

IN RE: PETITION FOR APPOINTMENT::IN THE COURT OF QUARTER SESSIONS
OF VIEWERS TO OPEN A PUBLIC ROAD:: OF
IN THE TOWNSHIP OF JACKSON, :: CAMBRIA COUNTY, PENNSYLVANIA
CAMBRIA COUNTY, PENNSYLVANIA :: No. 2 September Sessions, 1965,
:: R.D.

VIEWERS' REPORT

After consideration of a Petition presented on behalf of the property owners by Thomas A. Young, Esquire, the Court appointed Leopold J. Wendekier, Esquire, T. L. Locher and Owen Heeney as a Board of Viewers in this matter.

In pursuance of their appointment, the viewers caused notice to be served on all parties that a meeting would be held upon the premises at 10:00 o'clock, A.M., e.s.t., on Monday, November 22, 1965, for the purpose of viewing the premises. A copy of said notice is attached hereto and made a part hereof.

On the day and at the time appointed, the viewers met upon the premises and were met there by Thomas A. Young, Esquire, counsel for the property owners; Jacob Salem, David Hakanen and several other property owners. There was nobody present representing the Township.

A meeting at which time the testimony of witnesses could be taken had been previously scheduled for 1:30 o'clock, P.M., on the same date and was held as scheduled in the Cambria County Courthouse, in Courtroom No. 4.

This hearing was attended by several of the property owners; by Thomas A. Young, Esquire, their counsel; the Township Supervisors and by John W. Taylor, their counsel.

Those who testified for the assistance of the Board of View, were Mr. Jacob Salem and Mr. David Hakanen, for the property owners, and Mr. Wayne Horner and Mr. Dwight L. Bowman, on behalf of the Township.

From the testimony and evidence submitted to it, and from their own investigation and observation, the viewers find the following

FACTS

1. The Petitioners are residents of Jackson Township, Cambria County, Pennsylvania.

2. The Petitioners are the owners of certain real estate in Jackson Township, Cambria County, Pennsylvania, abutting upon Davis Street in said Township.

3. Davis Street is one of several streets laid out on the plan of lots prepared for Cyrus W. Davis in said Township on December 6, 1922, and recorded in Cambria County on April 30, 1940, in Plat Book Vol. 3, page 127.

4. Davis Street as laid out has a width of 50 feet and extends from Gillen Lane to Cyrus Avenue.

5. The Petitioners purchased their respective real estate in accordance with the aforementioned plan.

6. On April 29, 1960, the Supervisors of Jackson Township adopted Ordinance No. 6, "prohibiting the opening, construction or dedication for public use or travel of any road, street, or alley, or any drainage facilities in connection therewith, except in accordance with plans submitted and approved by the Township Supervisors as provided by the Act of 1933, May 1, P. L. 103, Art. XI, Sections 1140, et. seq."

7. On June 30, 1964, the Petitioners requested the Supervisors of Jackson Township to open Davis Street, but no action has been taken upon said request.

8. On September 1, 1965, the Petitioners, after notice to the Supervisors of said Township, requested the Court to appoint a Board of View to view and lay-out a public road as described in the Petition.

9. There being no objection thereto, the Court did so appoint a Board of View./

10. The Petitioners have been inconvenienced for want of a public road to serve their respective properties.

From the testimony and evidence submitted, and from their own investigation and observation, the viewers have reached the following

CONCLUSIONS OF LAW

1. This proceeding was properly brought before the Court of Quarter Sessions of Cambria County.

2. The Court has jurisdiction over both the subject matter and the parties hereto.

3. Ordinance No. 6, of the Township of Jackson, Cambria County, Pennsylvania, is a duly enacted Ordinance.

4. Ordinance No. 6, is in applicable to the situation hereunder consideration.

5. The Petitioners are entitled to have Davis Street declared a public way for a certain portion of its distance.

CONCLUSION AND DISCUSSION

It appears that sometime prior to December 6, 1922, one, Cyrus W. Davis, purchased a sizable tract of land in Jackson Township, Cambria County, Pennsylvania. He then engaged S. E. Dickey and Company, a firm of engineers, to prepare a plan of lots upon this tract of land. This plan was dated December 6, 1922, and was recorded in Cambria County on April 30, 1940, in Plat Book Vol. 3, page 127.

Mr. Davis, the owner of the tract in question, sold lots from this plan to various individuals, including the Petitioners.

On May 1, 1933, the Legislature of the Commonwealth of Pennsylvania enacted the Second Class Township Code, which has been variously amended since that time.

Pursuant to Section 1140, et. seq., of this Code, the Supervisors of the Township of Jackson, Cambria County, Pennsylvania, enacted Ordinance No. 6, on April 29, 1960.

On June 30, 1964, a number of residents of Jackson Township presented a Petition to the Supervisors of Jackson Township,

requesting that the Supervisors open and maintain a portion of a certain street known on the plan of lots prepared for Cyrus W. Davis, as Davis Street.

According to the Petition presented to the Court by these residents requesting that a Board of View be appointed to determine the necessity for the laying-out of a public road, no action has been taken upon this Petition.

The respective property owners, and Petitioners in this matter, have proceeded under the Act of June 13, 1836, P. L. 551, sec. 11, as amended, Purdon's Pa. Stat Ann., tit. 36, sec. 2731.

It is the contention of the Township that the Viewers are bound by the provisions of the Second Class Township Code, and by Ordinance No. 6, enacted thereunder.

Conversely, the Petitioners contend that the provisions of the Second Class Township Code, and, consequently, Ordinance No. 6, have no application in this matter and that the Viewers are bound to proceed under the General Road Law of 1836, as amended.

In making its Order appointing a Board of View, the Court subjected the Viewers to the provisions of the Act of June 13, 1836, which requires that the Board view the ground and upon finding that there is an occasion for the location of a road there, to proceed to lay-out the same, having respect to the shortest distance and the best ground for a road, and in such manner as to do the least injuries to private property, and also to be as far as practicable agreeable to the desire of the Petitioners.

