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Bill Analysis

Legislative Service Commission

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Reps. Gibbs, Peterson, J. McGregor, Evans, Huffman, Wagner, Miller, Fessler, Seitz, Bulp, Okey, R. McGregor, Fende

BILL SUMMARY

- With specified exceptions, requires all fields and enclosures in which livestock are kept or placed and that are bordered by a division line between the adjoining properties of different owners to be enclosed by a preferred partition fence, and defines "partition fence" and "preferred partition fence."
- Requires adjoining property owners to equitably share in the maintenance of an existing partition fence, requires those owners to equitably share in the construction of a new fence unless they enter into an agreement to do otherwise, and applies those requirements to certain previously existing partition fences.
- If an owner removes a partition fence without replacing it in one year, allows an adjoining property owner to file an affidavit stating that the fence existed between the owners within one year of its removal, and establishes requirements governing the construction of a new fence.
- Requires an owner who wants to build a partition fence to pay for the construction and maintenance of the fence if certain conditions are not met, authorizes the owner to file an affidavit specifying the cost of constructing and maintaining the fence, and authorizes the owner to file a claim for reimbursement of 50% of the total cost of building and maintaining the fence if the adjoining property owner uses the fence to enclose livestock within 30 years of the construction of the fence.
- If one owner neglects to build or maintain in good repair a partition fence, allows the aggrieved owner to file an action in a court of common

pleas or file a complaint with the board of township trustees of the township in which the land or fence is located or is to be built.

- Establishes procedures that a board of township trustees must follow when a complaint is filed, including, if applicable, the assignment of each owner's responsibility in building or maintaining a partition fence, and requires the board to consider certain factors when making an equitable assignment of responsibility.
- Allows an owner that does not agree with the board's assignment of responsibility to request binding arbitration with the board and the other owner, and establishes requirements and procedures governing binding arbitration.
- Establishes requirements and procedures that a board of township trustees must follow to award a contract to build or maintain a partition fence if either owner fails to build or maintain the portion of fence assigned by the board.
- Largely retains current law governing recovery of the costs of the board incurred in making an assignment.
- Authorizes an owner to file a civil action against the owner's neighbor if the neighbor neglects to build or maintain in good repair a partition fence, and requires the court in which the action is filed to consider certain factors when making an assignment of responsibility for building or maintaining a partition fence.
- Allows an owner to file an affidavit, within one year after the bill's effective date, with the applicable county recorder stating that a partition fence existed between adjoining properties within ten years prior to the filing of the affidavit, and states that the bill's provisions governing the construction and maintenance of existing or previously existing partition fences apply if such an affidavit is filed.
- Allows the owners of adjoining properties to enter into a written agreement that states that no fence is needed between the properties, a fence other than a preferred partition fence may be built and maintained, or the rights and obligations of the owners are different from what is established in the bill.



- Revises existing law governing the partition fence record by requiring the record to include all agreements between the owners of adjoining properties filed in accordance with the bill, all affidavits filed by owners in accordance with the bill, and all assignments of and findings and decisions regarding responsibility for building and maintaining in good repair partition fences made under bill.
- Allows an owner or contractor building a partition fence to enter on the adjoining property for no more than ten feet to build or maintain the fence if the adjoining owner does not share in the construction of the fence, and specifies that the owner or contractor is not guilty of criminal trespass in the ten-foot zone, but is liable for all damages caused by the entry onto the adjoining property, including damages to crops.
- Prohibits a person from obstructing or interfering with anyone who is lawfully engaged in the construction or maintenance of a partition fence or with a member of the board of township trustees who is awarding a contract for the construction or maintenance of a partition fence, and establishes penalties for violating the prohibitions.
- Requires an owner to notify his adjoining property owner before removing a partition fence, and establishes requirements and procedures regarding the notification and the consequences for not following them.
- As in current law, exempts from the Fences Law the enclosure of lots in municipal corporations and of adjoining lands that are laid out into lots outside of municipal corporations and certain railroad fences.
- Specifies that an owner of livestock who permits the livestock to run at large out of the livestock's enclosure is liable for all damages caused by the livestock on the premises of another.
- Largely retains existing law governing the maintenance of noxious weeds along fences.
- Repeals the provisions in existing law prohibiting the use of barbed wire or electrified fences and hedge fences and the provisions establishing: procedures governing when one party owns the entire fence and when a division line is in a stream of water or on a county or township line, requirements for the construction and maintenance of a water gate, venues for division line disputes, requirements regarding negligence of

township trustees, liability of owners of animals that escape, requirements for maintenance of hedge fences, and construction of a fence to bridges or culverts.

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CONTENT AND OPERATION

Overview

The bill revises the Fences Law, including establishing requirements for preferred partition fences, requirements regarding the construction and maintenance of existing or previously existing partition fences, and requirements regarding the construction and maintenance of new partition fences, and changing requirements and procedures with respect to the assignment of responsibility by a board of township trustees for constructing and maintaining partition fences.

The first part of this analysis describes the current Fences Law. The second part of this analysis describes the Fences Law as revised by the bill.

