

Dividing Fences and Retaining Walls

FENCES

The *Dividing Fences Act 1991* (NSW) addresses how the cost of a dividing fence is shared between adjoining land owners where an owner wants to erect a dividing fence or repair or renovate an existing dividing fence. It sets out the minimum requirements and owners may always agree to an arrangement exceeding those requirements. The Act also details the procedure for resolving disputes involving the cost, type and position of a fence.

Under the Act, a dividing fence means a fence separating the land of adjoining owners, whether on the common boundary of adjoining lands or on a line other than the common boundary. The fence may be a structure, ditch or embankment, or a hedge or similar vegetative barrier and includes:

- any gate, cattlegrid or apparatus necessary for the operation of the fence
- any natural or artificial watercourse which separates the land of adjoining owners
- any foundation or support necessary for the support and maintenance of the fence.

Note: Up until now, retaining walls have been specifically excluded from the *Dividing Fences Act*. However, the *Dividing Fences and Other Legislation Amendment Bill 2008*, currently before NSW Parliament, will change that situation if it is passed. The Bill would allow a Local Land Board or Local Court to make a fencing order requiring construction or maintenance of a retaining wall, to the extent necessary for settling a fencing dispute. Also, it would add into the costs of related fencing work (see below) the cost of lopping or removing vegetation, again, only to the extent necessary for settling a fencing dispute. The Bill was introduced on 11 April 2008; check the Bill's progress at www.legislation.nsw.gov.au.

The cost of a dividing fence includes the cost of all related fencing work, such as surveying, preparation of land, design, construction, replacement, repair or maintenance of the dividing fence. See note above on vegetation.

It is worth noting that the *Dividing Fences Act* only covers situations where a financial contribution is sought. If your neighbour wants to bear the whole expense of a fence on their land, you may not be able to influence the type of fence that they decide on. However, if the proposed fence requires council approval, you may have the opportunity to lodge an objection.

Who do you have to talk to?

Under the Act, an owner is one or more of the persons who own the land, or a tenant with a lease with more than five years left to run. A more specific definition of 'owner' is found in section 3 of the Act.

Sharing the cost of a dividing fence

Under the *Dividing Fences Act*, adjoining owners must share the cost of a 'sufficient dividing fence'. This is a fence that is sufficient to separate the properties, for example a paling fence in a residential area, or a wire and steel star post fence in a rural area.

The factors considered by a court or local land board in determining whether a dividing fence is 'sufficient', as set out in section 4 of the *Dividing Fences Act* are:

- the standard of the existing fence (if there is one)
- the uses or intended uses of the adjoining lands which the fence divides
- privacy or other concerns of the land owners
- the kind of fence usual for the local area
- any local government policy or code, or environmental planning instrument relevant to the dividing fence and the locality

If an owner wants a fence of a higher standard than is required to sufficiently separate the properties, that owner must pay the additional cost.

A swimming pool fence may be used as a dividing fence on two sides of a boundary. The *Swimming Pool Act 1992* (NSW) requires that pool fences are 1.2 metres high and child resistant. Swimming pool construction requires council approval, which will include requiring fencing.

If an existing dividing fence is damaged or destroyed by one owner or someone with that owner's permission, that owner must pay for the work required to restore the dividing fence.

Public authorities with control over Crown lands, parks, reserves etc do not have to contribute to fencing costs. However people living next to such properties may be able to negotiate with the authority for a contribution.

Practical steps

If you want to build a fence or repair one you should consult the adjoining owner first. It is helpful to get several quotes so that you and your neighbour can both agree on a price. Discussions should also cover the type and height of the fence.

Council approval is generally required for fences over 1.8 metres high and for front fences. Sometimes there are restrictions on what style of fence can be built in particular areas, due to council codes or policies, heritage protection orders or restrictive covenants (eg a subdivision may have an agreement that all fences be of a particular type). It is advisable to check with local council before proceeding.

