

A. Easements

a. Express Easements: Classification & Manner of Creation

i. Possessory v. Non-Possessory Interests**

- *Possessory*: Interest owner has a present or potential right to real property
- *Non-Possessory*: Interest owner has certain rights in real property possessed by **another person**. (e.g., servitudes)

ii. Servitudes

- Type of **non-possessory** interests that refers to land owned or possessed by one party that serves another.
 - ◆ Examples of servitudes:
 - ◇ *Easements*
 - ◇ **Promissory Servitudes**:
 - ▶ Real covenants
 - Affirmative covenant
 - ◆ (i.e., Requiring an owner to **do** something (like pay bills))
 - ▶ Covenants running w/the land
 - (Assignment 23)
 - ◇ **Equitable servitudes/Restrictive covenant/Negative covenant (synonymous)**
 - ▶ **A covenant enforceable only in equity** (Assignment 23)
 - ▶ (i.e., Right to PREVENT an owner from doing something)
 - ◇ **Profit**
 - ▶ Right to take material such as soil or wood from the land of another
 - ◇ **License**
 - ▶ More like an affirmative easement/but is revocable at will of the possessor of the land
- Usually arise from formal agreements evidenced by written documents, but are governed by property law.
- **Obligation of a servitude "runs w/the land"**
 - ◆ The creator of the servitude usually is responsible for complying w/the servitude *only while he or she owns the land*.
 - ◆ Subsequent owner of the land (i.e., successor to the creator of the servitude) is usually required to comply w/the servitude *despite the fact that she never expressly agreed to comply*.
- **Benefit of the servitude "runs w/the land" -->**
 - ◆ Holder of an easement or other servitude can use it only while owning or possessing the land benefited by the easement
 - ◆ The new owner of the land benefited can enforce the servitude even if there is no express assignment of the benefit to her.

iii. Easements (Restatement):

- An interest in land in the possession of another which:
 - ◆ Entitles the owner of such interest to a **limited use or enjoyment** of the land
 - Entitles him to **protection against third persons from interference of use or**

- Entitles him to *protection against third persons from interference of use or enjoyment*

- ◆ Is NOT subject to the *will of the possessor of the land*
 - ◆ Is NOT a *normal incident of possession of any land possessed by the owner of the interest*; and
 - ◆ Is *capable of creation by conveyance*
- Dominant Estate:
 - ◆ Land "benefited" by the easement
 - ◇ Ex. Blackacre has a path across it that's being used to get to Whiteacre --> Whiteacre = dominant estate
 - Servient Estate:
 - ◆ Land "burdened" by the easement
 - ◇ Ex. Blackacre would be the servient estate in the example above

iv. Affirmative Easement:

- Holder of an easement has **the right to do things on the *servient estate* which**, were it not for the easement, should would not be permitted to do.
 - ◆ No affirmative act by owner of the servient estate required.
 - ◆ Question of Inquiry: --> *What can the person do on the land?*

v. Negative Easement (i.e., "Restrictive Covenant"):

- Holder of easement may, by virtue of the easement, *prevent the possessor of the servient estate from performing acts upon the land that he would otherwise have a legal right to perform*.
 - ◆ Ex. Ellie (owns a house on Whiteacre) pays \$5k for an easement by which Frank (who owns adjoining parcel on Blackacre) agrees **not to build a structure on his property that will cut off the flow of light and air into Ellie's windows**.
 - ◇ **Ellie has only the right to prevent Frank from using his land in this one way**, and she has no other rights under the easement to do anything else = negative easement.
- **NOTE**: Neither affirmative nor negative easements authorize an affirmative action by the owner of the servient estate.
 - ◆ **Servient owner merely refrains from interfering w/the rights of the dominant estate (easement holder)**.

vi. Appurtenant Easements

- **NOTE**: The terms "appurtenant" and "in gross" ONLY DESCRIBE THE PEOPLE WHO BENEFIT FROM AN EASEMENT.
- Easements that attach to and benefit the DOMINANT ESTATE.
- Cannot be conveyed w/out simultaneously transferring the dominant estate
 - ◆ *"Just as the tail must follow [the adorable Yellow Lab puppy] an appurtenant easement must follow the dominant estate."*
- **PRESUMED b/c**:
 1. It is **reasonable to assume that the questioned easement was also intended** (unless contrary evidence exists)
 2. B/C most easements **pass automatically** w/a grant of the dominant estate, **presumption protects the grantee of that estate for falling to include a separate grant of an easement w/a grant of the fee.**
 3. Any detriment to the servient estate is **offset by a benefit to the dominant estate.**

vii. **Easements in Gross**

- Do NOT ATTACH to and benefit a land; may be PERSONAL to the easement owner
 - ◆ Common in American law to have affirmative easements in gross
 - ◇ Ex. K owns Blackacre and grants an easement across Blackacre to the RR who has no land in the area. Since the easement isn't appurtenant to any parcel, it's an easement in gross.
 - ◆ Assumption is you cannot assign easements in gross.

viii. **Creating Express Easements**

- **"RESERVING" or "Granting" an Easement:**
 - ◆ Grantor retains a NEWLY created easement, while the grantee receives a fee interest in the rest of the property.
 - ◇ E owns a fee interest in a 100 acre tract. No one else has an interest in the tract. E sells to F "all my 100 acres reserving an easement for right of way, 40 ft. wide along the North boundary." --> E had reserved an easement b/c it didn't exist prior to F.
- **"EXCEPTING" an interest indicates a FEE:**
 - ◆ Grantor excepts a PRE-EXISTING interest in a described geographical part of the property, which he or she *continues to own in fee simple*.