Current law

Requirements regarding construction and maintenance of partition fences and exceptions to those requirements

Under existing law, owners of adjoining lands must build, keep up, and maintain in good repair, in equal shares, all partition fences between them unless otherwise agreed upon by them in writing and witnessed by two persons. "Owner" means the owner of land in fee simple, of estates for life, or of rights-of-way while used by the owners of the land, estates, or rights-of-way as farm outlets and the Department of Natural Resources with regard to any land that it owns, leases, manages, or otherwise controls and that is adjacent to land used to graze livestock (sec. 971.01). The fact that any land or tract of land is wholly unenclosed or is not used, adapted, or intended by its owner for use for agricultural purposes does not excuse the owner from the obligations imposed by the Fences Law on the owner as an adjoining owner. The Fences Law does not apply to the enclosure of lots in municipal corporations or of adjoining lands both of which are laid out into lots outside municipal corporations. It also does not affect the law relating to fences that are required to be constructed by persons or corporations owning, controlling, or managing a railroad. (Sec. 971.02.)

Prohibitions regarding hedges and barbed and electrified fences

Current law prohibits the construction of certain types of fences. A person or corporation cannot have a willow or other live fence, except osage or blackthorn hedge (sec. 971.03(A)). In addition, a person or corporation is prohibited from constructing or causing to be constructed a partition fence made of barbed wire or electrified wire unless written consent of the adjoining owner is first obtained. The consent is not necessary for the use of one or two barbed wires, provided that neither is less than 48 inches from the ground and is placed on the

top of a fence other than a barbed wire fence. (Sec. 971.03(B).) A person or corporation who violates the prohibition against constructing barbed or electrified wire fences is guilty of a fourth degree misdemeanor (sec. 971.99(A)).

Assignment of responsibility by board of township trustees for construction and maintenance of partition fence

Existing law specifies that when a person neglects to build or repair a partition fence, or a portion of the fence that he is required to build or maintain, the aggrieved person may complain to the board of township trustees of the township in which the land or fence is located. The board, after not less than ten days' written notice to all adjoining landowners of the time and place of meeting, must view the fence or premises where the fence is to be built and assign, in writing, to each person his equal share of the fence to be constructed or kept in repair by him. (Sec. 971.04.)

Special circumstances regarding assignments. Current law addresses the application of the Fences Law when a property division line is in a stream of water, crosses a stream of water, or is on a township or county line. First, if the division line of adjacent landowners is in a stream of water, along which division line it is impracticable to construct and maintain a partition fence, the board must assign to each landowner his portion of the fence upon his land, and the parts so assigned must be built and maintained upon his own premises along the bank of the stream. The landowners must join their assigned parts of the fence by a fence or water gate. (Sec. 971.14.)

Second, if the division line of adjacent landowners crosses a stream of water, through which it is impracticable to construct and maintain a partition fence, the owners must construct and maintain a water gate across the stream that will turn livestock. In addition, the water gate must be built, kept up, and maintained in good repair in equal shares unless otherwise agreed upon by the owners in writing and witnessed by two persons. If either of the adjacent landowners neglects to build, keep up, and maintain the water gate or cannot agree upon the division of it that each must build, keep up, and maintain, the board must assign the portion of the water gate each must build, keep up, and maintain the same as if the water gate was a partition fence between adjacent owners. Current law specifies that the provisions governing the building, keeping up, and maintaining of partition fences apply to the provisions governing water gates, and, for determining the liability of the adjacent landowners by reason of trespass of domestic animals upon the lands of the other, the water gate must be a partition fence. (Sec. 971.25.)

Third, if a partition fence in controversy is on a township or county line, the boards of township trustees of the adjacent townships have concurrent jurisdiction,



and the board of either of the townships may be called to perform the duties imposed as to partition fences in the Fences Law. Either party may call the board of the other township, in which case they must act jointly, but separate record must be made in both townships. (Sec. 971.16.)

If a partition fence, an enclosure, or a part of a fence or enclosure is on the line of a township, or on the line of or in two or more townships of the same or different counties, actions prosecuted under the Fences Law may be brought before a judge of a county court or judge of a municipal court having jurisdiction in the township in which the defendant resides (sec. 971.17). The court before whom action is brought must issue process against the defendant, directed to the sheriff of the county in which the court is situated, to serve and return the process, and the defendant must answer to that court, and like proceedings must be had as if the defendant resided in the township where the action was commenced (sec. 971.18).

Costs associated with making assignment. Under existing law, the cost that is due the township fiscal officer and the board of township trustees for making the assignment of a partition fence must be taxed equally against each of the persons and, if not paid to the fiscal officer within 30 days from the date of the assignment, must be certified by the fiscal officer to the county auditor, with a correct description of the lands and the amount charged against each portion (sec. 971.05). The county auditor must place the amount authorized by the township fiscal officer upon the duplicate to be collected as other taxes, and the county treasurer must pay it, when collected, to the township fiscal officer as other funds are paid (sec. 971.06).

The report of the assignment of partition fences under the Fences Law must be made and certified to the county recorder by the township fiscal officer, and the cost of the record of the report must be taxed against the parties with the other costs (sec. 971.12).

Miscellaneous provisions governing assignment of fences. Existing law requires the county recorder to keep a book known as the "Partition Fence Record," and all divisions of partition fences made under the Fences Law must be recorded in the record, and must be final between the parties involved and successive owners after that, until the divisions become unequal by a sale or division of land or a portion of the land, in which case a new division may be had (sec. 971.10).

