INTERESTS IN THE LAND OF ANOTHER

EASEMENT: interest in the land of another for a particular purpose

A. Creation
   a. Express (in writing)
   b. Implication
      i. Necessity (unity of title + landlocked + can remain dormant until necessity arises)
      ii. Prior Use (unity of title + necessary + continuous use)
         1. easement by grant (reasonably necessary)
         2. easement by reservation (strictly necessary)
            a. traditional (grantor may not reserve and vest interest to 3rd party)
            b. modern (grantor can reserve and best interest of same prop to 3rd party)
   c. Prescription (open and notorious use, continuous use, adverse to owner’s rights; Exception: if owner consents, then license; can be negated by verbal/written agreement by owner)
      i. Custom (continuous use by public—dominant estate)

B. Characteristics
   a. Appurtenant (attached to the land)
   b. In gross (assignable, but not divisible b/c do not want to increase burden on servient)
   c. Profits a prendre (right to enter and remove product from land)

C. Scope
   a. Traditional (cannot expand interpretation of the easement)
   b. Modern (can be expanded if the use is reasonable)

D. Termination
   a. Abandonment (non-use + intent to abandon)
   b. No more necessity

LICENSE: revocable right to use the land for particular purpose for specified period

A. Traditional: landowner can revoke the license even if licensee has expended money or labor
B. Modern (exception): irrevocable if substantial expenditure + reliance

REAL COVENANTS: promise relating to the land to do or not do something, usually in writing

A. For covenant to run w/ land, must have:
   a. Touch and concern (has something to do w/ the land that affects the quality, value, or mode of enjoying the estate)
   b. Intent (intent by the parties for the covenant to run)
   c. Privity
      i. Vertical (most common; the person claiming the benefit or burden is a successor to the original person who was benefited or burdened)
      ii. Horizontal (covenant is connected to the transaction of the original parties)
      iii. Mutual (rare; mutual interest of the parties in the same land)
B. Covenant-not-to-compete (runs w/ the land if the covenant is touches + concerns the land)

EQUITABLE SERVITUDE: restrictions relating to the land may be enforceable in equity when some of the elements for a real covenant are missing

A. Elements to create an equitable servitude
   a. Intent (intent by the original owner to keep that specific covenant)
   b. Notice (grantee has notice, either actual or constructive, that there was a promise)
IMPLIED RECIPROCAL NEGATIVE EASEMENT: When one lot is conveyed with a restriction, and is within a subdivision with a common scheme, then the restriction is implied upon other lots that are conveyed without the restriction.

A. IRNE is a kind of an equitable servitude.
B. Must be appurtenant.
C. Must be part of common scheme.
D. IRNE cannot be exercised retroactively, if there is reliance or prejudice upon existing lot owner

CONSTRUCTION / TERMINATION

A. Restrictive covenants are broadly construed by looking at the underlying policy and consistency with the general plan
   a. A covenant can restrict development under the guidance of an architectural committee despite the absence of specific standards, if the standard of approval is reasonable and in good faith
B. Changed circumstances outside the subdivision do not necessarily justify changing the covenant within the subdivision

NUISANCE

C. Private Nuisance (unreasonable interference with the use and enjoyment of an individual’s land)
   a. Test = balancing social utility by D’s conduct v. harm to P
   b. Damages = Injunction and / or Permanent Money Damages
      i. Licensing a continuing harm: awarding $ damages in order to compensate for disturbance creates a license
      ii. If the disturbing party can be enjoined from continuing operation, a servitude (burden) is created in the neighboring landowner
D. Public Nuisance (unreasonable interference with the use and enjoyment of the land by the public)
   a. No balancing test → injunctions are generally granted against public nuisance, regardless of the cost
   b. Indemnification: if the public came to the nuisance, then the person who brought the public to the nuisance must indemnify (feed lot case)

SUPPORT OF LAND

A. Lateral Support (adjoining landowners have duty to provide lateral support to each other’s land)
   a. Strict liability for removal of lateral support is limited to land that would subside while in its natural state
   b. Negligence standard applied if the land subsides removal of lateral support b/c of the additional weight of a building
B. Subjacent Support (adjoining landowner excavates underneath another landowner which causes damages is liable for damages)

WATER RIGHTS

A. Drainage
   a. Common enemy / Trad’l (everyone can drain water at will b/c water is the enemy)
   b. Reasonable Use / Modern (landowner is legally privileged to make alterations to the nat’l flow of surface water until there is unreasonable interference w/ neighbor’s use of land = utility of use, degree of harm that results, foreseeability of harm, and feasibility of alternatives)

