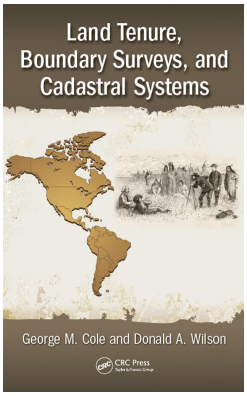

Land Tenure, Boundary Surveys, and Cadastral Systems

George M. Cole, Donald A. Wilson

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George M. Cole, Donald A. Wilson
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2.1 Territoriality

Territoriality is usually considered to be the attachment to and defense of a specific geographic area. Although often considered a characteristic of mankind, the identification of an area for exclusive use is a well-documented practice among many species of animal life. The examples provided in the Introduction involving the "marking" of territorial boundaries by dogs and the defense of nesting areas by mockingbirds illustrate two of many examples of territoriality by species other than humans. In addition to birds and dogs, territoriality has been observed in many other species. A number of mammals claim exclusive territories and mark the boundaries of those areas with self-produced scent in the form of urine or musk on stumps, tree limbs, or rocks. Among some social animals such as the primates, there is a tendency for territory to be claimed by groups rather than individuals. Organized bands of monkeys and apes often occupy and defend territories as a group.

Therefore, territoriality is apparently a natural tendency since many examples of territoriality may be observed among various species of animal life. In many cases, this tendency takes the form of a territory being claimed and defended by an individual or close family unit. In other cases, territory is claimed and defended in common by an expanded tribal group.

Among humans, groups of people have been seizing land from other groups as far back as historical records exist. Even early cave-dwellings societies have been reported to have individual partitions within their caves. Among the early hunting/gathering societies, land was probably not considered a commodity as in most contemporary societies. Nevertheless, a particular area of land was often associated with a tribe or group of people who lived upon it and defended it. Among Native Americans, for example, a tribe usually claimed a wide area common to all members, which was defended against intruders. In addition, individual occupancy of garden patches within that territory was respected in some areas. Some groups, such as the Sitkans of Alaska, divided productive areas of the coastline among families and used cornerstones and stakes to demarcate the boundaries of those

individual tracts. As other examples, the Montagnais tribe of Canada is reported to have produced good maps of their territory by carving on pieces of birch bark. Where urban societies or formal agriculture developed, both requiring intensive land use, recognition of individual rights over territory generally developed as opposed to tribal or group rights.

Thus, territoriality appears to be a natural pattern among many species of animal life, including humans. Furthermore, exclusive claim to land appears to be a universal trait of human culture and a part of the basic fabric of human society.

2.2 Land Tenure and Its Development

In human society, territoriality is manifested by the process of *land tenure*. That term may be very simply defined as the process of holding land.* Slightly more detailed, it may be said to be the relationship, whether defined legally or customarily, among people, as individuals or groups, with respect to land. Land tenure is an institution, that is to say, it is rules invented by societies to regulate behavior. The rules of tenure define how property rights to land are to be allocated with societies. It is an essential part of most legal systems and is an important part of social, political, and economic structure. Because of that multidimensional nature, it has important social, technical, economic, legal, and political aspects.

Reportedly, the earliest urban society, as well as earliest formal agriculture, developed about 8000 BC. Our knowledge of land tenure during that period is limited, but it is presumed that some sort of individual or group exclusive rights to land were recognized due to the nature of land use by those societies.

In the early stages of civilization, most forms of land tenure were collective. When people began to cultivate or otherwise intensely use the land, individual rights began to be recognized. With intensive use, it became more important to delineate and defend the areas involved to protect one's investment in the land. Eventually, this led to the development of ways to describe the land and legal systems to protect interests in land other than with physical defense, as well as to allow for the use of land as a commodity.

Definite evidence of private ownership of land and sales of privately owned land parcels in various societies has been found for periods as early as 2700 BC (Powelson 1988). That evidence is in the form of textual information on tablets in Southern Mesopotamia. No evidence exists of an organized

* The origin of the word *tenure* is the Latin verb *tenere*, which means to hold or comprehend. It is also seen in the Spanish verb *tener* or French *tenir*, meaning "to have."

system of land distribution or of concepts such as title deeds, but land was apparently claimed and occupied by those who would take it and hold it.

Egypt provides another example of an early society developing sophisticated land tenure practices. The oldest documented evidence of such a system is dated approximately 2350 BC. The land system in that country, even then, had laws requiring a document to be drawn up on papyrus, signed by three witnesses, and stamped with an official seal when transferring ownership of land. Furthermore, that system accounted for lands by use of a central registry in the office of the vizier, the pharaoh's prime minister. That registry also was used for recordation of wills and other documents affecting land ownership similar to the process in use in advanced societies today.

