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Final Analysis
Legislative Service Commission

Sub. H.B. 323

127th General Assembly
(As Passed by the General Assembly)

Reps. Gibbs, Peterson, J. McGregor, Evans, Huffman, Wagner, Miller, Fessler, Seitz, Bulp, Okey, R. McGregor, Fende, Schlichter, Sayre, Aslanides, Zehringer, Reinhard, Core, Hite, Domenick, Adams, Batchelder, Bolon, Collier, Combs, Dolan, Dyer, Gardner, J. Hagan, Harwood, Hughes, Luckie, Newcomb, Patton, Schindel, Setzer, Skindell, Szollosi, Uecker, B. Williams

Sens. Wilson, Faber, Grendell, Amstutz, Morano, Mumper, Niehaus, Roberts, Sawyer, Schuler, Seitz, Spada, Harris

Effective date: September 30, 2008

ACT SUMMARY

- Revises the Fences Law as discussed below.
- 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, requires that 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 a proportionate share 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.

- States that notwithstanding any other provision of the act, certain public owners of land are responsible for 50% of the total cost of building and maintaining in good repair partition fences between them and the owners of adjoining property.
- 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.
- Requires a board of township trustees to give to an aggrieved owner who intends to file a complaint with the board a document containing specified information, including a description of the possible financial and maintenance responsibilities that may result from the board's findings.
- 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 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 act's effective date, with the applicable county recorder stating that a partition fence existed between adjoining properties within two years prior to the filing of the affidavit, and states that the act'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 act.
- Revises the statute governing the partition fence record by requiring the record to include all agreements between the owners of adjoining properties filed in accordance with the act, all affidavits filed by owners in accordance with the act, and all assignments of and findings and decisions regarding responsibility for building and maintaining in good repair partition fences made under the act.
- 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 the former Fences Law, exempts from the revised 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 provisions governing the maintenance of noxious weeds along fences.
- Repeals provisions that prohibited the use of barbed wire or electrified fences and hedge fences and the provisions that established: procedures governing when one party owned the entire fence and when a division line was 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 escaped, requirements for maintenance of hedge fences, and construction of a fence to bridges or culverts.

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CONTENT AND OPERATION

Overview

The act 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 Fences Law as it existed prior to the act. The second part of this analysis describes the Fences Law as revised by the act. Although some provisions of the former Fences Law were retained and amended rather than repealed by the act, those provisions are included in the discussion of former law in order to present a complete description of the former Fences Law. Similarly, they also are included in the discussion of the changes made by the act in order to present a complete description of the revised Fences Law.

Former law

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

Under former law, owners of adjoining lands had to 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" meant 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 owned, leased, managed, or otherwise controlled and that was adjacent to land used to graze livestock (sec. 971.01). The fact that any land or tract of land was wholly unenclosed or was not used, adapted, or intended by its owner for use for agricultural purposes did not excuse the owner from the obligations imposed by the Fences Law on the owner as an adjoining owner. The Fences Law did not apply to the enclosure of lots in municipal corporations or of adjoining lands both of which were laid out into lots outside municipal corporations. It also did not affect the law relating to fences that were 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

Prior law prohibited the construction of certain types of fences. A person or corporation could not have a willow or other live fence, except osage or blackthorn hedge (sec. 971.03(A)). In addition, a person or corporation was 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 was first obtained. The consent was not necessary for the use of one or two barbed wires, provided that neither was less than 48 inches from the ground and was placed on the top of a fence other than a barbed wire fence. (Sec. 971.03(B).) A person or corporation who violated the prohibition against constructing barbed or electrified wire fences was 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

Former law specified that when a person neglected to build or repair a partition fence, or a portion of the fence that he was required to build or maintain, the aggrieved person could complain to the board of township trustees of the township in which the land or fence was located. The board, after not less than ten days' written notice to all adjoining landowners of the time and place of meeting, had to view the fence or premises where the fence was 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. Former law addressed the application of the Fences Law when a property division line was in a stream of water, crossed a stream of water, or was on a township or county line. First, if the division line of adjacent landowners was in a stream of water, along which division line it was impracticable to construct and maintain a partition fence, the board had to assign to each landowner his portion of the fence upon his land, and the parts so assigned had to be built and maintained upon his own premises along the bank of the stream. The landowners had to join their assigned parts of the fence by a fence or water gate. (Sec. 971.14.)

