11 Restrictions on Land Use

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Key Terms

- Police power
- Eminent domain
- Zoning ordinance
- Nonconforming use
- Variance
- Conditional use
- Rezone
- Spot zone
- Certificate of occupancy
- Subdivision
- Plat
- Planned unit development
- Growth Management Act
- Comprehensive plan
- Urban growth area
- Concurrency requirement
- CERCLA
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- Environmental impact statement
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- Clean Air Act
- Clean Water Act
- Open space
- Right to farm laws
- Ad valorem
- True and fair value
- Special assessment
- Condition
- Covenant
- CC&Rs

Chapter Overview

This chapter discusses the public and private restrictions that may limit the use of real property. Public restrictions are laws or regulations, such as a zoning ordinance; private restrictions are encumbrances on title, such as a restrictive covenant in a deed. Both types of restrictions can have a tremendous impact on how a piece of property may and may not be used, and that in turn can have a tremendous impact on the property's value.

For example, suppose an older house is for sale in an area that has recently experienced a lot of residential growth. The owners used to run a small grocery store out of the first floor of the house. They closed the store several years ago because they were getting too old to run it by themselves.

A young couple is interested in buying the house and would like to reopen the store. Can they? Just because there was a store here once does not necessarily mean that a store can be legally operated on the property now.

A real estate agent would be negligent if she told the prospective buyers that they would be able to reopen the store, unless the agent has first checked the local land use laws and any private restrictions that might apply.

Public Land Use Restrictions

During colonial times, landowners could do whatever they liked with their property. They could build a house or raise pigs or run a blacksmith shop, or even do all three on the same piece of property. But as the population grew and towns became crowded cities, people began to object to pig farms right next to shopping districts. To alleviate these types of problems and to ensure that landowners did not interfere with each other's use of property, local governments began enacting zoning ordinances.

Today, zoning ordinances are the primary type of public restriction on land use. Building codes, comprehensive planning laws such as Washington's Growth Management Act, and other regulations also serve to restrict land use in ways that benefit the public.

Power to Regulate Land Use

The power to regulate land use is rooted in the state's police power. **Police power** is a state government's power to adopt and enforce laws for the protection of the public health, safety, morals, and general welfare. (A state may delegate the police power to its local governments.) Because land use laws prevent overcrowding and its accompanying sanitation, fire protection, and law enforcement problems, they protect the public health, safety, and welfare. So as a general rule, land use laws are a legitimate use of the police power, and not an unconstitutional interference with private property rights. The U.S. Supreme Court upheld the constitutionality of zoning in a landmark case decided in 1926 (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365).

Nevertheless, the constitutionality of a particular land use law can still be challenged if it imposes excessive restrictions on a landowner's use of his property. In severe cases, an **inverse condemnation** lawsuit may be filed: the landowner sues the government, claiming that the restrictions amount to a "taking" of the property. That means that the restrictions limit development of the property to such an extent that it is equivalent to the government exercising its power of eminent domain and condemning the property for public use (see Chapter 9). As a result, the landowner argues, the government is constitutionally required to pay just compensation for the property. If the court agrees, the government will be ordered either to compensate the landowner, or to repeal or modify the land use law.

To successfully challenge a land use law, the landowner must do more than simply prove that the law has lowered the value of the property. The landowner ordinarily must prove that the law makes the property virtually useless, by preventing the only kind of development it was suited for.

Zoning

The purpose of zoning is to control and regulate growth and building in a way that serves the public's best interests. **Zoning ordinances** partition a community into areas or zones and specify the uses allowed in each zone. In this way, compatible uses are located in the same area. Zoning ordinances are detailed, specific land use laws enacted by the county or city council.

Zoning Categories. Early zoning regulations used only four categories—residential, commercial, industrial, and agricultural/rural. Today's zoning regulations are much more complicated. The four basic categories may still be used, but there are numerous subcategories as well.

A residential zone may be divided into areas for single-family housing, duplexes, apartments, condominiums, or mobile homes. Industrial zones may be divided into sections for light and heavy industry. There may even be a mixture allowed (for instance, a certain percentage of multifamily housing and commercial uses in the same zone).

In addition to specifying uses, zoning ordinances may also regulate the height, size, and shape of buildings, as well as their locations on a lot.

> **Example:** A city ordinance provides that office buildings located in a commercial area may not be more than ten stories high.

Zoning ordinances are also used to control population density, and to ensure adequate open spaces and access to air and daylight. They may even provide guidelines concerning specific matters such as vehicle parking.

> **Example:** A city ordinance allows storage of recreational vehicles (RVs) and boats only on the side or back of a lot, in a front yard if the vehicle is fully screened from view, or in an extra-long driveway.

Ordinances concerning items such as the storage of vehicles are often enforced on a complaint-only basis. For example, a property owner could probably park her RV on the street in front of her house until a neighbor complained; at that point, the city would require her to move the RV.

Zoning for Aesthetics. In many areas, there is a concern that the attractiveness of the community not be marred by developments that are ugly or cheap or that simply do not fit in with the general character of the other buildings in the neighborhood.

This is a difficult area to regulate, since personal tastes vary: what one person considers beautiful might be hideous to another. However, there are certain qualities that most people can agree on. For instance, a landscaped parking lot is more attractive than one that is completely asphalt with no plants or trees in sight.

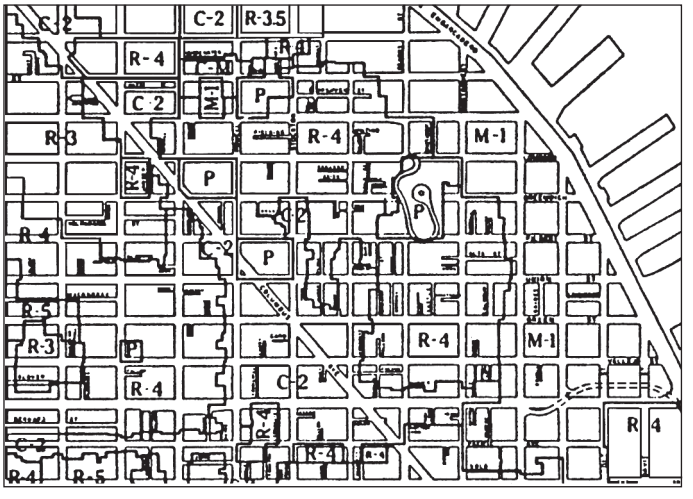
When a proposal for new development is made, it must go through a plan review process to make sure that it meets all building code and zoning requirements. Many communities now also have a design review process that assesses the aesthetic quality of the buildings and landscaping.

Exceptions to Zoning Regulations. In Washington, zoning ordinances are only adopted after a public hearing has been held. This gives members of the public the opportunity to express their opinions and to state any objections.

When an area is rezoned, there are usually at least some properties that don't comply with the new zoning restrictions, or some landowners who want to make a different use of their property than the one allowed. These conflicts are resolved by seeking exceptions to the zoning rules.

Nonconforming uses. A land use that violates current zoning but was legal prior to a zoning change is called a **nonconforming use**. Typically, the owners of nonconforming

Fig. 11.1 Zoning map



use property are not required to immediately discontinue the use, because such a requirement could be considered a "taking" of the property (and the government would then be required to compensate them). Instead, the use is permitted to continue even though it does not comply with the new or revised ordinance.

> **Example:** McGillicuddy lawfully owns and operates a bakery at the time his property is included in a rezone that changes the area to single-family residential use only. The bakery will be allowed to remain as a nonconforming use.

Although nonconforming uses are allowed to continue, they are usually subject to certain limitations or restrictions. For instance, the use may not be enlarged. (McGillicuddy can continue to run the bakery, but cannot expand or add on to the bakery.)

Also, if the use is discontinued, it cannot be resumed later on. (So if McGillicuddy closed the bakery down for a year, it could not be reopened.) However, a temporary cessation of business due to war or other causes over which the owner has no control does not constitute a discontinuance or abandonment. Most courts require proof of an intent to abandon the use.

Case Example:

The Raging River Quarry has been used as a rock quarry since about 1935. It existed prior to the adoption of the King County zoning code in 1958. The administrative department of King County determined that the quarry was a valid nonconforming use. That decision was appealed by property owners who lived near the quarry.

