

Property II- Prof. Brass, G.S.U., Spring 2000

I. Tort-type limits on possessory rights.

A. Lateral Support- 2 ways to be liable for lateral support

1. Strict Liability- If land in its natural state (without building) would have collapsed because of lack of lateral support, then person responsible for lack of lateral support is liable for land and any building.
2. Negligence- sloppy digger.

B. Nuisance- Private/Public nuisance has 3 parts:

1. Substantial Interference/harm (hypersensitivity to interference doesn't count) to,
2. A protected public/private use and enjoyment of property by,
3. Conduct that is:
 - Intentional and unreasonable* (ex. Spite Fence- must serve actual purpose) or,
 - Negligent (falls below reasonable and generally accepted standard) or,
 - Subject to Strict Liability (inherently dangerous or defined by statute).

• Nuisance guidelines for test of reasonableness*:

1. Location of claimed nuisance.
2. Character of neighborhood.
3. Nature of the thing complained of.
4. Frequency of intrusion.
5. Effect on enjoyment of life, health, and property.

• The court weighs the utility of the conduct against the gravity of the harm when determining reasonableness and when deciding on a remedy.

Utility of Conduct:

- Social value attached to primary purpose of conduct.
- Suitability of conduct to character of locality.
- Impracticability of preventing or avoiding the invasion.

Gravity of Harm

- Extent and Character of harm.
- Social value attached to type of use invaded.
- Suitability of use invaded to character of locality.
- Burden on person harmed to avoid harm.

• Differences between Public nuisance and Private nuisance:

- Can't prescribe against the public; purely private nuisance can gain a right to continue through prescription.
- Public nuisance must affect a large number of people.
- Courts also balance "economic efficiency" to see what is best for the community.

• Statutory Nuisance- where a nuisance is explicitly defined by statute; public nuisances are frequently defined by statute/zoning.

• Coming to the nuisance- it's your fault for moving into an area with an offending trade or industry; can move next to a pre-existing nuisance and then complain about it.

• Types of damages in nuisance cases (must show foreseeable damages):

1. Periodic Damages- Sue every time the statute of limitations is about to run out.
2. Permanent Damages- One-time, lump-sum payment to be able to continue nuisance.
3. Plaintiff wins, but pays for nuisance to move away.
4. No provable financial harm, so no damages.

C. Trespass- Physical intrusion able to be perceived by senses.

- "New Look" Trespass- unperceivable particulates that cause harm constitute trespass.
- If trespass occurs, then offender is liable; liability without harm; no balancing; strict liability.

- D. Taking- A taking occurs when:
- There is total destruction, or deprivation of all or most of the innocent party's interests.
 - OR the offending activity is directed at the innocent party's property.

II. Contract-type limitations on possessory rights.

A. Covenants- 2 ways to enforce covenants:

1. Damages- seeks money
2. Equity- seeks order for action; injunction

- Covenants can be removed if conditions change. The change must:

- Render the land useless; "Is it losing too much value?" OR
- Destroy the original purpose of the restriction.

- A covenant "runs with the land" when: [P.I.N.T.]

1. There is Privity between the parties (adverse possessors cannot enforce covenants).
2. It was Intended to run with the land (shown by "assigns").
3. There is actual Notice of the covenant- Must be a writing someplace, because of statute of frauds) but doesn't have to be in the chain of title.
4. It "Touches and Concerns" the land (benefits or burdens the land).

- Touch and Concern Tests:

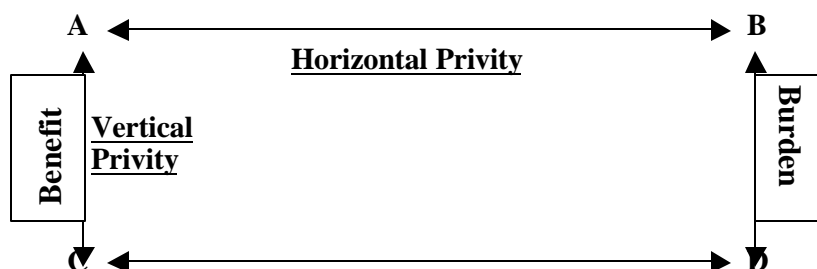
- No Limits- Notice is enough protection, let free market work.
- Bigelow/Clark Test- Scientific, duplex analysis of burden side and benefit side.
- Reichman/Land Utilization- Judges make rules that promote efficient utilization of land.
- Berger/Expectation- Normal expectations of society, juries rather than judges decide.
- Multi-Factor Balancing- touch and concern becomes a factor in establishing "reasonableness"; i.e. in NY, affirmative covenant (duty to act) does not touch and concern the land if it has no time limit for performance.
- Restatement of Servitudes- decision of validity of covenant made at time of litigation.

