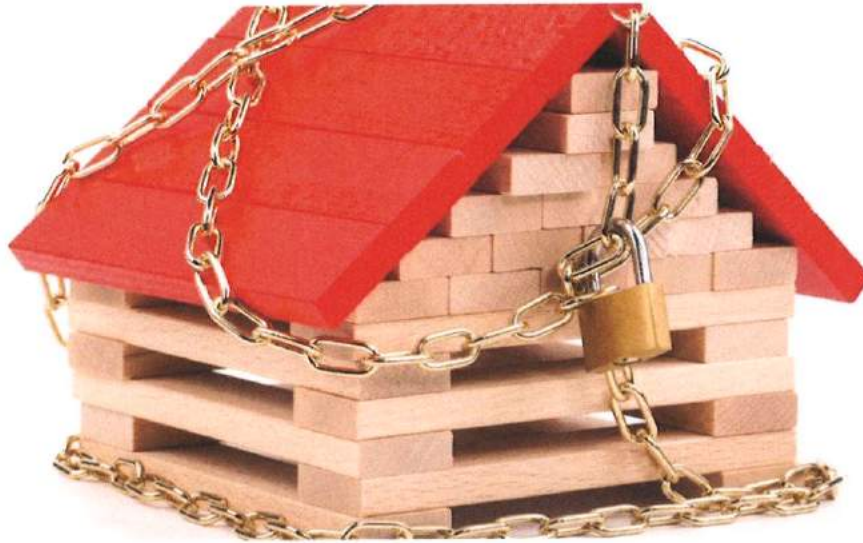


Chapter 4



Encumbrances

Chapter 4 Goals:

- Learn what a lien is
- Be aware of the various types of liens
- How a lien can be released
- How a lien can be placed on a property
- What is an easement
- Type of easements
- How land can be restricted
- What is an encumbrance
- How does an encumbrance effect land use

Chapter 4: Encumbrances

Key Terms

abandonment	eminent domain	lien release surety bond
clouded title	encroachment	long use
condition	encumbrance	mechanic's lien
covenant	equitable estoppel	non-financial encumbrance
Covenants, Conditions, and Restrictions (CC&Rs)	equity	notice of non-responsibility
decree to release the invalid lien	estoppel	payment bond
deed	financial encumbrance	preliminary notice
deed restriction	general lien	priority of claims
dominant tenement	homestead	satisfaction
easement	homestead declaration	servient tenement
easement appurtenant	homestead exemption	specific lien
easement by eminent domain	implied easement	stop notice
easement by implication of law	injunction	subcontractor
easement by prescription	involuntary lien	tax lien
easement holder	judgment lien	verification
easement in gross	license	voluntary lien
	lien	writ of attachment
	lien release	writ of execution
	lien release form	zoning

Encumbrances

An **encumbrance** is anything that affects a property owner's use of a property or its title. When a property owner's interest in a property owner is imperfect due to an encumbrance, the property is said to have a **clouded title**.

An encumbrance can be financial or non-financial. It can partially or fully limit an owner's ability to use his or her property.

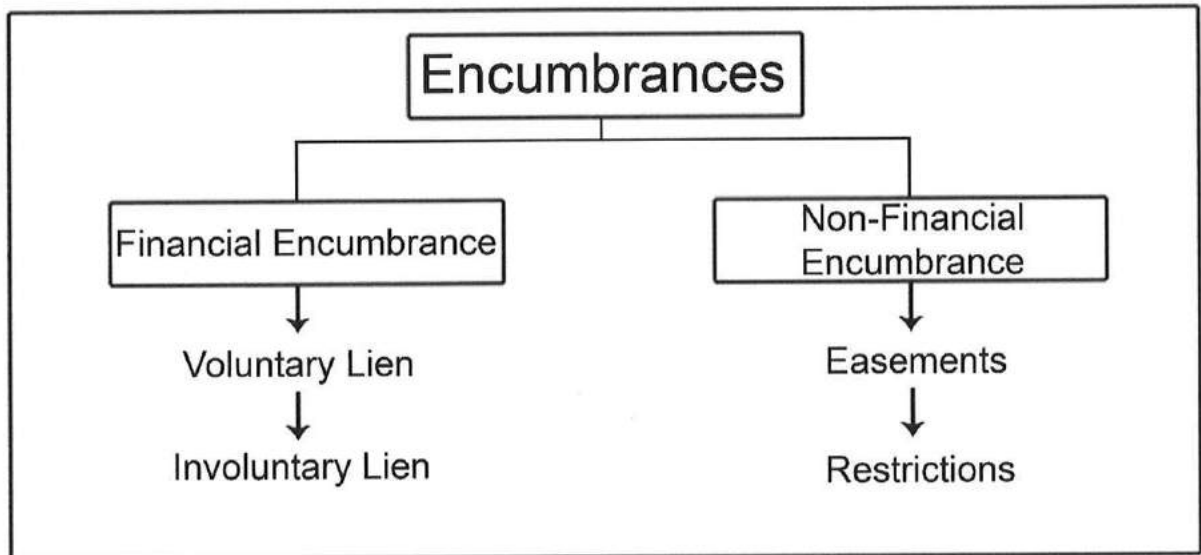
Encumbrances negatively impact a property's marketability. Most buyers wish to have full interest in a purchased property and many will not buy a property with a clouded title. Even if a buyer is willing to do so, he or she will likely not pay full market value for it.

