CHAPTER 3 - INTERESTS IN LAND (FORMS OF OWNERSHIP)

Notes:

HISTORY

Our modern law of real property developed from the English feudal system of land ownership. The basic concept of the feudal system was that the king was the title owner of all the land. The monarch would grant large tracts of land to faithful lords in return for allegiance and service. The lords granted portions of their land to lesser nobles, and these in turn granted portions to still lesser nobles. These grants, called **feuds**, continued on down to the **villeins** (*yes* – that *is* spelled correctly) who lived on and cultivated the land. Except for the monarch and the villeins, each person occupied a dual position; they were overlord to the tenant and, they were a tenant to their overlord.

The land itself was considered as owing services to the lord, those services to be performed by the tenant. At the time the tenant received the land, the service due from the tenant's tenure was specified. Thus, as to the same land, one tenant might owe their lord the payment of rent and this lord might owe to their overlord, “knight service” or military service. In addition to the services, there were certain “incidents” due from all tenures, such as homage (a ceremonial pledge of personal loyalty) and relief (the payment of a sum by the heir of the tenant for the right to inherit - an ancient inheritance tax).

Land was power and wealth; the feudal system was more than a system of land ownership. As can readily be seen, it was a system of government, establishing an economic structure and a military organization. In absence of a centralized administration for the kingdom, discipline and order was effectively maintained through the series of lord-and-vassal relationships.

The relationship between the English Crown and the American colonies was essentially feudal. For example, according to the Maryland Charter, the feudal services due were the delivery of two Indian arrows on Tuesday of Easter week and one-fifth of all the gold and silver ore found within the boundaries of the land grant. After the Revolution the feudal position of the English Crown presumably passed to the states. In some states, the concept of feudal tenure was abolished by law or judicial decision. In a few, there is reason to assume that the technical concept of feudal tenure probably exists. As a practical matter, it appears safe to conclude that all states follow the allodial theory of land ownership. Under the **allodial system**, land can be held in absolute independence by the individual, owing no rent, service, or acknowledgment to the state as overlord. Of course, the state has jurisdiction over land within its borders; the state has the right to tax the land for its support, to control its use in order to protect the health, safety and general welfare of the public, to take the land for public use under the right of eminent domain, and to take title to the land if the owner dies leaving no heirs and no will.

TYPES OF INTERESTS IN LAND

Estate is the character of ownership which the individual has in the land and which determines the duration of the individual's right of possession along with the right of use.

Estates are commonly classified as **freehold estates** or **non-freehold estates**. The basis of this classification is derived from the feudal system. Freehold estates were normal holdings under the feudal system; non-freehold estates appear to have begun primarily as a money-lender's device and did not have the dignity of feudal stature. The freehold estates are: (a) **fee simple absolute**, (b) **defeasible fee**, (c) **fee tail**, and (d) **life estate**. The non-freehold estates are: (a) **estate for years**, (b) **estate from period to period**, (c) **estate at will**, and (d) **estate at sufferance**. Leasehold estates (LEASES) are discussed later in this chapter.

The law concerning interests in land is extremely technical and complex. The following discussion of this area of law is simplified and condensed.

FREEHOLD ESTATES - Estate in which ownership is for an indeterminate length of time. Unlimited interest in a property.

1. **Fee simple absolute**. A fee simple absolute estate, (also: **fee** or a **fee simple**,) is the most comprehensive ownership known to the law. A fee simple is often defined as the largest bundle of ownership rights possible. Said ownership rights include the right to possess, use, enjoy, control, and dispose. Although the fee simple estate is the highest degree of ownership in land recognized by law, it in no means absolute ownership such as one may have in a book. A fee simple estate may also be created in air space. An example of this is the condominium.

2. **Defeasible fee**. A defeasible fee, (often called **base fee**, or **qualified fee**, or a **fee simple defeasible**, or a **fee simple determinable**) is a fee that can be divested (taken away) from the fee holder at some future time upon the occurrence or nonoccurence of a specified event.

a. **Condition Precedent**. A fee simple subject to a Condition Precedent, (also known as a **Fee Simple Subject to a Special Limitation**,) automatically terminates upon the happening of a specified event. Example: X, owner in fee simple absolute, conveys to Y and Y's heirs so long as the land is used for church purposes. Y's interest is called a fee simple subject to a special limitation and it may last forever. But if the land ceases to be used for church purposes, Y's interest in the land automatically ceases and the property returns to the grantor, X, or to X's successors in interest. X's right (or future interest) is called a Reversion.

b. **Condition Subsequent**. A fee simple subject to a condition subsequent gives the grantor, or the grantor's successors in interest, the power to terminate the grantee's estate upon the happening of a specified event. Unlike the Condition Precedent, the Condition Subsequent does not divest the grantee of her interest automatically; the grantor must exercise the right (through a legal proceeding, called a **Suit to Quiet Title**.) Example: X, owner in fee simple absolute, conveys to Y and to Y's heirs but if liquor is sold on premises conveyed, X shall have the right to re-enter for breach of said condition. Upon breach of the condition, Y's interest does not automatically terminate, but continues until X exercises X's power of termination. X's right (or **future interest**) is called the **Right of Re-entry**.

c. **Subject to an Executory Limitation**. Unlike the conditions precedent and subsequent, a fee simple subject to an executory limitation does not return to the grantor but passes automatically to some other person upon the happening of a specified event. Example: X, owner in fee simple absolute, conveys to Y and Y's heirs, but if Y dies without surviving children, then to Z and Z's heirs. If Y dies leaving no children, then Y's defeasible fee automatically terminates and the property passes to Z. Z's future interest is called a **Possibility of Reverter**.

Q&A Q&A

3. **Fee tail**. A fee tail could only be created by a conveyance reading exactly: "to X and the heirs of X's body." X could not convey the land, but the estate would continue so long as there were any legitimate and natural-born heirs of X. Upon failure of such descendants or issue, the land would revert automatically to the donor or their heirs. Because such property restrictions are a violation of the Constitutionally-given right to property, fee tail estates have been abolished or replaced in all states. Some states provide that a conveyance which under the common law would have created a fee tail now conveys a fee simple absolute. Other states, including Colorado, provide that the first taker has a life estate and the first taker's heirs have a fee simple title. (38-30-106 C.R.S.)

