OFFICIAL OPINION NO. 88-06, SDCL 49-16A-43

March 3, 1988

Mr. Clyde R. Calhoon
Brookings County State's Attorney
Brookings County Courthouse
Brookings, South Dakota 57006

Official Opinion No. 88-06

SDCL 49-16A-43

Dear Mr. Calhoon:

You have requested an official opinion from this Office in regard to the following factual situation:

FACTS:

Brookings County owns certain properties in the City of Brookings which abut the right-of-way of the Dakota, Minnesota and Eastern Railroad Corporation. The County properties are presently used by the County Highway Department and the County Extension building and grounds. By letter from the railroad dated October 12, 1987, Brookings County received notice that the railroad had received an offer for the purchase of certain railroad property which included the portion of the railroad right-of-way abutting the highway department and extension grounds. The letter was intended to be the notice required by SDCL 49-16A-43.

After receiving the letter the Brookings County Commissioners decided to attempt to purchase the railroad property to provide additional needed area for both the highway department and the Extension grounds. On or about October 28, 1987, by both telephone conversation and correspondence the railroad was contacted and informed of the County's interest in submitting an offer on the property. At that time a request was made that the railroad provide information as to the offer on the properties which it had received, however, the railroad refused to provide such information and continues to refuse to provide such information. Since the County decided it could not make a "counter offer" without knowledge of the first offer, it has refused to submit an offer on the property. It now

appears that the railroad intends to follow through with the sale of the property to the person who made the first offer.

Based upon those facts, you have asked the following questions:

QUESTIONS:

1. Under SDCL 49-16A-43, must the notice of sale to an owner of property abutting railroad property include the amount of the existing offer to enable submission of a "counter offer?"

2. If the abutting owner submits a "counter offer" higher than the railroad's existing offer, is the railroad compelled to sell only the land abutting?

IN RE QUESTION NO. 1:

SDCL 49-16A-43 provides:

Prior to any lease or sale, except to the South Dakota railroad authority or to another railroad, the lessee of any railroad property affected by the lease or sale and the owner of any property abutting such railroad property shall be served with written notice by certified mail and shall have twenty days from notice to make a counter offer.

The statute was considered recently in the case of Holida v. Chicago & Northwestern Transportation Company, 398 N.W.2d 742 (S.D. 1986). There the Court held that the owner of property abutting a street which abutted the railroad property was entitled to notice of the sale. Because that owner had not received notice, the sale was set aside. Speaking to the purpose of the notice the Court stated:

The statute provides notice to the lessee of railroad property and to the owner of abutting property, of the sale of such property for the purpose of affording them an opportunity to bid on the property.

398 N.W.2d at 745. See AGR 86-30.

Your first inquiry seeks a delineation of what the required notice must provide. The question is one of legislative intent; the starting place in determining that intent is the language of the statute itself. Words used in the statute are to be given their ordinary

meaning and effect unless the context requires otherwise. SDCL 2-14-1. American Rim & Brake, Inc. V. Zoellner, 382 N.W.2d 421 (S.D. 1986).

The language of the statute provides that notice of sale be served by certified mail and that the person receiving the notice has twenty days to make a "counter offer." One indicia of what the Legislature contemplated would appear on the notice is found in the use of the term "counter offer."

The dictionary definition of a "counter offer" is "a return offer made by one who has rejected an offer." Webster's New Collegiate Dictionary 257 (1979). At first blush, it would seem difficult to reject an offer and submit a counter offer unless the person doing so has some knowledge of what the first offer is.

In a technical, legal sense the phrase "counter offer" is not appropriately used in the statute. A counter offer is usually made by an offeree who could have accepted an offer by an offeror, but who instead of accepting, made a new offer on different terms. 1 Corbin On Contracts, § 89 at 378.

[A] communication that expresses an acceptance of a previous offer on certain conditions or with specified variations empowers the original offeror to consummate the contract by an expression of his assent to the new conditions and variations.

Corbin, supra, § 89 at 382.

That is not the situation presented by SDCL 49-16A-43. Nothing in the statute mandates that the railroad make an offer to sell to an abutting landowner; the statute requires notice of a contemplated sale. Therefore it appears to me that the statute simply affords the abutting owner the opportunity to submit a bid on the property the railroad is selling.

Although the question is a close one, it is my opinion that by use of the term "counter offer" the Legislature intended that an abutting owner have the opportunity to bid on the property and accordingly required notice that a sale was contemplated. See AGR 86-30. Notice of sale, however, is something different than notice of the contents of the offer made to the railroad. It is not the function of statutory construction to imply requirements in addition to the language used no matter how logical it may seem to do so. Here the language of the statute on its face simply requires notice of sale. Therefore my answer to your first question is No.

IN RE QUESTION NO. 2:

Your second inquiry implies that by submitting a counter offer which is higher than the offer disclosed in the notice, an abutting owner can force the sale of all or at least the abutting portion of the property. I do not agree.

It may well be that the Legislature intended to create in the abutting landowner a preemptive right or a right of first refusal, or an option to purchase the real property involved. I cannot, however, imply such a substantial restraint upon the railroad's free alienation of property from the language of the statute. SDCL 49-16A-43 contains no limitation as to the time in which such an implied right may be exercised (Cf. SDCL 43-9-1); nor does it mention the method of determining the price at which such property would be acquired. See generally 40 ALR3d 920; 61 Am.Jur.2d Perpetuities and Restraints on Alienation, § § 65, 100, 113, and 121; SDCL 43-3-5.

When the Legislature intended a specific disposition of railroad property, it certainly knew how to provide for it in specific language. See SDCL 49-16A-115. However, our courts have determined that when railroads acquire property by deed, the railroad usually acquires a fee simple interest. Nystrom v. State, 78 S.D. 498, 104 N.W.2d 711 (1960); Sherman v. Sherman, 23 S.D. 486, 122 N.W. 439 (1909). I am reluctant to imply a restraint upon the transfer of such an interest--assuming for argument's sake the power of the Legislature to do so--based only upon the language of SDCL 49-16A-43.

In my opinion the Legislature intended only that abutting owners have the opportunity to attempt the purchase of the abutting property by submitting a bid on the property. It stretches rules of statutory construction, however, to interpret SDCL 49-16A-43 to mandate a sale of any kind. Therefore, my answer to your second question is No.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General