Section 9 – Part 3

SLIDE 1 – Ownership Limitations and Restrictions

In this section we'll discuss the kinds of restrictions that can placed on property ownership and usage whether that restriction is by a government entity or by some deed restriction, such as those you might find in a planned community development or home owners association.

We'll wrap up this lesson by covering the restrictive aspects of leases and liens.

SLIDE 2

Government restrictions

Just because a property owner has a full bundle of rights that doesn't mean anything goes.

Private home ownership is almost always influenced by and subject to many legal entities of government.

This aspect of government is referred to as P.E.T.E.

- **P**olice power
- **E**minent domain
- **T**axation
- **E**scheat

SLIDE 3

Police powers

Police powers isn't just your local law enforcement. It is any entity of government – city, county, state or federal that enact and enforce laws written for the greater good.

Zoning regulations, building codes, environmental and social laws are prime examples.

SLIDE 4

Eminent domain

With a process called Judicial Condemnation, a government or public entity can take ownership of a piece of property for the public good, under these conditions:

- Owner must be compensated
- Owner must have due process

Say for example, a city government wants to widen a highway to accommodate growth.

The government uses eminent domain to condemn and purchase all properties abutting the thoroughfare in order to complete the construction project.

Owners affected by the eminent domain may take advantage of due process if they feel the compensation is inadequate or the project is not for the public good.

SLIDE 5

Taxation

The government has the legal right to collect taxes that fund services such as police, fire and rescue, and more.

The two types of taxation are:

- **Special assessment** – a one-time fee for something that affects one particular property – such as curbs and gutters replaced
- **Ad Valorem** – a value added tax that are based on property value and cost of community services

SLIDE 6

Escheat

If a property owner dies without a will and without legal heirs, the state government can take legal title to the property.

Also, if the property owner fails to pay taxes the state can take ownership.

SLIDE 7

PRIVATE RESTRICTIONS

Deed restrictions

It's uncommon to find property without restrictions. Previous owners or developers generally have some kind of restriction on the use of the property.

Any deed provision that limits or prohibits how a property is used is called a **restrictive covenant**.

SLIDE 8

PRIVATE RESTRICTIONS

Any restriction found to be discriminatory and violating the fair housing laws are not enforceable.

If restrictions are not enforced over an extended period of time courts may rule that consent is implied and rule in favor of the grantee.

SLIDE 9

EASEMENTS

An easement is an interest in real property giving the holder the right to use portions of the legal owner's real property in a defined way.

Easement rights may apply to a property's surface, subsurface, or airspace, and must be defined.

The receiver of the easement is the benefited party; the giver of the easement is the burdened party.

SLIDE 10

EASEMENTS

Easements only give another the right to USE a portion of a property. The owner retains all ownership rights.

Easements generally only allow the rights of ingress (to enter) or egress (to exit).

An easement is an interest or claim on the property. It is not an estate.

Over the next few slides we'll take a look at some different types of easements.

SLIDE 11

EASEMENTS

Appurtenant – An easement appurtenant gives a property owner a right of usage to portions of an adjoining property owned by another party.

The property enjoying the usage right is called the dominant tenement or dominant estate.

The property containing the physical easement itself is the servient tenement, since it must serve the easement use.

SLIDE 12

EASEMENTS

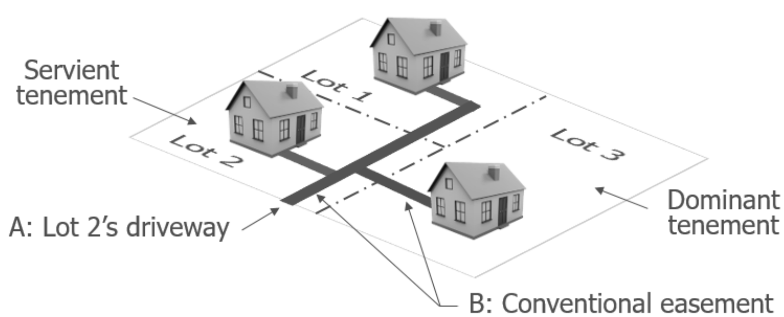
Appurtenant – Example

Here's an example of an appurtenant easement.

