

OPINION NO. 83-072**Syllabus:**

1. In making an assignment of partition fences under R.C. 971.04, a board of township trustees must provide written notice to all adjoining landowners, at least ten days in advance, of the time and place of the meeting whereat a partition fence complaint will be adjudicated; must actually view the fence which is the subject matter of a complaint; must issue a final decision in which it assigns in writing, to each person, his equal share of the fence to be constructed or kept in repair by him; must serve a copy of its written decision upon each adjoining landowner in accordance with the service requirements of R.C. 971.13; and must give proper and adequate notice to the county recorder of its decision so that the county recorder may properly inscribe his "Partition Fence Record" in accordance with R.C. 971.10.
2. In hearing and deciding a partition fence complaint under R.C. 971.04, a board of township trustees must allow each

landowner who wishes to do so to present evidence that the cost of the erection of the fence will exceed any increase in the value of his land.

3. A decision of a board of township trustees making an assignment of partition fences in accordance with R.C. 971.04, is appealable to the court of common pleas under R.C. 2506.01.
4. An appeal, pursuant to R.C. 2506.01, from an order of a board of township trustees assigning partition fences subsequent to an R.C. 971.04 proceeding, must, in accordance with R.C. 2505.07, be perfected within ten days of service of the board's written order.
5. If a person fails to build a portion of a fence assigned to him under R.C. 971.04 and has not appealed the decision making the assignment, a board of township trustees may proceed to have such fence built in accordance with R.C. 971.07(A). A party who has failed to avail himself of the appeal provided under R.C. 2506.01 may not collaterally attack a decision of a board of township trustees made after an R.C. 971.04 proceeding through an action for an injunction or declaratory judgment.

To: Michael G. Spahr, Washington County Prosecuting Attorney, Marietta, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your request for my opinion regarding the procedure to be followed by a board of township trustees in assigning partition fences under R.C. 971.04. Your question requires consideration of the entirety of R.C. Chapter 971.

R.C. 971.02 places a general duty upon all land owners in the township to maintain partition fences. That section states, in pertinent part, as follows:

The owners of adjoining lands shall build, keep up, and maintain in good repair, in equal shares, all partition fences between them, unless otherwise agreed upon by them in writing and witnessed by two persons. 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 sections 971.01 to 971.37 of the Revised Code on him as an adjoining owner. Sections 971.01 to 971.37 of the Revised Code do 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. . . .

If a landowner should fail to fulfill his obligation under R.C. 971.02, an "aggrieved party" may seek recourse from the board of township trustees under the procedure set forth in R.C. 971.04. That section provides:

When a person neglects to build or repair a partition fence, or the portion thereof which he is required to build or maintain, the aggrieved person may complain to the board of township trustees of the township in which such land or fence is located. Such board, after not less than ten days' written notice to all adjoining landowners of the time and place of meeting, shall view the fence or premises where such fence is to be built, and assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him.

R.C. 971.05, 971.06, 971.07, and 971.08 make provision for the assessment of the costs of erecting a partition fence if the landowner shall fail to erect a fence in accordance with an order of a board of township trustees issued under R.C. 971.04.

The pertinent portion of R.C. 971.07¹ reads as follows:

(A) If either person fails to build the portion of fence assigned to him under section 971.04 of the Revised Code, the board of township trustees, upon the application of the aggrieved person, shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and material, and build such fence according to the specifications proposed by the board, after advertising them for ten days by posting notices thereof in three public places in the township.

Collection of the costs incurred by the board of township trustees in making a partition fence assignment under R.C. 971.04 and 971.07 is accomplished through a special assessment placed upon the tax duplicate by the county auditor. The procedure for collection by the county auditor is set forth in R.C. 971.08 and 971.09. R.C. 971.08 states:

When the work is completed to the satisfaction of the board of township trustees, it shall certify the costs to the township clerk, and, if not paid within thirty days, such clerk shall certify them to the county auditor with a statement of the cost of the construction and incidental costs incurred by the trustees, with a correct description of each piece of land upon which the costs are assessed.

R.C. 971.09 states:

The county auditor shall place the amounts certified, as provided in section 971.08 of the Revised Code, upon the tax duplicate, which amounts shall become a lien and be collected as other taxes, and the board of township trustees shall certify the amount due each person for building such fence and the amount due each trustee and clerk for services rendered. In anticipation of the collection thereof, the auditor shall draw orders for the payment of such amounts out of the county treasury.

Turning to the specific problem raised in your letter, you indicate that a recent dispute arose regarding the assignment of costs involved in erecting and maintaining a partition fence. The ultimate result was that one party filed a lawsuit against your county auditor seeking to enjoin the collection of the R.C. 971.09 assessment on the theory that the cost of the fence was in excess of the benefit derived from its installation. As you indicate in your letter, in the first paragraph of the syllabus of Glass v. Dryden, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969), the Ohio Supreme Court stated:

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.

