



## **DEVELOPING WITH DRAINAGE JUST HOW EASY ARE DRAINAGE EASEMENTS?**

by  
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**Usually when you wish to develop land, there will be some impact on adjoining properties. Sometimes you will need to run sewers through another property or perhaps you need some permanent vehicular access.**

You have just had your architect finish the plans for the perfect development and within 40 days of lodgement of your development application with Council your development will be underway. How certain are you that the intended drainage easement sketched on the plan will be granted by the burdened landowner and if you cannot agree on terms is your development doomed? In response to situations such as this, statute, common law and even planning procedure have adapted to provide three main remedies for the would be developer.

### **Easements of Necessity**

An easement of necessity will arise in certain circumstances where land is landlocked, so that without the easement there will be no access to the land.

The court held in *North Sydney Printing v Sabemo* that the doctrine did not depend on any rule of public policy but only arose to give effect to the actual or presumed intention of the parties. In this case North Sydney Printing subdivided land which it owned and sold part of the total land. The remaining land had no access to public streets and was zoned "reserved for special uses parking". North Sydney Printing attempted unsuccessfully to sell the land-locked parcel to the local council. North Sydney Printing then claimed it was entitled to a right of way of necessity over the land sold.

As the facts of that case showed that the plaintiff had been the author of its own problem, no relief was given.

If the necessity subsequently ceases, such as the servient land owner acquiring alternative access to his land, there is authority for the proposition that the easement of necessity thereupon ceases. There is, however, also judicial comment the other way.

It is quite clear that an easement of necessity cannot be maintained under Torrens system land because of the indefeasibility provisions of the Real Property Act. Such an easement may, however, be binding on the original transferee.

In an earlier case there was no road access, but there was access via the Macleay River it was held that the existence of legal access does not necessarily exclude the implication of a way of necessity, but that the locality, the use and potential use of the land and factors such as water access are relevant, though not conclusive. On the facts before the judge, he held that a way of necessity should not be implied.

In short, this form of easement has no legislative backing. However, it may be upheld on application to the court if the elements of the necessity can be made out. In such circumstances the owner of landlocked property would be well served to also satisfy the elements of section 88K of the Conveyancing Act in order to bolster his odds of success.

## **Easements Created by the Court**

Section 88K of the Conveyancing Act 1919 was enacted in 1995. The section empowers the court to make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement. Such an order may be made only if the court is satisfied that:

- (a) use of the land in accordance with the easement will not be inconsistent with the public interest
- (b) the owner of the land to be burdened by the easement and each other person having an estate or registered interest in the land can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
- (c) all reasonable attempts have been made by the applicant for the order to obtain the easement, or an easement having the same effect, but have been unsuccessful.

Section 88K came into operation on 12 February 1996. Since then, there have been a considerable number of cases on the operation and meaning of the section.

A recent case has sought to draw a number of principles from the earlier decisions as follows:

1. The words “reasonably necessary” in section 88K(1) do not mean “absolutely necessary”. The requirement may possibly be satisfied even when the plaintiff’s land could be effectively used or developed without the easement.
2. The proposed easement must be reasonably necessary either for all reasonable uses on developments of the land or for one or more proposed uses or developments which are at least reasonable compared with the possible alternative uses and developments.
3. In order that an easement be reasonably necessary for a use or development, that use or development with the easement must be at least substantially preferable to the use or development without the easement.
4. The continued use of the word “necessary” means something more than mere desirability or preferability over the alternative means available. It is always a matter of degree.
5. Reasonable necessity is to be determined objectively. The question of reasonable necessity has to be decided in the light of the present circumstances, taking into account the factual position at the time of the making of the order as opposed to the court being confined to taking into account only the facts at the time the court proceedings were commenced.
6. The application should be approached with caution, having regard to the fact that a compulsory change of registered property rights is sought and that this is not to be undertaken lightly.

It has been held that the compensation must be assessed “by applying common sense to the facts of each particular case”.

Section 88K(5) provides that the costs of any proceedings under the section are payable by the applicant subject to any order of the court to the contrary.

## **Pump Alternatives to Easements**

In some circumstances an applicant has limited prospects of success or may have failed in obtaining either an easement of necessity or an easement under section 88K. Alternatively, the council may exercise its discretion by altering the development application such that an owner is required to install a pump system to direct draining upstream to alternate council drainage infrastructure. When considering pump easement alternatives developers should consider the following:

1. council zoning and use permits may not allow pumps or may encourage further alternative drainage systems such as on-site absorption systems;
2. council zoning and use permits may limit the application of the pump e.g. to drain seepage and a minor amount of direct run off from a basement parking area;
3. the application of the pump will generally be limited to:
  - (a) council drainage infrastructure;
  - (b) pumps litres per hour capacity; and
  - (c) pumps reservoir capacity;
4. council consent will normally place a minimum standard on pump design such as that contained in section 7.3 of AS 3500.3;
5. a pump system represents a significant up front development cost; and
6. the installation of a drainage easement may impact upon your ability to gain either an easement of necessity and/or an easement under section 88K.

When considering a pump system against an alternative you should always note:

1. the hardware costs of pump systems are often inhibitive or even prohibitive;
2. you may be required to have a drainage easement as well as a pump system;
3. with pump systems there may be costs in terms of electricity as well as noise and opportunity costs of the space they require; and
4. the reality of an overflow or pump system malfunction could be disastrous.

### **Conclusion**

Whichever of the above alternatives is chosen it is important to never take the intended drainage easement for granted. Applicants should always confer with adjoining landowners well prior to lodging an application for development and if possible document the agreement. Developers should familiarise themselves with the council's zoning, use, permits and usual approach in respect of pump easement alternatives.

It is also important to remember that your relationship may be governed by unknown urban planning instruments or even statutes such as the Access to Neighbouring Land Act 2000 (NSW).

With the proper professional advice, developers both small and large can have many of the hidden snags removed. Being mindful of the above is a positive step to ensure profitable and/or productive property planning.

If embarking on a development one can take many steps to professionally streamline the process and ensure that margins are preserved. Our experienced team is able to assist you throughout.

**This broad summary has been provided for your general information. Clearly there are many more issues that may be relevant to your individual circumstances. Should you require any particular advice please do not hesitate to contact any member of the Property Team at The Argyle Partnership on (02) 8263 6600.**