ix. **Easement v. Fee**

- Courts primarily consider the parties' INTENTIONS to determine whether a fee or an easement was created.
- **FEE:**
 - ◆ High consideration
 - ◆ **Precise description of the property (requires a reasonable certainty of boundaries)**
 - ◆ Very certain statement of intent
 - ◆ No reference to a "right of way" in the language
 - ◆ **Virtually no restrictions**
 - ◆ Word "*also*" means in addition to
 - ◆ Language: "all right title interest claims"
- **EASEMENT:**
 - ◆ Doesn't require precise description of property
 - ◆ When terms "*over and across*" are used in conjunction w/a **restriction of the use as a right of way**. It is considered to be that an easement was intended
 - ◆ Uncertainty of the eventual "location" of land
 - ◇ "Gates/fences" don't usually matter
 - ◇ ROADWAYS are usually considered easements
 - ◆ **Strips of land (interferes as a public policy w/the productivity of the larger parcel)**
...don't want to create a fee over a strip of land
 - ◆ Subject to restrictions
 - ◆ Past use by grantor

b. Express Easements: Interpretation & Extent

i. **Intent**

- *Court's primary consideration: **Parties' intent wrt the purpose of the easement.**

ii. **Ways to Determine Rights Under Easements**

1. **Easement language**

- ◆ If easement language is unambiguous, it will be given full effect.

2. **Surrounding circumstances and reasonable expectations**

- ◆ Granted or reserved?
- ◆ Consideration
- ◆ Prior use of land where easement is located
- ◆ Subsequent conduct of the parties

3. **Ambiguous easement length, width, and location**

- ◆ If no specified L, W, and location, easement is construed to extend only over much of an area that is *reasonably necessary* to effect the purpose of the easement.

4. **Changes in types, frequency, and intensity of use**

- ◆ General rule: A party may not use an easement for purposes that differ from or exceed those originally authorized --> trespass.
- ◆ ***However, courts must determine whether a new use of an easement would have been contemplated by the parties when creating the express easement, especially as conditions evolve, technology advances, or the easement holder's activities change.***
 - ◇ Considerations include: the express language of the instrument, parties' reasonable expectations considering the circumstances, and whether the new use appreciably increases the burden on the servient estate.
- ◆ ***In the absence of express language to the contrary, grantor and grantee are assumed to have contemplated a normal increase in the frequency and intensity of use of the easement over the years!***

5. **Easement relocation**

- ◆ **Majority rule**: Once an easement's location has been fixed, it cannot be *relocated* w/out the consent of both parties.
- ◆ **The Restatement (Third) of Property**: The owner of the servient estate is allowed to relocate an easement as long as the relocation affords the dominant estate benefits that are substantially similar.

6. **Use of non-dominant land**

- ◆ **Majority rule**: Appurtenant easement owners cannot use the easement, nor permit its use, for the service of land which was not part of the dominant estate at the time the easement was created.

7. **Maintenance and repair**

- ◆ In the absence of express language, the easement owner (i.e., dominant estate) must make necessary repairs so not as to interfere w/the servient owner's use and enjoyment of his property.

8. **Servient estate owner's duties**

- ◆ Servient estate owner may not interfere w/the easement owner's enjoyment

c. Express Easements: Succession

i. **Analysis**

1. Step One:

- ◆ Is the easement appurtenant or in gross?
 - ◇ If instrument clearly designates as either, the words are given effect.

2. Step Two:

- ◆ If the instrument doesn't indicate, look to the parties intent. If personal to the grantee, it will be non-transferrable.
 - ◇ **Presumption that the parties intended the easement to be appurtenant**
 - ▶ Presumption can only be overcome by significant evidence showing an intention to make an easement in gross. Consider:
 - Language in grant
 - Circumstances surrounding the grant
 - ◆ Types of rights conveyed by the easement
 - ◆ Relationship btwn the easement and other real property owned by the grantee.

ii. **Dominant Estate - Appurtenant**

- Running of **BENEFIT** of appurtenant easement
 - ◆ PRESUMED to be transferred w/the dominant estate, even if the deed transferring the estate does not mention the easement
 - ◇ Benefit runs w/land unless terms of transfer/creation preclude benefit from running
 - ◆ **Successor's possession is subject to same rights and privileges as his predecessor.**
 - ◆ If deed creating the easement precludes the easement from passing w/the dominant estate:
 - ◇ Terms of the deed extinguish easement upon transfer of dominant estate --> extinguished.
 - ◇ Terms of deed make appurtenant easement an easement in gross --> becomes easement in gross
 - ◆ If deed prohibits transfer w/the dominant estate but doesn't specify the consequences
 - ◇ --> either extinguished, OR
 - ◇ --> provision in deed preventing transfer is ineffective, in which case easement passes w/the dominant estate.

iii. **Servient Estate - Appurtenant**

- Running of the **BURDEN** of appurtenant easement
 - ◆ If servient estate is transferred, the burden of easement runs w/the land so as to be enforceable against the successors of the servient estate if the original parties intended that it run and if the successor to the servient estate had notice of the easement.
 - ◆ **Presumption that parties intended the burden to run.**
 - ◆ If the successor to the servient estate *purchases* the estate **WITHOUT notice of the easement, under most modern recording statutes, the easement will be extinguished and the new owner of the servient estate will NOT be subject to the burden of the easement.**
 - ◆ 2 requirements for easement to run:
 1. Intent that the easement will run w/servient estate.
 2. Notice of easement:
 - ▶ Actual
 - In absence of contrary evidence, presumed that the original parties intended the burden of the easement to run.

intended the burden of the easement to run.

