

# Chapter 8

## DEALING WITH EASEMENTS

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## CHAPTER 8 DEALING WITH EASEMENTS

### 801 DEALING WITH PRE-EXISTING EASEMENTS

A pre-existing easement means an easement that is either registered, vested as a Service Easement (Statutory Easement) or has been granted in an instrument lodged immediately prior in series (and not yet registered) over relevant land at the time application for the deposit or amendment of a strata plan is lodged at the Lands Titles Registration Office.

← STATUTORY  
EASEMENT, SEE  
S.223In RPA

There are three concerns relating to pre-existing easements that a conveyancer or a licensed surveyor need consider when preparing the relevant application and plan for either the deposit of a strata scheme or the amendment of an established scheme:  
Eg,

← SEE PARA 803.4

1. Is there a need to extinguish or vary in position (re-arrange) an existing easement that is adversely affected by a proposed development?
2. Is there a need to recite in an application the existence of an easement that has been created, immediately prior to and in series with an application, either through or appurtenant to the land?
3. Are there any pre-existing easements that are to be dealt with that were created as a condition of approval on a plan of division (including a resubdivision)?

← SEE PARA 805

← SEE PARA 804

### 802 EFFECT ON EASEMENTS DEPENDS ON NATURE OF SCHEME

The nature of a strata scheme or an addition to a strata scheme may adversely affect a pre-existing easement, either through the site or adjacent land, for a number of reasons.

E.g.,

1. an easement may be no longer required.
2. an easement may need to be partly extinguished due to part of the structure obstructing or otherwise interfering with an easement that is either appurtenant to the land or to which the land is subject. This will be evident in the case of a right of way that becomes obstructed and unusable. See figure 34.
3. An easement may need to be extinguished through a unit but be required to subsist through common property adjacent to, over or under the unit.
4. an easement may need to be varied in position (relocated) on the site or through adjacent land.
5. a dominant right may need to be appurtenant to portion of the site and the appropriate provisions of the Strata Titles Act, 1988 cannot be used.

For these reasons the Act provides for the extinguishment or variation of easements both dominant and servient to the site.

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**803 DISCUSSION OF POINTS 802. 1-5**

**1. WHERE AN EASEMENT IS NO LONGER REQUIRED (Para 802.1)**

The Strata Titles Act provides that where the land to which a strata plan relates is either the servient or dominant tenement of a registered easement, the easement can be extinguished or varied in position with the consent of prescribed persons.

← SEE SS.8(5) & 12(6a)

Where a dominant easement is affected, a note in the annotation panel to the effect that the easement is to be extinguished pursuant to Section 8 (5) (or S.12. (6a) in the case of an amendment to an established scheme) must be endorsed on the plan.

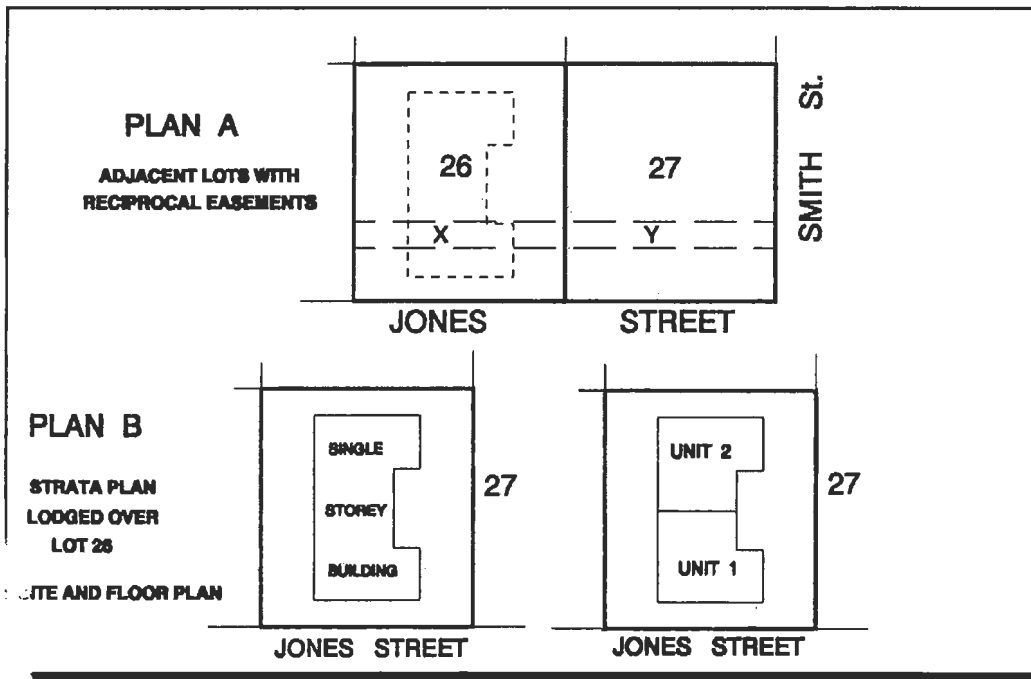
Figure 33 illustrates the manner in which the total extinguishment of both dominant and servient tenements is made on the plan.

Plan A of Figure 33 shows reciprocal easement rights between Lots 26 and 27.

← SEE PARA 807 WHERE LAND IS SERVIENT TENEMENT ONLY

Where a strata plan is lodged over Lot 26, Plan B shows the manner in which the easement is extinguished by not delineating it in the plan and the note of the annotation panel to the effect that the easement through the site and Lot 27 is to be extinguished pursuant to Section 8(5) [or Section 12(6a) or 13 as the case may be] of the Act.

← SEE PARA 804



← THE ANNOTATION PANEL WILL READ:

"The easement for drainage purposes over X and Y in CsT 4567/88 and 89 respectively are extinguished pursuant to S.8(5) [or 12(6a)] of the Strata Titles Act 1988".

In the case of a statutory easement the note will read:

"The easement to Minister of Water Resources for sewerage purposes over X and Y in CT4567/88 and 89 vide DP17999 are extinguished pursuant to S.8(5) of the Strata titles Act 1988". NOTE; S. 12 (6a) would be used if an easement is extinguished by amendment of a strata plan.

Figure 33 TOTAL EXTINGUISHMENT OF EASEMENT

# STRATA FACTS

803 2. **FULL EXTINGUISHMENT OF PART OF AN EASEMENT (Para 802.2)**

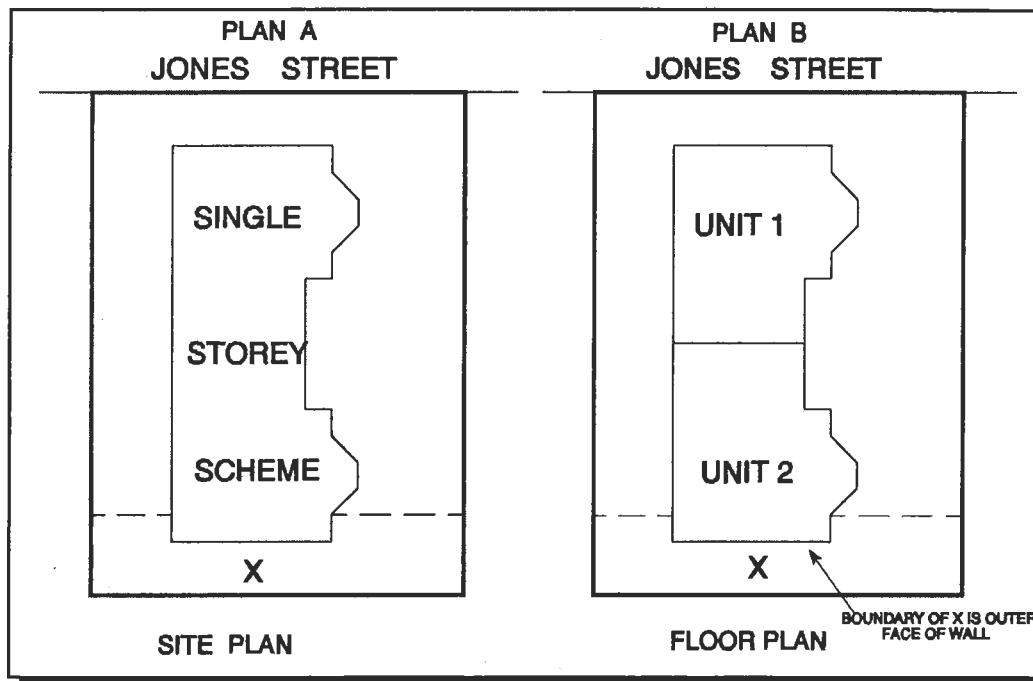
Where there is a need to fully extinguish part of an easement due to an obstruction, the portion affected is extinguished by not delineating the relevant part on the strata plan. Extinguishment occurs on deposit of the plan (or on amendment of a plan) provided the dominant owner(s) and any person having a registered encumbrance over either tenement has consented in the appropriate application and relevant duplicate certificates of title are produced.