To qualify as a nonconforming use, the use must lawfully exist on the date specified in the zoning code. If a nonconforming use is abandoned or discontinued, the right to continue as a nonconforming use comes to an end.

It is the nature of rock quarries to operate only when there is a need for material sufficient to justify quantity production. When the need is not present, quarry operations may cease for as long as a year or more.

Just because the quarry was not actively in use at all times did not necessarily mean the quarry had been discontinued or abandoned. Instead, it was necessary to find an intent to abandon or an overt act or failure to act that carried the implication of abandonment. *Andrew v. King County*, 21 Wn. App. 566, 586 P.2d 509 (1978).

Some ordinances place a time limit on nonconforming uses. In other words, they will be allowed to continue only for a certain amount of time. So long as the time limit is reasonable, it will generally be upheld by the courts. A factor in determining reasonableness is the life expectancy of the nonconforming building. If the life expectancy of the bakery building from the earlier example is thirty years, the ordinance may require that the nonconforming use be discontinued in thirty years.

Some ordinances forbid the rebuilding of a nonconforming structure that has been destroyed by earthquake, fire, or other casualty. Any new structure built must comply with the current zoning regulations. In our example, if McGillicuddy's building burned down, a house could be built on the property, but the bakery could not be rebuilt.

Nonconforming uses usually run with the land. This means that if the property is sold, the new owner can continue the nonconforming use. However, all of the same restrictions that applied to the previous owner would also apply to the new owner. A potential purchaser of property that is a nonconforming use should check whether there is a time limit or other restrictions on enlarging or rebuilding the structures.

Variances. A **variance** permits an owner to build a structure or conduct a use not otherwise allowed. Even well-planned zoning ordinances may cause unintentional hardship to certain property owners. A variance is a built-in safety valve that gives community officials flexibility when the injury to the property owner would outweigh the benefit of strict zoning enforcement.

Where peculiarities of a specific property make it difficult or impossible to meet the zoning guidelines, a variance can be granted. Generally, a variance allows only a minor deviation from the requirements of the zoning ordinance.

Example: Judith's property is located in a single-family residential zone that requires all structures to be set back at least 20 feet from the road. Judith's lot is an odd-shaped end lot. No matter how the plans are oriented, Judith finds it impossible to build her house 20 feet from the road. Judith applies for and obtains a variance to build her house only 18 feet from the road.

When a variance is sought, the proposed use must not change the essential character of the area, or reduce the value of the surrounding properties.

Case Example:

The Stromgrens owned a large, woodsy lot (36,840 square feet) in an area zoned RE (residential estate), which required a minimum lot size of 20,000 square feet. The Stromgrens' lot was not only oversized but uniquely positioned, with extensive roadside frontage that required more upkeep than the Stromgrens could handle.

Their home was located in one corner of the lot. They wanted to short plat the land and create a second lot. However, the zoning ordinance prohibited any change that would establish a new lot smaller than the permitted 20,000 square feet.

The Stromgrens applied for a variance, but several neighbors opposed it. The board of adjustment held two full hearings concerning the issue.

Evidence showed that the Stromgren lot was one of only four oversized corner lots in the zone. It was bounded on two sides by land zoned with a minimum lot size of only 7,300 square feet. In addition, 25 of the lots in the zone were smaller than 20,000 square feet because they were platted before the zoning ordinance. Therefore a smaller lot would not substantially change the character of the neighborhood. The Stromgrens' variance was granted. *Martel v. City of Vancouver Board of Adjustment*, 35 Wn. App. 250, 666 P.2d 916 (1983).

To obtain a variance, a property owner applies to the local zoning authority. As in the case example above, there may be an administrative hearing, which is similar to a court proceeding but less formal. Notice of the hearing is given to neighboring property owners. If the requested variance is minor and there are no objections, the hearing is perfunctory and the variance is easily granted. If the variance is a large deviation from the zoning requirements and there are objections, the hearing may be quite lengthy. Expert witnesses or neighbors may be called to testify.

In some communities, routine variances are handled by a board of adjustment, and a hearing is held only if there are objections to the requested variance.

In any case, certain factors must be present before a variance is granted. The owner must show that the zoning causes undue hardship. The hardship suffered must be that reasonable use cannot be made of the land, not simply that more money could be made by devoting the land to another use.

Fig. 11.2 Basic requirements for a variance

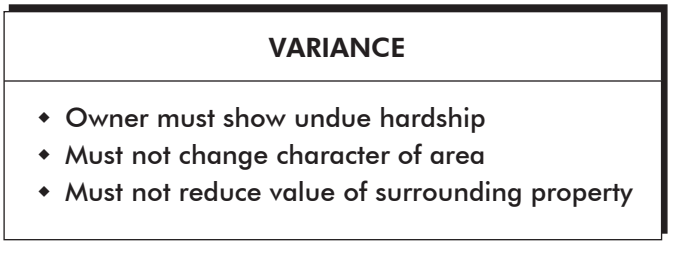
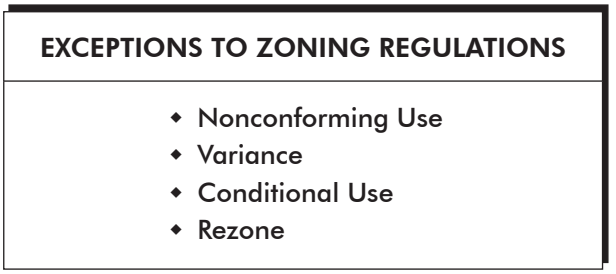


Fig. 11.3 Types of zoning exceptions



Personal hardship such as the owner's age or physical condition cannot justify a variance. And the hardship claimed cannot be the result of the owner's own action.

> **Example:** Johnson departs from the plans and specifications attached to his building permit and intentionally builds his house five feet closer to the road than the zoning ordinance allows. The building inspector spots the deviation. Johnson then seeks a variance.
>
> Johnson will not be granted the variance, because it's clear that his hardship was self-created. He intentionally departed from the permitted plans. An owner cannot knowingly build a structure that does not comply with the zoning ordinance and then seek a variance.

Conditional uses. A common provision in zoning ordinances allows the zoning board to issue special permits for certain uses that are inconsistent with the designated zone, but are necessary or beneficial to the community. Such **conditional uses** (also called **special exceptions**) include schools, hospitals, churches, cemeteries, public utility structures, and parks. These uses must be located somewhere, but they are controlled to ensure proper placement in the community and limit possible adverse effects on neighboring property. Most people would be dismayed to learn that the vacant lot next door is going to be developed as a cemetery.

In contrast to the requirements for variances, evidence of hardship in developing the property is not required for a conditional use permit. However, the use must meet a specific need of the community. As long as the proposed location meets the requirements detailed in the zoning code, the owner will generally be granted a permit to construct the special use.

Case Example:

The state Department of Corrections applied for a conditional use permit for a prison work release facility in downtown Kennewick. The location was chosen in part due to its proximity to businesses that would provide employment opportunities for inmates.

Under the city's zoning laws, a conditional use permit could be issued only if the use would not be materially detrimental to the public welfare or injurious to local property

or improvements. In addition, a conditional use permit for a penal institution located near facilities serving children or the elderly could be granted only if the city planning director made specific findings justifying the location, and found that the location was not detrimental to those uses.

Kennewick's city planning director found that the site conformed to the requirements of the code, and issued the permit. Neighboring property owners appealed to the city planning commission, which reversed the director's decision. The Kennewick City Council upheld the commission's reversal, stating that the fear of increased crime constituted a material detriment to the value of local businesses and properties. The Department of Corrections sought judicial review.

The court ordered the City of Kennewick to issue the conditional use permit, holding that unsubstantiated, generalized community fear was an irrelevant consideration when deciding where to build essential public facilities, and an improper basis for denying a land use permit. *DOC v. Kennewick*, 86 Wn. App. 521 (1997).

Rezones. If someone believes that the zoning classification applied to a particular property or neighborhood is inappropriate or out of date, they may petition to have the zoning ordinance amended. This is called a **rezone**. Generally the party seeking the change is a landowner or developer who wants to make a different use of the land than is permitted under its current zoning classification. Rezones may also be initiated by the local government based on recommendations from citizens' advisory committees or planning officials.

