

OFFICIAL OPINION NO. 75-173, Interpretation of SDCL 43-21-1, recording of transfers by metes and bounds

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Mr. Ronald D. Campbell
Hand County State's Attorney
P.O. Box 337
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OFFICIAL OPINION NO. 75-173

Interpretation of SDCL 43-21-1, recording of transfers by metes and bounds

Dear Mr. Campbell:

You have requested an official opinion from this office as to the proper interpretation of SDCL 43-21-1. The specific question you ask is:

Does SDCL 43-21-1 prohibit the recording of a metes and bounds conveyance which has previously been conveyed by a metes and bounds description?

In your letter requesting this opinion you point out that on a number of occasions in the past, this office has reached the conclusion that SDCL 43-21-1 does, in fact, prohibit the recording by the Register of Deeds of conveyances of tracts of land which are described by metes and bounds. You have referred to 1963-64 AGR 402 as but one example of the numerous opinions written on this subject. These official opinions are not consistent with each other and the reasoning used has differed from time to time. Some of the most recent opinions on this subject express no real "reason" other than what appears to the writer as a "line of opinions" in the past.

SDCL 43-21-1 provides:

When any owner of a government subdivision or a platted tract or lot which is within or without the corporate limits of any city or town shall divide the same into parcels for the

purpose of transfer that cannot be described except by metes and bounds, he shall cause the parcels of land so divided to be platted into lots and have the lots numbered and a plat thereof recorded before any instrument of transfer of such divided parcels of land shall be recorded. If such plat cannot be made without an actual survey he shall have such lands surveyed and the plat thereof recorded.

SDCL 43-21-1 has, with the exception of changes hereinafter noted, been the law of South Dakota since 1895. As originally drafted and as carried forward into the 1903 revision of the Code it read as follows:

When any owner of a government subdivision or a platted tract or lot of land shall divide the same in parcels for the purpose of transfer, that cannot be described except by metes and bounds, they shall cause the parcels of land so divided to be platted into lots and have the lots numbered and a plat thereof recorded before any instrument of transfer of such divided parcels of land shall be admitted to registry.

At 1945-1946 AGR 235, the Attorney General considered the legislative history of what is now SDCL 43-21-1:

In the 1919 Code Revision the only change made in the original act, insofar as here material, was in substituting for the phrase in the last sentence, i.e; "admitted to registry" the word "recorded." The amendment by Chapter 192 of the Laws of 1931 provided that the provisions thereof would apply only to a government subdivision or a platted tract or lot *within the corporate limits of any city or town*, in which form it was codified in SDC 51.1405. Chapter 214 of the Laws of 1945 made the provisions applicable to the *lands* within or without the corporate limits of any city or town.

From the foregoing brief history of this legislation, it will be observed that by the 1945 amendment the law is substantially the same as when originally adopted in 1903; it was then and is now applicable to all lands so divided or rearranged within the state.

Since 1945 the substance of SDCL 43-21-1 appears from the source note to have remained unchanged.

Through the years there has been considerable confusion and difference of opinion with respect to the proper interpretation of SDCL 43-21-1. On numerous occasions this office has been called upon for official opinions, the results of which have not all been consistent with

each other. In view of the prior difficulties this office has had in interpreting this statute in a way which is generally accepted, it appears to me that the Legislature should reconsider the present language of SDCL 43-21-1 and attempt to clarify just what the status is of metes and bounds descriptions. The present state of confusion and conflicting interpretations and opinions from time to time does not operate to serve the public interest.

A brief analysis of some of the Attorney General's Opinions interpreting SDCL 43-21-1 is informative and helpful in understanding the conclusion of this opinion.

The earliest official opinion from this office to interpret SDCL 43-21-1 as a "prohibition" to record instruments containing metes and bounds descriptions appears at 1963-64 AG R 343 and is confirmed at 1963-64 AG R page 402. These opinions were preceded with a different conclusion at 1949-50 AGR 97, which held that a conveyance offered for record which described property according to a vacated plat was not eligible for recording, and further stated, as its reasons for so holding, that the property could only be described by metes and bounds. That opinion was immediately preceded by 1945-46 AGR 347, which stated:

However the fact that an instrument is ineligible for registration does not, in my opinion, amount to a statutory injunction against the acceptance of the same for registering or recording it. The former goes merely to the constructive notice that recordation conveys while the latter absolutely prohibits it being recorded.

The next preceding official opinion is contained in 1945-46 AGR 235, which concluded that following the enactment of Chapter 214 of the Session Laws of 1945, what is now SDCL 43-21-1 was again in substantially the same form as the original act, and that, following the reasoning contained in 1929-30 AGR 307:

A conveyance or reconveyance of lands described by metes and bounds must be platted in order to be eligible for record.

Official opinions found at 1945-46 AGR 347 and 1945-46 AGR 235 also dealt with this matter and made the distinction between "ineligible for record" and "prohibited from being recorded."

SDCL 43-28-16, a curative statute, is also interesting in relation to the problems presented by SDCL 43-21-1. SDCL 43-28-16 provides:

Any instrument affecting real property which was previous to July 1, 1961 copied into the proper book of record kept in the office of any Register of Deeds shall be deemed to impart after that date, notice of such instrument and its contents to subsequent purchasers and encumbrancers notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgement thereof, or in the absence of such certificate of acknowledgement, or the omission of any notarial or corporate seal from such instrument or the absence of any post-office address of any grantee, mortgagee or assignee of mortgagee, from any instrument, and notwithstanding the fact that the property described in such instrument was not platted as required by Chapter 43-21, prior to the recording of such instrument; but nothing herein shall be deemed to affect the right of purchasers or encumbrancers who became such prior to July 1, 1961.

Although the effect of SDCL 43-28-16 certainly has a broader impact than curing or validating defects which might arise under SDCL 43-21-1, there can be little doubt that the effect of SDCL 43-28-16 is to validate certain problems presented by SDCL 43-21-1.

The opinion from this office which intervenes, and prevents the "line of cases" referred to in 1963-64 AGR 402 from being unbroken, is found at 1953-54 AGR 258. The fact situation there presented was that the county treasurer had issued a tax deed to the county which deed included four tracts described by metes and bounds, which tracts had previously been described in the same manner by transfers recorded in the Register of Deeds Office. The Attorney General said, in that opinion, that the statute had no application to the facts of the case for the following reasons: (1) the county treasurer was not the "owner" of the parcels of land; (2) the property had not been "divided" for purposes of transfer or otherwise; (3) a curative act (SDCL 43-28-16) declared any instrument recorded prior to the effective date of the act is to be deemed to impart after that date, notice of such instrument and its contents, notwithstanding the fact that the property described in the instrument was not platted as required by Section 51.1405 (now SDCL 43-21-1) prior to recording of such instrument. The Attorney General reasoned in that opinion that such a curative statute cured any defect resulting from failure to have the land platted and that any instrument thereafter offered for record which described the property in the same manner, is validated and entitled to be accepted for filing and recording by the register of deeds.

In view of all the above arguments and authorities, and being fully aware of the fact that reasonable minds can differ over the interpretation of this statute in its present form, it is my opinion that the phrase "divide the same into parcels for the purpose of transfer" is a

qualification of and a condition precedent to the requirement of prior recording of a plat. I further conclude that the term "divide" in SDCL 43-21-1 is to be interpreted as having its usual meaning, and that in the absence of a division being accomplished by the conveyance there is no requirement for prior platting.

Respectfully submitted,

William Janklow
Attorney General

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