

IS THAT PROPER EASEMENT?

Easements are pervasive in the use and development of land. In the construction process, they are used to permit a developer to install shoring into, or swing a crane into the airspace of, an adjacent parcel. Throughout and afterwards, they can, for example, be used to ensure a parcel can run utility lines over, get access through, or park on another parcel.

For the uninitiated, an easement is, at its core, a right of one person over another person's property. This raises an obvious question: what is the difference between an easement and another right of access and use such as a licence?

A proper, legal easement is defined in *Black's Law Dictionary* (7th ed) as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)...".¹

A licence, on the other hand, is "a personal right between the licensor and licensee and does not create any estate or interest in the land".²

The easement being an "interest in land" is an important characteristic. In short, an easement affects and binds the affected properties—the property that has the right of access or use and therefore benefits from the easement, known as the

"dominant tenement" and the property that must provide access or use and is therefore burdened by the easement, known as the "servient tenement"—independent of the owner of the lands.³ As well, and perhaps most importantly, "an easement may last forever".⁴ A licence, on the other hand, is only binding between the parties who entered into it.

For these reasons, it is important for the owner of the dominant tenement and owner of the servient tenement to ensure that the easement is enforceable, runs with the land, and will not be declared invalid. This article briefly discusses the general requirements for legal easements.

#1 Registration of Easements in the Land Title Office

First and foremost, in British Columbia, easements must be registered in the Land Title Office against title to property in order for it to run with the lands.⁵ An unregistered easement will generally only be enforceable by the parties to that easement.

#2 Characteristics of an Easement

There are three main characteristics for a legal easement:

- (a) there must be a dominant and servient tenement;

- (b) an easement must accommodate the dominant tenement; and
- (c) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.⁶

A historic, fourth characteristic that the owner of the dominant tenement and owner of the servient tenement must be different does not apply in British Columbia.⁷

The first characteristic is clear—there needs to be a parcel that benefits from the easement and a parcel that is burdened by the easement.⁸

The second characteristic is further described as requiring the easement to serve the dominant tenement and be “reasonably necessary for the better enjoyment of [the dominant] tenement”—if an “easement” has no necessary connection with the dominant tenement but remains “[conferring] an advantage upon the owner and renders [their] land more valuable, it is... a mere contractual right personal to and only enforceable between the two contracting parties”.⁹ An easement that is reasonably necessary could be, for example, an easement that grants a dominant tenement the ability to park vehicles on the servient tenement.

Regarding the third characteristic—whether the right is “capable of forming the subject matter of a grant [of easement]”—this depends on whether the terms for the easement are too wide and vague, if the rights granted amount to joint occupation or substantially deprive the owner of the servient tenement, known as servient owners, from possession of their property (i.e., virtually evicting the servient owners from their own property), and whether the rights granted do not have a “quality of utility or benefit”.¹⁰

We caveat that the foregoing is a general description and exceptions apply. For example, easements may

be used to permit the installation of power poles, thereby devoting land exclusively for use of the owner of the dominant tenement (i.e., the dominant owner),¹¹ while still remaining valid.

#3 No Positive Obligations

Easements that run with the land cannot impose positive obligations. “[A] positive covenant... only binds the original parties to an agreement and not successors in title”.¹² If an agreement with an easement contains a positive covenant, a court could have the easement itself continue while rendering the positive covenant invalid; however, if the positive covenant is at the heart of the agreement, then a court may declare the entire agreement invalid, leaving it only binding between the parties that entered into it.¹³

Note that a positive obligation is *not* the same as a positive easement. A positive easement grants a right to do something on the servient tenement while a negative easement grants a right to prohibit certain acts from occurring on the servient tenement.¹⁴ A positive obligation or covenant obligates the servient owner to act, such as an obligation to maintain an easement area.¹⁵

Conclusion

Easements are a useful tool in the development process (and in some cases may be necessary). But those wishing to rely on them should take care with how they are drafted and keep in mind the requirements that apply to easements to ensure that they bind the land regardless of the owner and they are not declared invalid.

September 2026

Kai Hsieh

- 1 *Adili v Donn*, 2012 ONSC 4086 at para 35.
- 2 See *Spur Valley v Csokonay et al*, 2000 BCSC 1356 at para 13.
- 3 See e.g. *Mihaylov v 1165996 Ontario Inc*, 2017 ONCA 116 at paras 49-50; *Roop v Hofmeyr*, 2016 BCCA 310 at para 30.
- 4 *Adili v Donn*, supra note 1 at para 35.
- 5 See *Land Title Act*, RSBC 1996, c 250, s 20; implied grants of easement do exist but are uncommon (see *Roop v Hofmeyr* at paras 32-34).
- 6 See *Robinson v Pipito*, 2014 BCCA 200 at para 18.
- 7 See *Property Law Act*, RSBC 1996, c 377, ss 18(5), 18(7), 18(8).
- 8 Statutory rights of ways are certain easements that do not require a dominant tenement (see *Land Title Act*, s 218).
- 9 *Depew v Wilkes*, 2002 CanLII 41823 (ON CA), at para 19.
- 10 See *Shaw Cablesystems Limited v Concord Pacific Group Inc*, 2008 BCCA 234 at paras 29-32.
- 11 See *Grant v MacDonald*, 1992 CanLII 5969 (BC CA) at para 14.
- 12 *1004364 BC Ltd v Kelowna (City)*, 2024 BCCA 418 (CanLII) at para 22.
- 13 See *ibid* at para 23.
- 14 See *Nordin v Faridi*, 1996 CanLII 3321 (BC CA) at para 33.
- 15 See *ibid* at para 34.



KAI HSIEH
604.358.7014
[KAI@CIVICLEGAL.CA](mailto:kai@civiclegal.ca)

Kai is an associate lawyer of the firm and maintains a general municipal law practice with a focus on real estate development. In particular, he regularly drafts section 219 covenants, statutory rights of ways and other legal agreements for real estate projects, and he has provided assistance during various stages of the development process, from rezoning and development permit issuance to air space parcel subdivision and occupancy permit issuance. He has also assisted with other local government matters, ranging from procurement to regulatory issues.

Kai obtained his Juris Doctor from the Peter A. Allard School of Law at The University of British Columbia, articulated with a provincial organization, and was called to the Bar of British Columbia in May 2022. Prior to law school, Kai obtained his Bachelor of Applied Science in Mechanical Engineering with Distinction from UBC. Upon graduating, he was employed as a Process Improvement Specialist at an architectural glass fabrication company for several years, where he designed and implemented a new laminated glass line as well as numerous mechanical and organizational process improvements.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

700 - 900 West Hastings Street, Vancouver, BC V6C 1E5
604.639.3639 | www.civiclegal.ca |  Civic Legal LLP