Unit 12 – Real Property: Rights, Limitations, and Taxation

I. Easements

An easement is the right of one person to legally enter and use the land of another. Easements are classified in two types: (1) an easement appurtenant which benefits the owner of one tract of land (the dominant tenement) by permitting the physical use or enjoyment of another piece of land (the servient tenement) and (2) an easement in gross which relates to only one piece of land and benefits its owner personally rather than benefiting the owner of the dominant tenement (i.e., the holder of the easement in gross is not the owner of the one tract of land involved). Easements appurtenant generally pass along with the dominant tenement and, unless limited by the terms of the grant or abandoned, have potentially unlimited duration. Easements in gross are usually personal and are extinguished with the death of the holder; they are generally not transferable. An exception to this rule is utility, railway and similar right of ways.

Easements are created by express grant (where the grantor gives an easement in property still owned by the grantor to the grantee) or by express reservation (where the grantor retains an easement in property that he is conveying to the grantee) in a deed. An easement can also be created by prescription, which is an enforceable easement acquired by meeting requirements similar to those for adverse possession, such as uninterrupted, continuous and under color of title for a statutory period of time. An implied easement arises where a conveyance of property has been made with no express reservation of an easement, but the underlying circumstances imply an intention to create an easement. For this easement to exist, adjacent lands must be initially owned by a single owner and subsequently sold so that there is more than one owner (separation of title). Finally, under North Carolina law, a person may petition the court for the right to use a cartway over his neighbor’s property. This condemnation is an exercise of the government’s power of eminent domain, but here it is for a private use rather than the usual public use.

II. Covenants Running With the Land (restrictive covenants)

When parties convey land, they can make agreements regarding its use. If the agreements are part of the deed or in a subdivision map filed with the real property records office, they are binding on subsequent owners and are called covenants running with the land. These covenants are generally classified as: (1) express covenants (ones explicitly stated in a deed) or (2) implied covenants (ones not stated in writing but implied by the language of the deed and existing conditions). A covenant running with the land confers a burden or a benefit on the owner of the land to which it attaches.

III. Zoning and Land Use Controls

The government has a sovereign right to promote the safety and general welfare of society within constitutional limits through its police power. Zoning is an exercise of police power to regulate the use of private land for an acknowledged public interest. Most zoning occurs at the municipal level, and it must relate substantially to the public
health, morals, safety or welfare. North Carolina authorizes county governments to zone parts or all of their territory not covered by municipal zoning (including areas of extraterritorial zoning.) The more urbanized counties of North Carolina have county-wide zoning covering those areas not covered by municipal zoning.

As a technique for regulating land use, zoning is based on the idea that in a given area, certain uses are expressly permitted and, consequently, all other uses are prohibited. In North Carolina, zoning is inapplicable to farms if they are not in an incorporated area.

Voluntary Agricultural Districts are areas of qualifying farm and horticultural land that the owners have agreed to include in districts. All landowners whose land is in voluntary agricultural districts must make an application to the county agricultural advisory board and agree to maintain certain conservation practices on the property. In counties with computerized land record systems buyers of properties within half a mile of district perimeters are put on record notice of the existence of the districts. Counties establish agricultural district programs through enactment of an agricultural district ordinance. <http://www.cals.ncsu.edu/wq/lpn/>

IV. Lateral and Subjacent Support

A real property owner has an absolute right to have his land supported on the sides (lateral support) and from beneath the surface (subjacent support) by adjacent real property, if the land is in its natural state. The right of lateral support is effective against acts such as excavation or the cutting of road grades. The right to subjacent support is important where there is underground mining. A landowner is strictly liable for the damage to the land if his excavation causes adjacent land to subside. However, if there are structures on the land, he is liable for the damage to the structures, as well as the land, if he is found to be negligent.

V. Taxation

If a property owner fails to pay his property taxes, the taxing authority (city and/or county) can place a lien on the property. The taxing authority can either file an action to foreclose a tax lien or can obtain a judgment against the property owner by docketing a certificate regarding the unpaid taxes. After proper procedures are followed as provided by statute, the property will be sold in fee simple, free and clear except for the tax lien, at a foreclosure sale for the amount necessary to satisfy the unpaid taxes, penalties, interests, and costs.

Under certain circumstances, the valuation of real property for tax purposes may be eligible for a reduced amount based on its present use rather than on its highest and best use (special use valuation). For example, agricultural lands that meet certain income and ownership requirements may be valued based on use as a farm rather than on use as a developed residential area or shopping mall. This program is available for agricultural, horticultural and forest lands in North Carolina. It is subject to many limitations and failure to comply with statutory provisions will result in recapture of the last three years
tax that was foregone. Participation in the program is not automatic; an application must be made to the tax office in the county in which the land is found.

VI. Adverse Possession

The doctrine of adverse possession permits a person in possession of land for a statutory length of time to acquire title to that property. It is distinguished from the government’s exercise of eminent domain because here one private citizen can take from another and there is no compensation for the taking. Adverse possession is best thought of as a statute of limitation on the bringing of a trespass action. While a person may acquire title through adverse possession, the title acquired is not a marketable title.

Certain elements must be present for acquiring title by adverse possession:

(1) Actual (not applicable to concurrent ownership with a cotenant)
[Adverse possession is available against a cotenant where one cotenant bars the other from the property. Where a property includes waste land, forest land and other land that would not normally be in active use, the possession will still be of the whole property where it is employed in its normal use.]

(2) Open and notorious (not secret or clandestine)

(3) Hostile (without permission) [Permissive use never gives rise to adverse possession.]

(4) Continuous (without interruption for the statutory period; the years of adverse possession by one occupant can be “tacked” on to the uninterrupted years of adverse possession by prior occupants to meet the statutory period requirement) [Where the normal use of the property is only seasonal, the lack of use during the off season will not defeat a claim of continuous use.]

(5) Exclusive possession (not shared with the true owner; (a) if against a private landowner, the statutory period is 20 years under a claim of right but only 7 years under color of title (this is an instrument or record that does not actually convey title but appears to have the effect of conveying ownership to the grantee, such as a deed with a forged grantor’s signature taken in good faith at the time of purchase) and if the possessor has paid all property taxes, or (b) if against the State (except public trust land, roads, canals, etc.), the statutory period is 30 years under a claim of right or 21 years under color of title). Adverse possession is not available against the federal government.

The reasons for adverse possession, even though it may seem unfair to the property owner, are to encourage full use and improvement of the property and to aid in settling boundary disputes and clearing titles. The statutory periods of limitation during which claims to land may be pursued in court prevent some of the confusion that can exist with real property titles and encourage the timely resolution of disputes. Adverse possession not only clears the record of many old claims but it often results in the passing
of land from the record title holder to the one who has used and claimed the land for many years.