Figure 34 shows a situation where a pre-existing easement has been encroached upon by part of the structure, including Unit 2.

A decision has been taken to fully extinguish the easement where encroached upon.

The easement will not be delineated on the areas of the plan contained within the structure.

Plans A and B show the manner in which the Site and Floor Plans of the scheme will show the extinguishment.



← THE ANNOTATION PANEL WILL READ:

"Portion of the common property marked X is subject to an easement for drainage purposes vide CT 4567/88."

The dominant owner(s) will need to consent in the consent panel of the relevant application. SEE PARA 804 re where easement was created by planning approval.

Figure 34 TOTAL EXTINGUISHMENT OF PART OF AN EASEMENT

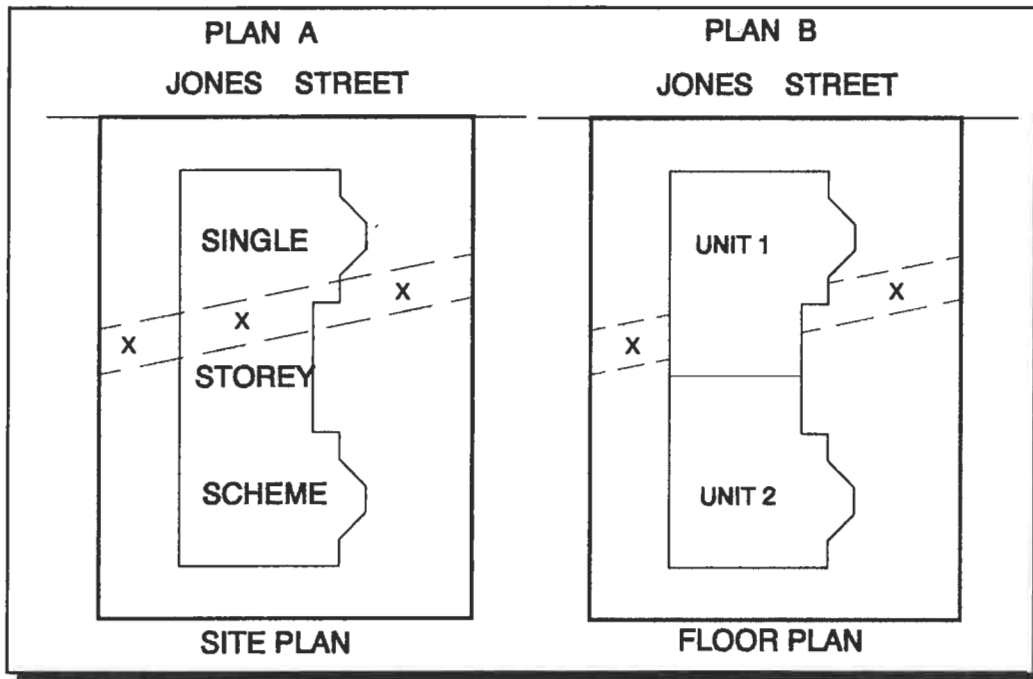
Note that in the above drawing, as is also the case of a strata plan, the width of a wall is shown as a single line. The inner part of the line represents the inside face of the wall and the outer part of the line represents the outside face of the wall.

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803 3. **PART EXTINGUISHMENT OF PART OF AN EASEMENT (Para 802.3)**

Where the need arises to extinguish an easement in part where it is obstructed by a structure but is required to subsist through common property above and below the structure, the strata plan will show the easement extending through the site on the Site Plan but is not delineated through the structure on the Floor Plan(s).

In Figure 35, Plans A and B show the manner in which the Site and Floor Plans should delineate the easements.



← THE ANNOTATION PANEL OF THE PLAN WILL READ:

"Portion of the common property marked X is subject to an easement for drainage purposes vide CT4567/88."

The dominant owner(s) will need to consent in the consent panel of the relevant application. SEE PARA 804.

Figure 35 PART EXTINGUISHMENT THROUGH A UNIT ONLY

# STRATA FACTS

803 4. **VARIATION IN POSITION OF AN EASEMENT (Para 802.4)**

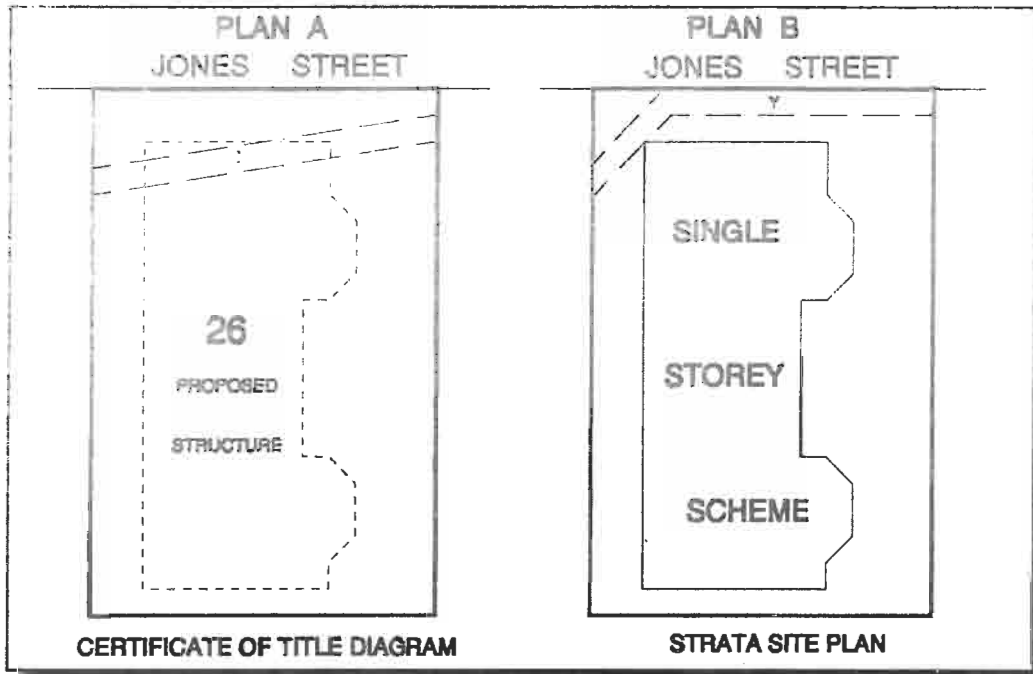
Where a part of a structure obstructs a pre-existing easement and full right of user is required, consideration should be given to changing the position of the easement on the ground.

Variation can be made in a manner similar to extinguishment. Note that the nature of the easement does not change, only its position through the site is affected.

In Figure 36, Plan A shows the original position of an easement on the certificate of title and Plan B shows a new varied position on the Strata Site Plan.

A statutory easement can be similarly varied with the consent of the authority in whom the easement is vested.

← SE PARA 806



← THE ANNOTATION PANEL WILL READ:

"The easement for drainage purposes marked X on CT4567/89 is varied to the position of Y hereon pursuant to Section 8(5) [or S.12(6a)] of the Strata Titles Act, 1988"

SEE PARA 804.

