

FARM FENCE ISSUES : November, 2007

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Selected Sections of the Code of Virginia pertaining to Division Fences

Please take note of the following selected portions of the Code of Virginia related to farm fences. In particular, compare 55-317 with 55-319. These two paragraphs, it could be argued, directly contradict one another. Virginia Code 55-317 indicates non-livestock holding landowners have the right to let their land lie open and are free of fencing obligations. However, VA Cod 55-319 appears to imply that in the case of a pre-existing fence, there is an obligation on both parties, regardless of the presence of livestock, to maintain pre-existing division fences. **On the last page of this document, is information from the Division of Legislative Services and their interpretation of 55-317 and 55-319. The Division of Legislative Services is the government office that reviews all proposed changes to the Code and advises the General Assembly on potential conflicts or contradictions in the Code of Virginia.** It appears the Division of Legislative Services interprets 55-319 to mean that previous arrangements between neighbors for the sharing of fencing costs must be recorded with the deed in order for the obligation to be conferred on a new owner.

CODE OF VIRGINIA

TITLE 55. PROPERTY AND CONVEYANCES.

CHAPTER 18. TRESPASSES; FENCES.

§ [55-299](#). Definition of lawful fence. – EFFECTIVE JULY 1, 2007

Every fence shall be deemed a lawful fence as to any livestock named in § [55-306](#), which could not creep through the same, if (1) Five feet high, including, if the fence be on a mound, the mound to the bottom of the ditch, (2) Of barbed wire, 42 inches high, consisting of at least four strands of barbed wire, firmly fixed to posts, trees, or other supports substantially set in the ground, spaced no farther than 12 feet apart unless a substantial stay or brace is installed halfway between such posts, trees or other supports to which such wires shall be also fixed, (3) Of boards, planks, or rails, 42 inches high, consisting of at least three boards firmly attached to posts, trees, or other supports substantially set in the ground, (4) Three feet high within the limits of any incorporated town whose charter does not prescribe, nor give to the council thereof power of prescribing, what shall constitute a lawful fence within such corporate limits, or (5) Any fence of any kind whatsoever, except as described in this section, and except in the case of incorporated towns as set forth in subdivision (4), which shall be: a. At least 42 inches high, b. Constructed from materials sold for fencing or consisting of systems or devices based on technology generally accepted as appropriate for the confinement or restriction of livestock named in § [55-306](#), and c. Installed pursuant to generally acceptable standards so that applicable livestock named in § [55-306](#) cannot creep through the same.

A cattle guard reasonably sufficient to turn all kinds of livestock shall also be deemed a lawful fence as to any livestock mentioned in § [55-306](#).

Nothing contained in this section shall affect the right of any such town to regulate or forbid the running at large of cattle and other domestic animals within its corporate limits.

The Board of Agriculture and Consumer Services may adopt rules and regulations regarding lawful fencing consistent with this section to provide greater specificity as to the requirements of lawful fencing. The absence of any such rule or regulation shall not affect the validity or applicability of this section as it relates to what constitutes lawful fencing.

§ 55-306 Damages for trespass by animals; punitive and double damages. If any livestock domesticated by man shall enter into any grounds enclosed by a lawful fence, as defined in §§ 55-299 through 55-303, the owner or manager of any such animal shall be liable for the actual damages sustained. When punitive damages are awarded, the same shall not exceed twenty dollars in any case. For every succeeding trespass the owner or manager of such animal shall be liable for double damages, both actual and punitive.

§ 55-307 Lien on animals. After a judgment of the court a lien upon such animal shall enure for the benefit of the owner or tenant of such enclosed ground, and execution shall thereupon issue from the court rendering the judgment, and the animal or animals so trespassing shall be levied upon by the officer to whom the execution was issued, who shall sell the same, as provided by statute.

§ 55-308 Impounding animals. Whenever any such animal is found trespassing upon any such enclosed ground, the owner or tenant of such enclosed grounds shall have the right to take up such animal and impound the same until the damages provided for by the preceding sections shall have been paid, or until the same are taken under execution by the officer as hereinbefore provided, and the costs of taking up and impounding such animal shall be estimated as a part of the actual damage.

§ 55-309 Duty to issue warrant when animal impounded. It shall be the duty of such owner or tenant of such lands so trespassed upon, within three days after the taking up and impounding such animal unless the damages be otherwise settled, to apply to a person authorized to issue warrants of the county or city in which such land is situated for a warrant for the amount of damages so claimed by him, and such court, or the clerk thereof, shall issue the same, to be made returnable at as early a date, not less than three days thereafter, as shall be deemed best by him; and upon the hearing of the case the judge shall give such judgment as is deemed just and right.

