

Date of Hearing: May 7, 2013

ASSEMBLY COMMITTEE ON JUDICIARY
Bob Wieckowski, Chair
AB 1404 (Judiciary) – As Amended: April 30, 2013

SUBJECT: REAL PROPERTY: BOUNDARIES

KEY ISSUE: SHOULD CALIFORNIA'S ANTIQUATED 150 YEAR OLD FENCE STATUTE, RELEVANT TO THE GOLD RUSH DAYS BUT NOT TO CONTEMPORARY CALIFORNIA, BE UPDATED WITH MODERN LANGUAGE TO CLARIFY THE ORIGINAL INTENT THAT NEIGHBORS TYPICALLY SHARE THE BENEFITS AND RESPONSIBILITIES OF COMMON FENCES TO ENSURE THEIR PRIVACY AND THEIR PRIVATE PROPERTY?

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

SYNOPSIS

This non-controversial bill seeks to clarify and modernize California's antiquated 150 year old neighborhood fence statute, maintaining the state's long tradition which holds that neighbors are presumed to gain mutual benefits from the construction and maintenance of a boundary fence between their properties, and as a result are generally equally responsible to contribute to the construction and maintenance of their shared fencing. This appears to be the approach intended for the past 141 years since Section 841 of the Civil Code was originally enacted in order to safeguard against the unjust enrichment of one landowner by the adjoining landowner's construction or maintenance of a boundary fence between them. However this is one of the rare examples of an old California statute never having been amended in all that time, so its 1870s language is no longer clear or helpful. This measure thus seeks to update and clarify existing law regarding shared fencing in California to reflect the modern benefits associated with boundary fences, which include protecting the premises against invasions of privacy and unlawful encroachment. In addition, the statutory update will provide much better guidance to all Californians who share common fences, to minimize neighborhood disputes. The measure has no known opposition.

SUMMARY: Seeks to clarify and modernize California's almost 150 year old neighborhood fence statute, maintaining the state's long tradition which holds that neighbors are presumed to gain mutual benefits from the construction and maintenance of a boundary fence between their properties, and as a result are generally equally responsible to contribute to the construction and maintenance of their shared fencing. Specifically, this bill:

- 1) Provides that there is a rebuttable presumption that adjoining landowners gain an equal benefit from the shared fencing that divides their properties, unless otherwise agreed to by the parties in a written agreement, and adjoining landowners are presumed to be equally responsible for the reasonable costs of construction or maintenance of any such fencing.
- 2) Requires a landowner who intends to incur costs for the construction or maintenance of a shared fence with an adjoining landowner, and who wishes to have reasonable contribution

for those costs by the adjoining landowner, to provide that neighbor written notice of at least 30 days to an adjoining landowner prior to any construction or maintenance of the fencing.

- 3) Requires the 30-day notice to include the following: notification of the presumption of equal responsibility for the reasonable costs of construction, maintenance or necessary replacement of the fence, and the estimated construction or maintenance costs.
- 4) Provides that, in the event there is a subsequent dispute about the shared fencing project, the court shall order contribution of the reasonable costs of construction or maintenance of the fencing, unless the adjoining landowner either rebuts the presumption, as specified, or demonstrates a financial hardship, and the court determines that no contribution or a contribution of less than an equal share is owed to the requesting landowner.
- 5) Provides that the presumption, as indicated above, may be rebutted by a mere preponderance of the evidence that demonstrates that imposing equal responsibility for the reasonable costs of construction or maintenance would result in a manifest injustice.
- 6) Requires the court to consider, when determining whether equal responsibility for the reasonable costs of construction, maintenance or necessary replacement would result in a manifest injustice, all of the following factors:
 - a) Whether the financial burden to one landowner is substantially disproportionate to the benefit conferred upon that landowner by the fence in question.
 - b) Whether the cost of the fence would exceed the difference in value of the land before and after its installation.
 - c) Whether the financial burden to one landowner would impose an undue financial hardship given that party's financial circumstances.
 - d) The reasonableness of a particular construction or maintenance project, including: 1) The extent to which the costs of the project are unnecessary; and 2) The result of the landowner's personal aesthetic, architectural, or other preferences.
 - e) Any other equitable factors appropriate under the circumstances.
- 7) Defines 'adjoining landowner' as any private person or private entity that lawfully holds any possessory interest in real property.
- 8) Excludes from the meaning of 'adjoining landowner' for purposes of this section any city, city and county, district, public corporation, or other political subdivision, public body, or public agency that lawfully holds any possessory interest in real property.

