EASEMENTS

An interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists; (b) entitles him to protection as against third persons from interference in such use or enjoyment; (c) is not subject to the will of the possessor of the land.

- Creates a non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.
- *Can* be affirmative easements or negative easements.
- Dominant estate gets easement; serviant estate gives easement.

Expressed easements- Look to documents as whole. We do not need specific language.

Affirmative Easement- Entitle the holder to certain acts

Negative easements- Prevents burdened landowner from doing something

Two Major Kinds of Easements

Easement Appurtenant- A burden attached to real property (connected to a beneficial land that either benefits or burdens the owner’s right to utilize that property).

  a. Specific words of inheritance or words of art are not necessary to create a valid appurtenant easement (courts look to the holder’s intentions and circumstances of the property, i.e. driveway parcel of land next to a gas filling station), even of unlimited duration.

Easement in Gross- A right to use the land of another that is specific to a particular individual and which expires upon the death of that person.

  - Common law did not recognize easements in gross, but most states have adopted via statutes.
    - Common ownership of both estates and a subsequent conveyance separating them
    - Common owner used part of the parcel for the benefit of another and this use was apparent, obvious, continuous, permanent
    - Necessary for enjoyment
  - More limited than an easement appurtenant
  - Limited in time- Usually for the grantee’s lifetime.
  - Not revocable

Easement by Implication- An easement that is not expressly stated in a deed but which is inferred upon conveyance, that a portion of one parcel had been used to benefit the other parcel and that upon sale the buyer of the benefited parcel could reasonably expect such benefits to continue.

  - Easement by Necessity- arises by operation of law without which the owner of the benefited property is deprived of the use and enjoyment of his property. Requirements:
    - Unity of title (originally part of serviant lot); Between Dominant and service estate
    - Landlocked no access except through other parcel;
    - Can remain dormant; does not need to be used regularly because the implication is that it will be used when necessary.
• **Easement by Prior Use** - where the prior use of the land supports the inference that the parties intended to create an implied easement, the required extent of the easement’s necessity is *less than* when necessity is the only circumstance from which intention can be drawn. Necessity is *not* required to establish an easement by prior use. **Requirements:**
  - Unity of title;
  - Continued use of one parcel to benefit another, necessity;
  - Circumstances can be inferred by intent. Can use circumstances to infer intent.
  - Can have situation where there is no longer a need for an easement of necessity because other access has been created, but the easement remains as an easement by prior use.
  - Volition- willingly
  - Profit- right to remove products from someone else’s land and cannot be oral because Statute of Frauds

  **Majority view** on the standard in determining an implied easement depends on whether the easement is by grant or reservation:
  - Easement by Grant- need only a showing of reasonable necessity
  - Easement by Reservation- need a showing of strict necessity

**Easement by Reservation** – reserves and vests an interest in the same property in a third person.
  - Traditional Rule- a grantor in deeding property to one person may not reserve and vest an interest in the same property in a third party.
  - Modern Rule- a grantor in deeding property to one person may effectively reserve and vest an interest in the same property in a third party. (Sell property to A with easement for B).

(revocable right to go on someone else’s land)

**License** - A right that is granted to a person allowing him or her to conduct an activity that without such permission he or she could not lawfully do.
  - Unassignable and revocable at the will of the licensor.
  - Most limited right of access to property; does not convey an interest in land.
  - Is, in general, subject to termination at the will of the possessor of the land subject to the privilege of using it, while an easement is not.

An oral license *can* become irrevocable when the licensee expends money or equivalent labor in reliance on the license. Licensee continues as long as the nature of the interest calls for it.

• Language that gives an exclusive right and privilege to use land conveys an easement rather than a lease or license.
  - Court looks at language of agreement to determine that it grants easement rather than license.
    - A lease conveys an interest in the land and transfers possession of the land. A license merely allows acts on land that otherwise be trespass and does not convey possession of the land. The fact that writing here is called a “lease” does not make it a lease. A license is revocable at the will of the person who possesses the land, even though the revocation may constitute breach of contract.
Prescriptive Easement- A manner of acquiring an easement in another’s property by **continuous** and **uninterrupted** used in satisfaction of the statutory requirements of **adverse** possession. Typically there is no specific SOL.

Requirements:

- Continuous use (does not require constant use, only necessary to show that claimant made use of the land as his needs required);
- Improvement?
- Can be negated by verbal/written objection.
- If the owner consents → license

Easements by Custom- like a prescriptive easement, but applies to a larger region of land, *not* simply a particular tract. **Requirements:**

- Continuous use by the public (does not require unity of title).
- Landowners have the serviant estate; the dominant estate is held by the general public.
- No issue of appurtenance.

“When an easement is acquired by prescription (adverse possession), the extent of the right is fixed and determined by the manner of use in which it originated.” **Bartholomew v. Staheli** involved a prescriptive easement in a roadway for the benefit of dominant land the use of which was changed from farming to the establishment and maintenance of a nudist colony. Significant change in intended use.

The public may acquire an easement over private land by custom (i.e. several generations using a private beach property). The custom doctrine has been criticized, and some courts have allowed the public to use beaches based on implied dedication (solemn appropriation of property to public use, either express or implied) which the landowner’s intent is required (knowledge of use by landholder would suffice for intent) For there to be a custom the following elements must be met…

A. The use must be ancient
B. The right must be exercised without interruption.
C. The use must be peaceable and free from dispute.
D. The use must be reasonable.
E. The use must be limited by visible boundaries and to specific uses.
F. The use must be obligatory, i.e. not left to each landowner to decide the public’s rights.
G. The custom must not be repugnant or inconsistent with other customs or laws.

Scope and Transferability

Traditional- strict interpretation that the easement **cannot** be expanded

Modern- reasonable use is permissible.

- Easements **cannot** be extended beyond the originally contemplated use because we do **not** want to create additional burdens on the servient estate.
- Easement in gross **must** be assigned but **not** divided.
- A person acquiring a prescriptive easement does **not** take exclusive possession of the land, but merely makes use of it in an adverse manner.
Use reasonable person standard when trying to interpret scope of easement - may not alter express terms of easement.

- You cannot look at a specific moment in time (i.e. technology at the time easement established) to determine the reasonability.

If the location of an easement is specified in a deed, the easement may not be relocated, even if the relocation is reasonable.

Example: The owner of an easement sued the owner of the servient estate to prevent him from building over the old easement and creating a new one. Whether, the dominant estate\(^1\) may use a truck instead of a car on an easement depends on how necessary and reasonable the change is and how troublesome the change is to the owner of the servient estate\(^2\).

**Termination of Easement by Abandonment** - conduct on the part of the user of an easement demonstrating intent to abandon the easement and not reclaim it. **Requirements:**

- Non-use;
- Circumstances indicating intent to abandon.

→ Mere non-use of an easement created by deed for a period however long will not constitute abandonment unless there is a clear manifestation of intent to abandon the easement.

- Easements may be terminated by mergers. This occurs when the dominant estate and the servient estate are owned by the same owner.
- Termination by Prescription: If the owner of the dominant estate fails to enforce its rights against interference with the easement by the owner of the servient estate within the statutory time period.

**REAL COVENANTS**

**Covenants** - Promises relating to the land; broader than an easement. Ex: promise not to erect buildings above a certain height on the land.

- Will have benefited and burdened parcel.
- Courts treat covenants as a property interest (similar to a fee simple, etc.) and will not let the covenant go away without some very good reason.

**Equitable Servitude** - land use restriction, but not all the elements of a covenant are met. Good wording for exam: “[Even if the covenant is not enforceable as running with the land, it may be enforceable as an equitable servitude.]”

