June 12, 2002

Neal Fitzgerald
Jackson Township Law Director
5735 Wales Avenue N.W.
Massillon, Ohio 44646

SYLLABUS: 2002-018

1. Pursuant to R.C. 971.11, when a landowner owns the entire partition fence between the landowner's property and that of an adjoining landowner, the board of township trustees may assign a portion of the fence to the adjoining landowner in accordance with R.C. 971.04 and order the adjoining landowner to pay the value of the portion so assigned. In such circumstances, the cost to the adjoining landowner is based upon the value to the adjoining landowner and not upon the actual cost of the fence. The adjoining landowner is relieved from the obligation of making this payment if the adjoining landowner demonstrates to the board of township trustees that the cost sought to be imposed upon him exceeds the difference between the value of his land before and after the construction of the fence.

2. If a landowner destroys an existing partition fence and constructs a new partition fence without following the procedures of R.C. 971.02 and 971.04, the board of township trustees may assign portions of the fence in accordance with R.C. 971.04 and adjudge the value of the portion assigned to the adjoining landowner in accordance with R.C. 971.11. The value of the previously existing fence may be considered in determining the amount by which the value of the land after the construction of the new fence exceeds the value of the land before the construction of the new fence.

3. Pursuant to R.C. 971.01(A), the partition fence provisions of R.C. Chapter 971 apply to owners of land in fee simple and owners of estates for life, regardless of whether the land on either side of the partition fence is used for agricultural purposes, and also apply to owners of rights-of-way while used by the owners as farm outlets.

4. To determine whether the costs of partition fence construction or maintenance assigned to an objecting landowner exceed the benefits to that landowner's property, the board of township trustees considers evidence presented by both adjoining landowners. There is a presumption that a partition fence benefits property that is immediately adjacent to the partition fence, and an objecting landowner must rebut this presumption in order to prevail. If neither landowner presents evidence on the issue, the partition fence assignment is allowed on the basis of the presumption of benefit.

June 12, 2002

OPINION NO. 2002-018

Neal Fitzgerald
Jackson Township Law Director
5735 Wales Avenue N.W.
Massillon, Ohio 44646

Dear Law Director Fitzgerald:

We have received your request for an opinion regarding the powers and duties of the Board of Trustees of Jackson Township, Stark County, Ohio[1] with respect to partition fences under R.C. Chapter 971. You have asked numerous questions, which are substantially as follows:

1. If a person constructed a line fence twenty years ago, does that mean he or a subsequent purchaser can now ask for the assignment of the fence construction costs and attempt to make a subsequent neighboring landowner pay for half of it? What effect should R.C. 971.11 be given in analyzing this question?

2. Before a new fence is constructed, should the board of township trustees be provided with the opportunity to determine if the existing fence is adequate or needs repair in certain places? If the fence is adequate, why should a neighboring landowner be subject to paying for one-half of the cost of a new fence that wasn't a necessity? If it is determined that the board of trustees should initiate assignment proceedings after a new fence has been constructed, can the board, and if so how does it, factor into its decision the existence of the prior fence? For the previously fenced area

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[1] In 1992, Jackson Township adopted the limited self-government form of township government, now known as limited home rule government, as authorized by R.C. Chapter 504. *See* Am Sub. H.B. 187, 123rd Gen A. (1999) (eff. Sept. 20, 1999). The Jackson Township Law Director has requested this opinion pursuant to R.C. 109.14.

and the area that did not have a prior fence, how does the board determine what is a reasonable cost of the fence constructed?

3. When does the Chapter 971 partition fence law apply? Is the language of R.C. 971.01(A), "while used by the owners thereof as farm outlets," a restriction on rights of way or fee simple estates too? Does one or both adjoining property owners have to engage in farming or raise livestock on their property? What qualifies as farming or livestock? If the word "owner" as defined in R.C. 971.01 is not limited to farming or livestock uses and there is no requirement that an agricultural use be made, then can any landowner request that a fence be constructed and the neighboring property owners be required to pay for one-half of the fence irrespective of what use is made of any of the properties?

4. How does a board of township trustees determine if "the costs of the partition fence construction or maintenance assigned to the burdened landowner will not exceed the benefits to the landowner's property"? What evidence does the board consider in making that decision? Does the petitioning landowner have the obligation to produce evidence on this issue? Or does the burdened landowner have the obligation of disproving the issue? What if neither side presents evidence on this issue?