If an adjoining landowner owns all of a line fence, the board of township trustees may adjudge the value of the portion assigned the other owner, which may be recovered by the owner of the fence with cost of suit (sec. 971.11).

Failure to comply with assignment. Current law specifies that if either person fails to build the portion of fence that is assigned to him by the board of township trustees in the township in which the land or fence is to be located, the board, upon the application of the aggrieved person, must award the contract to the lowest responsible bidder agreeing to furnish the labor and material and build the fence according to the specifications proposed by the board. Before awarding a contract, the board must advertise for bids once a week for three consecutive weeks in a newspaper of general circulation in the county in which the township is situated. If no bids are received from responsible bidders, the board must procure labor and materials at prevailing rates and cause the fence to be constructed. (Sec. 971.07(A) and (B).) No person can obstruct or interfere with anyone lawfully engaged in construction of a partition fence or in the performance of a member of the board of township trustees with respect to providing for the construction or maintenance of a partition fence (sec. 971.07(C)). A person who violates that prohibition is guilty of a third degree misdemeanor (sec. 971.99(B)).

When the work is completed to the satisfaction of the board, it must certify the costs to the township fiscal officer. If the costs are not paid within 30 days, the fiscal officer must certify them to the county auditor with a statement of the cost of the construction and incidental costs incurred by the board and a correct description of each piece of land upon which the costs are assessed. (Sec. 971.08.)

The county auditor must place the amounts certified upon the tax duplicate, at which time it becomes a lien and must be collected as other taxes. The board must certify the amount due each person for building the fence and the amount due each trustee and the fiscal officer for services rendered. In anticipation of the collection of the amounts, the auditor must draw orders for the payment of the amounts out of the county treasury. (Sec. 971.09.)

Construction of fences to bridges or culverts

Under existing law, a landowner along, or through whose lands, a state or county road is laid out and established, upon consent and under the direction of the board of county commissioners of the proper county, may build and construct fences within the roads leading from the sides thereof to, and along the approaches to, and to the ends of the sides of bridges and culverts constructed over streams and ravines in the highways. No landowner can acquire title by prescription or otherwise to any portion of the highways becoming a part of the enclosures of the landowner by reason of the construction of such fences as authorized in the provisions governing construction of fences to bridges or culverts. The owner, upon the order of the board of county commissioners, must promptly remove the fences, but no township highway superintendent, or member of the board of township trustees acting as the superintendent, must remove them except upon permission first obtained from the board. The superintendent must not interfere

with the fences further than is necessary to open ditches and improve the roadbed of the highways. (Sec. 971.31.)

Barbed wire cannot be used in the construction of fences to bridges or culverts, and the township highway superintendent or member of the board of township trustees acting as the superintendent must remove it if it is so used (sec. 971.32).

Requirements regarding hedge fences

Under current law, an owner or occupant of land bordering upon a public road or highway, except a street or alley in a municipal corporation, or through which a public road or highway passes may set, plant, and cultivate a hedge or live fence on the line of the road or public highway and place on the margin of the road a protection fence, not to occupy more than six feet of the margin. The protection fence, when placed opposite a live fence or hedge, set or planted, may remain for seven years. The board of township trustees may grant permission in writing to the owner of the hedge or live fence to continue the protection fence as long as is necessary. (Sec. 971.27.)

The owner of a hedge fence on a partition line, or along a public highway, must not permit it to remain of a greater height or width than six feet or for a longer period than six months or leave the cuttings from it on the public highway for more than ten days. A person violating that prohibition is liable to the person damaged in a sum not exceeding 20¢ per rod of the hedge fence. If the hedge is along a public highway, the person is liable to the board of township trustees of the township in which it is situated in a sum not exceeding 15¢ per rod of the fence. (Sec. 971.28.) Before a judgment is rendered, it must appear, by affidavit, that the person complained against has had at least 20 days' notice before the beginning of the suit from the person complaining that the hedge was unlawful and that unless it was cut to the legal height within 20 days, suit would be commenced for the violation (sec. 971.29). Actions with respect to hedge fences must be brought upon the complaint of the person damaged before a judge of a county court or judge of a municipal court having jurisdiction of the township in which the hedge is situated, or, if it is along a public highway, the complaint must be made by the township highway superintendent or a member of the board of township trustees acting as the superintendent (sec. 971.30).

Trespassing animals

Current law includes several statutes governing the trespassing of animals with regard to partition fences. The first such statute states that for determining the liability of one landowner by reason of the trespass of domestic animals upon the lands of the other, "such fence is a partition fence" (sec. 971.15). Second, if a

horse, mule, ass, hog, sheep, goat, or any neat cattle, running at large, breaks into or enters an enclosure, other than an enclosure of railroads, the owner of the animal is liable to the owner or occupant of the enclosure for all damages caused by the animal. An animal, so breaking into or entering, is not exempt from execution on a judgment rendered in a court, or before an officer having jurisdiction, for damages occasioned by the trespass. (Sec. 971.26.)

