Chapter 3—Land-Use Controls and Regulation

Learning Goals:

• Describe the ways that the use of privately owned land can be regulated by police power.
• Describe the purpose and typical provisions of a comprehensive or master plan.
• Explain zoning ordinances, including the purpose of zoning, types of zoning and zoning procedures that are common in your area.
• Define nonconforming use, variances and conditional-use permits.
• Describe the control of land using deed restrictions and restrictive covenants, including typical provisions and the procedures for creating and enforcing these restrictions.

Governmental Rights in Land

Government rights in land include include:

I. Eminent Domain using Condemnation
II. Escheat
III. Police Power
IV. Property Taxes
V. Special Assessment
Eminent Domain

“What is Eminent Domain

Eminent domain refers to the power possessed by the state over all property within the state, specifically its power to appropriate property for a public use. In some jurisdictions, the state delegates eminent domain power to certain public and private companies, typically utilities, such that they can bring eminent domain actions to run telephone, power, water, or gas lines. In most countries, including the United States under the Fifth Amendment to the Constitution, the owner of any appropriated land is entitled to reasonable compensation, usually defined as the fair market value of the property. Proceedings to take land under eminent domain are typically referred to as "condemnation" proceedings.

The Process of Eminent Domain

Eminent domain law and legal procedures vary, sometimes significantly, between jurisdictions. Usually, when a unit of government wishes to acquire privately held land, the following steps (or a similar procedure) are followed:

- The government attempts to negotiate the purchase of the property for fair value.
- If the owner does not wish to sell, the government files a court action to exercise eminent domain, and serves or publishes notice of the hearing as required by law.
- A hearing is scheduled, at which the government must demonstrate that it engaged in good faith negotiations to purchase the property, but that no agreement was reached. The government must also demonstrate that the taking of the property is for a public use, as defined by law. The property owner is given the opportunity to respond to the government's claims.
- If the government is successful in its petition, proceedings are held to establish the fair market value of the property. Any payment to the owner is first used to satisfy any mortgages, liens and encumbrances on the property, with any remaining balance paid to the owner. The government obtains title.
- If the government is not successful, or if the property owner is not satisfied with the outcome, either side may appeal the decision.
**Takings**

There are several types of takings which can occur through eminent domain:

**Complete Taking** - In a complete taking, all of the property at issue is appropriated.

**Partial Taking** - If the taking is of part of a piece of property, such as the condemnation of a strip of land to expand a road, the owner should be compensated both for the value of the strip of land and for any effect the condemnation of that strip has on the value of the owner's remaining property.

**Temporary Taking** - Part or all of the property is appropriated for a limited period of time. The property owner retains title, is compensated for any losses associated with the taking, and regains complete possession of the property at the conclusion of the taking. For example, it may be necessary to temporarily use a portion of an adjacent parcel of property to complete a construction or highway project.

**Easements and Rights of Way** - It is also possible to bring an eminent domain action to obtain an easement or right of way. For example, a utility company may obtain an easement over private land install and maintain power lines. The property owner remains free to use the property for any purpose which does interfere with the right of way or easement.

**Fair Value**

Fair value is usually considered to be the fair market value - that is, the highest price somebody would pay for the property, were it in the hands of a willing seller. The date upon which the value is assessed will vary, depending upon the governing law. If the parties do not agree on the value, they will typically utilize appraisers to assist in the negotiation process. If the case is litigated, both sides will ordinarily present expert testimony from appraisers as to the fair market value of the property.

**Just Compensation**

At times, fair value includes more than the price of an item of property or parcel of real estate. If a business is operating from the condemned real estate, the owner is ordinarily entitled to compensation for the loss or disruption of the business resulting from the condemnation. In a minority of jurisdictions, the owner may also be entitled to compensation for loss of "goodwill", the value of the business in excess of fair market value due to such factors as its location, reputation, or good customer relations. If the business does not own the land, but leases the premises from which it operates, it would ordinarily be entitled to compensation for the value of its lease, for any fixtures it has installed in the premises, and for any loss or diminishment of value in the business.
Public Use

Ordinarily, a government can exercise eminent domain only if its taking will be for a "public use" - which may be expansively defined along the lines of public "safety, health, interest, or convenience". Perhaps the most common example of a "public use" is the taking of land to build or expand a public road or highway. Public use could also include the taking of land to build a school or municipal building, for a public park, or to redevelop a "blighted" property or neighborhood.

