

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

IN RE: THE LAYING OUT, OPENING : NO. 8 DECEMBER SESSIONS, 1953.  
AND EXTENDING OF A PUBLIC STREET :  
KNOWN AS OCALA AVENUE, FORMERLY :  
LOCUST AVENUE FROM FERG STREET, :  
FORMERLY KING STREET, TO OAKLAND :  
STREET, IN THE TOWNSHIP OF STONY- :  
CREEK, COUNTY OF CAMBRIA AND STATE :  
OF PENNSYLVANIA. : EXCEPTIONS TO VIEWERS REPORT.

OPINION AND DECREE OF THE COURT SUSTAIN-  
ING EXCEPTIONS NOS. 1 AND 2, AND SETTING  
ASIDE REPORT OF VIEWERS.

BEFORE MCKENRICK, P.J., GRIFFITH, J. and McWILLIAMS, J.

APPEARANCES:

FOR PETITIONERS: DIFRANCESCO, KUYAT & LETIZIA, ESQS.

FOR EXCEPTANTS: ROGER W. HAGER, ESQ.

MCKENRICK, P.J.:

Certain residents, citizens and taxpayers of the Township of Stonycreek, a first class township in Cambria County, presented a petition to the Board of Commissioners of said township, requesting that Ocala Avenue, formerly Locust Avenue, from Ferg Street to Oakland Street, be opened. Said petition notified the Commissioners of Stonycreek Township that if they failed to open this street the petitioners would ask the Court of Quarter Sessions of Cambria County to appoint viewers to lay out and open the same. The Commissioners of Stonycreek Township refused to grant the petition and, consequently, the petitioners filed a proceeding in the Court of Quarter Sessions of Cambria County for the appointment of viewers to view the portion of Ocala Avenue aforesaid and make a report of their proceedings to the court at its next session. Thereafter hearings were held by the board of viewers and testimony taken from witnesses for the petitioners, the township, and other persons having an interest in the proceedings. On October 6,

1954, the board of viewers filed its report approving the opening of Ocala Avenue from Ferg Street to Oakland Street, and assessing damages for the benefit of the owners of the property over which Ocala Avenue was proposed to be opened. The Board of Commissioners of Stonycreek Township thereafter filed exceptions to the Viewers Report and an appeal was taken by the township.

The principal question involved in this proceeding is, Did the Court of Quarter Sessions have jurisdiction to appoint a board of viewers to lay out a public road in Stonycreek Township, a first class township?

The First Class Township Code, as amended by the Act of May 27, 1949, P.L. 1955, §43, 53 P.S. §19092-2005, is as follows:

"The board of township commissioners may enact, ordain, survey, lay out, open, widen, straighten, vacate, and relay all streets, and parts thereof, which are wholly within the township, upon the petition of a majority in interest of the owners of property or properties through whose land such street passes, or upon whose land it abuts, or without petition of the owners of abutting property if, in the judgment of the board of commissioners, it is necessary for the public convenience; \* \* \* \*"

Section 43 of the said act, 53 P.S. §19092-2007, provides that

"The board of commissioners shall give ten days' notice to the property owners affected thereby of the time and place when and where all parties interested may meet and be heard. Witnesses may be summoned and examined by the board of commissioners and by the parties interested at such meeting or any adjournment thereof."

Section 43 also provides, 53 P.S. §19092-2008,

"After such hearing and a consideration of the matter, should the board of commissioners, or a majority thereof, decide in favor of exercising the power so conferred, they shall make written report, together with a draft or survey of the street or highway, fixing the width thereof and noting the improvements along the line thereof, and the names of the owners of property through which the same shall pass or whereon it shall abut. Such report and draft shall be filed in the office of the clerk of the court of quarter sessions."

The first exception to the viewers report as filed in the court of quarter sessions is:

"The said report of the Board of Viewers is null and void for the reason that the Court of Quarter Sessions has no jurisdiction to appoint a Board of Viewers to lay out a public road in Stonycreek Township, a first class township."

Exception No. 2 is:

"The said report of the Board of Viewers is null and void for the reason that the First Class Township Code, Act of May 27, 1949, P.L. 1955, as amended, vests exclusive jurisdiction in the Commissioners of Stonycreek Township to decide whether or not a public road should be laid out and in the event that said Commissioners decide against laying out a public road no recourse exists to a Board of Viewers."

Other exceptions were filed to the viewers report but in our view Exceptions 1 and 2 go to the crux of the matter, and if these exceptions are sustained it will not be necessary to discuss the exceptions numbered 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

It is admitted that none of the petitioners are owners of property or properties through whose land such street passes, or upon whose land it abutts. Under the First Class Township Code it will be noted that the township commissioners may act only upon the petition of a majority in interest of the owners of property or properties through whose land such street passes, or upon whose land it abutts, or, the commissioners may act without a petition if in their judgment the street is necessary for the public convenience.

It is the contention of the township that because the commissioners have refused to exercise the right of eminent domain given them by the act the petitioners have no recourse to a view; and further, that unless the commissioners act favorably upon the petition there is no requirement that a written report, together with a draft or survey of the street, fixing the width thereof and noting the improvements and the names of the owners of the property upon which the same shall pass or abut be filed in the office of the clerk of the court of quarter sessions - in other words, that jurisdiction to open or refuse to open the street is exclusively in the province of the commissioners of a first class township. By this contention the commissioners argue that the court of quarter sessions had no power in the premises and that the action of the commissioners in refusing to grant

the prayer of the petition is finality.

Counsel for the parties agree that there are no adjudicated cases on the point involved here. There are a number of cases decided on the question that where a street is opened by affirmative action of the township commissioners, the court of common pleas has power to appoint viewers to assess the damages, if any. It may be profitable at this time to refer to the Second Class Township Code in order that a distinction between the powers of first and second class townships may appear.

The Second Class Township Code, as amended, 53 P.S. §19093-1101, gives township supervisors the ~~same~~ power by ordinance to lay out and open roads which are wholly within the township upon the petition of a majority in interest of the owners of property or properties through whose land such road passes, or upon whose land it abutts, with or without the petition of the owners of abutting property, if, in the judgment of the supervisors, it is necessary for the public convenience. However, this difference appears in the Second Class Township Code, as amended: "When any petition is presented to the township supervisors under the provisions of this section and the supervisors fail to act on the petition within sixty (60) days, the petitioners may present their petition to the court of quarter sessions which shall proceed thereon as provided by the general road law." Bearing in mind the distinction between a first and second class township, it is only where the supervisors of a second class township fail to act that the petitioners may present their petition to the court of quarter sessions, which means a prayer for the appointment of viewers, while no provision appears in the First Class Township Code for the appointment of viewers either upon the affirmative action of the township commissioners to open a street or road or the refusal of the township commissioners to approve the prayer of the petition.

The petitioners contend, however, that where they have ex-

hausted their remedies before the commissioners of a first class township they must necessarily have recourse to the General Road Law, which is the old Act of 1836, as amended, otherwise they are without remedy. Unfortunately for the petitioners, they may not invoke the Act of 1836 and are therefore without remedy.

While the First Class Township Code does not in terms repeal the Act of 1836, by implication, and we think by intent of the legislature, the First Class Township Code was intended to supersede the General Road Law. Even the Second Class Township Code requires that a petition shall be "by majority in interest of the owners of property or properties through whose land such road passes, or upon whose land it abutts", in order that a road or street wholly within the township may be opened. None of the petitioners fall within the classes named in either the First Class Township Code or the Second Class Township Code.

A number of cases have been cited for our consideration and we have read them all. Harrington's Petition, 266 Pa. 88, 93, is cited by petitioners' counsel, as follows: "While the preliminary procedure is before the township commissioners, instead of the court of quarter sessions \* \* \* \* (the court) may order a review 'in conformity with the now existing road laws of this commonwealth.'" That case was one wherein damages were claimed for change of grade of a street in a first class township. Under the Act of 1901, the Supreme Court decided that no right to damages for change of grade existed. The viewers disallowed the claim for damages for such change; exceptions were filed and the exceptions were dismissed by the court below. Justice Kephart, in his opinion, used the language quoted in the brief. He further elucidated by saying, "This eliminated the township as an agency to exercise the power of eminent domain, and substituted therefor the judiciary." The case, in our opinion, is not in point and throws no light upon the present situation.

Also cited is the case of Vacation of South Fayette Township Road, 50 D. & C. 26. It was there held that there is a right given to any citizen or freeholder of the township to appeal to the court of quarter sessions from the action of the commissioners of a township of the first class in vacating a road. As we have said previously, there are innumerable decisions sustaining the right of appeal where affirmative action has been taken by the board of commissioners, and this decision, along with others to be quoted, does not show much light on the question immediately before us.

In *Smith v. Cheltenham Township*, 35 Pa. Superior Ct. 507, (1908), cited by petitioners, the question was one of damages for the change of grade, and it was there held that the township was not liable. That case likewise does not give us much assistance in determining the question involved here.

In *St. David's Church vs. Sayer*, 244 Pa. 300 (1914), the proceeding was mandamus to compel the township commissioners to open and maintain in good repair a certain highway in the township. The defendants contended that the road in question had been vacated by action of the township commissioners. True, the termini and the whole route of the section vacated are within the township, but the section vacated was part of a public road which began in an adjoining township. The question before the court was, "Where a public road runs into or through a township of the first class, may the board of township commissioners under the Act of 1901, vacate a section of the road within the township?" The court there held that the vacation was not proper and that the court of quarter sessions had jurisdiction of the case because it was not within the power of the township commissioners to withdraw not only the user of the public whom they represented, but also the outside public whom they did not represent. It was in this case and on this proposition that the court said, on page 306,

"But in the case at hand, there is no exclusion of townships of the first class from the operation of the Act of 1836", this being the portion of the opinion cited in petitioners' brief.

On the other hand, there are cases which have been decided which seem to support the position of the township commissioners. The case of Big Beaver Township Road, reported in 69 D. & C. 486 (1949), involved a township of the second class. A petition was presented under the General Road Act of June 13, 1836, P.L. 551, 36 P.S. §1781, for the appointment of viewers to open a road wholly within the township. The question before the court was whether the Act of July 10, 1947, P.L. 1481, §15, 53 P.S. §19093-1101, superseded the General Road Act. It is there said: "It is the intention that this Act shall furnish a complete and exclusive system for the government and regulation of townships except as to the several matters enumerated in Section 103 of Article I of this Act (Section 103 of Article I has nothing to do with laying out or opening roads). All other acts and parts of acts inconsistent with this Act are repealed." Cited in the opinion of Judge Lamoree is the following: "The Act of March 21, 1806, P.L. 558, 4 Sm. L. 326, 46 P.S. §156, provides as follows:

"In all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

It is also said in that opinion: "The road in the present matter lies wholly within a township of the second class and it must be laid out in accordance with the provisions of the statute prescribing how roads wholly within a township of the second class are laid out. Such provision is found in the Act of 1947, P.L. 1481, and not under the Act of 1836."

In the case of In re Road in Milford Township, 78 D. & C. 79 (1951), certain "citizens, qualified electors and residents"

of Milford Township, Juniata County, a second class township, petitioned the court for the appointment of viewers to view and lay out a public road in the township. Viewers were appointed and filed their report, laying out a proposed road. The supervisors of the township filed exceptions to the report, the second exception being as follows: "2. The Court of Quarter Sessions of the Peace of Juniata County, Pa., has no jurisdiction to appoint viewers to determine the propriety of laying out a road upon the petition of qualified electors without the record affirmatively showing that the subject had been first acted upon by the supervisors of that township." The court said:

"There is no power in this court ex mero motu to lay out public roads. This is a legislative and not a judicial function and must be exercised in conformity with the mandate of the acts of assembly and within the limits prescribed by statute. The legislature may directly lay out and order roads to be opened: \* \* \* The more usual method is to constitute agents for such purpose. It may designate a commission or commissioners: \* \* \* The long established agency employed by the legislature, however, has been the court of quarter sessions, assisted by viewers selected by it, under the General Road Law of June 13, 1836, \* \* \*

"It would clearly appear that the township supervisors are now the properly designated agents of the legislature to lay out public roads and that this court has no power in the first instance to act upon a petition for the appointment of viewers: In re Vacation of Road in Middlecreek Township, 68 D. & C. 559 (1949) and Big Beaver Township Road, 69 D. & C. 486 (1949), are cases in accord. In the case of In re Public Road in Dallas Township, 75 D. & C. 45 (1950), it was held that the Second Class Township Code of July 10, 1947, established a procedure to lay out and vacate roads in addition to the prior procedure under the General Road Law of June 13, 1836, but that the Amendment of May 2, 1949, P.L. 819, to the Second Class Township Code evidenced the intention of the legislature of repealing the General Road Law of 1836 as it related to second class townships. The court did not cite nor consider the effect of section 2201 of the Act of 1947.

