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Senate Political Subdivisions Committee  
North Dakota State Legislature  
Attn: Chairman Burckhard

RE: Senate Bill 2223 – A bill relating to Deed in Lieu of Foreclosure

Dear Chairman Burckhard:

I am a partner in the law firm of Crowley Fleck PLLP and have served as the Chair of the Real Property Section of the State Bar Association of North Dakota since 2017. I submit this written testimony in opposition to Senate Bill 2223.

I have reviewed the written documentation submitted by the North Dakota Banker's Association by and through Rick Clayburgh. I concur with and fully support their analysis of this disastrous bill. Rather than beleaguer the points already made, I will limit my testimony to points not already addressed.

**I. Senate Bill 2223 infringes upon the rights of North Dakota citizens to contract.**

First and foremost, deeds are construed as contracts in the State of North Dakota. *See Freidig v. Weed*, 868 N.W.2d 546 (N.D. 2015), *Hallin v. Lyngstad*, 837 N.W.2d 888 (N.D. 2013). A deed in lieu of foreclosure is no different. While financial aspects of a debtor's ability to repay legitimate monetary obligations may be at the forefront of a debtor's decision to enter into a deed in lieu of foreclosure, the fact of the matter is that the debtor is under no obligation to enter into a deed in lieu of foreclosure. By refusing to enter into a deed in lieu of foreclosure, the debtor may force the creditor to commence a foreclosure action to obtain the exact result that this bill seeks to make law.

Senate Bill 2223 all but eliminates a debtor's right to engage in contract negotiations with a creditor in order to facilitate the resolution of the debtor's financial predicament. The deed in lieu, when available, provides a tool that benefits both debtor and creditor. The debtor avoids the stigma of being served with a foreclosure notice, summons and complaint and the necessity of legal expenses and costs in defending the action in cases that warrant it. It avoids the embarrassment of having the debtor's name published in the newspaper notifying the community that the debtor has been foreclosed. In many cases it transitions the costs of liquidation (broker commissions, title and closing fees) from the debtor to the creditor. From a creditor standpoint, the deed in lieu provides

an option to reduce the costs of collection and the time required to litigate the foreclosure action and await the redemption period.

Furthermore, if the North Dakota legislature pushes to impose foreclosure as the only remedy available in situations where debtors have defaulted, I would fully expect financial institutions to push this body to eliminate N.D.C.C. § 28-26-04 prohibiting contractual provisions for payment of attorney's fees in collection actions and come more in line with the prevailing position of allowing creditors to recoup such fees.

**II. Senate Bill 2223 is unlikely to pass muster under Article I, Section 10, Clause 1 of the United States Constitution.**

Article I, Section 10, Clause 1 of the United States Constitution, more commonly known as the "Contract Clause," recognizes the right of individuals to contract. Under the Contracts Clause, states are prohibited from impairing the ability of individuals to enter into contracts. While states are permitted to create laws barring contracts which offend public policy, this particular bill is completely devoid of a legitimate public policy argument in its support.


**III. Senate Bill 2223 seeks to change fundamental tenants of real property law.**

It has long been the law of North Dakota, and real property law in general, that a deed is effective upon delivery of the deed by the grantor. N.D.C.C. §47-09-06 provides that "a grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date." This provision was first codified in 1877, prior to statehood, and has been the law of this State since. This Bill would create a direct contradiction between N.D.C.C. § 47-09-06 and the contemplated new section of N.D.C.C. Chapt. 35-03.

There is no legitimate purpose to differentiate a deed in lieu of foreclosure with respect to its effectiveness from any other form of deed and in many circumstances a "deed in lieu of foreclosure" may be reflected as a Warranty Deed, a Limited Warranty Deed, or Quit Claim Deed.

For the foregoing reasons, as well as those indicated by the North Dakota Banker's Association, I strongly urge each member of the Political Subdivisions Committee to vote no on Senate Bill 2223.

Respectfully,



Blaine T. Johnson