4. **Life estate**. An estate for life may be created by X, owner in fee simple, conveying "to Y for as long as Y shall live". Such a conveyance entitles Y to the exclusive possession and use of the property as long as Y lives. Upon Y's death the property returns to X or to X's successor in interest. Y may not make unreasonable use of the property or do anything which would decrease the value of X's reversionary interest.

Q&A

Life estates in Y would also be created by conveyances reading: "to Y for life, then to Z", or "to Y for as long as Z shall live." In the first case, upon the termination of Y's life estate the property passes to Z or to Z’s heirs. In the second example Y’s life estate is measured by another's life rather than Y’s own life - upon Z's death the property reverts to X. This is called a **Life Estate Pur Autre Vie** (Old French for "for another's life.")

a. **Legal Life Estates**. According to the common law of England, and that of a few states today, there are two so-called "legal life estates" which are created automatically by law: dower and curtesy.

1) **Dower** is a life interest in real estate given to the wife upon her husband's death, consisting of a one-third part of all the real estate owned by the husband during the marriage. A conveyance to another by the husband before his death did not destroy the wife's right. If the wife had joined her husband in conveying the property, she was held to have waived her dower rights.

2) **Curtesy** is a life estate given to the husband upon his wife's death, consisting of a life interest in all the real property owned by his wife during the marriage provided a child was born alive from their marriage. As in dower, a conveyance by the wife did not terminate the husband's curtesy rights unless he joined in the conveyance and waived his right. Dower and curtesy have been abolished in Colorado, (15-11-112 C.R.S.)

3) **Community Property**, in one form or another, has replaced the concepts of Dower and Curtesy in some states. It requires that the owners be married. Property acquired during marriage is considered to be equally owned by both spouses. Property acquired prior the marriage, or by gift or inheritance is considered separate property. Either spouse can will his or her half of the community property to third parties. Because neither spouse can partition the community property, spouses cannot separately convey their community property interest.

LIMITATIONS ON OWNERSHIP

1. PUBLIC (GOVERNMENTAL) RESTRICTIONS

a. **Police Power** - the right of the government to impose reasonable limitations to protect and promote the health, safety and general welfare of the public;

b. **Eminent Domain** - the right of the government to take private property for public use upon payment of just compensation;

c. **Taxation** - the governmental right to impose taxes for its own support and to proceed against the land for non-payment; and

d. **Escheat** - the right of the government to acquire title to property owned by a person who dies without leaving a will or heirs at law.

e. **Zoning** - Local laws that implement the comprehensive plan and regulate the use of land and structures within designated land-use districts. A property owner who is inconvenienced by a particular zoning, or whose land-use does not “fit” under the zoning rules, may attempt to obtain an exception. The following are examples of these exceptions:

1**. Nonconforming Use** - If a lot or improvement does not conform to the zoning use because it *existed before the enactment* of the zoning ordinance, then the use may be permitted to stand ("grandfathered"). Example: allowing a business to continue in an area that has just been re-zoned to Residential only.

2. **Conditional Use Permit** – Allows a city or county to consider special uses which may be essential or desirable to a particular community, but which are not allowed within a zoning district. Examples are churches, schools, parking lots, and community care and health care facilities

3. **Variance** - If an owner is deprived of reasonable use of their property by the zoning enactment, a variance may allow a change in the use of their property to a use that is otherwise *strictly prohibited by the existing zoning*. The owner must demonstrate the unique circumstances that make the variance necessary. Examples of zoning variances are front, rear and side yard setbacks, and building height requirements.

4. **Spot Zoning** - is simply a "spot" within a larger zone which has different zoning - usually for political reasons, such as granting one bar the right to sell liquor within a "dry" town.

2. **PRIVATE (INDIVIDUAL) RESTRICTIONS**

a. **Deed restrictions** - the limitations on land use imposed by a grantor, such as requiring that all structures built upon the land must be of brick veneer;

b. **Mortgages** (and Deeds of Trust) - the security claim of the mortgagee upon the property prevents uses or changes that would injure the property's value;

c. **Leases** - the suspension of the fee owner's right to use and possess the property for a certain period of time; and

d. **Easements** - the fee owner's use is limited in that the fee owner may not interfere with the rights of the easement holder.

CONCURRENT INTERESTS

Although an estate or interest in land is probably more often owned by one person, it is possible that two or more persons may own real property concurrently or simultaneously. The two most important types of co-ownership are joint tenancy and tenancy in common.

1. **TYPES**

Q&A a. **Joint Tenancy**. In a joint tenancy, all the co-owners are equally entitled to the use, enjoyment, control and possession of the land, or its equivalent in rents and profits.

1) **Right of Survivorship**. Upon the death of one of the joint tenants, that tenant's rights pass to the joint tenants still remaining in the joint tenancy. (It

does not mean that the tenant's rights pass to his or her heirs.) Technically, the death of a joint tenant does not affect the title to the property, since the title is vested in the group and not in the individuals.

2) **Four Unities**. According to the common law, a joint tenancy was not created unless the "four unities" of time, title, interest and possession existed. The joint tenants must have equal interest, acquired at the same time, and entitling each to equal rights of possession. A conveyance from an owner to themselves and his or her spouse, could not at the common law, create a joint tenancy. Since the owner had acquired the interest at an earlier time by a different deed, the unities of time and title were lacking. Today in Colorado, such a deed could create a joint tenancy. "No estate in joint tenancy in real property, except when conveyed or devised to executors, trustees, or fiduciaries, shall be created or established unless, in the instrument conveying the property or in the will devising the same, it shall be declared that the property is conveyed or devised in joint tenancy or as joint tenants. Any grantor in any such instrument of conveyance may also be one of the grantees therein". (3 8-3 1 -1 01 C.R.S.)