Abuses of Eminent Domain

In recent decades there has been growing concern about the manner in which some states and units of government exercise their power of eminent domain. Some governments appear inclined to exercise eminent domain for the benefit of developers or commercial interests, on the basis that anything that increases the value of a given tract of land is a sufficient public use. Critics respond that this is absurd, and that there are few properties, no matter how upscale, which could not be made more valuable if developed in a different manner. They also note that if a developer is unable to purchase the property on the open market, it is unlikely that the landowners will truly be offered the value of the property through condemnation proceedings. The governmental response to that point is that the law of eminent domain arose from the experience that some property owners are unwilling to negotiate a reasonable sale price, and such unreasonableness should not provide a basis to extort an above-market price or to prevent the completion of a public project.

For example, in one case a town wished to exercise eminent domain over a residential neighborhood, so that an upscale condominium development could be built on that land. To advance that goal, they defined any home within the neighborhood as "blighted" if it did not have three bedrooms, two bathrooms, an attached two car garage, and central air conditioning. The homeowners challenged the definition in court, and were ultimately successful in fighting the municipality's efforts to take their homes.22

Eminent Domain Review

* Eminent Domain is the right of the government to acquire privately owned real estate for public use.
* Condemnation is the process by which the government exercises this right.
* The proposed use is supposed to be for the public good.
* Just compensation must be paid to the owner.
* The rights of the property owner must be protected by due process of law.

Nevada Case: Las Vegas Downtown Redevelopment Agency v Pappas

“Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003)" 1

PROPERTY – EMINENT DOMAIN Summary 2

In November 1985, the City of Las Vegas Downtown Redevelopment Agency (Agency) was created to evaluate and determine whether redevelopment was necessary to combat physical, social, or economic blight in various sections of the city. The Agency identified conditions in downtown Las Vegas constituting “blight” within the definition of NRS §279.388, and considered and approved a redevelopment plan (Plan) with the purpose of eliminating blight and to encourage businesses and individuals to return to a safe downtown area with adequate parking and facilities. Although the Pappases’ property was included within the Plan, no one, including the Pappases, challenged the Plan within the ninety-day period following its adoption, as required by statute.

Several years passed before the Agency entered into an agreement with a consortium of downtown casinos to develop the Fremont Street Experience (FSE). The FSE required construction of a parking garage on property owned by thirty-two individual parcels, three of which were owned by the Pappases. In November 1993, the Agency filed an eminent domain complaint to acquire the Pappases’ property, and gained possession of the Pappases’ land in January 1994 after the Pappases failed to oppose the Agency’s motion for immediate occupancy pending entry of judgment. The Pappases filed a counterclaim alleging six causes of action, and then filed a motion for rehearing regarding the Agency’s immediate occupancy, which was denied. The Agency took possession of the property, demolished the existing building, and constructed the parking garage.

More than three years after the district court had granted the motion for occupancy and the garage had been constructed, the Pappases filed a motion to dismiss the Agency’s eminent domain complaint. The district court dismissed the Agency’s eminent domain complaint, concluding, among other things: that the ninety-day statute of limitations in NRS §279.609 did not preclude judicial review of the taking; that the Agency lacked authority to use eminent domain because there were other less restrictive means to obtain the property; that the Agency acted in bad faith; and that the Agency’s taking of the Pappases’ property was not a public use. The Agency appealed, arguing the district court erred in entering an order dismissing the Agency’s eminent domain complaint. The Pappases cross-appealed, contending the district court erred in entering an order dismissing their counterclaims.

The Nevada Supreme Court concluded that the Agency’s use of eminent domain was constitutionally permissible because both the Federal and Nevada Constitutions allow the taking of private property for public use, because the Agency acted under a clearly defined economic redevelopment statute, and because a court cannot substitute its judgment when a legislative body determines a specific project furthers economic redevelopment and supports that decision with substantial evidence. The majority concluded the district court erred in dismissing the Agency’s eminent domain complaint.
However, two strong dissents were filed in this case. Justice Leavitt’s dissent was based on his conclusion that the Agency’s taking of the Pappases’ property was **not for a proper public use**. Under NRS §279.586(1)(a), a redevelopment area must include a “blighted area, the redevelopment of which is necessary to effectuate the public purposes.” Justice Leavitt pointed out that the Pappases’ property was not a slum, as was the case in *Berman v. Parker* where the U.S. Supreme Court upheld the transfer of property taken by eminent domain from one private party to another private party. Nor, contended Justice Leavitt, did the Agency demonstrate that the taking of the Pappases’ property was necessary, rather than desirable, for effective redevelopment as required by NRS §279.586(1)(a). Thus, Justice Leavitt concluded the taking of the Pappases’ property was unconstitutional and void.

**Conclusion**

The Federal and Nevada Constitutions allow the taking of private property for public use as long as the private property owner is justly compensated. The Nevada State Legislature has defined economic redevelopment as a public purpose. When substantial evidence supports a governmental agency’s determination that a specific project furthers economic redevelopment under NRS Chapter 279, the project is for a public purpose, and the agency’s use of eminent domain is constitutionally permissible. Public ownership of condemned property is not essential to a determination of public use. So long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain. If an agency’s finding of blight is supported by substantial evidence, it is not subject to judicial review. Courts may not question the wisdom of how to accomplish the public purpose absent a showing of fraud or bad faith.

