

Fencing Local Law 2016 submission

Comment	Response
During a recent dispute with our neighbour regarding our residential dividing fence, I sought advice from a City officer who commented that the existing law was “clear as mud”. Unfortunately, that has also been our experience. While the Local Law appears to provide that adjoining owners should share the cost where a dividing fence is considered insufficient, it does not provide sufficient clarity around what constitutes a “sufficient” fence, how that determination is made, or what practical avenues exist to resolve situations where one neighbour refuses to meet their obligation. The current provisions leave residents uncertain about their rights and responsibilities and place City officers in a difficult position when attempting to provide clear advice. A Local Law should not only set out obligations, but should also provide a clear framework for determining when those obligations apply and what steps can be taken when neighbours disagree. In addition, the obligations of neighbours where their actions affect the integrity of a dividing fence should be clearly addressed. In our case, our neighbour has used our asbestos-containing dividing fence as a retaining structure. Their garden has been built up approximately 40 cm higher on their side of the fence, placing significant pressure on the structure and causing it to lean, deteriorate and break away in sections. A residential dividing fence is not designed to function as a retaining wall. Where a neighbour’s landscaping, changes in ground level, or placement of fill creates pressure on a dividing fence, the responsibility for providing appropriate retaining infrastructure and addressing any resulting damage should be clearly defined. I would like to see the following amendments to the Shire of Kalamunda Fencing Local Law 2016: - the meaning of a “sufficient” dividing fence should be clearly defined, including the circumstances in which an existing fence can reasonably be considered inadequate; - the process for determining whether an existing dividing fence is “sufficient” should be clearly defined, including who has authority to make that determination and what steps are available where adjoining owners disagree; - the obligations of adjoining owners to contribute to replacement of an insufficient dividing fence should be accompanied by a clear dispute resolution or enforcement pathway where one party refuses to comply; - the Law should make explicit that a residential dividing fence is not a retaining wall and cannot be used as such unless it has been specifically designed and constructed for that purpose; - a neighbour who creates a need for retaining works through changes to ground levels, landscaping or placement of fill is responsible for providing appropriate retaining infrastructure;	The purpose and effect of the local law, as prescribed by clause 1.5, is as follows: <i>(1) The purpose of this local law is to prescribe a sufficient fence and the standard for the construction of fences throughout the district.</i> <i>(2) The effect of this local law is to establish the minimum requirements for fencing within the district.</i> The submission needs to be viewed through the context of a dispute between neighbours over a boundary fence. It is not the purpose of a Fencing Local Law to provide a dispute mechanism, or a cost-sharing arrangement over installing a boundary fence. These mechanisms are provided by the <i>Dividing Fences Act 1961</i>. As an Act of Parliament provides the mechanisms referred to, a local law cannot make provision for those matters. Such a course of action would highly likely result in Parliament disallowing the local law for reasons of duplicity against Acts of Parliament. The <i>Dividing Fences Act 1961</i> places any resolution of a dispute over costs or fence obligations as a civil matter between the parties. The Fencing Local Law will only respond in circumstances where – - There is no fence at all; or - An existing fence is not a sufficient fence, as prescribed by the Schedules to the local law. Corresponding enforcement mechanisms exist for both of those. Similarly, where a property owner has altered ground levels, introduced retaining walls or has backfilled, this is not a local law matter, but a compliance matter under the <i>Building Act 2011</i> as retaining walls and backfill require building permits. The City has enforcement powers available to it where such works have been undertaken without a building permit. Contrary to the views expressed in the submission, the purpose of the Fencing Local Law is not for dispute resolution, as those mechanisms already exist, just in other legislation. Accordingly the amendments suggested by the submission are not supported.

- where a dividing fence is damaged, or its expected lifespan is reduced, due to the actions of one adjoining owner, responsibility for repair or replacement costs should be clearly allocated.

In our situation, our neighbour has refused to contribute their 50% share towards replacement of the damaged dividing fence, despite the circumstances that have contributed to its failure. The lack of a clear resolution pathway has left us without an effective means of resolving the matter and has placed the burden of addressing the issue entirely on us.

While I appreciate that fencing disputes can be complex, the purpose of a Local Law should be to provide certainty and prevent disputes from escalating. The current wording appears to leave too much room for interpretation, resulting in confusion for residents and difficulty for City officers in providing clear and consistent advice.