

In my opinion No. 1942, issued to you under date of April 7, 1925, this decision was quoted from extensively and the question of what constitutes a muskrat farm was discussed at length, and need not be repeated herein.

You are advised that it is my opinion that where lands are enclosed by dykes and canals and the premises within the enclosure are used exclusively for the breeding and raising of the animals mentioned in sub-section a of Section 1398, General Code, the same would constitute an enclosure within the meaning of said section and the animals mentioned in said exception in said section may lawfully be taken or killed at any time, except on Sunday, within said enclosure by the owner thereof. It is further my opinion that under the authority of the case of *State vs. Evans*, supra, an employe of the owner of such a farm or enclosure may take or kill the animals mentioned in said exception in said section for his employer, when found within such an enclosure at any time except on Sunday.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

2680.

ROAD IMPROVEMENT—COUNTY COMMISSIONERS—LIMITED BY MAJORITY VOTE TO IMPROVEMENTS AS PETITIONED FOR—CANNOT COMBINE PETITIONS FOR PORTIONS OF ROAD—SUFFICIENCY OF PETITION—ROAD IN ONE COUNTY FOR WHICH LAND IN ANOTHER IS ASSESSABLE.

**SYLLABUS:**

1. *Where a petition is filed with the board of county commissioners for the improvement of a county road, under authority of Section 6907 of the General Code, the authority of the county commissioners to act by majority vote in favor of such improvement is limited to the improvement as designated in such petition, and there is no authority for combining separate petitions filed for the improvement of contiguous portions of the same road.*
2. *Where the improvement of a road is petitioned for and such road lies wholly within one county, but the assessment area for such improvement includes property located in another county, the improvement must be made in accordance with the provisions of Section 6941 of the Code, and related sections.*
3. *In determining the sufficiency of a petition filed for the construction of a road located wholly within one county but as to which property in another county is to be assessed, the property owners in such other county must be taken into consideration.*

COLUMBUS, OHIO, October 6, 1928.

HON. HOWARD J. SEYMOUR, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“Will you kindly rule on the following proposition which is before the county commissioners: Three separate road improvement petitions covering the taxpayers one-half mile each side of a road running through the three contiguous, special taxing districts, have been combined into one petition, although the engineer’s estimates show a different per mile cost of the separate sections of this road.

The proposed improvement is within less than half a mile of the county line for some distance and although the petition purports to include property owners within one-half mile either side of the road, no signers have been obtained across the county line, nor has any communication been had with the commissioners of the adjoining county.

Do you consider that Section 6930, relating to filing a certified copy of the petition with the commissioners of the adjoining county would indicate that petitioners in the adjoining county up to the one-half mile from the road in the first county, should be counted on the petition and taken into consideration in deciding whether a majority of the benefited holders had signed the petition?

Can the three petitions be combined equitably in view of the varying estimated per mile cost of construction in the different sections? *Goff vs. Gates*, 87th O. S. p. 152, the Supreme Court passed around the situation without ruling on it, although indicating that the benefited land in the adjoining county should be taxed."

I need not quote extensively from the statutes covering ordinary road improvements by county commissioners. The sections of the Code applicable are Sections 6906, et seq. Two methods are provided for the improvement of county roads generally, the first being prescribed by Section 6907, where a petition is filed, and in that event action may be taken by a majority vote of the board. Section 6911 of the Code provides that the commissioners may act without a petition by unanimous vote.

I note that you say three separate petitions have been filed by taxpayers for the improvement of the one road representing contiguous parts thereof, and that these petitions have been combined into one petition, although the engineer's estimates show a different cost per mile of the separate sections covered by the individual petitions. There is, however, in my opinion, no authority for such combination.

The provisions of the Code applicable to improvements by petition clearly indicate that the improvement of a specific portion must be asked in the petition and it is entirely conceivable that a signer of a petition for the improvement of a certain portion of the road would not be willing to sign if the improvement of the road were contemplated to a greater extent than indicated in the petition. That is to say, it is a well known fact that construction costs vary with the topography, and one section of the road, because of the necessity of cuts, fills, etc., will cost appreciably more than a contiguous section, although the improvement be made to the same width and of the same material. From your statement that the engineer's estimates show different costs per mile, it is apparent that this situation exists in the instance you cite. It is therefore a violent assumption that the signers of an individual petition would also be agreeable to the improvement of the road as a whole.

