

TREES AND FENCES – you and your neighbour

Disputes over trees and fences are a common cause of bad feeling between neighbours – trees that block your sun, roots that choke your drains, fences that your neighbours want built or replaced, often at considerable expense. These differences can usually be settled with a combination of tact and compromise, but if you are forced into a stand-off, legal action may be your only way out. That could cost you anywhere from a few hundred to thousands of dollars (depending on whether you can take the matter to the Disputes Tribunal yourself or use a lawyer to go to court) and will most likely destroy neighbourly goodwill. This information sheet explains where you stand if a neighbour's trees or fences are causing trouble.

Please note you should seek legal advice if you are unsure of your rights and obligations under the Fencing Act 1978, or in respect of problem trees. This leaflet does not constitute legal advice.

FENCES

The Fencing Act 1978 sets out your rights and obligations for building a fence between your property and your neighbours'.

When can I ask a neighbour to contribute to the cost of a new fence?

Generally if you want to build a fence on a common boundary with your neighbour, or upgrade an existing fence, you can expect the neighbour to go halves on the bill for an "adequate fence". An adequate fence is one that is "reasonably satisfactory" for the purpose it is intended to serve. It is important to note that you can only claim half the cost from your neighbour if you have given them prior written notice that you are having the fence built, including details of how much it will cost.

What should I do?

Talk to your neighbour when you are at the

planning stage. Try to keep the proposal for the fence reasonable. They are entitled to object to your proposal if they disagree about what is an appropriate fence. If you fail to reach an agreement, or your neighbour refuses to agree to pay half, there is a formal process which you can follow. First you must serve your neighbour with a "fencing notice". The notice should state that it is served under the Fencing Act 1978. It should contain the names and addresses of both you and your neighbour. It must also describe:

- The boundary to be fenced
- The type of fence to be built
- Who will build the fence
- The estimated total cost
- How materials are to be purchased
- The start date for the work

You should use the suggested notice which is in the schedules of the Fencing Act (which also contains some useful



descriptions of various types of fences). Hutt City Council holds a copy of the Fencing Act for reference purposes, and you may also be able to find a copy of it in your local library or at www.legislation.govt.nz.

Time periods

The fencing notice must explain that your neighbour has 21 days to object to any aspect of your proposal, and to make any counter-proposals. It should also say that if your neighbour does not accept liability, you must be told within 21 days the reason why, and they must also give you the name and address of whoever they believe is liable to contribute to the cost (for instance if your neighbour is a tenant of the property, they must give you the owner's contact details). If that is the case, you have to start again and serve a new notice on the liable person. They will then have 21 days to reply. The fencing notice must also say that if you neighbour (or your property owner) makes no communication within 21 days, they will be considered to have agreed to the proposal, and will have to share half the cost.

Serving the notice

Before you give the notice to your neighbour, you must remember to sign and date it, and also keep a copy of it for your own records. You can deliver the notice to your neighbour either by registered letter or by giving it to them in person. This is called "serving the notice".

My neighbour doesn't want a new fence at all

Your neighbour must give you a "cross notice" within 21 days after you have given them your fencing notice. They are able to object to part or all of your proposal if they believe the existing fence is adequate, or if they think that your proposal is excessive. They can also object to being asked to pay if they don't own the property (as discussed above). A cross notice must be "served" on you either in person or be sent to you by registered mail. The cross notice must contain details of your neighbour's objection to your proposal, and details of any counter-proposals that they want to make. A cross notice should also state that it is served under the Fencing Act 1978. The notice should be in the same form as the "cross notice" included in the schedules to the Fencing Act.

If you cannot get agreement ...

If you and your neighbour can't agree between you, there are various options to resolve the issues. These include mediation (being assisted to reach an agreement through compromise), arbitration (having a third party hear both sides and make a decision that binds both of you), going to the Disputes Tribunal, or filing proceedings in the District Court. The method you choose to resolve your dispute is up to you and your neighbour. If you want to go through the Disputes Tribunal, the value of the half share of the fence cannot exceed \$7500.00 unless your neighbour agrees (then the half share can be up to \$12,000.00).

An alternative is that you could simply build the fence just back from the boundary on your own side of the property; however, you will have to pay for this yourself. Even then, your neighbour still has the right in the future to insist on a boundary fence being built.

Who gets to choose the type of fence?

If you can't agree on the type of fence, you will have to get the issue resolved through the means outlined above. But remember that your neighbour doesn't have to pay any more than half the cost of an "adequate" fence, so if you want something fancy, you will have to pay a larger part of the bill.

