

January 8, 2016

The Honorable Kelly A. Riddle
Noble County Prosecuting Attorney
150 Courthouse
Caldwell, Ohio 43724

SYLLABUS:

2016-001

1. The phrase “all adjoining owners,” as used in R.C. 971.09(B), includes owners whose land touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or whose land touches the property upon which the partition fence or division line is located.
2. When a state road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or touches property upon which the partition fence or division line is located, the state of Ohio, in its capacity as the Department of Natural Resources, is an “adjoining owner” as that term is used in R.C. 971.09(B), if the Department of Natural Resources owns, leases, manages, or otherwise controls the land on which the state road is located and the land that abuts the road is used to graze livestock.
3. When a county or township road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b), or touches property upon which the partition fence or division line is located, a county or township with a real property interest in recreational trails is an “adjoining owner” for purposes of R.C. 971.09(B) if the county or township owns, leases, manages, or otherwise controls the land on which the county or township road is located and the land that abuts the road is used to graze livestock.
4. A board of township trustees has no authority to settle a dispute between adjoining owners regarding the proper location of an existing partition fence.

5. A board of township trustees may order the maintenance of a partition fence that has been considered a division line between two properties even though a survey establishes that the partition fence is not located on the division line.
6. When a court orders the relocation of a partition fence that has existed between the adjoining properties of two owners on or before September 30, 2008, relocation of the partition fence does not change the fact that a partition fence existed between the owners' adjoining properties on or before September 30, 2008, provided that the fence has been considered a division line between the adjoining properties of the two owners prior to its relocation.
7. A court decision that orders owners to relocate an existing partition fence does not affect a previous determination and assignment by a board of township trustees under R.C. 971.09 for the repair or maintenance of the fence. A determination and assignment by a board of township trustees under R.C. 971.09 is a final order that may only be challenged or revisited through arbitration pursuant to the procedures available in R.C. 971.09(G) or through administrative appeal pursuant to the procedures set forth in R.C. Chapter 2506.
8. A board of township trustees may not consult a contractor to obtain an estimate of the costs of constructing or maintaining a partition fence for the purpose of assigning a portion of those costs to each owner under R.C. 971.09(D)(2).
9. A board of township trustees may consider costs in assigning the construction or maintenance of specific portions of a partition fence to each owner under R.C. 971.09(D)(2) so long as the board also considers the factors listed in R.C. 971.09(E)(1)-(6).
10. R.C. Chapter 971 does not require owners to install a water gate as part of a partition fence.
11. A board of township trustees may not require the installation of a water gate as part of a partition fence.
12. When building or maintaining a partition fence pursuant to R.C. Chapter 971, an owner may not install a water gate as part of the partition fence.



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OPINION NO. 2016-001

The Honorable Kelly A. Riddle
Noble County Prosecuting Attorney
150 Courthouse
Caldwell, Ohio 43724

Dear Prosecutor Riddle:

We have received your request for an opinion regarding the application of Ohio's partition fence law, which comprises R.C. Chapter 971. In 2008, the General Assembly made numerous amendments to the partition fence law. *See* Sub. H.B. 323, 127th Gen. A. (2008) (eff. Sept. 30, 2008). Accordingly, you pose the following questions:

1. Which owners are considered “all adjoining owners” as that phrase is used in R.C. 971.09(B)?
2. If a state, county, or township road adjoins property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or adjoins property upon which the partition fence or division line is located, is the state of Ohio, the county, or the township an “adjoining owner” for purposes of receiving notice under R.C. 971.09(B)?
3. If a dispute exists between owners over the proper location of an existing partition fence, may a board of township trustees settle the dispute?
4. If a survey establishes that an existing partition fence is not located on the division line between the adjoining properties of two owners, may a board of township trustees require the adjoining owners to maintain the fence at its current location?
5. If, in settling a dispute over the proper location of a partition fence that existed between the adjoining properties of two owners on or before September 30, 2008, a court orders that the existing fence be relocated, is a partition fence considered to have existed between the adjoining properties of two owners prior to its relocation?

6. How does a court's order to relocate an existing partition fence affect a previous assignment by a board of township trustees pursuant to R.C. 971.09(D)-(F)?
7. May a board of township trustees consult with a contractor to obtain an estimate of the total cost of building or maintaining a partition fence and then assign a portion of that cost to each owner pursuant to R.C. 971.09(D)(2)?
8. May a board of township trustees consider the cost of constructing or maintaining specific portions of a partition fence when assigning the construction or maintenance of those portions of the fence to each owner under R.C. 971.09(D)(2)?
9. Does R.C. Chapter 971 require owners to install a water gate as part of a partition fence?
10. May a board of township trustees, in its discretion, require the installation of a water gate as part of a partition fence?
11. If a board of township trustees has authority to require the installation of a water gate as part of a partition fence, how shall the board allocate among the owners the cost of installing the water gate?
12. Notwithstanding the authority of a board of township trustees to require the installation of a water gate, is it permissible for an owner to install a water gate as part of a partition fence?
13. If an owner is not permitted to install a water gate, may the owner alter or destroy a watercourse to build a partition fence?

Before addressing your questions, it is helpful to review the provisions of R.C. Chapter 971 and explain how those statutes govern the maintenance and construction of partition fences in Ohio.

Ohio's Partition Fence Law—R.C. Chapter 971

A "partition fence" is "a fence that is located on the division line between the adjoining properties of two owners." R.C. 971.01(E). Statutes governing "partition fences have long been part of Ohio law." 2002 Op. Att'y Gen. No. 2002-018, at 2-108. These statutes require certain landowners to build and maintain partition fences on the boundaries between their adjoining properties and set forth how each landowner shares in the cost of building or maintaining the fence.

