

Creating Exceptional Outcomes

Navigating neighbourhood disputes and damage to property from floods

/ 28 March 2022

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Agenda

- **Case Example 1 – Dividing Fences**
- **Case Example 2 – Overland Flow**
- **Case Example 3 – Retaining Walls & Town Planning**

Case Example 1 – Dividing Fences

- **Damage to a boundary fence from floods – what happens if a neighbour wants to repair a fence?**
- **Considerations**
 - is it a “sufficient dividing fence”
 - ownership of the fence
 - liability for fencing work
 - contribution between adjoining owners
- **Legislation and Cases**
 - *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*
 - *Building Act 1975* (where the fence is a pool barrier)
 - *Ausrich v Fong & Anor* [2020] QCAT 380
 - *Wong v Arthur* [2020] QCAT 89

Dividing Fences



Dividing Fences – “Sufficient Dividing Fence”

- **Fence (s. 11)**

- structure, ditch or embankment, or a hedge or similar vegetative barrier, enclosing or bounding land, whether or not continuous or extending along the entire boundary separating the land
- **excludes** a retaining wall and a wall that is part of house, garage or other building

- **Dividing Fence (s. 12)**

- a fence on the common boundary of adjoining lands

- **Sufficient Dividing Fence (s. 13)** (for residential land)

- is between a minimum of 0.5m and a maximum of 1.8m in height and it consists substantially of “prescribed material”; or
- if the owners agree the dividing fence is sufficient or if QCAT decides it is sufficient

Dividing Fences – “Sufficient Dividing Fence”

- **Sufficient Dividing Fence – “Prescribed material”**
 - wood, including timber palings and lattice panels
 - chain wire
 - metal panels or rods
 - bricks
 - rendered cement
 - concrete blocks
 - hedge or other vegetative barrier
 - other material of which a dividing fence is ordinarily constructed

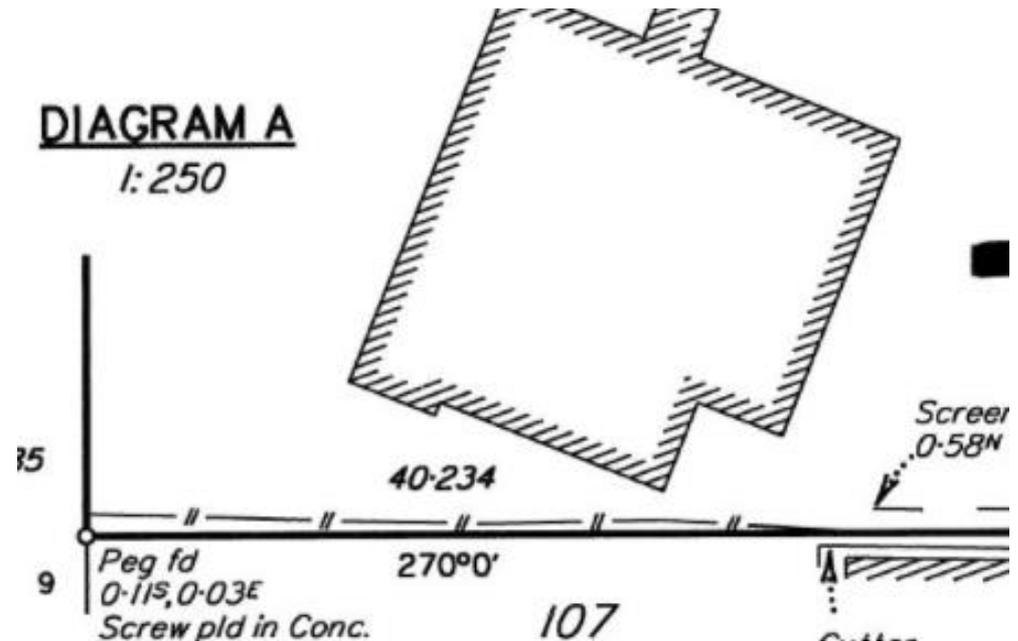
Dividing Fences – Ownership and Liability for Fencing Work

- **Ownership**

- on the common boundary, owned equally by adjoining owners
- consider any encroachment issues

- **Liability for fencing work**

- owners equally liable to contribute for fencing work
- when will they not be liable?
- what about repairing a fence to a greater standard?



