# Topic 4: Restrictions on Real Estate Rights



I. Restrictions on Real Estate Ownership: General Discussion
You can not do anything you wish on or to real estate, just because you happen to own it.

A. *Public restrictions* – imposed by law

1. *Eminent domain* – a term first used by 17th century Dutch political philosopher Hugo Grotius, who stated that citizens' property is "under the eminent domain of the state," which can acquire or destroy private holdings for reasons ranging from extreme necessity to public utility, but it must "make good" any losses the dispossessed private owners suffer.[1] Under U.S. law today it is the power of government (federal and state, and the state delegates to local jurisdictions and sometimes to private entities like utilities and railroads that need real estate in serving the public interest) to *condemn* land and take it from private owners if the government wants it, and a negotiated settlement can not be reached. Because the U.S. Constitution's 5th Amendment assures that "no person shall … be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public *use*, without just compensation" (and the 14th Amendment applies the 5th Amendment's provisions to state government actions), two conditions must be met:

   a. Just compensation: market value of the property taken, also moving expenses if the acquirer is the federal government[2] or some states, including Illinois.[3] In some cases, legal expenses are reimbursed, as well. But under a concept called the "scope of the project" rule, an owner who loses land to eminent domain should not be compensated for value increases that occurred only because the government announced the related development project. (Question: does *market value* provide high enough compensation? Think about your reservation price, or *investment value*.)
   b. Public use, or (newer standard) public purpose. Public purpose, which tends to involve taking property from one private owner for another private owner's use, often ostensibly to benefit the community through economic development, has been controversial since the 1980s when an Illinois court ruled that Chicago could condemn a blighted building and sell it to the state,[4] a Michigan court held that Detroit could sell condemned private homes to General Motors for a factory site,[5] and a federal case approved forcing five large trusts that owned most land in Hawaii to sell lots to other private owners.[6] Controversies have continued with the unpopular *Kelo v. City of New London* ruling (a Connecticut city took well maintained homes so the Pfizer pharmaceutical company could expand) and subsequent state legislative restrictions on takings.

      In the *Kelo* case the United States Supreme Court ruled that it is not a violation of the U.S. Constitution's 5th Amendment when a government unit condemns land owned by one private party and acquires it, with just compensation paid, to sell to other private users for public-benefiting purposes like economic development and expanding the property tax base (rather than for direct public use, like a road or school).[7] But it also said that if state governments want to impose standards that give more extensive protection to land owners in their jurisdictions they can – and following the *Kelo* ruling, a majority of states did! Example: some states require a forced, non-negotiated sale of land to a government entity that is not for a traditional direct public use (like schools, roads, police stations) to be compensated at 125% (*e.g.*, Michigan principal residences, agricultural land in Indiana), 150% (principal residences in Indiana, all real estate in Rhode Island), or even 200% (all real estate in Kansas) of the pre-taking appraised market value. Greater compensation also might accompany longer "tenure;" Missouri awards 150% of market value for taken land that has been in the owner's family for 50 years or more. Illinois awards market value compensation plus attorney, appraisal, and other costs, and allows takings only if the new owner will be a governmental entity. (A 2006 executive order by President G. W. Bush prevents the federal government from taking land if ownership is to be transferred to private parties, but such forced takings usually have been initiated by state or local government units.)

In a "quick-take" eminent domain action a condemning authority that needs multiple parcels, to build a road for example, can take possession of desired land quickly in return for a preliminary estimate of just compensation due, and then later – after steps ranging from further negotiation to a jury trial – the dispossessed owner receives final just compensation. Interesting point: the taking entity does not hand a check to the party whose land is taken under eminent domain; rather, payment goes to the county to hold in trust until any liens against the property are settled.

Finally, holders of real estate interests other than ownership, such as easements and leases, also can be entitled to compensation when the land they have the right to use is taken under eminent domain. An Ohio state agency that owned the archaeologically significant Octagon Earthworks, and wanted to open it to the public, used eminent domain to buy out the leasehold of the country club that had long rented the Earthworks land for its golf course.[8]

2. *Police power* – government's (usually local government's) power to protect public health, safety, and general welfare. The most common types are:
   a. *Zoning* – to control use of land (areas restricted to residential, commercial, industrial, *etc*. use). A 1922 U.S. Supreme Court case established this right of government.[9] Can include specifying minimum and maximum sizes of lots and structures (and even rooms), requirements that buildings follow a specific architectural style or aesthetic appearance, and "setback" limitations (how close improvements can be to the lot line). Zoning provisions must fulfill a legitimate government purpose in promoting safety or other benefits for the public; they can not be arbitrary, discriminatory, or unreasonable. (Chicago and some other large Midwestern cities have allowed construction of 500-square foot "tiny homes," with heating and plumbing systems, to provide more housing opportunities for the poor or homeless.)
   b. *Building codes* – to set minimal construction standards, often based on concerns for the health and safety of the built structures' ultimate users. Some communities follow the U.S. Department of Housing and Urban Development's *Minimum Property Standards* guidelines. Local governments design regulations, issue permits for construction, and make inspections to assure that construction meets requirements.
   c. *Subdivision regulations* – to assure that subdividers comply with the local area's building, zoning, and dedication codes (dedication is a requirement that a developer donate land for public uses, including streets).
   d. *Environmental protection laws*

3. *Taxation* – local governments collect taxes based on the value of real estate (*ad valorem*). If taxes are not paid, the government has a *lien* (claim on value) and can eventually sell the property to get the missing tax money. (The property *tax* I pay to local government, relating to the value of my house, bears no relationship to the amount of service received in return; owners of more expensive homes pay more in property tax but get no better police and fire protection than I do. Taxes differ from *fees*, paid to public bodies in return for specific services provided; the water bill I pay to the Town of Normal relates directly to the amount of water used.)
4. *Escheat* – county government takes possession of property if its owner dies with no will and no known heirs. The purpose is to assure that some party takes responsibility for all land; a county that takes possession under escheat must maintain the property and get it ready to be sold after making a serious effort to locate heirs.
5. *Tort & nuisance laws* (I call these public because they rely on the court system) – must use your real estate in a responsible and non-negligent manner, *e.g*. no dangerous animals or activities, not unreasonably blocking a neighbor's access to sunlight or discharging water onto an adjoining parcel. A land owner whose land can not be fully used and enjoyed because of a neighbor's actions can file a nuisance lawsuit. If an offending use harms one or a small number of neighboring owners (a *private* nuisance), the remedy ordered by a court generally would be an award of money damages to any harmed parties, with the nuisance use permitted to continue – especially if the harm is caused by an essential business; think noise or smells from a factory. If harm is suffered by many nearby owners (a *public* nuisance), a court might order an *injunction* to end the offending activity. A goal likely would be economic efficiency: have the loud factory pay for one family to move, but close/relocate the factory if its continued operation would require a whole community of residents to move.