A clouded title also affects a property's transferability. Many encumbered properties cannot legally be sold until existing encumbrances are removed.

Encumbrances include:

- Easements

- CC&Rs
- Deed restrictions
- Encroachments
- Liens, voluntary and involuntary



Non-Financial Encumbrances

Easements

An **easement** grants one party the non-possessory right to use a property for a specific purpose without having title to that property. The party with the non-possessory right is known as an **easement holder**.

Easements are commonly used between neighbors with adjoining properties. One neighbor may need to use a portion of the other neighbor's property in order to access his or her own property or to conduct certain actions.

For example, say a property owner has a piece of land that includes a long driveway. That driveway leads to his neighbor's house. The property owner may grant an easement for the driveway so that his neighbor can freely drive on the property's owner's land in order to get his own property.

An easement does not include the right to inhabit a property.

The property that "grants" the benefit of an easement is known as the **servient**

tenement. The property that “benefits” from an easement is known as the **dominant tenement**.

An easement holder may only use the land for the purpose intended by the easement. He or she is also responsible for maintaining the portion of the property being used. This includes the cost to maintain, repair, or update the easement to keep it in a safe condition.

If a property owner alters his or her property, the changes cannot affect an easement holder’s right to use the land. However, an easement may be reasonably adjusted to accommodate alterations to a property.

A seller of a property with an easement attached must inform a potential buyer of its existence. If the seller fails to disclose the easement, he or she may be held liable.

Creating an Easement

An easement can be created in the following ways:

- *Contract.* A written agreement between parties.
- *Eminent Domain.* The government has the right to seize a portion of a property owner’s land and claim it for public use.
- *Deed.* A deed may indicate a buyer’s right to access a specific portion of another property owner’s land. For example, say a property owner sells the back two acres of his 10-acre land. A new property deed may indicate an easement right for the buyer of the two-acre parcel to access a road on the property owner’s land in order to exit his or her property.
- *Law.* The law may determine that an easement is necessary for an adjoining property owner or the public.
- *Long Use.* If a property owner has been using his or her adjoining neighbor’s property for a long period of time (typically longer than five years), it can create an easement right.

An easement must clearly define the servient tenement and accommodate the rights of the dominant tenement.

Types of Easements

Easement in Gross

An **easement in gross** refers to when a property owner grants an easement holder the

legal right to use his or her property until the property owner sells the property or dies. Such an easement attaches to a person, rather than the land.

For example, a utility customer will commonly grant an easement in gross to a utility company. Such an easement allows the company to access the customer's property in the event a power line goes down and an electric box requires maintenance. If the utility customer sells his or her property or dies, the utility company's easement in gross is terminated.

Once established, an easement in gross is typically irrevocable until the property owner sells the property or dies.

Implied Easement

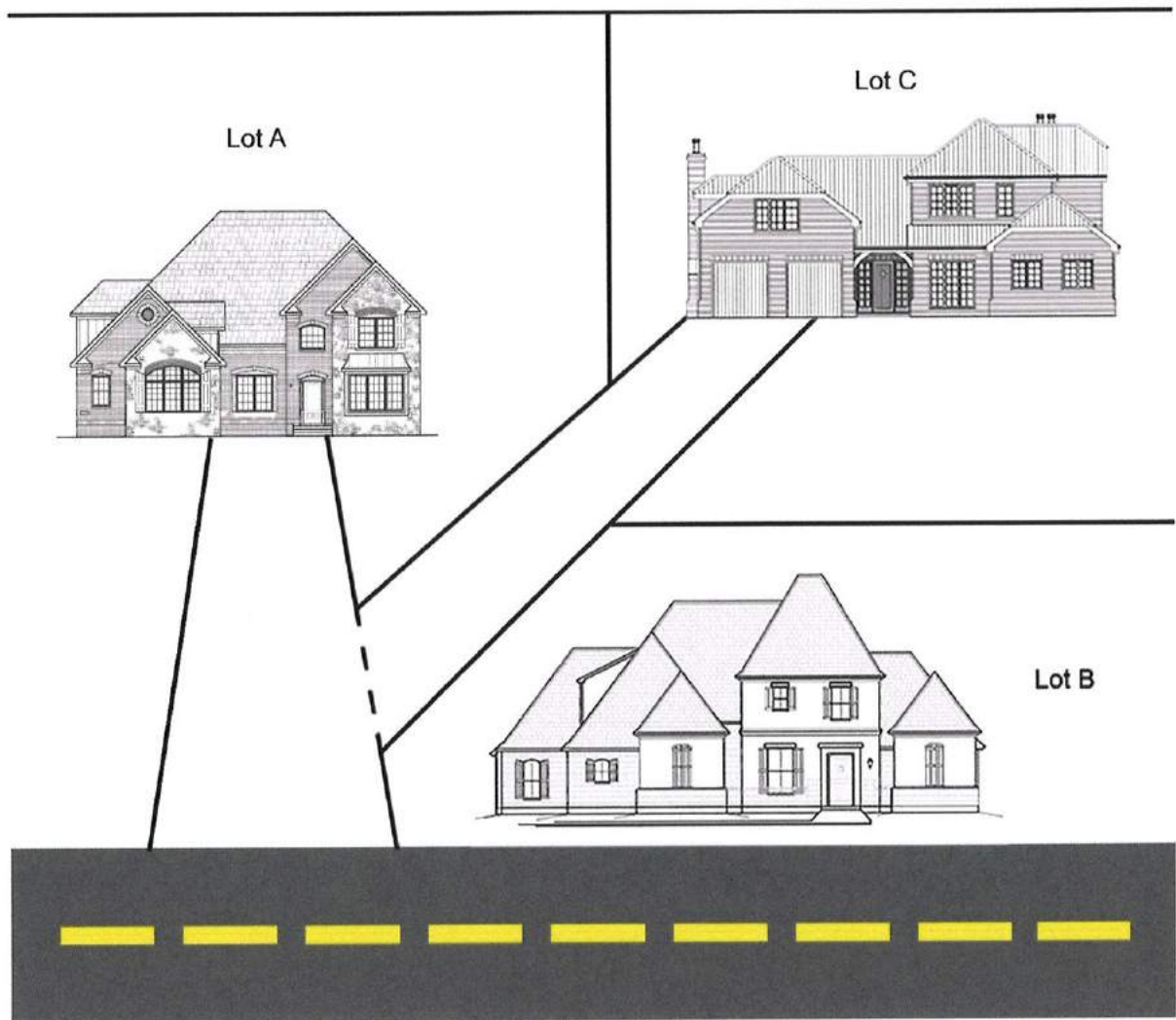
An **implied easement** – or an easement by implication – occurs when an easement right is understood or "implied" to exist. For example, assume a buyer purchases a new property and in the past the seller made use of an easement to enter and exist his property. The new buyer has the right to make use of his neighbor's land because there is an implied easement based on the fact that in the past the seller was using the same land.

