



Weekly Information Sheet 11

Real Property – Land Use

The Value of Title Searches

- *A purchaser can only get the property rights of the seller*
- *Title searches identify the property rights the seller has*
- *Title searches prevent mistakes like the Creamery Bldg.*
- *Title searches make the buyer eligible for title insurance*
- *Title insurance guarantees rights found in title searches*
- *Title searches help the buyer know what they purchase*

Nuisance

Generally

The law has long recognized the concept that one must not use one's property to injure another's property.

When this type of conduct occurs it can legally be classified as **Nuisance**.

There are two types of **Nuisance**.

- **Private Nuisance** – A private nuisance is the substantial interference with private rights to use and enjoy land, produced by either intentional and unreasonable conduct, or by unintentional conduct that is either negligent, reckless, or so inherently dangerous that strict liability is applied.
- **Public Nuisance** – A Nuisance that affects the rights held in common by many landowners, i.e. the public, rather than the specific rights of an individual, targeted landowner can be classified as a public nuisance.

Remedies for Nuisance

Remedies for nuisance include remedies at law and equity or both.

As a result, a party who has suffered a nuisance can bring an action for:

- **Money Damages;**
- **Injunction** (to have the person creating the nuisance cease creating it); or
- **Both**

Real Property – Continued

Trespass Generally

The law has also long recognized the concept that a property owner is entitled to use one's property with out interference from others.

It is the ultimate right of exclusion, and thus property owners have an inherent right to exclude those who wish to so interfere.

When this type of physical interference occurs, it can legally be classified as *Trespass*.

- **Trespass Defined** – At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a trespass. Although recent developments in the law have focused on carving out special exceptions to liability, the basic liability standards have not changed.

Special Issues with Trespass

- **Intent** - The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith, knowledge, and fault are irrelevant. A person commits trespass, even if they merely walk across a property owner's land, mistakenly believing it to be their own. The trespass doctrine requires only that the trespasser intended to enter onto the land as a matter of free choice, not that he had a subjective intent to trespass or even knew he was trespassing.
- **Entry** - Although trespass always involves a physical invasion, a trespass may occur without any personal entry by the trespasser. For a trespasser will also be liable in trespass, if they cause a thing or a third person to enter the property owner's land. This doctrine also applies to entries below the land surface (e.g., through tunnels or caves) as well as-at least partially to entries in the air space over the land.
- **Exceptions** - An entry under a legally recognized privilege does not constitute a trespass. A privileged entry is one made with the landowner's consent. If an owner invites a repairman onto their land to fix a leaky pipe, then the workman's entry is privileged. Privilege may also be found of necessity. A firefighter may enter private property to save an adjacent house from fire. A police officer may enter to arrest a suspect. Private persons can also be found to have a privilege to enter another's land in an emergency situation (e.g., while fleeing from an attacking bear).

Remedies for Trespass

Remedies for trespass also include remedies at law and equity or both.

As a result, a party who has suffered a nuisance can bring an action for:

- **Money Damages**; (can be nominal – unlike most actions no need to demonstrate actual harm, only the trespass itself – could be \$1)
- **Injunction** (called ejectment, to have the trespasser removed from the property and/or enjoined from re-entering it); or
- **Both**

Zoning

Generally

Zoning is the use of governmental power to regulate land use.

Zoning laws divide a political jurisdiction into specific separate geographic areas and impose limits on the permissible uses of land within each area.

Zoning has several legitimate objectives:

- To *prevent incompatible uses* from occurring (thus reducing the need for nuisance law),
- To *increase property values* generally by minimizing use conflicts (thus increasing the property tax base), and
- To *channel development into patterns that may serve larger social goals* (e.g., reduce urban sprawl to conserve resources and reduce air pollution from automobiles).
- **Trespass Defined** – Zoning is the use of public power to impose uniform results that might otherwise be accomplished in more piecemeal and selective fashion by private bargains.

Special Issues with Zoning

- **Use Limitations** - Zoning limits the use that may be made of property. Usually an area is zoned for a particular use (such as commercial, industrial, agricultural, residential).
- **Performed at the Local Level** - Zoning laws are local ordinances, enacted by cities, towns or villages, pursuant to legal authority conferred by a state enabling act. They must comply with the enabling state enabling act, as well as the state and federal constitutions, and all other state or federal laws that limit zoning power.
- **What Zoning Ordinances Do** - Zoning ordinances address many specific land uses such as density, aesthetics, or household composition, and when enacted, restrict or prohibit some prior lawful uses (but only most often only in new circumstances). Accordingly, to avoid challenges to the validity of the newly imposed regulation, zoning laws typically permit nonconforming uses to continue for a limited period of time (or for pre-existing property owners). Thus if an owner discontinues the use, it generally may not be renewed or taken up by a new owner.
- **Variances** – Variances are where the Zoning Board of Appeals grants an exception to the property owner from the ordinance, thus permitting otherwise prohibited uses or deviations from density or area controls. Zoning variances are granted only to alleviate undue hardships not of the applicant's creation.
- **Flexibility** - Exceptional uses are permitted by the zoning law under flexible criteria specified in the law.
- **Amendments and Spot Zoning** - Zoning amendments present the problem of spot zoning, an amendment that confers benefits on a discrete parcel without any public benefit, and often in disregard of the comprehensive use plan that zoning is supposed to implement.
- **Limitations on Zoning** - Constitutional and statutory law impose limits on the zoning power. Zoning for aesthetic purposes is generally permitted, particularly when it upholds property values. When zoning restricts free speech it is presumed void and the government has a heavy burden of justification. Zoning that restricts the ability of people related by blood or marriage to live together is presumed void, while zoning that restricts the ability of unrelated people to live together is presumptively valid.

Eminent Domain

Generally

The power of eminent domain is the power of a governmental body to take private property for public purposes.

The law places the particular focus upon the Governmental Entity seeking to take the property.

Constitutional Requirements:

Eminent domain takings, pursuant to Article V of the United States Constitution (the takings clause), requires a public purpose and just compensation.

These constitutional requirements apply to all governments and protects all forms of property. A taking occurs that requires these Constitutional protections whenever a regulation permanently dispossesses an owner or prevents their use and enjoyment of the property.

- **Public Use** - The public use requirement is satisfied so long as there is a conceivable public purpose for the taking.
- **Compensation** - Compensation for the taking must be the market value of the property. The amount of compensation is the current market value not the value that will occur due to the public improvement. Compensation is required for regulations that constitute takings, no matter how long or short the regulation may endure.

Case Law on Takings Clause

Case law in both federal and state courts has outline what is required to take property consistent with the “takings clause”. This case law has held:

- All governments in the United States have the power to take private property for public purposes, but that power (the eminent domain power) is limited by the U.S. Constitution, state constitutions, state statutes and judicial decisions.
- The U.S. Constitution's Fifth Amendment specifically provides that "private property [shall not] be taken for public use without just compensation." This is called the "takings clause" or the “eminent domain” clause.
- These requirements protect all property and applies to all governments.
- The takings clause serves two important and related purposes.
 1. Prevent forcible redistribution of property
 2. Takings permitted only for public benefit

The Controversy and Meaning of Public Use

A literal reading of the Constitution's text in the takings clause would limit governmental power to only take private property to instances where the property will actually be used by the public (e.g., as a park. school. road, or military base).

Case law has held however, that what actually can constitute a public use can be much broader.

The question becomes pronounced when seizures are designed to produce some collateral public benefit.

In the Kelo decision, the Supreme Court of the United States held that the elimination of blight or the purpose of urban renewal can be enough of a public use to allow a taking under eminent domain.