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## Fences in Agricultural Areas

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### Introduction

There is an old saying that good fences make good neighbors. Chapter 90 of the Wisconsin Statutes sets out rules regarding fences in agricultural areas. The law prescribes when a fence is required, how responsibility for a fence is divided, what a legal fence is and how to resolve disputes between property owners. As growth occurs in rural areas, residential and agricultural uses may come into conflict. Knowing and applying the fence law can help reduce conflicts.

Towns, villages and cities may have ordinances regulating fences in nonagricultural areas. Consult your municipal clerk if you have a question on such fences. This publication deals with fencing in agricultural areas, as covered by Ch. 90. Because most agricultural land is in towns, this publication refers to towns and town board supervisors who serve as “fence viewers.” However, Ch. 90 applies to land in cities and villages, as well as towns, where land is used for farming and grazing. In cities and villages, the alderpersons and village board trustees serve as fence viewers.

The law is intended for the benefit of the neighbors and therefore provides a guide to fencing. In agricultural areas where the law applies, neighbors may agree not to have fences or may agree upon a fencing arrangement different from what is specified in the statutes. It is best to come to an agreement with your neighbor and to maintain your fences in good repair. Call upon the town board supervisors as fence viewers only if you cannot reach agreement.

### Boundary Disputes

Boundary disputes must be distinguished from fence disputes. Placement of a fence does not determine the boundary. Although town board supervisors can settle fence disputes on agricultural lands under Ch. 90, they do not have the authority to settle boundary disputes. Boundary disputes are private matters between neighboring landowners. Private boundary disputes may require consulting a surveyor and possibly your own lawyer.

## When a Fence is Required

Neighbors should first determine whether a fence is required. The law provides that if either adjoining property of two neighbors is used for *farming or grazing*, a fence is required. However, the neighbors may reach an agreement to use markers instead of a fence, or agree not to have or maintain a fence at all. § 90.03.

Disputes often occur when one neighbor changes the use of land. For instance, if two neighbors both have wooded lands, a fence is not required. But if Neighbor A chooses to graze cattle in his or her woods, both Neighbor A and Neighbor B would then have to build and maintain a fence between their land, under the law, unless they both agree otherwise.

The partition fence law can apply when one of the neighbors is the state or a subdivision of the state, such as a town or county. But the law only applies if *both* parties agree that it applies. In other words, the government unit is not subject to Ch. 90 unless it so agrees. § 90.035.

## Responsibility

In the above example, Neighbor B may well believe that Neighbor A should bear the full cost and responsibility because the need for a fence arose from Neighbor A's decision to graze cattle. But under Ch. 90 both adjoining neighbors are responsible for erecting and maintaining their half of a fence, unless otherwise agreed. § 90.03.

A fence can limit or prevent damage from animals and affects liability. An owner who does not maintain a partition fence in good repair cannot claim damages when the neighbor's animals trespass. However, construction of a fence does not relieve the owner of swine, horses, sheep or goats from liability for damages they commit upon the enclosed premises of a neighbor. §§ 90.04 and 172.01. In addition, under § 172.01, some animals are considered so powerful or difficult to contain that the state has imposed liability on their owners regardless of whether the animals escape was the owner's or keeper's fault. This strict liability applies to stallions over one year old, bulls over 6 months old, and to boars, rams and billy goats over 4 months old.

## How a Fence is Divided Between Neighbors (Partition)

Although the law provides that responsibility for a fence is divided evenly between two adjoining neighbors, they may agree upon another arrangement. Partition fence agreements, especially if the arrangement is different from what the law prescribes, should be in writing, signed by the owners and two witnesses, notarized and filed with the town clerk. § 90.05. These agreements may also be recorded with the register of deeds. A purchaser or owner should therefore check with the town clerk and check their abstract or title insurance policy when buying or financing property to see if an agreement has been filed or recorded. Also, fence viewers should ask the property owners if there are any existing written agreements. (Past oral agreements are not binding.)

A partition made by agreement and filed with the town clerk, or one made by decision of fence viewers, binds future owners until a new partition is made.

The rule of thumb to follow in dividing responsibility between neighbors is: “Whenever practicable ... when facing a farm, going around the farm to the right, the first one-half of the line fence belongs to the farm faced.” § 90.07(3). This directive, found in a section concerning divisions of fences by fence viewers, also provides guidance for neighbors dividing responsibility themselves. The meaning of this directive may not be clear at first. It means that a person standing on his or her property line, facing the neighbor’s property, would ordinarily have the duty to maintain the half of the fence on his or her right, with the neighbor maintaining the half on the left. However, this may not be practicable, and another arrangement may be called for in light of past practice or challenging features, such as water.

If neighbors cannot agree on how a fence should be divided, either neighbor may apply for help from town supervisors, who are empowered to resolve fence disputes (see Resolving Disputes below).

