

December 20, 1995

OPINION NO: 95-041

The Honorable David P. Joyce  
Geauga County Prosecuting Attorney  
Courthouse Annex  
231 Main Street  
Chardon, Ohio 44024

Dear Prosecutor Joyce:

I have before me your request for a formal opinion concerning partition fences. Specifically, you ask whether the enforcement provisions available to a township under R.C. 971.07 apply to maintenance and construction responsibilities even though maintenance is not specifically mentioned in the statute. Additionally, you ask whether maintenance responsibilities can be assessed to the property owners by township trustees at any time, including post construction. After reviewing the statutes at issue and relevant supporting authority, it is my conclusion that R.C. 971.07 does apply to maintenance as well as construction responsibilities and that the township may assess responsibilities at any time.

In your request letter, you describe a partition fence which separates a single property on one side and two properties on the other. The fence was constructed approximately ten years ago and has always been maintained by the single parcel owner. Because one of the property owners has been willing to assume maintenance responsibilities, there has been no allocation of benefits realized by the owners and the township has had no occasion to be involved. However, recently the party who historically performed maintenance on the fence asked the adjoining property owners for help and they refused. As a result, the aggrieved party has asked the trustees for an order assigning maintenance responsibilities.

Pursuant to R.C. 971.04, the township trustees have express statutory authority to assign to various landowners the portions of a partition fence that they must build or maintain. Your question arises from an apparent inconsistency between R.C. 971.04 and R.C. 971.07, which codifies the township's authority to enforce the assignment once made. While R.C. 971.04 addresses both construction and maintenance, R.C. 971.07 specifically uses only the term "to build."

Provisions governing partition fences have existed in Ohio for more than one hundred years. *See* 70 Ohio Laws 246 (passed May 3, 1873). An early version of the statute expressly permitted the township trustees to have a partition fence constructed or repaired when the landowner failed to perform the assigned duties of construction or repair. *See* 82 Ohio Laws 215 (H.B. 801, passed May 1, 1885). Later, the enforcement provisions referred generally to the assignment but did not expressly mention repairs, and subsequent enforcement provisions have persisted in omitting an express reference to repairs. *See* 90 Ohio Laws 58 (H.B. 1016, passed March 1, 1893); *see also, e.g.,* 97 Ohio Laws 138, 139 (H.B. 165, passed April 18, 1904).

Although recent versions of R.C. 971.07 have not contained express references to repairs or maintenance, Ohio's Attorneys General have consistently read the partition fence enforcement provisions as encompassing both construction and repair of partition fences. In 1922 Op. Att'y Gen. No. 3969, vol. II, p. 893 at 894, one of my predecessors described the General Code sections dealing with partition fences as "providing in general that owners of adjoining lands are to share equally in the construction and repair of partition fences, and for the enforcement of that principle through proceedings before township trustees." *See also* 1955 Op. Att'y Gen. No. 5018, p. 101; 1941 Op. Att'y Gen. No. 3412, p. 47; 1940 Op. Att'y Gen. No. 2777, vol. II, p. 876. Implicit in this interpretation is the notion that, if the power to apportion costs associated with the repair of a partition fence is not coupled with the power to enforce the assignment, then there is no power in the first instance.

The courts have also treated the construction and maintenance of a partition fence as a single obligation. In *Alma Coal Co. v. Cozad*, 79 Ohio St. 348, 87 N.E. 172 (1909), the court recognized that there are constitutional limitations on the circumstances in which partition fence provisions may be enforced, requiring that there be a benefit to the land of the person charged with the expenses. That case indicates, however, that when the benefit requirement is satisfied, the landowner may be charged with the expense of constructing and maintaining a partition fence. *See also, e.g., Zarbaugh v. Ellinger*, 99 Ohio St. 133, 124 N.E. 68 (1918); *Dye v. Columbia Township Board of Trustees*, No. 375 (Ct. App. Meigs County July 22, 1986) (unreported).

I conclude, therefore, that the duty to maintain or repair a partition fence may be enforced by the board of township trustees in the same manner as the duty to construct a partition fence. The board of township trustees may proceed in accordance with R.C. 971.07 to have a partition fence built or repaired, if the person to whom that duty is assigned under R.C. 971.04 fails to carry it out and an aggrieved person makes an application for action by the trustees.

You have asked, also, whether township trustees may assess maintenance responsibilities at any time, including after a fence has been constructed. If the township trustees have not made an assignment of duties, the duties are, as prescribed by R.C. 971.02, for the landowners to build, keep up, and maintain the partition fences in equal shares, unless otherwise agreed by them in writing and witnessed by two persons. By its terms, R.C. 971.04 permits a board of township trustees to determine whether to assign construction or maintenance responsibilities whenever it receives a complaint from a person who is aggrieved by the failure of another to build or repair a partition fence or a portion of a partition fence that the other person is required to build or maintain. This

situation may exist if the trustees have allocated duties pursuant to R.C. 971.04, but it may also exist if the trustees have not allocated duties and the parties' responsibilities remain as prescribed by R.C. 971.02. A board of township trustees may assign the duty of constructing or maintaining a partition fence pursuant to R.C. 971.04 whenever an aggrieved person makes a complaint pursuant to R.C. 971.04, whether or not a partition fence has already been built, provided that all appropriate procedural steps are followed and all necessary findings are made. *See* R.C. 971.04, .10, .12-13; 1983 Op. Att'y Gen. No. 83-072.

