

OPINION NO. 74-026

Syllabus:

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.

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.

To: Gary F. McKinley, Union County Pros. Atty., Marysville, Ohio
By: William J. Brown, Attorney General, March 28, 1974

I have your request for an opinion which may be stated as follows:

"Landowner A has petitioned the township trustees for a partition fence under R.C. 971.04. Landowner B would not benefit in any manner from a partition fence and would still have open land after the partition fence is built.

"Question One: Are the township trustees required by R.C. 971.02 and 971.04 to make a partition and assess an equal share of the cost to the non-benefiting landowner?

"Question Two: Who is responsible for determining whether or not an adjoining landowner will receive any benefit from a partition fence?"

Although your questions have been specifically answered by decisions of the Ohio Supreme Court and Opinions of my predecessors, nevertheless this office continues to receive similar questions. Therefore, I believe a discussion of the

precedent on those questions which you present would be appropriate pursuant to my duty to advise the county prosecuting attorneys. R.C. 109.14.

R.C. 971.02 provides 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, inclusive, of the Revised Code on him as an adjoining owner. Sections 971.01 to 971.37, inclusive, of the Revised Code do not apply to the enclosure of lots in municipal corporations, or of lands laid out into lots outside municipal corporations, or affect sections 4959.02 to 4959.06, inclusive, of the Revised Code, relating to fences required to be constructed by persons or corporations owning, controlling, or managing a railroad."

In determining the applicability of R.C. 971.02 to the situation you present, an interpretation is necessary of that portion of R.C. 971.02 which provides that "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, inclusive, of the Revised Code on him as an adjoining owner."

The Ohio Supreme Court, in Alma Coal Co. v. Cozad, 79 Ohio St. 348 (1909), held that as a prerequisite to the applications of G.C. 5908 (the predecessor of R.C. 971.02), some benefit must be realized by the landowner in order to preserve the constitutionality of the Section. The Court's syllabus states as follows:

"1. The provisions of the constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another.

"2. The Act of April 18, 1904 (97 O.L., 138), may not be construed and administered as to charge an owner of lands which are, and are to remain, unenclosed with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor."

Although there was an intimation by the Court in this case that the application of the partition fence statute to unenclosed lands would be unconstitutional, the Supreme Court of Ohio in Zarbaugh v. Ellinger, 99 Ohio St. 133 (1918), limited Alma Coal Co. v. Cozad, supra, to its facts. The Court quoted the syllabus of Alma Coal Co. v. Cozad, supra, emphasizing in the second branch the phrase "sole benefit of the adjoining proprietor." The Court then stated at 99 Ohio St. 137-138, as follows:

"It will be observed that the court did not in that case hold the amended Section 4239, Revised Statutes, to be unconstitutional. But the right to invoke its application to a situation such as found in that case was denied. In the facts as they there existed there was no possible basis for the assessment on account of benefit, for there was none.

* * * * *

"From the fact that for so long a time the statutes required an owner to contribute to the cost only where the 'fence answered the purpose of enclosing his land,' it would seem to be apparent that at that time the general assembly felt that the only benefit conferred on a farmer's land by a fence was by its making a complete enclosure. The amendment to the statute in 1904, now Section 5908 et seq., General Code, evidences a different view by the legislature and 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."

The imposition of the duty to build and maintain a partition fence is a valid exercise of the police power of the state. See Glass v. Dryden, 18 Ohio St. 2d 149 (1969) and Zarbaugh v. Ellinger, supra. However, the power of the General Assembly to compel an adjoining owner to comply with 971.02 is conditioned upon the landowner's receiving benefits exceeding his expenses in the construction and maintenance of the partition fence.

The first branch of the syllabus in Glass v. Dryden, supra, reads as follows:

"1. 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.)

See also, Opinion No. 5018, page 101, Opinions of the Attorney General for 1955; Opinion No. 208, page 355, Opinions of the Attorney General for 1919.

The responsibility for the initial determination of the question of whether an adjoining landowner will receive benefits greater than the cost incurred in the construction of a partition fence is placed upon the board of township trustees by R.C. 971.04, which provides as follows:

"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."

See also, the first branch of the syllabus of Glass v. Dryden, supra; Opinion No. 5018, supra; Opinion No. 1992, page 298, Opinions of the Attorney General for 1921; Opinions of the Attorney General for 1910, page 753.

In specific answer to your questions it is my opinion, and you are so advised, that:

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.
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.