

GUIDE TO RIGHTS OF WAY



Welcome to Law North and Swift's GUIDE TO RIGHTS OF WAY

Rights of Way are extremely common but, in our experience, are often misunderstood. This guide will help you understand some of the finer points of how they work.

INTRODUCTION

A Right of Way typically gives one landowner the right to use another's property to get to and from their land. This is usually in the form of a road or driveway, but could also be in the form of pedestrian access.

What is a 'Right of Way'?

The two key terms to understand when considering a Right of Way are:

- a) **Benefitting Land (previously known as Dominant tenement)**
This describes the landowner who has the right to use the Right of Way. This person could be better described as the "user".

- b) **Burdened Land (previously known as Servient tenement)**
This term is used to define the owner of the land over which the Right of Way runs.

A Right of Way exists when the appropriate document has been registered against the title to the burdened land (owner's) recording that the benefiting land (user) has the right of access over an area defined on a plan. This plan will have been registered in the Land Registry. The area will normally be described by reference to "the area marked A" (or some other letter) on the plan. The document may also create other easements such as electricity, water etc at the same time.

How do you check whether a Right of Way exists?

The Certificates of Title for both the owner's and user's properties needs to be searched. In most cases it will be necessary to also search the plan of the Right of Way and the document that created the Right of Way.

Armed with these documents, you and your Lawyer can check whether the Right of Way exists, the area to which it applies and any rules governing its use.

Rules of the Right of Way

Most Right of Way documents do not have their own rules but have adopted rules provided in the laws of New Zealand (Statutes), using the rules in the Property Law Act and Land Transfer Act and Regulations.

They provide that the user has the right to pass over the owner's land and the owner is obliged to keep the land clear of obstructions to allow this to occur. The user can only pass over the land and not stop or park on it.

The standard rules provide that a shared Right of Way will be maintained by the Users and the owner (if used by the Owner) and the cost will be shared equally. This can lead to disputes between users regarding the extent to which the Right of Way is used by each. We believe it is worth recording more detail in the rules when Rights of Way are created, more on this later.

The owner of the land has limited use of the Right of Way area and is often obliged to keep it tidy but not able to put

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it to any use. The Right of Way is often far wider than the formed accessway and the user can require the owner to keep the whole area clear, unless there are rules in the Right of Way providing otherwise. This can place plantings, gateways etc at risk.

Right of Way disputes

There are numerous difficulties with Rights of Way. We do not have the space to record the disputes that have arisen, however some of these are: the owner's rights to cattle stops, gates, fences etc, the owner's rights to plantings, the width of formed carriageway, the type of roadway, the hours of usage and by whom it can be used, maintenance, cost of creation etc.

What can be done?

If you are the owner of land creating a Right of Way, you should consider limiting the rights of the user. If you do not provide limits, the law provides "**full, free, uninterrupted right of access**". This means that you may not be able to place anything on your land or carry out any plantings. Imposing rules is important if you also use the area and require a certain type of driveway, or landscaping etc. These rules must be in the right of way document.

It must also be remembered that a Right of Way is forever and circumstances can change. While the original Right of Way may be intended for residential use, changes in the area can lead to different uses. Subdivision will often increase the number of users; do you need to limit the number of users etc?

The rules should include provisions regarding formation and maintenance and endeavour to cover future requirements.

In our experience, subdividers do not document the rules for the Rights of Way or access lots appropriately. When planning the subdivision, the creation of an appropriate set of rules should be discussed with your lawyer. These rules can then be circulated to proposed buyers. Many subdividers spend a lot of time considering covenants for the use of the land but forget about the Right of Way. It is often the Right of Way that causes problems in the future.



Access Lots

This guide is aimed at Rights of Way, however similar comments apply to access lots. These are access strips owned by a number of landowners (eg 1/6 share each); very often these are created with no rules regarding use, maintenance etc. If your subdivision has an access lot, please discuss this with us.

Conversion of a Right of Way to a road

A subdivision often creates a Right of Way or access lot. While at that time there is no intention to transfer this area to a Local Authority as road, this may become appropriate in the future. When the owner of land wishes to vest it as road, anyone with easements, including Rights of Way over that area, must consent. A landowner can accordingly be held to ransom by the user. It is essential the original Right of Way document includes suitable provisions to allow the area to be created as a road in the future.

S U M M A R Y

While Rights of Way seem simple, they have the ability to cause long term problems and serious disputes between neighbours. As with all disputes, prevention is the cure. We therefore recommend the imposition of appropriate rules in the right of way from the outset.

Please discuss your requirements with us by contacting our office on 09 407 7099 or emailing info@lawnorth.co.nz



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