3**) Terminating a Joint Tenancy**. Any joint tenant can terminate the relationship. Some of the events which will end the joint tenancy are: a conveyance or a contract to convey by one of the joint tenants, or an involuntary transfer as by foreclosure of a mortgage or tax sale. When a joint tenancy is terminated, either voluntarily or involuntarily, the co-owners then hold as tenants in common.

b. **Tenancy in Common**. - A tenancy in common is a holding of an estate in land by two or more persons who need hold only by the unity of possession. As distinct from a joint tenancy, the tenants of a tenancy in common need not have the same proportionate share of interest, nor need their interest begin at the same time, nor derived out of the same conveyance. But each is entitled to undivided possession of the property, according to their proportionate share and subject to the rights of possession of the other tenants. Upon death, the share of each tenant in common descends to their heirs or according to their will (or in the absence of a will, according to state law.) There is no right of survivorship in this type of co-ownership.

c. **Tenancy by the Entirety**. Some states (not Colorado) allow husbands and wives to use a special form of co-ownership called Tenancy by the Entirety. Each spouse has an equal, undivided interest in the property. The term entirety refers to the fact the owners are considered one indivisible unit because early common law viewed a married couple as one legal person. During their lives they can convey title only by a deed signed by both parties. Upon the death of one spouse, the surviving spouse automatically becomes the sole owner.

d. **Tenancy in Severalty**. When title to the real property is vested in (owned by) one individual, that individual owns the property in severalty. The term comes from the fact that this sole owner is "severed" or "cut off" from other owners. (*Not* because there are “several” people in title.) The severalty owner has sole rights to the ownership and sole discretion over the transfer of the ownership. Colorado has not created this tenancy by enactment of *law*. *However*, it is perfectly acceptable that this term occasionally appears in deeds or sales contracts, when referring to an individual taking title.

2. **CONVEYING CONCURRENT INTERESTS**

Ownership of a home by a husband and wife is usually declared by the deed to be in "joint tenancy" or as "tenants in common". There are advantages and disadvantages to both types of ownership.

The right of survivorship which accompanies a joint tenancy ownership does eliminate some of the legal complications of probate in the event of the death of one of the parties. However, inheritance taxes are assessable and evidence of the death must be placed of record (by recording the death certificate in the office of the Clerk and Recorder of the county where the property is situated). Joint tenancy does assure the survivor gets his or her fair share of the marital property and the property does pass free of the claims of unsecured creditors.

Disadvantages of joint tenancy may arise if marital difficulties occur, or if one of the parties has obligations or responsibilities (children) resulting from a previous marriage. The financial and tax situation of the parties may also dictate that a tenancy in common ownership is best. Although the broker may explain the immediate meaning of "joint tenancy" or "tenancy in common", the broker may not advise clients as to what type of conveyance is best for them. To do so would be going beyond the role of the broker and it may constitute the unauthorized practice of law. (See Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n., Chapter 16.)

3. **HOMESTEAD EXEMPTION**

Q&A By Colorado statute (38-41-201, C.R.S.) every house owner in the state is entitled to a homestead not exceeding $60,000 in value (if the “homestead” is occupied as a home by an owner thereof or an owner’s family) which is exempt from execution and attachment arising from any *unsecured* debt (i.e., credit card, not mortgage), contract, or civil obligation. Homesteaded property is only exempt while occupied as a home (i.e., primary residence) by the owner or his or her family.

In addition, the homestead exemption is $90,000 for homes owned by an elderly or disabled owner, an elderly or disabled spouse of an owner, or an elderly or disabled dependent of an owner.

By Colorado law, homestead exemptions are created automatically as to any debt contract or civil obligation entered into or incurred after July 1, 1975.

A joint tenant who is a surviving spouse of a joint tenant with a homestead exemption will have the homestead exemption as to the joint tenant's interest. If there is no surviving spouse, the surviving minor children of a joint tenant with a homestead exemption will have such an exemption to the extent of the joint tenant's interest. This survival occurs without the need for occupancy. The homestead exemption of a joint tenant who dies will not pass to a joint tenant who is not related (husband, wife, parent, minor child).

If the homestead was created automatically as described above, the owner may convey or encumber the homestead without the signature of the owner's spouse. If the homestead exemption was *recorded* by the owner or owner's spouse then both spouses must execute the conveyance or encumbrance.

A homestead exemption may be released by an instrument in writing signed by the party or parties who could convey the property. All deeds of trust in Colorado contain a provision whereby the owner waives the homestead right as to that encumbrance only, (subordinates the homestead only as to that particular deed of trust.) However, the $60,000 homestead exemption would stand against any other judgment creditor who had not secured such a waiver.

If a homestead property is sold, the owner of the property or person entitled to the homestead may keep the proceeds of such sale separate and apart from other monies; and, if identified, the proceeds will be exempt from execution or attachment for one year. If the proceeds are used to buy a new home, there will be a homestead exemption on the new home. However, the homestead exemption will not stand against the rights of the holder of a **purchase-money-mortgage** (**seller carry-back** deed of trust).

Before any creditor of the owner may proceed with execution and attachment of a homesteaded property, the creditor must file an affidavit with the clerk and recorder to the effect that the equity in the property exceeds the amount of the exemption. This affidavit must be supported by the affidavit of an independent qualified appraiser stating the fair market value of the property. If the amount offered at the sale does not exceed 70 percent of the fair market value as shown in the affidavit, all proceedings to sell the property will terminate. If the sale succeeds, the creditor must pay the expenses of the sale, prior liens and the $60,000 homestead exemption before payment of the creditor's judgment. The balance, if any, will go to the homestead claimant.

EASEMENTS

Q&A An easement is a right to enter and use another person's land within certain definable limits. Most easements must be in writing signed by the owner of the land over which the easement lies. They are usually created by contract or express grant in a deed.

