



# Boundaries of Virginia Fence Law

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## Introduction

The origins of Virginia fence law date back to shortly after the first English settlement was founded in 1607. Virginia fence law has transcended from requiring landowners to fence in their livestock beginning in 1631, to requiring landowners to fence out unwanted livestock beginning in 1643, to the modern-day rule granting localities the authority to return to a fence-in rule of law. This overview sets forth the history of Virginia fence law and explains the modern-day rule of law, including what constitutes a lawful fence and when you need one.

## History

The origin of Virginia's fence law began in 1631 with English Common Law, with which many colonists were familiar. It was the livestock owner's obligation to keep his animals contained on his land, as is commonly referred to as the "fence-in" rule. Among the earliest pieces of fence-related legislation in America was a declaration by the Virginia House of Burgesses in 1631 that, "EVERY man shall enclose his ground with sufficient fences upon their owne perill (sic)" (see Virginia General Assembly, 1631-2 [Charles 1<sup>st</sup>] Act LXIII. Sufficient Fences). It was this declaration that established what is considered today as the fence-in rule.

However, the fence-in rule was originally short-lived in Virginia. As a nod to the practice of open-range grazing, Virginia's General Assembly adopted a "fence-out" rule of law in 1643 by declaring that "ev'rie (sic) planter... shall make a sufficient fence about his cleared ground. And if he be deficient therein what trespass or damage he shall susteyne (sic) by hoggs (sic), goats or cattle whatsoever shall be to his own losse (sic) and detriment ..." (see Acts of the Virginia General Assembly, 1642-3 [Charles 1<sup>st</sup>], Act V. Sufficient fences to be liade ... Breaking into grounds (n)ot sufficiently fenced).

Thereafter, a livestock owner was no longer responsible for keeping his livestock on his own land or for damages resulting from his livestock roaming at large. This

"general law," as it is known, placed the responsibility of property protection on a landowner rather than the owner of livestock. Recovery of damages could only be sought if the one desiring to exclude livestock from their land had erected a sufficient fence, as crop owners might want to do. This, of course, begged the question of what constitutes a "sufficient," or lawful, fence.

In 1646, Virginia created its first statutory definition of a lawful fence. Lawful fences were thereafter required to be 4.5 feet high and "substantial" at the bottom, particularly (see Acts of the Virginia General Assembly, 1646-21st [Charles 1<sup>st</sup>], Act XV. What deemed a sufficient fence). This Act also provided that should livestock damage a lawful fence properly erected to keep livestock out of the enclosed property, the owner of the trespassing livestock is responsible for resulting damages. This remains true today.

More than 200 years after this Act, on Oct. 3, 1862, during the Civil War, the General Assembly reconsidered the existing general law applying to fences:

"Whereas a considerable portion of the territory of the Commonwealth having been ravaged by the public enemy, and a great loss of labor, fencing and timber thereby sustained, it is rendered difficult if not impossible for the people of many counties and parts of counties, to keep up enclosures around their farms, according to existing laws: ... the county courts ... shall have the power ... to dispense with the existing law in regard to enclosures ... as in their discretion they may deem it expedient to exempt from the operation of such law" (see Virginia General Assembly, 1862. CH. 14. An ACT to repeal the Fence Law of Virginia as to certain Counties, and to authorize the County Courts to dispense with Enclosures in other Counties. ["1862 Act"]). The "public enemy" was a reference to Union troops. In light of the extensive property destruction resulting from the Civil War, the General Assembly recognized that, at least in counties suffering a brunt of the damage from the war, farmers were unable to maintain lawful fences around their property in accordance with the existing general law. The 1862 Act granted a handful of counties with land most affected

by the war a reprieve from the general law and the authority to enforce their own fence laws or adopt a fence-in rule.

The General Assembly gave such authority to all counties in 1887, when it extended an invitation to all Virginia counties to abandon the general law at their own discretion, if a majority of all qualified voters in any election district approved (see 1887 Va. Code § 3547). Though the language of the Code has since changed, counties continue to retain this authority.