   But courts also consider the concept of "coming to the nuisance," in which less or nothing would be awarded as damages if a harmed party had moved near a nuisance already in place. The Sun City retirement community near Phoenix kept expanding southward toward a long-established and growing cattle feed lot, and when the cow manure smell (and flies) became unbearable for residents and made it impossible to sell additional lots the developer sued, seeking to force the feed lot to close. The judge's ruling[10] held there was a public nuisance that necessitated an injunction, because it would not make economic sense to have all those residents vacate their homes; less waste would result from having the feed business relocate. But the court also noted that the private developer had come to the nuisance, in an attempt to secure a large amount of affordable land, while the feed lot firm was just continuing its longstanding activity, so the developer was ordered to pay for the feed lot's move.

B. *Private restrictions* – imposed on land by its owner; runs with the land so that future owners are bound.
1. *Restrictive covenant* – limits an owner's actions relating to things that "touch and concern the land" (not the owner's actions unrelated to the land); must not be discriminatory or otherwise contrary to public policy. May apply to one lot (would be spelled out in the deed that conveys ownership) or to all lots in an entire subdivision (noted in individual deeds and/or included in a broader recorded document). Covenants, which must be in writing, often are created by developers to take the place of or supplement zoning laws – they tend to involve questions of how land is used (no barns, livestock, mobile homes, cars in driveways overnight), density, size and quality, style, height, even exterior colors of buildings. If there is a homeowners' association that all residents become members of when they buy included lots, that association is likely to be the enforcing body (the obligation to pay annual association dues is itself a *positive* covenant). Under Illinois law a condominium project's homeowner association can prohibit smoking marijuana within individual units even though pot is now legal across the state (both tobacco and marijuana smoke have been found to cause health hazards for others and permanent odor damages to carpets, walls, *etc*.), but can not prohibit consuming it in food. An increasingly common covenant in wealthy ski haven Vail, CO, where

service workers often can not afford to live, requires that at least one occupant of a house or condo unit work full-time locally. Owners impose these restrictions in return for payment from the city, which can sue over violations.[11]

Covenants generally must be enforced (offended owners can file civil lawsuits if associations do not take action), but they can expire by time limits set in original agreement or by law. Or a court could release lots from an explicit restriction that it finds has been "abandoned" through longstanding *acquiescence* (open violation; a court ruled that a new resident could not enforce the subdivision's prohibition of horses, which had been violated for a decade)[12] or *waiver* (the Illinois supreme court held that A had waived his right to stop B's splitting a single rural Joliet lot into two, in violation of a subdivision covenant, because A had not objected to earlier lot splits);[13] or based on changes in the character of the surrounding area (a court ruled that a covenant requiring residential use was oppressive and no longer met the intended purpose when most nearby land was in commercial use.[14] A homeowners' association might also enact rules by majority vote from time to time that can be overturned by later votes. (Under technical legal definitions a *restrictive covenant*'s violation is penalized with money damages paid, whereas a court that orders an injunction to stop the offending behavior is viewing the violated restriction as an *equitable servitude*.)

In late 2019 a Mississippi couple living in a recreational vehicle in their driveway, as they dealt with insurance issues after a house fire, was sued and told to move. The local government had approved the arrangement, but having the RV on site for a prolonged period violated restrictions enforced by the subdivision's homeowner association. The story made national news because the pair were threatened with jail time ("for living in their RV" per the headlines), but the threat of incarceration was over missing a court hearing.[15] A billionaire has started investing in large, professionally managed RV and boat storage facilities in reaction to the restrictions increasingly seen on storing these types of vehicles outdoors in residential communities.[16]

When there are differences between what private covenants and public zoning allow, the more restrictive guideline generally controls. For example, if zoning would permit multi-family buildings but a covenant allows only single-family development, then only single-family homes can be built. If zoning law restricts building height on a given parcel to three stories, then that is the maximum allowed height even if a covenant would permit five stories.

2. *Condition* – accompanying a fee simple determinable or on a condition subsequent, allowing reversion or right of entry. There is a big difference between a restrictive covenant or "deed restriction" accompanying a fee simple absolute estate, as discussed in the paragraph above, and a condition that defines a different type of estate. An owner who violates a restrictive covenant (*e.g.*, using a prohibited paint color) could be subject to paying fines or damages, but generally not to losing ownership; whereas violating a condition on the estate (selling alcohol when the deed stated "so long as alcohol is not sold on the land") could cause ownership to revert to the grantor.

3. *Easement, profit, license* (explained earlier)

4. *Lien* – a right to the value of real estate in payment of money owed. Examples (aside from property tax) are:
   a. *Mechanic's lien* – labor and materials (sometimes called mechanics and materialmens' liens)
   b. *Mortgage* – pledge of property's value to lender to secure/assure repayment of the loan
   c. *Judgment lien* – after someone loses a lawsuit, lien can be placed on their personal or real property
   d. *Seller's lien* – if a buyer takes possession of real estate but has not yet paid everything owed to the seller

5. *Adverse possession* – owner can lose his/her ownership interest in some or all of a parcel of real estate if that owner does not exercise the rights of use and exclusion, and another party does exercise "rights" to use and exclude for a period of time specified by law. [Land that is not used is, in some sense, wasted, and a principle of property law is that waste should be avoided; recall how life tenants and cotenants in possession are not to engage in waste that could harm later possessors' interests. The legal term for an adverse possessor is a *disseizor*, and the party who loses the land to a claim of adverse possession is a *disseizee*. This topic is sometimes covered in a discussion of deeds and title, or maybe with easements by prescription, rather than as a private restriction on ownership.][17]

To gain ownership under adverse possession, the occupant must be using the property in the following manner:
   a. Actual and exclusive use (makes use of the land, excludes others as you would with your own land)
   b. Open and notorious (the land is used in a way that could be observed by an owner exercising ordinary care; a company using a subterranean cave that extended under a neighboring parcel was found not to meet the open and notorious requirement, because the activity took place far underground where it could not be seen)
   c. Hostile (denies rights of the true owner, does not have the true owner's permission to be on the land – but "hostile" does not have to involve an acrimonious relationship, except perhaps among relatives), and
   d. Under a claim of right (acts like he is the owner; the user may even think the land actually is his, but may in fact know he has no rightful claim and is strategically building a case for adverse possession – in one instance a couple made increasingly intensive use of a strip on what they knew was the adjacent vacant lot of absentee

owners, and after sufficient time they sued and won ownership of that strip by adverse possession)[18]

e. Continuous, with respect to the type of use (not just occasional use on a sporadic basis, which one court called "transitory trespass") for the requisite time period
f. In Illinois must also be able to describe the exact boundary lines of the land being claimed

The required time period to gain ownership through adverse possession in Illinois is 20 years, which is also the period under Illinois law for gaining an easement by prescription. (The statutory period for either interest tends to be shorter in the less densely populated western states, often five years – can be as short as 3 years in AZ, is 5 years in CA, 10 in IN and NY, 15 in MN and OK, 18 in CO, 20 in DE and HI, 21 in OH and PA, and a lengthy 30 in LA and NJ).[19] However, the period for adverse possession is reduced to seven years in Illinois if the possessor has "color of title," meaning a document that leads her to feel she has a legitimate claim (*e.g.*, maybe deed with incorrect legal description or from a party that did not have legitimate title, plus a receipt for property tax paid).

