

The New Ohio Line Fence Law

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One of Ohio's oldest rural laws has undergone a major revision. After many months of negotiation, the Ohio General Assembly passed a new line fence law in early June, which will go into effect on September 30, 2008.

The new law creates different rules for line fence obligations. A rule of individual responsibility will apply to "new" line fences, while "old" and previously existing fences will be subject to a rule of equitable shares. *Landowners should note that certain actions are necessary to ensure the continuation of shared responsibility for old or preexisting fences.* The new law also changes the process for resolving line fence disputes and includes clear standards for new line fences that contain livestock. The following summarizes the new law.

Defining the Line Fence

The law defines a line or "partition" fence as a fence placed on the division line between adjacent properties. Under the new law, the definition also includes a fence that has been "considered" as the division line even if a land survey subsequently shows that the fence is not placed directly on the property line. A few types of fences are specifically exempt from the line fence law. These include: fences within municipalities, fences between lands that are outside a municipality but are laid out in lots according to Ohio's subdivision laws, and fences required for railroads.

New Rules for Determining Line Fence Responsibility

The biggest change in the law is an end to the rule of "equal shares" for most line fences. Under the old law, adjacent landowners were required to share equally in the cost of building and maintaining a line fence. Under the new law, responsibility for a line fence is determined by three different rules: the rule of equitable apportionment, the rule of individual responsibility and the rule of equal shares.

- *Equitable apportionment rule.* Under this rule, the landowners must share "equitably" in the cost of constructing and maintaining a line fence. The rule of equitable shares allows for proportioned responsibilities based upon a consideration of factors regarding the fence, its purpose and location. This rule applies to fences in existence prior to the change in law (September 30, 2008) and fences that have been removed—but the landowner may need to take special action to show that the fence previously existed or was removed, as described below.
- *Individual responsibility rule.* This new rule provides that a person proposing a new line fence—one that did not exist before the new law came into effect or that is not a replacement of a previously existing or removed fence—must bear the entire responsibility for building and maintaining the fence. There is a reimbursement procedure for the landowner if the adjacent landowner later uses the fence, which is described later in this publication.
- *Equal shares rule.* The old line fence law's rule of equal responsibility for line fence construction and maintenance now applies only to certain government fences, described more fully below.

Determining the Type of Line of Fence

The law creates several different types of line fences and assigns a rule of responsibility to each type:

1. *Existing fences.* The intent of the law is to continue shared responsibility between landowners for existing fences, but the responsibility will be “equitable” shares rather than equal shares. Although the law does not clearly state such, the assumption is that a line fence in existence on the day the law is effective—September 30, 2008—is an “existing” fence and will fall under the rule of equitable shares.
2. *Previously existing line fences.* The law applies the rule of equitable shares to previously existing fences, which includes:
 - a. A previously existing fence established by affidavit. If there is evidence that a line fence existed, a landowner may file an affidavit in the county recorder’s office stating that the line fence existed within two years of the filing of the affidavit. Note that an affidavit of a pre-existing line fence must be filed within one year of the new law’s effective date, by September 30, 2009.
 - b. A previously existing fence established by evidence. Even without an affidavit, a line fence may be considered previously existing if there is some type of evidence showing that a line fence did exist at the location.
3. *Removed and replaced line fences.* A line fence that is properly removed will be subject to the law of equitable shares if it is replaced, but the rule of individual responsibility will apply where a landowner improperly removes a line fence. Proper fence removal requires:
 - a. Providing a notice of removal to the adjacent landowner at least 28 days prior to removal.
 - b. Filing an affidavit of removal with the county recorder’s office if the fence is removed but not replaced within one year.
4. *Reimbursement claim fences.* A reimbursement procedure (described below) allows a landowner who built a new fence under the rule of individual responsibility to seek reimbursement from an adjacent landowner if he or she uses the fence for livestock. After a reimbursement claim is paid on a line fence, the fence is subject to the rule of equitable shares, and both landowners are responsible for the fence.
5. *Government fences.* Certain government fences fall under the rule of equal shares. These include fences on land owned, leased, managed or controlled by the department of natural resources, a conservancy district or a political subdivision with a real property interest in “recreational trails,” *if* the government land is adjacent to private land used to graze livestock.

Reimbursement Claims for New Fences

Where a landowner builds a new line fence under the rule of individual responsibility and an adjoining landowner uses the fence for containing livestock within 30 years of the fence’s construction, the owner who built the fence may seek reimbursement from the adjoining owner. A few requirements must be met:

1. The owner who built the fence must file an “affidavit of costs” with the county recorder certifying the costs for constructing the fence, and may also file an affidavit of costs each year for maintenance expenses.
2. The owner, or successive owner, of the fence must send a reimbursement claim to the adjoining owner who is using the fence. The claim amount will be proportionate to the period of time the fence has existed, calculated by adding the total costs stated in affidavits, dividing the total costs by 30 to obtain the annual cost, and multiplying the annual cost by the number of years or partial years the fence has existed. Subtract this number from total costs for the reimbursement claim amount.