▶ Constructive

- E.g., recorded (doesn't matter if the purchaser is actually aware of the easement)

iv. **Succession of Easements in Gross**

□ **Restatement (Modern) View**

- ◆ Easement in gross will NOT PASS when the owner of the easement sells his or her land.
- ◆ For it to pass, it MUST be **assigned**.
 - ◇ Unless granting instrument contains an express provision as to the assignability of the easement, the court will make a presumption that the benefit of an easement in gross is assignable, UNLESS it's personal.
- ◆ Personal if:
 - ◇ It appears from all of the circumstances that the parties did not intend it to be transferrable.

□ **Old View**

- ◆ If primary purpose of the easement is to **gain economic benefit**, the easement = *commercial*, and therefore, there is a rebuttable presumption that it is assignable.
- ◆ If primary purpose of the easement is to **gain personal satisfaction** --> easement deemed non-commercial, and there's a presumption it's NOT assignable.
 - ◇ Presumption may be overcome in most jurisdictions if there is sufficient evidence to suggest that the parties intended the easement to be assignable (but some jurisdictions find ALL non-commercial easements in gross to be non-assignable).
- ◆ **Factors to determine intent:**
 1. **Relationship btwn the grantor of easement and grantee**
 - ▶ More personal = LESS likely parties intended assignability
 2. **Degree to which assignability of the easement increases the burden on the servient estate either by increasing or decreasing its value.**
 3. **Consideration paid for easement**
 - ▶ Greater cost of easement, more likely the parties intended the grantee to be able to recoup some of those losses by selling the easement
 - ▶ Lack of consideration = more likely intended to be personal and non-assignable
 4. **Degree to which the use of the easement is temporary and personal**
 - ▶ If temporary and personal, parties probably intended the easement to be used only by the grantee for the time designated --> NOT assignable.
- ◆ *By definition, the benefit of an easement in gross does NOT attach to the land of the easement holder.
- ◆ **The BURDEN of an easement in gross DOES attach to the land of the servient estate.

d. Express Easements: Termination & Extinguishment

i. **Express Terms & Impossibility**

- Time limitation
- Loss of purpose of easement
 - ◆ Ex. Easement holder may no longer need to use the easement

ii. **Changed conditions**

- **R(3)P** --> Allows the easement to be terminated when changed conditions exist b/c the easement has become unreasonably burdensome upon the servient estate, obsolete, or economically wasteful

iii. **Release and Abandonment**

- **Release**: in *formal written instrument that meets the requirements necessary to create an easement*.
- **Abandonment**: through **ACTIONS** - results when the owner, **INTENDING** to relinquish his easement rights, **engages in sufficiently unequivocal conduct manifesting his intent**
 - ◆ ****Non-use alone (no matter how long) is almost never enough to extinguish an easement.**
 - ◆ **Conduct = ACTS**

iv. **Misuse & Overuse**

- Generally **NOT** sufficient to extinguish an easement, but the servient estate holder can get an injunction to enjoin excessive use.
 - ◆ When a court can't find a remedy to misuse or overuse by limiting use of the easement, it will generally choose **complete extinguishment** over no use at all.

v. **Lack of Notice**

- Burden of an express easement will not run if the successor in interest to the servient estate is a bona fide purchaser for value **w/o notice of the easement**
 - ◆ E.g., recorded deed/seeing the easement while inspecting the premise

vi. **Prescription**

- When the servient owner of an estate extinguishes an easement by making adverse use of the burdened parcel. Generally:
 - ◆ **Sufficient**: Non-moveable, substantial, permanent structures --> buildings, elevated structures, massive fireplace
 - ◆ **Insufficient**: Trees, hedges, stone walls

vii. **Merger (requires action by both parties)**

- Should the dominant estate holder acquire ownership of the servient estate, the dominant owner's lesser rights (easement) are swallowed up by the greater rights of use realized upon merger w/the servient estate
- The extinguishment of an easement when caused by unity of ownership of the dominant and servient estates alone, extends only as far as this unity of ownership.
 - ◆ E.g., suspension of easement for limited time

viii. **Estoppel (requires actions by both parties)**

- When the servient owner reasonably relying on actions of the easement owner (dominant estate) engages in conduct inconsistent w/the continuance of the easement.

ix. **Third Party Actions**

- Eminent domain, mortgage foreclosures, tax sales
 - ◆ Original easements established before a mortgage will not be extinguished; however, if after a mortgage encumbers the land, an easement is placed on the property, this easement could be extinguished.

easement could be extinguished.

e. Non-Express Easements

i. Definition

- Informal easements that may arise through implication from prior use, implication from a map or boundary description showing streets or other areas of common use, necessity, or prescription.

ii. Origin

- Under circumstances ***in which land under common ownership is divided into separately owned parts by means of a conveyance.***
 - ◆ Courts are more inclined to terminate implied easements rather than express easements.
- *Key inquiry: Parties' INTENT to create implied easements.

iii. Intent

- Terms of conveyance
- Consideration
- Simultaneous conveyee
- Necessity
- Reciprocal benefits
- Use prior to conveyance + subsequent actions
- Knowledge of prior use
- Results fair to all parties
- Ability to avoid confusion
- Public policy considerations
 - ◆ Economic waste
 - ◆ Promotion of full utilization of land
- Shape, size, & location of land in question
- Whether claimant is conveyor or conveyee

iv. Implied

- Focus on use of claimed dominant and servient parcels ***prior to severance of common ownership***
- Quasi Easements:
 - ◆ When the owner of a parcel of land uses part of his land for the benefit and service of another part.
 - ◇ Quasi-dominant/servient estates
 - ◇ May be implied *if at the time of the severance, had reasonable grounds to expect the conveyance would not terminate the right to continue prior use.*
- Elements --> **intention of the parties!!:**
 - ◆ APPARENT (i.e., discoverable upon careful inspection)
 - ◆ CONTINUOUS (i.e., NOT casual or temporary)
 - ◆ Intended to be PERMANENT
 - ◆ Important or reasonable NECESSARY for enjoyment of the claimed dominant estate
 - ◇ **NOTE:** "Pleasure & recreation" is NOT typically necessary for the use of the dominant estate.