"Petitioners contend that if the exceptions are sustained 'residents', 'citizens', 'inhabitants' and 'freeholders' of a township will have no right to initiate proceedings to lay out, or vacate a road. The General Road Law of 1836 authorized the court of quarter sessions to appoint viewers 'on being petitioned to grant a view for a road within the respective county . . . .' The

act does not prescribe the qualifications of the persons on whose petition the court of quarter sessions may act. By common practice in this county, 'citizens, qualified electors and residents' of the townships in which the proposed road was located petitioned the court but probably the inhabitants of any township in the county could petition for a road in any other township thereof: \* \* \* Under the provisions of the Second Class Township Code of 1947, sec. 1101, the township supervisors may lay out a road: (1) Upon petition of a majority in interest of the owners of property or properties through whose land such road passes or upon whose land it abuts, or (2) without petition, if in the judgment of the supervisors, it is necessary for the public convenience. The right to initiate proceedings to lay out a public road is therefore apparently considerably narrowed and petitioners contend that hardship will result. Section 16 of the Act of July 10, 1947, 53 P.S. §19093-1102 (c), provides that any 'citizen or freeholder' of the township may except to the action of the supervisors in laying out a road within 30 days after filing of the report of the supervisors in the office of the clerk of the court of quarter sessions. It would therefore, appear that any citizen or freeholder of the township may except to, but not initiate, proceedings laying out a public road. Such seems to be the language and intent of the legislature and the court cannot enlarge it by judicial interpretation. The Act of May 2, 1949, P.L. 819, amended section 1101 of the code by providing:

"When any petition is presented to the township supervisors under the provisions of this section and the supervisors fail to act on the petition within sixty (60) days, the petitioners may present their petition to the court of quarter sessions which shall proceed thereon as provided by the general road law."

"It is to be noted that the petition must have been presented to the supervisors 'under the provisions of this section'. The qualification of persons upon whose petition the court can act after their remedy with the supervisors has been exhausted is still confined to a majority in interest of the property owners through whose land such road passes or upon whose land it abuts and is not extended to citizens or freeholders of the township in general. The question does not seem to have been previously passed upon. It is the opinion of this court that if hardship or inequity will result the remedy of petitioners must rest with the legislature."

There is no doubt in our mind that the legislature intended to commit to the commissioners of a township of the first class the power to act or to refuse to act upon a petition for the opening of a street. There is also no doubt in our mind that where the commissioners have acted affirmatively and have caused a street to be opened, the proceedings are subject to review as to their regularity. Where the commissioners refuse to take

action the status quo is preserved. However, if they do act to open a street, then the question of damages to land-owners who may be injured by such opening arises and the township may be fixed for the payment out of the township treasury of moneys collected in taxes from all parts of the township; therefore, persons not immediately affected by the proceedings have standing to except to the regularity and necessity of the proceedings to open or vacate, as the case may be. Obviously, there is no necessity to file a report in the court of quarter sessions fixing grades, width, etc., and defining the lines of the street, if such street is not actually opened. It is only where affirmative action has been taken that the necessity of filing a report appears. If, upon the refusal of the township commissioners in a township of the first class to open a street, citizens generally of the township could petition the court for the appointment of viewers under the General Road Law, the act giving power to the commissioners to open streets would be meaningless; it would in effect be allowing an appeal from the refusal of the commissioners to open a street to three viewers appointed by the court. Let us assume that the viewers found a necessity for the opening of a street and so reported. In certain populous and built-up sections of the state, where real estate is extremely valuable and the damages suffered necessarily of great amount, the judgment of the township commissioners as to the necessity for opening a street could be overridden by three viewers from different parts of the county, and the township impoverished by the payment of huge damages, at the behest of petitioners who had no real interest in the matter other than to have more convenient access to and from their homes and places of business. We do not believe the legislature intended to create such an anomalous situation. We, therefore, conclude that the court of quarter sessions had no power in the premises to appoint viewers to open the street in question,

CLAIR W. LUTHER, OFFICIAL STENOGRAPHER, FORTY-SEVENTH JUDICIAL DISTRICT, EBENSBURG, PA.

jurisdiction to do so being in the commissioners of the township.

It therefore follows as a sequence that the attempt of the viewers to assess damages or benefits for the opening of the said street was a nullity. The First Class Township Law, Act of June 24, 1931, P.L. 1206, Art. XX, §2010, 53 P.S. §19092-2010, provides as follows:

"Upon favorable action on such matter by the board of commissioners, and after the expiration of the term allowed for filing exceptions, or upon the order of the court upon the disposition of any exceptions, if in either case the compensation for the damages or benefits accruing therefrom have not been agreed upon, the court of common pleas, or any law judge thereof in vacation, on application by petition by the board of commissioners or any person interested, shall appoint three viewers, from the county board of viewers, to assess the damages and benefits occasioned by the proceeding in the manner provided by this act for such proceedings."

No favorable action having been taken by the board of commissioners there was no necessity for the appointment of viewers, either by the court of common pleas or by the court of quarter sessions. There were no damages to assess.

Since Exceptions Nos. 1 and 2, which raise the question of jurisdiction, are to be sustained, we believe there is no necessity to pass upon the other exceptions.

We, therefore, enter the following

DECREE

AND NOW, AUGUST 22<sup>nd</sup>, 1955, at 9:30 o'clock, A. M., e.d.s.t. after argument and upon due consideration, Exceptions Nos. 1 and 2 are sustained and the report of the viewers set aside, costs to be paid by the petitioners.

CONCURRED IN BY:

Boffard  
Judge  
McWilliams  
Judge

BY THE COURT:

McKinnis  
President Judge

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

IN RE: THE LAYING OUT, OPEN-  
ING AND EXTENDING OF A PUB-  
LIC STREET KNOWN AS OCALA  
AVENUE, FORMERLY LOCUST  
AVENUE FROM FERG STREET,  
FORMERLY KING STREET, TO  
OAKLAND STREET, IN THE TOWN-  
SHIP OF STONYCREEK, COUNTY  
OF CAMBRIA AND STATE OF  
PENNSYLVANIA.

OPINION AND DECREE SUSTAIN-  
ING EXCEPTIONS NOS. 1 AND 2  
AND SETTING ASIDE VIEWERS  
REPORT

CLAIR W. LUTHER  
OFFICIAL STENOGRAPHER  
FOR THE  
FORTY-SEVENTH JUDICIAL DISTRICT  
PENNSYLVANIA

*Filed: Aug. 22, 1955*

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

IN RE: THE LAYING OUT, OPENING  
AND EXTENDING OF A PUBLIC STREET  
KNOWN AS OCALA AVENUE, FORMERLY  
LOCUST AVENUE, FROM FERG STREET,  
FORMERLY KING STREET, TO OAKLAND  
STREET, IN THE TOWNSHIP OF STONY-  
CREEK, COUNTY OF CAMBRIA AND  
STATE OF PENNSYLVANIA.

No. 8 December Sessions, 1953

BRIEF OF STONYCREEK TOWNSHIP ON EXCEPTIONS TO  
REPORT OF VIEWERS

HISTORY OF THE CASE

On the 13th day of October, 1953, a group of property owners in Stonycreek Township, a first-class Township, presented a petition to the Commissioners of Stonycreek Township asking the Commissioners to open Ocala Avenue from Ferg Street to Oakland Street and notifying the Township Commissioners that if they failed to open this street the petitioners would ask the Court of Quarter Sessions of Cambria County to appoint Viewers to lay out and open this street. The Commissioners of Stonycreek Township refused to grant the petition primarily for the reason that other property owners claimed ownership and planned to build homes on the so-called street. This contradictory situation results from the fact that the petitioners examined a recorded plan that shows the existence of Ocala Avenue, formerly Locust Avenue, between Ferg Street and Oakland Street and thus concluded that a dedicated street existed in this location and that it should be available for public use. The persons claiming ownership of this land refer to another recorded plan which has no street in this location but has lots laid off and claim to own the land in question free of any dedication or easement for street purposes. Further, the Township refused to open this street for the reason that its ordinances require that all abutting property owners consent to the location and grade of any street before opening or ordaining a street; also, the Township requires that a base meeting certain specifications

be provided. Thereafter, the group of property owners desiring the opening of Ocala Avenue petitioned Your Honorable Court for the appointment of a Board of Viewers and on the 23 day of *Nov.*, 1953, Fred Claflin, Robert Mayer and Mahon Baumgardner were appointed Viewers to view the ground proposed for the extension of Ocala Avenue and lay out the same if they see the necessity therefore. Thereafter, hearings were held by the Board of Viewers and testimony taken from witnesses representing the petitioners, the Township and the property owners opposed to the proceedings. On October 6, 1954, the Board of Viewers filed its report approving the opening of Ocala Avenue from Ferg Street to Oakland Street and assessing damages for the benefit of the owners of the property across which Ocala Avenue was proposed to be opened. Thereafter, exceptions to the Viewers Report were filed and an appeal taken by the Township.

#### A R G U M E N T

THE REPORT OF THE BOARD OF VIEWERS IS NULL AND VOID FOR THE REASON THAT THE COURT OF QUARTER SESSIONS HAS NO JURISDICTION TO APPOINT A BOARD OF VIEWERS TO LAY OUT A PUBLIC ROAD IN A FIRST CLASS TOWNSHIP.

Formerly the power to lay out and open roads in townships was vested exclusively in the Board of Viewers under the General Road Law enacted June 13, 1836, P.L. 551, Section 1. However, laying out of a road is a legislative and not a judicial function and by statute both first and second class townships have been granted powers of eminent domain, which powers have been gradually increased in both classes by legislation: In re: Road in Wilford Township, 78 D. & C. 79 (1951).

Under the Second Class Township Code the courts have held that the procedure therein contained for laying out of roads is exclusive: Big Beaver Twp. Road, 69 D. & C. 486 (1949); and property owners have no right to petition for a view to the Court

of Quarter Sessions unless the property owners petition the Supervisors to open a road and the Supervisors refuse to grant the road, then in that case the petitioners can ask the Court of Quarter Sessions for a view under the General Road Law, Act of May 1, 1933, P.L. 103, Art. XI, Sec. 1102, as amended (53 P.S. 19093-1102). This is the procedure followed by the petitioners in this case.

However, Stonycreek Township as a first-class Township and the Commissioners thereof have been granted more complete rights of eminent domain:

"The board of township commissioners may enact, ordain, survey, lay out, open, widen, straighten, vacate, and relay all streets, and parts thereof, which are wholly within the township, upon the petition of a majority in interest of the owners of property or properties through whose land such street passes, or upon whose land it abuts, or without petition of the owners of abutting property, if, in the judgment of the board of commissioners, it is necessary for the public convenience; and the authority to open, widen and straighten highways with the approval of the Secretary of Highways", Act of June 24, 1931, P.L. 1206, Art. XX, Sec. 2005, as amended (53 P.S. 19092-2005).

Note that the Commissioners may but are not required to lay out a street on petition of the property owners, and no right to appeal to the Court of Quarter Sessions is granted to petitioners if the Board of Commissioners elects not to exercise the power of eminent domain:

"The board of commissioners shall give ten days' notice to the property owners affected thereby of the time and place when and where all parties interested may meet and be heard. Witnesses may be summoned and examined by the board of commissioners and by the parties interested at such meeting or any adjournment thereof", 53 P.S. 19092-2007.