Source: Google Images

Dividing Fences – Contribution for Fencing Work

- **If you want your neighbour to contribute to repair a fence**
 - notice to contribute for fencing work (s. 31)
 - approved form and include estimated cost, including labour and materials
 - must include at least one quote, but as a matter of courtesy at least two quotes are suggested
 - may propose it is shared 50/50, but also propose another proportional split
 - notices for “urgent” fencing work (s. 35)

Dividing Fences – Negotiating a resolution

- **Notice to contribute**
 - Given by the owner of land (e.g. the registered owner)
 - Serve either in person or by post
 - Work must not commence until agreement is reached (or QCAT makes an order)
- **Negotiate directly**
 - Where possible, speak to the neighbour face-to-face, preferably before serving the notice to contribute
 - If the neighbour thinks the cost is too high – ask them to get their own quote
 - If the neighbour thinks the work is more than what is necessary, consider offering to pay the extra cost
 - Mediation
- **Record any agreement in writing**

Dividing Fences - Mediation

- **Types of mediation**
 - Free neighbourhood mediation through the Queensland Government Disputes Resolution Centre
 - Mediation through QCAT
- **Dispute Resolution Centre mediation**
 - Contact the Dispute Resolution Centre
 - The Dispute Resolution Centre will contact your neighbour (usually within 10-14 days)
 - If the neighbour agrees, the Dispute Resolution Centre will organise a time (usually within 2 weeks)
 - Prepare for the mediation
 - If an agreement is reached, the mediator will assist the parties to record it in writing

Dividing Fences – Commencing proceedings

- **Time**
 - If no agreement, application can be made more than 1 month and less than 2 months after notice

- **QCAT**
 - Dividing fence disputes under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*
 - If the dividing fence is part of a pool barrier, disputes under the *Building Act 1975*
 - Limited right to legal representation
 - Limited jurisdiction to award costs

Dividing Fences - QCAT

- **Application**

- Form 53 – Application for minor civil dispute – dividing fences
- Form 3 – Application for minor civil dispute – minor debt if the dispute relates to the cost of fencing based on an agreed amount (up to \$25,000)
- Copies for QCAT and each party

- **Supporting documents**

- Notice to contribute
- Quotes
- A plan of the properties and the proposed work

Amount	Application fee
Not more than \$500	\$27.90
\$500 - \$1,000	\$71.65
\$1,000 - \$10,000	\$127.50
More than \$10,000	\$358.00

<https://www.qcat.qld.gov.au/matter-types/dividing-fence-disputes>

- Any written negotiations
- Photographs of:
 - the fence and the damage to be repaired
 - other commonly found fences in the neighbourhood

Case Example 2 – Overland Flow

- **Damage caused by overland flow during significant rain or flood events**
 - diverting or blocking the natural flow of water from landscaping, fences and walls
 - pool overflow caused by rainfall
- **Alteration of water flow by uphill owner**
 - Normally a downhill owner cannot hold an uphill owner responsible for overland flow
 - However, if the uphill owner alters the water flow, the downhill owner may have a claim for nuisance

Overland flow – Nuisance claims

- **Private nuisance**
 - Substantial and unreasonable interference with the right to the beneficial use and enjoyment of land
 - The owner does not have to create the nuisance in order for it to be actionable
- **Evidence**
 - Proof of cause of nuisance (e.g. expert evidence)
 - Proof of extent of interference (e.g. damage to the property)
- **Defences**
 - Prescription
 - Consent
 - Statutory authority
 - Contributory negligence

