

935.

WAIVER—ABUTTING PROPERTY OWNERS SIGNING WAIVER OF NOTICE AS REQUIRED BY SECTION 6977, GENERAL CODE, DISPENSES WITH PUBLICATION OF SAME—SECTION 6973, GENERAL CODE, DISCUSSED.

SYLLABUS:

If all of the owners of the property abutting upon a street which is being improved by county commissioners under authority of Sections 6973, et seq. of the General Code, sign a waiver of the notice required to be given by Section 6977, General Code, it is not necessary to publish the notice provided for in said section.

COLUMBUS, OHIO, August 30, 1927.

HON. ERNEST M. BOTKIN, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, which reads as follows:

“Where county commissioners have determined to proceed with the improvement of a street in platted lands outside of the municipality under the provisions of Sections 6973 to 6986 of the General Code, will a waiver by all of the owners of property abutting upon said street of the notice required to be given by Section 6977 of the General Code give the county commissioners jurisdiction to proceed with said improvement without the publication of the notice as therein provided?”

The improvement in question is being constructed under the provisions of Sections 6973, et seq. of the General Code, Ch. II, Tit. IV, Part Second, entitled “Roads, Streets, etc., outside of Municipal Corporation, Bounded by Platted Lands.” These sections provide that the commissioners shall have the power to improve any street which is bounded on both sides by platted lands and situated without a municipal corporation, when petitioned so to do by at least fifty-one per cent of the land or lot owners who will be specially assessed for such improvement. Section 6981 of the General Code provides:

“The entire compensation, damages, costs, and expenses of the improvement, including the expense of engineering and inspection, shall be assessed against the real estate abutting upon said improvement according to the benefits accruing to such real estate.”

These sections further provide that before the commissioners finally determine whether or not the improvement shall be made, they shall have plans and specifications prepared, and it is provided by Section 6977, General Code, that:

“Upon the completion of the surveys, plans, profiles, cross-section, estimates and specifications for such improvement by the county surveyor, he shall transmit to the commissioners copies of the same; and thereupon the county commissioners shall cause to be published in a newspaper published and of general circulation within the county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county, once a week for two

consecutive weeks, a notice that such improvement is to be made and that copies of the surveys, plans, profiles, cross-sections, estimates and specifications for said improvement are on file in the office of the county commissioners for the inspection and examination of all persons interested therein. Such notice shall also state the time and place for hearing objections to said improvement, and for hearing claims for lands and property to be taken for said improvement or damages sustained on account thereof, and that unless such claims are filed in writing with the county commissioners on or before the time fixed for hearing said claims the same shall be waived, except as to minors and other persons under disability."

It is also well to notice the provisions of Section 6979 of the General Code, which read as follows:

"All claims for damages sustained on account of, or incident to such improvement, and claims for compensation for land and property to be taken, shall be in writing setting forth the amount of damages or compensation, or both, claimed, together with a description of the property to be taken or damaged, and the same shall be filed with the board of commissioners of said county on or before the time fixed for hearing such claims.

The board of county commissioners shall upon actual view of the premises, allow compensation for land or property taken, and such damages as in their judgment will accrue from the construction of said improvement, to each person, firm or corporation making application therefor as herein provided, and they shall award such compensation and damages without any application to minors or other persons under disability, owning lands or property to be taken or damaged by the proposed improvement. Such compensation and damages shall be computed without deduction for benefits to such land or property.

Any person, firm or corporation aggrieved by the finding of the commissioners upon any application for compensation or damages may appeal to the probate court by giving the notice provided for with respect to appeals in road cases, and by filing the bond therein provided, and such proceedings shall be thereafter had upon such appeal as are provided for by law."

Section 6980, General Code, provides that if after hearing and determining all the claims for compensation and damages on account of the proposed improvement, the commissioners are satisfied that the public convenience and welfare require such an improvement, they shall by resolution order that they proceed therewith and shall adopt the surveys and plans, etc., therefor. An examination of all of the sections relating to an improvement of the kind under consideration discloses that the only parties who could be interested in or harmed by such a proposed project would be the abutting property owners and if they waive the giving of notice provided for in Section 6977, supra, they can not be heard to complain. It is a well recognized principle of law that, as set forth in 29 Cyc. 117,

"A waiver by the parties for whose benefit or protection notice should be given is equivalent to notice, and dispenses with its necessity."

In passing, your attention is directed to the fact that the assessments for the payment of expenses of such an improvement shall be charged as a special assessment against the land and shall be a lien thereon, and placed upon a special duplicate and collected by the county auditor.

Specifically answering your question, it is my opinion that if all of the owners of the property abutting upon a street which is being improved by county commissioners under authority of Sections 6973, et seq. of the General Code, sign a waiver of the notice required to be given by Section 6977, General Code, it is not necessary to publish the notice provided for in said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

936.

OHIO NATIONAL GUARD—OFFICER ENTITLED TO COMPENSATION WHILE ON ACTIVE DUTY EVEN THOUGH HOLDING OTHER POSITION IN ORGANIZATION WHICH RECEIVES CONTRIBUTIONS FROM THE STATE OF OHIO.

SYLLABUS:

Officers of the Ohio National Guard are entitled to compensation while on active duty even though they may hold positions in organizations which receive contributions from the State of Ohio, and their compensation for duties incident to such positions is paid from funds appropriated by the legislature for the use of such organizations.

COLUMBUS, OHIO, August 30, 1927.

HON. WILBUR E. BAKER, *Director of Finance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication reading as follows:

"The Adjutant General's Department has presented for our approval a voucher payable to Major J. E. for \$157.09. Of this amount \$147.10 represents ten days' personal service from August 3rd to August 12th, at the rate of \$14.71 per diem. During this period Major E. was at Athens, Ohio, representing the Adjutant General's office in the present mine investigation.

Major E. during the period of August 1st to 15th, drew payment from the state for services as Department Adjutant of the Spanish-American War Veterans in the amount of \$75.00; and for services as Secretary-Treasurer of the 37th Division A. E. F. History in the amount of \$100.00, both offices being in the Stoneman Building, Columbus, Ohio.

The above amounts are payable from appropriations in H. B. 502 as follows:

F-8 Contingencies—Ohio National Guard.

A-1 Salaries—Department Adjutant Headquarters Spanish-American War Veterans.

F-9 General Plant—37th Division A. E. F. History.

Your opinion is requested as to whether Major E. is entitled to receive payment for services from the Spanish-American War Veterans and the 37th Division A. E. F. History organization during the period he was on duty at Athens.