Easements

Easements grant rights over land belonging to someone else that bind current and future landowners. With some easements being created inadvertently from the use of land, purchasers are advised to investigate thoroughly before purchase.

Lesley Robinson explains the issues involved

An easement is a legal right benefiting property or a piece of land (known as the dominant land) that is enjoyed over another piece of land owned by somebody else (servient land). An easement consists of more than a mere personal permission or licence. Often the dominant land will lie adjacent to the servient land. An easement, unlike a licence, not only binds current landowners, but also subsequent owners of the land. It is a right over land belonging to someone else, but it is not a right to possession or even joint use of the land. Easements are significant as they provide a useful way to acquire additional rights that may benefit a piece of land and possibly enhance its value, but an easement may also affect the way a landowner can use his property and could have a detrimental effect on the value of the land or property.

A common example of an easement is one that allows the owner of the dominant land to do something on the servient land. Typically this might be a right of access such as a right to use a footpath or private road on a neighbouring piece of land. These are known as positive easements, that is there is a positive right in favour of the dominant landowner to ‘do’ something on the servient land.

Less commonly, there are negative easements which prevent a servient landowner from doing something on their own land. An example of this is an easement preventing the landowner over whose land the easements exists from building a property that would interfere with the dominant landowner’s right to light or right to park.

An easement can be created expressly or by implication. An express easement will be created by deed, and is normally registered at the Land Registry (exceptions will apply where the land is unregistered, which is now quite rare). Registration means that any purchaser of the land affected by the grant of an express easement will be aware of the right over the land he is buying.

In the absence of an express easement, an easement has to be implied from the surrounding facts. The issue has been considered by the courts, including how the land has been used and enjoyed over a period of years, and can be created inadvertently. In the event of a dispute over whether an easement exists or the extent of the easement, relevant factors will include whether the easement is one of necessity, such as the only means of gaining access to a property, or the common intention of the parties. Ideally, when land is being sold, especially if it is a sale of part, the easements should be set out in the contract or lease to avoid the possibility of the easement being challenged as to whether it exists or the extent of the easement created. The problem with an easement that is implied, is that it could end up being wider than originally intended or more restrictive than needed.

It is important that proper investigation is conducted into what rights exist over the land before a transfer of ownership is completed. The implications for the owner of land affected by easements that were not properly investigated can be disastrous. Similarly where an easement is being provided, legal advice should be sought in order to ensure that the right is sufficiently defined, and that it achieves the purpose intended.

Easements have come to the fore recently in relation to parking rights that have prevented a landowner from developing its land. A right to park on servient land may exist for a fixed period of time, which could preclude the owner from being able to use the land or part of his land at the same time for any other purpose. A right to park, particularly if it is a right to use a specific parking space or to park a defined number of cars which could take up all of the servient owner’s land, is a right creating an exclusive use of the land in favour of the dominant owner which can create problems.

An easement should not confer exclusive possession or prevent the owner from making reasonable use of his land or property; otherwise it might lead to a longer, more defined interest being created, which could be difficult to bring to an end, even after the end of any fixed period. Each case will depend on its facts. The issue has been considered by the courts,
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but the view prevails that an easement to park – even though it may prevent the owner from being able to use most of his own land for long periods of time – is still a valid easement. A key factor is whether the rights enjoyed by the owner with the benefit of the easement are for a limited purpose, so as not to be inconsistent with the rights of the owner of the land over which the easement is exercised to retain legal possession and control of the land. If the landowner is able to still use the land for other purposes, such as erecting advertising hoardings or being able to build on other parts of the land or above or beneath the area over which the right exists, however difficult, he retains control and the right will be an easement.

Where an easement exists, the landowner will be prevented from being able to require the beneficiary of the right to move elsewhere, such as to another parking space, to use another means of access or to extinguish the right altogether unless there is an express right to do so. This could have serious consequences for any development plans the landowner may have.

In summary, always check the registered title of the property you want to buy. It is also advisable to go and see the property yourself or instruct an agent or surveyor to do so on your behalf in case there are any tell-tale signs that might indicate an easement exists which could affect your plans.

Find out more
There is (very) detailed guidance on easements from the Land Registry at http://www.landregistry.gov.uk/professional/guides/practice-guide-62. For specific advice, please contact a member of the Property team http://www.bwbllp.com/services/property/