EXISTING LAW provides that "coterminal owners are mutually bound equally to maintain the fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterward encloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter." (Civil Code Section 841(2).)

COMMENTS: This non-controversial bill seeks to clarify and modernize California's almost 150 year old neighborhood fence statute, maintaining the state's long tradition which holds that neighbors are presumed to gain mutual benefits from the construction and maintenance of a boundary fence between their properties, and as a result are generally equally responsible to contribute to the construction and maintenance of their shared fencing. This appears to be the approach intended for the past 141 years since Section 841 of the Civil Code was originally enacted in order to safeguard against the unjust enrichment of one landowner by the adjoining landowner's construction or maintenance of a boundary fence between them. However this is one of the rare examples of an old California statute never having been amended in all that time, so its 1870s language is no longer clear or helpful. This measure thus seeks to update and clarify existing law regarding shared fencing in California to reflect the modern benefits associated with boundary fences, which include protecting the premises against invasions of privacy and unlawful encroachment. In addition, the statutory modernization will provide much better guidance to all Californians who share common fences.

Background: Civil Code section 841 was originally enacted to safeguard against the unjust enrichment of one landowner, most often a California rancher or farmer, by an adjoining landowner's construction and/or maintenance of a boundary fence. However the benefits associated with these original Gold Rush era boundary fences—such as the prevention of roaming livestock—have of course substantially evolved since the state's fencing statute was enacted in the 1870s. Thus this Committee bill seeks to bring this statute up to modern California where Californians most often live in urban or suburban areas with a plethora of shared fences, where it is not unusual for some neighbors to share fencing with three or four other neighbors.

This bill therefore seeks to clarify in modern English the statute's original intent that neighbors gain mutual benefits from the construction and maintenance of a boundary fence between their properties, and are therefore appropriately typically should be presumed to share equally in the need to contribute to the construction and maintenance of those fences. In addition, the updating of the law seeks to minimize neighborhood disputes.

Enacted in 1872, Civil Code section 841 has been without any revision or amendment since its enactment, which has left the language of the current statute antiquated and unclear. Under the current statute, adjoining landowners are mutually bound to maintain boundaries between them, including fences, if the property is enclosed. In other words, property owners are only responsible for contributing a “just proportion of the value” to the construction or maintenance of the fence if they are using the boundary fence to enclose their own property. (See *Gonzales v. Wasson* (1876) 51 Cal. 295 [one adjoining landowner could compel another to contribute to the expense of maintaining a partition fence when the fence completed an enclosure].)

Modernizing the ‘Good Neighbor’ Boundary Fence Statute Will Protect Against the Contemporary Risks of Unjust Enrichment. As written, Civil Code section 841 seeks to protect against a landowners unjust enrichment when an adjoining landowner provides a mutual benefit in the form of construction or maintenance of a boundary fence when one uses the boundary fence to enclose his or her land. (See *Bliss v. Sneath* (1894) 103 Cal. 43, 45-46.)

During the mid-1800s when this law was originally enacted, the California Legislature recognized the importance of protecting the fruits born of land cultivated for harvest, and enacted Section 841 of the Civil Code in 1872, which provided that adjoining landowners are mutually

bound equally to maintain the fences between them. At that time, the primary benefit associated with erecting a boundary fence around one's property was to, "prevent the ingress and egress of domestic animals as they are usually nurtured and confined thereon, and to protect the premises enclosed from unlawful encroachment." (*Meade v. Watson* (1885) 67 Cal. 591, 593.) By confining such animals, landowners could avoid liability associated with damage caused to adjoining landowner's crops because of animals roaming free. (*Ibid.*)

The current language of Civil Code section 841 reflects this narrow understanding of the benefits associated with, and the purposes served by a boundary fence. However in a society no longer dominated by agrarian pursuits, updating and modernizing the statute to better reflect the modern benefits associated with neighborhood fences makes sense, such as protecting the premises against invasions of privacy and unlawful encroachment. Today, one hundred and forty-one years after this statute's enactment, the landscape of California has changed dramatically. The United States Census Bureau reports that nearly 95 percent of California's population resides in urban areas, defined as densely developed residential, commercial and other nonresidential areas. The Los Angeles-Long Beach-Anaheim area, for example, is the most densely populated urbanized area with nearly 7,000 people per square mile. The San Francisco-Oakland area is the second most densely populated with 6,266 people per square mile.

In such densely populated urban areas, fencing between properties serves the basic functions of preserving each neighbor's privacy and provides a visual demarcation of property lines. Given these basic mutual benefits, fences dividing adjoining landowner's properties in an urban society are usually necessary and generally expected. The modernization of the statute in this bill will better recognize these contemporary mutual benefits by creating a presumption that adjoining landowners share an equal benefit, and an equal responsibility for the reasonable costs of construction and maintenance, of any fence dividing their properties.

