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# **FENCES**

## **THE NEW YORK LAW**

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FENCES IN NEW YORK

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## FENCES IN NEW YORK

Most people take fences for granted. Fences criss-cross the countryside taking various forms and serving a variety of purposes. All too often property owners fail to take the time to learn the reasons for the existence of the fences they own or to become aware of the problems they may encounter because of a fence - or lack of a fence.

"Good fences make good neighbors." There is much truth in that adage and it is important for those renting and owning land in New York to know their rights and liabilities with respect to fences so as to avoid costly and unpleasant disputes and law suits.

When you are confronted by a fence, more than idle curiosity should cause you to wonder why it was erected in the first place. Many a sage observer has cautioned that it is not wise to take down a fence or a wall until you know the reason why it was put up. Conversely, before building this type of structure it is important to consider, as Robert Frost said in his poem, "Mending Wall", what you might be walling in or walling out. Knowing your legal rights and liabilities is an added responsibility you should be willing to assume.

New York regulates fences by several statutes. These statutes add to, modify and, in some cases, reverse traditional common law doctrine concerning fences. At common law a landowner had the inherent right to fence his land or leave it unfenced. In the absence of an agreement or force of prescription\* an owner of land was not bound to fence it for the purpose of preventing intrusion upon the premises by other persons. However, at common law, the owner of domestic animals such as cattle was bound to keep them off the land of another, whether or not the neighboring land was fenced.

A fence is defined as a barrier constructed of wood, metal, stone, brick or other material which encloses a field or tract of land and is intended to protect the premises against intrusions and also to prevent animals on the premises from straying. Van Gorder v. Eastchester Estates, Inc., 207 Misc. 335, 137 N.Y.S. 2d 789 (Sup. Ct. 1955). A fence permanently affixed to the land is generally considered in law as part of the realty so it belongs to the person owning the land and passes with the conveyance of the real property.

Line Fences. A more specific classification of fence is the partition or division fence. Such a fence is often called a "line fence" as it is erected on the dividing line between privately-owned lands. It is a common fence which each of the adjacent proprietors may use as a part of his enclosures. Partition or division fences are erected to prevent animals from crossing division lines, to prevent trespassing on real property and to mark boundaries.

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\* A means of acquiring an easement in or on the land of another by continued regular use over a statutory period.

Line fences are governed primarily by New York Town Law Article 18. Section 300 as originally enacted changed the common law\* and placed a duty on the owners of two adjoining tracts of land to share the cost of making and maintaining a division fence between the tracts unless they agreed to let their lands lie open along the division line for the use of all animals that might be on the land of either owner. The owners were, of course, permitted to strike their own agreement concerning the division fence. In 1972 the Appellate Division, Fourth Department, declared that sections 300 through 309 of the Town Law as applied to a plaintiff landowner who kept no animals were unconstitutional, as the requirement to share the cost of the fence for the benefit of a neighbor who had 110 dairy cattle was oppressive, a deprivation of property, and not reasonably necessary to any legitimate public purpose. Sweeney v. Murphy, 39 A.D. 2d 306 (1972), aff'd mem., 31 N. Y. 2d 1042 (1973). The legislature codified this decision in 1974 by amending section 300 with the following language:

Provided, however that the owner of an adjoining tract of land who does not keep such animals thereon shall not be obligated or liable for erecting, maintaining or repairing such a division fence. Laws of 1974, c. 560, §1.

In 1976, section 300 was amended again. An owner of a piece of property who keeps no animals on his land within five years of the date of the erection of or repair of a division fence is not liable for erecting, maintaining or repairing the line fence. The landowner who erects or repairs a division fence is entitled, however, to recover from the owner of an adjoining tract twenty per cent of the proportionate cost for each year or part thereof in which the adjoining tract is used for keeping animals within five years of the erection or repair. Laws of 1976, c.464 §1. As the law now stands an adjoining landowner who keeps no animals is not liable for any costs associated with a line fence, but an owner who does keep animals is liable for his proportionate share of fencing costs. The costs are spread over the five-year period following erection of a line fence.

There are very few legal interpretations of section 300 as amended in 1976. An informal opinion of the State Attorney General indicates that "an adjoining tract of land" as that expression is used does not necessarily include a whole farm or an area of land in identical ownership. It includes only that portion of the land which, if animals are kept thereon, is so situated that the animals would stray onto the land of an adjoining landowner if there is no division fence or if the division fence is in need of repair. 1977 Op. Att'y Gen.251.