Easement by Implication of Law

An **easement by implication of law** – similar to an easement by necessity – allows one party to travel over another party's land.

The law concludes that every parcel of land must be easily accessible, even if accessing the property requires the use of another party's land. In the event that one party must use another party's property to access his or her own property, the law permits usage without the approval of the property owner whose land is being accessed.

For example, the property owner of Lot C in the figure below can only access his or her property by using Lot A's driveway. In this case, the property owner of Lot C has an easement by implication to use his or her neighbor's driveway.



Easement by Eminent Domain

An **easement by eminent domain** – also known as an easement by condemnation – refers to when the government claims an easement over a portion of a property owner's land for a public purpose.

Such an easement must provide benefits to the wider community. For example: installing power lines, cable lines, piping, or electrical grids.

Under this scenario, the government would likely be responsible for compensating a property owner for its use of the land and/or any reduction in the property's value.

Easement Appurtenant

An **easement appurtenant** is a common implied easement. It is an easement right that

"goes with the land". Such a right always transfers with a property unless the owner of the dominant tenement releases it.

An example of this would be if a property owner sells his property that had an easement, the new buyer would be entitled to that easement because the easement runs with the land meaning it continues irrespective of who owns that property.

Easement by Prescription

An **easement by prescription** – also known as a prescriptive easement – is an implied easement right gained through the legal concept of adverse possession.

Unlike adverse possession, however, an easement by prescription does not grant possession of a property, only the right to use a property. A prospective easement holder also does not need to pay property taxes.

A prospective easement holder uses a portion of a neighbor's property without permission for a number of years.

The following must take place for an easement by prescription to occur:

- *Open and notorious use.* A prospective easement holder does not hide his or her use of the rightful property owner's land.
- *Continuous use.* A prospective easement holder must use a neighbor's property consistently for more than five years.
- *Adverse use.* The actions of the prospective easement holder are illegal and go against the rights of the rightful property owner.
- *Hostile use*
- *Claimed right to title*

Easements by prescription are against the law until they become legally binding. An easement by prescription is granted through legal action or, less commonly, through an agreement by both parties.

Prescriptive easements are typically granted for neighbors of large rural properties, as it can be difficult for a property owner to keep track of an entire property.

Government property is immune to prescriptive easements.

Example

Question: Farmers Bill and Edward are neighbors. Bill's lot does not have direct access to the main county road; he has to drive the roughly seven minutes around his farm to exit the property. Bill discovers an unpaved path on Edward's property that provides direct access from Bill's property to the main road. In an attempt save time, Bill uses the path. His use violates Edward's property rights, but Edward doesn't object. Bill uses the path for the next ten years. One day, Bill discovers that Edward has installed a fence that blocks Bill's access to the path. Does Bill have the right to dispute Edwards's fence?

