Ohio Farm Bureau

Landowner Toolkit

VALUABLE INFORMATION ON LANDOWNER ISSUES *for* OHIO FARM BUREAU MEMBERS

Ohio Farm Bureau's $5,000 Reward Property Protection Program • Open Burning • Line Fence
Drainage and Water • Current Agricultural Use Value (CAUV) • Zoning and Land Use • Eminent Domain
Dog Laws • Oil and Gas Leasing • Trespassing and Landowner Liability • All Purpose Vehicles and Utility Vehicles
Ohio's Agricultural Districts and Agricultural Security Areas • Boundary Disputes, Trees, and Property Rights

Your Ohio Landowner Toolkit is here.
Another great benefit of an Ohio Farm Bureau membership.

Dear Farm Bureau Member,

Thank you for your membership in Ohio Farm Bureau. We are pleased to share with you our Ohio Landowner Toolkit designed to keep you informed and protected as a property owner in Ohio.

One of the most valuable benefits of Farm Bureau membership is our commitment to you and landowners like you across Ohio.

Whether it's understanding how CAUV reduces your tax burden or learning the basics about your property and the law, the Ohio Landowner Toolkit was built to give you the information you need to make the best decisions for you and your family.

But, our work for you doesn't stop with the Landowner Toolkit.

From our advocacy work on your behalf in Washington, D.C. and Columbus to our experts and dedicated volunteers and staff on the ground in every county, we make every effort to hear your needs and provide solutions that work.

I encourage you to immediately post a $5,000 Reward sign that you can receive for free at your county Farm Bureau office. You can find a flier about the program inside your Landowner Toolkit. Not only does this demonstrate your support, but it's a great deterrent to those who may want to do harm to your personal property.

Once again, thank you for your membership and I hope you enjoy the great information available in your Ohio Landowner Toolkit.

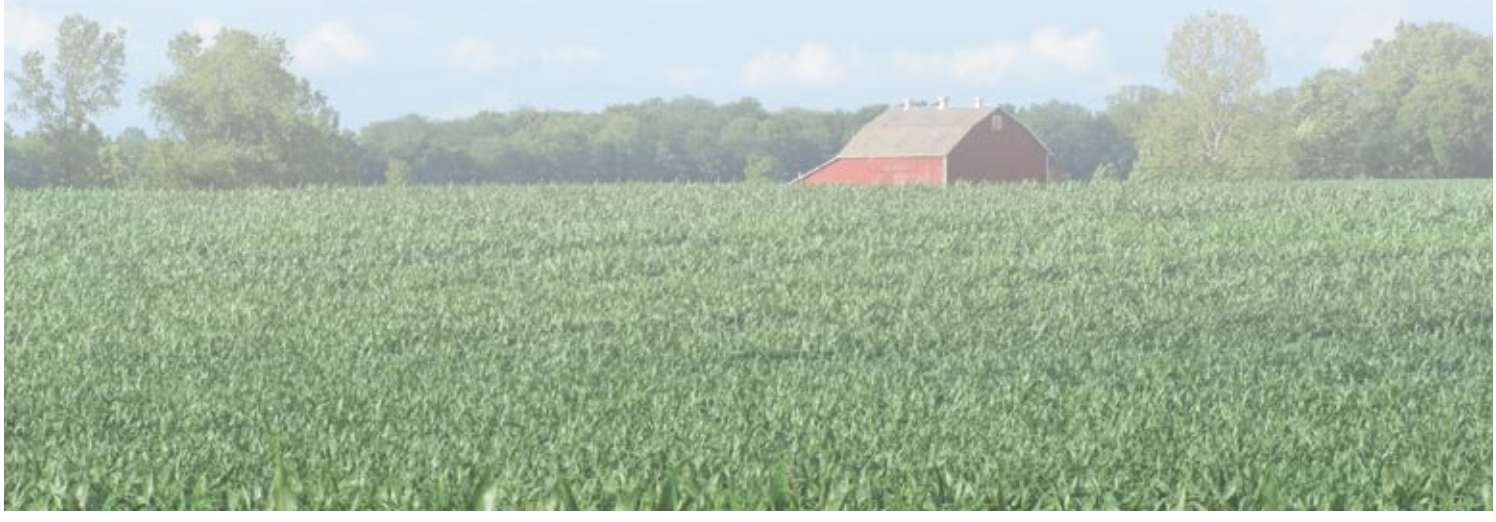
Sincerely,

Adam J. Sharp
Ohio Farm Bureau Executive Vice President

P.S. Please feel free to contact us and let us know what you think of our Landowner Toolkit. If there are important property rights questions that it doesn't answer, we want to know. Email us at info@ofbf.org.

Contents

This publication is meant to be an educational tool and should not be perceived as legal advice. Laws can be amended frequently in both substance and interpretation. This publication should not be considered a substitute of the actual text of the law. Landowners should consult their legal counsel with questions.



Ohio Farm Bureau's $5,000 Reward Property Protection Program

The Farm Bureau Property Protection Service helps deter crime in our communities and on members' premises by rewarding people for being watchful and concerned enough to help apprehend criminals.

Ohio Farm Bureau Property Protection Program Terms & Conditions

(Effective January 1, 2020)

1. **Overview.** A $5,000 reward will be paid to anyone providing information to law enforcement that leads to the arrest and conviction of persons for eligible property crimes committed against a Farm Bureau member's property. For the reward to be paid, the person providing information, the Farm Bureau member, and the crime must meet the following eligibility criteria and all terms and conditions of this program.

2. **Farm Bureau member eligibility.**
   The Farm Bureau member must:
   a. Be a current member of the Ohio Farm Bureau at the time the crime was committed.
   b. Not be involved or complicit in the commission of the crime.
   c. Have at least one reward sign posted prominently on the member's premises.

3. **Informant eligibility.** The informant must be an uninvolved bystander, meaning the informant must:
   a. Not be the Farm Bureau member against whom the crime was committed. The "Farm Bureau member" includes the spouse and all dependent unmarried children ages 18 and under who live in the member's household.
   b. Not be involved or complicit in the commission of the crime.
   c. Not be a law enforcement officer in the county or jurisdiction where the crime was committed.
   d. If more than one person provides information about the same crime, the reward will be given to the informant who provided the most timely and helpful information, or split between multiple informants who provided equally timely and helpful information, as determined by the reward committee with the assistance of law enforcement.

4. **Eligible crimes.** The conviction must be for at least one of the following crimes as defined in the Ohio Revised Code committed on or after January 1, 2020:
   a. Arson (R.C. 2909.13)
   b. Aggravated Burglary (R.C. 2911.11)
   c. Burglary (R.C. 2911.12)
   d. Breaking and Entering (R.C. 2911.13)
   e. Criminal Damaging or Endangering (R.C. 2909.06)
   f. Criminal Mischief (R.C. 2909.07)
   g. Criminal Trespass (R.C. 2911.21)
   h. Aggravated Trespass (R.C. 2911.211) Theft (R.C. 2913.02)
   i. Vandalism (R.C. 2909.05)
   j. Vehicular Vandalism (R.C. 2909.09)
   k. Only one reward will be paid even if the person is convicted of more than one eligible crime.
   l. If the conviction is appealed to a higher court, it must not be reversed on appeal.

5. **Process for claiming reward.**
   a. The informant must apply for the reward within 6 months after the conviction or final disposition of any appeal.
   b. The application must be made using the official claim forms available at ofbf.org, which must be fully completed.
   c. A reward committee appointed by the County Farm Bureau Board of Trustees will make a determination within 60 days after the application is submitted.
   d. All decisions of the reward committee are final.

$5,000 signs and decals are available through your county Farm Bureau.

Visit ofbf.org/counties to find your local office.

Learn more at OhioFarmBureau.org

Open Burning

Both the Ohio Environmental Protection Agency and the Ohio Department of Natural Resources have regulations concerning open burning in the state.

What does the EPA consider as "open burning"?

Open burning is the burning of any materials where contaminants resulting from combustion are released into the open air without passing through a stack or chimney.[1] Depending on what you are burning and where you are located, EPA permission may be required before burning.

What is the difference between a restricted and unrestricted area?

A restricted area consists of any area inside the corporation limits of a municipality.[2] In addition, if the municipality is between 1,000-10,000 citizens, the restricted area extends 1,000 feet beyond the municipality's boundary.[3] If the municipality has more than 10,000 citizens, the restricted area extends 1 mile past the municipality's boundaries.[4] An unrestricted area is any area outside of the restricted areas described above.[5]

What is considered agricultural waste?

Agricultural waste includes any waste material generated by crop, horticultural or livestock production practices and includes woody debris or plant material from stream flooding, bags, cartons, structural materials and landscape wastes that are generated in agricultural activities.[6]

Agricultural waste does not include land clearing waste, buildings (including dismantled or fallen barns), garbage, dead animals, animal waste, motor vehicles and motor vehicle parts.[7] Pesticides, such as fungicides, rodenticides, and herbicides are also not considered agricultural waste unless the manufacturer has indicated that burning is a safe disposal method.[8] For information on acceptable burning practices of these materials, contact the Ohio EPA.

What is considered residential waste?

Residential waste is any waste material, including landscape waste, which is generated upon the property of a one, two, or three family residence as a result of residential activity.[9]

1 OAC 3745-19-03(L)
2 OAC 3745-19-03(N)(1)
3 OAC 3745-19-03(N)(1)
4 OAC 3757-19-01(N)(1)
5 OAC 3745-19-01(O)
6 OAC 3745-19-01(A)
7 OAC 3745-19-01(A)
8 OAC 3745-19-01(A) and (E)

Residential waste does not include garbage, rubber, grease, asphalt, liquid petroleum products, or plastics.[9]

When can I burn agricultural or residential waste?

According to Ohio law, if you are located within a restricted area, you are not allowed to burn residential waste on your property. However, in a restricted area a landowner may burn agricultural waste that was generated on the premises, but must first notify the Ohio EPA at least 10 working days prior to the fire being set.[10] The notification must include a purpose for the open burn, a list of the nature and quantity of materials to be burned, the date(s) when the burning will take place, and the location of the burning site.[11] Upon receipt of notice, the EPA can determine any restriction on open burning and notify the landowner to that effect.[12]

If the landowner is not otherwise notified that the burning is not allowed, agricultural waste may be burnt on the date specified in the notice if the following conditions are met:

1. The fire is set when contaminants can readily dissipate.
2. The smoke will not create a visibility hazard on roadways, railroad tracks or airfields.

9 OAC 3745-19-01 (M)
10 OAC 3745-19-05(B)(1)
11 OAC 3745-19-05(B)(2)
12 OAC 3745-19-05(B)(3)

3. The fire is located at least 1,000 feet from any inhabited building, except for inhabited structures located on the same premises where the burn will take place.
4. The wastes are stacked and dried for efficient burning.
5. No materials containing rubber, grease, asphalt, liquid petroleum, plastics or building materials are burned.[13]

Both agricultural waste and residential waste, including landscape wastes such as trees, limbs or shrubbery, may be burned in an unrestricted area without notification to or permission from Ohio EPA if the same five conditions are met that are required for open burning of agricultural waste in a restricted area.[14] However, the same notification procedure outlined above for restricted areas will be required in an unrestricted area, if the pile of agricultural waste exceeds 20 feet in diameter by 10 feet in height (or 4,000 cubic feet) or the pile of residential waste exceeds 10 feet by 10 feet.

Whether you are planning to burn agricultural waste in a restricted or unrestricted area, it is a good idea to notify your local fire department of the date of your proposed burn. Depending on your location, the local fire district may require a permit for burning in addition to any EPA requirements. Local jurisdictions are permitted to make stricter regulations for open burning.[15]

What is land clearing waste?

Land clearing waste is any plant waste material removed from land for the purpose of preparing the land for residential, commercial, industrial or agricultural development.[16] Land clearing waste includes the plant waste material generated during the clearing of land for new agricultural development.[17]

When can I burn land clearing waste?

According to Ohio law, if you are located within a restricted area, you are not allowed to burn land clearing waste on your property.[18] If you are located within an unrestricted area, written permission from the Ohio EPA is needed to burn land clearing waste generated on the burning site.[19] The application to burn in an unrestricted area must be sent to Ohio EPA at least 10 working days prior to the date of the burn and must include a purpose for the proposed burning, the quantity or acreage and the nature of the materials to be burned, the date(s) of the proposed burn, the location of the burning site including distances to residences, populated areas, air fields, roadways and other pertinent landmarks, and the methods to be used by the applicant to reduce emissions of air contaminants.[20]

Once the Ohio EPA sends you a letter approving your open burn, land clearing waste can be burnt on the date specified in the application if all of the following conditions are met:

1. The fire is set when contaminants can readily dissipate.
2. The smoke will not create a visibility hazard on roadways, railroad tracks or airfields.
3. The fire is located no less than 1,000 feet from any inhabited structure unless the structure is located on the premises where the burn will take place.
4. An air curtain destructor, other device or other method which is determined by the director of the EPA to be as effective as an air curtain destructor is used to reduce the release of air contaminants. This should be addressed in your application to burn and will be approved when you receive your written permission to burn from Ohio EPA.[21]

Again, it is always a good practice to notify your local fire department of the date of the proposed burn if you have received permission to burn land clearing waste on your property.

Penalties for not complying with the open burning rules can result in a fine of up to $250/day for burning of residential waste, or up to $1,000/day for burning of any other waste.[22]

What materials are not permitted by the EPA to be burned?

The EPA asserts that the following materials may not be burned anywhere in the state at any time: garbage, which is defined as any waste material resulting from the handling, processing, preparation, cooking and consumption of food or food products;[23] materials containing rubber, grease and asphalt or made from petroleum, such as tires, cars and auto parts, plastics or plastic-coated wire;[24] and dead animals, unless approved for control of disease by a governing agency.[25]

How do I contact the Ohio EPA?

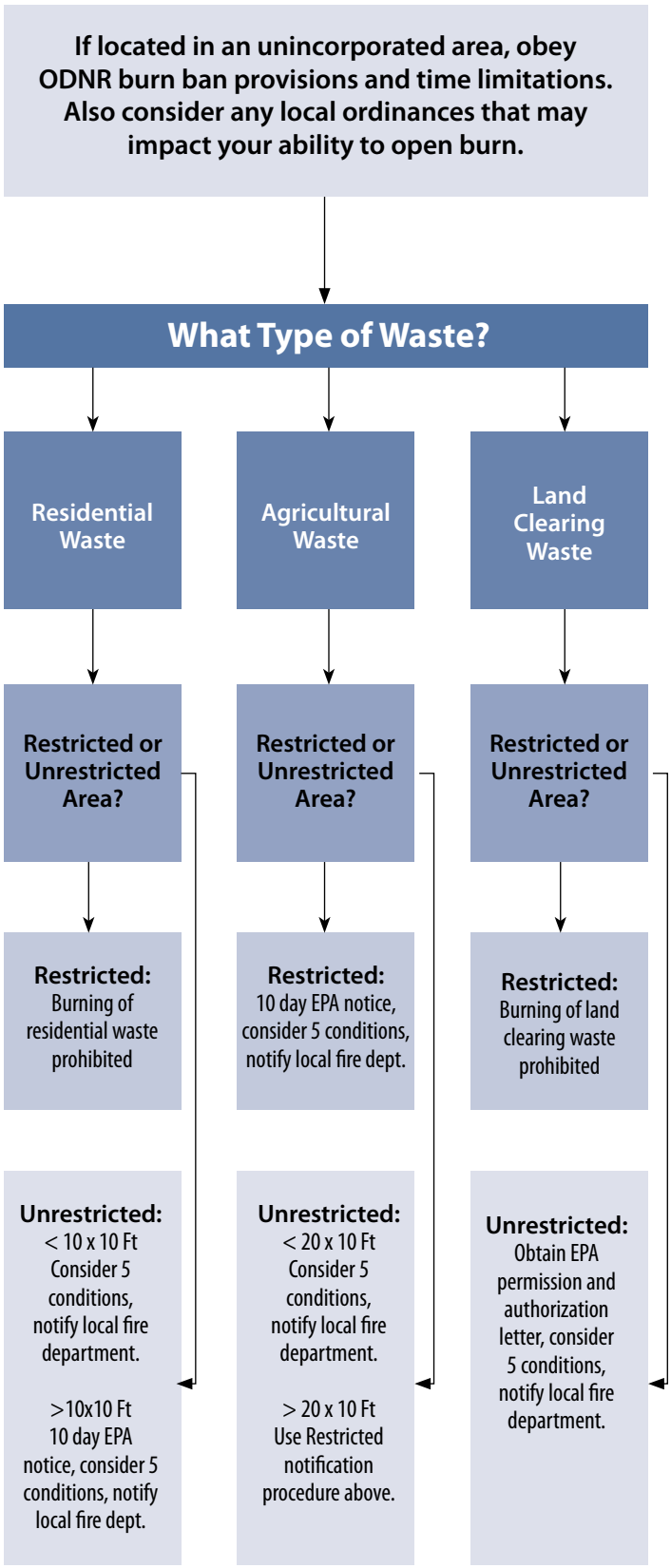
Where the burn will be conducted determines which district office must be contacted for notices and applications to open burn, or for answers to any other questions about open burning. Local EPA representative contact information, as well as notification and permission forms can be found online at the Ohio EPA Division of Air Pollution Control website, epa.ohio.gov/dapc. Information can also be obtained by calling the central office at (614) 644-8665.

