

**OPINION
71-247**

October 21, 1971 (OPINION)

Mr. John O. Garaas

State's Attorney

Cass County

RE: Municipal Industrial Development Act - Mortgage -

Foreclosure Proceedings

This is in response to your letter of October 12, 1971, wherein you request an opinion of this office regarding the construction of section 40-57-03 of the North Dakota Century Code, as the same relates to the foreclosure of property acquired under the Municipal Industrial Development Act. You submit the following facts and inquiry in your letter:

"I am requesting an opinion from your office as to whether the County of Cass, State of North Dakota would be able to give a quit claim deed to certain property to the Bank of North Dakota. The Bank of North Dakota is trustee for the bondholders and also is a bondholder itself.

"This involves an action entitled The State of North Dakota doing business as The Bank of North Dakota v. Lake Agassiz Sugar Corporation and other defendants wherein the plaintiff, State of North Dakota doing business as the Bank of North Dakota, is seeking to foreclose a mortgage it holds on the subject property as trustee for the bondholders and further to recover past due rentals from Lake Agassiz and Northland Research. The property consists of real estate and improvements thereon near Mapleton in Cass County which was to be used for the processing of corn sugar.

"Mr. Herman Wegner of the firm of Wegner, Fraase and Cooke who is Special Assistant Attorney General for the State of North Dakota doing business as the Bank of North Dakota in said action has requested a quit claim deed from Cass County, one of the defendants, to the Bank of North Dakota for the purpose of shortening the time necessary for a foreclosure and the running of the redemption period in order that the corn sugar plant could be placed on the market probably a year earlier than would otherwise be the case. The bank intends, if it receives a quit claim deed, to institute an action to cancel the outstanding lease which lease would not be affected by a foreclosure of the mortgage. The quit claim is to be made subject to the mortgage and indenture of trust and shall not merge with the lien of said mortgage. It is conceded that if a quit claim is obtained and the lease is cancelled, it would still be necessary to obtain the consent of bondholders before any disposition could be made of the plant for less than par value of the bonds and accrued but unpaid interest. The plant

has now been vacant for almost four years and physical deterioration also requires haste in finding a market or use for it.

"The County of Cass was involved as a vehicle in issuing bonds pursuant to the Municipal Industrial Development Act of 1955 (Chapter 40-57 of the North Dakota Century Code). I bring to your attention subsection 9 of section 40-57-03 which gives a municipality power to sell and convey properties so long as there is no impairment of the rights or interests of bondholders. My position in the action is that Cass County shall in no way ever be held liable to the bondholders or anyone else and I do not want such liability to be created as a result of this proposed quit claim deed.

"The question is, can the County of Cass make such a quit claim deed and would the execution of such deed create any liability on the part of the County of Cass? I have enclosed a copy of the proposed quit claim deed. I would appreciate an early response."

relating your question to the factual situation which you have described, it would appear that the sole question rests upon the interpretation of subsection 9 of section 40-57-03 of the North Dakota Century Code. The same provides as follows:

"POWERS OF MUNICIPALITY. Any municipality, in addition to the powers prescribed elsewhere by the laws of this state, shall have the power to:

* * *

9. Sell and convey all properties acquired in connection with such projects, including without limitation the sale and conveyance thereof subject to such mortgage as herein provided, and the sale and conveyance thereof to the lessee under an option granted in the lease of the project, for such price, and at such time as the governing body of the municipality may determine, provided, however, that no sale or conveyance of such properties shall ever be made in such manner as to impair the rights or interests of the holder, or holders, of any bonds issued under the authority of this chapter;

* * * "

Your question, however, directs itself to the liability of the municipality in all regard, i. e., "would the execution of such deed create any liability on the part of the County of Cass?" It is noted that the statute as quoted above refers only to "rights and interests of the holder, or holders, of any bonds issued under the authority of this chapter;", for which reason it would appear that your question is broader than the liability contemplated by the statute in the event of any impairment of rights or interests. Insofar as the conveyance which is contemplated by the county by quit claim deed is to the trustee of the bondholders, it is difficult to see where any rights or interests of such bondholders could be impaired by such conveyance. With regard to possible liability of the county,

however, from all other imaginable sources, it is near impossibility to foresee all of the possible ramifications of such conveyance which could possibly result in some form of liability. It appears clear that the intent and result of such a conveyance would cut off the redemption period otherwise prescribed by statute as a right of the mortgagor. Such redemption period is clearly a right created by statute and the conveyance impairs that right, however, that right would appear to be in favor of the county and those persons or other entities claiming through the county by virtue of its title to the property upon which foreclosure proceedings are sought rather than other possible interested parties.

We would further note that we do not have a copy of the lease which is currently in effect on the subject premises nor of any judgments that may have been rendered in action to which your inquiry refers. For this reason it would be impossible for this office to render any legal conclusion with regard to any possible liability which may accrue against the county for the execution and delivery of the subject conveyance documents. It may be that the lessee of the property involved can successfully claim that its rights have been impaired by virtue of the conveyance to the extent that the lease is either transferred to the grantee of the property or that the lease is effectively terminated by such conveyance.

In conclusion and in direct reply to your inquiry, we are of the opinion that the County of Cass may convey the subject properties to the state of North Dakota, doing business as the Bank of North Dakota, as trustee, and that the same will not expose the county to liability to the holder or holders of any bonds issued under the authority of Chapter 40-57 of the North Dakota Century Code by reason of impairment of such rights and interests as may thereunder be founded and that the conveyance is within the contemplation of and not prohibited by the statute under the instant situation and facts as submitted to this office.

With regard to any possible liability that may accrue to the county, however, it would be impossible for this office to envision all of the possible ramifications that could arise under the conveyance, for which reason we are of the opinion that a liability could possibly arise whereby the county may become liable to persons or entities other than the ones section 40-57-03 of the North Dakota Century Code purports to protect.

We trust that in view of the limited facts submitted to this office upon which to render an opinion, the foregoing will adequately set forth our opinion as to the interpretation of the statute in question and its effect on holders of bonds issued thereunder.

HELGI JOHANNESON

Attorney General