

1146.

ROADS AND HIGHWAYS—WHEN COUNTY COMMISSIONERS MAY ABANDON ROAD IMPROVEMENT AFTER BONDS ISSUED—HOW REIMBURSEMENT OF INSTALLMENTS OF ASSESSMENT ARE TO BE MADE IN EVENT OF DISCONTINUANCE OF SAID ROAD IMPROVEMENT.

*County commissioners may after the issue and sale of bonds abandon a road improvement project when it is found that the fund provided through such bonds for the doing of the work in accordance with original estimates is insufficient.*

*In the event county commissioners discontinue such road improvement project, persons who have paid installments of an assessment made in connection with such improvement are to be reimbursed through allowance made and paid in accordance with sections 2460 and 2572 G. C.*

COLUMBUS, OHIO, April 9, 1920.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Your letter is received reading as follows:

"The commissioners of Jefferson county, Ohio, by unanimous resolution, in 1918, provided for the improvement of one mile of a dirt road several miles in length, and proceedings in the way of plat, survey, view, notice to land owners and time for hearing were legally had. The county surveyor's estimate was \$12,600.00. The cost was apportioned by an assessment being placed upon the real estate within one mile of either side thereof. The balance was to be paid by the county. The assessments were levied. Bonds were issued to take care of the cost of the improvement and sold.

This was in the year 1918. Since then assessments have been regularly collected and the interest on the bonds falling due have been paid.

Bids for construction were asked for, but none were had within the estimate. The commissioners re-advertised for bids, but still none were received. The county engineer states that a re-estimate will have to be made, as the original one is below present market prices.

About seventy-five per cent or more of the property owners taxed are now opposed to the construction of the road, and wish that the project be abandoned.

The purchasers of the bonds, one of the banks in the city of Steubenville, still retain the same, never having disposed of them. This bank is willing to surrender the bonds.

The question the commissioners wish determined is whether the board of commissioners can abandon the construction of this one mile improved road. If so, what proceedings should the board follow to abandon the construction of this one mile road?

If they cannot abandon the improvement, can the owners of the abutting property be assessed for their proportion of the increased cost over and above the original estimate?"

No statute has been found expressly authorizing the discontinuance of road proceedings; hence any authority the commissioners may have in that connection must be ascribed to implication.

Your inquiry indicates that the commissioners in the proceedings in question

were acting under the so-called county road improvement statutes,—sections 6906 et seq.

It will be seen that road improvement proceedings under said statutes have their inception either in the filing with the commissioners of a petition signed by the owners of fifty-one per cent of the land to be specially assessed; or in the unanimous action of the commissioners declaring the necessity of the improvement. However, the filing of such petition does not cast the positive duty on the commissioners of going ahead with the improvement,—it merely requires them to view the proposed improvement within thirty days after the presentation of the petition, and to make a determination whether the public convenience and welfare require that such an improvement be made. Hence, it is evident that the law leaves to the sound discretion of the commissioners the question of the public utility of a proposed county road improvement.

This sound discretion vested in the commissioners would certainly seem to be equally in point when the commissioners find after the taking of bids, that the original proceedings cannot be carried out upon the original plan for the reason that the original estimates, assessments, etc., have been found inadequate. Perhaps in order to procure the additional funds necessary for going ahead with the improvement, the commissioners would have to resort to a bond issue under section 6929; and the matter of whether they will issue such bonds is left to the judgment of the commissioners. However, if we assume that a bond issue is not necessary, and that other funds are available for the improvement, there is certainly nothing in the law which compels the commissioners, against their judgment, to use such funds on the road in question. The commissioners might be of the belief that the public welfare requires the use of the funds on other roads. Hence, it is quite plain that under the circumstances set forth in your letter, the matter of providing additional funds is not a mere ministerial act on the part of the commissioners such as they might be required to perform by mandamus.

Upon the whole, in the absence of express statute or judicial precedent, about the only rule that suggests itself as a guide in your situation, is that the proceedings may be discontinued unless private property rights will be adversely affected.

It does not appear that such private property rights will be in any wise affected or impaired. Hence, the conclusion follows that the commissioners are at liberty in the exercise of their sound discretion to discontinue the proceedings if they consider such discontinuance in the public interest.

You inquire what proceedings the board is to follow in case the project is abandoned.

It is suggested that as its first step the board pass a formal resolution setting out the circumstances as recited in your letter and concluding with a determination that it is in the public interest that the road improvement project in question be abandoned, and that the installments of assessment thus far paid be returned. A certified copy of such resolution should be filed with the county auditor so as to show authority for cancellation of the assessments.

The matter of redemption of bonds is a simple one since the money paid over to the county for them is intact, and since the original purchaser still has the bonds and is willing to surrender them.

In the matter of reimbursement of those persons who have paid installments of assessment, attention is called to the following text appearing in section 1490 of Page and Jones Taxation by Assessment:

“If an assessment has been levied and collected and the money raised thereby has not been expended upon the construction of an improvement, and such improvement has been abandoned by the public corporation, such payments may be recovered upon the theory of failure of consideration.

\* \* \* A statute which directs the transfer of balances of special funds to the general funds, is not applicable to the proceeds of a local assessment."

Since it thus appears that the persons who have paid in their assessments are entitled to re-payment, it is suggested that procedure be had in accordance with sections 2460 and 2572 G. C. relating to allowance and payment of claims against the county.

The foregoing views make unnecessary an answer to your final question.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*

1147.

DISAPPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS  
IN JEFFERSON, WILLIAMS, PORTAGE AND HOCKING COUNTIES.

COLUMBUS, OHIO, April 12, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am returning, enclosed, without my approval, the following four of the six final resolutions sent me with your letter of April 8, 1920:

- Ohio River road, I. C. H. No. 7, section "M," Jefferson county.
- Edon Cooney road, I. C. H. No. 311, section "K," Williams county.
- Ravenna-Warren road, I. C. H. No. 322, section "V," Portage county.
- Logan-Lancaster road, I. C. H. No. 360, section "G-1," Hocking county.

On the first of these resolutions the date of the passage of the final resolution is not inserted; hence, I am unable to tell whether the auditor's certificate was made before or after the passage of such final resolution.

On the second resolution, the county auditor has stricken off of the auditor's certificate the words "sold and in process of delivery," and has inserted in lieu thereof the words "now being advertised for sale." The printed form of auditor's certificate embodied in the final resolution is in conformity with section 5660. The law does not recognize any such certificate as is the result of the change made by the county auditor, as noted above.

The third resolution noted above appears to have been passed on June 16, 1919, whereas, auditor's certificate was made on February 16, 1920. By the terms of section 5660, the auditor's certificate should either be made at the time of or before the passage of the final resolution.

The last resolution enclosed contains an endorsement of your department showing that part of the appropriation is out of the main market road fund. The resolution on its face fails to show that the road in question is a main market road.

Respectfully,

JOHN G. PRICE,  
*Attorney-General.*