5. If it is determined that the board of trustees is unable to assign partition fence construction responsibilities upon the receipt of a line fence petition after a new fence has already been built, does the maintenance responsibility analysis contained in 1995 Op. Att'y Gen. No. 95-041 still apply? Would R.C. 971.33 (cutting noxious weeds) apply?

You have described a situation in which the petitioning landowner removed an existing fence on the southern portion of his property and constructed a replacement fence, and also added a new fence to the eastern portion of his property. The landowner filed a partition fence petition on February 28, 2001, but proceeded to construct the fence in early April, 2001, before the board of township trustees had acted on the petition. The petitioner stated that he needed to construct the fence to house spring farm animals that were expected to, and did, arrive shortly after the new fence was constructed. The petitioner asserted that it was his opinion and that of the fence contractor that the previously existing southern fence had been inadequate.

In order to address your questions, it is helpful to begin with a review of the purpose of the partition fence provisions of R.C. Chapter 971. Provisions dealing with partition fences have long been part of Ohio law. *See, e.g., Alma Coal Co. v. Cozad*, 79 Ohio St. 348, 353, 87 N.E. 172, 172 (1909); *Nichols v. Turner*, 20 Ohio Cir. Dec. 317 (Cir. Ct. Portage County 1907), *rev'd*, 82 Ohio St. 410, 92 N.E. 1120 (1910); 1995 Op. Att'y Gen. No. 95-041, at 2-228. They provide for fences along the boundaries between properties of two landowners and were designed "to provide an inexpensive method of allotting to affected land-owners their respective shares of

fences, which are of benefit to more than one owner." 1922 Op. Att'y Gen. No. 3696, vol. II, p. 893, at 894.

R.C. Chapter 971 provides for the allocation between landowners of expenses and responsibilities relating to fences on the boundary lines between the landowners' property. R.C. 971.02 provides generally that the owners of adjoining lands[2] are equally responsible for building, keeping up, and maintaining partition fences between them, unless otherwise agreed in writing and witnessed by two persons. R.C. 971.02. If one person neglects to build or repair the portion of a partition fence that is that person's responsibility, the other landowner may complain to the board of township trustees, which is empowered, after appropriate notice, to view the fence or premises and assign to each person, in writing, "his equal share thereof, to be constructed or kept in repair by him." R.C. 971.04. The assignment of partition fences is certified by the township clerk to the county recorder, who maintains a Partition Fence Record. R.C. 971.10; R.C. 971.12; *Dunfee v. Decatur Township Bd. of Trustees*, No. 88 CA 11, 1989 Ohio App. LEXIS 2255 (Washington County June 7, 1989); 1983 Op. Att'y Gen. No. 83-072.

If either person thinks that the other has failed to properly build or maintain the portion of fence assigned by the township trustees, that aggrieved person may apply to the board of township trustees. R.C. 971.07. Through appropriate notice and bidding procedures, the board of township trustees may engage a contractor to build or repair the fence. If no bids are received, the trustees are empowered to procure labor and materials and cause the fence to be constructed. *Id*. The costs of such work are certified to the township clerk and, if not paid within thirty days, are certified to the county auditor to be placed upon the tax duplicate as a lien upon the property of the landowner with responsibility for that portion of the fence. R.C. 971.08-.09. Final decisions made by a board of trustees under R.C. Chapter 971 may be appealed to the court of common pleas in accordance with R.C. Chapter 2506. *See* R.C. 2506.01; *Shewmaker v. Clay Township Trustees*, No. 98CA29, 1999 Ohio App. LEXIS 3255 (Highland County June 30, 1999); *State ex rel. Fontaine v. Bd. of Trustees*, 18 Ohio App. 3d 23, 479 N.E.2d 898 (Butler County 1984); 1995 Op. Att'y Gen. No. 95-041; 1983 Op. Att'y Gen. No. 83-072.

