

Indiana Real Estate Brokers

CONTINUING EDUCATION

The Lay of the Land

PDH Academy - 4 CE HOURS

PDH Real Estate

HOW DOES THIS COURSE WORK?

To enhance comprehension, non-graded review questions will be asked throughout the course. After reading the course, take the final exam. These questions will be graded.

If you do not pass the final exam, you can review the course material and retake the exam at no additional cost.

If assistance is needed with this course you can contact PDH Academy at 888-564-9098 or at support@pdhacademy.com

After completing the course and final exam, we ask that you take our course survey to help us continue to provide high-quality continuing education.

The Lay of the Land - Final Exam

1. A central goal of public land use planning is to:
 - a. balance individual property rights with the community's welfare.
 - b. develop an accord between property owners and tenants.
 - c. impede development by for-profit developers and construction contractors.
 - d. subordinate private interests to the public good.
2. The best definition of a master plan is:
 - a. an annual review of all land use permits and zones.
 - b. a comprehensive analysis of existing land use patterns in a market.
 - c. a state or regional land use law requiring compliance on a county-by-county basis.
 - d. a fusion of land use laws and local land use objectives and strategies.
3. Zoning, building codes, and environmental restrictions are forms of local land use control known as:
 - a. force majeure.
 - b. pre-emption.
 - c. police power.
 - d. concurrency.
4. If a municipality exerts its power of eminent domain against a certain property owner, what happens?
 - a. The owner must pay higher property taxes or give up the property.
 - b. The owner must cede an easement without receiving any compensation.
 - c. The municipality annexes the property.
 - d. The owner must sell the property or grant an easement to the municipality for just compensation.
5. Counties and municipalities have the legal right to control land use due to:
 - a. the doctrine of appropriation.
 - b. delegation of authority by state-level enabling acts.
 - c. custom and tradition.
 - d. consensus of the local community through referendum.
6. What is the fundamental purpose of a building permit?
 - a. To restrict the number of new development projects
 - b. To establish the basis for an inspection
 - c. To promote certificates of occupancy
 - d. To ensure that improvements comply with codes
7. A primary objective of residential zoning is to:
 - a. control the value ranges of homes in a neighborhood.
 - b. regulate density.
 - c. ensure that only a limited amount of commercial and industrial activity is permitted in a particular residential zone.
 - d. maximize intensity of usage.
8. A non-profit organization wants to erect a much-needed daycare center in a residential zone. Given other favorable circumstances, the local authorities grant permission by allowing:
 - a. a special exception.
 - b. an illegal nonconforming use.
 - c. a variance.
 - d. a license.
9. A property that conformed with zoning ordinances when it was developed but does not conform to new ordinances is said to be:
 - a. a special exception.
 - b. a variance.
 - c. a legal nonconforming use.
 - d. an anomaly.
10. One situation in which a zoning board might permit a variance is when:
 - a. it would cause the property owner unreasonable hardship to bring the property into compliance with zoning ordinances.
 - b. the property owner is the one who brings the variance to the attention of the zoning board.
 - c. the variance was caused by a contractor rather than by the property owner.
 - d. the property is in conflict with no more than one zoning ordinance.
11. The approval process for development of multiple properties in an area includes submission of:
 - a. a covenant of restriction.
 - b. a plat of subdivision.
 - c. a court order.
 - d. a developer's pro forma.
12. A county or municipal authority usually grants a certificate of occupancy for new construction only after:
 - a. all contractors have been paid for services.
 - b. all work has been completed for at least thirty days.
 - c. the construction complies with building codes.
 - d. the tax assessor has valued the improvement.

13. A declaration of restriction in a planned unit development is unlike a deed restriction in that:
- it applies only to aesthetic standards of property use.
 - it attaches to rights rather than interests.
 - it cannot be terminated by a single individual.
 - it takes effect only when approved by a homeowners' association.
14. A deed restriction or declaration of restriction may be enforced by means of a:
- sheriff's warrant.
 - zoning commission order.
 - foreclosure action.
 - court injunction.
15. A distinguishing feature of a deed condition is that:
- it gives the grantor the right to re-possess the property if the grantee violates the condition.
 - it ceases to apply if a violation is allowed to continue for a certain period of time.
 - it can be filed at any time after title has been transferred.
 - it restricts who may own the property.
16. What is the principal purpose underlying legal descriptions of real property?
- To create a consistent, unchanging standard for locating the property.
 - To eliminate all possible boundary disputes.
 - To comply with federal laws.
 - To eliminate cumbersome metes and bounds descriptions.
17. Which of the following is a distinctive feature of metes and bounds descriptions?
- They use meridians and base lines.
 - They identify an enclosed area, beginning and ending at the same point.
 - They use lot and block numbers as the street address.
 - They incorporate elevation into the descriptions.
18. The area running east and west between base lines is a:
- range.
 - tier.
 - parameter.
 - parallel.
19. How many sections are there in a township?
- One
 - Six
 - Twelve
 - Thirty-six
20. A section contains how many acres?
- 640
 - 320
 - 160
 - 40
21. How many acres are there in the S 1/2 of the NW 1/4 of Section 3?
- 20 acres
 - 40 acres
 - 80 acres
 - 160 acres
22. The legal description of a parcel in a subdivision that has been recorded with lot and block numbers on a plat of survey is:
- the lot and block number, with section, township and meridian references.
 - the standard rectangular survey description.
 - the subdivision plat map.
 - the lot and block number.
23. A datum is a reference point used for legal descriptions of:
- agricultural and ranch properties.
 - properties that straddle state boundaries.
 - properties located above or below the earth's surface.
 - irregularly-shaped properties.
24. Easements and encroachments are types of:
- lien.
 - deed restriction.
 - encumbrance.
 - appurtenance.
25. An affirmative easement gives the benefited party:
- the right to possess a defined portion of another's real property.
 - the right to prevent the owner of a real property from using it in a defined way.
 - the right to a defined use of a portion of another's real property.
 - the right to receive a portion of any income generated by another's real property.
26. There are two adjoining properties. An easement allows property A to use the access road that belongs to property B. In this situation, property A is said to be which of the following in relation to property B?
- Subservient estate
 - Servient estate
 - Senior tenant
 - Dominant tenement

27. Which of the following describes a situation in which an easement might be created against the wishes of the property owner?
- The property has been continuously used as an easement with the knowledge but without the permission of the owner for a period of time.
 - The owner of an adjoining property asks the property owner for an easement, is refused, and then uses the property anyway without the knowledge of the owner.
 - The owner of an adjoining property decides he needs to widen his driveway by sharing his neighbor's driveway and sues in court to create an easement by necessity.
 - The owner of an adjoining property grants an easement to a third party that includes an easement on the first property.
28. What is the primary danger of allowing an encroachment?
- An encroachment automatically grants the benefiting party an easement.
 - The encroached party may be liable for additional real estate taxes to cover the area being encroached upon by the neighboring property.
 - Over time, the encroachment may become an easement by prescription that damages the property's market value.
 - An encroachment creates a lien.
29. A property owner who is selling her land wants to control how it is used in the future. She might accomplish her aim by means of:
- an injunction.
 - a deed restriction.
 - an easement.
 - a land trust.
30. What distinguishes a lien from other types of encumbrance?
- It involves a monetary claim against the value of a property.
 - It lowers the value of a property.
 - It is created voluntarily by the property owner.
 - It attaches to the property rather than to the owner of the property.
31. A certain property has the following liens recorded against it: a mortgage lien dating from three years ago; a mechanic's lien dating from two years ago; a real estate tax lien for the current year; and a second mortgage lien dating from the current year. In case of a foreclosure, which of these liens will be paid first?
- First mortgage lien
 - Mechanic's lien
 - Real estate tax lien
 - Second mortgage lien
32. The lien priority of junior liens can be changed by a lienor's agreement to:
- forgive portions of the debt.
 - assign the note.
 - foreclose on the note.
 - subordinate.
33. Among junior liens, the order of priority is generally established according to:
- the date of recordation.
 - the amount.
 - the order of disbursement.
 - special agreement among lienees.
34. What is meant by a "lien-theory" state?
- A state in which liens are given priority over other encumbrances
 - A state in which a mortgagor retains title to the property when a mortgage lien is created
 - A state in which the holder of a mortgage lien receives title to the mortgaged property until the debt is satisfied
 - A state in which liens exist in theory but not in practice
35. A homeowner has hired a contractor to build a room addition. The work has been completed and the contractor has been paid for all work and materials but fails to pay the lumber yard for a load of lumber. What potential problem may the home owner experience?
- The contractor may place a mechanic's lien for the amount of the lumber against the homeowner's real property.
 - The lumber yard may place a vendor's lien against the contractor and the homeowner for the amount of the lumber.
 - The lumber yard may place a mechanic's lien for the amount of the lumber against the homeowner's real property.
 - The homeowner has no liability because the contractor was paid for the lumber.
36. An important difference between a judicial foreclosure and a non-judicial foreclosure is:
- there is no right to redeem the property in a nonjudicial foreclosure.
 - a judicial foreclosure forces a sale of the property.
 - a non-judicial foreclosure ensures that all liens are paid in order of priority.
 - the lienor receives title directly in a non-judicial foreclosure.
37. A defaulting borrower may avoid foreclosure by giving the mortgagee:
- a promissory note.
 - a deed in lieu of foreclosure.
 - a redemption notice.
 - a lis pendens.

38. A property survey reveals that a new driveway extends one foot onto a neighbor's property. This is an example of:
- an easement appurtenant.
 - an encroachment.
 - an easement by prescription.
 - a party wall easement.
39. A property owner allows Betty Luanne to cross his property as a shortcut to her kindergarten school bus. One day the property owner dies. What right was Betty given, and what happens to it in the future?
- A personal easement in gross, which continues after the owner's death
 - An easement by prescription, which continues after the owner's death
 - A license, which continues after the owner's death
 - A license, which terminates at the owner's death
40. A court renders a judgment which authorizes a lien to be placed against the defendant's house, car, and personal belongings. This is an example of a:
- specific judgment lien.
 - general judgment lien.
 - voluntary judgment lien.
 - superior judgment lien.

LAND USE PLANNING

CHAPTER TOPICS

- Real Estate Planning
- Public Land Use Control
- Private Land Use Control
- Environmental Controls

REAL ESTATE PLANNING

- Goals of Land Use Control
- The Master Plan
- Planning Objectives
- Plan Development
- Planning Management

While the Constitution guarantees the right of individual ownership of real estate, it does not guarantee the uncontrolled sale, use, and development of real estate. As American history demonstrates, unregulated use of real estate has significant potential for eventual damage to property values as well as to the environment. Moreover, with the explosive urban growth in this century, it has become clear that regulation of land use is necessary to preserve the interests, safety, and welfare of the community.

Without a central authority to exert control, land use tends to be chaotic. For example, rapid growth can outpace the support capabilities of basic municipal services such as sewers, power, water, schools, roads and communications. On an aesthetic level, communities need controls to keep certain commercial and industrial land uses away from residential areas to avoid the undermining of property values by pollution, noise, and traffic congestion.

