

586.

ROAD IMPROVEMENT — COUNTY COMMISSIONERS — UNANIMOUS
VOTE ESSENTIAL TO MAKE AGREEMENT WITH TOWNSHIP TRUS-
TEES WHEN NO PETITION FILED.

SYLLABUS:

Under the provisions of Section 6921, General Code, the county commissioners or joint board thereof may only by unanimous vote, when no petition has been filed therefor, enter into an agreement with the trustees of the township or townships in which a road sought to be improved is in whole or part situated whereby said county and township or one or more of them may pay such proportion or amount of the damages, costs and expenses of such improvement as may be agreed upon between them.

COLUMBUS, OHIO, July 2, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Section 6921 of the General Code provides:

‘The county commissioners, or joint board thereof, upon a unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor, or the county commissioners or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county and township, or one or more of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them.’

Question: Does the provision requiring the unanimous vote of the county commissioners apply to an agreement made with the township trustees as well as to a case in which the county commissioners pay the whole cost of an improvement out of the county treasury?”

The statute is clear in that, if all the compensation, damages, costs and expenses of a road improvement are to be paid out of county funds, the county commissioners, upon a unanimous vote, may, without a petition therefor, so order. The alternative discretionary power is given to the county commissioners to agree with certain townships to apportion the damages, costs and expenses between the county and such townships. This latter alternative provision includes no reference to the necessity of a unanimous vote when acting without a petition. The question is, therefore, does the qualification as to unanimous vote without a petition apply to both alternative methods of procedure as contained in this section, or does this qualification apply only to the first. It is interesting to note that if acting under the second method as contained in this section, there appears no authority to apportion the compensation between the county and the townships, but only the damages, costs and expenses. If an improvement, therefore, required the taking of land, apparently compensation to owners of land so taken should be paid by the county only, although proceeding under the second method provided in this section.

A determination of the legislative intent, as disclosed in the surrounding sec-

tions of the General Code, is necessary. Section 6906, General Code, sets forth the general powers of county commissioners relating to the construction, improvement, reconstruction, repair and maintenance of public roads, except roads or highways on the state highway system. Section 6906-2, General Code, is as follows:

“When a petition signed by at least fifty-one per cent. of the land or lot owners who are to be specially assessed praying for the improvement of any road is filed with the board of county commissioners as provided in Section 6907 of the General Code said improvement may be determined upon and all orders with reference thereto may be made by a majority vote of the county commissioners. The procedure for such improvement shall otherwise be the same as in the case where the commissioners proceed without a petition.”

Section 6907 imposes a mandatory duty upon the county commissioners, in the event a petition is filed, to determine whether the public convenience and welfare require that such improvement be made. Section 6908 is as follows:

“Lot or land owners who are not otherwise taxed than to raise the proportion of the cost and expenses of said improvement to be paid by the township, or the county as a whole, shall not be considered as specially taxed, or assessed for said improvement, and such persons shall not be counted either for or against the improvement in determining whether the required number of persons have signed the petition for said improvement.”

Section 6911 provides that the board of county commissioners may, by resolution adopted by unanimous vote, improve any public road. No reference is made in this section to a petition having been filed for such improvement and it is expressly stipulated that the county commissioners may institute proceedings therefor by the passage of a resolution as therein provided only by unanimous vote. Such resolution must recite that the public convenience and welfare require the improvement and must apportion the cost by any one of the methods provided for by Section 6919, General Code. Section 6919 provides for three different methods for apportioning the cost of such an improvement, in each one of which a portion of such costs shall be assessed against the real estate abutting upon said improvement. This section also provides that when the board of county commissioners acts by unanimous vote and without the filing of a petition, the commissioners shall set forth in the resolution declaring the necessity of the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement.

It is noted that there appears no express provision whereby a board of county commissioners or joint board thereof may institute proceedings for any road improvement without a petition, except by unanimous vote. In fact, it is expressly provided that a unanimous vote shall be necessary when no petition is filed and in the event a petition is filed, a majority of the board may act. The same provisions as to the necessity of a unanimous vote when no petition is filed appear governing the procedure of township trustees when instituting proceedings for a township road improvement. Section 3298-15, General Code.

Considering now the first part of Section 6921, it seems manifest that where the total cost of a road improvement is to be paid out of county funds, there are no provisions for the filing of a petition for the reason that such a petition may, under Section 6908, supra, only be signed by those to be specially taxed or assessed. As stated by my predecessor (Opinions of the Attorney General, 1928, p. 1145):

“From what I have said, I believe it follows necessarily, that now, as well

as prior to the enactment of the Norton-Edwards Act, wherever a petition is presented for an improvement which is either a construction, reconstruction, improvement or repair of a public road, it is essential that a portion of the cost of such improvement be assessed."

