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Chinese Real Estate Law and the Law and Development Theory: Comparing Law and Practice

Gregory M. Stein

The Chinese Land Use Right **Is It Property?**

By Gregory M. Stein

The real estate boom occurring throughout China truly is astonishing. Shanghai, China's key financial center, is said to be the home to one-fifth of the world's construction cranes, which local residents refer to as China's national bird. This is an extraordinary development in a nation in which private ownership of land is prohibited, all land is owned by governmental units or agricultural collectives, and the government is firmly controlled by a single political party that, at least in name, remains Communist.

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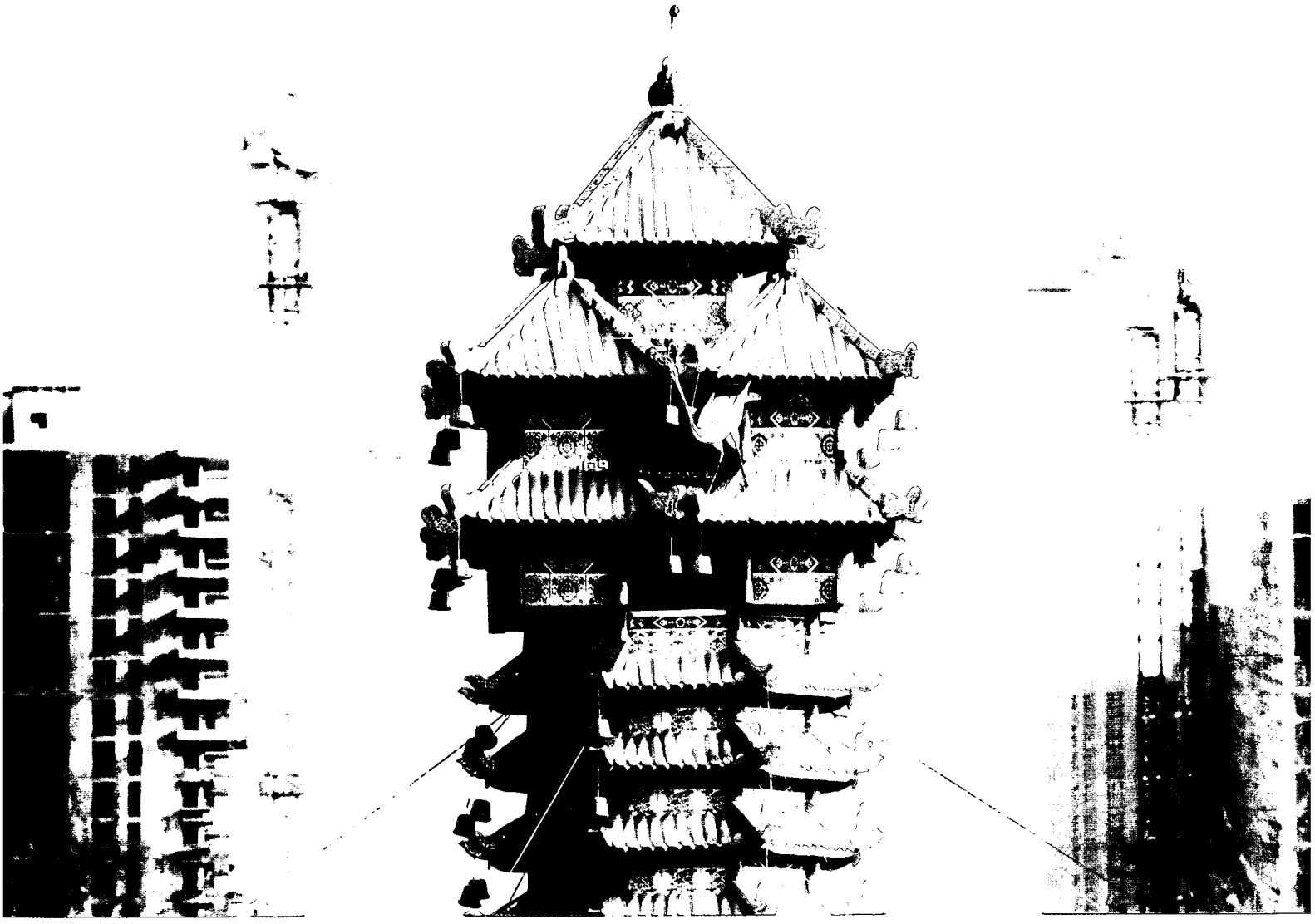

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China's real estate and business laws are evolving rapidly but still are at an early stage of development. In fact, China's first modern property law, the Property Law of China, enacted March 16, 2007, will become effective on October 1 of this year. As a result, Chinese legal and business practices are not as firmly established as those in Western nations. Few secondary sources are available on the topic of Chinese real estate law. Rule-of-law principles continue to grow in importance, but China's strong cultural tradition of reliance on personal relationships (*guanxi*) remains a key factor in many business interactions. There also are significant gaps between what China's few written laws state and how they are enforced in practice. For the Western attorney struggling to understand current Chinese doctrine, the most important question is not "what does the law say" but rather "how does the law actually operate."

This article offers an overview of how a specific segment of the Chinese real estate market—the acquisition of land use rights—functions in practice, from both legal and business perspectives. In an effort to comprehend how Chinese real estate laws actually operate in the field, I recently interviewed dozens of Chinese and Western experts knowledgeable about Chinese real estate law and practice. These professionals are currently taking part in what can be described without exaggeration as one of the greatest real estate booms in world history. My conversations with these real estate developers, bankers, government officials, judges, practicing lawyers, real estate consultants, economists, real estate agents, law professors, business professors, law students, and recent homebuyers provide useful insights into a major nation that is quickly transforming itself from an economic backwater into a self-styled "socialist market economy."

The article sets forth certain basic principles established by Chinese law, defines and discusses the land use right, and then aims to establish how this relatively new feature of Chinese real estate practice is maturing with what appears to be tremendous success against the backdrop of a legal system that is still emerging. It also describes the typical ownership entity in a Chinese commercial real estate transaction and addresses site selection. This article is intended to be a starting point for the interested practitioner, but it cannot cover a topic of this complexity and importance in great depth. For a more detailed treatment of the Chinese land use right, see Gregory M. Stein, *Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground*, 24 UCLA Pac. Basin L.J. 1 (2006).

