

ELEMENTS OF REAL PROPERTY

- Real property consists of:

- (1) **Land**, including the

- (a) **soil** and **natural structures** on the realty's surface,

- (b) all of the **water** and **minerals** on or below the realty's surface, and

- (c) most of the **airspace** above the realty's surface;

- (2) **Plant Life and Vegetation**, both natural and cultivated, as well as the produce of plant life and vegetation; and

- (3) **Fixtures**: Buildings and other artificial improvements (other than trade fixtures) attached to real property, as discussed more fully in Chapter 49.

- **Freedom of Contract**: A realty owner can subdivide any or all of the foregoing elements and contractually agree to sell or lease some or all of the legal rights that normally adhere to realty.

REAL PROPERTY OWNERSHIP

- **Fee Simple Absolute:** An ownership interest in real property that
 - (1) affords its owner the **exclusive rights** to **possess** and **use** realty for any legal purpose;
 - (2) entitles the owner to **convey** (i.e., **sell** or **give**) the same rights she has in the realty immediately prior to the sale or gift; and
 - (3) **potentially lasts forever**, passing from each owner to her buyer, donee, heir, or assignee.
- **Life Estate:** An interest in real property affording the holder the exclusive rights to possess and use the realty
 - (1) for the **duration** of the life of some person, usually the holder of the life estate, and
 - (2) only to the extent that the life tenant does not cause **waste** (i.e., injury to the land).
- **Duty to Maintain Value:** Because the life estate terminates after the specified person's death, the holder must keep the realty in a good state of repair and may have to pay property taxes during his tenancy.

CONCURRENT OWNERSHIP

- **Tenancy in Common:** Co-ownership of property, in which each party owns an undivided interest in the whole property.
 - When a tenant in common dies, her interest in the property passes to her heirs.
- **Joint Tenancy:** Joint ownership of property, in which each co-owner owns an undivided interest in a portion of the whole property.
 - **Effect of a Joint Tenant's Death:** A deceased joint tenant's rights will pass to the surviving joint tenant(s) if the joint tenancy is one *with right of survivorship*.
 - **Effect of Sale or Gift:** If a joint tenant sells or gives someone her interest, the sale or gift will transform the joint tenancy into a tenancy-in-common.
- **Tenancy by the Entirety:** Joint ownership of property by husband and wife (or by spouses, in states that recognize same-gender marriages), such that neither party can transfer his or her interest in the property without the other's consent.
- **Community Property:** Joint ownership of property by husband and wife, in which each spouse owns an undivided one-half interest in property *acquired during marriage*.

LEASEHOLD ESTATES

- **Lease:** A contract by which the owner of real property (the *landlord* or *lessor*) grants to a person (the *tenant* or *lessee*) an exclusive right to use and possess the property, usually for a specified period of time, in return for rent or some other form of consideration.
- **Leasehold Estate:** An estate in real property held by a tenant under a lease, giving the tenant a qualified right to possess or use the land.
 - **Fixed-Term Tenancy:** A leasehold estate for a specified period of time.
 - **Periodic Tenancy:** A leasehold estate for an indefinite period conditioned upon the receipt of rent at fixed intervals.
 - **Tenancy at Will:** A leasehold estate that permits either the lessor or lessee to terminate the tenancy, without cause and without notice.
 - **Tenancy at Sufferance:** A situation that arises when a tenant continues to occupy the real property after his leasehold estate expires.

NON-POSSESSORY INTERESTS

- **Easement:** A non-possessory right to use another's property in a manner established by express or implied agreement.
- **Profit:** The right to enter upon and remove things (*e.g.*, trees, oil, topsoil) from the property of another.
- **Easement or Profit Appurtenant:** An easement or profit pertaining to a piece of land adjacent to that owned by the holder of the easement or profit.
- **Easement or Profit in Gross:** An easement or profit that does not require the holder of the easement or profit to own an adjacent piece of land.
- **License:** A revocable right or privilege to come onto the land of another.

CREATING, TERMINATING, OR PERPETUATING EASEMENTS AND PROFITS

- Easements and profits can be created by
 - **contract, deed, or will**
 - **implication**, when the circumstances surrounding the division of a parcel of land imply its creation,
 - **necessity** (*e.g.*, an easement of access to a road), or
 - **prescription**, when a person exercises an easement without the owner's consent, but in an open and obvious way that lasts long enough to bar the owner from stopping the use.
- **Termination:** The beneficiary of an easement or profit can terminate it deeding it back to the owner of the burdened land, by abandoning it and relinquishing the right to use it, or by purchasing the encumbered property (*merger*).
- **Effect of Sale:** If the property that the easement **benefits** is sold, the easement will continue in favor of the new owner. But, if the property that the easement **burdens** is sold, its new owner is bound only if she knew or should have known of the easement's existence.