1. TYPES OF EASEMENTS

a. **Appurtenant Easement**. An appurtenant easement involves two or more adjacent parcels of land. The easement attaches to and benefits the land owned by the easement holder. The land of the easement holder (the one who gets to use or go on the land of another) is the **dominant estate** or **dominant tenement** (the land benefiting from the easement.) The **servient estate** or **servient tenement** is the land being used or burdened by the easement. Appurtenant easements pass with the title to the dominant estate, (run with the land,) whether they are mentioned in the deed or not. Even easements for light and air are appurtenant, although they may limit the usage of the land subject to the easement.

b. **Easement in Gross**. An easement in gross involves one piece of land being used (burdened) and an outsider (third party). This right belongs to the holder of the easement personally and does not require that they be an adjacent landowner. The power company's right to run a utility line across another person's land is an example of an easement in gross. These easements are assignable and permanent ("*run with the land*").

c. **Prescriptive Easement**. Although not in writing, an easement may be created by prescription, i.e., by long uninterrupted use without the consent of the owner. In Colorado, the requirements for a prescriptive easement would be the same as Adverse Possession, i.e., uninterrupted and exclusive use of another's land for 18 years without consent. Abandonment would terminate the easement. (The method of *acquiring* the right is the same as adverse possession. However, with adverse possession, *title* is being acquired. With a prescriptive easement, only the *right to use* the property is being acquired.)

d. **Easement by Necessity**. This is an easement created by implication of law. This occurs when an owner sells land that is inaccessible except through land belonging to the seller (landlocked). Courts will rarely grant an easement by necessity, because the owner of a landlocked parcel typically has placed themselves in that position voluntarily, (albeit perhaps unknowingly).

e. **Easement by Condemnation**. This easement is one acquired for a public purpose, such as a power line or sewage treatment facility, through the right of eminent domain. The owner of the servient tenement must be compensated for any loss in property value.

f. **Party Wall Easement**. A party wall can be an exterior wall of a building that straddles the boundary line between two lots, with half of the wall on each lot, or it can be a commonly shared partition wall between two properties. Each lot owner owns the half of the wall on his or her lot, and each has an appurtenant easement in the other half of the wall. A written party wall agreement must be used (and recorded) to create easement rights. An example of this is a party driveway shared by and partly on the land of adjoining owners.

Q&A

2. **TERMINATION OF EASEMENTS**

a. Written release or quit-claim deed given by the owner of the easement to the owner of the land on which the easement lies;

b. Destruction of the servient estate (i.e., destruction of a party wall);

c. Merger of the ownership of the dominant and servient estates (i.e., the owner of the dominant estate purchases or adversely possesses, and merges with the servient estate);

d. Abandonment or nonuse of the easement;

e. When the purpose for which the easement was created no longer exists;

f. By lawsuit (an action to quiet title) against someone claiming an easement; or

g. By excessive use, (i.e., a residential use is converted to commercial purposes, or a walking trail is converted to a highway.)

ADVERSE POSSESSION

Adverse possession is the right of an occupant of land to acquire superior title to real estate against the owner of record, where for a required statutory period, such occupancy has been:

- Open (not secretly),
- Notorious ("I own this" or "I am purposely occupying this land"),
- Adverse (does not benefit the true owner),
- Continuous (without interruption), and
- Hostile (against the interests of the true owner.)

This right of adverse possession can be inherited, but there can be no intervening tenancy. In Colorado the required statutory periods are:

1) 7 years - with **color of title** (a reasonable claim to ownership, such as an unrecorded deed) and/or with payment of property taxes. (38-41-108 C.R.S.)
2) 18 years - without the consent of the owner of record, and without color of title or payment of property taxes. (38-41-101 C.R.S.)

A nasty dispute between two Boulder landowners prompted the Colorado legislation to pass additional requirements:

3) The person claiming adverse possession had a *good faith belief* that the person in possession was the actual owner of the property and the belief was reasonable under the particular circumstances.
4) Also included in the law, judges will have the power to force adverse possessors to pay for the land they do win in court, and to compensate the original owners for back property taxes, and interest.

With the new law the burden of proof will lie with the possessor to prove they have evidence they were the actual owner which should reduce the number of cases appearing before the court. Unfortunately the new law was a little late to apply to the Boulder case.

COMBINED TYPES OF OWNERSHIP

Colorado law (38-32-101 C.R.S.) provides that estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owners of the land below such area, and shall be deemed to be estates, rights, and interests in lands.

A **Condominium** unit as defined in the Condominium Act effective July 1, 1992, means an individual air space unit together with the interest in the common elements appurtenant to such unit. The definition implies that the condominium unit owner does not individually own the land underneath the structure. The land, the hallways, and all the common facilities or elements of the condominium complex are commonly owned by the individual unit owners. Therefore, title is vested in the owner of each unit within a defined air space and each unit owner receives a common interest in the land and other elements of the complex.

Although an air space condominium complex may appear to be an ordinary apartment house structure, it is really a subdivision which has many owners. Consequently, a "Declaration" must have been filed with the county clerk and recorder so that each unit is properly and legally described. Each unit may then be taxed or mortgaged separately because each unit is truly an estate in land even if it is above the surface of the land.

Pursuant to the Colorado Common Interest Ownership Act, **Common Interest Community** means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of the separate ownership portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners. (38-33.3-103(9) C.R.S.) Although in the past, a condominium was only thought of and defined as an air space estate, by definition under the Colorado Common Interest Ownership Act, it is now possible to be a "condominium" project consisting of single family lots.

Pursuant to the Colorado Common Interest Ownership Act, **Planned Community** means a common interest community that is not a condominium or cooperative. A condominium or cooperative may be part of a planned community (38- 33.3-103(22), C.R.S.). A Planned Community may include a common interest community wherein the common elements are owned by the owner's association and not as undivided interests by the individual unit or lot owners as tenants in common. A Planned community may also include a common interest community where there is no common element. However the individual person, by virtue of such person's ownership of a unit or lot, is obligated to pay for such expenses as real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration such as private roads or a common greenbelt.

A **Planned Unit Development** (**PUD**) may also be a "Common Interest Community", and may consist of unit owners of duplexes, townhouses, condominiums and single family residences; all or some of the owners may either hold common ownership in land or facilities such as a greenbelt, a playground or a swimming pool, or are obligated for payment of expenses other than for or in addition to, the individually owned land underneath each owner's residence. If there are commonly owned elements or expenses, there must be a recorded declaration that sets forth the conditions and obligations associated with the ownership of real property located within the planned unit development (PUD) or "Common Interest Community".

There is a variation in conventional ownership which is called **Time-Share Ownership** (or **interval estate**). Time-share sales are usually sold to the vacation-seeking consumer and therefore the property is usually located in recreational areas. The idea of time-sharing is based on the premise that most people do not really require a year-round vacation home. In recreational areas, condominium units are sometimes sold or leased for short periods and that short period is repeated each year (e.g. a specific week out of each year). Thus, there may be up to 52 owners of one condominium unit, each having a specified period of ownership or tenancy out of each year.

