February 16, 2023

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, OH 45133

SYLLABUS: 2023-003

1. Neither landowners nor fence-builders can demand the removal of most trees situated within four feet of a partition fence pursuant to R.C. 971.33.

2. The term "trees for use" in R.C. 971.33 refers to trees that are planted for a particular purpose, and whether a particular tree is "for use" is a question of fact for the courts.

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OPINION NO. 2023-003

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, OH 45133

Dear Prosecutor Collins:

You have requested an opinion regarding R.C. 971.33 and its relevance to trees near partition fences. I have framed your questions as follows:

1. Does R.C. 971.33 allow landowners and fence-builders to demand the removal of trees located within four feet of a partition fence?

2. What does the term "trees for use," as used in R.C. 971.33, mean?

I

Your request concerns the treatment of trees in general, and trees planted "for use" in particular, under R.C. 971.33. So I will begin with the statutory text. R.C. 971.33 says:

> An owner of land, adjacent to a partition fence, shall keep all brush, briers,

> thistles, or other noxious weeds cut in the fence corners and a strip four feet wide on the owner's side along the line of a partition fence, but this section does not affect planting of vines or trees for use.

The statute deals with two acts: "cut[ting]" and "planting." The statute's coverage of the first act, cutting, extends only to the cutting of particular vegetation: "brush, briers, thistles, or other noxious weeds." The statute's coverage of the second act, planting, extends to distinct types of vegetation: "vines" and "trees for use." Accordingly, the law does not regulate the *cutting* of anything except "brush, briers, thistles, or other noxious weeds"—the cutting of other vegetation is not regulated by R.C. 971.33. Similarly, the statute does not regulate the *planting* of anything other than "vines [and] trees for use"—it does not, for example, speak to the planting of soy beans or flower gardens.

Statutes that place limits on or control private property—as R.C. 971.33 unquestionably does—are to be "strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed." *State ex rel. Moore Oil Co. v. Dauben,* 99 Ohio St. 406, 411, 124 N.E. 232 (1919); *see also Davis v. Miller*, 163 Ohio St. 91, 91, 126 N.E.2d 49 (1955) (Taft, J., concurring); *In re Appeal of Univ. Circle, Inc.,* 56 Ohio St.2d 180, 184, 383 N.E.2d 139 (1978). Accordingly, R.C. 971.33's mandate to "remov[e] or destr[oy] … noxious weeds, being in derogation of the common law, should be construed strictly and all ambiguous expressions or doubtful points

resolved in favor of the landowner." *Newark v. Garfield Dev. Corp.*, 25 Ohio Misc. 2d 4, 6, 495 N.E.2d 480 (M.C.1986).

II

Your first question asks whether, *generally speaking*, trees within four feet of a partition fence may be subject to the "cutting" mandate in R.C. 971.33.

The answer is *generally* "no," though the statute's application to a particular case will turn on particular facts concerning the size and characteristics of the plant in question. While I cannot resolve disputes of fact, I can provide legal guidance. 2005 Op. Att'y Gen. No. 2005-002, at 2-12. That is what this opinion endeavors to do.

A

R.C. 971.33's cutting mandate applies only to "brush, briers, thistles, or other noxious weeds." The Revised Code does not define these terms, so they are best understood according to their common meanings. R.C. 1.42; *City of Athens v. McClain,* 163 Ohio St.3d 61; 2020-Ohio-5146, 168 N.E.3d 411, ¶30. Your question boils down to whether, as a matter of ordinary meaning, any of these terms fairly describe "trees." In general, they do not.

Consider first the meaning of "thistles": "weedy plants … having prickly leaves and floral bracts." *The American Heritage Dictionary* 1810 (5th Ed.2011). That would be a most unnatural way to describe a *tree*,

which is a "perennial woody plant having a main trunk and usually a distinct crown." *Id*. at 1850; *accord Webster's New International Dictionary* 2700 (2d Ed.1948). Trees are not "briers," either. While that word sometimes bears a technical sense that encompasses certain small trees, its ordinary sense connotes only smaller "prickly plants." *American Heritage* at 231; *accord Webster's Second* at 335.