This legislative history is the backbone of modern-day fence law in Virginia, which follows the trend that began during the Civil War: General law still applies except in those counties which have, at their own discretion, opted to abandon it for a fence-in rule of law. The most recent Code of Virginia, revised in 1950, carries on this long-standing of allowing counties to abandon the general law in favor of a fence-in rule of law (see Va. Code Ann. § 55.1-2814).

## Fence-In and Fence-Out Fence-In

The commonly used language of Virginia fence law can be challenging to decipher. Understanding the origins and practical application of the terms “fence-out,” “fence-in,” and “no-fence” is beneficial when navigating Virginia fence law. The statutory language used in 1887, which is still used today, invites counties to declare property boundary lines to be lawful fences for domesticated livestock (see Va. Code Ann. § 55.1-2814). This is the so-called “no-fence law.” Accordingly, the often-adopted “no-fence law” creates an absolute duty of animal owners to contain their animals within their own boundary lines to prevent them from crossing onto the lands of another. Hence, the terms “fence-in” and “no-fence law” are often used interchangeably.

In fence-in jurisdictions, the property boundary lines are considered the lawful fence between landowners. This means that to recover damages for trespassing animals, a property owner who does not own livestock is not required to build or pay for the cost of a physical barrier around their property. In a fence-in jurisdiction, a livestock owner has a duty to ensure their livestock do not wander from their property. Farmers should ensure that there is a lawful fence, as defined in Va. Code Ann. § 55.1-2804, around all property boundaries to which their livestock have access. The failure to ensure livestock are enclosed by a lawful fence may make the livestock owner subject to liability for property damage, personal injury, and trespass, among other things.

Here’s an example of how fence-in applies: If John’s cattle wander from his property onto the property of

another or into a public space, such as a highway, John may be liable for any damage caused by his cattle to real or personal property, injury to another, and/or for trespass.

## Fence-Out

The general law is commonly referred to as the fence-out rule. Historically, fence-out jurisdictions reflected the practicalities of livestock grazing on public lands or unclaimed wandering animals in open range areas. Due to difficulty in identifying those responsible for unclaimed livestock and in navigating conflicts of fence law and open range grazing, landowners were expected to fence livestock out to avoid intrusion upon their land. In fence-out jurisdictions, all property owners, whether they own livestock or not, have a duty to erect a fence to keep livestock off of their property if they so desire. A livestock owner may not be responsible for property damage to another’s property caused by their livestock in a fence-out jurisdiction if the owner of the damaged property did not have a lawful fence around their property boundaries. This is the default rule of law if a jurisdiction has not adopted an ordinance regarding the fencing in or out of livestock.

It is important to note that livestock owners may not permit their animals to run at large on public or private lands, even in a fence-out jurisdiction (see Va. Code Ann. § 55.1-2820). This code section mandates that livestock owners prevent their animals from roaming at large beyond their land. However, in a fence-out jurisdiction, damages may not be awarded to a property owner if they don’t have a lawful fence around their property.

Here’s a fence-out example: If Wayne’s cattle enter upon John’s corn field and damage the crop, John may not have any recourse against Wayne for damages to his corn crop if he did not have a lawful fence around his field.

## Lawful Fence: Va. Code Ann. § 55.1-2804

The Virginia Code sets forth the following requirements for a fence to be deemed a lawful fence. A lawful fence must be constructed as such that no domesticated livestock may creep through and meet one of the following physical characteristics:

- 5 feet high, including (if present) the mound.
- Made of barbed wire at least 42 inches high.
- Made of boards, planks, or rails at least 42 inches high.

- Stand at least 3 feet high if within town limits where lawful fence has not otherwise been defined.
- Stand at least 3 feet high, constructed of materials generally accepted as appropriate fencing materials for livestock and installed pursuant to generally acceptable standards. (This includes electric fences and other fencing materials not expressly named where such are, as the code states, “generally accepted” standard management practice.)