Answer: *Yes. Because Bill openly used the path on Edward's land for more than five years without Edward stopping him, Bill has gained an easement by prescription over the path on Edward's land. Edward remains the property owner of the path, but he cannot prevent Bill from accessing it.*

Terminating an Easement

An easement can be terminated in the following ways:

- *Expiration.* Most easements do not expire based on a specific date, but rather, when a certain condition or action is met. For example, an easement in gross expires with the owner's death.
- *Estoppel.* The easement holder informs the easement grantor that he or she will no longer make use of the easement.
- *Abandonment.* The easement grantor owner abandons or vacates the property.
- *Non-Use.* The easement holder does not use the property for five years.
- *Deed.* An easement holder quitclaims the property to the easement grantor via a deed transfer.
- *Title Merger.* If the easement grantor buys the easement holder's property, the two properties will be merged and any easements between them will be terminated.
- *Misuse.* If the easement holder misuses the easement and does not reverse his or her actions, some easements have clauses that say: "Should this occur... the easement will terminate." This includes excessive use.
- *Lawsuit.* Legal action can be brought against a party falsely claiming to have an easement right that does not exist.

License

A **license** grants an individual the legal right to use a property owner's property for a specific purpose.

A license differs from an easement in several ways:

- It cannot be transferred, sold, or subleased
- The user cannot establish easement rights through adverse possession
- The property owner is not subject to the preferences of the user and has the right to suspend or revoke a license at his or her discretion

The particular use granted by a license is dependent on the terms established by the property owner. This means license use can be exclusive or nonexclusive.

A license does not grant an interest in a property, but rather, a temporary right to use the property. A license also does not give an individual control over a property; the property owner is still responsible for maintenance.

A common example of a license is a vending machine owner. A property owner grants a vending machine owner a license to place a vending machine on his or her property. In exchange for using the property owner's space, the vending machine owner will likely pay a fee or a percentage of the revenue from the machine.

Another example is a barbershop or hair salon owner that rents out "chairs" to independent barbers/beauticians.

Licenses are typically added to an extended contract.

A property owner cannot suspend a license with the intention of retaining the benefits of a licensee's labor or capital.

Property owners may be held liable for injuries and/or damages inflicted upon a licensee as a result of a property's condition. Therefore, a property owner should verify the safety of the property prior to granting a license.

Zoning

Zoning refers to the government's control of land use to promote the public interest. Zoning laws prevent or promote certain activity based on a property's land use category (i.e. residential, commercial, industrial, agricultural).

For example, zoning laws may prevent an industrial building from being built in a residential area or require a property owner to include certain safety provisions when building a property.

Zoning laws will be discussed in further detail in Chapter 15.

Covenants, Conditions and Restrictions (CC&Rs)

Covenants, conditions, and restrictions – known collectively as **CC&Rs** –are rules that restrict land use in a building or community. The purpose of CC&Rs is to protect, preserve, and enhance property values for the collective good of all property owners or tenants.

Unlike zoning laws, CC&Rs are made voluntarily between private parties and can be terminated if a majority of the property owners disagree with them.

Homeowners associations (H.O.A.s), gated communities, and housing cooperatives commonly create CC&Rs in order to regulate the condition of common interest properties, such as apartments or condominiums.

CC&Rs are only enforceable if a tenant/property owner is informed of them prior to his or her lease/purchase of a particular property.

CC&Rs do not terminate with the transfer or sale of a property. CC&Rs only terminate when a homeowner's association or community agrees to remove them.

Covenants

A **covenant** is a type of contract in which a property owner or tenant makes a promise to do or not do some action tied to the use of land.

One purpose of covenants relates to aesthetic and maintenance regulations. Covenants are geared towards creating visual symmetry in a neighborhood and/or maintaining certain exterior standards. This creates the appearance of property owners who care for their properties, thereby increasing desirability and property values within a neighborhood.

For example, a covenant may:

- Require property owners to maintain a well-trimmed lawn
- Prevent property owners from hanging clotheslines
- Impose rules on exterior paint colors, types of fencing, or plant growth

- Regulate a property's square footage size, its proximity to vital property lines, or "set back" restrictions

Covenants are also aimed at preventing property owners/tenants from violating the right to quiet enjoyment of other neighbors.

For example, a covenant may:

- Prohibit a property owner from keeping specific animals as pets (i.e. large dogs)
- Prohibit a property owner from engaging in certain animal activities (i.e. animal breeding, farming)
- Prevent a property owner from conducting commercial activity on a residential property
- Prohibit the playing of loud music at certain times

Covenants can occur in tenant leases or property purchases.

If a property owner or tenant breaches a covenant, an H.O.A. or other property owners can seek an **injunction** against the violating party. If successfully applied, an injunction can force an owner to remedy the covenant breach and/or pay damages.

Example

A property is located in a subdivision and is managed by a homeowners association. A buyer purchases the property under the pretext that he will maintain the property's H.O.A. covenants. One of these covenants states that any additions to the property need to be approved by the H.O.A.

A few years later, the buyer decides to alter his one-car garage into a two-car garage. He starts construction without the H.O.A.'s approval. The H.O.A. files an injunction. A judge approves the injunction and the buyer is forced to stop construction on the garage.

Conditions

A **condition** is a prerequisite or requirement that must be fulfilled in order for a real estate transaction to be approved.

Common conditions include giving a buyer a reasonable amount of time to obtain financing or conduct inspections.