"After such hearing and a consideration of the matter, should the board of commissioners, or a majority thereof, decide in favor of exercising the power so conferred, they shall make written report, together with a draft or survey of the street or highway, fixing the width thereof and noting the improvements along the line thereof, and the names of the owners of property through which the same shall pass or whereon it shall abut. Such report and draft shall be filed in the office of the clerk of the court of quarter sessions", 53 P.S. 19092-2008.

"Any citizen or freeholder of the township may, within thirty days after the filing of the report of the board of commissioners, upon entering in the court sufficient surety to indemnify the board for all costs incurred in the proceedings, file exceptions to the report, together with a petition for a review", 53 P.S. 19092-2009.

Because the Commissioners have refused to exercise the right of eminent domain, the petitioners have no recourse to a writ under the clear and plain meaning of the laws above quoted. Had the Commissioners filed a report indicating an intention to open Ocala Avenue, then the persons affected thereby, including the persons opposed to this street, would have had a right to seek judicial review of the propriety of the exercise of power.

That this is the proper procedure is clear because it was followed in the case of Vacation of South Fayette Township Road, 50 D. & C. 26, (1943), on appeal in Appeal of Likar, 157 Pa. Super. 572. (1945). In all cases found under the current acts the appeals to the Courts of Quarter Sessions resulted from dissatisfaction over the exercise of the power of eminent domain. None resulted from the refusal of the Commissioners to open or vacate a street.

The reasoning applied by the courts in construing the Second Class Township Procedure to have repealed or superseded the old Road Law is even more persuasive when applied to a first class

township, which is more like a real municipal corporation, having been established, as stated in the preamble of the Act of 1899, to give more populous townships, devoted largely to residential purposes, a form of government having greater powers than existing townships. Further, as pointed out in the Big Beaver Case, Supra, as a matter of statutory construction where a procedure or remedy is provided by act, the directions of the act shall be strictly pursued, Act of March 21, 1896, P.L. 558 (46 P.S. 156). It would be anomalous in view of the fact that the cases held the procedure set forth in the Second Class Township Code is exclusive to contend that under the First Class Township Code procedure there set forth is not exclusive.

THE AWARD OF DAMAGES IS NULL  
AND VOID BECAUSE THE COURT OF  
COMMON PLEAS HAS EXCLUSIVE  
JURISDICTION TO APPOINT A BOARD  
OF VIEWERS TO ASSESS DAMAGES.

The law provides that where the power of eminent domain is exercised by the township commissioners the Court of Common Pleas shall appoint Viewers to assess the damages or benefits therefrom:

"Upon favorable action on such matter by the board of commissioners, and after the expiration of the term allowed for filing exceptions, or upon the order of the court upon the disposition of any exceptions, if in either case the compensation for the damages or benefits accruing therefrom have not been agreed upon, the court of common pleas, or any law judge thereof in vacation, on application by petition by the board of commissioners or any person interested, shall appoint three viewers, from the county board of viewers, to assess the damages and benefits occasioned by the proceeding in the manner provided by this act for such proceedings," 53 P.S. 19092-2010.

This act refers to the sections of the First Class Township Code dealing generally with eminent domain:

"Except as otherwise provided in this act, in case the compensation for damages or benefits accruing from the exercise of the right of eminent domain or from the erection and construction of

public improvements has not been agreed upon, the court of common pleas, or any law judge thereof in vacation, on application thereto by petition by the township or any person interested, shall appoint three viewers, from the board of viewers of the county, and appoint a time, not less than twenty nor more than thirty days thereafter, when the viewers shall meet at the place of the improvement and view the same and the premises affected thereby," 53 P.S. 19092-1920.

Therefore, even if the Court of Quarter Sessions had jurisdiction to review the refusal of the Commissioners of Stonycreek Township to open Ocala Avenue by the appointment of a Board of Viewers to make an independent investigation, those Viewers had no authority to assess damages. In the case of In re: Ruthwood Ave. 142 Pa. Super. 101 (1940), property owners petitioned the first-class township commissioners to lay out a street to be called Ruthwood Avenue. The commissioners held a hearing and decided to lay out the avenue and filed their report in the Court of Quarter Sessions. Thereafter, Viewers were appointed by the Court of Common Pleas to assess damages arising out of the opening and laying out of Ruthwood Avenue. Property owners filed suit to invalidate the original proceedings laying out Ruthwood Avenue for the reason that the road had not been physically opened within five years after the completion of the proceedings for opening or laying out a public road, as required by 53 P.S. 19092-2013. The township argued that although five years had elapsed since the proceedings were confirmed in the Court of Quarter Sessions the proceeding referred to in this statute included the proceedings in the Court of Common Pleas which were then still pending to determine damages. The Superior Court in opinion by Judge Cunningham upheld the position of the property owners and nullified the opening of Ruthwood Avenue for the reason that under the First Class Township Code the proceedings in the

Court of Quarter Sessions to lay out a public road are separate and apart from the proceedings in the Court of Common Pleas for the assessment of damages or benefits arising therefrom. In this case the courts' opinion stated on page :

"The limit of the jurisdiction of the quarter sessions is reached when the report of the commissioners is confirmed, either automatically when no exceptions have been filed or when any exceptions have been filed or when any exceptions taken have been dismissed. Clearly, one of the main purposes of Article IX is the opening of new public roads. If the damages and benefits to abutting property owners have been agreed upon, the confirmation by the quarter sessions is the end of the whole matter; but if not agreed upon, the incidental and exclusive jurisdiction of the common pleas to appoint viewers and adjudicate all such controversies attaches as soon as the quarter sessions has confirmed the report in all other particulars. In no event has the quarter sessions any further jurisdiction."

OCALA AVENUE FROM FERG STREET  
TO OAKLAND STREET IS A DEDICATED  
ROAD SO NO DAMAGES CAN BE AWARDED  
TO THE SO-CALLED OWNERS.

The Board of Viewers avoided issue of the fact that the street in question is dedicated and no damages could be awarded inasmuch as they did make an award of damages. It was understood by counsel that the Viewers were limiting their inquiry to the necessity for laying out Ocala Avenue and not considering the matter of damages. In fact on page 9 of the testimony taken by the Viewers on February 25, 1954, Mr. Baumgardner, one of the Viewers, states on record that the hearing to determine the amount of the damages is a separate hearing to be held after the Court approves the report on the issue of laying out Ocala Avenue. The issue of whether or not Ocala Avenue is dedicated and subject to easements or incumbrances affecting the value of the land is rather complicated and inasmuch as the Viewers did not give the parties the opportunity to bring out all of the facts necessary

to establish the status of the land in question/<sup>it</sup>would be pointless to elaborate on those issues at this stage of the proceedings.

The property across which Ocala Avenue, formerly Locust Avenue, is sought to be opened was formerly owned by Isaac E. Griffith and is shown on the Oakland Plan of Lots attached hereto as Exhibit "A". After this plan of lots was recorded Isaac E. or I. E. Griffith prepared a second plan of lots showing the existence of Locust now Ocala Avenue. This plan is Exhibit "B". On the date of this plan; namely, September 29, 1925, Isaac E. Griffith owned all of the land in question. On October 30, 1925, Isaac E. Griffith conveyed Lots Nos. 21 to 27 on Block 2 on Exhibit "A" to his son, Frederick E. Griffith and his daughter-in-law, Lizzie Mae Griffith. On the same date he sold Lots Nos. 14 through 20 on Block 2 of said plan to his son, Roy B. Griffith, and his daughter-in-law, Catherine Marie Griffith. Thereafter, on November 16, 1929, Roy B. Griffith obtained the approval of the Commissioners of Stonycreek Township of the plan of I. E. Griffith, Exhibit "B". Thereafter, the Griffith brothers sold lots off the original plan Exhibit "A" and in contradiction to the street location shown on the plan approved by the Stonycreek Township Commissioners. The present owners have acquired ownership of the lots in question from the Griffith brothers as shown in the Abstract of Title attached hereto as Exhibit "C".

Any examiner of the title to those lots upon searching of the Plan Index in the Cambria County Recorder's Office would discover the dedicated street across the lots in question.

Further, this part of Ocala Avenue is shown on the official map of Stonycreek Township as provided for by the First Class Township Code:

"No person shall be entitled to recover any damages for any improvements placed or constructed within the lines of any street or highway after the same has been located or ordained on the plan provided for by this section," 53 P.S. 19092-2001.

This provision has been in effect since the Township Code of 1917 so that even though the dedication of this street has lapsed because it has not been opened up within 21 years of the dedication, nevertheless, the implied easement or a right of way from the laying out and recording of the plan continues and the provision in the law above referred to taking away the right to damages for improvements placed within the lines of this street both serve to reduce the value of the property taken. These issues were not dealt with by the Board of Viewers nor were they completely presented by the parties at the hearings who were led to believe that those issues were not for consideration at that time.

**REPORT OF THE VIEWERS  
IS DEFECTIVE IN FORM**

By law, the Board of Viewers is required to file a report in brief and concise paragraphic form setting forth all findings of fact and conclusions of law and to attach to the said report a plan showing the properties affected, Act of June 25, 1911, P.L. 1123, Section 9 (16 P.S. 3118).

Because of the difficulty of the factual and legal issues involved in this case, such findings of fact and conclusions of law are particularly necessary. On page 11 of the testimony taken February 25, 1954, Mr. Baumgardner stated, "Well, we're not getting anywhere as far as the legal phase of it is concerned. It's a complicated situation, I admit. We are a jury. We are not expected to pay much attention to the law". It is the opinion of the Township that the Board of Viewers did not clearly understand their function in this case and because of the difficulties at issue, intentionally overlooked them. If the Board of Viewers had jurisdiction to return an award of damages, as they did, the report should be returned to them for correction so that it will be in proper form for the filing of exceptions.

THE REPORT OF THE BOARD OF  
VIEWERS IS DEFECTIVE AND IN  
ERROR FOR OTHER REASONS.

The exceptions filed by Stonycreek Township state other reasons in addition to the reasons already elaborated upon why the report and award are in error. These exceptions are self explanatory and do not involve issues of substantive law.

If it is proper for these proceedings to be brought under the General Road Law the Viewers Report is defective because of the absence of a proper release of damages and a determination of the grade of Ocala Avenue. Further, examination of the Viewers Report shows there has been no finding or discussion as to the necessity of opening Ocala Avenue and the Report appears to confine itself to discussing the reasons for assessment of damages. The very serious issue of the necessity of opening Ocala Avenue was decided by the Township Commissioners in their refusal to grant the original petition. The petitioners at the hearing before the Viewers were unable to give any real reason for the necessity of opening Ocala Avenue. All of those petitioners and their witnesses have access to public highways and their testimony when boiled down to the essential facts shows that the opening of Ocala Avenue would mean for them the saving of several hundred feet in reaching certain spots which they may desire to visit. If every property owner or group of owners were permitted to insist upon the laying out of a road so that he could save himself a few seconds travel by automobile chaos would result.

In conclusion it is submitted that in this case the legislature authorized the Commissioners of Stonycreek Township to decide whether or not this street should be opened and that the Court of Quarter Sessions had no jurisdiction to appoint the Viewers and, further, that if the Court of Quarter Sessions had jurisdiction to appoint the Viewers the Viewers proceedings have been improper and incomplete.