R.C. 971.02(A) provides that “all fields and enclosures in which livestock are kept or placed and that are bordered by a division line between the adjoining properties of different owners shall be enclosed by a preferred partition fence.”¹ R.C. 971.02(A) does not apply to partition fences that were constructed prior to September 30, 2008, the date on which the amendments in Sub. H.B. 323 became effective. R.C. 971.02(C)(2); *see also* Sub. H.B. 323. R.C. 971.02(A) also does not apply to owners who agree, in writing, to forgo the construction of a partition fence or to construct a fence with different specifications. R.C. 971.02(C)(1); R.C. 971.04 (“[n]othing in this chapter prevents the owners of adjoining properties from entering into a written agreement that states that no fence is needed ... [or] a fence other than a preferred partition fence may be built and maintained”).

The responsibility of each owner to share in building or maintaining a partition fence depends, in part, upon the time at which the fence was originally built. *But see* R.C. 971.071 (recognizing that an owner of land as defined in R.C. 971.01(D)(2), notwithstanding any other provision in R.C. Chapter 971, “is responsible for fifty per cent of the total cost of building and maintaining in good repair a partition fence between that owner and the owner of adjoining property unless a written agreement has been entered into under [R.C. 971.04]”). If an existing partition fence was constructed prior to September 30, 2008, the owners are required to “maintain the fence in good repair in equitable shares.” R.C. 971.06(A). If owners decide to replace an existing fence, the owners must do so in equitable shares. *Id.* Similarly, if no partition fence currently exists, but there is evidence a fence existed prior to September 30, 2008, the owners shall build and maintain a partition fence in equitable shares. R.C. 971.06(B). If a partition fence does not exist and there is no evidence that a partition fence existed prior to September 30, 2008, an owner who desires to build a partition fence shall bear the total cost of the fence’s construction and maintenance. R.C. 971.07(A); *see also* R.C. 971.05; R.C. 971.06(C)(3). Only if an adjoining owner subsequently uses the fence to keep livestock enclosed may the owner who built the fence seek reimbursement for a proportionate share of the total cost of the fence’s construction and maintenance. R.C. 971.07(B)-(D).

When an owner fails to maintain or build a partition fence or portion thereof for which he is responsible, the aggrieved owner may file an action in a court of common pleas or file a complaint with the board of township trustees in whose township the fence or division line is

¹ R.C. 971.01(F) defines “preferred partition fence”:

“Preferred partition fence” means a partition fence that is a woven wire fence, either standard or high tensile, with one or two strands of barbed wire located not less than forty-eight inches from the ground or a nonelectric high tensile fence of at least seven strands and that is constructed in accordance with the United States natural resources conservation service conservation practice standard for fences, code 382. “Preferred partition fence” includes a barbed wire, electric, or live fence, provided that the owners of adjoining properties agree, in writing, to allow such fences.

located. *See* R.C. 971.09(A)(1)(a)-(b); R.C. 971.16. Upon receiving a complaint from an aggrieved owner under R.C. 971.09(A)(1)(b), a board of township trustees is required to, among other things, provide “written notice to all adjoining owners of the time and place” that the board will meet to view the fence or premises in question. R.C. 971.09(B). During this viewing, the board shall determine whether a partition fence exists or whether “there is evidence that a partition fence previously existed.” *Id.*

At its next regularly scheduled meeting after viewing the partition fence or division line, the board of township trustees shall determine whether “a partition fence is required to be built or maintained.” R.C. 971.09(D)(1). Upon concluding that the construction or maintenance of a partition fence is required, the board assigns responsibility for the fence’s construction or maintenance to the responsible owners. *Id.* If the owners of both properties are responsible for building or maintaining the fence, the board equitably assigns each owner’s share of the responsibility pursuant to R.C. 971.09(D)(2). A board of township trustees may require each owner to construct or maintain a specific portion of the partition fence or may assign to each owner a portion of the total cost of building or maintaining the partition fence “if the owners have submitted to the board an estimate from a contractor of the necessary cost to perform the applicable work.” R.C. 971.09(D)(2). A board of township trustees is required to consider several factors when making an equitable assignment under R.C. 971.09(D)(2), including, but not limited to, the topography of the property, the presence of water, and the type of livestock that may be contained by the fence. R.C. 971.09(E)(1)-(6).

If a board of township trustees finds that only one owner is responsible for building or maintaining a partition fence, the board shall require the owner to pay the total cost of the fence’s construction and maintenance. R.C. 971.09(D)(3). If a board of township trustees finds that a partition fence does not need to be built or maintained, the board notifies each owner of its determination in writing. R.C. 971.09(D)(4). The costs due to the township fiscal officer and board of township trustees for making a determination and assignment under R.C. 971.09 are taxed equally against each of the owners. R.C. 971.10.

If an owner does not comply with an assignment by a board of township trustees, “the board of township trustees, upon the application of the aggrieved owner,” contracts with an outside contractor to complete the neglected work. R.C. 971.12(A). The costs incurred from employing an outside contractor under R.C. 971.12 are certified to the township fiscal officer and, if not paid within thirty days, certified to the county auditor for collection by the county treasurer. R.C. 971.13-.14.

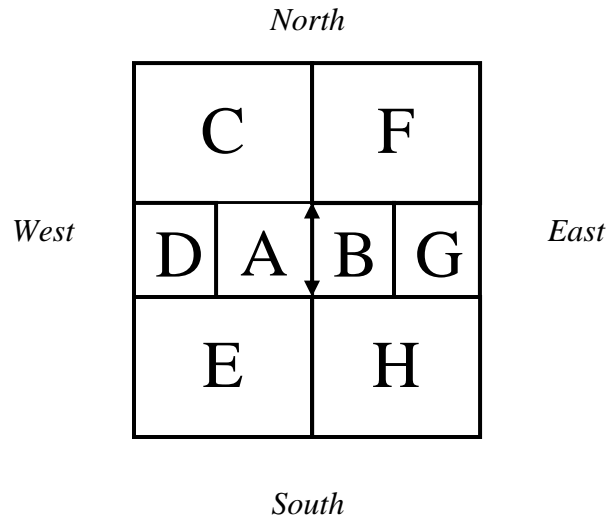
Notice to “All Adjoining Owners” under R.C. 971.09(B)

Your first two questions relate to the obligation of a board of township trustees to provide notice under R.C. 971.09(B). When a board of township trustees receives a complaint from an aggrieved owner that an adjoining owner has neglected to build or maintain his share of a partition fence, the board provides “not less than ten days’ written notice to *all adjoining owners* of the time and place” the board plans to meet to view the fence or division line at issue. R.C.