Figure 36 VARIATION OF AN EASEMENT FROM POSITION X TO Y

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### 803 5. EXPRESSLY EXCLUDING AN EASEMENT. (Para 802.5)

Where a pre-existing easement is appurtenant to the site, it may be unwise for the appurtenance to subsist to the units. This may be so in the case of a drainage easement or where it is inconvenient to obtain the consent of the servient owner(s).

← SEE PARA 804

For example, there may be numerous servient owners, an owner may be unknown or dominant rights may exist over streets laid out in deposited plans that are not public within the meaning of Section 301 of the Local Government Act.

It may, however, be prudent for an easement for access to remain appurtenant to the units as the enjoyment of the right is used directly by the units.

Advantages in limiting the appurtenance to part of the site are realised when it becomes necessary to further deal with the easement as units titles will not be involved. This matter should be considered carefully by the developer and conveyancer as a problem may be created for the Strata Corporation at some future time especially when the scheme is cancelled.

← SEE PARA 818

The provisions of Sections 8 (5) and 12 (6a) of the Strata Titles Act cannot be used where consents of servient owners are unavailable. However, consideration could be given to "expressly excluding" the easement to the relevant portion of the scheme by using the provisions of Section 36 of the Law of Property Act 1936. An example of how that may be made is shown in Figure 46, Para 913.

Section 36 of the Law of Property Act provides that a dealing with land will include an easement that is appurtenant to the land unless that easement is excluded from the dealing.

There are some points that must be kept in mind about the use of expressed exclusions.

1. An easement expressly excluded is regarded as extinguished.
2. The right cannot be expressly excluded as regards the whole of the site or the whole of an appurtenance to part of the site, a part must retain the dominant easement.
3. Section 36 should only be used where it is shown that the use and enjoyment of the right is severed from the land and therefore should not be used to exclude the easement from land abutting the easement.

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803.5

## WARNING NOTES

Expressed exclusion must not be used where there is a viable alternative method in the Real Property Act, 1886 or Strata Titles Act, 1988.

Consideration must be given to the method of creation as an easement created pursuant to a statute may only be able to be extinguished or varied in position pursuant to that statute.

An example of this is contained in Section 223lo of the Real Property Act which provides for the creation of an easement and its subsequent extinguishment. This can only be done by way of executing a Form 13 under the Real Property Act (Land Division) Regulations, 1982 or in the case of a strata scheme only, in accordance with S.8 (5) of the Strata Titles Act by not delineating the easement on the relevant part of the plan as discussed earlier. Care must also be taken where an easement has been created as a requirement of a condition of approval of a plan of division deposited prior to the commencement of S.223lo of the Real Property Act (12/9/1985) as a planning approval is necessary to partially extinguish an easement. An easement of this type becomes part of the allotment approved for the issue of a separate certificate of title. A dealing with the easement without planning consent is an offence against the Real Property Act. This should be not a problem when using SS.8 (5) and 12 (6a) as planning approval is given by the fact that the intention is stated in the annotation panel of the plan.

Where expressed exclusion is used, a note in the annotation panel of the plan is necessary as the council may have to consider the effects of the change. An appropriate note can read:

***The dominant easement for drainage purposes appurtenant to CT4567/88 is to remain appurtenant to common property (or whatever) only".***

Failure to advise the authorities of the intention may result in the document examiners of the Lands Titles Registration Office requesting new (land division certificates (certificates of approval) on a print of the plan that contains the annotation.

← SEE S.223lo (4)(b) RPA

← REFER TO PARA 804 FOR REMEDY

← SEE S.223lb RPA

## 804. EASEMENTS CREATED AS A CONDITION OF APPROVAL OF A PREVIOUS PLAN OF DIVISION.

It is important to note that where an easement, created as a condition of approval of a plan of division (including a plan of subdivision), is to be extinguished or varied, an annotation of the intention must be placed on the plan and also appear on the print of the plan on which the land division certificate (certificates of approval) of the Development Assessment Commission (planning authorities) are endorsed. If this is not done, appropriate planning approval to the measure is not given and the Registrar-General will not deposit the plan until a new land division certificate containing that annotation are presented to the Lands Titles Office. An easement of this type becomes part of the allotment approved for the issue of a separate certificate of title and is therefore part of the allotment. A dealing with the easement without planning consent is an offence against the Real Property Act.

← SEE S. 223lb, RPA.

Failure to advise the authorities of the intention will cause the document examiners of the Lands Titles Registration Office to request a new land division certificate.



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## 805. WHEN THE NEED TO RECITE AN EASEMENT ARISES.

The existence of an easement created prior to the strata application and in the same series of documents above, will need to be recited in the "Certificates of Title Affected" panel of the application. The land being dealt with has been modified by the inclusion of a dominant right or the exclusion of a servient right and this must be recited in the application. This is necessary as the dealing will not be registered at the time and a separate certificate of title for the allotment will not have issued at that stage.

← SEE PARA 913 AND Fig. 46

A likely example of how this may occur is shown in Figure 37 in which a land division application is required to create an allotment on which a strata application is contemplated. A condition of approval of the division requires an easement to be created over the adjacent allotment and held appurtenant to the site of the strata scheme.

In this hypothetical example, Plan A of Figure 37 shows a Plan of Division No. DP39001 creating allotments 31 and 32. Lot 32 is to be subject to an easement for drainage purpose appurtenant to Lot 31.

Lot 31 is the subject of a strata application lodged contemporaneously to the application for the land division.

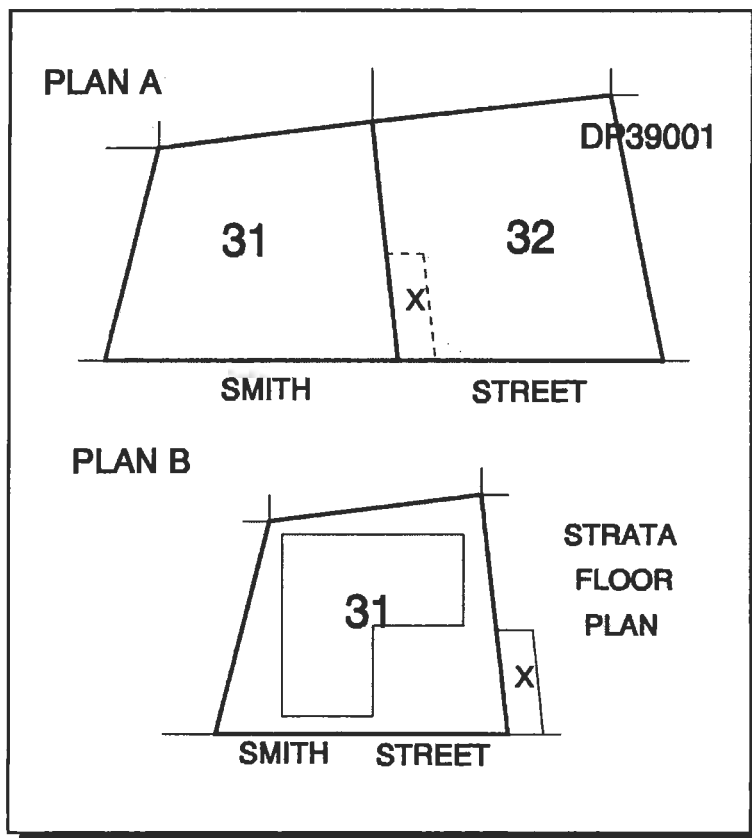


Figure 37 EASEMENT CREATED IN PRIOR SERIES

Ignoring possible dealings with encumbrances, the order of lodgement of document is:

1. Form 9 (Application to deposit Plan of Division and Issue Certificates of Title).

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- 805
2. Form 10 (Form of consent of Encumbrancees to the division)
  3. Form 9A (Creation of Easement pursuant to Section 223lo of the RPA).
  4. Strata Application (New Scheme)

As the strata application will become a waiting instrument and the easement created by the division, it will not be registered at the time of execution of the strata application, the strata application must recite the land precisely as its current status,

Viz, ***"Allotment 31 in DP39001 together with the easement for drainage purposes created by Application for Creation of Easement from ..... to the applicant(s) dated ..... and lodged contemporaneously hereto and being portion of the land in Certificate of Title Register Book Volume 4123 Folio 56."***

## 806. CONSENTS NECESSARY TO EXTINGUISH OR VARY AN EASEMENT

The Act provides that an easement can only be extinguished or varied in position upon the consent of owners and encumbrancees affected.

