

A Deed for Town Hall: Due Diligence in Certifying Titles from Municipalities

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One assumption that many real estate attorneys and the average citizen make is that deeds from governmental units are beyond reproach. However, when title attorneys begin to examine limitations on municipal conveyances and the procedures undertaken by the council in order to dispose of real property, then one realizes that a closer examination of title conveyed from a city or town needs to be conducted.

This article is intended to review and examine the procedures and limitations regarding conveyances from a city or town disposing of real estate. This article is intended only to review fee simple conveyances from municipalities; however, the reader should be alert to similar concerns with conveyances by other governmental bodies, or estates less than fee simple.

The Issue

It is important that the title attorney not assume that the city or town has followed proper procedure to provide the needed authority to convey property. Failure to do so may render title unmarketable. Bagwell v. Town of Brevard, 267 NC 604 (1966). In this case the Board of Alderman of the Town of Brevard resolved to sell the town's Country Club property. In doing so, the Board decided to sell the property at public auction on August 16, 1965 and determined that it would advertise the sale in the local paper for four consecutive weeks beginning July 22, 1965. The statute in effect at that time was NCGS § 160-59 which required advertisement for a period of 30 days, just as is currently provided as codified in NCGS § 160A – 270.

After the ad ran once, it was discovered that part of the property that was intended to be included in the sale was inadvertently omitted, so the Board decided to move the sale date to August 21, 1965 and readvertise for four consecutive weeks beginning July 29, 1965.

At the sale, Bagwell became the high bidder and deposited 10% of the purchase price and the council approved the sale. A few days later a second party made an increased bid. On August 30, 1965, the Board of Alderman decided to accept the bid, and to readvertise the property for sale on October 9, 1965 with an opening bid of \$80,000, the price offered by the second party. Bagwell filed suit to enforce his rights pursuant to the first public sale and demanded a deed to the property.

The court determined that because the initial advertisement was not published for a period of 30 days as required by the statute, any purported sale was void. Compliance with the statute is required before a town can make a valid sale of property. If the notice requirements are not met, a purchaser fails to acquire marketable title. Bagwell at 607. The court goes on to quote City of Asheville v. Herbert 190 NC 732 (1925), "All acts beyond the scopes of the powers granted to a municipality are void." (emphases added)

The decision in Bagwell underscores the need for title attorneys to be knowledgeable of the provisions giving cities or towns the authority to sell property owned by the city or town.

Limitations

There is an issue as to whether local governments may dispose of property held for current government use. See Lawrence, David M., Local Government Property Transactions in North Carolina, 2nd Edition (2000) § 502 p. 74. This may be true even with the provisions of NCGS § 160A – 265 which allow the council to use its discretion to dispose of real property. Although no North Carolina case defines governmental use, other jurisdictions view government use as use for a public function and apply the limitation. Id at p. 76. Private use therefore becomes property acquired through tax foreclosure, property never needed for its intended use, and property that was once used by the municipality, but now lies idle, or surplus property.

The title attorney should check any dedication to the municipality to search for any limitations on the dedication. If the conveyance would constitute a change of use in the property, that change might render the property unmarketable. This problem can manifest itself if the property was acquired with bond proceeds for a particular purpose as well as being dedicated by a private party. The title attorney should take steps to release any restrictions or in the case of bond-financed property, get a certification from the seller that there are no restrictions on its conveyance. See Lawrence for a complete discussion of this issue.

The Process

There are five means by which a city or town may dispose of real property belonging to the city. A city may sell real property by (1) private negotiation; (2) advertising for sealed bids; (3) negotiated offers, advertising and upset bids; (4) public auction; or (5) exchange. NCGS § 160A – 266.