The partition fence statutes have been challenged on the grounds that they permit the taking of the private property of one person for the sole benefit of another. *See Alma Coal Co. v. Cozad*; *Beach v. Roth*, 18 C.C. (n.s.) 579 (Cir. Ct. Medina County 1907), *aff'd*, 80 Ohio St. 746, 89 N.E. 1124 (1909), *disapproved by Glass v. Dryden*, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969). Their constitutionality, however, has been upheld under a construction providing that a landowner may be relieved of a partition fence obligation if the landowner can establish that the cost of compliance will exceed the benefit to the landowner's property. The standard for

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[2] R.C. Chapter 971 "does not apply to the enclosure of lots in municipal corporations, or of adjoining lands both of which are laid out into lots outside municipal corporations." R.C. 971.02. Further, it does not affect R.C. Chapter 4959, relating to fences required to be constructed by persons or corporations owning, controlling, or managing a railroad. *Id*.

challenging a partition fence obligation was set forth by the Ohio Supreme Court in 1969 and has been followed consistently since that time:

> A landowner will not be relieved from the obligation imposed by Section 971.04, Revised Code, to share in the construction of a partition line fence on the ground that such fence will not benefit his land, without adducing proof, if the allegation of absence of benefit is challenged, that the cost of compliance with the order of the Board of Township Trustees under the statute will exceed the difference between the value of his land before and after the installation of the fence. *(Schiff* v. *Columbus*, 9 Ohio St. 2d 31, followed. *Alma Coal Co.* v. *Cozad*, 79 Ohio St. 348, explained and distinguished. *Roth* v. *Beach*, 80 Ohio St. 746 [affirming *Beach* v. *Roth*, 18 C. C. (N.S.) 579] disapproved.)

Glass v. Dryden, 18 Ohio St. 2d 149, 149, 248 N.E.2d 54, 54 (1969) (syllabus, paragraph 1); *see also, e.g., Duncan v. Vernon Township Trustees*, No. CA2000-05-015, 2001 Ohio App. LEXIS 90 (Clinton County Jan. 16, 2001); *Howell v. Leas*, No. 514, 2000 Ohio App. LEXIS 1442 (Harrison County Mar. 29, 2000); 1995 Op. Att'y Gen. No. 95-041; 1976 Op. Att'y Gen. No. 76-063; 1974 Op. Att'y Gen. No. 74-026. *See generally* 1959 Op. Att'y Gen. No. 280, p. 134; 1955 Op. Att'y Gen. No. 5018, p. 101; 1927 Op. Att'y Gen. No. 1283, vol. III, p. 2315; 1919 Op. Att'y Gen. No. 208, vol. I, p. 355.

Having outlined the general principles of partition fence law, we turn now to your specific questions. Your first set of questions concerns a situation in which a person did not follow the procedure for having the construction of a partition fence allocated between adjoining landowners but, instead, proceeded independently to construct a fence on the line dividing two properties. That person undertook all expenses involved in constructing the fence. You have asked whether that person, or a subsequent purchaser, can ask for the assignment of fence construction costs and attempt to make a subsequent neighboring landowner pay for half of the cost of the fence.

As noted above, the general provision for having the construction or repair of a partition fence assigned between landowners appears in R.C. 971.04. The following conclusion was set forth in 1995 Op. Att'y Gen. No. 95-041:

> 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.

1995 Op. Att'y Gen. No. 95-041 (syllabus, paragraph 2)

As your request suggests, the situation in which a partition fence is owned entirely by one landowner is addressed in R.C. 971.11, which states: "If an adjoining landowner owns all the line fence, the board of township trustees may adjudge the value of the portion assigned the other owner, which may be recovered by the owner of such fence with cost of suit." This statute authorizes the board of township trustees, when assigning portions of a partition fence to adjoining landowners pursuant to R.C. 971.04, to make adjustments if the fence is owned entirely by one of the landowners. The township trustees may adjudge the value of the portion of the fence assigned to the other landowner and allow the owner of the fence recovery of that value.

To preserve the constitutionality of the statutes, however, the standard set forth in *Glass v. Dryden* must apply. The burdened landowner is relieved from the obligation of making the payment ordered by the board of township trustees if the burdened landowner demonstrates that the expense sought to be imposed on him exceeds the difference between the value of his land before and after the installation of the fence. Further, it has been held that use of the word "may" in R.C. 971.11 indicates that the trustees have discretion to determine whether to allow recovery of a portion of the value of a fence in circumstances covered by that section. *See Portofe v. Badalich*, No. 408, 1978 Ohio App. LEXIS 9340, at *4 (Carroll County Oct. 17, 1978) ("R.C. 971.11 uses the word 'may' instead of 'shall'; therefore it is discretionary for the board of township trustees to act under the facts of this case").