← SEE SS. 8 (5) AND 12 (6a) STA

The application for deposit of the plan is made by the registered proprietor of the land and an application to amend a strata plan is made by the Strata Corporation in pursuance of a unanimous resolution. Either application must be accompanied by all relevant certificates of title and the consents of:

- the proprietor of the easement (ie, the dominant owner and in the case of a statutory easement, the authority),
- the registered proprietor of the servient tenement, (but see 1. below)
- any person registered as the holder of an encumbrance over the servient tenement or the dominant tenement (if any).

← PARA 902 Definition of Encumbrance

To understand the provisions of the Act it is helpful to consider two possible situations.

1. Where the extinguishment or variation of an easement occurs only within the site of the strata plan. In which case the consent of;
  - the registered proprietor of the servient tenement will not be insisted upon as that person is also the applicant and consent will taken as implied by the application.
  - Where an extinguishment only (whether in part or in full) is made, the consent of any person registered as the holder of an encumbrance in the servient land will not be insisted upon in the case of an extinguishment as that person is benefiting from the extinguishment
  - Where a variation to the position of an easement is made, the consent of every encumbrancee in both dominant and servient tenements will be required.

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- 806 2. Where the extinguishment or variation of an easement occurs both within the site of the strata plan and other land. I.e., reciprocal rights between the site and other land are affected, the consent of all dominant and servient owners and encumbrancees are necessary.

← SEE Figures 34, 35 AND 36.

## 807 EXTINGUISHMENT - A PRACTICAL EXAMPLE

To illustrate the extinguishment and variation procedures, Figures 38, 39 and 40 are composite diagrams designed to show the sequence of events for the extinguishment of an easement through a strata plan and adjacent land.

Figure 38 represents Lot 10, subject to an easement marked A, and adjoining land being Lot 11, subject to an easement marked B, and the whole of the land comprised in certificate of title Volume 4700 Folio 100 which has an appurtenant right over both A and B. Easement A is appurtenant to Lot 11 and CT4700/100 and easement B is appurtenant to CT4700/100. Lot 10 is the site of a proposed strata plan.

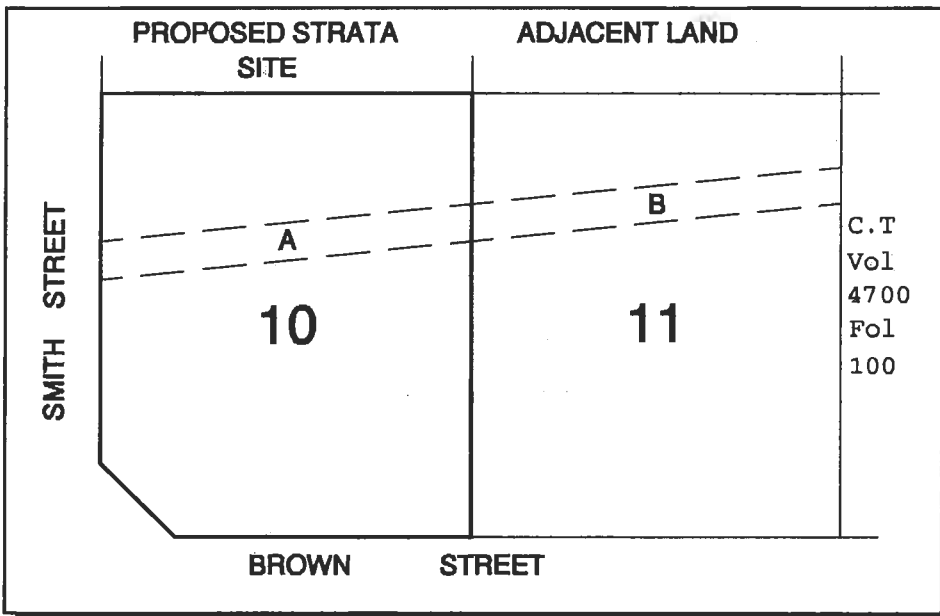


Figure 38 COMPOSITE DIAGRAM, REPRESENTATION OF LOTS 10 & 11 & CT4700/100 PRIOR TO EXTINGUISHMENT OF EASEMENT

It is proposed to fully extinguish easement A through Unit 1 of the strata plan (see Figure 40) and to reduce the width of the remainder of easement A through common property and easement B through Lot 11.

Figure 39 is a composite representation of two separate plans that need to be lodged in the Lands Titles Registration Office, viz., a strata plan over lot 10 and a Filed plan for easement purposes over lot 11.

The actual plans will contain measurements and monumental information sufficient to fix the easement. That information has been omitted here for convenience only.

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807 Extinguishment therefore occurs automatically on deposit of the strata plan in accordance with the Strata Titles Act as regards easement A only.

However, the following consents will be required:

1. The owner of Lot 10, as applicant and servient owner, will be taken to have consented to the extinguishment of easement A through Unit 1 and the reduction in width. The resultant easement is lettered X in Figures 39 and 40. ← SEE PARA 805
2. The owner of Lot 11 must consent to the partial extinguishment of easement A through the common property of the strata plan and the full extinguishment of easement A through Unit 1.
3. The owner of CT 4700/100 must also consent to all of the extinguishments.
4. Any person having an encumbrance over Lot 11 and CT 4700/100 must also consent to all of the extinguishments.  
Consent of encumbrancees of Lot 10 need not consent to the partial extinguishment as their consent to the application is taken to include the extinguishment also.
5. As the strata plan cannot, in this example, partially extinguish easement B, the proprietor of CT4700/100 will need to transfer their dominant right over the portion of easement B to merge and extinguish in the fee simple of Lot 11. Had easements A and B been reciprocal rights, the provision of the Act that enables a dealing with a servient or dominant tenement on deposit of the strata plan would be invoked and partially extinguish them as requested provided consents of the owners of Lot 11 and CT 4700/100 were endorsed on the application.

Figure 39 shows that easement A in its narrowed state is shown through the entire strata plan site as this sheet is regarded as a graphic display of the common property which, of course, exists above and below the units.

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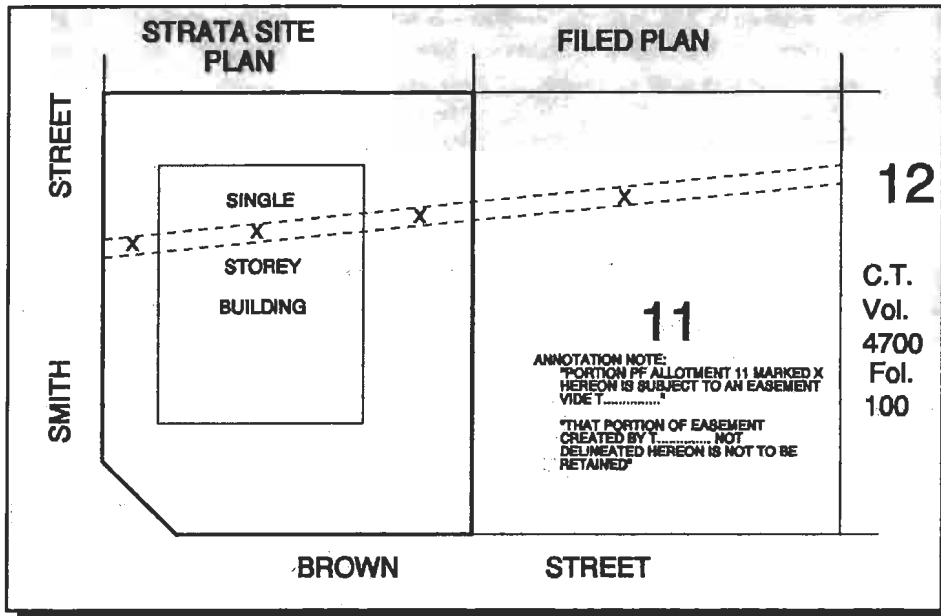