An interesting example of the relative complexity of early land transactions is one conducted by the prophet Jeremiah, which may be found in *Holy Bible* as follows (Jeremiah 32: 9–14, *Holy Bible*, Revised Standard Edition)

> And I bought the field at An'athoth from Han'amel my cousin, and weighed out the money to him, seventeen shekels of silver. I signed the deed, sealed it, got witnesses, and weighed the money on scales. Then I took the sealed deed of purchase, containing the terms and conditions, and the open copy; and I gave the deed of purchase to Baruch the son of Neri'ah son of Mahsei'ah in the presence of Han'amel my cousin, in the presence of the witnesses who signed the deed of purchase, and in the presence of all the Jews who were sitting in the court of the guard.
>
> I charged Baruch in their presence, saying, Thus says the Lord of Hosts, the God of Israel: Take these deeds, both this sealed deed of purchase and this open deed, and put them in an earthenware vessel, that they may last for a long time.

As may be seen, the transaction involved many of the same elements used today, including the requirement for witnesses to the transaction, public notice of the sale, and the preservation of the deed in a safe place such as a sealed vessel as was the custom of those days.

During the dynasty of Ptolemy (305–31 BC), a relatively advanced land information system was developed in Egypt that contained precise information on even small plots of land, including the legal status of the land, its dimensions, its location, the holder of the land, the state of its irrigation, and the type of crops grown on it.

It may be seen from the foregoing examples that having exclusive rights to land is a long-established practice of mankind. Furthermore, it may be seen that many of the practices associated with land ownership today, such as considering rights to land as a commodity that can be traded, the creation of formal land title deeds to represent land in transfers of ownership, the maintenance of a central registry of deeds to land, the recordation of other documents affecting rights to land such as wills, and even land information systems, are also long-established and essential components of human society.

As various societies have evolved, various degrees of private rights to land were recognized. At times, in some regions, land ownership became consolidated under a sovereign power. At other times in history, individual rights to land were recognized. Nevertheless, the general tendency in most urban or agrarian societies, especially in more recent times, has been to move toward individual land ownership rights with the demise of feudalism.

2.3 Modes of Interests and Tenure in Land

Practices and laws regarding land tenure vary considerably among nations. Nevertheless, there are some common principles. Generally, most systems provide for several levels of interest in land, some of which may intersect one another and exist simultaneously. For example, under common law, *fee simple* is the most complete ownership interest one can have in real property, other than the rare *allodial title*, when real property is owned absolutely free and clear of any superior landlord or sovereign. Yet, even land held in fee simple may be subject to overlapping interests, such as when the property is leased or rented by its owner to another party. Generally, when there is more than one interest in property, the interests are considered to be in one of the following classifications:

Overriding interests: when a sovereign power (e.g., a nation or community) has the powers to allocate or reallocate land through expropriation or similar practice

Overlapping interests: when several parties are allocated different rights to the same parcel of land (e.g., one party may have lease rights, and another may have a right of way). Examples of overlapping interests are in abundance. An obvious one is the land, burdened by a highway easement, further burdened by slope and sight easements, which in turn are burdened by overhead and underground utilities, along with telephone and cable lines. In major metropolitan areas, easements are stacked on top of one another, some being surface, while others are subsurface and above surface (air space)

Complementary interests: when different parties share the same interest in the same parcel of land (e.g., when members of a community share common rights to grazing land, community wells, and the like)

Competing interests: when different parties contest the same interests in the same parcel (e.g., when two parties independently claim rights to exclusive use of a parcel of agricultural land. Land disputes arise from competing claims)

Many different forms of land tenure can be found within a given society. *Rights in common*, especially for many agricultural uses, may be held in trust for the citizens. *Private tenure* is where rights to land are assigned to a private entity, which may be an individual, a husband and wife, a corporation, or other groupings. *Communal tenure* is when rights are assigned to a community or group where any member of that group has the right of use. *Open access tenure* is when rights are assigned to no one in particular and no one can be excluded. *Governmental tenure* is when rights are assigned to some authority in the public sector. For any of these types of land tenure, rights may include exclusive rights or more limited rights such as leasehold. Multiple rights may be held by several different persons or groups with differing rights in the same parcel of land frequently held by different parties. Thus, *tenure* is a broad and multidimensional concept. In common language, this has given rise to what is known as "the bundle of rights."

Rights in land may be simplified by categorization into use rights, control rights and transfer rights. Rights may also be classed as formal or informal. Formal property rights are those acknowledged by the state and which may be protected through legal means. Informal property rights lack official recognition and protection.