The Land Use Right

Background

The People's Republic of China was established in 1949. Mao Zedong, its leader, began to nationalize much of China's land, a process that was not actually completed for more than a quarter of a century. Several years after Mao's death in 1976, Deng Xiaoping came to power and began to encourage the re-emergence of a market-based economy. The Chinese Constitution of 1982 was amended in 1988 to allow for the creation of transferable land use rights. The Land Administration Law was adopted in 1986 and revised in 1998 and 2004. As mentioned earlier, China recently adopted the new Property Law of China, effective October 1 of this year. By granting long-term land use rights to those who wish to develop or use real estate, the Chinese government has taken affirmative steps to allow private citizens to control the use of land. Private ownership of land, however, remains prohibited, as it is inconsistent with Communist principles.

Despite these recent transformations, China's legal system remains relatively undeveloped compared to legal systems found in Western nations, particularly considering how advanced Chinese property markets have become. A Westerner visiting Shanghai for the first time is likely to overestimate the degree of recent reform in China's property laws and practices. The legal changes that have occurred have been spotty, often responding to specific problems rather than operating prospectively and comprehensively. China's real estate market remains subject to much intrusive government control and interference, particularly when compared to Western markets.

The Legal Basis for the Land Use Right

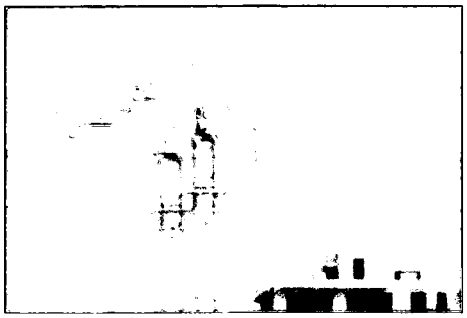
The Preamble to the 1982 Chinese Constitution states that the "basic task of the nation . . . is to concentrate its efforts on socialist modernisation." Constitution of the People's Republic of China, preamble (1982) (find at http://english.people.com.cn/constitution/constitution.html). Subsequent amendments added that this task must be accomplished "in accordance with the theory of building socialism with Chinese characteristics." Id. amend. II (1993). This last phrase was dropped in 2004, in favor of the term "Chinese-style socialism." Id. amend. IV (2004). The clause "socialist market economy" first appeared in this paragraph in 1999. Id. amend. III (1999).

In 1988, China amended Article 10 of its Constitution to state, "The right to the use of land may be transferred in accordance with the law," id. art. 10, amend. I (1988), language that was further buttressed by a 2004 amendment requiring the government to pay compensation when it expropriates land. Id. amend. IV. None of this language allows private ownership of land. Instead, these constitutional provisions, along with laws that were enacted to implement them, clarify that the government may grant land use rights for a specific term. This compromise created opportunities for sustainable economic growth and the flourishing of a private real estate market without formally abandoning Marxist principles.

The government may transfer land use rights to residential property for a term of up to 70 years. For commercial property, the maximum term is 40 years. Industrial and other

types of land use rights may not be granted for terms in excess of 50 years. See Patrick A. Randolph Jr. & Lou Jianbo, *Chinese Real Estate Law* 127–28 (2000).

Land use rights are granted with certain statutory limits. Article 25 of the Law on the Administration of Urban Real Estate, for example, states that the land use right may be reclaimed without compensation if the initial holder has not developed



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the land within two years. Law on the Admin. of Urb. Real Estate, art. 25 (1995) (find at www.lehmanlaw.com/resource-centre/laws-and-regulations/real-estate/the-law-of-the-peoples-republic-of-china-on-urban-real-estate-administration-1994.html). Many people indicated that this rule is frequently ignored; as one expert stated, "Every policy in China, you can change!" Rights holders may pay an additional fee to extend the term beyond two years, may initiate minimal construction before the two-year period expires as a means of formally meeting the use-it-or-lose-it requirement, or may seek extensions of this two-year term, which seem to be readily available. One person, however, noted that the Shanghai government has hinted that it may begin enforcing this rule more strictly, as a means of slowing the overheated real estate market and reducing the ability of investors to speculate on land use rights in undeveloped land.

The initial and subsequent non-government holders of land use rights may further transfer them, with certain limits. For instance, under Article 38 of the Law on the Administration of Urban Real Estate, the initial holder of a residential land use right may not re-sell the right to a second holder until the initial right holder has completed at least 25% of the proposed construction. Id. art. 38. This rule apparently is ignored with great regularity, often because of confusion about exactly how much construction has been completed. The holder of the land use right also must own the building constructed on that land. James M. Zimmerman, *China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises* 739 (2d ed. 2005). In addition, while some speakers advised me that in parts of China the purchaser is prohibited from using borrowed funds for the acquisition of a land use right, they were unable to clarify whether this is a legal restriction, a limitation imposed by lenders, or simply common practice.

Despite apparent similarities, the Chinese granted land use right differs significantly from the ground lease familiar to Western real estate lawyers. Chinese land can be owned only by the government, so the granting of a land use right by definition severs ownership of the land from ownership of the building constructed on that land, just as the Western ground lease does. In China, however, the holder of the land use right also must own the building constructed on that land, which forces the developer to incur the capital expense of acquiring the land use right in its entirety at the beginning of the construction process. The ground lease, by contrast, permits the developer to avoid all or most up-front land acquisition costs. The Chinese land use right, in short, is not a financing device.

Moreover, landlord-tenant law generally does not apply to land use rights. The purchaser of a land use right must pay the entire fee for the right in advance, and the grantee may not register the land use right until it has paid the entire fee. As noted above, the land to which use rights are granted must be developed within a fixed amount of time or the right is forfeited.

Government Sale of Land Use Rights

The process by which the government sells a land use right, like so many other procedures in Chinese law, derives from a combination of formal written rules and informal practice. Shanghai's procedure, as described to me by an official of the Shanghai government, serves as a useful illustration of these granting practices. The government initiates the sale process by deciding on the requirements and specifications for a tract. It asks the Department of Land Administration to place a value on the property and this administration sets a minimum price for the land use right. The government publicizes these requirements and specifications and makes the relevant documents available to prospective bidders, which then submit sealed bids. Each bid from a developer is solely a price bid, as the government already has established all of the specifications in advance.

Shanghai's government is not required to select the highest bidder, a fact that leaves it open to charges of favoritism or corruption. The government's response is that it is concerned with a bidder's reputation, experience, skill, financial strength, and general capacity to complete the project, and not just with the amount of its bid. The government argues, perhaps with some justification, that there is greater public benefit if the project is completed, even if the gov-

ernment receives less money in the short run. Nonetheless, bidders who have good personal relationships with highly placed officials are widely perceived as enjoying an edge, and these perceptions are further enhanced by a belief that the specifications themselves sometimes seem to have been drafted with particular bidders in mind. Concerns about favoritism are rampant; as one lawyer bluntly stated, it never hurts to know someone.

