REAL PROPERTY INTERESTS

Real and Personal Property

In most instances the surveyor's concern of differences between real and personal property is of minimal interest, but to his client these differences may be of extreme value. Real property is a fixed, immovable, and permanent thing, whereas personal property is consumable, can be destroyed, or moved at will. At times the distinction between the two may not be clear, yet it must be made. For example, standing timber is realty; cut logs may or may not be personality. A surveyor's failure to report observed cut logs in the course of a survey may result in liability if his client suffers damages by his failure to do so.

Constituents of Real Property

Land is the solid material of the earth (soil, rock, clay, sand, lava, minerals, etc.). Real property has become synonymous with land.

Real property is four dimensional, length, width, depth (including height) and time. The courts to include subsurface rights in minerals, waters, and passage as well as aerial rights and the space above the land itself have interpreted the third element, depth, in addition to surface rights. English common law and the courts in the United States also recognize a fourth dimension, time. Time can describe or indicate the duration of the legal rights in real property that the vendor has to convey.

From ancient times, land has been considered as immovable or fixed in position. Hence the courts and the resulting case law treated land as unique and considered the location of each parcel as definitive and distinguishable.

History of American Law

Basic American real property law has its foundation in English land law originating in feudalism. After 1066 A.D., all lands under English rule were considered owned by the King, William I. William made conditional land grants to his followers, to specific English barons, and to certain individuals who submitted to his control. The grantees became holders of the land or "tenants." Since the tenant made all grants in return for services, the terms of the holdings under which each tenant held were free or unfree tenure.

Free tenure was divided into:

1. Military or knight service, wherein each knight was required to give a number of days each year in defense of the king.

2. Spiritual or Frankalmoigne tenure, which required prayers or spiritual duties for the king.
3. Socage tenure, which consisted of nonmilitary duties such as providing the king with crops or cattle.

4. Serjeantry, wherein personal services were provided to the king.

Once each individual provided the identified and specific tenure, his remaining time was his own, and he could use the property freely in any manner desired. These four forms of tenure later became known as freeholds.

Serfs held their land under unfree tenure, in that they were bound to the land and could not use any of it for their own purposes. The main point in the feudal system is that the individual who held tenure also was in possession or seisin of the property. Upon the collapse of the feudal system, only socage remained, from which we retain freehold estates.

**Rights and Interests in Land**

Rights and ownership are related but are not the same. When a person owns a parcel, that person has the right to timber, water, minerals, and possession. Each right may be described, identified, and conveyed. The owner may convey all of the rights; yet retain the right to pay taxes.

The surveyor should understand the distinction between rights, interest, and title. Title is the vehicle by which one acquires an estate. Rights, such as the right to take minerals, are attributes that an individual may hold by being a landowner. A person holding a lien on land has an interest but not a title. Interest and title are not synonymous.

The primary function of the surveyor has been in regard to the boundary but, he is also concerned with the to rights and interest in land. The title to property is the exclusive domain of the attorney. However, as the surveyor's responsibilities, identity, and capabilities have been changed and redefined by the courts, he is no longer prohibited in many jurisdictions from giving an opinion about who holds the title to a piece of real property.

The rights and interest a person hold in land today are controlled and regulated by the laws of the state in which the lands is located. The federal government has control over the public domain, Indian lands, lands involved in bankruptcy, state boundaries, navigation, lands seaward of state boundaries, and air rights crossing state boundaries. Certain "common law" rights are recognized:

1. The right to dispose of property, not inconsistent with the law.

2. The right to have land free from interference.

3. The right to support of property, both subjacent and laterally.

4. The right to control waters that flow through or on property.

5. The right to any waters that flow through or touch property.
6. The right to all space above and below surface.

**Estates**

Under early common law, the people who possessed seisin owned a collection of rights incident to his land. The tenant holder's rights became known as his estate. These estates differed mainly in the length of time in which they might exist. In modern legal and technical senses an estate is the degree, quality, and nature of the interest which a person or individual has in real property. An estate may be either absolute or conditional. In most instances fee simple means absolute. Today all estates are classified as freehold or nonfreehold (less than freehold). Freehold estates are divided into fee simple, fee tail, and life estates.