Notice must be given to surrounding property owners and a hearing must be held before a rezone can occur. The change must be justified by the current needs of the community; it can be made only if it makes more sense than the current zoning category and will not damage the rights of those relying on the current zoning. The community should look to its overall plan to determine what use would best serve future as well as present owners.

Case Example:

In 1964, the city of Redmond zoned an area in the Sammamish River Valley for light industrial use. Valley View Industrial Park was a general partnership formed to develop a specific parcel of land located in this zone.

During the 1970s, the farmlands preservation movement began applying pressure for agricultural zoning of the parcel. In 1977, a citizens' advisory committee was formed to make recommendations on the land use plan. The committee conducted numerous public hearings and meetings.

In September 1978, Valley View submitted a preliminary site plan for its proposed development.

In June 1979, based on the citizens' advisory committee's findings, the Redmond City Council enacted a revised zoning code that rezoned the Valley View property from light industrial to agricultural use.

Valley View filed a lawsuit claiming that the rezone was unconstitutional or, in the alternative, that it was an uncompensated taking requiring the payment of damages.

The court found that the zoning change was unconstitutional. A property owner has a right to use property under the terms of the current zoning ordinance. This right vests or accrues at the time the building permit is applied for.

In other words, Valley View applied for approval for industrial development while the land was zoned for industrial use. If the permit application is complete and complies with the existing zoning ordinance and building codes, the developer has the right to rely on the current zoning.

Once a proper building permit is filed, the zoning classification it carries at the moment of the filing is fixed on the property. The city could no longer simply change the category. *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987).

Spot zoning. Some forms of zoning changes are illegal. For instance, **spot zoning**—when one piece of property is singled out and rezoned without any clear justification for the change—is illegal.

Example: A rich developer owns property in an area classified as residential. He does favors for several members of the local zoning authority, and his property alone is rezoned light industrial. (Industrial property can be much more profitable than residential property.) This type of spot zoning is illegal.

Some legitimate zoning changes may appear to be spot zoning. If the rezone of a single property or a few selected parcels is based on sound planning policy and is clearly justified, the change is not illegal.

Example: A new area on the outskirts of the city is zoned residential. Because residents complain about having to travel all the way into the city to find a gas station or convenience store, four corner lots in the developing neighborhood are rezoned for commercial use. This would probably be considered a justifiable reclassification.

In deciding whether or not a particular rezone is spot zoning, a court considers several factors:

- the size of the area rezoned,
- the character of the surrounding areas,
- whether the new use meets community needs or fits into the comprehensive plan, and
- whether the rezone benefits the individual owner without any corresponding benefit to the community.

Case Example:

In July 1979, Snohomish County adopted a comprehensive plan that designated an area near Lake Stevens as a suburban residential zone. This area included property known as the Soper Hill site. In August 1979, the Hewlett-Packard Company proposed development of an electronics manufacturing facility on the Soper Hill site. Hewlett-Packard suggested amending the comprehensive plan to provide for a business park zone.

In 1980, the county council formally enacted the plan amendment. Save Our Rural Environment (SORE), a nonprofit corporation organized to oppose the rezone, filed a lawsuit charging that the Soper Hill rezone constituted a spot zone.

In deciding to uphold the rezone, the court noted that environmental impact statements were prepared and the county planning commission conducted public hearings on the proposal. The county took traffic counts and arranged for road improvements to the area. The county also imposed certain conditions to mitigate the environmental impact on the area.

The rezone was found to bear a substantial relationship to the general welfare of the community. The court found the rezone valid and not an illegal spot zone. *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 326, 662 P.2d 816 (1983).

Enforcement of Zoning Ordinances. In Washington, zoning ordinances may be enforced by either city or county officials, depending on where the property is located. Fines or other penalties may be imposed on parties who violate zoning regulations. In addition, neighbors or the local government may bring court actions seeking to enjoin a particular use of the property.

One of the best methods for enforcing zoning regulations is a system of building codes and permits, which we'll discuss next. If a proposed use is in violation of the zoning ordinance, a building permit simply will not be granted. If construction begins without a permit, the owner and the builder may be penalized.

Building Codes and Permits

Like zoning laws, **building codes** are intended to protect public health and safety. Building codes are generally divided into specialized areas, such as the fire code or the plumbing code. They set minimum standards for construction methods and for the materials used in construction, as well as other safety requirements. Washington has a state building code, and there are also local building codes. A city or county's building code may set higher standards, but not lower standards, than the state code.

A structure that was built before a new building code standard is implemented may still be required to meet the new standard. For example, a provision was added to Washington's building code in 2009 requiring residential properties to have carbon monoxide detectors. By 2011, all new residential construction and all existing residential rental units had to be in compliance. So even if an apartment building had been built decades earlier, its owners had to install detectors in all units. Owner-occupied single-family homes that were legally occupied before July 2009 are exempt from the requirement, but only until they are sold; carbon monoxide detectors must be installed before such a home can be legally occupied by a buyer.

The primary way that building codes (and zoning rules) are enforced is by requiring a **building permit** to be obtained before a building can be built, repaired, or altered. Before issuing a permit, local officials inspect the construction plans to verify that they comply with the applicable building codes and zoning ordinances. With luck, any problems will be recognized at the planning stage and corrected before the actual construction begins.

After construction is under way, building inspectors may visit the property periodically to examine various phases of the construction. If there are problems, they must be resolved before construction can continue. Once the building is completed, it is inspected again. If the construction is found to be satisfactory, a **certificate of occupancy** is issued.

It's a good idea for real estate agents or prospective buyers to check with the building department to verify that the structures on a property have been inspected and approved, and that a certificate of occupancy has been issued. Most building departments also have records showing any improvements made to a building (such as a new roof, decks, or room additions). Some building departments have records showing where the sewer and utility lines run.

Subdivision Regulations

There are two types of subdivision regulations in Washington. The first type is concerned with the physical aspects of subdivisions, such as provisions for streets and utilities, the size of lots, and locations of schools, parks, and other community services, and these determine the procedures for subdividing and developing land. The second type of subdivision regulation is concerned with protecting the interests of consumers in real estate transactions.

Procedural Requirements. Regulations that set forth the procedures for subdividing land are adopted and administered by each county. Before subdividing, a landowner generally must notify the officials of the county where the property is located. If the property is within one mile of a city or within city limits, notice must also be given to city officials (usually the planning commission).

Notice is usually given by filing a map called a **plat**. A plat is a type of map that shows the location and boundaries of the proposed lots within the subdivision and the location of streets and public areas, and provides information about public services, such as utilities, schools, and parks.

Most city and county regulations provide that a developer may not divide and sell or make improvements to the land until the proposed design of the subdivision has been approved by the planning authority. This often means that the developer must submit a preliminary plat for consideration. After any required changes or improvements have been made, the subdivider files a final plat for approval.

Subdivision regulations may control the size of the individual lots, the location of streets and sidewalks, the placing of sewer and water lines, and the presence of open spaces and recreation areas.

Washington Land Development Act. The Washington Land Development Act is a consumer protection law that applies to sales of land subdivided into 26 or more vacant lots and sold or advertised to the general public.

Requirements. Under the act, a subdivision developer is required to provide prospective lot buyers with a **public offering statement** at least two days before the sale

of the lot closes. The public offering statement discloses detailed information about the development, such as:

- the name and address of the developer and the development;
- a brief description of the permitted uses and use restrictions pertaining to the development and the purchaser's individual lot;
- the number of existing lots in the development and the maximum number of lots that may be added to it;
- a list of the principal common amenities in the development; and
- any owners association dues or other charges the purchaser will be obligated to pay.

In addition, the public offering statement must include copies of relevant documents such as surveys and plat maps, CC&Rs (covenants, conditions, and restrictions), and the articles of incorporation, bylaws, and current or proposed budgets for the owners association (if there is or will be one).

The Land Development Act also makes it unlawful to sell a lot that is subject to a blanket encumbrance unless the purchaser of the lot will obtain legal title, free and clear of the blanket encumbrance. This means that if the developer has financed the development by using all of the parcels as security for the loan, the lender must be obligated to release each individual lot from the lien when it is purchased by the individual buyer. This way, the purchasers will be able to obtain title to the individual lots free and clear of the developer's debt.

