

A Commonsense Fence – by Mick Strack

Recent spats played out in the media between warring neighbours have prompted people to question their belief that their own legal boundary is in fact where their fence says it is. Otago University School of Surveying's lecturer Mick Strack, knows all about boundary issues and the bad behaviour that can result from them.

As property owners we want to be sure of our investment by knowing where our boundaries are, and in the interests of privacy and protection, we usually want to fence that boundary. This ensures boundary lines are clear and obvious to all - especially neighbours.

The Fencing Act 1978 (s22) states that "the middle of the fence shall be upon the boundary line...or as near thereto as practicable." It states quite categorically that "no person is entitled to erect a fence that encroaches to any degree whatever upon any land of which he is not the occupier." (s8), but then continues in less absolute terms, that the Court can order the removal of any encroaching fence unless it is satisfied "(a) that the degree of encroachment is minimal; and (b) that the encroachment in no way adversely affects the use and enjoyment of his land by the applicant."

The law is clear that pegs in the ground – rather than dimensions on a plan - are the best evidence of a boundary position. In the absence of pegs, then a longstanding occupation (e.g. a fence) is convincing evidence of a boundary position. This indicates that surveyors are exercising a quasi-judicial function in placing boundary pegs and in determining if fences are on the boundary. The final determination about boundaries and fences is a judicial decision not a surveyor's decision.

All survey measurements are subject to errors. Surveyors recognise this and always seek to minimise these errors, but surveyors allow for measurement tolerances, and the law allows for dimensional tolerances by stating that all dimensions are "a little more or less". Disputes about boundaries have the potential to cause significant neighbourly conflict, and surveyors need to exercise an extensive and pragmatic tolerance and not get fixated on the numbers and dimensions.

Ring fencing the issues:

- There is no common law obligation to fence a boundary, although there is a requirement to ensure that no nuisance is caused to adjoining neighbours by anything on, or escaping from, that property.
- There exists a statutory expectation that if any owner or occupier on either side of a boundary wants a fence, then it must be agreed to, and funded, by both affected owners.
- Where there are no survey pegs, the fence is the best evidence of boundary position.
- Fences can take a variety of forms, but the Fencing Act 1978 lists some 'standard, adequate' fences for both rural and urban situations. Anything more elaborate than an adequate fence is at the discretion of (and cost to) the proponent.

The Bra Fence

As an example of a high profile boundary dispute, the Bra Fence in the Cardrona Valley illustrates how numbers can sometimes get in the way of sense. In the long-running dispute about its legality (that included the opinion that it is now a sign and therefore a building, rather than a fence!), a statement was thrown up that in fact the fence was encroaching on the road by 80mm. Whether there are any existing survey pegs defining the boundary or not, a statement that a fence is not on the boundary by that amount is clearly a nonsense. The position of the boundary itself is only defined by survey to within 60mm. The farm posts may have a width of at least 200mm. The law must allow at least that much as coming within the range of “a little more or less”. However the Queenstown Lakes District Council adopted the idea that the fence is encroaching on the road reserve and made statements such as “The council’s property subcommittee decided in April the fence could stay, but the bras had to go. Alternatively, Mr Lee could move the fence on to his own property and apply for resource consent. The fence illegally encroaches on a road reserve by 8cm ...” (ODT July 2006).

This statement of legal encroachment is clearly nonsensical. The surveyor must not create, on a purely theoretical basis, adverse occupation and encroachment in respect of occupation lines that have been accepted as the title boundary for years.

In September the bras were finally removed – a loss of a quirky attraction that had received global notoriety - and a victory for conservative and boring planning rules.

Boundary and fence disputes are apparently reasonably common in New Zealand (as evidenced by TV programmes like “My House My Castle” etc.) but few proceed to court. It would seem that as surveyors, we could apply some common sense to fence measurement and ensure that neighbourly disputes are not aggravated by ‘authoritative’ statements of position that disregard the concept of ‘a little more or less’!



The Bra Fence, Cardrona