Prepared by the North Dakota Legislative Council staff for the Judiciary Committee
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REVIEW OF LAWS AND PRACTICES OF THE SALE OF REAL ESTATE BY AUCTIONEERS - BACKGROUND MEMORANDUM

Section 9 of Senate Bill No. 2008 directs a study of the practices and laws relating to the sale of real estate by auctioneers. The section provides that the study must include a review of the sale of multiple parcels of property at a single sale. The legislative history of this section indicates that there is a concern about the auction process that involves the sale of real estate. It was noted that complaints about the process used when selling multiple parcels of real estate at a single sale may indicate a need for more regulation of the auction process.

NORTH DAKOTA LAW

Laws governing auctioneers and auction clerks are contained in several titles throughout the North Dakota Century Code (NDCC).

Licensing of Auctioneers

The law regarding the licensing of auctioneers and auction clerks is located in NDCC Chapter 51-05.1. Section 51-05.1-04 defines an auctioneer as "a person, who for a compensation or valuable consideration, sells or offers for sale either real or personal property at public auction as a whole or partial vocation." Section 51-05.1-01 provides that a person may not conduct a sale as an auctioneer or an auction clerk without a license issued by the Public Service Commission. Section 51-05.1-02 provides that licenses may be granted only to persons with a good reputation for honesty, truthfulness, and fair dealing and who are competent to transact the business of an auctioneer or auction clerk. This section also provides that an applicant for a license or a renewal of a license must be at least 18 years of age and must have been actively engaged as a licensed auctioneer for at least one year preceding the date of application or must furnish proof of the satisfactory completion of an approved course of study relating to auctioneers. Section 51-05.1-01.1 provides that the fee for the annual license or renewal is $35. This section also requires that before a license is issued, the applicant must file a corporate surety bond with the commission.

North Dakota Century Code Section 51-05.1-01.2 provides for exceptions to licensure as an auctioneer. This section provides that a license is not required for the sale of an estate by an executor or an administrator; sale by a sheriff or other person under court order; sale by a public official acting in an official capacity; or sale of purebred or registered livestock. Section 51-05.1-03 contains the grounds for which a license may be refused, suspended, or revoked. According to this section, an auctioneer's license may be revoked or suspended if the licensee has performed any of the following:

1. Made a material false statement in the licensee's application for a license or in any information furnished to the commission.
2. Made a substantial and willful misrepresentation relating to an auction sale which injures the party for which the licensee acts as agent.
3. Made any false promise of a character such as to influence, persuade, or induce a party to an auction sale to that party's injury or damage.
4. Failed to account for or to remit, within a reasonable time, not exceeding 30 days, any money coming into the licensee's possession belonging to another, commingled funds of others with the licensee's own, failed to keep such funds or others in an escrow or trust account with a bank or other recognized depository in this state, or failed to keep records relative to the deposits, which must contain such information as prescribed by the rules of the commission.
5. Pled guilty or nolo contendere before, or been convicted by, any federal court or a court of competent jurisdiction in this or any other state of an offense determined by the commission to have a direct bearing upon a person's ability to serve the public as an auctioneer, or the board determines, following conviction of any offense, that the person is not sufficiently rehabilitated under Section 12.1-33-02.1.
6. Failed or refused upon demand to produce any document, book, or records in the licensee's possession or under the licensee's control, concerning any auction sale under investigation by the commission.
7. Failed to deliver to the seller in every auction sale, a complete, detailed closing statement, showing all the receipts and disbursements handled by such licensee for the seller, and to retain true copies of such statements in the licensee's files for two years.
8. Violated any provisions of this chapter or Chapter 41-02, 51-12, or 51-15, or rule or regulation promulgated by the commission.

This section also provides that a person has a right to a hearing before the Public Service Commission before a license may be revoked or suspended.

North Dakota Century Code Section 51-05.1-04.1 provides that "[a]n auctioneer may not sell the property of another at auction without a prior written contract with the seller which sets forth the terms and conditions upon which the auctioneer will sell the property." According to this section the contract must contain:

1. The licensee's name, trade or business name, state license number, business address, and business telephone number.
2. A general description of the property to be sold at auction, any restrictions, and a statement identifying whether or not the licensee is authorized to purchase at the auction.
3. A description of the services to be provided and the consideration for the services. The description must state which party is responsible for advertising and other expenses.
4. The date or dates when the items will be sold at auction.
5. A disclosure of the amount of bond that the licensee has on file with the commission and the commission's address and phone number.

North Dakota Century Code Section 51-05.1-07 provides that the penalty for a violation of Chapter 51-05.1 is a Class B misdemeanor.

North Dakota Century Code Chapter 3-05 provides for the agency rules between a seller and an auctioneer. Section 3-05-01 provides:

> An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller only as follows:
> 1. To sell by public auction to the highest bidder.
> 2. To sell for cash only, except such articles as usually are sold on credit at auction.
> 3. To warrant the title, quality, and quantity of personal property sold by him.
> 4. To prescribe reasonable rules and terms of sale.
> 5. To deliver the thing sold upon payment of the price to the clerk of the auction.
> 6. To do whatever else is necessary or proper and usual in the ordinary course of business for effecting these purposes.