GOALS OF LAND USE CONTROL

Over time, public and private control of land use has come to focus on certain core purposes. These are:

- preservation of property values
- promotion of the highest and best use of property
- balance between individual property rights and the public good, i.e., its health, safety and welfare
- control of growth to remain within infrastructure capabilities
- incorporation of community consensus into regulatory and planning activities

The optimum management of real property usage must take into account both the interests of the individual and the interests of the surrounding community. While maintaining the value of an individual estate is important, the owner of an estate must realize that unregulated use and development can jeopardize the value not only of the owner's estate but of neighboring properties. Similarly, the community must keep in mind

the effect of government actions on individual property values, since local government is largely supported by taxes based on the value of property.



Figure 1. Public Land Use Control

A community achieves its land usage goals through a three-phase process, as the exhibit illustrates:

- *development of a master plan* for the jurisdiction
- *administration of the plan* by a municipal, county, or regional planning commission
- *implementation of the plan* through public control of zoning, building codes, permits, and other measures

Municipal, county, and regional authorities develop comprehensive land use plans for a particular community with the input of property owners. A planning commission manages the master plan and enforces it by exercising its power to establish zones, control building permits, and create building codes.

In addition to public land use planning and control, some private entities, such as subdivision associations, can impose additional standards of land use on owners within the private entity's legal jurisdiction. Private controls are primarily implemented by deed restrictions.

THE MASTER PLAN

Public land use planning incorporates long-term usage strategies and growth policies in a land use plan, or master plan. In many states, the process of land use planning begins when the state legislature enacts laws requiring all counties and municipalities to adopt a land use plan. The land use plan must not only reflect the needs of the local area, but also conform to state and federal environmental laws and the plans of regional and state planning agencies. The state enforces its planning mandates by giving state agencies the power to approve county and local plans.

The master plan therefore fuses state and regional land use laws with local land use objectives that correspond to the municipality's social and economic conditions. The completed plan becomes the overall guideline for creating and enforcing zones, building codes, and development requirements.

PLANNING OBJECTIVES

The primary objectives of a master plan are generally to control and accommodate social and economic growth.

Amount of growth. A master plan sets *specific guidelines on how much growth the jurisdiction will allow*. While all communities desire a certain degree of growth, too much growth can overwhelm services and infrastructure.

To formulate a growth strategy, a plan initially forecasts growth trends, then estimates how well the municipality can keep pace with the growth forecast. The outcome is a policy position that limits building permits and development projects to desired growth parameters. A growth plan considers:

- nature, location and extent of permitted uses
- availability of sanitation facilities
- adequacy of drainage, waste collection, and potable water systems
- adequacy of utilities companies
- adequacy and patterns of thoroughfares
- housing availability
- conservation of natural resources
- adequacy of recreational facilities
- ability and willingness of the community to absorb new taxes, bond issues, and assessments

Growth patterns. In addition to the quantity of growth, a master plan also *defines what type of growth will occur, and where*. Major considerations are:

- the type of enterprises and developments to allow
- residential density and commercial intensity
- effects of industrial and commercial land uses on residential and public sectors, i.e., where to allow such uses
- effect of new developments on traffic patterns and thoroughfares
- effects on the environment and environmental quality (air, water, soil, noise, visual aspects)
- effect on natural resources that support the community
- code specifications for specific construction projects

Accommodating demand. As the master plan sets forth guidelines for how much growth will be allowed, it must also *make plans for accommodating expanding or contracting demand for services and infrastructure*. The plan must identify:

- facilities requirements for local government
- new construction requirements for streets, schools,

and social services facilities such as libraries, civic centers, etc.

- new construction required to provide power, water and sewer services

PLAN DEVELOPMENT

In response to land use objectives, community attitudes, and conclusions drawn from research, the planning personnel formulate their plan. In the course of planning, they analyze:

- population and demographic trends
- economic trends
- existing land use
- existing support facilities
- traffic patterns

PLANNING MANAGEMENT

Public land use management takes place within county and municipal **planning departments**. These departments are responsible for:

- long-term implementation of the master plan
- creating rules and restrictions that support plans and policies
- enforcing and administering land use regulation on an everyday basis

The planning commission. In most jurisdictions, a planning commission or board comprised of officials appointed by the government's legislative entity handles the planning function.

The commission oversees the operations of the department's professional planning staff and support personnel. In addition, the commission makes recommendations to elected officials concerning land use policy and policy administration.

The planning commission is responsible for:

- approving site plans and subdivision plans
- approving building permits
- ruling on zoning issues

PUBLIC LAND USE CONTROL

- Zoning
- Zoning administration
- Subdivision regulation
- Building codes
- Public acquisition and ownership
- Environmental restrictions

At the state level, the legislature enacts laws that control and restrict land use, particularly from the environmental perspective. At the local level, county and city governments control land use through the authority known as **police power**. The most common expressions of police power are county and municipal **zoning**. Other examples of public land use control are:

- subdivision regulations
- building codes
- eminent domain
- environmental restrictions
- development requirements

Governments also have the right to **own** real property for public use and welfare. In exercising its ownership rights, a municipality may **annex** property adjacent to its existing property or purchase other tracts of land through conventional transfers. Where necessary, it may force property owners to sell their property through the power of **eminent domain**.

ZONING

Zoning is the primary tool by which cities and counties regulate land use and implement their respective master plans. The Constitution grants the states the legal authority to regulate, and the states delegate the authority to counties and municipalities through legislation called **enabling acts**.

The zoning ordinance. The vehicle for zoning a city or county is the **zoning ordinance**, a regulation enacted by the local government. The intent of zoning ordinances is to specify land usage for every parcel within the jurisdiction. In some areas, state laws permit zoning ordinances to apply to areas immediately beyond the legal boundaries of the city or county.

Zoning ordinances implement the master plan by regulating density, land use intensity, aesthetics, and highest and best use. Ordinances typically address:

- the nature of land use-- office, commercial, residential, etc.
- size and configuration of a building site, including setbacks, sidewalk requirements, parking requirements, and access
- site development procedures
- construction and design methods and materials, including height restrictions, building-to-site area ratios, and architectural styles
- use of space within the building
- signage

Ordinance validity. Local planners do not have unlimited authority to do whatever they want. Their zoning ordinances must be clear in import, apply to all parties equally, and promote health, safety, and welfare of the community in a reasonable manner.

Building permits. Local governments enforce zoning ordinances by issuing building permits to those who want to improve, repair, or refurbish a property. To receive a permit, the project must comply with all relevant ordinances and codes. Further zoning enforcement is achieved through periodic inspections.

Types of zones. One of the primary applications of zoning power is the separation of residential properties from commercial and industrial uses. Proper design of land use in this manner preserves the aesthetics and value of neighborhoods and promotes the success of commercial enterprises through intelligently located zones.

Six common types of zone are:

- residential
- commercial
- industrial
- agricultural
- public
- planned unit development (PUD)

Residential. Residential zoning restricts land use to private, non-commercial dwellings. Sub-zones in this category further stipulate the types of residences allowed, whether single-family, multi-unit complexes, condominiums, publicly subsidized housing, or other form of housing.

Residential zoning regulates:

- *density*, by limiting the number and size of dwelling units and lots in an area
- values and aesthetics, by limiting the type of residences allowed. Some areas adopt **buffer zones** to separate residential areas from commercial and industrial zones.

Commercial. Commercial zoning regulates the location of office and retail land usage. Some commercial zones allow combinations of office and retail uses on a single site. Sub-zones in this category may limit the type of retail or office activity permitted, for example, a department store versus a strip center.

Commercial zoning regulates:

- intensity of usage, by limiting the area of store or office per site area. Intensity regulation is further achieved by minimum parking requirements, setbacks, and building height restrictions.

Industrial. Industrial zoning regulates:

- intensity of usage
- type of industrial activity
- environmental consequences

A municipality may not allow some industrial zones, such as heavy industrial, at all. The industrial park is a relatively recent concept in industrial zoning.

Agricultural. Agricultural zoning restricts land use to farming, ranching, and other agricultural enterprises.

Public. Public zoning restricts land use to public services and recreation. Parks, post offices, government buildings, schools, and libraries are examples of uses allowed in a public zone.

Planned Unit Development (PUD). planned unit development zoning restricts use to development of whole tracts that are designed to use space efficiently and maximize open space. A PUD zone may be for residential, commercial, or industrial uses, or combinations thereof.

ZONING ADMINISTRATION

Zoning Board of Adjustment. A county or local board, usually called the zoning board of adjustment or zoning appeals board, administers zoning ordinances. The board rules on interpretations of zoning ordinances as they apply to specific land use cases presented by property owners in the jurisdiction. In effect, the zoning board is a court of appeals for owners and developers who desire to use land in a manner that is not entirely consistent with existing ordinances.

The board conducts hearings of specific cases and renders official decisions regarding the land use based on evidence presented.

A zoning board generally deals with such issues and appeals as:

- nonconforming use
- variance
- special exception or conditional use permit
- zoning amendment

If the board rejects an appeal, the party may appeal the ruling further in a court of law.

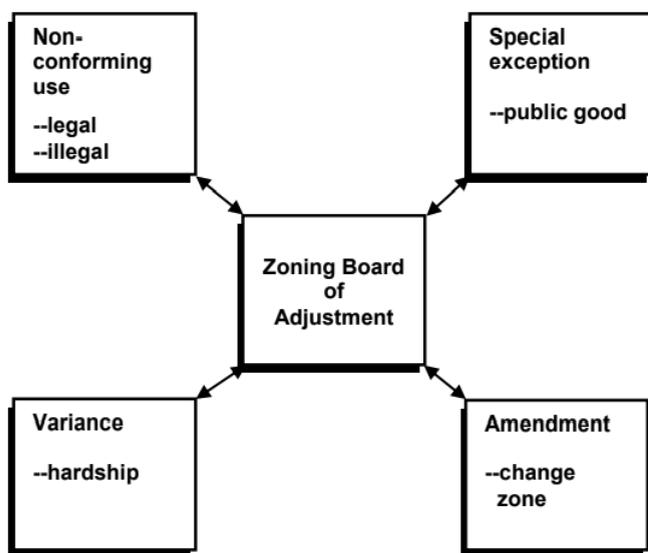


Figure 2. Zoning Appeals

Nonconforming use. A nonconforming use is one that *clearly differs from current zoning*. Usually, nonconforming uses result when a zoning change leaves existing properties in violation of the new ordinance. This type of nonconforming use is a **legal** nonconforming use. A board usually treats this kind of situation by allowing it to continue either:

- indefinitely
- until the structures are torn down
- only while the same use continues, **or**
- until the property is sold

For instance, a motel is situated in a residential area that no longer allows commercial activity. The zoning board rules that the motel may continue to operate until it is sold, destroyed or used for any other commercial purpose.

An **illegal nonconforming use** is one that conflicts with ordinances that were in place before the use commenced. For instance, if the motel in the previous example is sold, and the new owner continues to operate the property as a motel, the motel is now an illegal, nonconforming use.

Variance. A zoning variance allows a use that differs from the applicable ordinance for a variety of *justifiable* reasons, including that:

- compliance will cause unreasonable hardship
- the use will not change the essential character of the area
- the use does not conflict with the general intent of the ordinance

For example, an owner mistakenly violates a setback requirement by two feet. His house is already constructed, and complying with the full setback now would be extremely expensive, if not impossible. The zoning board grants a variance on the grounds that compliance would cause an unreasonable hardship.

