

Housebuilder Top Tip: The danger of relying on Prescriptive Rights

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One of the first issues that is considered in any development proposal is the adequacy of existing easements for the provision of an appropriate access into the site and for servicing the site.

It is often the case that the development does not benefit from the necessary express legal rights, but there may be potential to establish a successful claim for prescriptive rights by demonstrating that the rights have been used:

- continuously;
- for at least 20 years; and
- without permission.

However, in order to rely on prescriptive rights for the intended development, the following would need to be carefully considered:

(1) Does the development represent a change of identity or radical change in character?

(2) Would the use result in a substantially increased or altered burden on the land which is subject to the prescriptive rights?

If the answer to either of these two questions is yes, then the prescriptive rights cannot be relied upon as prescriptive rights are limited to their existing use. As an example, a development could take advantage of prescriptive drainage rights provided that the flow of water remains no greater as a result of the development by the construction of appropriate water attenuation on the site. In the absence of this attenuation, the owner of the burdened land could block off the drainage and make a claim for trespass.

The Courts have taken inconsistent views of what constitutes radical change of character and increased burden and so each case will turn on its facts. However, the key is never to assume that prescriptive rights can be relied upon and will be enough to serve a development, or that an adjoining landowner will not be entitled to take a ransom position and potentially hinder the development.

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