

OPINION NO. 86-072**Syllabus:**

The State of Ohio is not subject to the provisions of R.C. Chapter 971, so that the State is not required to share in the expense of constructing and maintaining a partition fence.

To: Alan W. Foster, Adams County Prosecuting Attorney, West Union, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 30, 1986

I have before me your request for my opinion, in which you inquire whether the State of Ohio is subject to the provisions of R.C. Chapter 971 concerning partition fences.

R.C. 971.02 provides for the construction and maintenance of partition fences between adjoining landowners 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, or affect sections 4959.02 to 4959.06 of the Revised Code, relating to fences required to be constructed by persons or corporations owning, controlling, or managing a railroad. (Emphasis added.)

R.C. 971.02 thus imposes a duty upon adjoining landowners to share in the cost of constructing and maintaining a partition fence. This duty is enforced pursuant to R.C. 971.04, which provides that if "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." Thereafter, the board of township trustees shall view the fence or premises and "assign, in writing, to each person his equal share thereof, to be constructed or kept in repair by him." R.C. 971.04. See 1974 Op. Att'y Gen. No. 74-026 (a landowner must comply with R.C. 971.02 unless the cost of construction of a partition fence exceeds the difference between the value of his land before and after the installation of the fence; the responsibility for initially determining whether a landowner will receive benefits in excess of the cost incurred in the construction of the fence is placed upon the board of township trustees pursuant to R.C. 971.04). See also Glass v. Dryden, 18 Ohio St. 2d 149, 248 N.E.2d 54 (1969); 1983 Op. Att'y Gen. No. 83-072; 1955 Op. Att'y Gen. No. 5018, p. 101. The cost of the township clerk and the board of township trustees in reaching a determination under R.C. 971.04 is taxed equally against each of the landowners. If the cost is not paid within thirty days, it is certified to the county auditor, R.C. 971.05, who places the amount upon the duplicate "to be collected as other taxes," R.C. 971.06. If either person fails to build the portion of fence assigned to him, the board must proceed to have the fence constructed pursuant to R.C. 971.07. When the work is completed, the board of township trustees "shall certify the costs to the township clerk, and, if not paid within thirty days, such clerk shall certify them to the county auditor," R.C. 971.08, who shall place the amounts so certified "upon the tax duplicate, which amounts shall become a lien and be collected as other taxes." R.C. 971.09.

You ask whether the foregoing provisions apply to the State of Ohio, so that the State must share in the expense of constructing and maintaining a partition fence between its property and that of adjoining land owners.

Pursuant to R.C. 971.01, an "owner" is defined for purposes of R.C. Chapter 971 as "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."¹ In this instance, you note that

¹ You have indicated that in this instance, those landowners whose property adjoins that of the State are

the State of Ohio owns several hundred acres of land, presumably in fee simple, as a wildlife area. See R.C. 1531.06. Thus, the State appears to fall within the meaning of "owner." It is well established, however, that the State is not bound by the terms of a general statute, unless it is expressly so enacted. State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); State ex rel. Nixon v. Merrell, 126 Ohio St. 239, 185 N.E. 56 (1933); State ex rel. Parrott v. Board of Public Works, 36 Ohio St. 409 (1881). There is no language in R.C. Chapter 971 expressly making the State subject to the provisions of that chapter. Therefore, the State is not required to share in the expense of constructing and maintaining partition fences.

More specifically, I note that R.C. 971.06 and R.C. 971.09 provide for certain amounts to be "collected as other taxes" from an owner who disputes his obligation to contribute to the cost of a partition fence or fails to build a fence which he is required to construct. In Glass v. Dryden, the court stated:

It has been said, in at least one case, that an order to build a partition fence is "different" from a special assessment to pay for a public improvement made by a governmental body. Zarbaugh v. Ellis, 99 Ohio St. 133, 139. Yet for the purpose of this inquiry, we think it is analogous and that the differences are insubstantial. A special assessment against real property is "based on the proposition that, due to a public improvement of some nature, such real property has received a benefit." (Emphasis supplied.) State v. Carney, 166 Ohio St. 81, 83. True, a partition fence is not a public improvement in the sense that the public uses it directly. Yet, as Judge Johnson conceded in Zarbaugh, to the extent that "the annoyance and inevitable trespassing upon adjoining fields and crops which would result from the absence of a fence" is prevented, the fence inures to "the ulterior public advantage." (Emphasis in original.)

18 Ohio St. 2d at 151-52, 248 N.E.2d at 56. See also Op. No. 83-072 at 2-299 ("[c]ollection of the costs incurred by the board of township trustees in making a partition fence assignment under R.C. 971.04 and R.C. 971.07 is accomplished through a special assessment placed upon the tax duplicate by the county auditor"). See generally Home Owner's Loan Corp. v. Tyson, 133 Ohio St. 184, 188, 12 N.E.2d 478, 480 (1938) ("an assessment is levied upon property abutting or adjacent to a public improvement with reference to the special benefits conferred for the purpose of paying the cost thereof").

It is clear that special assessments may not be collected against the State in the absence of express statutory authority therefor. See 1985 Op. Att'y Gen. No. 85-082 (in the absence of express statutory authority, a municipality has no power to levy an assessment against state property for the planting and maintenance of shade trees); 1972 Op. Att'y Gen. No. 72-092

farmers. Thus, I am assuming that the property owned by the State along which the partition fences are to be constructed is a farm outlet for purposes of R.C. 971.01. See generally Zarbaugh v. Ellinger, 99 Ohio St. 133, 124 N.E. 68 (1918).

(absent a statute to the contrary, a state university is exempt from the payment of sanitary district special assessments); 1962 Op. Att'y Gen. No. 3388, p. 870 (a political subdivision of the state, in the absence of legislative permission, has no power to levy or collect a special assessment against property owned by the State). See also State ex rel. Monger v. Board of County Commissioners, 119 Ohio St. 93, 162 N.E. 393 (1928). Cf. State ex rel. Williams v. Glander (the State may not be taxed in the absence of express statutory authority therefor). As I noted in Op. No. 85-082 at 2-330, the lack of authority for political subdivisions to assess state property is based upon the fact that, "the state is the superior governmental body...and that a municipality, like other political subdivisions, may not burden the state through its power of assessment" (citations omitted).

It is, therefore, my opinion and you are advised, that the State of Ohio is not subject to the provisions of R.C. Chapter 971, so that the State is not required to share in the expense of constructing and maintaining a partition fence.