Third, if a horse, mule, ass, hog, sheep, goat, or any neat cattle injures or trespasses upon land or an enclosure bounded by a partition fence, in consequence of the failure or neglect of a person to keep up and maintain in good repair his share of the fence, the person failing or neglecting must pay to the person injured the damages caused by the animal, to be assessed, under oath, by three judicious, disinterested men, residents of the county, appointed by a judge of a county court or a judge of a municipal court having jurisdiction in the township in which the premises are situated. If the damages are not paid, the amount of the damages may be recovered in an action with cost of suit. (Sec. 971.22.) In all assessment actions, the assessment, reduced to writing, and subscribed by the persons making it, is prima-facie evidence of the damages sustained by the party aggrieved, but the court before which the cause is tried may set aside the verdict for irregularity or other good cause (sec. 971.23). The trespassing animals are not exempt from execution issued on a judgment rendered in a court, or before an officer having jurisdiction, for damages occasioned by the trespass (sec. 971.24).

Noxious weeds along fences

Current law requires an owner of land, adjacent to a line or partition fence, to keep all brush, briars, thistles, or other noxious weeds cut in the fence corners and a strip four feet wide on his side along the line of a partition fence, but that requirement does not affect the planting of vines or trees for use (sec. 971.33). If the owner or tenant occupying land neglects or refuses to cut brush, briars, thistles, or other noxious weeds, an owner or occupant of land abutting on the line or partition fence, after having given the owner or tenant not less than ten days' notice to cut or remove them, may notify the board of township trustees of the township in which the land is situated. The board must immediately view the premises and, if satisfied that there is just cause of complaint, must cause the noxious weeds to be cut by letting the work to the lowest bidder or by entering into a private contract for that purpose. (Sec. 971.34.)

When the work is completed, the board must certify to the county auditor the amount of the cost of the work with the expenses for the work attached and a correct description of the land upon which the work was performed. The auditor must place the amount upon the tax duplicate to be collected as other taxes. The county treasurer must pay the amount, when collected, to the township fiscal officer as other funds are paid. (Sec. 971.35.) The board may anticipate the

collection and refund the cost of the work to the township fiscal officer for the amount, payable out of any township funds that may be in the fiscal officer's hands (sec. 971.36).

Miscellaneous provisions

Under existing law, proceedings under the Fences Law do not bind the owner unless the owner is notified as discussed below (sec. 971.01). Notice to landowners must be given in writing by serving a copy personally upon them or by mailing a copy to them at their last known address by certified mail, return receipt requested. If the notice sent by certified mail is refused or unclaimed, notice may be served by sending it by ordinary mail. If the notice sent by ordinary mail is returned for failure of delivery, or if the addresses or whereabouts of any landowner involved is unknown and cannot with reasonable diligence be ascertained, notice may be served by publication once a week for three consecutive weeks in a newspaper of general circulation in the county in which the township is situated. (Sec. 971.13.)

If a member of the board of township trustees refuses or neglects to perform a lawful duty imposed upon him by the Fences Law, he must forfeit not less than \$50 nor more than \$500, to be recovered by a civil action in the name of the state. The amount recovered must be paid into the township treasury for township purposes. (Sec. 971.21.)

The bill

Preferred partition fence requirements and exemptions

Except as discussed below, the bill requires all fields and enclosures in which livestock are kept or placed and that are bordered by a division line between the adjoining properties of different owners to be enclosed by a preferred partition fence (sec. 971.02(A)).¹ "Partition fence" means a fence that is located on the division line between the adjoining properties of two owners. "Partition fence" includes a fence that has been considered a division line between two such properties even though a subsequent land survey indicates that the fence is not located directly on the division line. (Sec. 971.01(E).) The bill defines "preferred partition fence" as a partition fence that is a woven wire fence, either standard or high tensile, with one or two strands of barbed wire located not less than 48 inches from the ground or a nonelectric high tensile fence of at least seven strands and

¹ "Livestock" means horses, mules, asses, hogs, sheep, goats, cattle, and any other animal that is raised or maintained domestically for food, fiber, or hunting purposes (sec. 971.01(C)).

that is constructed in accordance with the United States Natural Resources Conservation Service Conservation Practice Standard for Fences, Code 382. "Preferred partition fence" includes a barbed wire, electric, or live fence, provided that the owners of adjoining properties agree, in writing, to allow such fences. (Sec. 971.01(F).) "Owner" means both of the following:

(1) The owner of land in fee simple, of estates for life, of easements, or of rights-of-way while used by the owners of the land, estates, easements, or rights-of-way as farm outlets; and

(2) Any of the following with regard to any land that it owns, leases, manages, or otherwise controls and that is adjacent to land used to graze livestock:

(a) The Department of Natural Resources;

(b) A conservancy district organized under the Conservancy Districts Law;

(c) A political subdivision with a real property interest in recreational trails (sec. 971.01(D)). "Recreational trail" means a public trail that is used for hiking, bicycling, horseback riding, ski touring, canoeing, or other nonmotorized forms of recreational travel and that interconnects state parks, forests, wildlife areas, nature preserves, scenic rivers, or other places of scenic or historic interest (sec. 971.01(G), by reference to sec. 1519.07(A)(3), not in the bill).

Nothing in the bill prevents an owner from building a fence that exceeds the requirements for a preferred partition fence established under the bill.² The owner building such a fence must pay all additional costs and expenses of building the fence and maintaining it in good repair. (Sec. 971.02(B).)