Respectfully submitted,

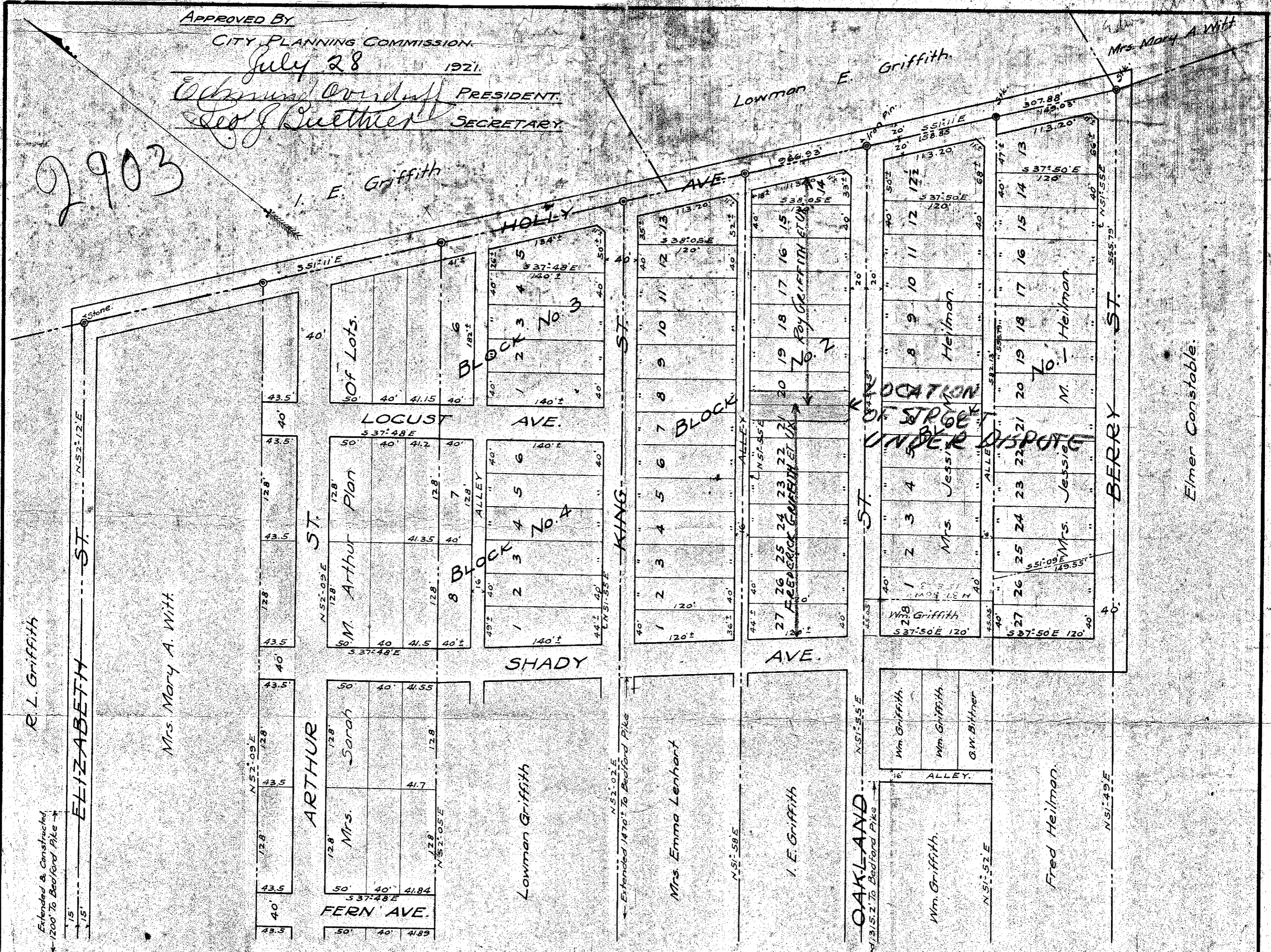
  
Solicitor for Stonycreek Twp.

NOTE: In the Abstracts of Title, Exhibit "C", some of the deeds refer to the Oakland No. 3 Plan of Lots of Isaac E. Griffith. This Plan of Lots is laid out by E.A. Griffith, engineer, on July, 1923, and approved by resolution of the Commissioners of Stonycreek Township February 2, 1925, and acknowledged by Isaac Griffith May 21, 1925, and recorded in the Cambria County Recorder's Office on May 28, 1925, in Plat Book Vol. 2, page 92. It shows that section of Oakland Plan of Lots owned by Isaac E. Griffith and shows Lots Nos. 14 through 27 to be the same as on the Oakland Plan of Lots.

I was unable to obtain a copy to attach to the Brief.

APPROVED BY  
 CITY PLANNING COMMISSION  
 July 28 1921.  
 Edmund Overdurf PRESIDENT.  
 Geo J. Guether SECRETARY.

2903



STATE OF PENNSYLVANIA } S.S.  
 COUNTY OF CAMBRIA }  
 Before me, a Notary Public, in and for said County and State, personally came William Griffith and Dollie, his wife; I. E. Griffith, widower; Frederick Heilman and Mollie, his wife; Jessie M. Heilman, widow; Elmer E. Counstable and Julia, his wife; ~~Lowman E. Griffith and Mary A., his wife~~; Mrs. Emma Lenhart and Milton Lenhart, her husband; Lowman E. Griffith and Mary A., his wife; Sarah M. Arthur and Henry W. Arthur, her husband; and Mrs. Mary A. Witt and Edward S. Witt, her husband, who acknowledged this Plan of Lots, designated as 'Oakland' in Stonycreek Township, Cambria County, Pa. to be the plan of Lots, Streets, Alleys and Places surveyed and laid out by them and desired the same to be recorded as such.

Recorded in Plat  
 Book No. 1 Page 219  
 Aug. 30, 1921 At  
 Ebensburg, Pa.

# OAKLAND

## PLAN OF LOTS

SITUATE IN  
 Stonycreek Township, Cambria County, Penna.  
 Scale 1"=100 S.E. Dickey & Co. July 14, 1921.  
 Civil and Mining Engrs.  
 Johnstown, Pa.

Note: - No Building or porch is to be constructed on the above plan of lots nearer than 20' from the street line on which said building faces.

William Griffith Elmer E. Counstable Sarah M. Arthur  
Mollie Heilman Julia C. Constable  
Fred Heilman Mrs. Emma Lenhart Mrs. Mary A. Witt  
Milton Lenhart Edward S. Witt  
Mollie Heilman Lowman E. Griffith  
Mrs. Jessie M. Heilman Mary A. Griffith

Witness my hand and Notarial Seal this 27th day of August, A.D. 1921.  
Myrtle N. Johnston  
 Notary Public  
 My commission expires Feb. 27, 1925.

Elmer C. Constable

STATE OF PENNA. }  
COUNTY OF CAMBRIA } SS

Before me a Notary Public in and for said County and State, personally appeared RAY B. GRIFFITH who declares that he is the owner of certain lots in the within plan, designated as the I. E. GRIFFITH PLAN OF LOTS situate in Stonycreek Township, Cambria County, Penna.; That said plan is the plan of Lots, Streets, Alleys and Places laid out by I. E. GRIFFITH, DECEASED; and that he desires same to be recorded as such.

Witness my hand and Notarial Seal this 4<sup>th</sup> day of Nov. A.D. 1929.

Robert West  
Notary Public

Approved by  
**CITY PLANNING COMMISSION**

Nov 19 1929  
[Signature] Pres.  
[Signature] Secy.

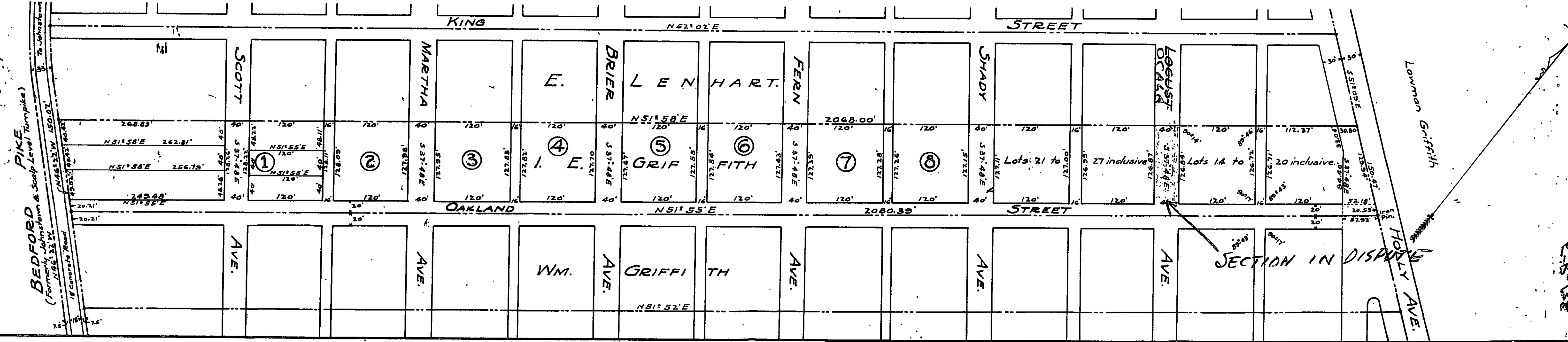
Approved by  
**STONYCREEK TWP. COMMISSIONERS**

1929  
[Signature] Chairman  
[Signature] Secy.

RECORDED JULY 29, 1930  
Property of  
**I. E. GRIFFITH**

Situate In  
Stonycreek Township, Cambria Co., Pa.  
Scale 1" = 100'  
Sept. 29, 1925,  
S. E. Dickey & Co.  
Civil and Mining Engrs.  
Johnstown, Pa.

My Commission expires



5-B-138

2-B-138

THOMAS J. GELET ABSTRACT

#1

General Warranty Deed

Isaac E. Griffith, widower  
to.  
Roy B. Griffith and Catherine  
Marie Griffith, husband and wife

Dated: Oct. 30, 1925  
Acknowl: Oct. 30, 1925  
Recorded: Dec. 7, 1925  
In: 400-239  
Consid: \$1.00  
Signed, sealed, acknowledged  
and receipted

Conveys: Stonycreek Township  
Lots 14 to 20 inclusive Oakland No. 3 Plan of Lots.

Recites: Will of Eli Griffith (Will Book Vol. 6, page 213.)

#2

General Warranty Deed

Roy B. Griffith and Catherine  
Marie Griffith, husband and wife  
to.  
Joseph E. Kuntz

Dated: Aug. 6, 1942  
Acknowl: Aug. 6, 1942  
Recorded: Aug. 14, 1942  
In: 515-312  
Consid: \$1.00  
U.S.R. \$2.20  
Signed, sealed, acknowledged  
and receipted.

Conveys: in Stonycreek Twp.  
Lots Nos. 14 to 20 inclusive, Oakland No. 3 Plan of  
Lots.

Recites: 400-239.

#3

General Warranty Deed

Joseph E. Kuntz, single  
to.  
Ethel V. Brown and Orel A. Brown,  
her husband,  
Roy B. Griffith and C. Marie  
Griffith, his wife.

Dated: Aug. 11, 1949  
Acknowl: Aug. 11, 1949  
Recorded: Aug. 24, 1949  
In: 602-443  
Consid: \$1.00  
U.S.R. \$1.10  
Signed, sealed, acknowledged  
and receipted.

Conveys: Stonycreek Township lots Nos. 14 to 20 inclusive on  
I.E. Griffith Plan, recorded in Plat Book Vol. 2,  
page 92.

Recites: 515-312.

#4

General Warranty Deed

Orel A. Brown and Ethel V. Brown,  
husband and wife,  
Roy B. Griffith and C. Marie Griffith,  
husband and wife  
to.  
Thomas J. Gelet

Dated: Oct. 12, 1951  
Acknowl: Oct. 12, 1951  
Recorded: Oct. 15, 1951  
In: 635-30  
Consid: \$500.00  
Signed, sealed, acknowledged  
and receipted.

EXHIBIT C

Cont. #4.

Conveys: in Stonycreek Township.

Beginning at a point on the westerly side of Oakland Street at line of land of Glenn C. Corl and Ruth G. Corl; thence by line of land of Glenn C. Corl and Ruth G. Corl; North  $37^{\circ} 50'$  West, a distance of 126.85 feet to line of land now or late of Emma Lenhart; thence by line of land of Emma Lenhart North  $51^{\circ} 55'$  East a distance of 60 feet to other land of the above named grantors; thence by other land of the above named grantors South  $37^{\circ} 50'$  East, a distance of 126.84 feet to Oakland Street; thence by line of Oakland Street, South  $51^{\circ} 55'$  West, a distance of 60 feet to the point and place of beginning.