Property rights may also be illegal under some circumstances. Often, illegal property holdings arise because of inappropriate laws. In other cases, property may be classed as extralegal. These are situations that are not against the law but are also not recognized by the law. It is important to distinguish between statutory rights, or "formally recognized rights," and customary rights, or "traditional rights." Custom, or customary rights, may play an important role in identifying rights of a group of people established over a long period of time. Customary rights in land involving indigenous societies are usually created following their traditions and through the ways in which community leaders assign land use rights to the members of the community. They are often rights developed through ancestral occupation and use by ancestral societies.

There are a variety of modes of land ownership and tenure. Some involve individual ownership and others involve collective ownership, which may take the form of membership in a cooperative or shares in a corporation, which owns the land (typically in fee simple, but possibly under other arrangements). There are also various hybrids, such as in some communist states, where government ownership of most agricultural land is combined in various ways with tenure for farming collectives.

Allodial title—Allodial title is a system in which real property is owned absolutely free and clear of any superior landlord or sovereign. True allodial title is rare, with most property ownership in the common law world (Australia, Canada, Ireland, New Zealand, United Kingdom, and United States) being in fee simple. Allodial title may be conveyed, devised, gifted, or mortgaged by the owner, but it may not be distressed and restrained for

collection of taxes or private debts or condemned by the government through eminent domain proceedings.

Common areas in colonial states—In the Pennsylvania case of *Bruker v. Burgess and Town Council of Borough of Carlisle*,* the court found some of the evidence confusing, and incomplete in its wording, but stated that ancient rights as established in favor of the public continue; however, in the absence of more complete definition, uses may change over time to meet the needs of the community.

Two things in this case are noteworthy. The first is the court's statement that "there is no doubt that the mere fact of the use of (the Square) by the public for now more than 200 years is sufficient to raise a conclusive presumption of an original grant for the purpose of a public square; such is an ancient and well established principle of the law. Nor can it be denied that, where such a dedication has been established and the public has accepted it, there cannot be any diversion of such use from a public to a private purpose, and it is also true that, where a dedication is for a limited or restricted use, any diversion therefrom to some purpose other than the one designated is likewise forbidden" (citing several cases).

The second item of note is the dissenting opinion (of two of the judges) which states, in part

> Evidence of dedications and titles based upon ancient documents or events arising out of antiquity cannot possibly be as strong or clear as would be required in matters arising or titles created in modern times; and we must not lightly strike down rights or public uses which have existed for more than a century. Counsel for the Borough frankly admits that if the Borough can change or destroy this market place it can also change or destroy the church which was built on this same public square and like the market place has been used for more than 200 years. This church and this market place were dedicated by Thomas Penn in 1751; and this dedication and use as a market place were thereafter frequently ratified. The Borough merely contends that there exists today no clear evidence that this square was the 'spot' which was dedicated for these purposes.
>
> We are living in exciting and rapidly changing times. We rode from the horse and buggy age to the automobile age and then flew too rapidly to the airplane age and the atomic age. The tremendous changes which have occurred and are still daily occurring have necessarily produced uncertainty, unrest and confusion—not only in the minds of men, but in many phases of man's life. As a consequence, 'change' is on every man's lips, and unrest and uncertainty in many a man's heart. In the craving for change, in the restless quest for a Utopia of riches and ease, haven't we too often forgotten the things of the spirit, as well as the history of our Country and the immemorial customs of our people? Haven't we rushed frantically and heedlessly after false goods—material prosperity and

* 376 Pa. 330; 102 A.2d 418, Pennsylvania (1954)

> political panaceas? Should not our wonderful farm people be allowed to preserve in a farming community a few of their ancient privileges, customs and practices, even though more income would be produced by a different (public or private) use?
>
> Title to this market place or square is not in the Borough of Carlisle; it is in the Commonwealth of Pennsylvania, with a reversionary interest in Penn's heirs. The Borough has no title or estate in this property; it has only a right to control and regulate, in the interest of the public, the public use of the 'market place' for the uses and purposes to which it was dedicated.*

An *easement* is a right of use of land owned by others for a designated purpose, but not ownership. The owner of the land may continue to use the land over which there is an easement as long as it does not interfere with the use of the land specified in the easement. Easements are typically used to provide formal permission for utility lines to cross over or under property and for providing ingress and egress to adjacent property. The most classic easement is the right of way.

Fee simple estate—This is exclusive ownership interest in property. The owner(s) may hold, convey it, and pass it on to heirs without limitation.

Fee tail—Under common law, this is hereditary, nontransferable ownership of real property. A similar concept, the *legitime*, exists in civil and Roman law. The legitime limits the extent to which one may disinherit an heir.

Feudal land tenure—Feudal land tenure is a system of mutual obligations under which a royal or noble personage is granted a fiefdom (some degree of interest in the use or revenues of a given parcel of land) in exchange for a claim on services such as military service or simply maintenance of the land in which the lord continued to have an interest. This pattern obtained from the level of high nobility as vassals of a monarch down to lesser nobility whose only vassals were their serfs.

