

Modern Real Estate Practice in Illinois, 6th Edition
Filmore W. Galaty, Wellington J. Allaway, Robert C. Kyle
Laurie MacDougal, Consulting Editor

Chapter 7: Interests in Real Estate

Learning Objectives

After reading this chapter, students should be able to:

- Identify the kinds of limitations on ownership rights that are imposed by government action and the form of conveyance of property.
- Describe the various estates in land and the rights and limitations they convey.
- Explain concepts related to encumbrances and water rights.
- Distinguish the various types of police powers and how they are exercised.
- Define the following key terms: accretion; appurtenant easement; avulsion; condemnation; deed restrictions; doctrine of prior appropriation; dominant tenement; easement; easement by condemnation; easement by necessity; easement by prescription; easement in gross; eminent domain; encroachment; encumbrance; erosion; Equity in Eminent Domain Act; escheat; estates in land; fee simple absolute; fee simple defeasible; fee simple determinable; fee simple estates; freehold estates; future interests; homestead; leasehold estates; license; lien; life estate; life tenant; littoral rights; party wall; police power; quick-take; remainder interest; reversionary interest; riparian rights; servient tenement; taxation; Uniform Probate Code.

Why Learn About Interests In Real Estate?

As we discussed in Chapter 2, an extensive bundle of rights goes along with owning real estate. However, there are many different interests in real estate that can be acquired, and not all of them convey the entire bundle of legal rights to the owner. Licensees must take great care to ensure that prospective buyers understand exactly what interests a seller wishes to transfer.

Suggested Items to Bring To Class

1. Sample deeds containing different fee simple and life estate interests.
2. Sample easement documents showing their wording and how they are created.
3. Photographs, color slides, or overhead transparencies showing various types of encroachments.

Lecture Outline

I. Limitations In Rights Of Ownership

An extensive bundle of rights goes along with owning real estate. Even the most complete ownership the law allows is limited by public and private restrictions.

II. Government Powers

Individual ownership rights are subject to certain powers, or rights, held by federal, state, and local governments.

IN ILLINOIS . . . *the state and local government powers discussed in this section are all held by the state of Illinois and various county and municipal governing bodies.*

A. Police Power

Every state has the power to enact legislation to preserve order, protect the public health and safety, and promote the general welfare. The laws must be uniform and nondiscriminatory.

B. Eminent Domain

- *Eminent domain* is the right of the government to acquire privately owned real estate for public use.
- *Condemnation* is the process by which the right is exercised, by either judicial or administrative proceedings.
- The proposed use must be for the public good, just compensation must be paid to the owner, and the rights of the property owner must be protected by due process of law.

IN ILLINOIS . . . *local units of government and quasi-governmental bodies are given the power of eminent domain by Article I, Section 15 of the Illinois Constitution and by the Illinois Code of Civil Procedure. In certain situations, Illinois law permits a summary proceeding, called a "Quick take," in which a plaintiff/condemnor may obtain immediate fee simple title to real property, including the rights of possession and use. The plaintiff must deposit a sum with the county treasurer that is preliminary considered by the court to be just compensation; this can be litigated later.*

C. Taxation

Taxation is a charge on real estate to raise funds to meet the public needs of a government.

D. Escheat

Escheat is an avenue by which the state may acquire privately owned real or personal property when an owner dies without a will and leaves no heirs.

IN ILLINOIS . . . *real property escheats to the county in which it is located, rather than to the state.*

III. ESTATES IN LAND

Historically, estates in land have been classified as *freehold* and *leasehold* estates.

- Freehold estates last for an indeterminable length of time and include fee simple, defeasible fee and life estates.

IN ILLINOIS . . . *the traditional freehold estates are recognized under Illinois law.*

- Leasehold estates last for a fixed period of time. They include estates for years and estates from period to period.

A. Fee Simple Estate

An estate in fee simple (or fee simple absolute) is the highest interest in real estate recognized by law: the holder is entitled to all rights to the property, limited only by public and private restrictions. Upon the death of its owner, it passes to the owner's heirs or as provided by will.

B. Fee Simple Defeasible

- subject to the occurrence or nonoccurrence of some specified event.
- condition subsequent: the new owner must not perform some action or activity. If the condition is broken, the former owner can retake possession of the property through legal action (right of reentry).
- special limitation: estate ends automatically upon the current owner's failure to comply with the limitation (possibility of reverter). Also called a fee simple determinable.
- Right of reentry and possibility of reverter are considered future interests.

C. Life Estate

A freehold estate limited in duration to the life of the owner or the life of some other designated person or persons. The ownership may be sold, mortgaged, or leased, but it is always subject to the limitations of the life estate.

- 1. Conventional life estate** is created intentionally by the owner. The life tenant has full enjoyment of the ownership for the duration of his or her life. When the life tenant dies, the estate ends and its ownership passes to another designated individual or returns to the previous owner.

- A life estate that is based on the lifetime of a person other than the life tenant is known as a life estate *pur autre vie*.

- A life tenant may not injure, or *waste*, the property.
2. **Remainder and reversion**
- Remainder interest: The creator of the life estate may name a remainderman as the person to whom the property will pass when the life estate ends.
 - Reversionary interest: The creator of the life estate may choose not to name a remainderman, in which case the creator will recapture ownership when the life estate ends.
3. **Legal life estate** is a form of life estate established by state law: dower, curtesy and homestead.

IN ILLINOIS . . . *as in most separate property states, the common-law concepts of dower and curtesy have been abolished in favor of the Uniform Probate Code, which gives the surviving spouse a right to an elective share upon the death of the other spouse.*

- Homestead: a legal life estate in real estate occupied as the family home in which the home or some part of it is protected from creditors during the occupant's lifetime.

