

# An Overview of Virginia Fence Law

*Jason Carter, Extension Agent, Augusta County*



# Disclaimer

The information presented in this presentation about Virginia Fence Law and legislation is meant to be for educational purposes only.

Any advice regarding general or specific cases of applicability of any or all Virginia Fence Laws, in the Code of Virginia or locally, should be dispensed by a qualified attorney at law.

## Virginia Cooperative Extension

---



[www.ext.vt.edu](http://www.ext.vt.edu)

Virginia Cooperative Extension programs and employment are open to all, regardless of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. An equal opportunity/affirmative action employer. Issued in furtherance of Cooperative Extension work, Virginia Polytechnic Institute and State University, Virginia State University, and the U.S. Department of Agriculture cooperating. Alan L. Grant, Dean, College of Agriculture and Life Sciences, and Interim Director, Virginia Cooperative Extension, Virginia Tech, Blacksburg; Wondi Mersie, Interim Administrator, 1890 Extension Program, Virginia State, Petersburg.



# Fence & Fence Law

Appearances have  
changed with time  
but intent has  
remained relatively  
consistent



# English Common Law



Virginia's original fence law was based on Common Law with which many colonists were familiar. It was the livestock owners liability to fence in his animals.

# Common Law Fence Legislation

- 1631 – “Every man shall enclose his ground with a sufficient fence.”

Implication - the notion of what constituted a “lawful” fence was being considered and legislated for the first time in America

# Then in 1643 ...

- “that every man shall make a sufficient fence about his cleared ground.”

Now the priority for containing livestock was shifted to the Planter.

Virginia General Law had been born



# Virginia General Law

- Beginning in 1643, the livestock owner no longer was primarily responsible for keeping his animals on his own land or for damages resulting from escaped animals.
- In 1646, the fence law was honed to define a lawful fence as being 4 ½ feet high and substantial at the bottom particularly.
- “General Law” placed the liability of property protection on the Planter and recovery of damages could only be sought if a lawful fence was provided by the Planter.

# Return to Common Law

- On October 3, 1862 the General Assembly reconsiders the existing General Law applying to fences:

“Whereas a considerable portion of the territory of the commonwealth having been ravaged by the public enemy, and a great loss of labor, fencing and timber thereby sustained, it is rendered difficult if not impossible for the people of many counties and parts of counties, to keep up enclosures around their farms, according to existing laws...therefore county courts shall have the power to dispense with the existing law in regard to enclosures, so far as their respective counties may be concerned, and in their discretion they may deem it expedient to exempt from the operation of such law.”

# § 55-310 “*No-Fence Law*”

- Ultimately county courts yielded to Boards of Supervisors to enact local law, but when the No-Fence Law was locally approved, it created an absolute duty of animal owners to fence in their animals to contain them and prevent them from crossing onto the lands of another
- This gave rise to the terms “Fence-In” and Fence-Out”

# Fence-In

- Source is English Common Law
- Boundary lines have been declared to be lawful fences under § 55-310 of the Virginia Code. Landowners must fence their animals in.
- In 1862, most eastern VA counties enacted this option

# Fence-In Example

A shepherd in Augusta County, which is “Fence-In”, has several sheep escape through a gate and find their way to a neighbor’s property whereby they commence to destroying a flower garden.

*In this case, Augusta County, being Fence-In recognizes a property boundary line as a legal fence. This places liability for the damage incurred by the flower garden squarely on the Augusta County shepherd since it is his duty to control his animals. The moment those sheep crossed into the neighbor’s property, they crossed a “lawful fence”.*

# Fence-Out

- Source is Virginia General Law
- Landowners must construct a lawful fence around their properties in order to keep wandering animals out. This is like, open range law in some western states.
- In 1862, timber was still plentiful in most of western Virginia and some of these counties chose to remain with General Law.

# Fence-Out Example

A cattleman in Rockbridge County has a few cows wander into a neighbor's corn field whereby the cattle consume a large quantity of corn and fodder.

*Here the question of liability for the damage to the corn becomes two fold. First, Rockbridge County is "Fence-Out", meaning that boundary lines are not legal fences and citizens must erect a legal fence to bear no liability for unwanted livestock entering their premises. So, was there a fence around the corn field? The second concern then becomes, if there was a fence, did it meet the "legal fence" definition?*

**Legal fence YES** – the cattlemen is liable for the damages

**Legal fence NO** – the damages are a loss for the owner of the corn

# What Is A Lawful Fence?

The Code of Virginia has, over time, defined what an acceptable lawful fence which “livestock<sup>1</sup> domesticated by man cannot creep through”<sup>2</sup> is.