- Horizontal Privity: [T.I.P.S.]

- Tenorial/ English Privity- one party has present interest, and one party has future interest.
- Instantaneous Privity (American Majority)- promissory and promisee each have one hand on a deed transferring an interest in property for an "instant"; includes tenorial and simultaneous privity plus fee simple.
- Promise alone privity- no relationship other than covenant.
- Simultaneous/Massachusetts Privity- Both parties have a continuing and simultaneous interest in the same piece of property; includes tenorial privity plus concurrent estates and possessory / non-possessory interests (easements).

- Vertical Privity

- Benefited party succeeds to any interest through transfers (not adverse possession).
- Burdened party succeeds to any interest of same duration i.e. FS—FS, FT—FT (same bloodline), LE—LE (same measuring life); can be divided in size, but not duration.



B. Equitable Servitude- Intent and promise to perform.

- Different from covenant in that:
 - Requires no privity. If privity is found, promise can be covenant and equitable servitude.
 - Adverse possessor can enforce it.
 - Notice can be actual (knowledge), constructive (in chain of title) or implied (physical appearance of neighborhood suggest restriction).
 - Must show that original parties intended to bind successors (common scheme is evidence of intent and notice).
- Common Scheme- where even if individual title does not have a restriction, development pattern can establish a common scheme that restricts the parcel through equitable servitude.
 - Two Theories:
 1. Property Theory- Express promise by buyer creates implied reciprocal servitude by seller; subsequent purchasers only get negative restrictions if not in deed.
 2. Contract/ 3rd party beneficiary theory- Beneficiaries of the agreement can enforce the agreement, does not have to be original developer.
- Where a scheme exists, the grantee subject to restrictions acquires by implication an enforceable right to have the remaining land of the vendor, within the limits of the scheme, bound by similar restrictions.
- No balancing of interests in equitable servitudes; enforced even if there is harm on the other side.
- CA rule- All deeds have to be interpreted as of the moment of their delivery. Since at the time of delivery of the first deed, no common scheme exists, common scheme never develops.

III. Defenses to promises respecting use of land.

- Construing language to get around restriction.
- In equitable servitudes, don't have to fix first, then sue for damages; don't have to show no adequate remedy at law.
- Laches- undue delay in enforcing right of action caused evidence to go stale.
- Waiver- plaintiff voluntarily waived right to action.
- Estoppel- If a landowner reasonably relies on words and/or conduct of other home owners or the Homeowners' Association to his detriment in spending money to make improvements that technically violate the restrictions, a court may say that the other owners or the Association would be estopped from enforcing the restrictions.
- Changed conditions- burden is on the person claiming changed conditions to show:
 - Removal will not unjustly injure neighboring property.
 - Original purpose has been destroyed or frustrated.
 - Person claiming change of conditions did not cause change.
- Statutes exist that say only money damages can be given, or that restrictions cannot impede the highest and best use of the land (better taxes).

IV. Zoning- primarily a function of local government (cities and counties) as a exercise of police power granted from the states by either: enabling acts (statutes), or home rule (state constitutions).

- Must be in writing and public must have access to it (could be in form of comprehensive plan).
- Standard Zoning Enabling Act- Sets up Planning Commission (sets up zoning and does amendments) and Board of Zoning Appeals/Adjustments (does variances and special exceptions). Both (PC and BZA) are appointed by elected officials.

B. Euclid- Held that use zoning is constitutional. Zoning will only be struck down if it is clearly "arbitrary and unreasonable"- shown by no substantial relationship between zoning and public health, morals, safety, and welfare. Euclidian Zoning- "cookie cutter" zoning where each use has a place.