A developer's failure to comply with any of these requirements may lead to:

1. liability for actual damages,
2. an injunction prohibiting future sales, and
3. cancellation of any sales agreements made with purchasers who did not receive a copy of the public offering statement.

Exemptions. The Land Development Act has several exemptions. For example, the act does not apply if all of the lots in the development are at least five acres. A subdivision is also exempt if the lots have buildings on them or if the developer has a legal obligation to construct buildings on them within two years. And a subdivision that is entirely within the limits of a city is not subject to the act.

Planned Unit Developments. Some communities use **planned unit developments** (**PUDs**) to provide flexibility in zoning requirements. PUDs differ greatly from each other, but usually have certain characteristics in common. Generally, PUDs are larger than traditional subdivisions, and houses are clustered closely together on slightly undersized lots in order to provide more open space to all of the residents.

A developer may also be able to mix residential and retail uses, single-family and multifamily uses, or some other combination of uses that would not normally be permitted in one area. In return, the developer must usually provide more open space, dedicate more land to the public, or take other actions beneficial to the public welfare.

Some communities designate specific areas as PUD zones. More commonly, a floating zone system is used, which means that a PUD could be put in any area if an adequate proposal is made and approved by the community and the local zoning authority.

To get approval for a PUD, a developer must submit detailed plans of the proposed development to the planning authority. The planning authority may require additional concessions to the community before approval for the PUD is granted.

Historic Preservation

Throughout the United States, and particularly in older urban areas, certain buildings, properties, or districts have been designated as historic sites under federal, state, or local historic preservation laws. This affects land use because the designation protects buildings from destruction. In addition, a special permit must be obtained before any significant changes can be made to historic buildings.

Land Use Planning and Administration

In Washington, land use planning and administration changed dramatically with the passage of the **Growth Management Act** (GMA) in 1990, and its subsequent amendments. The GMA has four major goals:

1. to change Washington's previous patterns of "sprawling settlement" by concentrating new development in already existing urban growth areas;
2. to ensure adequate public facilities are available to serve all new development by requiring thorough infrastructure planning;
3. to protect critical areas from environmentally harmful activities, and to protect natural resource lands from incompatible development; and
4. to encourage regional responsibility by coordinating the plans and regulations of neighboring communities.

The GMA created a framework for land use planning, outlining the steps local governments must take to achieve the goals of the act. The GMA also contains deadlines for compliance, and it established three regional hearing boards to adjudicate disputes under the act. However, the act leaves the bulk of land use planning to the local governments themselves.

Comprehensive Plans. All states—not just Washington—have adopted legislation authorizing or requiring local governments to develop comprehensive plans. A **comprehensive plan** (sometimes referred to as a comp plan) sets forth general guidelines for development in a community, to prevent the problems caused by haphazard and unplanned growth. A comprehensive plan addresses many issues affecting land use, such as building intensity, affordable housing, utility services, and roads and transportation. A comp plan is usually developed by a **planning commission** appointed by the local legislative body (the county council or city council).

In Washington, the land use planning objectives of the GMA are achieved using comprehensive plans. The GMA requires most counties in Washington, as well as the cities within those counties, to prepare a plan. Other local governments may choose whether or not to prepare one.

Requirements. The Growth Management Act requires comprehensive plans to be:

1. internally consistent;
2. coordinated and consistent with the plans of adjacent counties and cities within a region; and
3. implemented by development regulations (such as zoning ordinances) that are consistent with those plans.

Under the GMA, comprehensive plans must specifically address a number of land use issues. Among other things, a plan must:

- include comprehensive information on required land uses, especially housing;
- address the housing needs of all economic segments of society, by providing for low-income housing, government-subsidized housing, manufactured housing, group homes, and foster care facilities;
- explore the relationship between land use and transportation, inventory current transportation facilities, forecast future transportation needs, and plan the financing of future transportation facilities;
- determine the location and distribution of various land uses, set forth the appropriate population densities and building intensities in relation to the various land uses, and project future population growth; and
- provide for the protection of ground water quality and quantity, and the management of drainage, flooding, and storm water run-off.

Generally, comprehensive plans are implemented by zoning ordinances. Local zoning ordinances can never conflict with the goals set forth in a comp plan. Amendments to the plan can only be considered once a year.

In a large city, in addition to a planning commission, there are often several agencies that administer the zoning ordinances and other land use laws. There may be a board of adjustment that grants variances and conditional use permits, a hearing examiner who decides quasi-judicial disputes, a board for subdivision approval, a department that issues building permits, and an enforcement division. In a small town, the town council may handle all of those matters and also serve as the planning commission.

Urban Growth Areas. The Growth Management Act requires new development to be concentrated in compact **urban growth areas** that are contiguous with presently urbanized areas. Counties and cities planning under the GMA must designate the areas to which new urban growth will be limited. Urban growth areas must consist of areas that are or will be adequately served by public facilities and services, and must contain greenbelt and open

space areas. Each county's urban growth area must contain enough space to accommodate the county's projected 20-year population growth.

The resulting high density in urban growth areas minimizes the number of areas that will be developed and helps protect natural resource areas and critical areas. Using urban growth areas also helps ensure that public facilities are provided more efficiently and with less environmental damage.

Concurrency Requirement. Another important element of the Growth Management Act is its **concurrency** requirement. Under this requirement, public facilities that are adequate to serve new development must be made available when the impact of development occurs and without decreasing current service levels below certain minimum standards. This means that development cannot take place unless it is accompanied by sufficient public facilities and services.

Case Example:

In 1996, Mason County adopted a comprehensive plan and accompanying development regulations. Members of a local community group filed a petition with the local Growth Management Hearings Board, challenging the plan. The board determined that the comp plan and regulations failed to comply with several GMA requirements.

First, the board found that the county had used the wrong population growth projections and had therefore allocated too much land for urban growth areas. The comp plan also provided for density levels in rural areas that were high enough to be essentially "urban in nature." These density levels would allow excessive population growth and prevent growth from concentrating in urban growth areas.

In addition, the comp plan did not meet the GMA's concurrency requirement: the plan used inaccurate growth projections, contained no rural transportation plan, and failed to discuss the future levels of service that would be required from major public facilities.

The board also found that the comp plan did not make adequate provisions for affordable housing and failed to identify open space areas and greenbelts.

The board ordered Mason County to re-evaluate the comp plan and regulations and bring them into compliance with the GMA. When the county appealed, the court upheld the board's order. *Diehl v. Mason County*, 94 Wn. App. 645 (1999).

Environmental Legislation

The federal and state governments have enacted environmental legislation to preserve and protect the natural environment and the health and welfare of their citizens. These laws affect land use in a number of ways.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

The Comprehensive Environmental Response, Compensation and Liability Act is a federal law that concerns liability for environmental cleanup costs. This act is responsible for dramatically changing the way property owners view potential environmental liability.

CERCLA is well known for its creation of the **Superfund**, a multibillion dollar fund used to clean up hazardous waste dumps and respond to spills of hazardous materials. CERCLA also created a process that is used to identify liable parties and make them responsible for cleanup costs.

The Environmental Protection Agency (EPA) is responsible for enforcing CERCLA. Once the EPA determines that a release of hazardous materials has occurred, it can begin remedial action. First, the EPA determines who is responsible for the release of hazardous materials. These parties, which may include present and previous landowners as well as industrial generators of waste, are referred to as "potentially responsible parties." If the potentially responsible parties fail to cooperate voluntarily in the cleanup, the EPA can begin the cleanup work itself. The EPA will then charge the cleanup costs to the responsible parties. Cleanup costs may include both the cost of cleaning up that particular property and the cost of cleaning up any neighboring property that may have been contaminated by the hazardous substances.

Liability under CERCLA is **joint and several**: any one property owner can be held responsible for the entire cost of the cleanup, regardless of the liability of any other owners. If only one owner can afford the cleanup, she must pay for it, and can then try to get reimbursed by the other owners.

In some cases, the current owners of contaminated property may be required to pay for the cleanup even if they did not cause the contamination. This kind of liability is referred to as **retroactive liability**, and does not depend on any findings of fault.