13 OAC 3745-19-03(C)(3)
14 OAC 3745-19-04(B)(3)
15 ORC 3704.11
16 OAC 3745-19-01(J)
17 OAC 3745-19-01(J)
18 OAC 3745-19-03(A)
19 OAC 3745-19-04(C)(4), OAC 3745-19-05(A)
20 OAC 3745-19-05(A)(2)
21 OAC 3745-19-04(C)(4)
22 OAC 3745-19-06(A)
23 OAC 3745-19-01(G)
24 OAC 3745-19-01(A), OAC 3745-19-03(C)(3)(e), OAC 3745-19-04(B)(3)(e)
25 ORC 941.14

Other open burning restrictions

Ohio EPA also prohibits any open burning when any air quality alerts, warnings or emergencies are in effect.[26] In most cases, a landowner could determine whether an air quality alert or warning is in effect by visiting the National Weather Service website, weather.gov, and choosing "Active Alerts." If the area has its own local division of air pollution control, the landowner can also check with this agency to determine if any alerts are in place to prevent open burning.

Ohio Department of Natural Resources prohibits any open burning in unincorporated areas between the hours of 6 a.m. and 6 p.m. during the months of March, April, May, October and November unless the burn is conducted in a plowed field or garden and is at least 200 feet from any woodland, brush land or field of dry grass.[27] Prescribed fires, those used to meet resource management objectives, are allowed during these months so long as a Prescribed Fire Manager is on site. Contact ODNR Division of Forestry for more information, ohiodnr.gov/home.



26 OAC 3745-19-02
27 ORC 1503.18

Line Fence

Line fence law became a major source of confusion and contention for many rural landowners, as court decisions and customs muddied the meaning of much of the law. The line fence laws were updated, effective Sept. 30, 2008. The result is a set of laws attempting to balance the considerations of all types of farmers and landowners.

When the line fence law applies

The line fence law applies to any owner of land in fee simple, an estate for life, an easement, or a right of way while used by the owner as a farm outlet.[1] The law also applies to the Ohio Department of Natural Resources, conservancy districts, and political subdivisions with a real property interest in recreational trails, whenever they own, lease, manage, or control land that neighbors a landowner with livestock.[2] The law does not otherwise apply to the state or state agencies.

The line fence law does not apply to the enclosure of lots within municipal corporations, the enclosure of adjoining properties laid out into lots outside of municipal corporations, or fences required to be constructed by railroads under ORC 4959.[3] The line fence law will also not apply if the adjoining landowners enter into a written agreement under ORC 971.04, or if the fence is not actually a partition fence.[4] A "partition fence" includes those on a division line, or those that have historically been considered to be the division line, even if a subsequent land survey shows the fence is not directly on the line.[5]

Existing fences

For those partition fences that were in existence prior to the enactment of the new law (Sept. 30, 2008), the fence must be maintained in equitable shares between the adjoining landowners, regardless of the fence's condition.[6] If a fence had been recently removed[7] and the owner had filed an affidavit by Sept. 30, 2009, the maintenance of any replacement fence will proceed as if it had never been removed, requiring equitable shares in maintenance.[8] Going forward, if a landowner wishes to remove a fence and not immediately replace it, but retain the application of the equitable shares rule, they must file an affidavit within one year of its removal with the county recorder evidencing the fence and its location.[9] Any replacement fence built will then proceed as if the original fence had never been removed. Landowners should consult with neighbors before removing a partition fence, whether or not the landowner intends to replace it.

"Equitable" maintenance is to be determined by considering the following six factors:[10]

1. The topography of the property.
2. The presence of bodies of water.
3. The presence of trees/vines/vegetation.
4. The level of risk of trespassers on either property due to population density or recreational use of adjoining properties.
5. The importance of marking division lines.
6. The number and type of livestock owned by either owner contained by the fence.

Previously, the law had required equal maintenance between landowners. The use of the term "equitable" means shares may not necessarily result in 50/50 maintenance or cost sharing of a fence. "Equitable" instead will use the six factors above to determine the shares of the maintenance and cost based on the individual situation. This could mean one landowner is solely responsible for the entire cost of building or maintaining a fence.

1 ORC 971.01(D)(1)
2 ORC 971.01(D)(2)
3 ORC 971.03(A)-(C)
4 ORC 971.01(E)
5 ORC 971.01(E)
6 ORC 971.06
7 Within 2 years prior to filing of affidavit.
8 ORC 971.05, 971.06(C)(1)-(3)
9 ORC 971.06(C)(1)-(3)
10 ORC 971.09(E)

Adjoining landowners are always free to enter into a written agreement evidencing an arrangement for maintaining the fence they come to privately. This agreement can be recorded with the county recorder, making it binding on the two parties and any successors, and enforceable by the township trustees or a court if a dispute should arise.[11]

Landowners wishing to use an existing partition fence are advised to inquire into the status of the partition fence, including how the maintenance obligations and costs are shared between the owners. This would be a good time to put the agreement in writing.

New fences

If no fence is in existence, there was no affidavit filed evidencing a fence, and there is no written agreement between the landowners, the landowner who wants the fence is solely responsible for the cost of building and maintaining it.[12] However, if a landowner with livestock neighbors the Department of Natural Resources, a conservancy district, or a political subdivision with a real property interest in recreational trails, the government agency will be responsible for 50% of the cost of building and maintaining a partition fence, unless an alternative written agreement is entered into by the parties.[13]

A landowner building a new fence should also make record of the cost of building the fence and file an affidavit with the county recorder evidencing that amount. Each year thereafter, the landowner should do the same with a record of the yearly costs of maintaining the fence. By doing this, a landowner will ensure that should a neighbor place livestock against the fence, that neighbor will be responsible for a proportionate share of the depreciated cost of building and maintaining the fence.[14] If the property is transferred, subsequent owners will also be liable for costs should they place livestock against the fence.[15]

If no affidavit is filed, the neighboring landowner will not be required to pay the past costs of the fence.[16] The law states an adjoining owner shall promptly pay any reimbursement for the partition fence upon a claim of the original owner. If the neighbor doesn't pay, the original owner has a right to file an action in court to recover the costs of the fence.[17]

Landowners wishing to begin placing livestock against a partition fence are advised to inquire into the status of the partition fence, including whether the new user will be responsible for a proportionate share of the depreciated cost of building and maintaining the fence, as well as maintenance obligations going forward.

11 ORC 971.04, 971.09(B), 971.16(B)(3)
12 ORC 971.07(A)
13 ORC 971.071
14 ORC 971.07(B). By law, fences depreciate at 1/30th per year for 30 years.
15 ORC 971.07(B)
16 ORC 971.07(E)
17 ORC 971.07(C)

Fence requirements

Prior to Sept. 30, 2008, the law did not specify the type of fence to be built. Any fences in existence prior to Sept. 30, 2008 are not required to meet any specifications under the new law.[18] The new law does provide for a "preferred partition fence." A preferred partition fence includes a woven wire fence, either standard or high tensile, with one or two strands of barbed wire located not less than 48 inches from the ground, or, a nonelectric high tensile fence of at least seven strands constructed in accordance with the Natural Resource Conservation Service conservation practice standard for fences, Code 382.[19] A preferred partition fence is required by law for any new fence on a property line that will hold livestock, regardless of who pays for the fence.[20]

Adjoining landowners can agree, in writing, to not have a fence, or to have a fence other than a preferred partition fence, such as barbed wire, electric or living fence.[21] Nothing in the law prevents a landowner from building a fence exceeding the preferred partition fence requirements.[22] However, the landowner requesting such a fence shall pay the additional costs and expenses of building the fence and maintaining it in good repair beyond the cost of a preferred partition fence.[23]

Protections for fence builders

If a landowner chooses to build a new partition fence, and the adjoining landowner is not sharing in the construction of the fence, the owner or his contractor may enter the property up to 10 feet for the length of the fence in order to build and maintain the fence.[24] The owner or his contractor will be liable for any damages to the adjoining property, including damages to crops.[25] Trees are considered property; therefore if they have value, the landowner building the fence will be liable for any trees on the neighboring property that need to be removed. It is a good idea to consult with neighbors before removing trees on the property line or on the neighbor's side of the property line, and oftentimes a timber appraisal is helpful to determine whether the trees have any value. Some neighbors will not object to the removal of the trees so long as they are paid for the timber, less the costs of harvesting the timber.

The law also makes it a crime to interfere with or obstruct anyone who is lawfully engaged in building or maintaining a partition fence.[26] Penalties range from a second degree misdemeanor when a threat of harm is made, to a fifth degree felony if serious harm or death is a result of the interference.[27]

18 ORC 971.02(C)(2)
19 ORC 971.01(F)
20 ORC 971.02(A)
21 ORC 971.02(C)(1)
22 ORC 971.02(B)
23 ORC 971.02(B)
24 ORC 971.08(A)
25 ORC 971.08(A)
26 ORC 971.08(B)
27 ORC 971.99(B)-(D)

Use good judgment in notifying adjoining landowners before entering their property for fence construction or maintenance, particularly if it is likely damage to property, crops, or trees will occur.

Complaint processes

If a landowner does not feel his or her neighbor is maintaining the fence in equitable shares, and discussions with the neighbor have not resolved the issue, there are two options which can be used in order to remedy the situation.

The first option involves filing a complaint with the township trustees with jurisdiction over the fence. Once a fence complaint is filed with the township trustees, the trustees must notify the landowner that they have a choice to file the action in court in lieu of the township trustee procedure. After the complaint is filed and signed by the landowner, a viewing of the fence must be completed with at least 10 days notice to the landowners.[28] At the viewing, the trustees must determine whether a partition fence exists, regardless of its condition; whether there is evidence a partition fence previously existed; or if an appropriate affidavit had been previously filed with the county recorder.[29]

At the next regularly scheduled trustees' meeting, the board must determine if a partition fence is required to be built or maintained in good repair.[30] If the board determines a fence is required to be built or maintained, it will decide each owner's equitable share using the six factors, and put those shares in writing.[31] The board may assign a specific portion of the fence, or it may assign a portion of the total cost, if the owners have submitted to the board an estimate from a contractor of the necessary cost.[32] If the fence will contain livestock, any assignment of cost shall include the cost of building or modifying a fence to meet the standards for a preferred partition fence.[33] The board will certify its decision to the county recorder.[34]

Property owners can then choose to accept the decision, or request to appeal the decision to binding arbitration. The trustees will submit a report to the court of common pleas overseeing the arbitration, and shall have no further involvement. Binding arbitration will have no right of appeal once a decision has been rendered. In addition, landowners should consider the costs of binding arbitration which will be borne equally by both parties.[35]

Alternatively, a landowner could choose to file a complaint with the local Court of Common Pleas to hear the dispute and make an assignment of equitable shares.[36]

The court will follow a similar procedure as the township trustees, determining if a fence exists, and if so, what the equitable shares between the landowners should be using the six factors.[37] Landowners will be entitled to an appeal through the court system like any other court action.

Noxious weeds

Landowners are still required to keep a four-foot strip on each side of the fence free of brush, briers, thistles or other noxious weeds, regardless of the landowner's share of the cost to build or maintain the fence.[38] If a landowner is having issues with a neighbor not keeping the fence line free of these weeds, the landowner must give notice to the neighbor that they wish the weeds to be removed. Once a 10-day notice is given, the aggrieved landowner may file with the township trustees to have the issue addressed.[39] The township trustees will view the premises, and if the complaint is justified, have the weeds cut with the costs of doing so assessed to the offending landowner on his or her next tax bill.[40]

Removing a partition fence

A landowner wishing to remove a fence must give a 28-day notice to the adjoining landowners in writing. If an owner removes the fence without giving proper notice, he or she forfeits any right to reimbursement for the construction or maintenance of a new fence.

In addition, if a landowner removes a partition fence that a neighbor has a property interest in, whether the neighbor is currently using the fence or not, the landowner who removed the fence may be liable to the neighbor for damages, including attorney's fees and court costs.[41] Therefore, it is imperative to determine the status of the partition fence and to consult with neighbors before the fence is removed.

28 ORC 971.09(A)
29 ORC 971.09(B)
30 ORC 971.09(D)(1)
31 ORC 971.09(D)(2)
32 ORC 971.09(D)(2)
33 ORC 971.09(D)(2)
34 ORC 971.09(F)
35 ORC 971.34
36 ORC 971.09(A)(1)(a), ORC 971.16
37 ORC 971.16
38 ORC 971.33
39 ORC 971.33
40 ORC 971.35
41 ORC 971.17(C)

Drainage and Water

Water, and the ability to remove it, is extremely important to Ohio farmers. Each growing season, Ohio's farmers encounter issues with the amount of water on their property: either too much due to excessive rain and ineffective drainage or too little due to drought or interference with moving water. Being a water-rich state, Ohio historically limits statutory law related to water rights, and much of our water law comes from cases that have presented themselves to the courts. Therefore, the legal implications of drainage issues are tremendously fact specific.

"Reasonable use": the standard

Ohio courts have applied the "reasonable use" standard in Ohio regarding water and drainage and subsurface drainage disputes.[1] The reasonable use doctrine states a landowner may make a reasonable use of his land, even though the flow of surface waters could be altered by that use and cause some harm to others, and has no liability for that harm unless his actions are unreasonable.[2] "Reasonable" is a question of fact, determined by the court based upon the details of the situation.

The factors a court will use to determine whether a use is reasonable include: the purpose and suitability of the water/drainage use, the gravity of the harm to the innocent landowner, the practicality of the use and alternate methods, and the justice of requiring others to bear losses caused by the use.[3]

If a neighbor or other landowner has unreasonably interfered with drainage or watercourses that affect your property, a civil lawsuit may be pursued for either monetary damages or an injunction to stop the offending practice. Examples would be a neighbor damming a creek that flows through a landowner's property, either depriving the landowner of water or increasing flooding, or a neighbor cutting drainage tile and not replacing it. The court will use the above factors to determine if the actions of the others were reasonable or if the practice should be stopped or deserves compensation.

