

Real Property III/Mortgages

Restrictive Covenant - A almost always loses - lack of horizontal privity

Equitable Servitude - Runs with the land against subsequent purchasers with notice - treated like easement. Mutual enforcement, so each lot owner can mutually enforce. With a subdivision, the biggest problem is the original owner (divider's) intent - if most of the lots have the restriction, can enforce against the other lots. See if most of the lots have the restriction. Requirements:

- 1) Restrictive Covenant in writing
- 2) Intention of O - infer from COMMON BUILDING PLAN
- 3) Notice to defendant - Defendant purchased with notice of restriction (in deed)

Personal Defenses to immediate parties (Does not sever the group restriction)

- 1) Clean hands - plaintiff can't have committed the same infraction
 - 2) Acquiescence - Plaintiff can't have allowed a previous party to commit the infraction
 - 3) Laches - Unreasonable delay causing hardship
 - 4) Estoppel - material reliance on plaintiff's assertions the infraction was fine
- NY DISTINCTION - 2 year statute of limitations

Absent a mutually agreed release, the only ability to terminate is CHANGED CONDITIONS - All or nothing - only when changes in unrestricted area adversely affects ALL the restricted lots - can never remove the restriction from just individual lots

METHODS BY WHICH PROPERTY CAN BE ACQUIRED, RETAINED, and TRANSFERRED

Adverse possession - HELUVA - If elements satisfied, owner is one HELUVA mess

H-Hostile - X has no permission & is holding against the interests of the owner

E-Exclusive - X has control - excluding others

L-Lasting - X's acts must last for full period - 20 years (NY DISTINCTION - 10 years)

U-Uninterrupted throughout period - if x leaves & comes back, must start all over

V-Visible - X's acts must be visible & notorious - is x in control of the land

A-Actual - X must actually possess - constructive possession is no good

Actual knowledge is not required, lack of X's claim is irrelevant

Special rules:

1) Constructive Adverse Possession - If x enters a partition of unitary tract (false deed or island) and remains on partition, at end of Statute X owns the entire tract, not just his occupied portion - serves to expand his adverse possession to the boundaries

2) Co-tenants - can't gain adverse possession against each other unless oust the other co-tenant for period

3) Life tenant - remainder problem - O conveys legal title to unoccupied land to L, remainder to R. THEREAFTER, X enters & remains for 22 years - X only gets the life estate, has to start over against remainder. If he entered BEFORE the division, he gets whole thing

4) Tacking - anything goes - A possess 10 years then dies, B (in privity with A) continues. After 10 years, B gets it

5) Disabilities - if X enters and AFTER the owner becomes insane for 25 years

then becomes sane, owner loses - intervening disability does not
toll the statute - the true owner must be disabled the date of entry

Recording (Retention)

At common law, in absence of recording statute, "First in time, First in Right"

Notice statute - B protected if buys land without notice of A's conveyance - if B buys BEFORE A records, B wins, regardless of who records first

Race-Notice - B must purchase BEFORE A recorded, AND B must RECORD before A does

Title Search

Every deed indexed by every grantor and separately by grantee alphabetically

1) Must first establish a chain of title for 60 years

2) Using grantor index, must examine (adverse) each grantee from each grantor to see what each grantor did with the land during their period of record ownership -
check for incumbrances or conveyances (fatal break in chain of title)

Legal Blinders - Attorney doesn't look before or after the deeds - only looks at each grantor during the period of ownership (record notice)

Bona Fide Purchaser - B must purchase from O, in good faith, for value, without notice of A

1) Value - Bargain Basement Sale OK - absent an explicit claim of fraud, irrelevant that money paid is less than value of land. Lien creditors are not protected parties,
but mortgagees are. Doomed Donee - O's heir always loses because not purchaser for value

2) Without notice of A

a) Actual notice - from whatever source dooms B

b) Record Notice - Constructive notice from records

i) chain of title limitation - A's recording is outside of title & gives no record notice to B when:

(1) A records too late (after B gets title)

(2) A records too early (before A gets title)

Recording errors - recorded moment deed handed to clerk - B loses

Inquiry Notice - If B has facts that would leave a reasonable person to search, B must undertake

1) Must first examine the records & therefore on inquiry notice of any unrecorded instrument if referred to in recorded instrument

2) Must then examine the land - on inquiry notice on what examination of the property would reveal

Conveyancing (transfer) - 1) Contract itself, & 2) deed

1) Land sale contract - Governed by General contract principles - stat. of frauds - can't sue on contract unless in writing

Part performance - equity takes removes the statute of frauds writing requirement only if clear & convincing proof of:

a) buyer must show the oral agreement's terms were clear

b) acts of part performance must be SUPERPROOF

i) buyer takes possession of land & pays full consideration, or

ii) buyer takes possession & makes substantial improvements

2) Legal Effect of Land Contract - Risk of loss & EQUITABLE CONVERSION - the moment the contract is signed there is an immediate change of ownership - seller holds the title only to secure the debt, buyer immediately owns land subject to the debt, even if contract requires transfer of the deed 1 year later.

