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ROAD—VACATE—COUNTY COMMISSIONERS MAY VACATE A ROAD WHEN IT WILL BE FOR PUBLIC CONVENIENCE OR WELFARE—MAY ADOPT NECESSARY RESOLUTIONS PROVIDED FOR IN SECTION 686₂ ET SEQ., G. C.—PETITION NOT REQUIRED TO BE FILED BY PROPERTY OWNERS IN VICINITY OF ROAD.

SYLLABUS:

County commissioners may, when they are of the opinion that it will be for the public convenience or welfare, proceed under Section 6862, General Code, and the following sections, and vacate a road by adopting the necessary resolutions provided for in such sections even though no petition for such closing has been filed by the property owners in the vicinity of the road.

Columbus, Ohio, September 18, 1950

Hon. Leon C. McCarty, Prosecuting Attorney
Morrow County, Mount Gilead, Ohio

Dear Sir:

I am in receipt of your communication requesting my opinion, as follows:

“The Commissioners of Morrow County, Ohio, desire to know whether or not they have the power to close a road which has not been used for over twenty-one years by a resolution when no

petition for such closing has been filed by the property owners in the vicinity of the road.

“Said road is in litigation. The opinion of the Supreme Court of Ohio being in Vol. 152, page 241, of the Ohio State Reports.”

In answering your question, attention is directed to Section 6860 of the General Code, which authorizes the county commissioners to locate, establish, alter, widen, straighten, vacate or change the direction of roads. The power therein granted extends to all roads within the county except that when the roads are on the state highway system the approval of the Director of Highways shall be had before any action may be taken.

Your attention is further invited to Section 6862, General Code, which deals specifically with the question you ask and which reads as follows :

“When the county commissioners are of the opinion that it will be for the public convenience or welfare to locate, establish, alter, widen, straighten, vacate or change the direction of a public road *they shall so declare by resolution*, which resolution shall set forth the general route and termini of the road, or part thereof, to be located, established, or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed. When a petition signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement is presented to the board of county commissioners of any county requesting said board to locate, establish, alter, widen, straighten, vacate or change the direction of a public road, such board of county commissioners shall view the location of the proposed improvement, and if they are of the opinion that it will be for the public convenience or welfare to make such improvement, they may take the action prescribed by this and the succeeding sections and proceed to make such improvement. Such petition shall set forth the general route and termini of the road, or part thereof, to be located, established or vacated, or the general manner in which such road is to be altered, widened, straightened or the direction thereof changed.”

(Emphasis added.)

An interpretation of this section as it relates to the question presented by your communication is the subject of discussion in Ohio Jurisprudence, Vol. 20, p. 651. Said passage reads as follows :

“It was well established under the highway statutes as they existed prior to the amendment of §6862, G. C., by the act passed April 21, 1927, so as to authorize the establishment of highways by county commissioners upon their own initiative, that jurisdic-

tion of a proceeding for the establishment of a highway or for the making of a highway improvement by county commissioners under the provisions of §6860, G. C., was dependent upon the execution and filing with the commissioners of a petition for such purpose by the requisite number of qualified freeholders. It was further established, under the former law, that the statutory qualifications of the signers of the petition as 'freeholders of the county residing in the vicinity of the proposed improvement' must affirmatively appear upon the record of the proceeding in order to confer such jurisdiction upon the commissioners, and that the failure of the record to show such facts would render the proceeding invalid in a review thereof on error, but not in a merely collateral proceeding. While the provisions of the statute in question, as so amended, have not as yet been judicially construed, they appear to have the effect of authorizing the county commissioners to initiate such a proceeding by the passage of a resolution, independently of a petition by freeholders, and while the statute still makes provision for the execution and presentation of such petition, the only function or purpose thereof seems to be to require the commissioners to make a preliminary view of the improvement therein requested. If the commissioners, upon making such view, are of the opinion that it will be for the public convenience or welfare to make such improvement, they are then authorized 'to take the action prescribed by this and the succeeding sections (§§6862 et seq., G. C.) and to proceed to make such improvement;' that is, they may adopt the initial resolution declaring such opinion, and fixing therein the dates for the formal view and for the final hearing. It would thus appear that the function of the petition under the present law is not of the jurisdictional character which it performed under the earlier form of the statute, and that, under the present law, the requisite action to initiate the proceeding and confer jurisdiction upon the commissioners to conduct the same is the adoption of the resolution provided for in §6862, declaring their opinion that the improvement therein described and proposed will be for the public convenience or welfare."

Under an earlier form of Section 6863, General Code, the petitioners for a highway improvement under the provisions of Section 6860 et seq., General Code, were required to execute a bond, with sureties, for the payment of the costs and expenses of the proceeding in the event of a refusal to grant the prayer of the petition. Such provision is not carried in the present statute, having been omitted in the revision and amendment thereof of 1927 (112 O. L. 484).

In commenting upon the omission of the bond requirement in the statute as it now stands, it is said in Vol. 20, O. Jur., p. 652, as follows:

“The fact that the former requirement as to the filing of a bond by the petitioners has been omitted from the amended statute would seem to support the view that the petition cannot be regarded as functioning even as an alternative jurisdictional step, coordinate with the action of the commissioners in adopting a resolution on their own initiative. The apparent reason for the omission of the requirement as to bond is that if the commissioners are of the opinion, upon making a preliminary view of the improvement petitioned for, that its establishment will be for the public convenience or welfare, the further proceedings, including the formal view and hearing, are taken, and the expense incident thereto incurred, upon the judgment and responsibility of the commissioners rather than at the request of the petitioners. In other words, the present function of the petition seems to be limited to setting in motion the legal machinery to the extent only of securing the preliminary view of the proposed improvement, leaving the responsibility for further proceedings in the matter to rest upon the representatives of the public.”

It may also be well to mention that the use of the term “improvement” in Section 6860, et seq., General Code, supra, includes the vacation of a road as defined by Section 6863, General Code, as follows:

“* * * The word ‘improvement’ used in this and related sections signifies any location, establishment, alteration, widening, straightening, vacation or change in the direction of a public road, or part thereof, as determined upon by a board of county commissioners or joint board by resolution.”

It is accordingly my opinion then, in specific answer to your question, that the county commissioners may, when they are of the opinion that it will be for the public convenience or welfare, proceed under Section 6862, General Code, and the following sections, and vacate a road by adopting the necessary resolutions provided for in such sections, even though no petition for such closing has been filed by the property owners in the vicinity of the road.

Respectfully,

HERBERT S. DUFFY,
Attorney General.