Being Lot No. 20 and part of Lot No. 19, Block No. 2 on Oakland Plan recorded in Plat Book Vol. 1, page 219.

"Said plans as hereinabove described includes one half of an alley situate at the northwesterly side of the land hereinabove described in the said lot of land and also shown on a Plan of Oakland No. 3 recorded in Plat Book Vol. 2, page 92.

Excepting and reserving and under and subject to...

Recites being part of 602-443.

NILES H. BUMBARGER ABSTRACT

#1  
General Warranty Deed  
Isaac E. Griffith  
to.  
Frederick E. Griffith and  
Lizzie May Griffith, husband  
and wife.  
Dated: October 30, 1925  
Acknowl: October 30, 1925  
Recorded: December 7, 1925  
In: 400-236  
Consid: \$1.00  
Signed, sealed, acknowledged and  
receipted  
Conveys: Lots 21 to 27, inclusive on Oakland No. 3 Plan of Lots  
in Plat Book Vol. 2, page 92 (alley also)  
Recites: Will of Eli Griffith, etc.

#2  
General Warranty Deed  
Frederick E. Griffith and Lizzie  
May Griffith, husband and wife  
to.  
R. Lynn Griffith and Sarah H.  
Griffith  
Dated: October 23, 1945  
Acknowl: October 23, 1945  
Recorded: January 3, 1946  
In: 554-77  
Consid: \$1.00  
Signed, sealed, acknowledged  
and receipted  
Conveys: Lots 21, 22, 23 in Block No. 2 in Plat Book Vol. 1,  
page 219.  
Recites: 400-236.

#3  
General Warranty Deed  
R. Lynn Griffith and Sara H.  
Griffith, husband and wife  
to.  
Miles H. Bumbarger and Nellie G.  
Bumbarger, husband and wife.  
Dated: September 5, 1946  
Acknowl: September 6, 1946  
Recorded: September 9, 1946  
In: 566-299  
Conveys: in Stonycreek Twp. Lots 21, 22 and 23 in Block No. 2,  
Oakland Plan in Plat Book Vol. 1, page 219.  
Recites: 554-77.

#4  
General Warranty Deed  
Miles H. Bumbarger and Nellie G.  
Bumbarger, husband and wife  
to.  
Glenn C. Corl and Ruth G. Corl,  
husband and wife,  
Dated: June 3, 1949  
Acknowl: June 3, 1949  
Recorded: November 27, 1951  
in: 635-391  
Consid: \$1.00  
Signed, sealed, acknowledged  
and receipted.  
Conveys: in Stonycreek Twp. Lots 21, 22 and 23 in Bloc No. 2,  
Plat Book Vol. 1, page 219.  
Recites: 566-299.

#5

**Article of Agreement**

**Glen C. Corl and Ruth G. Corl,  
husband and wife**

**to.**

**Miles H. Bumbarger and Nellie  
G. Bumbarger, husband and wife**

**Dated: May 20, 1953  
Acknowl: May 20, 1953  
Recorded: June 1, 1953  
In: 645-575  
Consid: \$1200.00**

**Contract to sell in Stonycreek Twp. Lots 21,22 and 23 in Block  
No. 2, Oakland Plan in Plat Book Vol. 1, page 219.**

**Recites deed from R. Lynn Griffith, et ux.**

No. 8 December Sessions, 1953

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

2903

IN RE: THE LAYING OUT, OPENING  
AND EXTENDING OF A PUBLIC STREET  
KNOWN AS OCALA AVENUE, FORMERLY  
LOCUST AVENUE FROM FERG STREET,  
FORMERLY KING STREET, TO OAKLAND  
STREET, IN THE TOWNSHIP OF STONY-  
CREEK, COUNTY OF CAMBRIA AND STATE  
OF PENNSYLVANIA.

---

BRIEF OF STONYCREEK TOWNSHIP

---

LAW OFFICES  
**ROGER W. HAGER**  
417 LINCOLN STREET  
JOHNSTOWN, - PENNA.

PLEASE FILE

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

In the Court of Quarter  
Sessions of Cambria County,  
Pennsylvania.  
No. 8 December Sessions, 1953.

EXCEPTIONS TO VIEWERS REPORT

TO THE HONORABLE JUDGES OF THE ABOVE NAMED COURT:

AND NOW, to wit, this 28th day of October, 1954,  
comes the Township of Stonycreek by its Solicitor, Roger W. Hager,  
and takes exceptions to the report of the Board of Viewers filed  
October \_\_\_\_, 1954, in the above captioned proceedings, as  
follows:

1. The said report of the Board of Viewers  
is null and void for the reason that the Court of Quarter  
Sessions has no jurisdiction to appoint a Board of Viewers to  
lay out a public road in Stonycreek Township, a first class  
Township.

2. The said report of the Board of Viewers  
is null and void for the reason that the First Class Township  
Code, Act of May 27, 1949, P.L. 1955, as amended, vests exclusive  
jurisdiction in the Commissioners of Stonycreek Township to  
decide whether or not a public road should be laid out and in the  
event that said Commissioners decide against laying out a public  
road no recourse exists to a Board of Viewers.

3. The said report of the Board of Viewers  
is null and void for the reason that the Court of Common Pleas  
has exclusive jurisdiction over the appointment of Viewers in  
first class townships.

4. The said report of the Board of Viewers  
is defective for the reasons that it fails to set forth in  
brief and concise paragraphic form findings of fact and conclu-  
sions of law and fails to have attached to said report a plan  
showing the properties affected as required by P.L. 1123,  
Section 9 of June 23, 1911.

5. The said report of the Board of Viewers and the Award of Damages thereunder are defective for the reason that the testimony presented before the Board of Viewers showed that the street in question; namely, Ocala Avenue from Perg Street to Oakland Street, was a dedicated road already approved by the Township of Stonycreek and that in view of said dedication it was improper for the Board of Viewers to award damages.

6. The said report of the Board of Viewers and the Award of Damages made thereunder are defective for the reason that no award of benefits was made when in fact the laying out and opening of said street will benefit and not damage any of the adjoining property owners.

7. The said report of the Board of Viewers is defective for the reason that it is not accompanied by a release of damages from the adjoining property owners as required by law.

8. The said report of the Board of Viewers is defective for the reason that at the last hearing held before the Board of Viewers it was understood that in the event that the Viewers decided that the road should be opened that a further hearing would be held to determine the matter of damages and the Board of Viewers without any further hearing or notice to parties awarded damages without the taking of any testimony on the issue of the damages.

9. The said report of the Board of Viewers is defective for the reason that it in effect requires the Township to open up a street for the mere convenience of several tax payers who already have access to public highways.

10. The said report of the Board of Viewers is defective for the reason that the report intends the Township of Stonycreek to open up a street at its own cost and expense whereas the Township of Stonycreek has an ordinance providing that no street shall be opened up and ordained unless a base has been already provided thereon by the adjoining property owners.

11. The said report of the Board of Viewers is defective for the reason that although it purports to provide for the laying out of said Ocala Avenue it does not establish the grade thereof.

12. The said report of the Board of Viewers is defective for the reason that damages or benefits cannot have been assessed without determining or establishing grade of said street and the Viewers failed to establish said grade.

  
Township Solicitor

No. 8      December Sessions, 1953  
IN THE COURT OF QUARTER SESSIONS  
OF CAMBRIA COUNTY, PENNSYLVANIA

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

*Filed Oct. 24, 1954*

---

EXCEPTIONS TO VIEWERS REPORT

---

LAW OFFICES  
**ROGER W. HAGER**  
417 LINCOLN STREET  
JOHNSTOWN, - PENNA.

March 1, 1954

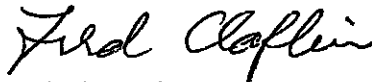
In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

0  
0  
0  
0

In the Court of Quarter  
Sessions of Cambria County,  
Pennsylvania.  
No. 8 December Sessions, 1953.

Please be advised that there will be a continued hearing  
in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township,  
Cambria County, Pennsylvania at 10:00 A.M. E.S.T. on Wednesday,  
March 24, 1954, re a proposed public road in the Township of Stonycreek,  
County of Cambria and State of Pennsylvania, at which time and place  
all interested persons may appear and be heard.

Yours very truly,



Fred Clafin  
Chairman of Board of Viewers

ENC:ncr

Clerk of Courts



In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

0 In the Court of Quarter  
0 Sessions of Cambria County,  
0 Pennsylvania.  
0 No. 8 December Sessions, 1953.

NOTICE OF VIEW

We, the undersigned Viewers, appointed by the above named Court for the purpose of viewing a proposed public road in the Township of Stonycreek, Cambria County, Pennsylvania. Said proposed public road being known as Ocala Avenue, formerly Locust Avenue from Ferg Street, formerly King Street to Oakland Street in the Township of Stonycreek, County of Cambria, State of Pennsylvania a distance of 300 feet as measured from the center line of Ferg Street to the center line of Oakland Street and extending in a southeasterly direction from Ferg Street to Oakland Street.

The beginning of said proposed road is in a public highway and the ending of said proposed road is likewise in a public highway, as stated above, will meet at the place of beginning on the twenty-eighth day of January A.D., 1954, at 10:00 A.M. E.S.T. for the purpose of performing the duties of our appointment at which time and place all interested persons may appear and be heard.

F. W. Claflin  
Robert Mayer  
Mahlon Baumgardner

Viewers

January 8, 1954

In re: Order to View a proposed public road in the Township of Stonycreek, County of Cambria and State of Pennsylvania.

In the Court of Quarter Sessions of Cambria County, Pennsylvania  
No. 8 December Sessions, 1953.

ACCEPTANCE OF SERVICE OF EXCEPTIONS  
FILED IN THE ABOVE CAPTIONED CASE

NOW, October 29, 1954, the undersigned hereby accept service of a copy of the Exceptions to Viewers Report filed in the above captioned proceedings and acknowledge a receipt of a copy thereof.

*Dionisius Kuyal & Letizia  
by Edward H. Kuyal Jr.*

Attorney for parties asking that  
Ocala Avenue be laid out

Attorney for Miles H. Bumbarger and  
Nellie G. Bumbarger, husband and  
wife

*Thomas J. Gelet*

Attorney for Thomas J. Gelet

*Heimer Bennett & Sons  
by Thomas J. Gelet  
Attys for Marie Knipple  
& Vivian E. Knipple  
successors to the right, title,  
& interest of mile H. Bumbarger  
et al*

*Filed 12-7-1954*

IN THE COURT OF QUARTER SESSIONS OF CAMBRIA COUNTY, PENNSYLVANIA

IN RE: THE LAYING-OUT, OPENING ( )  
AND EXTENDING OF A PUBLIC STREET )  
KNOWN AS OCALA AVENUE, FORMERLY ( )  
LOCUST AVENUE, FROM FERG STREET, ) NO. 8 DEC. SESSIONS,  
FORMERLY KING STREET, TO OAKLAND ( 1953  
STREET, IN THE TOWNSHIP OF STONYCREEK, )  
COUNTY OF CAMBRIA, AND STATE OF ( )  
PENNSYLVANIA )

BRIEF ON BEHALF OF PETITIONERS ON EXCEPTIONS TO  
REPORT OF VIEWERS

HISTORY OF THE CASE

On August 11, 1953, at 8:00 P. M., certain residents, citizens and taxpayers of the Township of Stonycreek, a first class township, presented a petition to the Board of Commissioners of Stonycreek Township, requesting that the Board of Commissioners open Ocala Avenue (formerly Locust Avenue) from Ferg Street to Oakland Street for the reason that the said Ocala Avenue from Ferg Street to and extending beyond Oakland Street to Berry Street is a dedicated street under the lay-out of lots of I. E. Griffith; the aforesaid plan or lay-out of lots having been approved by the City Planning Commission on November 19, 1925, and approved by the Stonycreek Township Commissioners on November 4, 1929, said plan being recorded on July 29, 1930 in the Office of the Recorder of Deeds in and for Cambria County in Plat Book Vol. 3, Page 75. The aforesaid petition further stated that the said Ocala Avenue is dedicated as a forty foot street, notwithstanding the fact that the surface of a portion of Ocala Avenue had been attempted to be conveyed by the following deeds to private individuals: Deed from Estate of Emma Lenhart to Lula P. Butler and Lela M. Boyd, recorded in the Recorder of Deed's Office

in and for Cambria County in Deed Book Vol. 502, Page 132, in 1941; deed from Glenn C. Corle to Miles H. Bumbarger, conveying twenty-four feet of the said Ocala Avenue, which deed is recorded in Deed Book Vol. 608, Page 148 (1949) and Deed Book Vol. 645, Page 575 (1953); deed from Oral A. Brown et al., to Thomas J. Gelet for sixteen feet of the said Ocala Avenue, which deed is recorded in Deed Book Vol. 635, Page 30 (1951).

