

SENATE JUDICIARY COMMITTEE
Senator Noreen Evans, Chair
2013-2014 Regular Session

AB 1404 (Committee on Judiciary)
As Amended April 30, 2013
Hearing Date: June 11, 2013
Fiscal: No
Urgency: No
BCP

SUBJECT

Real property: boundaries

DESCRIPTION

The bill would establish a presumption that adjoining landowners share an equal benefit from any fence dividing their properties and, absent a written agreement to the contrary, are equally responsible for the reasonable costs for the fence, as specified.

BACKGROUND

Under existing law, "coterminous" landowners (property owners that share the same boundary) are required to equally maintain the fences between them, unless one of them chooses to let his or her land lie without fencing. (Civ. Code Sec. 841.) The requirement for landowners to equally share in the costs of fences between their properties was enacted in 1872 and based upon prior requirements for landowners to share costs for fencing. In *Bliss v. Sneath* (1894) 103 Cal. 43, the California Supreme Court further observed:

[Civil Code Section 841 is] one of many code provisions relating to the rights and duties of property holders, and the liability arising from the conditions mentioned cannot justly be said to be a statutory liability. The liability arises from the fact that plaintiff's principal made use of a fence built by the defendant under circumstances which create the liability. She has been benefited, and the law says she must pay for it. Here are all the elements of an implied contract. The obligation to pay legal interest could be claimed, with much greater plausibility, to be a statutory liability, and therefore not a contract liability. The fact that the Civil Code has changed some common-law rules, by which the rights and obligations of persons were ascertained, does not make the new or changed obligations any less obligations arising from implied contracts than were the different obligations fixed by the common law. (*Id.* at 45.)

(more)

The existing statutory requirement generally imposing a mutual obligation upon landowners to maintain fences has not been amended in over 140 years. This bill seeks to update and clarify that section by codifying a presumption that adjoining landowners are equally responsible for construction, maintenance or necessary replacement of a fence, requiring a landowner to give 30 days written notice to affected adjoining landowners prior to incurring costs for a fence, and allowing the presumption to be overcome by a preponderance of the evidence demonstrating that imposing equal responsibility would be unjust.

CHANGES TO EXISTING LAW

Existing law provides that coterminous owners are mutually bound equally to maintain: (1) the boundaries and monuments between them; and (2) the fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterwards encloses it, he must refund to the other a just portion of the value, at that time, of any division fence made by the latter. (Civ. Code Sec. 841.)

This bill would repeal the above provision and, instead, provide that adjoining landowners shall share equally in the responsibility for maintaining the boundaries and monuments between them.

This bill would provide that adjoining landowners are presumed to share an equal benefit from any fence dividing their properties and, unless otherwise agreed to by the parties in a written agreement, shall be presumed to be equally responsible for reasonable costs of construction, maintenance, or necessary replacement of the fence.

This bill would require a landowner to give 30 days' written notice to each affected adjoining landowner if the landowner intends to incur costs for a fence, as specified. The notice shall include notification of the presumption of equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence. The notice shall also include a description of the nature of the problem facing the shared fence, the proposed solution addressing the problem, the estimated construction or maintenance costs involved to address the problem, the proposed cost sharing approach, and the proposed timeline for getting the problem addressed.

This bill would allow the above presumption to be overcome by a preponderance of the evidence demonstrating that imposing equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence would be unjust. In determining whether equal responsibility for the reasonable costs would be unjust, the court shall consider: (1) whether the financial burden to one landowner is substantially disproportionate to the benefit conferred upon that landowner by the fence in question; (2) whether the cost of the fence would exceed the difference in the value of the real property before and after its installation; (3) whether the financial burden to one landowner would impose an undue hardship given that party's financial circumstances as demonstrated by reasonable proof; (4) the reasonableness of the particular

construction or maintenance project, as specified; and (5) any other equitable factors appropriate under the circumstances.

This bill would provide that when a party rebuts the presumption by a preponderance of the evidence, the court shall, in its discretion, consistent with the party's circumstances, order either a contribution of less than an equal share for the costs of construction, maintenance, or necessary replacement of the fence, or order no contribution.

This bill would define "landowner" as a private person or entity that lawfully holds any possessory interest in real property, and provide that landowner does not include a city, city and county, district, public corporation, or other political subdivision, public body or public agency.

This bill would also define "adjoining" as contiguous or in contact with.

COMMENT

1. Stated need for the bill

According to the author:

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.

The current language of Civil Code section 841 reflects this narrow understanding of the benefits associated with a boundary fence. However in a society no longer dominated by agrarian pursuits, modernizing the statute to better reflect the contemporary benefits associated with neighborhood fences makes sense. Today, 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.

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 thus better recognize these contemporary mutual benefits by clarifying the rebuttable 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 appropriately 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. The current statute in place does not speak to this issue at all.