Leasehold or rental—Under both common law and civil law, land may be leased or rented by its owner to another party. A wide range of arrangements is possible, ranging from very short terms to the 99-year leases common in the United Kingdom, and allowing for various degrees of freedom in the use of the property. Generally, improvements to the land during the term of the lease, such as buildings, remain the property of the owner of the property.

A *lien* is a claim on property for payment of a debt or obligation. It is not the right of possession but is the right to have the property sold to satisfy the debt. Liens are frequently used by contractors as a means of collecting unpaid fees for work performed on improvements to property. Government entities may also impose liens because of failure to pay taxes on the property.

Life estate—Under common law, this is an interest in real property that ends at the holder's death. The holder has the use of the land for life but typically no ability to transfer that interest or to use it to secure a mortgage loan.

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* *Hoffman v. City of Pittsburgh*, 365 Pa. 386, 75 A.2d 649 (1950)

In those cases where such estate does pass to another, the next holder is said to have an estate *per autre vie* (for the life of another). It, too, terminates upon the death of the original holder.

A *mortgage* is a conditional conveyance of real property as a pledge for the security of a debt. An example of a mortgage is when a person borrows money to purchase property. That person guarantees that he or she will repay the money by making a conditional conveyance to the lender. If the money is repaid as specified, the mortgage becomes null and void. If the money is not repaid as specified, the lender may take possession of the property.

Native title (aboriginal title), also referred to as indigenous title, original Indian title, and customary title, is a common law concept that recognizes that some indigenous people have certain land rights that derive from their traditional laws and customs. Native title can coexist with nonindigenous proprietary rights, and in some cases, different indigenous groups can exercise their native title over the same land. In the United States, aboriginal title is a common law doctrine that the land rights of indigenous peoples to customary tenure persist after the assumption of sovereignty under settler colonialism. It has been described as an aboriginal right, or the right to the land itself, and is a communal right. Nearly all jurisdictions are in agreement that aboriginal title is inalienable, except to the national government, and that it may be held either individually or collectively. (See Section 3.1.7 for expanded information on this topic.)

Public trust easement—The ancient laws of the Romans held that the seashore not appropriated for private use was open to all. This principle became the law in England, and these rights were further strengthened by later laws in England and subsequently became part of the common law of the United States.

An easement through public trust was one of the claims made in the case of *Akau v. Olohana Corp.*[*] In this case, the plaintiffs had lived or fished in Kawaihae for many years. They represented two subclasses: one containing Hawaii residents who used or were deterred from using the trails, and the other containing all persons who own land or reside in the area and used or were deterred from using the trails. The defendants were landowners or tenants who possessed the beachfront land between Spencer Beach Park and Hapuna Beach Park, a span of about two and a half miles along the beach. They had barred all public access across their land to the public beach since acquiring the land in 1954.

Two of the trails in issue run roughly parallel to the beach between the two parks and had existed since before the turn of this century. The Kamehameha Trail is at most points very close to the water and at others about 100 yards away. The Kawaihae-Puako Road is about 150 yards further upland. There are also 11 intersecting trails that run from the main trails to the shore. Plaintiffs allege that these trails had been used by the public until 1954.

[*] 65 Haw.383, 652 P.2d 1130, Hawai'I (1982)

The Territory of Hawaii owned the land between the two parks until it was sold to Richard Smart in 1954. The parcel consisting of the Kawaihae-Puako Road was also sold to Smart at that time. Smart conveyed all his land by deed or lease, and all the original defendants were owners or lessees of that land.

Plaintiffs claimed that the trails have been and are public rights-of-way and asked for declaratory and injunctive relief to that effect. The eight theories plaintiffs rely on are (1) HRS §7-1; (2) ancient Hawaiian custom, tradition, practice, and usage; (3) common law custom; (4) easement by implied dedication; (5) easement by prescription; (6) easement by necessity; (7) easement by implied reservation; and (8) easement through public trust. The State was made a nominal defendant to protect the interests of the public. Its position, however, is in support of the plaintiffs in the appeal.

It is noted that the *Akau v. Olohana Corp.* case had to do with class standing as opposed to the State bringing the action. Yet, it is illustrative of the theories under which an action of this nature may be brought.