Nonetheless, Shanghai's method of auctioning land use rights has improved dramatically. Before 2002, the municipality would negotiate privately with several reputable developers and then choose one, a process that still is followed in some of the less commercialized provinces. Whatever their flaws, Shanghai's current procedures generally are recognized as among the most impartial in China.

The Department of Land Administration's calculation of the minimum price is a complex one. The floor price should reflect some base value for the land use right itself. If the government also plans to undertake the controversial and costly tasks of relocating current residents and demolishing existing structures, it also passes the costs of these activities along to the bidders in the form of a higher minimum price. For this reason and others, developers tend to prefer land that is already vacant. The government also may include a third component in the minimum price, to reflect certain infrastructure costs that the government will incur. This last component of the minimum price is loosely analogous to the impact fees that some American jurisdictions impose. Alternatively, the government may simply mandate that the acquirer of the land use right install this infrastructure itself.

Expiration of Land Use Rights

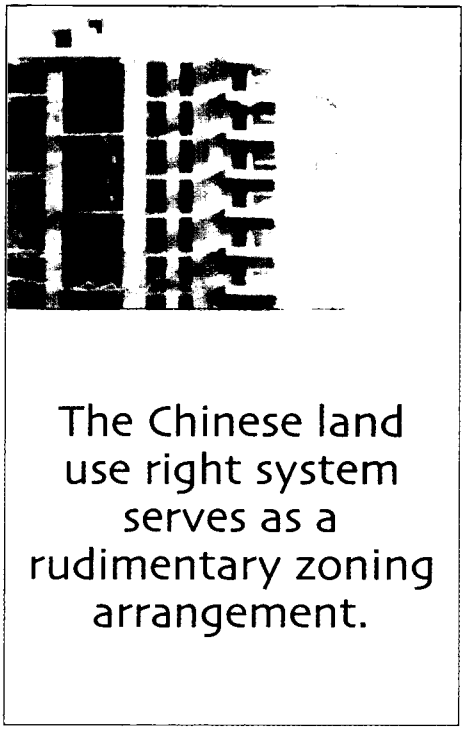
One obvious question about China's current system of land use rights is what happens to the land use right and the structures on the land when the term of the right expires. The current system of land use rights is only about 20 years old, while the term of most land use rights ranges from 40 to 70 years, so China's legal system and real estate market have had little occasion to address this question. One Chinese lawyer described a few cases in which shorter-term land use rights, originally granted for less than the legal maximum term, had been approaching their expiration dates. This lawyer stated that the government legally could have recovered possession of the land and the buildings now on the land, but the government either had been willing to negotiate an extension of the land use right or had provided compensation for the buildings. The relevant legal provisions, meanwhile, are ambiguous. China's new Property Law states simply, "The term of the right to the use of land for building houses shall automatically [be] renewed on expiration," without specifying the length of the renewal term or the method of calculating the renewal price, and makes similar provisions for nonresidential land. Property Law of China, art. 149 (2007) (find at www.Politica-China.org/wp-content/uploads/2007/05/Propoerty_Rights_Law_of_the_PRC__LLX__03162007_.pdf). [Editor's Note: typo "Propoerty" is in URL.]

China does not impose ad valorem property taxes. In addition, the government will someday run out of desirable land on which to grant new land use rights. Most experts told me that they assume that Chinese government entities will be eager to negotiate extensions of land use rights in exchange for the payment of a periodic or one-time fee to the government.

Land Use Planning and Land Use Rights

The Chinese land use right system serves as a rudimentary zoning arrangement. When the government transfers land use rights, it executes a formal document with the acquirer. In this document, the government limits the uses to which the land may be put. See Randolph & Lou, supra, at 379–87.

The price for a land use right is a function of the total buildable area that can be constructed on the land. If that number changes as the project moves forward, the price is adjusted accordingly. This fact illustrates the tension between regulating land uses and maximizing revenues that local



government entities face: a bigger building that may be undesirable for planning reasons will generate greater revenue.

Municipal planning bodies may devise land use plans restricting certain types of developments in specified areas. These entities are also aware of the tremendous revenue-raising possibilities from the sale of desirable land to developers, who may wish to improve it in a manner that conflicts with those land use plans. Pressure is mounting both domestically and internationally for China to place greater emphasis on protecting the environment, and Shanghai officials regularly note the increasing amount of green space that is available to residents of that city. But if land that is slated for a downtown park proves to be consid-

erably more valuable than anticipated to its government owner, there may be huge financial incentives to convey the right to use that land to a developer.

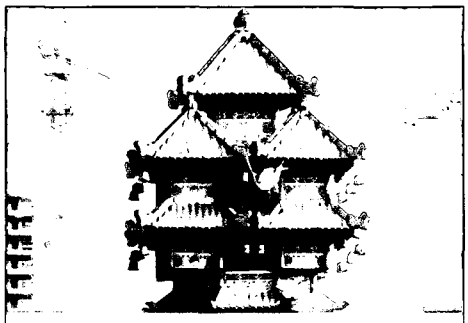
The Chinese real estate boom has made land use rights extremely valuable in many urban areas. Government bodies in these regions often treat land use rights as assets to be sold whenever the need for cash arises, and many provincial and municipal governments employ the sale of land use rights as an indispensable means of keeping themselves solvent. Officials of these government bodies surely must recognize that if they transfer too many land use rights too quickly, they will impair the government's long-term financial viability. Like the corporate directors they are becoming, however, these officials often look to short-term needs and not to longer-term aspirations.

On a national level, Beijing has begun to worry that a prolonged real estate boom might lead to more generalized social unrest. If the bubble bursts suddenly, those who have already invested may be dramatically harmed. If the boom continues, those who have been priced out of the market may become resentful. The national government recognizes important reasons to slow the real estate market down, and because it is less dependent on revenues from the sale of land use rights, it suffers less than the provinces and municipalities if it accomplishes this goal.

The Ownership Entity

Government Control of the Ownership Entity

Most real estate projects in Shanghai are owned by domestic limited liability companies formed in accordance with China's Company Law. Company Law, arts. 23–76 (2006) (find at www.lehmanlaw.com/resource-centre/laws-and-regulations/company/the-company-law-of-the-peoples-republic-of-china.html). If a new limited liability company wants to develop real estate, the first thing it must do is obtain land use rights. This company often is itself partly owned by a private developer-manager and partly owned by a government entity, a fact that reflects the reality that a local government entity controls the use of the land that the developer needs. The government body provides the land use right to the ownership entity as its contribution to that entity. See id. art. 27. In short, the local government's control of the land ensures that it can retain an interest in the entity that will develop the land.