Regardless of which above fence structure is selected, a fence will only meet the statutory requirements for a lawful fence if it also prevents domesticated livestock from creeping through. If a fence meets one of the above requirements but does not prevent livestock from getting through, it does not satisfy the requirements of a lawful fence. Conversely, if a fence meeting one of the above requirements fails to prevent dogs from getting through, it may still qualify as a lawful fence since dogs are not considered domesticated livestock. Localities may not adopt more stringent requirements for lawful fences (see Va. Code Ann. § 55.1-2817).

## Division Fences

Virginia law provides an exception for landowners who choose to let their land “lie open” with no intention of utilizing the land in a manner that would necessitate a boundary fence, but only if a division fence does not already exist between adjoining landowners. Specifically, the Virginia Code provides the following:

### § 55.1-2821. 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.

Once it is determined whether fence-in or fence-out rules apply in a jurisdiction, adjoining landowners should be aware of who bears the responsibility for erecting, maintaining, and/or repairing a property line division fence. Adjoining landowners often, but not always, have an equal obligation to build, maintain, and repair division fences between their lands.

### § 55.1-2822. When no division fence has been built.

If 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 build his half of such fence. The owner so notified may, within 10 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. If the landowner giving the original notice subsequently builds such division fence and the landowner who has so chosen to let his land lie open, or his successors in title, subsequently shall enclose his land, he, or his successor, shall be liable to the landowner who built such fence, or to his successors in title, for one-half of the value of such fence at the time it was enclosed, and such fence shall thereafter be deemed a division fence between such lands.

If, however, the person so notified fails to give notice of his intention to let his land lie open and fails to agree, within 30 days after being so notified, to build his half of such fence, he shall be liable to the person who builds the fence for one-half of the expense, 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 recordation indexing of the notice in the clerk’s office of the county in which the land is located.

The above Code section states that if a landowner decides to let their land lie open, thereby avoiding equal responsibility for building and maintaining a division fence, but later changes their mind and uses their land in a manner inconsistent with letting it lie open, if proper notice was given and recorded, that landowner may be required to retroactively share equally in the cost of the fence and any maintenance. Accordingly, documenting and keeping good records of fencing costs may prove beneficial in the long run, even when an adjoining landowner is rightfully choosing to let their land lie open for the time being.

The key to interpreting § 55.1-2821 and § 2822 is the absence of an existing division fence. These two code sections apply where there is not already an existing division fence. If a division fence already exists, regardless of whether the fence is in a state of such disrepair that it no longer meets the definition of a lawful fence, these sections do not give a property owner the option to leave it in disrepair by then choosing to let their land lie open.

## Fence Repairs

Sometimes the most contentious fencing issues between adjoining property owners arise over the disrepair of an existing division fence. When a landowner believes a division fence needs substantial repairs such that his neighbor should share in the costs of such repairs, and the adjoining landowner does not want to contribute to fencing repairs or improvements, neighbors may find themselves in a quandary. According to § 55.1-2823 of the Virginia Code, determining who is responsible for the costs of any desired repairs hinges on whether the existing division fence, in its current state, constitutes a lawful fence per § 55.1-2804.

### § 55.1-2823. When division fence already built.

Virginia code § 55.1-2823 states:

When any fence (i) that has been built and used by adjoining landowners as a division fence, or any fence that has been built by one landowner and the other landowner is afterwards required to pay half of the value or expense of such fence under the provisions contained in this article, and (ii) that has thereby become a division fence between such lands, becomes 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 repair his half of such fence. If the landowner receiving written notice fails to do so within 30 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 of such repairs.

Accordingly, when an existing division fence no longer prevents domesticated livestock from creeping through or otherwise fails to meet the definition of a lawful fence under the Virginia Code, adjoining landowners assume equal responsibility for its repair and maintenance. Since § 55.1-2823 deals with an existing fence, a property owner may not avoid financial obligation for repair or maintenance by choosing to let their land lie open at the time repairs become necessary. Once a fence has served as a division fence, it will always be a division fence unless there is an enforceable agreement to the contrary.

Importantly, advanced notice of intended fence repairs must be properly recorded for 30 days before no response from the adjoining landowner imposes financial responsibility on the nonresponsive party. A party may

collect from an adjoining landowner, when due, by filing an action or a warrant in debt (see Va. Code Ann. § 55.1-2824).

