would have to pay the amount specified in section 57-2819 of the 1957 Supplement to the North Dakota Revised Code of 1943.
- 4) If the county holds a tax deed on property obtained through tax deed proceedings for both delinquent general taxes and delinquent installments of a special assessment, the county would not have to pay any of the unpaid installments arising out of that special assessment.
- 5) A purchaser of land from the county which held under tax deed does not have to pay any accrued or unpaid installments of a special assessment which arose out of the special assessment for which delinquent installments were sold with delinquent general taxes.

LESLIE R. BURGUM

Attorney General