When is a covenant going to run with the land (be enforceable against subsequent owners)?

1. **Touch and concern** - affecting the quality, value or mode of enjoying the estate. (Can almost always find touch and concern).
   - Ex: Utilities (running water), height restrictions, etc.
2. **Intent of the parties** at the time the covenant is created that the covenant be enforceable against subsequent conveyees. (Intent can be limited in time: the covenant shall be in place so long as xxxx.)

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\(^1\) The land that benefits from an easement.

\(^2\) The land that is burdened by an easement.
3. **Privity of Estate**
   a. Vertical privity- most common; the person presently claiming the benefit or being subjected to the burden, is a successor to the estate of the original person so burdened or benefited. Can also be a legal relationship between the benefited or burdened estate and the group trying to enforce the restriction (such as an HOA).
   b. Horizontal privity-?? Connection with conveyance
   c. Mutual privity- mutual interest of the parties in the same land.

4. **Notice** is a *very* important element to enforcing the equitable servitude because it would be unfair to enforce restrictions upon a landowner that was unaware of them.

Pertinence (actual constructive) (touch and concern) can be inferred from a common scheme.

Affirmative covenants disfavor when they don’t substantially affect ownership. (ie. If a is required to build something that is not related to his ownership) = courts wont enforce as a petition of owning their land.

**Equitable Servitude requirements:**
- Probably need at least *intent* and *notice* to enforce an equitable servitude.
  A. A covenant is enforceable in equity as an equitable servitude against a person who purchases land with notice of it.
     - Less requirements compared to a *covenant running with the land*. Touch and concern element not required, some courts require only the intent of servitude + service.
       - EX. Tulk had a covenant which required maintenance of a garden on some land, but Moxhay later tried to put buildings on it after buying it. Issue: Is a covenant enforceable against a purchaser of land when that purchaser acquired the land with knowledge of the covenant? *Held: England holds that it would be inequitable for a covenant that is enforceable against a seller of land to be unenforceable against a person who purchases the land with notice of the covenant* (since the land was acquired at a lower price). An equitable servitude is a covenant regarding the use of land which is enforceable against subsequent possessors in equity, even if the covenant itself is not enforceable at law.
  - The land must be adjoining in order to have a covenant/equitable servitude.
  - An equitable subdivision must be conveyed in a written instrument; may also be evidenced by a separate agreement between the landowners involved (or recorded on a subdivision plot map).
  - 14th amendment *prohibits* judicial enforcement of racially restrictive covenants, even if the agreement was between private individuals.
  - **Affirmative**- entitles the holder to do certain acts

**Reciprocal Negative Easements**- Makes restrictions which are of benefit to the land retained mutual so that the owner can do nothing upon the land he has retained that is forbidden to the owner of the lot sold.
  A. An equitable servitude does not run with the land if the convenantee does not own any land which the covenant may benefit.
     - EX. Buyers of a lot in a subdivision sued the seller and a subsequent buyer to enforce a restrictive covenant in their deeds, but not in the deed to the subsequent buyer. **An equitable servitude is not enforceable against buyers who had no written notice of it.** The question is whether an easement is reciprocal when a subdivider includes the covenant in most deed in a subdivision but forgets to include it in one deed. If all the elements are met, every deed after...
the first one sold with the covenant will be held to contain the reciprocal negative easement³.

(1) Vertical privity: \(\Delta\) was the common owner of all the lots (2) Parties intended the restriction to be building upon the entire subdivision (3) The notice could have be actual (purchaser actually knew of the restriction), constructive (buyer should have reasonably known) or inquiry (purchase should have had enough knowledge to suspect that there might be some restrictions as to inquire about them) [this element weighs more heavily when the subdivision seems more uniform] (4) touch and concern: Here the limitation on using the land for residential purposes only related to the use of the land. [Since notice wasn’t satisfied the court did not find a reciprocal negative easement].

- Michigan Supreme Court holds that where a property owner sells off lots by deed containing covenants meant to carry out a scheme of a residential district, and a lot purchaser has notice of those covenants, that purchaser is barred from building a gas station on his lot by an implied covenant.
- Note: Most jdx follow this case and imply negative restrictions from a common scheme. A few, however, closely follow the Statute of Frauds [contracts of land must be in writing] in such matters. Court in these JDXs say that an equitable servitude will not be implied from the presence of restrictions on other lots in a subdivision, from developer’s oral promise to impose such restrictions, or from a general scheme not included in the deed to the lot in question.

Where the grantor conveys a lot with certain restrictions, the retained lot should also be burdened.

**Implied Reciprocal Negative Easements**—Implied covenant; if the owner of two or more lots, which are situate so as to bear a relation to each other, sells one with restrictions which are of benefit to the land retained, during the period of restraint, the owner of the lot(s) retained cannot do anything forbidden to the owner of the lot sold.

a. Lots in same scheme are subject to same negative easements.
   - Lot owners in a subdivision sued another lot owner for violating a restriction in their deeds against building commercial buildings. *If lots are part of a common scheme, restrictions in some deeds are enforceable against owners of other lots as well.* The \(\Delta\)’s lot lies at the entrance of the development and sets the character of the entire tract. That lot was shown on all the plans from the beginning. \(\Delta\) lot was restricted in 1923, the restriction was part of an original scheme and gave rights to earlier as well as later purchasers. The court explains that *a restriction must benefit the land and be intended to be appurtenant to that land.* If the restriction is not so, then it is considered a personal contract and will not run with the land. Here, the only evidence of a scheme is a list of conveyances of different lots from several years ago all with similar restrictions [court explains that extensive omissions or variations of the restriction often time tend to show that there is no scheme].
      a. This case looks at the doctrine of implied reciprocal easements. Once the subdivider has sold all the property, he or she no longer has the power (or the interest) to enforce a covenant. Thus, other owners in the subdivision may enforce it. The issue here is whether people who bought their property after and before \(\Delta\) bought his lot may enforce the covenant against \(\Delta\). Subsequent purchasers certainly can enforce it. When the original owner sold the lot to \(\Delta\), the covenant in \(\Delta\) deed was appurtenant to all the original owner’s remaining lots. The covenant ran with the land when the original owner sold the subsequent purchasers their lots. However, it is more difficult to establish that prior owners may enforce the covenant. This case looks at the issue from a third party beneficiary perspective. It holds that the covenant in the deed to \(\Delta\) benefits prior purchasers as third party beneficiaries [for residential development].

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³ An easement created when the owner of two or more lots sells one with restrictions on it that benefit the land retained by the owner. This sale creates a mutual servitude, and while it is in effect, the original owner cannot use his or her retained land in any way that is forbidden to the buyer of the other lot.
• **Implied**- not stated expressly; **Reciprocal**- if one property is burdened, the other property should be burdened as well; **Negative**- the owner cannot do something that the other property owners cannot do.

• **Must** start with a common owner.

• Reciprocal Negative Easements are **never** retroactive.

• **Runs with the land**- operative upon use of the land by any owner having actual or constructive notice thereof.

• **Does not** violate the Statute of Frauds b/c it is not in writing- it is an implied contract as a matter of law (different from an oral contract/conveyance). The writing is found in the original restrictions; the question is how broadly are they going to be applied?

• **IRNE**- cannot be exercised retroactively if there is 1. **reliance** and 2. **prejudice** to an exiting owner
  - Equitable estoppel prohibits enforcement of restrictive covenant created after purchase of property.
  - Homeowners in a subdivision sued another owner who wanted to build a facility for mentally disabled, claiming that the facility violated a new restriction in their deeds. A restrictive covenant may not be imposed against persons who acquired property in reliance on the nonexistence of the covenant and who would suffer prejudice if the covenant were enforced.

