

VOLUME NO. 36

Opinion No. 104

BOARD OF INVESTMENTS—Mortgage foreclosures; BOARD OF LAND COMMISSIONERS—Jurisdiction; BOARD OF LAND COMMISSIONERS—Mortgage foreclosure, property as state lands; GOVERNOR—Powers, execute deeds; OFFICES AND OFFICERS—Governor to execute deeds; PUBLIC EMPLOYEES RETIREMENT SYSTEM—Mortgage foreclosure; STATE LANDS—Real property acquired by mortgage foreclosure as; Art. VIII, Sec. 13, Constitution of Montana (1972), Art. X, Sec. 11, Constitution of Montana (1972); Sections 79-309, 79-310, 81-102, 81-103, 81-912, 81-932, 82A-201, Revised Codes of Montana 1947.

- HELD:**
- 1. Real property acquired by the Board of Investments through the foreclosure of a PERS mortgage is state land as defined by section 81-102 (4), Revised Codes of Montana 1947.**
 - 2. The administration, control and disposition of real property acquired by the Board of Investments through the foreclosure of a PERS mortgage comes under the jurisdiction of the Board of Land Commissioners.**
 - 3. The proper state official to execute deeds of conveyance on real property acquired by the Board of Investments through the foreclosure of a PERS mortgage is the governor, and in his absence or inability, the lieutenant governor.**

November 12, 1976

Mr. Lawrence P. Nachtsheim
Public Employees' Retirement System
Department of Administration
1712 Ninth Avenue
Helena, MT 59601

Dear Mr. Nachtsheim:

You have requested my opinion on the following question:

Who would be the proper state official to convey real estate which has been acquired through foreclosure of a mortgage, purchased as an investment with funds of the Public Employees' Retirement System?

The facts that have prompted your request appear to be as follows: In 1961 the Board of Administration invested Public Employees' Retirement System (PERS) funds in a FHA insured first mortgage on residential real property. The assignment of the mortgage ran to "Public Employees Retirement System, a Department of the State of Montana." The mortgagee subsequently defaulted and the mortgage was foreclosed at a foreclosure sale held on May 27, 1975, and PERS was the purchaser. It is now in the best interest of PERS to sell the real property and a question has arisen as to who is the proper state official to convey title.

Inherent in your request is the question of whether the real property involved is public land within the intent and meaning of Art. X, Sec. 11, Constitution of Montana (1972), which provides in part:

(1) **All lands of the state that have been** or may be granted by Congress, or **acquired by gift or grant** or devise **from any person or corporation, shall be public lands of the state.** They shall be held in trust for the people, **to be disposed of as hereafter provided**, for the respective purposes for which they have been or may be granted, donated or devised.

(2) **No such land** or any estate or interest therein **shall ever be disposed of except in pursuance of general laws providing for such disposition**, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(4) **All public land shall be classified by the board of land commissioners in a manner provided by law.** Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in areas. (Emphasis supplied)

The Board of Land Commissioners has the responsibility for the administration and sale of state lands. Section 81-103, R.C.M. 1947, provides:

The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands, and subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration....

Section 81-102 (4), R.C.M. 1947, defines state lands as:

... lands granted to the state by the United States for any purpose, either directly or through exchange for other lands; lands deeded or devised to the state from any person; and lands that are the property of

the state through the operation of law. The term does not include lands the state conveys through the issuance of patent, or those lands used for building sites, campus grounds, or experimental purposes by any state institution that are the property of that institution.

Both the constitutional and statutory provisions refer to public or state lands as those acquired through grant, deed, or operation of law. The real property acquired by PERS through the foreclosure sale was certainly acquired by "operation of law". Thus, it appears that the real property in question is state land subject to the administrative control of the Board of Land Commissioners unless the Board of Investments or PERS statutes contain language to the contrary.

The Board of Investments is a creature of the Legislature created pursuant to Art. VIII, Sec. 13, Constitution of Montana (1972), which provides in part:

- (1) The legislature shall provide for a unified investment program for public funds and provide rules therefore, ...

Section 82A-204, R.C.M. 1947, establishes the Board of Investments and provides that it:

- (4) ... has sole authority to invest state funds. No other agency may invest state funds. The board shall direct the investment of state funds in accordance with the laws and constitution of this state....

The "sole authority to invest state funds" includes the authority to invest PERS funds. Section 79-309 (2) (b), R.C.M. 1947.

Permissible investments that the Board of Investments may make are delineated in section 79-310, R.C.M. 1947, and includes, inter alia, "unencumbered real property and first mortgages on unencumbered real property". Arguably, if the Board of Investments has the authority to invest in first mortgages, it should also have, by implication, the authority to foreclose and dispose of the real property involved including the authority to execute a deed of conveyance. However, no such specific authority exists. Therefore, I must conclude that once title to real property passes to the State of Montana, its administration, control and subsequent disposition comes under the direction and supervision of the Board of Land Commissioners and the provisions contained in Title 81, Chapter 9, R.C.M. 1947, pertaining to sale of state lands. However, I would hasten to add that the disposition of funds derived from such a sale would not be governed by section 81-912 (4), R.C.M. 1947, because that statute only applies to the funds derived from the sale of state lands that had been granted to the state by Congress under the Enabling Act. Any funds derived from the sale of the real property involved here would have to be routed back to the Board of Investments to be deposited in and credited to PERS' accounts.

The ultimate question then is who or what state official may execute a document conveying state land to a private party. Since the real property involved is state land and the Board of Land Commissioners has exclusive authority to sell or dispose of state land, the law governing the execution of the conveyancing document must be contained in Title 81, Chapter 9, supra.

The only statute dealing with this question is section 81-932, R.C.M. 1947, which provides in part:

(1) The governor, and in his absence or inability, the lieutenant governor, shall execute deeds or patents of conveyance transferring without covenants any lands sold by the board (of land commissioners) under the laws of this state when full payment has been made therefore. ...The deed or patent shall be attested by the secretary of state, countersigned by the commissioner of state lands, and have the great seal of the state and the seal of the board (of Land Commissioners) thereto attached, but need not be acknowledged....

The provisions of section 81-932, supra, are quite clear, only the "governor, and in his absence or inability, the lieutenant governor, shall execute deeds ... of conveyance transferring ... any land sold by the board."

THEREFORE, IT IS MY OPINION:

1. Real property acquired by the Board of Investments through the foreclosure of a PERS mortgage is state land as defined by section 81-102 (4), Revised Codes of Montana 1947.
2. The administration, control and disposition of real property acquired by the Board of Investments through the foreclosure of a PERS mortgage comes under the jurisdiction of the Board of Land Commissioners.
3. The proper state official to execute deeds of conveyance on real property acquired by the Board of Investments through the foreclosure of a PERS mortgage is the governor, and in his absence or inability, the lieutenant governor.

Very truly yours,

ROBERT L. WOODAHL
Attorney General