- **Scope - Implied**
 - ◆ Extent of use prior to severance is the major factor in determining the scope.
 - ◇ *Permit additional use arising from foreseeable changes in the dominant estate*
- **Rule - Implied**
 - ◆ Every implied easement is appurtenant and is presumed to pass w/grants of the dominant estate EXCEPT:
 1. Prohibited by terms of the transfer
 2. Not in accord w/the circumstances surrounding the creation of an easement

v. **Necessity**

1. An original unity of ownership of the claimed dominant and servient estates; and
 - ◆ Courts will look to the distant past in search of the required unity of ownership
2. The existence of the necessity at the time of severance of unity of ownership.
 - ****DIFFERENTIATING** feature:
 - ◆ **Use of the claimed dominant and servient parcels prior to severance of the common ownership is unimportant in establishing an easement by necessity.**
 - ◇ ****Element of necessity is far more important for easements by necessity than for implied easements generally.**
 - **Purpose**
 - ◆ To promote the productive use of land
 - ◆ *Policy:* Courts will often find an intent to create an easement by necessity unless it affirmatively appears from the language or circumstances of the conveyance that the parties intended a different result.
 - **LANDLOCKED**
 - ◆ Most prevalent type of easement by necessity --> right of way arises upon conveyance or retention of landlocked parcel
 - ◇ Grantee's need for right of way passage is deemed to be ABSOLUTE (can also apply to grantor)
 - **Scope**
 - ◆ Courts will grant rights that are reasonably essential to use of the land.
 - ◇ Factors:
 - ▶ Distance, injury to the person on whose estate the passage is granted, practicality, and benefit to the dominant estate
 - **Termination**
 - ◆ Rights granted terminate as soon as necessity disappears

vi. **Takeaway:**

- Analysis
 1. First look to see if there is common ownership
 2. Do analysis for both implied and necessary easements
 - ◇ Mention two different standards...the "reasonable necessity" test is the more important thing (but also bring up the strictly necessary)
 - ▶ Strictly necessary --> Not preferred b/c the burden on the servient estate may be negligible etc.
- **Implied Easement:**
 - ◆ ****UNITY OF OWNERSHIP**
 - ◆ Convenience
 - ◆ Beneficial to the dominant estate
 - ◆ Intent to create an easement at the time of the severance of the estate (Epstein)

- ◆ Intent to create an easement at the time of the severance of the estate (EPSTEIN)
- ◆ Prior use --> continuous
- ◆ Public Policy considerations
- **Easement by Necessity**
 - ◆ ****UNITY OF OWNERSHIP**
 - ◆ Necessity, but jurisdictions differ as to whether it needs to be REASONABLY necessary or strictly necessary
 - ◆ Look for land-locked parcels

B. Covenants

a. Covenants Running w/the Land

i. Terminology:

- **Covenant = a PROMISE**
 - ◆ "To **do** something": Affirmative covenant (e.g., pay fees)
 - ◆ "To **not do** something": Negative covenant (e.g., *refrain* from building up)
- **Servitude**:
 - ◆ Right in land possessed by another that is not normally implied from the mere ownership of one's own land.
 - ◆ *Examples*
 - ◇ Easements
 - ◇ Promissory Servitudes***
- **Promissory Servitudes**:
 - ◆ Usually originates in a promise or agreement to do or refrain from doing a specified act
 - A. "Real covenants"
 - B. "Equitable servitudes"
 - ◆ MERGE together to just refer to as --> "**covenants**" / "**covenants running with the land**" (**Restatement (Third) of Property view**)

ii. "Real Covenants" --> "Affirmative Covenants"

- Covenants that the law courts recognize as running w/the land.
- Usually require the servient owner to take certain actions.
 - ◆ "**Enforceable at law**" --> the breach of that covenant will give rise to a cause of action for damages (\$\$), a legal remedy
 - ◆ Require specific **acts**
 - ◆ *Examples*
 - ◇ Promising to pay dues
 - ▶ **NOTE**: Promising to "abide by the rules" is affirmative in nature, but negative in substance (i.e., NOT to do something)

iii. "Equitable Servitudes" --> "Negative Covenants"

- Most restrict the use of the burdened land by prohibiting the owner from using the land in certain specified ways.
 - ◆ Usually only "**enforceable in equity**" --> INJUNCTION (no damages)
 - ◇ *Examples*
 - ▶ Promising only to use a premise as a "single family home"
- **Covenants can be both real covenants AND equitable servitudes, and can be enforced in equity and at law.**

iv. Running of Covenants?

- **Covenant Disputes Do Not Always Involve Issues of Succession:**
 - ◆ Covenants in Gross: Most Ks and promises do NOT run w/the land and are intended to benefit a specific person rather than a particular parcel of land
 - ◆ ****If the dispute is btwn the original contracting parties --> it doesn't matter if the promise is one that runs w/the land.**
 - ◇ Key: differentiate whether the situation is dealing w/a simple K or a true "running" question.

b. Enforcement & Running of Covenants

i. Overview

□ Traditional View

At Law	(\$\$)	In Equity	(Specific Performance)
Burden (Lot R)	Benefit (Lot OB)	Burden (Lot R)	Benefit (Lot OB)
Intent	Intent	Intent	Intent
T&C	T&C	T&C	T&C
Notice		Notice	
Horizontal Privity (AA & BB)			
Strict Vertical Privity	Relaxed Vertical Privity		