Overland flow – Nuisance claims

- **Remedies**

- Injunction to prevent the nuisance from continuing
- Damages
 - damage to property
 - diminution in value of the land
 - interference with the enjoyment of the land (even where no actual damage is suffered)
- Self-help
 - Normally only where entry onto another person's land is **not** required

- **Case example**

- *Turner v Kubiak* [2020] QDC 223

Case Example 3 - Retaining Walls and Town Planning

- **Damage to a retaining wall**
 - if on a common boundary QCAT has limited jurisdiction – “ancillary power”
 - who is responsible?
 - planning approval might be required – if over 1m high
- **Damage to homes**
 - building permits
 - planning approvals for particular types of houses and works to land
 - disputes in the Planning and Environment Court

Regulation of development in Queensland – *Planning Act 2016*

- **“Development” is regulated under the *Planning Act 2016* and includes:**
 - building work, plumbing and drainage work, operational work, reconfiguring a lot, and material change of use of premises
- **Building a house on a vacant parcel of land involves:**
 - a new use of the land (i.e. material change of use)
 - establishing of “building” on land (i.e. building work)
 - excavating and filling works (i.e. operational work)
 - installing plumbing (i.e. plumbing and drainage work)
- **Several approvals may be required – building approval, planning approval and plumbing approval**

Regulation of development in Queensland – *Planning Act 2016*

- **Planning approval – “development approval”**
 - planning schemes and the *Planning Regulation 2017* prescribe particular forms of development as “assessable development” (which require approval)
- **Planning Schemes – factors which influence whether an approval is required**
 - zone (e.g. Character residential zone)
 - overlays (e.g. Traditional building character overlay)
 - neighbourhood plan (e.g. Kangaroo Point Peninsula Neighbourhood Plan)
 - development codes (e.g. dwelling house code, traditional building character design code)
- **Considerations**
 - is it a complete rebuild or repairing an existing building?
 - is there damage to a retaining wall?
 - what about if there is significant damage to land (such as a landslide)?

Damage to a retaining wall

- **If retaining wall part of the dividing fence**
 - QCAT may be able to make an order for contribution between adjoining owners
 - depends if QCAT is making orders about the dividing fence itself – otherwise no jurisdiction
- **Why are retaining walls generally not covered? – *White v Steer* [2018] QCATA 30 at [15] to [16]**
 - “*Retaining walls serve quite different purposes from fences. They are usually substantial and extensive structures which repose within the subsurface of the land of one adjoining owner. Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work.*”
 - “*Generally retaining walls involve engineering specifications prior to construction. They are more than the mere levelling of dirt. Unlike fences, it is not usually possible to make both adjoining owners liable for the cost of maintaining, repairing or replacing a retaining wall. This is because usually a retaining wall is of greater benefit to one of the adjoining owners.*” (emphasis added)
- **Right to support land and buildings – s. 179 of the *Property Law Act 1974***

Damage to a retaining wall

- **Owner of the retaining wall likely to be liable for the cost**
 - depends exactly where the retaining wall sits
 - depends if the retaining wall has caused damage to another property

- **Repairing or replacing the retaining wall**
 - excavating and filling greater than 1m in most zones in Brisbane may require approval

Categories of development and assessment	Assessment benchmarks
Assessable development—Code assessment	
If <u>filling or excavation</u> , where resulting in a retaining wall greater than 1m or an increase in depth or height of the ground level or finished design level by 1 vertical metre or more	Filling and excavation code Operational work code