The partition fence statutes contemplate that R.C. 971.11 may apply when the sale or division of land results in a situation in which the portion of partition fence existing between adjoining owners is a portion owned entirely by one of the owners. *See* R.C. 971.10. These statutes do not expressly address the question of a fence that was constructed a number of years earlier, but do not preclude recovery in such circumstances. It should be noted, however, that the recovery that the board of trustees may authorize is not the cost of the fence but "the value of the portion assigned the other owner." R.C. 971.11. Thus, the amount to be determined is not the amount that one landowner spent for the fence but the amount by which the adjoining landowner benefits from the fence. *Id*. *See generally Mistak v. Trimbur*, 53 Ohio Op. 443, 121 N.E.2d 108 (C.P. Trumbull County 1953); *Robb v. Brachmann*, 24 Ohio St. 3, 11 (1873) (in appraising a partition fence, the question the township trustees determine "is not what the materials are worth for any other purpose, and not, necessarily, what the materials and labor cost, but what, in the condition in which they find it, is its value *as a fence*. This may or may not equal the cost, depending, among other things, upon what economy was used in its construction, the suitableness of the materials, the character of the work, and whether, by reason of decay or other cause, it has deteriorated in value").

Accordingly, it is concluded that, pursuant to R.C. 971.11, when a landowner owns the entire partition fence between the landowner's property and that of an adjoining landowner, the board of township trustees may assign a portion of the fence to the adjoining landowner in accordance with R.C. 971.04 and order the adjoining landowner to pay the value of the portion so assigned. In such circumstances, the cost to the adjoining landowner is based upon the value to the adjoining landowner and not upon the actual cost of the fence. The adjoining landowner is

relieved from the obligation of making this payment if the adjoining landowner demonstrates to the board of township trustees that the cost sought to be imposed upon him exceeds the difference between the value of his land before and after the construction of the fence.

Your second set of questions concerns a situation in which a landowner filed a petition to have portions of an existing fence assigned for construction or repair under R.C. 971.04. However, before the board of township trustees had completed its proceedings, the landowner replaced the existing fence with a new fence. As your letter suggests, for the initial petition to be granted, the petitioner should have provided an opportunity for the board of trustees to view the original fence and assign portions to be replaced or repaired.[3] The action of the petitioner made that impossible, because the petitioner destroyed the original fence before the township trustees had the opportunity to view it and complete the assignment procedure. As a result, the matter must, instead, be treated as one that is governed by R.C. 971.11, that is, as a situation in which the landowner who built the new partition fence now owns the entire partition fence.

In such circumstances, the board of township trustees is authorized by R.C. 971.04 and R.C. 971.11 to assign the fence in equal shares to the owner of the fence and the adjoining landowner. The board of township trustees is further authorized to determine the value of the portion assigned to the adjoining landowner and to order the adjoining landowner to pay that amount to the owner of the fence. However, as discussed above, the adjoining landowner may not be required to make any payment unless the standard set forth in *Glass v. Dryden* is satisfied and the cost of compliance does not exceed the difference between the value of his land before and after the installation of the fence.

Your questions indicate concern about the fairness of a process under which one person takes action unilaterally and then seeks reimbursement of half the cost from a neighbor, and we share that concern. We note, however, that the amount of reimbursement ordered by the township trustees must be based on the *benefit to the neighbor*. If the previously existing fence was adequate or in need only of inexpensive repairs, it is possible that, although the cost to the builder may have been substantial, the benefit to the neighbor may be minimal. Further, as noted above, R.C. 971.11 grants the trustees discretion to determine whether to act in a particular situation, and provision is made for judicial review of a final decision of the board of township trustees. *See* R.C. Chapter 2506.

You have asked how the board of township trustees should factor in the existence of the previously existing fence. Because the standard for making the cost-benefit determination is the difference between the value of land before and after the installation of the fence, it would

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[3] Courts have construed the statutes as granting the landowner to whom a portion of a partition fence is assigned the option of determining whether to replace it or repair it. *See, e.g., Dye v. Columbia Township Bd. of Trustees*, No. 375, 1986 Ohio App. LEXIS 8133, at *6 (Meigs County July 22, 1986).

appear proper to consider the previously existing fence as part of the value of the land before the installation of the new fence.