A seller typically enforces conditions in order to avoid wasting time with a buyer who cannot purchase his or her property.

For example, a seller may require a buyer to obtain a mortgage approval to prove that his or her offer is serious. If the buyer obtains an approval, the seller will sell the home to the buyer.

A condition for the sale or transfer of a property cannot require either party to perform unlawful or impossible actions. For example, a condition cannot stipulate that a property be sold on the basis of race, religion, or gender.

If a condition is not fulfilled, a real estate contract will terminate. If one party in a contract breaches a condition, the party may lose the sale or be forced to forfeit the property.

Example

Anthony, a successful real estate investor, wants to transfer a property to his favorite charity, Help Our Soldiers. Anthony transfers the property on the condition that at least 70% of the total land space is used to directly accommodate veterans. After a couple of months, Anthony conducts an inspection of the foundation and discovers that only 50% of the property is being used directly for veterans. In other words, Help Our Soldiers breached the conditions of the agreement. At this point, Anthony has the right to repossess the property.

Restrictions

A **deed restriction** is a provision within a deed that limits how a property can be used and what can be built on it.

For example, an H.O.A. may impose a deed restriction that prevents a property owner from painting the exterior of his or her home a certain color. H.O.A.s commonly do this to ensure that all properties within a subdivision or area are uniform in nature.

Deed restrictions are similar to covenants, however the major difference is that a covenant is a promise to do or not do something, whereas a restriction limits how a property can be used.

Terminating CC&Rs

CC&Rs can be terminated under the following circumstances:

- The terms of a CC&R expire
- The enforcer cancels the CC&R
- The government intervenes, either by imposing or removing a CC&R
- An ownership merger

Example

A neighborhood H.O.A. created a restriction on using baluster material. This was because baluster material was very heavy and presented a safety hazard to residents. Ten years later, a family living in a property controlled by the H.O.A. implements a new baluster material into its exterior décor. The H.O.A. initially rules against the family. However, the family argues that the new baluster material is lighter than it was previously and is just as safe as other common building materials. After verifying these claims, the H.O.A. terminates its original restriction and allows the use of the new baluster material.

Encroachment

An **encroachment** is when a property owner builds a structure that encroaches upon the property of a neighbor or goes beyond his or her property's legal boundary.

For example, a property owner may build a fence that encroaches upon the boundary line with his or her neighbor. Other common encroaching items include trees, sheds, gates, or shrubberies.

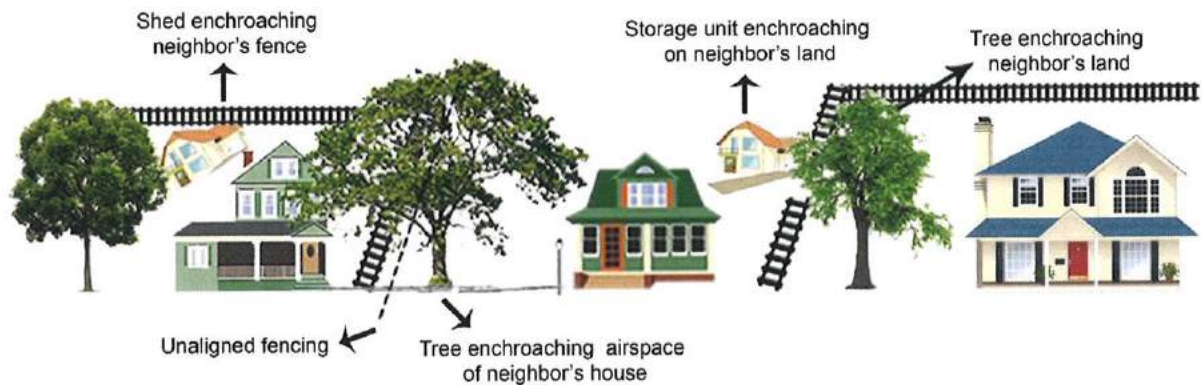
If a violated property owner knows of a neighbor's encroachment and does nothing to stop it, the violating party may have a valid easement by prescription or an adverse possession claim.

Therefore, when a violated party first becomes aware of an encroachment, he or she should immediately file a lawsuit. A court will consider the following in its determination of whether something is an encroachment:

- The extent of encroachment (i.e. one inch vs. 10 feet)
- The difficulty of removing an encroaching item (i.e. tree branch vs. building)
- Whether the violating party acted with intent

As property lines can be difficult to discern without a surveyor's review, some encroachments are genuinely unintentional and do not warrant a harsh punishment.

If an encroachment is deemed to have been intentional, however, a court will always side with the violated party. The violating party may be required to pay for the removal of the encroachment and any damages sustained to the violated party's property.



Example

Question: A new homeowner, Marie, discovers that her neighbor, Louisa, has planted trees, plants, and bushes that encroach upon her property. These encroachments prevent Marie from landscaping her property. What can Marie do?

Answer: *Marie has the right to ask Louisa to remove the encroaching trees, plants, and bushes. If Louisa does not remove them, Marie can file a lawsuit for damages and/or the forcible removal of the encroachments.*

Example

Question: A property owner, Eric, goes to the county recorder's office and discovers that the boundary lines between his and his neighbor's properties are inaccurate. In fact, Eric's neighbor's house juts almost two feet over the accurate boundary line. Eric brings legal suit against his neighbor to forcibly remove his or her house. Can Eric do this?