Could a tree be described as "brush"? Certain very small trees could be. As a predecessor of mine observed, "brush" means a "thicket of shrubs or small trees."1930 Op. Att'y Gen. No. 1549, vol. I, p. 304, at 305 (quoting Webster's Second). But the tree would need to be small indeed—a tree measuring 3 to 4 inches in diameter that was "voluntary growth" would not qualify. *Id*. at p. 304. I take you to be asking about larger trees—the sorts of plants that every ordinary English speaker would easily distinguish from a shrub. Such trees do not qualify as "brush."

That leaves only the question whether trees are "noxious weeds." They are not. "Noxious" means "[h]armful to living things; injurious to health." *American Heritage* at 1207. A "weed" is "[a] plant considered undesirable, unattractive, or troublesome, especially one that grows where it is not wanted and often grows or spreads fast or takes the place of desired plants." *Id*. at 1963. In common parlance, "[w]hat are commonly called weeds are *small* annual plants that grow without cultivation and have no agricultural or ornamental value." Grammar, *Patterson's Allergic Diseases,* Ch.6, p. 103, (8th Ed., WL 2023) (Emphasis added). The word "small" is key—no ordinary English speaker

would describe an oak or a maple tree, even if unwanted, as a "weed." Thus, the trees I take you to be asking about are not "noxious weeds" for purposes of R.C. 971.33.

And this is why: the phrase "other noxious weeds" in R.C. 971.33 does not stand alone—it appears at the end of a list that includes "brush," "briers," and "thistles." That matters because, under the *ejusdem generis* canon, "general words follow an enumeration of two or more things" are naturally understood to apply "only to … things of the same general kind of class specifically mentioned." Scalia & Garner, *Reading Law,* §32, 199 (2012); *Black's Law Dictionary* 594 (9th Ed.2009); *accord State v. Aspell,* 10 Ohio St.2d 1, 4, 225 N.E.2d 226 (1967); *see also* 2015 Op. Att'y Gen. No. 2015-008, Slip Op. at 6-7; 2-96. This canon thus suggests that "other noxious weeds" refers exclusively to weeds that are similar in nature to brush, briers, and thistles. *See, e.g.,* 1935 Op. Att'y Gen. No. 4023, vol. I, p. 253 (using *ejusdem generis* to determine that a specific type of weed displays characteristics that make it a noxious weed); *see also Wooten v. CSX RR.,* 164 Ohio App.3d 428, 2005-Ohio-6252, 842 N.E.2d 603, ¶48 (2d Dist.) (corn is not a noxious weed); 1917 Op. Att'y Gen. No. 535, vol. II, p. 1530, at 1536 (a hedge fence is not included in the definition of noxious weeds). Trees of the sort I take you to be asking about are not remotely similar to these small plants.

B

Several interpretive principles bolster my conclusion that R.C. 971.33's cutting mandate does not generally apply to trees.

First, the presumption of consistent usage. Under this presumption, "a material variation in terms suggests a variation in meaning." *Reading Law*, §25, 170; *see also* 2003 Op. Att'y Gen. No. 2003-018, at 2-141, *citing Metropolitan Securities Co. v. Warren State Bank,* 117 Ohio St. 69, 76, 158 N.E. 81 (1927). Thus, when the legislature "includes particular language in one section of a statute but omits it in another," courts will presume that the legislature "intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014) (quotation marks omitted); *State ex rel. Rocco v. Cuyahoga Cty. Bd. of Elections*, 151 Ohio St. 3d 306, 318 (2017) (DeWine, J., dissenting); 2022 Ohio Op. Att'y Gen. No. 2022-004, Slip Op. at 7; 2-22 ("different language connotes different meaning"). Here, the very same statute uses different language when listing the plants that must be cut ("brush, briers, thistles, or other noxious weeds") and those that may be planted ("vines or trees for use"). The different words—which appear not in different "section[s] of a statute," but rather in the same section—suggest a difference in meaning. That is, the General Assembly's decision to include "trees" in the planting provision while omitting "trees" from the cutting mandate suggests that the cutting mandate does not apply to trees.