Further, the authority of the board of township trustees to assign responsibilities relating to a partition fence allows the board discretion to allocate the burdens equitably. *See, e.g., Gunlock v. Green Township Trustees,* No. 97 CA 2270, 1998 Ohio App. LEXIS 349 (Ross County Jan. 26, 1998), *appeal dismissed*, 82 Ohio St. 3d 1410, 694 N.E.2d 74 (1998); 1921 Op. Att'y Gen. No. 1992, vol. I, p. 298. It appears, therefore, that the previously existing fence may be considered in any manner that promotes the fairness of the proceeding and is in compliance with law. *See generally Clark v. Chambers*, 81 Ohio Law Abs. 57, 61, 160 N.E.2d 870, 873-74 (Ct. App. Champaign County 1957) (recognizing "common sense approach" of township trustees as "reasonable solution" to partition fence dispute), *appeal dismissed*, 167 Ohio St. 514, 150 N.E.2d 42 (1958); *Bowers v. Viereck*, 66 Ohio Law Abs. 467, 476, 117 N.E.2d 717, 723 (C.P. Franklin County 1953) (in resolution of partition fence question, "reasonable minds should prevail"). In addition, there might be a remedy in tort for the wrongful removal of property that belonged to the adjacent landowner. *See Goodin v. Sforza*, No. CA-3444, 1989 Ohio App. LEXIS 4801 (Licking County Dec. 6, 1989).

Thus, it may be concluded that, if a landowner destroys an existing partition fence and constructs a new partition fence without following the procedures of R.C. 971.02 and 971.04, the board of township trustees may assign portions of the fence in accordance with R.C. 971.04 and adjudge the value of the portion assigned to the adjoining landowner in accordance with R.C. 971.11. The value of the previously existing fence may be considered in determining the amount by which the value of the land after the construction of the new fence exceeds the value of the land before the construction of the new fence. As noted above, the adjoining landowner is relieved from the obligation of making the payment ordered by the board of township trustees if the adjoining landowner demonstrates that the cost sought to be imposed upon him exceeds the difference between the value of the adjoining landowner's land before and after the construction of the new fence.

Your third set of questions asks when R.C. Chapter 971 applies. The underlying concern is whether both adjoining property owners must engage in farming or raise livestock on their property. To address these questions, it is helpful to consider certain aspects of the history of Ohio's partition fence law.

In Ohio's early days, a small portion of land within the state was under cultivation and livestock was generally allowed to run free, so the duty was placed on a landowner to provide a fence to fence out livestock and protect the landowner's crops. After cultivation of crops became more widespread, that rule was changed, and the law imposed a duty upon the owner of livestock to fence in the owner's livestock. Initially, partition fence responsibility was imposed only if the land was completely enclosed. *See Zarbaugh v. Ellinger,* 99 Ohio St. 133, 124 N.E. 68 (1918); *Wurzelbacher v. Colerain Township Bd. of Trustees,* 105 Ohio App. 3d 97, 101 n.2, 663 N.E.2d 713, 715 n.2 (Hamilton County 1995); *Eichel v. Dudley,* 18 Ohio Op. 2d 158, 179 N.E.2d 812

(Butler County Ct. 1961). Partition fences, built on the lines between adjoining properties, fulfilled the obligations of both landowners.

The partition fence law was designed to provide an inexpensive and direct means of allocating fencing responsibilities between adjacent landowners. The established standard for the type of fence required was that it needed to be a good and substantial fence capable of turning livestock ordinarily kept by farmers. 1931 Op. Att'y Gen. No. 3059, vol. I, p. 395, at 395 (syllabus, paragraph 1); *see also Robb v. Brachman,* 24 Ohio St. at 8 (a lawful fence is "such a fence 'as a good husbandman ought to keep'"); *Dye v. Columbia Township Bd. of Trustees*, No. 375, 1986 Ohio App. LEXIS 8133 (Meigs County July 22, 1986). As the law developed, the fencing requirement was imposed regardless of whether the land was completely enclosed and regardless of its actual use. *See Zarbaugh v. Ellinger; Nichols v. Turner*.