Answer: *Eric has the right to bring his neighbor to court to answer for the encroachments. However, a court will not force Eric's neighbor to remove his*

or her house. Such a task would require a significant financial burden and would present an unreasonable imposition. Instead, a court may require the neighbor to pay minimal monetary damages.

Financial Encumbrances

Liens

A **lien** is a type of encumbrance that grants a lender a legal possessory right over a borrower's property.

A lien clouds a property's title/ownership and prevents the sale or refinance of the property until a lender's balance is satisfied. (One exception is if a buyer wishes to purchase the property with the existing liens.)

Most homebuyers take out loans to finance home purchases. Lenders require some form of security in order to fund those loans. A lien allows a lender to use a property's equity as collateral in the event that the borrower defaults on a loan. **Equity** refers to the monetary difference between a property's market value and all of its combined loans and liens. All property liens require the property to have equity; otherwise, no interest can be secured.

In short, liens protect a lender's financial investment.

The **priority of claims** refers to the order in which lien holders get paid in the event that a property forecloses. If a property's equity is not substantial enough to cover all parties, those parties with priority will be paid first.

The priority of claims is as follows:

1. Tax liens
2. Senior lien holders
3. Junior lien holders
4. Administrative expenses, including levying officer
5. Judgment creditors
6. Property owner

Types of Liens

There are various types of liens.

A **general lien** is a lien placed on all real property owned by a borrower.

A **specific lien** only applies to a particular property owned by the borrower.

A **voluntary lien** is when a borrower knowingly allows a lien to be placed on his or her property in return for a loan or a service. The most common example is a mortgage loan. The presence of a voluntary lien will be indicated on a contract executed between a borrower and a lender.

An **involuntary lien** is a lien that is placed on a borrower's property without his or her permission. A lender typically uses an involuntary lien when a borrower fails to make payments on a debt.

An involuntary lien attaches to a property's title and prevents the property from being sold until the debt is paid.

Tax Lien

A **tax lien** is an involuntary lien resulting from the property owner being substantially behind on real property taxes. It is placed on a borrower's property by the government.

Judgment Lien

A **judgment lien** – or judgment – is a court-ordered, involuntary lien placed on a property owner's land when he or she owes an outstanding debt.

In order for a judgment to be placed on a property, a court must determine that a lender's debt claim is valid and enforceable. A lender must supply the court with documentation of the amount of debt owed by a property owner (i.e. written agreements, receipts, copies of checks) and prove why a lien is necessary to protect its financial interests.

Equitable estoppel is a court's denial to grant a judgment or other legal remedy to a plaintiff due to the plaintiff's lack of compliance with a legal rendering. This occurs when a plaintiff misrepresents him or herself to a defendant, fraudulently hides material facts, or fails to provide valid proof to substantiate a claim.

For example, assume Ally and Frank want to divorce after 25 years of marriage. Ally wants to take over the couple's primary residence which is granted through court ordered alimony. The couple married in Russia and Frank claims that his Russian marriage was not valid and that therefore his marriage was never a legal marriage.

Frank sought for the case to be reheard on the basis that the marriage was never valid. The trial court agrees with Frank. Ally appeals and the case makes its way to the appellate court. The appeals court reverses its holding arguing that the couple lived together for 25 years, raised a family with three kids, owned joint property, and acted in the normal manner of marriage. During the marriage Frank acted in the manner that any normal partnership would and only claimed the marriage was void when his wife wanted to claim the property as her own. The appellate court agrees to make the judgment final and give the property to Ally. The act of doing things that a normal couple would constituted a valid marriage even if the marriage was not done in the United State's, therefore there was an equitable estoppel for the divorce to go through and for the property to be transferred to Ally.

If issued, a judgment must be recorded in the county recorder's office associated with the subject property.

A judgment lien remains on a property for ten years. It is effective against any property that is not exempt from judgment laws. Therefore, if a property owner with a judgment lien on his or her property purchases a new property, the judgment may also attach to that new property.

After a court grants a judgment against a property owner, the property owner will typically pay off his or her debt in order to clear the property's title and avoid foreclosure. **Satisfaction** refers to when a property owner pays off his or her debts prior to the expiration of a judgment.

If a property owner fails to make payments, however, a lender can petition the court for a writ of attachment.

A **writ of attachment** – also known simply as an attachment – is a court-ordered involuntary lien that freezes a property owner's assets. This is done to prevent a property owner from hiding, transferring, or selling his or her assets to avoid paying a debt.

A **writ of execution** is a court order that enforces a judgment ruling. It allows a sheriff to take possession of the property owner's land. If the property owner continues to not cooperate, the sheriff can foreclose on the property. A sheriff- seized property will be sold in a sheriff's sale. The proceeds from the sale will be used to fully or partially satisfy a lender's debt.