971.09(B) (emphasis added). Failure to provide proper notice under R.C. 971.09(B) divests a board of township trustees of jurisdiction to consider the complaint and make the determinations and assignments provided for under R.C. 971.09(D). *See Wireman v. Mary Ann Twp. Bd. of Trs.*, Licking App. No. 01CA103, 2002-Ohio-2519, at *1 (board of township trustees lacked jurisdiction to consider a partition fence complaint because the board failed to give notice to a neighboring property owner under former R.C. 971.04 (now R.C. 971.09(B))); *Bowers v. Viereck*, 66 Ohio Law Abs. 467, 473, 117 N.E.2d 717 (Franklin County C.P. 1953) (board of township trustees had no jurisdiction to assign to owners a share of the partition fence to be built because notice was given to owners less than ten days before the board’s viewing of the premises); 1928 Op. Att’y Gen. No. 2366, vol. III, p. 1766, at 1767 (without giving notice to all co-owners of one of the two properties that adjoined the division line where a partition fence was to be built, a board of township trustees had no authority to require owners to build the partition fence and to assign to owners the costs of the fence’s construction).

Your first question asks us to advise you which owners are “all adjoining owners,” as that phrase is used in R.C. 971.09(B). The following example will aid an understanding of your question.

Consider that the east boundary line of Property A abuts the west boundary line of Property B. The north, west, and south boundary lines of Property A abut the south, east, and north boundary lines of Properties C, D, and E, respectively. The north, east, and south boundary lines of Property B abut the south, west, and north boundary lines of Properties F, G, and H. The following diagram illustrates these property relationships:



The owner of Property A files a complaint with a board of township trustees, alleging that the owner of Property B has failed to maintain her portion of a partition fence that is located on the division line between Property A and Property B. You ask whether the board of township trustees is required by R.C. 971.09(B) to furnish notices to the owners of Properties A and B and the owners of Properties C through H, or whether the board of township trustees need notify only

those owners whose properties adjoin at the partition fence, namely, the owners of Properties A and B.

R.C. 971.01(D) defines “owner,” as used in R.C. Chapter 971, to mean both of the following:

- (1) The owner of land in fee simple, of estates for life, of easements, or of rights-of-way while used by the owners thereof as farm outlets;
- (2) Any of the following with regard to any land that it owns, leases, manages, or otherwise controls and that is adjacent to land used to graze livestock:
 - (a) The department of natural resources;
 - (b) A conservancy district organized under [R.C. Chapter 6101];
 - (c) A political subdivision with a real property interest in recreational trails.

R.C. Chapter 971 does not define the term, “adjoining,” or the phrase, “adjoining owner.” When not defined by statute, it is appropriate to accord a term or phrase its common meaning. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983) (“any term left undefined by statute is to be accorded its common, everyday meaning”). *Merriam-Webster’s Collegiate Dictionary* 16 (11th ed. 2012) defines “adjoining” to mean “touching or bounding at a point or line.” *Black’s Law Dictionary* 1130 (7th ed. 1999) defines an “adjoining owner” as “[a] person who owns land abutting another’s.” *See also Merriam-Webster’s Collegiate Dictionary* 6 (11th ed. 2012) (defining “abut” to mean “to border on ... to touch along a border or with a projecting part”). Therefore, the term “adjoining owners,” as used in R.C. 971.09(B), means owners, as defined in R.C. 971.01(D), whose properties abut or touch at a point or line.

An Ohio court of appeals has interpreted “all adjoining owners,” as used in the partition fence law, to include neighboring landowners whose property did not adjoin another property at a partition fence, but merely touched the property upon which a partition fence was located. *See Wireman*, 2002-Ohio-2519, at *1 (requiring a board of township trustees to provide notice to a neighboring landowner whose property “touche[d] the property on which the partition fence [was] located at a single point” even though the neighboring landowner was not involved in the dispute over the partition fence). The court held that failing to notify the neighboring landowner of the time and place at which the board of township trustees planned to meet and view the partition fence divested the board of jurisdiction to act on the partition fence complaint. *Id.* The court based its decision, without further explanation, “upon the language in R.C. 971.04 [predecessor to R.C. 971.09(B)] as well as the rational [*sic*] set forth in *Bowers v. Viereck*.” *Id.*

When the General Assembly intends to limit the application of a section of the partition fence law to only those owners whose properties adjoin at a partition fence or division line on which a partition fence may be constructed, it refers specifically in its language to “one” owner,

“two” owners, or “both owners.” See R.C. 971.01(E) (defining “partition fence” to mean “a fence that is located on the division line between the adjoining properties of *two* owners”) (emphasis added); R.C. 971.05(A) (“[i]f there is evidence that a partition fence previously existed between the adjoining properties of *two* owners, *one* of the owners, or *both*, may file an affidavit ... stating that a partition fence existed”) (emphasis added); R.C. 971.09(D)(2) (authorizing a board of township trustees to decide that “*both* owners” are responsible for building or maintaining a partition fence and assign to each owner her share of the responsibility for building or maintaining it) (emphasis added); R.C. 971.09(D)(3) (“[i]f the board finds that *one* owner is responsible, the board shall require that owner ... to pay the total cost of building or maintaining ... the partition fence”) (emphasis added).

In R.C. 971.09(B), on the other hand, the General Assembly uses the word “all” to describe the adjoining owners that a board of township trustees shall notify before meeting to view a partition fence or division line. *Merriam-Webster’s Collegiate Dictionary* 31 (11th ed. 2012) defines “all” to mean “every member or individual component of.” It follows that the General Assembly’s use of the term “all” in R.C. 971.09(B) means that the phrase “all adjoining owners” encompasses more than the two owners whose properties adjoin at a partition fence or division line. In fact, as recognized in *Wireman*, the phrase “all adjoining owners” encompasses the two owners whose properties adjoin at a partition fence or division line as well as those owners whose land touches one of the two properties upon which the partition fence or division line is located.