All eminent domain cases filed after *Pappas* challenging the proceeding based on lack of public use or necessity grounds must be raised prior to occupancy and material demolition, alteration or construction on the subject property. Failure to timely assert lack of public use or necessity will constitute a waiver of these issues.

**References in Article:**

1. By Sally L. Galati
2. *Pappas* was heard *en banc* by the Nevada Supreme Court, with Justice Becker writing the opinion. Justices Agosti, Rose, and Shearing concurred; Justices Leavitt and Maupin filed dissenting opinions. Justice Gibbons voluntarily recused himself from the decision.

24 U.S. CONST. amend. V; NEV. CONST. art. 1, §8, cl. 6.
25 NEV. REV. STAT. 37.010(17).
28 *Pappas*, 76 P.3d.
31 *Pappas*, 76 P.3d. 32 *Id.*

2008: Nevada Statewide Ballot Question:

Eminent domain question approved

QUESTION NO. 2 Amendment to the Nevada Constitution (Ballot Question)

PASSED

Shall Article 1 of the Nevada Constitution be amended in order: to provide that the transfer of property from one private party to another private party is not considered a public use; to provide that property taken for a public use must be valued at its highest and best use; to provide that fair market value in eminent domain proceedings be defined as the —highest price the property would bring on the open market; and to make certain other changes related to eminent domain proceedings?

EXPLANATION The proposed amendment, if passed, would create a new section within Article 1 of the Nevada Constitution. The amendment provides that the transfer of property taken in an eminent domain action from one private party to another private party would not be considered taken for a public use. The State or its political subdivisions or agencies would not be allowed to occupy property taken in an eminent domain action until the government provides a property owner with all government property appraisals. The government would have the burden to prove that any property taken was taken for a public use. If property is taken by the State or its political subdivisions or agencies for a public use, the property must be valued at its highest and best use. In an eminent domain action, just compensation would be considered a sum of money that puts a property owner in the same position as if the property had not been taken, and includes compounded interest and reasonable costs and expenses. Fair market value, for eminent domain purposes, would be defined as the —highest price the property would bring on the open market. If property taken in an eminent domain proceeding is not used for the purpose the property was taken for within five years, the original property owner would be able to reclaim the property upon repayment of the original purchase price.
**Escheat**

Probate is the process by which a responsible party gathers all the assets and property of someone who died, pays all necessary debts and taxes, and distributes the balance to the people designated in the will. There are two types of probate upon a person’s death. Testate probate happens when the deceased left a valid will. Intestate probate happens when the deceased did not leave a valid will.

Intestate probate without legal heirs may cause the assets (property included) of the deceased to be transferred to the government. This process is called 'escheat'.

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**Escheat Review**

If an individual dies without a will

* the state gives the property to his/her heirs (close relatives)
* if the deceased has no heirs the government inherits the property.
Police Power

Police power is the rights of government to regulate behaviors and enforce order within its territory, often framed in terms of general welfare, morals, health, and safety. The most common use of police power over real property is for the adoption and enforcement of zoning regulations, building codes, and environmental protection regulations, by local, regional, and national governments.

City planning

"City planning is a profession in which planners work to guide the present and future growth of a city by striking a careful balance between residential, commercial, recreational, and institutional needs. A planner makes the best use of a community's resources, solves current community problems, and protects important physical and geographical landmarks, all while considering how the future needs of a city will fit in. City planning usually begins with planners collecting and analyzing data about every aspect of a city. Important aspects of their study include problems like traffic congestion; air, water, and soil pollution; ecological preservation; and infrastructure. Planners must analyze street and highway capacity, location and capacity of water and sewer lines, public schools, libraries, cultural sites, and so on.

Once all the data has been collected and analyzed, city planners work with neighborhood groups, business leaders, law enforcement agencies, and government officials to determine the needs of the community. City planners deal with zoning and building codes and environmental regulations to ensure that the plan is legal and will work within existing codes. An important aspect that city planners must consider is what type of industry exists in the community, and how that industry will best be served. Geographical landmarks are also a key factor in how a
community is planned. A beach or lake community may have an entirely different plan than river, mountain, or landlocked cities.

Planners establish development goals by creating a master plan, also known as a comprehensive plan. This plan includes the municipality’s objectives for the future and a timeline for those objectives to be implemented.

Suburban sprawl can be a nightmare for city planners. Many plans that were conceived decades ago were not progressive enough to accommodate the inevitable sprawl that has developed in cities across the nation. As populations grow, many cities are stretched beyond their infrastructure.