Adverse possession is like the big brother of easement by prescription; while some of the requisite conditions (open, continuous, hostile/user acting as though she has a right to do what she is doing) are similar, a successful lawsuit for adverse possession leads to the land user's becoming the owner, while a successful suit for an easement by prescription leads only to a permanent right for the user and subsequent owners of the "dominant estate" to use the "servient" land in a specific, limited manner. (Judges in the 2015 *Tumulty v. Schreppler* and 2023 *Banks v. Schrock* cases noted the irony of Delaware common law's imposing a "clear and convincing evidence" standard for easement by prescription, but a weaker "preponderance of evidence" standard for a more powerful adverse possession claim.)

But we must stress that in both situations the use must be hostile, meaning that the user does not have or seek the owner's permission – someone who has the owner's permission to use the land in question would probably be viewed by a court as having a license, and someone with a license = permission has no basis for gaining adverse possession or an easement by prescription, no matter how long the use continues (the "hostile" test is not met if the user has the owner's approval – but complications can arise on that front if the adverse user refuses to accept the owner's permission; "I don't need or want your permission," in which case the owner is probably wise to file a lawsuit for trespass, or "ejectment"). Interestingly, someone who has gained ownership through adverse possession no longer has to occupy the land to remain the legally rightful owner.

On the positive side, an owner who occupies land openly, continuously, and exclusively for the required period can cite what has been essentially her own adverse possession against the rest of the world as a defense against many types of third-party claims that might arise from before that owner's purchase. In fact, in Illinois a title search involving a typical residential property in a platted subdivision usually must cover transactions going back only to the first deed recorded more than 20 years earlier. A's house built in 1980 encroached slightly, and sheds built in 1990 sat completely, on neighbor B's land because of an incorrect survey. A's grantee C openly lived in the house until 2004 and maintained the sheds and surrounding grounds; B never complained. In 2004 C sold to D. In 2009 when B tried to keep his land classified as forest use for lower property taxes, a survey correctly showed the encroachments. B sued to have the buildings removed, but a court held that C had obtained ownership of the land the house and sheds sat on by adverse possession because of open use and care for more than the state's ten-year requirement, so D had gotten clean title from C. Also helping D's case was that he, and C before him, had regularly paid property tax bills that identified the sheds as part of the real estate being taxed – while, of course, B had not.[20] Arkansas law awards title to someone who has paid the property tax on unenclosed land for seven consecutive years, or fifteen consecutive years for "wild and unimproved" land.

Yet while paying property tax on the land in question can bolster someone's case when claiming ownership of an entire parcel by adverse possession, having paid the property taxes is not necessarily the final word on ownership. When an outdoorsman sought ownership through adverse possession of recreational land shown in public records with "owner unknown," a Delaware court noted favorably his having paid many years of unpaid property taxes, along with meeting open/ hostile/continuous use requirements.[21] In another Delaware case, however, when A claimed ownership by adverse possession of a portion of B's small tract onto which her animal pens long had encroached, having paid the property tax did not protect B from losing his entire lot. The judge decided it would be impractical to award A just part of B's land, carved from a platted lot inherited with his two brothers, and leave only a fraction of an acre, too small to sell (but, we might ask, even to his brothers/other adjoining land owner?).[22]

Although adverse possession can apply to entire parcels, its most frequent occurrence relates to *boundary disputes*. Building a fence around the land in question tends to bolster the adverse possessor's claim (creating a boundary by "practical location"); a farmer whose father had mistakenly placed a permanent fence past a neighboring parcel's boundary line gained adverse ownership of the 11-foot strip after using it (or leasing it to others who used it) exclusively, openly, and continuously for far longer than Minnesota's 15-year requirement. In one unusual case B put up a fence that did not include all of the land she had purchased from neighbor A, and A started using the

portion he had sold her that was not fenced. A court ruled that A's grantee C had obtained ownership of B's unfenced land through adverse possession, with C's period of use tacked onto A's to meet the state's twenty-year requirement, since A and C had both used the land openly.[23] X was Z's neighbor to the right, and X's brother Y was Z's left neighbor. Both built fences that encroached on Z's land. A court ruled that after twenty years both brothers had acquired the fenced portions by adverse possession, though Y's mere mowing of an unfenced lawn area that Z also mowed did not constitute "dominion and control" over the land that would give Z notice of a hostile claim.[24]

Filing a trespass suit interrupts a potential adverse possessor's claim of continuous occupancy. Court cases suggest that you can not gain title by adverse possession against fellow joint tenants, on the reasoning that possession can not be hostile within the special joint tenancy relationship. But someone can gain adverse possession against fellow tenants in common by "ousting" them from the land through direct steps to keep them away, like changing locks.

(The law presumes someone has the permission of her tenants in common to use the affected land, so actions that convey "I don't need or want your permission" are required to establish hostility on the user's part, and to put other co-owners on notice that they need to assert/protect their rights. When Florence Williams died with no will in 1960 her nine children inherited her 51-acre farm as equal tenants in common. But domineering son John moved into the house, allowing sister Rachel and her children to live there but telling the others to stay away, that the land was his, and generally they did; a few even legally signed over their interests without compensation. Kizer and another brother were often at the farm, but as John's hired workers, not as owners. Kizer's son Robert once brought cows to graze on land he felt his father had rights in, but John threatened to kill the cows and Robert if it ever happened again; Rachel's adult son was so concerned that John would carry out such a threat that he hid John's guns for a few days. After John died in 2001 Robert and other siblings' children sued, saying they had ownership rights in the land through their parents' status as tenants in common. But John's daughter and Rachel's two children, to whom John had left the land in his will, said John had become the sole owner through adverse possession. A court held that the other tenants in common had not taken meaningful steps to assert their ownership rights while John had met the test of ouster, gaining sole title through adverse possession against his fellow tenants in common.)[25]

A surprisingly similar case a few decades earlier had a different outcome. One brother who farmed jointly-inherited land and solely paid the property taxes was not granted ownership by adverse possession against his fellow tenants in common – the state court ruled that the brother in possession had taken no steps to show he was treating his use as adverse, and thus that use was deemed to be with the others' permission.[26]

Generally it is not possible to gain adverse possession of government-owned land.

(In 2019 Utah resident Andrew Blackwell was unhappy when an elderly owner refused to sell him her vacated $350,000 house for $90,000, so he just moved in, believing he could gain title through adverse possession. He changed the locks, removed all the furniture, cut down some trees, had utilities put in his name [a corporation he created], and even made some structural changes, all the while ignoring repeated orders from the police to stay off the property – apparently in the belief that violating these directives actually bolstered the case that he was occupying the property in a "hostile" manner. Charged with burglary, trespassing, theft, forgery, and stalking.)

As with easement by prescription, a series of adverse possessors all claiming rights through the same "chain of title" can ultimately gain ownership through *tacking*. For example, G occupies the property for 10 years, then sells his interest (whatever that may be) to H, and then H occupies the property for 10 years: H meets the 20-yr. requirement. (And there could have been different actual owners over the 20 years, such as J for four years and K for sixteen.) But the deed by which G purports to convey title to H should include the legal description of the land in question. Note that occupier G does not build time toward adverse possession if rightful owner J was insane, a minor, in a coma, or incarcerated in prison, and thus legally "disabled," at the start of the adverse possessory period.