- C. Restrictions to zoning:
1. Constitutional Rights (Equal protection, Due process, Taking, Within police power).
 2. Fundamental Rights (voting, right to exclude, right to transfer/grant, sanctity of family). When fundamental right is involved, courts will take a closer look at the ordinance. If right is violated, it is a restriction to zoning.
- D. Ways around zoning:
1. Variances- granted by BZA; supposed to be rare and unexpected. Must show:
 - a. Unnecessary hardship (not self-inflicted)
 - b. Property is unique (none like it with proper zoning can be found).
 - c. Proposed use is not contrary to public interest.
 2. Special Exceptions/Conditional Uses- Anticipated exceptions that are listed in zoning ordinance, and approved/granted by the BZA, usually with conditions attached. Uses are compatible with underlying zoning if put in correct place.
 - a. To oppose a special exception, must show that the location, not the use, is bad because the use is already approved in the zoning ordinance.
 - b. Floating Zone- special exception done by elected officials; written into zoning ordinance; no location on a map until approved.
 3. Amendments- Amendment to the zoning ordinance done by Planning Commission.
 - a. Map amendment- changes zone lines; may change zoning for one parcel.
 - b. Comprehensive Map amendment- re-draws the entire map.
 - c. Text amendment- rewriting the text of the zoning ordinance.
- E. Spot Zoning- where one parcel of land is zoned for a use very different from everything else around it. There is a legislative presumption that original zoning ordinance was valid and that local government had good reason for re-zone.
1. Spot Zoning Doctrine- eliminates presumption that spot zoning is valid; switches burden to gov't.
 2. Maryland Change or Mistake doctrine- government can not grant small parcel re-zone regardless of the merits of the proposed change unless it can show that original zoning was a mistake, or that there has been a change that made original zoning inappropriate.
- F. Quasi-Judicial Administrative Decisions- Apply broad policies to individual cases.
1. As opposed to Legislative Decisions, which make policies and rules that are applicable to open classes of individuals and situations.
 2. Standards for supporting quasi-judicial decisions:
 - a. Comply with comprehensive plan.
 - b. Public need being served (market analysis justification).
 - c. Best location (no other properly-zoned property available).
- G. "In accordance with a comprehensive plan"- catch phrase used in zoning ordinances, 3 views:
1. Unitary View- the zoning is the plan.
 2. Planning Factor View- separate plan gives greater presumption of planning, more power in court.
 3. Planning Mandate- must have and follow a separate plan.
- H. Planned Unit Development (PUD)- Developer submits proposal to local government for combined-use development. Overall population and building density is no higher than it would have been in single-use zoning. Considers usage on the average, rather than parcel by parcel- antithesis to zoning because it allows development by method other than "cookie cutter".
- I. 4 theories for enforcing zoning ordinances:
1. Contract (3rd party beneficiary).
 2. Covenant (someone who is part of the covenant).
 3. Nuisance (must prove damages).
 4. Zoning ordinance (creates public-interest rights in individuals).

V. Takings

A. Exaction: City/County requires land or money for public facilities from developers. 3 Views:

1. Pioneer Trust (Illinois): in order to demand exactions, government must show that new facilities are uniquely and specifically attributable to the development in question.
2. General Guidelines (Jordan): government must show need based on general guidelines/averages.
3. Rational Nexus (California) View: Very loose connection between need and development.

B. Takings Framework (Wiseman):

1. Is the government's purpose legitimate?
2. Is the government means related to the purpose?
 - a. Is there a connection between government's rationale and what they are asking for? (*Nollan*- essential nexus)
 - b. If YES, then how close is the connection (*Dolan*- rough proportionality)
3. Is a fundamental property right being destroyed? If YES, it is a Categorical Taking which requires just compensation to be paid, 2 types:
 - a. Physical Invasion- denies fundamental right to exclude.
 - b. Regulation denies all economically beneficial use of the land. Must show:
 - i. No reasonable economic use (no reasonable rate of return) caused by,
 - ii. A new restriction (originally had right, but was taken away) that,
 - iii. Renders the land valueless.
4. Is the public benefit larger than the private harm? (no balancing in federal court, only state court)

C. Transferable Development Rights (TDRs)- transfer of development rights from one parcel to another; often based on Floor Area Ratio (FAR): ratio of floor space to a parcel. Can be considered when deciding if a parcel of land is "valueless" when determining whether a taking has occurred.