1 *McGlashan v. Spade Rockledge*, 62 Ohio St.2d 55, syllabus (1980)
2 Id.
3 4th Restatement on Torts 2d 108-142, Sections 822-831

Statutory drainage law

The Ohio Revised Code provides two statutory processes to accomplish ditch projects that assist in the drainage of property. These processes are the soil and water conservation district petition process and the county commissioner petition process.

Soil and Water Conservation District petition process

Ohio Revised Code Chapter 940 provides the process by which the Soil and Water Conservation Districts may effectively work with landowners to accomplish projects for flood prevention, conservation, development, utilization and management of natural resources, including water.[4]

For SWCD projects, the landowner initiates the process through a petition, which is either preliminarily accepted or rejected by the SWCD.[5] Landowners should consult with their district prior to filing a petition to determine the proper forms and procedures.[6] After preliminary acceptance, the SWCD will view the prospective project site and hold a public hearing on the proposed improvement.[7] Other landowners may file objections prior to the hearing, and SWCD staff will present a report at the hearing detailing costs and plans of the improvement.[8]

After notice and hearing, the SWCD may vote to proceed with a project survey if they find that the proposed improvement is necessary and conducive to public welfare and the benefits will outweigh the costs.[9] Upon an affirmative vote, the SWCD will prepare all necessary information in a report to be submitted to the county commissioners. Submissions to the commissioners will include the petition, a preliminary report, surveys, plans, construction specifications, schedule of damages, cost estimates, estimated assessments, and any other information obtained during the preparation of the submission.[10]

Upon receiving a submission from SWCD, the county commissioners will conduct a hearing to determine if the following elements have been satisfied:[11]

4 ORC 940.06
5 ORC 940.19
6 ORC 940.19 (E)
7 ORC 940.19
8 ORC 940.20(A)(5), 940.22
9 ORC 940.23
10 ORC 940.24, ORC 940.25, ORC 940.26, ORC 940.27, ORC 940.28.
11 ORC 940.31

1. The benefits of the improvement outweigh the cost.
2. The improvement is necessary.
3. The improvement is conducive to the public welfare.
4. The improvement will improve water management and development in the county, and.
5. The improvement will promote economic, environmental, or social development in the area.

If approved, the commissioners may levy an assessment on property within the project area for the construction either at a uniform or varied assessment rate as necessary.[12] Landowners with property subject to the assessment will receive notice of the property to be assessed.[13] Affected landowners have the ability to appeal final estimated assessments within 30 days to the appropriate court of common pleas.[14]

County commissioner petition process

Drainage projects can also be accomplished through a similar process with the county commissioners. Although SWCD projects can apply to any type of improvement, the county commissioners are given authority in ORC Chapter 6131 to only construct, recondition, widen, deepen, straighten, or alter the course of a ditch, watercourse or floodway.[15]

As with the SWCD process, the landowner initiates the process by submitting a petition for improvement to the county commissioners.[16] Landowners should consult with their county engineer to determine the proper forms and procedures before filing a petition.[17] Those submitting the petition will be required to post a bond in the amount of $1,500, plus $5 per parcel of land in excess of 200 parcels to cover costs of the notices and hearings.[18] The commissioners will then hold a viewing of the proposed improvement, provide for a hearing, and send notice to all the affected landowners announcing the viewing and hearing by publication in a local newspaper.[19] The county engineer prepares a preliminary estimate of the costs, comments on the feasibility of the project, provides a list of favorable and unfavorable factors of the improvement apparent to the engineer, and gives an opinion on whether the benefit exceeds costs.[20] The county engineer may also submit alternate proposals that achieve a similar end.

Based upon the viewing and the hearing, the commissioners may approve the petition upon finding the proposed improvement is necessary and that it will be conducive to the public welfare and finding the benefit of the improvement will exceed the costs.[21] "Benefits" considered include the elimination or reduction of damage from flood waters, removal of water conditions that jeopardize public health and safety, increased value of land resulting from an improvement, use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto, and providing an outlet for runoff from artificial drainage.[22]

If the board approves the petition, the county engineer drafts plans, maps and cost estimates, estimates benefits to each landowner and makes a recommendation for assessments.[23] Upon these recommendations, a final hearing is held where landowners have the opportunity to challenge the engineer's plan. The county commissioners then make a final approval of the project, and in doing so consider: cost, compensation for land taken, effect on land along or in vicinity of improvement, effect of improvement on land below lower terminus of improvement, sufficiency or insufficiency of the outlet, benefits to the public welfare, and any other proper matter that assists in finding for or against the improvement.

Throughout the process, landowners have the right of appeal. Appeal from final decision on the project is limited to within 30 days of the final approval or disapproval.[24] The appeal can be centered around the necessity of the project, whether the project is conducive to the public welfare, whether the cost exceeds the benefits, whether the route, termini or mode of construction is the best to accomplish the purpose of the improvement, whether assessments levied are in accordance with benefits, and whether awards for compensation or damages are appropriate.[25]

Anyone who owns land along the improvement may form an advisory committee in order to recommend needed repair or maintenance work to the county engineer. The committee should notify the engineer of its recommendations by May 1 of each year.[26] The engineer shall consider these recommendations but is not bound by them.

If a ditch or drainage improvement was put in place by the petition ditch procedure and requires maintenance,

12 ORC 940.32(A)
13 ORC940.32(B)
14 ORC 940.32, 940.38
15 ORC 6131.02
16 ORC 6131.04
17 ORC 6131.04(A)
18 ORC 6131.06
19 ORC 6131.07
20 ORC 6131.09
21 ORC 6131.12
22 ORC 6131.01(F)
23 ORC 6131.14
24 ORC 6131.25
25 ORC 6131.25
26 ORC 6137.06

improvement or alteration, request for such work can be initiated in the same way. For example, if tile would become clogged on a neighbor's property, landowners should first use the petition ditch process in order to remedy the situation. If ditches are not properly maintained by officials, or officials do not respond to a petition for maintenance under the above process, a legal action may be necessary to require them to fulfill their legal obligations. It is important to note that local governments receive a certain amount of immunity for negligent governmental actions under the law. This immunity may limit or eliminate recovery of monetary damages arising out of drainage maintenance issues or damage.

Ditch maintenance fund

Each county is directed to create and maintain a fund exclusively for the repair, upkeep and permanent maintenance of any improvements constructed under the above county commissioner ditch petition process or SWCD improvements.[27] The fund is maintained by a yearly assessment levied upon the benefitted landowners, based upon the estimated benefits of the improvement, with a minimum assessment of $2.[28]

Each year, the county engineer is charged with the duty of inspecting all drainage improvements and making recommendations to the county commissioners regarding the condition of drainage improvements, as well as the costs to repair and maintain the improvements.[29] After six annual assessments, the county commissioners will review the costs, benefits, and assessments and may ask the county engineer to refigure the original cost of construction and update the assessments used to pay for the maintenance and construction of the ditch improvement accordingly.[30]

Landowners also may petition for a reduction in their maintenance assessment in exchange for proposed work the landowner will perform on a public ditch, watercourse or other improvement.[31] Landowners must submit a proposal of the work prior to May 1, and must state the nature of the work to be performed. The engineer, in making his inspections, will note the extent to which the landowner has carried out any maintenance or repair work, and shall include within his annual report to the commissioners the name of each owner who has applied for a reduction in maintenance assessment.[32] The county commissioners then may either confirm or reject the allowances.

If maintenance or upkeep of a ditch is made necessary by the negligent acts of a landowner, the commissioners may choose to raise the assessment amount on the negligent landowner to compensate for the needed maintenance.

27 ORC 6137.02
28 ORC 6137.03
29 ORC 6137.06
30 ORC 6137.11, 6137.112
31 ORC 6137.08
32 ORC 6137.08

Private development

Landowners may be able to privately develop drainage projects on their own property or with the consent and cooperation of their neighbors. SWCD can assist a landowner with planning and constructing appropriate drainage projects on their property. Each county has an SWCD office that houses professional technicians experienced with drainage construction, as well as a statewide network of drainage engineering resources to assist landowners.

If done with the cooperation of a neighbor, written agreements that accurately memorialize the expectations and duties of the two landowners should be created. An easement will most likely be necessary to allow for shared responsibility of the drainage maintenance and upkeep. When writing the agreemenmt, ensure the easement and any agreements are set up so that they will be binding upon subsequent landowners should either property be sold. It will be helpful to engage a private attorney to draft appropriate and binding documents to cover the drainage projects.

In some situations, landowners may acquire a prescriptive easement over neighboring property for the purposes of drainage. In general, a prescriptive easement may be created when property is used for a certain purpose by a non-landowner for a period of at least 21 years and that use is open and obvious to the actual landowner. If a court would declare a prescriptive easement in regard to drainage, the landowner could go on to a neighbor's property for purposes of maintaining the drainage at his or her own expense. However, a court will typically not consider a prescriptive easement claim until after the landowner has unsuccessfully used the petition ditch process.

Altering or improving natural waterways or wetlands

Landowners should also be careful whenever altering or improving natural watercourses or wetlands on their property. Filling, dredging, or otherwise altering natural watercourses or wetlands could result in significant penalties or enforcement from the Ohio EPA, US EPA or the Army Corps of Engineers under the Clean Water Act.[33] Such action could in turn result in a loss of conservation or farm program payments from the Farm Service Agency.[34] Before taking any action to alter a natural watercourse or wetlands on your property, determine whether permits from the above authorities may be required. Even private drainage ditches, if not maintained for long enough periods, may become naturalized to a point that they could be considered a natural waterway, leaving limited ability for maintenance or reconstruction.

33 33 USC 1311, 1344
34 16 USC 3821-24

Current Agricultural Use Value (CAUV)

Current Agricultural Use Value (CAUV) is a program that values property based upon its value for agricultural productivity, rather than fair market value, for tax purposes. CAUV was designed to follow the farm economy, resulting in higher values in times of prosperity and lowered values if the farm economy falters. Even as CAUV values increase, landowners typically still see a significant discount from fair market value if enrolled in the CAUV program.

Property taxation and exceptions to the rule

The Ohio Constitution requires that all property be taxed uniformly.[1] This traditionally has meant all land is taxed at its fair market value, or the value at which it would change hands between a willing seller and willing buyer.[2] A constitutional amendment in 1973 allowed for farmland to be valued differently, using the capitalized net income from agricultural activities to value land or the land's current agricultural use value (CAUV). [3] At that time, the value of land at its "highest and best" use was quickly becoming the value used to figure real estate taxes, allowing development pressure to push up the taxable value of farmland. With CAUV, the land value depends upon capitalizing the expected net income from farming, making the taxation of farm real estate more fair and reasonable.

All properties have four individual values, which are aggregated to find the total property value. The four individual values represent the home, a one-acre home site, other buildings and all other land. CAUV can only apply to the "all other land" portion of a property's value. Land values are reappraised on a rotating six-year schedule.[4] An appraisal is updated every three years following reappraisal or at any time the auditor finds that property has changed in value.[5]

Qualifying for CAUV

Tracts of land, 10 acres or larger, can qualify for CAUV if they are devoted exclusively to commercial agricultural use.[6] Farms smaller than 10 acres are eligible if the average yearly gross farm income, or anticipated income, is at least $2,500 from agricultural products.[7] The land could be used for virtually any type of agriculture, however, there must be some profit seeking activity involved to make it "commercial." Hobby farms or agricultural activities conducted solely for personal use or consumption will not qualify land for CAUV. Land enrolled in a federal conservation or land retirement program also qualifies for CAUV treatment, regardless of acreage.[8] Woodlands not managed for timber that are contiguous to at least 10 acres of otherwise qualifying agricultural land can also qualify for CAUV, as well as land used for conservation practices that is 25% or less of the total acreage.[9] Finally, the existence of agritourism on a farm that otherwise qualifies for CAUV does not disqualify that farm from the CAUV program.[10] Landowners must apply with the county auditor between the first Monday in January and the first Monday in March each year.[11] There is a $25 fee for new applications and no charge for renewals. Typically, the application will ask for a description of the land and farming activities to help the auditor understand how the land qualifies for CAUV.

1 Ohio Constitution, Article XII, Section 2
2 ORC 5713.03
3 Ohio Constitution, Article II, Section 36
4 ORC 5715.33
5 ORC 5715.33
6 ORC 5713.30(A)(1)
7 ORC 5713.30(A)(2)
8 ORC 5713.30(A)(1)(c)
9 ORC 5713.30(A)(1)
10 ORC 5713.30(A)(4)
11 ORC 5713.31

Calculating CAUV values

CAUV values are based on the land's soil type.[12] To find the CAUV of a plot of land, the soil type is determined from a soil map.[13] The soil type takes into consideration problems or hazards due to slope, erosion, drainage or flooding on that particular farm. The calculation is based on the three most prevalent field crops in the state of Ohio: corn, soybeans and wheat.[14] Five factors make up the CAUV formula:[15]

- **Crop yields** are taken from the Farm Service Agency 1984 yield for the soil, and updated using a factor. The factor is derived by taking the most recent 10-year average statewide yield and dividing it by the 1984 average statewide yield.
- **Crop prices** are gathered from the Ohio grain elevators and the National Agricultural Statistics Service. A seven-year Olympic average of crop prices is applied to the yields to get the average gross income for the farm.
- **Non land production costs**, including things like seed, chemicals, fuel, transportation and machinery, are taken from the OSU Extension Crop Enterprise Budgets. The costs also use a seven-year Olympic average. Costs are deducted from gross income to arrive at the net return.
- **A cropping pattern** representing a five-year average of the percent acres harvested of the three crops in Ohio is multiplied by the net returns for each crop to arrive at rotational returns. These rotational net returns are added to find a total net return.
- **The capitalization rate** is the final factor. It uses data from a typical mortgage loan from Farm Credit Mid-America to determine interest rates for debt and equity, and uses a seven-year Olympic average. The total net return is then divided by the capitalization rate to arrive at the final soil value.

The Ohio Department of Taxation performs this calculation for all 3,500 soil types with a slope of 25% or less each year. Those values are then sent to the local county auditors, who apply values to each individual parcel based on the respective soil types. After applying the CAUV values to a property, the auditor will add the market value of any house, house site and buildings to arrive at the total appraised value for the farm. The auditor will take the total appraised value and assess taxes on 35% of that value, as Ohio law requires that all property be taxed at a uniform percentage, which is set by rule at 35%.[16]

12 ORC 5713.31
13 OAC 5703-25-33
14 OAC 5703-25-33(H)
15 OAC 5703-25-33
16 Ohio Const., Article 12, Section 2; OAC 5703-25-05(B)

Valuing conservation land

For land enrolled in a federal conservation or land retirement program, as well as qualifying land used for conservation practices, the auditor will apply the lowest CAUV value of all soil types to such acreage. If conservation land valued in this manner is not used for conservation purposes for at least three years, the auditor will recoup the tax savings enjoyed from being valued at the lowest soil value instead of the actual soil value.[17]

Removing land from the CAUV program

CAUV was intended to be a farmland preservation tool, and therefore provides for penalties if land is converted from agricultural use and removed from the CAUV program. There are four ways land will be considered converted and removed from CAUV:

- Failure to file a renewal application every year.
- Failure to file an initial application as a new owner.
- Failing to qualify as land devoted exclusively to agricultural use.
- Taking acts inconsistent with the return to agriculture if the land is laying fallow.