Likewise, you state in your letter that my predecessor opined, in 1974 Op. Att'y Gen. No. 74-026, as follows:

1. A landowner must comply with R.C. 971.02 and share in the construction and maintenance cost of a partition fence unless the cost of construction exceeds the difference between the value of his land before and after the installation of the fence.

¹ While there is some authority to support the view that this statute is violative of the Ohio Constitution, Beach v. Roth, 80 Ohio St. 746, 18 C.C. (n.s.) 579 (1909), the most recent pronouncement of the court is that the statute is valid. Glass v. Dryden, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969).

2. The board of township trustees is responsible for making the initial determination of whether a landowner will receive benefits greater than the costs incurred in the construction of a partition fence. R.C. 971.04.

The problem which you raise, and which is not addressed by the Supreme Court or my predecessor, is what procedure is to be followed by the board of township trustees in conducting an R.C. 971.04 hearing. You have also asked whether or not a landowner may "appeal" a ruling of the board, and whether, in the absence of an appeal, the order of the board of township trustees becomes "final."

Your first question appears to be answered at least in part by the language of R.C. 971.04 itself. Under that statute, the board is required to provide written notice, at least ten days in advance, to all adjoining landowners of the time and place of the meeting wherein the partition fence complaint will be reviewed. The board must view the fence, and must ". . . assign, in writing, to each person, his equal share. . . [of the fence], to be constructed or kept in repair by him." R.C. 971.13 requires that the notice be served upon a landowner residing in the township by either personal or residence service. If the landowner is not a resident of the township, then service by certified mail is sufficient. In addition to serving notice upon each landowner, the clerk of the board of township trustees must notify the county recorder of the partition fence assignment made in accordance with R.C. 971.04. This duty is imposed upon the township clerk by virtue of R.C. 971.12, which provides:

The report of the assignment of partition fences, under section 971.01 to 971.37, inclusive, of the Revised Code, shall be made and certified to the county recorder by the township clerk and the cost of the record thereof shall be taxed against the parties with the other costs.

The duty of the county recorder to maintain a record of partition fence assignments is set forth in R.C. 971.10. It states:

The county recorder shall keep a book known as "Partition Fence Record," and all divisions of partition fences made under sections 971.01 to 971.37, inclusive, of the Revised Code, shall be recorded therein, and shall be final between the parties thereto and successive owners thereafter, until such divisions become unequal by a sale or division of land or a portion thereof, in which case a new division may be had.

Therefore, in partial answer to your first question, the language of R.C. Chapter 971 indicates that a board of township trustees, in making an assignment of partition fences, must follow certain procedural guidelines. The board must provide written notice of the meeting at least ten days in advance thereof. The board must view the fence. The board must issue a written decision regarding fence assignments, and must serve that notice upon the appropriate landowners. The board must report its fence assignment to the county recorder who must, in turn, maintain a "Partition Fence Record." Finally, the board must tax each landowner for the cost of making the fence assignment, and, if that tax goes unpaid for more than thirty days, the township clerk must certify the delinquency to the county auditor for collection. R.C. 971.05. However, as you indicate in your letter, R.C. Chapter 971 is silent as to how the actual R.C. 971.04 hearing is to be conducted; what record, if any, is to be kept of the proceedings; and whether or not a landowner may appeal the board's ruling.

The answers to these questions may be found in R.C. Chapter 2506. R.C. 2506.01 provides, in part, as follows:

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of

the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

It was held in Jacobs v. Maddux, 7 Ohio St. 2d 21, 218 N.E.2d 460 (1966), that a quasi-judicial decision of a board of township trustees was appealable to the court of common pleas under this section. A decision of a board of township trustees made in accordance with R.C. 971.04 certainly requires the exercise of discretion, and is therefore quasi-judicial. In my view it is thus appealable under R.C. 2506.01.

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.

In your second question you have asked whether an order of a board of township trustees regarding partition fence assignments may be appealed, and, if so, where and when the appeal is to be filed. R.C. 2506.01 provides for an appeal to the court of common pleas. The time for perfecting an appeal pursuant to that section is controlled by R.C. 2505.07. In re Locke, 33 Ohio App. 2d 177, 294 N.E.2d 230 (1972). R.C. 2505.07 states, in pertinent part, as follows:

After the journal entry of a final order, judgment, or decree has been approved by the court in writing and filed with the clerk for journalization, or after the entry of other matter for review, the period of time within which the appeal shall be perfected unless otherwise provided by law, is as follows:

(A) Appeals to the supreme court or to courts of appeals, or from municipal courts and from probate courts to courts of common pleas, shall be perfected within twenty days.

. . . .

(B) All other appeals shall be perfected with ten days.