<sup>1</sup>poultry has remained excluded from the term livestock

<sup>2</sup>Code of Virginia § 55-306

# § 55-299 Definition of Lawful Fence

1.  $\geq 60$  inches from top of fence to bottom of ditch for earthen mound fencing
  2.  $\geq 42$  inches for barbed wire,  $\geq 4$  strands, substantial support  $\leq 12$  feet apart w/o bracing
  3.  $\geq 42$  inches for board, plank or rail with  $\geq 3$  boards and substantial support
  4.  $\geq 36$  inches high in a town w/o specific lawful fence requirements
- OR
5. Any fence whatsoever that is,
    - a)  $\geq 42$  inches high
    - b) Constructed of industry accepted fencing material or technology that appropriately confines or restricts livestock in accordance with § 55-306
    - c) Installed pursuant to industry accepted standards

A cattle guard reasonably sufficient to turn all kinds of livestock.

The Virginia Department of Agriculture and Consumer Services may adopt more stringent standards than these as requirements for lawful fencing.

# Lawful Fence

Generally speaking, American Society of Testing and Materials (ASTM) certification is found on any appropriate livestock fencing materials. This assures that standards for strength and durability have been met.



# Cattle Guards

§55-304 and §55-305

Cattle guards provide a convenient and effective way to contain cattle and other livestock where private roads need to pass through a boundary or fence. These sections guarantee the following regarding cattle guards:

- Any landowner who provides an easement for others to travel on or off the property, may install a cattle guard in that easement if they deem it necessary
- Any tenant having an easement or right of way across the lands of another may, at their own expense, replace a gate with a cattle guard. The owner of the easement then assumes the responsibility for maintaining the cattle guard.
- Cattle guards are lawful gates and should not interfere with easement traffic.

# Trespassing Animals

## § 55-306 through § 55-309

These laws deal with how land owners, neighbors and courts handle trespassing livestock and the potential resulting damage.

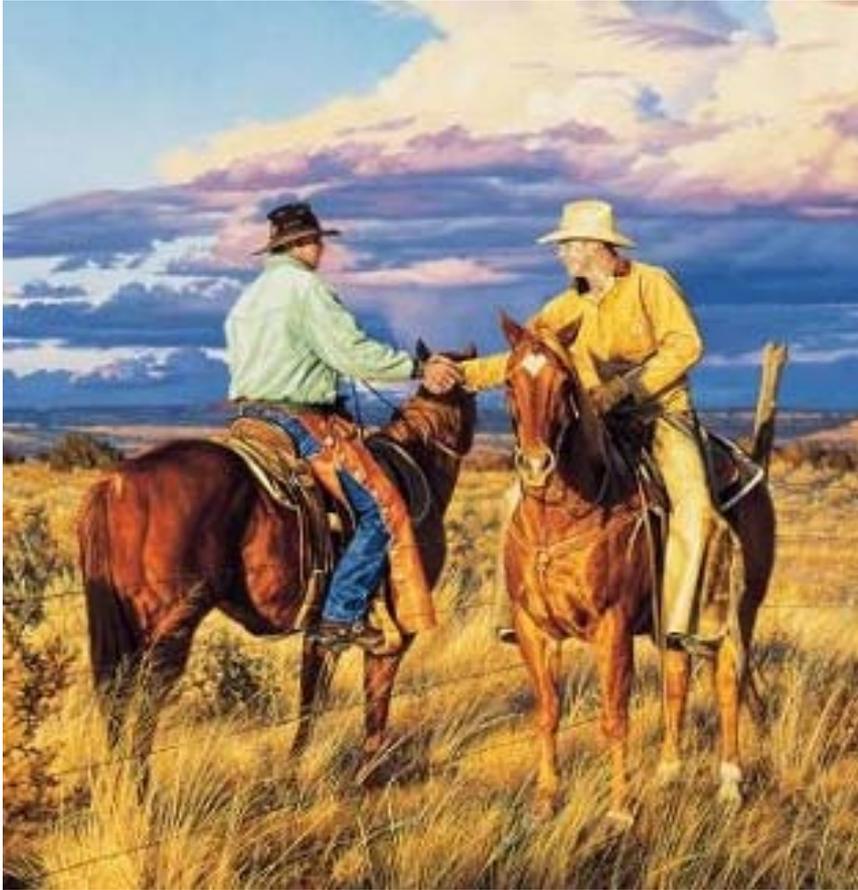
- § 55-306: When a trespassing animal crosses a lawful fence then owner of the animal is liable for property damage and punitive damages up to \$20. Succeeding incidents will be subject to double actual and punitive damages.
- § 55-307: After a trespassing judgment involving damages, a lien may be placed on the offending animal until damages are settled.
- § 55-308: After damages, the owner of lawfully enclosed ground may impound the trespassing animal until damages are settled including the cost of impounding the trespassing animal.
- § 55-309: Any landowner of lawfully enclosed ground, experiencing damages from trespassing animals, must issue a warrant for the damages within three days of impounding the offending animal unless damages are to be settled otherwise.

