

Easements & Rights of Way

Note: For the purpose of this fact sheet the term easement includes a right of way.

What is an easement or right of way?

An easement is a right enjoyed by the owner of land over the lands of another, such as:

- rights of support
- rights to a flow of water, sewer, power, etc.
- rights of way

An easement or right of way is a contract made between parties to give an individual, a company, a council or other authority (grantee) the right to use a landowner's property (grantor) for a particular purpose. While an easement or right of way grants rights, it also has the effect of partially restricting a landowner's use of that part of the land affected by the easement or right of way.

Most easements are registered on the title of the property and remain as the land is bought and sold. They remain on the title until both the grantee and grantor agree for them to be removed. There are certain 'statutory easements' that may not be registered or defined on a title. These easements include electricity, sewerage and telecommunication easements.

For example, if you own property and SA Water has a sewer pipe positioned under your land, it is likely that they will have a registered easement on your title that will guarantee them access to the pipe in the event of any maintenance, repair or replacement being required. It is suggested that 'Dial Before you Dig' be contacted on 1100 before excavation begins to reduce the likelihood of damage to underground services.

Who owns an easement or right of way?

The grantor continues to own the land and has only given up certain rights on that part of land used for the easement. The grantee is permitted access to an easement and holds certain rights regarding usage of the property described in the easement document. The rights of use are described and can be restricted by the terms (covenants) set out in the document.

What are they used for?

Easements can be created between the grantee and grantor for many purposes including:

- Pathways or walkways
- Supply of electricity
- Supply of gas
- Access Roads
- Right to park a vehicle
- Sewer and water mains
- Party walls

Does a landowner get compensation for an easement or right of way?

The landowner granting the easement can receive payment or compensation at the time of creation and this is usually open to negotiation between the parties.

Can a landowner refuse to provide an easement or right of way?

Yes, a landowner can refuse to grant an easement or right of way over their property, however a statutory authority i.e. SA Water may acquire an easement without the landowner's consent. If the landowner agrees to grant an easement over their property, the appropriate documentation prepared by a registered conveyancer or solicitor must be lodged with the Lands Titles Office to create the easement. Once granted and registered, the landowner cannot refuse the grantee his or her use of the easement.

Can an easement or right of way be removed from my title?

An easement can be removed if the grantee and the grantor agree and the appropriate documentation prepared by a registered conveyancer or solicitor is lodged with the Lands Titles Office. Sometimes if no agreement is reached, and the easement is no longer required or used, a Court action may be required for it to be removed from the title.

How do you know where an easement or right of way is?

A plan may be lodged with the Lands Titles Office that will provide distances to locate the easement. The easement may be described on the diagram that is attached to your title. A landowner can contact the holder of the easement for any relevant information. Alternatively, in the case of extensive easements, the services of a Surveyor can identify and locate the easement.

Will building approval from my council include information about easements?

The council should take into account any existing easements or additional easements required by the proposed development. Landowners (and their agents) should carefully consider the implications of easements before they build or apply for development approval by checking their title to the land.

What effect does an easement or right of way have on the value of my property?

Each situation is different. The value of property 'subject' to the easement may be affected by restrictions on the use of the land resulting from the easement. On the other hand, if the property has the right to use someone else's land, this is usually a benefit and may increase the value of the property having the 'together' rights. Prospective purchasers should consider the effects of easements on the property before a contract is signed.

What kinds of restrictions can an easement or right of way cause?

Any building/structure that impedes access to the easement by the grantee may be prohibited. For the same reason a right of way should not be fenced off to prevent access for those entitled to the benefit of the right of way. All landowners should enquire about any easement agreement prior to undertaking any major construction or alteration to their property. It is suggested that information provided by the parties concerned should be in writing to avoid any misunderstandings. Alternatively, contact the owner of the easement as other restrictions may apply e.g. SA Water has a tree planting guide.

What are the consequences for buildings or improvements over an easement?

The landowner may be faced with all costs for removal of the building or improvements and any associated damages resulting from the unauthorised location of building or improvements on the land that is subject to an easement.

Who maintains the property subject to an easement or right of way?

In the case of an easement being granted, the grantee is generally responsible for the maintenance of the pipes, pumps, electrical cables etc. In the case of a right of way being granted the benefiting party is generally responsible for the maintenance of the right. However, unless the granting document specifies this information then the question of maintenance is one that must be negotiated between the affected parties.

What is the meaning of Free and Unrestricted Right of Way?

This terminology is set out on numerous titles and refers to the short form of describing the 'right of way' set forth in Schedule 5 of the *Real Property Act 1886*. Schedule 5 contains the following description – A full and free right and liberty to and for the proprietor or proprietors for the time being taking or deriving title under or through this instrument, so long as he or they shall remain such proprietors, and to and for his and their tenants, servants, agents, workmen, and visitors, to pass and repass for all purposes, and either with or without horses or other animals, cart, or other carriages.

Where can I find more information about easements or rights of way?

For existing easements, the first source of information is Certificates of Title or plans and documents registered at the Lands Titles Office. Once the easement is identified, the next source of information is usually the holder of the easement. If you wish to have an easement over someone else's land, or remove an easement, then you should seek advice from a solicitor or registered conveyancer.

For further information please contact

Land Services Group at:

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