



# Understanding Agricultural Liability: Maryland Fencing Law

## Introduction

A fence is defined as “a barrier intended to prevent escape or intrusion or to mark a boundary; *especially*: such a barrier made of posts and wire or boards” (Merriam-Webster, 2012). In dealing with Maryland livestock producers, Maryland courts have adopted the traditional common law rule of “fence-in.”

The fence-in view prohibits unrestrained grazing and requires livestock owners to fence their stock in. Compare this to the view in many Western states. There, the fence-out view does not require livestock owners to keep stock fenced in, but does require those landowners who do not want livestock grazing on their property to construct a fence to keep unwanted livestock out. The fence-in rule places the burden of fence construction on the landowner with the grazing livestock. It can also force one landowner to pay the costs of erecting a fence, though there are ways that neighboring landowners can share in the costs of its construction.

*Maryland has adopted the traditional English common law rule of “fence-in.”*

This article limits its scope to Maryland law and does not attempt to include any relevant county regulations on fencing, except for Howard, Kent, and St. Mary’s Counties’ regulation; check your county’s regulations to



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determine if any are related to division fence requirements.

## Am I Required to Build a Fence?

Maryland has adopted the traditional English common law rule of “fence-in.” The fence-in rule requires landowners to fence-in livestock to prevent livestock from damaging neighbors’ properties (*Richardson v. Milburn*, 1857). The common law puts the burden on the livestock owner to erect a division fence, or a fence separating two landowners. Landowners (farmers and non-farmers) without livestock are under no obligation to construct a fence to keep livestock<sup>1</sup> off their property. Maryland has adopted this rule through court decisions, and the Maryland legislature could modify this rule at any time.



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A landlord with an unfenced property and a tenant who wants to graze livestock on the property should consider terms in the lease specifying how the cost of constructing the fence will be handled and any maintenance costs. For example, Greg leases unfenced pasture land to Steve. Steve wants to graze cattle on this pasture and comes to an agreement with Greg for a higher rental rate. Under this agreement, Greg will cover the construction costs of the fence and Steve will bear the maintenance costs. A landlord should require the tenant to obtain adequate liability insurance with the landlord named as an additional insured on the policy in the event the livestock trespass off the leased property. Landlord should also require the tenant to provide a certificate of insurance each year of the lease. In addition, the landlord may want to include language that the tenant indemnifies and hold harmless the landlord with regards to damage to others caused by the livestock.

Unlike other states, Maryland has no statute or court decision defining

*If livestock stray because a livestock owner did not fence-in his/her stock, or if the fence is in disrepair and the livestock stray from the farmer's property, the livestock owner may be liable for the damages caused by his stock (Annapolis & Elkridge R.R. Co.).*

the exact standards for constructing a fence. For this reason, a livestock owner should consider building the fence to a height, number of wires, post distance, and with materials necessary to contain the livestock. For example, Greg is pasturing cattle on his property and would need to build a fence with the materials, to a proper height, appropriate post distance, and number of wires to keep the cattle within his own pasture.

#### **Stream Fencing**

As part of the strategies for implementing the Chesapeake

Bay Watershed Implementation Plan, the Maryland Department of Agriculture (MDA) has listed as a best management practice "stream protection with fencing." Fences built to keep livestock out of a stream could be either temporary or permanent, and cost-share funds may be available to help construct permanent fencing.<sup>ii</sup> Livestock owners who are considering putting in a stream protection fence, either temporary or permanent, would want to check with their local soil conservation district for the exact specifications for these fences and if fencing is necessary.

#### **Damages From Stray Livestock**

If livestock stray because a livestock owner did not fence-in his/her stock, or if the fence is in disrepair and the livestock stray from the farmer's property, the livestock owner may be liable for the damages caused by his stock (*Annapolis & Elkridge R.R. Co.*). Negligence occurs when a livestock owner fails to act in a way one would expect a reasonable person exercising average judgment, skill, and care in the same situation to act. This is sometimes referred to as a reasonable and prudent person standard (*Black's Law Dictionary*, 2004). Factors to consider in meeting this standard would be regularly checking fences, repairing damaged portions of the fence that could allow animals to escape, checking to make sure gates are kept closed, and so on. If the livestock owner fences in the livestock and the livestock escape through no negligence on the part of the livestock owner, then the livestock owner is not liable for any damage caused (*Annapolis & Elkridge R.R. Co.*).

### Who Pays for the Fence?

Under the fence-in rule, the livestock owner is required to build the fence, and neighboring landowners will not be required to share in this expense. These conclusions arise because the fence-in view places the duty/obligation on livestock owners to keep their stock in. A livestock owner would also be required to keep the fence in good condition and to repair defects (*Annapolis & Elkridge R.R. Co.*).

This common law view can allow livestock owners to erect a fence to keep livestock in and a neighboring landowner to take advantage of the fence without contributing to the construction costs. Although this may seem unfair, we will discuss ways to share costs next.