City planners must allow for growth by planning cities where highways can be enlarged, schools can be added, and the citizenry can be served by government agencies. Some city planners are finding new ways to limit sprawl and to make suburban communities more self-contained. As suburbs take workers further from city centers and jobs, planners must also find ways to help the city foster new business development in the suburbs to create jobs for the growing population.

City planning is an important aspect of a city’s plan for its present and future. A well planned city is convenient, healthy, efficient, and aesthetically pleasing to its residents, and all its parts fit together in a symbiotic relationship.24

Las Vegas Master Plan Link:

Reno Master Plan Link:

Master Plans
There are also master plan communities within the master plan. Las Vegas, for example offers many master plan communities within the master plan including Aliante, Canyon Gate, Green Valley, Green Valley Ranch, Lake Las Vegas, Seven Hills, Summerlin, Rhodes Ranch and The Lakes to name a few.

Master/Comprehensive plan includes:

- land use
  - determines how much land may be proposed by residence, industry, business, agriculture, traffic and transit facilities, utilities community facilities, parks and recreational facilities, floodplains, areas of special hazards

- housing needs
  - for present and anticipated residents
  - rehabilitation of declining neighborhoods
  - new residential developments

- movement of people and goods
  - includes highways and public transit, parking facilities, pedestrian and bikeway systems

- community facilities and utilities
  - schools, libraries, hospitals, recreational facilities, fire and police stations, water resources, sewerage and waste treatment and disposal, storm drainage and flood management

- energy conservation
  - helps to reduce energy consumption
  - promotes the use of renewable energy sources

Zoning

Zoning is a device of land use planning. Zoning is commonly controlled by local governments such as counties or municipalities, though the nature of the zoning regime may be determined or limited by state or national planning authorities or through enabling legislation.

The word is derived from the practice of designating permitted uses of land based on mapped zones which separate one set of land uses from another. Zoning may be use-based (regulating the uses to which land may be put), or it may regulate
building height, lot coverage, and similar characteristics, or some combination of these. Similar urban planning methods have dictated the use of various areas for particular purposes in many cities from ancient times.

The primary purpose of zoning is to segregate uses that are thought to be incompatible. In practice, zoning is used to prevent new development from interfering with existing residents or businesses and to preserve the "character" of a community.

Zoning may include regulation of the kinds of activities which will be acceptable on particular lots (such as open space, residential, agricultural, commercial or industrial), the densities at which those activities can be performed (from low-density housing such as single family homes to high-density such as high-rise apartment buildings), the height of buildings, the amount of space structures may occupy, the location of a building on the lot (setbacks), the proportions of the types of space on a lot, such as how much landscaped space, impervious surface, traffic lanes, and parking must be provided.

Most zoning systems have a procedure for granting variances (exceptions to the zoning rules), usually because of some perceived hardship caused by the particular nature of the property in question. Basically, zoning fall into one of the five major categories: residential, commercial, industrial, agricultural and special purpose. Each category can have a number of sub-categories.25

Zoning Terms:

On average, some zoning classifications are more valuable than others. Usually commercial is a more valuable zoning classification than residential and agricultural but this is impacted by the focus of the community. A change in the zoning of a property will impact the value of the property.

**Down-zoning**: A change in zoning that decreases the value of the property.

**Example**: property changes from commercial zoning to residential zoning

**Up-zoning:** A change in zoning that increases the value of the property. 
*Example:* property changes from residential zoning to commercial zoning

**Spot Zoning:** A change in zoning isolated to one parcel within a neighborhood. The size of the parcel will reflect the size of neighborhood parcels. It could be a parcel that is 1 acre in size or 100 acres in size. It just depends on the parcel size of most of the lots in the neighborhood.

**Buffer Zone:** Spot zoning that separates two conflicting zones. For example, a park may separate residential and commercial zones.

**Building codes**
Building codes set the requirements for kinds of materials and standards of workmanship, sanitary equipment, electrical wiring, fire prevention, etc. The municipal inspector issues a certificate of occupancy or occupancy permit when the requirements are met. All new residential structures must have received an occupancy permit before a purchaser can take possession.

**Setback:** The distance a structure must be from the edge of the lot line. For example the setback from the border is 10 feet, so the home must not be any closer to the border than 10.1111 feet (farther than 10').

"In land use, a setback is the distance which a building or other structure is set back from a street or road, a river or other stream, a shore or flood plain, or any other place which needs protection. Depending on the jurisdiction, other things like fences, landscaping, septic tanks, and various potential hazards or nuisances might be regulated. Setbacks are generally set in municipal ordinances or zoning. Setbacks along state, provincial, or federal highways may also be set in the laws of the state or province, or the federal government.