A grant of a zoning variance may be unconditional, or it may require conditions to be fulfilled, such as removing the violation after a certain time.

Special exception. A special exception grant authorizes a use that is not consistent with the zoning ordinance in a literal sense, yet is clearly *beneficial or essential to the public welfare* and does not materially impair other uses in the zone.

A possible example is an old house in a residential zone adjacent to a retail zone. The zoning board might grant a special exception to a local group that proposes to renovate the house and convert it to a local museum, which is a retail use, since the community stands to benefit from the museum.

Amendment. A current or potential property owner may petition the zoning board for an outright change in the zoning of a particular property. For example, a

property zoned for agricultural use has been idle for years. A major employer desires to develop the property for a local distribution facility, which would create numerous jobs, and petitions for an amendment. The board changes the zoning from agricultural to light industrial to permit the development. Since a change in zoning can have significant economic and social impact, an appeal for an amendment is a difficult process that often involves public hearings.

SUBDIVISION REGULATION

In addition to complying with zoning ordinances, a developer of multiple properties in a subdivision must meet requirements for subdivisions.

Subdivision plat approval. The developer submits a plat of subdivision containing surveyed plat maps and comprehensive building specifications. The plat, as a minimum, shows that the plan complies with local zoning and building ordinances. The project can commence only after the relevant authority has approved the plat.

Subdivision requirements typically regulate:

- location, grading, alignment, surfacing, street width, highways
- sewers and water mains
- lot and block dimensions
- building and setback lines
- public use dedications
- utility easements
- ground percolation
- environmental impact report
- zoned density

Concurrency. Many states have adopted policies that require developers, especially of subdivisions, to take responsibility for the impact of their projects on the local infrastructure by taking corrective action. Concurrency is a policy that requires the developer to make accommodations concurrently with the development of the project itself, not afterwards. For example, if a project will create a traffic overload in an area, the developer may have to widen the road while constructing the project.

FHA requirements. In addition to local regulation, subdivisions must meet FHA (Federal Housing Authority) requirements to qualify for FHA financing insurance. The FHA sets standards similar to local ordinances to ensure an adequate level of construction quality, aesthetics, and infrastructure services.

BUILDING CODES

Building codes allow the county and municipality to protect the public against the hazards of unregulated construction. Building codes establish standards for virtually every aspect of a construction project, including offsite improvements such as streets, curbs, gutters, drainage systems, and onsite improvements such as the building itself.

Building codes typically address:

- architectural and engineering standards
- construction materials standards
- building support systems such as life safety, electrical, mechanical, and utility systems

Certificate of occupancy. Building inspectors inspect a new development or improvement for code compliance. If the work complies, the municipality or county issues a **certificate of occupancy** which officially clears the property for occupation and use.

PUBLIC ACQUISITION AND OWNERSHIP

If efforts to regulate privately owned property are inadequate or impractical in a particular situation, or if there is a compelling public need, a county or local government may acquire property by means of direct purchase.

A government body might acquire land because of the public need for:

- thoroughfares and public rights-of-way
- recreational facilities
- schools
- essential public facilities
- urban renewal or redevelopment

In many cases, public acquisition of property is a voluntary transaction between the government entity and the private owner. However, if the private party is unwilling to sell, the government may purchase the property anyway. The power to do this is called **eminent domain**.

Eminent domain. Eminent domain allows a government entity to purchase a fee, leasehold, or easement interest in privately owned real property for the **public good** and for **public use**, regardless of the owner's desire to sell or otherwise transfer any interest. In exchange for the interest, the government must pay the owner "just compensation."

To acquire a property, the public entity initiates a condemnation suit. Transfer of title extinguishes all existing leases, liens, and other encumbrances on the property. Tenants affected by the condemnation sale may or may not receive compensation, depending on the terms of their agreement with the landlord.

Public entities that have the power of eminent domain include:

- all levels of government
- public districts (schools, etc.)
- public utilities
- public service corporations (power companies, etc.)
- public housing and redevelopment agencies
- other government agencies

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In many cases, public acquisition of property is a voluntary transaction between the government entity and the private owner. However, if the private party is unwilling to sell, the government may purchase the property anyway. The power to do this is called **eminent domain**.

Eminent domain. Eminent domain allows a government entity to purchase a fee, leasehold, or easement interest in privately owned real property for the **public good** and for **public use**, regardless of the owner's desire to sell or otherwise transfer any interest. In exchange for the interest, the government must pay the owner "just compensation."

To acquire a property, the public entity initiates a condemnation suit. Transfer of title extinguishes all existing leases, liens, and other encumbrances on the property. Tenants affected by the condemnation sale may or may not receive compensation, depending on the terms of their agreement with the landlord.

Public entities that have the power of eminent domain include:

- all levels of government
- public districts (schools, etc.)
- public utilities
- public service corporations (power companies, etc.)
- public housing and redevelopment agencies
- other government agencies

To acquire a property, the public entity must first adopt a formal resolution to acquire the property, variously called a “resolution of necessity.” The resolution must be adopted at a formal hearing where the owner may voice an opinion. Once adopted, the government agency may commence a condemnation suit in court. Subsequently, the property is purchased and the title is transferred in exchange for just compensation. Transfer of title extinguishes all existing leases, liens, and other encumbrances on the property. Tenants affected by the condemnation sale may or may not receive compensation, depending on the terms of their agreement with the landlord.

In order to proceed with condemnation, the government agency must demonstrate that the project is necessary, the property is necessary for the project, and that the location offers the greatest public benefit with the least detriment.

As an eminent domain proceeding is generally an involuntary acquisition, the condemnation proceeding must accord with due process of law to ensure that it does not violate individual property rights. Further, the public entity must justify its use of eminent domain in court by demonstrating the validity of the intended public use and the resulting “public good” or “public purpose” ultimately served.

The issue of eminent domain versus individual property rights has recently come under scrutiny in light of a 2005 Supreme Court ruling that affirmed the rights of state and local governments to use the power of eminent domain for urban redevelopment and revitalization. The ruling allowed that private parties could undertake a project for profit without any public guarantee that the project would be satisfactorily completed. The ruling brought the issue of “public use” into question, as the use of the re-development could well be private and even a private for-profit enterprise. The winning argument was that the “public purpose” is served when redevelopment creates much needed jobs in a depressed urban area. As a result of this decision, many see the power of eminent domain and the definition of public good as being in conflict with the constitutional rights of private property ownership. New and different interpretations of the public’s right to pre-empt private property ownership by eminent domain may be expected.

PRIVATE LAND USE CONTROL

- Deed restriction
- Declaration restriction
- Deed condition

Property owners in the private sector can regulate land use to some extent through deed restrictions and deed conditions.

DEED RESTRICTION

A restriction expressed in a conveyance (deed or lease) of a residential, commercial, or industrial property places limits on the use of the property. Such restrictions are also referred to as “covenants, conditions, and restrictions,”

or CCRs. A quitclaim deed can terminate a private deed restriction.

Typical restrictions concern:

- required minimum area of a residence
- setback
- prohibition against construction of sheds or secondary buildings
- prohibition against conducting certain commercial activities

Deed restrictions may not be discriminatory by restricting ownership or use on the basis of race, religion, marital status, or gender. Restrictions on commercial property use may not violate fair trade and anti-trust laws.

DECLARATION RESTRICTION

The declaration of a subdivision, Planned Unit Development, condominium, and commercial or industrial park contains private use restrictions. These have the same legal effect as a deed restriction, as the declaration attaches to the rights in the property. A private party cannot, however, extinguish a declaration restriction by agreement or quitclaim deed.

The kinds of restrictions found in declarations are much the same as those found in deeds: construction restraints, aesthetics standards, etc.

The underlying purpose of restrictions is to preserve the value and quality of the neighborhood, commercial center, or industrial park.

Injunction. A private usage restriction can be enforced by filing for a court injunction. A court can order the violator to cease and desist, or to correct the infraction. If, however, owners in a subdivision or park allow a violation to continue for a sufficient length of time, they can lose their right to legal recourse.

DEED CONDITION

A deed condition may restrict certain uses of a property, much like a deed restriction. However, violation of a deed condition gives the grantor the right to re- take possession of the property and file suit for legal title.

ENVIRONMENTAL CONTROLS

- Areas of concern
- Major legislation
- Responsibilities and liabilities

In recent years, federal and state legislatures have enacted laws to conserve and protect the environment against the hazards of growth and development, particularly in terms of air, water, and soil quality.

Regional, county, and local planners must integrate environmental laws into their respective land use plans and regulations. Private property owners are responsible for complying with these laws.

AREAS OF CONCERN

Air. Air quality, both indoor and outdoor, has been a matter of concern since the 1960's. With today's construction methods creating airtight, energy-efficient structures, attention to sources of indoor air pollution is more important than ever. Off-gassing from synthetic materials and lack of ventilation can lead to such consequences as Sick Building Syndrome (SBS) and Building-Related Illness (BRI) as well as other health problems. Among the significant threats are:

- *asbestos*, a powdery mineral once commonly used as a fireproof insulating material around pipes, in floor tiles and linoleum, in siding and roofing, in wallboard, joint compound, and many other applications.

When airborne, it is a health hazard. Its use today is highly restricted, and removal can be expensive and dangerous. Inspection by a certified asbestos inspector is the best way to determine whether a building needs treatment. Carbon monoxide, a colorless, odorless, poisonous gas that may result from faulty heating equipment. Home and commercial detection devices are available.

- *carbon monoxide*, a colorless, odorless, poisonous gas that may result from faulty heating equipment. Home and commercial detection devices are available.
- *formaldehyde*, a chemical used in building materials and in other items such as fabrics and carpeting. As it ages, formaldehyde gives off a colorless, pungent gas.

Its use in urea-formaldehyde foam insulation (UFFI) was banned 1982 (ban later reduced to a warning) but the material is still present in many structures. Other substances known in general as volatile organic compounds (VOCs) and used in construction materials such as adhesives emit toxic fumes. Professional testing can identify levels and, in some cases, sources of formaldehyde gas and other VOCs.

- *lead*, a heavy metal once widely used in paints and plumbing materials. It has been banned in paint since 1978 and in new plumbing since 1988.

It continues to be a health threat, particularly to children, as it occurs in airborne paint particles, paint chips, and soil and groundwater polluted by various external sources of emission. Inspection should be performed by licensed lead inspectors.

- *mold*, a fungus that grows in the presence of moisture and oxygen on virtually any kind of organic surface.

It often destroys the material it grows on and emits toxic irritants into the air. Tightly sealed structures with inadequate ventilation are most susceptible. Roof leaks, improper venting of appliances, runoff from gutters and downspouts, and flood damage are common contributors. In recent years, mold- and mildew-related lawsuits and claims have become substantial.

- *radon*, a colorless, odorless, radioactive gas that occurs naturally in the soil throughout the United States.

It enters buildings through foundation and floor cracks, wall seams, sump pits, and windows, among other ways. At accumulations above certain levels, it is suspected of contributing to cancer. Excessive radon can be removed by special ventilation systems. Professional and home inspections are available.