Whether the partition fence law applies to property that is not used for livestock or for other agricultural activity is addressed directly by R.C. 971.02, which states in part: "The fact that any land or tract of land is wholly unenclosed or is not used, adapted, or intended by its owner for use for agricultural purposes shall not excuse the owner thereof from the obligations imposed by this chapter on the owner as an adjoining owner." Landowners on both sides of a partition fence are adjoining landowners. *See, e.g.,* R.C. 971.02; R.C. 971.04; R.C. 971.11. Thus, action to have a partition fence assigned may be brought even if neither adjoining landowner uses or intends to use the land to hold livestock or undertake other agricultural activities.

This conclusion is bolstered by the definitions appearing in R.C. 971.01: "As used in this chapter, 'owner' means … (A) The owner of land in fee simple, of estates for life, or of rights-of-way while used by the owners thereof as farm outlets." The phrasing and punctuation of this language indicate that "while used by the owners thereof as farm outlets" refers only to rights-of-way, and the general usage of the words "farm outlets" supports this interpretation. *See* R.C. 1.42; *Zarbaugh v. Ellinger*, 99 Ohio St. at 138, 124 N.E. at 69 (holding that the owner of a private right of way that passed through farmlands owned by others and was used as a farm outlet to a public highway was required to build and keep up one-half of the fence on each side of the private right of way, even though the area would not be enclosed, because "the fencing of such a right of way would confer a benefit on the owner thereof, and be of assistance and convenience in driving stock in and out of his own farm, to and from the public road beyond. The annoyance and the inevitable trespassing on adjoining fields and crops which would result from the absence of a fence along a private road through cultivated lands on either side are apparent"); *Smith v. Pierce*, 17 Ohio N.P. (n.s.) 264, 269-70 (C.P. Clark County 1914) ("a fence between the right-of-way and such pasturage lands would bar stock from interfering with the use by the plaintiffs of said right-of-way which in the case of breechy and vicious stock might be called a valuable protection"); 1934 Op. Att'y Gen. No. 2783, vol. II, p. 824.

The language of R.C. Chapter 971 thus indicates that provisions of that chapter apply to all owners of land in fee simple and of estates for life, regardless of the use of their property, and also to owners of rights-of-way used by the owners as farm outlets. No provision of the chapter

suggests that an individual is precluded from proceeding under the chapter on the grounds that the individual's property, the adjoining property, or both properties, are not used to raise stock or perform other agricultural activities. *See, e.g., Duncan v. Vernon Township Trustees* (partition fence between property used to keep cattle and property being developed into a subdivision of single-family homes); *McDonald v. Guyan Township Trustees,* No. 94CA21, 1995 Ohio App. LEXIS 733 (Gallia County Feb. 21, 1995) (partition fence between property used to keep cattle and unimproved property not used for agriculture); *Board of Township Trustees v. Phelps*, No. 14-89-18, 1990 Ohio App. LEXIS 4785 (Union County Oct. 31, 1990) (partition fence between agricultural land and residential lot); *Franklin v. Rayburn*, No. 438, 1986 Ohio App. LEXIS 9873 (Adams County Dec. 10, 1986) (partition fence between golf course and property with dairy cattle); *Vance Brand Co. v. Dagger*, No. 82CA13, 1983 Ohio App. LEXIS 13344 (Champaign County 1983) (partition fence through uncultivated land).

You have asked specifically, if the word "owner" as defined in R.C. 971.01 is not limited to farming or livestock uses and there is no requirement that an agricultural use be made, whether any landowner can request that a fence be constructed and the neighboring property owners be required to pay for one-half of the fence irrespective of what use is made of any of the properties. It appears that such a request is allowed in areas that are subject to R.C. Chapter 971, *see* note 2, *supra*, and that responsibility for portions of a partition fence may be assigned to adjoining landowners regardless of the actual use of the land. Again, however, as noted above, a mandate that a landowner comply with such a project is subject to challenge under the cost-benefit analysis on the grounds that the cost would exceed the benefit to the landowner's property.

Therefore, pursuant to R.C. 971.01(A), the partition fence provisions of R.C. Chapter 971 apply to owners of land in fee simple and owners of estates for life, regardless of whether the land on either side of the partition fence is used for agricultural purposes, and also apply to owners of rights-of-way while used by the owners as farm outlets. Portions of a partition fence may be assigned to such owners, provided that the statutory procedures are followed and the appropriate cost-benefit analysis is made.