In the instant case, the Viewers did view the ground as directed by the Statute and by the Court, and found that there was already a road laid-out, dedicated and used by the public.

In the hearing before the Board, two of the Petitioners testified that they had purchased lots in this plan of lots and had erected residences thereon.

The Viewers observed on the date of the view that there were a number of other houses whose only access was the road laid-out and traveled by all the property owners in common.

This road intersects with, and connects to, a highway which is a part of the Township road system, namely Gillen Lane.

It was admitted at the hearing that Gillen Lane had been a part of the Township road system for a number of years and was maintained by the Township Supervisors at the expense of the Township./

One of the witnesses on behalf of the Petitioners, Mr. Jacob Salem, testified that he was also one of the petitioners in the proceeding whereby Gillen Lane was made a part of the Township road system.

While the Board is of the opinion that discussion of the question of necessity for this road is hardly necessary, it is mindful that the statute requires a finding of necessity and does, therefore, so find.

As was previously stated, the only access which the owners of property abutting on the so-called Davis Street have to other public thoroughfares is Davis Street to Gillen Lane and from Gillen Lane to such other thoroughfares.

This is not only the only means of access for their personal vehicles, but it is also the only access for emergency vehicles such as fire equipment, ambulance and police vehicles. All deliveries of a commercial nature must be made via the same route. The same route must be used by the owners of property along Davis Street in their every day pursuits, such as going to work, going shopping, going to church, etc.

It is extremely doubtful that anybody could argue with the necessity for this road.

The principal difficulty lies in the contention of the Supervisors that the road does not conform to the requirements laid down in Ordinance No. 6, and that, consequently, they, the

Supervisors, are not required to accept this road as a part of the Township road system and thereby maintain it.

The Board is of the opinion that the Supervisors are attempting to give retrospective effect to the Ordinance.

It must be noted that the plan of lots was prepared in 1922 and that said plan was placed of record in 1940.

The Ordinance was not adopted until 1960, subsequent to the enactment by the Legislature of amendments to the Second Class Township Code in 1956 and 1957.

If the Board were to adopt the Supervisors contention, it would be necessary to say that the Amendments to the Second Class Township Code and Ordinance No. 6, had a retroactive effect.

We do not believe that the Statute, or the Ordinance adopted in pursuance thereof, should be given such an effect in the absence of a specific directive by the Legislature.

We agree that the statute was meant to apply to future plans of lots prepared by developers, and probably applies also to plans of lots prepared prior to the enactment of the Amendments but in which no public roads had been laid out, dedicated and opened.

Where, as here, the road had been laid-out and used by the public for many years prior to the enactment of the Ordinance, it is the Board's opinion that the Ordinance is of no effect.

There was testimony elicited at the hearing that this road, Davis Street, had been opened and used by the public for more than eighteen (18) years, which would, of course, mean that the road had been used by the public for approximately twelve (12) or thirteen (13) years prior to the enactment of Ordinance No. 6.

Our attention has been called to Lank vs. Hughes, 402 Pa. 284, 167 A. 2d 268 (1961), as a case decided by our Supreme Court supporting the contentions of the Petitioners.

We are also aware of a later decision of the Supreme Court of Pennsylvania in Appeal Of Kress, 410 Pa. 565, 189 A. 2d 848 (1963), which apparently reaches an opposite conclusion.

We wish to point out, however, that both of these cases involved proceedings under Section 1140.1 of the Second Class Township Code, whereas the present proceeding has been taken pursuant to the General Road Law of 1836.

We do not believe, therefore, that we are bound by the decision of the Court in either of the above instances.

It is our understanding that our duty is to determine the necessity for such a road as was requested in the Petition and to determine the most feasible course therefore.

We have, as was stated previously, found a necessity for the road and recommend to the Court that the Township Supervisors be directed to accept the road as laid-out herein.

The Court's attention is called to the case of In Re Opening of Two Public Roads In Upper Providence Township, 2 D.&C. 2d, 290 (1955), which upholds the Board's position.

We wish to acknowledge, with gratitude, the co-operation of the parties and their counsel; our duties were considerably lightened by their consideration and thoughtfulness.

The hearing in this matter, while more or less informally conducted, was outstanding with respect to the candor and sincerity of the witnesses, and the courteous and gentlemanly advocacy of counsel.

Counsel for the petitioners, at the request of the Board, submitted, on several occasions, short briefs or memoranda in support of his position. These were most helpful.

While counsel for the respondent chose not to submit a written statement in support of his position, his suggestions and attitude were very beneficial.

It is the Board's recommendation, based upon the view, the evidence presented, and the law, that Davis Street be made a part of the public highway system of Jackson Township according to the following description:

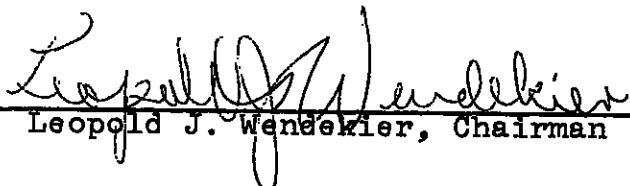
Beginning at a point in the centerline of a Township Road, known as Gillen Lane, and corner of Lot #38 on the hereinafter mentioned Plan of Lots and on the Northerly side of Davis Street; thence along the Northerly side of Davis Street North $60^{\circ} 06'$ East 791.49 feet to a point at corner of Lots #43 and #44; thence across Davis Street South $29^{\circ} 54'$ East 50.0 feet to a point at corner of Lots #11 and #12 on the Southerly side of Davis Street; thence along the Southerly side of Davis Street South $60^{\circ} 06'$ West 857.0 feet to a point in the centerline of a Township Road, known as Gillen Lane; thence by the centerline of said Gillen Lane North $22^{\circ} 45'$ East 82.41 feet to a point, the place of beginning.