The driveway marked A belongs to Lot 2.

An easement appurtenant, marked B, allows Lot 3 to use Lot 2's driveway.

Lot 3 is the dominant tenement; Lot 2 is the servient tenement.



SLIDE 13

EASEMENTS

By necessity – An appurtenant granted by a court of law to a property owner because of a circumstance of necessity, most commonly the need for access to a property.

Property cannot be legally landlocked, or without legal access to a public thoroughfare

Courts will grant property owners an easement by necessity over an adjoining property that has access to a thoroughfare.

In this case the landlocked party becomes the dominant tenement, and the property containing the easement is the servient tenement.

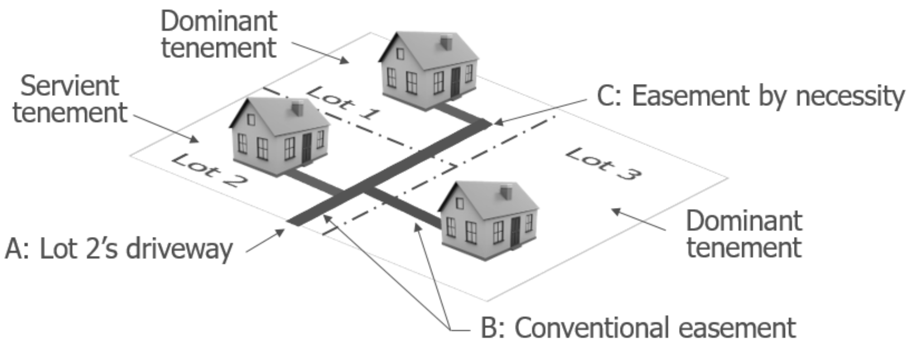
SLIDE 14

EASEMENTS

By necessity – Example

Since Lot 1 has no public thoroughfare access, the lot 1 owner petitions a court of law and is granted an easement by necessity.

Lot 1 is a dominant tenement.



Lot 2 is the servient tenement to lots 1 and 3.

SLIDE 15

EASEMENTS

In gross – A personal right that one party grants to another to use the grantor's real property.

The right does not attach to the grantor's estate. It involves only one property and does not benefit any property owned by the easement owner.

There are no dominant or servient estates in an easement in gross. An easement in gross may be personal or commercial.

SLIDE 16

EASEMENTS

In gross – A personal easement in gross is granted for the grantee's lifetime.

The right is irrevocable during this period, but terminates on the grantee's death.

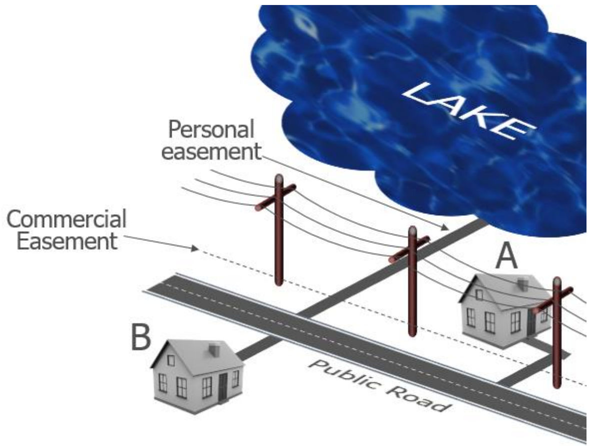
It may not be sold, assigned, transferred, or willed.

SLIDE 17

EASEMENTS

In Gross – Example

The illustration shows that a beachfront property owner (A) has granted the neighbor across the street (B) the right to cross A's property to reach the beach.



A commercial easement in gross is granted to a business entity rather than a private party. The duration of the commercial easement is not tied to anyone's lifetime. The right may by assigned, transferred, or willed.