TRANSFER BY SALE

- **Listing:** Most sellers of real estate employ a licensed real estate **agent** or **broker** to present the property to prospective purchasers. The parties typically set forth the specific terms of the engagement – including any *commission* due the agent or broker if the property sells – in a written *listing agreement*.
- **Offer:** A prospective buyer will generally make a **written offer** and deposit *earnest money* with an *escrow agent*. The earnest money will apply toward the purchase price if the deal closes, but will generally be returned only at the seller's discretion if the deal falls through.
- **Contract:** All contracts for the sale of real estate should be written, and should include, at a minimum: (1) the purchase **price**, (2) the **type of deed** the buyer will receive, (3) any **contingencies**, such as obtaining financing, (4) a **legal description** of the premises and its condition, and (5) the **closing date** and time.
- **Closing/Settlement:** The final step, in which all necessary documents are signed, the *mortgage loan* (if any) is funded, title insurance is obtained, and title passes and is recorded on the appropriate deed.

SELLER'S DUTIES

- **Implied Warranty of Habitability:** In a majority of states, the seller of a new house warrants that it will be **fit for human habitation**, *regardless of whether any such warranty is included in the deed or contract of sale.*
- Essentially, the seller warrants that the house is in **reasonable working order** and is of **reasonably sound construction**.
- The buyer need not prove that the seller knew of any defect; rather, the buyer is only required to prove that she has suffered some damage due to the house's defective design, construction, or condition.
- Some states extend the protection of this implied warranty to purchasers of used homes as well.
- **Duty to Disclose:** In most jurisdictions, a seller must disclose
 - (1) any **known defect**
 - (2) that **materially affects the value of the property**,
 - (3) which the **buyer could not reasonably discover**.

DEEDS

- **Deed:** A document that conveys legal title to real property. A valid deed must contain

- (1) the **names** of the buyer (*grantee*) and seller (*grantor*),
- (2) words evidencing the grantor's **intent to convey** the property,
- (3) a legally sufficient **description** of the land, and
- (4) the grantor's **signature**, and
- (5) must be **delivered** to the grantee.

- **Warranty Deed:** A deed in which the grantor assures the grantee that

- (1) the grantor has **title** to the subject property,
- (2) the grantor has the **power to convey** said property,
- (3) the property is **not subject to any undeclared rights or interests** that will diminish its value, and
- (4) the grantee **will not be disturbed in her enjoyment** of the property by the grantor or any third party.

SPECIAL DEEDS

- **Special Warranty Deed:** A deed warranting only that the grantor held good title during her ownership of the property.
- **Quitclaim Deed:** A deed intended to pass whatever title, interest, or claim the grantor may have in the property, but not warranting that the grantor's title, interest, or claim is valid or clear of any encumbrances.
- **Grant Deed:** A deed warranting that the grantor owns the property and has not transferred it to anyone else or encumbered it except as disclosed.
- **Sheriff's Deed:** A document giving ownership to a buyer at a foreclosure sale, subject to any statutory redemption period.

RECORDING STATUTES AND TITLE

- **Recording Statutes:** All states have statutes permitting deeds to be recorded, thereby giving public notice of ownership and, if filed, encumbrances. Deeds are generally recorded in the county (or parish) where the property is located.
- **Title Examination:** After the sales contract has been negotiated, a party designated in the contract will examine all recorded transfers of, liens and other encumbrances on, and sales of the subject property to ensure that the seller has a *marketable title*, free and clear of encumbrances, defects in the chain of title, and other title defects.
 - Title is considered marketable even though the property is subject to **zoning** restrictions or public **easements**.
 - If a title defect is found, the seller has breached the sale contract and the buyer may seek appropriate remedies.
 - Buyers of real estate often purchase **title insurance** to protect against undiscovered defects in title.

ADVERSE POSSESSION

- **Adverse Possession:** Acquiring title to real property by occupying it, without the consent of the owner, for a statutory period of time. The occupation must be:
 - (1) **Actual and Exclusive:** The possessor must take sole physical occupancy of the property;
 - (2) **Open, Visible, and Notorious:** The possessor must occupy the property for the entire world to see;
 - (3) **Continuous and Peaceable:** The possessor must occupy the property without abandoning it for any period of time and without being interrupted by the true owner or the courts; and
 - (4) **Hostile and Adverse:** The possessor must claim the property against the entire world, and cannot occupy it with the permission of the true owner.

EMINENT DOMAIN

- **Eminent Domain:** The power of a sovereign government to acquire land from private citizens (1) for **public use** and (2) with **just compensation**.
- **Eminent Domain Procedure:** In order to *condemn* private property, a government must
 - (1) determine that a particular parcel of land is **necessary for public use** (*e.g.*, it is the land that separates two roads, or two parts of the same road, which the government wants to connect),
 - (2) **obtain title** to the land by a judicial proceeding, and
 - (3) pay the landowner the **fair value** of the land, as determined by a court or as agreed between the government and the landowner.
- A government that fails to properly condemn private property and compensate its owner commits an potentially unconstitutional *taking*.