It is prudent that a board of township trustees follow *Wireman* in providing the notice required under R.C. 971.09(B). If a board of township trustees fails to provide notice to an owner whose property touches one of the two properties that adjoin at the partition fence or division line on which a partition fence may be constructed, *Wireman*’s holding enables an owner to challenge the board’s determination and assignment under R.C. 971.09(D) on jurisdictional grounds. Alternatively, if a board of township trustees provides notice to those owners whose properties touch one of the two properties that adjoin at the partition fence or division line on which a partition fence may be constructed (as well as those owners whose two properties adjoin at the fence or line), any doubt that the board has complied with the notice requirement in R.C. 971.09(B) is alleviated.

Accordingly, we conclude that the phrase “all adjoining owners,” as used in R.C. 971.09(B), includes owners whose land touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or whose land touches the property upon which the partition fence or division line is located.

Whether the State of Ohio, a County, or a Township is an “Adjoining Owner” under R.C. 971.09(B)

Your second question asks whether a board of township trustees is required to provide notice to the state of Ohio, a county, or a township as an “adjoining owner” under R.C. 971.09(B) when a state, county, or township road touches property at a partition fence or a

division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b), or touches property upon which the partition fence or division line is located. The answer to your question depends, in part, upon whether the state of Ohio, a county, or a township is an “owner” as defined in R.C. 971.01(D).

R.C. 971.01(D)’s definition of “owner” consists of two parts. The first part defines “owner” as “[t]he owner of land in fee simple, of estates for life, of easements, or of rights-of-way while used by the owners thereof as farm outlets.” R.C. 971.01(D)(1). The second part identifies as “owners” certain governmental entities that own, lease, manage, or control any land that is adjacent to land used to graze livestock. *See* R.C. 971.01(D)(2). The express inclusion of some governmental entities as “owners” to the exclusion of others implies that only those governmental entities specifically identified in the statute are to be included within R.C. 971.01(D)’s definition of “owner.” *See generally State v. Droste*, 83 Ohio St. 3d 36, 39, 1998-Ohio-182, 697 N.E.2d 620 (1998) (“[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded”); 2014 Op. Att’y Gen. No. 2014-024, at 2-217 to 2-218 (relying on *expressio unius est exclusio alterius* to conclude that only the three entities specifically identified in R.C. 339.72 could be designated as tuberculosis control units). Therefore, the state of Ohio, a county, or a township is an “owner” under R.C. 971.01(D) if expressly identified as such under R.C. 971.01(D)(2).

R.C. 971.01(D)(2) defines “owner” to mean “[a]ny of the following with regard to any land that it owns, leases, manages, or otherwise controls and that is adjacent to land used to graze livestock: (a) The department of natural resources; (b) A conservancy district ... [and] (c) A political subdivision with a real property interest in recreational trails.” The Department of Natural Resources is a state agency and a county and a township are political subdivisions.² *See State ex Barstow v. Summit Cnty. Comm’rs*, 15 Ohio Law Abs. 31, 32 (Summit County App. 1933) (“[t]he county is a political subdivision of the state”); *FDL Marine dba Edgewater Marina v. Picklo*, No. 2013 CVI 12422, 6 N.E.3d 698, 699 (Mun. Ct. Cuyahoga County 2013) (identifying the Department of Natural Resources as a state agency); 2008 Op. Att’y Gen. No. 2008-019, at 2-204 (“[a] township is a political subdivision”); *see also* R.C. 1.60 (defining “state agency” for purposes of R.C. Title 1 as “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government”); R.C. 121.02(F) (creating “[t]he department of natural resources,” an administrative department of the state). Therefore, the state of Ohio is an “owner” under R.C. 971.01(D) when, in its capacity as

² The term “political subdivision” is not defined for purposes of R.C. 971.01(D)(2)(c) or more generally, for purposes of R.C. Chapter 971 or R.C. Title 9. A political subdivision is “[a] division of a state that exists primarily to discharge some function of local government.” *Black’s Law Dictionary* 1277 (9th ed. 2009); *see also* 1972 Op. Att’y Gen. No. 72-035 (syllabus) (“[a] political subdivision of the State is a limited geographical area wherein a public agency is authorized to exercise some governmental function, as contrasted to an instrumentality of the State, which is a public agency with state-wide authority”).

the Department of Natural Resources, it owns, manages, leases, or otherwise controls land as described in R.C. 971.01(D)(2)(a). *See generally* R.C. 1501.01(C) (the Director of Natural Resources may accept lands on behalf of the Department of Natural Resources); R.C. 1501.01(G) (when authorized, the Director of Natural Resources may appropriate property for the use of the Department of Natural Resources or may purchase property when the purchase of such property is “advantageous to the state”); R.C. 5301.012 (requiring an instrument by which the state or one of its agencies acquires a real property interest to identify the state agency for whose use and benefit the real property interest is acquired). Similarly, a county or a township with a real property interest in recreational trails is an “owner” under R.C. 971.01(D) when it owns, manages, leases, or otherwise controls land that is adjacent to land used to graze livestock. *See* R.C. 971.01(D)(2)(c).

Accordingly, we conclude that when a state road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or touches property upon which the partition fence or division line is located, the state of Ohio, in its capacity as the Department of Natural Resources, is an “adjoining owner,” as that term is used in R.C. 971.09(B), if the Department of Natural Resources owns, leases, manages, or otherwise controls the land on which the state road is located and the land that abuts the road is used to graze livestock. We also conclude that when a county or township road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or touches property upon which the partition fence or division line is located, a county or township with a real property interest in recreational trails is an “adjoining owner” for purposes of R.C. 971.09(B) if the county or township owns, leases, manages, or otherwise controls the land on which the county or township road is located and the land that abuts the road is used to graze livestock.