### **Applicability to Subdivisions**

The partition fence law applies when subdivisions lie next to agricultural land. The town board may, if it has been granted village powers by the town meeting, adopt an ordinance requiring the subdivider to construct half of a fence on subdivision land adjoining land used for farming or grazing, as a condition of plat approval by the town. § 90.05(2). In such case, the owners of the lots in the subdivision are responsible for their half of the fence, while the neighboring owner of the agricultural land must build and maintain his or her half. This means that it’s not necessary to place posts to mark each lot in the subdivision that adjoins farming or grazing land.

If the town does not place such a fence requirement on the subdivider as a condition of subdivision plat approval, the fence law still applies to the owner of the agricultural land and to each adjoining lot owner. Confusing situations may arise upon subdivision of the land. Consider two examples. First, if the need to partition a fence arises because the open land starts being used for farming or grazing, or because a legal partition has not been in effect, the agricultural owner could be responsible for half of a fence on each of a number of subdivision lots adjoining his or her agricultural property. To avoid this patchwork of responsibility, the adjoining landowners could agree in writing, or the fence viewers if called upon could determine, to use a more practical method of apportioning responsibility for a fence between the farmer and adjoining lot owners, such as making the new lot owners responsible for an undivided one-half share of the fence, with the farmer responsible for the other undivided half.

Second, an unfair situation could arise upon subdivision. If a previous arrangement, giving the farmer and neighbor each responsibility for half of the fence, continued unchanged, then the subdivision owners adjoining the farmer’s half of the fence would have no responsibility for the fence, while the subdivision owners on the other half would have full responsibility. This inequity can be avoided by an agreement between the neighbors or a decision by the fence viewers.

## What is a Legal Fence?

**Materials.** Chapter 90 provides that allowable fences may be: woven wire alone or with barbed wire or high tensile wire above; boards alone or with barbed wire or high tensile wire above; electrified wire (when agreed to in writing by neighbors); or barbed wire or high tensile wire. In addition, other materials or land features, such as bodies of water, may serve as “fences.” § 90.02(2).

The following descriptions give minimum requirements; “better” fences are, of course, legal.

**Height.** In general, all fences, must be 50 inches high with the bottom not over 4 inches from the ground. § 90.02(3). However, shorter heights apply to electric fences, barbed wire fences and high tensile fences (see below).

**Woven wire fences** must be:

- (A) 50 inches high\* ; or
- (B) 46 inches high\* with 1 barbed or high tensile wire inches above; or
- (C) 30 inches high\* with 2 barbed or high tensile wires above; or
- (D) 26 inches high\* with 3 barbed or high tensile wires above.

The distance between the woven part and the barbed or high tensile wire may be no more than 6 inches. The space between vertical strands of woven wire may be no more than 8 inches, and the space between the cross wires may be no more than 12 inches. The vertical strands of woven wire must be no smaller than No. 12 wire, and the cross wires must be no smaller than No. 16. The spacing between the barbed or high tensile wires may not exceed 8 inches. Wires must be stretched and securely fastened to posts no more than 16 feet apart.

**Board fences** must have at most a 6-inch spacing to a height of 30 inches, then no more than a 10 inch spacing is allowed. Posts are spaced no more than 8 feet apart.

**Board/wire fences** are allowed. The law requires a minimum of two boards with 3 barbed or high tensile wires above. Spacing between the boards may not be more than 6 inches. Spacing between the wires may not exceed 8 inches. The space between the top board and bottom wire may not be more than 6 inches. The posts may not be more than 8 feet apart.

**Wire and picket fences** may consist of at least 3 wires with pickets interwoven or fastened to the wires. Pickets must be at least 4 feet long, spaced no more than 6 inches apart, and the wires must be No. 12 or thicker. Posts are spaced no more than 16 feet apart.

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\* Note: the law actually uses the term “wide” instead of “high” in setting forth the above requirements. However, since the size of the mesh for woven fences is specified in §90.02(2), it’s obvious that the above requirements refer to the height of the woven part of the fence. Because fences must generally be at least 50 inches high, the above means that the top wire strand above the woven part must meet that height requirement.

**Electric fences** are allowable if both neighbors agree in writing. Two strands of strong and tightly stretched wires are required with the top wire 34-36 inches high, measured at the posts. Note that this mandates a different height from the general 50 inch requirement. Wires are fastened with insulators to posts that are no more than two rods (33 feet) apart. Electric fences may also be of high tensile wire with posts no more than 20 feet apart.

**Barbed wire fences and high tensile wire fences** need four evenly spaced wires, with the top wire at least 48 inches high. Note that this allows a fence two inches shorter than the general requirement. For barbed wire fences, posts are spaced no more than 16 feet apart. For high tensile wire fences, posts are spaced no more than 20 feet apart. The posts may be of steel of any thickness or wood at least 3 inches in diameter.

