



# WHY ARE YOU ON MY LAND?



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## Property easements are forever (almost)

**P**roperty ownership has become more complex as our living lifestyles have evolved. For example, in the suburbs, large green electrical transformer boxes or telephone boxes can be seen on front lawns. In urban areas, there are power lines running parallel to fence lines in backyards or shared driveways. On ravine lots, conservation easements can be seen restricting interference.

Easements can be granted in several forms: by deed, by prescription (i.e., prolonged, uninterrupted use, etc.), by implication, and by statute. Once obtained, they will continue until such time as they are extinguished, which can be achieved in writing, when the dominant tenement and the servient tenement are owned by the same party, or by statute.

### EXPRESS GRANT

An express grant means that the right of way has been expressly granted and will be registered on title in the Land Registry Office. Generally, an express grant occurs when the owner of the servient property grants an easement to benefit another property or properties. A typical example of this is when a property owner severs a lot and creates a mutual driveway between the properties. When the property is split, the express grant will be registered on title. Like all interests in land, this must be done in writing, since verbal grants are not acceptable. Easements should be registered on title of both the dominant land as a 'together with' in the thumbnail description and the servient tenements should be registered as 'subject to' so that the easement is properly recorded.



### IMPLIED GRANT

The implied grant is a legal doctrine, which provides that an easement will arise because it is necessary for the use and enjoyment of the property. For example, take a property owner who owns a lot and proceeds to sever it, but this time does not register an easement for access and the severed lot is landlocked. There will be an implied easement for access, as access is necessary for the use and enjoyment of the land

### EASEMENTS OF PRESCRIPTION

A prescriptive easement arises when a right is enjoyed for 20 years without interruption or consent by the servient landowner. There are specific legal requirements before the court will consider a right to be enjoyed without consent or interruption. For example, an easement by prescription cannot arise if the servient property owner provides the dominant user with permission every 20 years.

It should be noted that easements by prescription are limited to those properties registered in the Registry system, as opposed to the land registered in the Land Titles system, since a prescriptive easement cannot be formed on land registered in Land Titles. That said, a prescriptive easement, which first arose under Registry, can continue if the property has been converted to the Land Titles system.

### EASEMENT CONCERNS

An easement may not be used contrary to its intended benefit when it was created. For example, an easement for foot travel does not include vehicle access. If the servient owner complains about an increase or expanded use of an easement, the courts will resolve the matter by deciding whether the

current use was within the original contemplation of the parties when the easement was created. Thus, it is important to see the precise language of the easement and, when it is being drafted, to ensure that it captures all of the intended uses.

### ANCILLARY RIGHTS

Ancillary rights recognize that an easement may also include specific rights to make the easement meaningful. For example, an easement to access island properties will include the right to install a dock and a vehicle turn-around area, even though the easement does not specifically provide so. The ancillary right must be necessary for the easement and not just convenient or reasonable.

### EXTINGUISHMENT

Easements are not easily removed. Non-use by the dominant owner is not sufficient to be considered a release of easement. There must be some action by the owner of the dominant tenement that demonstrates an intention to abandon or terminate the easement, and only the dominant tenement can be the one to release the easement.

An example of extinguishment of an easement is where an owner of a dominant tenement does not use a right of way for many years, and subsequently plants trees and installs a fence to block the easement. Also, easements may be extinguished if the servient land and easements are expropriated by a third party, or if the dominant tenement and servient tenement are owned by the same party.

### REMEDIES

Abatements and actions are two methods available to provide remedies for disputes over easements. Although

not the preferred approach, an abatement allows one party to remove the obstruction to the easement.

Examples of this would be where the owner of a dominant tenement removes an obstruction from a right of way, or the owner of the servient tenement removes any cause of increased traffic on the easement. By far, relief by action is the preferred remedy and can produce damages (monetary benefits) or an injunction to prevent further breaches to the terms of the easement. The moral here is to not engage in self-help remedies, because, if they are wrong, they create a worse position.

### CONCLUSION

Easements are historic, nuance-riddled real property issues whose existence is to protect property rights by ensuring all people have the reasonable enjoyment of their land and can be provided with crucial services, even if it involves other properties. If owners of an easement right or a dominant tenement want to know their rights or obligations, they should start with what the registered easement provides for. From there, or if nothing is registered, they should seek legal advice.

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