B. Surface
   a. Riparian Rights Doctrine (rights that belong to any owners whose land touches water)
      i. Trad’l = Natural Flow Theory (cannot obstruct natural flow, but can take as much as needed for household use; cannot divert to non-riparian land)
ii. **Modern = Reasonable Use** *(all riparians are entitled to reasonable use of water for any purpose, including artificial use, as long as it doesn’t divert from downstream users; can divert to non-riparian property as long as no harm to other riparian users)*

b. **Prior Appropriation** *(first in time is 1st right = the 1st appropriator who gets to the water can use the water; subsequent appropriators cannot take from 1st appropriator’s portion; 1st appropriator cannot claim a subsequent appropriator’s portion)*

c. **Public Trust Doctrine** says that the sovereign owns all the water rights and holds and supervises them for public trust and can set limitations on prior appropriation if it infringes on public / recreational values (*Mono Lake* case)

C. **Groundwater**

a. **English / Traditional = Capture Rule** *(can take whatever you want)*

b. **American / Modern = Proportionate / Reasonable Use** *(can use the amount that is proportional to your needs w/out taking more than that which would be detrimental to the neighbor)*

c. **CA = Correlative Rights** *(apportionate share principal; can take the percentage equivalent to amount of surface area owned)*

D. **OIL**

a. **Traditional = Capture Rule** *(owner can pump as much as oil from well as desired)*

b. **Modern = Fair Share Principal** *(landowner has right to reasonable opportunity to recover their proportionate share in the common pool)*

E. **AIRSPACE**

a. **Traditional** = own everything above land

b. **Modern** *(flights over private prop are a taking and can create a servitude on underlying property if they are so low and frequent if they immediately interfere w/ the enjoyment and use of the land) *NUISANCE* *

F. **SUNLIGHT**

a. **Traditional = Ancient Lights** *(implied use of sunlight—if landowner has received sunlight for a specific period of time, then IRNE for the sunlight, and adjacent landowner cannot obstruct access to sunlight)*

b. **Modern = Reasonable Doctrine** *(if there is unreasonable interference w/ the use and enjoyment of the land, then it becomes a private nuisance)*

**TRADITIONAL LAND USE CONTROLS: Zoning, Subdivisions, Maps**

A. **Zoning** ordinances are a constitutional exercise of police power if they are related to the advancement of the general public welfare (counter argument that it is a taking)

B. **Regulation of Subdivisions – City Maps**

a. Local planning boards have discretion to deny approval of subdivision plans

b. **Savings Clause** *(state map ordinances are deemed constitutional if it has a savings clause which protects an owner from substantial damage)*

i. Permit can be denied if the applicant seeks to place a building outside the map, unless the applicant would be substantially damaged

ii. Where a gov action substantially harms a prop’ owner’s interest, the prop owner must be fairly compensated

C. **Public Ownership v. Taking:** gov can constitutionally take real prop w/ just compensation when there is a relationship b/w the exercise of eminent domain and conceivable public purpose

a. HI v. Midkiff (breaking the traditional land monopoly in HI) → gov. can transplant to private individuals if there is broader public purpose

D. **Non-conforming Uses** are uses which do not conform w/ the zoning ordinances

a. Usually occur when the city re-zones and an owner cannot use his prop anymore due to the rezoning

b. **Variances** allow non-conforming use; can be granted for pre-existing uses when the zoning ordinance would cause unnecessary hardship; rarely granted
c. Non-conforming uses are generally not allowed in areas that are zoned a certain way:
   i. Amortization (period of time permitting a prop owner to comply w/ zoning ordinances to re-coup their investments)
      1. Allowed if the zoning ordinance is reasonable and does not cause hardship to the pre-existing non-conforming use
      2. Gov. must balance individual’s need w/ having orderly land use
   ii. Substantial Investment (if the prop owner has made a substantial investment and expenditure prior to the re-zoning, then the owner has a vested right in the original zoning classifications)
      1. Majority = Balance the steps taken toward the construction: preliminary plans v. substantial reliance through $ + preparation
      2. Minority = obtaining the permit constitutes a vested right (date certain vesting rights)
      3. Exception = When the aim of re-zoning is to hinder the proposed development project, then substantial investment does not protect the non-conforming user.

d. Ad-hoc zoning is disfavored and usually invalid b/c they are inconsistent w/ general plan

E. Zoning by Electorate (zoning changes can be ratified by a referendum by majority vote; some jdx find zoning by electorate is unconstitutional)

REGULATORY TAKINGS
A. Taking occurs when the gov. substantially deprives an owner of the uses and enjoyment of their land, requiring compensation to the owner w/ fair value of the prop. To determine if the government’s action rises to the degree of a taking
   a. Traditional (balancing value of pub benefit against priv. loss of prop due to gov. action)
      i. Any physical permanent occupation, however small or insignificant, is a taking and must be compensated
   b. Modified Traditional = Lucas (per se taking → no balancing needed if value is diminished)
   c. Modern:
      i. Close Nexis = Nollan (there must be a direct connection b/w the gov goal burden imposed on private owner must be directly connected to the means)
         1. Exaction is when gov. forces a landowner to do something in exchange for granting a permit.
      ii. Rough Proportionality = Dolan (some rough connection must exist)
         1. Same as Close Nexis test
         2. Looser test to make it easier for the gov. to succeed in taking
d. Kelo (highly criticized decision allowing priv takings of priv land if there is public benefit)