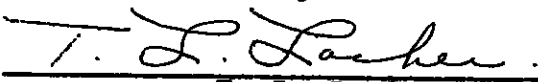
Being marked, known and numbered as the Westerly most portion of Davis Street, as the same appears on the plan of lots of Cyrus W. Davis, prepared by S. E. Dickey and Company, on December 6, 1922, and recorded in Cambria County in Plat Book Vol. 3, page 127.

Being shown colored in yellow on the print attached.

Respectfully submitted this 29th day of April, 1966.

BOARD OF VIEW


Leopold J. Wenzekier, Chairman


T. L. Locher


Owen Heeney

Commonwealth of Pennsylvania, }
County of Cambria } SS.

At a Court of Quarter Sessions of the Peace of the County of Cambria held at Ebensburg, in the said County, on the 1st day of September A. D. 19 65, before the Honorable Judge of the said Court: Upon the petition of divers inhabitants of the Township of Jackson, in the said County, setting forth that they labor under inconvenience for want of a public road or highway, to lead from a point on the easterly side of a present township road where the same is intersected by the southerly line of Davis Street as shown on the hereinafter mentioned plan of lots; thence along the southerly line of Davis Street North 60 degrees 06 minutes East 1457 feet, more or less, to the westerly side of Cyrus Avenue; thence along the westerly side of Cyrus Avenue South 30 degrees 43 minutes East 380 feet, more or less, to the northerly side of another township road; thence by the northerly side of said township road, and crossing Cyrus Avenue, North 60 degrees 06 minutes East 50 feet to the easterly side of Cyrus Avenue; thence by the easterly side of Cyrus Avenue, North 30 degrees 43 minutes West 380 feet, more or less, to the southerly side of Davis Street; thence crossing Davis Street, North 30 degrees 43 minutes West 50 feet to a point on the northerly side of Davis Street; thence along the northerly side of Davis Street South 60 degrees 06 minutes West a distance of 1400 feet, more or less, to the easterly line of the first mentioned township road; thence along the easterly line of said township road South 22 degrees 45 minutes West a distance of 65 feet, more or less, to the place of (over) and therefore praying the Court to appoint proper persons to view and lay out the same according to law. The Court, upon due consideration had of the premises, do order and appoint Leopold J. Wendekier, Esquire, Chairman, ~~James~~ and T. L. Locher and Owen Heeney, viewers, to view the ground proposed for said road, and if they view the same, and shall agree that there is occasion for such road, they shall proceed to lay out the same, having respect to the shortest distance and the best ground for a road, and in such manner as shall do the least injury to private property, and also be as far as practicable, agreeable to the desires of the petitioners, and that they make a report of their proceedings to the next Court of Quarter Sessions to be held for said County, stating particularly whether they judge the same necessary for a public or private road, together with a plot or draft thereof, and the courses and distances, and references to the improvements through which it may pass.

By the Court.

Attest:

J. L. Olschovich, Clerk

NOTE. "It shall be the duty of all persons appointed in the several counties of this Commonwealth to view and review any public or private road or bridge, if they shall decide in favor of locating said road or bridge, to endeavor to procure from the person or persons over whose land such location may be made releases from all claims for damages that might arise from the opening of such road or the building of such bridge; and in every case where said viewers shall fail to procure such releases, and it shall appear to them that any damages will be sustained, it shall be their duty to assess the damages and make report thereof signed by a majority of their number, and return the same, together with all releases obtained, to the Court of Quarter Sessions, and the damages so assessed shall be conclusive, or may be subject to appeal, review or modification, as may be provided by existing laws in the different counties of this Commonwealth."

"The persons appointed as aforesaid shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners."

"The viewers, as aforesaid, shall make report at the next term of said Court, and in the said report shall state particularly: First, who of them were present at the view, second, whether they were severally sworn or affirmed; third, whether the road desired be necessary for a public or private road; they shall also annex and return to the Court a plot or draft thereof, stating the courses and distances, and noting briefly the improvements through which it may pass; and, whenever practicable, the viewers shall lay out the said roads at an elevation not exceeding five degrees (except at the crossing of ravines and streams), where, by moderate filling and bridging, the declination of the road may be preserved within that limit."

beginning; being the westerly most portion of Davis Street and all of Cyrus Avenue, as the same appears on the plan of lots laid out for Cyrus W. Davis by S. E. Dickey & Co., Dec. 6, 1922, and which was recorded April 30, 1940, in Plat Book Vol. 3, Page 127, records of Cambria County.

NO. R.D.2 Sept. SESSIONS, 19 65

Order to view Public Road in
the Township of Jackson,
Cambria County, Pennsylvania

Viewers

Leopold J. Wendekier, Esq.

T. L. Locher

Owen Heeney

Clerk

No. ^{Pl}2 September Sessions, 1965,
R.D.

IN THE COURT
OF QUARTER SESSIONS OF
CAMBRIA COUNTY, PENNSYLVANIA

IN RE: PETITION FOR
APPOINTMENT OF VIEWERS
TO OPEN A PUBLIC ROAD
IN THE TOWNSHIP OF
JACKSON, CAMBRIA COUNTY,
PENNSYLVANIA

VIEWERS' REPORT

FILED
CLERK OF COURTS
CAMBRIA CO. PA.

APR 29 1 23 PM '66

STEPHEN D. OBLACKOVICH
CLERK OF COURTS

LEOPOLD J. WENDEKIER
Attorney at Law
PATTON, PENNSYLVANIA

PUBLIC ROAD IN THE TOWNSHIP OF JACKSON, CAMBRIA COUNTY, PENNSYLVANIA :: IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA :: No. 2 September Sessions, 1965, R.D.

VIEWERS' NOTICE

You are hereby notified that the Board of View appointed in the above matter will meet upon the premises for the purpose of viewing the same on Monday, November 22, 1965, at 10:00 o'clock, A.M., e.s.t.

All persons interested may appear at the view, if they so desire.