□ Running at Law

- ◆ **Burden**
 - ◇ Intent
 - ◇ TC
 - ◇ Notice
 - ◇ HP
 - ◇ SVP
- ◆ **Benefit**
 - ◇ Intent
 - ◇ TC
 - ◇ RVP

□ Running in Equity

- ◆ **Burden**
 - ◇ Intent
 - ◇ TC
 - ◇ Notice
- ◆ **Benefit**
 - ◇ Intent
 - ◇ TC

□ Restatement View

- ◆ Generally controlled by REASONABLENESS, however, draws some distinctions btwn affirmative & negative covenants
 - ◇ Intent
 - ◇ Notice
 - ◇ **NO TC**

- ▶ Exception
- ◇ NO HP
- ◇ NO VP
 - ▶ GENERAL rule
 - ▶ Exception to the general rule.
- ◇ ***Reasonableness factors

ii. Intent

- That these parties want this covenant to run w/the land?
 - ◆ **Critical intent is the intent of the **original** contracting parties **at the time** they entered into the covenant.
 - ◇ When a promisee (benefited) attempts to enforce a covenant against a **successor of the promisor** (burdened), the promisee must show that the original parties intended the promise to run w/the *burdened land* (and vice versa)
 - ◆ --> **Look to:**
 - ◇ **Language in the original covenant/written promise**
 - ▶ Does the grant clearly state that it won't use it for any other purpose than the original purpose?
 - ◇ If no language, court will **infer that the burden and/or benefit will run from the nature of the promise and from the surrounding circumstances.**

iii. Notice

- Did grantee 2 know about the **burden** of the property when she bought it?
 - ◆ **Rule:** To be binding on a purchaser, she must only have *notice* and not mere knowledge of the covenant *before* she purchases the land.
 - ◇ In every case where the purchaser has knowledge of the covenant, she also has notice of it, but opposite NOT true.
 - ◆ --> **Look to:**
 1. If the **covenant has been recorded/could be discovered by a competent search in records**
 - ▶ i.e., Constructive notice
 2. Actual --> actually know about it.

iv. Touch & Concern

- **Original Restatement**
 - ◆ **Burden**
 - ◇ Did not use the phrase "T&C," however, did provide that the covenant affect the benefited land in some physical way.
 - ▶ Covenant must affect the benefited land in a **PHYSICAL WAY**
 - ▶ Covenant runs only when the promise benefits the beneficiary of the promise in the "*physical use or enjoyment of the land*"
 - ▶ Most courts do not follow the old Restatement by requiring a physical benefit to the land.
 - **Burden:**
 - ◆ "The burden of a covenant doesn't run **AT LAW** unless the covenant benefits the land of either the promisee or the promisor in a **physical way.**
 - ◇ *The burden may run **IN EQUITY** even if does NOT affect the land to be

- ◇ If in the fact pattern and it's two neighbors agree to something, HP is probably not satisfied.
 - **Strict Vertical**
 - ◆ Successor to the promisor must have succeeded to the same estate as that owned by the promisor
 - ◇ Refers to the relationship btwn the promisor and his successors or btwn the promisee and her successors
 - ▶ Burden of a covenant runs **at law** w/the estate of the original promisor.
 - ▶ Successors of the promisee/or **VP established**:
 - Grantee
 - Heir
 - Devisee
 - ▶ **NO VP** for:
 - Adverse possessors
 - Those taking title paramount to the promisee/promisor
 - One taking interest through foreclosure proceeding
 - ◆ --> Don't take their interests from the original covenanting party.
 - **Relaxed Vertical**
 - ◆ Successors can include those who do not succeed to the same interest of the promisee so long as they have some interest benefited from the enforcement of the promise.

vi. The Restatement

- **TC exception**
 - ◆ **NO** requirement UNLESS
 - ◇ Illegal
 - ◇ Unconstitutional
 - ◇ Violates Public Policy
- ****General Rule****
 - ◆ Unless prohibited by the parties, *all appurtenant benefits and burdens run*, including to: (ALL)
 - ◇ Adverse possessors
 - ◇ Life tenants
 - ◇ Lessees
 - ▶ **NOTE**: Restatement doesn't discuss running for assignees and sub-lessees.
 - ◇ And those acquiring title through a Lien foreclosure proceeding
- *****Exception to the General Rule*****
 - ◆ Those holding superior title can't be burdened.
 - ◆ **AFFIRMATIVE** covenants: Persons holding estates of lesser duration *aren't subject to EITHER* burdens or benefits, unless they are: Life tenants or Lessees:
 - ◇ **Benefits** - to maintain, repair, and render services to the property **run**
 - ▶ --> applies to both life tenants & lessees
 - ◇ **Affirmative** benefits that can be enjoyed by lessee w/out diminishing its value to the lessor and w/out materially increasing the burden of performance on the person obligated to perform the covenant do **run**
 - ◇ **Benefits & Burdens** run to the life tenant EXCEPT their liability to perform is limited to the value of his or her life estate

