

OPINION NO. 73-028

Syllabus:

A divestiture committee created pursuant to R.C. 501.041 may enter into an agreement to convey an option to purchase school lands. The proposed agreement, subject to the additions described below, is consistent with this authority.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 29, 1973

Your request for my opinion poses the following question:

May a divestiture committee created pursuant to Section 501.041 of the Revised Code enter into an agreement with a prospective purchaser of school lands, which contains the following provisions:

- (a) This option shall remain in full force and effect for a period of ten (10) years from the date thereof, unless earlier terminated by either party as hereinafter set forth.
- (b) The property has been appraised as having a current fair market value of \$ hereinafter referred to as "Principal". As consideration for this option, Buyer agrees to make consecutive monthly payments equal to one-twelfth (1/12) of 7% of the Principal balance outstanding as of the date each payment is due and payable. The first payment of \$ shall be due and payable 1973. Amounts paid by Buyer from time to time shall be applied to reduce the original Principal amount, thus leaving the outstanding balance on which the 7% is figured.

R.C. 501.041 provides that:

If the total value of the school and ministerial lands credited to a school district under the terms of an original grant exceeds fifty thousand dollars, the lands may be sold by a divestiture committee consisting of five

members, including two members chosen by the board of education of the school district which would receive revenue from the sale of such land; the auditor of state or his representatives or, if two school districts receive revenues from the sale of such land, one member chosen by the board of education of each district; the director of public works or his representative; and one member chosen by the legislative authority of the municipal corporation or township in which the lands lie or, if the lands lie in unincorporated territory, by the board of trustees of the township in which the lands lie, or, if the lands lie in two or more municipal corporations, townships, or municipal corporations and townships, by the board of county commissioners. The divestiture committee may sell the lands or any parts thereof or interests therein, upon affirmative vote by at least four members, at public auction or by the receipt of sealed bids in the manner provided in sections 501.06, 501.07, and 501.08 of the Revised Code, or at private sale, negotiated by the committee with any prospective buyer. No land, part thereof, or interest therein shall be sold for less than its value as appraised by the department of public works. The buyer shall make all payments for the purchase of lands sold by the divestiture committee to the supervisor of lands appropriated by congress for the support of school and ministerial purposes, for deposit in the school district deposit fund or investment by the sinking fund commissioners, and the auditor of state shall prepare deeds conveying the lands and interests sold by the divestiture board, in accordance with section 501.11 of the Revised Code.

A divestiture committee shall be established upon written request to the auditor of state by any school district which would receive revenue for the sale of such land. The authority shall, upon receiving such request, notify the director of public works and the affected legislative authorities, boards of township trustees, and boards of county commissioners regarding the establishment of a divestiture committee, and request them to choose their representatives. The auditor shall be chairman of the committee and shall call an organizational meeting and other meetings as may be necessary.
(Emphasis added.)

In determining whether this contract may be entered pursuant to R.C. 501.041, it is necessary to consider the nature of the interest conveyed by the option agreement. Since the authority granted a divestiture committee under R.C. 501.041 is limited to the selling of the lands, parts thereof, or interests therein, an option agreement is authorized by this Section, only if the option may be treated as an interest in land.

There are several lines of cases concerning the nature of

an option and whether it confers on the holder an interest in the land. See James, F., The Law of Option Contracts (1916) and cases cited therein. In Ohio, the case of Cullen v. Bender, 122 Ohio St. 82 (1930), is probably the most significant because it overturned, in this state, the general proposition that a privilege of purchase (option) creates no interest in the land. See also Bevard v. Drucher, 43 Ohio App. 294 (1932). However, Cullen v. Bender, supra, was specifically limited to cases where the option to purchase the real property accompanied a lease, and was in fact a covenant in the agreement by which the property had been leased. Based on this the court reasoned that the option to purchase must be presumed to have been one of the controlling factors, on the part of the lessee, in determining to execute the lease. It, therefore, concluded that the option, under the circumstances, represented an interest in that land.

Prior to Cullen v. Bender, supra, however, a court of appeals did rule on the question of a mere option to purchase, which is not related to a lease. Sause v. Ward, 7 Ohio App. 446 (1917). In that case the court said in part that:

A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person, and at the price named therein, if accepted within the time stated in the optional contract. The option confers no right to the holder of the option in the real estate, but it is only a sale of a right to him to become the purchaser upon the acceptance thereof within the time stated. Until the acceptance of the offer according to the terms thereof, it does not ripen into a sale of the real estate or become a completed contract between the parties for the sale thereof. It is only after the holder of the option has accepted the option that he becomes the equitable owner of the property, and can compel specific performance of the contract in a court of equity.

See also The George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54 (1908); Warner & Swasey Co. v. Rusterholz, 41 F. Supp. 498, 503 (1941), 22 Ohio Op. 114, 117; Ross v. Couden, 22 Ohio App. 330, 336 (1926). In Opinion No. 69-143, Opinions of the Attorney General for 1969, my predecessor, relying on the above cases, concluded that an option to purchase real estate conferred no interest in the land and that, therefore, a county recorder was not required to file such options.

In 1971, however, the General Assembly amended R.C. 317.08, which provides for records to be kept by the county recorder. Amended House Bill No. 300, effective December 30, 1971. The Section now reads as follows:

The county recorder shall keep five separate sets of records as follows:

* * * * *

(B) A record of mortgages, in which shall be recorded:

(1) All mortgages, including amendments, supplements, modifications, and extensions thereof, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contracts;

(3) All options to purchase real estate including supplements, modifications, and amendments thereof, but no such instrument shall be recorded if it does not state a specific day and year of expiration of its validity.

* * * * *

The recording of an option to purchase real estate, including any supplement, modification, and amendment thereof, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the instrument. (Amending language underlined.)

The effect of this is not only to require the recording of options but also to express a legislative intent that an option be treated as an interest in the real estate it covers, and not just a right in personam. I must, therefore, conclude that an option is an interest in land, and that a contract, whereby an option is granted, would constitute a conveyance of this interest in land pursuant to R.C. 501.041, which provides that the lands, parts thereof, or interests therein may be sold at a private sale, negotiated by the committee with any prospective buyer.

With respect to part (b) of the agreement, as set out in your question, it does not appear to conflict with R.C. 501.041, and I approve it subject to the following additions to the language of that section of the agreement:

As consideration for this option, Buyer agrees to make consecutive monthly payments equal to one-twelfth (1/12) of 7% of the Principal balance outstanding as of the date each payment is due and payable and in no event shall consideration payments be applied to reduce or in any way affect the Principal balance. The first payment of \$ _____ shall be due and payable _____, 1973.

Amounts paid by Pover from time to time, pursuant to the provisions of Article (3) hereof, RELEASE OF PARCELS, shall be applied to reduce the original Principal amount, thus leaving the outstanding balance on which the 7% is figured.

(Added language emphasized.)

Your request raises only the legal sufficiency of the proposed contract under R.C. 501.041. I, therefore, express no opinion regarding the advisability of a private negotiated sale, as opposed to a sale at public auction or by receipt of sealed bids. Nor should my answer be construed as a recommendation of the proposed contract over other possible methods of disposing of the lands in question, or interests therein, at a private negotiated sale. Those determinations are committed by R.C. 501.041 to the discretion of the divestiture committee in the light of all the circumstances.

In specific answer to your question it is my opinion, and you are so advised, that a divestiture committee created pursuant to R.C. 501.041 may enter into agreement to convey an option to purchase school lands. The proposed agreement, subject to the additions described above, is consistent with this authority.