RESTRICTIVE COVENANTS

- **Restrictive Covenant:** A private restriction on land use.
 - A covenant that applies to the initial purchaser of a property and all subsequent purchasers is said to ***run with the land*** and cannot be separated from the property. In order to be enforceable, such a covenant must:
 - (1) be set forth in a **written** document;
 - (2) **intend** that the covenant run with the land;
 - (3) **touch and concern** the land – that is, the limitation must have something to do with the owner’s use of the land; and
 - (4) manifest in such a way as to give actual or constructive **notice** to any subsequent purchaser or prospective purchaser of the property.
 - **Illegal Covenants:** Not all private restrictions on land use are enforceable. For example, courts have refused to enforce covenants that would have the effect of perpetuating racial segregation.

ZONING

- **Zoning laws** permit a state or locality to regulate uses of land without having to compensate landowners.
- **Use Restrictions** specify the permitted *use* (e.g., residential, commercial, industrial) to which the property may be put.
- **Structural Restrictions** cover details such as minimum lot-size, building appearance, height, etc.
- A landowner may obtain a ***variance***, thus permitting her to use her land notwithstanding a zoning law, if:
 - (1) she cannot realize a **reasonable return** on the land as zoned;
 - (2) the zoning ordinance has a **particularly adverse effect** on the person seeking the variance, and
 - (3) granting the variance does not substantially alter the **essential character** of the zoned area.
- A landowner may also seek a ***special-use permit*** that will allow a non-conforming use if she complies with specific requirements imposed to protect neighboring property owners' interests.

LANDLORD-TENANT: POSSESSION

- The landlord is obligated to deliver possession of the leased premises at the inception of the lease, during the term of which the tenant is entitled to possess and use the premises until the lease expires.
- **Covenant of Quiet Enjoyment:** The landlord is also obliged to ensure that no one claiming superior title disturbs the tenant's possession and use of the premises during the lease term.
- **Eviction** occurs when the landlord deprives the tenant of her use or possession of the leased premises (*e.g.*, by changing the locks on the tenant's doors).
- **Constructive eviction** occurs when the landlord wrongfully performs or fails to perform an essential duty of the lease thereby making the tenant's use and enjoyment of the premises untenable (*e.g.*, failing to provide heat, water, electricity).

LANDLORD-TENANT: USE

- Unless the lease agreement specifies otherwise, the tenant may use the leased premises for **any legal purpose** that does not injure the landlord's reversionary interest.
- However, the tenant may not create a *nuisance* that substantially interferes with others' quiet enjoyment of their own property rights; and
- unless the lease agreement provides otherwise, the tenant is responsible for all **damages** to the premises, *except for ordinary wear and tear*, the tenant, his guests, and invitees causes.

LANDLORD-TENANT: MAINTENANCE AND RENT

- **Maintenance:** A landlord must **maintain** the leased premises in good repair and ensure that they meet local **building, safety, fire, and health codes**.
- The landlord must also maintain all **common areas** used by or accessible to all tenants, such as hallways, stairs, elevators, and laundry rooms.
- **Implied Warranty of Habitability:** The landlord impliedly promises that rented residential premises are and remain fit for human habitation and free from substantial defects.
- **Rent:** Generally, a tenant must pay rent for the lease's duration, *even if she refuses to occupy or no longer occupies the leased premises* – unless her refusal to occupy is due to a breach of the landlord's warranty of habitability or the premises are destroyed due to no fault of the tenant.

LANDLORD-TENANT: TRANSFER

- **Transferring the Landlord's Interest:** A landlord may sell, give away, or otherwise transfer his property. However, the existing lease agreement continues in force with the new owner assuming the landlord's rights (*e.g.*, to collect rent) and duties (*e.g.*, maintaining habitability).
- **Transferring the Tenant's Interest:** Assuming that such transfers are not forbidden by the lease agreement, a tenant may transfer his interest in leased property as follows:
 - **Assignment:** An agreement by the tenant (the *assignor*) to transfer all of his rights, title, and interest in the lease to another person (the *assignee*).
 - While an assignment divests the assignor of his rights in the leased property, unless the landlord consents to the assignment, the assignor remains liable to the landlord for rent and any other obligations set forth in the lease agreement.
 - **Sublease:** A lease executed by the tenant to a third person (the *sublessee*) which conveys less than the tenant's full interest in the lease.

LANDLORD-TENANT: TERMINATION

- **Expiration and Surrender:** Most leases terminate when their term ends, the tenant surrenders the property to the landlord, who retakes possession of the property or delivers possession to another tenant.
- **By Notice:** A lease that is self-renewing does not terminate automatically; therefore, the landlord must provide a notice of termination to the tenant (or vice versa).
- **Release and Merger:** A lease may also give the tenant the opportunity to purchase the property at or before the end of the lease. If the tenant does so, she is released from any more obligations under the lease.
- **Surrender by Agreement:** The landlord and tenant may agree to terminate the lease before it expires.
- **Abandonment:** If a tenant abandons leased property, the landlord may treat the abandonment as terminating the lease.
 - A tenant who abandons the leased premises remains obligated to pay rent for the remainder of the lease term unless the landlord finds another tenant.