- ◇ limited to the value of his or her life estate
- ◇ **More reasonably** performed by the person in possession than by the holder of the reversionary interest in the burdened property run to the LESSEE.
- ◆ Adverse possessors may not obtain the benefits of affirmative covenants, w/the exception of the covenant to maintain, repair, and render services to the property.
 - ◇ New Restatement allows adverse possessors to be subject to the burdens of the covenant.
- **Reasonableness Factors (LFACF)**
 - ◆ Legitimacy and importance to be served
 - ◆ Fairness of the arrangement
 - ◆ Alienability/marketability
 - ◆ Competition impact
 - ◆ Fundamental rights interference

c. Defenses to Enforcement of Covenants

i. **Changed Circumstances Doctrine (CCD)**

- Courts may refuse to enforce a covenant if changed circumstances make it unlikely that enforcement will be of a substantial benefit to the covenantee or her successors.
- **Doctrine applies --> only if the changed conditions have adversely affected the benefited land**
 - ◆ (Basically so that the benefit of the covenant is no longer a benefit.)
 - ◆ Impossible to achieve the original parties' intent even if the covenant were enforced/can't achieve the original goal of the covenant.
 - ◇ Ex. When a neighborhood changes from one use to another.
 - ▶ Cov. "Keep a neighborhood for residential purposes," and all of a sudden area is used for breweries --> has been impossible to achieve the original goal.
- Courts will continue a restriction that is still substantially valuable to the benefited land, even if changed circumstances have cause a hardship to the burdened owner.
- **Tests**
 - ◆ Frustration of purpose in light of changed circumstances (Bowie)
 - ◆ RADICAL change as to render perpetration of the restriction's enforcement as no substantial benefit to the dominant estate. (Chevy Chase)
 - ◇ --> or can state together that change has been so radical that it has frustrated the purpose.

ii. **Relative Hardship Doctrine (RHD)**

- Focus on the **hardship of the BURDENED land**
- Courts may refuse to enforce a covenant if enforcement will result in a hardship to the owner of the burdened land that is DISPROPORTIONATE to the benefit of its enforcement.
- If the hardship on the DEFENDANT is very great and the benefit to the P is relatively minor --> courts may refuse to issue an injunction.
 - ◆ Will especially refuse to grant injunctions if the other party acted WITHOUT KNOWLEDGE of the covenant.
- Even in these cases, court is likely to look at the extent to which the hardship of the D increased b/c of unanticipated changed circumstances.
 - ◆ --> Two doctrines are somewhat intertwined.
- **TEST**
 - ◆ If the burden SIGNIFICANTLY outweighs the benefit.

... if the burden on the owner outweighs the benefit.

C. Misc.

a. Common Interest Communities

i. Definition

- Property is **burdened by servitudes** requiring property owners to contribute to **maintenance of commonly held property** or **pay dues or assessments** to an Owners Association that provides services or facilities to the community
- *Examples*
 - ◆ Condos
 - ◆ Planned communities
 - ◆ Traditional subdivisions
 - ◆ Combination properties w/residential and commercial components
- **NOTE:** Owners only "own" the INSIDE of their unit.
 - ◆ Once you get outside the walls of the unit, everything else is owned by the Association.

ii. Overview

- CICs provide amenities through **covenants**
 - ◆ **"Covenants, conditions, and restrictions"** --> **"CC&R"**
 - ◇ Or a "declaration of trust"...generally when a developer develops a complex, he or she will draft this declaration that contains a number of restrictions
 - ◆ Recorded by the **developer** --> **"DECLARANT"**
 - ◆ ****AFTER THE FIRST PROPERTY is purchased in a development, the covenants become effective and bind ALL OTHER PROPERTIES in the developments.**
- **CC&R Characteristics**
 - ◆ Are the source of the association's power/authority
 - ◆ Often:
 - ◇ Mandate membership in a homeowners or property association and require the payment of *dues or assessments* to the association
 - ◇ **Restricts the use of the land w/in a CIC and requires the association's approval before changes can be made to an individual property**
 - ▶ Members may have to be a certain AGE/prohibit PETS, etc.
- Conflicts arise when:
 - ◆ The interests of an individual property owner are at odds w/that of other property owners or the association
 - ◇ --> Center around: Interpreting an existing covenant/rejecting a new covenant/disputing the actions of an association board.

b. Adverse Possession

i. Overview

- **Adverse Possession**
 - ◆ One can acquire ownership of land w/out payment of \$\$ and w/out the consent of the legal record owner
 - ◇ Permits an uninvited intruder who fulfills certain statutory and common law (hereinafter, "CL") requirements to acquire legal title to the land & *completely* divest the record titleholder's rights.
 - ◇ "possession" --> "dominion and control" over the property
 - ◆ All **elements** get to a particular characteristic of "possession," which is **exercise of**

• All elements get to a particular characteristic of possession, which is **exercise of dominion and control over the property**

- ◇ Adverse possession is a blend of statutory and case law. All states recognize a statute of limitations for recovering possession of land from a wrongful occupant.

ii. Arguments in Favor of AP

- **POSSESSION "bias"**
 - ◆ Might merely be an extension of property law's favor for one who is in possession of the land or object (i.e., "finder's keepers")
 - ◆ **Rules of capture** --> Recognizing the rights of one who reduces a fugitive (i.e., free and mobile) object to possession
 - ◇ (e.g., baseball example)
 - ◆ Dark side: "the legal system's recognition of rights in one who has dispossessed another"
 - ◇ **Has traditionally been used to dispossess others by FORCE (e.g., Native Americans)**
- **Most important reason**
 - ◆ "Protects one who *innocently and mistakenly* possesses the land of another for **such a long period** that a justifiable reliance on the existing state of affairs may be presumed."
- **Promotes certainty in land titles / nullifies conveyancing errors / settles boundary disputes**
 - ◆ --> only way to do this is to "quiet title"
 - ◆ Protects third parties who detrimentally rely on their belief that the AP is the true owner of the land.
 - ◆ *Encourages beneficial use over the land that is NOT being used by the owner of the land.
 - ◆ Society as a whole is benefited while the record owner is "punished" for not using or protecting her land.

iii. Arguments Against AP

- Rewards people who have acted "badly"
 - ◆ Sometimes makes us ask whether this doctrine is correct when we have a recording system
- Demonstrates the "dark side" of rules of capture: "the legal system's recognition of rights in one who has dispossessed another."