Soil and water. Soil, groundwater, and drinking water supplies are vulnerable to pollution from leaking landfills; improper waste disposal; agricultural runoff; industrial dumping in waterways; highway and rail spills; industrial emissions; internal combustion emissions; and underground tanks leaking fuels and chemicals, to mention but a few sources. Some of the problems subject to controls are:

- dioxins, a family of compounds produced as a byproduct of manufacturing and incinerating materials that contain chlorine
- lead and *mercury*
- MTBE, Methyl Tertiary Butyl Ether, a gasoline additive
- PCB, Polychlorinated Biphenyl, a substance formerly widely used as an electrical insulation
- *Underground Storage Tanks* (USTs), regulated since 1984
- *Wetlands*, considered part of the natural water filtering system as well as special habitats, subject to restrictions on development and use.

Other ambient and natural conditions. Other regulated and controlled environmental conditions include:

- *Electromagnetic Fields* (EMFs) created by powerlines
- *noise* created by airports, air, rail and highway traffic
- *earthquake and flood hazards* that affect hazard insurance, lending practices, and construction requirements for buildings in designated flood and earthquake zones.

	Indoors	Outdoors
Air	asbestos, BRI, carbon monoxide, formaldehyde, lead-based paint, mold, radon, SBS, VOCs	airborne lead, carbon dioxide, mercury, sulfur, dioxins
Soil		dioxins, lead, PCBs, waste, hazardous materials
Water	dioxins, lead plumbing, lead-paint, mercury, MTBE, PCBs	dioxins, lead, mercury, MTBE, PCBs, USTs, waste, hazardous materials
Ambience		EMFs, noise
Structure		flood, earthquake

Figure 3. Environmental Concerns

BRI: Building-Related Illness
 SBS: Sick Building Syndrome
 VOC: Volatile Organic Compound
 MTBE: Methyl Tertiary Butyl Ether

PCB: Polychlorinated Biphenyl
 UST: Underground Storage Tank
 EMF: Electromagnetic Field
 UFFI: Urea-Formaldehyde Foam Insulation

MAJOR LEGISLATION

National Environmental Policy Act (1969). This act created the Environmental Protection Agency (EPA) and the Council for Environmental Quality, giving them a mandate to establish environmental standards for land use planning. The act also required environmental impact surveys on large development projects.

Clean Air Amendment (1970). This act authorized the EPA to establish air quality standards for industrial land uses as well as for automobile and airplane emissions.

Water Quality Improvement Act (1970), the Water Pollution Control Act amendment (1972), the Clean Water Act Amendment (1977). These

acts addressed standards to control water pollution and industrial wastes from the standpoints of future prevention as well as remediation of existing pollution.

Resource Recovery Act (1970), the Resource Conservation and Recovery Act (1976), the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) (1980), the Superfund Amendment and Reauthorization Act (1986). These acts addressed disposal of solid and toxic wastes and measures for managing waste. In addition, the Superfund act provided money for hazardous waste disposal and the authority to charge cleanup costs to responsible parties.

Lead-based paint ban (1978) and Residential Lead-based Paint Hazard Reduction Act (1992, 1996). These regulations banned lead in the manufacture of paint and established disclosure requirements and guidelines for testing and remediation.

Legislation	Date	Regulated
Solid Waste Disposal Act (later part of RCRA)	1965 (1976, 1999, 2002)	landfills
Air Quality Act, Clean Air Act	1967 (1970)	air quality standards
National Environmental Policy Act (NEPA)	1969 (1970)	created EPA
Flood Control Act	amended 1969	building in flood zones; flood insurance
Resource Recovery Act	1970	solid waste disposal
Water Quality Improvement Act	1970	dumping in navigable waters; wetlands
Water Pollution Control Act amendment	1972	dumping in navigable waters; wetlands
Marine Protection Research and Sanctuaries Act	1972	offshore waste dumping
Noise control legislation	1972	airport- and transportation-related noise
Coastal Zone Management Act	1972	beaches, marine habitats
Clean Water Act	1972 (1977)	dumping in navigable waters; wetlands
Safe Drinking Water Act	1974	public water supply, lead
Resource Conservation and Recovery Act (RCRA)	1976	hazardous waste, solid waste
Toxic Substances Control Act	1976	industrial chemicals
Lead-based paint ban (US Consumer Product Safety Commission rule)	1978	lead-based paint in residences
PCB ban (EPA rule)	1979	polychlorinated biphenyls
RCRA amendment	1984	underground storage tanks
Comprehensive Environmental Response, Compensation and Liability Act	1980	hazardous waste disposal
UFFI ban	1982	formaldehyde in insulation materials
Superfund Amendment and Reauthorization Act	1986	hazardous waste cleanup costs
Asbestos ban (EPA rule)	1989	asbestos in building materials
Residential Lead-based Paint Hazard Reduction Act (EPA and HUD rule)	1992 (1996)	lead-based paint disclosure and treatment
Flood Insurance Reform Act	1994	flood insurance in flood zones
Brownfields legislation	2002	industrial site cleanup

*Figure 4.
Landmarks in
Environmental
Control Legislation*

RESPONSIBILITIES AND LIABILITIES

Licensees are expected to be aware of environmental issues and to know where to look for professional help. They are not expected to have expert knowledge of environmental law nor of physical conditions in a property. Rather, they must treat potential environmental hazards in the same way that they treat other material facts about a property: disclosure.

In sum, for their own protection, licensees should be careful to:

- be aware of potential hazards
- disclose known material facts
- distribute the HUD booklet (below)
- know where to seek professional help.

Lead. The Lead-based Paint Act of 1992 requires a seller or seller's agent to disclose known lead problems in properties built before 1978. The licensee must give the buyer or lessee a copy of the EPA-HUD-US Consumer Product Safety Commission booklet, "Protect Your Family from Lead in your home."

Further, the 1996 lead-based paint regulation requires sellers or lessors of almost all residential properties built before 1978 to disclose known lead-based paint hazards and provide any relevant records available. The seller is not required to test for lead but must allow the buyer a ten-day period for lead inspection. Only a licensed lead professional is permitted to deal with testing, removal or encapsulation. It is the real estate practitioner's responsibility to ensure compliance.

CERCLA/Superfund. Under CERCLA and the Superfund Amendment of 1986, current landowners as well as previous owners of a property may be held liable for environmental violations, even if "innocent" of a violation. Sellers often carry the greatest exposure, and real estate licensees may be held liable for improper disclosure.

A real property owner can be held liable for the entire cost of remediating soil, groundwater, or indoor air contamination. A tenant can be held liable for cleanup costs as an "operator" if tenant operations are linked to contamination.

Sale of a contaminated property. Selling a property with an environmental problem does not avoid liability for the seller, although seller and buyer may agree to share or transfer some liability. If there is a concern, a Phase I audit or Environmental Site Assessment (ESA) should be conducted before proceeding with the transaction. A Phase I audit identifies:

- prior uses
- presence of hazardous materials

The Phase I ESA reviews environmental documents;

conducts a title search for environmental liens and restrictions; and includes a visual inspection of the site and surrounding properties. There is no sampling or testing. Fannie Mae, Freddie Mac, and HUD require special Phase I ESAs on certain properties.

A Phase II audit (ESA) is conducted if a site is considered contaminated. This is a more detailed investigation using chemical analysis to uncover hazardous substances and/or petroleum hydrocarbons in samples of soil, groundwater or building materials.

A Phase III audit (ESA) involves remediation. Intensive testing, sampling, monitoring, and modeling are applied to design plans for remediation, cleanup, and follow-up monitoring. Remediation may use a variety of techniques and technologies, such as excavation and removal, dredging, chemical treatment, pumping, and solidification. Major remediation efforts usually require extensive consultation with the surrounding community. Federal funding may be available.

For additional information, check out these sources:

Toxin	Informational Website
asbestos	https://www.epa.gov/indoor-air-quality-iaq
carbon monoxide	https://www.epa.gov/indoor-air-quality-iaq
formaldehyde	https://www.epa.gov/indoor-air-quality-iaq
lead	https://www.epa.gov/lead https://www.hud.gov/program_offices/healthy_homes/enforcement/disclosure https://www.epa.gov/lead/real-estate-disclosure
mold	https://www.epa.gov/mold/mold-and-your-home
radon	https://www.epa.gov/indoor-air-quality-iaq https://www.hud.gov/program_offices/healthy_homes/healthyhomes/radon
CERCLA	https://www.epa.gov/superfund

Figure 5. Websites providing information about toxins

REVIEW

REAL ESTATE PLANNING

Goals of Land Use Control

- preserve property values; promote highest and best use; safeguard public health, safety and welfare; control growth; incorporate community consensus
- process: develop plan; create administration; authorize controls

The Master Plan

- long term growth and usage strategies; often required by state law
- local plans fuse municipal goals and needs with state and regional laws Planning objectives

- control growth rates: how much growth will occur and at what rate
- control growth patterns: type of growth desired, where it should be located
- accommodate demand for services and infrastructure

Plan Development

- research trends and conditions; blend local and state objectives into master plan

Planning Management

- commission makes rules, approves permits, codes, and development plans

PUBLIC LAND USE CONTROL

- state laws; local regulations, zones, codes; public ownership; private restrictions

Zoning

- “police power” granted by state-level enabling acts; zoning ordinance: creates zones, usage restrictions, regulations, requirements

Types of Zone

- residential, commercial, industrial, agricultural, public, PUD

Zoning Administration

- Zoning Board of Adjustment oversees rule administration and appeals
- nonconforming use: legal if use prior to zone creation; variance: exception based on hardship; special exception: based on public interest; amendment: change of zones; rezoning

Subdivision Regulation

- plat of subdivision and relevant requirements must be met and approved; must meet FHA requirements for insured financing

Building codes

- comprehensive onsite and offsite construction and materials standards; must be met to receive certificate of occupancy

Public Acquisition and Ownership

- eminent domain: public power to acquire property for public use

PRIVATE LAND USE CONTROL

Deed restriction

- single-property use restriction as stipulated in a deed; may not be discriminatory

Declaration restriction

- use restriction in multiple-property declarations; enforced by court injunction

Deed Condition

- usage restriction that can trigger repossession by a previous owner if violated

ENVIRONMENTAL CONTROLS

Areas of Concern

- air, soil, water quality; ambient health hazards; natural hazards

Major Legislation

- limits damage to environment; standards for air, land, water, materials use

Responsibilities and Liabilities

- disclosure and information for practitioners; remediation for owners; lead disclosure; CERCLA/Superfund exposure; Phase I, II, III Environmental Site Assessments to detect and mitigate contamination

LEGAL DESCRIPTIONS

CHAPTER TOPICS

- Methods of Legal Description
- Metes and Bounds
- The Rectangular Survey System
- Recorded Plat Method
- Describing Elevation

METHODS OF LEGAL DESCRIPTION

There are many common ways of describing properties: address (100 Main Street), name (Buckingham Palace), and general description (“the south forty acres”). Such informal descriptions are not acceptable for use in public recordation or, generally speaking, in a court of law because they lack both permanence and sufficient information for a surveyor to locate the property.

Even if a legal document or public record refers to an address, the reference is always supported by an accepted legal description.

A legal description of real property is one which accurately *locates and identifies the boundaries of the subject parcel to a degree acceptable by courts of law in the state where the property is located*.

The general criterion for a legal description is that it alone provides sufficient data for a surveyor to locate the parcel. A legal description identifies the property as unique and distinct from all other properties.