Your fourth set of questions concerns the procedure that a board of trustees follows in determining whether the costs of partition fence construction or maintenance assigned to a burdened landowner exceed the benefits to the burdened landowner's property. This matter was addressed in 1983 Op. Att'y Gen. No. 83-072, which discusses the procedures required by R.C. Chapter 971. *See* 1983 Op. Att'y Gen. No. 83-072, at 2-300. As explained in that opinion, because a final decision of the board of township trustees may be appealed to the court of common pleas pursuant to R.C. 2506.01, it is appropriate also to look to R.C. Chapter 2506 for guidance regarding the manner in which such a decision should be made. On this point, the 1983 opinion states:

> R.C. Chapter 2506 does not offer specific guidance as to how the "administrative" decisions appealable thereunder are to be conducted. Cf. R.C. Chapter 119 (Procedure to be followed by administrative agencies expressly

> subject to the Administrative Procedure Act). R.C. 2506.02 and 2506.03 indicate that a record of an R.C. 971.04 hearing should be maintained in some form. While a stenographic transcript of the proceedings would seem desirable, it does not appear to be essential. Dvorak v. Municipal Civil Service Commission, 46 Ohio St. 2d 99, 346 N.E.2d 157 (1976). Grant v. Washington Township, 1 Ohio App. 2d 84, 203 N.E.2d 1859 (1963). However, in accordance with R.C. 2506.03, all persons whose interests are to be adjudicated in an R.C. 971.04 hearing should be afforded the opportunity to present arguments, to offer and cross examine witnesses, to submit evidence for consideration by the board of township trustees, and to utilize the authority of the board to compel the attendance of witnesses. In addition, all witnesses who testify in an R.C. 971.04 hearing must do so under oath.

Id. at 2-301; *see also* R.C. 2506.02; R.C. 2506.03.

The requirements for proof are as set forth in *Glass v. Dryden*, quoted above. That case expanded upon *Alma Coal Co. v. Cozad*, which held that the partition fence statutes would authorize the unconstitutional taking of private property if they authorized the laying of an imposition upon private property for the sole benefit of one of the adjoining landowners. *See* 1995 Op. Att'y Gen. No. 95-041. In a later case, the Ohio Supreme Court examined the history of the partition fence statutes, which no longer required that the fence completely enclose a landowner's property, and found:

> a determination to impose a larger duty, namely, the view that there are conditions and circumstances in which a partition fence is of advantage and value to a landowner, even when it does not make a complete enclosure. When such a situation is presented the enforcement of the requirements of the statute is not a violation of rights guaranteed by the constitution.

Zarbaugh v. Ellinger, 99 Ohio St. at 137-38, 124 N.E. at 69.

Courts have recognized that partition fences may serve "the ulterior public advantage" by deterring trespassing and providing protection for crops and property. *Id.* at 139, 124 N.E. at 70; *see also Kloeppel v. Putnam,* 76 Ohio App. 130, 63 N.E.2d 237 (Van Wert County 1945); *Jennings v. Nelson*, 15 Ohio App. 395, 398-99 (Vinton County 1921). Therefore, there is a presumption that a partition fence benefits property that is immediately adjacent to it. *Glass v. Dryden*, 18 Ohio St. 2d at 152, 248 N.E.2d at 56; *Duncan v. Vernon Township Trustees*, 2001 Ohio App. LEXIS 90, at *8; *Bd. of Township Trustees v. Phelps*.

A landowner may rebut this presumption with proof that the cost of compliance will exceed the difference between the value of his land before and after the installation of the partition fence. *Glass v. Dryden*; *Duncan v. Vernon Township Trustees; Howell v. Leas*; *Wurzelbacher v. Colerain Township Bd. of Trustees.* If no evidence is presented, the presumption of benefit prevails, and the action regarding the partition fence is allowed. *Wolfe v.*

City of Avon, 11 Ohio St. 3d 81, 84, 463 N.E.2d 1251, 1254 (1984) ("[t]he landowner must offer sufficient proof of the value of his property before and after the alleged improvement"); *Parks v. Wayne Township Trustees*, No. CA99-01-005, 1999 Ohio App. LEXIS 3346 (Fayette County July 19, 1999). The board of township trustees is responsible for making the initial determination as to whether this standard of proof has been met. 1974 Op. Att'y Gen. No. 74-026.[4]

In summary, to determine whether the costs of partition fence construction or maintenance assigned to an objecting landowner exceed the benefits to that landowner's property, the board of township trustees considers evidence presented by both adjoining landowners. There is a presumption that a partition fence benefits property that is immediately adjacent to the partition fence, and an objecting landowner must rebut this presumption in order to prevail. If neither landowner presents evidence on the issue, the partition fence assignment is allowed on the basis of the presumption of benefit.