A less contentious form of settling boundary issues than adverse possession is *acquiescence*, which must involve a strip of land along two adjoining tracts, a fence or other separator, and a mutual error on where the true property line is. Think of an owner who puts a fence up somewhere close to the neighboring border, the neighbor does not object (he acquiesces, there is no hostility), and the fence stays in place for a long time (generally 20 years in Illinois); after that time a court would likely rule the fence as the boundary, with one owner gaining a bit of land, one losing a bit.

Incidentally, because trespassers should not be rewarded, natural resources that include wild animals are seen legally as property of the owner of the land where those resources exist. A *private* land owner becomes the owner of any items found on her land. Under historical property law an item *lost* on *publicly* owned land (initial owner did not intend to part with it, perhaps it fell from a pocket) belongs to the finder, on the logic that the initial owner would not know where to look for it. Something *misplaced* on public land (rightful owner meant to put it where they did, but then forgot it) should be given to the land's manager for the benefit of the rightful owner, who would know

where to look. Today generally any items found on public land, whether lost or misplaced, are legally to be turned in to the land manager, with the finder getting it back if the rightful owner does not claim it in a reasonable time.

## II. Real Estate Taxes and Other Liens

A *lien* is a claim against the value of another party's property that can result in a judgment for damages by a court. It is enforced through legal action that could lead eventually to *foreclosure* and the forced sale of the property, though in many cases the lien's existence just prevents the owner from selling until owed amounts have been paid.

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| It may be either: | *Equitable* (voluntary) – with the consent of the owner (*e.g.*, a mortgage) or<br>*Statutory* (involuntary) – without consent of the owner (*e.g.*, a mechanic's lien) |
| Furthermore, it may be either: | *Specific* – *e.g.*, mortgage or tax lien against a specific parcel or parcels or<br>*General* – *e.g.*, judgment lien against all of someone's real & personal property |
| Finally, it may be either: | *Senior* – highest in the priority of claims or<br>*Junior* – subordinate to one or more other liens |

Seniority is normally based on the order in which the liens are recorded in local government property records (see Topic 5). But tax liens are an exception: they are senior to all other liens. Also, condominium (or other homeowner) association fees can be senior to mortgages. So you can see why mortgage lenders often collect property taxes along with loan payments, and why lenders will intervene if a borrower's condo fees are not paid.

Examples of Types of Liens:

A. *Mechanic's lien* – state laws provide for a worker or material supplier who provides goods or services that enhance a property's value to file an affidavit of lien, and then to have an enforceable lien until all amounts owed to them are paid – including interest (at 10% per year in Illinois!) and attorney fees. There was no right to this type of lien under common law. If solar energy is provided with leased panels the panel provider can file a lien against the property if the owner does not make the lease payments. (An auto mechanic has a right to be paid, and can place a mechanic's lien on a car worked on.)

Both general contractors and subcontractors can file mechanic's liens. Sometimes a home owner who has work done deals with a *general contractor*, who in turn hires and deals with *subcontractors* (plumbers, electricians, *etc*.). But a subcontractor would have a legal right to sue the home owner if not paid by the general contractor. So before a home owner (or the owner's lender) pays anything to the general contractor, the general contractor should provide an *affidavit* that all suppliers of materials and labor have been paid, and provide *lien waivers* obtained from any subcontractors certifying that the subcontractors have been paid and therefore no longer can file liens against the property's value. Since some time may pass before a worker has sent a bill and comes to realize that (s)he is not going to be paid, the law allows a statutory period (often 3 months, a bit longer at 4 months in Illinois) after work is completed before a lien must be filed and recorded. Then within two years the worker can start foreclosure action.

[What if a tradesperson who has not been paid realizes that the 4-month period has passed and (s)he has forgotten to file a lien, so he goes back to the property and does a little more work of a minor nature? Doing so does not revive the filing period.] Points to note:

- A mechanic's lien in some cases has priority even over a previously recorded mortgage, to the extent that the goods/services provided have increased the property's value above what it otherwise would be (which benefits the mortgage lender).
- Buyers must use caution – an enforceable mechanic's lien may exist even if it has not been recorded and the buyer does not know about it (because the 4-month filing period has not yet expired). That is one reason to buy title insurance.

And just as it generally is not possible to gain ownership by adverse possession against government-owned land, a labor or material provider generally can not enforce a mechanic's lien when government-owned land is improved.

B. *Property tax lien* – real estate value is the primary tax base for local government in most states (on average it provides about 75% of local government revenues). The U.S. Supreme Court held long ago that an *ad valorem* tax is not a taking of property, but a mandated contribution land owners make "for which they receive compensation in the protection government affords."[27] This tax can be a substantial amount, so both a buyer and a seller must be aware of the taxes for purposes of (1) price negotiation [property tax perceived as high relative to public services received makes it harder for the buyer to justify paying high price] and (2) proration at closing [the seller provides cash to offset the local property tax bill the buyer will get later; see example in Topic 8].

Real estate tax is an *ad valorem* tax – it is based on the value of the property; every parcel with a separate legal description is assigned a tax identification number by local government. In theory, we are basing people's taxes on their ability to pay (using property value as a proxy for someone's overall wealth). In practice, that is not necessarily the case – elderly people, for example, might have high-value homes but few other resources. The elderly in some states (including Illinois) therefore are given some relief from property taxes on residences.

*Property tax concepts:*
1. *Assessed value* – determined by an elected local *township assessor* in Illinois. In theory, a property's assessed value should be a close reflection of its true market value, estimated with standard real estate appraisal techniques. (When personal property is taxed the value base generally is the purchase price.) For some reason jurisdictions often assess only a portion of value (in most of Illinois real estate is assessed at ⅓ of market value, though in Cook County the figure is 10% for residential and most other types of property but 25% for industrial – and of course if local government assesses property at only a third of its value then it has to apply a tax rate three times as high to collect the real estate tax revenue needed to fund local government activities).

In practice, the estimate may not be quite that accurate because (1) reassessments are required by state law to be conducted only every four years [every three years in Cook County] and (2) some township assessors seem to consistently get their estimates a little high or low, as evidenced by average prices of properties that are sold relative to their assessed values. That is why, in addition to the *state equalization factor* applied by the state Department of Revenue, there may be a *county equalization factor* applied by the county's appointed *chief county assessment officer* or *supervisor of assessments*. Your assessed value, adjusted for these equalization factors, is your *equalized assessed value* (which is supposed to be a good reflection of true market value), to which the tax rate is applied.