At the same time, the bill takes into account that neighborhood fences are not always mutually beneficial, and that an adjoining landowner who clearly receives little or no benefit from a boundary fence should not be forced to subsidize an adjoining landowner's fence construction. By allowing such owners to demonstrate the unfairness of imposing equal responsibility in a particular case, this bill seeks to prevent the inequities that would result from a hard and fast "blanket" presumption of equal benefit and responsibility.

This Clarification of State Law Is Particularly Helpful Because Local Ordinances Often Fail to Provide Needed Guidance to Adjoining Landowners Regarding Shared Fences: Research by the Committee reveals that there are several California cities that explicitly require property owners to maintain any fences on their properties. However, the ordinances do not address in any way how adjoining property owners should avoid and if needed settle disputes regarding the reasonable apportionment of costs of construction or maintenance of such shared fencing.

For example, Sacramento Municipal Code Section 17.76.010(C) states the maintenance of a wall or fence shall be the responsibility of the owner(s) of the property on which the fence is located. However, the ordinance fails to specify how the responsibilities shall be shared when – as is so often the case in modern California – the fencing is shared between one or perhaps several adjoining landowners. In addition, Los Angeles Municipal Code Section 91.8104.13 merely requires fences to be maintained in good repair, but again fails to indicate by whom, and by what manner neighbors should presumptively share in that responsibility.

These typical omissions and ambiguities in local ordinances that touch upon shared fencing issues highlight the need and benefit of finally clarifying and modernizing the state's neighborhood fencing statute under Civil Code section 841.

Other States' Statutory Schemes Similarly Recognize a Presumption of Mutual Benefit from Neighborhood Fencing: In several states, including Minnesota, Nebraska, Iowa, New Hampshire and Louisiana, adjoining landowners are similarly presumed to gain a mutual benefit from a fence between their properties, and are required to contribute to the construction or maintenance of a fence.

Under Minnesota's statutory scheme, for example, just like California's antiquated statute, adjoining landowners are presumed to benefit from any fence dividing their properties, unless evidence to the contrary is presented. (Min. Stat. Ann. § 344.03.) The Court of Appeals in *In re Bailey* emphasized the purpose of the state's partition fence law. "We believe it is clear that the partition fence law serves the broad purposes of mediating boundary, fence, and trespass disputes by requiring adjoining landowners to share the cost of a partition fence." (*In re Bailey* (2001) 626 N.W.2d 190, 195.)

California would continue to be in line with other states in modernizing its fencing law's approach. Indeed, in 2010, the Nebraska State Legislature amended Section 34-102 of its Revised Statutes to announce a rule similar to the one proposed by this bill, which recognizes the duty of adjoining landowners for the construction or maintenance to be mutually beneficial to the public interest and general welfare. The amendment was accompanied by the following legislative findings:

The Legislature finds the duty of adjoining landowners for the construction and maintenance of division fences to be beneficial to the public interest and welfare. Such benefits are not confined to historical and traditional societal benefits that accrue from proper constraint of livestock, but also include suppression of civil disputes and public and private nuisances and the protection of public safety. Division fences promote the peace and security of society....

(2010 Nebraska Laws L.B. 667.) It bears noting that some of the Nebraska Legislature's findings would apply with even more force in California, given the prevalence of densely populated urban areas, and the privacy-related benefits of boundary fences in those areas.

Appropriate Notice to Encourage Cooperation and Minimize Disputes: To encourage neighborly cooperation and collaboration for resolving neighborhood fencing issues, this modernization of the fencing statute requires a neighbor seeking contribution from another neighbor to provide reasonable written notice to that adjoining neighbor prior to any construction or maintenance of the shared fencing between their properties. This will provide the appropriate opportunity for neighbors, if they so desire, to have an equal voice in determining the type of fence or fence repair that will address the fencing issue between their properties. The bill therefore requires the 30-day written notice to include the following information: notification of the presumption of equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence, along with the estimated construction or maintenance costs.

Though Unaddressed in the Antiquated Original Fencing Statute, This Bill Is Appropriately Limited to Private Persons and Private Entities: The presumption of equal responsibility and contribution for shared fencing does not make sense in the context of public lands, such as

California's 1.5 million acres containing state parks, or in the context of many other state and local public lands. The measure thus appropriately limits its scope to private landowners.

REGISTERED SUPPORT/OPPOSITION:

Support

None on file

Opposition

None on file

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