Your fifth set of questions is based upon a determination that the board of trustees is unable to assign partition fence construction responsibilities if it receives a line fence petition after a new fence has already been built. As noted above, we conclude that the board will be able to process such a petition and assign partition fence responsibilities pursuant to R.C. 971.04 and R.C. 971.11. Accordingly, it is unnecessary to address your fifth set of questions.

Therefore, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 971.11, when a landowner owns the entire partition fence between the landowner's property and that of an adjoining

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[4] Courts have stated that, "[t]o meet the cost/benefit burden of proof, the objecting landowner must present objective evidence that the cost of repairing or replacing fence exceeds the difference of the value of the land before and after the repair or replacement of the fence." *Gunlock v. Green Township Trustees*, No. 97 CA 2270, 1998 Ohio App. LEXIS 349, at *17 (Ross County Jan. 26, 1998), *appeal dismissed*, 82 Ohio St. 3d 1410, 694 N.E.2d 74 (1998); *see also Duncan v. Vernon Township Trustees*, No. CA2000-05-015, 2001 Ohio App. LEXIS 90 (Clinton County Jan. 16, 2001) (mere assertions of landowners that the construction of a fence would be of no economic benefit to them did not meet burden of proof); *McDonald v. Guyan Township Trustees*, No. 94CA21, 1995 Ohio App. LEXIS 733, at *8 (Gallia County Feb. 21, 1995) ("[t]he law requires objective tests of value or diminution of value in order to avoid the obvious uncertainty of the truth of subjective assessments of value by the potential recipient of those values"); *Bd. of Township Trustees v. Phelps*, No. 14-89-18, 1990 Ohio App. LEXIS 4785 (Union County Oct. 31, 1990). It has also been stated that "[o]pinion testimony of the owner of real estate as to its fair market value is competent regardless of the owner's knowledge of property values, and the weight to be given to the opinion is for the trier of fact." *Wurzelbacher v. Colerain Township Bd. of Trustees*, 105 Ohio App. 3d 97, 100, 663 N.E.2d 713, 715 (Hamilton County 1995) (agreeing that the issue of value requires an objective test).

landowner, the board of township trustees may assign a portion of the fence to the adjoining landowner in accordance with R.C. 971.04 and order the adjoining landowner to pay the value of the portion so assigned. In such circumstances, the cost to the adjoining landowner is based upon the value to the adjoining landowner and not upon the actual cost of the fence. The adjoining landowner is relieved from the obligation of making this payment if the adjoining landowner demonstrates to the board of township trustees that the cost sought to be imposed upon him exceeds the difference between the value of his land before and after the construction of the fence.

2. If a landowner destroys an existing partition fence and constructs a new partition fence without following the procedures of R.C. 971.02 and 971.04, the board of township trustees may assign portions of the fence in accordance with R.C. 971.04 and adjudge the value of the portion assigned to the adjoining landowner in accordance with R.C. 971.11. The value of the previously existing fence may be considered in determining the amount by which the value of the land after the construction of the new fence exceeds the value of the land before the construction of the new fence.

3. Pursuant to R.C. 971.01(A), the partition fence provisions of R.C. Chapter 971 apply to owners of land in fee simple and owners of estates for life, regardless of whether the land on either side of the partition fence is used for agricultural purposes, and also apply to owners of rights-of-way while used by the owners as farm outlets.

4. To determine whether the costs of partition fence construction or maintenance assigned to an objecting landowner exceed the benefits to that landowner's property, the board of township trustees considers evidence presented by both adjoining landowners. There is a presumption that a partition fence benefits property that is immediately adjacent to the partition fence, and an objecting landowner must rebut this presumption in order to prevail. If neither landowner presents evidence on the issue, the partition fence assignment is allowed on the basis of the presumption of benefit.

Respectfully,

BETTY D. MONTGOMERY
Attorney General