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Via Email

Ms. Tina Schlemme
Real Estate and Drainage Clerk
Auditor's Office
1215 Edgington Ave., Suite 1
Eldora, Iowa 50627
tschlemme@hardincountyia.gov

Re: Hardin County Drainage District 55

Dear Tina:

You asked me to review and provide advice on the following matter:

"We had a landowner... call in a repair request for district tile plugged in the railroad right-of-way. CGA investigated and determined that tree roots are plugging the tile (see the attached repair summary for details). The Trustees would like to move forward with removing the trees (including inside the RR ROW), root clean and jet the tile and televise to verify its condition. They are seeking legal advice if they're able to do this with or without railroad permission."

You also provided me with all of the railroad agreements and railroad petitions for District 55 that you still had, most of which are from the 1920s. In addition, you provided the work proposal with a description of the proposed maintenance and the estimated cost of the work. I have reviewed them all.

Not surprisingly, the law on this question is somewhat nuanced. The drainage district statutes are over 100 years old, and in circumstances like this there are some gray areas.

Once a drainage district is established, it acquires a permanent easement for purposes of constructing and maintaining the drainage improvement. Iowa Code § 468.27. Moreover, after a drainage improvement has been constructed, drainage districts have "a positive mandate to keep the drainage system in such condition that it will function properly and perform the service for which it was intended." *Chicago Cent. & Pac. R. Co. v. Calhoun Cty. Bd. of Sup'rs*, 816 N.W.2d 367, 371 (Iowa 2012); *see also* Iowa Code § 468.126(1).

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Iowa code section 468.138 concerns maintaining the ditches by removing trees and shrubs and states:

The board shall cause to be removed from the ditches, drains, and laterals of any district any obstructions which interfere with the flow of the water, including trees, hedges, or shrubbery and the roots thereof, and may cause any tile drain so obstructed to be relaid in concrete or any other adequate protection, such work to be paid for from the drainage funds of the district.

The nuance in this instance arises due to the interplay between the above law and statutes and Iowa Code section 468.109, which states:

Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain, or watercourse as surveyed and located crosses the right-of-way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right-of-way of such company, and the full requirements for its complete construction across such right-of-way as shown by the plans, specifications, plat, and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

In essence, section 468.109 provides that when a drainage district is going to construct an improvement which will cross into the right-of-way of the railroad, notice must be served on the railroad which allows them the option to do the work themselves within 30 days.

Technically speaking, what District 55 intends to do in the present circumstance not an “improvement” which is defined as any “project intended to expand, enlarge, or otherwise increase the capacity of any existing ditch, drain, or other facility above that for which it was designed.” Iowa Code § 468.126. Because the District only intends to clean out the tile and replace it, without increasing its capacity, it would be considered merely maintenance.

Bringing all of the above together, I think that *technically* the Drainage District does not need to provide notice to the railroad to remove the trees at issue. However, the less adversarial

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and perhaps more prudent course of action would be to serve the railroad with notice under section 468.109 and wait 30 days to do the work.

As a final note, I cannot tell from the project proposal documents how close the trees and shrubs are to the tracks, and whether they could arguably result in stability concerns. I am operating under the assumption that Lee Gallentine has assessed this potential and already concluded there is no concern. If that is not correct, or if there is a concern on resulting stability, I would use strongly recommend the notice method under section 468.109.

Please call with questions or concerns.

Very truly yours,

DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.

A handwritten signature in cursive script, appearing to read "mcrich", written in black ink.

Michael C. Richards

MRIC/mjw