Homes usually have a setback from the property boundary, so that they cannot be placed too close together. This would not only be psychologically uncomfortable to
residents staring through windows into each others' blank exterior walls (or even into windows, causing a privacy problem), but would present a fire hazard, particularly during windy conditions. Setbacks may also allow for public utilities to access the buildings, and for access to utility meters. In some municipalities, setbacks are based on street right-of-ways, and not the front property line.

Setbacks also allow for major thoroughfares to be expanded when traffic increases. If a road is widened, thus reducing the setback to less than minimum, the existing structure may be grandfathered into the new situation. If the setback is made so narrow as to be dangerous, the structure may be forcibly taken from the owner via eminent domain. Some homeowners find themselves in the extremely difficult position of having a new highway nearly up to their front door because the setback has been so severely reduced, and businesses may also suffer greatly by having most of their parking lots taken.

Mailboxes, on the other hand, often have a maximum setback instead of a minimum one. A postal administration or postmaster may mandate that if a mailbox on a street is too far from the curb for the letter carrier to insert mail, without having to get out of the vehicle, the mail may not be delivered to that address at all until the situation is corrected.

Setback can also be important for security purposes. Embassies or other government buildings may be placed further from the street to reduce the risk of terrorist attack."^{26}

Nonconforming use

Non-conforming use is the use of land in the manner that lawfully existed before enactment of a zoning ordinance. This use may be maintained after the effective date of the ordinance, although it no longer complies with use restrictions newly applicable to the area. The use is grandfathered in. If the property is destroyed or torn down or the current use is abandoned, the new zoning must be followed.

For example: Tom’s Barber Shop has been operating as a barber shop for 50 years. This year a residential subdivision was built in the area, and Tom’s Barber Shop is now zoned residential. Due to community outcry, Tom’s Barber Shop will continue to operate as a commercial property even though it is no longer zoned commercial. The barber shop cannot expand. If it is torn down or abandoned, the building loses its right to operate as a commercial structure.

**Conditional-Use permit or Special-Use Permit**

A conditional use permit allows a city or county to consider special uses which may be essential or desirable to a particular community, but which are not allowed as a matter of right within a zoning district, through a public hearing process. A conditional use permit can provide flexibility within a zoning ordinance. Another traditional purpose of the conditional use permit is to enable a municipality to control certain uses which could have detrimental effects on the community.

Consideration of a conditional use permit is a discretionary act. A conditional use permit application tendered by a project proponent is considered at a public hearing and, if approved, is generally subject to a number of pertinent conditions of approval. Depending on local ordinance requirements, hearings are typically held by a board of zoning, the planning commission, or a zoning administrator. The owners of property near the site are sent advance notice of the date, time, and place of the hearing.

Examples of common uses allowed with a conditional use permit can be found in any city or county zoning ordinance. For example, these may include temporary amusement attractions, the placement of a building or structure on a lot or parcel which has been moved from another lot or parcel, public buildings and facilities, parking or access located off-site from the site being served, private recreation centers, and planned developments. Each city or county may include in their zoning ordinance a wide variety of uses which they will permit with a conditional use permit.
**Variances**
A variance permits the landowner to use the property in a manner that is strictly prohibited by the existing zoning. It provides relief if zoning regulations deprive an owner of the reasonable use of the property for unique circumstances. A variance is issued by zoning boards after public hearings. This differs from non-conforming use, because the zoning of the property would be changed (spot-zoning) to match the current use. A property using non-conforming use is in violation of its current zoning.

**Zoning Review**
- Zoning ordinances are local laws that implement the comprehensive plan and regulate and control the use of land and structures within designated land-use districts.
- comprehensive plan = big picture and zoning = details
- A zoning board is established to hear complaints, and petitions for variances or exceptions.
- The plan:
  - divides land use into residential, commercial, industrial, agricultural and special purpose classifications.
  - divides land use into subclasses of land use
  - establishes buffer zones for parks and playgrounds
  - screens residential areas from nonresidential zones
  - indicates:
    - the permitted uses of each parcel of land
    - lot sizes
    - types of structures
    - building heights
    - setbacks - How far from the lot lines do structures need to be?
    - style and appearance of structures
    - density
    - protection of national resources
Private land-use controls

Real property also has private land use controls such as restrictive covenants and encumbrances. The most common restrictive covenant is a group of recorded rules and guidelines called covenants, conditions and restrictions, referred to as C,C & R’s. Typically there are C,C & R’s dictated by the master plan, other more specific C,C & R’s created by the developer and still others created by or changed by local community homeowners. These can be found in the recorded deed. The most common encumbrance is an easement that protects other peoples rights to use private land. A utility company, for example, has the right to keep equipment such as power boxes and mail boxes on private homeowner’s land for the common use of all.

