

OPINION NO. 76-063

Syllabus:

1. R.C. 971.09 imposes a mandatory duty upon the county auditor to place amounts certified as expenses in the construction of partition fences pursuant to R.C. 971.08 upon the tax duplicate.

2. When certification pursuant to R.C. 971.08 has occurred, R.C. 971.09 imposes a mandatory duty upon the county auditor to draw orders for payment from the county treasury in anticipation of collection of both amounts certified under R.C. 971.08 and costs due township officers.

To: John F. Holcomb, Butler County Pros. Atty., Hamilton, Ohio
By: William J. Brown, Attorney General, September 8, 1976

I have before me your request for my opinion in respect to the duties of the county auditor under R.C. 971.09 concerning the costs involved in the erection of partition fences. Your question is whether the language of R.C. 971.09 imposes a mandatory duty upon the auditor to draw orders for payment of the amounts enumerated therein in anticipation of the collection of such amounts.

Under the provisions of R.C. 971.02, the owners of adjoining land have a duty, in equal share, to build, keep up, and maintain in good repair all partition fences between them. While the provisions of R.C. 971.01 to 971.37 do not apply to the enclosure of lots within municipal corporations or of lands laid out into lots outside municipal corporations, the fact that any land is wholly unenclosed or not used for agricultural purposes does not excuse the owner thereof of the duties imposed by these sections.

R.C. 971.04 specifies the duties of the township trustees when a person neglects to build or repair a partition fence. These duties include the responsibility to view the fence or premises involved and to make an assignment in writing to each person of his share of the fence to be constructed or repaired. R.C. 971.05 provides for the cost due the township clerk and trustees for making an assignment pursuant to R.C. 971.04. R.C. 971.06 specifies that the county auditor shall place these costs due township officers on the tax duplicate and shall pay the amounts authorized by R.C. 971.05 to the township clerk when collected.

R.C. 971.07 specifies the procedures to be followed when either party fails to build the portion of fence assigned to him under R.C. 971.04. In such a situation bids are to be let by the board of township trustees for the construction of such fence and, if no bids are received from responsible bidders, the trustees are authorized to pro-

cure labor and materials at prevailing rates and to cause such fence to be constructed.

R.C. 971.08 provides that when such construction is completed to the satisfaction of the board of township trustees, it shall certify the costs to the township clerk. If these costs are not paid by the landowners involved within thirty days of such certification, R.C. 971.08 requires certification of the amounts involved in construction to the county auditor.

R.C. 971.09 specifies the duties of the county auditor in the following terms:

"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."

(Emphasis added.)

One of my predecessors addressed the question you present in 1935 Op. Att'y Gen No. 4579 and concluded that under the provisions of G.C. 5915, the predecessor to R.C. 971.09, it was permissive and discretionary with the county auditor to draw orders for payment in anticipation of the collection of such amounts. This conclusion, however, was grounded upon the statutory provisions of G.C. 5915 then in force. The last sentence of G.C. 5915 in effect at the time of the 1935 Opinion specified, "The auditor may anticipate the collection thereof and draw orders for the payment of such amounts out of the county treasury."

This provision of G.C. 5915, however, was amended by H.B. 61 in 1947. The "may" in the last sentence was at that time changed to "shall" and this requirement has remained unchanged since that time.

In light of this legislative history, it is apparent that the General Assembly intended to impose a mandatory duty upon the county auditor under what is now R.C. 971.09 to draw orders from county treasury to pay amounts certified pursuant to R.C. 971.08 in anticipation of the collection thereof. Further, while R.C. 971.06 provides that the costs due township officers for an assignment are to be paid from the county treasury when collected, under the express terms of R.C. 971.09, where it has become necessary for the township to utilize the provisions of R.C. 971.07 to 971.09 and proceed with fence construction because a landowner has failed to comply with an assignment, the costs due township officers also become payable from the county treasury in anticipation of collection.

It should be noted that Rev. Statute 4243, which formed the basis of what is now R.C. 971.07 to 971.09, had been held unconstitutional in Roth v. Beech, 80 Ohio St. 746 (1909), affirming without comment Beech v. Roth, 18 C.C. (n.s.) 579 (1909). The holding of Roth v. Beech, *supra*, however, was expressly disapproved in Glass v. Dryden, 18 Ohio St. 2d 149 (1969), so that any doubt concerning the constitutionality of these statutory provisions has been resolved.

As you observe in your letter, the legislative reason for imposing a mandatory duty of payment in anticipation of collection may be to ensure that contractors are not burdened with a delay in payment occasioned by governmental processes which would discourage them from undertaking a needed project. In any event, however, it is clear that the 1947 amendment of what is now R.C. 971.09 require payment from the county treasury in anticipation of collection of both construction costs pursuant to R.C. 971.08 and of the amounts due township officers where it has become necessary for the township to proceed with fence construction.

It is, therefore, my opinion, and you are so advised that:

1. R.C. 971.09 imposes a mandatory duty upon the county auditor to place amounts certified as expenses in the construction of partition fences pursuant to R.C. 971.08 upon the tax duplicate.
2. When certification pursuant to R.C. 971.08 has occurred, R.C. 971.09 imposes a mandatory duty upon the county auditor to draw orders for payment from the county treasury in anticipation of collection of both amounts certified under R.C. 971.08 and costs due township officers.