A Board of Township Trustees May Not Resolve Disputes about the Location of an Existing Partition Fence

Your third question asks whether a board of township trustees may resolve a dispute between adjoining owners about the proper location of an existing partition fence. The Attorney General addressed this issue on two occasions, concluding in both that settling division line disputes between adjoining owners is not within the authority of a board of township trustees. 1941 Op. Att’y Gen. No. 3412, p. 47; 1922 Op. Att’y Gen. No. 3696, vol. II, p. 893.

In 1922 Op. Att’y Gen. No. 3696, vol. II, p. 893, the Attorney General considered whether a board of township trustees had authority under G.C. 5910, now R.C. 971.09, to employ a county surveyor to establish a division line between the properties of two owners for the purpose of determining the appropriate location for a partition fence. The owners disputed the location of the division line. *Id.* The Attorney General concluded that the partition fence law did not authorize the board to settle the landowners’ boundary dispute in this manner. *Id.* at 894. The Attorney General observed that the provisions governing partition fences exist “to provide an inexpensive method of allotting to affected land-owners their respective shares of fences ... not to provide a method of settling boundary disputes.” *Id.*

In 1941 Op. Att’y Gen. No. 3412, p. 47, a survey revealed that a partition fence, thought to be located on the division line between the properties of two adjoining owners, was not actually located on the division line. When one of the adjoining owners relocated the fence in accordance with the survey’s findings, the second owner requested that the board of township trustees, pursuant to G.C. 5910, order that the partition fence be rebuilt at its prior location. *Id.* Relying on 1922 Op. Att’y Gen. No. 3696, vol. II, p. 893, the Attorney General stated that the partition fence statutes do not authorize a board of township trustees “to settle boundary disputes between adjoining land-owners.” 1941 Op. Att’y Gen. No. 3412, at 48.

The General Assembly has amended the partition fence law several times since the 1922 and 1941 opinions, but none of these amendments requires us to deviate from the conclusions reached in those opinions. A board of township trustees is a creature of statute and possesses only those powers expressly conferred by statute or necessarily implied therefrom. *In re Petition for Incorporation of the Vill. of Holiday City*, 70 Ohio St. 3d 365, 370, 639 N.E.2d 42 (1994) (recognizing that “absent a specific directive from the General Assembly, township trustees are powerless to” act); *Trs. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875) (“[township] trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted”). Upon receiving a complaint submitted by an aggrieved owner pursuant to R.C. 971.09(A)(1)(b), a board of township trustees may determine which owners are responsible for building or maintaining a partition fence and assign to those owners their share of the responsibility for the fence’s construction or maintenance. *See* 1941 Op. Att’y Gen. No. 3412, at 48. When a boundary dispute exists between owners over the proper location of an existing partition fence or division line on which a partition fence is to be located, no provision in R.C. Chapter 971 or any other provision in the Revised Code authorizes a board of township trustees to settle the dispute by determining the proper location of the partition fence or division line.

Accordingly, we conclude that a board of township trustees has no authority to settle a dispute between adjoining owners regarding the proper location of an existing partition fence.

Authority of a Board of Township Trustees to Order the Maintenance of a Partition Fence That is Not Located on the Division Line

Your fourth question asks whether a board of township trustees may require adjoining owners to maintain a partition fence at its current location even though a survey establishes that the fence is not located on the division line between their two properties.

R.C. 971.09(A)(1)(b) authorizes an owner to file a complaint with a board of township trustees “[w]hen an owner neglects to ... maintain in good repair a partition fence, or the portion thereof that the owner is required to ... maintain.” Pursuant to R.C. 971.09(B)-(E), the board of township trustees views the partition fence and, upon determining that the fence “is required to be ... maintained in good repair ... decide[s] each owner’s responsibility for” its maintenance. R.C. 971.09(D)(1). Pursuant to the plain language of R.C. 971.09, a board of township trustees has authority to order that a partition fence be maintained. The definition of “partition fence”

“includes a fence that has been considered a division line between two ... properties *even though a subsequent land survey indicates that the fence is not located directly on the division line.*” R.C. 971.01(E) (emphasis added).

Accordingly, we conclude that a board of township trustees may order the maintenance of a partition fence that has been considered a division line between two properties even though a survey establishes that the partition fence is not located on the division line.

The Effect of a Court Order Relocating an Existing Partition Fence

Your fifth and sixth questions pertain to the relocation of an existing partition fence by court order. Your fifth question asks whether a partition fence shall be considered to have existed between the adjoining properties of two owners on or before September 30, 2008, if, in settling a boundary dispute, a court orders that the existing partition fence be relocated.³

Whether a partition fence existed between the adjoining properties of two owners on or before September 30, 2008, determines whether the owners are to share equitably in the fence’s construction and maintenance. If a partition fence existed between the adjoining properties of two owners on or before September 30, 2008, and the owners decide to build a new partition fence, R.C. 971.06(A) requires the owners to construct the new fence in equitable shares. Similarly, if an owner removes a partition fence that existed on or before September 30, 2008, and the fence is rebuilt, the owners shall, under the circumstances set forth in R.C. 971.06(C)(1)-(3), build and maintain the new partition fence in equitable shares. If a partition fence did not exist between the owners’ properties on or before September 30, 2008, the responsibility for the construction of a new partition fence rests entirely with the owner who wants to build the fence. R.C. 971.07(A); *but see* R.C. 971.07(B) (requiring the owner of adjoining property that did not bear the costs of building or maintaining the new partition fence to pay a proportion of those costs if the owner subsequently uses the fence to keep livestock enclosed).

A fence that is located between the adjoining properties of two owners and “has been considered a division line between two such properties” is a “partition fence” for purposes of R.C. Chapter 971 even when “the fence is not located directly on the division line.” R.C. 971.01(E). Therefore, a fence that “has been considered a division line between” the adjoining properties of two owners is a partition fence, notwithstanding the fact that a subsequent court order requires that the fence be relocated.