IN ILLINOIS . . . *every homeowner is entitled to a homestead estate up to a value of \$15,000 in the land and buildings he or she occupies as a principal residence. Homestead estates of a husband and wife can be combined for a total of \$30,000. The estate extends to all types of residential property, both real and personal, including condominiums, cooperatives, beneficial interests in land trusts, and leaseholds. Single persons, as well as householders with spouses and families, qualify.*

No notice has to be recorded or filed to establish a homestead in Illinois. Therefore, prospective purchasers, lienholders and other concerned parties are charged with inspecting a property to see if it serves as the residence of the potential debtor and if homestead estate rights can be claimed. A family can have only one homestead at any one time. The Illinois homestead exemption is not applicable between co-owners but is applicable to any co-tenant's unsecured creditors. The exemption continues after the death of an individual for the benefit of the surviving spouse as long as he or she continues to occupy the homestead residence and extends for the benefit of all children living there until the youngest reaches 18 years of age.

IV. ENCUMBRANCES

A claim, charge, or liability that attaches to real estate; a right or an interest held by someone other than the fee owner of the property that affects title.

A. Liens

- A charge against property that provides security for a debt or obligation of the owner.

B. Restrictions

- Deed restrictions, also referred to as covenants, conditions and restrictions, or CC&Rs, are private agreements that affect the use of land.

C. Easements

- The right to use the land of another for a particular purpose.
 - Appurtenant easement: annexed to the ownership of one parcel and allows the owner the use of a neighbor's land.
- The parcel over which the easement runs is the servient tenement; the neighboring parcel that benefits is the dominant tenement.
 - An appurtenant easement is part of the dominant tenement. If the dominant tenement is conveyed to another party, the easement transfers with the title.

1. Creating an easement

An easement may be created by

- a written agreement between the parties.
- the grantor in a deed of conveyance.
- longtime usage, as in an easement by prescription.
- necessity.
- implication.

2. Party wall easement

Each lot owner owns the half of a shared wall on his or her lot, and each has an appurtenant easement in the other half. A written party wall agreement must be used to create the easement rights.

3. Easement by necessity arises when an owner sells part of his or her land that has no access except over the seller's remaining land.

- Created by court order

4. Easement by prescription

The claimant's use must have been continuous, exclusive and without the owner's approval. The use must be visible, open and notorious; that is, the owner must have been able to learn of it.

- The concept of tacking provides that successive periods of continuous occupation by different parties may be combined to reach the required total number of years.

IN ILLINOIS . . . *to establish an easement by prescription, the use must be adverse, exclusive, under claim of right and continuous and uninterrupted for a period of 20 years. Illinois law permits owners of pedestrian walkways in shopping centers and large commercial or industrial buildings to prevent the establishment of prescriptive easements by the public. The owner must display signs stating that access to the property is by permission (and thus not adverse).*

5. **Easement in gross** is an individual interest in or right to use someone else's land.
 - Commercial easements in gross may be assigned, conveyed and inherited.
 - Personal easements in gross usually are not assignable and terminate upon the death of the easement owner.
6. **Easement by condemnation** is an easement acquired for a public purpose through the right of eminent domain.

7. **Terminating an easement**

An easement may be ended:

- when its purpose no longer exists.
- when the properties are merged under one legal description (termination by merger) when acquired by a single owner.
- by release of the right to the owner of the servient tenement.
- by abandonment.
- by nonuse of a prescriptive easement.
- by adverse possession by the owner of the servient tenement.
- by destruction of the servient tenement.
- by lawsuit against someone claiming an easement.
- by property conversion.

D. Licenses

A personal privilege to enter the land of another for a specific purpose.

- A license differs from an easement: it can be terminated or canceled by the licensor.
- A right to use another's property that is given orally or informally, is generally considered to be a license rather than a personal easement in gross.
- A license ends upon the death of either party or the sale of the land by the licensor.

E. Encroachments

An encroachment occurs when all or part of a structure illegally extends beyond the land of its owner or beyond the legal building lines.

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V. NATURE AND WATER: RIGHTS AND RESTRICTIONS

- *Riparian rights* are rights of owners of land along the course of a river, stream or similar body of water.
- *Littoral rights* are the rights of owners whose land borders commercially navigable lakes, seas and oceans.

A. Accretion, Erosion, and Avulsion

- *Accretion* is an increase in the land resulting from the deposit of soil by the water's action (called alluvion or alluvium). If water recedes, new land is acquired by reliction.
- *Erosion* is the gradual wearing away of the land by natural forces.
- *Avulsion* is the sudden removal of soil by an act of nature.

B. Doctrine of Prior Appropriation

Under this doctrine, the right to use any water, with the exception of limited domestic use, is controlled by the state rather than by the landowner whose property lies adjacent to the water. To secure water rights, a landowner must demonstrate to a state agency that he or she plans a beneficial use of the water.

DISCUSSION QUESTIONS

1. What concept of property rights did the drafters of the Constitution have?
2. How has the power to tax real estate been implemented in your area?
3. How and when has local police power affected private ownership of real property in your area? Has any zoning law change affected property values in your area?
4. Have there been any unpopular uses of the power of eminent domain in your neighborhood, or do you know of any unusual use of this power? What property has been condemned lately?
5. Have you ever noticed a property that was vacant for a long period of time while the state searched for any descendants under the power of escheat?
6. Why would anyone want to create a fee simple defeasible estate? Give examples.

7. Why would anyone want to create a life estate? Give examples.

CLASSROOM EXERCISES

1. Have your class discuss real estate licensing laws as an exercise of police power by the state. If the industry were not regulated, what might it be like?