Time-share interests may consist of either a fee simple deeded interest or a non-deeded "right to use" interest. Right-to-use is a contractual or membership interest granting exclusive occupancy rights to a specific or non-specific unit for a set period of time each year. The right-to-use interest usually runs only for a limited number of years and has the effect of a leasehold interest. Although right-to-use purchasers do not acquire any actual ownership interest in the property, recent changes in the bankruptcy laws have extended equal protection to such owners in the event of a bankruptcy by the owner or developer.

Time-shares may be created by dividing a fee simple estate into several fee simple estates or leases; or by dividing a lease into several subleases. Time-shares may also be created by dividing owned or leased property into a number of contracts to use the property for defined periods of time. Owners who are tenants in common can, by contract, create time-shares for certain periods of the year. Membership agreements may also create time-shares.

Exchange companies have been formed which, for a yearly fee, will attempt to exchange the use of a time-share in one recreational area for the use of a time-share in another recreational area.

Colorado time-share developers are required to register with the Colorado Real Estate Commission as a Subdivision Developer and all sales must be conducted by real estate licensees.

Ownership in a community apartment project is accomplished by having all unit owners become tenants in common with each owner being given the exclusive right to occupy a specific apartment.

A **Cooperative Housing Corporation** or **stock cooperative** is formed by the creation of a non-profit corporation. The purpose of such corporation is to provide each stockholder with the right to occupy, for dwelling purposes, a house or an apartment in a building owned or leased by the corporation. Each stockholder receives a **proprietary (private) lease** (rather than a deed) or right of tenancy document.

Sales of such interests in a Cooperative Housing Corporation have usually been regarded as a sale of securities. However, in Colorado such sales are by statute deemed to be real estate and are exempted from the Colorado Securities Act. The statute enabling the formation of such cooperatives also enables banks and associations to make first mortgage loans on a stockholder's interest. (Title 38, Article 33.5 C.R.S., 11-7-103 C.R.S., and 11-41-110 C.R.S.)

Cooperative Housing Corporations and condominiums and time-share condominiums are treated as subdivisions.

WATER RIGHTS

Whether the water will be used for agricultural, recreational or other purposes, waterfront real estate has always been desirable. Therefore each state has strict laws governing the ownership and use of water and the adjacent land. The laws vary among the states, (see the Colorado provisions, below,) but much depends on climatic and topographical conditions. Where water is plentiful, many states rely on the simple parameters set by the common law doctrines of riparian and littoral rights.

Normally, the right to use water is given to the person who first diverts it and puts it to use. Since water rights are *interests in land*, the transfer of title is accomplished through a deed. They may also be transferred by will, or if the holder of the rights dies *intestate* (without a will), then those interests will pass according to the state's Statute of Descent, which specify what heirs are to get the decedent's interests in land, and in what percentages.

Unlike, say, an easement, Water Rights do not "run with the land". This means that if someone deeds title to land, any water rights will *not automatically pass*. Water rights, therefore, must be *specified* in the deed, or they will remain with the previous (or *original*) holder of the right. In a typical land or home sale, therefore, the buyer will rarely – if ever – be acquiring the water rights to the property. The right to use or divert water (usually underground) will remain vested in the original holder (i.e., municipality or nearby farms, etc.)

Similar to water rights, *mineral rights* (the right to use and extract minerals, oil or gasses) are *real property* interests. Mineral rights *also* pass by deed and do *not* "run with the land". These are usually held and disbursed by a governmental agency such as the state (or railroad or mining interest), and the property owner very rarely owns them.

1. **TYPES OF WATER RIGHTS**

a. **Riparian Rights**. Many states subscribe to the common law doctrine of riparian rights. These rights are granted to owners of land along the course of a river, stream or lake. These owners have the unrestricted right to use the water, provided the use does not interrupt or alter the flow of the water or contaminate the water. In addition, an owner of land that borders a non-navigable waterway owns the land under the water to the exact center of the waterway. Land adjoining navigable rivers is usually owned to the water's edge, with the state holding title to the submerged land. Navigable waters are considered public highways in which the public has an easement or right to travel.

Q&A

b. **Littoral Rights**. Closely related to riparian rights are the littoral rights of owners whose land borders on large, navigable lakes, seas and oceans. Owners with littoral rights enjoy unrestricted use of available waters but own the land adjacent to the water only up to the mean ("average") high-water mark. All land below this point is owned by the government.

Riparian and littoral rights are appurtenant (attached) to the land and cannot be retained when the property is sold. The right to use the water belongs to whoever owns the bordering land and cannot be retained by a former owner after the land is sold.

c. **Doctrine of Prior Appropriation**. Where water is scarce, however, the state controls all but limited domestic use of water according to the doctrine of prior appropriation, which is where the right to use any water, with the exception of limited domestic use, is controlled by the state rather than by the landowner adjacent to the water. To secure water rights a person must show a beneficial use for the water, such as crop irrigation, and obtain a permit from the proper state department.

2. **ACTION OF WATER**. The quantity of land ownership can be affected by the natural action of the water:

a. **Accretion**. Accretion is increases in land resulting from the deposit of soil by the water's action. An owner is entitled to all land created through accretion. (**Alluvion** is the term for the soil that is built up by this process.)

b. **Reliction**. If water recedes, new land is acquired by reliction.

c. **Erosion**. Conversely, an owner may lose land through erosion, the gradual and imperceptible wearing away of the land caused by flowing water.

d. **Avulsion**. In contrast with erosion, avulsion is the sudden removal of soil by an act of nature, (such as a landslide).

3. **COLORADO WATER RIGHTS**
The topic of Colorado Water Rights is discussed in detail in Chapter 17, Related Real Estate Laws.

Note that the above basic descriptions are tested on the Uniform portion of the license exam. The Colorado Water information in Chapter 17 will be tested on the Colorado portion of the license exam.