Second, if the division line of adjacent landowners crossed a stream of water, through which it was impracticable to construct and maintain a partition fence, the owners had to construct and maintain a water gate across the stream that would turn livestock. In addition, the water gate had to 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 neglected to build, keep up, and maintain the water gate or could not agree upon the division of it that each was required to build, keep up, and maintain, the board had to assign the portion of the water gate each was required to build, keep up, and maintain the same as if the water gate was a partition fence between adjacent owners. Former law specified that the provisions that governed the building, keeping up, and maintaining of partition fences applied to the provisions that governed 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 had to be a partition fence. (Sec. 971.25.)

Third, if a partition fence in controversy was on a township or county line, the boards of township trustees of the adjacent townships had concurrent jurisdiction, and the board of either of the townships could be called to perform the duties imposed as to partition fences in the Fences Law. Either party could call the board of the other township, in which case they had to act jointly, but separate record had to be made in both townships. (Sec. 971.16.)

If a partition fence, an enclosure, or a part of a fence or enclosure was 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 could be brought before a judge of a county court or judge of a municipal court that had jurisdiction in the township in which the defendant resided (sec. 971.17). The court before whom action was brought had to issue process against the defendant, directed to the sheriff of the county in which the court was situated, to serve and return the process, and the defendant had to answer to that court, and like proceedings were

required to be had as if the defendant resided in the township where the action was commenced (sec. 971.18).

Costs associated with making assignment. Under prior law, the cost that was due the township fiscal officer and the board of township trustees for making the assignment of a partition fence had to 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, had to 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 had to place the amount authorized by the township fiscal officer upon the duplicate to be collected as other taxes, and the county treasurer had to pay it, when collected, to the township fiscal officer as other funds were paid (sec. 971.06).

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

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

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

Failure to comply with assignment. Former law specified that if either person failed to build the portion of fence that was assigned to him by the board of township trustees in the township in which the land or fence was to be located, the board, upon the application of the aggrieved person, had to award the contract to the lowest responsible bidder who agreed to furnish the labor and material and build the fence according to the specifications proposed by the board. Before a contract was awarded, the board had to advertise for bids once a week for three consecutive weeks in a newspaper of general circulation in the county in which the township was situated. If no bids were received from responsible bidders, the board had to procure labor and materials at prevailing rates and cause the fence to be constructed. (Sec. 971.07(A) and (B).) No person could obstruct or interfere with anyone who was 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 violated that prohibition was guilty of a third degree misdemeanor (sec. 971.99(B)).

When the work was completed to the satisfaction of the board, it had to certify the costs to the township fiscal officer. If the costs were not paid within 30 days, the fiscal officer had to 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 were assessed. (Sec. 971.08.)

The county auditor had to place the amounts certified upon the tax duplicate, at which time it became a lien and had to be collected as other taxes. The board had to 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 had to draw orders for the payment of the amounts out of the county treasury. (Sec. 971.09.)

Construction of fences to bridges or culverts

Under prior law, a landowner along, or through whose lands, a state or county road was laid out and established, upon consent and under the direction of the board of county commissioners of the proper county, could build and construct fences within the roads that led 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 was permitted to acquire title by prescription or otherwise to any portion of the highways that became a part of the enclosures of the landowner by reason of the construction of such fences as was authorized in the provisions that governed construction of fences to bridges or culverts. The owner, upon the order of the board of county commissioners, had to promptly remove the fences, but no township highway superintendent, or member of the board of township trustees acting as the superintendent, could remove them except upon permission first obtained from the board. The superintendent could not interfere with the fences further than was necessary to open ditches and improve the roadbed of the highways. (Sec. 971.31.)

Barbed wire could not 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 had to remove it if it was so used (sec. 971.32).

Requirements regarding hedge fences

Under former law, an owner or occupant of land that bordered upon a public road or highway, except a street or alley in a municipal corporation, or through which a public road or highway passed could 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, could remain for seven years. The board of township trustees could grant permission in writing to the owner of the hedge or live fence to continue the protection fence as long as was necessary. (Sec. 971.27.)

