

EASEMENTS

An easement is a right granted by an owner of land (servient tenement) to the owner of a parcel of land for the benefit of the land (dominant tenement) to enter and use the land for a non-exclusive purpose, example, a right of way by the owner of a dominant tenement over the servient tenement.

There are four (4) essential conditions required to be satisfied in order to create an easement.

1. There must be a dominant tenement and a servient tenement.
 - a. A dominant tenement is lands for the benefit of which an easement exists.
 - b. A servient tenement is lands which are subject to the burden of an easement existing for another parcel of land.

2. A dominant tenement and servient tenement should not be owned by the same person, that is, there must be separate ownership. If two parcels of land are owned by the same person then an easement cannot be granted over his/her own lands. However, where a person owns separate parcels of lands in two capacity, example, in capacity as executor and the other as beneficial owner an easement may be granted as tenements are not owned by the same person with the same rights.

3. An easement must benefit the lands which are described as the dominant tenement, that is, it must have a natural connection with the estate being for its benefit. A right that benefits the registered owner is not an easement.
4. The right, the subject of the easement, must be capable of forming the subject matter of a grant.

Additional elements

1. The lands need not be contiguous.
2. All owners of the both lands must be a party to the easement. There must be a capable grantor (capacity to make the grant) and grantee (capacity to acquire the grant).
3. The easement must specify the land benefiting and burdened by the easement and any conditions affecting the easement.
4. If an easement is granted or benefiting a life tenant or lessee the interest cannot extend beyond the interest of the grantor or the grantee. (It expires on the determination of the life estate or leasehold).
5. An easement may be created in a transfer or lease granting such an easement. Section 93 of the Registration of Titles Act enables the grant of a right of way in a transfer by reference to the Third Schedule.
6. The rights created in an easement must be reasonable definite. If uncertain or vague it might not constitute an easement.

An easement runs with the land which enjoys the benefit, therefore, when the land is transferred the new owner acquires the benefit. Such easement is a legal estate in the land unlike a licence which is purely equitable.

EXAMPLES OF AN EASEMENT

- Right of way for pedestrians or motor vehicles;
- Right to take water from a well or spring;
- Right of light;
- Right of air (example along a defined channel);
- Right to maintain and service utilities;
- Rights of support of land;
- Use of a letterbox, lavatory, kitchen

The category of easements is not closed. It is possible for new easements to be created.

Extinguishing an Easement

An easement may be extinguished by:

1. express release by registration of a transfer releasing the easement;
2. by a order of the court which has the power to modify or extinguish an easement;
3. Unity of ownership;

4. Alteration of the dominant tenement in such a manner that the easement is no longer necessary;
5. Implied release such as abandonment of an easement;
6. Agreed event or time.

An easement may be varied by both registered owners of the dominant and servient tenements, the terms of the variation must be expressly stated in the instrument.

Easements by Prescription

Where there has been a long and extended use of land (twenty years; Section 2 of the Prescription Act) over another person's land that has the characteristics of an easement in theory an easement may be created by prescription. It should be shown that the servient tenement knew of the easement, was under no disability to object and did not take the steps to prevent the exercise of the easements.

If the registered owners wish to have the right recorded on the Certificate of Title it may be necessary for them to apply to the courts to have the easement defined in terms of the nature and extent of the easements. (Section 9 of the Prescription Act).