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The government body's partial ownership of the project allows it to control and profit from the development, with the other partner providing the professional know-how and much of the cash. It appears that the fractional interest in the ownership entity that local governments demand has dropped in recent years, with one expert stating that the percentage of a project typically owned by the government partner has decreased from 60% to 40%.

The government also may benefit by acting as a subdivider. It is quite simple for the government to profit in this role when it controls the right to use desirable land and also may unilaterally determine how that land can be used. In some less densely populated areas, a municipal government will establish a first-level developer company in which it holds a large ownership stake and then convey land use rights to this entity. This company subdivides the land, breaking a larger parcel into smaller ones and installing necessary infrastructure. It then transfers the land use rights to the smaller lots to the real estate developers that actually will build on them.

State-owned enterprises (SOEs), like governmental units, may own land use rights, or they may obtain these rights from local governments at little or no cost. These SOEs then contribute the land use rights to a development entity that they jointly own with a local developer or, occasionally, a foreign partner. SOEs often are highly inefficient manufacturing operations that have difficulty competing against private businesses in the modern Chinese economy. They historically have comprised a key part of the "iron rice bowl" social service network, typically offering their workers a guaranteed job, housing, schools, and health care. Any time an SOE fails the government must step in and provide these benefits, or else the SOE's former employees will suffer the type of reduction in comfort and security that can lead to more generalized social upheaval. The government obviously has a strong political interest in seeing these SOEs survive. SOEs have learned recently that if they diversify successfully into the real estate industry, they can improve their overall performance, a result the government presumably welcomes.

Just as SOEs have sought to profit from real estate investments, private companies that are not primarily engaged in the real estate business have been seeking to diversify their portfolios, and real estate has proved to be one of the most successful investment sectors in recent years. The government has become sufficiently concerned about competition from these private entities that it has

started limiting their ability to invest in real estate, even taking steps to encourage these private companies to sell their real estate assets to state-owned real estate holding companies.

Personal Connections and Real Estate Development

Although the government clearly profits from participating in real estate transactions, government units that wish to invest in development may not have the expertise to do so. Professionals who possess this skill and are willing to share the gains with the government—or with certain officials within the government—are more likely to obtain the land use rights they need. Even when there is no outright corruption, those professionals who master the nuances of a fluid, fast-changing legal system and maintain amicable relationships with the government workers whose approval they need hold a huge edge over their less-well-connected competitors. *Guanxi,* or personal relationships, matter enormously in a nation in which laws are evolving rapidly and being applied inconsistently.

A local government sometimes will convey a land use right to a company in which it holds an ownership stake for less than the fair market value of the land. The development company then can resell a portion of the land use right at a higher per-square-meter price (reflecting the true market rate) and recover all or most of its total cash investment before construction even begins. The restriction on reselling land use rights for land that has not been developed does not appear to impede transactions of this type. The result of this two-step transaction is that the company obtains the right to develop its remaining land at little or no cost. In many of these cases, the private co-owner of the company is someone with close personal connections to the government, such as a former government official.

Concerns about this type of corruption, or at least the appearance of corruption, are beginning to lead to change. Public auctions of land use rights are becoming more common. Several participants in Shanghai's real estate market informed me that this city's operations recently have become far more transparent and that Shanghai generally is perceived as having a lower level of government corruption than many other places.

Nonetheless, the earlier participants in the real estate market, generally large operations with a government partner and strong connections to well-placed officials, may have taken a lead that their newer competitors will never be able to diminish. Their early jump allowed them to acquire experience and market share, and more recent entrants into the real estate market must compete with them for land use rights and financing. Several smaller developers complained about their limited access to land use rights and funding. They explained that they often have to rely on purchasing distressed projects rather than initiating their own transactions from scratch.

Some of the more established investors have even sought to cement their advantage by lobbying for legal changes that would reduce the very type of corruption from which they appear to have benefited themselves. Having built a huge lead under the original rules, they now seek to level the playing field. For example, the government may limit the bidding for desirable land use rights to those developers who have demonstrated in their previous work that they have the skills to complete larger transactions, a group that often consists of the same first-generation developers who were able to acquire land use rights under the more opaque procedures that were in place just a few years ago.

The importance of *guanxi* and experience helps to explain why so many developers in China are Chinese. The little foreign investment that there is in Chinese real estate mostly comes from overseas Chinese in Hong Kong, Taiwan, and the United States. Well-known Western corporations have also begun to enter China's real estate market, recently acquiring trophy properties in desirable areas such as the Lujiazui Trade and Finance Zone in Shanghai's Pudong New Area.

Site Selection

Government Control of Site Selection

When a Chinese real estate developer is deciding where to build, its choice is influenced by both the profit motive and government inducement or compulsion. Developers seek to acquire land use rights and build structures in locations that will be profitable. At the same time, the government uses its power, including its ownership of the underlying land, as a means of channeling development where it wishes. If the government is seeking to intensify development in a thinly populated area, it benefits as well from the fact that it is advantageous for private developers to build on land from which they will not have to remove current occupants and structures, a controversial and expensive undertaking.

Public Input and Land Use Planning

Chinese government entities do engage in land use planning and zoning. Land use plans in China are developed in a top-down manner, with little or no citizen input. See, e.g., City Planning Law, art. 4 (1990) (find at www.chinagateway.com.cn/english/2161.htm). One expert advised me that some government entities do invite public comment, but that citizens' suggestions are followed only rarely, an approach that likely hampers the government in its planning efforts. The government does seem to have become more aware in recent years of the need for better land use planning and environmental control, and even a government-imposed plan may be better than no plan at all. A Chinese lawyer told me that citizen input may have more effect on changes to existing land use plans than on the initial enactment of those plans, suggesting that the government is more open to citizen input after it has erred initially.

It appears that the land use planning process is becoming more transparent, though hardly more citizen-based. A Shanghai government official explained how that city engages in multiple levels of planning. Step one is known as "Open Planning," in which Shanghai's municipal government comes up with a proposal that must be approved by both the Shanghai National People's Congress

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and the State Council. Following completion of this first step, the Shanghai Municipal People's Government (or, for less significant projects, the Shanghai Urban Planning Administration, an administrative arm of the municipal government) next specifies requirements for individual blocks of land. Subsequent rezonings, while occasionally available, are difficult to obtain. In step three, technical specifications are proposed for individual buildings. Steps four and five consist of bidding on the transfer of land use rights and the execution of a contract with the successful bidder. These steps are not completely alien to the American real estate practitioner, but the Chinese process allows virtually no opportunity for input from outside the government, even by those considering bidding.