Reaching an agreement

(Information from Local Courts 'Problems with Fences')

If you and your neighbour both agree on the price and proposed construction of the fence, you should both put the terms of the agreement in writing and both sign the agreement.

The agreement should cover all relevant details of the cost and design of the fence including:

- height
- type of material
- colour
- cost
- position of fence
- provision for removal of existing fence

Both you and your neighbour should keep a signed copy of the agreement.

If the owner of the neighbouring land cannot be contacted, the court is able to make an order if satisfied that reasonable efforts have been made to contact the owner.

If you cannot reach an agreement

If you cannot reach an agreement, you can serve the neighbour with a 'Notice to Fence'. This notice formally outlines your proposed fencing work and requests the owner to agree to pay a contribution.

A valid notice to fence needs to include:

- the position of the proposed fence
- the type of fence proposed
- the estimated cost of the fencing
- the proposed contribution of each neighbour

Keep a copy of the written notice for yourself and make a note of when you handed or posted the form to them. There is no standard form required, however an example is set out on this page.

A sample Fencing Notice.

FENCING NOTICE
(Dividing Fences Act 1991)

***To:** _____
(Name) (Address) *(Name and address of adjoining land owner)

The fencing work described below is required between our adjoining properties. I would be pleased if you would share the cost as shown.

From: _____
(Name) (Address)

Proposal: _____ (Signed) _____ (Date)

1. Properties affected (street address):
A _____ owned by _____
B _____ owned by _____

2. Position of fencing work (on boundary line, or as shown on attached plan)

3. Fencing work proposed to be carried out (include length, height and type of materials)

4. Estimated cost: \$ _____

5. Sharing of cost:
a. _____ will pay for the fencing work and will be paid half the estimated cost
by _____ on completion, OR
b. (insert other option) _____

If you agree to this proposal, please complete the form of agreement hereunder and return a copy to me.
Section 12 of the Dividing Fences Act 1991 provides that if adjoining owners do not agree as to the fencing work to be carried out within 1 month after the service of this notice, either owner may apply to a Local Court or a Local Land Board for an order determining the manner in which fencing work (if any) is to be carried out.

Property A **AGREEMENT TO FENCING** **Property B**
I agree to the above proposal I agree to the above proposal

(signed) (dated) (signed) (dated)

If after one month of serving the notice your neighbour still does not agree to your proposal, you may ask the Local Court or Local Land Board to make an order about the fencing work required. Alternatively, you can make use of the free mediation service provided by Community Justice Centres.

Applying to the Local Land Board for an order

Local Land Boards are community-based tribunals consisting of a Chairperson and two local community members¹ who are familiar with the local area and have knowledge of land management practices.

A Local Land Board sits as a dispute resolution tribunal and conducts hearings in relation to a variety of matters including dividing fences. Applications should be lodged with Local Land Board Registrars. An application fee (\$61 at the time of publication) is required. You can contact the Land Board Registrar at one of their Departmental offices.

Advantages of lodging an application at the Local Land Board rather than at the Local Court include:

- the Board can conduct on site inspections
- the Board's hearings are conducted less formally and are not bound by rules of evidence
- the application may be filed by post

Applying to the Local Court for an order

Application to the Local Court can be made, as part of its fencing order, to direct the other party to pay a contribution to the fencing construction. Lodging an application for a court order in the Local Court will incur a \$70.00 application fee (at the time of publication).

The case will be listed before the Court in approximately four to six weeks so that a summons can be served on the other party. Contact your Local Court for more details on lodging applications.

Urgent fencing work

If a dividing fence has been damaged or destroyed and urgently needs to be repaired, it is not necessary to serve a Notice to Fence before carrying out fencing work. Adjoining owners must share equally the cost of that urgent work unless the damage was caused by one owner's negligence.

Reasons for urgent fencing work include safety, security or to prevent stock loss. A Local Court or Local Land Board can review any dispute arising in these circumstances.

Recovering money

If the Court makes an order against the adjoining owner and this is not complied with, you will need to take additional court action to enforce the agreement or order.