§ 55-310 How governing body of county may make local fence law. The board of supervisors or other governing body in any county in this State after posting notice of the time and place of meeting thirty days at the front door of the courthouse, and at each voting place in the county, and by publishing the same once a week for four successive weeks in some newspaper of such county, if any be published therein, and if none be published therein, in some newspaper having a general circulation therein, a majority of the board being present and concurring, may declare the boundary line of each lot or tract of land, or any stream in such county, or any magisterial district thereof, or any selected portion of such county, to be a lawful fence as to any or all of the animals mentioned in § 55-306, or may declare any other kind of fence for such county, magisterial district or selected portion of the county than as prescribed by § 55-299 to be a lawful fence, as to any or all of such animals.

§ 55-311 Effect of such law on certain fences. Such declaration shall not be construed as applying and shall not apply to relieve the adjoining landowners from making and maintaining their division fences, as defined by § 55-299, but as to such division fences, §§ 55-317 to 55-322, inclusive, shall be applicable.

§ 55-312 Application to railroad companies. No action taken under the provisions of § 55-310 shall relieve any railroad company of any duty or obligation imposed on every such company by § 56-429, or imposed by any other statute now in force, in reference to fencing their lines of railway, and rights-of-way.

§ 55-313 No authority to adopt more stringent fence laws. Nothing in § 55-310 shall authorize or require the boards of supervisors or other governing bodies of counties to declare a more stringent fence as a lawful fence for any county, magisterial district, or selected portion of any county, than as prescribed by § 55-299.

§ 55-314 Effect on existing fence laws or no-fence laws. Nothing in § 55-310 shall repeal the existing fence laws in any county, magisterial district or selected portion of any county, until changed by the board of supervisors or other governing body, in accordance with the provisions thereof; nor shall the provisions of such section apply to any county, magisterial district, or selected portion of any county, in which the no-fence law is now in force, if such no-

fence law exists otherwise than under an order of the board of supervisors or other governing body of such county entered pursuant to such section.

§ 55-315 Lands under quarantine. The boundary line of each lot or tract of land in any county in this Commonwealth which is under quarantine shall be a lawful fence as to any and all of the animals mentioned in § 55-316.

§ 55-316 When unlawful for animals to run at large. It shall be unlawful for the owner or manager of any animal or type of animal described in § 55-306 to permit any such animal, as to which the boundaries of lots or tracts of land have been or may be constituted a lawful fence, to run at large beyond the limits of his own lands within the county, magisterial district, or portion of such county wherein such boundaries have been constituted and shall be a lawful fence.

§ 55-317 Obligation to provide division fences.

Adjoining landowners shall build and maintain, at their joint and equal expense, division fences between their lands, unless one of them shall choose to let his land lie open or unless they shall otherwise agree between themselves.

§ 55-318 When no division fence has been built.

When no division fence has been built, either one of the adjoining owners may give notice in writing of his desire and intention to build such fence to the owner of the adjoining land, or to his agent, and require him to come forward and build his half thereof. The owner so notified may, within ten days after receiving such notice, give notice in writing to the person so desiring to build such fence, or to his agent, of his intention to let his land lie open, in which event, and if the one giving the original notice shall build such division fence and the one who has so chosen to let his land lie open, or his successors in title, shall afterwards enclose it, he, or they, as the case may be, shall be liable to the one who built such fence, or to his successors in title, for one-half of the value of such fence at the time such land shall be so enclosed, and such fence shall thereafter be deemed a division fence between such lands. If, however, the person so notified shall fail to give notice of his intention to let his land lie open, as hereinabove provided, and shall fail to come forward within thirty days after being so notified, and build his half of such fence, he shall be liable to the person who builds the same for one-half of the expense thereof, and such fence shall thereafter be deemed a division fence between such lands. Notwithstanding the provisions of this section, no successor in title shall be liable for any amount prior to the recordation and proper indexing of the original notice in the clerk's office of the county in which the land is located.

§ 55-319 When division fence already built.

When any fence which has been built and used by adjoining landowners as a division fence, or any fence which has been built by one, and the other afterwards required to pay half of the value, or expense thereof, under the provisions hereinbefore contained, and which has thereby become a division fence between such lands, shall become out of repair to the extent that it is no longer a lawful fence, either one of such adjoining landowners may give written notice to the other, or to his agent, of his desire and intention to repair such fence, and require him to come forward and repair his half thereof, and if he shall fail to do so within thirty days after being so notified, the one giving such notice may then repair the entire fence so as to make it a lawful fence, and the other shall be liable to him for one-half of the expense thereof.