Figure 39 PART EXTINGUISHMENT OF EASEMENT (IN WIDTH) THROUGH COMMON PROPERTY AND ADJACENT LAND

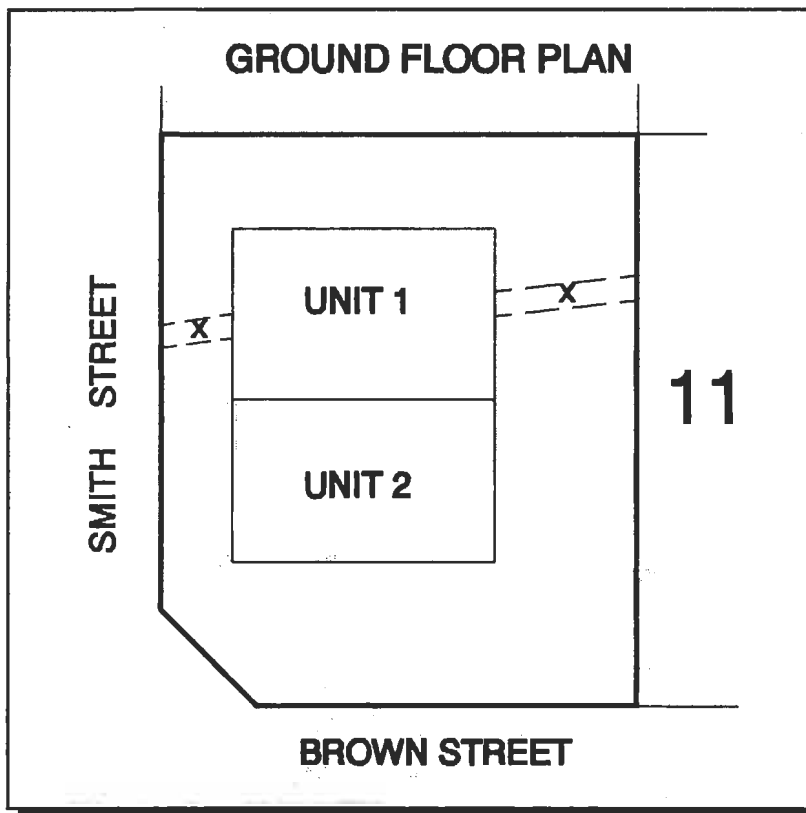


Figure 40 EXTINGUISHMENT OF EASEMENT THROUGH UNIT 1

- 807 Figure 40 represents the Floor Plan of the strata scheme. Easement A is not shown through Unit 1 as it is to be extinguished and will not prevail there.

Note that in Figure 39 the easement, as reduced in width, is shown through the entire site of the strata plan. This is to ensure that the easement remains through common property both above and below the unit.

### 808 EXTINGUISHMENT AT THE REGISTRAR-GENERAL'S INITIATIVE

The Act gives power to the Registrar-General to extinguish or vary an easement at his/her own initiative.

It is most unlikely that the Registrar-General will require an easement to be varied in position, however the provision was placed within the Act in 1990 to give the Registrar-General a means whereby easements over public or other streets or reserves can be extinguished with the consent of the applicant (the dominant owner) and the owner of the street/reserve (the servient owner), rather than carry them forward as appurtenant to the common property and units.

← SEE SS. 8.(5) & (b)  
AND 12 (6a)

Where the owner of a street or reserve is not a council and is unknown, the Registrar-General will make a reasonable attempt to locate a person who is entitled to be the owner.

In the case of a private street that is used as if it were public and maintained by a council, the council will be asked to declare the street public in the first instance. If the council cannot co-operate for any reason, the Registrar-General will make a reasonable attempt to locate the owner, or a person who is entitled to be owner and who can give the consent. If the servient owner cannot be located, the Registrar-General may extinguish the easement.

The consent may take the form as shown in Figure 51, Para 918.

If this provision is not used the easement will be carried forward as appurtenant to the units and common property. If the council needs to extinguish the easement at a later time, it will have to accept transfers of the right from the strata corporation and unit owners, who may be numerous. Consideration should be given to expressly exclude the easement from the certificates of title to issue for the units to minimise this problem

← SEE PARA 803.5

### 809 CREATING NEW EASEMENTS

Prior to the Strata Titles Amendment Act, 1990 it was not possible to create an easement from a strata plan as a condition of approval of that plan.

← SEE PARA 813

Where a planning authority required an easement to be created to facilitate the scheme, there was no power for that authority to have a condition of approval placed on the plan.

It therefore became necessary for the authority to insist that easements be granted prior to lodgement of the strata plan in the Lands Titles Registration Office.

This, particularly if the timing of the documentation was not right, caused serious delays to the subsequent deposit of the strata plan. Problems occurred for the developer who, as the owner of other land, was required to create an easement in respect of that land.

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809 Unless some arrangement could be made with the council such that the easement could be granted subsequent to the deposit of the plan, the developer could only proceed (at some considerable expense) by creating a separate ownership to whom one of the parcels would be conveyed and the easement then granted either through or appurtenant to it (as the case may be).

### 810 FORM 9A

The Strata Titles Act Amendment Act, 1990 has inserted a provision that enables an easement to be created as a condition of approval of a strata plan in much the same way as an easement requirement on a plan of division under Part XIXAB of the Real Property Act, 1886.

← SEE PARA 934 Re  
STAMP DUTY  
PAYABLE ON THIS  
FORM

The instrument prescribed by the Registrar-General for the purpose of creating an easement pursuant to either S.223lo of the Real Property Act or S.17b of the Strata Titles Act is Panel Form 9A. Although both Acts vest the easement in the proprietor(s) of the relevant certificates of title on deposit of the plan, there is a requirement for the registration of an instrument of creation. Viz. Form 9A.

### 811 ORDER OF LODGEMENT OF FORM 9A

It is important to note that where an easement is to be created between the land of the site and other land, panel Form 9A must always *accompany and precede* the application for the deposit of a strata plan. Should the form follow the strata application, the strata corporation will need to execute it. However, as the corporation is not established at law until deposit of the plan, Form 9A cannot be executed until after that time. Thus the purpose of the form is defeated. Where an easement is to be created between units, Form 9A should be lodged in series and after the application.

### 812 REQUIREMENTS OF THE ACT AS REGARDS FORM 9A

The following criteria must be followed in order to be able to use form 9A to create an easement from a strata plan:-

1. The delineation of an easement in 1. above must also appear on the print containing the land division certificate of DAC.

← SEE PARA 708

#### 2. THE FORM MUST SET OUT:-

a) The land to which the easement will be appurtenant.

← SEE S.17b (1)(a)

b) The land that will be subject to the easement.

Where the servient land is within the site, the plan diagram must delineate the position of the easement.

← SEE S.17b (1)(a) and  
Figs. 11 & 13

c) The terms of the easement.

← SEE S.17b (1)(c)

#### 3. EASEMENTS GRANTED THROUGH OTHER LAND

Where the right is granted though other land appurtenant to the site, it must be delineated on a Filed Plan (FP) that has been approved and filed in the Lands Titles Registration Office.

An appropriate note of the requirement must be shown in the annotation panel of the strata plan. If the servient land is subject to an encumbrance, an instrument of discharge, surrender, of the right may need to the form accompany the form 9A.

812 **4. SCHEDULE EASEMENTS**

It is desirable to use the provisions of the Fifth and Sixth Schedules of the Real Property Act, 1886 wherever possible when describing easements.

← SEE SS. 89 AND 89a, RPA.

These Schedules set out the short and long forms of certain easements. When used, the short form must be set out precisely in the annotation panel of the plan. This will avoid confusion for the conveyancer and possibly prevent an incorrect easement being granted.

Any other easement must be set out in full in the form 9A and referred to on the strata plan in terms suitable for accurate interpretation by the conveyancer.

Care should be taken in describing the easement on the plan or confusion may result. Eg., an easement described as a right of way on the strata plan may be described in a Form 9A in a manner other than that of a "free and unrestricted right of way".

5. The execution of the dominant and servient owners.

← SEE S.17b (2)

The approved form is shown in Appendix A to this Chapter.