In the earliest days of the real estate boom in Shanghai, investors considering acquiring land use rights could become involved in the planning process sooner. During the 1990s, the government would ask developers to locate a development site and propose a project for it. This method is rarely used today. Instead, the government either makes its planning decisions in the manner described above and invites proposals from developers who must comply with these detailed specifications, or it invites proposals for specific blocks that it has designated but not yet planned in great detail so that the developer can participate in the later stages of the planning process. This newer approach allows the government to retain greater control over land use policy and also may reduce opportunities for improper behavior by government officials.

Population Dispersal

Faced with increasing population density in its central districts, Shanghai has sought to reduce crowding in its core while encouraging new development in its outlying areas. The Shanghai government has set up suburban satellite communities as commuter towns in more remote and less densely populated districts of the city. This policy occasionally has succeeded too well, with the population of some of these commuter townships swelling even as automobile traffic downtown has increased. The government now hopes to accelerate the population dispersal process even further, by selecting industries that it wishes to see relocate to these suburban areas. The municipal government's hope is that these satellite towns will grow large enough to be self-sustaining, with residents working near their homes rather than commuting downtown.

Government coercion of this type can be quite direct. In the early years of the huge Pudong development, Shanghai's municipal government decided to transform Pudong's Lujiazui area into a center of banking and finance and its Jinqiao area into a residential district attractive to foreigners. The government advised foreign banks that they would obtain necessary business licenses only if their offices were physically located in Lujiazui and informed international schools that they would need to locate in Jinqiao. Today, Lujiazui has become the center of Shanghai's financial district, and Jinqiao houses roughly 20 of the international schools that expatriates seek out for their children. The government can accomplish much the same result by refusing to convey land use rights to developers for disfavored purposes.

The government can turn off the spigot if it wishes to slow development in a particular area. After 15 years of encouraging development in the Pudong New Area, Shanghai's government seems concerned that the Pudong real estate market may have overheated. The district government of Pudong was informed that it will no longer be allowed to retain within the district the money that is generated by the transfer of land use rights and that the Shanghai municipal government will now keep these funds. The central and municipal governments also have been tinkering with tax policy and interest rates to keep a lid on the real estate market.

The Central Government and the Provinces

The question of whether to slow China's real estate surge offers a prime example of a conflict between the central government in Beijing and the government of a province or municipality. Lower-level government entities enjoy huge benefits when they grant land use rights: they retain 70% of the proceeds from sales of land use rights, while Beijing receives only 30%. Land Admin.

Law, art. 55 (2004) (find at www.Chinadaily.com.cn/bizchina/2006-05/08/content_584128_7.htm). China has no system of ad valorem property taxation, so municipalities must fund a significant portion of their ongoing capital and operations budgets by selling land use rights.

Several of the experts with whom I spoke argued that China's vast stock of government- and collective-owned land ensures that the Chinese economy will not collapse any time soon, as some Western experts have nervously predicted. The government can simply keep transferring land use rights on the ever-expanding urban fringe at hefty prices that reflect the land's increasing value for urban residential or commercial use. These experts argue that as long as the government has land use rights that it can sell, it will never run out of cash.

Meanwhile, the central government, which receives less than one-third of the sales proceeds, fears that an overheated real estate market fueled by this sort of local government behavior may lead to social turbulence. Fear of upheaval may be the most important reason why the central government is trying to slow the real estate market. Developers and many private citizens, however, wish to see the hot market persist at least long enough for their next investment to pay off. Lower levels of government, which have their own economic reasons for wanting to see the good times continue to roll, use their enormous control over local markets to encourage further growth. Beijing seems to be learning firsthand that capitalism is hard to restrain once it is unleashed.

Conclusion

The recent changes in China's real estate market are remarkable. The fact that China has accomplished as much as it has despite a prohibition on private ownership of land, a stated adherence to Marxist principles, and the absence of a national property law until this year makes these successes even more incredible. Although China's formal legal system still has some catching up to do, its informal legal practices illustrate how real estate professionals have been able to thrive during the past two decades. Overall, China is gambling that its central planners will be able to prevent the market from accelerating too rapidly and that its legal system eventually will attain the same level of maturity that its markets seem to be reaching.

China's leaders appear to be intent on rebuilding an entire country in a few decades. They have made significant progress, especially considering how recently they began this task and how stagnant the Chinese economic and legal systems were when they embarked on this project. For the interested real estate practitioner, it is difficult to imagine a more exciting market than China's in the early 21st century. ■

Keeping Current

Property

Keeping Current—Property offers a look at selected recent cases, literature, and legislation. The editors of *Probate & Property* welcome suggestions and contributions from readers.

CASES

COVENANTS: Use restriction for farming does not run with the land after gift is disclaimed. A testator devised a large parcel to two friends, subject to restrictions including a prohibition against alienation and a requirement that they continue to farm the land. The will provided that if they did not comply or if they disclaimed the devise, the property would pass to the state "subject to the same conditions and covenants." The court held that the alienation restriction was an illegal restraint, and the state was not obligated to continue farming. The language created a covenant, not a defeasible estate, because there was no express right of entry. The testator must have realized that changes in economic and other conditions might make continuation of the property as farmland impracticable. *Rodeheaver v. State*, 917 A.2d 1122 (Md. Ct. Spec. App. 2007).

DEEDS: Estoppel by deed binds successor to grantor who acquires title after making conveyance. A landowner sued his neighbor for trespass, with the neighbor defending on the basis that he had an express easement. The case turned on the validity of the easement. There were two chains of title for the land subject to the easement. The earlier chain began with a 1958 deed from Lujan. Subsequently Lujan's successor granted the easement to the neighbor. But Lujan had not owned the land in 1958. Lujan acquired the land by deed in 1967 and subsequently conveyed, starting a chain of title that culminated in plaintiff. The neighbor prevailed based on the doctrine of estoppel by deed, also known as the doctrine of after-acquired title. When Lujan acquired title in 1967, that title automatically passed to the grantee in the 1958 deed, thus validating the prior chain of title, which included the easement. When a grantor who lacks title subsequently acquires title, that title passes to the grantee, whose rights are paramount to persons claiming under a subsequent conveyance from the original grantor. The court rejected the plaintiff's argument that estoppel should apply only to the original grantor (Lujan) and not to subsequent grantees. *Rendleman v. Heinley*, 149 P.3d 1009 (N.M. Ct. App. 2006).