Examples of commercial gross easements include:

- A marina's right-of-way to a boat ramp
- A utility company's right-of-way across a lot owners' property to install and maintain power or telephone lines. (as illustrated in this example)

SLIDE 18

EASEMENTS

By prescription – If someone uses another's property as an easement without permission for a statutory period of time (20 years in Florida) and under certain conditions, a court order may give the user easement right by prescription, regardless of the owner's desires.

SLIDE 19

EASEMENTS

By prescription – For a prescriptive easement order to be granted, the following circumstances must be true:

> **Adverse and hostile use:** The use has been occurring without permission or license
>
> **Open and notorious use:** The owner knows or is presumed to have known of the use
>
> **Continuous use:** The use has been generally uninterrupted over the statutory prescriptive period

SLIDE 20

EASEMENTS

By prescription – For example, a subdivision owns an access road, which is also used by other neighborhoods to access a grocery store. One day, the subdivision blocks off the road, claiming it has never granted the neighbors permission to use the road.

If the neighbors have been using the road for the prescribed period, they may sue for an easement by prescription, since the subdivision owners can be assumed to have known of the usage.

SLIDE 21

EASEMENTS

By implication – An easement can be implied, even with no documentation, if circumstances or the actions of the involved parties create it.

Usually there are three requirements:

1. Easement must be reasonably necessary
2. The land must be divided or subdivided so that the owner of a parcel is either selling part to new owners or retaining part
3. The implied easement claimed must have existed prior to the severance or sale

SLIDE 22

EASEMENTS

Encroachment – The unauthorized, physical intrusion of one owner's real property into that of another. Encroachments cause infringements on the rights of the trespassed owner, and may diminish the property's value, particularly when the property is to be sold.

Encroachments often do not appear on a property's title records. A survey may be required to detect or demonstrate the existence of an encroachment. An owner may sue for removal of an encroachment or for compensation for damages.

If an encroached owner takes no remedial action over a prescribed number of years, the encroachment may become an easement by prescription.

Examples of encroachments are:

- a tree limb extending into the neighbor's property, violating his or her airspace
- a driveway extending beyond the lot line onto the neighbor's land
- a fence built beyond the property line

SLIDE 23

EASEMENTS

So how are easements terminated?

- Express release of the right by the easement holder
- Merger - dominant tenement acquires the servient property or vice versa
- Purposeful abandonment by the dominant tenement
- Condemnation through eminent domain
- Change or cessation of easement purpose
- Destruction of an easement structure
- Non-use of an easement by prescription

Section 9 – Part 4

SLIDE 1 – Ownership Limitations and Restrictions

A lease is both an instrument of conveyance and a contract between principal parties to uphold certain covenants and obligations.

A lease conveys an interest, called the leasehold estate, but does not convey legal title to the property.

For this reason, a leasehold is also called a less-than-freehold estate.

The types of leases we will cover in this section are:

1. Gross
2. Net
3. Percentage
4. Variable index
5. Ground

SLIDE 2

LEASES

Gross Lease – A gross lease, or full service lease, requires the landlord to pay the property's operating expenses, including utilities, repairs, and maintenance, while the tenant pays only rent.

Rent levels under a gross lease are higher than under a net lease, since the landlord recoups expense outlays in the form of added rent.

Gross leases are common for office and industrial properties.

Residential leases are usually gross leases with the exception that the tenants often pay utilities expenses.

SLIDE 3

LEASES

Net Lease – A net lease requires a tenant to pay for utilities, internal repairs, and a proportionate share of taxes, insurance, and operating expenses in addition to rent.

In effect, the landlord "passes through" actual property expenses to the tenant rather than charging a higher rent level.

Net leases vary as to exactly what expenses the tenant pays.

The extreme form of net lease requires tenants to cover all expenses, including major repairs and property taxes.

SLIDE 4

LEASES

Percentage Lease – The tenant’s rent amount is equal to a percentage of the tenant's periodic gross sales.