A hearing in the above matter will be heard on the same date, Monday, November 22, 1965, at 1:30 o'clock, P.M., e.s.t., in Courtroom No. 4, Cambria County Courthouse, Ebensburg, Pennsylvania.

BOARD OF VIEW

by

Leopold W. Wenzel
Chairman

PUBLIC ROAD IN THE TOWNSHIP OF JACKSON, CAMBRIA COUNTY, PENNSYLVANIA :: IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA :: No. 2 September Sessions, 1965, R.D.

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All persons interested may appear at the view, if they so desire.

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BOARD OF VIEW

by Leopold W. Wendt
Chairman

AND NOW, this 2nd day of November, 1965, I hereby accept service of the above Notice.

James W. Taylor
Solicitor for Jackson Twp.

PUBLIC ROAD IN THE TOWNSHIP
OF JACKSON, CAMBRIA COUNTY,
PENNSYLVANIA

IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY, PENNSYLVANIA
No. 2 September Sessions, 1965,
R.D.

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BOARD OF VIEW

by Lopold J. Wendelken
Chairman

AND NOW, this 1 day of November, 1965, I hereby accept service of the above Notice.

Thomas A. Young

April 18, 1966

C
John W. Taylor, Esq.
Attorney at Law
213 South Center Street
Ebensburg, Pennsylvania 15931

Re: Davis Street, Jackson Township

O
Dear Mr. Taylor:

P
You are hereby notified, in accordance with the provisions of Section 513 of the Eminent Domain Code of 1964, that the Board of View appointed in the above matter has made its determination and will file its Report on Friday, April 29, 1966.

The Report will become final unless any who feels aggrieved thereby files an appeal within thirty (30) days from the filing thereof.

Y
We have enclosed a copy of the Report for your records in this case.

Sincerely yours,

Leopold J. Wendekier
Leopold J. Wendekier

LJW:bls
Enclosure

April 18, 1966

C
O
P
Y
Thomas A. Young, Esq.
Attorney at Law
406 First National Bank Building
Johnstown, Pennsylvania 15901

Re: Davis Street, Jackson Township

Dear Mr. Young:

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We have enclosed a copy of the Report for your records in this case.

Sincerely yours,

Leopold J. Wendekier
Leopold J. Wendekier

LJW:bls
Enclosure

No. 2 September Sessions, 1965
Road Docket

IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY, PENNSYLVANIA

In Re: Petition for Appointment
of Viewers to Open a Public Road
in the Township of Jackson,
Cambria County, Pennsylvania.

EXCEPTIONS TO VIEWERS' REPORT

LAW OFFICES

MYERS, TAYLOR & PEDUZZI

213 SOUTH CENTER STREET

EBENSBURG, PENNSYLVANIA 15931

FILED
CLERK OF COURTS
CAMBRIA CO. PA.

MAY 27 3 33 PM '66

STEPHEN D. OBLACKOVICH
CLERK OF COURTS

In Re: Petition for Appointment
of Viewers to Open a Public Road
in the Township of Jackson,
Cambria County, Pennsylvania.

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IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY, PENNSYLVANIA

No. 2 September Sessions, 1965
Road Docket

EXCEPTIONS TO VIEWERS' REPORT

And now this 27th day of May, 1966, exceptions to the Viewers' Report in the above entitled case are filed by the Supervisors of Jackson Township, Cambria County, Pennsylvania, as follows:

1.

The petition describes and designates the road other than by the termini.

2.

The petition describes the road so that the Viewers were without discretion as to its location.

3.

The Viewers were not sworn for this particular case in the form and manner prescribed by law.

4.

The Viewers' Report does not set forth that the Viewers were duly sworn or affirmed before entering upon their duties, nor does said Report set forth the manner in which the oath was administered to the Viewers.

5.

The termini of the road as set forth in the Viewers' Report does not correspond with the termini of the road as set forth in the petition for viewers.

6.

There has been no compliance with the provisions of Ordinance No. 6 of the Township of Jackson, Cambria County, Pennsylvania, and Section 1140 et seq. of the Second Class Township Code (53 P.S. 66140 et seq.) which set forth

the requirements to be met before the roads are taken over as public roads in Jackson Township.

TOWNSHIP OF JACKSON

By John W. Taylor
Attorney for Jackson Township

STATE OF PENNSYLVANIA X
 : SS.:
COUNTY OF CAMBRIA X

Before me, the undersigned officer, personally appeared JOHN W. TAYLOR, Attorney for the Supervisors of Jackson Township, who being duly sworn according to lay, deposes and says that the facts set forth in the foregoing Exceptions are true and correct to the best of his knowledge, information and belief.

John W. Taylor

Sworn to and subscribed before me
this 27th day of May, 1966.

Judith A. Shank

JUDITH A. SHANK, Notary Public
EBENSBURG, CAMBRIA CO., PA.
My Commission expires Dec. 16, 1968

FILED
CLERK OF COURTS
CAMBRIA CO. PA.

JUN 1 9 32 AM '66

STEPHEN D. OBLACKOVICH
CLERK OF COURTS

In Re: Petition for Appointment
of Viewers to Open a Public Road
in the Township of Jackson,
Cambria County, Pennsylvania.

IN THE COURT OF QUARTER SESSIONS
OF CAMBRIA COUNTY, PENNSYLVANIA

No. 2 September Sessions, 1965
Road Docket

ACCEPTANCE OF SERVICE

AND NOW, this 31 day of May, 1966, I hereby accept service
on behalf of the petitioners of a copy of the Exceptions to Viewers' Report.