The bill's preferred partition fence provisions do not apply to the owners of adjoining properties that enter into an agreement in accordance with the bill (see "***Agreement between property owners***," below) and fences that were constructed prior to the bill's effective date (sec. 971.02(C)).

Requirements regarding construction and maintenance of existing or previously existing partition fences

Under the bill, if a partition fence exists between adjoining properties, the owners of the adjoining properties must maintain the fence in good repair in equitable shares. If the owners decide to build a new fence, they must do so in equitable shares in accordance with the bill unless the owners enter into an

² "Build a fence," "construct a fence," and "maintain a fence in good repair" include any necessary clearing of land (sec. 971.01(B)).

agreement in accordance with the bill (see "Agreement between property owners," below). (Sec. 971.06(A).)

The owners of adjoining properties must build and maintain in good repair a partition fence in equitable shares in accordance with the bill if there is evidence that a partition fence previously existed between the adjoining properties or if either of the owners of the adjoining properties, or the previous owners of the adjoining properties, has or had filed an affidavit with the applicable county recorder under the bill (see "Filing of affidavit with county recorder regarding previously existing partition fence," below).³ However, the owners of the adjoining properties are not required to build and maintain in good repair a partition fence in equitable shares if the owners enter or the previous owners entered, as applicable, into an agreement in accordance with the bill. (Sec. 971.06(B).)

If a partition fence is removed by an owner and not replaced within one year after removal, the owner of adjoining property may file an affidavit with the applicable county recorder to be placed in the partition fence record that is required under current law and continued by the bill stating that a partition fence existed between the adjoining properties within one year prior to the filing of the affidavit. The affidavit also must specify the location of the properties and state that the fence has been removed and not replaced. (Sec. 971.06(C)(1).)

If an affidavit is filed and a partition fence is rebuilt, the owners of the adjoining properties must build and maintain in good repair the new fence in equitable shares in accordance with the bill unless the owners enter into an agreement in accordance with the bill (sec. 971.06(C)(2)). If an affidavit is not filed and a partition fence is rebuilt, the owner constructing the fence must bear the total costs of building and maintaining it in good repair (sec. 971.06(C)(3)).

Requirements regarding construction and maintenance of new partition fence

The bill states that if a partition fence does not exist between adjoining properties, there is no evidence that a partition fence previously existed, an affidavit has not been filed with the applicable county recorder in accordance with the bill (see "Requirements regarding construction and maintenance of existing or previously existing partition fences," above, and "Filing of affidavit with county recorder regarding previously existing partition fence," below), or a

³ The bill defines "applicable county recorder" as the county recorder of a county in which a partition fence is, was, or is not required to be constructed and maintained in good repair (sec. 971.01(A)).

written agreement between the owners of adjoining properties has not been filed with the applicable county recorder in accordance with the bill (see "Agreement between property owners," below) and an owner wants to build a partition fence, that owner must bear the costs of building and maintaining in good repair the partition fence. The owner may file with the applicable county recorder an affidavit that specifies the costs incurred by the owner to build the partition fence. Each year after the fence is built, the owner may file with the applicable county recorder an affidavit that specifies the costs incurred that year by the owner to maintain the fence in good repair. (Sec. 971.07(A).)

If an owner of adjoining property that did not assist in bearing the costs of building and maintaining in good repair a partition fence, or any successor in interest of the property, subsequently uses the fence to keep livestock enclosed on the property within 30 years after the fence was built, the owner that built the fence, or any successor in interest of the property, may file a claim for reimbursement of 50% of the total cost of building and maintaining in good repair the partition fence with the owner of the adjoining property or that owner's successor in interest, provided that an affidavit has been filed. An owner that receives a claim for reimbursement promptly must pay it. In addition, if necessary, the owners must modify the partition fence so that it complies with the standards for preferred partition fences established by the bill. The owners must equally divide the costs of the modification of the partition fence. (Sec. 971.07(B).)

If the owner of adjoining property, or that owner's successor in interest, fails to pay the claim for reimbursement of 50% of the total cost of building and maintaining in good repair the partition fence, the owner that filed the claim for reimbursement may file an action in a court of competent jurisdiction to recover not more than 50% of the total cost of building and maintaining in good repair the partition fence (sec. 971.07(C)).

If the owner of adjoining property, or that owner's successor in interest, pays the claim for reimbursement filed by the owner that built and maintained in good repair the partition fence or is required to reimburse that owner by a court under the bill, the owner of the adjoining property, or that owner's successor in interest, subsequently is subject to the bill's provisions governing the construction and maintenance of existing or previously existing partition fences (sec. 971.07(D)).

If the owner that builds and maintains in good repair a partition fence does not file an affidavit under the bill, the owner forfeits the owner's right to reimbursement from the owner of adjoining property as authorized under the bill (sec. 971.07(E)).