813 **DOMINANT AND SERVIENT PROPRIETOR MAY BE THE SAME PERSON**

The Act provides that the easement will vest in the registered proprietor of the dominant tenement notwithstanding that he/she may also be the proprietor of the servient tenement.

← SEE S.17b (3)

This provision was inserted to provide consistency with Section 223lo of the Real Property Act, 1886 and to eliminate the difficulty experienced by an owner, as owner of both dominant and servient tenements, not being able to grant an easement to him/herself and avoid the problems set out in Para 809.

814 **CASE STUDY OF EASEMENT CREATION - AN ILLUSTRATION**

The following example is given to illustrate the manner in which Panel Form 9A is executed.

Figure 41 shows a simplified diagrammatic representation of a proposed strata plan, dividing the land comprised in certificate of title Volume 4949 Folio 100 into 2 units and common property and a Filed Plan approved for the purpose of creating an easement appurtenant to the strata scheme.

The council has imposed a requirement that access is required for unit 1 to Smith Street, and reciprocal drainage rights are required through the strata plan and an adjacent property (comprised in certificate of title Volume 3900 Folio 199).

The Filed Plan is designated FP 30000 and has been filed in the Lands Titles Registration Office for the purpose of granting an easement through Lot 12 in compliance with the condition of approval of the council.



# STRATA FACTS

814 The conditions of approval on the plan require:-

1. The portion of Yard Unit Subsidiary 2 marked D hereon is to be subject to a free and unrestricted right of way appurtenant to Unit 1 hereon.
2. The portion of Yards Unit Subsidiaries 1 and 2 marked B hereon are to be subject to an easement for drainage purposes appurtenant to Lot 12 in FP 30000 (CT3900/199).
3. The portion of Yard unit Subsidiary 2 marked C hereon is to be subject to an easement for drainage purposes appurtenant to Unit 1 hereon.
4. The portion of Lot 12 in FP 30000 and Marked A thereon is to be subject to an easement for drainage purposes to be appurtenant to Units 1 and 2 and common property hereon.

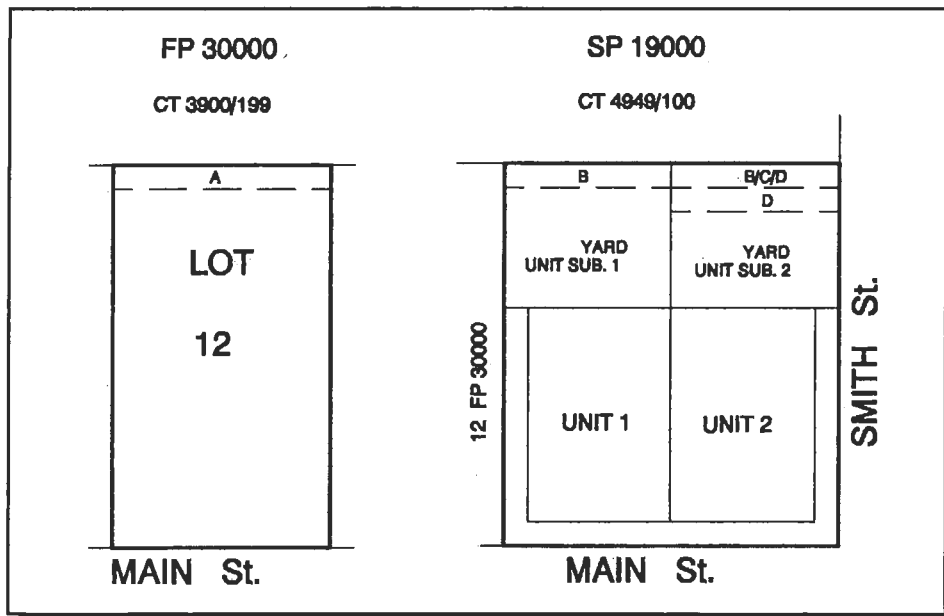


Figure 41 COMPOSITE PLAN, ILLUSTRATION OF EASEMENT REQUIREMENTS BETWEEN A FILED PLAN AND A STRATA PLAN

Satisfactory arrangements as regards mortgages, encumbrances and leases, etc., will need to be made in respect of the easements created. Any discharges, surrenders will need to precede the Form 9A and new mortgages (including a collateral security) will follow, but care will need to be taken as these instruments may best be placed after the strata application. This will more particularly be the case when lodging an application for an "existing strata scheme" as the mortgage (etc) will be extinguished on deposit of the plan and a substituted security will have to be lodged.

← SEE PARA 928

815 FILLING IN FORM 9A

A Panel Form 9A, completed for the example illustrated in Para 814, appears in Appendix A to this Chapter.

PANEL 1

This panel of the Form makes reference to the land affected by reciting the certificates of title affected. There will be occasions where several certificates of title are involved in a strata plan, but not all will be affected by the grant of an easement. Only those titles through which an easement is created can be included in this panel.

PANELS 2 AND 3.

These set out the estate and interest in the land and any encumbrance to which the land is subject. Show "Nil" in the Encumbrance Panel where a discharge precedes this instrument. However, where both titles are in the same ownership and subject to the same registered mortgage or encumbrance, etc., the registered interests will have to be recited in the Encumbrance Panel.

THE GRANTOR PANEL

As the easements for drainage purposes are reciprocal, the Registered Proprietors of the two properties concerned are both dominant and servient owners. Both names must therefore appear in the Grantor and Grantee Panels.

THE CONSIDERATION CLAUSE

The consideration clause must include any monetary value actually paid between different owners. The value of any easement created by a proprietor to him/herself need not be expressed.

GRANTEE PANEL

Show name(s), address(es) of grantee(s) in full. If preferred, however, the grantee panel may recite "as above" (to refer to the Grantor Panel).

THE STAMP DUTIES PANEL.

Where there is a grant between separate parties a certification as regards S.67 of the Stamp Duties Act, 1923 may be necessary, particularly if there are other transactions involved between them. Appropriate enquiries should be made to the Stamp Duties Office when in doubt. Otherwise the panel may be left blank.

THE OPERATIVE CLAUSE

This is ideally completed as shown in Appendix A to this Chapter.

Where the appurtenance of an easement created within a strata site is to other land, reference to the certificate of title reference of that land should be made in the appurtenance clause as shown Secondly in Appendix A.

THE EXECUTION CLAUSE

This is completed in the same way as any other grant of easement instrument. However, where both grantor and grantee is the same person, and no other owners are involved, only the Grantor panel need be executed. The instrument will still need to be accepted. The recommended method in this case is shown in Appendix A.

PROOF.

The signatures of all Grantors must be proved in the normal way. Forms of proof are included in the form.

# STRATA FACTS

## 816 EASEMENT APPURTENANT TO PORTION OF A STRATA SITE

Occasionally a situation is encountered where an appurtenance exists to only portion of the site of a proposed strata plan. Care should be taken as an overburdening of the rights may occur.

← SEE PARA 412

Overburdening occurs when an easement is used to an extent greater than was intended by the original grantor. To determine whether an easement right is overburdened, a number of factors must be examined. These will include, the extent of the appurtenance, the nature of the right granted and the intended purpose of the easement at the time of grant. The subject of overburdening of easements is most complex and legal advice should be sought where any doubt exists.

← FOR READING SEE CHAPTER III - WAYS "LAW OF EASEMENTS" BY C.F. GODDARD 8th EDITION, pp 375-404.

An appurtenance is most probably caused by the consolidation of two or more parcels of land at some stage in the past, one or more having an appurtenance and the remainder not.