Q&A

LEASES

1. **COMMON LAW ESTATES**
a. **Estate for Years** (**Tenancy for Years**). An estate for years is one for a fixed period of time, whether for a day or 99 years. (Do not be confused by the use of the word "years" - it can be any specific period of time.) A conveyance from X to Y for 10 years creates an estate for years.

b. **Estate from Period to Period** (**Periodic Tenancy**). An estate from period to period is usually created by implication and not by express provision. Such an estate arises where there is no definite agreed upon time or termination date but the rental period is fixed at so much per week, month, or year. This estate is a terminable by either party at the expiration of any rental period upon the giving of proper notice of termination. An example is a "month-to-month" rental of an apartment.

c. **Estate at Will** (**Tenancy at Will**). - An estate at will is one that is, expressly or implied, terminable at the will of either party. Upon the giving of proper notice, either the tenant or landlord may cancel the estate at any time.

d. **Estate at Sufferance** (**Tenancy at Sufferance**). - An estate at sufferance arises when the tenant wrongfully holds over after the expiration of the tenant's lease term. The landlord has the choice of treating the holdover tenant as a trespasser and having the tenant evicted, or the landlord may choose to accept such tenant for a similar term and amount of rent.

2. **TYPES OF LEASES**

a. **Ground Lease** is a tenancy for years whereby a parcel of unimproved land is let for usually a fairly long period of time. This lease usually provides that a building shall be erected on the land by the tenant. Also, provision is made as to the disposition of the building at the end of the lease. The landowner usually becomes entitled to the building upon the payment of all, part or none of the value of the building, depending upon their agreement. In absence of agreement, the building legally becomes a real property and belongs to the landowner who is not required to reimburse the tenant.

A long-term ground lease can be of considerable advantage to the tenant. When land values run as high as $10,000 and more per front foot, considerable capital would have to be invested in the land alone. If the cost of a building is added to this, the investment becomes tremendous and beyond the ability of many investors. But if the investor can obtain a long-term ground lease, part of the financing problem is solved. Such a lease can be considered as the borrowing of the capital value of the land for the term of the lease. The ground rent paid the owner is, in this sense, the interest on the capital value of the land. The land itself, plus the improvements erected by the tenant, is the security for the "loan". A transaction with such ample security is indeed a good investment for the fee holder. Big businesses and investors have no hesitation in dealing with such long-term leases, provided the location involved is suitable to their purposes.

In addition, long-term leases involve a tax advantage. The rent paid by the tenant may be a deductible business cost. If a person purchases the ground, such cost is a capital investment and is not deductible; in fact *the ground* is not even depreciable. To the landowner, the advantage is less income tax liability on the rent received over the years as compared to the larger capital gains tax if the property is sold to the tenant.

There is another advantage for the owner of valuable land who has insufficient finances to properly develop their holdings. Through a long-term ground lease the owner may acquire a tenant who will make the suitable improvements. To induce the tenant, the landowner may make concessions in terms of lower rent. With the correct improvements the fee holder's land will increase in value, said increase eventually returning to the owner at the end of the lease. Such leases often provide for the increases in value to be matched by increased ground rent at suitable intervals. This is what is known as a **step-up lease** or **graduated lease**. Two common ways to provide for these increases in rent are: (1) to provide for a fixed increase at stated intervals, or (2) to provide for the increase to be based upon the value of the property, determined by an arbitration committee. Although the first method has the advantage of being clear and definite, it is often said to be too inflexible to meet changing economic conditions over a long period of years. The second method implemented by an arbitration committee usually composed of one member selected by the tenant, one by the landlord, and the third selected by agreement of these two - consists of applying a fixed capitalization rate to the appraised value of the property at regular intervals. This method is said to provide a currently reasonable rental, but it can be difficult to implement when the committee members cannot agree. Some authorities on long-term leases claim that straight rentals for the entire period give the greatest satisfaction to both parties for they are then on a fixed program and can more easily plan their business to meet this program. Other authorities feel that such a fixed rental program is too inflexible and works a hardship on the tenant during a recession or a hardship upon the owner in an inflationary period.

b. **Percentage leases**. Percentage leases are used for commercial establishments, generally retail stores, and usually provide for a fixed minimum rent plus a percentage of the tenants' gross sales. Definition of gross sales or gross income should be clear and should provide for such things as returned merchandise, discounts for prompt payment made to customers, sales to employees, sales by mail services rendered at cost (such as clothing alterations), income from vending machines, etc. Detailed provisions should be made concerning the tenant's records and the landlord's right to examine or audit the tenant's books. Satisfactory use of percentage leases requires thorough knowledge and expert judgment.

c. **Sky lease** or lease of air space is another type of lease that usually creates a tenancy for years, generally for a long period of time. One of the first such leases to come into existence was executed in 1910 whereby the Cleveland Athletic Club leased the air space above a five-story building and erected thereupon eight additional stories. The club paid rental for its space and also the improvement taxes, but not land taxes. The upper stories of this structure will revert back to the lessor at the end of the term upon the payment of its appraised value. The lease is based upon the common law right of the fee holder to use their land from the center of the earth to the dome of the skies which today has been limited by the governmental right to regulate air traffic.

One of the most interesting uses of air space involves the Merchandise Mart in Chicago. The building is constructed over the tracks of the Chicago and Northwestern Railroad, erected on piers 23 feet above the earth's surface, leaving space necessary for the operation of the railway.
Within the state of Colorado there exist a few such leases or sales of air space. In 1953 the Colorado legislature enacted a statute that stated that estates, rights and interests may be created in areas above the surface of the ground and such interests may be transferred as are other interests in land. (Title 38, Article 32, C.R.S.)

d. **Net lease**. A lease in which the tenant pays all or a substantial part of the cost of operation and maintenance. There are various expressions used in real estate to describe the many variations in net lease transactions. For instance, if a lease provides for the tenant to pay all operating expenses, maintenance costs, insurance, real estate taxes, etc., it might be referred to as 100% net or "**net-**

net". If the lease provides for the tenant to maintain and operate the premises only, it might be referred to as "net - excepting for taxes, insurance and outside repairs". A "**triple-net**" or "net-net-net" lease is one where the tenant will pay 1) a base amount of rent; and 2) a share of the landlord's expenses; and also 3) a share of the landlord's debt (mortgage.)

e. **Gross lease**. A lease where the owner pays their own expenses such as taxes, insurance, maintenance, operating expenses. The tenant pays only for their set rent amount. The most obvious example of a gross lease is the typical monthly apartment rent.

f. **Farm leases** are based on the same principles as other leases. Often the farm tenant pays a rental based on a crop-sharing basis. The owner agrees to give possession to the land and improvements thereon, and perhaps to furnish the equipment, and the tenant agrees to furnish the labor and capital, to farm the land in a sound, reasonable manner and to pay a specified share of the crops. In some instances the rental may be a fixed sum. Ordinarily, each locality has and uses a farm lease that meets the various needs and conditions of the community.