Model Toxics Control Act

Washington's Model Toxics Control Act (MTCA) is a state law analogous to CERCLA. Like CERCLA, MTCA imposes joint and several liability for hazardous waste cleanup on "potentially liable parties" that include past and present landowners and waste generators. Cleanup under MTCA is coordinated by the state Department of Ecology and is funded in part through taxation of hazardous materials.

Potentially liable parties may conduct cleanup without the assistance and oversight of the state, but the cleanup results must still be reported to the Department of Ecology. If the potentially liable parties do not begin cleanup voluntarily, the department may handle the cleanup and then recover up to three times the amount spent from the responsible party.

National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to provide an **environmental impact statement** (EIS) for any action that would have a significant effect on the environment.

NEPA applies to all types of federal development, such as construction projects, the building of highways, and waste control. NEPA also applies to private actions when the use or development requires the approval of a federal agency in the form of licenses, permits, or even federal loans. In these cases, federal agencies may require submission of an EIS before approving the use or development.

An EIS should disclose the impact of the proposed development on energy consumption, sewage systems, school population, drainage, water facilities, and other environmental, economic, and social factors.

State Environmental Policy Act

Many states have developed specific state versions of NEPA—sometimes known as "little NEPAs." Washington's "little NEPA" is the State Environmental Policy Act (SEPA). It is similar to the federal legislation in that it requires the issuance of an environmental impact statement for all acts of local and state agencies that may have a significant effect on the quality of the environment.

SEPA applies to all state and local developments and also to private developments that require the approval of state, city, or county government agencies. For instance, SEPA requirements must be met before a city or county can give approval for rezones, variances, conditional use permits, or building permits.

SEPA Procedures. When a government agency is considering its own project or whether to issue a permit for a private project, the agency must review the environmental considerations. This review is based on information found in an **environmental checklist**, which is provided by the project applicant. After reviewing the checklist, the agency decides if the project may have significant environmental effects that would require the preparation of an environmental impact statement.

If the proposal will have only a moderate or minor effect on the environment, the agency may issue a **determination of nonsignificance**. When a determination of nonsignificance is issued, additional SEPA procedures do not have to be met, and an environmental impact statement does not have to be prepared.

When the effect is deemed significant, an environmental impact statement is required. The state or local agency may prepare the statement itself. But commonly, the developer provides the necessary environmental information to the agency, or may even be involved in the actual preparation of the EIS. The agency makes its decision to approve or deny the proposed project after considering the findings in the EIS.

If a buyer is purchasing property with plans to improve it, the buyer needs to consider what impact the improvements will have on the surrounding environment. Even if the

proposed development meets all zoning and building code requirements, a building permit may still be refused based on adverse information in an environmental impact statement.

Case Example:

Polygon Corporation applied for a permit to build a 13-story condominium in an area of Seattle zoned "Multiple Residence High Density." The city's building department determined that the proposed project was a major action with significant environmental impacts. An environmental impact statement was prepared.

The EIS disclosed a number of adverse impacts, including "view obstruction, excessive bulk and excessive relative scale, increases in traffic and noise, and shadow effect." The EIS also contained comments of numerous local residents who opposed the project.

The Superintendent of Buildings denied Polygon's permit application, stating that the project was inconsistent with SEPA's goals. Polygon appealed the denial, arguing that its project complied with existing zoning regulations.

The court held that since SEPA "overlays" existing local ordinances, the city could deny the permit even though the project conformed to local zoning laws. SEPA gives a municipality the discretion to deny a building permit application on the basis of adverse environmental impacts disclosed by an EIS. *Polygon Corp. v. Seattle*, 90 Wn.2d 59 (1978).

Shoreline Management Act

Washington's Shoreline Management Act protects shorelines by regulating development within 200 feet of high water marks. The act applies to coastal shorelines, to the shores of lakes larger than 20 acres, and to streams that flow at a rate in excess of 20 cubic feet per second. Since there is so much water in the state, the Shoreline Management Act affects quite a large amount of property. Anyone purchasing shoreline property needs to consider what impact this law may have on the use they hope to make of the property.

Structures existing at the time the law took effect get special treatment. Provisions in the law allow existing structures (including houses, fences, bulkheads, and docks) to be maintained and repaired. And if an existing structure burns down, a replacement can be built in the same footprint. But buyers who want to build a new home or other structure—or add on to an existing one—may face problems.

Developers of shoreline property are required to obtain a **substantial development permit** from their city or county before beginning any work. A development is considered "substantial" if it would materially interfere with the normal public use of the water or shoreline, or if its value exceeds $7,047. (This threshold value is adjusted for inflation every five years; the current value will be adjusted again in 2022.)

The Shoreline Management Act also requires cities and counties to adopt **shoreline master programs**. These programs regulate development in shoreline areas, and preempt other zoning laws that may apply to shoreline regions.

Case Example:

Clam Shacks of America, Inc., leases approximately 1,500 acres of mud-flat tidelands in Skagit Bay, where it harvests clams. In 1983, Clam Shacks planned to begin harvesting clams with a newly developed hydraulic clam rake. The rake injects salt water into the sand, which causes the clams to break free and float to the surface.

The Skagit County Planning Department placed certain conditions on Clam Shacks concerning the use of the clam rake. Clam Shacks filed a petition seeking a determination that it was not subject to the regulatory requirements of the Shoreline Management Act or the Skagit County Shoreline Master Program because its use of the clam rake was not a "development."

The court determined that the Shoreline Management Act should be construed to provide the greatest protection to the shoreline environment and concluded that a permit may be required for an activity affecting the shoreline even though it is not a "development." *Clam Shacks of America v. Skagit County*, 45 Wn. App. 346, 725 P.2d 459 (1986).

Violation of the Shoreline Management Act may result in fines and damages. A court may also order that the shoreline be restored to its original condition—even if this means the complete removal of any buildings or improvements.

Clean Air Act

The federal Clean Air Act requires the Environmental Protection Agency (EPA) to control the emission of air pollutants that are harmful to the public health and welfare. National standards have been issued for certain pollutants. Each state is required to prepare a **state implementation plan** (SIP) for meeting the national standards.

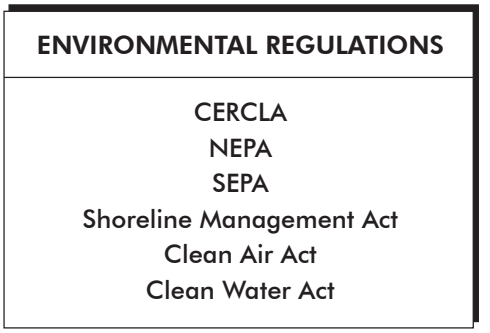
The air quality of an area can have a significant effect on land use and development. A state must be concerned with how any new development or use of the property will affect the air quality. Refusal to grant a building permit may be based on how the proposed use would adversely affect air quality.

Developers of projects that will cause direct emissions of pollutants into the air must obtain permits from the State Department of Ecology or from regional air pollution control authorities.

Clean Water Act

The federal Clean Water Act is meant to safeguard water and prevent water pollution. Water quality standards may affect land use by prohibiting the construction of certain

Fig. 11.4 Federal and state environmental laws



industrial uses that would discharge an unacceptable level of water pollutants. Permits are required for the discharge of pollutants into a lake, stream, or other waterway.

The Clean Water Act also regulates wastewater treatment systems. It encourages local governments to investigate new technology and alternatives to the traditional sewage treatment plants. The wastewater facilities available may have a significant effect on the type and amount of new construction permitted. New construction will not be permitted in an area that does not have adequate sewage treatment facilities.

Other Legislation

A number of other federal statutes may also affect land use, including the Endangered Species Act, the Coastal Zone Management Act, the Resource Conservation and Recovery Act, and the Noise Control Act. Washington also has some similar state statutes.

In addition, other laws that don't immediately seem to apply to real estate may also have an effect on land use.

> **Example:** Due to a declining population in the district, an old grade school building has been closed and unused for several years. The school district is anxious to sell the building. An agent has a client who is interested in purchasing the building and turning it into offices.
>
> Unfortunately, many of the construction materials used in the building contain asbestos. The Occupational Safety and Health Act (OSHA) provides health and safety standards to protect employees in the workplace. It has set specific asbestos standards that must be met. The building cannot be approved for use as offices until the asbestos has been removed.