EASEMENTS: Easements of view protect only such views as existed when the easements were granted. In 1999, three oceanfront lots were subdivided, with the deeds creating express easements to protect "an unobstructed view [of] the waters of Pleasant Bay and the Atlantic Ocean, along with islands, marshes, beaches, and mainland promenades which present themselves." To preserve the views, each easement owner had the right to "trim and top trees and other vegetation" on designated areas on the neighbor's land, with the limitation that this "shall not be done more than once per calendar year." In 2003 a dispute over the extent of permitted trimming arose. When the deeds were executed in 1999, the lots had a significant amount of

View of Pleasant Bay. Courtesy of CapeCodTravel.com.

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vegetation, including trees. An owner planned to trim vegetation so as to create a completely unobstructed view of the water. The court, however, limited trimming to growth that took place since the conveyances, concluding that the easement was intended to protect the views as they existed at their time of creation. The court also held that the view easements were perpetual, rejecting an argument that a statute providing for a 30-year limit on negative restrictions applied. Mass. Gen. Laws ch. 184, § 23. The statute does not apply to affirmative easements, and the view easement was affirmative because of the owner's right to enter to conduct the trimming. *Patterson v. Paul*, 863 N.E.2d 527 (Mass. 2007).

EMINENT DOMAIN: Valuation of property in "quick-take" proceeding at date of deposit does not infringe owner's right to just compensation. A community college district sought to condemn 30 acres of land owned by a private university, Azusa Pacific, under a statutory "quick-take" eminent domain proceeding. In 2000 the district deposited $1.789 million into court as probable compensation for the property and promptly obtained possession. The statute declared that the date of deposit is the date of valuation and provided that an owner who withdrew the funds from court waived the right to contest the condemnation. Lengthy litigation over a number of issues, including whether the district had the right to condemn the land, followed. The university did not withdraw the funds from the court, and the trial over the amount of compensation began in 2004. The university claimed that "just compensation" required measurement of value at the time of the trial, alleged to be $4.2 million. The court held that the valuation as of the date of the deposit was constitutional, because the owner had immediate access to the deposited funds. It also rejected the university's argument that the statutory waiver of rights on withdrawal was an unconstitutional condition. *Mt. San Jacinto Community College Dist. v. Superior Court*, 151 P.3d 1166 (Cal. 2007).

LANDLORD-TENANT: Under guaranty that terminates if tenant is not in default during first three years, tenant's habitual late payment of rent within seven-day grace period does not constitute default. A 10-year lease of a building for use as an automobile dealership provided for rent payable on the first day of each month. A guarantee signed by two of the tenant's principals was to terminate "in the event Tenant shall not have been in monetary default under the Lease at any time during the first three (3) years" of the lease term. During the first three years, the tenant paid all installments of rent but often paid after the first of the month. The landlord accepted the rent payments without objection. The tenant abandoned the property midway through the fourth year of the term. The lower courts held that the landlord, by accepting late rents, waived its right to declare a default under the lease, and thus the guaranty terminated, because there was no "monetary default" within the first three years. The court of appeals affirmed based on a different rationale. Neither the lease nor the guaranty defined "monetary default." For the late payment of rent, the lease granted remedies to the landlord only if the landlord notified the tenant and the tenant failed to cure within seven days thereafter. No such notices were sent during the first three years of the term, so the court concluded that the tenant never had been in "monetary default." *Madison Avenue Leasehold, LLC v. Madison Bentley Associates LLC*, 861 N.E.2d 69 (N.Y. 2006).

MORTGAGES: Buyer has no cause of action for negligence against real estate appraiser hired by mortgage lender. An Indiana mortgage fraud scheme led to an action against a real estate appraiser. A swindler induced a person to defraud mortgage lenders by acting as buyer and falsely overstating the purchase price for homes. The swindler told the buyer that he would use the excess loan proceeds to repair the properties and then rent them to tenants. Instead, the swindler pocketed the loan proceeds, leaving the buyer personally liable on the mortgage loans. The documentation used to deceive lenders included false appraisals, which were prepared by an apprentice appraiser. As required by state law, a fully licensed appraiser supervised the apprentice's work. Unfortunately, the appraiser paid little attention to checking the accuracy of the apprentice's appraisals. The buyer brought an action for damages against the appraiser (the apprentice was apparently judgment-proof). The court dismissed the action, holding that the appraiser owed no duty of care to the buyer/borrower. The lender contracts with the appraiser, and the appraiser's duty runs to her client, the lender. Although an appraiser may be liable to a third party for fraud, there was no evidence that the supervising appraiser realized that the apprentice had produced false appraisals. *Decatur Ventures, LLC v. Daniel*, 485 F.3d 387 (7th Cir. 2007).

SALES CONTRACTS: Buyer entitled to reasonable amount of extra time to obtain mortgage loan when time is not of the essence. The parties entered into a contract for the sale of a vacation home for $1.8 million. The buyer told the seller that he was "prequalified" for a mortgage, but the contract included a mortgage contingency allowing the buyer to terminate if he did not obtain a specified loan by November 5. The contract called for closing two months later. The contract had no "time of the essence" clause. The parties bargained over an extension of the mortgage contingency deadline, because the buyer's appraiser needed more time to acquire information. The seller extended to November 9, also agreeing to grant a further extension if there were satisfactory explanations of the need for further delay. On that date, the buyer asked for a further extension because his lender was reviewing his income tax returns. The seller refused and then contracted to sell to another person. The buyer sued for specific performance. The court agreed with the buyer that the seller had a duty to be reasonable in considering the exten-

sion requests but held that the seller had acted reasonably. The seller had already purchased a replacement vacation home and did not want to carry two mortgages. The seller also was suspicious about the lender's need to evaluate tax returns, giving the buyer's previous statement that he was "prequalified." *Jaramillo v. Case,* 919 A.2d 1061 (Conn. App. Ct. 2007).

SUBDIVISION MAPS: Designation of avenue on plat is not sufficient for dedication to public. A 1926 subdivision plat depicted a 33-foot strip of land as "Winnetka Avenue." Later a nearby city annexed the subdivision. The strip was never paved or used as a public street. In 2003 the owners of the adjacent lots successfully brought an action to quiet title to the strip against the city. A statutory dedication takes place when a plat shows "portions of the premises . . . marked or noted on such plat as donated or granted to the public." 765 Ill. Comp. Stat. 205/3. The court found no statutory dedication because private streets are permissible and the plat had no marks or notations pointing to use by the public. Nor was there a common law dedication, which creates a public easement when there is evidence of intention to dedicate for public use and acceptance by the public. Labeling the strip as "Winnetka Avenue" by itself is ambiguous and thus is insufficient evidence of intent to dedicate. *Bigelow v. City of Rolling Meadows,* 865 N.E.2d 221 (Ill. App. Ct. 2007).