Under this language, a party seeking to appeal from a partition fence assignment made by a board of township trustees under the authority of R.C. 971.04 must do so within ten days. However, neither R.C. 2505.07, 2506.01 nor 971.04 specifies which action of the board constitutes its "final entry or order" with respect to the assignment of partition fences. Fortunately, there are a number of cases which offer guidance. For example, it was held in State ex rel. Cunagin Construction Corp. v. Creech, 20 Ohio St. 2d 128, 254 N.E.2d 18 (1969), that a written denial of a building permit for construction of a mobile home park, sent to an applicant by a city planning commission, constituted a final order within the purview of R.C. 2506.01. A similar result is found in Tolson v. Oregon, 53 Ohio App.2d 183, 372 N.E.2d 1360 (Lucas County, 1976), which held that a municipal ordinance which approved a recommendation of the Assessment Equalization Board with respect to the final amount to be assessed against a landowner was a final order for purposes of R.C. 2506.01, despite the fact that the final cost of the improvement was subject to revision, and despite the fact that the city council had not yet adopted an ordinance to proceed with construction of the improvement. Cunagin and Tolston thus support the view that an order is "final" for purposes of R.C. 2506.01 when it amounts to the final decision of a governmental agency or officer and substantially affects the substantive rights of the persons to whom the order is directed.

Applying these cases, particularly Tolston, to an R.C. 971.04 proceeding, it seems that the "final" order of the board of township trustees with respect to the assignment of partition fences occurs when the board serves notice of its decision upon the various landowners in accordance with R.C. 971.04 to 971.13. Once that point has been reached, the rights of the parties have been established, and all further action by the board, (e.g., assessments of costs for the complaint hearing under R.C. 971.05, contracting to have a fence erected when a landowner refuses to comply under R.C. 971.07, and the certification of a delinquency to the county auditor under R.C. 971.08) are strictly ministerial, and do not require the exercise of quasi-judicial authority. Accordingly, if a landowner wishes to appeal a partition fence assignment made under R.C. 971.04, the appeal to the court of common pleas must be perfected within ten days of service of the board's written notice.

Finally, but perhaps most significantly, you have raised the issue of the finality of a determination of a board of township trustees with respect to the assignment of partition fences. You indicate that in Washington County there recently was a dispute wherein a landowner brought suit to enjoin collection of the partition fence assessment after the board of township trustees had entered into a contract to erect a fence, and after the township trustees had certified a delinquency to the county auditor who had placed it on the tax duplicate. In a recent decision, the Ohio Supreme Court held that where a party has failed to avail himself of an appeal under R.C. 2506.01, he may not seek relief collaterally through declaratory judgment. Schoemaker v. First National Bank, 66 Ohio St. 2d 304, 421 N.E.2d 530 (1981). The third paragraph of the syllabus in Schoemaker reads: "A person entitled under R.C. 2506 to appeal the order of a planning commission granting a variance pursuant to a village ordinance is not entitled to a declaratory judgment where failure to exhaust administrative remedies is asserted and maintained." Thus, if a property owner fails to avail himself of the appeal afforded under R.C. 2506.01, he may not subsequently seek to collaterally attack the board of township trustees' decision through an action for injunction or declaratory judgment. Therefore, the board of township trustees may assume that its decision regarding assignment of partition fences is final if no appeal is perfected within ten days of service of its written notice of decision.

Therefore, in answer to your specific question, it is my opinion, and you are so advised, that:

1. In making an assignment of partition fences under R.C. 971.04, a board of township trustees must provide written notice to all adjoining landowners, at least ten days in advance, of the time and place of the meeting where at a partition fence complaint will be adjudicated; must actually view the fence which is the subject matter of a complaint, must issue a final decision in which it assigns in writing, to each person, his equal share of the fence to be constructed or kept in repair by him; must serve a copy of its written decision upon each adjoining landowner in accordance with the service requirements of R.C. 971.13; and must give proper and adequate notice to the county recorder of its decision so that the county recorder may properly inscribe his "Partition Fence Record" in accordance with R.C. 971.10.
2. In hearing and deciding a partition fence complaint under R.C. 971.04, a board of township trustees must allow each landowner who wishes to do so to present evidence that the cost of the erection of the fence will exceed any increase in the value of his land.
3. A decision of a board of township trustees making an assignment of partition fences in accordance with R.C. 971.04, is appealable to the court of common pleas under R.C. 2506.01.
4. An appeal, pursuant to R.C. 2506.01, from an order of a board of township trustees assigning partition fences subsequent to an

R.C. 971.04 proceeding, must, in accordance with R.C. 2505.07, be perfected within ten days of service of the board's written order.

5. If a person fails to build a portion of a fence assigned to him under R.C. 971.04 and has not appealed the decision making the assignment, a board of township trustees may proceed to have such fence built in accordance with R.C. 971.07(A). A party who has failed to avail himself of the appeal provided under R.C. 2506.01 may not collaterally attack a decision of a board of township trustees made after an R.C. 971.04 proceeding through an action for an injunction or declaratory judgment.