Example

Question: A landlord, Travis, and a retail storeowner, Dorothy, are in negotiations for the rental of a large retail space in a shopping center. Travis gets the sense that Dorothy is not interested due to the lack of consumer traffic in the shopping center. Consequently, Travis tells Dorothy that an AMC movie theater and a few big name retailers are moving into the shopping center in the near future. Believing that the presence of these larger companies will attract traffic to her business, Dorothy agrees to rent the space.

Months turn into years and none of the large retailers Travis had promised rent space in the shopping center. In response, Dorothy stops making rental payments. Does Dorothy have the right to do this?

Answer: *Yes. Travis's false claims that other large retailers would lease space at the shopping center induced Dorothy to rent there. Because of this misrepresentation, Dorothy may have the right to stop making rental payments and/or potentially terminate her lease with Travis.*

Example

Question: Bob uses the services of a local investment company owned by Sid to find a development property. Bob tells Sid that he only wishes to purchase a property if it can be subdivided. Sid affirms that a particular subject property can be subdivided. Relying on this information, Bob purchases the property. Later, Bob discovers that certain zoning rules regulating the property make it impossible to be subdivided. This results in a \$200,000 loss for Bob. What can Bob do to recoup his losses?

Answer: *Bob can file a judgment against Sid for fraud and misrepresentation and seek damages to recoup all or a portion of his losses. If the judgment doesn't prompt Sid to repay Bob, Bob can go to court and request a writ of attachment and/or a writ of execution.*

Mechanic's Lien

In 1791, Thomas Jefferson introduced the mechanic's lien in an attempt to incentivize construction and protect the financial rights of construction workers.

A **mechanic's lien** – or construction lien – is an involuntary lien filed against a property by a contractor who has performed services on behalf of a property owner, but is subsequently not paid for those services.

Such liens protect a contractor's financial interests by forcing a defaulting property owner to settle an outstanding debt. It gives contractors another avenue to collect a debt beyond suing a property owner.

A mechanic's lien encumbers a property and clouds its title. If a property owner fails to resolve a mechanic's lien, his or her property may be forced into foreclosure. Even if a property goes into foreclosure, a mechanic's lien will remain on the property until the debt is paid off.

In order to avoid potential disputes, it is advisable for a property owner and a contractor to sign a release form after each step of a construction project. A release form should clearly indicate:

- The project's start and end date
- The materials and labor that will be required to complete the project
- Payments that have already been submitted
- Payments that are still owed and the expected dates on which those payments will be received
- A clause in which a contractor agrees not to file a mechanic's liens after full payment has been received

A property owner should also require a contractor to have a payment bond. A **payment bond** is a surety bond posted by a contractor that guarantees its subcontractors and suppliers will be paid. A payment bond must be for 100% of a contract's value. This helps avoid liability resulting from a contractor's actions or non-actions.

Today, the Californian Constitution states that any licensed contractor who supplies labor and/or materials has a constitutional right to file a mechanic's lien. This includes:

- Contractors
- Subcontractors
- Architects
- Engineers
- Equipment lessor
- Truckers
- Land surveyors
- Material suppliers

A **subcontractor** is an individual or company hired by the primary contractor to perform a specific task as part of an overall project. A contractor is required to pay a subcontractor. If a contractor does not pay a subcontractor, the subcontractor has the right to file a mechanic's lien against the property on which the work was performed.

A subcontractor can file a mechanic's lien even if he or she did not have direct contact with the property owner.

An unlicensed contractor cannot file a mechanic's lien.

Filing a Mechanic's Lien

A mechanic's lien must be filed and enforced within 90 days of a property owner failing to pay a contractor.

Preliminary Notice

A **preliminary notice** is a notice sent to a property owner after he or she defaults on a payment to a contractor. It informs the property owner of the contractor's intention to file a mechanic's lien.

A notice should include:

- Contractor's name
- Property owner's name
- Job sit address
- Description of work performed
- Description of material and labor required to perform the work
- Amount owed
- Contractor's signature

A contractor must supply a preliminary notice within 20 days of first providing labor or materials on a property. If a notice is supplied outside of the 20-day period, a mechanic's lien will only cover the portion prior to the 20 days of performed work.

A contractor must serve a property owner with a preliminary notice prior to actually filing a mechanic's lien. If a contractor fails to provide a preliminary notice, his or her right to a mechanic's lien is invalidated.

A preliminary notice can be given to a property owner in person or through certified mail.

Stop Notice

A **stop notice** is a notice sent to a property owner that formally traps – or “stops” – funds that have not yet been paid on a construction project. It is issued in an attempt to ensure contractor payment.

A stop notice is typically used instead of, or in addition to, a mechanic's lien. Unlike a mechanic's lien, a stop notice does not attach to a property or cloud a property's title.

A contractor must file a preliminary notice prior to serving a stop notice.

Prepare Mechanic's Lien Document

If a property owner fails to respond to a contractor's preliminary notice, the contractor must prepare the official mechanic's lien document. A mechanic's lien document must include the following:

- Property owner's name
- Name of party who hired the contractor (if not the property owner)
- Legal property description and/or description of job site
- Statement identifying what the lien is for
- Verification

Verification is a sworn statement under oath regarding the validity of a claim. A contractor must provide proof of his/her claim to a mechanic's lien, including documentation of the service agreement and services performed.

