Fences: Myth, Reality, and The Law

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Fences, whether made of wood, stucco, stone, or some other material, are a common feature of many homes. Despite this fact, there is relatively little state law on the subject of fences in a residential setting. Except for any duty to construct and maintain fences imposed by agreement, easement, CC&Rs, and the duty to keep domestic animals off the land of others, in a residential context, the owner of land may leave his or her land unfenced. On the other hand, an owner may build a fence on his or her property where he or she pleases so long as it is not in violation of an agreement, CC&Rs, local ordinances, or California law regulating "spite" fences, and as long as it does not constitute a nuisance and is not constructed negligently so as to cause harm.

Generally, a fence on one's own land is not a nuisance merely because it obstructs the passage of light and air to an adjoining property. On the other hand, if such a fence is erected maliciously, it may become a private nuisance which the adjoining property owner may file a civil action to abate.

California's spite fence law provides that any fence or other structure in the nature of a fence that unnecessarily exceeds ten feet in height and is maliciously erected or maintained for the purpose of annoying the owner of an adjoining property constitutes a private nuisance. The spite fence law expresses the judgment of our legislature that a fence, which includes any structure, trees, shrubs, or traditional fences, built to separate the boundary between two adjoining parcels does not need to be more than ten feet high to serve that purpose.

The difficulty in interpreting this statute is that it turns on, among other findings, the purpose for which the fence was constructed, the intent of the party constructing it, whether it was built to separate two adjoining

properties, and whether it constitutes a nuisance to the use and enjoyment of the adjoining property. Given the subjectivity of many of these factors, predicting the outcome of spite fence disputes is, needless to say, a challenge. Practically speaking, they often turn on the personalities of the participants, how they express themselves in court, who is viewed by the court as being reasonable or unreasonable, and any correspondence or direct communication that has taken place between the property owners.

The other concept that California state law recognizes in this area is a "division" fence. A division fence is one built on the actual boundary between two properties. A division fence may be erected without enclosing the remainder of that property owner's land. A fence erected entirely on the property of one landowner is not a division fence. A division fence must be a lawful fence, meaning that it is good, strong, substantial, and sufficient to prevent the ingress and egress of domestic animals. In the absence of any restrictions imposed by CC&Rs, local ordinances, or some specific state law, the courts cannot impose aesthetic standards on the construction of a division fence.

State law goes onto provide that adjoining landowners are mutually bound equally to maintain division fences between them unless one of the property owners lets his or her land lie unfenced. If that property owner decides at a later time to enclose his or her property, he or she must refund to the other property owner a just proportion of the value, at that time, of any division fence made by the other.

As with spite fences, predicting the outcome of disputes involving what one party claims is a division fence is challenging. Some of these challenges include obtaining the historical information regarding the construction of the fence, having the court accept the testimony of your surveyor, rather than the surveyor retained by the adjoining property owner, that the fence is actually on the surveyed property line, proving that the adjoining property owner subsequently enclosed his or her land, and demonstrating that a demand for payment was actually made.

With this understanding of state law, I thought it would be productive to look at some of the myths and practical issues raised with respect to residential fences.

Myth No. 1: The fence, shrubs, vegetation, or other structure represents the boundary between the two properties. The only way to determine the boundary between two properties is to have it surveyed, have the survey recorded with the county in which the property is located, and, to avoid any disputes, have your neighbor agree that the survey is accurate, rather than obtain his or her own survey and therefore raise an issue with respect to the accuracy of the initial survey. Remember that surveying is not a pure science. There are interpretations and subjective determinations involved in that process. This myth is the reason that standard advisories in residential real estate transactions include the recommendation that fences, trees, etc., not be relied upon as the actual boundary, and that the only way to determine the boundary is to obtain a survey.

Myth No. 2: State law requires that the construction of a fence meet certain aesthetic standards. This is often characterized as a belief that state law requires that fences be "good neighbor" fences. State law does not regulate the aesthetics of the construction of a fence. Aesthetics may be regulated by

CC&Rs, agreement, or local ordinance. The traditional definition of a good neighbor fence is one that has the same aesthetic appearance on both sides, rather than a traditional construction, which has all of the boards on one side secured to the stringer, which then leaves one side looking at the posts and stringers, while the other only sees the fence boards.

Myth No. 3: The fence has been in place for so long that it now represents the boundary between the two properties. This myth was displaced by California law in the mid-1990s. The long-standing presence of a fence between residential properties no longer allows one property owner to assume that the fence represents the boundary line between the two properties or that a prescriptive easement has been acquired as a result of the encroachment of that fence. Once again, the only way to establish the actual boundary line is through a survey. California law does not recognize a prescriptive easement in this context. It is also doubtful that California law will recognize adverse possession because of the inability to prove that taxes have been paid by the encroaching property owner. While there are other possible easement theories that may provide a basis for retaining the land that has been fenced in, many of these are disfavored by the courts and all of them will require a lawsuit to establish.

Myth No. 4: The fence represents an oral agreement reached between the property owners regarding the boundary line. While the doctrine of agreed boundary remains a viable legal theory in California, it is one that is difficult to establish. It requires a dispute or uncertainty over a boundary line, an agreement to either erect a fence or a leave a fence in place as the agreed upon boundary, and an inability to otherwise establish the actual boundary between the properties. This last component refers to the ability to determine the boundary by survey or some other more precise manner. The burden of proving all of these elements is on the party seeking to establish the fence as the boundary line. In short, while the theory remains a viable one, it is becoming increasingly disfavored because of the ability to establish boundary lines by other more precise means than oral agreement.

Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

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