Covenants, Conditions and Restrictions (C,C, & R’s)

A real covenant is a legal obligation imposed in a deed by the seller upon the buyer of real estate to do or not to do something. Such restrictions frequently "run with the land" and are enforceable on subsequent buyers of the property. In jurisdictions that use the Torrens system of land registration, restrictive covenants are generally registered against title.

Scope of covenants
Restrictive covenants may arise from many sources, and may be registered against titles or included in leases. Some covenants exist for safety purposes, such as a covenant forbidding the construction of tall buildings in the vicinity of an airport or one restricting the height of fences on corner lots (so as not to interfere with drivers' sight lines). Covenants may restrict everything from the height and size of buildings to the materials used in construction to superficial matters such as paint color, allowed vegetation and holiday decorations.

State law strengthens the enforcement of some C,C, & R’s and prohibits others. It is a violation of state law in Nevada to prohibit the flying of an American flag, and discourage water conserving landscaping.
Commercial covenants

Restrictive covenants are commonly registered against commercial properties. Developers may seek to restrict the type of business allowed to operate in a certain area so that a purchaser of land in a research park, for example, could not turn the building into a bingo parlor or a tool and die factory. A commercial lease may include a restrictive covenant forbidding the sale of certain items, such as pornography or liquor. A powerful mall tenant (such as a major supermarket chain or other anchor store) may require its landlord to include in its leases to other tenants a restrictive covenant forbidding the sale of certain items (such as fresh meat and produce).

Residential covenants

Residential covenants are also common. Some residential covenants are very detailed. Some restrictive covenants may govern what color a home’s exterior is painted, what and how many exterior decorations are allowed, where cars are allowed to be parked, or even who (ages for example) lives in the house.

Controversy

Some have accused homeowners associations of selective enforcement of these rules, making a case only when it is something (or someone) another person dislikes. Breaking a rule, even unintentionally, can bring fines or even a lien on the home. In extreme cases, a homeowners’ association may file a lawsuit against an owner who violates the covenants or even foreclose the property.

A restrictive covenant differs from a zoning regulation in that its creation and enforcement is a matter of contract between the landowners whose properties are affected by it, rather than an exercise of the governmental police power.27

C,C, & R Review

* restrictive covenants
* C,C & R’s (covenants, conditions and restrictions)
* governs type, height and size of buildings
* governs land use, architectural style, construction methods, setbacks and square footage

Encumbrances: Things attached to Property

Encumbrance is the legal term for anything that affects or limits the title of a property, such as mortgages, leases, easements, liens, or restrictions. An encumbrance could be a claim, charge or liability that attaches to real estate; a right or interest held by someone other than the fee owner of the property. It affects the title of real estate and may increase or decrease the value of the property and may hinder the use of the property. It does not necessarily prevent the transfer of ownership.

There are 2 major categories of encumbrances: (1) financial, and (2) physical. A mortgage lien is the most common type of monetary encumbrance. An easement is the most common type of conditional use encumbrance. There are also subsets under these 2 major types.
Financial Encumbrances

The most common type of financial encumbrances is a lien. A lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. Hypothecation is a contract which pledges or creates a lien on collateral to secure a debt, where the debtor keeps possession of the collateral.

A lien represent an interest in the property. There are various types of liens with different priority rights. Some are voluntary, a mortgage or trust deed; and some are involuntary, put in place by someone other than the owner of the property, a tax lien or construction lien. Liens can also be categorized as statutory or equitable. A statutory lien, created by a statute (a law) is an involuntary lien that does not require consent of any party or court to be enforceable. A tax lien is an example of a statutory lien. An equitable lien is created from a court-ordered judgment. Other classifications include general vs. specific liens. General liens affect all of the assets of the debtor. A specific lien secures specific property. A mechanics lien would be an example of an involuntary, specific, equitable lien. This type of lien may arise from non-payment of construction work completed on a property. An Internal Revenue Service lien would probably be classified as an involuntary, statutory, general lien.
Priority of a lien is the primary consideration. If the property was sold, and there were many liens against the property, who will be paid first, second, etc? Statutory liens would also be paid first, for example any tax and special assessment liens would be top priority. Mortgages, liens secured by the property, would be next. Mechanics liens and 2\textsuperscript{nd} mortgages would be paid last, if there is anything left. If there isn't anything left, these creditors may pursue a deficiency judgment in court, and start the process again.

**Definitions**

**Statutory:** a lien imposed on property by state statute (state law)

**Equitable:** lien arising out of common law (decided by a judge - based on fairness)

**General Lien:**

Tax lien or judgment lien that attaches to all personal and real property of a person or firm (the lienee). It covers not only the goods or property that gives rise to the debt, but all the goods or property of the lienee. In the US, a general lien applies only to personal property. Examples include:

- Judgments
- Estate and Inheritance Taxes
- Deceased Person’s debts
- Corporation Franchise Tax
- IRS Taxes
**Judgments**

A judgment is a general, involuntary equitable lien. To enforce a judgment, the creditor must obtain a writ of execution from the court.