Thomas A. Young
Attorneys for Petitioners

NO. 2 SEPTEMBER TERM, 1965

ROAD DOCKET
IN THE COURT OF QUARTER SESSIONS
OF
CAMBRIA COUNTY, PENNSYLVANIA

IN RE: PETITION FOR
APPOINTMENT OF VIEWERS
TO OPEN A PUBLIC ROAD
IN THE TOWNSHIP OF
JACKSON, CAMBRIA COUNTY,
PENNSYLVANIA

BRIEF IN SUPPORT OF
VIEWERS' REPORT

THOMAS A. YOUNG
ATTORNEY-AT-LAW
602 U. S. NATIONAL BANK BUILDING
JOHNSTOWN, PENNSYLVANIA 15901

FILED
CLERK OF COURTS
CAMBRIA CO. PA.
AUG 31 1 12 PM '66
STEPHEN D. ODLACKOVICH
CLERK OF COURTS

IN RE: PETITION FOR
APPOINTMENT OF VIEWERS
TO OPEN A PUBLIC ROAD
IN THE TOWNSHIP OF
JACKSON, CAMBRIA COUNTY,
PENNSYLVANIA

(IN THE COURT OF QUARTER SESSIONS
) OF
(CAMBRIA COUNTY, PENNSYLVANIA
)
(NO. 2 SEPTEMBER SESSIONS, 1965
) ROAD DOCKET

BRIEF IN SUPPORT OF VIEWERS' REPORT

ARGUMENT

- I. THE DESCRIPTION OF DAVIS STREET, SET FORTH IN PETITIONERS' PETITION WAS FOR THE PURPOSE OF EXPRESSING THEIR DESIRES AS TO THE LOCATION OF THE PUBLIC ROAD, AND WAS NOT BINDING UPON THE BOARD OF VIEW.

Petitioners in this proceeding first petitioned the Supervisors of Jackson Township to accept Davis Street as a part of the township road system. Upon their refusal so to do, petitioners proceeded under the general road law.

Section 2 of the road law (36 Purdon's Sec. 1785) states that "The persons appointed as aforesaid, shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners".

(Emphasis supplied). Petitioners know of no case which states that the desire of the petitioners cannot be set forth in the petition. In State Street, 8 Pa. 485 (1848) a number of citizens petitioned to have State Street, in Harrisburg, extended. The proceeding was brought under an Act of the Legislature dated 1817 regulating Harrisburg Borough. The viewers ignored the description set forth in the petition, changed the center line and the width of the extension. In reviewing this action the Court said, "The viewers, as well as the Court, very properly paid no regard to this desire of the petitioners. The viewers laid out the extension, and reported it to the Court, declaring that they

believed the extension of said State Street is necessary for public purposes. The Court confirmed the report, and ordered the extension to be sixty feet wide. To fix the width of the street was within the province of the Court*.

Not every attempt by petitioners to aid viewers is held to jeopardize the proceedings. In Packer Twp. Road, 29 C.C. 663 (1904) petitioners used certain directions as designating the area which the road should occupy. An objection was raised similar to the one raised in this case. The Court said, "All that the petition and order of court conveyed to the viewers was the general direction the end of the road was from the starting point. This we think was rather commendable than otherwise". Petitioners in this proceeding felt that the expression of their desires would enlighten all the parties and make the proceeding easier, rather than harder, to decide.

The courts, through the years, seem to have approved the inclusion of a description of the road in the petition when an old road is being vacated and a new one is to be supplied in its place. This procedure is found in Section 18 of the original Act No. 169, June 13, 1836, P.L. 558. That section of the general road law was in issue in In Re Petition to Vacate and Relay Public Road, 11 Luzerne 88 (1902) and also in In the Matter of the Vacation and Supply of a Public Road in Ottercreek Township, 104 Pa. 261 (1883). In the Luzerne County case Judge Halsey, in overruling the exceptions, said, "We do not think that the description of the road to be vacated and of the road to be located contained in the petition is in violation of the Act of Assembly, supra". If it is proper to describe a new location for an old road, there is no reason why it should not be just as proper to describe the location of a new one.

Finally, the original proceeding was brought under the Second Class Township Code, 53 P.S. 66101. The courts no longer

have the power, in the first instance, to act upon a petition for the appointment of viewers. In Re Road in Milford Twp., 78 D & C 19 (1952). Yet there is nothing in the Second Class Township Code, or in the decisions which followed its enactment in 1933, which says that the petition to the supervisors must not contain a description of the route of the proposed road. It would be a strange rule indeed that the original petition to the supervisors could contain a description, but that a subsequent petition to the court could not. This could not have been in the minds of the legislators who drafted the Code, and was not in the minds of the petitioners in this proceeding, the Judge who appointed the viewers, or the viewers themselves. The report of the viewers, in at least two places, pages 1 and 3 of the viewers' report, stated that their findings were made "from the testimony and evidence submitted and from their own investigation and observation". There is no suggestion in the report that the viewers felt bound by the description in the petition, and it should not be given this strained construction. The description should be held to be mere surplusage and matter which the viewers could have rightly rejected.

II. THE REPORT NEED NOT SHOW ON ITS FACE THAT THE VIEWERS WERE SWORN IF THEY HAVE BEEN SWORN GENERALLY.

Each of the viewers appointed by the Court has filed an affidavit at the time of his appointment to the effect that he will carry out his duties as a viewer on any case assigned to him. This affidavit should be sufficient. Road in Windsor Twp. 14 Dist. 415 (1904) does not hold that the report must show the oath on its face. The case was decided solely on the point that no proper notice of the view was given to the supervisors. In passing, the Court noted that one viewer affirmed the other two and himself. The Court said this was irregular, that the order stated they should affirm each other, and that "the report should show on its face how this was done". Such language does not lead

to a holding that failure to put it in invalidates the report.

III. UNDER THE CIRCUMSTANCES OF THIS CASE VIEWERS CAN LOCATE A ROAD WITH A TERMINI DIFFERENT FROM THAT SET FORTH IN THE PETITION.

Substantially the same arguments are involved under this heading as are involved under I. Petitioners do not dispute the fact that there are a number of cases which declare that the report of the viewers must agree with the petition as to the matter of termini. Here again, however, all of exceptants' cases were decided prior to the enactment of the Second Class Township Code. There is no provision under that legislation requiring the termini to agree completely with the petition. No such requirement should be imposed on the "appellate" procedure, which is really the position the general road law now occupies.