³ As it appears in your letter your fifth question asks whether a partition fence is a “new” fence for purposes of R.C. Chapter 971 when a court, in adjudicating a dispute about the proper location of an existing partition fence, orders that the existing fence be moved. You have since clarified your fifth question to ask whether a partition fence shall be considered to have existed between the adjoining properties of two owners on or before September 30, 2008, if, in settling a boundary dispute, a court orders that the existing partition fence be relocated.

Accordingly, when a court orders the relocation of a partition fence that has existed between the adjoining properties of two owners on or before September 30, 2008, the relocation of the partition fence does not alter the fact that a partition fence existed between the owners' adjoining properties on or before September 30, 2008, provided that the fence has been considered a division line between the adjoining properties of the two owners prior to its relocation.

Your sixth question asks how a court's order to relocate an existing partition fence affects a board of township trustees' assignment of costs for the repair or maintenance of a partition fence.⁴ An assignment by a board of township trustees under R.C. 971.09 is a final, appealable order. *Saltzman v. Elchert*, No. 13-77-25, 1978 WL 215740, at *1 (Seneca County App. Feb. 7, 1978) (an order of assignment by a board of township trustees under R.C. 971.04, predecessor to R.C. 971.09(D), "is a final order of a political subdivision of the State"). The board's assignment may be challenged through the arbitration process under R.C. 971.09(G) or an administrative appeal under R.C. Chapter 2506. *See Miller v. Blume*, Noble App. No. 13 NO 398, 2013-Ohio-5290, at ¶25 (recognizing that an order by a board of township trustees rendered pursuant to R.C. 971.09 may be challenged by "requesting arbitration or filing an administrative appeal"); *Saltzman*, 1978 WL 215740, at *1 (an assignment order by a board of township trustees under R.C. 971.04, predecessor to R.C. 971.09(D), may be reviewed under R.C. Chapter 2506).

Absent a request for arbitration under R.C. 971.09(G) or an administrative appeal pursuant to R.C. Chapter 2506, the board's determination is a final order not subject to further review in another manner. *See Saltzman*, 1978 WL 215740, at **1-2 (where an administrative appeal is available, a party may not bring a separate action to enjoin the enforcement of a court's order). Accordingly, we conclude that an order by a court requiring the relocation of a partition fence does not affect a prior assignment rendered by a board of township trustees pursuant to R.C. 971.09.

⁴ A board of township trustees may refrain from making an assignment under R.C. 971.09 if a division line dispute exists between the adjoining owners. *See, e.g., Paulus v. Haren*, No. 649, 1989 WL 58384, at *3 (Monroe County App. May 26, 1989) (noting that the township trustees had "stepped aside from their statutory duties [under R.C. Chapter 971] because, supposedly, the [owners] contested the boundary lines between the adjoining parcels"); *Portofe v. Badalich*, No. 408, 1978 WL 215060, at *3 (Carroll County App. Oct. 17, 1978) (township trustees told owner they would not make assignments to owners for the construction of a partition fence because a dispute existed between the owners as to the proper location of the property line). For the purpose of addressing your question, we shall presume that a dispute about the proper location of a partition fence did not arise until after the board of township trustees made an assignment under R.C. 971.09.

A Board of Township Trustees May Not Consult a Contractor in Making an Assignment Pursuant to R.C. 971.09(D)(2)

Your seventh question asks whether a board of township trustees may consult a contractor to obtain an estimate of the total costs of building or maintaining a partition fence and then assign a portion of those estimated costs to each owner under R.C. 971.09(D)(2).

R.C. 971.09(D)(2) requires a board of township trustees, upon determining that two owners are responsible for constructing or maintaining a partition fence, to “equitably assign, in writing, each owner’s share” of the fence’s construction or maintenance. The statute declares unequivocally that a board of township trustees “may assign a portion of the total cost of building or maintaining in good repair the partition fence *if the owners* have submitted to the board an estimate from a contractor of the necessary cost to perform the applicable work.” R.C. 971.09(D)(2) (emphasis added). The statute does not authorize a board of township trustees to assign portions of the total cost of the fence’s construction or maintenance by any other method. In particular, the statute does not authorize a board of township trustees to consult a contractor on its own initiative.⁵

Accordingly, we conclude that a board of township trustees may not consult a contractor to obtain an estimate of the costs of constructing or maintaining a partition fence for the purpose of assigning a portion of those costs to each owner under R.C. 971.09(D)(2).

The Factors a Board of Township Trustees May Consider When Assigning the Construction or Maintenance of Specific Portions of a Partition Fence to Owners under R.C. 971.09(D)(2)

In your eighth question, you ask whether a board of township trustees may consider the cost of constructing or maintaining specific portions of a partition fence when assigning the construction or maintenance of those portions of the fence to each owner under R.C. 971.09(D)(2). For example, assume a partition fence 1,000 feet in length will cost \$1,000 to construct or maintain. As a result of multiple factors, including variations in the topography of the land, it will cost \$500 to construct or maintain 800 feet of the fence and \$500 to construct or maintain the remaining 200 feet. You ask whether a board of township trustees may assign the 800-foot portion to one owner and the 200-foot portion to the other owner.

R.C. 971.09(D)(2) requires a board of township trustees to equitably “assign a specific portion of the partition fence to be built or maintained” or “assign a portion of the total cost of building or maintaining ... the partition fence if the owners have submitted to the board an estimate from a contractor of the necessary cost to perform the applicable work.” This statute does not require a board of township trustees to divide the specific portions of the partition fence

⁵ R.C. 971.12 authorizes a board of township trustees to award a contract for building or maintaining a partition fence to the lowest bidder if an owner fails to build or maintain the portion of a partition fence assigned to the owner pursuant to R.C. 971.09.

in any particular manner. When making an equitable assignment under R.C. 971.09(D)(2), a board of township trustees is required to consider certain factors, including the topography of the property, the presence of a body of water, and the livestock that may be contained by the fence.⁶ See R.C. 971.09(E)(1)-(6). R.C. 971.09(E) provides that a board of township trustees shall consider these factors “without limitation.” Therefore, a board of township trustees may consider other factors deemed relevant in making an equitable assignment, so long as the factors listed in R.C. 971.09(E)(1)-(6) are also considered.