TITLE REGISTRATION: Purchaser of Torrens property takes subject to unregistered mortgage of which purchaser had actual notice. Only a few states use land title registration, sometimes called the Torrens system. In Minnesota, where registration is optional but widely used, a lender who took a mortgage on registered land failed to register the mortgage. Instead, the mortgagee filed its mortgage in the regular county land records. The borrower defaulted, and the mortgagee purchased at its foreclosure sale. An investor offered to buy the property from the mortgagee, but the parties failed to reach an agreement. The investor researched title and discovered the error. Then the investor bargained with the borrower, paying $5,000 for a quitclaim deed. The intermediate court of appeals quieted title in favor of the investor based on a statutory requirement that a mortgage on registered land "shall be registered and take effect on the title only from the time of registration." Minn. Stat. § 508.54. The state supreme court, however, reversed based on another provision in the Torrens statute, which provides that "every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration" shall take free of unregistered interests. Minn. Stat. § 508.25. The investor lacked "good faith" because he had actual knowledge of the mortgage. Although the decision may be understandable based on the particular equities of the parties, it introduces uncertainty into the registration system. For many sales of land, it is possible for a person to make allegations that a purchaser has notice of unregistered interests. In effect, the court imported into the registration system the concept of notice used in the recording system. The court's holding on the surface is limited to "actual notice," but the line between actual notice and imputed notice (inquiry or constructive) is notoriously difficult to draw. In other states, there is even a line of authority for the proposition that a person has "actual notice" of facts that he could have discovered through the use of ordinary diligence. *In re Collier,* 726 N.W.2d 799 (Minn. 2007).

ZONING: Ordinance that excludes national chain stores violates Dormant Commerce Clause. The owner of a 12,000-square-foot retail store contracted to sell to a buyer, who planned to build a Walgreens drug store, to be situated on the same footprint as the existing store. The zoning ordinance providing that "formula retail establishments," offering standardized appearance, services, or other features, were limited to 50 feet of frontage and 2,000 square feet of area. The court held that the ordinance violated the Dormant Commerce Clause of the federal constitution. The town alleged that the regulation protected the community's small town quality, but the court observed the community already had the appearance of a commercialized small town, with no immediate special natural attractions. The real purpose was the impermissible one of protecting local businesses. *Island Silver & Spice, Inc. v. Islamorada, Village of Islands,* 475 F. Supp. 2d 1281 (S.D. Fla. 2007).

LITERATURE

Conservation Easements. Currently, over 1,500 land trusts in the United States hold "over 5 million acres of private land in conservation easements." In *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States,* 39 Urb. Law. 19 (2007), J. Breting Engel reviews the current status of conservation easements and addresses some of the arguments in favor of curtailing or eliminating these easements. When landowners (particularly farmers and ranchers) burden their property with a conservation easement, they are "permanently limit[ing] uses of the land in order to protect its conservation values." As consideration for granting conservation easements, landowners receive monetary compensation for the easement from the grantee or tax benefits from federal and state governments for donating the easement. Engel argues the length of time that landowners should be allowed to carry over their deductions should be increased from the current six years to enable relatively low-income ranchers and farmers to more "fully realize the value of [their] donation." Society also benefits, Engel states, because conservation easements keep "private ranches working yet protected from development pressures in rural areas." Some critics believe that conservation easements should be abandoned because they wrongfully burden

future generations, who might disagree with our concept of preservation. Engel counters by pointing out that the Supreme Court's *Kelo* decision will allow the taking of a conservation easement that obstructs the development of "an unarguable public use." Furthermore, conservation easements recognize "one of the most fundamental property rights sticks in the bundle: the right to alienate." Therefore, governments should continue to find ways to encourage landowners to grant conservation easements.

Eminent Domain; Blight Elimination. Legislatures have quickly responded to the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). One common response is to limit the government's ability to take private property solely for the urban renewal of "blighted" areas. In *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. Rev. 177 (2007), Amanda W. Goodin argues that eminent domain rules should only be adopted if they "apply evenhandedly to all property owners." Blighted areas tend to contain mostly poor people, so allowing certain types of eminent domain solely in blighted areas will disproportionately affect the poor. This means that "minority groups, and no one else, [will have] a personal interest in ensuring that new rules for . . . eminent domain are generous to individual property owners." This problem is compounded by the traditional lack of access to the political process that low-income and minority citizens experience. Many states, such as Alabama and Georgia, have nonetheless passed laws that specifically allow *Kelo*-type takings only in blighted areas. Goodin also addresses reasons commonly given as to why eminent domain is necessary for the urban renewal of blighted areas. She suggests that "[t]he holdout problem is not insurmountable without the use of eminent domain—assembling land on the private market is certainly possible." Using eminent domain to resolve the "holdin" problem (which occurs when a landowner "subjectively values her property at a higher price than the market value") is problematic, because the "just" compensation paid to the owner is an inaccurate reflection of the property's worth to the owner. Goodin believes that allowing landowners to subjectively value their land for eminent domain and property taxes at the same time might be a better solution. Alternatively, states could give affected communities veto power over uses of eminent domain for development of blighted areas. Her viewpoint, however, is that the best legislative solution is to completely omit blight elimination as a public purpose justification for use of the power of eminent domain.

Eminent Domain; Just Compensation. In her article, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 Hofstra L. Rev. 37 (2006), Prof. Barbara L. Bezdek addresses the problem of the displacement of poor people and the destruction of their neighborhoods as a result of urban redevelopment. Prof. Bezdek first details how urban redevelopment has had a disproportionately negative effect on the poor. Cities have an incentive when redeveloping to create middle- and upper-class neighborhoods. Bezdek makes the claim that, because "[l]ocal governments collect three-quarters or more of their revenues from taxes on property," it is in each local government's best financial interest "to maximize the assessed value of its real estate." Although this claim is incorrect for many jurisdictions, it is true that property taxes are a significant source of revenue for almost all cities. Unfortunately, maximizing assessed value displaces the poor. Bezdek continues by pointing out that while this may seem like a minor problem, in actuality it can have serious consequences. Forcing residents to relocate not only results in those residents losing their homes, "but also [their] streets, friends, neighbors, churches, child care arrangements, schools and transit routes." Bezdek proposes that governments shift from "profit-focused development" to "people-focused development." The most important aspect of Bezdek's proposal "is the issuance of shares in a development cooperative, attributable to the land area targeted for development, or in the value-generating project itself, or both." The shares would belong to the residents and "be held either in an autonomous Community Equity Company, or in the project development itself." Bezdek argues that following such a plan will give residents equity in the redevelopment, recognize the social capital they have in their community, and lead to overall stability. Bezdek fails to address many questions raised by her proposal. For example, how are these unsophisticated and low-income residents going to cooperatively manage to revitalize their own neighborhoods, and how can developers be attracted to projects in which they must share the development profit with existing residents? The result of her proposal might actually be a simple veto by the residents of any meaningful revitalization or their exploitation by fast-talking demagogues who gain control of the development cooperative and siphon off profits in the form of salaries and fees.

