



EASEMENTS – RIGHTS OF WAY

➤ What is a right of way?

A right of way (ROW) is simply a right to pass over part of a property. Generally there will be a servient tenement and a dominant tenement; the servient tenement being the property granting the right and the dominant tenement is the property which is granted the right of way. The dominant tenement has the right to pass and repass over the easement for some purpose connected with the use or enjoyment of the dominant tenement. A right of way will be, in nearly all cases, a defined area on the ground.

➤ Right of way use:

Any person who is expressly or implicitly authorized to do so by the granting of the easement is able to use a right of way.

➤ Limits of rights:

A right of way may be general or limited. Where the right is general there are no limitations on its use but a limited right of way may have some limitation placed upon it. These limitations may be as to time of use, the type of traffic on it (such as pedestrian only) or the persons that are entitled to use it.

➤ Right of way creation:

Under s348 of the Local Government Act 1974 no person may lay out or form a right of way without the prior permission of the district council. In granting their permission the council may impose conditions such as widths, levels, formation type or the number of buildings which may use the right of way. In essence, an application will need to be submitted to the district council in order for the approval to be given.

Under current legislation a right of way easement must be marked on the ground by survey and the survey plan approved by the General Surveyor when created.

➤ Access lots:

An access lot is generally created as a simple and tidy means to access rear properties which do not have direct road frontage. The access lot is a separate lot owned by all parties which require access from it as Tenants in Common. A right of way easement is often registered over the lot as a legal mechanism to manage the rights and responsibilities associated with the land.

➤ Right of way maintenance:

Under s126B of the Property Law Act 1952, on granting of an easement several rights, are implied. This includes the right to reasonable contribution from other occupiers towards the cost of establishment, maintenance, upkeep and repair of the driveway to an appropriate standard. There is also the right to recover from the other occupiers the cost of repair due to any willful or negligent act by them or others invited by them or simply by their use of the right of way.



➤ **Right of way removal (extinguishing a right of way):**

An owner of the dominant tenement may surrender the easement by executing a memorandum of transfer to the owner of the servient tenement, relinquishing their rights to the easement. If the tenement is subject to a mortgage, then the surrender cannot occur without the consent of the mortgagee.

If the right of way has been created subject to conditions made by a territorial authority a right of way cannot be extinguished without first obtaining a resolution from the territorial authority under s243(a) of the Resource Management Act 1991.

FAQ

➤ **Is my driveway a right of way?**

If another party is entitled to access their property from your driveway, then it is likely that there is a right of way easement. If no other party needs to use the driveway, then it probably isn't a right of way.

➤ **How do mutual rights of way work?**

Mutual rights of way are a common means of access for rear sections. Effectively, two or more properties have long strips leading together towards the road frontage. The combined width of these strips will at least meet the minimum requirements for driveway width and will encompass the formation of a driveway. Each party will have a right to cross the other party's area of the drive so giving them all a practical and legal means of access to the road.

➤ **How is a right of way different to a service lane or private road?**

A right of way is intended for specific persons to use, being the owners, tenants, friends and family, tradesmen and others required for the use and enjoyment of the dominant tenements. A service lane is essentially a road, vested in the district council, and is free for use by anyone. A private road is owned as tenants in common by the owners of the properties it serves and is not vested in council but is still intended for the use of the general public .

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