

2915.

LIGHTING DISTRICT—HEARING HELD IN RESPONSE TO FILING OF PETITION—NECESSITY FOR CREATION DETERMINED BY BOARD OF TOWNSHIP TRUSTEES—ADVERSE FINDING DOES NOT PRECLUDE LATER ACTION IN PROCEEDING WITH IMPROVEMENT AND PAY FROM GENERAL TOWNSHIP FUND.

SYLLABUS:

1. *When a proper petition is filed under Sections 3428 et seq., General Code, the board of township trustees must hold a hearing thereon and reach a determination as to the necessity of creating a lighting district.*

2. *If the trustees find against the necessity of the improvement, such action terminates the proceedings.*

3. *The termination of such proceedings does not preclude said trustees from acting under Section 3440-1, General Code, which section does not require the filing of a petition, and the cost of said improvement under said Section is payable from the general township funds.*

4. *Under Section 3440-1, General Code, a majority of the members of the board of trustees may take action.*

COLUMBUS, OHIO, February 5, 1931.

HON. W. M. VANCE, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—In your recent communication you enclose a copy of your opinion rendered to the Board of Trustees of Mad River Township, and request my opinion upon the same propositions. The queries considered by you were as follows:

"1. When a petition complying with the law, is filed with the Township Clerk, praying for the lighting of a certain highway passing through the township, in accordance with Section 3428, General Code of Ohio, are the Township Trustees compelled to proceed under Sections 3428 to 3439, inclusive, and if they determine for the improvement, assess the cost against the benefited property, OR MAY THE TRUSTEES IGNORE THE PETITION AND PROCEED UNDER SECTION 3440-1, assessing the cost against the general fund of the township?"

2. Can the Township Trustees, after the filing of a petition under G. C. 3428, proceed to give notice, have a hearing, and determine against the improvement, then, at a later date, reconsider the matter under G. C. 3440-1, determine for the improvement and pay the cost thereof from the general fund of the township?"

3. Does the determination of the township trustees in favor of lighting part of the territory under their supervision and control, under G. C. 3440-1, require a unanimous vote of approval, or a majority?"

The conclusions which you reached in reference to the above inquiries read:

"1. If a petition is filed with a township clerk asking for lighting of a certain highway in the township, signed by the owners of at least one-half the feet front of the lots and lands abutting on said highway,

according to Section 3428, G. C., the township trustees must proceed to the hearing and determination of the necessity of such lighting. The petition can not be ignored.

2. On the hearing provided for in Section 3433, the township trustees may determine against the improvement. There is nothing to prevent the same township trustees at a later time changing their minds as to the necessity, and on their own initiative declaring for the same improvement previously determined against, and proceeding under Section 3440-1.

3. The determination of the township trustees under G. C. 3440-1, requires only a majority, and not unanimous vote."

Sections 3428 to 3440, inclusive, of the General Code, were discussed in my opinion, found in Opinions of the Attorney General for the year 1929, page 563, and the following is quoted therefrom, for the purpose of indicating the import of the sections mentioned in so far as your question is concerned:

"Sections 3428 to 3440, inclusive, of the General Code, provide for the establishment of lighting districts in unincorporated portions of a township. Section 3428 provides that when the owners of more than one-half of the foot frontage of the lands abutting on the public way of an unincorporated district in a township, sign a petition for artificial lighting of said way and file it with the clerk of the township, notice shall be given to the trustees of the filing of such petition. Section 3429 provides that the petition shall specify the metes and bounds of the district but shall include no more than 660 feet from, nor any lands not abutting on the public ways in the district. Said section further provides that the signing of such a petition by the owner constitutes a waiver by him of all claims for compensation and damages for lands necessarily used for the purposes of supporting and maintaining such lights. The next section requires that the clerk shall fix a day for the hearing of the petition, giving notice in writing to the lot and land owners and to the corporations, either public or private, affected by the improvement, etc. Section 3431 relates to the service and return of such notice. Section 3433 provides for the hearing by the trustees, and requires such trustees to view the public ways and the premises along and adjacent thereto to be lighted and benefited and determine the necessity thereof. Section 3434 provides:

'If the trustees decide for such improvement, they shall specify the number of lights they deem necessary for properly lighting the streets and public ways in the district, determine the candle power thereof and locate the points where the lights shall be located and the kind of supports for them.'"

It must be kept in mind that the sections above mentioned provide an entirely different proceeding from that mentioned in Section 3440-1, General Code. The first procedure involves the creation of an assessment district and the cost is to be paid entirely by assessments, while in the latter there is no petition filed, there are no assessments made, and the cost is paid from the general township fund. While the former sections would appear to make it mandatory that the trustees hold a hearing in the event a proper petition is filed, it clearly appears to be a discretionary matter as to whether or not they find for such improvement.

The language of the sections requiring the establishing of the lights, etc.: "If the trustees decide for such improvement," clearly implies that nothing is to

be undertaken in the event they do not so decide. Section 3440-1, General Code, as last amended, reads:

"The township trustees of any township shall also have power to provide artificial lights for any road, highway, public place or building under their supervision or control, or territory within such township and outside the boundaries of any municipal corporation, when such township trustees determine that the public safety or welfare requires that such road, highway, public place or building or territory be lighted. Such lighting may be procured either by installing a lighting system or by contracting with any person or corporation to furnish lights.

In case such lights be furnished under contract such contract may provide that the equipment employed in supplying same may be owned either by the township or by the person or corporation supplying same.

If the township trustees determine to procure said lighting by contract, they shall prepare plans and specifications therefor and shall advertise for bids for furnishing the same, for a period of two weeks, either by posting said advertisement in three conspicuous places in said township, or by publication thereof once a week for two consecutive weeks in a newspaper of general circulation in the township.

The contract for such lighting shall be made with the lowest and best bidder and no such contract shall be made to cover a period of more than ten years. The cost of installing and operating any such lighting system, or of any such light furnished under contract, shall be paid from the general fund of the township treasury."

The section last above quoted, contemplates an entirely different procedure from that hereinbefore discussed. There is no petition required, no assessment district created, and the cost is paid from the general township fund. While under Section 3440-1, the township trustees are authorized to provide lighting for public buildings or public places under their control, the section also expressly provides for the lighting of any road or highway.

While it might be argued that in the case you present it would be inconsistent for the trustees to hold against the necessity upon the hearing of the petition to establish a district and then later provide for the same thing under Section 3440-1, it is not believed that this is necessarily true. In other words, the trustees may properly find that the needs are not so imperative as to justify assessments against all of those who may be in a contemplated district and that the public, generally, will be benefited by such undertaking, so as to justify providing the same from public funds. Of course the proceedings under Section 3440-1, supra, theoretically would not be regarded as any part of the original proceedings, but would constitute a separate and distinct undertaking.

In considering your third inquiry, it may be stated that it is well settled in this state that a majority of the members of a board of township trustees may take any authorized action unless the statutes expressly require the unanimous action of all the members. Inasmuch as Section 3440-1, supra, contains no provision requiring unanimous action, it follows that a majority of said trustees may act thereunder.

In view of the foregoing, I concur in the conclusions stated in your opinion to the trustees.

Respectfully,
GILBERT BETTMAN,
Attorney General.