**Other Lien terms**

**lis pendens**
- means litigation pending
- a special notice, not a lien
- notice of a possible future lien
- it notifies prospective purchasers and lenders that there is a potential claim against the property
- establishes a priority for the later lien: the lien is backdated to the recording date of the lis pendens

**writ of attachment**
- prevents debtors from conveying title to previously unsecured real estate while a court suit is being decided
- the court retains custody of the property until the suit concludes
- first the creditor must post a surety bond or deposit with the court
- if judgment is not awarded, the debtor will be reimbursed from the bond

**ad valorem**
- latin for (according to value)
- tax is a percentage of the value.
- The greater the value, the greater the tax, proportionately

**writ of execution**
- directs the sheriff to seize and sell as much of the debtor’s property as is necessary to pay both the debt and the expenses of the sale

**Estate and Inheritance Tax Liens**
- general, statutory, involuntary liens
- encumber a deceased person’s real and personal property
- usually paid or cleared in probate court proceedings

**IRS Tax Liens**
- results from a person’s failure to pay any portion of taxes
- general, statutory, involuntary lien
- lien on all real and personal property
- it does not supersede previously recorded liens
Specific Liens

Real Estate Tax Liens
* annual taxes levied over real estate usually have priority over previously recorded liens
* 2 types
  * General Real Estate Taxes
    * also called ad valorem taxes (according to value)
  * Special Assessments for Improvement Taxes
* Both types are specific liens

Enforcing Real Estate Tax liens:
* must be valid to be enforceable which means they:
  * must be levied properly
  * must be used for legal purpose
  * must be applied equitably to all property
* taxes that have remained delinquent for a statutory period can be collected through tax sale
  * public notice is given
  * sale price minimum is tax delinquency amount
  * certificate of sale is given to purchaser
  * usually delinquent taxpayer can redeem at any time before sale (equitable right of redemption)
  * some state may also allow a statutory right of redemption after sale

Mortgage or Deed of Trust Lien
* voluntary lien on real estate given to a lender by a borrower as security for a real estate loan
* it becomes a lien on real property when the lender records the documents in the county where the property is located

Mechanic's liens
* a specific, involuntary lien
* gives security to persons or companies that perform labor or furnish material to improve real property
* available to contractors, subcontractors, architects, equipment lessors, surveyors, laborers and other providers
* filed when the owner has not fully paid for the work or when the general contractor has been compensated but has not paid the subcontractors or suppliers of materials
* the person who did the work must have been under contract
Taxation

Taxation bodies include:

- states, counties, cities, towns and villages
- drainage, water, sanitary districts
- parks, forest and recreation districts

Nevada Property Taxes

* starts with a local budget for the upcoming fiscal year
* Nevada fiscal year is July 1 - June 30
* net amount to be raised by real estate taxes is the difference between projected income and expenses
* ways to state tax rate
  * mills
  * .001 or 1/1000 of a dollar

A mill rate is calculated by dividing the ‘taxable value’ by 1,000 and then multiplying by the mill rate.

Example: Fair market value: $150,000, Taxable value 25%, Mill Rate 12.5

A properties fair market value is $150,000, and 25% ($37,500), is the taxable value. To calculate the amount of property tax, divide $37,500 by 1,000 and multiple that number times the number of mills (12.5 in this example). ($37,500 divided by 1,000 = 37.5 times 12.5 mills = $468.75 (annual taxes)).

Transfer Taxes:

When a person sells a house, he has to pay the state a transfer tax.

⇒ also called deed stamps, revenue stamps or documentary stamps
⇒ in Nevada cost is $5.10 per $1,000 of value (or any portion of $1,000)
⇒ paid when the deed is recorded
Calculating Transfer Tax:
Calculate the transfer tax on a sale transaction of $91,500 at a rate $5.10/$1,000
91.5 X 5.10 = $466.65
Calculate the transfer tax on a sale transaction of $141,600 at a rate $5.10/$1,000
141.6 X 5.10 = $722.16

Equalization factor
♦ used to correct inequalities in state wide state assessments
♦ used to create uniformity
♦ may be applied to raise or lower assessments in a particular district or county
♦ assessed value is multiplied by equalization factor to and then the tax rate is applied to the equalized assessment

Property Tax Assessment ratio:
* Most states assess property value at only a portion of its value, usually 35-50%
* Nevada uses 35%
* actual percentage is set by state law
* The homeowner pays property taxes based on 35% of the properties value
* $140,000 value X .35 = 49,000 X .035 (hypothetical tax rate) = $1715 annual taxes.
Property Taxes