My conclusion is accordingly that the county commissioners must act separately on each individual petition if their action is to be taken by a majority vote only. If, however, an ordinary county road improvement were involved which did not include the assessment of property not located within the county, the commissioners could disregard the petitions filed and proceed, by unanimous vote, to make the whole improvement comprehended within the three petitions. In such case the petitions would have no legal effect, but the commissioners could give them consideration as to whether or not it would be advisable to make the improvement. Your inquiry, however, sets forth that over a considerable portion of the proposed improvement the one-half mile assessment area will include property located in another county. It accordingly becomes necessary to determine what procedure is applicable in such case.

Section 6930, to which you refer, is as follows:

“When the proposed improvement is in two or more counties or along the county line between two or more counties in this state, the petition may be filed with the county commissioners of any one of said counties. The commissioners with whom said petition is filed shall cause a certified copy thereof to be filed with the commissioners of each of the other counties in which some part of the proposed improvement is situated.”

The succeeding sections set forth the action to be taken for such an improvement and it is sufficient to state that the county commissioners of the two counties, acting as a joint board, have similar powers to those conferred upon the county commissioners in case of an improvement wholly within the county. The improvement contemplated by these sections may be made either with or without a petition. It is clear, however, that the improvement under consideration does not come within those prescribed in Section 6930, supra. It is neither located within two or more counties nor along the county line. Consequently, I am of the opinion that these sections have no application to your question.

The section specifically covering your situation is Section 6941, which is as follows:

“When the proposed improvement is wholly within one county but within less than the legal assessment distance of the county line and a petition is filed asking for such improvement, signed by fifty-one per cent of the persons to be specially assessed therefor, such improvement shall be regarded as a joint county improvement, and shall be made in accordance with the provisions of Sections 6930 to 6939 inclusive of the General Code of Ohio in so far as said sections are applicable.”

This section applies to any improvement located wholly within one county, but within less than the legal assessment distance of the county line. It is the only section of the Code applicable to such a situation. The section specifically is only applicable where a petition for the improvement is filed, and accordingly the conclusion must be reached that an improvement of this character cannot be undertaken without a petition therefor. This being true, it follows that the county commissioners are not at liberty to disregard the three separate petitions which have been filed. The filing of a petition being a condition precedent to any action looking toward the improvement, the rule which I have heretofore set forth must be applied and each petition must be treated separately, there being no power to combine petitions, although they be filed for the improvement of contiguous portions of the same road.

It follows that the commissioners must proceed under Section 6941, supra, which section in turn refers to and makes applicable the provisions of Sections 6930 to 6939 of the Code. The procedure set forth in these sections is clear and I anticipate you will have no difficulty in determining the course to pursue. Of course, there is nothing to prevent the withdrawal of the three separate petitions and the substitution therefor of a new petition covering the whole improvement, and, in the event it is properly signed by the requisite number of property owners to be assessed, the commissioners could proceed to make the improvement as a whole, being governed by the provisions of Section 6941 of the Code, and related sections.

You inquire whether petitioners in adjoining counties within the half-mile area should be counted in determining whether fifty-one per cent of those to be assessed have signed the petition. The answer to this is clear from the provisions of Section

6941, supra. Inasmuch as the petition must be signed by fifty-one per cent of the persons to be assessed therefor, manifestly this would include property owners in the adjoining counties as well as those in the county in which the improvement is to be made.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

2681.

ROADS—DUTIES OF COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES AS TO STREETS IN PLATTED TERRITORY OUTSIDE OF MUNICIPALITY DISCUSSED.

*SYLLABUS:*

*Township trustees are by virtue of the provisions of Section 7464, General Code, charged with the duty of maintaining roads and streets in platted territory outside the boundaries of any municipality, unless such roads or streets are, by action of the county commissioners of the state, incorporated in either the county or state system.*

COLUMBUS, OHIO, October 6, 1928.

HON. OSCAR A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge the recent communication of Mr. Ferbstein, Assistant Prosecuting Attorney, which reads as follows:

“We respectfully request an opinion from your office concerning the interpretation of Section 7464 of the General Code as set forth in 112 O. L. 496. Our specific question under this section is as follows:

Paragraph C of Section 7464 says that ‘township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships.’

Under the above quoted section, first, are the trustees compelled to maintain and improve roads and streets in allotted territory outside of the municipality assuming that a plat of said territory has been duly made and dedicated and recorded and that the road or street has thereby become a public highway; and, secondly, would it be illegal for the township trustees to spend township money improving such roads or streets if it is not mandatory upon them to do so?”

The answer to this inquiry is, I believe, clear from the language of Section 7464 of the Code, from which a portion is quoted in the communication. The section in full is as follows:

“The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include the roads and highways on the state highway system.

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under