You can initiate action through the Civil Claims jurisdiction of the Local Court to recover the money. You will have to file and serve a Statement of Claim.

Entering the adjoining land

An owner who is carrying out fencing work under the *Dividing Fences Act* is able to enter the adjoining land for that purpose at any reasonable time. This also applies to the owner's employees and agents.

RETAINING WALLS

A retaining wall is a structure that supports excavated or filled earth on a property. As mentioned, the *Dividing Fences Act* does not currently cover retaining walls. This means that it is important to establish whether a structure is a dividing fence or a retaining wall, as disputes over retaining walls are heard in the Supreme Court, not the Local Court (where dividing fence matters are dealt with). An important case dealing with the distinction is *Kontikis v Schreiner* (1989) 16 NSWLR 706. A retaining wall that is positioned on a boundary is called a 'common party wall'.

Note: The Dividing Fences and Other Legislation Amendment Bill 2008, currently before NSW Parliament would, if passed extend the jurisdiction of the Local Courts and Local Land Board to make orders for maintenance or construction of retaining walls, to the extent necessary to resolve dividing fence disputes. The Bill was introduced on 11 April 2008; check the Bill's progress at www.legislation.nsw.gov.au.

The construction of a retaining wall will often require a Development Application. If you are planning to build a retaining wall, you will need to check with your Local Council.

Law of support

The NSW Law Reform Commission's Report 84 (1997) *The Right to Support from Adjoining Land* pointed out deficiencies in the way common law dealt with supported land. The law only extended to land in its natural state, and so not to buildings or other improvements. It also did not include support to water or reclaimed land. The *Conveyancing Act 1919* was amended by *Conveyancing Amendment (Law of Support) Act 2000* to create a 'duty of care in relation to the right of support for land' see section 177(1). The action which had previously been available was the common law action of nuisance, which was abolished with respect to supported lands.

The new duty of care is created as an addition to the common law of negligence. It prohibits activity which:

- damages supported land
- makes supported land and its structures unsafe
- makes supported land unable to safely support any structures which may foreseeably be erected on it in future

It allows a person to bring an action in negligence for any damage caused by the removal of any natural support, or of any structure that has replaced that natural support. Supporting land includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.

Excluding or modifying the duty of care

The duty of care can be excluded or modified by agreement between the owners. For example, if the owner of supporting land wishes to do work on their land that will remove support, the owner of the supported land may agree to relinquish their right in exchange for money. Such an agreement does not bind subsequent owners unless is an 'easement for removal of support'² is registered on the title of the supported land.

The change to the law was a recognition of the need to increase responsibility of neighbours in modern living conditions, especially in cases of semi detached houses, common party walls and retaining walls on sloping lands.

Proposal for change

There has been a proposal by the Department of Lands that Local Courts or Local Land Boards be given the power to deal with retaining walls in a similar way to dividing fences.³ However, a submission from the Property Law Committee of the NSW Law Society points out the significance of the difference between dividing fences and retaining walls, in that where dividing fences simply divide land, retaining walls affect the rights of adjoining landowners. The Committee suggested further requirements for proposed legislation to take account of the fact.

[Information in this section was based on the Second Reading Speech to the *Conveyancing Amendment (Law of Support) Act 2000*, NSW Parliamentary Debates, Legislative Assembly, 5th April 2000, 4174 (R Amery) and articles in *The Law Society Journal*, 'Right to support from adjoining land catches up with law reform recommendations', P Blair, (2000) 38 (6) p 34 and 'Does the "law of support" amendment provide an unnatural right of support?', C Wong, (2001) 39 (4), p 56.]

1. The *Dividing Fences and Other Legislation Amendment Bill 2008*, if passed, will allow a senior Chairperson to sit alone, or to direct a Chairperson to sit alone in residential dividing fence hearing.
2. The standard form of words is in Schedule 8 to the *Conveyancing Act*.
3. *Law Society Journal*, September 2007, p 7 'Difference between retaining walls and dividing fences needs to be borne in mind'.