In their prayer the petitioners prayed that the Honorable Board of Commissioners open the said Ocala Avenue from Ferg Street to Oakland Street, and that if the Commissioners fail to grant the prayer requested the petitioners stated that they would petition the Court of Quarter Sessions of Cambria County, Pennsylvania, to appoint viewers to lay-out and open said Ocala Avenue from Ferg Street to Oakland Street. The Commissioners of Stonycreek Township failed to act on the petition, wherefore the aforementioned petitioners, being residents, citizens, and taxpayers of the Township of Stonycreek, petitioned your Honorable Court for the opening of Ocala Avenue as aforesaid, whereupon your Honorable Court did on the day of \_\_\_\_\_, 1953, appoint Fred Claflin, Robert Mayer, and Mahlon Baumgardner as Viewers to view the portion of Ocala Avenue aforesaid, and make a report of their proceedings to your Honorable Court at the next sessions of the Court of Quarter Sessions of Cambria County.

Thereafter hearings were held by the Board of Viewers and testimony taken from witnesses for the petitioners, the Township, and other persons having an interest in the proceedings. On October 6, 1954, the Board of Viewers filed its report approving the opening of Ocala Avenue from Ferg Street to Oakland Street and assessing damages for the benefit of the owners of the property over which Ocala Avenue was proposed to be

opened. The Board of Supervisors of Stonycreek Township thereafter filed exceptions to the Viewers' Report, and an appeal was taken by the Township.

#### QUESTIONS INVOLVED

(1) Did the Court of Quarter Sessions have jurisdiction to appoint a Board of Viewers to lay-out a public road in Stonycreek Township, a first class township? We answer this in the affirmative.

(2) Is Ocala Avenue from Ferg Street to Oakland Street a dedicated road? We answer this in the affirmative.

(3) Did the Board of Viewers have authority to assess damages? We answer this in the negative.

#### ARGUMENT

**THE COURT OF QUARTER SESSIONS DID HAVE JURISDICTION TO APPOINT A BOARD OF VIEWERS TO LAY-OUT A PUBLIC ROAD IN STONYCREEK TOWNSHIP, A FIRST CLASS TOWNSHIP.**

The First Class Township Code relative to power of a first class township to lay-out, open, widen and vacate township roads provides as follows:

"The board of township commissioners may enact, ordain, survey, lay out, open, widen, straighten, vacate, and relay all streets, and parts thereof, which are wholly within the township, upon the petition of a majority in interest of the owners of property or properties through whose land such street passes, or upon whose land it abuts, or without petition of the owners of abutting property if, in the judgment of the board of commissioners, it is necessary

for the public convenience; and the authority to open, widen and straighten highways with the approval of the Secretary of Highways. Such power shall include authority to vacate in whole or in part streets laid out by the Commonwealth where the same have remained unopened for a period of thirty years; and also the authority to lay out and open a street which will be a continuation of extension of a street already opened by an adjacent city, borough, or township. As amended 1949, May 27, P. L. 1955, Section 43; 1953, May 27, P. L. 220, Section 3." 53 P. S. Section 19092-2005.

The Township Code provides further:

"The board of commissioners shall give ten days' notice to the property owners affected thereby of the time and place when and where all parties interested may meet and be heard. Witnesses may be summoned and examined by the board of commissioners and by the parties interested at such meeting or any adjournment thereof. As amended 1949, May 27, P. L. 1955, Section 43." 53 P. S. Section 19092-2007.

"After such hearing and a consideration of the matter, should the board of commissioners, or a majority thereof, decide in favor of exercising the power so conferred, they shall make written report, together with a draft or survey of the street or highway, fixing the width thereof and noting the improvements along the line thereof, and the names of the owners of property through which the same shall pass or whereon it shall abut. Such report and draft shall be filed in the office of the clerk of the court of quarter sessions, As amended 1949, May 27, P. L. 1955, Section 43; 1953, May 27, P. L. 220, Section 3." 53 P. S. Section 19092-2008.

"Any citizen or freeholder of the township may, within thirty days after the filing of the report of the board of commissioners, upon entering in the court sufficient surety to indemnify the board for all costs incurred in the proceedings, file exceptions to the report, together with a petition for a review. (1931, June 24, P. L. 1206, Art. XX, Section 2009. Reenacted without change by Act 1949, May 27, P. L. 1955, Section 43." 53 P. S. Section 19092-2009.

"Upon favorable action on such matter by the board of commissioners, and after the expiration of the term allowed for filing exceptions, or upon the order of the court upon the disposition of any exceptions, if in either case the compensation for the damages or benefits accruing therefrom have not been agreed upon, the court of common pleas, or any law judge thereof in vacation, on application by petition by the board of commissioners or any person interested, shall appoint three viewers, from the county board of viewers, to assess the damages and benefits occasioned by the proceeding in the manner provided by this act for such proceedings. (1931, June 24, P. L. 1206, Art XX, Section 2010) Reenacted without change by Act 1949, May 27, P. L. 1955, Section 43. " 53 P. S. 19092-2010.

It is to be noted that the First Class Township Code is silent as to the rights of any citizen or freeholder of the Township if the Board of Commissioners fails to take favorable action on the opening of a Township road. Therefore, counsel for the Board of Commissioners contends that since the Board of Commissioners has refused to exercise the right granted them under the aforesaid Code to open a portion of Ocala Avenue, the petitioners have no recourse to a view. We cannot agree with this contention that the legislature intended that the Board of Commissioners of a first class township have exclusive authority to refuse the prayer of the petitioners, whereby the petitioners would be deprived of their day in court.

In Herrington's Petition, 266 Pa. 88, involving first class township law, on Page 93 the Court said:

"While the preliminary procedure is before the township commissioners, instead of the court of quarter sessions....may order a review 'in conformity with the now existing road laws of this commonwealth'".

The evident intent of the amended First Class Township Code provided for a review wherein the Board of Commissioners take affirmative action under the Code so that the Court may be fully informed before

final action upon the report of the Supervisors. Vacation of South Fayette Township Road, 50 D. & C. 26, citing in re Public Road, 70 Pitts. L. J. 691.

We, therefore, contend that since these cases hold that the Court be fully informed before final action on the report of the Commissioners, that the evident intent of the Code is to grant a review to fully inform the Court of the failure of the action by the Board of Commissioners to act on the petition submitted to them to open a road in the Township.

A portion of the First Class Township Code, being 53 P. S. 19092-2005, impowers the Board of Commissioners of a First Class Township to lay-out, open, widen and vacate the Township roads which are wholly within the Township, upon the petition of a majority in interest of the owners of property or properties through whose land such street passes, or upon whose land it abuts, or without petition of the owners of abutting property if, in the judgment of the Board of Commissioners, it is necessary for the public convenience. It is important to note that the Board of Commissioners may act (1) on petition of a majority in interest of the owners of property through whose land such street passes, or (2) without petition of the owners of abutting property if the Board of Commissioners feels it necessary for the public convenience. Counsel for Stonycreek Township in his brief argues that the procedure followed by the petitioners was that as set forth in the Second Class Township Code. With this contention we do not agree. It must be remembered that the petitioners were not a majority in interest of the owners of property or properties through whose land such street passes, but were inhabitants, citizens and taxpayers of the Township of Stonycreek. In fact, there was not one signer of the petition who owned land abutting the section of Ocala Avenue requested to be opened. Therefore, the petitioners submitted in the first instance their petition to the Board of Commissioners of Stonycreek

Township on August 11, 1953, for action by the Commissioners to lay-out and open the section of Ocala Avenue in question.

Under the portion of the First Class Township Code; namely, "without petition of the owners of abutting property if, in the judgment of the Board of Commissioners, it is necessary for the public convenience", the Board of Commissioners apparently decided that it was not necessary to open that portion of Ocala Avenue in question and refused to take any action granted to them under the First Class Township Code. Upon the refusal of the Board of Commissioners of Stonycreek Township to act on the petition submitted to them by the inhabitants, citizens and taxpayers of Stonycreek Township, the said petitioners had exhausted any remedy under the First Class Township Code, 53 P. S. Section 19092-2005, which they may have had to have the portion of Ocala Avenue laid-out and opened, "without the petition of the owners of abutting property", as stated in the aforesaid section of the First Class Township Code.

Therefore, any further remedy which the petitioners would have to open that section of Ocala Avenue would be granted to them under the General Road Law, 36 P. S. 1781. It is to be noted further that the First Class Township Code, 53 P. S. Section 19092-2005, is derived from the Act of 1901, June 7, P. L. 510 (Repealed), wherein the Township Commissioners of a First Class Township were given authority to ordain a street, but only upon petition of the "owner or owners through whose land such street passed, or upon whose land the same abutted." The Superior Court in determining the intention of the legislature and the rights of the citizens under the Act of 1901 other than the owner or owners through whose land such street passed or upon whose land the street abutted, in Smith, appellant, vs. Cheltenham Township,

35 Pa. Super., 503 (1908), on Page 512, stated:

"The Township Commissioners have no authority to lay-out a street, nor do they have any veto power should a citizen begin proceedings in a Court to lay-out a street. In the Act of June 7, 1901, P. L. 510, they may ordain a street, but only upon the application of the owner through whose land such street may pass, and anyone interested may bring the proceedings into the Court, whereupon it is governed by the General Road Laws."

Therefore, it is our contention that since the Act of June 7, 1901, P. L. 510, and the section of the First Class Township Code, 53 P. S. 19092-2005, are similar respecting application or petition of the owner through whose land such street may pass, that we must, therefore, follow the precedent as set forth in the Superior Court in *Smith vs. Cheltenham Township, Supra.*, as to legislative interpretation and intent.

The General Road Law pertaining to appointment and duties of viewers is covered in 36 P. S. 1781, which reads as follows:

"The court of quarter sessions of every county of the Commonwealth, on being petitioned to grant a view for a road within the respective county, shall have power and are hereby required, in open court, to appoint, as often as may be needful, three persons, qualified as hereinafter is provided, to view the ground proposed for such road, and make report of their proceedings to the respective court at the next term thereof: Provided, That the provisions of this act, relative to the appointment of viewers to lay out roads and to assess damages, shall not extend to the city and county of Philadelphia, herein specially provided for. 1836, June 13, P. L. 551, Section 1; 1911, April 27, P. L. 95, Section 1."

It is to be noted that the legislature has not expressly repealed this section of the General Road Law pertaining to the appointment

of viewers. In *St. David's Church vs. Sayer*, appellant, 244 Pa. 300 (1914), the Supreme Court on Page 306, stated, "...There is no exclusion of townships of the first class from the operation of the Act of 1836", this Act of 1836 being the General Road Law.