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### Fencing Agreements

Maryland has no law to prohibit two neighboring landowners from agreeing to share the costs of erecting a division fence even though one or neither of the landowners may own livestock. In some areas of Maryland, it has been customary that two livestock owners split costs for the maintenance and construction of a division fence. The problem with this custom is that new owners may not know the custom exists; parties may want to consider written agreements to determine how costs will be allocated. This agreement should lay out how costs will be shared, the standard the fence's condition will be measured by, a dispute resolution process, and other conditions for the construction and upkeep of the fence.

*When using an agreement with a division fence, neighboring landowners should ensure the agreement is binding on future landowners.*

For example, Greg and Bobby agree to build a division fence between their two properties. In the agreement, Bobby and Greg agree that Greg will be required to repair and Bobby to keep up the left half and Greg to keep up the right half. Bobby and Greg also agree to use a mediation process to settle any disputes which could arise.

When using an agreement with a division fence, neighboring landowners should ensure the agreement is binding on future landowners. To do this, the parties would need to make sure the cost-share agreement meets the requirements for a "real covenant." A real covenant is a promise concerning the land, in this case to maintain a division fence. In order for the division fence agreement to be a valid real covenant, the agreement must 1) be in writing; 2) intend for maintenance of the division fence to pass down to future landowners; 3) touch and concern the land; and 4) be recorded with the clerk of the circuit court in the county where the property is located. Privity, which is defined by Merriam-Webster to be "a relationship between persons who successively have a legal interest in the same right or property," must also exist between the landowners.

To "touch and concern the land" means that the covenant tends to necessarily enhance the value, confer a benefit, or impose a burden on the land (*Whalen v. Baltimore & O.R. Co.*). Examples of covenants found to touch and concern the land include those to restore the land to its previous condition (*Mercantile-Safe Deposit & Trust Co.*), agreements to pay rent and keep property insured (*Barren v. Whiteside*), and agreements to pay a share of costs to develop public streets and utilities (*Gallagher v. Bell*). Although there are many forms of "privity," in this context privity would mean the successor in the interest of property with the covenant would hold the same interest in the property as one of the original parties to the covenant.

For example, Greg and Bobby will want to make sure the fence agreement is in writing, signed by them both, and notarized. The fence agreement which states where the fence will be erected should also be recorded with the Clerk of the Circuit Court. Recording the

agreement will put future landowners on notice of the agreement. The agreement will touch and concern the land because it confers a benefit on their respective properties, a division fence, and confers a burden by requiring Bobby and Greg to keep the fence in good repair. Bobby and Greg will need to include language stating the agreement is binding to future landowners,

such as “this Agreement binds and benefits Owners and their respective personal representatives, successors and assigns.” This language would bind potential future owners of either property to the fencing agreement.

One way to avoid disputes is for the two landowners to always communicate issues to each other. Communication between the two parties may not always work, however, and the parties may consider including an alternative dispute resolution process to settle any disputes which could arise. Alternative dispute resolution methods include mediation or arbitration and tend to be faster and less expensive than using the traditional court system. For example, Greg and Bobby include a requirement to mediate any dispute over their fencing agreement. Greg neglects his duties to repair his half of the fence and Bobby is forced to pay for the repairs on Greg’s half. In order for Bobby to get reimbursed for his costs, Bobby and Greg both present evidence to a mediator to determine the amount that Greg will need to reimburse Bobby for repairs to Greg’s half of the fence.

### Selected County Fence Law Ordinances

Howard County, Kent County, and St. Mary’s County take a different approach in their county ordinances than Maryland’s fence-in view. These three counties have been granted this authority by the state to:

1. Regulate the construction and maintenance of fences;
2. Provide for a procedure to enforce the rights of parties with reference to a fence; and
3. Provide for a lien for repairs to a fence made by an owner who is not in default (Md. Local Gov’t



PHOTO: USDA BLOG AT [HTTP://BLOGS.USDA.GOV/2013/01/24/RETIREE-IMPROVES-AND-DIVERSIFIES-KENTUCKY-FARM-FOR-FUTURE-GENERATIONS/](http://blogs.usda.gov/2013/01/24/retiree-improves-and-diversifies-kentucky-farm-for-future-generations/)

Code Ann. § 10-318).

These county ordinances on fences clarify many of the unresolved issues in Maryland, and specify the minimum height and strength a fence should be built to, how construction and maintenance costs will be allocated, and a procedure for collecting unpaid costs (table 1). Adjoining landowners in Howard County

are required to share the costs of constructing and maintaining a fence dividing their properties. Finally, in Howard County, the fence cannot be within 5 miles of the City of Baltimore (Section 15.303).

These ordinances also provide for processes to collect unpaid repaired costs after written notice to the neighboring landowners. Howard and Kent counties require the appointment of non-interested third parties to determine if the repairs are necessary and determine a cost for the repairs. In Howard County, this determination is made before the fence is repaired and the landowner seeking the other landowner to pay construction or maintenance costs will not have to spend more than the amount set by the three disinterested landowners (Section 15.302).