The percentage rent may be:

- a fixed percent of gross revenue without a minimum rent
- a fixed minimum rent plus an additional percent of gross sales
- a percentage rent or minimum rent, whichever is greater

Percentage leases are used only for retail properties.

SLIDE 5

LEASES

Variable Index Lease – A lease agreement where future lease payments are calculated using some established index, such as the consumer price index (CPI) or the Federal Reserve’s cost of funds index.

A shift in the index will generate a corresponding increase or decrease in the lease payment amount.

SLIDE 6

LEASES

Ground Lease – An agreement in which a tenant is permitted to use and develop a piece of property during the lease period.

A ground lease usually indicates that the improvements will be owned by the property owner unless an exception is created. These leases typically stipulate that all relevant taxes incurred during the lease period will be paid for by the tenant.

Ground leases are usually for 10 years or more, up to 99 years.

SLIDE 7

LEASES

Assignment – An assignment of the lease is a transfer of the entire leasehold interest by a tenant, the *assignor*, to a third party, the *assignee*.

There is no second lease, and the assignor retains no residual rights of occupancy or other leasehold rights unless expressly stated in the assignment agreement.

The assignee becomes primarily liable for the lease and rent, and the assignor, the original tenant, remains secondarily liable.

The assignee pays rent directly to the landlord.

SLIDE 8

LEASES

Sublease – the transfer by a tenant, the *sublessor*, of a portion of the leasehold interest to another party, the *sublessee*, through the execution of a sublease.

The sublease spells out all of the rights and obligations of the sublessor and sublessee, including the payment of rent to the sublessor.

The sublessor remains primarily liable for the original lease with the landlord. The subtenant is liable only to the sublessor.

SLIDE 9

LEASES

Sale subject to lease –

If a property is sold during a tenancy the lessee retains leasehold rights to the property until the lease expires.

The lessor will transfer all deposits and rents to the new owner, who now becomes the lessor.

At the lease expiration the new owner has the right to either renew the lease or ask the tenant to vacate the property.

All aspects of the tenant/landlord relationship and property leases are regulated by the:
Florida Landlord and Tenant Act – F.S. 83

SLIDE 10

LIENS

What is a lien? – F.S. 713 The statute covers all aspects of liens and their application as regulated by Florida law.

A lien is a creditor's claim against personal or real property as security for a debt of the property owner.

If the owner defaults, the lien gives the creditor the right to force the sale of the property to satisfy the debt.

For example, a homeowner borrows $5,000 to pay for a new roof. The lender funds the loan in exchange for the borrower's promissory note to repay the loan.

At the same time, the lender places a lien on the property for $5,000 as security for the debt. If the borrower defaults, the lien allows the lender to force the sale of the house to satisfy the debt.

There are two types of liens:

- Voluntary
- Involuntary

SLIDE 11

LIENS

Voluntary lien – A property owner may create a voluntary lien to borrow money or some other asset secured by a mortgage.

Involuntary lien – An involuntary lien is one that a legal process places against a property without the owner's consent.

SLIDE 12

LIENS

Liens are classified as either *general* or *specific*.

A *general lien* is one placed against any and all real and personal property owned by a particular debtor.

Examples of general liens are:

- Judgements – If someone has lost a lawsuit the courts can place a lien on all assets of the defendant.
- Income tax – If someone doesn't pay their income tax the IRS commonly places a lien on all their assets until the income tax debt is paid.
- Estate tax – When someone dies its common for an inheritance tax lien be placed against all property of the heir until the estate tax is settled.

SLIDE 13

LIENS

A *specific lien* attaches to a single item of real or personal property, and does not affect other property owned by the debtor.

Some examples are:

- Property tax & special assessment – If the property owner fails to pay property or special assessment taxes a lien will be placed on the property.
- Mortgage – Many homes go into foreclosure when the buyer fails to pay his mortgage and the lender places a lien on the property.
- Vendors (Seller's lien) – secures a purchase money mortgage, a seller's loan to a buyer to finance the sale of a property.
- Construction (mechanics/materialman's) – secures the costs of labor, materials, and supplies incurred in the repair or construction of real property improvements.

