

Retaining Wall Disputes in Queensland

Introduction

At BCLS we receive many enquiries about retaining wall disputes. Since the February 2022 flood and weather events in Queensland we have noticed an increase in enquiries from clients experiencing legal problems relating to retaining walls. The law regarding retaining walls is complex and you should obtain legal advice about your specific legal issue. This factsheet is of a general nature only.

A retaining wall is a reinforced structure that supports excavated and filled earth and maintains differences in ground level and sloped soil. If soil excavation or any other earthworks have been completed and soil movement must be prevented to protect the property, then a retaining wall must be constructed by law – see section 75 of the *Building Act 1975*.

Any drainage must also be carried out in a way that protects land, buildings, and structure. Landowners also have an obligation not to do anything that withdraws support from any other land or from any building, structure or erection that has been placed on or below it (s 179 *Property Law Act 1974*).



Under the Building Code of Australia, a retaining wall is classified as a non-habitable structure (class 10b) and will need to comply with certain building and design requirements as well as any relevant planning and zoning controls. Contact your local council if you have any questions regarding planning and/or building approvals as they vary across different regions.

How is a retaining wall different to a fence?

Retaining walls serve a different purpose than fences as they are engineered to support built up or excavated earth, rather than simply dividing adjoining land along a common boundary line. Retaining walls are also not normally a matter of joint responsibility as they usually benefit one neighbour more than the other.

The Queensland Civil and Administrative Tribunal (QCAT) does not typically deal with retaining walls. QCAT may only resolve disputes involving a retaining wall if it relates to necessary works on a retaining wall directly related to required fencing (section 35(f) of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*). Therefore, if works on the retaining wall are required to perform necessary works on a dividing fence, it may fall under fencing works. This may allow for the dispute to fall within the scope of what orders QCAT can make in respect of retaining walls.

What to do before building a retaining wall and how to prevent disputes

If your retaining wall is less than one metre high from the natural ground level, you do not usually need planning or building approval. Before constructing your retaining wall, you should ensure that you have:

- obtained the required Council and building approvals;
- speak with a qualified lawyer, town planner and or building certifier for advice specific to your retaining wall;
- undertaken a boundary survey or cadastral survey; and
- gained consent from any affected neighbours.

Generally, a retaining wall will not require a Council Development Application in Brisbane if:

- there is no surcharge loading over the wall's zone of influence;
- the total height of the wall and of the fill/cut retained by the wall does not exceed 1 metre above the wall's natural ground surface;
- the wall is no closer than 1.5 metres to any building, structure (including swimming pools), or other retaining wall; and
- the wall is built to appropriate construction standards under the Queensland Development Code.

Any walls that are greater than 1 metre in height will need engineer certification and council approval. You should make enquiries with your local council about whether your retaining wall requires approval before you begin construction.



In some instances and often with older properties, the existence of a fence line and/or retaining wall and/or fence line may not represent the actual boundary line. It is recommended that a determination on the actual boundary line be provided by way of a formal identification survey carried out by a QBCC licensed surveyor.

You should consider reaching out to your neighbours to agree on any aesthetic, maintenance, repair, or replacement concerns and obligations that may arise with respect to the retaining wall. When you and your neighbour agree on something related to the retaining wall, get it in writing.

Retaining walls should be constructed so that the whole structure is wholly within a single lot/land, including footings, posts, sleepers, and drainage layers. If the purpose of the retaining wall is to allow you to build up your land, the entire wall must be on your property. If the purpose is to allow you to 'cut' your land it must be wholly on your property.

Who is responsible for a retaining wall between properties?

When attributing responsibility for a retaining wall, several factors are relevant.

These include:-

- Why was the wall constructed?
- Who constructed the retaining wall?
- Who benefits or receives the greater benefit from the wall's existence?
 - Are you a higher owner whose built up soil is being held back by the wall? or
 - Is the soil being cut to allow you to level your land? or
 - Is it a case of half and half being for the advantage of both owners?
- Who is on the lower or higher ground?
- Who caused the damage?
 - Generally if someone caused the damage, this is the person that is liable.
- Where is the retaining wall located?
 - On one person's private lot or along a common boundary?



Landowners have an obligation to retain soil where it becomes necessary to do so. If you are building a retaining wall that will also serve as a dividing fence along boundary lines, the retaining wall will be your responsibility to build and maintain. This is because retaining walls will normally be solely for the benefit of one of the properties.

A common example is if you are on the higher ground and the wall is holding back your soil from your neighbour's property, you are then responsible for the retaining wall.

If the retaining wall is on your property, you are responsible for maintaining the retaining wall.

If the batter (receding slope of a wall, structure, or earthwork) is located on your property and needs to be replaced with a retaining wall, you will be responsible for the construction of the wall. Where the batter runs across two lots, such as across a common boundary, neighbours that have both altered the lots' ground levels should negotiate a proportional-based agreement. This should also be done where a retaining wall is required to support a dividing fence. Importantly, unlike issues relating to dividing fences and trees, there is no Act which governs rights and obligations of parties involved in retaining wall disputes.

How can I resolve my dispute?

1. If you have not done so already, consider reaching out to your neighbours to agree on any maintenance, repair, or replacement costs and obligations that may arise with respect to the retaining wall.
2. Get the land surveyed to determine the location of the retaining wall and fence.
3. If no agreement can be reached, invite the parties to attend a dispute resolution conference with the benefit of a third-party mediator to help identify possible solutions.

It is recommended that you obtain legal advice before you attend mediation. Options for mediation include:

- A private mediator;
 - A dispute resolution centre (you can find a centre closest to you on the Qld government website); or
 - BCLS Mediation service – contact our office for more information – (07) 3162 3282
4. Engage a lawyer to represent you and negotiate on your behalf directly with the neighbour (or their legal representative). Your lawyer will help you record the terms of any agreement and resolve your matter as efficiently as possible.

5. If the work to the retaining wall was necessary as part of broader fencing work, you can make a QCAT Application for minor dispute – dividing fences, seeking an order about fencing. This is the only jurisdiction QCAT has over retaining wall matters. It is an ancillary power only.

These disputes are generally resolved without lawyers, but determinations are nonetheless binding on the parties.

6. Initiate Magistrates Court proceedings against the neighbour to have a Judge rule on the matter. The Magistrates Court can hear disputes for claims up to \$150,000. It is strongly recommended that you obtain legal advice before filing court proceedings

If you are successful, you may be able to recover damages, legal costs, and other Court Orders that may be appropriate.

Where to get Legal Advice?

BCLS provides free legal information, referrals, advice and assistance about retaining wall matters. To make an appointment please see our contact details below.

Bayside Community Legal Service acknowledges the traditional owners of the lands across Queensland, and in particular the Quandamooka peoples, the traditional owners of this land where our Bayside community is situated. We pay our respect to elders past, present and emerging.

Contact Bayside Community Legal Service

Website: www.bcls.org.au

email: info@bcls.org.au

Phone: (07) 3162 3282

Office Hours: 8:30am-4:30pm Monday to Thursday

Address: Wynnum Community Centre, 105 Florence Street, Wynnum QLD 4178
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