iv. Requirements

- **All jurisdictions**
 - ◆ Actual
 - ◆ Open & notorious
 - ◆ Exclusive
 - ◆ Hostile or adverse
 - ◆ Continuous
- **Some jurisdictions additionally require:**
 - ◆ Claim or right of title
 - ◇ Good faith?
 - ◆ Color of title

- ◆ Improvement, cultivation, or enclosure
- ◆ Payment of taxes

v. Elements - All Js

□ **Actual**

- ◆ The adverse possessor must take *actual possession* of the land
- ◆ Under the majority view, this means that the claimant must physically use the particular parcel of land in the same manner that a reasonable owner would, given its nature, character, and location.
 - ◇ *Directly relates to whether the adverse claimant used the property as would an ordinary owner of the type of land in question (In this way, overlaps w/"continuous" requirement)*
 - ▶ (e.g., maintaining seasonal beach property like a normal owner would)

□ **Open & Notorious**

- ◆ The claimant's acts of possession must be **open and notorious**--so visible and obvious that a reasonable owner who inspects the land will receive notice of an adverse title claim.
 - ◇ Open: everyone can visibly **see** the AP possessing the land.
 - ◇ Notorious: everyone knows about it / would put a reasonable person on notice

□ **Exclusive**

- ◆ The claimant must hold **exclusive possession**. His possession must not be shared w/either the true owner or the general public, but must be as exclusive as would characterize an owner's normal use for such land.
 - ◇ No sharing the property in a way that would be adverse to what a true landowner would do.

□ **Hostile or adverse**

- ◆ "Hostile":
 - ◇ **NO PERMISSION** to use the land from true owner
 - ◇ Person is in wrongful possession of the land uses property **without owner's permission**
 - ▶ Minority: **mistaken possession** does not constitute hostility
- ◆ "Adverse":
 - ◇ AP must manifest some act that would indicate to the others, if they were reasonably alert, that the AP's occupation is adverse to the true title holder's interest.
 - ◇ Possession is adverse only if it is **w/out authority or permission of the true owner**
 - ▶ CT rule: endorses the objective view of hostility**
 - ▶ ME rule: endorses the subjective view of hostility
- ◆ **NOTE** on good or bad faith:
 - ◇ Majority: Requirement met if the claimant merely uses the land as a reasonable owner would--**w/out permission from the true owner**
 - ▶ i.e., AP does NOT need to have a good faith belief he or she owns title
 - ◇ Minority: the claimant must believe in good faith that he owns title to the land.

□ **Continuous, for the prescribed statutory period**

- ◆ The requirement of **continuous possession** means that the claimant's acts of possession must be as continuous as those of a reasonable owner, given the **nature, location, and character of the land**.

- ◆ Tacking: Successive adverse possessors are allowed to tack (add together) their periods of adverse possession provided they are in privity (sufficient nexus or connection btwn the consecutive possessors)
- ◆ Tolling: Some jurisdictions permit extending required SOL periods under certain circumstances
 - ◇ E.g., if the title holder has a disability
- ◆ Met if the AP uses the property in a way that an ordinary owner would use it
 - ◇ E.g., if a winter home, living there in the winter!
- ◆ Statutory Period (i.e., "SOL" --> Statute of Limitations)
 - ◇ The period for adverse possession varies from state to state
 - ◇ Most states use periods of 10, 15, or 20 years** (up to 60!)

vi. Elements - Some Js

- **Claim or right of title**
 - ◆ APs get right of title only if they rightfully believed they were occupying the land
 - ◇ --> Courts intuitively seek to avoid conferring title on an adverse possessor who **is intentional wrongdoer or acted dishonestly**, and require that adverse possessor must have had a good faith belief that she actually owned the property in question
 - ▶ ****big policy reasons for this!**
 - ◆ --> *Reasonable basis for the belief that the property belongs to the adverse possessor or property owner*
 - ◇ *Not required usually when the owner of the property can't be ascertained/located by reasonable means
 - ◆ **To discern whether someone had a *subjective* good faith belief, an OBJECTIVE TEST is preferred, looking at all relevant circumstances.**
- **Color of title**
 - ◆ A person enters under color of title when he or she claims ownership pursuant **to a written instrument**
 - ◆ Sometimes may reduce requirements for an AP who has possessed the property under an instrument purporting to give him or her title but ultimately proving to be void or invalid
 - ◇ E.g., the statutory period required to establish AP
 - ◇ Policy Reason: AP doctrine may be useful to remedy an old deed that turns out to be void/invalid, even though all the parties treated it like it was valid!
 - ▶ Ex. AP claims under color of title can be used to quiet title to clear up problems w/enforcement of deeds that are 50 years old but void as a matter of law, even though everyone has treated them like they are valid.
- **Improvement, cultivation or enclosure**
- **Payment of taxes**

vii. AP effect:

- Once the required statutory period has run, the AP is ***immune from possession for trespass!***
 - ◆ Before this time, however, he or she is subject to an action in ejectment.
- **HOWEVER, the adverse possessor himself can bring actions while waiting for SOL to run:**
 - ◆ Ejectment to oust other trespassers
 - ◆ Nuisance/other legal right incident to possession

... easements/other legal right incident to possession.