3. ELEMENTS OF A LEASE

As stated earlier, a lease is both a contract and a conveyance. It is a contract in that it embodies the agreement of the parties; it is a conveyance in that the agreement involves the transfer of an interest in land, the right to possession and use for a period of time. As a ready reference, the following list contains the more common elements.

a. **Date**: Although not essential, a date can prevent controversy as to questions of time and related problems, such as the portion of a month or year's rent due.

b. **Parties**: It is essential that the parties have contractual ability and be named and clearly designated. If the property is owned or leased by more than one person, all should be parties to the lease.
c. **Consideration**: The lease is not enforceable without consideration. The lessee's payment or promise to pay rent and the lessor's delivery or promise to deliver possession is the usual consideration supporting the lease.
d. **Description of the property**: It is essential that the lease describe the premises with reasonable certainty. If only a part of a building is rented, use of basement storage space, if any, or other facilities should also be described.
e. **Operative words**: The lease should clearly state the extent and the nature of the interest being conveyed to the tenant, including the duration or term of the lease and the lessee's rights.
f. **Conditions and exceptions**: All conditions imposed on the lessee's tenancy and exceptions to the rights which normally accrue to a tenant should be set forth.
g. **Lessor's and lessee's covenants**: Any and all covenants to be fulfilled by either party should be included in the lease.

h. **Signatures**: A lease for longer than one year must be in writing and signed by the parties, according to the Statute of Frauds. The best evidence of the parties' mutual assent is the signed instrument. If the lessee accepts the lease and goes into possession, only the lessor need sign to be a valid lease. The lessee's taking possession is evidence of his assent.
i. **Seal**: A seal is not required.
j. **Delivery**: Like a deed, a lease must be delivered to be effective.
k. **Recording**: A lease need not be recorded to be good. A long-term lease, as for 99 years, is usually extremely valuable and it is recommended that it be recorded. As a rule, the landlord does not furnish the tenant with an abstract of title or title insurance commitment, but in the case of valuable long-term leases, the tenant should require the owner to furnish evidence of his clear title.
l. **Acknowledgment**: A lease need not be acknowledged. Again, in the case of a valuable lease which will be recorded, acknowledgment of the signatures should be made.

Some other lease clauses which may be useful are: Cost of living adjustment; handling of the security deposits clause; use of remises clause; acceptance of the premises by lessee; surrender of premises at the end of the term; maintenance, repair and alterations of premises during term; which party is to pay utilities; entry and inspection by lessor agents; assignment and subletting provisions; agent hold-harmless clause; who pays taxes - real property and personal property; clause covering repossession due to unpaid rent; abandonment of premises by the tenant; provisions regarding holding over; agreement regarding sale of premises; cessation of lease in case of condemnation or destruction of premises; right of the lessor to mortgage or subordinate; signage regulation; renewal options; provisions for notices upon termination, and disposition of deposits upon appointment of a new property manager, etc.

4. **TERMINATION OF LEASES**
Leases can be terminated in four major ways:

a**. Expiration of the term of the lease**. A *tenancy for years ends on the last day of the term*, with *no notice* to quit being required. Colorado law provides: "No notice to quit shall be necessary from or to a tenant whose term is, by contract, to end at a time certain." [C.R.S. 13-40-107 (4)] If the contract is oral, the lessor should give the written statutory notice to quit because of the possible difficulty the lessor may have in establishing the terms of the oral agreement.

To terminate periodic *tenancies and tenancies at will, written notice* to quit must be served by the party desiring to end the lease. Written notice to quit is required of the lessee as well as the lessor. According to Colorado law, notice to quit must be in writing, describing the premises, stating the time the tenancy will terminate, signed by the party giving such notice or their agent, and served within a specified time before the end of the tenancy period.

To terminate *a year-to-year tenancy, such notice must be given three months* prior to the end of the term; a *six month's tenancy by one month's notice*; a *month-to-month tenancy by a ten-day notice*; and a *tenancy at will by a three-day notice* (13-40-107 C.R.S.). Said notice must be delivered to the tenant or other person occupying such premises, or by leaving a copy with some other person, a member of the family above the age of fifteen, or in case no one is in actual occupancy of the premises and the tenant cannot be found, then by posting such notice in some conspicuous place on the premises.

In 1994, Colorado law was amended to provide for a three day expedited eviction of certain "undesirable and dangerous persons". The statute states that there are people or their guests who have demonstrated themselves "unfit to coexist with their neighbors and co-tenants" by committing infractions referred to in the law as "substantial acts". The statute, C.R.S. 13-40-107.5(1), lists these "substantial acts" as various drug and violence related felonies as well as endangerment of person and property. The statute considers these acts severe enough to give the landlord the remedy of an expedited eviction. However, the statute specifically states that victims of domestic abuse do not fall within the definition of a crime of violence, and persons who could not reasonably have known of or prevented the "substantial acts" are also exempt from any expedited eviction action.

A trespasser or holdover tenant is not entitled to notice to quit. If the lease is for a definite term and the tenant does not actually surrender possession of the property at the end of the term, the landlord may elect to hold the tenant for another term. Such election must be accompanied by some act on the part of the landlord that signifies an intention to accept the tenant, such as receiving the next rent payment. Unless the landlord indicates that the landlord elects to retain the tenant, the tenant is a tenant at sufferance and is not entitled to notice to quit.