Legal description provides accuracy and consistency over time. Systems of legal description, in theory, facilitate transfers of ownership and prevent boundary disputes and problems with chain of title.

A legal description is required for:

- public recording
- creating a valid deed of conveyance or lease
- completing mortgage documents
- executing and recording other legal documents

In addition, a legal description provides a basis for court rulings on encroachments and easements.

The three accepted methods of legally describing parcels of real estate are:

- metes and bounds
- rectangular survey system, or government survey method
- recorded plat method, or lot and block method

Since the metes and bounds method preceded the inception of the rectangular survey system, the older East Coast states generally employ metes and bounds descriptions. States in the Midwest and West predominantly use the rectangular survey system. Some states combine methods.

METES AND BOUNDS

A metes and bounds description identifies the boundaries of a parcel of real estate using reference points, distances, and angles. The description always identifies an enclosed area by starting at an origination point, called **point of beginning**, or POB, and returning to the POB at the end of the description. A metes and bounds description *must return to the POB in order to be valid*.

The term “metes” refers to distance and direction, and the term “bounds” refers to fixed reference points, or **monuments** and **landmarks**, which may be natural and artificial. Natural landmarks include trees, rocks, rivers, and lakes. Artificial landmarks are typically surveyor stakes.

Many states use metes and bounds description to describe properties within the rectangular survey system.

A metes and bounds description begins with an identification of the city, county, and state where the property is located. Next, it identifies the POB and describes the distance and direction from the POB to the first monument, and then to subsequent monuments that *define the property's enclosed perimeter*.

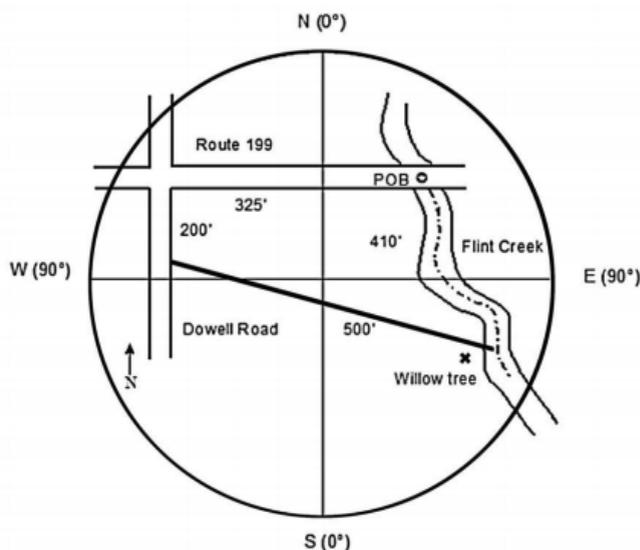


Figure 1. Metes and Bounds Description

A parcel of land located in Bucks County, Pennsylvania, having the following description: commencing at the intersection of the south line of Route 199 and the middle of Flint Creek 410 feet, more or less, to the willow tree landmark, thence north 65 degrees west 500 feet, more or less to the east line of Dowell Road, thence north 2 degrees east 200 feet, more or less, along the east line of Dowell Road to the south line of Route 199, thence north 90 degrees east 325 feet, more or less, along the south line of Route 199 to the point of beginning.

THE RECTANGULAR SURVEY SYSTEM

- The survey grid
- Sections of township
- Fractions of a section
- Converting section fractions to acres

The federal government developed **the rectangular survey system**, or **government survey method**, to simplify and standardize property descriptions as a replacement for the cumbersome and often inaccurate metes and bounds method. The system was further modified to facilitate the transfer of large quantities of government-owned western lands to private parties.

To institute the system, all affected land was surveyed using latitude (east-west) and longitude (north-south) lines. The object was to create uniform grids of squares, called townships, which would have equal size and be given a numerical reference for identification.

The rectangular survey system works well for describing properties that are square or rectangular in shape, since these can be described as fractions of sections. However, for an irregular shape, such as a triangle, the rectangular system is inadequate as a method of legal description. The full description has to include a metes and bounds or lot and block description.

THE SURVEY GRID

The following exhibit shows a portion of the rectangular survey system.

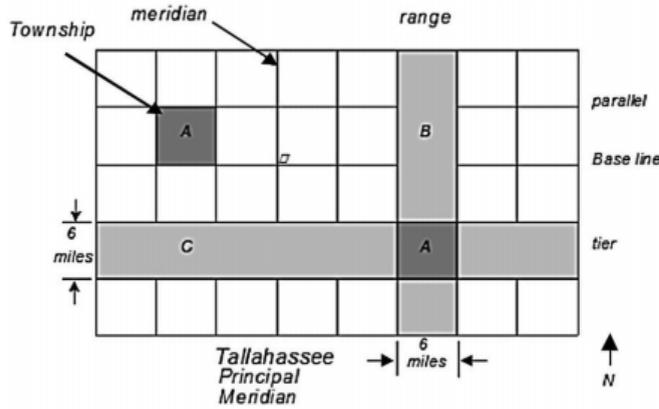


Figure 2. A Sample Survey Grid: Florida

Meridian. The north-south, longitudinal lines on the survey grid are **meridians**. The **principal meridian** is the single designated meridian for identifying townships in the principal meridian's geographical "jurisdiction." There are 37 principal meridians in the national survey. In the exhibit, the principal meridian is the Tallahassee Principal Meridian.

Parallel. The east-west, latitudinal lines are called **parallels**. The **base parallel** or **base line** is the designated line for identifying townships. There is a base parallel for each principal meridian.

Range. The north-south area between consecutive meridians is called a **range**. The area labeled "B" in the exhibit is a range. A range is identified by its relationship to the principal meridian. All ranges are six miles wide.

Tier. The east-west area between two parallels is called a **tier**, or a **township strip**. The area marked "C" in the exhibit is a tier. A tier is identified by its relationship to the base parallel. All tiers are six miles wide. Township. A township is the area enclosed by the intersection of two consecutive meridians and two consecutive parallels, as the shaded square marked "A" in the exhibit illustrates. Since the parallels and meridians are six miles apart, a township is a square with six miles on each side. Its area is therefore 36 square miles.

SECTIONS OF A TOWNSHIP

The rectangular survey system divides a township into thirty-six squares called **sections**. Each side of a section is one mile in length. Thus, the area of a section is one square mile, or 640 acres. As the next exhibit illustrates, the sections in a township are numbered sequentially starting with Section 1 in the northeast corner, proceeding east to west across the top row, continuing from west to east across the next lower row, and so on, alternately, ending with Section 36 in the southeast corner.

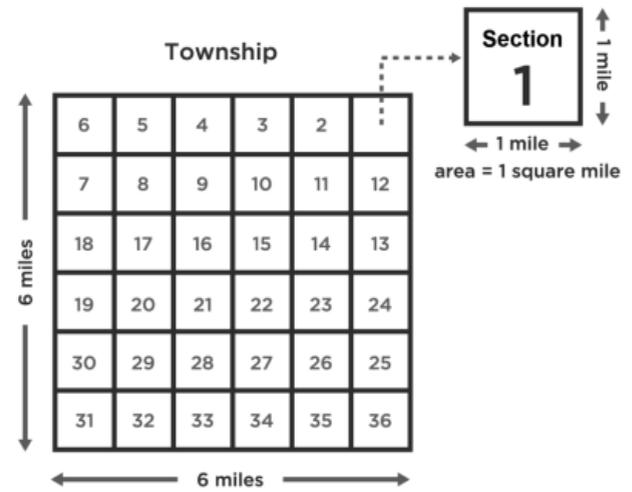


Figure 3. Sections of a Township

FRACTIONS OF A SECTION

A section of a township can be divided into fractions as the next exhibit shows.

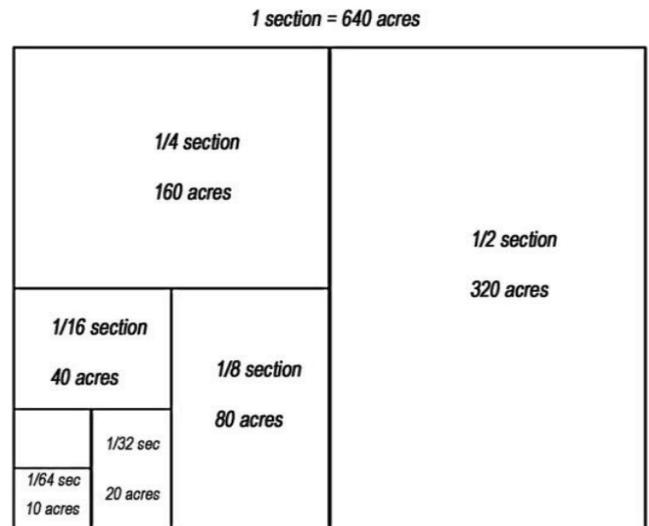


Figure 4. Fractions and Sections of Acreage

CONVERTING SECTION FRACTIONS TO ACRES

The size in acres of a subsection of a township is a fraction of 640 acres, since there are 640 acres in a section.

For example, the SW 1/4 of a section is one quarter section. Thus, its acreage is one quarter of 640, or 160 acres. Going further, the E 1/2 of the SW 1/4 is one half of that one quarter, or 80 acres. The E 1/2 of the SW 1/4 of the SW 1/4 is 20 acres.

A quick method of calculating the acreage of a parcel from its legal description is as follows:

(1) *Multiply the denominators* of the fractional descriptions together.

(2) Divide 640 by the resulting number.

Applying this method to the foregoing descriptions, we get:

SW 1/4 of a section: $\frac{640}{4} = 160 \text{ acres}$

E 1/2 of the SW 1/4 of a section: $\frac{640}{(2 \times 4)} = 80 \text{ acres}$

E 1/2 of the SW 1/4 of the SW 1/4 of a section: $\frac{640}{(2 \times 4 \times 4)} = 20 \text{ acres}$

RECORDED PLAT METHOD

- Subdivision plat map
- Description format

SUBDIVISION PLAT MAP

The recorded plat method, also called the **lot and block system**, is used to describe properties in residential, commercial, and industrial *subdivisions*.

Under this system, tracts of land are subdivided into lots. The entire group of lots comprises the subdivision. In a large subdivision, lots may be grouped together into **blocks** for ease of reference. The entire subdivision is surveyed to specify the size and location of each lot and block. The surveyor then incorporates the survey data into a **plat of survey**, or **subdivision plat map**, which must comply with local surveying standards and ordinances.

If local authorities accept it, the subdivision plat map is recorded in the county where the subdivision is located. The recorded lot and block numbers of a subdivision parcel, along with its section, township and meridian reference, become the property's legal description. The exhibit shows a sample subdivision plat map.