In the instant case the viewers felt the petitioners did not need all that they had asked for. Their needs could be met by opening the street to a point where houses ended, and this is what was done. The petitioners do not complain about the decision. They ask only for a public road to serve their needs. The rule of law which prohibits the viewers from finding a termini different from that prayed for was designed to guard against the evil of having the viewers locate a road which would not meet the need of the petitioners as set forth in their petition. In the instant case, however, the location given by the viewers does meet the need of the petitioners. To apply the general rule to the facts at hand would be to ignore the whole problem of the petitioners. The cost to the township of maintaining a road as described in the petition would be much greater than the cost of maintaining that described by the petitioners.

IV. IS AN ORDINANCE PASSED UNDER SECTION 1140 OF THE SECOND CLASS TOWNSHIP CODE BINDING ON PETITIONERS' PROCEEDING UNDER SECTION 1101? Negative.

The legal problem involved in this part of the argument is intricate and not easy of solution. Basically, Jackson Township enacted, in 1960, an ordinance as authorized in 53 Purdon's Section 66140.1. This section of the Code, as well as the ordinance, sets forth that "no person shall construct, open or dedicate any road without first submitting plans thereof to the township supervisors for their approval". The legislation goes on to say that the plans must conform to rules and regulations adopted by the supervisors. Failure to comply with the Act makes the actor guilty of a misdemeanor and subject to the payment of a fine. (53 P.S. Section 66144).

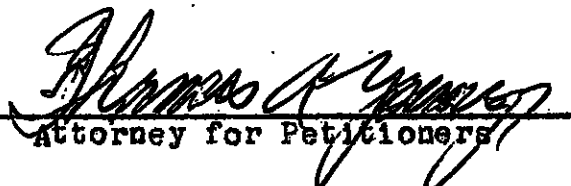
When the petitioners first appealed to the township supervisors they were told that they must comply with the terms of the ordinance, particularly with Section 8-2, requiring certain base course. Petitioners argued that the road has been in existence as a private road for many years prior to the enactment of the ordinance, and that petitioners were neither constructing, opening or dedicating it. It was already constructed, was open to travel for the past eighteen years, and had been dedicated by Cyrus Davis as Davis Street. What the petitioners were asking was that the supervisors accept something already laid out, not approve something in the future. It is contended, for example, that none of the petitioners could be prosecuted under Section 66144 for the reason that none had committed the unlawful act of constructing, opening or dedicating the street. Nevertheless, the prayer of the petition under Section 66101 was denied, by failure to act within sixty days, so petitioners presented their petition to the Court of Quarter Sessions as provided in Section 66101.

Much is made of Kress Appeal, 410 Pa. 565 (1963). Petitioners would like to point out that there had been no prior dedication, in that case. There the appellants made an offer of

dedication which was refused unless they made certain improvements as set forth in the local ordinance, similar to the one in effect in Jackson Township. In Kress, the local ordinance was passed, then the offer of dedication was made. In this case the offer of dedication was made in 1922 when Cyrus Davis began selling off lots in accordance with this plan. If petitioners could not be prosecuted under Section 66144, then Kress Appeal, which petitioners feel to be correctly decided, simply does not apply to these facts.

Petitioners contend that the case which controls this situation is Lank v. Hughes, 402 Pa. 284 (1961). That case is practically indistinguishable from Kress, except in one very important aspect. It appears in Lank v. Hughes that a dedication had already been made and that the petitioners were asking the supervisors to accept the dedication, which is quite a different thing. In Lank, the act of dedication was complete, in Kress it was not. Section 66140.1 and the local ordinance prohibits a construction, opening or dedication. If those things have already been done, prior to the enactment of this statute, then it is argued, the statute cannot operate retroactively, and the procedure followed in this case was correct, as set forth in Lank. For a lower court decision to the same effect, see Petition for the Laying Out of a Public Road in Susquehanna Twp., Dauphin County, Known as Kramer Street, 52 Dauph. 315.

Petitioners respectfully request your Honorable Court to dismiss the exceptions.


Attorney for Petitioners

R.L.2, Sept. 1965

IN THE COURT OF QUARTER
SESSIONS OF CAMBRIA COUNTY

ROAD DOCKET

In Re: Opening of Public
Road in Jackson Township

PETITION FOR VIEWERS

TH
THOMAS A. YOUNG

ATTORNEY AT LAW

JOHNSTOWN, PA. 15901

FIRST NATIONAL BANK BUILDING

FILED
CLERK OF COURTS
CAMBRIA CO. PA.
SEP 1 3 39 PM '65
STEPHEN D. OBLACKOVICH
CLERK OF COURTS

IN RE: PETITION FOR APPOINTMENT : In the Court of Quarter Sessions
OF VIEWERS TO OPEN A PUBLIC ROAD: of
IN THE TOWNSHIP OF JACKSON, : Cambria County, Pennsylvania
CAMBRIA COUNTY, PENNSYLVANIA : No. Term, 1965

To the Honorable, the Judges of the above named Court:

1. The undersigned petitioners are residents and taxpayers of the Township of Jackson, County of Cambria and State of Pennsylvania, or are owners of real estate situate in said township.

2. Your petitioners and other taxpayers and inhabitants of the County of Cambria labor at great inconvenience for want of a public road or highway in the Township of Jackson, Cambria County, Pennsylvania, to begin and end at two public roads, at the points hereinafter designated, and such a public road or highway is necessary for public travel.