My neighbour has sold and I still want a new fence – do I have to issue a new fencing notice?

A new neighbour means a new chance for a friendly relationship, and you may find that they readily agree with your plans. If they don't agree, you will have to start the whole process again, beginning with giving them a new fencing notice.

My neighbour still objects to the fence and won't let the builder cross the boundary line while building the fence. Can the builder or I still go on to the neighbour's property?

The Fencing Act gives you limited rights to access someone else's property if the construction of the fence makes it necessary. However, this can only be done by getting a court order under section 26 of the Fencing Act. You can apply for such an order if it is too difficult for the work to be done from your side of the property. If you do get an order and go on to your neighbour's property, you

must do as little damage as possible, particularly to plants. You are only allowed to enter at reasonable times to do whatever is reasonably required to build the fence.

To avoid difficulties, it might be useful to raise the issue of access in your fencing notice. This way, if you have had to go to either the Disputes Tribunal or the District Court, you can ask for an order at the same time as the other issues are being sorted out.

Where should the fence go?

The fence posts should be placed right on the boundary line or as near to it as practicable. If it is the sort of fence which does not have any posts, the middle of the fence itself should be on the boundary line between the properties.

My neighbours destroyed the fence – do I have to pay for a new one?

NO! If your neighbours were responsible for the damage, then they have to pay the cost of replacing the fence with another adequate one.

A storm destroyed the fence but my neighbour is away and I need to get it repaired quickly. Can I ask them to help with the cost when they get home?

Yes. Immediate repairs can be done while the neighbour is away and you can recover half the costs. Remember, you should replace it with a comparable fence, and you cannot upgrade without the neighbour's agreement (but you can install an "adequate" fence).

Is there a limit on fence height?

You can usually build a fence up to two metres in height without the need to get planning consent or a building consent from the Council. However, you should always check with the Council first to make sure. It may be that you live in a special heritage area, or are affected by rules in the District Plan which mean that you cannot build a fence as high as this.

TREES

Section 333 of the Property Law Act 2007 makes property owners responsible for any nuisance or damage their trees cause to neighbours, even if the trees were planted before they bought the property.

Decide first whether the nuisance that the trees are causing is worth the risk of souring relationships with your neighbours. You also need to decide whether the problem outweighs the benefits that the trees give both of you – such as beauty, privacy, shelter and shade. These are the sorts of things that the court will look at if you end up taking the matter through the District Court.

Try to work out a solution tactfully. Give neighbours time to think about what you are suggesting. They might be quite happy to trim or relocate their trees, if it means saving them. It is better to talk over the back fence than in court.

If you reach an impasse, you may need to take legal action. If you do, tell your neighbour first. How would you feel if you received a court order in the name of your neighbour without warning?

Your neighbour may co-operate if there is a legal obligation for them to take some action. If you cannot work it out informally with your neighbour, you may need to take court action and you will have to ask your lawyer to apply to the District Court for an order. Your neighbour will have the opportunity to let the court know their views as well. It should be noted that the Hutt City Council does not have a by-law currently in place with regard to trees growing on private property. Therefore, we are not able to become involved in neighbourhood disputes over trees.

PROTECTED TREES

Some trees are protected and you may not remove them or damage them in any way without obtaining a resource consent. Tree protection includes the listing of significant trees in a District Plan and Heritage Orders or Consent Notices following subdivision under the Resource Management Act 1991.

There are substantial fines for ignoring these protections, so before you start cutting trees, check with the Council as to whether or not you need special permission.

ROOTS

The roots of a willow tree standing on another property continually block your drains. Twice in 18 months you

have had to get a plumber to clear them. The plumber has warned you that this will be a regular exercise and expense unless the cause of the problem is completely removed. Even worse it could mean that you have to get new drains. You approach your neighbour about having the tree removed. They indignantly point out that the tree was well established on their property long before you bought the one next door, and they have no intention of removing the tree for you and your drains. Have you any comeback?

Yes. The law does not accept that a tree planted 30 years ago cannot be a “nuisance” today. If all the facts in this situation were presented in court, the neighbour would probably be ordered to remove the tree.

Some of the roots on your neighbour’s macrocarpa tree start to push through your carefully manicured lawn. You ask your neighbour to do something about it but they say there is nothing they can do. You then ask them to have the tree removed. They are not prepared to do that. You decide to solve the problem by poisoning the roots on your side of the fence. Unfortunately the poison kills the tree and your neighbour threatens to take you to court for damaging their property. Can they do this?