viii. Prescriptive Easements

- When adverse use is exercised by a **private individual or entity**
- Essential: Non-recognition of the owner's authority to permit/prevent use of an easement that's crucial
- **DO NOT need exclusive use (can be used by several parties), so that requirement isn't necessary**
- No possessory interest (if not exercising dominion and control over land all the time, how can we measure if there's been AP wrt an easement) --> what do we look at?
 - ◆ *Look at type of use. Easements are "right of ways"...so needs to be open and notorious and continuous in the sense that you'd do it in the same way most easement owners would do it.*
 - ◇ i.e., travel on the road once a week. Look to the nature of the easement
- SOL for the recovery of real property might not apply to non-possessory interests in land (i.e., EASEMENTS!!!), some courts will invoke SOLs by analogy/have statutes governing easements by prescription.
 - ◆ During statutory period, the owner can bring an action in **TRESPASS** and NOT EJECTION b/c the adverse user is NOT IN ACTUAL possession!!
 - ◇ Apparently, "actual" possession is required for easements by prescription
 - ◇ Further differences btwn easements by prescription and adverse possession:
 - ▶ Easements by prescription = adverse use of the land
 - NOT subject to real estate taxes
 - ▶ Adverse possession = a FEE
 - Higher standard, so may be expected to pay taxes
 - ▶ Prescriptive easements = non-possessory interest

ix. Implied Dedication/ "Custom"

- When the **public at large** is creating the interest
- Dedication = setting aside of privately owned land for use by the public
- **BOTH CL & statutory** require some unequivocal act indicating the owner's intent to dedicate
- Statutory:
 - ◆ --> usually transfers a FEE of the property to a governmental entity
 - ◆ Acceptance takes place in the form of approval by a municipal council or planning body
- CL Dedication:
 - ◆ *Operates on a theory of estoppel, offer, and acceptance*
 - ◆ Right conferred is usually an EASEMENT
 - ◇ **Express**
 - ▶ Requires expressed manifestation of the owner's dedicatory intent (i.e., deed, usually involves roads, public squares, parks, subdivisions)
 - ◇ **Implied**
 - ▶ Construed from ACTS or conduct that illustrate an offer and intent, based on ESTOPPEL.
 - ▶ Inferred from the public's adverse use of the property and the owner's acquiescence of that use.
 - ▶ *Use must be WITHOUT the owner's permission, but he must have actual KNOWLEDGE of the use (will be imputed if the use is open and notorious)
 - ▶ Public must "accept" the offer

- If only a limited number of people use it, it will likely be a private prescriptive easement.

- ◆ **Custom:**

- ◆ Also allows the general public to acquire rights over private property in some jurisdictions

c. Nuisance

i. Specific Areas

- Tool for residents of low-income/minority neighborhoods to use against their communities to redress the burdens of pollution and undesirable urban conditions
- Claims against industrial companies for contributing to climate change or failing to act to reduce greenhouse gas emissions
- Mechanism for protection against entire ecological systems, allocating **damages** for economic harms to "ecosystem services" that ecosystems provide to people and society
 - ◆ E.g., pollinating, flood control, pollution filtration
- Intense storm water runoff from developed/altered lands
 - ◆ Combines nuisance, trespass, and negligence theories, allowing governmental agencies/landowners to see **injunctions or damages** for runoff *that is greatly increased by a landowner's actions in developing, grading, and paving their lands.*
- Government regulation to protect the environment
 - ◆ "Nuisance law serves as a limitation inherent in private property rights that **shields government regulatory agencies from "takings" compensation liability** when the **agencies severely restrict private land-use rights to prevent uses that would constitute nuisance.**"
 - ◆ May be more efficient for the government to take some action than the property owners

ii. Public Nuisance

- Unreasonable interference w/a **right common to the general public**, including activities injurious to the health, safety, morals or comfort of the public
 - ◆ Closely resembles a misdemeanor
 - ◆ Usually only a public official can sue to abate it
 - ◆ Ex. Strong water runoff b/c an infrastructure wasn't built to handle all the runoff --> Federal gov't had to step in to address the public nuisance
 - ◆ Private citizens are prohibited from suing to abate a public nuisance
 - ◆ Policy reason: *Prosecutorial discretion* can best be preserved by preventing private person from bringing actions to enjoin public nuisances

iii. **Private Nuisance

- A *wrongful interference w/the use or enjoyment of land of another*. Primarily the one we deal with!
 - ◆ A private individual suffering a "different in kind" injury from the general public may bring an action herself.
 - ◆ "Interfere" --> activities don't mean going on someone else's property...nuisance is generally NOT considered trespass
 - ◆ Nuisance = interfering w/use and enjoyment, but doesn't invade/trespass on property
 - ▶ Ex. Cattle in Spur aren't on the property, but it's interfering w/the use and enjoyment of the property.

enjoyment of the property.

iv. **Key Considerations**

□ **2 Variables to Consider in Every Nuisance Case**

1. **Fairness**

◇ Usually damages --> \$\$\$

2. **Efficiency**

◇ Most economically efficient

□ **2 Questions for the Proposed Rule**

1. **Which party should pay for it?**

◇ Consider fairness factor

▶ Question: Who is more morally blameworthy? --> they should pay.

2. **What should be done?**

◇ Consider efficiency factor

v. **Remedies**

□ **Traditional rule**

◆ Successful Ps get damages for past injuries and an unconditional injunction

◇ If P is unsuccessful, he or she is denied an injunction.

□ **Proposed rule**

◆ Appropriate remedy in nuisance action should be an **injunction** cancellable upon the payment by the D of damages to the P for **past injuries and for future injuries that would flow from the continuation of D's activities.**

◇ Unsuccessful P awarded an injunction contingent on his paying the D the cost of compliance.

□ **Boomer**

◆ Permanent damages --> ONE TIME SOLUTION

◆ Balancing interests

◇ Need to keep cement plant going...maximizing resources

◇ Plant operating there more valuable than the homeowners living there

□ **Spur**

◆ Laws of equity --> INDEMNIFICATION

◆ Common issue w/**urban sprawling**

◆ **UTILITY:** developers have great utility (efficiency)

□ **Prah**

◆ Private nuisance law applicable to disputes over access to sunlight for **reasonable use** of solar panels.

d. Zoning