If an adjoining owner fails to pay a reimbursement claim, the owner demanding the reimbursement may file an action in court to recover the amount. Once reimbursement is paid or ordered by a court, the fence is subject to the rule of equitable shares and both owners are responsible for the fence.

Procedures for Line Fence Disputes

Historically, township trustees have had the legal duty of resolving line fence disputes. The new line fence law now provides an aggrieved owner with two options for addressing a line fence dispute: filing an action directly in the court of common pleas or filing a complaint with the board of township trustees. The new law also revises the procedures for viewing the line fence location, and changes the process for trustees to follow when handling a line fence complaint.

An important component of the new law is a list of factors the court or board of trustees must consider when determining responsibilities under the equitable shares rule. These factors include: topography of the property, presence of streams and other waters, presence of trees, vines and vegetation, trespasser risk due to population density or recreational use of adjoining properties, importance of marking the property line, and number and type of livestock contained by the fence. The court or trustees must rely upon these factors to determine how to apportion responsibilities equitably between the adjoining owners.

Arbitration and Enforcement

Another new provision in the line fence law allows an owner to request binding arbitration if he or she disagrees with a decision of the board of township trustees on a line fence complaint. A court appointed arbitrator will review the decision and make a final determination that is binding on the landowners. If a landowner chooses this option, the parties must share the costs of the arbitration and may not appeal the arbitrator's decision. In lieu of arbitration, a party may appeal the township's decision on a line fence to the court of appeals, an option also available to parties dissatisfied with a decision of the court of common pleas in a line fence action.

If one landowner does not comply with an order of the board of township trustees, the aggrieved owner may apply to the trustees for enforcement. The trustees may award a contract for building or maintaining the fence and have the county auditor assess the costs upon the landowner's tax duplicate.

Duty to Enclose Livestock with "Preferred" Fences

The new law requires that fields bordering a property division line in which livestock are kept must be enclosed by a "preferred partition fence." This new requirement does not apply to fences constructed prior to the date the law becomes effective, September 30, 2008. A "preferred" partition fence is any of the following:

- A woven wire fence of either standard or high tensile and with one or two strands of barbed wire at least 48 inches from the ground.
- A nonelectric high tensile fence of at least seven strands constructed according to NRCS standards.
- A barbed wire, electric or live fence to which both parties agree, in writing.

The preferred partition fence rule does not apply if the adjoining landowners agree to a different fence, but the agreement must be in writing and recorded with the county recorder. Additionally, where a reimbursement claim is made and paid by a later landowner who uses a "new" line fence to contain livestock, the new line fence must be upgraded to a "preferred partition fence" unless the landowners agree otherwise.

Access for Building a Fence

Neighboring property owners no longer have a right to exclude someone who is building or maintaining a new line fence for the adjacent owner. The new law grants rights to the adjoining landowner or a contractor to enter

on up to ten feet along the line of a neighbor's property for construction and maintenance, but also states that the owner or contractor is responsible for harm caused to the neighbor's property, including crop damage.

Removal of Line Fences

New provisions exist for another problematic area of line fence law—removal of line fences. Under the new law, a landowner who wants to remove a line fence must first notify the adjoining landowner of the proposed removal at least 28 days before removing the fence. Failure to give notification waives the equitable shares rule, and the landowner who removed the fence without notice will be subject to the rule of individual responsibility for a replacement fence. If a removed fence is not replaced within one year, the owner who removed the fence must file an affidavit of fence removal if he or she wants to ensure that a future replacement fence would fall under the equitable shares rule. Otherwise, an owner would be fully responsible for a replacement fence. Debris from a fence removal may not be placed on an adjoining property without written permission of that owner, and owners impacted by the removal of a line fence may use legal action to recover damages, including attorney fees.

Clearing the Fence Row

The law maintains a duty to keep a fence row clear of brush, briars, thistle and weeds within four feet of the fence is still intact. A landowner may demand that a neighbor clear the fence row and may seek the assistance of the board of township trustees if the neighbor fails to comply with the demand. The trustees may hire labor to complete the work and assess costs against the owner's property taxes through the county auditor.

Criminal Penalties for Obstruction

Criminal penalties can result from the obstruction or interference with a person who is lawfully engaged in building or maintaining a line fence. Penalties become more severe where there are threats or actual physical harm; causing serious harm or death amounts to a felony.

Landowner Agreements

Like the old law, the new law allows adjoining landowners to vary the law's provisions. The agreements must be in writing, signed by the parties and filed in the partition fence record with the county recorder.

Repealed Provisions

The following provisions of the old law are repealed: prohibitions against barbed wire, electric or live fences; procedures for fences on a county or township line or in a stream; water gate requirements; fences to bridges and culverts; restrictions on hedge fences; and negligence penalties against township trustees.

The line fence bill is available by searching for House Bill 323 at <http://www.legislature.state.oh.us/index.cfm>. The new law is available after September 30, 2008 at <http://codes.ohio.gov/orc/971>. Additional information is posted on our website at <http://aede.osu.edu/programs/aglaw>.

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