If any of these acts occur, the auditor is required by law to remove the land from the CAUV program and to charge recoupment.[18] Recoupment must be equal to the most recent three years of tax savings the owner enjoyed by being enrolled in the CAUV program.[19] In addition to the recoupment penalty, the owner will begin paying taxes on the fair market value of the land instead of the CAUV value. The property owner of record at the time land is converted from an agricultural use is liable for that recoupment, even if that property owner did not enjoy any of the past three years' savings. This is why it is very important to discuss CAUV status in any land sale.[20]

Appealing CAUV status or values

Landowners who feel their land should qualify for CAUV and who have had their CAUV application denied or their land removed from CAUV can appeal this through the local board of revision.[21] The county auditor, county treasurer, and a county commissioner (or a representative of each respective office) sit on the county's board of revision.[22] It is important for a landowner to establish a good record supporting his or her claim at the board of revision, as it may be difficult to present information not brought forth at the board of revision in later appeals.[23]

17 ORC 5713.31, 5713.34
18 ORC 5713.34, 5713.35
19 ORC 5713.34
20 ORC 319.202(B)
21 ORC 5715.19
22 ORC 5715.02
23 ORC 5715.19(G)

If the board of revision denies the claim, the landowner can choose to appeal to either the local Court of Common Pleas or the Ohio Board of Tax Appeals within 30 days after notice of the decision of the board of revision is mailed.[24] Through the local court, the landowner could then appeal through the typical court system. Through the Board of Tax Appeals, an appeal must be filed with the local court of appeals, with the option to seek a transfer to the Ohio Supreme Court. Landowners should seriously consider consulting with an attorney when disputing a CAUV denial or removal. Even at the board of revision stage, an attorney can help a landowner compile a sufficient record, which is very important for any further appeals.

CAUV values are not set or controlled by your county auditor; rather, they are determined by an official entry of the tax commissioner each year. This is in contrast to the other values that make up your property (house, home site, and other buildings), which are appraised and valued individually by your county auditor. Because CAUV values are not unique to individual property holders, appealing CAUV values requires asserting that the calculation itself is flawed or incorrect. If a landowner is considering such an action, it is highly suggested that they contact an attorney to sort how and if such claims could be made.

Additional CAUV benefits

Properties approved for the CAUV program are also afforded an affirmative defense in nuisance lawsuits arising from agricultural practices performed on the land participating in the CAUV program.[25] Landowners may secure a complete defense in a civil action for nuisance if they are able to show that the agriculture activities at issue are conducted on CAUV participating land, that the activities were established prior to the plaintiff's activities or interest, and that the activities are not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or were conducted in accordance with generally accepted agriculture practices.[26]

Additional resources

A full explanation of the CAUV calculation can be accessed at the Ohio Department of Taxation's webpage: tax.ohio.gov/real_property/cauv.aspx

Ohio Farm Bureau members can also access many other resources explaining CAUV at the Ohio Farm Bureau Federation website, ohiofarmbureau.org.

24 ORC 5717.01, 5717.05

25 ORC 929.04

26 Id.

Zoning and Land Use

Zoning restrictions can often place burdens upon agricultural activities of landowners. This information seeks to help landowners understand what are permissible zoning restrictions that can be applied to agricultural activities on their land.

County and township zoning

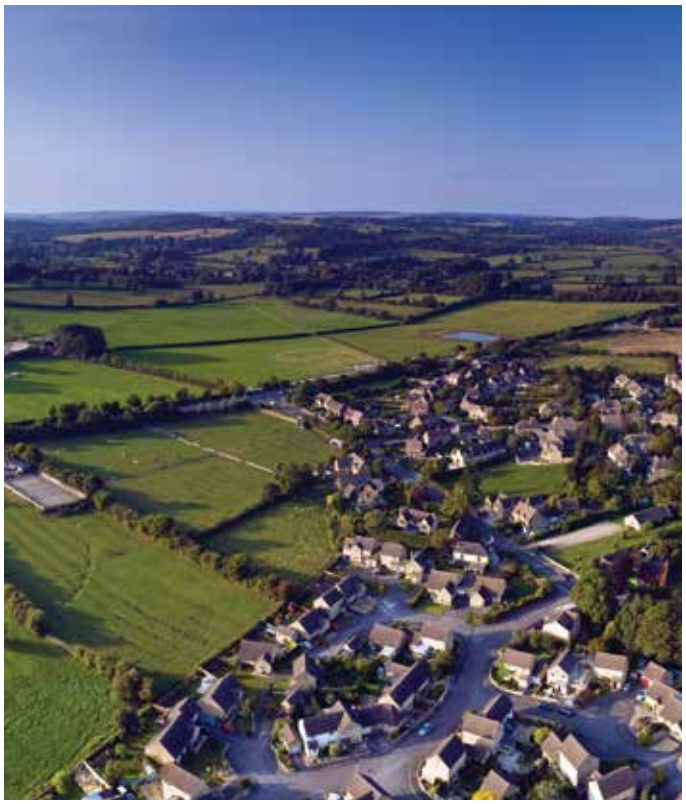
Both county and township governments have the ability to set reasonable zoning regulations. County and township governments may regulate the uses of land, such as where a factory can be located versus where a housing subdivision can be built and may regulate how densely populated an area may be. They may also regulate, through a comprehensive plan, uses of buildings and factors relating to a building's size and placement relative to roads or property lines. This power is generally granted to counties and townships through Ohio law. However, both of these local authorities are also restricted by the laws of the state, and cannot exceed the specific zoning limitations that have been placed upon them by state law. Local zoning regulations enacted by county and township governments are separate and distinct from other state or local regulations applicable to buildings or homes, such as building, fire, or residential code provisions, and any exemptions from zoning authority are likewise distinct from any applicable exemptions from other code regulations.

In general, state law has created a very limited ability for county or township governments to make zoning regulations concerning agriculture.

Two similar statutes provide this limitation to local governments.[1] The statutes prohibit these local authorities from making any zoning regulations concerning agriculture that apply to lots larger than five acres.

On lots that are less than five acres and located either in a platted subdivision or a non-platted area that consists of at least 15 contiguous lots, local governments have more flexibility regarding their zoning of agriculture. Specifically, local authorities can regulate:

- Any agricultural activities on lots that are one acre or less.
- Agricultural building height, size, and set-backs on lots less than five acres but more than one acre.



- Animal or poultry husbandry or dairying, on lots less than five acres, but more than one acre when those lots are in a subdivision which has at least 35% of the total lots developed. Once 35% of the lots are developed, any existing dairying or animal/poultry husbandry will be considered a nonconforming use.

County and township authorities are also limited in their ability to exercise zoning power over certain related agricultural activities, including:

- No power to regulate a farm market where 50% or more of the gross income received from the market is derived from produce raised on farms owned or operated by the market operator in a normal crop year. County commissioners may regulate factors such as size of structures, parking areas, set back building lines, egress or ingress where that regulation is necessary for public safety.
- No power to regulate biodiesel production, biomass energy production or electric or heat energy when located on farmland that derives at least 50% of the stock material from the farm.
- No power to regulate production of biologically derived methane if the production facility is located on the farm, derives at least 50% of the stock material from the farm, and produces no more than 5 MW or 60,710 BTUs.

1 ORC 519.21, ORC 303.21

- No power to prohibit the use of land for "agritourism," which is an agriculturally related educational, entertainment, historical, cultural, or recreational activity conducted on a farm that invites members of the public to enjoy that activity. Local governments may regulate factors such as size of structures, parking areas, setback building lines, egress or ingress where that regulation is necessary for public safety.[2]

Annexation and municipal zoning

Under the Ohio Constitution, municipalities enjoy the power of home rule. "Home rule" basically means cities have all rights of self-government, so long as the laws they make do not conflict with the general laws of the state. In almost all cases, zoning regulations will be seen as a distinct home rule power, which cannot be interfered with by the state government. Only in certain exceptional cases have courts found a city's zoning regulations to be impermissible under state law.

Cities often restrict agricultural activities within their boundaries. Today, many city governments have become more open to the idea that people are interested in growing and producing their own food. If a landowner faces issues with zoning regulations and agriculture within their city, the landowner should work with local officials to determine whether their chosen activities can be achieved within the zoning scheme. However, remember that city zoning has the goal of creating an urban environment acceptable for the citizens on the whole. Neighbors may live in the city because they do not want to live next to livestock or farm animals, and city zoning officials must also take these concerns into account. Farmland that has been annexed into a municipality should typically be allowed to continue agricultural activities, despite city zoning codes, as a nonconforming use.

Nonconforming use

A nonconforming use of land is one that existed prior to a zoning regulation being imposed, and which may continue at its current activity.[3] The nonconforming use cannot be expanded or significantly changed. Additionally, if the use is abandoned for more than two years, the property will be required to comply with all current zoning regulations.[4] Nonconforming use designations become especially important in situations involving annexation of rural lands. For example, a farm may be annexed by a municipality and technically, the farm activities would violate the municipality's zoning code. However, because the farming activities existed prior to the imposition of the zoning regulation, the farm cannot be forced to change its activities through the zoning regulations.

Remember though, nonconforming uses cannot be expanded or significantly changed. This means the farm could be limited in its ability to grow larger, or change the commodities or livestock it grows. Additionally, if a nonconforming use is ended for at least two years, it cannot be revived at a later time. This means if the farm would stop operation, it could not go back into farmland without being required to comply with the applicable zoning regulations. Note that this issue for farming would not apply in an area with county or township zoning, as the agricultural zoning exemptions would apply.

Zoning disputes

When zoning disputes arise, landowners will typically be notified of a zoning violation by their local authority and be given a chance to correct the offending issue. In township and county zoning situations for agriculture, always look to the language of the statute to ensure whether the local authorities have the ability to impose zoning regulations upon your agricultural operation. Often, simply showing the text of the statute can assist zoning officials in understanding the limits of zoning power over agriculture.

Zoning disputes typically first go before the local zoning board of appeals, which can hear arguments from the landowner as to why the zoning violation should not apply.[5] If the landowner does not receive a satisfactory result from the zoning board, they can appeal that decision to the local Court of Common Pleas.[6] In reviewing a zoning board decision, a court will look for whether the zoning board violated its own zoning codes, or if the decision was unconstitutional, arbitrary, illegal or not based on sufficient evidence. The court could not change a zoning decision, however, based solely on its own judgment as to the appropriateness of the land's use.

Important statutes

Statutes referenced in this publication, as cited below, can be accessed at codes.ohio.gov/orc.

2 ORC 519.21(C)(4) and (D)(2), ORC 303.21(C)(4) and (D)(2), ORC 901.80(A)(2)
3 ORC 303.19 (counties), 519.19 (townships), 713.15 (municipalities)
4 ORC 303.19 (counties), 519.19 (townships), 713.15 (municipalities)
5 ORC 303.14 (counties), 519.14 (townships), 713.11(municipalities)
6 ORC 2506.01(A)

Eminent Domain

The 5th Amendment to the U.S. Constitution—commonly referred to as the "Takings Clause"—forbids the taking of private property for a public use without just compensation. The Ohio Constitution contains similar protections in Article 1, Sec. 19, providing that private property should be held forever inviolate but subservient to the public welfare.

"Appropriation," "eminent domain," "condemnation" and "takings" are all terms that are commonly used to refer to the government's ability to take private property for public use. No matter what it is called, protections of the U.S. and Ohio Constitutions, as well as additional safeguards in the Ohio Revised Code, will apply in eminent domain situations.

Recent U.S. Supreme Court and Ohio Supreme Court cases have reshaped eminent domain. In the groundbreaking *Kelo v. New London* decision, the U.S. Supreme Court ruled that economic benefit or development satisfies the public-use requirement in the U.S. Constitution, and therefore private property could be taken by the government to be used for nongovernmental (i.e. private) development without violating the Takings Clause of the U.S. Constitution.[1] Shortly thereafter, the Ohio Supreme Court ruled in *Norwood v. Horney* that economic development alone does not satisfy the public-use requirements under the Ohio Constitution, and therefore economic development may not be the sole reason for taking property for private development in Ohio.[2] Following both court cases, the Ohio General Assembly overhauled the eminent domain laws setting specific procedures for the appropriation of property and establishing additional safeguards against the taking of property for private development.

Preliminary procedures

The appropriating authority is required to complete three steps at least 30 days prior to filing a petition for appropriation:

Appraisal: The agency must obtain an appraisal of the property sought before submitting a good faith offer and provide a copy of the appraisal to the owner at the time of the first offer to purchase.[3]

Notice: The agency must give the landowner notice of the intent to appropriate. This notice must be either personally served or sent via certified mail to the property owner.[4] The notice must adequately describe the property, the purpose for appropriation, and contain a description of landowners' rights.[5]

Offer: Ohio law requires the appropriating authority to submit a good faith offer to purchase the property at least 30 days before the petition for appropriation is filed.[6] The appropriating authority may only revise its offer if it becomes aware of indigenous conditions of the property that could not have been reasonably discovered at the time of the initial offer or if the agency and the owner exchange appraisals before the appropriation petition is filed.

These three documents may be provided to the landowner at one time in one delivery. A landowner should consider obtaining a private appraisal of their property as early in the process as possible in order to ensure the offer and appraisal received is fair. Having a private appraisal performed can also ensure the landowner is able to take advantage of certain attorneys' fees provisions if an agreement cannot be met. The landowner should also consider engaging a private attorney early in the process. Eminent domain can be a time sensitive process. By hiring a private attorney, a landowner can rely on the assistance of counsel to ensure these procedures are followed properly.

1 *Kelo v. New London*, 545 U.S. 469 (2005)
2 *Norwood v. Horney*, 110 Ohio St. 3d 353 (2006)
3 ORC 163.04(C)
4 ORC 163.04(A)
5 ORC 163.041
6 ORC 163.04(B)

Survey: After notice is given, the agency may enter the property to perform surveys.[7] The agency must provide 48 hours notice of any entry for survey. The agency is also liable for any damages caused to the property in entering or performing such surveys.

Petition for appropriation

If an agreement to purchase cannot be made and accurate notice has been given, the appropriating authority will file a petition for appropriation.[8] The landowner will be served with a copy of the petition and has 20 days to respond. If the landowner has not yet hired an attorney, at this point it is imperative to engage counsel to formulate an answer to the petition.

Once an answer is filed, the court will set a hearing date between five and 15 days from the filing of the answer to rule upon the claims of both parties. The landowner can challenge the necessity of the appropriation, and the agency has the burden to prove necessity of appropriation of the specific and contiguous parcels as well as the public use. If the court rules against a landowner on the basis of necessity or any other matter denied by the owner in their answer, the landowner is entitled to an immediate appeal.[9]

The court will set a time not less than 60 days from the decision of necessity for a jury trial to determine the value of the property taken.[10] Damage to the remainder of the land, or the land that the landowner will retain in his possession after the eminent domain procedure takes place, must also be considered in the jury award. Damages can include physical disruption to the property, but also could include more lasting inconveniences such as a landowner's lack of access to his property or the disruption of drainage systems.

The exception: quick take

The same general procedures, with some important modifications, will apply in times of war, public emergency, or appropriation for the building of roads open and free to the public. Quick take is the familiar name for eminent domain procedures used in these situations, most commonly used for the building of roads. Quick take is provided for in the Ohio Constitution, Article 1, §19.

When using quick take, the agency can deposit the estimated value and damages of the appropriation and a statement of intention to obtain possession at the same time it files the petition to appropriate.[11] After the deposit, the agency can take possession of and enter on the property immediately.[12]

In the case of building or repairing roads, the agency will also be entitled to take possession and enter any structures on the property.[13] Value can be further disputed afterwards in a jury trial.[14] In a quick take situation, the owner of the property will not be able to dispute that the project is (1) necessary or (2) for a public purpose in their answer to the appropriation petition.[15] The agency is not required to prove the project is necessary or for public use as in other circumstances.[16] The owner also has no right of immediate appeal from a decision on the petition to appropriate in quick take situations.[17]

Protections

Costs and Fees: If the jury compensation award is more than 125% of the good faith offer, the court will enter judgment in favor of the owner for all costs and expenses, including attorneys' and appraisal fees.[18] This applies to all appropriated land, not just agricultural land. However, the fees and cost award is limited to 25% of the difference between the agency's offer and the final award.[19]

In order to qualify for attorneys' fees, the landowner must submit an appraisal of the property to the agency at least 50 days before trial. The appraisal should be accompanied by a sworn statement from the owner stating the value of the property and an explanation of how the value was derived. In order to meet this timeline, a landowner should act immediately to have an up-to-date appraisal performed on the property.