A real estate agent should advise his clients that there may be significant expenses above and beyond the price of the property. In the example above, substantial renovations may have to be made before the school can be approved and used as office space. (In addition to this concern, the agent would need to know the zoning regulations in this area. Is it zoned for office space? Most schools are located in residential areas.)

Taxation

Although taxes are not levied primarily to control land use, the tax liability that attaches to certain properties can affect their use. For instance, high taxes on farmland in an urban area may encourage or even force the owner to convert the land to nonagricultural use. Conversely, an agricultural or forestland tax exemption may encourage a property owner to keep the land undeveloped.

We'll discuss the two main types of taxes on real property: general real estate taxes and special assessments.

General Real Estate Taxes

General real estate taxes are levied annually and used to support the government's general operations and services. For example, police and fire protection are usually paid for out of general tax revenues.

General real estate taxes are sometimes referred to as **ad valorem taxes** because the amount of the tax is calculated based on the value of the property. (*Ad valorem* means "according to value" in Latin.) The taxable value is periodically determined by a county assessor.

Assessing Value. In Washington, real property is valued at its "true and fair value" unless otherwise specifically provided by law. **True and fair value** means market value. In other words, how much would the property sell for if it were currently on the market? For assessment purposes, land is valued as if vacant and available for development to its highest and best use. **Highest and best use** means the use of the property that would produce the highest net return.

> **Example:** Property located in the middle of the downtown business district is used as a parking lot. The highest and best use of the lot is as a site for an office building.
>
> The property taxes are based on the lot's value to someone who wants to purchase a site for an office building—not the lot's value to someone who wants to continue operating the parking lot.

Thus, a property owner generally pays taxes based on the highest and best use of the land rather than the use to which it is actually devoted. However, the projected use must be legal and in compliance with zoning regulations and other city or county ordinances.

> **Example:** A parcel of property would be worth a great deal of money if its owner could use it as a site for an office building. However, the lot is in an area that is zoned for single-family residences.
>
> The value of the lot will be assessed according to its value as a building site for single-family homes. This is the highest and best use of the lot because it is the only use permitted under current zoning regulations.

The value of improvements to property (such as office buildings, houses, etc.) is assessed separately from the value of the land.

Example: A residential property is assessed for tax purposes. The lot is valued at $80,000; the house itself is valued at $100,000. Thus, the total assessed value of the property is $180,000.

Exceptions. Some specific types of property are not taxed at their highest and best use. For example, the Washington legislature passed the Open Space Taxation Act because it decided that it was in the best interest of the state to maintain and preserve open space for the production of food, fiber, and forest crops, and to assure the use and enjoyment of natural resources and scenic beauty for the well-being of its citizens.

Under the Open Space Taxation Act, open space is taxed on the basis of its current use rather than its highest and best use. For instance, if agricultural property is used for farming but is located in an area that is experiencing suburban growth, the land will be taxed on its value as agricultural property, not its value as if subdivided for residential use. (The Open Space Taxation Act will be discussed in more detail in the next section.)

The legislature has also declared that it is in the public interest to encourage the preservation of historic landmarks. Therefore it has provided a special tax valuation for improvements to historic property.

Exemptions. Certain types of property are exempt from general real estate taxes. Some of the most important exemptions include publicly owned property, church property, cemeteries, property owned by nonprofit organizations and veterans' organizations, libraries, health care facilities, schools, and museums.

Tax Amounts. In Washington, the total amount of all general taxes on real and personal property in any year cannot exceed 1% of the true and fair value of the property. (This limit does not apply to port district or public utility district levies, or to special levies voted for by the people.)

In most taxing districts the rate is set at a certain number of dollars per thousand dollars of value. That rate is then applied to the assessed value of each taxpayer's property.

Collection of Taxes. Tax bills are usually mailed in the middle of February. Payment of one-half of the tax is due on April 30 and the balance is due on October 31.

Special Assessments

Special assessments (also called **improvement taxes**) are levied to pay for public improvements that benefit specific pieces of property. These taxes are usually a one-time expense to pay for particular improvements, such as installing street lights or sewers.

Only those pieces of property that benefit from the improvement are taxed. The theory behind this rule is that the value of these properties will increase because of the improvements, so the property owners should bear the cost of the improvements.

Case Example:

Samis owned over 200 platted, undeveloped lots in Soap Lake. The city imposed an annual $60 "standby" charge on any vacant, unimproved land that abuts but is not connected to a water or sewer line. Samis challenged the fee as an unconstitutional property tax. The city argued the charge was a regulatory fee assessed in exchange for benefits conferred.

Based on the following considerations, the court held that the charge was an illegal property tax. First, the primary purpose of the charge was to raise revenue and not to regulate the fee payers. Second, the collected funds were not segregated and used to benefit the parties being assessed, but rather were used to pay the cost of general utility improvements. And last, there was no relationship between the fee charged and any service received by the lots.

The $60 charge therefore constituted a property tax. Because the tax was imposed selectively and without regard to property value, it was unconstitutional. *Samis Land Co. v. Soap Lake*, 143 Wn.2d 798 (2001).

Open Space and Agricultural Properties

In the last section, we discussed how agricultural properties are sometimes taxed at a lower rate as an incentive for property owners to preserve open space and traditional farms. In this section, we'll take a closer look at what buyers and sellers need to know when transferring ownership of property that has been classified as open space, agricultural property, or timber land. We'll also look at how the state's Right to Farm law has attempted to address conflicts that arise when the needs of residential property owners and agricultural property owners collide.

Open Space Taxation Act

As we mentioned earlier, the Open Space Taxation Act allows property owners to have certain property valued (and taxed) based on its current use, rather than its highest and best use. This law has the effect of lowering—sometimes drastically—the tax bills of property owners who use their property for certain beneficial purposes.

Property Classifications. The law applies to three classifications of property: open space land, farm and agricultural land, and timber land.

Open space. Open space land includes lands that are preserved in their natural state. This means that the current use of the land conserves and enhances natural or scenic resources; protects streams or water supplies; promotes conservation of soils, wetlands, beaches or tidal marshes; or preserves archaeological and historic sites.

Farm or agricultural land. To be classified as farm or agricultural land, a property must be devoted primarily to livestock or agricultural production for commercial purposes. If the property is smaller than 20 acres, it must meet minimum revenue guidelines to

qualify. For instance, if a parcel is between five and 20 acres, it will qualify as farm land as long as it has earned a gross income of at least $200 per acre per year for three of the preceding five calendar years.

Timber land. Finally, a parcel of land that is five or more acres may be classified as timber land if it is devoted primarily to the growth and harvest of timber for commercial purposes.

Current Use Status. Once property is classified as open space, agricultural land, or timber land, it must maintain that use for at least 10 years. An owner can withdraw the property from the classification early, but it will cost a significant amount of money to do so. The property owner will have to pay the difference between the classified tax rate and the normal tax rate for up to the previous seven years, plus interest on that amount. There is also a penalty equal to 20% of the total amount owed.

There are some exceptions to this rule. For example, owners can reclassify property from one open space category to another without penalty, such as from timber land to farm land. Also, land use is allowed to change without penalty if the change is due to a natural disaster.

Classified property can be sold (or transferred) at any time, but the seller (or transferor) becomes liable for the additional tax, interest, and penalty at the time of sale (or transfer), unless the new owner agrees to preserve the property's current open space use.

Right to Farm Law

As suburbs have pushed further and further into what were once rural and farming areas, conflicts have developed. After buying a home in a new subdivision in an apparently idyllic rural community, former city dwellers may be in for a shock when the odor of manure from nearby farms fills the air on a sunny day.

Usually, such an offensive odor would meet the statutory definition of a nuisance—something which interferes with an owner's use and enjoyment of her property. But many states have attempted to balance the needs of farmers against the needs of homeowners with statutes known as right to farm laws.

Washington's Right to Farm Act protects not just agricultural activities, but also forest practices (such as a tree farm's clear cutting). In general, if the agricultural property's use is consistent with good agricultural (or forestry) practices, and was established prior to the surrounding nonagricultural property use, then the use is presumed to be reasonable and will not be considered a nuisance.