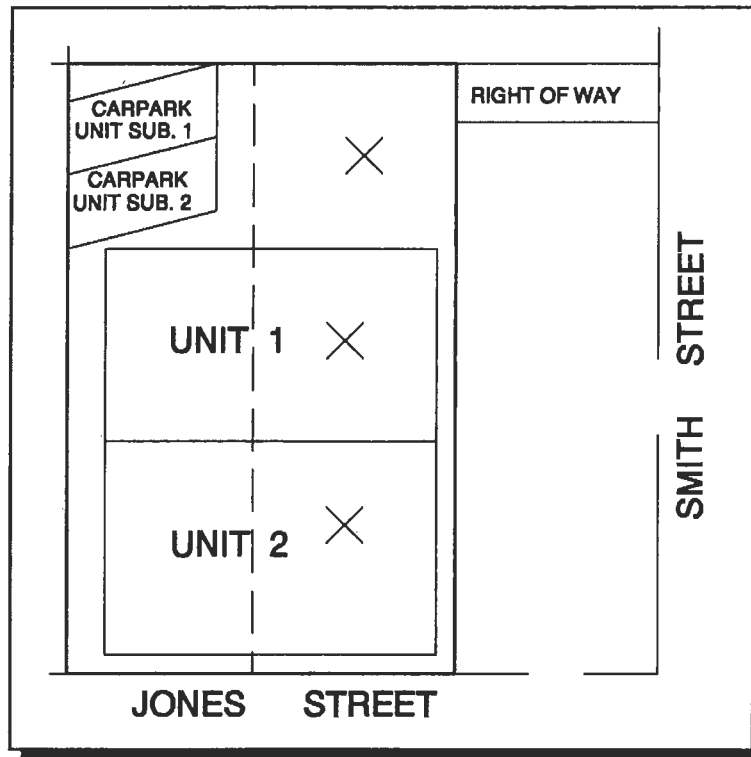


Figure 42 AN APPURTENANCE TO PORTION OF THE SITE ONLY

Figure 42 shows a simple situation where the site of a strata plan is split by an appurtenance as regards portion of the land. The attached right of way is appurtenant only to the portions of the plan marked with the letter X.

The problem here lies in the fact that access to the scheme is through the right of way and the appurtenance lies only to portion of the units. A unit owner must pass through the right of way to park his/her car in their unit subsidiary car park, which is outside the area having the appurtenant right, and may be regarded as an overburdening of the easement right by the servient owner.

It is possible that the servient owner of the right of way could instigate legal proceedings against the offending unit owner(s).

# STRATA FACTS

- 816 This is a matter that the council of the area, as planning authority, and the developer should take into account before lodging a strata plan for deposit in the Lands Titles Registration Office.

The Lands Titles Registration Office will ask, as a requisition on the plan or application, for some rectification such as a further grant of easement appurtenant to the whole of the land. Note here, that where a further grant is made, an appurtenance boundary line will still appear on the plan as there are now two easements appurtenant to a part of the site.

Although it will complicate the plan and appear "messy", this does not matter in a legal sense as the rights are consistent across the plan. If possible, the original easement should be extinguished and re-created by Form 9A (as a condition of approval of the plan) appurtenant to the whole of the site.

817 **UNLAWFUL ACCESS TO THE SITE**

There are occasions where rights to use a street or reserve are implied for the use of owners of allotments within the same plan. Extreme care should be taken to ensure that the owner of a site can lawfully use an abutting non public road.

← SEE PARA'S 413-418 & Figs. 15-17 for further information

Figure 43 shows an instance, although factually portrayed here, that has occurred to the dismay of a developer. Access to the garages at the rear of the scheme is through a right of way, which cannot be legally used for that purpose as it lies in another deposited plan and no rights of access have been granted over it appurtenant to the site.

The owner of the right of way, also the owner of adjacent allotments in DP 201, objected and insisted that an easement for access be formally granted in favour of the Strata Plan. A purchase price had to be negotiated. Meanwhile the deposit of the plan was seriously delayed.

This is an example where early detection of the problem could have prevented that delay.

← SEE PARA 412

In a similar situation the owner of the right may be unknown and the council of the area may not be in a position to declare it to be a public road.

This has also occurred with disastrous results.

In more than one instance the council has agreed to declare a lane-way public road provided the developer of the strata scheme pays the cost of making and paving the lane to the satisfaction of the council.

Both council and the developer have a responsibility to ensure that access is legal. State planning laws require all new allotments formed by a division process to have legal access that is safe and convenient.

← SEE PARA 707 1. AND S. 14 STA GENERALLY

# STRATA FACTS

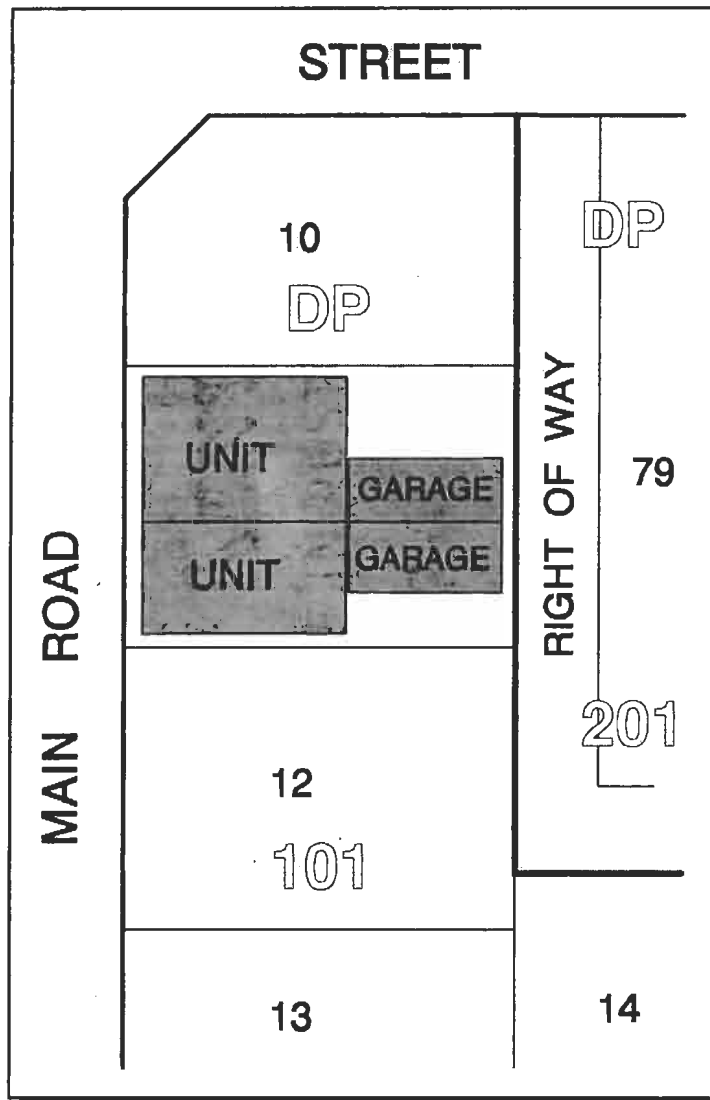


Figure 43 INSTANCE WHERE USE OF AN ADJACENT PRIVATE ROAD IS NOT LAWFUL

## 818. EASEMENTS AND PLANS OF AMALGAMATION OF STRATA SCHEMES

← SEE CHAPTER 11  
AMALGAMATION

There are occasions where two (or more) adjacent strata schemes wish to amalgamate and portion of the common property in one scheme is subject to an easement appurtenant to land in the other.

For example, in Plan A of Figure 44, the common property of SP14000 is subject to an easement appurtenant to the units and common property of SP15000.

As the provisions of the Strata Titles Act, 1988 for the extinguishment of easements are not available for amalgamation, the extinguishment of easements between common property and units (if required) is complex and depends on the manner in which the easement was created.

# STRATA FACTS

818 E.g.,

1. Where the easement was created pursuant to Section 223lo of the Real Property Act 1886 or Section 17b of the Strata Titles Act 1988, a Form 13 must be lodged with and prior to the application for Amalgamation otherwise merger cannot occur as regards common property as the strata corporation is not yet formed and therefore cannot execute a Form 13 until the plan is deposited.
2. Where the easement was created as a condition of a plan of division (including a plan of resubdivision) prior to the introduction of Section 223lo in 1985, the Lands Titles Registration Office will accept a letter of consent from the council of the area for the extinguishment of the easement. This consent is not required if the easement was created in a plan of division in the City of Adelaide or a division by the Crown as, at that time, Certificates of Approval were not required for the initial division. Since the commencement of the Development Act 1993, a land division certificate must accompany any application that is required to evidence a planning approval. A request to merge the easement as regards common property titles can be placed on the application document, however, the easement will remain appurtenant to the Units.

