Coveting thy neighbour's land

Access options

Question: Can I have access to, or through, my neighbour's land?

The short answer is: Yes, if your neighbour agrees.

Otherwise, the answer is longer, with legal options available in some circumstances.

In NSW, there is legislation that enables Court ordered access to be granted, both temporary and permanent in certain situations. But, the Courts won't interfere with your neighbour's property rights lightly and will not go beyond any power available to order access.

Keep in mind that your neighbour is, effectively, an innocent party, who is involved simply because they happen to own land next to yours.

Any concerns from your neighbour should be considered and addressed as far as possible before, and even during, any Court proceedings (if legal action becomes necessary). In Court proceedings a Court will consider concerns raised by your neighbour, and often will also consider any negotiations between the parties, especially when considering any orders for the costs of the proceedings.

Negotiating in good faith in the interests of meeting real concerns of your neighbour can only help an application for access and any costs application. Plus, you may just reach agreement which will save time, money and stress as well as removing the uncertainty of a Court outcome.

The first step

Talk to your neighbour, either on your own or with someone who can help... maybe you can agree on terms for access.

Whatever happens, you should always be willing and open to communicate. Unless your neighbour's expectations are completely unrealistic, it will nearly always be better to negotiate an agreement, especially if you are going to be neighbours for a while.

Talking hasn't worked yet

It might be time to get advice. Depending on what sort of access is required and how long you need it for, this can be a fairly involved area of law and if access is required as soon as possible then a strategy will need to be worked out. That strategy could consider legal action including as set out later in this paper.

Legal action involves its own set of costs (mostly time and money) and it may be that alternatives, previously dismissed, may now be more attractive. Even if you have commenced legal action it is always worthwhile keeping communication open, as an agreement could lead to a better outcome for all involved.

What next? Legal options

Access to Neighbouring Lands Act, 2000 (NSW)
[http://www.legislation.nsw.gov.au/maintop/view/inforce/act+2+2000+cd+0+N]

This Act is probably the best legal option in most cases for **temporary** access for building or other work.

The existence of this Act alone helps the prospects of an agreement being reached. The procedure is fairly straightforward and quick, but the terms of any access will be decided by the Court (Local) and not through negotiation. Court applications are likely to cost more than a negotiated agreement and there is **no** right to compensation for a neighbour (except for actual loss or damage) so there is some incentive to try to agree.

The Act specifies that the Court can make an access order if it is satisfied that access is required for the purpose of carrying out work (the type of work is pretty broad) and that it is appropriate to make an access order in the circumstances. The Court must consider:

- whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without access; and,
- whether the access would cause unreasonable hardship to a person affected by the order.

So, assuming that the Court is satisfied in a particular case that there is a necessity for access and that any hardship can be addressed through conditions, then the Court is likely to grant an access order subject to appropriate conditions.

The Act sets out the kinds of conditions for access the Court could make, including conditions to: avoid or minimise loss or damage to people and property; minimise inconvenience or loss of privacy; specify precautions and safeguards; require insurance against risks; limit access to specific parts of the land; and, reimburse expenses.

The Act provides that the costs of an application are payable by the applicant for the access order subject to any order of the Court. In working out what are appropriate costs orders the Court may consider the attempts to reach agreement of the parties and whether any refusal to consent to access was unreasonable.

In most, if not all, cases, with an awareness of the Act (especially the conditions of access considered by the Court, and the lack of compensation available under the Act) it will make sense for neighbours to work out acceptable terms that suit them, rather than leaving it to the Court to determine at greater expense and uncertainty.

Easement via s88K of the Conveyancing Act 1919 or s40 of the Land & Environment Court Act

If the access required is permanent, such as for a stormwater drainage easement or a right of way for an access driveway or footway, and it has not been possible to negotiate an agreement, then applications to either the Supreme Court NSW (**"the Supreme Court"**) or the Land & Environment Court NSW (**"L&E Court"**) are likely to be the only legal options available.

Section 88K: http://www.legislation.nsw.gov.au/maintop/view/inforce/act+6+1919+cd+0+N

Section 88K gives power to the Supreme Court to grant an easement (a permanent right over neighbouring lands) provided certain elements are met, including:

- the easement required must be reasonably necessary for the effective use or development of the land to benefit from the easement;
- use of the land with the benefit of the easement must not be inconsistent with the public interest;

- the owner of the land burdened by the easement can be compensated for any loss or disadvantage as a result of the easement; and,
- all reasonable attempts have been made to obtain the easement.

Many of the cases concerning s88K applications involve an analysis of whether in the particular case the easement is *"reasonably necessary"*. Although s88K does not require "absolute" necessity, there can be uncertainty when there are alternative developments possible that would not necessarily require an easement.

However, each of the elements listed above are the subject of substantial caselaw and each set of circumstances would have to be examined with reference to the decided cases.

The power of the Court to grant an easement is discretionary so it is not as simple as ticking the boxes and expecting the easement will be granted. The Court will need to be convinced that it is appropriate to use the power under s88K to grant an easement that will permanently impact on your neighbour's land.

It is worth bearing in mind that the costs of a section 88K application are normally paid by the applicant (the person asking for the grant of an easement) but are subject to any order of the Court to the contrary. Even where a costs order is made against an applicant though, there will be still be costs incurred by a respondent (the person objecting to the grant) that will not be recoverable from an applicant.

Section 40: http://www.legislation.nsw.gov.au/maintop/view/inforce/act+204+1979+cd+0+N

Section 40 of the Land & Environment Court Act allows the L&E Court to exercise the jurisdiction of the Supreme Court under section 88K in relation to cases before the L&E Court involving the granting or modification of a development consent.

Whether under s88K in the Supreme Court or s40 in the L&E Court, these types of cases involve significant costs and can become quite involved in terms of legal argument and expert evidence. The amount of compensation for an easement, if awarded, can be a relatively small amount when compared to the legal costs incurred. It will often be the case that it is better to reach an agreement where possible.

Eakin McCaffery Cox Lawyers can help by advising and acting for you in all your property matters including negotiations and dispute resolution procedures on a cost effective basis. Please contact **Eakin McCaffery Cox Lawyers on (02) 9265 3098** for advice and action on property matters including negotiation and dispute resolution, planning, Council and the Land & Environment Court matters.

This paper is a summary providing general information and should not be construed as specific legal advice.

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