# Beyond § 55-310

The infamous “No-Fence Law” gives certain authority to localities determining their own fence law status, but successive laws limit other possible implications of § 55-310.

- § 55-311: Adjoining landowners are not relieved of making and maintaining division fences
- § 55-312: Railroad companies must maintain right of way fencing
- § 55-313: Only VDACS may increase stringency of lawful fence definition
- § 55-314: Existing county fence law status can only be changed by the local Board of Supervisors
- § 55-316: Livestock owners may not allow their animals to roam freely beyond their boundaries even where boundary lines are deemed lawful fences

# Division Fences



Good fences make good neighbors only after the law ensures that obligation to build and maintain them, now and in the future, is assured.

# Obligation to Provide Division Fences

## § 55-317

***Adjoining landowners shall build and maintain, at their joint expense, division fences between their lands, unless one of them shall choose to let his land lie open or unless they shall otherwise agree between themselves.***

In 2005, when this law was amended, the intent was to remove the ability for an owner of commercial property to label the land as “lying open” regardless of interest in agricultural use.

See: *Holly Hill Farm Corp. v. Rowe*, 404 S.E.2d 48, 48-49 (Va. 1991)

***However the key to interpreting § 55-317 is the absence of an existing division fence.*** If one neighbor needs a fence, typically for livestock, and the other neighbor does not, then both neighbors are not equally liable for the fence, as long as one neighbor allows the land to basically remain fallow.