**Construction, Administration and Termination**

• Restrictions on dwellings/residences **can** be applied more broadly to land as well.
  i. Some courts hold that restrictions in a deed should not be strictly construed; they look at the parties’ intent and the surrounding circumstances to interpret the restrictions more broadly.
    1. EX. Homeowner in a subdivision sued the owner of one lot to prohibit owners in an adjoining subdivision to use that lot for beach access. Should restrictions in a deed be strictly construed? Some courts look beyond language in a deed restriction to determine parties’ intent and surrounding circumstances. Here, although the restrictions in the deed for the lot in question referred only to buildings, they clearly were meant to require the property to be used only for residential purposes. The trial court was not required to find that the use of the lot was within the scheme of development.
      a. Other courts hold that nothing will be deemed a violation of a restriction that is not in plain disregard of its express words.
      b. In order for a covenant to run with the land, it must be mutual and not capable of being altered without the consent of adjacent owners.
        • EX. An owner in a subdivision sued the owner of an adjacent lot for an injunction when the adjacent owner built commercial property on the land in violation of a deed restriction. Because there was no mutuality here, we hold that the reservation in the deeds was a personal covenant between the grantors and their individual grantees. The individual grantees do not have the right to enforce the covenant against others.
        • Note: This is an example of a covenant running with the land b/c the grantor has less control in terms of the restrictions b/c the deed disclosed that the restrictions could be altered by permission through grantor or grantees. This is different from a personal covenant because the grantor has absolute control over the restrictions.

• Easements and covenants can be land use planning devices.

• If a grantor maintains the general power to dispense with restrictions, it is a personal covenant (easement in gross)
• A covenant can restrict development under the guidance of an architectural committee despite the absence of specific standards if they maintain a standard of approval that is reasonable and in good faith; cannot be arbitrary or capricious. Even with vague standards

• Restrictive covenants are generally construed broadly to be consistent with a general plan.

Violations of a Covenant
• Changed conditions in the surrounding area will defeat the servitudes only where the benefit sought to be achieved is no longer possible because of the charged external circumstances.
• A duly recorded easement may not be violated because of changed conditions.
• Changed conditions outside the subdivision do not justify the violation of a covenant
  o A restrictive covenant will become unenforceable only if changed conditions affect the entire subdivision that is subject to the covenant, not just the outskirts of the association.
    ▪ EX. Landowners in a subdivision sued another owner for violating a restrictive covenant requiring the land to be used only for residential purposes. The court here discusses ways a restrictive covenant may be terminated. Subdivision owners may waive the right to enforce the covenant by their agreement in previous violations. But, as this case holds, changed conditions alone may not be enough to terminate a covenant. The changed conditions must affect the entire development, not just some of the tracts. The equities favoring the lot owner who opposes the restriction must be weighed against the equities favoring the other lot owners who purchased their property in reliance on the restriction.

• A recorded right to certain lot use is not subject to changed circumstances.

NON-VOLITIONAL (“NATURAL”) INTERESTS

Private Nuisance- an unreasonable interference with the use and enjoyment of the land. The character, volume, frequency/duration, time and locality of noise may constitute such interference. (Only arises in an individual ownership situation).
• Balance the social utility of the nuisance against the disturbance.
• Sometimes courts will grant permanent damages as an alternative to an injunction if the injunction would cause permanent harm.

Two views on whether a property interest is created:
  1. Servitude created (some sort of property interest) - an adjoining landowner has a right not to be interfered with and to prevent nuisance.
  2. A taking is established- if a party is prevented from doing something which he believes is a right to his property, the owner should be compensated.

In a situation where the social utility outweighs the disturbance of the private nuisance, there are two ways to view the result:
  1. Licensing continuing wrong- awarding monetary damages in order to compensate the landowners for the disturbance, essentially creating a license. Creates a servitude in the party causing the disturbance, essentially creating a license. Creates a servitude in the party causing the disturbance (they are paying for the use).
  2. IF the disturbing party can be enjoined from continuing operation, a servitude is created in the neighboring landowner (landowner owns a right to prevent the nuisance).

Public Nuisance- harm to the general public; an activity that unreasonably interferes with a right common to the overall public.
  • No need to do a balancing test.
• It can be argued that the neighborhood is given a servitude (very broad) against the neighboring nuisance.

• Injunction generally granted regardless of cause unless party came to nuisance. Damages are given for building only if failure of the land would have led to collapse of land without the building must prove negligence.

Support of Land

• Subjacent Support = Mr. Burns’ Oil Scheme
• Lateral Support = Support that exists when the supported and supporting lands are divided by a vertical plane.

• Strict liability for failure of lateral support of land. (Don’t confuse w/ subjacent support).
  1. No balancing – treated more as a public nuisance than a private nuisance. (We don’t want land to fall-it affects other people when land collapses.)

• Under theories of strict liability and negligence, adjoining landowners have a duty to provide lateral support to each other’s land.
  o Strict liability for removal of lateral support is limited to land that would subside while in its natural state.
    a. A homeowner on the side of a mountain sued the homeowner at the bottom for damages arising from failure to provide lateral support for a deteriorating retaining wall. Under theories of strict liability and negligence, adjoining landowners have a duty to provide lateral support to each other’s land. The wall was constructed before the construction of the Π’s house. There is no allegation that Δ did anything to cause the collapse of the wall. For the Π to recover, they must prove that the disrepair of the retaining wall would have caused their land to subside in its natural condition. If the land would not have subsided but for the weight of the Π’s house, they cannot recover. Reversed.
      ▪ Note: The downhill landowner has an ordinary duty of care. The downhill landowner must protect the uphill landowner from injury when the downhill landowner takes action that may affect the stability of the neighbor’s property.

• If the land subsides from removal of lateral support because of the additional weight of a building, the adjacent landowner is only liable in cases of negligence (b/c must exercise an ordinary duty of care).
  ▪ Adjacent lateral support may be removed provided that artificial support, such as a retaining wall, is provided to replace such support.
  ▪ The duty to maintain the artificial support becomes a covenant that runs with the land.

Drainage

1. “Common Enemy” Rule (majority)- emphasizes the possessor’s privilege to rid his lands of surface waters as he will; in substance, a possessor of land has an unlimited and unrestricted legal privilege to deal with the surface water on his land as he pleases, regardless of the harm which he may thereby cause to others. [If an owner creates something that causes damage to adjacent property, he is liable.]

2. Civil Law Rule: A landowner who interferes with the natural flow of surface waters so as to cause an invasion of a neighbor’s interests in the use and enjoyment of his land is subject to liability to others.

3. Reasonable interference (minority) – landowner can drain his property as long as it doesn’t unreasonably interfere with other land owners. Balances the utility of the use against the gravity of harm. (adopted in CA)
  ▪ Courts look at the following factors:
    i. The utility of the possessor’s use of his land.
    ii. The degree of harm that results.
iii. The foreseeability of harm that results.
iv. The feasibility of alternatives.

1. EX. A downstream landowner sued an upstream developer for an injunction due to the increased volume of water and flooding in a stream caused by the developer’s expulsion of surface waters. The court adhering to the reasonable use rule explained that when expelling surface waters from one’s land onto another’s land, the landowner must act reasonably. This was not the case here because the Δ failed to build a channel or conduit to control the flow of the water to prevent damage to Π’s property.

Water in Watercourses (Surface Water)

- Key distinction in water law: riparian rights v. prior appropriation. Most western states have a compromise between riparian law and prior appropriation. States have water allocation schemes which look at a combo of factors.
- Must demonstrate actual injury/damage in order to make claim.