§ 55-320 Recovery of amount due in connection with division fence. Any sum which may be due and payable by one adjoining landowner to another in pursuance of any of the provisions of §§ 55-318 and 55-319 may be recovered by motion, action or warrant, according to the amount.

§ 55-321 Requirements for agreement to bind successors in title; subsequent owners. No agreement made between adjoining landowners, with respect to the construction or maintenance of the division fence between their lands, shall be binding on their successors in title, unless it be in writing and specifically so state, and be recorded in

the deed book in the clerk's office of the county in which the land is located, and properly indexed as deeds are required by law to be indexed. If any notice, as required by § 55-318 or § 55-319 is recorded in the deed book in the clerk's office of the county in which the land is located and is properly indexed as deeds are required by law to be indexed, then any subsequent owners of such land shall be liable for any sum which may be due pursuant to § 55-320.

§ 55-322 How notice given. Any notice herein provided to be given shall be given to the owner of the land, if he reside in the county in which the land lies; otherwise, it may be given to such person as, under the laws of this commonwealth, would be his agent; or to any person occupying such land as tenant of the owner, who shall, for the purposes of this article, be deemed the agent of such owner.

Explanation of “Fence-In” and “Fence-Out”

Virginia’s original agricultural fencing statutes appeared in the colonial statutes of 1642. Further amendments to the statute produced a law that instructed every planter to construct a fence four and a half feet high around their property. If such a fence was judged to be sufficient by two appointed officials, then damage recovery could be had for damages done by wandering livestock. If a planter failed to construct such a fence, any damages were to be at his own loss and peril. Virginia “General Law” had been born.

The Virginia “General Law” was uniquely opposite to the English “Common Law” fencing statutes with which many colonists were familiar. English “Common Law” held that a livestock owner had the duty to keep his animals on his own land, and was responsible for any damages they may have caused if they escaped. The “General Law” now shifted the burden of protecting one’s property to the non-owner of the animal. It is up to the non-owner of the animal to erect a “lawful” fence in order to keep the stock off of his land. If the animals cross this lawful fence, the landowner may recover for trespass or damages.

In time, however, the “General Law” was modified to include an option for individual counties to return to the English style “Common Law” with the passage of § 55-310, also known as the *No-Fence Law*. This legislation enabled counties or portions thereof, to declare that the boundary lines of all tracts of land are lawful fences by act of the Board of Supervisors. If the Board decided to enact the No-Fence Law, it created an absolute duty of animal owners to prevent their animals from crossing onto the lands of another by building a fence to contain them.

Fence In – Source – English Common Law

Definition – Boundary lines have been declared to be lawful fences under §55-310 of the Virginia Code. Landowners must fence their animals in.

Fence Out –

Source – Virginia General Law

Definition – Landowners must construct lawful fences around their properties in order to keep wandering animals out. This is like, open range law in some western states

Fence-In and Fence-Out Counties

The option of declaring boundary lines to be lawful fences through the No-Fence Law created two types of counties: fence-in and fence-out.

In distinguishing between "fence-in" and "fence-out" counties, "fence-in" counties are those that have declared boundary lines to be a legal fence and follow the Common Law referred to above. "Fence-out" counties follow the Virginia General Law, which puts no duty on the livestock owner to keep his animals in. Some helpful examples of fencing situations in both types of counties are shown below.

Fence-Out

Farmers Crop and Cattle live next to each other in Free-roam County, Virginia. Their county is a "fence-out" county and, therefore, has **not** declared the boundary lines to be legal fences. Neither farmer has chosen to erect a fence since neither keeps livestock on the portions of their property that adjoin. One day, a cow belonging to Farmer Cattle escapes from the barn and wanders through the hay field that adjoins Farmer Crop's cornfield. The cow crosses into Crop's corn and proceeds to destroy a large quantity of sweet corn. Farmer Crop would be unable to collect for the damages because his county, being a "fence-out" county, follows the Virginia General Law. Under the Virginia General Law, landowners have the duty to fence animals out, which Farmer Crop has not done.

Suppose that Farmer Crop did have a fence around his sweet corn. The question would now concern whether or not that fence could be deemed a lawful fence by the statute. If the fence can be declared lawful then Farmer Cattle would owe Farmer Crop for damages done by the cow. See page 5 for an in-depth description of lawful fence requirements as defined by the statute.