In the case of *Banner Milling Co. v. State*,* the New York court explored the differences in land rights held by a state. It said, "We are of the opinion that the vital question in this case is this: Was the land, the title of which is in question here, owned and held by the State as a sovereign in trust for the People, or as a proprietor only? There is a well-recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only, for the purpose of 'sale or other disposition.' (*Weber v. State Harbor Comrs.*, supra, 18 Wall. 68) In either circumstance, except a statute (making an agreement on behalf of the People not to sue) authorizes it, lands of a sovereign State cannot be lost to, or taken from, the State by failure to assert her title (2 C.J. 213; *Fulton L., H. & P. Co. v. State*, 200 N.Y. 400; *St. Vincent F.O. Asylum v. City of Troy*, 76 id. 108; Hays v. U.S., 175 U.S. 248); and, after such a statute has been passed by a State, such lands only as the State holds as a proprietor may be lost to the State; it cannot lose such lands as it holds for the public, in trust for a public purpose, as highways, public streams, canals, public fair grounds. (*Burbank v. Fay*, 65 N.Y. 57; 2 C. J. 213, 214, 215)."

Rights to use a common—These may include such rights as the use of a road or the right to graze one's animals on commonly owned land.

Sharecropping—Under sharecropping, one has use of agricultural land owned by another person in exchange for a share of the resulting crop or livestock.

Traditional land tenure—Most indigenous nations or tribes of North America had no concept or formal notion of land ownership. When Europeans first came to North America, they sometimes disregarded traditional land tenure and simply seized land, or they accommodated traditional land tenure by recognizing it as aboriginal title. This theory formed the basis for treaties with indigenous peoples.

* 117 Misc. 33, New York (1921)

2.4 Conveyance of Interests in Land

There are a number of processes by which legal interests in land may be conveyed by the owner to others. Some of the most utilized processes include deeds, dedications, and wills.

Deeds are the most common and the most important instrument used for conveyance of interest in real property. A deed is always a formal document and, by law, must be written. There are two principal types of deeds: warranty deeds and quitclaim deeds. Warranty deeds are instruments whereby the grantor warrants that he or she is the lawful owner of the property being conveyed and is therefore bound to forever defend the title to the property. With quitclaim deeds, the grantor does not warranty that he or she owns the land being conveyed. Rather, a quitclaim deed is used to convey whatever interest that the grantor has in the property to the grantee. Another very specific type of deed is a patent. It is a deed from a sovereign (or sovereign government) to an individual. Examples of this are the many patents used to convey parcels of the public lands of the United States to individuals.

A dedication is a conveyance of real property or rights to real property to the public. An example of this is the dedication of the streets in a subdivision to the public as part of the formal recordation process. The interests conveyed by such a dedication must be accepted by the government entity named as the grantee for the dedication to be valid.

An additional means of conveying interest in land is by means of a will. A will is a declaration of a person's wishes for the distribution of his or her property after death. Before property ownership can be actually transferred under the terms of the will, it must be submitted to a probate court for approval.

2.5 Transfer of Interests in Land without Agreement of Owner

In addition to the various means by which interest in land may be conveyed by the owner to other individuals or the public, there are several means by which interest in land is conveyed *without* the agreement of the owner. The most utilized of these processes include condemnation under the right of eminent domain, adverse possession, and prescription.

The public may acquire an interest in land from an individual through *condemnation* procedures under the right of eminent domain. When this process is utilized, the transfer is involuntary on the part of the private land owner. An example of this may occur when a state or county is constructing a project in the public interest, such as a new roadway, through lands where the owner is not willing to sell at the offered price. Condemnation requires a

judicial finding to approve the process and to establish fair compensation to the owner for the property as well as for consequential damages.

Adverse possession is the acquisition of title to real property without the agreement of the owner based on long-continued possession of the property by another. The right to acquire property by this means is also called *squatter's rights*. Requirements for acquiring property in this manner vary with state law but typically require open and exclusive possession of the property for a certain period of time in such a manner that the owner would be aware of the possession. The ultimate effect of adverse possession is to extinguish the former title. The following two definitions best describe the significance of the adverse possession process:

> Adverse possession is the ripening of hostile possession, under proper circumstances, into title by lapse of time. (3 Am Jur 2d Adverse Possession, §2)
> Adverse possession generally creates an absolute title to real property in fee simple, which is as good as title by patent from the state or title by deed from the record owner, although it does not amount to record title unless and until made so by judicial proceeding. (3 Am Jur 2d Adverse Possession, §1)

In the United States, there is a long history of property being acquired by adverse possession. In colonial times and even after the American Revolution, occupying land without title, or "squatting," was a frequent practice in the United States. Even George Washington, the first president of the United States, is known to have had problems with squatters on his Virginia farmland and was once warned by his lawyer that "if he succeeded in his suit against squatters on his estate, they would probably burn his barns and fields" (de Soto 2000). Gradually, this situation was improved as public domain land was made more readily available to settlers and land recordation systems became more efficient and accessible.