Counsel for the Township of Stonycreek has cited cases in his brief wherein the courts have held that the Second Class Township Code of 1947 has attempted to repeal the General Road Law of 1836. This is true to the extent that abutting property owners or owners through whose land such street runs petitions the Board of Commissioners to lay-out and open a street within the Township and also when the Board of Commissioners acting without a submit of petition opens and lays-out a street or road solely within the boundaries of the Township. Again we contend that it does not repeal the General Road Law as to the rights and remedies which the other citizens in the Township may have for submitting a petition to the Court of Quarter Sessions of the County wherein the Township lies requesting the appointment of viewers to lay-out a street within the Township. It is to be noted further that counsel for Stonycreek Township has not cited one case wherein the courts have held that the First Class Township Code attempts to, or does, repeal the General Road Law of 1836.

Counsel for the Township Commissioners contends that the question of the necessity for the said road for the public convenience is entirely within the judgment of the Board of Township Commissioners, and it is our belief that his position is untenable. In re: Vacation of South Fayette Township Road, 50 D. & C. 26 (1943) counsel for the Township Commissioners had a similar contention. The Court of Quarter Sessions of Allegheny County also stated that the Court was of the opinion that position of the counsel for

the Township Commissioners of South Fayette Township was untenable, and on

Page 34 stated:

"The legislature having given any citizen or freeholder of the township a right to file exceptions to the report of the commissioners, together with a petition for a review, it is nothing more than reasonable that the legislature intended to give such citizens or freeholders a sufficient remedy, under any case, in which proper exceptions or a petition for a review would lie under the law."

The Court further on Page 34 stated:

"We, therefore, conclude that there is a right given to any citizen or freeholder of the township to appeal to the quarter sessions court from the action of the commissioners of a township of the first class in vacating a road, provided the action is taken within the proper time and the proper bond is posted."

Since the First Class Township Code does not expressly allow for an appeal by the petitioners from the action of the Township Board of Commissioners in failing to favorably act upon the petition, the petitioners therefore had to seek a remedy to have their case heard in Court under the General Road Law.

We fully agree with counsel for the Township Commissioners when he states in his brief that in all cases found under the current acts, being the First and Second Class Township Code, the appeals to the Court of Quarter Sessions resulted from the action on the part of the Commissioners to lay-out, open or vacate streets within the Township, and that no cases have decided the issue which is presented by the instant case, being the jurisdiction of the Court of Quarter Sessions pertaining to non-action by the Board of Commissioners in opening-laying-out and vacating Township roads under the current First and Second Class Township Code. Therefore, as a

result of our intensive research, we find that the exact issue in question is before your Honorable Court for the first time.

Wherefore, we contend that the procedure as expressly set forth in the First Class Township Code is exclusive, but pertains solely to petitions submitted to the Board of Commissioners by abutting owners, by owners through which the street runs, or on action by the Board of Commissioners without a petition, and in no way regulates the rights and privileges of other citizens of the Township to have a road laid out and opened under the General Road Law.

**OCALA AVENUE FROM FERG STREET TO  
OAKLAND STREET IS A DEDICATED STREET.**

The plan of lots of Stonycreek Township laid out by I. E. Griffith and approved by the City Planning Commission on November 19, 1925, and approved by the Stonycreek Township Commissioners on November 4, 1929, shows a section of Ocala Avenue, formerly Locust Avenue, from Ferg Street to Oakland Street. This plan was recorded on July 29, 1930, in the Office of the Recorder of Deeds in and for Cambria County in Plat Book Vol. 3, Page 75. Therefore, the recording of the said plan of lots of I. E. Griffith, showing the portion of Oakland Avenue aforesaid and being approved and recorded as aforesaid, resulted in a dedication of that portion of Ocala Avenue in question in the instant case.

This was so held in *Smith vs. Union Switch and Signal Company*, 17 Pa. Super. 444 (1900); See also *Richardson vs. City of McKeesport*, 18 Pa. Super. 285; *U. S. vs. 1.8 acres of land, more or less, in Berks County, Pennsylvania*, 85 F. Supp. 788 D.C. (1949), and *Ansbach vs.*

Rittenhouse, 29 Luz. L. Reg. Rep. 129.

Therefore, any attempted sale of any portion of that part of Ocala Avenue in question was null and void as to the owners of the other lots on the recorded plan.

Counsel for the Board of Commissioners also states that Ocala Avenue from Ferg Street to Oakland Street is a dedicated road, and we agree with his contention.

**THE BOARD OF VIEWERS DID NOT HAVE ANY  
AUTHORITY TO ASSESS DAMAGES.**

Your Honorable Court did appoint Fred Claffin, Robert Mayer, and Mahlon Baumgardner as viewers to view the portion of Ocala Avenue aforesaid and make a report of their proceedings to your Honorable Court, at the next session of the Court of Quarter Sessions of Cambria County. Therefore, we agree with the contention of counsel for the Board of Commissioners of Stonycreek Township that no where in the Order of appointment was there authority granted by your Honorable Court to the aforesaid viewers to assess damages. Since we agree with the contention of counsel for the Board of Commissioners of Stonycreek Township that Ocala Avenue from Ferg Street to Oakland Street is a dedicated road, we also contend that the Board of Viewers had no authority in their report to your Honorable Court to assess damages at that time, but were restricted in their report as to the feasibility of the laying-out and opening of that portion of Ocala Avenue in question.

We contend further that if damages are to be assessed, that another Board of Viewers, or the same Board of Viewers, should be appointed or re-appointed to take testimony as to support payment and

assessment of damages and make a report thereof to the Court of Quarter Sessions of Cambria County.

In conclusion it is submitted that in the case at bar the Court of Quarter Sessions did have jurisdiction to appoint the viewers as your Honorable Court had so done, but that this Board of Viewers, in accordance with the Decree issued by your Honorable Court, had no authority to assess any damages at this time.

Respectfully submitted,

  
Attorney for Petitioners

NO. 8 DEC. SESSIONS, 1953

IN THE COURT OF QUARTER  
SESSIONS OF CAMBRIA COUNTY,  
PENNSYLVANIA

IN RE: LAYING-OUT, OPENING  
AND EXTENDING OF A PUBLIC  
STREET KNOWN AS OCALA  
AVENUE, FORMERLY LOCUST  
AVENUE, FROM FERG STREET,  
FORMERLY KING STREET,  
TO OAKLAND STREET, IN THE  
TOWNSHIP OF STONYCREEK,  
COUNTY OF CAMBRIA AND  
STATE OF PENNSYLVANIA.

BRIEF ON BEHALF OF PETITIONER  
ON EXCEPTIONS TO REPORT  
OF VIEWERS

DI FRANCESCO, KUYAT & LETIZIA

ATTORNEYS AT LAW

FIRST NATIONAL BANK BUILDING

JOHNSTOWN, PENNSYLVANIA

In Re: The Laying-Out, Opening and Extending of a Public Street Known as Ocala Avenue, Formerly Lecust Avenue, from Ferg Street, Formerly King Street, to Oakland Street, in the Township of Stonycreek, County of Cambria and State of Pennsylvania.

In the Court of Quarter Sessions, Cambria County, No. 8 December Sessions, 1953.

REPORT OF VIEWERS

To the Honorable, the Judges of the above named Court, we the undersigned Viewers, appointed by the above Court to View and Inspect the land and premises owned by Thomas J. Gelet and Miles H. Bumbargar in the Township of Stonycreek, County of Cambria and State of Pennsylvania and to determine and estimate the damages or benefits that have resulted or that may seem likely to result due to the taking of twenty-four (24) feet frontage by one hundred twenty (120) feet deep of Lot No. 21 on the property of Miles H. Bumbargar and the taking of sixteen (16) feet frontage by one hundred twenty (120) feet deep of Lot No. 22, property of Thomas J. Gelet all as shown on Oakland Plan of Lots situate in Stonycreek Township, Cambria County, Pennsylvania by S. E. Dickey Co., Engineers dated July 14, 1921 and recorded in Plat Book Vol. 1, Page 219, August 30, 1921 at Ebensburg, Pennsylvania.

That we have been duly sworn or affirmed as Members of the Permanent Board of Viewers of Cambria County, Pennsylvania, as shown by the records of the aforesaid Court; that due public notice of the time and place of the meeting of the Viewers was given by the posting of ten hand bills upon a public street known as Ocala Avenue formerly Lecust Street, from Ferg Street formerly King Street to Oakland Street in the Township of Stonycreek, County of Cambria and State of Pennsylvania and upon Roger W. Hager, Solicitor for the Township of Stonycreek, Mr. Samuel R. DiFrancesco, Counsel for the property owners and Edward J. Harkins, Counsel for the property owners.

Pursuant to the Notice to View designating the time and place of the meeting of the Viewers, we met at the property involved in the above proceedings on the 28th day of January, 1954 at 10 o'clock A.M. E.S.T. for the purpose of performing the duties of our appointment, and viewed the property.

Notices for a hearing to be held in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township, Cambria County, Pennsylvania at 10 o'clock A.M. E.S.T. on February 11, 1954 re the laying-out, opening and extending of a public street known as Ocala Avenue, formerly Locust Avenue, from Ferg Street, formerly King Street, to Oakland Street in the Township of Stonycreek, County of Cambria and State of Pennsylvania were prepared and served on all parties concerned in the petition for the street opening including Roger W. Hager, Samuel R. DiFrancesco and Edward J. Harkins, all of whom accepted service and acknowledged having received a copy of said notice of hearing.

Pursuant of said notices and acceptance of service thereon of all parties interested we met on February 11, 1954 at 10 o'clock A.M. E.S.T. in the Oakland Fire Hall in the Township of Stonycreek, Cambria County, Pennsylvania and proceeded with the duties of our appointment. In addition to the Attorneys in the above case, nine (9) witnesses were heard. The case was continued for further hearing.

Notices were sent to all parties concerned in this case for a continued hearing in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township, County of Cambria, State of Pennsylvania at 10 o'clock A.M. E.S.T. on February 25, 1954. All parties present at the hearing on February 11, 1954 were present and the case was carried on. Due to lack of time and all the testimony to be offered, this hearing adjourned and a continued hearing was arranged, by proper

notice, to be held in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township, Cambria County, Pennsylvania at 10 o'clock A.M. E.S.T. on March 24, 1954 and all parties at the hearing on February 25 were present and final taking of testimony was completed.

At the view, during the hearings and after a careful study of all testimony transcribed and briefs presented, the Viewers based their assessment of damages on the following conditions:

- (1) Topographical location of the site.
- (2) Present development and possible future development of the area surrounding the location of Ocala Avenue from Ferg Street to Oakland Street.
- (3) A study of various lot layouts in this locality.
- (4) Logical development of utilities and conveniences to be enjoyed by the opening of this street.
- (5) Advantage of vehicular transportation due to topography in this area.

After taking into consideration all the matters above briefed, the Viewers unanimously approve the opening of Ocala Avenue from Ferg Street to Oakland Street and hereby assess damages to Thomas J. Gelet for the taking of sixteen (16) feet frontage by one hundred twenty (120) feet deep of Lot No. 22 in the amount of Two Hundred Eighty (\$280.00) Dollars and assess damages to Miles H. Bumbargar for the taking of twenty-four (24) feet frontage by one hundred twenty (120) feet deep of Lot No. 21 in the amount of Four Hundred Twenty (\$420.00) Dollars, making a total damage assessed of Seven Hundred (\$700.00) Dollars and the Viewers assess no benefits.

Witness our hands and seals this first (1st) day of October, 1954.

Fred Chaplin Chairman  
Robert Wagner  
Mahlon Bumbargar  
Viewers

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 2 day of December A. D. 1953,  
before the Honorable Judge of the said Court: Upon the petition of the inhabitants of the Town-  
ship of STONYCREEK, in the said County, setting forth that they labor under incon-  
venience for want of a road or highway to lead from

IN RE: THE LAYING-OUT, OPENING AND EXTENDING OF A PUBLIC  
STREET KNOWN AS OCALA AVENUE, FORMERLY LOCUST AVENUE, FROM  
FERG STREET, FORMERLY KING STREET, TO OAKLAND STREET, IN THE  
TOWNSHIP OF STONYCREEK, COUNTY OF CAMBRIA AND STATE OF  
PENNSYLVANIA.

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

FRED CLAFLIN surveyor, and ROBERT  
MAYER AND MAHLON BAUMGARDNER.