Riparian Rights

- **Natural Flow Theory (traditional)** - neither party has a right to use all the water; both have a right to participate in the use of the water naturally flowing through his land. Under common law cannot obstruct natural water flow for any reason. (Riparian Rights: If you live alongside a stream, then you have rights to the stream = Eastern States)
- **Reasonable Use Theory (modern)** - each riparian proprietor on a watercourse or lake is merely to be free from unreasonable interference with his use of the water herein, but preference is given to those using water for natural purposes. (A compromise from the natural flow theory.) Entitled to reasonable use for artificial (Industrial) use. They cannot obstruct downstream natural use with upstream artificial use.
  - A downstream mill operator sued an upstream mill operator when the upstream mill operator dammed the stream and blocked the water from reaching the downstream mill. *May riparian landowners use all the water of a stream to the detriment of other riparian owners. A riparian landowner may use all the water in a stream to satisfy natural needs for water, such as thirst. But for artificial needs for water, such as manufacturing and irrigation, it is up to a jury to decide on a case-by-case basis how the water should be divided.* Here we see that a riparian landowner may take water from the stream in two situations: 1) When taking the water will not affect the flow of water in the stream; and 2) when the water is used for “natural” purposes, such as for drinking and household purposes. When taking the water for artificial purposes affects downstream users, the old minority view is the natural flow theory, that the downstream owner could always sue the upstream user for an injunction. The majority view is the reasonable use theory, that the upstream user may use the water reasonably. The reasonable use theory involves balancing the landowners’ respective needs. Relevant factors include: the utility of the possessor’s use of his land; the degree of harm that results; the foreseeability of harm that results; and the feasibility of alternatives.
  - **Riparian owner can divert to non-riparian last if no injury.**
    - A downstream landowner sued an upstream landowner for diverting stream water to land that was not connected to the stream. *May a riparian landowner use stream water for land that is not adjoining the stream if there is no damage to downstream riparian landowners? A landowner may make reasonable use of the water in connection with his riparian land, provided he leaves the current diminished by no more than is reasonable.* Other courts have held that a riparian owner may obtain an injunction against any person who diverts water to non-riparian lands even

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4 Water coming from rain, snow, and streams that spreads over the ground or collects in pounds, as opposed to stream water that runs in defined channels.
if the riparian owner is not damaged. On the other hand, the Rest. 2nd of Torts provides that a non-riparian owner may make reasonable and beneficial use of stream water so long as the use does not harm a riparian owner.

**Prior Appropriation [Western States]**

The first appropriator of water from a natural stream for a beneficial purpose has a prior, vested right to the extent of such appropriation. The first appropriator has the right to all of the water they want as long as it’s “beneficial use.” Purpose: promote use of the water.

- All based on priority of use- who came to the water first?
- Reasonable use doctrine **not** applicable; riparian element is **not** applicable.
- Used in the days of the Old West.
- First person to appropriate water for a beneficial use gets to use it to the amount of the original appropriation.

**Groundwater**

Domestic use has a priority over agricultural use.

- **Law of Capture (English Rule)** - allows a landowner to pump as much groundwater as he chooses, without liability to neighbors who claim the pumping has depleted their wells. (Similar to prior appropriation). Texas is the only remaining state adhering to the law of capture.
- **Rule of Reasonable Use (American Rule)** - limits the common-law right of landowners to take water from a common well by imposing liability on those who take “unreasonably” to their neighbors’ detriment.
- **Correlative Rights Doctrine (California)**—determine what percentage of the water is under each person’s land, and that’s the percentage each is entitled to use. Based on the concept that land ownership entitles you to everything above/below your soil.
- **Public Trust Doctrine**—the court (State) maintains continuous jurisdiction to allocate resources in the public interest, not confined by past appropriation which may be incorrect in light of current knowledge or inconsistent with current needs. Public trust doctrine should be considered in line with prior appropriation. A prior appropriation right is subject to provision based on environmental, recreational and other values. The court should suppress the limitation of appropriation rights.
  - EX. An environmental organization sued a water district that was permitted to take almost all the water flowing into MONO lake, thereby damaging the lake’s beauty and ecology. *In allocating water, public trust must be balanced against population needs*. The purpose of the public trust is to protect navigation, commerce and fishing on the water, along with preserving the land’s natural state. Although the streams diverted by DWP are not navigable, we hold that the public trust doctrine protects navigable waters from harm caused by diverting nonnavigable tributaries. The public trust doctrine prevents any party from acquiring the right to appropriate water that harms the interest protected by the public trust. The legislature may grant permits for using waters in ways that may not promote the public trust. The state has a duty to take the public trust into account when it allocates water resources. [Focus on the interests the court looked at 1) Recreation → Scenic 2) Business → Shrimp and 3) Public → Ecological]
    - The public trust doctrine provides that the government owns the navigable waters and land lying beneath them for the public’s benefit. *The government has a servitude over navigable waters and private rights of water are subject to that servitude*.
- **Proportional interest rule**—people above groundwater receive a proportional interest in
Interests in Oil and Natural Gas

- **Law of Capture (Traditional Rule)** - very similar to prior appropriation; the first appropriator of resources for a beneficial purpose has a prior, vested right to the extent of such appropriation. Can remove all of the resources regardless of effect from the bottom of his land.

- **“Fair Share” Principle (Modern Rule)** - recognized right to have a reasonable opportunity to produce one’s just and equitable share of oil in a pool (also called “correlative rights”). Each landowner is entitled to his proportional share of oil in the pool below his property.
  - Disadvantage to correlative rights: slows production because we must wait for property owners to make use of the natural resources of their land. Hinders access to public oil (economic theory).
  - Common law to whomsoever the soil belongs he also owns the sky and depths
  - Modern law if flights over private are so low a flight that they interfere with the use and enjoyment then there is a taking.

Interests in Airspace, Air, Sunlight and Clouds

- **Airspace** – airspace that is interfered with is compassable under the Takings Doctrine.

- **Sunlight** - the doctrine of prior appropriation applies to the use of sunlight as a valuable protectable resource. There is an implied easement of sunlight. You can't interfere with someone else’s light. Balance benefit with burden.
  - **Doctrine of Ancient Lights (Traditional Rule)** - if the landowner had received sunlight across adjoining property for a specified period of time, the landowner was entitled to continue to receive unobstructed access to sunlight across the adjoining property. Landowner acquired a negative prescriptive easement and could prevent the adjoining landowner from obstructing access to light. No longer applicable.
  - **Reasonableness Doctrine (Modern Rule)** - if the use is reasonable, the doctrine of prior appropriation applies to protect those who first exploit the resource. If the interference rises to the unreasonable level of cutting off sunlight, it becomes a private nuisance. Analyze the same as a private nuisance, what is the balance between the benefits and the burden.
    - Can record a right to solar access-similar to recording an easement.

- **Over flights** can create a servitude on underlying property.
  - Direct and immediate interference is a taking.

**TRADITIONAL LAND USE CONTROLS**

**Zoning** - that restricts land use is constitutional if it is reasonably related to public welfare, but this is not unlimited. A zoning ordinance, as a valid exercise of police power, will only be declared unconstitutional where its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.

- Segregation of residential and industrial buildings presents sufficient benefit to the public.

**Regulation of the Subdivision of Land (City Maps)**

Subdivision regulations typically seek to assure that subdivisions are appropriately related to their surroundings—more sophisticated administrative process than conventional zoning regulations. Commonly, they require that the subdivision be consistent with the comprehensive plan for the land (i.e. by reserving land for proposed highways and parks). Requirements typically include:

1. Assure that utilities tie into those located or planned for the adjoining party;
2. Widths of streets, length of blocks, size of lots, etc.;
3. Allocations of facilities’ costs: dedications and fees (i.e. streets, sidewalks, sewers, street lights, etc.)