Prescription is a method of acquiring easement rights to property without the agreement of the owner through long-continued usage. An example of this could occur if you acquired property where the previous owner had been allowing his neighbors to cross his property to access their property for many years. The neighbor could possibly have acquired prescriptive rights to continue use of the property for a driveway that would preclude you from closing the property to his use after buying the property. Another application of this process allows the public ownership of road right of way over lands used and maintained by the public for a long period of time.

Custom is a method of acquiring easement rights by the operation of law through continuous use of land for a specific purpose over a long period of time. An easement right acquired by custom lacks a dominant tenement and is in generally in favor of the inhabitants of a particular locality.

Custom differs from prescription, which is personal and is annexed to the person of the owner of a particular estate, while the other is local and relates

to a particular district. The distinction has been thus expressed: *"While prescription is the making of a right, custom is the making of a law."*[*] Bouvier's Law Dictionary defines custom as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates." Another description of the distinction is provided by an early New Hampshire case as follows:

> Whether rights are holden as a custom, or as a prescription, depends on the manner in which they are holden—whether by a local usage, or as a personal claim, or as dependent on a particular estate. All rights which may be holden as a custom, may be holden as a prescription, but the reverse is not true. If the rights are common to any manor, district, hundred, parish or county, as a local right, they are holden as a custom. If the same rights are limited to an individual and his descendants, to a body politic and its successors, or are attached to a particular estate, and are only exercised by those who have the ownership of such estate, they are holden as a prescription.[†]

2.6 Land Tenure in Contemporary Society

As previously mentioned, the general trend in land tenure in recent years has been toward individual land ownership. That type of land tenure, protected by a formal land property system, has been a key factor in the prosperous economic system of the United States and other economically advanced nations. This is due to the ability of owned land to have an economic life in addition to its physical life. Such a system provides security of title to a parcel of land, thus encouraging stable development. In addition, the land becomes an asset that can be traded to take advantage of increased value and one that can be used as security for mortgages. The land also represents an accountable address for collection of taxes and debts and provides a basis for the development of reliable public utilities.

Yet, in many developing nations in the so-called third world, large percentages of people reside on land without formal title. In some areas, massive squatter communities, called *favelas* in Brazil, *ranchos* in Venezuela, *barrios marginales* in Mexico, *pueblos jóvenes* in Peru, and *paracaidistas* in Central America, exist. De Soto (2000) estimated that 80% of all real estate in Latin America is held extralegally. Although such informal communities represent a tremendous amount of financial investment, the lack of formal property title prevents the occupied land from contributing to the economy. This has

[*] Lawson, Usages & Cust. 15, note 2
[†] *Perley v. Langley,* 7 N.H. 233, New Hampshire (1834)

led some researchers to the conclusion that such extralegal land occupation is a major obstruction to prosperity for the nations in which it exists.

During the 20th century, there was a movement in some regions of the world away from individual land ownership associated with the communism movement. That movement advocated common, or state, ownership of land. After more than a century of competition between capitalism, which supported individual ownership of land, and communism, which supported state ownership, almost all of the former communist nations have moved toward a more capitalistic economy featuring individual land ownership. This is in an apparent attempt to take advantage of the economic advantages of individual land ownership.

Thus, while the general trend of land tenure worldwide has been toward individual land ownership, there have been opposing movements at times, such as the communism movement in the 20th century, which attempted to move away from that principle. Furthermore, there are still large numbers, possibly representing a majority of the earth's population, living in communities without legal claim to the land that they occupy. Nevertheless, the general trend, supported by the apparent economic advantages of land ownership, appears to be toward more individual land ownership.

It is interesting to reflect on the concept of individual land ownership as practiced today. As previously mentioned, it does appear to be a natural tendency of mankind. Yet, on examination of history, struggles over the "ownership" of land have often been brutal. The following paragraph from a prominent land surveying textbook (Brown et al. 1981) provides much food for thought:

> Real property is not a creation of mankind. Original ownership, therefore can only come from conquest or discovery. Private ownership of land has many injustices, but perhaps it is the least of several evils. An alternative (although completely undesirable) plan would be the nationalization of land as prevails in some noncapitalistic countries. As civilization progressed, strong-armed men assumed ownership by force. All titles today run back to and are maintained by force.

2.7 Legal Restrictions on Land Ownership and Use

Absolute land ownership is a theoretical concept (Dekker 2003). Practically every society has placed certain restrictions on the use of land that is "owned" by individuals. Indeed, for almost as long as there has been individual land ownership, there has been some type of restriction on the completely free use of land imposed by rulers or governments. These restrictions may be in the form of a tribute or land tax paid to the ruler or government, restrictions on hunting or fishing, restrictions on how the land can be used, and

many other restrictions. This was true even in the American colonies. As societies have become more complex, there has been increasing emphasis on the general welfare and the distribution of rights among all members of society as opposed to only the rights of the owners of land. In many ways, that increased emphasis developed is a means of achieving the goals of the socialistic movement regarding land ownership. Yet, regardless of one's social philosophy, there is no question that as neighborhoods or nations become more densely populated, the way one person uses his or her land affects others more and competition for resources increases. As a result, it is also without question that such increased density requires increased mediation by governmental policy and increased restriction on land use.

