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13 August 2018

SENATOR TONI G. ATKINS
SENATE PRESIDENT PRO TEMPORE
39TH DISTRICT
1350 FRONT STREET, SUITE 4061
SAN DIEGO, CA 92101

RE: AB 1404 and Neighbor Encroachment

Dear Senator Atkins,

It may well be, as you say in your letter of 9 August 2018, that "possible encroachment by a neighbor would be covered under the City of San Diego's code compliance ordinances."

But we already know that *my* particular dispute over construction and maintenance of subdivision boundary fencing is ***not*** covered by city ordinances, as I informed Brian Maienschein's office on 26 February 2016, with copies posted to my website; *see*

https://she-philosopher.com/SCCcase/comments-on-AB1404_2W07.html

for a direct link, and

https://she-philosopher.com/SCCcase/comments-on-AB1404.html#Follow-Up-No7

for the indirect link.

As I have already documented in the detailed study of AB 1404 posted to my website, the first thing I did after predatory neighbors in the rental property behind us removed their subdivision boundary fencing — and neither they nor their landlord would honor the other long-standing "boundaries and monuments between" our two subdivisions, as protected by Cal. Civ. Code § 841 (*i.e.*, the 1872 statute, still in force as of 2011 when the ensuing "encroachment by a neighbor" occurred) — was to contact the city's Development Services Department, Neighborhood Code Compliance Division. My detailed communication with the city over their code compliance ordinances took place from December 2011 through March 2012 (and, needless to say, I have a complete record of all that transpired, if anyone needs to review it ;-).

It was because city code did ***not*** apply to my particular case that I had to pursue other measures, eventually ending up in small claims court, then writing two Open Letters to the California state legislature and agitating for law reform after it turned out that the "Good Neighbor Fence Act of 2013" had removed my historical protections under Cal. Civ. Code § 841. The original statute, in force from 1872 until 2013, read in full:

> 841. Coterminous owners are mutually bound equally to maintain:
>
> 1. The boundaries and monuments between them;
>
> 2. The fences between them, unless one of them chooses to let his land lie without fencing; in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

The 1872 statute clearly applies to my boundary fencing dispute, and offered me protection from predatory neighbors who use my private fencing for purposes of enclosure, without my consent. Conversely, the "Good Neighbor Fence Act of 2013" purposefully withdrew these protections (more on this below), leading to unintended consequences which I believe it is the responsibility of the state legislature (not San Diego City Councilmember Chris Cate) to remedy. To refresh everyone's memory, there is a link to the text of the new "clarified and modernized" law here:

> https://she-philosopher.com/studies/California-AB-1404.html#text-of-AB-1404

In your 8/9/2018 letter, you state that

> Governor Brown signed this bill into law which clarified and modernized California's neighborhood fence statute which had not been updated or amended since its adoption in the 1870's.

Since I have actual experience testing the new law in small claims court, I can argue with confidence that there is a great deal pertaining to modern boundary fencing that the new law has not "clarified," but obfuscated. Not all disputes over fencing have to do with cost sharing (*e.g.*, unfairly forcing an adjoining neighbor to pay for "cadillac" division fencing disproportionate with the benefits they receive from said fencing), which, as I interpret it, is the focus of the modernized statute, along with exempting the state from "equal responsibility" for fencing public lands (by limiting the new statute's scope to *private landowners*).

It used to be that when neighbors were unable to agree on shared division fencing, the recommended solution was for each party either to leave their *entire* property without fencing (unenclosed), or erect private fencing on their private property (*vs.* shared fencing that is located on the shared property line). Is it the intent of the California state legislature that the latter is no longer an option for homeowners, because adjoining

landowners are now free to enclose their property with their neighbor's privately-owned "cadillac fence," without that neighbor's consent? and without remunerating that neighbor for use of their private property?