Costs and fees are not available in quick take cases of appropriation, unless the property is devoted to agricultural use and the final award exceeds 150% of the initial offer. Again, the fees and cost award will be limited to 25% of the difference between the agency's initial offer and the final award.[20]

Additional ODA Review: If an appropriating authority aims to take 10 acres or 10%, whichever is greater, of land enrolled in the state's agricultural district program and owned by one landowner, the Ohio Department of Agriculture is granted special review power. If the director finds the taking would have an unreasonably adverse effect upon the agricultural district, or policies and programs of the department, he will inform the governor, who will place a 60-day stay upon the proceedings. A hearing will then be

7 ORC 163.03
8 ORC 163.05
9 ORC 163.08
10 ORC 163.05
11 ORC 163.06(B)
12 ORC 163.06(A)
13 ORC 163.06(B)
14 ORC 163.06(B)
15 ORC 163.041
16 ORC 163.08
17 ORC 163.09(B)(3)
18 ORC 163.21(C)(1)
19 ORC 163.21(C)(4)
20 ORC 163.21(C)(2)

conducted and final recommendations submitted to the agency or authorities proposing the taking.[21]

Elected Agency Veto: If the appropriation is undertaken by a nonelected public agency, and the owner provides that agency with a written objection, the elected officials of that agency or the elected individual that appointed the unelected agency may veto the appropriation.[22] If the agency is a state agency or instrumentality like a university, the governor holds that veto power.[23]

Mediation: Either party may request nonbinding mediation as to the value of the property being appropriated. The appropriating authority is required to pay for the mediation.[24] The mediation must conclude within 15 days and a judge can only extend this time limit for lack of an appraisal.[25]

"Blighted" Property: All appropriations must be necessary and for a public use, and the Ohio Supreme Court has stated that economic benefits alone derived from private redevelopment do not satisfy the public use requirement in the Ohio Constitution.[26] Therefore, if land is appropriated solely to convey to a private developer or for raising revenue, the agency must prove it fits the definition of "blighted" property and follow the procedures set forth in ORC 163.021. Agricultural land cannot be classified as blighted when the land is consistent with conditions normally incident to generally accepted agricultural practices.

Relocation Assistance: When certain federally funded, urban renewal, or highway projects displace a landowner, they may be eligible for relocation assistance payments. Payments are authorized for:

- Actual reasonable expenses to move themselves, their family, business, farm and other personal property.
- Actual losses of personal property as a result of moving or discontinuing a business or farm, not exceeding the amount to relocate such property.
- Actual expenses in searching for a replacement business or farm.
- Actual reasonable expenses necessary to re-establish a displaced farm, nonprofit organization, or small business at a new site, not to exceed $10,000.[27]

Right of Repurchase: If the agency decides not to use the property for the purpose stated in the appropriation petition, the owner will have the right to repurchase the property at fair market value, determined by an independent appraisal. The prior owner has 60 days from the offer to repurchase to exercise this right.[28]

Agencies with power of appropriation

Many government agencies within the local, state and federal government hold the power to appropriate land. Following are some, but not all, entities with this power:

- State governmental agencies, including: the Ohio Departments of Transportation, Natural Resources, Rehabilitation and Corrections and others.
- Districts, commissions and local boards, including boards of education, sewer and sanitary districts, conservancy districts, regional airports and park districts.
- County commissioners and township trustees.
- Municipal corporations, including the boards of transit and park commissions.
- Private corporations, who are given appropriation power through the Ohio Revised Code: utility companies such as electric, water, and gas; railroads; colleges and universities, and preservation societies or associations.
- Public-private partnerships, a new facet of Ohio law, which allows the Ohio Department of Transportation to engage private companies to assist in the development of transportation facilities.
- Certain types of pipelines, including those under Federal Energy Regulatory Commission siting regulation and Ohio Public Utilities Commission siting regulation. Courts have questioned the eminent domain authority of certain types of pipelines, and not all pipelines enjoy this power.

21 ORC 929.05
22 ORC 163.021(E)
23 ORC 163.021(E)
24 ORC 163.051
25 ORC 163.051
26 *Norwood v. Horney*, 110 Ohio St. 3d 353 (2006)
27 ORC 163.53
28 ORC 163.211

Dog Laws

Requirements for all dogs

Every dog over three months of age must be licensed.[1] Licensing is facilitated by the county auditor, who will issue a certificate of registration as well as a metal tag for each dog. Annual registration is required between the preceding December 1 and January 31 of each year. After January 31, the auditor is permitted to charge a late registration fee. Dog owners should ensure the dog's registration tag is displayed and worn by the dog at all times, unless constantly confined to a registered kennel.[2]

Dogs should always be confined to their owner's property or under the control of their owner, unless they are engaged in hunting and accompanied by their owner.[3] If a dog owner fails to keep the dog either confined or under reasonable control of some person, the owner could be subject to a fine, ranging from $25-$100 plus any court costs for first time offenses and $75-250 and spend up to 30 days in jail for each subsequent offense.[4]

The courts may also order the dog owner to personally supervise the dog and/or the dog to complete obedience training.[5]

Additional requirements for nuisance, dangerous or vicious dogs

Any public official with the ability to enforce the dog laws can determine a dog to be a nuisance, dangerous or vicious dog.[6] This includes a county dog warden or any local law enforcement. A dog's behavioral determination can be appealed through the county or municipal court with jurisdiction, using the procedures in ORC 955.222.[7]

A nuisance dog is one which, without provocation and while off the premises of its owner, has chased or approached a person in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person.[8] The owner of a nuisance dog has no additional obligations, but will be subject to harsher penalties for non-confinement.

A dangerous dog is any dog that has caused injury, other than killing or serious injury,[9] to any person; killed another dog; or has been the subject of three violations of non-confinement under ORC 955.22(C).[10] Dangerous dog owners must obtain a dangerous dog registration certificate from the county auditor in addition to the normal license, and keep a dangerous dog tag on their dog at all times.[11] Owners of dangerous dogs will be required to maintain certain enclosures and obey leash requirements.[12] Dangerous dog owners are also required to notify the local dog warden immediately if the dog is loose or unconfined, bites a person while away from the owner's property, or attacks another animal while off the owner's property.[13] The auditor must also be notified within 10 days of the sale, transfer, gift or death of a dangerous dog.[14]

A vicious dog is one that has killed or caused serious injury to any person, without provocation.[15] An unconfined vicious dog which causes a person's death will be ordered humanely destroyed by a court and the owner charged with a fourth degree felony.[16] When causing serious injury, the owner is subject to a first-degree misdemeanor and the court may order the dog destroyed.[17] If the court does not order the dog destroyed, the dog will be considered a "dangerous dog." The owner shall be subject to all laws pertaining to dangerous dogs and will be required by the court to obtain liability insurance of at least $100,000.[18]

It is important to note that dogs may not be considered dangerous or vicious dogs if it can be proven that the dog was teased, tormented, abused or defending a person not involved in an illegal activity when it attacked.[19]

1 ORC 955.01(A)(1)
2 ORC 955.10
3 ORC 955.22(C)
4 ORC 955.99(E)(1)
5 ORC 955.99(E)(2)
6 ORC 955.222(B)
7 ORC 955.222
8 ORC 955.11(A)(3)(b)
9 ORC 955.11(A)(5)
10 ORC 955.11(A)(1)(a)
11 ORC 955.22(E)(2),(I)
12 ORC 955.22(D)(1),(2)
13 ORC 955.22(E)(3)
14 ORC 955.22(E)(4)
15 ORC 955.11(A)(6)
16 ORC 955.99(H)(1)(a)
17 ORC 955.99(H)(1)(b)
18 ORC 955.99(H)(2)
19 ORC 955.11(A)(7)

A vicious dog also does not include one that has caused death or serious injury to a person committing or attempting to commit a criminal offense on the property of the dog's owner.[20] Police dogs being used to assist law enforcement officers in the performance of their official duties will not be deemed nuisance, dangerous or vicious dogs.[21]

Counties, townships, and municipalities may impose additional restrictions upon dog owners.[22]

Transfer of ownership of dogs

Whenever ownership of any dog is transferred, the seller must provide the new owner with a transfer certificate, available from the county auditor.[23] Failing to provide such certificate is a minor misdemeanor.[24] If the buyer or transferee makes a request, the owner must provide written notice of the behavioral propensities of the dog prior to the transfer of ownership.[25] Within 10 days after the transfer of ownership or possession of a dangerous dog, the seller/transferor shall give to the buyer, the dog warden, and the Health Department in the county where the buyer/transferee resides, a completed transfer form supplied by the county dog warden.[26]

The penalty for failing to provide the written notice of a dangerous dog transfer is a minor misdemeanor for a first offense and a fourth degree misdemeanor for each subsequent offense.[27]

Dogs and livestock

A landowner has the right to kill any dog which is in the act of chasing, threatening, harassing, or attempting to or actually injuring or killing any persons, livestock, poultry, or other domestic animals (except cats or another dog).[28] In this circumstance, the landowner will not be criminally liable for killing or injuring the dog. If a dog has bitten a person, the dog owner shall not kill it unless it is to prevent further injury or attack to a person.[29] If a dog bites a person, the local board of health must be notified within 24 hours so that the dog may be quarantined and observed for rabies.[30] The dog's owner will be liable for any damages.[31]

20 ORC 955.11(A)(6)(b)(ii)
21 ORC 955.11(A)(1)(b), (3)(b), (6)(b)(i); ORC 955.22(D)
22 ORC 955.221
23 ORC 955.11(B)
24 ORC 955.99(A)(1)
25 ORC 955.11(C)
26 ORC 955.11(D)
27 ORC 955.11(E), ORC 955.99(A)(1), (2)
28 ORC 955.28(A)
29 ORC 955.261(A)(2)
30 OAC 3701-3-28, OAC 3701-3-29
31 ORC 955.28(B)

Injuries or deaths by coyotes

The state's coyote and black vulture indemnity fund remains in law, but has remained unfunded for a number of years. The information below outlines the process, should the indemnity fund become viable once again.

If the owner of an animal believes that its death or injury was caused by a coyote and that the fair market value of the animal is $25 or greater, the owner should notify the dog warden by telephone, and photograph the injuries sustained by the animal within 72 hours.[32]

The dog warden will investigate the claim to determine if the injuries or death were caused by a predator.[33] If the dog warden feels that the injuries were made by a predator, then the evidence is sent to the local wildlife officer for investigation. If the claim is approved by the dog warden and supported by the wildlife officer, the Department of Agriculture will hear the owner's case.[34]

The owner of the animal will then need to fill out a report of indemnification. Upon request, the dog warden will assist the animal owner in filling out the form. Within 30 days of discovery of the injury or death, the owner must submit all evidence of injury along with the indemnification forms, including any registration papers for the animal, to the Ohio Department of Agriculture.[35] Copies of the form must be sent to the dog warden and wildlife officer as well. The department will allow or disallow the claim based on the evidence provided.[36] If the claim is allowed, the department will make a final determination regarding the fair market value of the animal that was injured or killed. "Fair market value" is determined by the value of a healthy grade animal as chosen by the Ohio Director of Agriculture, or 125% of the grade value if the animal was registered.[37] The funds will not be paid for those animals covered by insurance or to owners who have received $500 or more in the previous year from the fund.[38] If a farmer disagrees with the fair market value assessed by the Ohio Department of Agriculture, they can appeal the decision as set forth in Ohio Revised Code section 955.51-955.53. Claims submitted when sufficient funds have not been appropriated will be denied and may not be resubmitted.[39]

Insurance

Because of the lack of viable indemnity programs, producers should insure livestock, especially high value livestock, for their full value. Talk to your insurance agent regarding specific coverage of livestock animals.

32 ORC 955.51
33 ORC 955.51(C)
34 ORC 955.51(D)
35 ORC 955.51(B)
36 ORC 955.52
37 ORC 955.52
38 ORC 955.52(A)(3)
39 ORC 955.52(B)

Requirements for commercial dog breeders

Ohio law sets forth regulations governing dog breeders in the state who meet the threshold for being a "high volume breeder," including regulations pertaining to licensing, inspection, recordkeeping, and animal care standards.

A "high volume breeder" of dogs is an establishment that keeps, houses, and maintains six or more breeding dogs and does at least one of the following:

- In return for a fee or other consideration, sells five or more adult dogs or puppies in any calendar year to dog brokers or pet stores;
- In return for a fee or other consideration, sells forty or more puppies in any calendar year to the public; or
- Keeps, houses, and maintains, at any given time in a calendar year, more than forty puppies that are under four months of age, that have been bred on the premises of the establishment, and that have been primarily kept, housed, and maintained from birth on the premises of the establishment.[40]

No person who meets the definition of a high volume dog breeder may operate in the state without a license issued by the Ohio Department of Agriculture.[41] Anyone who wants to begin operating a new high volume dog breeding establishment must submit an initial application for a license through the Ohio Department of Agriculture at least ninety days before beginning operation.[42] Thereafter, license renewal applications must be filed by December 31 in order to renew the license for the following year.[43] For most establishments, application fees are based on the number of litters sold annually.[44]

In addition to submitting a completed application for a high volume dog breeder license, the applicant must also submit an affidavit affirming the number of adult dogs at the location, an estimate of the number of puppies to be kept/housed/maintained and the number of litters of puppies or total number of puppies to be produced during the term of the license, photographic evidence documenting the dog facilities, a signed release authorizing a background investigation of the applicant, and proof that the applicant has established a veterinary-client-patient relationship.[45] High volume breeder license applicants are also required to provide evidence of insurance, or, in the alternative, a surety bond to ensure compliance with the licensing rules. The amount of insurance or bond needed increases as the number of adult dogs increases.[46]

The Ohio Department of Agriculture is directed by statute to develop rules regarding standards of care that address nutrition, exercise, grooming, biosecurity and disease control, waste management, whelping or birthing of pups, and any other general standards of care for dogs.[47] Ohio law also requires the Department of Agriculture to develop recordkeeping procedures, including a requirement that a high volume breeder keep and maintain veterinary care records for each dog for three years after the care has been provided by the veterinarian,[48] as well as rules regarding high volume breeders' compliance with applicable sales tax requirements and proper advertising.[49] In addition to complying with the rules developed by the Ohio Department of Agriculture, high volume breeders also must comply with specific care standards established for high volume breeders outlined in the Ohio Revised Code.[50]

The Ohio Department of Agriculture is responsible for enforcing the relevant requirements and standards.[51] To ensure compliance, all licensed high volume dog breeders will be inspected at least once annually.[52] Additionally, an inspection will be made of a currently unlicensed boarding kennel when the Department receives information that the kennel is breeding dogs and may be subject to licensure.[53] Licensed high volume breeders may also be inspected for compliance if the Department receives a complaint about the breeder.[54]

Ohio law also sets forth regulations governing dog brokers (who buy, sell, or offer to sell dogs at wholesale for resale to another who sells or gives one or more dogs to a pet store annually),[55] animal rescues, and pet stores.[56] Medical kennels, research kennels, animal shelters (operated by either a local government or a humane society), and veterinarians are specifically exempted from the regulations applicable to high volume dog breeders, dog brokers, animal rescues, and pet stores.[57]

40 ORC 956.01
41 ORC 956.04(A)(1)
42 ORC 956.04(C)
43 ORC 956.04(D)
44 ORC 956.07(A)
45 ORC 956.04(C)
46 ORC 956.03(A)(6)
47 ORC 956.03(A)(7) and OAC 901:1-6
48 ORC 956.03(A)(1); OAC 901:1-6-07
49 ORC 956.03(A)(10) and (11)
50 ORC 956.08(A) and ORC 956.031
51 ORC 956.09
52 ORC 956.10(A)(1)
53 ORC 956.10(A)(2)
54 ORC 956.10(B)(1)
55 ORC 956.01
56 ORC Chapter 956
57 ORC 956.02

Oil and Gas Leasing

Before an oil and gas producer can drill, deepen, convert, plug back, plug and abandon, or reopen a well, the producer must obtain a permit from the Ohio Department of Natural Resources' (ODNR) Division of Mineral Resource Management.