## Notice

The notice provisions of § 55.1-2822 and § 2823 of the Virginia Code are significant and unforgiving. Failure to give proper notice and properly record such notice as required will prevent enforcement of these provisions. For these provisions of the code to be enforceable, parties must properly give and record notice in accordance with the relevant legal provisions. For the cost-sharing provisions of Virginia fence law to apply, proper notice is required (see Va. Code Ann. §§ 55.1-2822-23). Additionally, to bind subsequent owners of land to the obligations of the current landowners, § 55.1-2825 requires a written agreement, and recording and indexing such agreement in the county clerk's office.

### § 55.1-2825. 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 (i) is in writing and specifically so state, (ii) is recorded in the deed book in the clerk's office of the county in which the land is located, and (iii) is properly indexed as deeds are required by law to be indexed.

If any notice, as required by § 55.1-2822 or 55.1-2823, 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 as required by law, then any subsequent owners of such land shall be liable for any sum that may be due in accordance with § 55.1-2824.

For an agreement between landowners for construction or maintenance of a division fence to be binding on successors in title, the agreement must

1. Be written.
2. State that it is binding on successors.
  1. Be properly recorded in the deed book in the county clerk's office where the land lies.
  1. Be properly indexed by the county clerk.

If a landowner fails to comply with any one of these requirements, an attempt to enforce these code provisions will likely fail.

## Enforcement

It is important to note that even where liability may be assigned and appear obvious, enforcement measures are almost always still necessary. Most often, fence disputes are civil in nature and should be resolved by seeking enforcement action in the county's circuit court where the property lies. For violations of local ordinances and where permitted by Virginia law, local law enforcement may issue citations and also seek enforcement through the judicial process. Disputing parties wishing to avoid litigation may consider mediation, where a neutral mediator assists the parties in reaching a mutually agreeable resolution.

In the event of a civil dispute concerning fence laws or trespassing animals, document all perceived violations of Virginia law, property and fencing conditions and actions taken by all affected individuals and witnesses. This should include pictures, written notices and correspondence, dates of alleged offenses, repair costs, and the like. Should litigation or mediation be necessary, such contemporaneous records may serve as vital evidence.

## Trespassing Animals

Common questions related to Virginia fencing laws often involve trespassing animals. These laws deal with how landowners, neighbors, and courts handle trespassing livestock and any resulting damage. Below are summaries of relevant Virginia Code sections dealing with trespassing animals.

### **Animals Running at Large. (Va. Code Ann. § 55.1-2820)**

Owners of livestock may not permit their animals to run at large.

### **Damages for trespass by animals. (Va. Code Ann. § 55.1-2810)**

If any domesticated livestock enters into any grounds enclosed by a lawful fence, the owner or manager of the animal shall be liable for the actual damages sustained. Punitive damages of less than \$20 may be awarded, and each additional trespass will double the damages the owner is liable for.

### **Lien on animals. (Va. Code Ann. § 55.1-2811)**

A lien may be placed upon trespassing animals where a court judgment has been granted for such trespass.

### **Impounding animals. (Va. Code Ann. § 55.1-2812)**

Landowners have the right to impound any animal found trespassing on their land that is enclosed by a lawful fence. For the animal to be given back to its owner, damages must be paid.

### **Issuing warrant when an animal is impounded. (Va. Code Ann. § 55.1-2813)**

If the damages have not been settled in another way within three days of domesticated livestock trespassing, the landowner or tenant of the trespassed land is responsible for receiving a county or city warrant of the appropriate amount from an authorized person. The court of a clerk will issue the warrant and a judge will hear the case for final judgement.

### **Dogs Harassing Livestock. (Va. Code Ann. § 3.2-6552)**

If a dog is found chasing, injuring, or killing livestock on land designated for livestock, the officer or person finding the dog is allowed to kill the dog on sight, if the necessary circumstances exist. The court may also decide that the circumstances of the dog being a danger will be reduced by placement with another owner, instead of death or removal from the state. With proper tagging and rehoming, the animal can be given another chance at living with a new owner.