Second, the strict construction principle laid out above resolves any doubt on this score. Any ambiguity regarding the cutting mandate's scope must be resolved in favor of a narrow reading. *See above Dauben,* 99 Ohio St. at 411, 124 N.E. 232; *Newark,* 25 Ohio Misc. 2d at 6, 495 N.E.2d 480. Because the statute *can be* read not to require the cutting of most trees, it must be read not to require the cutting of those trees.

*

Ultimately, I conclude that medium-to-large trees of the sort I take you to be inquiring about are not subject to R.C. 971.33's cutting mandate. Put differently, these trees are not "brush, briers, thistle, or other noxious weeds" that property owners must cut or remove if they appear within four feet of a partition fence. *Dauben,* 99 Ohio St. at 411, 124 N.E. 232; *Newark,* 25 Ohio Misc. 2d at 6, 495 N.E.2d 480.

III

Your second question asks what the term "tree for use" means.

As stated above, the first part of R.C. 971.33 relates to clearing the four-foot area along partition fence lines and does not require the *cutting or removal* of (most) trees. The second part expressly allows the "*planting* of vines or trees for use" within four feet of a partition fence. (Emphasis added.) R.C. 971.33. This distinction is important: the law expressly permits the planting of "trees for use" in the area where "brush, briers,

thistles, or other noxious weeds" are prohibited and must be cut.

Since "for use" is not defined in the Revised Code, I must give the phrase its common meaning. 2017 Op. Att'y Gen. No. 2017-001, Slip Op. at 4; 2-5 to 2-6; *see* R.C. 1.42. I find that "use" means "[t]o put into service or employ for a purpose." *The American Heritage Dictionary* 1907 (5th Ed.2011). As a result, a tree that is planted for a purpose would be considered a tree for use.

Determining which uses of a tree satisfies the "for use" requirement—thereby allowing it to be planted within four feet of the partition fence—calls for a factual determination that is beyond the scope of the opinion-rendering function. 2005 Op. Att'y Gen. No. 2005-002, at 2-12; *see generally* Smith, *The Law of Yards,* 33 Ecology L.Q. 203 (2006). When "it comes to the usefulness or ornamental value of different forms of vegetation, people of common intelligence can hold widely differing views." *Commonwealth v. Siemel*, 686 A.2d 899, 902 (Pa.Commw.1996) (Friedman, J., dissenting). Such disputes can be hard enough to work out in concrete cases. I will not attempt to resolve them in the abstract.

IV

This opinion is limited to the removal of specific vegetation and the planting of trees for use within four feet of the partition fence under R.C. 971.33, and it neither addresses other sections of the Revised Code that regulate vegetation nor states a position on actions that may sound in common law as tort claims of nuisance, trespass, or anything else. *See, e.g.,* R.C. 901.50; 2 Ohio Jurisprudence 3d, Adjoining Landowners, Section 10 (1977); *Rautsaw v. Clark*, 22 Ohio App.3d 20, 488 N.E.2d 243 (12th Dist.1985); *Rababy v. Metter*, 2015-Ohio-1449, 30 N.E.3d 1018 (8th Dist.); *Brewer v. Dick Lavy Farms, LLC*, 2016-Ohio-4577, 67 N.E.3d 196 (2d Dist.); *Telle v. Pasley*, 5th Dist. Delaware No. 12 CAE 08 0048, 2013-Ohio-2407; *see also* R.C. 901.51.

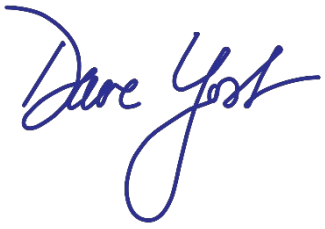
Conclusions

Accordingly, it is my opinion, and you are hereby advised that:

1. Neither landowners nor fence-builders can demand the removal of most trees situated within four feet of a partition fence pursuant to R.C. 971.33.

2. The term "trees for use" in R.C. 971.33 refers to trees that are planted for a particular purpose, and whether a particular tree is "for use" is a question of fact for the courts.

Respectfully,



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