

OPINION NO. 77-012**Syllabus:**

There is no express statutory prohibition against the use of an electrified fence as a partition fence. The consent of adjoining landowners is not a prerequisite to the installation of such a fence pursuant to R.C. 971.02 et seq.

To: Anthony G. Pizza, Lucas County Pros. Atty., Toledo, Ohio
By: William J. Brown, Attorney General, March 15, 1977

You have requested an opinion concerning the use of electrified fences. Specifically you have asked:

- 1) Does any statutory authority regulate the use of electrified fences on private property outside municipalities?
- 2) If an electrified fence is to be installed as a partition fence, is the consent of adjacent landowners required?

With respect to your first question a review of pertinent sections of the Revised Code reveals no language expressly regulating the use of electric fences on private property. It is, therefore, necessary in addressing your second question to consider the general provisions of law regulating the installation of partition fences.

The construction and maintenance of fences is provided for in R.C. Chapter 971. R.C. 971.02 reads 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.

Courts interpreting the above-quoted statute have held that under this section a landowner may be compelled to build a partition fence unless it is shown that it will not benefit his land in excess of the cost of complying with this requirement. Glass v. Dryden, 18 Ohio St. 2d 149 (1969).

The General Assembly has seen fit to impose some restrictions on the type of fence which may be built. See R.C. 971.03. Only certain kinds of hedge fences are permitted, and that section further requires the consent of the adjoining landowner as a prerequisite to the construction of a partition fence from barbed wire. The General Assembly, however, has apparently not seen fit to impose this condition on the use of electrified partition fences.

Expressio unius est exclusio alterius is the well established rule of statutory construction that the express mention of one or more items implies the exclusion of all others not mentioned. Transportation Co. v. Glander, 155 Ohio St. 471, 480 (1951); Beatty v. Alston, 40 Ohio App. 2d 545 (1974); 1975 Op. Att'y. Gen. No. 75-050; 1974 Op. Att'y. Gen. No. 74-002. In view then of the fact that the General Assembly has not established conditions for the construction of an electrified partition fence, I must conclude that such construction is not subject to the consent of adjoining landowners.

As noted above, however, the requirement to participate in the cost of building and maintaining a partition fence, be it electric or other, is not absolute. It must be determined whether or not the partition fence is a benefit to an adjoining landowner. In 1974 Op. Att'y. Gen. No. 74-026 I had occasion to consider this matter and opined 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.

See also Glass v. Dryden, *supra*. The type of fence proposed could then enter into the township trustee's determination as to the net benefit received by the adjoining landowner. Therefore, while an adjoining landowner's consent is not required for the construction of an electric partition fence, he may be relieved of his duty to participate in the cost of the construction if the cost of construction exceeds the benefit to his land as a result of the installation of the fence.

In specific answer to your question it is my opinion and you are advised that there is no express statutory prohibition against the use of an electrified fence as a partition fence. The consent of adjoining landowners is not a prerequisite to the installation of such a fence pursuant to R.C. 971.02 et seq.