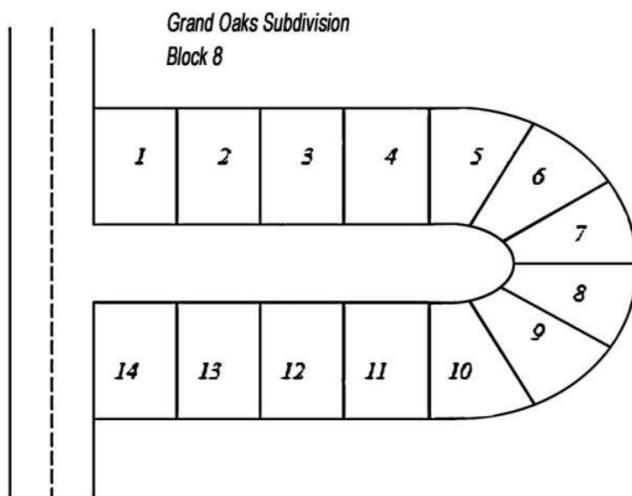


Figure 5. Subdivision Plat Map

DESCRIPTION FORMAT

The description of a recorded plat property first presents the property's lot number or letter, then the block identifier and the subdivision name. Note that this is only a portion of the full legal description, which must describe the subdivision's location within a section, a township, a county, and a state. For example, if the subdivision in the exhibit is situated in the southeast quarter of Section 35 of Township T28S, R19E, of the Tallahassee Principal Meridian, the legal description of the lot marked "7" would be:

"Lot 7, Block 8 of the Grand Oaks Subdivision of the SE 1/4 of Section 35, Township T28S, R19E of the Tallahassee Principal Meridian in Pinellas County, Florida."

DESCRIBING ELEVATION

To describe property located above or below the earth's surface, such as the air rights of a condominium, a surveyor must know the property's elevation. Standard elevation reference points, called **datums**, have been established throughout the country. The original datum was defined by the U.S. Geological Survey as mean sea level at New York harbor. A surveyor uses a datum as an official elevation point to describe the height or depth of a property. If, for example, the datum for an area is a point 100 feet above sea level, all surveys in the area will indicate elevation as a distance above or below 100 feet above sea level.

In many cases it is impractical for a surveyor to rely on a single datum for an entire surveying area. To simplify matters, surveyors have identified local elevation markers, called **benchmarks**, to provide reference elevations for nearby properties. Once a benchmark is registered, it provides a valid reference point for surveying other elevations in the immediate area.

REVIEW

METHODS OF LEGAL DESCRIPTION

- metes and bounds; rectangular survey system or government survey; recorded plat or lot and block
- legal description is sufficiently accurate, acceptable in court of law; facilitates transfers; avoids disputes; used in legal contracts

METES AND BOUNDS

- describes property perimeter by landmarks, monuments, distances, angles
- from point of beginning (POB), describes perimeter and returns to POB; usable within rectangular survey system

RECTANGULAR SURVEY SYSTEM

The Survey Grid

- meridians: north-south lines six miles apart

- parallels: east-west lines six miles apart
- ranges: north-south strips of area between meridians; tiers: east-west strips of area between parallels; townships: the area representing the intersection of a range and a tier, consisting of six-mile by six-mile squares of land

Sections of a Township

- 36 sections per township, each one-mile square (1 mile on each side)

Fractions of a Section

- 1 section = 640 acres; fractions of sections described by size and location within progressively larger quarters of section

Converting Section Fractions to Acres

- formula: multiply denominators of section fractions; divide product into 640

RECORDED PLAT METHOD

- or lot and block system; used in surveyed subdivisions

Subdivision Plat Map

- surveyed plat of subdivided tract; legal descriptor if approved and recorded

Description Format

- lots within subdivision are identified by lot reference and block reference: "Lot 7 Block B of the Grand Oaks Subdivision"

DESCRIBING ELEVATION

- datum: a standard elevation reference point; benchmark: elevation marker officially surveyed and registered

ENCUMBRANCES AND LIENS

CHAPTER TOPICS

- Encumbrances
- Easements
- Encroachments
- Licenses
- Deed Restrictions
- Liens
- Foreclosure

ENCUMBRANCES

An encumbrance is an interest in and right to real property that limits the legal owner's freehold interest. In effect, an encumbrance is another's right to use or take possession of a legal owner's property, or to prevent the legal owner from enjoying the full bundle of rights in the estate.

An encumbrance does not include the right of possession and is therefore a lesser interest than the owner's freehold interest. For that reason, encumbrances are not considered estates. However, an encumbrance can lead to the owner's loss of ownership of the property.

Easements and liens are the most common types of encumbrance. An easement, such as a utility easement, enables others to use the property, regardless of the owner's desires. A lien, such as a tax lien, can be placed on the property's title, thereby restricting the owner's ability to transfer clear title to another party.

The two general types of encumbrance are those that affect the property's use and those that affect legal ownership, value and transfer.

Restrictions on Owner's Use by Others' Rights to Use	Restrictions on Ownership, Value and Transfer
easements encroachments licenses deed restrictions	liens deed conditions

Figure 6. General Types of Encumbrance

EASEMENTS

- Easement appurtenant
- Easement in gross
- Easement creation
- Easement termination

An **easement** is an interest in real property that gives the holder the right to use portions of the legal owner's real property in a defined way. Easement rights may apply to a property's surface, subsurface, or airspace, but the affected area must be defined.

The receiver of the easement right is the **benefited party**; the giver of the easement right is the **burdened party**.

Essential characteristics of easements include the following:

- An easement must involve the owner of the land over which the easement runs, and another, non-owning party. One cannot own an easement over one's own property.
- an easement pertains to a specified physical area within the property boundaries
- an easement may be affirmative, allowing a use, such as a right-of-way, or negative, prohibiting a use, such as an airspace easement that prohibits one property owner from obstructing another's ocean view

The two basic types of easement are appurtenant and gross.

EASEMENT APPURTENANT

An easement appurtenant gives a property owner a right of usage to portions of an *adjoining property* owned by another party. The property enjoying the usage right is called the **dominant tenement**, or **dominant estate**. The property containing the physical easement itself is the **servient tenement**, since it must serve the easement use.

The term appurtenant means “attaching to.” An easement appurtenant attaches to the estate and transfers with it unless specifically stated otherwise in the transaction documents. More specifically, the easement attaches as a beneficial interest to the dominant estate, and as an encumbrance to the servient estate. The easement appurtenant then becomes part of the dominant estate’s bundle of rights and the servient estate’s obligation, or encumbrance.

Transfer. Easement appurtenant rights and obligations automatically transfer with the property upon transfer of either the dominant or servient estate, whether mentioned in the deed or not. For example, John grants Mary the right to share his driveway at any time over a five-year period, and the grant is duly recorded. If Mary sells her property in two years, the easement right transfers to the buyer as part of the estate.

Non-exclusive use. The servient tenement, as well as the dominant tenement, may use the easement area, provided the use does not unreasonably obstruct the dominant use.

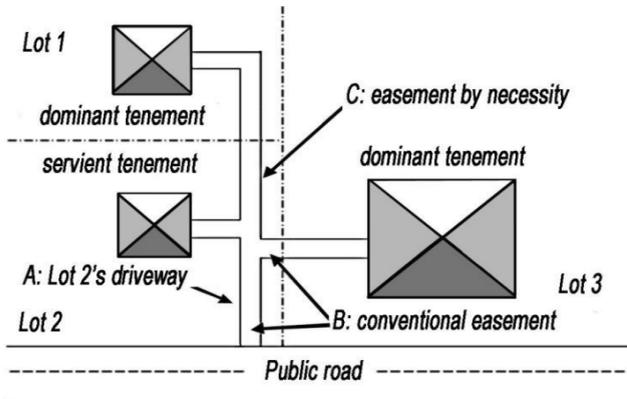


Figure 7. Easements Appurtenant

The exhibit shows a conventional easement appurtenant. The driveway marked A belongs to parcel #2. An easement appurtenant, marked B, allows parcel #3 to use #2's driveway. Parcel #3 is the dominant tenement, and #2 is the servient tenement.

Easement by necessity. An easement by necessity is an easement appurtenant granted by a court of law to a property owner because of a circumstance of necessity, most commonly the need for access to a property. Since property cannot be legally **landlocked**, or *without legal access to a public thoroughfare*, a court will grant an owner of a landlocked property an easement by necessity over

an adjoining property that has access to a thoroughfare. The landlocked party becomes the dominant tenement, and the property containing the easement is the servient tenement.

In the exhibit, parcel #1, which is landlocked, owns an easement by necessity, marked C, across parcel #2.

Party wall easement. A party wall is a common wall shared by two separate structures along a property boundary.

Party wall agreements generally provide for severalty ownership of half of the wall by each owner, or at least some fraction of the width of the wall. In addition, the agreement grants a *negative* easement appurtenant to each owner in the other's wall. This is to prevent unlimited use of the wall, in particular a destructive use that would jeopardize the adjacent property owner's building. The agreement also establishes responsibilities and obligations for maintenance and repair of the wall.

For example, Helen and Troy are adjacent neighbors in an urban housing complex having party walls on property lines. They both agree that they separately own the portion of the party wall on their property. They also grant each other an easement appurtenant in their owned portion of the wall. The easement restricts any use of the wall that would impair its condition. They also agree to split any repairs or maintenance evenly.

Other structures that are subject to party agreements are common fences, driveways, and walkways.

EASEMENT IN GROSS

An easement in gross is a *personal right* that one party grants to another to use the grantor's real property. The right *does not attach* to the grantor's estate. It involves only one property, and, consequently, does not benefit any property owned by the easement owner. *There are no dominant or servient estates in an easement in gross.* An easement in gross may be personal or commercial.

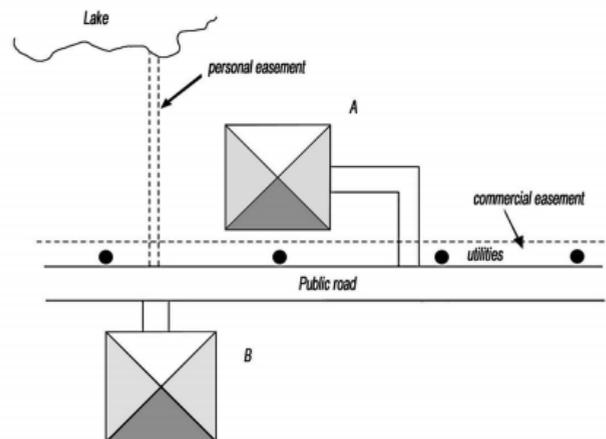


Figure 8. Easements in Gross

Personal. A personal easement in gross is granted for the grantee's lifetime. The right is irrevocable during this period, but terminates on the grantee's death. It may not be sold, assigned, transferred, or willed. A personal gross easement differs from a license in that the grantor of a license may revoke the usage right.

The exhibit shows that a beachfront property owner (A) has granted a neighbor (B) across the street the right to cross A's property to reach the beach.

Commercial. A commercial easement in gross is granted to a business entity rather than a private party. The duration of the commercial easement is not tied to anyone's lifetime. The right may be assigned, transferred, or willed.

Examples of commercial gross easements include:

- a marina's right-of-way to a boat ramp
- a utility company's right-of-way across a lot owners' property to install and maintain telephone lines (as illustrated in the exhibit).

EASEMENT CREATION

An easement may be created by *voluntary action, by necessary or prescriptive operation of law, and by government power of eminent domain.*

Voluntary. A property owner may create a voluntary easement by express grant in a sale contract, or as a reserved right expressed in a deed.

Necessity. A court decree creates an easement by necessity to provide access to a landlocked property.