**Other fences** may be allowed. Rails, boards, wires or walls, or combinations of these, may be allowed. Also, brooks, rivers, ponds, creeks, ditches or hedges may serve as legal fences. However, these other “fences” must, in the judgment of the fence viewers, be the equivalent of the fences specified above.

**Fencing of farm-raised deer.** A recent amendment to the law creates special fencing requirements to deal with this use. § 90.20.

## Water Problems

Where a property boundary is a river, brook, pond or creek it may not be feasible to build the fence on the true boundary. If the water is sufficient as a fence, then a fence does not need to be built. If a fence is needed but cannot be built in the water, then the fence may be built on either side or alternating sides of the water. § 90.09. In deciding on a fence, the known recreational use of water must be taken into account. A stream used by canoeists, for example, should not have wire that could cause an injury. Also, some adjustment may be necessary on streams where people who are fishing wade, since Wisconsin case law has held that such use in a stream bed is not trespass.

When the owners cannot agree on a fencing arrangement, the dispute may be referred to the town board supervisors (see following section).

## Resolving Disputes and Recovering Costs

Neighbors should try to resolve fence disputes between themselves, using the law as a guide. If a dispute cannot be resolved, either neighbor may contact their town supervisors who are empowered as fence viewers to resolve fence disputes (but not boundary disputes). §§ 90.07 and 90.09. Town supervisors charge fees to each of the neighbors for resolving the disputes. § 90.15. If the land is in two towns, a fence viewer from each town is appointed, and each town clerk must maintain a record of the decision.

The procedures under Ch. 90 are the exclusive remedy in Wisconsin law to resolve fence disputes. That means no other type of legal action or lawsuit may be used to enforce Ch. 90, but

a court action called *certiorari* may be used to ask a court to review a determination by fence viewers.<sup>1</sup>

**Example:**

If Neighbor A and Neighbor B cannot agree on a partition fence, then either neighbor may seek help from town supervisors to resolve the dispute using the following process:

- a. Neighbor A or B contacts town supervisors. At least two of the supervisors will act as fence viewers.
- b. Fence viewers give eight days' written notice to each neighbor of the time when they will go on to the property. The statute provides that notice is given as a summons or by registered mail. If a summons is used, notice is personally served by the sheriff's department in the county of residence, or by a constable or private process server. If service is done by mail, then the recommended process is to use certified mail with return receipt requested. Any receipt, whether for acceptance or no pick up after notice by the postal office, should be kept in the clerk's records.
- c. Fence viewers first observe the situation and decide if a fence is required or an existing fence is adequate. If action is required, the fence viewers divide responsibility for the fence and assign a reasonable timetable for building or repairing the fence (e.g., 30 days unless circumstances dictate a shorter time). Their decision is filed with the town clerk. Both neighbors must pay the fence viewers' fees.

After the fence viewers' decision, each neighbor knows their responsibilities concerning the fence. What if Neighbor B refuses to build or repair the fence as directed by the fence viewers? Neighbor A may then build or repair the fence and recover costs from Neighbor B:

- a. Neighbor A contacts the town supervisors who appoint two or more fence viewers.
- b. Fence viewers give written notice to Neighbors A and B.
- c. Fence viewers view the fence.
- d. Fence viewers determine fencing costs and their own fees.
- e. Neighbor A may then demand payment from Neighbor B for the costs and fees.
- f. If Neighbor B does not pay within one month, there is a charge of 1% interest/month.

If Neighbor B does not make timely payment to Neighbor A, Neighbor A may obtain payment from the town treasury for the costs and fees Neighbor A incurred in doing Neighbor B's portion. The town recovers the amount of costs and fees by placing a lien on

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<sup>1</sup> *Tomaszewski v. Gierea*, 2003 WI App 65, 260 Wis. 2d 569(Ct App. 2003).

Neighbor B's land. If Neighbor B does not pay the town, this may be collected as a special charge on the property tax bill. § 90.11.

In conclusion, adjoining rural property owners should try to resolve disputes in a neighborly way before approaching the town supervisors. If the town supervisors act to resolve a dispute, the neighbors will be charged for the supervisors' work. Their decision may not be as pleasing as one worked out by the neighbors themselves.

Good fences help make good neighbors. Follow the law and be a good neighbor by maintaining your fences properly.

*Note:* The Wisconsin Town Law Forms booklet contains a form for owners to use in partitioning a fence and for fence viewers to use under Ch. 90. This booklet may be obtained from Document Sales, Wisconsin Department of Administration, at tel. 608-266-3358. These forms are on the WisLaw CD Rom, which is likewise available from Document Sales. Also, you may check with your town clerk.

## **Acknowledgments**

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