The tenant does not have any right of election in such a case, only the landlord. It is rather common practice to include in the lease an automatic renewal clause which provides that unless an agreed upon notice of a certain number of days, such as 30 or 60 days, is given by either party, the lease shall be continued automatically from the end of the term for a like period.

b. **Surrender and acceptance**. A mutual agreement, either expressed or implied, between a landlord and tenant that the lease will be terminated without obligation on the part of either, is a termination by surrender of the lease and an acceptance thereof.

c. **Breach of conditions**. Failure by either lessor or lessee to perform agreed-upon conditions or covenants constitutes a breach of the lease and may permit the injured party to cancel said lease.

d. **Eviction of the tenant**. An eviction may be either actual or constructive. An actual eviction occurs if the tenant is ousted from the premises, completely or partially, either by an act of the landlord or by someone with superior title. **Constructive eviction** occurs when the leased premises have been permitted to become in such physical condition, owing to some act or omission of the landlord, that the tenant is unable to use the premises for the purpose intended. Failure to furnish heat or other facilities contemplated by the lease or any other deprivation of use by the lessor is also a constructive eviction.

e. **Termination under other conditions**. If leased property is taken for public use by condemnation, the lease is terminated. The tenant is entitled to compensation for the value of the unexpired portion of the lease, and his claim is paramount to that of the landlord.

The foreclosure of a mortgage or other lien may terminate the lease. If the mortgage or other lien was prior in time and the tenant had either actual notice or record notice of the lien, then foreclosure of said claim will terminate the lease.

5. DUTIES AND LIABILITIES OF THE PARTIES TO A LEASE

A carefully drafted lease will clearly set forth all the duties and responsibilities of the lessor and lessee, thus avoiding ambiguities that might lead to controversy. In the absence of a complete written lease setting forth all terms, the law presumes certain agreements on the part of the parties. For instance, unless there is an agreement as to payment of rent in advance, the law presumes that the rent is not due until the end of the rental period.

a. **Lawful Use**. The tenant may use the premises in any lawful way whatsoever and for which they are appropriate, unless the lease expressly restricts such use. If the premises are unsuitable for the specified purpose of the lease, the landlord, unless having agreed to do so, need not remodel the property but the tenant may do so. The landlord may compete or lease to a competing business within the same building unless the lease so prohibits.

b. **Advertise**. A lease of business property automatically gives the tenant the right to advertise their business by maintaining signs on the leased property. No such right exists, unless granted, to advertise when the leased property is residential, as might be the case when a doctor, dentist or others maintain an office in their residence.

c. ***Covenant of Habitability***. (*Not* provided-for by law in Colorado.) In multiple-unit commercial or residential property, it is the duty of the landlord to keep the premises warm and habitable, unless each unit has its own facilities. Provisions as to the furnishing of gas, electricity, heat, hot water, or other services should be incorporated in the lease.

d. **Repair of Premises**. Generally, unless the lease so provides, the landlord is not required to keep the premises in repair. Neither is the tenant required to make the repairs. Provision for repair should be included in the lease and should clearly state the scope of the duties of the party obligated to keep the premises in repair. An agreement to repair does not impose the duty to rebuild if the premises are accidentally destroyed. A landlord is not required to repair and make habitable property which is uninhabitable at the time of making the lease, for the tenant is presumed to have full knowledge of the condition of the property and should specify any repairs they may require.

e. **No Right to Enter**. The lessor has no right to enter upon the leased premises. The landlord's right to enter upon the premises to inspect the property or to show it to prospective purchasers or lessees should be provided for in the agreement.

f**. Liability for Injury**. As a general rule, the person occupying the property is liable to others for injury caused them by the condition of the property. The occupant is also liable to others for any nuisance resulting from the occupant's use, which interferes with others' use and enjoyment of their property.

The landlord is generally not liable for injury to the tenant or the tenant's family caused by the property's condition, unless such condition is latent (not apparent) and the landlord had knowledge of such latent, dangerous condition. The landlord may be held liable to persons using the sidewalks or highway abutting on the property or injury caused by dangerous conditions existing on the property. In such a case, the landlord's liability continues only until a reasonable time after the tenant takes possession and has opportunity to correct the dangerous condition, whereupon the tenant becomes responsible. It is advisable that the parties to the lease agree as to responsibility for injury to other persons, and for the party responsible to protect himself through liability insurance.

g. **Common Areas**. The landlord usually retains control over entrances, hallways, elevators, stairways and other portions of multi-unit property. In such cases the landlord is liable for injury to the tenants, their guests or business visitors caused by dangerous conditions existing in these areas due to the landlord's negligence. As a general rule, partial or total destruction of the premises by fire or other accident does not relieve the tenant from his obligation to pay rent. Some states feel this common law rule is harsh and have enacted statutes stating that in the case of destruction or damage making the property unfit for occupancy the lease is terminated and the tenant is relieved from paying rent. It is usual, and strongly recommended, that the lease provisions cover such emergencies.

h. **Sublet**. Unless the provisions of the lease prohibit, the tenant may assign or sublet the premises to another. Although the lessee sublets the property, the lessee remains liable to the lessor for the performance of all the conditions of the lease. It is usual for the lease to provide that the property will not be sublet or assigned without the lessor's consent.

The general rule is that the "re-entry" of a leased premises by the landlord constitutes an eviction of a tenant and relieves the tenant from all liability for rent to accrue in the future. This is not applicable where the parties to the lease have, by express agreement, contracted to the contrary.

If the lease specifically authorized the landlord, upon vacation of the premises by the tenant, to re-enter the premises and re-let the same without terminating the lease, a court may hold that the tenant remains liable for the rent the tenant agreed to pay according to the provisions of the lease, less that amount the landlord received for the time the premises were again leased.

i. **Default**. Many lease agreements provide that upon default of the tenant the landlord may: (a) declare the term of the lease ended, enter the premises, expel the tenant, and take possession of the premises; or (b) re-let the premises, apply the rent from the new tenant's lease to the lease of the old tenant, with the old tenant being responsible for any balance due.

The above discussion should indicate the extreme desirability of having a carefully drafted lease, clearly setting forth all the conditions and covenants of the tenancy and all the duties and responsibilities of each party.

6. **FIXTURES AND TRADE FIXTURES.**

An important element of a business lease is the *trade fixture*. A **fixture** is a former item of personal property that has become so connected to the real property that it has become part of the real property. *Example:* If you attach a ceiling fan in an apartment you are renting, this becomes part of the property – a fixture – and technically cannot be removed.

A **trade fixture** Personal property installed by a tenant to carry on a trade or business; remains personal property and can be removed by the tenant any time prior to the lease expiration. *Example:* A restaurant owner attaches shelves to the leased property in which she is running her restaurant. As long as she removes them prior to the expiration of the lease, she may do so without penalty, since the shelves are a *trade fixture*.