Prior to obtaining a permit, an oil and gas producer must obtain permission from the landowner(s) to enter the land. This permission is in the form of an oil and gas lease agreement. **LEASES MUST BE IN WRITING**. Every effort should be made to negotiate terms of the lease agreement that are fair to both the landowner(s) and the producer. **All lease agreements should be negotiated, prepared and reviewed by a qualified attorney before signing.** Following are some issues and lease terms to consider when negotiating a lease.

Understanding the Parties Involved The lessor is the owner of the minerals to be extracted. Every person with an interest in the property needs to sign the lease. The lessee is the company interested in obtaining the rights to drill and produce the oil and gas. The lessee is not always the same company developing the site.

Working with old leases or severed mineral interests

The leasing and sale of mineral rights has been conducted in Ohio for decades. Some landowners know their property is covered by an old oil and gas lease signed by a previous landowner. Others find their property is covered by an old oil and gas lease even though it did not show up in the title search conducted when they purchased the property.

Companies possessing these old oil and gas leases could sell them to interested producers today for a profit. Be aware that the companies currently holding an old oil and gas lease could ask to make adjustments to key provisions of an old lease. Landowners should consider adjustments only if the entire lease is opened for renegotiation.

Landowners who are unsure whether their property is encumbered by an old oil and gas lease should work with the county recorder or a title examiner to determine whether the lease has been terminated or released. If there is no evidence with the county recorder of the lease's termination or release, an attorney may be able to use the provisions of Ohio Revised Code 5301.332 to remove the old oil and gas lease from the property.

A different problem occurs when mineral rights have been severed from the surface rights. This often occurs when a person sells property but reserves the mineral rights for his or her own use. Provisions of the Ohio Dormant Minerals Act, Ohio Revised Code 5301.56, may be used to declare the severed mineral interests to be abandoned and then merge the mineral interests with the surface estate.

Lease provisions are negotiable

Unless otherwise specified by federal or state law, all lease provisions are negotiable. Leases should be written to fit the landowners' specific needs. Leases and all terms must be in writing; oral promises not included in the written lease are unenforceable. Any promises, changes, additions or deletions discussed between the parties must be included in the lease before signing. All blanks should be filled in legibly, with words the landowner understands.

Purpose of the lease

The lessee often wants broad language to allow access to the property without further landowner notice or permission. These "farm wide" leases can lead to multiple wells, pipelines, storage units, compressor stations, roads, etc. located on your property. The landowner should narrow or remove these provisions from the oil and gas lease. The landowner could allow certain facilities being located on their property for additional compensation.

At the very least, the point of entry and location of any structures should require landowner approval. Landowners

should avoid language such as "all other minerals;" "transport from, across, and through;" "by any means;" or "storage of oil, gas or brine from any other land." Keep in mind each company may use a different lease form on which a landowner can make adjustments.

Size and scope of a lease

During the 20th century, producers tapped 40-60% of the resources available in Ohio's geologic formations. Today, these formations are being revisited, and new projects accessing deeper Marcellus and Utica shale are underway. Some landowners will work with companies using smaller, traditional vertical drilling technology; others will deal with companies engaged in larger, horizontal drilling projects.

No matter the size or scope of the operation, simple lease agreements do not cover today's financial, logistical, environmental and liability issues. Landowners should request and expect longer, more detailed leases and realize the necessity of working with an attorney.

Lease duration

The duration of an oil and gas lease involves two terms: the primary term and the secondary term. The primary term is the fixed period of time before drilling starts. This period can last from a few months to 10 years, with two to five years being common. Landowners should prefer a shorter primary period.

The secondary term of a lease can be triggered by a number of events, typically when a well begins operations or starts producing in "paying quantities." The secondary term runs indefinitely while the well is active. Both terms should be clearly defined in the oil and gas lease.

When the lease terminates, Ohio Revised Code 5301.09 requires the lessee to have the lease officially "released" in the records of the county recorder. If the lessee fails to do so, the landowner may follow the procedures in Ohio Revised Code 5301.332 to declare the lease forfeited. Landowners should also add a lease term that requires the oil and gas company to release the lease upon termination.

Bonus payments

The up-front bonus payments made to landowners are one-time, per acre "signing bonuses" for agreeing to enter into a lease. The amount varies from site to site. Landowners should negotiate a bonus payment to compensate them for the time and expense of attorney review, baseline environmental testing of the property's soil and water resources, financial planning advice, and other expenses they may incur.

Delay rental

A delay rental is a way for the oil and gas company to keep the lease valid without drilling a well. In essence, the landowner is paid a small amount, on a per acre basis, to extend the term of the lease until drilling commences. It is to the landowner's benefit to have as much of the delay rental paid as early

as possible. The amount of the delay rental varies greatly depending on demand for drilling locations and the potential production of the well. Delay rental payments generally mean the company has an exclusive right to drill a well.

Royalty payments

Upon completion of a successful well, the lease agreement shifts into the secondary term. The landowner is paid a percentage of the production, referred to as a royalty. A one-eighth share (12.5%) has been common, but given recent demand and interest, a skillful negotiator may negotiate a royalty well above that amount. The royalty should be paid on all saleable products including oil, gas, Y-2 class gas liquids, etc., and be paid on gross proceeds, not net proceeds. This prevents the oil and gas company from deducting certain costs (e.g. marketing, transportation) before paying royalties. The oil and gas lease should include a remedy for delinquent royalty payments, and the landowner's right to audit royalty payment records.

Shut-in wells

Given economics or logistics, there are times when a well is capable of producing, but it is not profitable to do so. In this case, a well can be "shut-in." The lease agreement should contain a shut-in royalty payment, which is often the same amount as the delay rental, during these times.

Free gas

A landowner normally receives free gas, often up to 300,000 ccf per year. Provisions to use free gas are at the expense and liability of the landowner. Generally free gas use is limited to the residence where the producing well is located, but the ability to use free gas for activities other than home heating is beneficial. The lease should specify how much the landowner must pay for gas used in excess of free gas. Prices are usually indexed to the local natural gas utility rate.

Depending on well location, depth, pressure and the presence of natural gas liquids, the landowner may not be able to receive free gas. In such instances, landowners should negotiate for a payment in lieu of free gas, or ownership of an annual allotment of gas from the well to sell back to the producer. The landowner can then use the proceeds to purchase appropriate fuel for home heating use and other activities.

Depth of collection pipelines

Although federal and state law regulate the installation of interstate transportation and public utility service pipelines, individual lease agreements determine how deep oil and gas collection pipelines must be buried on private property. ODNR's Division of Soil and Water Conservation recommends a depth of five feet. As a result, landowners should strike terms that specify "below plow depth," and specify depths that accommodate subsurface drainage tiles and other on-site infrastructure.

Storage

Landowners should avoid lease terms that allow for the storage of oil, gas or brine. If the landowner wishes to explore a storage lease, it should be a separate agreement with additional compensation.

Damage to the property

Leases should require the company to pay for damages to growing crops, buildings and other infrastructure unique to the property, timber, fences, roads, water supplies, and any other damage unique to the specific property. Repair or remediation for soil compaction and subsurface tile damage should be specified for a period of several years.

Consolidation, pooling and utilization

Under Ohio law, producers must have adequate land area before drilling a well in order to protect the integrity of oil and gas resources. A formula determines the minimum acreage for a drilling unit, based on well depth.

Leases typically contain clauses allowing a company to combine several adjoining properties as a drilling unit. The royalty from the well is then split in proportion to the number of acres each landowner contributes to the pool. The landowner with the well located on their property must incur all the nuisance, but share production royalties. Leases can provide additional payment to the landowner with the well on their property.

It is recommended that pooling provisions be removed from the lease and separately negotiated. All landowners involved in a potential pool are able to negotiate, regardless of the number of acres they contribute.

Company's right to utility access and water

A producer needs public utility access to drill and operate a well. Landowners should negotiate lease provisions indicating how and where temporary and permanent public utility infrastructure will be installed. Additional compensation is negotiable if installation causes extreme hardship.

The drilling industry in Ohio has used hydraulic fracturing since the 1950s. Many companies will purchase water from nearby municipal water plants and have it stored, filtered, recycled and reused on several area drilling projects. Landowners should remove lease provisions allowing the oil and gas company to use water from their land (e.g. allowing access to "non-domestic" sources of water on their property), and should negotiate additional compensation if their property will be used for water storage. The lease should specify the type of technology used (open reservoir or tank farm) and the location on the property. Pre and post-drilling water testing should also be required in an oil and gas lease.

Assignments and renewal provisions

Unless stated otherwise, the oil and gas company can assign the lease to another company. The landowner may want to maintain the right to deny assignment, or at least require the right to approve any assignment, to ensure the company receiving the assignment is satisfactory.

Some leases contain automatic renewal provisions, which renew the lease for additional terms without the landowner's knowledge or consent.

Be wary of provisions allowing automatic renewal of the lease at the end of the primary term, or that make it difficult for landowners to terminate the lease at the end of the term. Acceptance and cashing of a lease fee after the original term could automatically renew a lease, depending on the terms of renewal. If you receive a payment that seems unusual, such as a payment on an old lease or an old, inactive well, consult a qualified attorney before cashing or depositing the check.

Reclamation of well site

Ohio Revised Code 1509.072 contains standards for reclamation after drilling. Reclamation of land around a project must occur within six months after drilling has commenced. The company has six months after plugging a well for land reclamation and removal of all drilling equipment. If reclamation is not completed within the allotted time frame, Ohio Revised Code 1509.32 allows for filing a complaint with ODNR's Division of Mineral Resources Management. These laws set a reclamation schedule and minimum standards; however, it is also important to incorporate remediation and repair provisions into the lease to address specific landowner needs.

Negotiation groups and associations

Leases cover agreements between individual entities. Landowners joining negotiation groups and associations should determine how collective collaboration and membership adds value to the negotiation process. Landowners still need to assess their unique needs and have the ability to have their individual attorney review the group or association lease to represent their unique interests.

Landowners should practice the same caution in joining a negotiation group or association as when engaging in direct negotiations with an oil and gas producer. Having individual legal counsel to represent their interests and analyze all documents is highly recommended.

Obtain references

Ask the oil and gas company for five landowner references that have, or previously had, operating wells on their property. Call the references and ask:

1. Is the producer easy to talk to and responds to problems promptly?
2. Are delay rentals or royalties paid regularly and on time?
3. Were you consulted on access road, well site and facility locations?
4. Was restoration done properly?
5. Are there any problems with the producer?

Finding the right attorney

It is critically important for landowners to secure professional advice and assistance before signing any lease. When looking for an attorney, look for one with oil and gas leasing experience. Begin by discussing the attorney's fee structure. A landowner's modest investment in an attorney will often result in larger bonus payments and royalties, more favorable lease terms, and more protections for the landowner and their property.

Conclusion

Landowners should recognize a lease as a partnership with the drilling company. Constant dialogue and true understanding is necessary for a successful partnership. Get everything in writing and keep the lease in a safe, but easily accessible, place. If the lease is lost, secure a copy from the county recorder's office.

Trespassing and Landowner Liability

Americans have always cherished their constitutional right to own and control private property. Farmers and other landowners are often threatened by trespassers. This section attempts to help landowners learn about their rights and obligations in regard to trespassing and property rights.

Civil trespassing under common law

In common law, a trespasser is a person who enters upon the land of another without express or implied permission from the landowner or tenant. A trespasser also can be a person who, without authorization, goes upon the private premises of another person without any invitation or enticement by the owner or tenant and purely for the trespasser's own purpose or convenience. Common law is mostly concerned with damage done to property by trespassers and speaks to the rights of landowners to recover money damages from trespassers. This must be done in a civil court action brought by the landowner against the trespasser. Ohio follows the premise that at least nominal damages are owed when trespassing occurs, even if there has been no substantial damage to the landowner or his property due to the trespasser's acts.[1]

Criminal trespassing under Ohio statutes

Under Section 2911.21 of the Ohio Revised Code, a person can be charged with a fourth degree misdemeanor if they do any of the following without the privilege to do so:

1. Knowingly enter or remain on the land or premises of another.
2. Knowingly enter or remain on the land or premises of another, the use of which is restricted and the person knows he/she is in violation of any such restriction or is reckless in that regard.
3. Recklessly enter or remain on the land or premises of another in which unauthorized access or presence is communicated by fencing or enclosures designed to prevent access, by actual communication, by posting in a manner that will reasonably come to the attention of potential intruders, and/or by a manner prescribed by the law.

1 *Pembauer v. Cincinnati*, 745 F. Supp. 446 (S.D. OH 1990)

4. Remain on the land or premises of another after being notified by signage or by the owner or occupant or their agent to leave the property or premise.[2]

This statute applies to public and private land and applies to any person who is on land or premises owned by another when that person secured permission to enter by deception.[3]

The penalty for those found guilty of fourth-degree misdemeanor trespassing is up to 30 days in jail and/or a maximum fine of $250.[4]

Also, under Section 2911.21 of the Revised Code, a person can be charged with a first-degree misdemeanor for knowingly entering or remaining on a "critical infrastructure facility" that has been properly enclosed and marked to inform potential intruders that entry is forbidden.[5] Some examples of property deemed to be a "critical infrastructure facility" under Ohio law include water or sewage treatment systems, above-ground portions of oil or gas pipelines or storage facilities, above-ground storage of hazardous materials, and mining operations.[6] Those found guilty of trespassing on a "critical infrastructure facility" face up to 180 days in jail and /or a maximum fine of $1,000.[7]

2 ORC 2911.21
3 ORC 2911.21
4 ORC 2929.28, 2929.24
5 ORC 2911.21(A)(5), ORC 2911.21(F)(4)
6 ORC 2911.21(F)(4)
7 ORC 2929.28, 2929.24

Status of Visitor	Duty of Landowner
Trespasser – those on your property without any permission or invitation and for their own purposes or convenience[1]	No duty except to avoid injuring trespassers with willful or intentional misconduct[1]
Known Trespasser – those on your property without permission but who you know are present or, when you are aware of frequent trespassing on your property[2]	Warn of concealed unnatural dangerous conditions on the property, avoid willful or intentional harm[2]
Licensee – social guests or those that come onto land for their own business purposes, like electricity or gas personnel reading a meter[3]	Warn of concealed unnatural dangerous conditions on property, avoid willful or intentional harm
Invitee – Those on your property for your business benefit, such as visitors to a farm market[4]	Warn of dangerous natural and unnatural conditions on the property, reasonably inspect property to discover non-obvious dangers and make those conditions safe

1 ORC 2305.402(A)(3)
2 OJur 3d Premises Liability §1
3 *Provencher v. Ohio Dept. of Transp.*, 49 Ohio St.3d 265 (1990)
4 Id.