A property owner who feels (s)he has been over-assessed can appeal the assessment to the elected county *Board of Review*, can further appeal to the *Illinois Property Tax Appeal Board* (PTAB), or, if not satisfied there, the courts. PTAB's web site notes that appeals can be based on disagreements with assessed values, and on charges of unequal treatment relative to other land.[28] (A tax assessor's registry of real estate ownership is called a cadastre, pronounced ca-DAS-ter.)[29] Land owned by government units, and often land owned by non-profits like hospitals and private universities, is not subject to property tax. Private institutions of this type sometimes make voluntary "PILOT" (payment in lieu of taxes) payments to local government to help cover the costs of public services, like police and fire protection, that they receive. But exempt entities sometimes resist making such payments; West Chester University refused to pay a storm water runoff "fee," successfully arguing the charge was not a usage fee but a tax, since no direct related benefit was received by the university, which had its own storm water management system.[30]

[Illinois governor J.B. Pritzker unleashed the "Toiletgate" scandal in 2015 by having all five toilets removed from a mansion he owned near Lincoln Park in Chicago, next door to his actual residence. The assessment fell to a fraction of what it would have been for a habitable structure, and Pritzker saved $331,000 in property tax over several years.[31] The way local government classifies vacant land can have a huge impact on how it is taxed. Famous liquor billionaire Tito Beveridge held some Austin, TX land for investment. One parcel assessed at $38.4 million would be taxed about $726,000 annually if just left vacant for future development, but because animals are kept on the land it qualifies as agricultural use, with $3,000 annual tax.[32] But some true agricultural activity would likely be required; a court held that land suitable for housing development in a residential area was not "agricultural" just because the owner had delayed his plan to build homes, and he occasionally picked walnuts from trees growing on the site.[33]]

2. *Tax rate* – usually stated in *mills* (⅒ of a cent per dollar, or $1 per thousand dollars, of assessed value). The rate is determined as total money needed ÷ total assessed value of all property in the jurisdiction. If it is 45 mills per dollar, then on a $150,000 home (with $50,000 equalized assessed value) the tax is .045 x $50,000 = $2,250. Actually, that rate is a composite of all local taxing authorities' rates. For example, city .013 + county .009 + township .004 + school district .012 + library district .002 + sanitary district .002 + park district .003 = .045.

The tax is collected by the county, which then allocates the appropriate sums to the other local governmental units. In Illinois, the *prior year's* taxes are due in two installments: *June 1* and *September 1* (or dates close to these). Some counties send both bills in one mailing (*e.g.*, McLean); others send two separate mailings (*e.g.*, Cook). Interesting tidbits: a January 25, 2021 *Chicago Tribune* editorial cautioning on property tax increases told of a 10,000 square foot mansion on Ardsley Road in Winnetka with a $675,000 annual property tax bill, and a commercial building at 300 E. Randolph Street in downtown Chicago with a $19,600,000 annual tax payment. A condo unit constituting a full upper floor of a Gold Coast building was billed $130,000 in yearly tax, while the owners of another upscale condo unit near Lake Shore and Oak Street had a relative bargain, paying only $48,000 annually. By way of comparison, your elderly instructor's $150,000-ish house in Normal had an annual property tax bill of just over $3,600 in that same general time period.

3. *Special assessment* – a lien for improvements that primarily benefit specific properties rather than the community as a whole (*e.g.*, new sewers in a neighborhood, or a gravel road is paved, as opposed to taxes to support schools or police city-wide). These assessments are paid in addition to the regular property taxes that support public services in general. Special assessments may be pending but not yet recorded, so buyer beware (see the comment on *Brewer v. Peatross* in Topic 5). Usually they are paid over a ten-year period (with each year's payment due on January 2).

[Interesting points: special assessments are not deductible as property taxes on your federal income tax return the way regular *ad valorem* property taxes are; instead, they increase the *basis* of, meaning amount paid for or invested in, your land. Also, government actions like road widening do not necessarily increase nearby private land values; courts have held that when road improvements serve the public, while reducing privacy for residents on those roads, special assessments on those residents are invalid and would amount to unjustified takings of their property.][34]

4. *Tax sale* – when the *ad valorem* tax on a parcel of real estate remains unpaid, the county holds an auction involving the property (based on rules that can differ, even across counties in the same state). [The U.S. Supreme Court has stated that "people must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property."[35]] Technically, though, in Illinois the *right to pay the taxes* is purchased. The successful bidder pays the taxes, in effect lending the owner money to pay the taxes. The bidder who succeeds is the one who *bids the lowest interest rate*. Then the owner has a time period set by law – two years in Illinois for most property types – to repay the money owed, plus interest and legal costs, to the tax sale buyer. If the owner does not pay these amounts, the tax buyer applies to the county for a *tax deed* and becomes the owner.

Historically, in fourteen states where counties sell tax-delinquent properties directly, if the sale brought more than the tax owed the defaulting owner did not get the difference back; local jurisdictions kept the full amount received. But then in May 2023 the U.S. Supreme Court ruled unanimously that Minnesota law violated U.S. Constitution 5th Amendment prohibitions on taking property without just compensation; the ruling invalidated a 1935 state statute that treated excess money received in a tax sale as not being "property." When the county sold 93 year-old widow Tyler's vacated condo unit over unpaid property taxes it kept all $40,000 in sale proceeds even though only $2,300 in back taxes and $13,000 in interest and penalties were owed, and it offered no avenue for appeal. The Court noted that, dating back to a 1798 statute, when taxes are due the U.S. government can take only enough of someone's land to pay what is owed, and most states have followed that rule. (There was actually a nationwide federal tax on land during the Civil War.) It observed that ceding $40,000 to meet a $15,000 debt forces a taxpayer to contribute far more than her fair share to the public coffers. It rejected the state's argument that in failing to pay the tax within the three-year permitted window Tyler had abandoned the property, and also rejected the argument that because she owed $49,000 on a mortgage loan and $12,000 in owner association fees Tyler had lost no property when the $25,000 surplus was not refunded (the Court pointed out that a refund could have been used toward paying off those debts). It further noted that after a Minnesota lender forecloses the defaulting borrower is refunded the sale price minus the debt and related fees owed, and that the state should have no more rights than a private party in a similar context. In fact, the state imposed that forfeiture only on real estate taxes owed, not when property was seized for unpaid personal property taxes.[36] Tyler was represented by the property rights-advocating Pacific Legal Foundation.

So can you make easy millions by bidding at tax sales? Of course not. First, if a property had much value, the owner would not want to lose his or her equity by letting taxes go unpaid (it would make far more sense to sell the real estate, pay the tax, and keep the difference toward making a fresh start). Second, if a lender is involved, it will either bid at the tax sale or exercise its legal right to buy from a successful bidder by paying the taxes and interest.

Interesting note: The late prominent local developer Jack Snyder is reported to have paid the delinquent property taxes of $25, in the early 1970s, to obtain a piece of Bloomington swampland that now is home to the Double Tree Hotel, Brickyard Apartments, and several other local businesses.[37]

5. *Impound* (sometimes "escrow") *payments* – because a tax lien is superior to all other liens (including first mortgages), a lender wants to be sure that local property taxes are being paid in full and in a timely manner. Therefore, unless the borrower has made a sizable down payment (20% or more), the lender has most of the money at risk and in turn typically requires 1/12 of the year's expected total property tax bill to be added to each monthly mortgage loan payment submitted. Then the lender's loan servicing department (or outside servicing firm) uses money in the borrower's escrow account to directly pay the tax. (Also if the borrower has not made a 20% down payment the lender typically requires 1/12 of the year's expected homeowner's insurance premium to be paid monthly so the loan servicing department can pay the premium and know the property is insured in case of fire/other perils.)