If one of the property owners is a municipality, section 300 may not be applicable. The section applies to private property owners and a village which owns real property in a town beyond the village corporate boundary is not subject to the obligations imposed by the section. 1970 Op. Att'y Gen. 160 (informal opinion).

\* At common law adjoining owners were not bound as between each other to maintain division fences unless the right to compel their maintenance had been acquired by prescription or agreement. Roney v. Aldrich, 51 Sup. Ct. (44 Hun.) 320 (1887).



Section 301 of the Town Law deals with unfenced lands. When adjacent owners choose to let their lands lie open, neither is liable for damages done by his animals to the other's premises. Either owner may have the lands enclosed by giving written notice to the owner of adjacent lands and upon such written notice it becomes the duty of both parties to build and maintain their fair proportions of the division fence. Section 302 outlines what happens to title to the division fence when title to one of the adjoining tracts changes. Either owner shall refund to the other a just proportion of the value of the affected fence maintained by the other, or he shall be required to build his proportion of such division fence.

If disputes arise between owners of adjoining lands concerning division fences, section 303 of the Town Law provides that two fence viewers of the town shall be chosen to settle the dispute. The procedure for handling these problems is set out in sections 303 and 304 which list the powers of fence viewers, including the power to examine witnesses and issue subpoenas. Pursuant to section 40 of the Town Law, the assessors in a town shall act as fence viewers, or if a town has a sole appointed assessor, the assessor and the members of the town board shall act as fence viewers.

If one neglects his duty to make or maintain his proportion of a line fence section 305 of the Town Law dictates that he shall be liable for such damages that result from the neglect. Damages are determined by any two fence viewers. The injured party in the case of a refusal to make or repair a fence (even if the fence is damaged by accident) may make or repair the fence at the expense of the refusing landowner.

Section 307 and section 308 of the Town Law provide that whenever a party neglects to build a division fence or neglects to keep a sufficient fence, that party will be precluded from recovering damages done by any animal lawfully kept on adjoining lands that enters through the insufficient fence. Section 309 allows the use of barbed wire in the construction of a line fence if the fence has at least four strands of wire and the posts and supports are set at distances prescribed by the fence viewers of the town (with a maximum distance of fourteen feet) and the structure is sufficient to hold the kind of cattle or other animals usually pastured on either side of the fence.

Section 300 of the Town Law as amended creates a duty to apportion the cost of the division fence only when both of the adjacent owners keep animals. The fence viewing procedure outlined in Article 18 of the Town Law is applicable only when two adjoining landowners both keep animals on their land. 5 Op. Counsel SBEA 23 (1976). Several questions arise when section 300 is applied where an adjacent landowner subsequently obtains animals, triggering a duty to contribute to the erection or repair of a line fence, or when both property owners have animals but their needs for fencing differ. What is an equitable apportionment of costs between an owner who keeps a large herd of animals and his neighbor who only keeps a few and who could restrain his animals by an alternative means? How should costs be apportioned when one owner keeps dangerous animals requiring expensive fencing and the adjacent owner keeps more docile stock? The section allows owners to strike their own agreements concerning apportionment of the division fence. This procedure seems to be the

best method to be used in cases where different types or numbers of animals are to be kept on either side of the fence. Sufficiency of the type or quality of the fence and prorated costs of the fence can be decided by the parties in advance insuring that they will not be saddled with an inequitable situation which ruins their relationship as good neighbors.

Once adjoining landowners reach an agreement and build the line fence, their investment is given some measure of protection by the Environmental Conservation Law. Environmental Conservation Law section 11-2117 prohibits hunters, trappers and fishermen from trespassing on private property or cutting, destroying, or damaging any bars, gates or fences. Breach of this section is punishable as a violation under ECL §71-0923. This could result in imprisonment for not more than fifteen days, or a fine of not more than two hundred and fifty dollars, or both. In addition ECL §71-0925[10] provides for the imposition of a civil penalty of one hundred dollars, one half of which is payable to the owner of the damaged fence. The civil penalty is in addition to any damages sustained by the owner.

Railroad Fences. The duty of railroads to build and maintain fences is spelled out in Article 3 of the State's Railroad Law. Section 52 provides that every railroad corporation or person in possession of its road must erect and maintain fences that will prevent cattle, horses, sheep and hogs on the adjacent lands from going onto the railroad. The fencing requirement is limited to this duty to keep stock from straying onto the railroad right of way -- fences need not enclose every roadbed unless the commissioner of transportation has determined that a fence is necessary for the public welfare. Railroad Law §52-b.