Local planning board has the discretion to deny subdivision plan under applicable regulations
But they can’t deny on the basis of zoning laws.

**Reservations of Land for Public Acquisition**- Statutory map laws are constitutional; plotting of a street upon a city plan does not constitute a taking giving rise to damages. Primary purpose of city map laws is to promote orderly growth of cities-relates to public welfare. State map ordinances are valid uses of police power if there is a statings clause protecting the owner against substantial damage.

- Building permits for structures encroaching on proposed streets may be denied only when an applicant would not be substantially damaged (savings clause).

**Public Ownership**
States can constitutionally take real property with just compensation from lessor and transfer it to lessees when there is a rational relationship between the exercise of eminent domain and conceivable public purpose.

- *Hawaii v. Midkiff*- restructure of land regime for "public purpose"- basically redistributed the land by forcing landowners to sell their property to the homeowners who leased the land. Reduced the concentration of ownership of fee simples.
  - Supreme Court is willing to uphold the notion of prospective planning-either in future or existing communities.

**Administration of Land Use Controls**

**Non-Conforming Uses**- The use of a structure which is rendered unlawful by the promulgation or revision of a zoning ordinance. A use that is not allowed in the area as now zoned but it pre existed, it was there before the zoning.

- **Amortization period**- period of time permitting a property owner to comply with zoning ordinances. Within police power of local government. **Must** be:
  - Reasonable and not cause hardship to the pre-existing indefinite continuous non-conforming use.
    - (Example code prohibiting placement of mobile homes outside of mobile home parks that would require current mobile homes placed outside of parks prior to enactment to move as well would be unreasonable.)
  - Government body **must** balance the need for the individual to recoup an investment with interests in the public in having orderly land use.
    - Several courts have declared any amortization of nonconformities unconstitutional.
    - Some municipalities establish an individual amortization period appropriate for each nonconformity.

- **Substantial investments**- a substantial investment or expenditures creates a vested right in the original zoning classifications (prior to rezoning). Determined by:
  - The type of project, location, ultimate cost, and principally the amount accomplished under the conformity.
Minority of jurisdictions have created two exceptions to substantial investment requirement (provides more uniformity of outcome);

- Detrimental reliance
- When the aim of re-zoning is to hinder the proposed development project.

(1) EX: Π purchased land zoned for multifamily dwellings with the intent of erecting such dwellings. Subsequent to the purchase, Δ rezoned the area for single-family dwellings, thus depriving Π of the multi-family development.

- Some states simply provide that the right to develop vests at the time the developer files for a building permit.
  (a) This has been to as a date certain vesting rights doctrine.
- A municipality may be barred on equitable estoppel ground from rezoning land upon which it had assured a developer it could build.
- A building permit issued in error and then relied upon may be revoked in the majority of jdxs. The minority estop the issuing authority from revoking such a permit issued in good faith.

Ad hoc- zoning (for a special situation) is not valid, must be a plan.

Variance- local boards have the power to grant variances although they should do this sparingly.

  ii) Where a proposed nonconforming use is compatible with established uses, a local zoning board of adjustment may issue special exception, sometimes called a conditional use permit, which spells out the requirements for the nonconformity to be allowed.
  iii) Courts reviewing special exceptions often require the board to state its reasons for granting or denying a request and to base its decision on substantial evidence.
  iv) A variance from a zoning regulation is not confined to a specific use as is a special exception. They are given only to avoid unnecessary hardship.

Zoning by Electorate- City charters requiring proposed land use changes to be ratified by a referendum of the voters is a constitutional delegation of legislative power. In establishing legislative bodies, the people can reserve themselves the power to deal directly with matters which might otherwise be assigned to the legislature. (However, a vote with a small group of people would not be considered a fair referendum).

Developer cannot, without approval depart materially from plans of sketches he has submitted to obtain rezoning.

REGULTORY TAKINGS

Traditional Test: Balance the public value of the regulation against the property value diminution.
No-taking.

Lucas: If a regulation prevents all economically viable uses of a land then it is a taking (Per se rule).

Taking- when the government substantially deprives an owner of the uses and enjoyment or value of their land, requiring compensation to the owner with “fair” value of the property. Evaluation:

When there is a physical invasion, there is a taking.

- Objective analysis. Will always be viewed as a taking when the invasion is substantial; but where the physical invasion is minor, it is relatively unimportant to classify as a taking (issue of principle).

Does the public interest outweigh the private loss in value?
1. Is there close nexus/rough proportionality between the goal that the government has and the means that they are using to achieve it?
   - If Yes: go to #2
   - If No: there is a taking and compensation must be paid

2. Has the owner lost all value in the property?
   - If yes: there is a taking and compensation must be paid
   - If no: go to #3

3. Balance the public interest vs. the private interest (diminution in value).
   - If the public interest outweighs: no taking, no compensation
   - If private interest outweighs: there is a taking and compensation must be paid.

**Temporary Loss of Use** is not a taking unless the period of deprivation is substantial. Permanent loss of use is more likely to be a taking than temporary loss of use. Compensation even for a temporary loss of use [Traditional]. But recently under the Modern Rule, a temporary loss alone is not a taking.

**Exactions**- where government requires the property owner to do something as a condition for getting some benefit. A state may not condition a property permit on an act not addressing the problem caused by the permitted use.

- **Close Nexus Test**- is there a connection between what the government is trying to do and the method by which they do it? (Adds another factor to public v. private interests.)
  - Example: Calif. Coastal Commission, finding that such a use would impede public viewing of the beaches, conditions permit of residence on beach property on granting of an easement along the property to adjacent public beaches.

- **Rough Proportionality Test**- a broader way of showing some rational nexus to the public purpose—a reasonable relationship must exist between the exactions demanded by the city’s permit and a legitimate state interest.
  - Pro-property rights; easier for a landowner to receive compensation for government use of property.

Some exactness: are always upheld if they are dedicated to fixing infrastructure.

**DISCRIMINATION AGAINST GROUPS OF PEOPLE**

Ordinance which limits an area to a single family neighborhood is constitutional.

An ordinance is *invalid* if it limits occupation within the family.

City Officials *cannot* deny a permit to a group home for the mentally retarded.

Local governments *must* act affirmatively to ensure the availability of low/moderate income housing.

**Racial Discrimination**- To show discrimination was a motivating factor, there *must* be evidence of intent, because racially disproportionate impact alone is insufficient. Intent is inferred from the circumstances.

- **Factors** in determining discriminatory intent: Historical context, departures from normal procedural sequences, previous discriminatory practices.

**Exclusion from Certain Groups**- Zoning legislation does not violate the Equal Protection Clause if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective. Apply "Close Nexus" test-is there a close relationship to the goal of the city and the method by which they are seeking it?
• Strict Scrutiny Analysis- when the government intrudes on choice concerning family living arrangements, the courts **must** scrutinize carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.
  
  o Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause and any zoning ordinance infringing on those freedoms is subject to strict scrutiny.
  
  o Broad definition of family.

• Rational Basis Test- a test employed by the court to determine the validity of a statute in equal protection actions, whereby the court determines whether the challenged statute is rationally related to the achievement of a legitimate state interest.

Growth limiting ordinance is **not unconstitutional** if it is conditioned upon expansion of services and there is no evidence that it is unreasonable.

**THE REAL ESTATE CONTRACT**

**Statute of Frauds** - Requires that a contract for the sale of real property be in writing. [When something is taken out of the statute of frauds, a non-written agreement is ok.]