The existence of these overriding interests, some of which are public and others solely between individuals or groups of individuals, represents legally valid restrictions on use of land. Therefore, they represent a legally valid interest in land. Yet, records and information regarding most of those interests are not typically found in a lands records repository. Rather, they are scattered among many public agencies. Thus, presently, the determination of all interests in a specific parcel of land is currently not simply a matter of researching ownership records found in a cadastral system.

2.7.1 Restrictions of Public Nuisances

A great deal of land use regulation is based on the common law concept of *nuisance*, which holds that a property owner cannot use his or her property in a manner that injures that of a contiguous owner (Dale and McLaughlin 1999). Typical forms of regulated nuisances include the causing of bad odors or air pollution, blocking off a neighbor's light and air, making excessive noise, and other actions that endanger or impair the enjoyment of nearby property.

The development of modern land use regulation based on nuisance may be illustrated by a review of early regulations for the city of London. Although that city has had controls governing the way in which buildings are constructed and maintained since the 12th century (Dale and McLaughlin 1999), the first modern building law was enacted there in 1666. The Great Fire of that year raged through the city and destroyed 13,200 houses, leaving over 100,000 persons homeless. Much of the damage associated with the fire was attributed to the lack of regulation of building construction material, size and location, and access for emergencies. In the aftermath of the fire, regulations were enacted that allowed only stone and brick to be used for the exterior of buildings, put height restrictions on houses, and increased the width of streets. The law also required that public nuisances, such as breweries and tanneries, be relocated from the center of the city to more suitable outlying areas (Platt 2014).

In the United States, land rights have traditionally been highly valued. Nevertheless, limits have always been placed on such rights when they could interfere with the rights of others by creating a public nuisance. For example,

as early as 1872, the U.S. Supreme Court clearly expressed this concept with a decision upholding an ordinance in New Orleans restricting livestock slaughter houses with the following language:

> Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may…be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community. (Slaughterhouse Cases, 16 Wall 36, 1872)

With the increasing urbanization of the United States, regulation of nuisances has become more prevalent and increasingly restrictive. Such regulations commonly are used to restrict many types of activities perceived to be nuisances. In addition to those discussed previously, they also include noise, unmowed lawns, buildings in disrepair, and items such as signs and billboards that are aesthetically offensive.

2.7.2 Land Use Zoning

Another type of restriction on the use of land is land use zoning. This process involves dividing a community into a system of zones in which only certain types of land use are permitted. Common classes of land use for this purpose include residential, commercial, industrial, and agricultural. Often, such principal land use classifications are further subdivided into classes such as single-family residential, multiple-family residential, and so forth. For each class, zoning regulations specify which uses are permitted, which are prohibited, minimum lot size, allowable density of development, and other requirements.

Land use zoning is often called "Euclidian zoning," after the town of Euclid, Ohio, where a challenge of its zoning ordinance resulted in the original approval of zoning by the U.S. Supreme Court (*Village of Euclid v. Ambler Realty Co.*[*]). That decision answered the basic question of whether a town or city can deny property owners the right to certain uses of their land under our laws. Following that decision, zoning has become a widely used practice.

As with most land use regulation, zoning is largely a function of local and state laws, not a federal function. Typically, communities appoint a citizen's planning commission to develop a comprehensive plan defining how the community is to be zoned, resulting in the development of a zoning map for the community. The resulting plans are then used to regulate orderly development of the community. Many recent comprehensive plans also include measures to encourage land to be used or developed in accordance with

[*] 272 U.S. 365 (1926)

public policy objectives such as reducing urban sprawl, preservation of open space, preservation of agriculture, encouragement of industry, and ensuring an adequate supply of affordable housing.

2.7.3 Subdivision Regulation

Most communities have subdivision regulations restricting the development of land. In the United States, over 60% of new residential construction is in the form of single-family houses, in contrast to the rest of the world, where much of new housing is in the form of high-rise apartments. Single-family houses are typically constructed on an individual parcel of land, usually in a subdivision of a larger tract of land. Thus, subdivision regulations are a key component of land use regulation in the United States.

Since subdivisions often include streets that are dedicated to the public, subdivision regulations usually have minimum requirements for the alignment, size, and paving of streets to prevent future maintenance problems as well as for storm water drainage. Subdivision regulations also usually address sanitary sewer, water, and electric utility requirements. In addition, these regulations typically include requirements for the survey and monumentation of the subdivision lot boundaries and requirements for the subdivision plat.