Accordingly, we conclude that a board of township trustees may consider any factors it deems relevant in assigning the construction or maintenance of specific portions of a partition fence to each owner under R.C. 971.09(D)(2), including the costs of constructing or maintaining the fence, so long as the board also considers the factors listed in R.C. 971.09(E)(1)-(6).⁷

⁶ R.C. 971.09(E) requires a board of township trustees to consider the following factors in making an equitable assignment under R.C. 971.09(D)(2):

- (1) The topography of the applicable property;
- (2) The presence of streams, creeks, rivers, or other bodies of water;
- (3) The presence of trees, vines, or other vegetation;
- (4) The level of risk of trespassers on either property due to the population density surrounding the property or the recreational use of adjoining properties;
- (5) The importance of marking division lines between the properties;
- (6) The number and type of livestock owned by either owner that may be contained by the partition fence.

⁷ In 1910 Op. Att’y Gen. 753, the Attorney General addressed whether a board of township trustees, in assigning the responsibility for maintaining a partition fence under G.C. 5910 (now R.C. 971.09), had authority to assign a larger portion of the partition fence to one owner, while requiring the other owner to maintain a water gate in addition to the smaller portion of the fence. The Attorney General stated, at 754:

I am of the opinion that the duties of the township trustees under this section are of a judicial nature, and, in any controversy over the division of partition fences, it is their duty to take into consideration everything connected and pertaining to the building and maintaining of the partition fence, and the statute provides that they are to assign in writing to each person his equal share thereof. This, in my opinion, does not mean the equal number of rods, but does mean that after the taking into consideration of all the conditions of the making and maintaining of the fence, that each party is to be assigned his equal share and if, perchance, one end of the fence requires the making and maintaining of a watergate across a stream, it is the duty of the trustees to take this fact into consideration and, having ascertained the whole amount, to assign, in writing, to each land owner his equal share thereof.

The Effect of Sub. H.B. 323, 127th Gen. A. (2008) (eff. Sept. 30, 2008), Upon the Installation of Water Gates

Your remaining questions pertain to the installation of water gates. Before the General Assembly amended the partition fence law in Sub. H.B. 323, 127th Gen. A. (2008) (eff. Sept. 30, 2008), adjoining owners were required to construct and maintain water gates on the division line between their two properties when that division line “crosse[d] a stream of water, through which it [was] impracticable to construct and maintain a partition fence.” R.C. 971.25. If an owner neglected to build or maintain her portion of the water gate, the board of township trustees was required to assign a portion of the water gate’s construction or maintenance to each owner in the same manner as the board made assignments with respect to the construction or maintenance of a partition fence. *Id.* Sub. H.B. 323 repealed R.C. 971.25 and no statute was enacted in its place. A statute that has been repealed is no longer part of the laws of Ohio and may not be relied upon or enforced. *See In re Day*, Belmont App. No. 01 BA 28, 2003-Ohio-1215, at ¶15 (“as a general rule, when a statute is repealed, it is rendered inoperative” (citing *State ex rel. Board of Educ. of Kenton City Sch. Dist. v. State Bd. of Educ. of Ohio*, 174 Ohio St. 257, 189 N.E.2d 72 (1963) (syllabus, paragraph 1))); *State ex rel. Taylor v. Columbus Ry. Co.*, 14 Ohio C.D. 609, 636 (Cir. Ct. 1903) (“obvious effect of the repeal of a statute is that it no longer exists”); *see also Black’s Law Dictionary* 1301 (7th ed. 1999) (“repeal” means “[a]brogation of an existing law by legislative act”). *But see* R.C. 1.58 (the repeal of a statute does not affect prior actions taken under the statute while it was in force or any rights or liabilities previously acquired or incurred thereunder).

Your ninth question asks whether R.C. Chapter 971 requires an owner to install a water gate as part of a partition fence. No provision in R.C. Chapter 971 requires an owner to install a water gate as part of a partition fence. Accordingly, we conclude that R.C. Chapter 971 does not require an owner to install a water gate as part of a partition fence.

Your tenth question asks whether a board of township trustees may, in its discretion, require the installation of a water gate as part of a partition fence. No provision in R.C. Chapter 971 or elsewhere in the Revised Code authorizes a board of township trustees to require the installation of a water gate as part of a partition fence. R.C. Chapter 971 authorizes a board of township trustees to require owners to construct or maintain partition fences, and in some instances, to provide the specifications for the construction or maintenance of a partition fence. *See* R.C. 971.09; R.C. 971.12 (authorizing a board of township trustees to propose specifications for the construction or maintenance of a partition fence when an owner has failed to build or maintain the portion of the fence previously assigned to the owner under R.C. 971.09). The power given to a board of township trustees to require the construction or maintenance of a partition fence or to propose specifications for the fence’s construction or maintenance does not authorize the board to require the installation of a water gate. *See* R.C. 971.12(A) (“[i]f either owner fails to build or maintain ... the portion of a *partition fence* assigned to the owner under [R.C. 971.09], the board of township trustees, upon the application of the aggrieved owner, shall award the contract to the lowest responsible bidder ... and build or maintain the *fence* according to the specifications proposed by the board” (emphasis added)).

R.C. 971.01(E) defines “partition fence,” in relevant part, as “a *fence* ... located on the division line between the adjoining properties of two owners.” (Emphasis added.) A fence is “a barrier intended to prevent escape or intrusion or to mark a boundary.” *Merriam-Webster’s Collegiate Dictionary* 461 (11th ed. 2012). A “water gate,” on the other hand, is “a gate (as of a building) giving access to a body of water.” *Id.* at 1413. A “gate” is “an opening in a wall or fence ... a door, valve, or other device for controlling the passage esp. of a fluid.” *Id.* at 517. A “gate” (an opening in a barrier) is not synonymous with “fence” (a barrier). Therefore, the authority given to a board of township trustees to propose specifications for the construction or maintenance of a partition fence does not include authority to require the installation of a water gate. Accordingly, we conclude that a board of township trustees may not require the installation of a water gate as part of a partition fence.⁸

Your next question asks whether it is permissible for an owner to install a water gate as part of a partition fence, notwithstanding whether a board of township trustees may require the installation of a water gate. Nothing in R.C. Chapter 971 authorizes an owner to install a water gate as part of a partition fence. As our preceding analysis explains, the General Assembly has deleted from the law the construction of a water gate as part of a partition fence. Accordingly, when building or maintaining a partition fence pursuant to R.C. Chapter 971, an owner may not install a water gate as part of the partition fence.