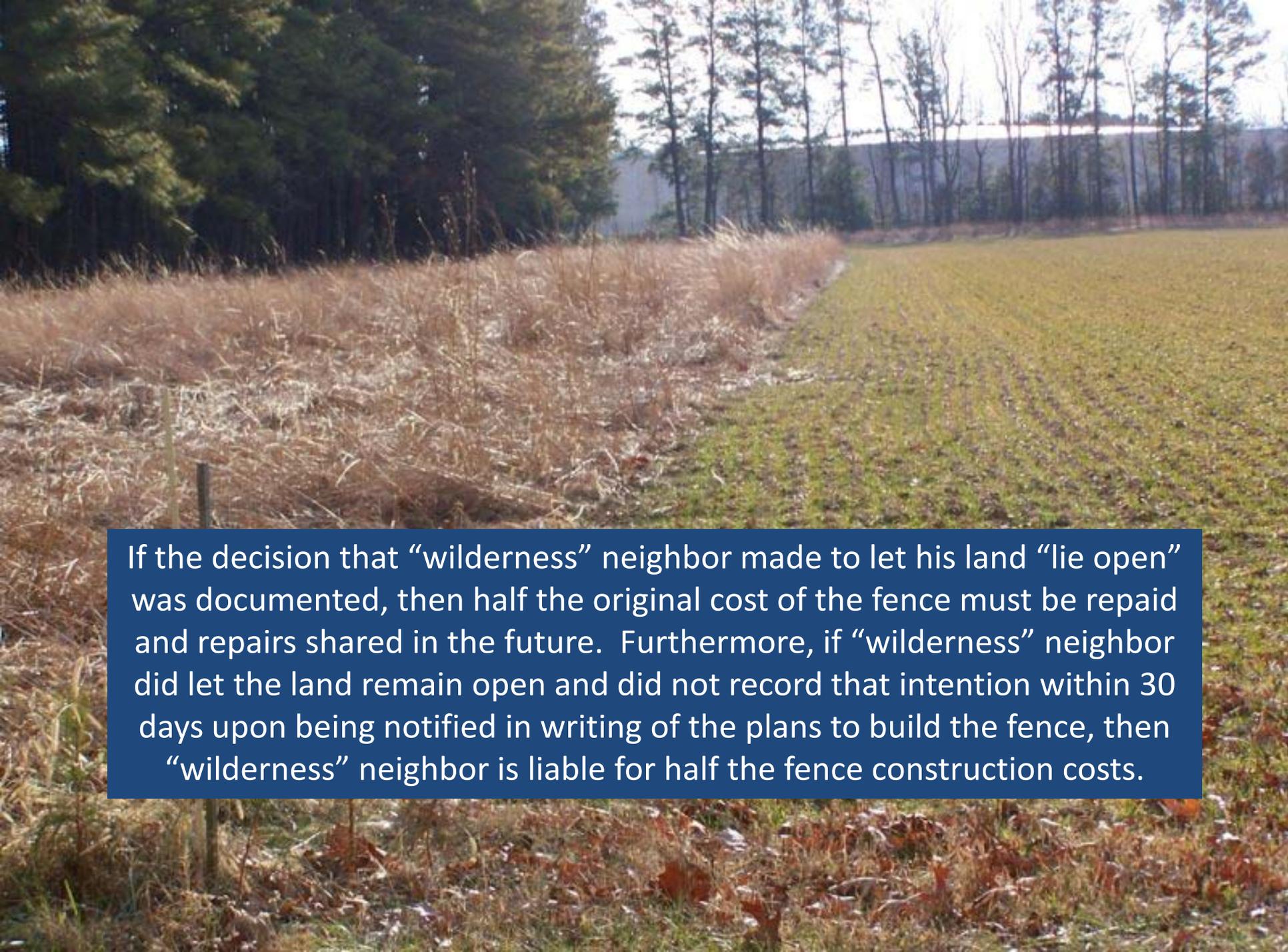


# Does “lie open” mean forever?

§ 55-318, When no division fence has been built

So one neighbor in the sheep business builds a division fence while the other neighbor says “I’ll raise wilderness, you pay for the fence”. Then five years later a fellow can sell a one hundred pound lamb for \$1.80/lb and “wilderness” neighbor decides to get in the sheep business. Does “wilderness” neighbor benefit from a free fence for a decision he made and reneged on five years ago?

***The key to § 55-318 is whether or not the intention to build the original fence was put in writing and the decisions made were recorded in the county clerk’s office.***



If the decision that “wilderness” neighbor made to let his land “lie open” was documented, then half the original cost of the fence must be repaid and repairs shared in the future. Furthermore, if “wilderness” neighbor did let the land remain open and did not record that intention within 30 days upon being notified in writing of the plans to build the fence, then “wilderness” neighbor is liable for half the fence construction costs.

# When Division Fences Already Exist

## § 55-319

Sometimes the most contentious fencing issues between adjoining property owners arises over the disrepair or “unlawfulness” of an existing division line fence. The question of who pays for what if they don’t each agree that the fence is in need of repair or replacement can cause significant angst.

§ 55-319 addresses this.