Easement by prescription. If someone uses another's property as an easement without permission for a statutory period of time and under certain conditions, a court order may give the user the easement right by **prescription**, *regardless of the owner's desires.*

For a prescriptive easement order to be granted, the following circumstances must be true:

- **Adverse and hostile use:** the use has been occurring without permission or license
- **Open and notorious use:** the owner knows or is presumed to have known of the use
- **Continuous use:** the use has been generally uninterrupted over the statutory prescriptive period

For example, a subdivision owns an access road, which is also used by other neighborhoods to access a grocery store. One day, the subdivision blocks off the road, claiming it has never granted the neighbors permission to use the road. If the neighbors have been using the road for the prescribed period, they may sue for an easement by prescription, since the subdivision owners can be assumed to have known of the usage.

Eminent domain. Government entities can create easements through the exercise of eminent domain, wherein they condemn a portion of a property and cause

it to be sold "for the greater good." A typical example is a town's condemnation of private land to create a new municipal sewer system.

EASEMENT TERMINATION

Easements terminate by:

- *express release of the right* by the easement holder
- *merger*, as when a dominant tenement acquires the servient property, or vice versa
- *purposeful abandonment* by the dominant tenement
- *condemnation* through eminent domain
- *change or cessation of the purpose* for the easement
- *destruction* of an easement structure, such as a party fence
- *non-use* of an easement by prescription

ENCROACHMENTS

An encroachment is the unauthorized, physical intrusion of one owner's real property into that of another.

Examples of encroachments are:

- a tree limb extending into the neighbor's property, violating his or her airspace
- a driveway extending beyond the lot line onto the neighbor's land
- a fence built beyond the property line

Encroachments cause infringements on the rights of the trespassed owner, and may diminish the property's value, particularly when the property is to be sold.

Encroachments often do not appear on a property's title records. A survey may be required to detect or demonstrate the existence of an encroachment.

An owner may sue for removal of an encroachment or for compensation for damages. If an encroached owner takes no remedial action over a prescribed number of years, the encroachment may become an easement by prescription.

LICENSES

A license, much like a personal easement in gross, is a personal right that a property owner grants to another to use the property for a specific purpose. Licenses are not transferrable and do not attach to the land. They cease on the death of either party, or on the sale of the property.

Unlike a personal easement in gross, a license is revocable at any time. Licenses are often granted informally, as a verbal statement of permission.

A farmer granting a neighbor permission to cross his land to reach and fish in his pond is an example of a license.

DEED RESTRICTIONS

A deed restriction is a limitation imposed on a buyer's use of a property by stipulation in the deed of conveyance or recorded subdivision plat.

A deed restriction may apply to a single property or to an entire subdivision. A developer may place restrictions on all properties within a recorded **subdivision plat**. Subsequent re-sales of properties within the subdivision are thereby subject to the plat's covenants and conditions.

A private party who wants to control the quality and standards of a property can establish a deed restriction. Deed restrictions take precedence over zoning ordinances if they are more restrictive.

Deed restrictions typically apply to:

- the land use
- the size and type of structures that may be placed on the property
- minimum costs of structures
- engineering, architectural, and aesthetic standards, such as setbacks or specific standards of construction

Deed restrictions in a subdivision, for example, might include a minimum size for the residential structure, setback requirements for the home, and prohibitions against secondary structures such as sheds or cottages.

Deed restrictions are either covenants or conditions. A **condition** can only be created within a transfer of ownership. If a condition is later violated, a suit can force the owner to forfeit ownership to the previous owner. A **covenant** can be created by mutual agreement. If a covenant is breached, an injunction can force compliance or payment of compensatory damages.

LIENS

- Lien types
- Lien priority
- Superior liens
- Junior liens

A lien is a creditor's **claim** against personal or real property as security for a debt of the property owner. If the owner defaults, the lien gives the creditor the right to force the sale of the property to satisfy the debt.

For example, a homeowner borrows \$5,000 to pay for a new roof. The lender funds the loan in exchange for the borrower's promissory note to repay the loan. At the same time, the lender places a lien on the property for \$5,000 as security for the debt. If the borrower defaults, the lien allows the lender to force the sale of the house to satisfy the debt.

The example illustrates that a lien is an encumbrance that restricts free and clear ownership by securing the lien property as **collateral** for a debt. If the owner sells the property, the lienholder is entitled to that portion of the sales proceeds needed to pay off the debt. Also, a defaulting owner may lose ownership altogether if the creditor forecloses.

In addition to restricting the owner's bundle of rights, a recorded lien effectively reduces the owner's equity in the property to the extent of the lien amount.

The creditor who places a lien on a property is called the **lienor**, and the debtor who owns the property is the **lienee**.

Liens have the following legal features:

- **A lien does not convey ownership, with one exception**

A lienor generally has an equitable interest in the property, but not legal ownership. The exception is a mortgage lien on a property in a title-theory state. In these states, the mortgage transaction conveys legal title to the lender, who holds it until the mortgage obligations are satisfied. During the mortgage loan period, the borrower has equitable title to the property.

- **A lien attaches to the property**

If the property is transferred, the new owner acquires the lien securing the payment of the debt. In addition, the creditor may take foreclosure action against the new owner for satisfaction of the debt.

- **A property may be subject to multiple liens**

There may be numerous liens against a particular property. The more liens there are recorded against property, the less secure the collateral is for a creditor, since the total value of all liens may approach or exceed the total value of the property.

- **A lien terminates on payment of the debt and recording of documents**

Payment of the debt and recording of the appropriate satisfaction documents ordinarily terminate a lien. If a default occurs, a suit for judgment or foreclosure enforces the lien. These actions force the sale of the property.

LIEN TYPES

Liens may be voluntary or involuntary, general or specific, and superior or inferior.

Voluntary and involuntary. A property owner may create a **voluntary** lien to borrow money or some other asset secured by a mortgage. An **involuntary** lien is one that a legal process places against a property regardless of the owner's desires.

If statutory law imposes an involuntary lien, the lien is a **statutory lien**. A real estate tax lien is a common example. If court action imposes an involuntary lien, the lien is an **equitable lien**. An example is a judgment lien placed on a property as security for a money judgment.

General and specific. A **general** lien is one *placed against any and all real and personal property* owned by a particular debtor. An example is an inheritance tax lien placed against all property owned by the heir. A **specific** lien *attaches to a single item* of real or personal property, and does not affect other property owned by the debtor.

A conventional mortgage lien is an example, where the property is the only asset attached by the lien.

Superior and inferior lien. The category of superior, or **senior**, liens ranks above the category of inferior, or **junior**, liens, meaning that superior liens receive first payment from the proceeds of a foreclosure. The superior category includes liens for real estate tax, special assessments, and inheritance tax. Other liens, including income tax liens, are inferior.

LIEN PRIORITY

Within the superior and inferior categories, a ranking of lien priority determines the order of the liens' claims on the security underlying the debt. The highest-ranking lien is first to receive proceeds from the foreclosed and liquidated security. The lien with lowest priority is last in line. The owner receives any sale proceeds that remain after all lienors receive their due.

Lien priority is of paramount concern to the creditor, since it establishes the level of risk in recovering loaned assets in the event of default.

Establishment of priority. Two factors primarily determine lien priority:

- the lien's categorization as superior or junior
- the date of recordation of the lien

Superior liens in rank order	
1.	Real estate tax liens
2.	Special assessment liens
3.	Federal estate tax liens
4.	State inheritance tax liens

Junior liens: priority by date of recording	
	Federal income tax liens
	State corporate income tax liens
	State intangible tax liens
	Judgment liens
	Mortgage liens
	Vendor's liens
	Mechanic's liens (priority by date work was performed)

Figure 9. Priority of Real Estate Liens

All superior liens take precedence over all junior liens regardless of recording date, since they are considered to be matters of public record not requiring further constructive notice. Thus, a real estate tax lien (senior) recorded on June 15 has priority over an income tax lien (junior) recorded on June 1.

A junior lien is automatically inferior, or **subordinate**, to a superior lien. Among junior liens, date of recording determines priority. The rule is: *the earlier the recording*

date of the lien, the higher its priority. For example, if a judgment lien is recorded against a property on Friday, and a mortgage lien is recorded on the following Tuesday, the judgment lien has priority and must be satisfied in a foreclosure ahead of the mortgage lien.

The mechanic's lien is an exception to the recording rule. Its priority dates from the point in time when the work commenced or ended, as state law determines, rather than from when it was recorded.

The following example illustrates how lien priority works in paying off secured debts. A homeowner is foreclosed on a second mortgage taken out in 2018 for \$25,000. The first mortgage, taken in 2017, has a balance of \$150,000. Unpaid real estate taxes for the current year are \$1,000. There is a \$3,000 mechanic's lien on the property for work performed in 2019. The home sells for \$183,000.

The proceeds are distributed in the following order:

1. \$1,000 real estate taxes
2. \$150,000 first mortgage
3. \$3,000 mechanic's lien
4. \$25,000 second mortgage
5. \$4,000 balance to the homeowner

Note the risky position of the second mortgage holder: the property had to sell for at least \$179,000 for the lender to recover the \$25,000.

Subordination. A lienor can change the priority of a junior lien by voluntarily agreeing to subordinate, or lower, the lien's position in the hierarchy. This change is often necessary when working with a mortgage lender who will not originate a mortgage loan unless it is senior to all other junior liens on the property. The lender may require the borrower to obtain agreements from other lien holders to subordinate their liens to the new mortgage.

For example, interest rates fall from 8% to 6.5% on first mortgages for principal residences. A homeowner wants to refinance her mortgage, but she also has a separate home-equity loan on the house. Since the first-mortgage lender will not accept a lien priority inferior to a home equity loan, the homeowner must persuade the home equity lender to subordinate the home equity lien to the new first-mortgage lien.

SUPERIOR LIENS

Real estate tax lien. The local legal taxing authority annually places a real estate tax lien, also called an **ad valorem tax lien**, against properties as security for payment of the annual property tax. The amount of a particular lien is based on the taxed property's assessed value and the local tax rate.

Special assessment lien. Local government entities place assessment liens against certain properties to ensure payment for local improvement projects such as new roads, schools, sewers, or libraries. An assessment lien applies only to properties that are expected to benefit from the municipal improvement.

Federal and state inheritance tax liens. Inheritance tax liens arise from taxes owed by a decedent's estate. The lien amount is determined through probate and attaches to both real and personal property.

JUNIOR LIENS

Tax liens. All tax liens other than those for ad valorem, assessment, and estate tax are junior liens. They include:

- **Federal income tax lien**
- placed on a taxpayer's real and personal property for failure to pay income taxes
- **State corporate income tax lien**
- filed against corporate property for failure to pay taxes
- **State intangible tax lien**
- filed for non-payment of taxes on intangible property
- **State corporation franchise tax lien**
- filed to ensure collection of fees to do business within a state

Judgment lien. A judgment lien attaches to real and personal property as a result of a money judgment issued by a court in favor of a creditor. The creditor may obtain a **writ of execution** to force the sale of attached property and collect the debt. After paying the debt from the sale proceeds, the debtor may obtain a **satisfaction of judgment** to clear the title records on other real property that remains unsold.

During the course of a lawsuit, the plaintiff creditor may secure a **writ of attachment** to prevent the debtor from selling or concealing property. In such a case, there must be a clear likelihood that the debt is valid and that the defendant has made attempts to sell or hide property.