The owner of a hedge fence on a partition line, or along a public highway, could 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 who violated that prohibition was liable to the person damaged in a sum that did not exceed 20¢ per rod of the hedge fence. If the hedge was along a public highway, the person was liable to the board of township trustees of the township in which it was situated in a sum that did not exceed 15¢ per rod of the fence. (Sec. 971.28.) Before a judgment was rendered, it had to appear, by affidavit, that the person complained against had had at least 20 days' notice before the beginning of the suit from the person who complained 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 had to be brought upon the complaint of the person damaged before a judge of a county court or judge of a municipal court that had jurisdiction of the township in which the hedge was situated, or, if it was along a public highway, the complaint had to 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

Former law included several statutes that governed the trespassing of animals with regard to partition fences. The first such statute stated that for determining the liability of one landowner by reason of the trespass of domestic animals upon the lands of the other, "such fence was a partition fence" (sec. 971.15). Second, if a horse, mule, ass, hog, sheep, goat, or any neat cattle, running at large, broke into or entered an enclosure, other than an enclosure of railroads, the owner of the animal was liable to the owner or occupant of the enclosure for all damages caused by the animal. An animal that broke into or entered into an enclosure was not exempt from execution on a judgment rendered in a court, or before an officer that had jurisdiction, for damages occasioned by the trespass. (Sec. 971.26.)

Third, if a horse, mule, ass, hog, sheep, goat, or any neat cattle injured or trespassed 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 had to 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 that had jurisdiction in the township in which the premises were situated. If the damages were not paid, the amount of the damages could 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 who made it, was prima-facie evidence of the damages sustained by the party aggrieved, but the court before which the cause was tried could set aside the verdict for irregularity or other good cause (sec. 971.23). The trespassing animals were not exempt from execution issued on a judgment rendered in a court, or before an officer who had jurisdiction, for damages occasioned by the trespass (sec. 971.24).

Noxious weeds along fences

Prior law required 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 did not affect the planting of vines or trees for use (sec. 971.33). If the owner or tenant who occupied land neglected or refused to cut brush, briars, thistles, or other noxious weeds, an owner or occupant of land that abutted on the line or partition fence, after the owner or tenant was given not less than ten days' notice to cut or remove them, could notify the board of township trustees of the township in which the land was situated. The board was required to immediately view the premises and, if satisfied that there was just cause of complaint, had to have the noxious weeds 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 was completed, the board was required to 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 had to place the amount upon the tax duplicate to be collected as other taxes. The county treasurer had to pay the amount, when collected, to the township fiscal officer as other funds were paid. (Sec. 971.35.) The board could 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 were in the fiscal officer's hands (sec. 971.36).

Miscellaneous provisions

Under former law, proceedings under the Fences Law did not bind the owner unless the owner was notified as discussed below (sec. 971.01). Notice to landowners had to 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 was refused or unclaimed, notice could be served by having it sent by ordinary mail. If the notice sent by ordinary mail was returned for failure of delivery, or if the addresses or whereabouts of any landowner involved was unknown and could not with reasonable diligence be ascertained, notice could be served by publication once a week for three consecutive weeks in a newspaper of general circulation in the county in which the township was situated. (Sec. 971.13.)

If a member of the board of township trustees refused or neglected to perform a lawful duty imposed upon him by the Fences Law, he was required to 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 had to be paid into the township treasury for township purposes. (Sec. 971.21.)

The act

Preferred partition fence requirements and exemptions

Except as discussed below, the act 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 act 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 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 "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)).

(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 act).

Nothing in the act prevents an owner from building a fence that exceeds the requirements for a preferred partition fence established under the act.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 act's preferred partition fence provisions do not apply to the owners of adjoining properties that enter into an agreement in accordance with the act (see "Agreement between property owners," below) and fences that were constructed prior to the act's effective date (sec. 971.02(C)).

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

Under the act, 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 act unless the owners enter into an agreement in accordance with the act (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 act if there is evidence that a partition fence previously existed between the adjoining properties or if

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

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 act (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 act. (Sec. 971.06(B).)

If a partition fence is removed by an owner and not replaced within one year after removal, that owner must file an affidavit with the applicable county recorder to be placed in the partition fence record that was required under former law and is continued by the act (see "**Partition fence record**," below) 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 act unless the owners enter into an agreement in accordance with the act (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 act 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 act (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 written agreement between the owners of adjoining properties has not been filed with the applicable county recorder in accordance with the act (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

³ The act 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)).

