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No Longer Fenced In After 150 Years

One reason it's still fun to practice real estate law after 44 years is the wide range of cases we see, all of which vary greatly in size, scope, and complexity.

A classic problem that always plunges homeowners into acrimonious disputes with their neighbors and creates major headaches for real estate agents representing buyers and sellers is the issue of paying to repair or replace a common fence dividing adjoining properties. Although the amount in dispute is often small, tempers flare, egos are bruised and, unfortunately, lawsuits often result. While these cases aren't the huge multi-million-dollar disputes that make headlines, they're just as important as a "big" case to the parties and attorneys involved.

We have handled so many disputes between adjoining landowners regarding cost of replacing or repairing fences that we lost count of them years ago. One reason these cases are so common is California's statute addressing this issue. The problems neighbors face are exacerbated by the fact that California's fence statute is antiquated. It was drawn up nearly 150 years ago, and it was most relevant in the Gold Rush days. To be of any real value, the statute would have to be updated and rewritten in modern language clarifying the original intent, namely, that neighbors should, and typically do, share the benefits and responsibilities of a common fence to ensure each owner's privacy in their respective properties.

Effective January 1, 2014, the California legislature completely revised Section 841 of the Civil Code to address this issue. The new statute does clarify many points, but it also raises certain issues that I'm sure will lead to further controversy. The statute is to be known as the "Good Neighbor Fence Act of 2013" and is clearly intended to update and clarify existing California law regarding shared fencing. It will largely affect only residential property owners, because it does not apply to any city, county, district or public corporation or other political subdivision or public agency.

The new Good Neighbor Fence Act is also designed to avoid one party being unjustly enriched at the expense of another party – their neighbor. The revised statute begins with the premise that adjoining landowners are presumed to share equal benefits from any fence dividing their properties. Of course,

unless the parties have agreed in writing to some different arrangement, the law provides that the reasonable cost of construction, maintenance, or necessary replacement of a fence shall be equally shared.

In order to prevent surprise, the law provides that when one neighbor intends to incur costs for a fence, whether due to construction, maintenance, or necessary replacement, that landowner shall give their neighbor 30 days' prior written notice. The notice must state that the intent is to share responsibility equally for the costs of construction, maintenance, or necessary replacement. The notice must also provide a description of the problem with the shared fence, the proposed solution, the estimated construction or maintenance costs involved to fix the problem, and the proposed cost-sharing approach. It further provides that the owner shall provide in that notice a timeline for addressing the problem. Unfortunately, the law does not provide how the written notice should be delivered and what the remedy or procedure is if the neighbor does not respond to the notice. We advise that whenever possible, this notice should be hand-delivered to the property owners involved and discussions undertaken between the neighbors to make sure everyone is on the same page as to what is going to be done, how much it is going to cost, and the fact that the costs will be shared equally. If such a meeting takes place, one of the parties should make a written record of it in order to have a paper trail in case anyone conveniently develops total or partial amnesia later on.

As mentioned, this new law presumes that each property owner adjoining the fence shall equally share in the cost. However, the law also contains an opt-out clause providing that an owner may overcome this presumption "by a preponderance of the evidence over 50%" demonstrating that equal responsibility for costs would be unjust. The statute then gives factors that a judge or court should consider in determining whether equal financial responsibility would be unjust. Those factors are as follows:

- Whether the financial burden to one landowner is substantially disproportionate to the benefit conferred upon that landowner by the fence in question. For example, your downhill neighbor wants to construct a fence on their downhill side, which is not visible, confers no benefit on the uphill property owner, and cannot be seen by the uphill property owner.
- When the cost of the fence would exceed the difference in the value of the real property before and after its installation. This is a real trap for the unwary, because just how would one determine whether the value of the property would exceed the cost of installation?
- Whether the financial burden to one landowner would impose an undue financial hardship on that party's financial circumstances "as demonstrated by reasonable proof."
- The reasonableness of the particular construction or maintenance project must be weighed with regard to the following: (a) the extent to which the costs for the project appear to be unnecessary or extensive or (b) the extent to which the costs for the project appear to be the result of the landowner's personal aesthetic, architectural, or other preferences.
- The law also provides that the court must take into consideration any other equitable factors appropriate to the circumstances, which essentially gives the judge great latitude in deciding what other factors are appropriate.

In most cases, the presumption that the costs should be shared equally will apply, but if one neighbor wants to try to rebut that resumption based on any of the factors listed above, it is certainly possible to do so.

Given the fact that neighbors are allowed to attempt to rebut the presumption of equal sharing of costs, it makes it doubly important to sit down with your neighbor and see if you can agree on the type of fence, costs, etc. If one party wants redwood and the other wants some rare Brazilian imported lumber, that is a factor that must be taken into consideration in accordance with the guidelines set forth above.

While this new statute is a significant improvement on the outdated Gold-Rush-era statute, my prediction is that disputes between neighbors over shared fences will continue to keep attorneys busy for years to come.

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.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

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The California law firm of Rossi, Hamerslough, Reischl & Chuck provides legal representation to real estate and business clients throughout Silicon Valley and the San Francisco Bay Area including San Francisco, San Jose, Palo Alto, Los Altos, Los Gatos, Menlo Park, Gilroy, Hollister, Santa Cruz, Santa Clara, Aptos, Monterey, Carmel, Salinas, Morgan Hill, Saratoga, San Francisco County, Santa Clara County, Santa Cruz County, San Benito County, Alameda County, San Mateo County, Monterey County, and Contra Costa County.