6. *Uniformity* – are property value assessments fair? This is more of a problem in areas (*e.g.*, California) where real estate is reassessed only when a property is sold. As noted, in Illinois, most real estate must be reassessed

every four years. Still, sometimes there are assertions that the most expensive residential properties are routinely underassessed relative to their true market values. (Question: is real estate value a fair and reasonable tax base?)

7. *Exemptions* – some home owners receive preferential treatment with regard to property tax in Illinois. Over age 65: equalized assessed value is effectively reduced by $5,000 (and assessments are frozen, meaning they do not rise as property values generally rise, for over-65 households with annual incomes less than $65,000). Disabled individuals in general: reduction of $2,000. Returning military veterans get a one-time $5,000 reduction. Disabled veterans and their surviving spouses: a $2,500 annual homestead exemption if 30% disabled, $5,000 if 50% disabled, and no property tax owed if 70% disabled (or for the surviving spouse if the service member is killed in the line of duty). All home owner/occupants get "homestead" assessed value reductions up to $6,000 (not for rental properties) relative to 1977 assessment levels, and all owners get a 4-year delay in assessment increases when they pay for improvements that increase their homes' market values (up to $75,000). Utah is a state that also allows extra property tax relief to the landlord of real estate that is used as the primary home of a lessee.[38]

8. *Tax land only*? Some analysts (dating back to 19th century journalist and economist Henry George, and carried on today by the Robert Schalkenbach Foundation) advocate taxing only the value of land, not improvements. The idea is that this plan would force land to be used in the most productive possible way, since the land owner is being taxed the same no matter what use the land is put to. In many jurisdictions today vacant land is taxed at a lower rate than land with buildings, often far lower, leading owners to hold parcels vacant in the hope they will become more profitable to develop later. Keeping a few head of livestock might even qualify land for agricultural classification, taxed even less intensively than vacant land. There have been efforts in Detroit, Philadelphia, and other cities to apply a split-rate *ad valorem* tax, with assessed values broken into land and improvements components (as most local government assessors have long done), and the land portion taxed at a higher rate to encourage construction of housing or other needed forms of improved real estate.[39] [Then again, real estate economist Peter Colwell has asked whether local assessors face pressure to overvalue commercial buildings and undervalue the accompanying land, getting the entire value estimate right for local property tax purposes while giving local business owners some cover to claim larger depreciation deductions in paying federal income tax.][40]

Local governments in many areas also have created "land banks" with power to acquire blighted or abandoned properties on which taxes are delinquent, and then resell those parcels with clear titles for development.

9. Changing real estate values and property tax – if market conditions push real estate values upward, a result could be higher assessed values and property taxes. But Illinois does have some potential protection against runaway tax increases. The Property Tax Extension Limitation Law (PTELL) limits increases over the prior year's bill to the lower of 5% or the CPI-based rate of inflation. But voters in counties outside the Chicago area must vote to have the law applied, and McLean County is one that has not.[41] The Truth in Taxation law requires any taxing district whose proposed overall collections are to exceed the prior year's by more than 5% to hold a hearing to get public input.[42]

And from the opposite perspective: post-Covid reductions in companies' use of office space can be expected to reduce the market (and, when reassessments are done, assessed) values of office buildings, compromising the property tax bases and taxes collected to fund schools and other local services in many communities. And higher interest rates, which limit what a buyer could justify paying, will likely reduce assessed values more. Washington, D.C., where reassessments occur annually, showed an 11% loss in privately owned office building values in 2021.

## III. Land Use Planning and Zoning

Why do governments control land use? Because of the principle of *conformity* (also to be discussed in our appraisal topic): property values tend to be maximized if land uses within close proximity conform (do not create *negative externalities* for each other). The value of a real estate owner's property is strongly influenced by zoning and other land use topics to be discussed in this section. Zoning also can be used to address problems like traffic congestion.

### A. *Legal Foundations of Land Use Regulation*

*Zoning* has become a governmental prerogative through the *police power*. (Recall that in regulating real estate, the government can exercise the rights of police power, taxation, eminent domain, and escheat.) The police power allows local government to regulate private activity (including the use of privately owned real estate) to protect the public's *health*, *safety*, and *general welfare*.

A question that often arises is whether a local government's regulatory activity amounts to an implicit *taking* of an individual's property. Local government's right to enact zoning laws can be traced to a few U.S. Supreme Court cases of long bygone days. (The issues focused on whether such restrictions constituted takings for which the owners should have been compensated for temporary or permanent loss of value to their land holdings.)

- A late 1880s brewery owner sued for compensation when his state enacted liquor prohibition; the Court ruled that someone should not be compensated for regulations that prevent them from harming the public's health and safety.[43]

- 1920s Real estate broker and investor Ambler sued the village of Euclid, Ohio over value lost when a new zoning ordinance restricted his land, which was in the path of expected commercial growth, to residential use. The Court stated that, in an era of growing population and intensive development, land use regulation was as essential in protecting the public as traffic regulation had become in the automobile age. [Because of this case, we refer to locally-determined land use regulation as *Euclidean* zoning.][44]

- A 1920s property owner sued when a new zoning ordinance restricted his prime commercial land (already surrounded by industrial uses) to residential use *while he was in the process of selling it*, and it might have been left with no value at all. The Court found the new law to be *arbitrary and irrational*, in that it harmed an individual land owner without benefiting the public.[45]

So there is a legal foundation for local zoning as long as it furthers the public's well-being without being arbitrary and irrational. If the land's use is limited, but the owner still can put the property to some beneficial economic use/earn a reasonable return on investment/not face significant diminution in value, a court would be unlikely to award the land owner any compensatory relief. (Some would argue that land use regulation does not constitute a taking as long as the owner of regulated land receives *implicit compensation* through protections arising from neighboring owners' need to comply with those same regulations.)

However, if the regulation were unusually severe the owner could bring a suit for *inverse condemnation*. (In *condemnation*, the government intentionally takes land and pays the owner. In inverse condemnation, the owner charges that specific government actions have restricted the owner's use or enjoyment of the land, or access to that land, in a manner that amounts to a taking, and demands payment.) The court might award relief to the owner if:

(1) the regulation prevented any reasonable use (new state mine subsidence restrictions prevented a coal company from mining on land on which it had subsurface rights; U.S. Supreme Court Justice Oliver Wendell Holmes stated that regulation is a taking when it goes "too far"[46]) or it thwarted the owner's "investment-backed expectations" (the Court held that banning a railroad from building a skyscraper in the air space atop its historical terminal still left it with the ability to collect rents and transfer its development rights to other downtown land owners),[47] and/or