Your final question asks whether an owner, if not permitted to install a water gate as part of a partition fence, may alter or destroy a watercourse⁹ to construct or maintain a partition fence. Whether an owner may alter or destroy a watercourse to build or maintain a partition fence implicates the application of a host of state laws in addition to the provisions of R.C. Chapter 971. R.C. 3767.17 prohibits persons from destroying watercourses created by the governing

⁸ Your eleventh question asks how a board of township trustees is to allocate among the owners the costs of installing a water gate. Because we have concluded that a board of township trustees is not authorized to require owners to install a water gate as part of a partition fence, it is unnecessary for us to address this question.

⁹ A “watercourse” is defined at common law as follows:

[A] stream usually flowing in a particular direction in a definite channel having a bed, banks or sides and discharging into some other stream or body of water. It need not flow continuously, and may [sometimes] be dry or the volume of such [watercourse] may [sometimes] be augmented by freshets or water backed into it by a lake or bay or other extraordinary causes; but so long as it resumes its flow in a definite course in a recognized channel and between recognized banks, such stream constitutes a watercourse.

Beddow v. Norton Fireman’s Ass’n, Inc., No. 18373, 1998 WL 208996, at *3, n.1 (Summit County App. Apr. 29, 1998); *see also Merriam-Webster’s Collegiate Dictionary* 1413 (11th ed. 2012) (defining a “watercourse” as “a natural or artificial channel through which water flows”).

bodies of certain political subdivisions. *See* R.C. 3767.17 (prohibiting a person from obstructing a watercourse constructed by a board of county commissioners or a board of township trustees). R.C. 6101.19(D) requires a person to follow certain statutory procedures before erecting an obstruction that diminishes a watercourse located in a conservancy district. *See* R.C. 6101.19(D) (“[n]o person or public corporation shall erect within the drainage area of the district ... any work or obstruction diminishing the cross section of any stream or watercourse in it, until a copy of the plans for the ... work, or obstruction has been filed with the secretary of the conservancy district for the board’s examination”). Further, multiple statutes and common law principles prevent a landowner from altering or destroying a watercourse in ways that harm neighboring landowners. *See, e.g.*, R.C. 3767.13(C) (prohibiting a person from “corrupt[ing]” a watercourse, rendering the watercourse “unwholesome or impure,” or “unlawfully divert[ing] such watercourse from its natural course or state to the injury or prejudice of others”); *Pontifical Coll. v. Kleeli*, 18 Ohio Dec. 703, 706-08, 5 Ohio N.P. (N.S.) 241 (Franklin County C.P. 1907) (setting forth principles that govern the water surface rights of neighboring landowners). Whether an owner violates these laws by altering or destroying a watercourse to build or maintain a partition fence depends, in part, upon the specific facts and circumstances of the owner’s situation.

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. The phrase “all adjoining owners,” as used in R.C. 971.09(B), includes owners whose land touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or whose land touches the property upon which the partition fence or division line is located.
2. When a state road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b) or touches property upon which the partition fence or division line is located, the state of Ohio, in its capacity as the Department of Natural Resources, is an “adjoining owner” as that term is used in R.C. 971.09(B), if the Department of Natural Resources owns, leases, manages, or otherwise controls the land on which the state road is located and the land that abuts the road is used to graze livestock.
3. When a county or township road touches property at a partition fence or division line that is the subject of a complaint filed under R.C. 971.09(A)(1)(b), or touches property upon which the partition fence or division line is located, a county or township with a real property interest in recreational trails is an “adjoining owner” for purposes of R.C. 971.09(B) if the county or township owns, leases, manages, or otherwise controls the land on which the county or township road is located and the land that abuts the road is used to graze livestock.

4. A board of township trustees has no authority to settle a dispute between adjoining owners regarding the proper location of an existing partition fence.
5. A board of township trustees may order the maintenance of a partition fence that has been considered a division line between two properties even though a survey establishes that the partition fence is not located on the division line.
6. When a court orders the relocation of a partition fence that has existed between the adjoining properties of two owners on or before September 30, 2008, relocation of the partition fence does not change the fact that a partition fence existed between the owners' adjoining properties on or before September 30, 2008, provided that the fence has been considered a division line between the adjoining properties of the two owners prior to its relocation.
7. A court decision that orders owners to relocate an existing partition fence does not affect a previous determination and assignment by a board of township trustees under R.C. 971.09 for the repair or maintenance of the fence. A determination and assignment by a board of township trustees under R.C. 971.09 is a final order that may only be challenged or revisited through arbitration pursuant to the procedures available in R.C. 971.09(G) or through administrative appeal pursuant to the procedures set forth in R.C. Chapter 2506.
8. A board of township trustees may not consult a contractor to obtain an estimate of the costs of constructing or maintaining a partition fence for the purpose of assigning a portion of those costs to each owner under R.C. 971.09(D)(2).
9. A board of township trustees may consider costs in assigning the construction or maintenance of specific portions of a partition fence to each owner under R.C. 971.09(D)(2) so long as the board also considers the factors listed in R.C. 971.09(E)(1)-(6).
10. R.C. Chapter 971 does not require owners to install a water gate as part of a partition fence.
11. A board of township trustees may not require the installation of a water gate as part of a partition fence.

12. When building or maintaining a partition fence pursuant to R.C. Chapter 971, an owner may not install a water gate as part of the partition fence.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General