Certain counties in Washington, such as Snohomish and Skagit, require sellers to give potential buyers a mandatory Right to Farm disclosure form when a property is within a certain distance of designated farmland. This disclosure informs potential buyers that they may be subject to unpleasant odors, pesticide-spraying, noise, dust, and similar agricultural activities from nearby farms.

The purpose of Washington's right to farm law is to promote forestry practices and protect farming from nuisance laws. In essence, it gives the agricultural property owner the right to say "I was here first."

Private Restrictions

So far this chapter has discussed only governmental or public restrictions on land use. However, there may also be private restrictions on a property. Private restrictions are agreements between a seller and a buyer or between neighbors. Private restrictions are usually found in the deed to the property, and they generally run with the land. If the land is transferred or sold, the new owner is also bound by the restrictions.

Covenants and Conditions

Private restrictions may be either covenants or conditions. A **covenant** is a promise to do or not do something. A **condition** in a deed places a restriction on the owner's title. A condition is much more serious than a covenant: a breach of a condition can result in forfeiture of the owner's title through a reversion clause (see Chapter 4).

Since forfeiture is an extremely harsh punishment, if there is any ambiguity in the wording of the clause, a court will usually construe a restriction as a covenant rather than a condition. Almost all private restrictions (especially those found in subdivision restrictions) are covenants.

The violation of a covenant can lead to a court order requiring compliance with the covenant, or a judgment for money damages. Failure to abide by the court order can result in punishment for contempt of court, which is usually time spent in jail.

> **Example:** Leonard purchased a one-story home with a view overlooking Lake Sammamish. All building lots in this subdivision were bound by a restrictive covenant stating that no structure should exceed one story in height, except that the architectural control committee could grant a special variance if the proposed building or addition would not restrict the view for others within the area.
>
> Several years later, Leonard added a second story addition to his house that blocked his neighbor Winston's view of the lake. Winston brought a lawsuit requesting that his view be restored.
>
> Leonard argued that Winston was only entitled to money damages. The court determined that a view is a unique asset for which a monetary value is very difficult to determine. Winston testified that one of the main reasons he bought this particular house was because of the view.
>
> Leonard was required to remodel or remove the addition in its entirety so as to restore Winston's view.

Termination of Restrictions

Most restrictive covenants have no time limit and may be enforced indefinitely. However, some restrictive covenants include a time limit. If a covenant contains a time limit, the covenant simply terminates at the end of the specified time period.

A few states impose time limits on restrictive covenants even if no time limit is specified in the covenant itself. For example, in New York private restrictions terminate automatically after thirty years, unless formally renewed. However, Washington and most other states impose no time limitations.

A restrictive covenant may also terminate by abandonment.

Example: A developer planned to create a residential subdivision and placed a restrictive covenant in some of the deeds. Then the developer's plans changed and the remaining portions of the subdivision were used for commercial buildings. The restrictive covenant for residential use was abandoned.

Similarly, a restrictive covenant may no longer be enforceable if the nature of the restricted neighborhood has changed.

Example: All of the deeds in a particular neighborhood contained a restrictive covenant restricting the properties to residential use. Over the years, however, several other uses crept in.

Now the neighborhood includes a gas station, a convenience store, and several restaurants. A property owner would have difficulty enforcing the restrictive covenant because the neighborhood has changed so much. The covenant may be deemed inoperative because it is no longer appropriate or suited to the neighborhood.

Subdivision Restrictions

Probably the most common example of private land use regulation is the list of restrictions placed by a subdivider on lots within a subdivision. The restrictions may be referred to as a **declaration of restrictions** or as **CC&Rs** (covenants, conditions, and restrictions).

Subdivision restrictions usually cover matters such as the permitted uses of the property (e.g., single-family detached dwellings for residential use only), and may specify items such as minimum square footage, maximum height, setback requirements, and permitted exterior materials. They may also address aesthetic concerns, such as limiting overnight parking on the streets, and may even limit the types of pets or other animals the property owners may keep.

Example: Although all the lots in a particular subdivision are at least one acre, the CC&Rs prohibit property owners from keeping horses on their property, because the neighborhood is essentially residential rather than rural in character.

Example: A particular subdivision in the Snoqualmie Valley consists of two- to four-acre lots, and many families keep horses and small farm animals on their properties for their own enjoyment. However, the CC&Rs prohibit property owners from keeping animals for commercial purposes. One property owner decided to operate an ostrich farm on the property, keeping ten to twenty ostriches on the land and selling their eggs and offspring.

Several other property owners sued the ostrich farmer, claiming that the nine-foot birds were nuisances (because of the resulting odor and noise) and a violation of the CC&Rs.

Even though ostrich farming in this area does not violate any zoning ordinance, health laws, or other public regulations, the property owner will probably have to give up the ostriches to comply with the CC&Rs in effect in the neighborhood.

General Plans. Often subdividers or other land developers devise a general plan for uniformity among all of the lots in the development. The most common way of setting up restrictions in this type of development is with a recorded plat or map of the area that lists all of the uniform restrictions that will apply to every lot. The individual deed to each lot then states that the lot is subject to the restrictions in the recorded plat. The recorded restrictions are incorporated by reference in each individual deed, and the title conveyed is subject to those restrictions.

Enforcement. If there is a general plan, any lot owner may enforce the restrictions in the plan against any other owner. Some developers create a homeowners association made up of the lot owners. The association has the right to enforce the restrictions or bring a lawsuit if the restrictions are violated.

> **Example:** The CC&Rs of a subdivision imposed strict aesthetic requirements on the property owners. The owners of one home repainted it mauve and eggplant. The subdivision homeowners association insisted that they repaint the house in more traditional colors. The owners refused, claiming the mauve and eggplant color scheme was contemporary, yet tasteful. The homeowners association sued the owners and won, forcing them to repaint their house.

Restrictions that violate public policy will not be enforced. For example, a restriction prohibiting the sale of the property to members of a particular race or religion is unenforceable.

Any doubts about the meaning or application of a restriction are usually resolved in favor of the free use of the land, rather than a more restrictive use.

Private Transfer Fees. When ownership of a property in a subdivision is transferred by sale, gift, or inheritance, or even when a property is leased, some homeowners associations require the payment of a fee to the association. In 2011, the Washington legislature passed a law effectively prohibiting these **private transfer fees** as an unreasonable restraint on alienation of real property.

Under this law, private transfer fees cannot run with the land, which means they are not binding on subsequent owners or purchasers of property. Private transfer fee obligations recorded before April 13, 2011 may be enforceable in certain cases, but are not presumed to be. Obligations recorded or entered into after that date are void.

Conclusion

Private property is subject to a considerable variety of public restrictions. Before developing or building on their property, landowners generally must comply with applicable zoning ordinances, building codes, subdivision regulations, and environmental laws. Property taxation also affects land ownership and may have an impact on land use.

In addition to the laws and regulations that apply to a property, there may be private restrictions limiting how it can be used. Prospective property buyers should always make sure that there are no restrictions prohibiting the use they plan to make of the property.

Case Problem

The following is a hypothetical case problem. Most of the facts are taken from a real case. Based on what you have learned from this chapter, make a decision on the issues presented, and then check to see if your answer matches the court's decision.

The Facts

The Wilhelms owned a lot in a residential subdivision that was partially surrounded by adjoining lots. In 1980, the Wilhelms began construction of an enclosure for their swimming pool so that it could be used year-round. (The Wilhelms filed an application and received a building permit for the addition to their home.)

The enclosure was sided with cedar drop siding the same color as the siding on the house, with windows, doors, and trim similar to the house. It was entered through a recreation room in the house, with no separation between the house and the pool enclosure. The back portion of the enclosure was less than 15 feet from the rear property line.

The Dixons and the Whites (neighbors of the Wilhelms) objected to the construction of the pool enclosure and claimed that it violated the subdivision covenants.

When the subdivision was developed in 1962, the developers filed an instrument containing residential area covenants. They also formed an architectural control committee to approve building plans prior to construction, but by 1980 the committee had not functioned for several years.

The neighbors claimed that building the swimming pool enclosure violated the following three covenants:

1. No building shall be erected other than one detached single-family dwelling and a private garage.
2. No building shall be erected until the construction plans and specifications have been approved by the architectural control committee.
3. No dwelling shall be located on any interior lot closer than 15 feet to the rear lot line.