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 a proportionate share 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. A reimbursement claimed under the act must equal the total cost of building and maintaining the partition fence in good repair minus one-thirtieth of the total cost multiplied by the number of years, including parts of a year, that are included in the period beginning on the date on which the affidavit was filed and ending on the date on which the claim for reimbursement is made. 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 act. 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 the proportionate share 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 the proportionate share 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 act, the owner of the adjoining property, or that owner's successor in interest, subsequently is subject to the act'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 act, the owner forfeits the owner's right to reimbursement from the owner of adjoining property as authorized under the act (sec. 971.07(E)).

Responsibility of certain public entities for building and maintaining partition fences

The act states that notwithstanding any other provision of the act, specified public owners of land are responsible for 50% of the total cost of building and maintaining in good repair partition fences between them and the owners of adjoining property unless a written agreement has been entered into under the act (see "**Agreement between property owners**," below) (sec. 971.071). For purposes of this provision, "owner" means any of the following with regard to any land that it owns, leases, manages, or otherwise controls and that is adjacent to land that is used to graze livestock: (1) the Department of Natural Resources, (2) a conservancy district organized under the Conservancy Districts Law, or (3) a political subdivision with a real property interest in recreational trails (sec. 971.01(D)(2)).

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

The act 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 former law. Under the act, 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 act (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. The act adds that if the aggrieved owner intends to file a complaint with the applicable board of township trustees, the board must present the aggrieved owner with a document containing both of the following: (1) notification that in lieu of filing a complaint with the board, an action may be filed in a court of common pleas as provided under the act (see "**Civil action regarding construction or maintenance of partition fence**," below), and (2) a description of the possible financial and maintenance responsibilities that may result from the board's findings. The aggrieved owner must sign and date the document and return it to the board prior to filing a complaint with the board.

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 act. 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 act (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 act (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 act. (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 act 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 act 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. If either owner requests binding arbitration, the board must submit a report of its recommendation of assignment or its finding of responsibility, as applicable (see above), to the court of common pleas in which the arbitration is to be held. (Sec. 971.09(G)(1).)

The court of common pleas in which the arbitration is to be held must appoint an arbitrator. The court must furnish the board's report to the arbitrator. The owners 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 the former Fences Law, the act 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 act, 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 the former Fences Law, the act 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 act 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 act (see "**Agreement between property owners**," below);
- (4) Whether an affidavit has been filed with the applicable county recorder in accordance with the act (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 act 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 act, 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 two 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 act's effective date. (Sec. 971.05(A).)

If an affidavit is filed, the act'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 act's provisions governing the construction and maintenance of new partition fences apply (sec. 971.05(C)).

Agreement between property owners

The act 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 act, or the rights and obligations of the owners are different from what is established in the act. 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 the former Fences Law, the act requires the applicable county recorder to keep a book known as the "partition fence record." The act expands its contents by requiring that all agreements between the owners of adjoining properties filed in accordance with the act, all affidavits filed by owners in accordance with the act, and all assignments of and findings and decisions regarding responsibility for building and maintaining in good repair partition fences made under the act 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 act, 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 act 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 act (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 act, 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 act or any other provision of Ohio law may be prosecuted under the act, the other provision, or both. (Sec. 971.99(E).)

Notice to owners

The act incorporates provisions in the former Fences Law governing the notification of property owners. Under the act, 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 act, the owner forfeits the owner's right to seek reimbursement under the act 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 the former Fences Law, the act specifies that the revised 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 act, 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 act generally retains the provisions from the former Fences Law governing noxious weeds along fences, but removes references to line fences. Thus, the act 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 act, 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 act repeals the provisions in former law that prohibited the use of barbed wire or electrified fences and certain hedge fences and the provisions that established: procedures governing when one party owned the entire fence, procedures governing when a property division line was 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 escaped, requirements for maintenance of hedge fences, and requirements for the construction of a fence to bridges or culverts (former 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
Reported, H. Agriculture & Natural Resources	04-17-08
Passed House (95-0)	05-13-08
Reported, S. Agriculture	05-28-08
Passed Senate (32-0)	05-29-08
House concurred in Senate amendments (93-0)	06-10-08

08-hb323-127.doc/kl