### **Right to Retrieve. (Va. Code Ann. § 18.2-136)**

When hunting on other lands, fox and coon hunters may follow their dogs and other hunters onto prohibited lands as long as they are not carrying firearms or bows and arrows. They also may not hunt any game located on the prohibited land.

## **Frequently Asked Questions Is a cattle guard considered a lawful gate?**

Cattle guards provide a convenient and effective way to contain cattle and other livestock where private roads need to pass through a boundary or fence. The Virginia Code considers cattle guards lawful gates. Landowners and tenants alike may replace any gate traversing an easement with a cattle guard at their own expense, so long as the cattle guard does not interfere with the easement (see Va. Code Ann. § 55.1-2808).

## Can I replace a gate on my easement with a cattle guard?

Any person with an easement of right-of-way across the lands of another may personally pay to replace any gate there with a substantial cattle guard that can turn livestock. The owner must keep it in working condition at all times or have an alternative functioning method (see Va. Code Ann. § 55.1-2809).

## Is a water stream or canal a lawful fence?

The Virginia Code declares certain low grounds along the James River a lawful fence (see Va. Code Ann. § 55.1-2806). Additionally, circuit courts in any county may declare any stream or water canal a lawful fence within its jurisdiction upon petition of a landowner or tenant (see Va. Code Ann. § 55.1-2805). Any water boundaries so declared by official act before 1887 have been grandfathered in and remain a lawful fence (see Va. Code Ann. § 55.1-2807).

## Are railroad companies responsible for completing mandatory duties such as fencing and declaring right of ways?

There is no legal exclusion for railroad companies to not follow through on their duty or obligation in terms of local fencing ordinance or statute (see Va. Code Ann. § 55.1-2816). Virginia Code Ann. § 56-429 requires railroad companies to erect lawful fences along the railroad bed upon the landowner's request.

## If my neighbor decides to let land lie open but later decides to place livestock on the land, is the neighbor then responsible for one half of the building expense?

Providing notice allows the adjoining landowner 10 days to decide whether to let the land lie open or participate in the building process. The landowner can later choose to utilize the property for livestock purposes but will be responsible for enclosing the land and owes one half the fencing costs to the building landowner [see Holly

Hill Farm Corp. v. Rowe, 241 Va. 425, 404 SE.2d 48 (1991)]. All notice provisions set forth in Va. Code Ann. §§ 55.1-22-23 must have been followed when the division fence was originally erected.

## Do I have the right to remove or trim obnoxious trees or plants belonging to a neighboring landowner's property from entering my property and unintentionally causing damage?

Landowners may remove or trim tree limbs and greenery which physically invade or intrude upon their land to the least extent necessary for protection of their own property. For example, if one branch of a bifurcated limb hangs over the property line causing damage or nuisance to the non-tree owner, the single branch causing the damage may be removed by the neighboring property owner at the point of which it enters the neighboring property. This is traditionally referred to as the "self-care" rule. Landowners are not generally permitted to take liberties past self-care, but further action may be necessary in situations of trees or other plants causing harm or imminent danger (see *Fancher v. Fagella*, 274 Va. 549, 650 SE.2d 519 [2007]).

## Is my livestock guardian dog considered livestock?

Under Va. Code Ann. § 3.2-5900, dogs are not considered livestock. Should a livestock guardian dog trespass in the pursuit of a predator, the dog's owner will likely have the reasonable right of retrieval the dog. Va. Code Ann. §§ 55.1-2810, 2820 and § 3.2-6552 will still apply.

*Disclaimer: The information presented in this document about Virginia fence law and legislation is meant to be for educational purposes only. Any advice regarding general or specific cases of applicability of any or all Virginia fence laws in the Code of Virginia or locally should be dispensed by a qualified attorney at law.*

*This work was supported by the USDA National Institute of Food and Agriculture Multistate Research project NE2203.*

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Produced by Virginia Cooperative Extension, Virginia Tech, 2023

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VT/0923/AAEC-323P