

No. 3 June Sessions, 1956
Road Docket

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY,
PENNSYLVANIA

IN RE:

OPENING OF ROAD IN
UPPER YODER TOWNSHIP,
(NO. 2)

Filed - Dec 14, 1959

OPINION AND DECREE
QUASHING VIEWERS' REPORT

ELSIE PORADA
OFFICIAL STENOGRAPHER
FOR THE
FORTY-SEVENTH JUDICIAL DISTRICT
PENNSYLVANIA

3 copies

IN RE:	X	IN THE COURT OF QUARTER SESSIONS
OPENING OF ROAD IN UPPER	:	OF CAMBRIA COUNTY, PENNSYLVANIA
YODER TOWNSHIP,	:	No. 3 June Sessions, 1956
(NO. 2)	:	ROAD DOCKET
	:	OPINION AND DECREE QUASHING
	X	VIEWERS' REPORT

BEFORE MCKENRICK, P.J., GRIFFITH AND McDONALD, JJ.

APPEARANCES:

FOR PETITIONERS:	Spence, Custer, Saylor & Wolfe, Esqs.
FOR SUPERVISORS:	Frank P. Barnhart, Esq. and Di Francesco & Di Francesco, Esqs.

OPINION

GRIFFITH, J.

Under the provisions of Sec. 1101, et seq. of the Second Class Township Code of May 1, 1933, P.L. 103, as amended, 53 P.S. 66101, et seq., petitioners presented their petition to the supervisors of Upper Yoder Township requesting the opening of a public road. The supervisors failed to act within sixty days and consequently petitioners presented their petition to the Court of Quarter Sessions for the appointment of viewers to lay out the road which the township supervisors had failed to approve. In accordance with Sec. 1101 of the Second Class Township Code, 53 P.S. 66101, the Court of Quarter Sessions is directed to "proceed thereon as provided by the general road law". Under the General Road Law of June 13, 1836, P.L. 551, 36 P.S. 1781, et seq., viewers were appointed, held their hearings, and made their report. Both exceptions and a petition for re-view were filed. We found the viewers' report ambiguous as to the necessity for a public road. In re: Opening of Road in Upper Yoder Township,

14 D. & C. 2d, 50. Accordingly, we appointed re-viewers who filed a report finding that a public road is necessary. To this report the township supervisors filed exceptions as well as a petition for re-review.

Until the amendment of Sec. 1101 of the Second Class Township Code by the Act of July 10th, 1947, P.L. 1481, it was the function of the Courts of Quarter Sessions to lay out, open and vacate roads in townships of the second class under the General Road Law of 1836, supra. However, Sec. 1101 of the Second Class Township Code, after the enactment of the amendment of 1947, gave the township supervisors the primary power. Nevertheless, the Act provided that if the supervisors failed to act on any petition within sixty days, a petition might be presented to the Court of Quarter Sessions which shall then "proceed thereon as provided by the general road law."

The supervisors' first exception suggests that the road recommended does not follow the shortest practicable route between the termini.

Sec. 2 of the Road Law of 1936, P.L. 551, 36 P.S. 1785, provides that if a road is found to be a public necessity it shall be laid out having respect to: (1) the shortest distance; (2) the best ground; (3) the least injury to private property; and (4) as far as practicable, agreeable to the desire of the petitioners. The shortest distance between the two termini is 2,872 feet as compared with the road laid out by the viewers which was 5,380 feet in length. Certainly, the shortest distance between the two termini should not in every case be utilized to lay out a proposed road. In order to utilize the best ground, to do least injury to private property and, so far as practicable, conform to the wishes of the petitioners, it is entirely proper

for the viewers to lay out a road having a length somewhat greater than the shortest distance between the two termini mentioned in the petition. However, the fact the viewers used a route almost double the length of the shortest distance between the two termini makes it clear that they violated the requirements of this section of the road law. The road as laid out by the viewers starts at a point on Meadow Drive and runs at an angle of 45 degrees from the shortest distance between the two termini for a distance of approximately 250 feet, then it turns and runs away from the line marking the shortest distance at an angle of more than 130 degrees, or almost in the opposite direction, and pursues that course for a distance of more than 1100 feet. It gradually turns toward the other terminus and, after meandering through the lands of the petitioners, finally reaches its distant goal. The fact that the proposed road serves no public convenience in traveling between the designated termini is rendered glaringly obvious by the sketch which shows an already existing road between the termini only 3000 feet in length. Clearly the purpose of the route chosen was to serve the private interests of the petitioners and not the interest of the public. The fact that occasional picnics are held on a private property known as "Wild Cat Rocks" we regard as of little moment.

The supervisors' first exception must be sustained.

From what has been said above, it is apparent that the proposed road is not necessary for use by the traveling public. Moreover, this clearly appears from the record.

The general rule is that the question of the necessity of the proposed road as a public road is a matter for the viewers

and that the court may not vacate a viewers' report on exceptions going to the lack of necessity. The usual procedure where the lack of necessity appears probable to the court is to grant reviews and re-reviews. However, in this case, the lack of public necessity clearly appears. In such case, the report should be vacated. In re: Opening of two Public Roads, 2 D. & C. 2d, 290, 293. It is crystal clear from the record that there is no present necessity of opening the proposed road for the benefit of the traveling public. There would undoubtedly be some benefit to the land owners abutting the proposed road but such consideration should be taken into account on a petition for a private and not a public road. In the testimony, the viewers conceded that the proposed road would be used by very few people other than the land owners. One of the viewers testified that the viewers laid out the suggested road "in order to develop this land up there.....". He also testified that the important consideration in the minds of the viewers was the future and not the present necessity for the proposed road. In order to require the laying out of a road the necessity must be a present one. In Little's Appeal, 180 Pa. Super. Ct. 555, 559, the court said:

"It seems so basic as to require no extended discussion that the necessity be a present one. Contemplated necessities, grounded as they are in but a present opinion of what the future will require, are the weakest kind of material upon which to build a determination that would compel the taking of one man's land for the use of another....".

An examination of the record further shows that the viewers were under a misapprehension as to the law. They were of the opinion that the property owners would have to bear the expense of opening the road and rendering it passable to the traveling public. Of course, after the road had been opened and rendered

passable by the township supervisors, the property owners could be compelled to bear the cost of paving but the viewers recommended the laying out of the proposed road believing that the entire cost of opening and rendering the road passable would be at the expense of the property owners and not that of the township.

In view of the fact that viewers did not have respect to the shortest practicable distance between the two termini and on account of the fact that the record clearly shows the lack of necessity for a public road, we must sustain the exceptions and vacate the report of the reviewers. Since the report will be vacated there is no necessity for allowing a re-review.

In view of the above disposition, we need not discuss the additional exceptions.

We, therefore, enter the following

D E C R E E

AND NOW, December 14, 1959, at 9.00 A.M.,
after argument and upon due consideration, the petition of the
Supervisors of Upper Yoder Township asking for a re-review is
denied but their exceptions are sustained and the report of the
reviewers is hereby vacated. Costs are placed on petitioners.

BY THE COURT:

Griffith J.

CONCURRED IN BY

McKenrick P.J.

McDonald J.