To preserve the constitutionality of the statutory scheme, it is essential for the board of township trustees to follow the procedures set forth in R.C. Chapter 971 and to provide proper notice and an opportunity for each landowner to present evidence that the cost of building or repairing the partition fence will exceed any increase in the value of the landowner's property. *See, e.g., Glass v. Dryden*, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969); Op. No. 83-072. As was stated in 1974 Op. Att'y Gen. No. 74-026 at 2-124: "[T]he power of the General Assembly to compel an adjoining owner to comply with [R.C.] 971.02 is conditioned upon the landowner's receiving benefits exceeding his expenses in the construction and maintenance of the partition fence."<sup>1</sup> The board of township trustees is responsible for making the initial determination as to whether a landowner will incur costs greater than the benefits received in satisfying the obligation to build or repair a partition fence pursuant to R.C. 971.04. Op. No. 74-026 (syllabus, paragraph 2). A landowner may appeal an assignment of partition fence responsibilities made by a board of township trustees pursuant to R.C. 971.04. *See* R.C. 2506.01; Op. No. 83-072; *see also State ex rel. Fontaine v. Board of Trustees*, 18 Ohio App. 3d 23, 479 N.E.2d 898 (Butler County 1984).

I conclude, therefore, that the board of township trustees may assign the duty of constructing or maintaining a partition fence pursuant to R.C. 971.04 whenever an aggrieved person makes a

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<sup>1</sup> The test for enforcing the construction or repair of a partition fence has been variously stated as finding that the costs do not exceed the benefits to the land or that the benefits do exceed the costs. *See, e.g.,* 1974 Op. Att'y Gen. No. 74-026. It appears, however, that if the costs and benefits are equal, enforcement is permissible. *See, e.g., Wolfe v. City of Avon*, 11 Ohio St. 3d 81, 84, 463 N.E.2d 1251, 1254 (1984); *Glass v. Dryden*, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969). Hence, the more accurate statement of the standard is that, for the obligation to build or repair a partition fence to be imposed upon a landowner, the costs must not exceed the benefits to the land. There is no unconstitutional taking if the costs and benefits are equal. *See, e.g., Glass v. Dryden*.

complaint pursuant to R.C. 971.04, whether or not a partition fence has already been built, provided that all appropriate procedural steps are followed and that the board finds with respect to each affected landowner that the costs of the partition fence construction or maintenance assigned to that landowner will not exceed the benefits to the landowner's property. If, following the allocation of partition fence responsibilities pursuant to R.C. 971.04, a landowner who has been given any partition fence responsibilities fails to perform them and an aggrieved person makes application to the township trustees, the township trustees may cause the construction or maintenance to be performed in accordance with R.C. 971.07.

Therefore, it is my opinion and you are advised:

1. The duty to maintain or repair a partition fence may be enforced by the board of township trustees in the same manner as the duty to construct a partition fence. The board of township trustees may proceed in accordance with R.C. 971.07 to have a partition fence built or repaired, if the person to whom that duty is assigned under R.C. 971.04 fails to carry it out and an aggrieved person makes an application for action by the trustees.
  
2. The board of township trustees may assign the duty of constructing or maintaining a partition fence pursuant to R.C. 971.04 whenever an aggrieved person makes a complaint pursuant to R.C. 971.04, whether or not a partition fence has already been built, provided that all appropriate procedural steps are followed and that the board finds with respect to each affected landowner that the costs of the partition fence construction or maintenance assigned to that landowner will not exceed the benefits to the landowner's property.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

December 20, 1995

The Honorable David P. Joyce  
Geauga County Prosecuting Attorney  
Courthouse Annex  
231 Main Street  
Chardon, Ohio 44024

SYLLABUS:

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1. The duty to maintain or repair a partition fence may be enforced by the board of township trustees in the same manner as the duty to construct a partition fence. The board of township trustees may proceed in accordance with R.C. 971.07 to have a partition fence built or repaired, if the person to whom that duty is assigned under R.C. 971.04 fails to carry it out and an aggrieved person makes an application for action by the trustees.
2. The board of township trustees may assign the duty of constructing or maintaining a partition fence pursuant to R.C. 971.04 whenever an aggrieved person makes a complaint pursuant to R.C. 971.04, whether or not a partition fence has already been built, provided that all appropriate procedural steps are followed and that the board finds with respect to each affected landowner that the costs of the partition fence construction or maintenance assigned to that landowner will not exceed the benefits to the landowner's property.