(2) the regulation were found not to be necessary/helpful in promoting the public good (the U.S. Supreme Court has ruled, starting decades ago, that a state or city agency could not: force a private land owner to give the public a beach access easement in order to get a rebuilding permit,[48] use public safety arguments to prevent a contractor from building on beachfront lots over safety concerns when nearby existing houses were permitted to remain standing,[49] force a business to donate land for a public greenway as a condition of getting a permit to expand its parking lot,[50] or force a land owner to pay money rather than giving land to support public projects not necessitated by the improvements that the party wanted to make,[51] because there was no *essential nexus* between the land owner's desired actions and what public officials were telling the land owner to do). A more recent state appellate court ruling held that a car dealership could be required to pay for drainage improvements only in "rough proportionality" to the costs its proposed expansion would impose on the public through added water runoff.[52]

The U.S. Supreme Court also has ruled that land owners along a navigable river have property rights in land up to the river's high water mark, but not below the high water mark, so no taking of property occurs when government action, such as tearing down a dam, raises the water level and reduces the amount of dry ground.[53] In a 2021 Illinois case, Berwyn's city government agreed to street alterations when Turano Baking bought and tore down houses to expand parking across the alley from its Roosevelt Road plant. Street work reduced the number of public parking spots in the affected area, and RBD Properties alleged that less access to nearby parking harmed its apartment building's value and thus was a taking of its property. But a federal appellate court ruled that any lost value was minor, and RDB could not have suffered a taking of property because it never had property rights in public parking spots the work took away.[54]

B. *A General Overview of Land Use Regulation*

A local government controls land use through a comprehensive general plan, which includes *zoning regulations*, *subdivision regulations*, and *building codes*.

1. *Zoning*

Zoning is the restriction of specific geographic areas to specific uses, usually various levels of *Residential* (houses and apartments), *Commercial* (retail and office properties), and *Industrial* (factories and warehouses). For example,

R-1 might be single-family residential while R-2 is multi-family and R-3 is mobile home; I-1 might be light industrial while I-2 is heavy industrial). [There is no standard meaning of, for example, R-4: in upscale Cleveland suburb Mentor, Ohio R-4 involves single-family homes on lots at least a half acre in size, while in some other jurisdiction R-4 might designate duplexes and in another it could be large apartment complexes. Normal has no R-4 category, with R-3A/R-3B allowing medium/high-density multi-family residential development, while R1-A and R1-B are single-family residential categories with larger *vs*. smaller required lot sizes; see the town zoning map.[55]

A zoning law consists of an *ordinance* (explanations) and a *zoning map*. Zoning is usually, but not always, *cumulative*: an owner can put land to a *higher* (meaning less intensive), but *not lower* (meaning more intensive) use than the one specified. That is, typically you could build homes on commercially zoned land, but could not put a factory on land zoned residential. The idea is to prevent negative externalities. Interesting point: in Chicago there are areas where commercially zoned land *must* be used only for commercial purposes (a situation known as *exclusive use* zoning). In addition to identifying general use categories, zoning regulations can specify:

a. *Height limitations* – maximum number of feet or stories
b. *Bulk limitations* or floor area ratios – maximum building size relative to land area
c. *Minimum lot size* – particularly if private septic systems must be used (where there are no public sewers)
d. *Setback requirements* – to keep open spaces at the front and sides, particularly with regard to residential lots

Analysts may talk informally of "*spot zoning*," in which commercial uses appear intermittently within residential areas (assigning differential zoning to individual lots may have started with local government attempts to curtail crime or other undesired activities taking place at specific locations), and of "*strip zoning*," in which commercial uses appear in long strips along major streets. A problem with strip zoning of commercial uses is that it creates huge, elongated boundary areas with residential (and thereby imposes more externality complications).

An owner desiring a change in her property's zoning classification can approach the local zoning authority or courts to change or strike down the zoning law. Alternatively, a *zoning board of appeals* can grant a *special use permit* (*e.g*., a church in an R-1 area) or a *variance* (*e.g*., a reduction of side-yard requirements for a narrow lot if doing so relieves the owner of hardship she did not cause, and without imposing burdens on other owners or the community). A *conditional use permit* would let, *e.g.*, a grocery store or other essential business operate in a residential area. Zoning officials devote much of their time to dealing with variance and conditional use issues.

If an area's zoning changes (or a zoning plan is first enacted) after a property has already been adapted to a given use, the owner generally is granted permission to continue the *nonconforming use* of the property; otherwise the new restriction might constitute an uncompensated governmental taking of the property. [The owner may be restricted from expanding the building, or from rebuilding to the nonconforming use after a fire; and following a sale of the property a new owner might not be allowed to continue the nonconforming use.] A violation of the zoning laws can be enforced through fines, injunctions, or even court orders to demolish offending improvements. Interesting point: the city of *Houston, Texas has no comprehensive zoning* ordinance (also true in some other nearby towns). Uses seem to conform fairly well where private deed restrictions or homeowner association rules were well-designed, and the lack of restrictions allows for more intensive building and thus is said to contribute to housing affordability, and also attract businesses to the area. But there are a lot of unusual mixes of uses, such as a roller coaster or even oil refinery built very close to existing family homes. Elections have been held in Houston three times, the most recent in 1993, and the voters always have rejected the imposition of a zoning ordinance.[56]

2. *Subdivision Regulations*

These regulations are rules outlining what a developer must do in *planning and laying out a new subdivision* (splitting land into two or more separate parcels). Examples: construction requirements for streets and drainage systems, requirements that power lines be underground. The idea is to protect people who will eventually buy the subdivided lots, and to reduce burdens that taxpayers could face if the developer did not provide adequately for streets, sewers, *etc*.

The developer meets with the planning board in an informal pre-application conference, then proceeds with a *preliminary plat* (a map showing streets, lots, utility easements), then (after approval) completes construction of the streets, sewers, *etc*. (sidewalks usually are the responsibility of individual lot owners), and finally submits a *final plat*. If the subdivision is for commercial/industrial use, a *site plan review* of each parcel may be required. A typical requirement placed by local governments on subdivision developers is *mandatory dedication* – the developer must donate land for streets, and also for such public uses as parks and schools. The required donation of land or payment of *impact fees* has raised court challenges in recent years.

3. *Building Codes* – detailed standards on construction methods and materials, to promote quality and safety (particularly fire safety). The owner of a new building is given an *occupancy permit* only after the local government's inspector has determined that the property is "up to code." The Leadership in Energy and Environmental Design (LEED) organization has issued standards for "green" construction (to promote energy and water conservation, for example), that some local governments have incorporated into their building codes.