1 ORC 2305.402(B)
2 OJur 3d Premises Liability §18

Landowner responsibilities and liabilities

A landowner should know how to safely and legally deal with trespassers. A landowner should not attempt to detain a trespasser if that is the only crime observed. A citizen's arrest of a trespasser is not permitted in Ohio and if attempted could result in prosecution of the landowner.[8] In other words, unless physical danger is involved, landowners should avoid possible problem situations.

Under Ohio law, a person entering the premises of another takes on a certain identity or status. Under common law, such an individual can be a trespasser, a known trespasser, a licensee or social guest, or business invitee.

Review the chart above to understand the status of the person entering your property and your corresponding duty as the landowner.

However, with anyone on your property, if a landowner comes upon that person injured or in immediate peril, a duty of ordinary care to avoid further injury is owed.[9]

Ohio law provides some protection for landowners when people enter a property for specific activities. Ohio's recreational user statute exempts a landowner from liability to any recreational user who enters the premises without charge for purposes of hunting, fishing, hiking, swimming or to operate a snowmobile or all purpose vehicle.[10]

There is no duty for the landowner to make the premises safe for the recreational user nor does the landowner make any assurances about the safety of their entry. Further, the landowner does not assume any liability for harm caused by the recreational user to others. This immunity remains intact even when a landowner has entered into a hunting lease, or other lease arrangement for the recreational use.[11]

Ohio has created special protection when farmers open their property for public access to growing agricultural produce, such as "U-Pick" or "Pick Your Own" establishments. These landowners are not required to assume any responsibility or liability for injuries or loss that results from the natural condition of the terrain or from the condition of the terrain which resulted from the cultivation of the soil.[12]

Similarly, Ohio has special protection for "agritourism" providers. In a civil lawsuit, an agritourism provider will not be held liable if an agritourism participant is harmed as a result of a risk inherent in the agritourism activity.[13] Ohio law describes inherent risks as those dangers or conditions that are an integral part of an agritourism activity, and include all of the following: surface and subsurface conditions of the land; the behavior or actions of wild animals; the behavior or actions of domestic animals (other than vicious or dangerous dogs); the ordinary dangers associated with structures or equipment ordinarily used in farming or ranching; the possibility of contracting illness resulting from physical contact with animals, animal feed, animal waste or surfaces contaminated by animal waste; the possibility that a participant may act negligently, fail to follow instructions, or fail to exercise reasonable caution.[14] In order to receive the liability protection afforded by law, an agritourism provider must post and maintain warning signs using the specific language set forth in statute.[15] In either recreational user, agritourism, or U-Pick situations, landowners would still be liable for any intentional, willful or wanton misconduct which causes harm to another.

8 ORC 2935.04
9 ORC 2305.402(C)
10 ORC 1533.181

11 ORC 1533.18(B)
12 ORC 901.52
13 ORC 901.80(B)
14 ORC 901.80(A)(6)
15 ORC 901.80(D)

Attractive nuisance

Ohio has adopted an attractive nuisance doctrine that requires landowners to protect foreseeable child trespassers from dangerous conditions on the landowner's property.[16] This doctrine has also been codified into Ohio law.[17]

An attractive nuisance is an artificial condition that is dangerous yet attractive to children.[18] Some examples of an attractive nuisance include an open swimming pool, a swing set, a tree swing, or something that could entice children into trespassing. For a landowner to be held liable for an injury to a child based on the attractive nuisance doctrine, all of the following must apply:

1. The landowner must know or have reason to believe that children are likely to trespass on his property.
2. The landowner knows or has reason to know the artificial condition poses an unreasonable threat of death or serious injury to children.
3. The children that are trespassing cannot understand the risk associated with the condition.
4. The need for the condition and the burden of eliminating the condition are slight compared to the danger it poses to children, and
5. The landowner has failed to exercise reasonable care in eliminating any danger related to the condition or to protect children that may trespass.[19]

The law also extends the attractive nuisance doctrine to adults, if the adult was acting to rescue a child in an attractive nuisance situation.[20] The outcome of each allegation or claim under the attractive nuisance doctrine will vary by case depending upon the facts surrounding each incident. This means that any violation of the attractive nuisance doctrine must be determined by a court of law.

How can landowners best deal with trespassers?

1. Landowners should post and adequately mark their property boundaries with "No Trespassing" signs. Posting is not required but serves as extra assurance, especially if problems and legal concerns arise. "No Trespassing" signs are available from your county Farm Bureau office.
2. A landowner can file a civil lawsuit against a trespasser to recover damages caused by the trespasser or to obtain an injunction against future trespassing, if repeated violations have occurred. A civil lawsuit requires the landowner know the identity of the trespasser. Consult an attorney for this type of lawsuit.
3. A landowner can call the sheriff or other law enforcement with authority in the area where the land is located. If an officer observes a violation of law, the officer should arrest the violator. The game warden has jurisdiction for hunting, fishing, and trapping violations and will make trespassing arrests related to those offenses. Officers will generally not arrest a trespasser unless the officer witnesses the violation.
4. If the landowner is unable to contact the sheriff or the sheriff does not witness the trespassing, a landowner may file an affidavit charging the offense committed with a judge, county prosecutor or magistrate for their review to determine if a complaint should be filed.[21] Upon filing of the affidavit, the reviewing official may issue a warrant for the suspect's arrest or a summons to appear to the suspect.[22]

16 *Bennett v. Stanley*, 92 Ohio St. 3d 35 (2001)
17 ORC 2305.402(D)
18 *Bennett v. Stanley*, 92 Ohio St. 3d 35 (2001)
19 ORC 2305.402(D)(1)
20 *Bennet v. Stanley*, 92 Ohio St. 3d 35 (2001), ORC 2305.402(D)
21 ORC 2935.09(D)
22 ORC 2935.10(B)

All Purpose Vehicles and Utility Vehicles

All purpose vehicles have become a great tool for today's farmers. Unfortunately, the same vehicles providing a service to farmers create problems when used to trespass on farmland.

ATVs and other all purpose vehicles (APVs) are any vehicle "designed for cross-country travel on land and water, or on more than one type of terrain, and steered by wheels or caterpillar treads… including vehicles that operate on a cushion of air, and those commonly known as all-terrain vehicles, all-season vehicles, mini-bikes and trail bikes."[1] However, the definition of "all purpose vehicle" does not include golf carts or "utility vehicles," such as a Gator, Mule or other vehicle "designed with a bed, principally for the purpose of transporting material or cargo in connection with construction, agricultural, forestry, grounds maintenance, lawn and garden, materials handling, or similar activities."[2]

Registration and exceptions

APV owners who primarily use their vehicle on their farm, where the owner qualifies for Current Agricultural Use Value (CAUV), are not required to register their APV for use on the farm or between farms.[3]

Any other non-farm APVs are required to be registered with the state.[4] There is no longer a simple exception from registration for an APV that is operated exclusively on land owned by the owner of the APV or land to which the APV owner has a contractual right. Such an exception to registration remains in place for snowmobile and off-highway motorcycle owners operating only on their own land.[5]

Farm use APVs may also be legally operated without registration on a public road, or road right-of-way to travel from one farm field to another so long as the local jurisdiction allows for it and/or the terrain of the right of way safely permits APV travel.[6]

If a farm owner uses his APV on other public lands, trails or right-of-ways, or on other private land that he does not own, registration will be required.[7]

Children and APVs

Children under age 16 and without a valid driver's license can only ride an APV on land owned or leased by their parent or legal guardian.[8] Children under 16 may ride on other privately owned lands if they are accompanied by a licensed driver at least 18 years of age.[9] A valid driver's license is required to drive an APV on any publicly controlled land, including road right-of-ways. Children under 16 without a driver's license may ride APVs on Ohio Department of Natural Resources' property if the park allows it and they are accompanied by their parent or legal guardian who holds a valid driver's license and is over the age of 18.[10]

APVs on the road

It is not generally permitted to operate an APV on the public roadways, although local jurisdictions with the power of home rule, such as municipalities and some townships, may allow it.[11] APVs may be operated on the berm or the shoulder of a highway, except limited access highways, when terrain permits it to be done safely and without the need to enter a traffic lane.[12] County and township authorities have no ability to allow APVs

1 ORC 4519.01(B)
2 ORC 4501.01 (VV), ORC 4519.01(B)
3 ORC 4519.02(B)(2), (3)
4 ORC 4519.02
5 ORC 4519.02(B)(1)
6 ORC 4519.02(B)(2), (3)
7 ORC 4519.02(B)(2)
8 ORC 4519.44(B)
9 ORC 4519.44(B)
10 ORC 4519.44(B)
11 1987 Ohio Op. Atty. Gen. No. 87-077
12 ORC 4519.41(D)

on a public roadway, however, there is also no specific penalty for doing so.[13] Because of this, an APV operated on a county or township road can be cited for not complying with the laws generally applicable to cars, trucks and other motor vehicles operated on public highways, including requirements imposed by ORC Chapters 4511 and 4513.[14]

UTVs on the road

Local authorities may regulate the operation of non-agricultural use UTVs on public roadways under their jurisdiction.[15] However, despite the presence or absence of regulation by local authority, a person may operate a UTV on any public roadway, other than a freeway, when traveling from one farm field to another for agricultural purposes so long as the UTV is properly displaying a slow-moving vehicle emblem.[16]

Trespassing

Ohio law requires all registered APVs to display a valid license plate that is clearly visible. This is an attempt to make an APV more recognizable and give the landowner an opportunity to report any trespassing APVs. Again, those APVs used on the farm are not required to register or display a license plate unless they are operated off the farm, such as on public lands.

The law also has increased the penalty for trespassing with an APV. Whenever criminal trespass is committed using an APV, the court is directed to double the typical fine of $250.[17] Additionally, upon a third offense of trespassing with an APV, snowmobile or off-highway motorcycle, the court may impound the registration and license plate of the vehicle for at least 60 days, in addition to other penalties.[18]

Required equipment for all purpose vehicles[19]

All APVS, including on-farm APVs, are required to have the following equipment:[20]

- Unless operated only during daylight hours, at least one headlight which can reveal persons and objects at least 100 feet ahead under normal nighttime conditions.
- Unless operated only during daylight hours, at least one red taillight having minimum power to be plainly visible from a distance of 500 feet to the rear under normal nighttime conditions.
- Adequate brakes.
- A muffler system capable of precluding emission of excessive smoke or exhaust fumes and limiting engine noise.
- When operating in a state forest, a helmet and eye protection is required.

13 1987 Ohio Op. Atty. Gen. No. 87-077
14 1987 Ohio Op. Atty. Gen. No. 87-077
15 ORC 4511.214, ORC 4511.215
16 ORC 4511.216
17 ORC 2911.21(D)(2)
18 ORC 2911.(D)(3)
19 Including those used on farms. See ORC 4519.20, OAC 4501-29-01
20 ORC 4519.20, OAC 1501:3-4-14

Penalty for violating these equipment standards is a fine of no more than $50. If there has been a previous violation of equipment standards, the penalty may consist of a fine of $15 to $100, three days imprisonment, or both.

APV safety

APVs are also a common source of serious accidents, both on and off the farm. Consider these helpful tips to ensure you or your children operate an APV safely at all times:

- Always wear a helmet and other protective gear, such as eye protection, long sleeves and pants, and sturdy shoes.
- If possible, avoid riding on public roads and use extreme care when on a road right-of-way.
- Never operate an APV when under the influence of drugs or alcohol.
- Never carry a passenger on an APV built for a single rider.
- Ride at a safe speed for the terrain and activity.
- Consider enrolling yourself and your children in a rider safety course.
- Ensure young riders are on an APV suitable for their size, age and experience level.
- Steer clear of livestock and wildlife. State law prohibits the use of an APV to chase, pursue, capture or kill any animal or wildfowl.[21]
- Unload and securely encase any guns, bows, or other hunting implements before transport on an APV.[22]
- Be mindful of crops and the potential damage you could cause with your APV.
- Be aware of fences or roads that may block your path.
- Use the APV's parking mechanism and remove the keys when you are finished riding.

21 ORC 4519.40(A)(6)
22 ORC 4519.40(A)(5)

Ohio's Agricultural Districts, Agricultural Security Areas, and Agricultural Easements

Ohio law holds an important protection for agricultural land called agricultural districts. In addition to the benefits that individual landowners accrue, this process also serves as an important farmland preservation tool for the state.

Enrolling in an agricultural district

Landowners can enroll their land in an agricultural district through application to their county auditor.[1] Agricultural district applications require no fee. In order to qualify land as an agricultural district, the owner must show the land is at least 10 acres or had an average gross income of at least $2,500 for each of the last three years, or the land is enrolled in a federal conservation or land retirement program.[2] While the requirements for an agricultural district are the same as those for the Current Agricultural Use Value program, they are separate programs that land has to be individually enrolled in. After application, if land is located outside of any municipality, the auditor will review and approve the application.[3]

Agricultural districts in municipalities

If the land is located within a municipality or an annexation petition has previously been filed regarding the property, the legislative body of the municipality must also approve the agricultural district enrollment.[4] The municipality must accept, modify or reject the application within 30 days. If the municipality chooses to modify or reject the application, it must demonstrate a substantial adverse effect on the provision of municipal services, the efficient use of land, orderly growth and development, or the public health, safety or welfare.[5] Modifications could include limiting benefits such as assessment deferral, nuisance lawsuit protection or the duration of the district, but is not limited to these areas.

If land is annexed after enrollment in an agricultural district, the municipality does not have the ability to review the agricultural district application, unless the land was sold or transferred to another person outside of the immediate family or the landowner signed the annexation petition.[6]

Benefits of an agricultural district

By enrolling land in an agricultural district, the landowner can receive several benefits. All of these benefits are only available during the time that the land is properly enrolled in the agricultural district program.

First, the landowner is afforded deferred assessments for water, sewer and electric on any land not occupied by a residence.[7] If a residence is present, the owner will still owe any assessments for the acre of land the house sits upon.

Second, agricultural district owners are afforded an affirmative defense in nuisance lawsuits regarding their agricultural practices when conducted inside the agricultural district.[8] In order to use the affirmative defense under the agricultural district law, the landowner will need to show that the plaintiff bringing the suit is not a farmer, that the landowner's interest existed prior to the plaintiff, and that the landowner is not violating any other federal, state or local laws relating to the alleged nuisance or that agricultural activities were conducted in accordance with generally accepted agricultural practices.[9]

Third, agricultural district land can receive special review if a government agency proposes to take the land by eminent domain.[10] If 10 acres or 10%, whichever is greater, of agricultural district land under one ownership is proposed for eminent domain, the appropriating agency must give advance written notice to the Ohio Department of Agriculture for additional review. If the director of agriculture has reason to believe that the proposal will have an adverse effect on the district, the director can ask the governor to stay the proceedings for 60 days. During the stay, the director will conduct a public hearing in the area. The director will then compile a report and recommendations regarding the proposal.

Removing land from an agricultural district

Agricultural districts must be renewed every five years between the first Monday in January and the first Monday in March.[11] If a landowner does not renew the agricultural district, they will lose the benefits tied to its status. Once land is enrolled in the agricultural district program, it must remain in agricultural use for the next five years. If the land is changed from agricultural use during the five-year period, the landowner will owe a penalty to the county.[12] If the land was enrolled in CAUV, the penalty will be calculated by multiplying the prime interest rate times the recoupment charged under CAUV.[13] If the land

1 ORC 929.02(A)
2 ORC 929.02(A)
3 ORC 929.02(A)(2)
4 ORC 929.02(B)
5 ORC 929.02(B)
6 ORC 929.02(E)
7 ORC 929.03
8 ORC 929.04
9 ORC 929.04
10 ORC 929.05
11 ORC 929.02(A), (C)
12 ORC 929.02(D)
13 ORC 929.02(D)(1)

was not enrolled in CAUV, the penalty is the prime interest rate times the savings that would have occurred under the CAUV program.[14] However, if a landowner simply chooses not to renew the agricultural district, there is no penalty. In any circumstance that land comes out of an agricultural district, either by non-renewal or conversion to a non-agricultural use, the landowner will be charged for any deferred assessments and applicable interest which accrued during the time the land was enrolled.