  If a property owner fails to pay for work performed or materials supplied, a worker or supplier can file a lien to force the sale of the property and collect the debt.

  Mechanic's liens in Florida can be very complex. Refer to Florida Statute 713 for full explanation.

SLIDE 14

LIENS

Liens are ranked in two categories: superior and junior.

Two factors are considered to determine lien priority:

- Lien's categorization as superior or junior
- The date of recordation of the lien

Rank order - Superior
1. Real estate tax liens
2. Special assessment liens
3. Federal estate tax liens
4. State inheritance tax liens

Rank order – Junior by date
Federal income tax liens
State corporate income tax liens
State intangible tax liens
Judgment liens
Mortgage liens
Vendor's liens
Mechanic's liens

SLIDES 15-19, **SUMMARY**

Slide 15

Summary

CONCEPT OF TITLE	
Bundle of rights	Owning title to real property commonly indicates ownership of the complete bundle of rights
Equitable title	The interest or right to obtain legal title to a property in accordance with a sale or mortgage contract between the legal owner and a buyer or creditor is equitable title. During the contractual period of time when ownership of legal title is contingent upon the contract, the buyer or lender owns equitable title to the property.
Title transfer	Transfer of ownership, whether voluntary or involuntary, is done by deed or operation of law. Once the deed is executed the complete scope of the bundle of rights transfer immediately to the new owner.

Section 9: Titles, Deeds, and Ownership Restrictions

Slide 16

Summary

TRANSFER BY VOLUNTARY ALIENATION	
Voluntary alienation	the owner of the property, the grantor, made the decision of his own accord to transfer his property to another. There are two methods by which real property can be voluntarily transferred: 1- By deed, 2- By will
Transfer by deed	In cases where an owner sells a piece of property to another party or decides to gift it to another, transfer is executed by deed. The deed is the written instrument that conveys title to real property.
Transfer by will	In cases where a property owner has died transfer happens through the action of a will. The parties to the will are: Deceased person who made the will: – male: testator; female: testatrix Person receiving the property: – devisee: real property; beneficiary: personal property devise if real property; bequest if personal property

Section 9: Titles, Deeds, and Ownership Restrictions

Slide 17

Summary

TRANSFER BY VOLUNTARY ALIENATION	
Transfer by will	If someone dies with a will in place they are said to be *Testate*. A person dying without a will is *Intestate*.

Section 9: Titles, Deeds, and Ownership Restrictions

Slide 18

Summary

TRANSFER BY INVOLUNTARY ALIENATION	
Involuntary alienation	The transfer of real estate by law and without the owner's consent is involuntary alienation. Four ways property can transfer by involuntary alienation: transfer by descent, escheat, eminent domain and adverse possession.
Transfer by descent	If someone dies without a will in place are said to be "Intestate". In this circumstance the State of Florida will intervene and determine who are the heirs and the line of property distribution. Once the determination is made, the state will ensure legal title is passed to the rightful heirs.
Escheat – FS 716	If a landowner dies without a will (intestate), and without legal heirs, then the property would revert to the state.
Eminent Domain F.S. 73	The State of Florida government, as well as other public service entities, such as railroad, utility, sanitation and others, have the authority under the rule of law to take ownership of real property for valid and necessary public use. The government can take the property under the legal process of condemnation.

Section 9: Titles, Deeds, and Ownership Restrictions

Slide 19

Summary

TRANSFER BY INVOLUNTARY ALIENATION	
Adverse possession F.S. 95	Adverse possession is a means of gaining legal title to property by continuous possession and satisfies these conditions: • Open – easily seen by others • Notorious – known by others • Continuous – 7 years in Florida • Adverse – to the owner's possession • Hostile – without the owner's consent • Taxes must be paid

Section 9: Titles, Deeds, and Ownership Restrictions