Destruction - in the interim between contract & closing, the buyer bears the risk of loss, even if seller was in possession

NY DISTINCTION - Uniform vendor & risk act - party in possession until date of closing bears risk

3) Implied warranties - caveat emptor

Implied warranty of marketable title in every land contract, needn't be perfect title, just one a reasonable purchaser would accept - seller must give

a) clear record proof - provable record title, adverse possession not good enough

b) title free from encumbrances - easement or restrictive covenant

c) possessory estate (possession) - must deliver land when required at time of closing

DEED

Doctrine of Merger - when deed delivered, the contract is merged with the deed and is destroyed, the deed is the party's only agreement

Formalities of execution - must be in writing, name the grantor & grantee, a granting clause, & description of the land. Minor discrepancy ok

Beware: if there is some convoluted description of the estate that is unclear, may not sufficiently describe the land

Delivery of deed - absolutely necessary, need not be physical delivery. Test: did the grantor have PRESENT INTENT to part with the land?

Conditional delivery - must use escrow - hand to 3rd party escrow agent to hold until condition (usually payment) made - still need present intent

Covenants of Title

Quitclaim deed - when deed is silent - any interest seller has belongs to buyer, but no promises to buyer

Present Covenants - can sue immediately - immediate cause of action. Only present grantee can sue

Covenant of seisin - the only promise is that seller will deliver possession

Covenant of right to convey - same as covenant of seisin - only promise is delivery of possession

Covenant against encumbrances - in addition guarantees no easements or restrictive encumbrances

Future Covenants - can not sue until damaged in future - must first be an ouster - everybody can sue, runs with the land to any subsequent purchaser

Covenant of general warranty (quiet enjoyment) - O promises to defend in future against any 3rd party interference once it materializes

Covenant for future assurances - If forgot to sign the deed, bring it back and will reconvey

Measure of damages (Limited liability rule) - Allowed to recover value of land limited by the purchase price paid to defendant + out of pocket expenses

Financing the Conveyances (mortgages)

Mortgage is union of 2 key elements - a DEBT (the loan or note) & a VOLUNTARY TRANSFER OF AN INTEREST (written) to secure the debt

Can be called a mortgage, deed of trust, sale-lease-back, or installment land contract)

Equitable mortgage (absolute deed) - a deed absolute on its face but with evidence between the parties can be shown to be security for the debt - look out for 3rd parties, if creditor conveys, bona fide purchaser wins

Rights of O after mortgage - O retains full rights of land as if there were no mortgage

Rights of Creditor - only right to look to the land IF AND ONLY IF there is a default

Foreclosure - right to foreclose only through APPROPRIATE JUDICIAL PROCEDURES - no self help. Foreclose down, eliminate all inferior rights of creditors

O must redeem up (O has the equity of redemption)

Transfers by mortgagor & Mortgagee - if O1 sells to O2 "subject to" the mortgage, only O1 is personally liable, O2 has no obligation. If O2 "assumes" the mortgage, both are personally liable - O1 is secondarily liable

Priorities - rights between creditor & 3rd parties (think of as going to movies)

1) Record the mortgage (get a ticket)

2) First in time, first in right (wait in line) - prevail over subsequents but junior to prior recordings. Foreclose down, senior creditors unaffected

3) Purchase money mortgage superpriority (movie star) - can beat earlier priorities - exists from any mortgage O takes to purchase w/creditor's money

Rights incidental to land ownership (bonus rights)

1) Right to support - Common law right of support is only in support of the land's natural unimproved condition, not to any structures on the land, unless can show B's actions would have caused land to collapse even without the structure (get full damages)

2) Water rights

a) Riparian rights - any land bordering surface water, get to use that water. Entitled to use all water necessary for domestic purposes, even if deprives person downstream. Commercial use - limited to reasonable use of water, can't substantially impair quality or supply

b) Percolating (underground) water - A sinks well 100', B sinks well 200'. Under common law B had absolute ownership. Today B is limited to reasonable use - no waste to detriment of neighbor

Controls on land use

Private controls - coops and condominiums

Coop - shares in corporation, title vests in corporation, each member has proprietary lease. Only a blanket mortgage over the entire property. Tax liability is joint and severally liable to entire tax amount. Courts have held that because of the economic dependency there is a RESTRAINT ON ALIENATION unless approved by 2/3 board of directors

Condominium - Owner gets title in fee simple of his unit and only has common ownership with common areas. Tax liability is several, mortgage only to the unit. Because each individual has own interest, any RESTRAINT ON ALIENATION IS VOID, but can

require right of first refusal to condo association.

Public Controls of land ownership : Zoning

City A has fixed boundaries each with particular use, O owns land just designated residential. Before enacted, O was operating shoe factory

1) Zoning valid? Locus Test - How does it work citywide? - If reasonable to city it is valid & constitutional even if bad to a particular individual

2) What about shoe factory? Nothing - non conforming use, because was in use already, can't be eliminated, but can require termination at end of use (end of amortization of factory)

3) Escape - the only way to escape the ordinance is to get a variance - must show unnecessary hardship:

a) Land can't yield a reasonable return if used as zoned

b) Must show variance with not alter character of zone (almost never passes this) - shoe factory will disrupt housing