Assignment of responsibility by board of township trustees for construction and maintenance of partition fence

The bill establishes requirements and procedures governing the assignment of responsibility by a board of township trustees for construction and maintenance of a partition fence that are similar to those in current law. Under the bill, when an owner neglects to build or maintain in good repair a partition fence, or the portion of the fence that the owner is required to build or maintain, the aggrieved owner may file an action in a court of common pleas as provided in the bill (see "**Civil action regarding construction or maintenance of partition fence**," below) or file a complaint with the board of township trustees of the township in which the land or fence is located or is to be built. When a partition fence is on a township or county line, the boards of township trustees of the adjacent townships have concurrent jurisdiction, and the board of township trustees of either of the townships may be called to perform the applicable duties established in the bill. Either party to the complaint may call the board of the other township, in which case they must act jointly, but a separate record must be made in both townships. (Sec. 971.09(A).)

If a complaint is filed with a board of township trustees, the board, after not less than ten days' written notice to all adjoining owners of the time and place of meeting, must view the fence or premises where the fence is located or is to be built. At the meeting, the board must determine whether a partition fence exists, regardless of whether it is in disrepair, or there is evidence that a partition fence previously existed. If there is no evidence that a partition fence exists, even in disrepair, or if there is no evidence that a partition fence previously existed, the board must review the applicable county recorder's records to determine whether an affidavit has been filed in accordance with the bill (see "**Requirements regarding construction and maintenance of existing or previously existing partition fences**" and "**Requirements regarding construction and maintenance of new partition fence**," above, and "**Filing of affidavit with county recorder regarding previously existing partition fence**," below) or an agreement has been filed in accordance with the bill (see "**Agreement between property owners**," below). (Sec. 971.09(B).)

After viewing the fence or premises and reviewing the applicable county recorder's records, if applicable, the board may request additional information from either owner that is a party to the complaint (sec. 971.09(C)). At the next regularly scheduled meeting of the board after viewing the fence or premises and reviewing the applicable county recorder's records, if applicable, the board must determine if a partition fence is required to be built or maintained in good repair, as applicable. If the board determines that a partition fence is required to be built

or maintained, the board must decide each owner's responsibility for building or maintaining in good repair the partition fence. (Sec. 971.09(D)(1).)

If the board finds that both owners are responsible, the board must equitably assign, in writing, each owner's share of building or maintaining in good repair the partition fence. When making an equitable assignment, the board may assign a specific portion of the partition fence to be built or maintained in good repair, or the board may assign a portion of the total cost of building or maintaining in good repair the partition fence if the owners have submitted to the board an estimate from a contractor of the necessary cost to perform the applicable work. If the partition fence does or will contain livestock, the board must include in the equitable assignment the cost of building or modifying the fence to meet the standards for preferred partition fences established in the bill. (Sec. 971.09(D)(2).)

If the board finds that one owner is responsible, the board must require that owner, in writing, to pay the total cost of building or maintaining in good repair the partition fence or the portion of the partition fence for which the owner is responsible, as applicable (sec. 971.09(D)(3)). If the board determines that a partition fence is not required to be built or maintained in good repair, as applicable, the board must notify each owner of that determination in writing (sec. 971.09(D)(4)).

When making an equitable assignment, the board must consider, without limitation, all of the following:

- (1) The topography of the applicable property;
- (2) The presence of streams, creeks, rivers, or other bodies of water;
- (3) The presence of trees, vines, or other vegetation;
- (4) The level of risk of trespassers on either property due to the population density surrounding the property or the recreational use of adjoining properties;
- (5) The importance of marking division lines between the properties; and
- (6) The number and type of livestock owned by either owner that may be contained by the partition fence (sec. 971.09(E)).

The board must certify a report of an assignment or a finding made under the bill to the applicable county recorder, who must record the assignment or finding in the partition fence record (sec. 971.09(F)).

Arbitration. If either owner does not agree to the board's assignment of responsibility under the bill for building or maintaining in good repair a partition fence, the owner, not later than 30 days after the assignment has been made, may deliver to the board and the other owner a written request for binding arbitration. An owner that requests binding arbitration also must deliver a copy of the request to the court of common pleas of the county in which the arbitration is to be held, which must be the county in which the owner that seeks the binding arbitration resides. (Sec. 971.09(G)(1).)

The court of common pleas in which the arbitration is to be held must appoint an arbitrator. The owners and the board must pay the costs of the arbitrator's services in equal amounts. An arbitrator that has knowledge of the Fences Law must be appointed, if possible. (Sec. 971.09(G)(2).)

Not later than 30 days after appointment of an arbitrator, each owner and the board must deliver to the arbitrator a recommendation for the assignment of responsibility for building or maintaining in good repair the partition fence. Not later than 60 days after appointment of the arbitrator, the arbitrator must approve one of the recommendations submitted or assign responsibility for building or maintaining in good repair the partition fence based on the arbitrator's judgment.

The arbitrator must deliver to each owner and the board a written statement of the arbitration decision that states each owner's responsibility for building or maintaining in good repair the partition fence. The arbitrator must certify a report of the arbitration decision to the applicable county recorder, who must record the decision in the partition fence record. The owners must abide by the arbitration decision. The arbitration decision must be enforced, upon petition by either owner, by the court of common pleas of the county in which the petitioner resides. (Sec. 971.09(G)(3).)