Under this first method of paying such cost, no one is specially taxed or assessed. If the provision "upon a unanimous vote without a petition therefor" applies only to the first part of the section, the reference to a petition is, at best, surplusage.

Under the theory that the provision as to unanimous vote without petition, is applicable to the second part of the section under consideration, there appears no such inconsistency. The second alternative method of procedure therein set forth does not expressly state that all of the cost is apportioned between the county and townships. It is merely provided that the county and townships may enter into an agreement "whereby said county and township, or one or more of them may pay *such proportion* or amount of the damages, costs and expenses as may be agreed upon between them." Apparently under such an agreement, some part of the cost may be assessed. Section 6921-1, General Code, provides in part:

"Where the compensation, damages, costs and expenses of an improvement, other than the portion thereof, if any, to be specially assessed against benefited real estate, are to be paid in part by the county and in part by the township or townships in which such improvement is situated, under an agreement between the county commissioners and the trustees of such township or townships entered into under the provisions of Section 6919 or Section 6921 of the General Code, the part of such compensation, damages, costs and expenses to be paid by the interested township or townships may be paid from the proceeds of any levy or levies made by the county commissioners under Section 6927 of the General Code or from the proceeds of any levy or levies made by the township trustees under Section 3298-15d of the General Code.

* * * * "

Considering the reference as to a unanimous vote when no petition is filed as applicable to the entire section rather than solely to the first half thereof, there is no ambiguity in the reference to the possibility of a petition being filed.

In any event, if no part of the cost of a road improvement is to be assessed, but such cost is all to be paid by the county and township or townships, I can see no reason why, on the one hand where a county tax is levied by the county commissioners, a unanimous vote shall be required, and, on the other hand, a unanimous vote shall not be required, although the county commissioners may be levying the township taxes as well as the county taxes. I do not believe such to be the legislative intent. On the contrary it appears to be the well established policy under the Norton-Edwards Act and prior thereto, to require that when no petition is filed for road improvements, the county commissioners may only by unanimous vote declare the necessity for an improvement and determine the method of paying the cost thereof. I do not believe that Section 6921 contains any exception to this rule.

In specific answer to your question, therefore, I am of the opinion that under the provisions of Section 6921, General Code, the county commissioners or joint board thereof may only by unanimous vote, when no petition has been filed therefor, enter into an agreement with the trustees of the township or townships in which a road sought to be improved is in whole or part situated whereby said county and township

or one or more of them may pay such proportion or amount of the damages, costs and expenses of such improvement as may be agreed upon between them.

Respectfully,

GILBERT BETTMAN,
Attorney General.

587.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS SUPERINTENDENT OF BUILDING AND LOAN ASSOCIATIONS—JOHN W. PRUGH—TWENTY-FIVE BONDS FOR EMPLOYEES OF SAME DEPARTMENT, APPROVED.

COLUMBUS, OHIO, July 2, 1929.

HON. JOHN W. PRUGH, *Superintendent of Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the sum of \$10,000, executed by you as principal, and by Southern Surety Company of New York, as surety, to cover the faithful performance of your duties as Superintendent of Building and Loan Associations. In this connection it is noted that a bond for \$10,000, for the faithful performance of your duties in your official capacity, upon which The Metropolitan Casualty Insurance Company of New York was surety, was approved by me in Opinion No. 189, issued to you under date of March 12, 1929. In said opinion it was pointed out that Section 154-14 of the General Code requires you to give bond in a sum approved by the Governor, which said sum shall not be less than \$10,000. It also was pointed out that said section makes it the duty of the Governor to approve the surety. It is assumed, therefore, that the Governor has required you to give bond in the amount of \$20,000, or else the former bond, for some reason, was released. In any event it will be necessary for the Governor to approve this bond before the same is filed.

You further submit twenty-five other bonds, each in the sum of \$5,000, upon which Southern Surety Company of New York appears as surety, to cover the faithful performance of the duties of officers and employes of your department, as hereinafter indicated:

<i>Name</i>	<i>Position or Office</i>
Edgar H. McArthur.....	Deputy Inspector of Building and Loan Associations
Edward F. Baker.....	Accountant
Catherine M. Darrah.....	Private Secretary
Mabel H. Kramer.....	Statistician
Ruth Montieth.....	Assistant Statistician
Charles A. Bitzer.....	Examiner
Frank M. Cole.....	Examiner
John M. Dickey.....	Examiner
Edmund C. Fitzgerald.....	Examiner
Fred A. Frietsch.....	Examiner
Agnes I. Gallagher.....	Examiner
Helen M. Hare.....	Examiner
Eugene S. Hartsock.....	Examiner
George H. Hieber.....	Examiner