3. A description of the road desired to be opened is as follows:

Beginning at a point on the easterly side of a present township road where the same is intersected by the southerly line of Davis Street as shown on the hereinafter mentioned plan of lots; thence along the southerly line of Davis Street North 60 degrees 06 minutes East 1457 feet, more or less, to the westerly side of Cyrus Avenue; thence along the westerly side of Cyrus Avenue South 30 degrees 43 minutes East 380 feet, more or less, to the northerly side of another township road; thence by the northerly side of said township road, and crossing Cyrus Avenue, North 60 degrees 06 minutes East 50 feet to the easterly side of Cyrus Avenue; thence by the easterly side of Cyrus Avenue, North 30 degrees 43 minutes West 380 feet, more or less, to the southerly side of Davis Street; thence crossing Davis Street, North 30 degrees

43 minutes West 50 feet to a point on the northerly side of Davis Street; thence along the northerly side of Davis Street South 60 degrees 06 minutes West a distance of 1400 feet, more or less, to the easterly line of the first mentioned township road; thence along the easterly line of said township road South 22 degrees 45 minutes West a distance of 65 feet, more or less, to the place of beginning; being the westerly most portion of Davis Street and all of Cyrus Avenue, as the same appears on the plan of lots laid out for Cyrus W. Davis by S. E. Dickey & Co. Dec. 6, 1922, and which was recorded April 30, 1940 in Plat Book Vol. 3 Page 127, records of Cambria County.

4. The width of both Davis Street and Cyrus Avenue, as shown and dedicated on the above plan, is 50 feet, which is in excess of the minumum required width as set forth in the Second Class Township Code.

5. Your petitioners, or some of them, presented their petition to the Supervisors of Jackson Township on June 30, 1964, requesting that the supervisors open the above dscribed road, but no action has been taken on said petition from that day to this.

WHEREFORE, your petitioners pray that your Honorable Court appoint Viewers to view and lay out a public road as herein prayed for and make report of their proceedings to your Honorable Court at the next term thereof.

Arvin C. Gillin

Pauline A. Gillin

James B. Dunbar

Nancy E. Dunbar

Jacob H. Salem

Helen M. Salem

Mrs Rose Salem

James Salem

Chabrier Hull

William H. Findley Jr

Mrs Wm Findley

Nike Mikulik

Mary L. Mikulik

David L. Hakanen

Mellie L. Hakanen

Robert P. Hildebrand

Winona Hildebrand

Dorothy Dreikorn

William H. Dreikorn

Clifford Allison

Jennie M. Allison

Bruce P. Coleman

Thelma L. Coleman

John L. Candler

Eileen M. Candler

Harold Hekoppke

Mrs Harold Hekoppke

Matthew P. Hart


Mrs. Matthew Hart

State of Pennsylvania:
: SS
County of Cambria :

Irvin C. Gillin, being duly sworn according to law, deposes and says that he is an inhabitant and taxpayer of the Township of Jackson, County of Cambria and State of Pennsylvania, that he is one of the petitioners herein, and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.


Irvin C. Gillin

Sworn to and subscribed before
me this 30 day of August,
1965.


Notary Public
Clerk of Courts

DECREE

AND NOW, this 1st day of September, 1965, the within
petition having been presented by Thomas A. Young, the attorney for
the petitioners, Leopold J. Wendelberger, Jr. T. L.
Locke and Owen Heeney
are hereby appointed viewers to view the ground proposed for the
road described in the within petition, and to make report of their
proceedings to this court; returnable

BY THE COURT:

Griffith
P.J.

In the Court of Quarter
Sessions of Cambria Co. Pa.

No. 2 Sept. Sess. 1965
Road Docket

IN RE: PETITION FOR
APPOINTMENT OF VIEWERS
TO OPEN A PUBLIC ROAD
IN THE TOWNSHIP OF
JACKSON, CAMBRIA COUNTY,
PENNSYLVANIA.

O P I N I O N

(McWilliams, J.)

IRENE STEED
OFFICIAL STENOGRAPHER
FOR THE
FORTY-SEVENTH JUDICIAL DISTRICT
PENNSYLVANIA

FILED
CLERK OF COURTS
CAMBRIA CO. PA.

JAN 20 11 47 AM '67

STEPHEN D. OBLACKOVICH
CLERK OF COURTS

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNA.

IN RE: PETITION FOR) No. 2 Sept. Sessions, 1965.
APPOINTMENT OF VIEWERS	(
TO OPEN A PUBLIC ROAD)
IN THE TOWNSHIP OF	(
JACKSON, CAMBRIA COUNTY,)
PENNSYLVANIA.	(ROAD DOCKET

O P I N I O N

McWILLIAMS, J.

Petitioners in this proceeding first petitioned the Supervisors of Jackson Township to accept Davis Street, shown in Plat Book Vol. 3, page 127, of Cambria County, on Plan of Lots laid out for Cyrus W. Davis by S. E. Dickey & Company, December 6, 1922.

Petitioners then proceeded under the general road law (Act of 1836, as amended, 36 P.S. 1781, et seq.). Notice was given. Viewers were appointed. Notice of view was given. Meeting and testimony of witnesses was taken, and the Viewers' Report made and filed April 29th, 1966, with the Clerk of Courts of Cambria County. Exceptions were filed to the Viewers' Report by the Township Supervisors of Jackson Township. Argument on exceptions was had and briefs were filed.

Exception 1 states: "The petition describes and designates the road other than by the termini." The record shows on its face that the termini of the road can be ascertained and located. Reference to the description in the petition, along with reference to the description shown in Plat Book Vol. 3 page 127, and referred to in the

petition is sufficient to warrant a finding that the termini are sufficiently described, and that the point of beginning and point of ending are definitely fixed, and we so find and determine, and Exception 1 is accordingly overruled.

Exception 2 states: "The petition describes the road so that the Viewers were without discretion as to its location."

The Court, not the Viewers, determine the width of the street, and it is error to lay it out by a survey of boundaries only. Royersford Streets, 1 Montgomery 32 (1885).