Deliver and File Mechanic's Lien

A contractor must deliver a mechanic's lien to a property owner in person or send it through certified mail. A contractor should keep a receipt of the mailing and/or sign an affidavit attesting that he or she delivered the lien.

A contractor must then file the mechanic's lien and the affidavit with the county recorder's office in which the job site was located.

Notice of Non-Responsibility

In the event that a property owner does not authorize work to be performed on his or her property, he or she must provide a contractor with a **notice of non-responsibility**.

The purpose of such a notice is to make it clear that a contractor does not have the right to continue working on a property and that his or her work will not result in payment. This protects property owners from unscrupulous contractors who attempt to perform unauthorized work with the intention of collecting money to which they are not entitled.

A notice of responsibility must be visibly posted at the scene of construction within 10 days of the property owner becoming aware of the unauthorized activity. It must also be filed with the county recorder's office.

A notice of non-responsibility includes:

- Property owner's name (or name of party enforcing the notice)
- Contractor's name
- Property address and description
- Description of situation
- Brief statement indicating that the property owner does not authorize the work being performed

A notice of non-responsibility can protect a property owner against an invalid mechanic's lien claim.

Example

Question: Eddie has used Ted's Contracting Services in the past and was happy with all the work performed. Eddie tells Ted that he wants to begin construction on an addition to his property. Eddie shows Ted the blueprints and walks him through what he wants done. Ted tells Eddie that he wants the job, but cannot begin for a few more weeks. The two never sign an agreement for the new work to be performed. A few weeks pass and Eddie leaves town for a family emergency. Eddie returns to discover Ted and his crew have started work on the addition to his property. Eddie tells Ted to stop working, but Ted does not want to stop working and lose the work he already began. Ted says that he and Eddie had an agreement that he would begin work a few weeks after their initial meeting. What can Eddie do?

Answer: *Eddie must post a notice of non-responsibility on the entrance of the property within ten days of the beginning of the construction. Additionally, the notice must be filed with the county recorder's office as proof of the incident.*

Removing an Invalid Mechanic's Lien

A mechanic's lien is considered invalid if a contractor's work is:

- Wrongly performed
- Only partially completed
- Included buying supplies that went unused
- Includes other factors that were not in the original contract

A property owner has the right to dispute an invalid mechanic's lien claim.

To do so, a property owner must first send a lien claimant a written request by certified mail. This request informs the claimant that if he or she does not revoke the invalid lien claim, the claimant will be responsible for paying all reasonable legal fees required to remove the lien.

In most cases, a claimant will drop his or her invalid claim after such a request. In the event that a lien claimant does not remove his or her invalid lien claim, a property owner may petition the court for a **decree to release the invalid lien**.

Courts commonly rule in favor of parties who have valid documentation. Therefore, a property owner should make sure to provide all appropriate documents.

Lien Release

In order to be released from a mechanic's lien, a property owner must pay the full debt amount, settle the debt, or establish a repayment plan.

A mechanic's lien can be released if the lien claimant files a **lien release form** with the county recorder's office.

A **lien release surety bond** is a surety bond that property owners may be required to have for certain construction projects. The release of a lien bond allows a property owner to discharge the mechanic's lien, while guaranteeing payment to a contractor.

The following must be submitted to file a lien release bond:

- Application for lien release bond
- Personal financial statement
- Explanation of the issue in question, including the disputed property and the payments requested
- Copy of court order

Homesteads

California has strict foreclosure laws that make it difficult for lenders to foreclose on a borrower's property.

A **homestead** is a legal protection that safeguards all or a portion of a homeowner's equity from unsecured creditors. Unsecured creditors include credit card companies and collection agencies for medical bills and student debt.

A homestead does not protect property owners against property-related liens (i.e. tax liens, trust deeds, homeowners' association liens, mechanic's liens).

A homestead only applies to a property owner's principal residence.

There are two types of homestead programs:

- Homestead Exemption (Automatic)
- Homestead Declaration

Homestead Exemption

A **homestead exemption** is an automatic protection provided in California to everyone who owns and lives in a home.

Only one homestead exemption applies to each married couple or domestic partnership. If multiple owners own title to the same property, each owner can claim the homestead exemption.

The amount of the exemption varies depending on the age, marital status, and income of the property owner:

- \$50,000-\$75,000 for singles
- \$75,000-\$100,000 for households
- Up to \$175,000 for senior citizens or disabled residents
- Up to \$175,000 for low-income residents (those who make less than \$15,000 annual income as a single or \$20,000 as a couple)

A property will not be sold if its equity is lower than the debt balance plus the homestead exemption. However, if a homeowner's equity is greater than the exemption amount, a court may order it to be sold.

Homestead Declaration

Some property owners may choose to file a homestead declaration in addition to an automatic homestead exemption. A **homestead declaration** is an additional protection that allows a homeowner to assert that a particular dwelling is his or her principal residence.

A homestead declaration offers additional protections to homeowners. By recording a homestead declaration, a homeowner is exempt from an involuntary seizure or sale. Additionally, if a homestead goes into foreclosure, the proceeds of a foreclosure sale are protected from lenders for up to six months.