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, to-  
gether 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:

Joseph C. Wess, Clerk

NO. 8 Dec. SESSIONS, 1953

Order to view IN RE: THE LAYING-  
OUT, OPENING AND EXTENDING OF  
A PUBLIC STREET KNOWN AS  
OCALA AVENUE, FORMERLY LOCUST  
AVENUE, FROM FERG ST. FORMER-  
LY KING ST. TO OAKLAND ST. IN  
THE TOWNSHIP OF STONYCREEK,  
COUNTY OF CAMBRIA AND STATE  
OF PENNSYLVANIA.

FRED CLAFLIN

ROBERT MAYER

MAHLON BUMGARDNER

Viewers

Clerk

*Joseph C. Weiss*

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."

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

Ø In the Court of Quarter  
Ø Sessions of Cambria County,  
Ø Pennsylvania.  
Ø No. 8 December Sessions, 1953.

NOTICE OF VIEW

We, the undersigned Viewers, appointed by the above named Court for the purpose of viewing a proposed public road in the Township of Stonycreek, Cambria County, Pennsylvania. Said proposed public road being known as Ocala Avenue, formerly Locust Avenue, from Ferg Street, formerly King Street, to Oakland Street in the Township of Stonycreek, County of Cambria, State of Pennsylvania a distance of 300 feet as measured from the center line of Ferg Street to the center line of Oakland Street and extending in a southeasterly direction from Ferg Street to Oakland Street.

The beginning of said proposed road is in a public highway and the ending of said proposed road is likewise in a public highway, as stated above, will meet at the place of beginning on the twenty-eighth day of January A.D., 1954, at 10:00 A.M. E.S.T. for the purpose of performing the duties of our appointment at which time and place all interested persons may appear and be heard.

F. W. Claflin  
Robert Mayer  
Mahlon Baumgardner

Viewers

January 8, 1954

EDWARD T. GRAY  
REGISTERED ENGR. AND SURVEYOR

FRED W. CLAFLIN  
ASSOC. MEM. AM. SOC. OF C. E.  
REGISTERED ENGR. AND SURVEYOR

606 SWANK BLDG.  
TELEPHONE 7-3631

**GRAY AND CLAFLIN**  
CONSULTING CIVIL ENGINEERS  
JOHNSTOWN, PA.

February 1, 1954

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

o  
o  
o  
o  
In the Court of Quarter  
Sessions of Cambria County,  
Pennsylvania.  
No. 8 December Sessions, 1953.

Please be advised that there will be a hearing in the Oakland  
Fire Hall, 1741 Bedford Street, Stonycreek Twp., Cambria County,  
Pennsylvania at 10:00 A.M. E.S.T. on February 11, 1954, re a  
proposed public road in the Township of Stonycreek, County of  
Cambria and State of Pennsylvania.

Yours very truly,

Fred Claflin  
Chairman of Board of Viewers

FWC:amr

February 12, 1954

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

o In the Court of Quarter  
o Sessions of Cambria County,  
o Pennsylvania.  
o No. 8 December Sessions, 1953.

Please be advised that there will be a continued hearing  
in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Twp.,  
Cambria County, Pennsylvania at 10:00 A.M. E.S.T. on February 25,  
1954, re a proposed public road in the Township of Stonycreek,  
County of Cambria and State of Pennsylvania, at which time and place  
all interested persons may appear and be heard.

Yours very truly,

*Fred Claflin*  
Fred Claflin  
Chairman of Board of Viewers

FWC:amr

March 15, 1954

In re: Order to View a proposed  
public road in the Township of  
Stoneycreek, County of Cambria  
and State of Pennsylvania.

0 In the Court of Quarter  
0 Sessions of Cambria County  
0 Pennsylvania.  
0 No. 5 Decree No. Sessions, 1953.

Please be advised that there will be a continued hearing in the Oakland Fire Hall, 1741 Bedford Street, Stoneycreek Township, Cambria County, Pennsylvania at 10:00 A.M. P.M. on Wednesday, March 31, 1954, re a proposed public road in the Township of Stoneycreek, County of Cambria and State of Pennsylvania, at which time and place all interested persons may appear and be heard. The continued hearing scheduled for March 24, 1954 has been canceled due to conflicting dates.

Yours very truly,

*Fred Claflin*  
Fred Claflin  
Chairman of Board of Viewers

FRC:DJR

Copies sent to:

Mr. Robert Mayer - 1  
Mr. Mahlon Baumgardner - 1  
Atty. Roger Hager - 2  
Atty. Samuel DiFrancesco - 2  
Atty. Edward Harkins - 2  
Mr. Walter D. Griffith - 1  
Mr. Telford Locher - 1  
Clerk of Courts - 1  
Prothonotary - 1  
County Commissioner - 2

March 1, 1954

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

0 In the Court of Quarter  
0 Sessions of Cambria County,  
0 Pennsylvania.  
0 No. 8 December Sessions, 1953.

Please be advised that there will be a continued hearing  
in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township,  
Cambria County, Pennsylvania at 10:00 A.M. E.S.T. on Wednesday,  
March 31, 1954, re a proposed public road in the Township of Stony-  
creek, County of Cambria and State of Pennsylvania, at which time  
and place all interested persons may appear and be heard.

Yours very truly,

*Fred Claflin*  
Fred Claflin  
Chairman of Board of Viewers

FWG:amr

I hereby accept service of the above Notice and acknowledge receipt  
of copy of same.

*Maurice A. Johnson, Jr.*  
County Commissioner

February 1, 1954

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

0 In the Court of Quarter  
0 Sessions of Cambria County,  
0 Pennsylvania.  
0 No. 8 December Sessions, 1953.

Please be advised that there will be a hearing in the Oakland  
Fire Hall, 1741 Bedford Street, Stonycreek Twp., Cambria County,  
Pennsylvania at 10:00 A.M. E.S.T. on February 11, 1954, re a  
proposed public road in the Township of Stonycreek, County of  
Cambria and State of Pennsylvania.

Yours very truly,

*Fred Clafflin*

Fred Clafflin  
Chairman of Board of Viewers

FTO:amr

I hereby accept service of the above Notice and acknowledge receipt  
of copy of same.

*James R. Sturges*

March 15, 1954

In re: Order to View a proposed  
public road in the Township of  
Stonycreek, County of Cambria  
and State of Pennsylvania.

0 In the Court of Quarter  
0 Sessions of Cambria County  
0 Pennsylvania.  
0 No. 8 December Sessions, 1953.

Please be advised that there will be a continued hearing  
in the Oakland Fire Hall, 1741 Bedford Street, Stonycreek Township,  
Cambria County, Pennsylvania at 10:00 A.M. P.M. on Wednesday,  
March 31, 1954, re a proposed public road in the Township of Stonycreek,  
County of Cambria and State of Pennsylvania, at which time and place  
all interested persons may appear and be heard. The continued hearing  
scheduled for March 24, 1954 has been canceled due to conflicting  
dates.

Yours very truly,

*Fred Claflin*

Fred Claflin  
Chairman of Board of Viewers

FC:amr

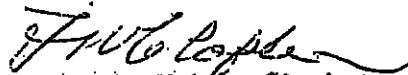
I hereby accept service of the above Notice and acknowledge receipt  
of copy of same.

*Samuel R. DiFrancesco*  
Atty. Samuel R. DiFrancesco

**NOTICE OF EXHIBIT OF SCHEDULE**

Please be advised that the Exhibit of Schedule in the matter of the laying-out, opening and extending of a public street known as Coala Avenue, formerly Locust Avenue, from Berg Street, formerly King Street, to Oakland Street in the Township of Stonycreek, County of Cambria and State of Pennsylvania will be held in the office of Gray & Claflin, Consulting Engineers, 606 Swank Building, Johnstown at 7 o'clock P.M. E.S.T. on Wednesday, October 6, 1954 for the purpose of exhibiting our award of damages in the said proceedings.

Yours very truly,

  
Fred Claflin, Chairman  
Board of Viewers

AMR

In Re: The Laying-Out, Opening and Extending of a Public Street Known as Ocala Avenue, Formerly Locust Avenue, from Ferg Street, Formerly King Street, to Oakland Street, in the Township of Stonycreek, County of Cambria and State of Pennsylvania.

In the Court of Quarter Sessions, Cambria County,

No. 8  
December Sessions, 1953.

CAMBRIA COUNTY in Account with Fred Claflin, Robert Mayer and Mahlon J. Baumgardner.

Fred Claflin

1954			
Jan. 14	Prepared Notices to View	\$ 12.00	
	Stenographer, Stationary & postage	2.30	
" 16	Posted Notices	12.00	
	Mileage - 13 miles	1.30	
" 28	Making View	12.00	
	Mileage - 13 miles	1.30	
Feb. 1	Preparing Notices for Hearing	12.00	
	Stenographer, Stationary & postage	2.40	
" 11	Hearing at Oakland Fire Hall	12.00	
	Mileage - 13 miles	1.30	
" 12	Notices for continued hearing	12.00	
	Stenographer, Stationary & postage	1.60	
" 25	Continued Hearing at Oakland Fire Hall-	12.00	
	Mileage - 13 miles	1.30	
Mar. 15	Notices for continued hearing	12.00	
	Stenographer, Stationary & postage	1.60	
" 31	Continued Hearing at Oakland Fire Hall-	12.00	
	Mileage - 13 miles	1.30	
Sept 22	Conference at residence of Mahlon J. Baumgardner, Ebensburg - 1 day	12.00	
	Mileage - 40 miles	4.00	
" 24	Preparing Report	12.00	
	Stenographer, Stationary	1.60	
Oct. 6	Exhibit of Schedule, Gray & Claflin office	12.00	
	Mileage - 5 miles	.50	
" 13	Filing Report at Ebensburg	12.00	
	Mileage - 40 miles	4.00	

\$180.50

Robert Mayer

1954			
Jan. 28	Making View	\$ 12.00	
	Mileage - 11 miles	1.10	
Feb. 11	Hearing at Oakland Fire Hall	12.00	
	Mileage - 11 miles	1.10	
" 25	Continued Hearing	12.00	
	Mileage - 11 miles	1.10	
Mar. 31	Continued Hearing	12.00	
	Mileage - 11 miles	1.10	
Sept. 22	Conference at residence of Mahlon J. Baumgardner, Ebensburg	12.00	
	Mileage - 40 miles	4.00	
Oct. 6	Exhibit of Schedule	12.00	
	Mileage - 4 miles	.40	

\$ 80.80

Mahlon J. Baumgardner

1954			
Jan. 28	Making View	\$ 12.00	
	Mileage - 50 miles	5.00	
Feb. 11	Hearing at Oakland Fire Hall	12.00	
	Mileage - 50 miles	5.00	
" 25	Continued Hearing	12.00	
	Mileage - 50 miles	5.00	
Mar. 31	Continued Hearing	12.00	
	Mileage - 50 miles	5.00	
Sept. 22	Conference	12.00	
Oct. 6	Exhibit of Schedule	12.00	
	Mileage - 40 miles	4.00	

\$ 96.00

The above is a true and correct statement of costs due to the Viewers in the Case of Miles H. Bumbargar and Thomas J. Gelet in the Township of Stonycreek, County of Cambria and State of Pennsylvania, the original of which is filed with the Report in the Clerk of Courts Office, October 13, 1954.

Fred Claphin  
Robert Mayer  
Mahlon Baumgardner  
Viewers

COPY FOR CLERK OF COURTS

In Re: The Laying-Out, Opening  
and Extending of a Public Street  
Known as Ocala Avenue, Formerly  
Locust Avenue, from Ferg Street,  
Formerly King Street to Oakland  
Street, in the Township of Stony-  
creek, County of Cambria and  
State of Pennsylvania.

In the Court of Quarter Sessions,  
Cambria County,  
No. 8  
December Sessions, 1953.

*Filed*  
*10/13/54*  
*Joseph C. Wilson*

VIEWERS:  
Fred Claflin, Chairman  
Robert Mayer  
Mahlon Baumgardner