Fence-In

Farmer Sheep lives in an urbanizing portion of No-roam County, Virginia. His farm is surrounded by residential developments that were built on land his former neighbors had sold when they retired from farming. This is a "fence-in" county, which means that the Board of Supervisors has declared boundary lines of every tract of land to be legal fences. One day, as Farmer Sheep is attempting to shear his flock in the barn, a main gate comes undone and twenty sheep escape. Upon leaving the barnyard the sheep run past the main house, through the front yard, across the road, and straight into Sue's prize rose garden. The twenty sheep cause tremendous damage to the flowerbed before being retrieved by Farmer Sheep. In this case, Farmer Sheep would be liable to Sue because his county follows the Common Law rule, which places an absolute duty on livestock owners to control their animals. By crossing the boundary line into Sue's yard, the flock had crossed a "lawful" fence, and Farmer Sheep would be liable to Sue for damages.

If the previous example had been used for this scenario, Farmer Cattle would be responsible to Farmer Crop for damages done to the cornfield. The cow would have crossed a lawful fence in the eyes of the Board of Supervisors, the boundary line.

Fence-In Counties

Counties/Cities that **have** "declared the boundary line of each lot or tract of land, or any stream in such county...or any selected portion of such county to be a lawful fence":

Albemarle Arlington Augusta Botetourt Buckingham Campbell Charles City Chesterfield Clarke
Culpeper Cumberland Dickenson Fauquier Floyd Fluvanna Gloucester Goochland Grayson Greene
Halifax Hanover Isle of Wight King George Loudoun Louisa Madison
New Kent Orange Page Patrick Pittsylvania Pulaski Rappahannock Roanoke Rockingham Russell Scott
Southampton Spotsylvania Smyth Sussex Washington Wise Wythe York

Fence-Out Counties

Counties/Cities that have **not** "declared the boundary line of each lot or tract of land, or any stream in such county/city...or any selected portion of such county/city to be a lawful fence":

Accomack Alleghany Amelia Amherst Appomattox Bath Bedford Bland Brunswick Buchanan Caroline
Carroll Charlotte Chesapeake Craig Dinwiddie Essex Fairfax Franklin Frederick Giles Greenville
Hampton Henrico Henry Highland James City
King & Queen King William Lancaster Lee Lunenburg Mathews Mecklenburg Middlesex Montgomery
Nelson Newport News Northumberland Northampton Nottoway Orange Powhatan Prince Edward Prince
George Prince William Richmond Rockbridge Shenandoah Stafford Suffolk Surry Tazewell
Virginia Beach Warren Westmoreland

Opinion provided by the Division of Legislative Services on §55-317 and §55-319:

The 2005 amendment to Va. Code § 55-317 did not change the law that an adjoining landowner could choose to let his or her land lie open; instead it removed the prohibition that precluded the owner of land used for industrial or commercial purposes from deciding to let the land lie open. The primary question is whether a division fence exists or not. **Although there hasn't been any court cases discussing the interplay of these statutes, their relation was explained in an 1981 Attorney General's opinion as follows:**

"The option to let land lie open is mentioned in §§ 55-317 and 55-318, and by the terms of those sections, the option applies only when no division fence has been built. Section 55-319, by its terms, applies when a division fence has already been built. Section 55-319, unlike § 55-317, allows no option to a landowner to let his land lie open. Accordingly, it is my opinion that, under § 55-319, a landowner **may not** avoid liability for repairs to an existing division fence by choosing to let his land lie open, as provided in § 55-317."

Under the Attorney General's reasoning, if no fence exists, a landowner could choose to let his land lie open under the provisions of §§ 55-317 and 55-318. **However, where such a fence exists, the adjoining landowners share the responsibility for its repairs.**

It should also be noted that the question of whether successive landowners would be bound by old agreements concerning division fences is governed by Va. Code § 55-321. Under this title, **successors in title are only so bound if any agreement between the previous owner and the adjoining landowner was in writing and recorded in the deed book in the clerk's office.** This statute provides as follows:

§ 55-321. Requirements for agreement to bind successors in title; subsequent owners.

No agreement made between adjoining landowners, with respect to the construction or maintenance of the division fence between their lands, shall be binding on their successors in title, unless it be in writing and specifically so state, and be recorded in the deed book in the clerk's office of the county in which the land is located, and properly indexed as deeds are required by law to be indexed.

If any notice, as required by § 55-318 or § 55-319 is recorded in the deed book in the clerk's office of the county in which the land is located and is properly indexed as deeds are required by law to be indexed, then any subsequent owners of such land shall be liable for any sum which may be due pursuant to § 55-320.

Thus, the answer to the question regarding whether new owners of adjacent lands are bound by old agreements concerning division fences is going to depend on whether the requirements of § 55-521 have or have not been met.