• Various pieces of memorandum can equal a “writing”
  
  o The writings must contain the general terms of the contract (adequate description of the land).
  
  o Does not require that both parties sign the contract if a contract signed by one party is acted upon by the other party-binding agreement results. Only party to be charged must sign. Need not name a special buyer.

• An informal agreement **can be sufficient unless** there is evidence that there was no intent to create a binding contract. Oral contract for the sale of land is not barred by statute of frauds when there is possession and part performance and there is no evidence of fraud.

The doctrine of Part Performance and Equitable Estoppel- contracts for sale of land out of the scope of the statute of frauds by either possession or part performance and when there is no evidence of fraud-indicates an intent by the parties to effect a sale.

• Unequivocal Reference Theory – Not every act of part performance will demonstrate a contract; must have a clear and unambiguous reference to a vendor-vendee relationship.
  
  o I.E. A told B that if B lived with him until he died, then B could have his land upon his death, and as a result B did so. Taking care of someone is not unequivocally referable to a land sale contract → B could have lived with A in hopes of being repaid later.
    
    ▪ Hint: If there is another explanation for the act then, then they are not reliable enough evidence to substitute the writing reqs of SOF.

• **What constitutes a part performance:** [Different JDXs].
  
  1. Possession alone;
  2. Possession and Payments (includes property taxes);
  3. Possession plus lasting and valuable improvements;
  4. Possession, change of position, and irreparable injury;
  5. Part performance (some jurisdictions require unequivocal reference to the contract).

• Seller can get specific performance of a land sale contract despite the statute of frauds if the buyer has made part payment and has possessed the property in an act of ownership because of ____motivator?
• The statute of frauds will **not** be enforced if the party seeking performance changed his position in reasonable reliance on the contract (estoppel).

**Parol Modification and Rescission**—An oral agreement is **sufficient** to rescind a contract for the purchase of real property, but oral modifications are not.

• However, if the money and the land had changed hands, any changes to the agreement would be reconveyance and a written agreement would be required.

• Modification **does not** require consideration

  o EX. Πs backed out of their written agreement to buy the Δ property before the deadline for payment, and the parties then orally agreed to different terms regarding the return of Π deposit. *Does an oral rescission of a prior written agreement violate the statute of frauds where the written agreement is still executory?* No. Jurisdictions are split on whether to allow an oral rescission of an agreement for the sale of an interest in land, but the majority is set out here. The rationale is that the SOF governs when a party may enforce a contract, but not when he may release rights under it. However, a party cannot orally modify only some terms of a land contract because a contract that is partly written and partly oral is not enforceable. In such a case, only the written portion of the contract will be enforceable.
    - Courts are also divided on how substantial modification must be to fall within the general rule. If the modification is only incidental, some courts enforce the contract as modified even if the modification is oral. Other courts require all modifications, however minor, to be in writing.
    - Parol modifications to a written land contract are generally not enforceable, but they may be if estoppel makes this possible. Where there is reliance on the parol modification, either the modification will be enforceable or reasonable time comply with the contract as written must be given.

**Construction and Performance—Time for Performance** Time is of the essence clauses must be stated in a contract or the parties’ conduct and circumstances must indicate that this is their intention. When it is stipulated it has to be strictly enforced.

1. After Π missed a deadline for making payment under a land sale contract, Δ treated the contract as null and void and refused further performance. *Can a buyer who performs late compel specific performance where the real estate contract does not stipulate that time is of the essence?* At law, time is always of the essence unless the parties agree that it is not. However, the remedy at law is only damages. In equity, where specific performance and other equitable remedies are available, the rule is reversed: **time is not of the essence unless the parties expressly state that it is, or their conduct, the purpose of the sale or the surrounding circumstances indicate that it is.** Thus, in equity, unless the parties make time of the essence, a failure to perform by the closing date will not be a breach unless the delay is unreasonable. Here, Π’s delay in making payment was not unreasonable, particularly in view of that fact that Δ was in no hurry to perform its part of the contract. This case makes it clear that simply inserting a closing date in a real estate contract is not enough to make time of the essence equity. It may be enough to state a closing date and that any failure to close on that date will result in a default, or that the contract will be null and void if deadlines are not met. The intent of the parties is what counts, however they express it.
    a. When the parties to a contract for the sale of land have not made time of the essence, either party may render time of the essence by giving reasonable notice to the other party.

• Simply the fact that a closing date is indicated in the contract does not indicate that time is of the essence-treated more as a formality than as an essential term.

• When there is a time extension in a contract without a restatement that time is of the essence, courts will likely determine that time is no longer of the essence.
• If there is a repeated acceptance of late payment then it is a waiver and shows that time is not of the essence.

• Changes in the market value might have an affect on the court’s decision, if time of the essence is a material factor courts will enforce.

**Forfeiture**—The divestiture of property without compensation.

**Financing Arrangements**—Mortgages and Installment Land Contracts

• **Mortgage**—a land conveyance being used as a security for a debt. The object of the document is to provide security for the payment of a debt, not to effect a land sale (as in the case of a deed).

• **Foreclosure**—bars equitable redemption after a certain period of time.
  - [Equity of Redemption]—borrowers who had lost their property through default would petition the king to accept the money the borrower now had and convey the land back to the borrower.] A legal proceeding to terminate a mortgagor’s interest in property.

• **Subject to**—financing clauses cannot be indefinite or it is void— the financing of a land sale contract is of essential importance to the contract.
  - If a subject to finance clause (offer conditional upon buyer obtaining proper financing) is ambiguous or lacking as to essential details, and the surrounding circumstances do not indicate the intent of the parties as to these details, then the contract must fall for indefiniteness.
    - A buyer may waive his right under a financing clause, but, where time is of the essence, he must do before the deadlines pass and the seller terminates the contract.

• **INSTALLMENT CONTRACTS**: An alternative to the mortgage.

• In a long term land sale contract the buyer takes possession immediately, but does not take legal title until he pays the full purchase price through a series of installments.
  - Traditionally, these contracts give the buyer no equity of redemption;
  - They include forfeiture provisions which allow the seller to terminate the contract and keep all previous payments if the buyer defaults.

• Forfeiture on an installment plan cannot be unreasonable when a buyer has already acquired a substantial interest in the property. Vendee has the right to complete the contract by paying the full purchase price. Forfeiture in a land sale contract is inappropriate where the amount forfeited is disproportionate or substantial to the total contract.

**Merchantable Title**—A warranty of marketable title is implied in every land sale contract. A buyer’s agreement to accept a quitclaim is not a waiver. The law implies in all land sale contracts a covenant by the vendor to convey marketable title free from encumbrances, unless the vendee stipulates to accept less than marketable title.

• The burden of proving marketable title is on the seller because the seller is in the better position to know what encumbrances are associated with the property. The buyer is a stranger to the land and not in as good a position to know.

• ** Marketable Title**—a title which is free from “reasonable doubt” of validity. A title that, although not perfect, would be acceptable to a reasonably well-informed buyer exercising ordinary business prudence.
  - Things that might affect marketability of title: easements, adverse possession, etc.
• Buyer **cannot** get specific performance to force the seller to clear title when there are contingencies/uncertainties out of seller’s control. He **can** get money paid.
  
  o Court will not compel a seller to clear title where the defect is incurable, but may do so if the defect is clearly curable.
  
  o Because a seller’s and buyer’s performance are concurrent conditions in a real estate contract, one party must generally tender (show the ability and willingness to perform) performance to trigger the other party’s duty to perform before he can place the other party in default
    
    ▪ EX. Π demanded that Δ return her deposit due to her objection to certain title defects, but she failed to specify the defect before closing and did not tender payment. Where title defects are curable without difficulty in a **reasonable time**, the buyer must make a tender and demand to the seller in default before she can recover her deposit.
  
  o Buyer **cannot** anticipatorily rescind breach because of lack of title in the vendor prior to the date when performance is due. Buyer is entitled to ask for reasonable assurances that the seller is working to clear up title. Buyer **cannot** put seller in default by demanding deed in advance.
  
  o Restrictions on assignments\(^5\) are disfavored and strictly construed -
    
    ▪ A court equity should relieve a buyer from forfeiture resulting from his violation of a stipulation against assignment where the buyer offers and is able to fully perform the contract.