Other State Laws and Rules Applicable to Auctioneers

Other laws that are applicable to auctioneers and auction clerks are NDCC Chapter 51-12, which deals with false advertising; Chapter 51-15 regarding consumer fraud and unlawful credit practices; Chapter 9-06 regarding the formation of a contract; Chapter 36-09 regarding brands and marks; Chapter 41-02 regarding sales; Chapter 41-06 regarding bulk transfers; and Chapter 57-39.2 regarding sales tax.

Administrative rules regarding auctioneers are contained in North Dakota Administrative Code Article 69-8. The rules include the requirements for approved auction schools and the retention of records by auction clerks.

A publication proposed by the Public Service Commission regarding the responsibilities of auctioneers and auction clerks is attached as an appendix.

Other Professions That Sell Real Estate

North Dakota Century Code Chapter 43-23 provides for the licensing and standards for real estate brokers and salespersons. This chapter defines a real estate broker, in part, as "any person who, for another, for a fee, commission, salary, or other consideration . . . [s]ells, exchanges, purchases, or leases real estate or any interest therein . . . [o]ffers to sell, exchange, purchase, or lease real estate or any interest therein, or any improvements affixed thereon . . . " Section 43-23-07, which contains exceptions from real estate broker licensure requirements, provides that the term "real estate broker" or "real estate salesperson" does not include "[a]ny person selling real estate as an auctioneer, provided the sale is advertised as a bona fide public auction."

As a related issue, the question of whether an attorney or real estate broker must obtain an auctioneer's license to sell real estate by auction sale was the issue raised in a January 2, 1976, Attorney General's opinion and reexamined in an April 4, 1983, memorandum of the Attorney General. According to the opinion and memorandum, while NDCC Chapter 51-05.1 does not contain a specific exemption for attorneys and real estate brokers, "the chapter's definition of an auctioneer, as well as other provisions of the Code, gives rise to good arguments that attorney and real estate brokers are exempt from the license requirement." The opinion noted that "[t]he statute defines an auctioneer as a person who sells property at public auction as a whole or partial vocation. Attorneys and real estate brokers do not generally hold themselves out to the public as auctioneers. Rather, such sales would be conducted only as incident to their professional duties." The opinion also noted that Section 51-05.1-04 contains a specific exemption for isolated transactions in selling property for another. Finally, it was noted that Chapter 43-23 does not restrict a real estate broker from selling real estate by auction and that an attorney does not even need a real estate license to make sales of real estate arising in the usual course of the practice of law.

REAL ESTATE AUCTION PRACTICES IN OTHER STATES

A brief survey conducted by the Public Service Commission regarding the real estate auction practices in other states resulted in the following responses:

Alabama - Real Estate Commission, Legal Division - Alabama does not have any regulations addressing how an auctioneer goes about selling parcels of land.

Arizona - Real Estate Commission - There are no rules or statutes in Arizona which address how parcels of land are sold.

Arkansas - Real Estate Commission - Arkansas law does not address the manner in which real estate is sold at auction.

Kansas - Office of the Attorney General - Kansas law does not address the method in which land is sold.

Louisiana - Auctioneers Licensing Board - Louisiana does not address the manner in which parcels of land would be sold.

Massachusetts - Division of Standards - Massachusetts does not address the manner in which parcels of land would be sold. The auctioneer can set whatever conditions he or she chooses; however, statute requires that the conditions and terms of the sale be made known before the auction sale.

North Carolina - Auctioneer Licensing Board - North Carolina law provides that auctioneers can sell plots of land using whatever terms or conditions have been agreed upon and auctioneers and sellers can establish a variety of kinds of terms or conditions. State law does not dictate terms and conditions as long as they are lawful.

Oklahoma - Real Estate Commission - State law does not address the method in which land is sold.

Oregon - Real Estate Agency - Oregon statutes do not address the method in which land is sold.

South Dakota - Real Estate Commission - South Dakota Administrative Rule 20:69:06:05 provides that "[a]ll contracts listing a property for sale with an auctioneer must be in writing. Each written listing agreement shall show the legal description of the property. . . ." Rule 20:69:06:07 provides "[i]f property being sold by auction is put up in tracts, each tract is the subject of a separate sale. Such a sale is with reserve unless the real estate being sold is explicitly put up without reserve. In an auction with reserve the auctioneer may withdraw the real estate being offered for sale at any time until announcing completion of the sale. In an auction without reserve, the real estate being offered for sale may not be withdrawn after an auctioneer calls for bids unless no bid is made within a reasonable time. A bidder may retract a bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid. If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid and notice has not been given that liberty for such bidding is reserved, the buyer may either avoid the sale or take the real estate at the price of the last good faith bid prior to the completion of the sale. A sale is complete when the auctioneer announces its completion by the fall of the hammer or in any other customary manner."

Washington - Department of Licensing - Washington law provides that land must be identified before bidding.

SUGGESTED STUDY APPROACH

The committee, in its study of the practices and laws relating to the sale of real estate by auctioneers, may wish to approach this study as follows:

- Receive information and testimony from representatives of the North Dakota Auctioneers Association, the North Dakota Association of Realtors, and other interested persons regarding real estate auction practices;
- Receive information and testimony from representatives of the Public Service Commission regarding licensing requirements, responsibilities, and practices of auctioneers; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1