Yes – the proper thing to do would have been to dig up and cut off the roots on your side of the boundary, or to take court action, rather than use poison that would lead to the death of the tree. You are allowed to remove any part of a neighbour’s property that intrudes into your property but your right to take action stops at the boundary line between your property and your neighbour’s. Using poison that would have an effect beyond your side of the boundary is illegal.

LEAVES

A neighbour’s oak tree continually drops leaves in the guttering of your house, forcing you to climb a ladder every few weeks to get the leaves out. Do you have to suffer this inconvenience?

If the branches causing the problem are growing over your side of the fence, you are allowed to prune them back to the boundary. If not, you can ask your neighbour to cut back the trees or remove them. If the neighbour disagrees, you could try and get a court order to solve the problem.

A large conifer growing on the other side of your back fence is obviously dying. You are concerned that at any time the tree, or part of it, could fall on your house. You ask your neighbour to do something about it. They tell you to mind your own business as the tree is doing no harm and in their opinion is unlikely to fall down on you or your house. But you are not convinced. Can you have the tree chopped down?

Yes, but first you must apply for a court order to have the tree removed. If the court agrees that the tree is likely to damage your house or cause a danger to anybody, the neighbour will have no choice but to cut it down once the order is made.

BRANCHES

You buy a section. There is a large chestnut tree growing on the property next door, with branches growing over your side of the boundary fence. The law allows you to cut off the branches on your side, but they are long and thick, making it a major operation. Is your neighbour obliged to do the work or pay for it to be done?

No. Provided the branches are not causing any real nuisance, they are your responsibility if they are growing on your side of the fence.

You remove a large branch from a neighbour’s plum tree that is growing over your property. This is quite legal but unfortunately the result of this “amputation” is that the neighbour’s tree dies. Can your neighbour demand compensation?

No, you were within your rights when you cut off the branch on your side of the boundary, as long as the method you used was reasonable. It might be that any resulting damage to the tree was the neighbour’s fault anyway, because they should have pruned the branch back when the tree was young (so that the life of the tree was less likely to be affected).

If the branches of your neighbour’s tree encroach on your land (or the roots are causing a nuisance), you can cut them back to the boundary line. In law this is called “abatement”. But unless you have your neighbour’s permission, you cannot thin the whole tree yourself or trespass on your neighbour’s property to chop down a tree growing on the boundary between the properties without an order from the court.

Remember that the parts of the tree removed (including any fruit) belong to your neighbour even if they hang or fall over your property. If you need advice, ask an independent arboriculturist (a “tree doctor”) for an assessment – some will provide this advice free if they are likely to get the work. If you don’t want to trim the branches yourself, or cannot reach agreement with your neighbour, you will need to get an order from the District Court for the tree to be trimmed or removed.

SUNLIGHT

Trees on a neighbour’s property are blocking sunlight from your house and garden. Is this a good enough reason to ask that they be cut back?

Yes. Talk to your neighbour and try and find a solution both of you can live with – does the tree really need to be chopped down? Could it be thinned? A mutually agreed solution is always preferable to a lengthy, costly and potentially bitter legal battle.

VIEWS

When you bought your home 10 years ago, you had a great view from your lounge window. Now a line of trees has grown high enough to block your view completely. The trees are not on your immediate neighbour’s property but on property further down the street. Can you do anything about having them cut back?

It does not matter if the trees are on a neighbour’s property or one further away. First, you should try approaching the owner of the property where they are growing – they may agree to trim the tops of

the trees. If not, you will need to seek legal advice about taking the case to court to try and get an order – Remember, this may be costly, and you may not win.

FRUIT

Fruit trees growing on your property branch out over your neighbour’s. The neighbour picks all the fruit growing on their side of the fence – can you do anything about it?

Yes. A neighbour must not take your property, even if the branches are hanging well over your neighbour’s section. The fruit on them still belongs to you. However, the neighbour could exercise their right to cut off the branches which are “intruding” on to their property. Try working out a compromise with your neighbour.

WHO PAYS?

If you have roots or branches cut back on your side of the boundary, you will probably have to pay. If you have applied for a court order, the presumption is that you will pay for the work to be done, although the court is able to make the other party pay if this is fair.

However, if the tree does damage to your property, the neighbour may have to pay – both for cleaning up the mess and making good on the damage. This is true even if the damage is caused by something beyond their control such as a storm, but only if they should have known their tree was unsafe and they had had the opportunity to make it safe but had chosen to do nothing about it.

ACKNOWLEDGEMENT

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