B. Temporary taking = land-use regulations which amount to a temporary taking:
   a. Old = 1st English Church (temporary loss is a taking and must be compensated)
   b. New = Lake Tahoe (temporary loss in value is not a taking; reversed pre-existing rule)

DISCRIMINATION
A. Racial Discrimination:
   a. Civil Rights Act prohibits discrimination against race, etc.
   b. To show discrimination was a motivating factor, there must be evidence of intent, b/c racially disproportionate impact alone is insufficient.
      i. Intent is inferred from: historical context, departures from normal procedural sequences, previous discriminatory practices
   c. No constitutional right to housing exists, but cannot exclude based on race
B. Zoning - 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. Use “close nexis” test to see if there is a close relationship b/c city’s goal and method of seeking it.

a. **Strict Scrutiny Analysis** (higher standard used when there is a compelling state interest; when the gov. intrudes on choice concerning family living arrangements, cts must carefully scrutinize the importance of the gov interests and the extent to which they are served by the challenged regulation)

b. **Rational Basis Test** (lower standard; test employed by ct to determine validity of a statute in equal protection actions, whereby the ct determines whether the challenged statutes is rationally related to the achievement of a legitimate state interest)

C. **Single Family**
   a. Ordinance which limits an area to a single family neighborhood is constitutional b/c it is legitimate police power goals
   b. An ordinance is **invalid** if it limits occupation w/in the family b/c undermines privacy and has no legitimate goal

D. Miscellaneous:
   a. City officials **cannot deny** a permit to a group home for the mentally retarded
   b. Local gov. **must** act affirmatively to ensure availability of low/moderate income housing
   c. Growth limiting ordinance is **constitutional** if it is conditioned upon expansion of services and there is no evidence that it is unreasonable

**CONTRACTS**

A. **Statute of Frauds**
   a. Statute of frauds regulates that real estate Ks must be in writing.
      i. Written documents (informal several memos can constitute a binding agreement)
      ii. Signed by party to be charged
   b. Oral agreements can be enforced when there is:
      i. **Part Performance** = must have:
         1. Part payment
         2. Possession / Improvements
         3. Unequivocal Reference Theory (if there is no unequivocal referability, then statute of frauds will still bar the agreement, and require writing)
      ii. **Equitable Estoppel** (changing position based on reliance)

B. **Rescission:** Ks can be rescinded orally; statute of frauds only applies to formation
   a. Minority = oral rescission is not enough

C. **Modification** of a K must be in writing
   a. Minority = even if modification is merely incidental to the benefit of the bargain, then oral modification is okay

D. **Standard Forms**

E. **Time of the essence** is generally not presumed; must be expressly included in the K, and if so, are strictly construed

F. **Financing**
   a. “**Subject-to-financing clause**” must be clear and detailed; if not clear, then the clause will be void for indefiniteness
   b. **Mortgage**
      i. Traditional (*mortgage served as a conveyance*)
      ii. Modern (*lien = mortgagee has interest in the land until mortgagor fully pays off *)
      iii. Equity of Redemption (*bank has to give opportunity to pay back before foreclosing*)
   c. **Foreclosure**
      i. Statutory Redemption (*debtor can get land back, even after forfeiture, if he can show that foreclosure was premature*)
   d. **Installment K** (alternative to mortgagee)

G. **Implied Warranty of Marketability** (must convey valid title free of defects and litigation)
H. Remedies for Breach of K
   a. English (if title is unmarketable and breach is in good faith, then can recover damages, including ??)
   b. American (can recover)

TITLE ASSURANCE
A. Covenants
   a. Traditional (no implied warranties; “caveat emptor”—buyer beware)
   b. Modern (some warranties are implied)
      i. Implied Covenant of Habitability (implied promise that the sold prop is of fair quality and is fit for the intended purpose; ie. home is fit for living)
         1. Extends to intended use
         2. Quitclaim deed waives it??
   c. Waiver must be clear and unequivocal; but general warranty waiver is okay

B. Covenants of Title
   a. Present
      i. Covenant of Seisin
      ii. Covenant of Conveyance
      iii. Covenant of Encumbrance
   b. Future
      i. Covenant of Further Assurance
      ii. Covenant of Quiet Enjoyment
      iii. Covenant of Warranty

C. Estoppel by Deed – After-Acquired Title (if grantor acquires title after the original transaction, his acquired title immediately goes to the grantee under the deed)