D. 3 ways government can take without just compensation:

1. Nuisance: If harm is being prevented, then it is not a taking.
2. Public Trust Doctrine: Land held on the coast must be kept for uses that only use the coast (must be used for wharfs, fisheries, etc., cannot be used for railroad)
3. Custom Doctrine: Ever since land was land it was used by public, so even though you own it, it is public land (if beach is privately owned and law states that property line goes to mean tide line, public can use dry sand area because of historical custom).

VI. Landlord-Tenant Law

A. Duality of a lease: Contract elements v. Property elements.

1. Two parts work independently; breach of contract does not affect land transaction.
2. Covenants in property transactions are independent of each other (i.e. no rent does not equal right to not perform on behalf on landlord)
3. Conditions and Limitations- required as "property remedies" to "property breaches" (non-payment, non-compliance). Conditions and limitations tie the two independent covenants together; must be specifically laid out in lease.

B. Problems with Lease Forms

1. Distrait/Distress - Landlord may take tenants property to pay for rent.
2. Waiver of Exemptions- exemption is the limitation on landlord; he had to leave basic furniture.
3. The lease as a "Dangerous Product"- lease treated as commodity and lease form withdrawn from market because it endangers the public by not disclosing tenant's responsibilities under the lease in plain language; landlord responsible to disclose all lease terms clearly to tenant.
4. Unconscionability- because of unequal bargaining power, take-it-or-leave-it; indemnification clause not identified to uneducated tenants which meant no assent, plus it violated public policy.

C. Eviction

1. Forcible Entry and Wrongful Detainer Statutes: quick way to get tenants out; set up Housing Court.
2. Self-help: where landlord evicts on his own. 3 views:
 - a. No self-help.
 - b. Peaceable self-help (majority view)
 - c. Reasonable Force.
3. Remedies for unpaid rent (after eviction):
 - a. Do nothing- sue from time to time (solvent tenants).
 - b. Run a tenants account- re-let on tenants behalf; re-let must have same terms (length, space).
 - c. Sue for contract damages- must show damages, so agreed rent must have been greater than fair market value; trend is toward requiring landlords to mitigate in residential leases, not commercial leases.
4. Constructive Eviction- substantial breaching of covenant can be an “eviction” if it forces the tenant to actually leave; tenant must react within a reasonable time; once tenant leaves, no more rent is due; there is an implied covenant of quiet enjoyment in every lease.
5. Partial Actual Eviction- where tenant is blocked from using a portion of the property. If blocked by landlord, tenant does not have to pay any rent. If blocked by something other than landlord, rent will be reduced by a proportional amount.
6. Partial Constructive Eviction (no longer done)- Breaching of covenant can be a partial eviction if conditions cause tenant to abandon part of the property; usually get proportional relief.
7. Illegal Contract- If lease is for property that violates housing codes, then lease can be illegal, and tenant can get back all rents paid.
 - a. Violations must have been in place at the inception of the lease.
 - b. Implied warranties in leases- Housing Code is an implied warranty in every lease; if warranties are breached, then tenant can recover rent to the extent they were affected.
 - c. In an eviction action, tenant may use code violations as a defense to non-payment of rent. However, non-code related breaches of a lease do not give rise to the defense of implied warranty. This Contract remedy can only be used for code violations.
 - d. 3 results when defense is raised:
 - i. All rent is due; no violations or damages found.
 - ii. Some rent is abated, difference is due.
 - iii. No rent is due.
8. Defenses to Eviction:
 - a. State action- by using courts landlord becomes state actor subject to due process scrutiny.
 - b. In re Quarles- Government cannot function if people are scared to report violations of the law. This was held as fundamental requirement of government beyond constitution.
 - c. Retaliatory Eviction- Eviction statutes interpreted to mean eviction for any reason or no reason, but not for bad reason; if tenant complains to government or landlord, any eviction or increase in rent within 1 year is presumed to be in retaliation.