If no fences, or insufficient fences, are constructed, the railroad will be liable for damage or injury to animals in the right of way. Section 52 of the Railroad Law provides that barbed wire may not be used in a railway fence but otherwise gives no specifics as to what constitutes a "sufficient" fence.

The railroad has a duty to regularly inspect its fences and keep them in good repair. If the company has actual notice that a fence is out of repair, it will clearly be liable for damages to livestock if it has not moved to repair within a reasonable time. Wheeler v. Erie R. Co., 2 N. Y. Sup. Ct. (2 Thomp. & C.) 634 (1874).

A landowner may be paid by the railroad to build or maintain a fence along the roadbed and the railroad can enforce that obligation. If the landowner neglects his duty and the fence is not built or falls into disrepair, any expenses incurred by the railroad must be reimbursed by the landowner provided he is given thirty days notice by the railroad corporation of the need for maintenance.

In addition to fences, railroads must also build and maintain farm crossings, openings with gates, and cattle guards at all road crossings in order to keep livestock off the roadbed. When fences and cattle guards are not made or are not kept in repair, the railroad is liable for all damages to any domestic animals caused on the roadway. If the fences are in good repair the railroad is only liable for damage negligently or wilfully done.

This section was enacted solely for the benefit of farm lands and not for residential property and has no application where a farm was converted into residential property, and a crossing discontinued. Smith v. New York Cent. R. Co., 235 A.D. 262, 257 N.Y.S. 313 (1932). The section pertains only to maintenance of fences for protection of animals, and not human beings, and any individual who might trespass on the right of way has no recourse pursuant to this statute. Lefler v. Penna. R. R., 203 Misc. 887, 118 N.Y.S. 2d 389 (1952).

Railroads also have a duty to fence lands other than agricultural lands. Section 52-a of the Railroad Law requires a railroad to erect and maintain fences along the boundary line of its railroads operated by an electric third rail, within any city with a population over one million inhabitants. The fences must be erected where necessary for the public welfare.

Highway Law. The authority of the State to build and maintain highways has an effect on property owners in New York. The commissioner of transportation may take out or move a fence which prevents the free flow of water under or through a State highway, bridge or culvert, or which causes snow to drift across the roadway. He may also erect snow fences on lands adjacent to a state highway to prevent drifting. Highway Law §45.

Section 118-b of the Highway Law provides that a county superintendent, when authorized by the county board, may enter lands adjoining county roads to remove or change the position of fences that obstruct the flow of water or that cause snow to drift. He may also put up snow fences to keep county highways free of drifting snow. Section 147 grants the same authority to a town superintendent maintaining town roads pursuant to town board directive.

If damages are sustained by the property owner as a result of this activity on his land, provision is made for payment to compensate for his loss in the same section of the Highway Law which allows entry upon his property by government representatives. The commissioner of transportation and the town and county officials have the authority to agree to a mutually satisfactory sum in settlement of a claim. If this is not possible, a legal proceeding may be necessary.

Section 190 provides that whenever a highway will run through enclosed, cultivated or improved lands, the town superintendent will notify the landowner to remove the fences through which the highway will run. If the owner does not remove the fences within sixty days the town superintendent will have the fences removed.

If a highway will run along the division line between lands of two adjacent landowners when it is totally on one side of the line and land on both sides is cultivated or improved, the persons owning or occupying the lands adjoining the highway will be paid for building and maintaining any additional fence made necessary by the laying out and opening of the new road. Highway Law §191. Where a fence is on the landowner's property which will be appropriated for highway purposes, the cost of removal must be borne by the landowner. 11 Op. State Compt. 83 (1955).



Pursuant to sections 340-b, 340-d and 346 of the Highway Law, the commissioner of transportation has the authority to build fences along the boundaries of interstate highways, state expressways and state thruways. Interpreting the language used in these sections, fencing along these roadways is not mandatory on the part of the State.

Section 205 of the Highway Law deals with abandoned highways and the circumstances under which a landowner may build a fence across an abandoned roadway. A highway is deemed to be abandoned if it is not used for six years, excluding any period of non-use resulting from a legal action or proceeding involving the highway. Whenever one owns or has the right to possession of lands directly opposite each side of an abandoned highway, he may construct and maintain a fence at each end of the portion of the highway running through his property. He must put a ten-foot long gate in each cross fence which must be kept unlocked but securely latched at all times. Section 205 further provides that any person who intentionally or by willful neglect leaves the gate unlatched is guilty of a misdemeanor.