2.7.4 Private Deed Restrictions

Not all restrictions on land use are imposed by government. Deed restrictions imposed by land developers are often used to control some aspects of private subdivisions. Such restrictions are based on a voluntary contract between a developer and lot purchasers and therefore involve no public regulatory function. Often, deed restrictions are more restrictive than governmental requirements. They are often used to require certain sized homes, the external appearance of houses, landscaping and fencing, underground electric service, and other factors. Enforcement of private deed restrictions is not a governmental function. It requires legal action by the developer or by other affected land owners subject to the same restrictions.

2.7.5 Land Development and Use Regulation

Wetlands are natural areas where the groundwater table is normally at or close to the surface. Wetlands are widely recognized as among the most important ecosystems on the earth. Some of the currently recognized contributions to the environment by wetlands include plant and animal habitat, water purification, groundwater recharge, floodwater storage and flood peak reduction, aesthetic and recreational values, and carbon storage (Cole 2007).

Floodplains are natural overflow areas adjoining surface waters. While some floodplains are also wetlands, many are not, even though they are

subject to flooding during storm events. Floodplains are often defined based on the probability of being flooded in any given year. As an example, the 100-year floodplain is an area having a 1% probability of being flooded in a given year or a 100% probability of being flooded within a 100-year period. In many fast-growing areas, extensive development has occurred in wetlands and floodplains, without regard to either the environmental sensitivity of the wetlands or the potential danger to development associated with floodplains. As a result, there have been costly losses and significant damage to the environment, both of which have led to changes in land use policy.

In many floodplain areas, the fertile alluvial soil is ideal for agriculture, and such use is reasonably compatible with occasional flooding (Platt 2014). The primary concerns regarding land use in floodplains are the loss of life and property from flooding that can result when houses are constructed in these areas and concern that alteration of the natural topography of the floodplain can cause worse flooding. Based on these concerns, land use regulation for floodplains has focused on reducing hazards to life and property. Generally, such regulations allow agriculture and similar low-impact use as long as no topographical alterations are made. Construction is usually not allowed in the floodway zones closest to the surface water but generally allowed in the outer portions of the floodplain with the provision that occupied areas and such facilities as septic tanks be elevated above maximum flood elevations.

In wetlands, regulations are more restrictive. The goal in those areas is to preserve the wetland in its natural condition or to restore it to that condition due to environmental considerations. Generally, all dredge and fill and construction activities are banned in wetlands.

In both floodplains and wetlands, there are typically both local and state regulations. In addition, there are also federal restrictions in both. Federal wetland regulations are based on Section 404 of the Clean Water Act and are jointly administered by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. Federal floodplain regulation is administered through the National Flood Insurance Program administered by the Federal Emergency Management Agency.

2.7.6 Compensation for Land Use Restrictions

Without question, private land owners hold property subject to the general right of the community to regulate land use for the public welfare. It is also without question that land use regulation may affect the value of private land. As a result, land use regulation involves a delicate balance between public and private interests and frequently provokes controversy. Land regulation can produce a paradox at times. One of its primary purposes is to protect and enhance property values. Yet, land regulation may reduce or even totally eliminate the value of property by limiting the options for which the property may be used. When private property is taken for public use under eminent domain laws, the private owner receives just compensation. Yet,

with land use regulation, compensation is typically not paid to the owner even if the owner loses the option of using the land. This can create a fairness issue.

Private property rights are protected by the Fifth Amendment in the Bill of Rights of the U.S. Constitution as follows:

> No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

As a result, a common question confronting land use regulation is to what extent regulations may reduce the value of private property without compensation to the owner due to the regulation being a "taking" of land. This issue has frequently been litigated with the general rule being stated by Justice Oliver Wendell Holmes in the U.S. Supreme Court case of *Pennsylvania Coal Co. v. Mahon*[*] as follows:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.

As new forms of land use regulation have been propagated in conjunction with the increased urbanization of the United States, there have been frequent legal challenges to those restrictions. In general, judicial decisions on these issues have favored the public interest and allow increasing regulation. Yet, it has been recently held that when a regulation "denies all economically beneficial or productive use of land," it is a compensable taking (*Lucas v. South Carolina Coastal Council*[†]).

Recommended Additional Reading on Land Tenure

Clawson, Marion (1964). *Man and Land in the United States*. Lincoln: University of Nebraska Press.

Desoto, Hernando (2000). *The Mystery of Capital*. New York: Basic Books (Perseus Book Group).

[*] 260 U.S. 393 (1922)

[†] 112 S.Ct. 2886 (1992)