The Questions

Was the construction of the pool enclosure a violation of the restrictive covenants? Should the structure be allowed to remain?

The Answer

The pool enclosure did not violate restriction number one, because it was not a separate building. An addition to a home does not violate a restrictive covenant against building more than one building on the lot.

The pool enclosure was technically a violation of restriction number two, which required approval by the architectural control committee before building. However, the committee had not been operating for several years. If a covenant is habitually and substantially violated so as to create the impression that it has been abandoned, it will not be enforced.

Furthermore, the Whites and the Dixons had also violated this covenant. The Dixons' house was actually built without approval of the committee, and the Whites had altered a deck and added a storage shed without approval of the committee. Someone who has violated a building restriction cannot enforce the same restriction against others.

The court decided that restriction number three was ambiguous because it did not define an "interior lot." The Wilhelms' lot was only partially surrounded by adjoining lots. Any doubts about restrictions should be resolved in favor of the free use of land.

In this case, the Wilhelms' pool enclosure was allowed to remain. *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407 (1983).

Chapter Summary

- Police power is a state's power to adopt and enforce laws and regulations necessary to protect the public health, safety, morals, and general welfare. The state delegates this power to local governments.
- Local governments use zoning ordinances to separate incompatible land uses by creating residential, commercial, industrial, and agricultural zones. Zoning ordinances also regulate the height and size of buildings and where they may be located on a site.
- A nonconforming use is a use that was already legally in place when a new zoning ordinance came into effect, and which does not comply with the requirements of the new ordinance. Nonconforming uses are generally allowed to remain but may be subject to certain restrictions.
- A variance is a permit to build a structure or conduct a use that would not otherwise be allowed. In order to receive a variance, a property owner must show undue hardship.
- Conditional use or special exception permits are generally granted for schools, hospitals, churches, cemeteries, public utility structures, and parks.
- If a property owner believes a zoning classification is incorrect, a rezone may be requested. However, spot zoning—a change in zoning category for a single piece of property without clear justification—is illegal.
- Building codes establish minimum construction standards to protect public health and safety. A building permit must be granted before construction can begin. The completed building must pass an inspection before a certificate of occupancy is issued.
- The Growth Management Act is intended to concentrate development into already existing urban growth areas, help protect environmentally critical areas and natural resource areas, and increase the efficiency of community transportation systems, utilities, and other services. The GMA requires most counties and cities in Washington to adopt a local comprehensive plan.
- Taxation of real property can have an effect on land use by promoting or discouraging certain uses of property. Most real estate is taxed based on the assessed value of its highest and best use. There are some exceptions and exemptions, however.
- Environmental legislation that affects land use includes CERCLA, the Model Toxics Control Act, the National Environmental Policy Act, the State Environmental Policy Act, the Shoreline Management Act, the Clean Air Act, and the Clean Water Act.
- Most private restrictions are covenants rather than conditions. Subdividers commonly impose restrictions (CC&Rs) on the entire subdivision. Violation of private restrictions may result in a court order to comply or a judgment for money damages.

Checklist of Problem Areas

Real Estate Licensee's Checklist

- ❑ If you're listing a property, have you checked what zoning restrictions apply to it?
- ❑ If you're working with a buyer, are the buyer's plans for the property compatible with the zoning? Are there private restrictions on the property that could interfere with the buyer's plans?
- ❑ If a house has an addition or there are other signs of remodeling, was that construction properly permitted and inspected? Are there unpermitted outbuildings that might be unsafe as well as illegal?
- ❑ Has the property been designated as a historical site? If so, the building is protected from destruction, and the owner would need a special permit before any significant changes could be made to it. Is the potential buyer aware of this?
- ❑ Is the property close to the water? It may be subject to the Shoreline Management Act, which could affect how the buyer can build on the property.
- ❑ Are there aspects of the property (such as wetlands) that could be environmentally sensitive, preventing or limiting development or other uses?

Buyer's Checklist

- ❑ What is the zoning designation of the neighborhood where the property is located? Is the character of the neighborhood consistent with that designation?
- ❑ Have you read any private restrictions that apply to the property, such as the subdivision's CC&Rs? Does it appear that those restrictions have been enforced?
- ❑ If you are planning to remodel a structure or develop the property, consider whether your plans could be prevented or adversely affected by:
  - the zoning restrictions, including height limits and setback requirements;
  - the CC&Rs or other private restrictions;
  - a historic preservation law;
  - the Shoreline Management Act; and/or
  - laws concerning toxic waste (CERCLA and MTCA), air and water quality, noise, habitat protection, or other environmental issues.
- ❑ Do you understand that there can be retroactive liability for the cost of toxic waste cleanup? Could you be held liable for cleanup costs if you purchase this property, even though you weren't responsible for the contamination?

Chapter Quiz

1. Which of the following has the power to regulate and restrict the use of private property?
   a. The federal government
   b. State governments
   c. Local (city or county) governments
   d. All of the above

2. An area of the city has recently been rezoned residential. John McAllister has been operating a retail upholstery shop in this zone. He will be allowed to continue using his property for commercial purposes. This is known as a:
   a. variance
   b. nonconforming use
   c. spot zone
   d. conditional use

3. In order to be granted a variance, you must show that:
   a. the proposed use will result in a financial benefit
   b. the proposed use will change the character of the area
   c. a hardship will be suffered if the variance is not granted
   d. All of the above

4. A wealthy, philanthropic landowner owns property in a residential area. He is a member of the First Presbyterian Church and wants to build a new church building on the lot as a charitable gift to the church. Will he be allowed to build the church on this lot?
   a. No, because it is zoned residential
   b. Yes, if he is granted a conditional use permit
   c. No, he will not be granted a variance, since he has suffered no true hardship
   d. Yes, because it is a nonconforming use

5. Johnson owns property in a large commercial zone. His property alone is rezoned for industrial use, and he builds a lucrative industrial plant on the property. This is an example of:
   a. a spot zone
   b. a variance
   c. justified zone modification
   d. comprehensive planning

6. Subdivision regulations may control:
   a. lot size
   b. location of streets and sidewalks
   c. provisions for public services such as utilities
   d. All of the above

7. Generally, comprehensive plans are implemented by:
   a. inverse condemnation
   b. variances
   c. building codes
   d. zoning ordinances

8. A planned unit development (PUD):
   a. is generally smaller than most subdivisions
   b. usually places houses on larger than average lots
   c. generally clusters houses close together on undersized lots
   d. may only be located in a commercial zone

9. One of the main methods of enforcing zoning ordinances is:
   a. through the use of building permits
   b. by bringing criminal charges for violations
   c. neighborhood watch programs
   d. None of the above

10. A new addition to the plumbing code requires the use of non-lead pipes in daycare facilities because of the harmful effects of lead on children. The Kiddie Care Center has been located in the Hansen Building for 15 years. The Hansen Building has lead pipes. The Kiddie Care Center:
    a. doesn't have to comply with this requirement because the plumbing code only applies to new buildings
    b. may be required to meet the new standard
    c. is not the only tenant in the Hansen Building, so the plumbing code requirement does not apply
    d. must have non-lead pipes to meet the new standard within 90 days

11. Once a building is completed, if a building inspector finds it satisfactory:
    a. a building permit will be issued
    b. a certificate of occupancy will be issued
    c. an environmental impact statement will be prepared
    d. None of the above

12. General real estate taxes:
    a. are also called ad valorem taxes
    b. are assessed annually
    c. pay for police and fire protection and other public services
    d. All of the above

13. In Washington, the value of agricultural property may be assessed for tax purposes:
    a. based on its current use
    b. every six months
    c. based on its highest and best use
    d. None of the above

14. Under the State Environmental Policy Act (SEPA):
    a. every building project must submit an environmental impact statement
    b. environmental impact statements are only required for state or federal projects
    c. no environmental impact statement is required if there has been a determination of nonsignificance
    d. None of the above

15. If there is ambiguity in the wording of a private restriction, a court will usually construe the restriction as a:
    a. covenant rather than a condition because a condition can result in forfeiture
    b. covenant rather than a condition because a covenant can result in forfeiture
    c. condition rather than a covenant because a condition can result in forfeiture
    d. condition rather than a covenant because a covenant can result in forfeiture