The private negotiation and sale of real property may be used only where the property is significant for its architectural, archaeological, artistic, cultural or historical associations, or for its natural, scenic or open condition. NCGS § 106A – 266 (b). In this case, the property shall be sold only to a nonprofit corporation or trust whose purposes include the preservation of the special character of the property. A preservation agreement as defined in NCGS § 121 – 35 must be placed in the deed and the grantee may dispose of or use the property only subject to the covenants which promote the preservation of the property. In this case, the council must adopt a resolution, at a regular council meeting, authorizing an appropriate city official to dispose of the property at a private sale. NCGS § 160A – 267. The resolution must identify the property to be sold and may specify the minimum price. A notice must be published at least 10 days prior to the consummation of the sale, which summarizes the contents of the resolution.

The second method a city or town may use to dispose of real property is by advertising for sealed bids. NCGS § 160A – 268. The advertisement of bids shall be made at least 30 days prior to the date fixed for opening bids. This manner of sale shall proceed in the

same manner as proscribed by law for the purchase of property, which is codified in NCGS § 143 – 129. Accordingly, following a resolution by the council to sell the property by sealed bid, the advertisement must describe the property, identify the person to whom inquiries should be directed, state the time and place at which bids will be opened and note the boards right to reject all bids. The bids must be opened in public, reported to the governing board and recorded in its minutes. Unless all bids are rejected, the city or town must sell to the highest responsible bidder.

Third, a city or town may negotiate an offer to purchase and then advertise for upset bids. NCGS § 160A – 269. Before an offer of purchase is accepted, the council shall require the offeror to deposit 5% of the purchase price with the city clerk and shall publish notice of the offer. The notice shall contain a general description of the property, the amount and terms of the offer, and state the opportunity to raise the bid by not less than 10% of the first \$1,000.00 and 5% of the remainder. The bidder shall deposit 5% of the upset bid with the clerk, at which time the clerk shall readvertise and repeat the process until there are no further bids. The council may then accept or reject the offer, which should be documented in its minutes.

The fourth method of selling city or town property is at public auction. NCGS § 160A – 270. To do so, the council must first adopt a resolution authorizing the sale which describes the property to be sold, specifies the date, time, place and terms of the sale and states that any offer must be accepted by the council before the sale will be effective. The notice may require a deposit. The notice shall describe the property sufficient to identify it, state the terms of the sale, refer to the authorizing resolution, and be published at least once not less than 30 days prior to the sale. Following the sale, the council has 30 days to accept or reject the bid, and if rejected the council may readvertise.

Finally, the city or town may exchange property pursuant to NCGS § 160A – 271. The municipality must receive full and fair consideration of the exchange. To this end, the notice must state the value of the properties and other consideration changing hands, as well as the description of the properties to be exchanged. The notice should announce the council's intent to authorize the exchange at its next regular meeting and be published at least 10 days prior to the meeting.

Reviewing The Title

In reviewing the title, the certifying attorney should first determine the process used by the city or town for disposing of the property. A review of the minutes of the council meeting should suffice. These minutes may be found at the city or town clerks office, and while there, the attorney should request evidence of the publication requirements, including the substance and date of publication. It would be helpful for future title searchers for recitals to be made in the deed which specify the approval of the council and the compliance with the specific statute including publication dates.

In reviewing the deed, the title attorney should verify the authority of the individual executing the deed to sign for the city or town. Further, even though NCGS § 39 – 6.5 states that the seal of the signatory shall not be necessary to effect a valid conveyance in real property, NCGS § 160A – 11 requires a corporate stamp or seal to be affixed on all

documents to make them legally valid and binding. Arguably, the necessity of the seal to municipal conveyances has not been abolished and therefore the title attorney still needs to search for the seal of the city or town.

Conclusion

Conveyance from city and towns, where the municipality failed to follow the process provided in the statute renders the title unmarketable. Therefore it is incumbent upon the title attorney to verify compliance with the statutes, especially the publication dates as well as any used restrictions or limitation on the property to be sold. Finally, the attorney should examine the deed to make sure the individual executing the deed has authority to do so on behalf of the municipality and the city or town seal is affixed.