Eminent Domain; Public Use or Public Purpose. In her article, *Much Ado About Nothing:* Kelo v. City of New London, Babbit v. Sweet Home, *and Other Tales from the Supreme Court*, 75 U. Cin. L. Rev. 663 (2006), Marcilynn A. Burke argues that the effect of *Kelo* has been grossly exaggerated and the public outrage at it unwarranted. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court held that the Fifth Amendment to the Constitution does not prohibit a government from using its power of eminent domain to take property from one private party and to give it to another for the purpose of economic development. Politicians responded by promising they would pass legislation that would prevent such a use of eminent domain in the future. Burke first points out that the *Kelo* decision "was arguably quite conservative," as the Court simply stated

that the issue was one of policy that should be resolved by the legislature. Burke argues that politicians have seized on the *Kelo* controversy to propose marginally related property laws, such as a law weakening environmental protection recently enacted in Nevada. Many such laws proposed as a response to the *Kelo* decision would have little, if any, effect on takings. Responding to those who criticize *Kelo* from an originalist perspective, Burke finds no strong historical evidence that the Framers would have opposed *Kelo*-type condemnation. Burke concludes by stating that any changes in response to *Kelo* should be minimalist in nature—narrow and deliberate.

LEGISLATION

Arizona establishes a condominium recovery fund. An aggrieved buyer may recover for the failure of a subdivider to complete the condominium project. Awards are limited to 20% of the base price of the unit, not to exceed $1 million per project. 2007 Ariz. Sess. Laws 221.

Arizona allows early termination of a residential lease by a tenant who is the victim of domestic violence. 2007 Ariz. Sess. Laws 100.

Arizona limits the recording of nonconsensual liens. The county recorder may record nonconsensual liens that are accompanied by the notarized signature of the debtor acknowledging the lien. Certain listed liens are exempt from this requirement. 2007 Ariz. Sess. Laws 220.

Colorado imposes a duty of good faith and fair dealing on mortgage brokers. A violation is treated as a deceptive practice under the Colorado Consumer Protection Act. 2007 Colo. Sess. Laws 389.

Florida imposes significant obligations on the sellers of out-of-state timeshares. Among other requirements, the act requires sellers of timeshare units located outside of Florida to provide disclosure statements and completed contracts to prospective purchasers. 2007 Fla. Laws ch. 75.

Georgia allows the creation of "subcondominiums." 2007 Ga. Laws 334.

Indiana authorizes "Homeowner Association Liens." Liens may be recorded against the interest in real estate of a member for the failure to pay assessed common expenses. 2007 Ind. Acts 136.

Indiana attempts to limit fraud associated with mortgage rescue schemes. The act imposes stringent requirements on those who attempt to profit from the growing number of mortgage defaults. 2007 Ind. Acts 100.

Maryland allows purchasers of property encumbered by a conservation easement to rescind the contract unless they were notified about the conservation easement by the seller. 2007 Md. Laws 606.

Maryland modifies the common law rule against perpetuities for nondonative transfers of property interests. Certain interests such as options, lease renewals, warrants, and calls are now exempt from the rule against perpetuities. 2007 Md. Laws 381.

Minnesota limits predatory lending practices for sub-prime loans. 2007 Minn. Sess. Law Serv. 74.

Montana authorizes beneficiary deeds. The deed is revocable until the death of the grantor. A beneficiary deed is a countable asset under Medicaid. 2007 Mont. Laws 258.

Montana limits eminent domain. Blighted property may not be acquired by eminent domain if the purpose of the project is to increase tax revenue. 2007 Mont. Laws 512.

Montana prohibits cities and towns from using eminent domain to obtain property to sell, lease, or provide to a private entity for urban renewal. 2007 Mont. Laws 441.

Montana ratifies the Water Rights Compact with the United States of America, Department of Agriculture, Forest Service. 2007 Mont. Laws 213.

Nevada prohibits the use of eminent domain to transfer an interest in the property to a private person. 2007 Nev. Stat. 115.

Nevada enacts the Uniform Assignment of Rents Act. 2007 Nev. Stat. 106.

Nevada adopts the Uniform Custodial Trust Act. 2007 Nev. Stat. 103.

Nevada enacts the Uniform Limited Partnership Act. 2007 Nev. Stat. 146.

Nevada passes the Uniform Disclaimer of Property Interests Act. 2007 Nev. Stat. 102.

Nevada adopts the Uniform Real Property Electronic Recording Act. Electronic signatures, filing, recording, and storage are authorized by the act. 2007 Nev. Stat. 57.

New Mexico enacts the Uniform Power of Attorney Act. 2007 N.M. Laws 135.

New Mexico adopts the Uniform Real Property Electronic Recording Act. Electronic signatures, filing, recording, and storage are authorized by the act. 2007 N.M. Laws 261.

Oregon clarifies its preferences for concurrent estates. The tenancy in common remains the general preference. The joint tenancy is the preferred concurrent estate for transfers to a trustee or personal representative. A tenancy in common with a right of survivorship creates cross contingent remainders. The tenancy by the entirety is presumed for a conveyance to husband and wife. 2007 Or. Laws 64.

Washington expands disclosures for the sale of unimproved residential property. 2007 Wash. Legis. Serv. 107. ■

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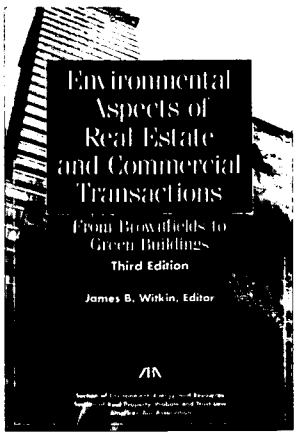

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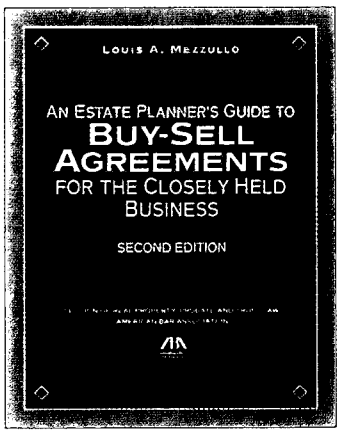

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