4. *Recent Issues in Land Use Regulation*

a. *Planned Unit Development* (PUD). Typical zoning, as discussed above, calls for separating residential from business areas. In a PUD, supporting retail, commercial, and recreational uses are planned for and incorporated into the residential area, keeping supporting uses close by, sometimes within walking distance. (To be a genuine PUD, it should be ten acres or larger, but this general concept is increasingly being used in new developments.) The California firm proposing what would be the nation's tallest building, the 1,907-foot tall Boardwalk at Bricktown tower in Oklahoma City, sought a Simplified Planned Unit Development (SPUD) zoning classification for the 134-story mixed-use development (retail, restaurants, offices, residential condominiums).[57]

b. *Performance zoning* – the local government sets standards on, for example, noise and pollution. Any use that does not violate the guidelines is permitted.

c. *"Exclusionary" vs. "Inclusionary" Zoning* – zoning in some communities has been criticized as "exclusionary" because its requirements for large lot sizes or prohibitions against multi-family housing serve to exclude residents without high incomes. So officials in some areas strive to make their zoning "inclusionary" by *requiring* developers who wish to build big, expensive houses also to provide for *low/moderate income housing*. (A Georgetown University law and public policy professor states that zoning ordinances a century ago often were designed to prevent racial minorities from moving into specific areas, while today's zoning-based discrimination involves keeping lower income residents out. He states that some of the worst cases involve high income communities with highly educated people who are prejudiced against the less educated, even when such areas are racially integrated.[58])

d. *Incentive zoning* – developers who provide desired public amenities, such as open spaces or pedestrian plazas, are allowed to develop more intensively than otherwise would be permitted. Florida's "Live Local Act" allows exclusion from some local zoning restrictions for a developer that includes housing for middle-income renters (so that people who work in service jobs are not priced out of the community's housing market).[59]

e. *Transfer of Development Rights* (TDRs) – property owners who do not wish to (or are not permitted to) develop their properties to the typical degree of intensity can sell their development rights to nearby owners, who in turn can develop their own properties more intensively. (Simple example: local zoning allows two parties each to build to a height of ten stories. One chooses to build only to five stories, but sells his/her development rights, and the other can build to fifteen stories. The government still meets its goal of keeping some air space open.)

f. *Historic Preservation Districts* – areas with many older homes or other structures may be rezoned in a way that restricts physical changes in improvements to be in keeping with the character of the neighborhood. (For example, owner can not use a paint color, or even a doorknob, unless it is of a type that was in use 100 years ago.) These are nice areas to visit, but expensive ones to own homes in (though owners sometimes receive property tax benefits).

g. *Growth management* – in recent years, some cities have tried to restrict, rather than encourage, population growth. Techniques tried have included the refusal to extend city services and the requirement of large minimum lot sizes. *Smart growth* and *urban sprawl* have become modern buzz words. (Arguments for keeping cities more compact became less convincing when the Covid-19 crisis hit, and high contagion levels were seen in densely populated areas like New York City.)

The tendency is for courts to uphold growth control ordinances if they promote public health/safety and orderly growth, but to strike down laws that would discourage low-income families, especially racial minorities, from moving to an area. (If a plan includes low-income housing, courts are not likely to interfere.)

h. *Environmental Protection Laws* – local or state governments can require developers to submit environmental impact reports before beginning construction. Noise and hazardous wastes are of primary concern, but even uses that are merely unsightly (billboards) can be prohibited.

i. *Open space requirements* – these have been used in recent years, especially in metropolitan downtown areas. •

[1] Grotius, Hugo. *On the Law of War and Peace*. 1625.
[2] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

[3] True since 2007 changes to the Illinois Eminent Domain Act.
[4] *City of Chicago v. Gorham* (Illinois appellate court, 1980).
[5] *Poletown Neighborhood Council v. Detroit* (Michigan supreme court, 1980).
[6] *Hawaii Housing Authority v. Midkiff* (U.S. Supreme Court, 1984).
[7] *Kelo v. City of New London* (U.S. Supreme Court, 2006).
[8] *Ohio History Connection v. Moundbuilders Country Club Company* (Ohio supreme court, 2022).
[9] *Village of Euclid v. Ambler Realty Company* (U.S. Supreme Court, 1922).
[10] *Spur Industries v. Del Webb Development* (Arizona supreme court, 1972).
[11] Bernstein, Fred A. "Finding Room for the Locals." *The Wall Street Journal*, November 17, 2023, M1, M8-9.
[12] *Kelly v. Lovejoy* (Montana supreme court, 1977).
[13] *Watts v. Fritz* (Illinois supreme court, 1963).
[14] *Norris v. Williams* (Maryland appellate court, 1947).
[15] Betz, Bradford. "Mississippi Couple Facing Jail Time for Living in RV After Fire Partially Burned Home." *WDBD Fox 40*, Jackson, MS, November 14, 2019.
[16] Grant, Peter. "Entrepreneur Bets RV Storage Will Be the Next Big Thing." *The Wall Street Journal*, August 17, 2022.
[17] Adverse possession is called *acquisitive prescription* in Louisiana, with legal traditions based on the Napoleonic civil law code rather than English common law.
[18] *Walling v. Przybylo* (New York appellate court, 2026). Also see *Tumulty v. Schreppler* (Delaware appellate court, 2015, discussed later).
[19] Doskow, Emily. "State-by-State Rules on Adverse Possession." *NOLO*, referenced January 10, 2024.
[20] *Card v. Sprinkle* (Indiana appellate court, 2022).
[21] *Tumulty v. Schreppler* (Delaware trial court, 2015).
[22] *Banks v. Schrock* (Delaware trial court, 2023). Mr. Banks stated, in reply to a question from your ancient instructor in a December 2023 e-mail exchange, that the judge did not consult with him before awarding Ms. Schrock Mr. Banks's entire parcel, and not just the part she had openly occupied.
[23] *Lindl v. Ozanne* (Wisconsin appellate court, 1978).
[24] *Thornton v. Driscoll* (Massachusetts land court, 2022).
[25] *Williams v. Williams-Farley* (Mississippi appellate court, 2006).
[26] *Jones v. Ball* (Alabama supreme court, 1975).
[27] *County of Mobile v. Kimball* (U.S. Supreme Court, 1881).
[28] See Illinois Department of Revenue. *Assessment Appeals – Property Tax*. https://tax.illinois.gov/localgovernments/property/appeals.html.
[29] *Cadasta* is a digital platform used by officials in some third-world countries to map and register land toward resolving title disputes; see "Parcels, Plots, and Power," *The Economist*, September 12, 2020.
[30] *Borough of West Chester v. State System of Higher Education*, Pennsylvania trial court, 2023.
[31] Editorial Board. "Pritzker and Those Toilets: A 'Scheme to Defraud.'" *Chicago Tribune*, October 2, 2018.
[32] Putzier, Konrad. "Sunbelt Land Boom Brings Big Profits and Big Risks." *The Wall Street Journal*, August 9, 2022.
[33] *Nudo Holdings v. Kenosha* (Wisconsin supreme court, 2022).
[34] See *Fluckey v. Plymouth* (Michigan supreme court, 1960), *DeFraties v. Kansas City* (Missouri supreme court, 1975), and *Sears v. City of Columbia* (Missouri appellate court, 1983).
[35] *Jones v. Flowers* (U.S. Supreme Court, 2006).
[36] *Tyler v. Hennepin County* (U.S. Supreme Court, 2023).
[37] Flick, Bill. "Pencils Out for This B-N Quiz." *The Pantagraph*, July 16, 2023, p. A15.
[38] A point mentioned in *Stirling v. County of Leelanau* (Michigan supreme court, 2023).
[39] Putzier, Conrad, "Housing Shortage Reflects the Cheap Cost of Holding Vacant Land," *The Wall Street Journal*, November 22, 2022.
[40] Colwell, Peter F. "Ask the Cynical Assessor." *Illinois Real Estate Letter*, Winter/Spring 1993, 7.
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