The county ordinances help clarify many issues unresolved in Maryland law, such as allocation of construction and maintenance costs. The possibility still exists for a fencing agreement to be used by neighboring landowners to further specify the allocation of construction and maintenance costs and responsibilities. Producers in other counties will want to check their own ordinances to ensure that ordinances impacting fences have not been recently enacted. Livestock owners and neighboring property owners in these counties should pay attention to their county ordinances. Howard, Kent, and St. Mary’s counties have clarified the height and strength fences should be built to, methods for allocating construction and maintenance costs, and ways to collect unpaid costs. These county ordinances help clarify many of the issues that exist in the fence-in view and specify when neighboring landowners may be required to contribute to construction and maintenance of a division fence.

One final note on fencing ordinances: Kent County’s ordinance appears to create a duty to fence out (Kent County Code § 87-5). The language of the ordinance places the responsibility on property owners to have sufficient fences to enclose their property, and property owners could potentially be liable for damages caused to a neighbor’s livestock who wander onto the property.

Two disinterested and respectable neighboring property owners will be appointed to award livestock damages (§ 87-5). At least in Kent County, landowners would want to make sure they have a sufficient fence to keep livestock off their property and to prevent injury to the livestock.

**Table 1: Makeup of Howard, Kent, and St. Mary’s Fence Ordinances**

	Howard	Kent	St. Mary’s
<b>Who does ordinance apply to?</b>	Adjoining property owners except those within 5 miles of Baltimore City (§ 15.303).	Adjoining property owners	Only to farmers (§ 43-1)
<b>Minimum Fencing Requirements</b>	At least 4 feet high and strong enough to keep hogs in (§ 15.303).	At least 4.5 feet high and sets minimum spacing between rails (§ 87.1).	At least 4 to 4.5 feet (depending on type of fence). Sets minimum rail spacing (§ 43.2)
<b>Sharing Costs</b>	Each maintains ½ of fence	Each maintain ½ of fence	Each maintain ½ of fence
<b>Refusal to Repair</b>	Based on appraiser’s determination (§ 15.302).	Provide written notice to party that fence needs to be repaired and if not done in 20 days can get warrant from court authorizing yourself to repair (§ 87-2).	Have to provide 30 days written notice before other party can repair (§ 43-3). Court can order reimbursement of reasonable expenses incurred (§ 43-3).
<b>Appointment of Appraisers</b>	Before repairing fence, court will appoint 3 disinterested landowners to determine if fence needs to be repaired and costs (§ 15.302).	If neighbor refuses to repair and you have warrant authorizing repairs, then 2 sensible and discreet persons are called to assess value (§ 87-3).	No provision
<b>Discontinuance</b>	No provision	Does allow as an option instead of repairing fence (§ 87-4).	Does allow as an option instead of repairing (§ 43-4).

### Summary

Maryland places the burden of fencing in livestock on the livestock owner. The livestock owner must ensure that the fences constructed are in good repair, because negligent upkeep in the fence could make the livestock owner liable for damages caused by his/her trespassing livestock. Since the burden is placed on a livestock owner to construct a fence, a second livestock owner could gain the benefit of the fence without sharing in construction costs. When two livestock owners plan to use neighboring properties for grazing, the livestock owners can share the costs of construction and upkeep through a fencing agreement. When the conditions for a real covenant are met, this agreement can be filed with the county's Circuit Court and will be binding on owners of the two properties. ■

### *Disclaimer:*

This publication is intended to provide general information about legal issues and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. State and federal laws vary and no attempt is made to discuss laws of states other than Maryland. For advice about how these issues might apply to your individual situation, consult an attorney.

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### *References*

- Annapolis & Elkridge R.R. Co. v. Baldwin*, 60 Md. 88 (Md. 1883).  
*The Baltimore & Ohio R.R. Co. v. Lamborn*, 12 Md. 257 (Md. 1858).  
 Howard County, Maryland, Code of Ordinances §§ 15.300 through 15.304 (2014).  
 Kent County, Maryland Code of Ordinances §§87-1 to 87-8 (2014).  
*Richardson v. Milburn*, 11 Md. 340 (Md. 1857).  
 St. Mary's County, Maryland, Code of Ordinances §§ 43-1 to 43-5 (2014).  
*Van Clief v. Comptroller of Md.*, 211 Md. 191 (Md. 1956).

### *Endnotes*

- i. In Maryland, courts have defined livestock to be “domestic animals used or raised on a farm, especially those kept for profit.” (*Van Clief*, 1956).
- ii. Producers should check with their local NRCS office or local soil conservation district to determine if cost-share money is available.

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The Agriculture Law Education Initiative is a collaboration between the University of Maryland Francis King Carey School and College of Agriculture & Natural Resources, University of Maryland, College Park. Through the University of Maryland Extension - the statewide, non-formal agriculture education system - the collaboration partners with the School of Agricultural and Natural Sciences, University of Maryland Eastern Shore.

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