Public Streets or Grounds. Section 130 (7) of the Town Law provides that a town board after a public hearing may prohibit the use of barbed wire or similar fences by individuals whose land borders on public streets or grounds. Whether an ordinance prohibiting the erection of electric fences in residential areas is enforceable depends upon the public necessity of such a fence as opposed to the rights of the property owner. 26 Op. State Compt. 118 (1970). Section 130(15-c) of the Town Law gives town boards in Nassau, Rockland, Westchester, and Suffolk Counties the authority to erect, replace, repair or maintain fences on private property where the fences are required by zoning ordinances and the landowner has failed to erect the required barrier. The costs incurred by the town may be assessed against the property which needed screening.

Spite Fences. A right of action against an owner of property who builds a "spite fence" is provided by section 843 of the Real Property Action and Proceedings Law. Whenever an owner or lessee of land erects a fence (or similar structure) which extends ten feet in height in order to exclude the owner or occupant of a structure on adjoining land from the enjoyment of light or air, the deprived owner or occupant may bring an action in the Supreme Court to have such a fence adjudged a private nuisance. If it is declared to be a nuisance, the court may order that it be removed. This section shall not preclude the owner or lessee of land from making improvements in good faith.

Junk Yards. The regulation of automobile junk yards is covered by section 136 of the General Municipal Law. A junk yard must be completely surrounded with a fence at least eight feet high that substantially screens the yard unless the topography or natural growth of the area already provides a sufficient screen. The fence must contain a gate that is closed and locked at all times except the working hours of the junk yard. The fence must be erected at least fifty feet from any public highway.

Ice Cutting. Section 265 of the General Business Law creates a duty on any person or corporation who cuts ice from any waters in the state to surround the holes in the ice with fences sufficient to keep people out of the cutting area.

The fences or guards must be built before or at the time of cutting and must be maintained until the area refreezes to a three-inch thickness or until the ice surrounding the cutting area melts or breaks up. Failure to comply with the statute is a misdemeanor.

Purebred Stock. Section 95 of the Agriculture and Markets Law makes it unlawful to permit a bull older than six months, a stallion older than eighteen months or buck or boar over five months of age to run at large on any lands without the permission of the person entitled to possession of those lands. The section goes on to deny any right of action to a person responsible for building or maintaining a line fence who does not build or adequately maintain such a fence for damages caused by the animal if the animal comes onto the land of this person through the defective or inadequate line fence.

Indian Reservations. The New York Indian Law provides for the regulation of fencing on the reservations of the Seneca and Tonawanda nations. The Council of each nation is responsible for enacting by-laws and ordinances consistent with State law which protect the common land of the nation and control cattle and other animals. Indian Law §§73 and 80.

Section 28 of the Indian Law provides that one who leases land within the Onondaga Indian reservation is liable for damages to another done by animals kept on his land even though the injured party, or a third party, was responsible for erecting or maintaining fences and failed to do so. It appears that this section applies to non-Indians who lease reservation land from members of the tribe pursuant to section 24. Such a lessee will assume a greater responsibility for controlling his livestock than would be true of a lessee using non-Indian property.

#### CONCLUSION

Most of the New York Law dealing with fences envisions that landowners will voluntarily assume responsibility for erecting and maintaining fences where they are needed, for it is in the landowner's interest to assume that his animals do not stray, and that other individuals recognize the boundaries of the property over which he exercises dominion and control. The State provides mechanisms for resolving disputes when they arise and for insuring that the needed fences are built and repaired even when the party responsible for the work fails to perform.

Owners of agricultural property in New York who keep livestock should remember their obligations under the law. There is a duty to build and maintain fences to control animals and this requires both regular inspection to insure that fencing is sufficient, and efforts to repair insufficient fences within a reasonable time.

In most cases where fences are required by a zoning ordinance, or on private property along a highway or public grounds, the erection of such a structure cannot be mandated without adequate notice to the property owner,

and sometimes a public hearing. This gives the affected property owner an opportunity to challenge the necessity or location of the proposed structure before it is built.

This summary of the New York statutes dealing with fences should alert owners and lessees of real property in the State as to their rights and liabilities in this area. These are general guidelines; complicated legal questions should be referred to an attorney who can give advice based on the specific facts in a given situation.