• **Quitclaim Deed** - a lesser deed whereby the grantor conveys whatever interest he may have in the property **without** any warranties or covenants as to title. [If buyer finds an easement after signing the contract, then can’t sue the grantor and instead must litigate the person who possesses the easement]
  
  o Often used by parties who are trying to clean up title (i.e. buy out others who may have specific interests in the property such as easements, etc.).

• **Warranty Deed** - when there are no encumbrances on the property. IF seller claims it is merchantable when it is not, the sale might not go through and/or might be sued for fraud. [Buyer can sue grantor directly because of disclosed assurances]

**Remedies for Breach of Contract**

  o Specific performance is a remedy that is usually available to a buyer for breach of a real estate contract.
    
    o However, a seller of real estate is not automatically entitled to specific performance just because the buyer would be entitled to it.
    
    o Courts should confine specific performance to those special cases in which the seller will otherwise suffer an economic injury which damages would be inequitable to compensate, or where other equitable considerations require granting it. (Majority)

  • **English rule** - if there is unmarketable title and the vendor is not guilty of any bad faith or fraud, then the measure of the vendee’s damages for breach of contract is the consideration he has paid, plus interest, and any legitimate expenses incurred (out-of-pocket expenses). (Contract is

\(^5\) Transfers a person’s right and duties under a contract to another person, without changing the terms of the contract. When an assignment occurs the assignee steps into the assignor’s shoes and deals directly with the other part to the contract.
rescinded). If the seller acts in bad faith, then the buyer gets the difference between contract and marketable price.
  o Policy: English courts are concerned about the intricacies of title; gives the seller an out.

- **American Rule (Majority)**- damages for unmarketable title is the benefit of the bargain: the difference between the market value at the time of the breach and the unpaid balance on the property under the contract. Good faith is immaterial.
  o Policy: the seller is in the best position to ensure clear title.

- **Assignments**- Seller **cannot** bar the buyer from selling to a third party under and independent contract assuming the buyer is going to meet his obligation in the original contract.

**DEEDS**

A signed writing transferring title to real property from one person to another.

**The Modern Deeds-Types and Elements**-When the deed is ambiguous and supports two or more possible interpretations with no extrinsic evidence available to clarify the ambiguity, the deed should be interpreted as conveying the greatest possible estate.

**Granting clause**- the words that transfer an interest in a deed.

**Habendum Clause**- a clause contained in a deed that specifies the parties to the transaction and defines the interest in the land to be conveyed.

When there is a conflict between the habendum and granting clauses:

- **Modern Rule**- The real intentions of the parties, if ascertainable from the deed as a whole, prevails. Ambiguous language will be construed in favor of the grantee, but the intent of the grantor will be considered.

- **Traditional Rule**- more technical approach; the granting clause will prevail.

**Execution of the Deed**- traditional formal requirements (many states waive some/all of the requirements):

**Two types of deeds**

- **Warranty deed**- contains covenants regarding the nature of the estate conveyed
- **Quitclaim deed**- only transfers the interest the grantor has.

**Deed requirements:**

1. Names
2. Dates Consideration
3. What is being conveyed
4. Description
5. Exceptions
6. Reservations

- Delivery of a blank deed is sufficient to vest title if the grantor has the intent that title pass [Modern].
- The signature of the grantor (not necessary to have the signature of the grantee)-consistent with the intent approach.
- Official seal (not necessary in all states). Necessary today
- Attestation-practice of having witnesses sign the deed as a method of assuring its authenticity.
- Acknowledgement-attestation of a public officer usually notary public or justice of the peace). Local statutory law-importance varies from jurisdiction to jurisdiction. Necessary today

- **IF** the condition is satisfied, then the deed passes over of escrow to buyer.
If the conditions are not satisfied, the deed and any subsequent conveyance is void.

**Escrow** - the deposit of a deed with a third party pending performance of conditions. A transfer point between the buyer and the seller of real estate.

- **Deed and Money Escrow** - conditions relating to title: purchaser turns over money only if the abstract title has been approved.
  - When all the conditions are met and the deed has not been delivered, title still passes.
  - Some courts hold that a deed that is wrongfully delivered out of escrow is void. The grantee of such a deed has no title to pass to an innocent purchaser.

- **Money Lenders Escrow** - involves deposit of the proceeds of a mortgage loan with a third party to be disbursed as directed when satisfactory evidence has been furnished showing the mortgage to be a valid first lien.

- **Relation Back** - Traditional common law notion; the deed is to be considered valid from the time it is deposited in escrow. While in escrow the point of transfer goes back to the point when the deed and conveyance was put into escrow. Illustrated with the following situations:
  - Death of grantor
  - Dower of grantor’s widow
  - Incompetency of grantor
  - Death of grantee
  - Conveyance by grantor to a third party

**Legal Descriptions of Land** - Legal descriptions are based on surveys-metes and bounds (measurements and boundaries of a tract of land). The description must start at a readily identifiable point and return to the beginning. i.e. It’s not admissible to create an ambiguity where the description is already clear.

- Legal description need not contain every fact about the property; it is enough that the property matches the description.

- Extrinsic evidence may be introduced to resolve latent ambiguity in a description of land in a deed (POR = Four Corners Approach)
  - Some courts explain that attaching a map to a deed is not extrinsic; while physically going to the land and taking pics to attach would be.

- When there isn’t any inconsistency on the face of the deed, extrinsic evidence is not allowed to show inconsistency/nonconformity between the deed and the description of the ground.

- In determining boundaries of land, priority is given in the following order:
  1. Natural monuments;
  2. Artificial monuments and marked or surveyed lines;
     - Includes highways-boundaries are measured from the center of the highway/monument
  3. Adjacent tracts or boundaries;
  4. Courses or directions;
  5. Distances;
  6. Area or quantity.

- When a conveyance is to a monument, it is presumed to extend to the middle of the monument; unless parties intent indicates otherwise.
  - Municipalities or government authorities generally do not convey public streets to their center lines.
Some courts hold that in construing a legal description, the location of a monument does not necessarily control over a course or distance; the parties’ intent controls.

**THE RECORDING SYSTEM**

All prior interests in land are void if not duly recorded as to subsequent takers who purchase for value. Protects a Bona fide purchaser by providing a way of checking the status of title through a registry.

If the purchaser had notice of the unrecorded deed or was a purchaser for no consideration, then they were not a Bona Fide Purchaser and do not get title.

Two systems of filing: (depends on jurisdiction)

1. Tract System
   a. Easier for searcher to read but more difficult for government to compile
   b. Divides the land into lots, and each particular lot’s history is listed in chronological order

2. Grantor/grantee
   a. Alpha index grantee and alpha index by grantor
   b. Easier to file, but harder to use

**Recording** - Recording can make a void instrument valid

- The recordation of an interest in land is constructive notice of such interest, but only those who have a duty to search it are bound by the notice. But not to people like contractors who might issue a mechanics lien.

- The recordation of a void deed cannot be used to validate an invalid transfer of title evidenced by that deed.
  - Only valid instruments can be legally recorded.