Failure to comply with assignment. Similar to existing law, the bill states that if either owner fails to build or maintain in good repair the portion of a partition fence assigned to the owner by the board of township trustees under the bill, the board, upon the application of the aggrieved owner, must award the contract to the lowest responsible bidder agreeing to furnish the labor and material and build or maintain the fence according to the specifications proposed by the board. Before awarding a contract, the board must advertise for bids once a week for three consecutive weeks in a newspaper of general circulation in the county in which the township is situated. (Sec. 971.12(A).) If no bids are received from responsible bidders, the trustees must procure labor and materials at prevailing rates and cause the fence to be constructed or maintained (sec. 971.12(B)).

When the contract work is completed to the satisfaction of the board of township trustees, it must certify the costs to the township fiscal officer. If the



costs are not paid within 30 days, the fiscal officer must certify them to the county auditor with a statement of the cost of the construction or maintenance and incidental costs incurred by the trustees and a correct description of each piece of land upon which the costs are assessed. (Sec. 971.13.)

The county auditor must place the amounts certified by the township fiscal officer upon the tax duplicate, which amounts must become a lien and be collected as other taxes. The board of township trustees must certify the amount due each person for building or maintaining the fence and the amount due each trustee and the fiscal officer for services rendered. In anticipation of the collection of the amounts, the auditor must draw orders for the payment of the amounts out of the county treasury. (Sec. 971.14.)

Costs incurred in making assignment. As under current law, the bill requires the cost due the township fiscal officer and the board of township trustees for making an assignment to be taxed equally against each of the persons. If the costs are not paid to the fiscal officer within 30 days from the date of the assignment, the costs must be certified by the fiscal officer to the county auditor, with a correct description of the lands and the amount charged against each portion. (Sec. 971.10.) The county auditor must place the amount authorized by the fiscal officer upon the duplicate to be collected as other taxes, and the county treasurer must pay it, when collected, to the fiscal officer as other funds are paid (sec. 971.11).

Civil action regarding construction or maintenance of partition fence

As an alternative to filing a complaint with the board of township trustees, the bill authorizes an owner to file an action in a court of common pleas of the county in which the owner resides if the owner of adjoining property neglects to build or maintain in good repair a partition fence or the portion of a partition fence that the owner is required to build or maintain (sec. 971.16(A)). In such an action, a court must consider all of the following when making an assignment of responsibility for building or maintaining in good repair a partition fence:

- (1) Whether a partition fence currently exists even if it is in disrepair;
- (2) Whether there is evidence that a partition fence existed in the past;
- (3) Whether a written agreement between the owners has been filed with the applicable county recorder in accordance with the bill (see "**Agreement between property owners**," below);
- (4) Whether an affidavit has been filed with the applicable county recorder in accordance with the bill (see above); and

- (5) All of the following:
- (a) The topography of the applicable property;
 - (b) The presence of streams, creeks, rivers, or other bodies of water;
 - (c) The presence of trees, vines, or other vegetation;
 - (d) The level of risk of trespassers on either property due to the population density surrounding the property or the recreational use of adjoining properties;
 - (e) The importance of marking division lines between the properties; and
 - (f) The number and type of livestock owned by either owner that may be contained by the partition fence. The court must make an assignment in equitable shares. (Sec. 971.16(B).) The bill also requires the court to assign attorney's fees and court costs in an equitable manner to the parties (sec. 971.16(C)).

Filing of affidavit with county recorder regarding previously existing partition fence

Under the bill, if there is evidence that a partition fence previously existed between the adjoining properties of two owners, one of the owners, or both, may file an affidavit with the applicable county recorder to be placed in the partition fence record stating that a partition fence existed between the adjoining properties within ten years prior to the filing of the affidavit. The affidavit also must specify the location of the properties and that the fence has been removed and not replaced. The affidavit must be filed no later than one year after the bill's effective date. (Sec. 971.05(A).)

If an affidavit is filed, the bill's provisions governing the construction and maintenance of existing or previously existing partition fences apply (sec. 971.05(B)). If an affidavit is not filed, the bill's provisions governing the construction and maintenance of new partition fences apply (sec. 971.05(C)).

Agreement between property owners

The bill states that nothing in its provisions prevents the owners of adjoining properties from entering into a written agreement that states that no fence is needed between the properties, a fence other than a preferred partition fence may be built and maintained pursuant to the bill, or the rights and obligations of the owners are different from what is established in the bill. The agreement must be filed with the applicable county recorder and placed in the partition fence record. In addition, the agreement runs with the properties that are subject to the agreement. (Sec. 971.04.)

Partition fence record

As in existing law, the bill requires the applicable county recorder to keep a book known as the "partition fence record." The bill expands its contents by requiring that all agreements between the owners of adjoining properties filed in accordance with the bill, all affidavits filed by owners in accordance with the bill, and all assignments of and findings and decisions regarding responsibility for building and maintaining in good repair partition fences made under the bill be recorded in the record. A document recorded in the record must be final between the parties thereto and successive owners thereafter until modified by a subsequent document. All documents recorded in the record must describe the land where a partition fence is located and the portion of the fence assigned to each applicable owner. In addition, the documents must describe the purposes and use of the partition fence. (Sec. 971.15.)