That's how my small claims court judge interpreted your "clarified and modernized" law. And this is why I adamantly disagree with you that my dispute over maintenance of subdivision boundary fencing is — or should be — "covered under the City of San Diego's code compliance ordinances." Such important issues concerning "the rights and obligations of owners of real property" are general, guiding principles that properly fall under the jurisdiction of state, not local, law, and have done so in the U.S. since the 17th century; *see*, for example, the 1682 fence law enacted by the New Jersey legislature establishing, in terms similar to California's 1872 statute, that

> … all persons in and throughout this Province, whose house lots hath been improved, or shall hereafter be improved and joining to another persons house lot … shall make and maintain his proportion of a sufficient division fence, except he and his neighbour shall otherwise agree ….
>
> (*see* <https://she-philosopher.com/studies/California-AB-1404.html#1682-fence-law> for full text of law)

More importantly, the 2nd of 5 analyses of AB 1404, created 5/6/2013 by and for the California legislature, expressly states that Section 841 of the Civil Code needs to be modernized in order to over-write strict local requirements that "property owners … maintain any fences on their properties" and to resolve "typical omissions and ambiguities in local ordinances":

> 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.
>
> (*see* legislature's analysis created 5/6/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No2of5>, p. 4)

So the legislature, itself, has already spelled out that this area of the law, relating to real property, is properly covered by the California Civil Code, not "the City of San Diego's code compliance ordinances."

As for my contention that the legislature's "clarification" of the 1872 statute has resulted in a flawed law, generating negative outcomes that were not just unintended (*cf.* your own record of legislative intent, as enumerated in the 5 analyses of AB 1404 created by and for the legislature, from May–June 2013), but actually *contradict* legislative intent: I believe

the authors' starting assumptions concerning the meaning of the original statute were in error, and because of this, Cal. Civ. Code § 841 was not modernized in the way it should have been. Again, quoting from the 2nd of 5 legislative analyses of AB 1404:

> 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 [*sic*] 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.
>
> (*see* legislature's analysis created 5/6/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No2of5>, p. 3)

I would argue that these early fence laws, based on English common law, were less about rural boundary disputes, and more about "possible encroachment by a neighbor" in towns, cities, and suburbs — the sort of trespass exemplified by Thomas Cromwell's land grab, *c.*1532, as I described in my 2nd Open Letter (dated 2/10/2016) to the lawmakers who enacted and/or continue to support California Assembly Bill 1404:

> https://she-philosopher.com/SCCcase/comments-on-AB1404.html#1532-neighbor-encroachment

and have documented here:

> https://she-philosopher.com/ib/topics/neighbors-and-fences.html

Cromwell's encroachment on his urban neighbor's property in the early 16th century gives new meaning to the injunction "Coterminous owners are mutually bound equally to maintain: 1. The boundaries and monuments between them; …."

Further evidence for my alternative historian's interpretation of the "antiquated" version of Cal. Civ. Code § 841 can be found in the section on Judeo-Christian laws re. trespass, the Diggers, and 17th-century radical republicanism at:

> https://she-philosopher.com/studies/California-AB-1404.html#founding-rights

If you start from this very different view of the 1872 statute, it becomes obvious that what the California legislature misinterpreted as a

> … narrow understanding of the benefits associated with a boundary fence …
>
> (*see* legislature's analysis created 6/10/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No3of5>, p. 3)

was actually more all-encompassing than what we ended up with after repealing and replacing it with AB 1404!

There are three flaws in the "clarified and modernized" law of 2013 to which I attribute the recent loss of my founding rights of property & privacy:

[1] The purposeful weakening of language (not just in the old statute, but also in local laws around the state) requiring "property owners to maintain any fences on their properties" (including, presumably, the "double fences" prevalent in neighborhoods like mine).

[2] The purposeful removal of language relating to enclosure.