- Failure to record a deed does not invalidate the transfer of title.
  - Exception: Bona Fide Purchaser and creditors who were unaware of prior conveyances will trump the owner of the unrecorded deed. Protects land purchasers because they have a right to rely on the information in the registry of deeds.

- Recording does not protect against title acquired by Gr AP.

- Once a party has acquired property by adverse possession, the title will stand regardless of a failure to record. (Doesn't matter if the property which was adversely possessed is sold by the original owner to a subsequent purchaser who records title.)

- A deed that’s not recorded under the prescribed statute does not constitute constructive notice to a bona fide purchaser.

- An unrecorded deed is only binding on the heirs of those with notice.

- Bona fide purchaser- actual, constructive, inquiry.

**Persons Protected by the System**

- **Majority**- a grantee of real property must be a bona fide purchaser for value in order to be protected by a recording statute (donees not protected).

- **Minority**- a recording statute shall be valid against any class of persons with any kind of rights. Donees and those given gifts.
Quitclaim Deed Notice

- **Majority**: a quitclaim deed does not amount to notice of prior interests or other encumbrances, but only releases any interests that the grantor has. Grantee is a Bona Fide Purchaser and can record.

- **Minority**: The restrictive nature of a quitclaim deed is equivalent to notice. The Bona Fide Purchaser of the quitclaim deed cannot record title against the holder of an unrecorded warranty deed.

- BONA FIDE PURCHASER only needs nominal consideration

- Mortgage taking a mortgage to secure an existing debt is not a BONA FIDE PURCHASER because there is no new consideration.

- To change a pre-existing debt into a mortgage with the right of foreclosure, new consideration must be given in order for the mortgage to record.

- A purchaser has a duty to inspect their property and will not be protected by the recording statute from things which an ordinary inspection would reveal. (Inspection constitutes notice).

**Chain of Title**: A deed outside the chain of title is not constructive notice and a subsequently recorded deed will take priority.

**TITLE ASSURANCE**

Traditional- no title assurance, “buyer beware”

Modern- implication of implied warranties.

**Covenants**

- Implied Warranty of Habitability-assurance that the property will be reasonably fit for its intended use, survives delivery of a deed.
  - Applies to new homes as well as used or older homes.

  - The implied warranty also permits repudiation (an affirmation that a party to a contract will not perform as promised) of a contract to purchase a home based upon defect in the home even if those defects do not render the home completely inhabitable.

- Implied Warranty of Quiet Enjoyment- there are no nuisances that would prevent the purchaser from possessing or occupying the land. In order to breach covenant of Quiet Enjoyment, there must be actual or constructive eviction.

- Tenant or grantee will enjoy guaranteeing the grantee unimpaired use of property.

**Waiver**

- Waiver of an implied warranty must be clear and unequivocal. But generally a waiver is sufficient to waive an implied warranty of habitability.

**Estoppel by Deed**

When the grantor does not have title at the time of the original transaction, but later acquires title, his-after-acquired title immediately goes to the grantee under the deed.

**6 Usual Guarantees with Respect to Quality of Title**

**Current Breach** = Breach upon delivery of the deed (Current Covenants)

- Covenant of Seizing—right to take possession/occupy the land
• Covenant of Right to Convey—grantor has power to convey title
• Covenant against Encumbrance—promise to convey a clear title, including encumbrances that the purchaser knew or could have known about through reasonable inspection. [This means that even if an undisclosed encumbrance is open and visible, the covenant against encumbrances is still breached].
  o Exception: when there is a known easement for a public right-of-way or public utility, the grantee will be held to take the property without protection. [Why? Public encumbrances are more visible than private encumbrances, i.e. telephone line].

Later Breach = Breached at some point after delivery of the deed (Future Covenants) → These covenants usually run with the land such that if a remote grantee is evicted by the paramount owner, he may bring suit against the original grantor for breach of covenant of quite enjoyment provided he can show privity of estate.

• Covenant of Further Assurances—Promise not to convey to anyone other than the purchaser.
• Covenant of Quiet Enjoyment— in order to breach covenant of quiet enjoyment one must not only show a paramount title but also actual or constructive eviction.
  o A breach claim requires a showing not only that someone else has title to the land but also that the other title holder has evicted the grantee.
    • Such eviction can be constructive or actual, but constructive eviction requires more than the mere possibility that the title holder could someday some and claim possession of land. Ex. While no one disputed that the prior grantor who reserved the 2/3 mineral estate could someday come and claim possession of his 2/3 interest, since it had not yet happened, there was nothing prevent the grantee from taking possession of the whole estate which he believed was transferred by grantor.
  o SOL runs at time of discovery. So the Π must sue the conveyor at the time of breach before SOL expires otherwise Π is barred.
• Covenant of warranty—promise to defend the purchaser against all lawful claims which would constructively or actually evict them. Ex. A delivers an indefeasible estate or defective deed to B
  o Most states have adopted statutes that provide that in such situations where a simple mistake has occurred, title is passed if A subsequently obtains a correct deed or acquires a defeasible estate.
  o In addition, courts interpreting such statutes have held them applicable to oil and gas leases.
  o Remedies
    • Majority Rule- damages are limited to the purchase price plus improvements. (Policy: enforcing the intent of the parties-they bargained for what it is worth at the time of sale, not what its worth in the future.) Purchase money plus interest.
    • Estoppel by deed- grantee gets title even if the grantor only acquires property after the deed is conveyed or delivered.
    • Minority rule- damages equal the value of the land plus improvements

Good Faith Improvers (Madrid)
• When a present covenant, such as the covenant of seizing is breached, the question often arises what damages are recoverable?
  o General rule is that one may recover only the price actually paid for the land plus interest.
  o Damages are limited to actual value of the improvements plus cost of labor and materials; not for the enhanced value of the property. Value of improvements or the

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6 Is a promise that the grantor will defend the grantee’s land against any and all who may claim some interest in it.
labor and materials. Whichever is least. The owner can sell at unimproved value or pay for the value of improvements.

**Title Companies (Abstracts)**

- **Abstract** - a summary of the history of a title to property.
- Abstract companies are held to a high standard of care; liable when they knowingly and expect a third person to rely on the abstracts. And the third party is when they know the third party will rely or induced to rely.

**Torrens System** - all evidence re: a land title must be recorded; anyone who has an interest in property is required by law to record it. (Principal effect: Under this system, an adverse possessor is required to record in order to preserve the title chain). Way of centralizing things so subsequent purchasers can see all the interests in the property.
  - Pink slip for property-lists all interests.
  - Even the US government must comply if state jdx has adopted Torrens
  - Only available in 11 states.

**Statute of Limitations**

**Adverse Possession**

- Part-time residency alone **does not** destroy the continuity of possession required to establish title by adverse possession if such residency is similar in nature to owners of like property.
  - The nature of his possession will be determined solely on the basis of the manner in which he treats the property. Makes adverse possession very easy.
- Mineral rights **may** be severed from the surface estate-two conceptually different pieces of property, even though there is one estate (title). Someone who is claiming adverse possession to the mineral rights would **not** necessarily have title to the land itself.
- **A.P. to mineral rights:**
  - **Must** actually take minerals or apprise community of such interest.

**Misc.**

- Co-tenants **cannot** adversely possess against other co-tenants without actual or constructive notice.
- Statutes which limit the amount of time within which an owner **may** assert his interest in land are not per se unconstitutional as a denial of due process, equal protection, or just compensation.
- **The Marketable Record Title Act** operates to extinguish an otherwise valid claim of a common law way of necessity when such claim was not asserted within 30 years.
  - Rights **must** be asserted publicly.
- **A.P.** is in some ways anti-environmental

According to marketable title statutes: claims that are inconsistent with title **must** be publicly asserted to be recognized