Right to enter onto adjoining property to construct fence

Under the bill, if an owner chooses to build a partition fence and the owner of adjoining property does not share in the construction of the fence, the owner building the fence, or a contractor hired by the owner, may enter on the adjoining property for no more than ten feet for the length of the fence to build and maintain in good repair the fence. The owner or contractor building the fence is not guilty of criminal trespass or an ordinance of a municipal corporation that is substantially equivalent, provided that the owner or contractor does not enter onto the property beyond the ten feet. However, that owner or contractor is liable for all damages caused by the entry onto the adjoining property, including damages to crops. (Sec. 971.08(A).)

Penalties

The bill prohibits a person from obstructing or interfering with anyone who is lawfully engaged in the construction or maintenance of a partition fence or with a member of a board of township trustees who is awarding a contract for the construction or maintenance of a partition fence (secs. 971.08(B) and 971.12(C)). Except as otherwise provided in the bill (see below), whoever violates either prohibition is guilty of a third degree misdemeanor (sec. 971.99(A)). If, in committing the offense, the violator made a threat of physical harm to the person that was building or maintaining a partition fence, the person is guilty of a second degree misdemeanor (sec. 971.99(B)). If, in committing the offense, the violator caused physical harm to the person that was building or maintaining a partition fence, the person is guilty of a first degree misdemeanor (sec. 971.99(C)). If, in committing the offense, the violator caused serious physical harm or death to the person that was building or maintaining a partition fence, the person is guilty of a fifth degree felony (sec. 971.99(D)).

Under the bill, prosecution for a violation of one of the above prohibitions does not preclude prosecution for a violation of any other provision of Ohio law. One or more acts, a series of acts, or a course of behavior that can be prosecuted under the bill or any other provision of Ohio law may be prosecuted under the bill, the other provision, or both. (Sec. 971.99(E).)

Notice to owners

The bill incorporates current law governing the notification of property owners. Under the bill, not fewer than 28 days prior to removing a partition fence, an owner must notify the owner of adjoining property in writing that the owner intends to remove the partition fence. The notice may be delivered personally or by certified mail, return receipt requested, to the last known address of the adjoining owner. If the notice delivered by certified mail is refused or unclaimed, the notice may be delivered by ordinary mail. If the notice delivered by ordinary mail is returned for failure of delivery, or if the address of the adjoining owner is unknown and cannot be ascertained with reasonable diligence, notice may be served by publication once a week for three consecutive weeks in a newspaper of general circulation in the county in which the partition fence is located. (Sec. 971.17(A).)

If an owner removes a partition fence without notifying the owner of adjoining property in accordance with the bill, the owner forfeits the owner's right to seek reimbursement under the bill for the construction and maintenance of a new partition fence (sec. 971.17(B)). An action for trespass by the owner of adjoining property against the owner removing a partition fence may include a reasonable request for court costs, attorney's fees, and other litigation costs (sec. 971.17(C)).

No owner can place any debris accumulated from the removal of a partition fence on adjoining property without entering into a written agreement with the owner of the adjoining property. An adjoining owner who has not entered into such a written agreement has a cause of action against the owner that placed debris from the removal of a partition fence on the adjoining owner's property for the cost of removing that debris. Any action against the owner may include any attorney's fees. (Sec. 971.17(D).)

Exemptions

Similar to current law, the bill specifies that the Fences Law does not apply to any of the following:

- (1) The enclosure of lots in municipal corporations;

(2) The enclosure of adjoining properties that are laid out into lots outside of municipal corporations; and

(3) Fences that are required to be constructed by persons or corporations owning, controlling, or managing a railroad pursuant to the Right of Way Drainage and Fences Law (sec. 971.03).

Liability for damages by trespassing livestock

Under the bill, an owner of livestock who permits the livestock to run at large out of the livestock's enclosure is liable for all damages caused by the livestock on the premises of another (sec. 971.18).

Noxious weeds along partition fences

The bill revises the provisions in existing law governing noxious weeds along fences by removing references to line fences. The bill requires an owner of land, adjacent to a partition fence, to keep all brush, briars, thistles, or other noxious weeds cut in the fence corners and a strip four feet wide on the owner's side along the line of a partition fence, but states that the provision does not affect the planting of vines or trees for use (sec. 971.33).

If the owner or tenant occupying land neglects or refuses to cut brush, briars, thistles, or other noxious weeds, as provided in the bill, an owner or occupant of land abutting on the partition fence, after having given the owner or tenant not less than ten days' notice to cut or remove them, may notify the board of township trustees of the township in which the land is situated, who must immediately view the premises and, if satisfied that there is just cause of complaint, must cause them to be cut by letting the work to the lowest bidder or by entering into a private contract for that purpose (sec. 971.34).

Repealed provisions

The bill repeals the provisions in existing law prohibiting the use of barbed wire or electrified fences and certain hedge fences and the provisions establishing: procedures governing when one party owns the entire fence, procedures governing when a property division line is in a stream of water or on a county or township line, requirements for the construction and maintenance of a water gate, venues for division line disputes, requirements regarding negligence of members of a board of township trustees in their duties, liability of owners of animals that escape, requirements for maintenance of hedge fences, and requirements for the construction of a fence to bridges or culverts (secs. 971.03, 971.11, 971.14, 971.15 to 971.18, and 971.21 to 971.32, repealed).

HISTORY

ACTION

DATE

Introduced

09-25-07

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