2. Presumption of benefit and responsibility for fences

Under existing law, coterminous landowners (owners that share the same boundaries) are required to equally maintain the fences between them. (Civ. Code Sec. 841.) That requirement does not apply if one landowner chooses to not place fencing on his or her land, unless, the landowner later chooses to enclose the land, in which case, that owner must pay a just portion of the value of the fence. This bill seeks to update and clarify that statute by repealing the above requirements and, instead, enacting a presumption that adjoining landowners share an equal benefit from any fence dividing their properties and, unless otherwise agreed to in writing, are equally responsible for the reasonable costs of construction, maintenance, or necessary replacement of the fence.

That presumption appears to be consistent with prior law, case law, and the common perception of landowners in California that he or she must share in the costs of a fence shared with a neighbor. To provide clarity as to the burden that must be met if a landowner disagrees with the presumption, this bill would allow the presumption to be overcome by a preponderance of the evidence demonstrating that equal responsibility for the reasonable costs of construction, maintenance, or necessary replacement of the fence would be unjust.

The bill would also include various factors that a court must examine in determining whether the equal sharing of costs would be unjust, including, whether the financial burden is substantially disproportionate to the benefit, whether the financial burden would impose a financial hardship, the reasonableness of the particular construction or project, and any other equitable factors. Thus, a landowner that objects to sharing the equal costs could rebut the presumption by proving, among other things, that the project is excessive, or that the owner is financially unable to pay for his or her share of the fence at that time.

Staff further notes that while most homeowners do share a fence with at least one neighbor, the last published case citing Civil Code Section 841 (dealing with equal contribution for fences) occurred in 1964. Given the regularity with which fence repairs are likely made within the state, and the lack of reported cases brought on the issue, it

appears as though many landowners attempt to resolve any fence dispute without seeking court involvement (or go to small claims court for reimbursement of costs). To the extent that this bill clarifies the presumption of equal responsibility for reasonable costs, as well as circumstances where equal responsibility would be unjust, the criteria provided by this bill would provide guidance not only for the courts, but for parties seeking to resolve the dispute between themselves.

It should also be noted that the language proposed by this bill does not expressly include the exemption under existing law for a landowner who elects to not place fencing on his or her land. Despite that omission, the factors that must be considered by the court (including “any other equitable factors appropriate under the circumstances”) would appear to provide sufficient discretion to allow such an exemption to continue forward where appropriate.

3. Thirty day notice

In an effort to encourage cooperation and minimize disputes, this bill would require a landowner to give 30 days’ prior written notice to each affected landowner if he or she intends to incur costs for which there is a presumption of equal responsibility. That notice must include notice of a presumption of equal responsibility and a description of the problem, proposed solution, estimated costs, proposed cost sharing, and proposed timeline. While, as noted above, many landowners may be resolving these disputes without seeking assistance from a court, it appears appropriate that any update and clarification of the fence law also include a requirement for notice prior to replacing a fence (especially when the landowner will then be seeking contributions for costs). That advance notice would potentially allow adjoining landowners to proactively resolve disputes before the fence is actually built – that resolution could avoid a situation where a party refuses to pay, which could result in an action filed in court.

It should also be noted that fences can be expensive and that it would appear to be reasonable to give a landowner at least one month’s notice that he or she may be required to pay several thousand dollars towards replacement of a fence. Furthermore, as noted above, since financial hardship is a factor a court must consider with respect to the presumption of equal responsibility, that advance notice may promote a discussion whereby the landowner seeking to erect or repair a fence can be made aware that the cost may be a financial hardship for a particular neighbor. This would assist the landowner in making an informed decision about whether or not to proceed with the planned fence construction.

4. Local ordinances

The author notes that “there are several California cities that explicitly require property owners to maintain any fences on their properties. However, the ordinances do not address – as this bill will - 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.” As an example of a statute requiring fence maintenance, Sacramento Municipal Code Section 17.76.010(c) provides that maintenance of a wall or fence shall be the responsibility of the owner(s) of the property on which the fence is located. While this bill is not inconsistent with that section, it would, as noted by the author, provide detail as to how costs generally are to be shared between landowners.

5. Scope limited by definition of landowner

This bill would define “landowner” as a private person or entity that lawfully holds any possessory interest in real property, but provide that landowner does not include a city, city and county, district, public corporation, or other political subdivision, public body, or public agency. As a result, the definition seeks to limit the proposed presumption to private landowners but exclude state or local public lands (such as California’s numerous state parks).

To clarify that the definition would also not apply to a county, the author offers the following amendment:

Author’s amendment:

On page 3, line 23 after “city,” insert: “county,”

Support: None Known

Opposition: None Known

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation: None Known

Prior Vote:

Assembly Committee on Judiciary (Ayes 10, Noes 0)

Assembly Floor (Ayes 72, Noes 0)