A petition to appoint viewers which fixes the route of the proposed road is fatally defective. In re: Road in Shenango Township, 88 Pa. Superior Ct. 51 (1926). Also Kress Appeal, 410 Pa. 565 (1963). In Kress Appeal, the street had already been laid out by developer on a lot plan. This is the same situation as we have in the instant case, although this Court recognizes that in Kress Appeal the Court was discussing the Act of 1933, as amended. As stated in Kress Appeal, supra, p. 567, the Court said:

"We hold that the court below correctly decided that Section 1101 of the Code was improperly invoked in this case. That section gives a court of quarter sessions power to appoint a board of viewers to 'survey, lay out [and] open' roads as public roads where the township supervisors fail to so act. But the roads in question here have already been surveyed, laid out and opened by the developers of the McNary Plan, and thus there is no reason or basis for the appointment of viewers under Section 1101. Appellants'

object is not to have roads laid out and constructed as public roads, but rather to have roads already constructed maintained at public expense. See In re: Milford, 4 Pa. 303 (1846)."

Lank vs. Hughes, 402 Pa. 284, 167 At. 2d 268 (1961) has been cited by petitioners in support of their position, but as was pointed out in the Kress Appeal, supra, the Court had already confirmed absolutely the Viewers' Report and the road had been judicially made a part of the township system. Had no exceptions been filed by Jackson Township Supervisors in this instant case, and this Court had confirmed the Viewers' Report absolutely, a like result as the Lank case could well have been applicable. But such is not the case as this Court has not confirmed the Viewers' Report absolutely, and, in fact, exceptions were filed to said Report. Thus, Exceptants' Exception No. 2 must be sustained.

Exceptions 3 and 4 read as follows: "3. The viewers were not sworn for this particular case in the form and manner prescribed by law.

"4. The Viewers' Report does not set forth that the viewers were duly sworn or affirmed before entering upon their duties nor does said report set forth the manner in which the oath was administered to the viewers."

The Viewers' Report is, in fact, devoid of any mention of an oath. Exceptions to Report of Viewers are for the purpose of objecting to some error in the procedure or

to dispose preliminarily of a question of law. In re: Opening of First Avenue, 4 Lycoming 309 (1955).

A viewers' report need not specify the form and scope of the oath administered to them, but it is sufficient if it states that they were sworn according to law. In re: Road in North Middleton Township, 46 D. & C. 615 (1944).

The Viewers' Report should show on its face how the oath was administered, i.e. was it according to law? Windsor Township Road, 14 Dist. 415, 18 York 139 (1904).

The Act of 1836, June 13th, P. L. 551, Sec. 3, 36 P.S. 1831, states the report shall state particularly: ... "Second, whether they (Viewers) were severally sworn or affirmed."

Therefore, Exceptants' Exceptions 3 and 4 must be sustained.

Exception 5 states: "The termini of the road as set forth in the Viewers' Report does not correspond with the termini of the road as set forth in the petition."

It is true the termini of the Report and of the Petition do not conform or correspond. The difference of termini of the road as set forth in the Petition and the Report is approximately a 968 foot difference. As held in Union Township Road, 29 Pa. Superior Ct. 179 (1905) where the report of road viewers locates the terminus of a road 142 feet from the terminus described in the petition, the report will be set aside. See also Springfield Township Road, 18 York 38 (1904); Beaver and Ashland Township, 13 D. & C. 662 (1930).

Therefore, Exceptants' Exception 5 must be sustained.

Exception 6 states: "There has been no compliance with the provisions of Ordinance No. 6 of the Township of Jackson, Cambria County, Pennsylvania, and Section 1140 et seq. of the Second Class Township Code (53 P.S. 66140 et seq.) which set forth the requirements to be met before the roads are taken over as public roads in Jackson Township."

The court in Kress Appeal, supra, seems clearly to have answered this question (as long as Viewer's Report has not been confirmed absolutely by the Court). The court therein stated: "In such a situation, the proper procedure is to comply with the provisions of the Second Class Township Code dealing with dedication of private roads."

Under the Second Class Township Code, the Supervisors may but do not have to maintain, repair, et cetera, the road until it becomes a part of the public road system of the township. See Chryst Appeal, 81 D. & C. 538 (1951).

Thus, it appears that where a road has been laid out by a developer on a plan and the road size prescribed, the general road law provisions will not afford a duty of maintenance, repair, et cetera upon the supervisors until said road becomes part of the public road system of the township.

In summary, as was stated by the court in the Chryst Appeal case, supra, and we so state, "We have a great deal of sympathy with these petitioners. . . The supervisors seem cooperative and it is hoped some plan may be worked out to give petitioners a measure of relief." However, the law is clear. Exceptants' Exceptions 2 through 6, inclusive, must be sustained, and in accordance thereto, we make the

following

O R D E R

Exceptants' Exceptions 2, 3, 4, 5 and 6 are sustained, and the Report of the Viewers and all proceedings subsequent to filing of the Petition are set aside. County to pay costs of view.

January 19, 1967.

BY THE COURT:

McWilliams J.

CONCURRED IN:

Griffith P.J.

McDaniel J.

161-V-5

PROPERTY OF CYRUS W. DAVIS

SITUATE IN
JACKSON TOWNSHIP, CAMBRIA COUNTY, PA.
Scale 1"=100' S.E. Dickey & Co., Dec. 6, 1922.
Civil and Mining Engrs.,
Johnstown, Pa.
Revised June 26-1943 Lots 50 to 61
Revised Sept. 10-1956 Lots 53-103
Revised Oct. 6-1958 C. Osteo. Hos.

State of Penna. } ss.
County of Cambria }
Before me a Notary Public in and for said
County and State personally appeared Cyrus W. Davis
and Mary E. his wife, who acknowledged this Plan
of Lots to be the Plan of Lots, Streets and Alleys
surveyed and laid out by them and desired
the same to be recorded as such.

Cyrus W. Davis
Mary E. Davis

Witness my hand and Notarial Seal this
31st day of January, A.D. 1939.

Mary F. Wellett
Notary Public

My Commission expires April 8, 1939