**Fee Simple**

A fee simple estate is the highest and greatest estate in land that one can obtain. Fee simple absolute each distinct word carries a specific meaning. Fee denotes that the estate is one that can be inherited or devised by a will. Simple denotes that the estate is not a fee tail estate. Absolute means that there are no conditions or limitations in time, and this estate may continue forever.

**Fee Tail**

Fee tail is an early English type of estate. It is a true freehold estate limited by the grantor to the heirs of the grantee's body. If the conditions are breached (no male or female are produced by the grantee), the estate reverts to the grantor or his heirs. In the United States, this type of estate was never adopted as part of the English common law, or statutes eliminated the estate. Any reference to fee tail connotes fee simple absolute today.

**Life Estate**

A life estate is considered a freehold estate since it can be conveyed to a third party, yet its duration is only measurable by some life. In essence, the life estate lasts only for the life of some person. An "ordinary" life estate is normally worded "to Jones for life and then to Brown in fee simple." An estate "per autre vie" has a measured life of a third person and may be worded "to Jones for the life of Brown and then to Smith in fee simple." This estate terminates with the death of Brown.

**Easements**

An easement is one type of interest which one person has in the land of another. A number of different types of easement may be recognized.

Affirmative or positive easements permit the possessor of the easement to do some physical act on, under, or over the lands of another party. The land that benefits is called to dominant tenement, and the land to which the easement is attached is called the servient tenement.

Negative easements are those in which the holder of the dominant tenement can prevent the servient estate holder from some use of property, such as easements for light, air, or scenic value.
An appurtenant easement benefits the dominant tenement and attaches to the parcel of land. For example, an easement acquired by the owner of a landlocked parcel for the purpose of gaining access to a road is appurtenant to the land. The easement automatically passes with the sale of the land, whether mentioned in the conveyance or not; it is attached to the land.

An easement in gross attaches to an individual, not to a particular parcel of land. For example, an easement granted to a railroad for a right of way, or to an individual for the right to fish or hunt on a parcel of land or for access and use of a swimming pool on a nearby parcel are all easements in gross which attach to an individual.

**Servitudes**

Servitude is a limited real right over another person's property that entitles the holder to certain powers of use and enjoyment in relation to that property. In the true legal sense, an individual other than the owner, who has a direct interest in the property and thus is “served”, restricts the freedom of ownership of a parcel of land. The condition of the ownership of the restricted property is termed “servitude" and the land itself has a burden placed upon it.

Law may classify servitudes as real or personal. A real servitude, such as an easement, is a right or rights established in favor of a parcel of land (the dominant tenement) over a second parcel (the servient tenement). A real servitude is established for the benefit of a particular estate of land and is held for the benefit of the estate and not the individual.

A covenant is an agreement between persons or parties that restricts the use of a freehold property. It is enforceable not only between the original parties who were privy to the agreement, but by all parties who become assignees of the encumbered land. In order to be enforceable, the covenant must "touch and concern the land." Courts have held that it would be inequitable to permit an individual to purchase a parcel at a price kept low because of a restrictive covenant, and then allow him to sell it at a much higher price free of the restrictions. Covenants therefore run with the land.

A covenant contained in a conveyance instrument is an agreement usually to restrict certain acts and may take on certain forms:

1. Covenants contained in an agreement between more than one party, usually in the same neighborhood or subdivision.

2. Covenants contained in a deed of a single parcel.

3. Covenants, conditions, or restrictions contained in the deeds or on the plat of a subdivision binding on all owners or purchasers of lots within that subdivision.

A developer or owner may convey parcels with specific restrictions recited, as he desires for his benefit or that of the subdivision. Such restrictions will be binding upon all future owners as long as they are not unlawful (racial or religious), or contrary to established rules of public policy. These restrictions will be binding upon all future owners whether they have actual notice or not.
Liens

A lien on property may be described as a right to have property sold or applied to the satisfaction of a debt. A lien is not a right to the thing itself, but constitutes a charge upon the property. A lien may arise from a contract of the parties (a mortgage), equity (claim), or by operation of law (a tax lien.)