Certain properties are exempt from judgment liens, such as homestead property and joint tenancy estates.

Mortgage and trust deed lien. In lien-theory states, mortgages and trust deeds secure loans made on real property. In these states, the lender records a lien as soon as possible after disbursing the funds in order to establish lien priority.

Vendor's lien. A vendor's lien, also called a seller's lien, secures a purchase money mortgage, a seller's loan to a buyer to finance the sale of a property.

Municipal utility lien. A municipality may place a utility lien against a resident's real property for failure to pay utility bills.

Mechanic's lien. A mechanic's lien secures the costs of labor, materials, and supplies incurred in the repair or construction of real property improvements. If a property owner fails to pay for work performed or materials supplied, a worker or supplier can file a lien to force the sale of the property and collect the debt.

Any individual who performs approved work may place a mechanic's lien on the property to the extent of the direct costs incurred. Note that unpaid subcontractors may record mechanic's liens *whether the general contractor has been paid or not*. Thus, it is possible for an owner to have to double-pay a bill in order to eliminate the mechanic's lien if the general contractor neglects to pay the subcontractors. The mechanic's lienor must enforce the lien within a certain time period, or the lien expires.

In contrast to other junior liens, the priority of a mechanic's lien *dates from the time when the work was begun or completed*. For example, a carpenter finishes a job on May 15. The owner refuses to pay the carpenter in spite of the carpenter's two-month collection effort. Finally, on August 1, the carpenter places a mechanic's lien on the property. The effective date of the lien for purposes of lien priority is May 15, not August 1.

FORECLOSURE

- Mortgage lien foreclosure
- Judicial foreclosure
- Non-judicial foreclosure
- Strict foreclosure
- Deed in lieu of foreclosure

All liens can be enforced by the sale or other transfer of title of the secured property, whether by court action, operation of law, or through powers granted in the original loan agreement. The enforcement proceedings are referred to as foreclosure.

State law governs the foreclosure process. Broadly, a statutory or court-ordered sale enforces a general lien, including a judgment lien. A lawsuit or loan provision authorizing the sale or direct transfer of the attached property enforces a specific lien, such as a mortgage. Real estate tax liens are enforced through tax **foreclosure sales**, or **tax sales**.

MORTGAGE LIEN FORECLOSURE

Three types of foreclosure process enforce mortgage liens:

- judicial foreclosure
- non-judicial foreclosure
- strict foreclosure

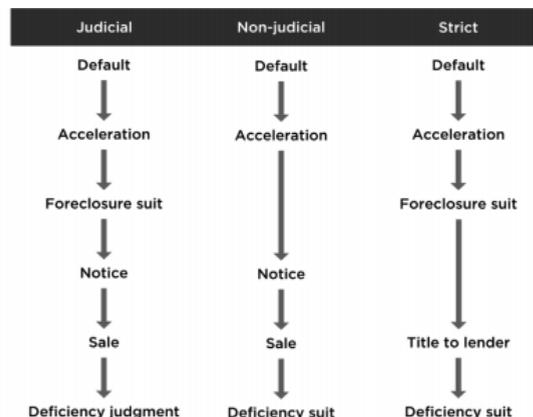


Figure 10. Foreclosure Processes

JUDICIAL FORECLOSURE

Judicial foreclosure occurs in states that use a two-party mortgage document (borrower and lender) that does not contain a “power of sale” provision. Lacking this provision, a lender must file a **foreclosure suit** and undertake a court proceeding to enforce the lien.

Acceleration and filing. If a borrower has failed to meet loan obligations in spite of proper notice and applicable grace periods, the lender can **accelerate** the loan, or declare that the loan balance and all other sums due on the loan are payable immediately.

If the borrower does not pay off the loan in full, the lender then files a foreclosure suit, naming the borrower as defendant. The suit asks the court to:

- 4 terminate the defendant’s interests in the property
- 4 order the property sold publicly to the highest bidder
- 4 order the proceeds applied to the debt

Lis Pendens. In the foreclosure suit, a **lis pendens** gives public notice that the mortgaged property may soon have a judgment issued against it. This notice enables other lienholders to join in the suit against the defendant.

Writ of execution. If the defendant fails to meet the demands of the suit during a prescribed period, the court orders the termination of interests of any and all parties in the property, and orders the property to be sold. The court’s **writ of execution** authorizes an official, such as the county sheriff, to seize and sell the foreclosed property.

Public sale and sale proceeds. After public notice of the sale, the property is auctioned to the highest bidder. The new owner receives title free and clear of all previous liens, whether the lienholders have been paid or not. Proceeds of the sale are applied to payment of liens according to priority. After payment of real estate taxes, lienholders’ claims and costs of the sale, any remaining funds go to the mortgagor (borrower).

Deficiency judgment. If the sale does not yield sufficient funds to cover the amounts owed, the mortgagee may ask the court for a deficiency judgment. This enables the lender to attach and foreclose a judgment lien on other real or personal property the borrower owns.

Right of redemption. The borrower’s right of redemption, also called equity of redemption, is the right to *reclaim a property* that has been foreclosed by paying off amounts owed to creditors, including interest and costs. Redemption is possible within a **redemption period**. Some states allow redemption during the foreclosure proceeding at any time “until the gavel drops” at the sale. Other states have statutory periods of up to a year following the sale for the owner of a foreclosed property to redeem the estate.

NON-JUDICIAL FORECLOSURE

When there is a “power of sale” provision in the mortgage or trust deed document, a non-judicial foreclosure can force the sale of the lien property *without a foreclosure suit*. The “power of sale” clause in effect enables the mortgagee to order a public sale without court decree.

Foreclosure process. On default, the foreclosing mortgagee records and delivers notice to the borrower and other lienholders. After the proper period, a “notice of sale” is published, the sale is conducted, and all liens are extinguished. The highest bidder then receives unencumbered title to the property.

Deficiency suit. The lender does not obtain a deficiency judgment or lien in a non-judicial foreclosure action. The lender instead must file a new deficiency suit against the borrower.

Re-instatement and redemption. During the notice of default and notice of sale periods, the borrower may pay the lender and terminate the proceedings. Exact re-instatement periods vary from state to state. There is no redemption right in non-judicial foreclosure.

STRICT FORECLOSURE

Strict foreclosure is a court proceeding that gives the lender title directly, by court order, instead of giving cash proceeds from a public sale.

On default, the lender gives the borrower official notice. After a prescribed period, the lender files suit in court, whereupon the court establishes a period within which the defaulting party must repay the amounts owed. If the defaulter does not repay the funds, the court orders transfer of full, legal title to the lender.

DEED IN LIEU OF FORECLOSURE

A defaulting borrower who faces foreclosure may avoid court actions and costs by voluntarily deeding the property to the mortgagee. This is accomplished with a deed in lieu of foreclosure, which transfers legal title to the lienholder. The transfer, however, does not terminate any existing liens on the property.

REVIEW

ENCUMBRANCES

- non-possessory interests limiting the legal owner's rights

EASEMENTS

- a right to use portions of another's property

Easement appurtenant

- dominant tenement's right to use or restrict adjacent servient tenement; attaches to the real estate
- easement by necessity: granted by necessity, e.g. to landlocked owners
- party wall: negative easement in a shared structure

Easement in gross

- a right to use property that does not attach to the real estate
- personal: not revocable or transferrable; ends upon death of easement holder
- commercial: granted to businesses; transferrable

Easement creation

- voluntary grant, court decree by necessity or prescription, eminent domain
- by prescription: obtainable through continuous, open, adverse use over a period

Easement termination

- release; merger; abandonment; condemnation; change of purpose; destruction; non-use

ENCROACHMENTS

- intrusions of real estate into adjoining property; can become easements

LICENSES

- personal rights to use a property; do not attach; non-transferrable; revocable

DEED RESTRICTIONS

- conditions and covenants imposed on a property by deed or subdivision plat

LIENS

- claims attaching to real and personal property as security for debt

Lien types

- voluntary and involuntary; general and specific; superior and junior

Lien priority

- rank ordering of claims established by lien classification and date of recording; determines who gets paid first if lienee defaults

Superior liens

- rank over junior liens; not ranked by recording date; real estate tax and assessment liens and inheritance taxes

Junior liens

- rank by recording date: judgment; mortgage, vendor's, utility, mechanic's, other tax liens; mechanic's lien priority "dates back" to when work or sale transpired

FORECLOSURE

- enforcement of liens through liquidation or transfer of encumbered property

Mortgage lien foreclosure

- liquidation or transfer of collateral property by judicial, non-judicial, or strict foreclosure

Judicial foreclosure

- lawsuit and court-ordered public sale; deficiency judgments, redemption rights

Non-judicial foreclosure

- "power of sale" granted to lender; no suit; no deficiency judgment; no redemption period after sale

Strict foreclosure

- court orders legal transfer of title directly to lender without public sale

Deed in lieu of foreclosure

- defaulted borrower deeds property to lender to avoid foreclosure

Lay of the Land - Review Questions

- The principal mechanism for implementing a master plan is:**
 - zoning.
 - referendum.
 - public elections.
 - property management.
- In most jurisdictions, the master plan is managed by:**
 - the mayor or county superintendent.
 - the Board of Equalization.
 - the planning commission.
 - the zoning board of adjustment.
- To be valid, a local zoning ordinance must:**
 - reasonably promote community health, safety and welfare.
 - comply with federal zoning laws.
 - apply only to unique properties.
 - be published periodically in the local newspaper.
- In addition to government entities, organizations that may be able to condemn property under the power of eminent domain include:**
 - public utilities.
 - financial institutions.
 - major employers.
 - neighborhood associations.
- A property owner is precluded by deed restriction from developing a thirty-foot boat dock. The limitation prompts the owner to sell to another party. The new owner:**
 - is free to build the dock since the next-door neighbor built a similar dock two weeks later.
 - takes title subject to the same restriction.
 - can build the dock with special permission from the zoning board.
 - may build, since the restriction is extinguished by the sale.
- What are the approximate dimensions of a township in the rectangular survey system?**
 - Thirty-six miles on a side
 - Twenty-five square miles
 - Depends on the state
 - Six miles by six miles
- The area running north and south between meridians is a:**
 - range.
 - township.
 - strip.
 - tier.
- If a parcel does not have a lot and block number and is too irregular to be described as a fraction of a section, the legal description:**
 - is the street address.
 - will include a metes and bounds description.
 - will use an estimate of the sectional fraction.
 - will create a special reference number.
- A certain legal description contains the phrase "...southeasterly along Happy Road to the stone landmark..." What kind of description is this?**
 - Plat survey plat
 - Government grid
 - Metes and bounds
 - Rectangular survey
- The abbreviation POB stands for:**
 - perimeter of boundaries.
 - point of beginning.
 - point of bounds.
 - plat of boundary.
- The process of enforcing a lien by forcing sale of the lienee's property is called:**
 - execution.
 - attachment.
 - foreclosure.
 - subordination.
- A property owner has an easement appurtenant on her property. When the property is sold to another party, the easement:**
 - terminates.
 - transfers with the property.
 - transfers with the owner to a new property.
 - becomes a lien on the property.
- A brick fence straddles the property line of two neighbors. The neighbors agree not to damage it in any way. This is an example of:**
 - a party wall.
 - an encroachment.
 - a trade fixture.
 - a deed restriction.