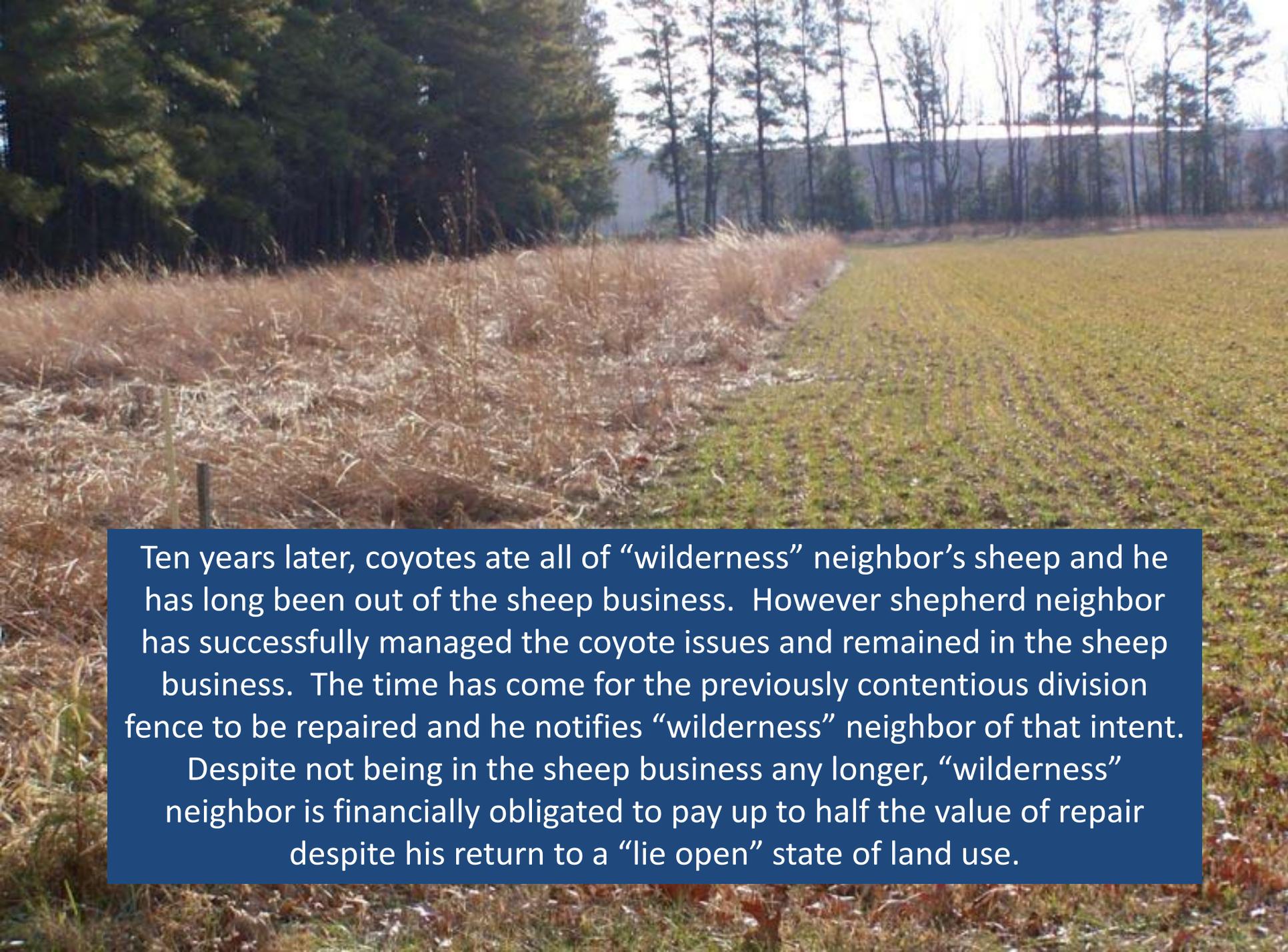
# When Division Fences Already Exist

## § 55-319

**When any fence that has been built and used by adjoining landowners as a division fence...shall become out of repair to the extent that it is no longer a lawful fence, either one of the adjoining landowners may give written notice to the other...of his desire and intention to repair such fence, and require him to come forward and pay his half thereof...**

# § 55-319      Key Points

- When an existing and lawful division fence is in place and is in need of repair, adjoining landowners both assume responsibility for half the repair costs.
- Since § 55-319 deals with an existing fence, there is no avoidance of financial obligation for maintenance by one landowner choosing to let their land “lie open”.
- Like § 55-318, notice of fence repair has to be filed at the county clerk’s office for 30 days before no response from the adjoining landowner obligates financial responsibility for half the fence.



Ten years later, coyotes ate all of “wilderness” neighbor’s sheep and he has long been out of the sheep business. However shepherd neighbor has successfully managed the coyote issues and remained in the sheep business. The time has come for the previously contentious division fence to be repaired and he notifies “wilderness” neighbor of that intent. Despite not being in the sheep business any longer, “wilderness” neighbor is financially obligated to pay up to half the value of repair despite his return to a “lie open” state of land use.

# Summary

- The history and interpretation of Virginia Fence Law can be both fascinating and complex.
- The “No-Fence Law” and division laws are probably the most misunderstood pieces of Virginia Fence legislation.
- It is important that, where boundary fences are concerned, landowners understand their obligations before construction to avoid contractors being caught in a conflict.

# Summary

- Meeting the requirements of a “lawful fence” is critically important for enforcement of any of the Virginia Fence related laws.
- Fence maintenance agreements between adjoining landowners should be filed with the County Clerk’s office in the jurisdiction of the fence location.
- Properly filed fence agreements are binding for successive generations and landowners.

# Any Questions?