* a priority lien on any property regardless of the date or notice
* superior to mortgages, mechanic's liens, judgment, IRS liens
* purpose:
  * fund local government activities such as schools, police, fire, roads and the business of government
* the government activities budget (or expenses) is the total of tax revenue which they must collect from property owners
* ad valorem tax
* the greater the value of the property, the greater the tax
* everyone pays the same tax rate - variations in the amount of tax are due to different values of property
* computed by applying the tax rate to the assessed valuation of the property
* each property usually only gets 1 tax bill unless fiscal year is different among bodies
* due dates (penalty dates) are set by statute
* different types of payments are as follows:
  * semi-annually (2 yearly installments)
  * quarterly (4 installments)
  * monthly (12 installments)
* different timing of payments are as follows
  * in advance (prepaid)
  * in arrears (paid when due)
* penalties are added to tax bills that are not paid when due
* appropriation
  * the way a taxing body authorizes the expenditures of funds
  * generally involves the adoption of an ordinance or passing of a law that states the specific terms of the proposed taxation
  * a tax levy is then imposed on property owners

Assessments

* valued by county assessors or appraisers
* use market data approach if possible
**Special Assessments:**
* taxes paid for public improvements to the area benefiting such as:
  * Paved streets
  * curbs
  * gutters
  * Sidewalks
  * storm sewers
  * street lights
* always specific and statutory
* can be voluntary or involuntary liens
* a prorated share of the improvement is charged to the property owners
* share is determined by fraction or cost per foot
* usually paid in equal, annual installments over a period of years
* first bill includes one year’s interests on the property owners share of the entire assessment
* subsequent bills include one year’s interest on the unpaid balance
* property owners can prepay without penalty
* not used frequently in many parts of the country where improvements are a condition of a subdivision’s approval

**Business Exempt from property taxes include:**
* properties owned by cities, various municipal organizations, state and federal governments, religious and charitable organizations, hospitals, educational institutions
* certain land uses and owners
  * senior citizens often granted reductions in the assessed value of their homes
  * some governments offer incentives to attract industries and sport franchises
  * agricultural land
Tax Problems:

1) Real value = $100,000
   Assessment ratio = 40%
   Tax rate = 22 mills
   Quarterly tax = ?

   $100,000 * .40 = $40,000
   $40,000 * .022 = $880
   $880/4 = $220

2) Assessment ratio = 50%
   Tax rate = $1.76/$100
   Tax = $116.40/month
   Real value = ?

   $116.40 * 12 months = $1,396.80 year
   $1,396.80/$1.76 = $793.64
   $793.64 * 100 = $79,363.64
   $79,363.64/.50 = $158,727.27

3) Real value = $125,000
   Assessed value = $50,000
   Tax = $850/semi-annual
   Assessment ratio = ?
   Tax rate (in mills) = ?

   $50,000/$125,000 = .40
   $850 * 2 = $1,700
   $1,700/$50,000 = .03
tax rate (in mills) = 30 mills

4) Assessment ratio = 35%
   Tax rate = $8/$1000
   Tax = $84.69/month
   Real value = ?

   $84.69 * 12 = $1,016.28
   $1,016.28/8 = $127.035
   $127,035 * 1000 = $127,035
   $127,035/.35 = $362,957.14

Transfer Tax Examples:

1. A property in Reno sold for $230,000. How much were the seller’s transfer taxes?

   $230,000 ÷ 1,000 = 230
   230 X $2.60 = $598

2. A property in Overton was listed for $170,000. It sold for $166,255. How much did the seller pay the state for transfer taxes?

   $166,255 ÷ 1,000 = 166.255
   166.255 X $2.60 = $432.27
Income Tax Topics

1099-forms
* Reports to the IRS and recipient additional income
  * interest received
  * miscellaneous income
  * proceeds from the sale of real estate
  * reporting a salesperson or broker’s commission
  * reporting rents paid by a tenant

Tax deductions for homeowners:
♦ mortgage interest payments on most first and second homes – BUT NOT 3rd!
♦ real estate taxes, except penalties
♦ certain loan origination fees
♦ loan discount points
♦ loan prepayment penalties
More Tax Topics:

1031 Tax - Free Exchange:

* done for tax savings or tax deferral
* Section 1031 of the IRS code
* "tax-deferred" exchange
* If the owner structures the transaction as a trade or exchange instead of a profit sale, the payment of tax can be delayed until the sale of the second property.

Rules for 1031 exchange

* see a qualified intermediary (registers with the Real Estate Division) or accountant for specific details
* Property must be like-kind.
* mortgage must be equal or larger
* investor must take no boot
* can exchange:
  ⇒ real property for real property
  ⇒ personal property for personal property
* cannot exchange:
  ⇒ real property for personal property
  ⇒ personal property for real property
* property must be of equal or greater value
* any broken rules may cause the transaction to be partially or fully taxable