> 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.
>
> (*see* legislature's analysis created 6/10/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No3of5>, p. 5)

Lawmakers are wrong to assume that enclosure is an antiquated issue affecting predominantly rural areas. The right to enclosure is a hugely important issue for those of us packed like sardines in high-density urban, suburban, and exurban developments. Enclosure law has the potential to affect everything from the SoCal trend for indoor/outdoor living to fence heights (*e.g.*, can/should a division fence be high enough to prevent my lights at ground level from shining into my neighbor's bedroom window at 2:00 AM?). I would argue that the debate over enclosure is one case where the 1872 statute really did need modernizing — but didn't get it! — because our contemporary needs for enclosure are rapidly changing (even from what they were several decades ago). Especially today, there must be better guidance than this for those of us dealing with neighbors who choose to leave their property unenclosed, or to enclose it by illegal means.

The omission was misguided, and urgently needs to be remedied. "Modernizing the statute to better reflect the contemporary benefits associated with neighborhood fences" — while excluding enclosure from that modern understanding of benefits — makes *no*

sense in a world where "nearly 95 percent of California's population resides in urban areas." (*see* legislature's analysis created 6/10/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No3of5>, p. 3)

[3] The exclusive focus on "the construction and maintenance of their shared fencing." A properly "clarified and modernized" neighborhood fence statute must also address boundary fencing that is not "shared" (*i.e.*, private fencing located on private property rather than the shared property line). What kind of "mutual obligation upon landowners to maintain fences" (*see* legislature's analysis created 6/14/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No4of5>, p. 3) applies here?

It is because of these gaping new holes in the law that I lost control over my private property in July 2015, and because of this, I no longer derive from it any of the "benefits" to which I used to be entitled by law. We chose to enclose our property with "cadillac" boundary fencing, which we paid for ourselves. We knew it was not fair to ask or demand that our subdivision neighbors pay union-scale wages to the master masons and other artisans who built the custom wall *we* wanted — constructed to local codes, and then some (*e.g.*, adding block truss mesh for joint reinforcement to reduce cracking that arises from thermal stresses and to improve seismic performance during earthquakes). If we wanted to pay a fair wage for an expensive, well-constructed and safe wall, with extras like the block truss mesh, we knew we would have to foot the entire bill, choosing to ***share*** our "cadillac" masonry fencing with our subdivision neighbors to the north and south (by placing it on the shared property line), and choosing ***not to share*** it with landowners in the adjoining subdivision (by locating it *at*, not on, our subdivision's property line to the west). We happily made the financial trade-offs, in expectation of certain benefits, which the judge in small claims court was able to strip from us and transfer to predatory neighbors because of the legislature's "clarified and modernized" law.

In conclusion, I want to look again at the stated purpose of AB 1404 as recorded in the 2nd of 5 analyses prepared by and for the California state legislature:

> 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.
>
> (*see* legislature's analysis created 5/6/2013, <https://she-philosopher.com/SCCcase/comments-on-AB1404.html#legislative-analysis-of-AB-1404-No2of5>, p. 3)

Not only have you failed to "provide much better guidance" and "to minimize neighborhood disputes" (2nd of 5 analyses, "Synopsis," p. 1 and "Background," p. 3) with AB 1404, the law has actually led, in my case, to "the unjust enrichment of one landowner by the adjoining landowner's construction or maintenance of a boundary fence between them." Thus, even when judged according to its own metric, AB 1404 has proven an abject failure.

As such, it needs to be fixed … in Sacramento, not in San Diego and other localities with disparate values and approaches, which would mean we have replaced a perfectly good 1872 statute with a patchwork of laws that confuse citizens and courts.

As my elected representative in Sacramento, and an experienced legislator who I still believe cares about "the little guy" and what moves us, I'm hoping you will take the lead on this. We need to enact a quality revision of Cal. Civ. Code § 841, weakened by AB 1404, which I can only assume was rubber-stamped into law because the system has no mechanism for the sort of slow haste required to produce more effective legislation.

So, once again, I ask: *will you commit to fixing California's flawed "Good Neighbor Fence Act of 2013" — yes? or no?*

Sincerely,

Deborah Taylor-Pearce
Resident & voter
California State Senate District 39 & California State Assembly District 77

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