Agricultural security areas

While agricultural districts are available to individual landowners, agricultural security areas represent a commitment among landowners and local officials to keep land in agricultural production for at least 10 years.

Creating an agricultural security area

In order to create an agricultural security area, landowners, township trustees and county commissioners need to enter into a cooperative agreement affirming their intent to protect the land's agricultural use. In addition, the area considered for the ASA must be at least 500 contiguous acres of farmland.[15] The land can be owned by different owners or be different parcels but must be contiguous. All landowners must agree to enroll in the ASA, and all land must be located in an unincorporated area of a township or county. The land must be enrolled in the Agricultural District program and the Current Agricultural Use Value program.[16] Finally, the applicants must not have any criminal record pertaining to violations of environmental laws in the past 10 years and the farming must be conducted in accordance with best practices as certified by the USDA Natural Resources Conservation Service or the local Soil and Water Conservation District.[17]

14 ORC 929.02(D)(2)
15 ORC 931.02(B)(1)
16 ORC 931.02(B)(2),(3)
17 ORC 931.02(A)(4), ORC 931.03(C)(2)

Procedure to establish an agricultural security area

After completing an application from the county auditor, the landowners must submit the application to the township trustees and county commissioners where the land is located.[18] Each township and county then must hold a public hearing on the application.[19] After the hearings, each authority must pass a resolution either approving or rejecting the ASA.[20] If either body rejects the application, the ASA cannot be established.

Benefits of an agricultural security area

Once an ASA is established, a county or township may not install any new roads, or water or sewer lines, except under order of the U.S. or Ohio EPA.[21] Landowners may also ask for approval from county and township officials to provide up to 75% tax exemption for real property taxes on new property improvements within the ASA after enrollment.[22] Finally, all non-agricultural development will be prohibited within the ASA during its 10-year term.[23]

Agricultural easement

An agricultural easement is a voluntary, perpetual and legally binding restriction on a farm that prohibits certain development or non-agricultural uses to preserve and protect Ohio's farmland.[24] Legally, an agricultural easement is an incorporeal right or interest in land that is held by the state for the public purpose of retaining the use of land predominantly in agriculture.[25] Private property owners who choose to preserve their land for the use of agriculture through an agricultural easement continue to privately own the land, including all private property rights not explicitly addressed in

18 ORC 931.02(A)
19 ORC 931.03(A)(1)
20 ORC 931.03(A)(3)
21 ORC 931.03(C)(1)(a)-(c)
22 ORC 5709.28
23 ORC 931.03(C)(1)
24 R.C. 5301.67
25 ORC 5301.67(C)

the easement agreement.[26] The development rights, however, are sold or given to the state to prevent future loss of farmland. Land encumbered by an agriculture easement may be sold, gifted, or traded at any time by the landowner, but the easement is an encumbrance that will follow the land and apply to any future owners.

Local agricultural easement purchase program

Ohio is one of 30 states to fund a statewide easement purchase program to preserve productive and valuable agricultural land.[27] The Clean Ohio Local Agricultural Easement Purchase Program (LAEPP) provides compensation to eligible farmland owners who would like to permanently preserve their land for agricultural purposes. Landowners approved for LAEPP can receive up to 75% of the appraised value of a farm's development rights, with the cap set at $2,000 per acre and $500,000 per farm.

Applying for LAEPP agricultural easements

Before initiating the application process to participate in LAEPP, farmland owners should first determine whether the land meets the program requirements. Eligible land will meet all of the following conditions:[28]

1. Enrolled in CAUV and Agricultural District Programs.
2. Landowner possesses full and irrevocable title with no disqualifying encumbrances.
3. Landowner certifies the property does not contain any hazardous materials.
4. All parcels within the application are contiguous and no land is excluded.[29]
5. Landowner has not violated either state or federal agricultural laws within five years of application.
6. Property is at least 40 acres or property borders a protected ODA easement.

Owners of eligible land must apply for LAEPP through an approved local sponsor.[30] Local sponsors are municipal corporations, counties, townships, Soil and Water Conservation Districts, or charitable organizations that have been certified by the Ohio Department of Agriculture and have agreed to monitor agricultural easements.[31]

Application enrollment periods are set by the local sponsors and will be open for a maximum of 90 days.[32] Incomplete or late applications will be automatically disqualified, so potential applicants should reach out to their local sponsor to inquire about the application period and the materials that will be needed to complete their application.[33]

Properly submitted applications are scored based on criteria such as soil type, protected areas, management practices, development pressures, local plans allowing for agriculture and other miscellaneous items with the highest-ranking scores receiving admission to the program.[34]

Agricultural easement donation program

Farmland owners also have the option to donate their land's development rights through the Agricultural Easement Donation Program (AEDP). In order to be eligible for donation, the land must meet the same criteria required for LAEPP property and must go through a similar application process. Tax benefits may also be available if a landowner chooses this option. Landowners wishing to apply to participate in AEDP should reach out to the Ohio Department of Agriculture's Farmland Preservation staff directly.

Extinguishing an agricultural easement

An agricultural easement must be held in perpetuity, though unexpected changes in conditions may make continued enforcement of the easement impossible or impractical.[35] When faced with irreversible natural changes or development pressure rendering agricultural use impossible, landowners may request an extinguishment of the easement with their local sponsor or the Department of Agriculture, who will make an appealable determination of the need to terminate the easement.[36] Landowners who are successful in extinguishing an easement will be responsible for the recoupment of costs.[37]

Agricultural easement resources

For more information about the LAEPP and AEDP application process you can visit the Ohio Department of Agriculture's Farmland Preservation webpage at agri.ohio.gov/programs/farmland-preservation-office.

26 ORC 901.21
27 ORC 901.21
28 ORC OAC 901-2-02
29 OAC 901-2-01(M)
30 OAC 901-2-04
31 ORC 5301.69, OAC 901-2-07 and 901-2-11
32 OAC 901-2-04
33 OAC 901-2-04
34 OAC 901-2-05
35 OAC 901-2-12
36 OAC 901-2-12
37 OAC 901-2-13

Boundary Disputes, Trees, and Property Rights

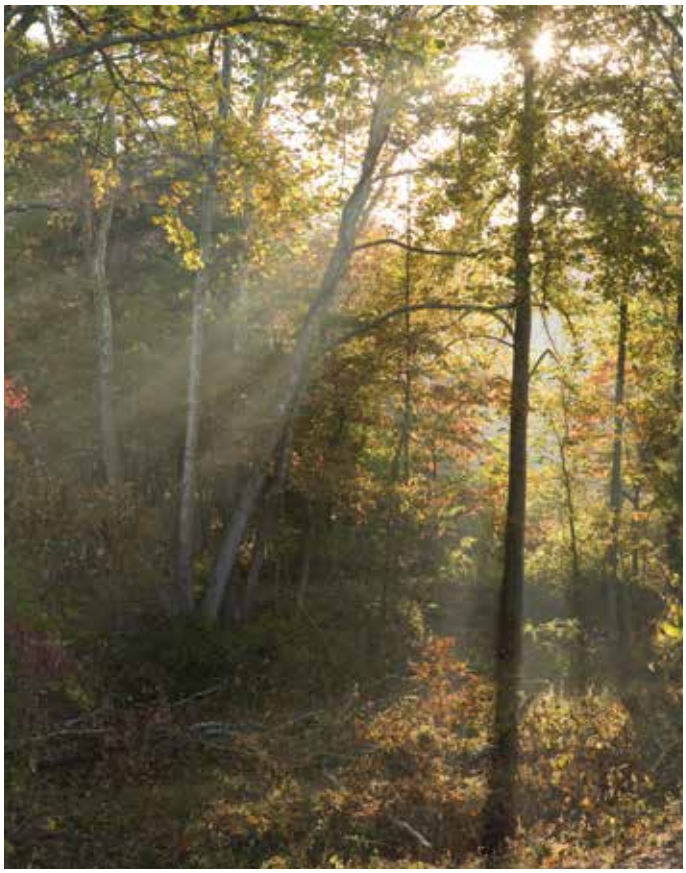
A common concern many landowners share is understanding their rights when they believe that someone is encroaching on their property. Sometimes the encroachment may involve overhanging tree branches or overgrown shrubs. Sometimes the encroachment may involve someone else using the owner's property or placing a structure over the boundary line. Disputes also arise when neighboring owners disagree regarding the location of the property line, either due to competing property surveys or how the neighbors historically treated the property line. The resolution of these types of disputes is always very fact-specific. This information will explore a few of the most commonly encountered issues and a basic overview of some of the legal doctrines associated with such issues.

Trees and property rights

Trees Located on the Property Line: A tree that sits on the boundary line between properties generally belongs to both property owners.[1] Given this general rule, one should seek the neighbor's permission before removing a tree that sits on the property line. If both neighbors agree that the tree should be removed, it would be a best practice to work out the necessary details in advance, such as deciding how and by whom the removal costs will be paid, obtaining permission to enter onto property to safely remove the tree, and resolving any questions regarding disposal of the tree and any debris or the distribution of any proceeds from the tree's products.

Overhanging Branches From a Tree Located on Neighboring Property: Landowners' property rights extend upward, and owners have the right to clear the airspace above their property of the tree limbs or branches overhanging the property line.[2] However, a property owner's right to clear their airspace is limited by the neighbor's right to be free from trespassing.

1 26 A.L.R.3d 1372
2 *Murray v. Heabron*, 74 N.E.2d 648 (1947).



Therefore, it is important that any owner who chooses to trim overhanging branches refrain from any form of trespassing, such as stepping onto the neighboring property, placing debris or letting debris fall onto the neighboring property, or trimming parts of the tree beyond the property line. Communication between neighbors prior to trimming is the best way to reduce misunderstandings and unnecessary disputes. Trimming branches overhanging the property line should also be done with care to avoid reckless damage to the tree.

Damaging a Neighbor's Tree: Ohio law prohibits a person from recklessly cutting down, destroying, or otherwise injuring a tree, bush, vine, shrub, sapling, or crop on another's property without permission to do so. The law provides this is a fourth degree misdemeanor with criminal penalties. In addition, the owner of that tree can pursue a private lawsuit against the person who injured the tree or crop and may be awarded up to three times the damages of the value of the tree or crop that was damaged.[3] These civil damages may be awarded, if successfully proven by the tree owner, even if the person who cut the tree was not convicted of the misdemeanor.[4]

3 ORC 901.51, ORC 901.99
4 *Wooten v. Knisley*, 79 Ohio St.3d 282 (1997)

Liability for Falling Tree: Liability is always a question to be decided within a court proceeding based on the specific facts of the case. However, case law in Ohio provides us with the general principles upon which such cases will be decided. In general, landowners are not liable for damage caused by a falling tree or tree branch, such as when an otherwise healthy tree is struck by lightning and falls or is toppled by strong winds. An exception exists when the landowner actually knew or clearly should have known that the tree is in a dangerous condition which may cause harm, especially if the tree abuts a public roadway.[5] For instance, if a tree is obviously diseased, damaged, rotting, or even dead, a landowner must take reasonable care to prevent the tree or its branches/limbs from falling and causing harm. Courts may also look at whether the fallen tree is on a rural property with numerous trees or an urban property with few trees, under the theory that it is reasonable for an urban property owner with only a few trees to inspect them for disease or damage, whereas a rural landowner with a forest of trees would not have the same duty to inspect each individual tree. However, that rural landowner must still take reasonable care with such trees they know or should know are at risk of falling.[6]

Trees on Utility Easements: Trees are typically an issue with electric and phone lines, and utility companies often need to trim trees in order to ensure they do not fall onto or damage utility lines. Most utilities that have an easement or right of way across a landowner's property to service and maintain the utility infrastructure and will include language in that easement/right of way that gives the utility the right to trim or maintain trees that overhang the easement or right of way. If the language of the written easement or right of way grants this authority to the utility, a landowner has no cause to object to the utility exercising this authority, even if the utility company has never trimmed trees in the past.

Boundary disputes and competing ownership claims

The resolution of boundary disputes between neighbors or the determination of property rights between persons with competing ownership claims to the same piece of property are civil disputes that must be resolved through court action, if those involved are unable to reach an agreement. Some of the common types of actions filed to resolve such claims are actions to quiet title (to "quiet" multiple claims to the property at issue and determine who is the rightful owner) or actions seeking a declaratory judgment (to declare the respective rights of the parties). Within the various types of civil actions regarding competing ownership disputes, below are a few of the legal doctrines that may be encountered.

Adverse Possession: Adverse possession is a legal doctrine that is used in civil actions when a person who does not hold legal title to a piece of property claims to have taken ownership of that property away from the legal titleholder[7] by possessing and using that property as his own. The elements of an adverse possession claim in Ohio, require a claimant to show that they:

- Possessed the property in an exclusive manner, meaning they used it in a way in which the titleholder could not have also made use of it.
- Used the property in an open and notorious manner, or it would be noticeable to the titleholder that someone else is using the property.
- Used the property in an adverse manner, or generally, without any permission to use the property
- Used the property continuously, for a period of at least 21 years.[8]

5 *Heckert v. Patrick*, 15 Ohio St.3d 402 (1984)

6 *Heckert v. Patrick*, 15 Ohio St.3d 402 (1984); Hay v. Norwalk Lodge No. 730, B.P.O.E., 109 N.E.2d 481 (1951)

7 The legal titleholder is the person/entity whose ownership of the property is evidenced by a written deed.

8 *Grace v. Koch*, 81 Ohio St.3d 577 (1998); *Pennsylvania Rd. Co. v. Donovan*, 111 Ohio St. 341 (1924)

The person claiming adverse possession is required to prove these elements by the highest standard, "clear and convincing evidence." This means the evidence must fulfill all the required elements to a highly probable or reasonable certainty. A person claiming adverse possession does not need to show that the claimant specifically intended to take the property away from the titleholder, only that the claimant intended to possess the property and treat it as his or her own.[9] In other words, a person can claim that his or her use of the property was "adverse" to the titleholder's interests even if the person using the property did so thinking it was his own.

Prescriptive Easements: A prescriptive easement is acquired by successfully proving open, notorious, continuous, and adverse use of the property at issue for a period of 21 years. The element of exclusive possession is not required for a prescriptive easement.[10] This is because a prescriptive easement does not change the title to the property, but gives the person who has proven the claim an easement on the property to continue using it.

Acquiescence: The doctrine of acquiescence is raised most commonly in situations where neighboring landowners have mutually used a fence or some other line as the boundary between their properties for a significant time period. If at some point one of the neighbors disputes the agreed upon boundary line, they may use a new survey to dispute the location of the line. The neighbor who wants the historical boundary to remain as the property line may argue that the neighbor wanting it changed had "acquiesced" to the prior boundary line, and will then ask the court to legally change the boundary to the one acquiesced to by the parties.[11] To support acquiescence, the landowner will likely need to show that the boundary line was mutually respected for at least 21 years. The doctrine of acquiescence is a separate doctrine from adverse possession, but it also must be proven by clear and convincing evidence and is often raised with adverse possession in a boundary dispute.[12]

9 *Evanvich v. Bridge*, 119 Ohio St.3d 260 (2008)
10 *Pennsylvania Rd. Co. v. Donovan*, 111 Ohio St. 341 (1924)
11 *Ballard v. Tibboles*, 1991 WL 251957; *Allread v. Holzapfel*, 2013 WL 3934918
12 *Thomas v. Wise*, 2007-Ohio-3467

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23050 05/2023