Source: City Plan 2014

Damage to a retaining wall

- **Development constraints – Filling and excavation code**

Performance outcomes	Acceptable outcomes
<p>PO1 Development for filling or excavation minimises visual impacts from retaining walls and earthworks.</p>	<p>AO1 Development ensures that the total height of any cut and fill, whether or not retained, does not exceed: (a) 2.5m in a zone in the Industry zones category; (b) 1m in all other zones, or if adjoining a sensitive zone.</p>
<p>PO2 Development of a retaining wall proposed as a result of filling or excavation: (a) is designed and constructed to be fit for purpose; (b) does not impact adversely on significant vegetation; (c) is capable of easy maintenance. Editor's note—A retaining wall also needs to comply with the Building Regulation and embankment gradients will need to comply with the Building Regulation.</p>	<p>AO2.1 Development of a retaining structure, including footings, surface drainage and subsoil drainage: (a) is wholly contained within the site; (b) if the total height to be retained is greater than 1m, then: (i) the retaining wall at the property boundary is no greater than 1m above the ground level; (ii) all further terracing from the 1m high boundary retaining wall is 1 vertical unit:1 horizontal unit; (iii) the distance between each successive retaining wall (back of lower wall to face of higher wall) is no less than 1m horizontally to incorporate planting areas.</p>

Damage to homes

- **Considerations**
 - repairs and re-builds will likely require a building approval
 - even repairs may also trigger a planning approval
 - ‘character houses’ in Brisbane
 - existing use rights
- **Traditional building character overlay**
 - codes that regulate design
 - codes that regulate demolition (partial and full)

Damage to homes

- **Traditional building character overlay (design) code**
 - **PO1:** Development retains buildings constructed in 1946 or earlier in its original setting and complements nearby buildings in the street built in 1946 or earlier.
 - **PO2:** Development for a garage does not dominate the street frontage or gardens and complements the traditional setting of residential buildings constructed in 1946 or earlier nearby in the street.
 - **PO3:** Development has a building form and bulk which complements the predominant traditional scale of a dwelling house constructed in 1946 or earlier nearby in the street.
 - **PO4:** Development has a building form which complements the traditional building form and traditional elements, detailing and materials of a residential building constructed in 1946 or earlier nearby in the street.
 - **PO5:** Development provides external elements and detailing which (a) reflect traditional elements and detailing and materials, (b) reduce building bulk and (c) form a transition with the external landscape.
 - **PO6:** Development uses (a) materials which reflect the traditional materials used predominantly in residential buildings constructed in 1946 or earlier nearby in the street, (b) external materials which reflect the architectural themes of residential buildings constructed in 1946 or earlier, reduce building bulk and form a transition with the external landscape.
 - **PO7:** Development provides roof forms which complement traditional roof styles of residential buildings constructed in 1946 or earlier that are located nearby in the street in terms of roof pitch and proportion.

Disputes

- **Development offences**
 - carrying out assessable development without a development permit (s. 163)
 - contravening a development approval (s. 164)
 - using premises for use that is not lawful (s. 165)
 - Maximum penalty – 4,500 penalty units
- **Enforcement tools to remedy the offence**
 - show cause notices and enforcement notices
- **Enforcement proceedings in the Planning and Environment Court**
 - any person may start proceedings in the P&E Court for an enforcement order (s. 180)
 - enforcement order may restrain an action being undertaken until an approval has been obtained
 - local Council may commence proceedings
 - a neighbour might commence proceedings

Disputes

- ***Baxter v Preston & Brisbane City Council & Graya Construction Pty Ltd [2021] QPEC 69***
 - dispute between adjoining neighbours on Reading Street, Paddington
 - Prestons developed their land for a large character home (building and planning approvals)
 - Baxter commenced proceedings in the P&E Court alleging that:
 - filling and excavation on the land required approval
 - building work for a swimming pool (including supporting structures) required approval from Council, not just a private certifier
 - 6 day trial
 - Prestons were successful defending the proceeding, however an application for leave to appeal was filed to the Court of Appeal on 31 January 2022
- **Enforcement Orders**
 - works to remediate land
 - overland flow

Summary – Retaining Walls and Town Planning

- **QCAT has limited jurisdiction for retaining walls**
- **Retaining walls likely to be the responsibility of one party (depending where it sits)**
- **Consider town planning advice for damage to retaining walls and homes**
- **Repairs and re-builds of homes will likely require a building approval**
- **Repairs and re-builds of homes may also trigger a planning approval (e.g. character houses)**
- **Beware of carrying out work without an approval – development offence & proceedings in the P&E Court**

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