Where rights were created by traditional grant, rights appurtenant to the units must then be transferred to the Strata Corporation to the intent that they merge and be extinguished in the fee simple of the land comprised in the certificate of title for the common property. Where created by Form 9A (under Section 223lo of the Real Property Act), an application for the extinguishment of an easement using Form 13 will be required. A unanimous resolution will be necessary.

3. Where an easement was created without a planning approval, it may be transferred back by the unit owners to the strata corporation.

Transfers of easements will be executed between the strata corporation and unit holders of the dominant scheme and the strata corporation of the servient scheme and must be lodged immediately before deposit of the amalgamated scheme.

Without any transfer, the easement will remain appurtenant to the units.

Where amalgamation is anticipated in a staged development, it would be prudent to create the easements appurtenant to common property only.

← SEE PARA 1202  
CHAPTER 12 -  
STAGED  
DEVELOPMENT

Figure 44 gives an illustration of the result of amalgamation where an easement remains appurtenant to units 3 and 4 in the new scheme, SP16000. Plan A represents the original strata schemes and Plan B represents the amalgamated scheme.

# STRATA FACTS

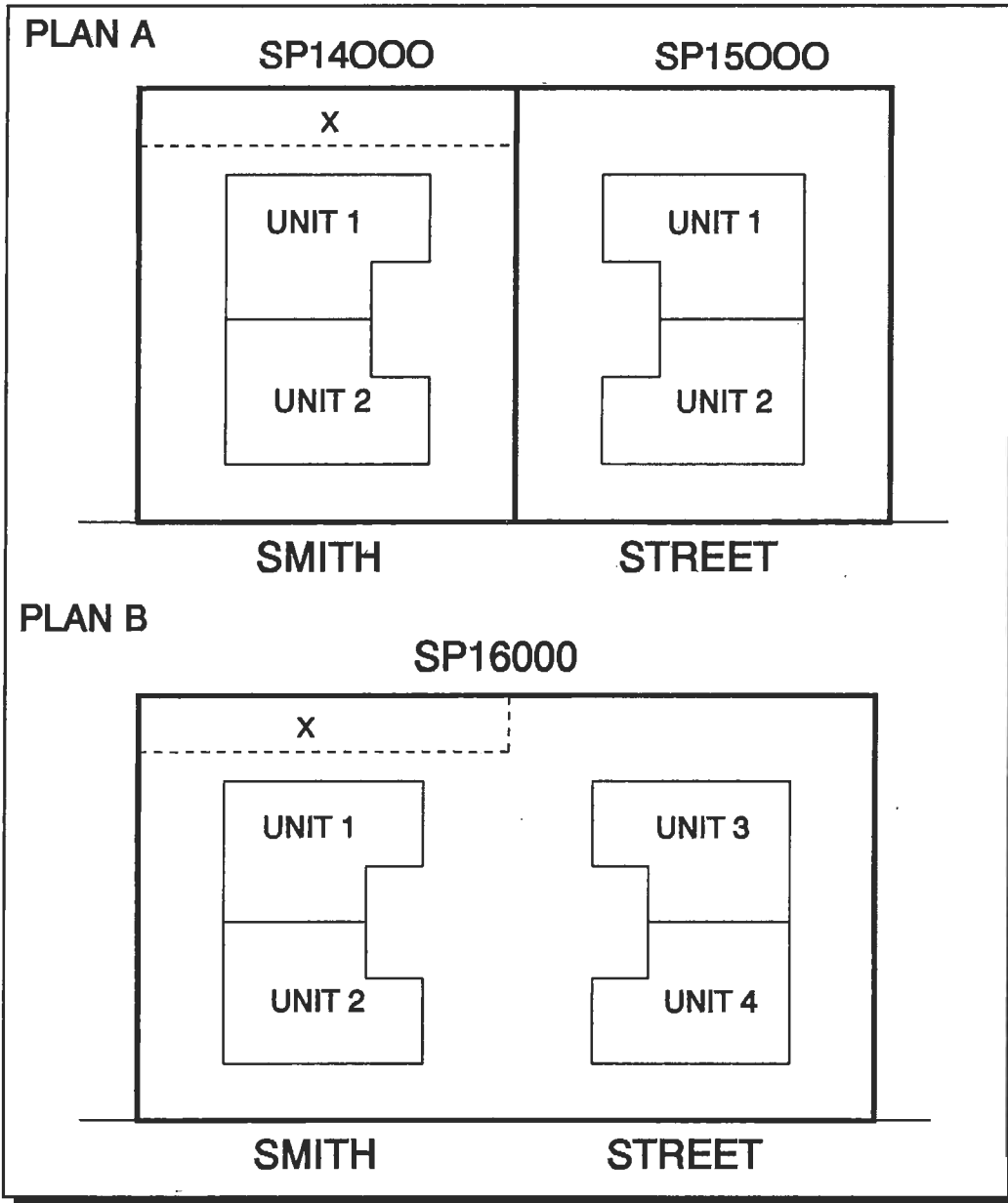


Figure 44 EFFECT ON PRE-EXISTING EASEMENT BY AMALGAMATION

# STRATA FACTS

DEALING WITH EASEMENTS - CHAPTER 8

Form 9A  
(See Note 1)

## APPLICATION FOR CREATION OF EASEMENT

(PURSUANT TO SECTION 223lo OF THE REAL PROPERTY ACT 1886  
OR SECTION 17b OF THE STRATA TITLES ACT 1988)

CERTIFICATE(S) OF TITLE OVER WHICH RIGHTS ARE BEING GRANTED (See Note 2)	The whole of the land in Certificates of Title Register Book Volume 3900 Folio 199 and Volume 4949 Folio 100.
ESTATE AND INTEREST	ESTATE IN FEE SIMPLE
ENCUMBRANCE(S)	NIL
GRANTOR Full Name and Address (See Note 3)	Joseph Henry Black, Farmer and Helen Jane Black, Home duties both of 27 Main Street Port Lincoln 5280,  and  Arthur William Jones, and Eileen Belinda Jones, Builders both of 89 Newton Road Springfield 5017
CONSIDERATION Where applicable insert monetary consideration in words and figures	For no monetary consideration, or  Five Hundred Dollars (\$500) and in order to comply with the condition of approval of a strata plan.
GRANTEE (See Note 4)	As above.



# STRATA FACTS

THE GRANTOR ACKNOWLEDGES RECEIPT OF THE CONSIDERATION HEREIN EXPRESSED AND HEREBY GRANTS TO THE GRANTEE

Here set forth  
the rights  
and liberties  
being created  
Define  
precisely

FIRST, an easement for drainage purposes over the piece marked A in FP 30000 and being portion of the land in the said certificate of title Register Book Volume 3900 Folio 199.

SECONDLY, an easement for drainage purposes over the pieces marked B and C on the strata plan lodged contemporaneously hereto, and

THIRDLY, a free and unrestricted right of way over the piece marked D on the said strata plan,

the said land secondly and thirdly above described being portion of the land in the said certificate of title Volume 4949 Folio 100

Here set forth  
appurtenance  
Define  
precisely

TO BE HELD APPURTENANT TO:-

As regards the easement First above described, the Units 1 and 2 and Common Property in the strata plan lodged contemporaneously hereto (or if convenient refer to the strata plan No).

As regards the easement marked B Secondly above described, Lot 12 in FP 30000 being the whole of the land in certificate of title Volume 3900 folio 199.

As regards the easement marked C Secondly above described, Unit 1 in the said strata plan.

As regards the free and unrestricted right of way marked D Thirdly above described, Unit 1 in the strata plan lodged contemporaneously hereto.

# STRATA FACTS

DATED THIS 21 DAY OF MAY 1993

EXECUTION (GRANTOR)

EXECUTION AND  
ATTESTATION  
(See Note 5)

The within grant is hereby accepted

(L.S.) A. B. SMITHERS

GRANTEE-ACCEPTED

REGISTERED ...../...../19

REGISTRAR-GENERAL