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Legal Aspects
of
Real Estate

Sixth Edition



California real estate law

Chapter 1

After reading this chapter, you will be able to:

- understand the origins of California real estate law;
- distinguish which branches of law are responsible for which legal activities;
- understand the nature and extent of federal and state law controlling California real estate; and
- identify the constitutional protections in place if the government abuses its power.

administrative agencies

civil law

common law

due process

eminent domain

equal protection

executive branch

federalism

interstate commerce

inverse condemnation

judicial branch

legislative branch

police power

Learning Objectives

Key Terms

Historically, California real estate law has been influenced by two key sources of human conduct:

- the English legal system, or **common law**; and
- the Spanish legal system, or **civil law**.

The *common law* of England has been the predominant influence on California real estate law. This legal framework was officially adopted by California soon after obtaining statehood in 1850.¹

The English and Spanish influence

¹ Calif. Civil Code §22.2

common law

An English legal system in which disputes are decided on a case-by-case basis before a judge applying codes and prior cases.

Under the common law, legal disputes are decided on a case-by-case basis before a judge. Even today, the common law is often called “judge-made” law. When similar legal disputes arise, the judges refer back to the logic of earlier decisions to decide current cases. The reliance on an earlier decision to decide a current case is called **stare decisis**. The earlier case relied on is called **precedent**.

civil law

A Spanish legal system in which an elaborate system of statutes address permissible conduct of the people in advance of disputes.

Similarly, the *civil law* of Spain had a significant impact on California real estate law. Civil law establishes statutes to settle legal disputes in advance, rather than on a case-by-case basis.

These legal traditions continue to exist today in the form of:

- statutes, regulations and ordinances; and
- case law. [See Chapter 2]

The role of the U.S. Constitution

The United States Constitution (U.S. Constitution) is the supreme law of the United States.²

All powers which the state and federal governments possess are derived from the U.S. Constitution.

The U.S. Constitution lists and explains the powers of the federal government. All other powers not given to the federal government rest with the individual states or **with the people**.³

The form of government in which individual states share powers with a national or central government is called **federalism**.

Under *federalism*, the individual states remain independent (*sovereign*) to regulate any matters within their own borders which are not already controlled by the federal government.

Each state has its own constitution to regulate state matters remaining under their control. A state may provide more constitutional protection than the federal government if it chooses, but it may not provide less.

federalism

A form of government in which individual states share powers with a national or central government.

Separated powers

Both the federal and state governments created under the U.S. Constitution are separated into three branches:

- the **legislative**;⁴
- the **executive**;⁵ and
- the **judicial**.⁶

The state and federal *legislatures* enact the *codes and statutes* which regulate most aspects of real estate interests.

legislative branch

The branch of government which enacts the codes and statutes which regulate most aspects of real estate interests.

² United States Constitution, Article VI, clause 2

³ U.S. Const., Amend. X

⁴ U.S. Const., Art. I

⁵ U.S. Const., Art. II

⁶ U.S. Const., Art. III

The *executive* polices the law and establishes *regulations* to carry out the administration of government as established by the legislature.

The *judiciary* settles disputes and issues *case opinions* regarding the application of the law and regulations.

No branch may exercise a power given to another branch. However, as will be later illustrated, all three branches of the government actually make law.

The federal and California legislatures and local governments may only enact laws if they have been given the power to do so by the U.S. Constitution or the California Constitution.⁷

The authority of the California legislature to enact laws regulating real estate activities comes from three main constitutional powers:

- the police power;
- the power of eminent domain; and
- the power to tax.

The U.S. Constitution confers on California the right to enact laws to protect public health, safety and welfare.⁸

The California Constitution confers an equal power to local cities and counties to likewise protect the public good.⁹

This power to protect the public well-being is called **police power**. *Police power* is the source of the state or local government's authority to act.

Police power is the basis for laws governing such things as highway construction and maintenance, rent control, zoning and traffic.¹⁰

A statute or ordinance passed under the government's constitutional police power and affecting real estate-related activity is valid as long as the law:

- is fair and reasonable;
- addresses a legitimate state interest;
- does not unreasonably burden the flow of interstate commerce; and
- does not conflict with related federal law.

The second key power of the state to regulate real estate is the power of **eminent domain**.¹¹

Eminent domain is the right of the government to *take* private property for public use. The process of using the power of eminent domain is called **condemnation**.

⁷ U.S. Const., Art. I

⁸ U.S. Const., Amend. X

⁹ California Constitution, Article XI §7

¹⁰ *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 US 365

¹¹ Calif. Const., Art. 1 §19

executive branch

The branch of government which polices the law and establishes regulations to carry out the administration of government as established by the legislature.

Authority to legislate

judicial branch

The branch of government which settles disputes and issues case opinions regarding the application of the codes, cases and regulations.

police power

The constitutional source of the state or local government's authority to act.

Eminent domain

eminent domain

The right of the government to take private property for public use on payment to the owner of the property's fair market value.

However, the government needs to pay the owner the fair market value of the property taken.¹²

Examples of eminent domain include condemning property to provide highways and roads, establish parks, construct flood control levees and provide land for redevelopment.

Inverse condemnation

inverse condemnation
A government taking of privately held real estate interests which does not constitute eminent domain and for which the property owner seeks compensation.

The government's exercise of police power may become a **taking** of an owner's real estate by **inverse condemnation** if the government surpasses their power of eminent domain.

For example, an owner demolishes their beachfront bungalow. The owner intends to rebuild a better home and submits an application to the coastal commission which has jurisdiction over the use of beachfront property.

A public beach is located nearby, but not directly adjacent to the owner's real estate.

The coastal commission grants the owner a permit to build, conditioned on the owner granting to the public a frontage easement across their beachfront property. The coastal commission claims its goal is to allow better public viewing of the coastline.

The owner refuses to comply with the condition unless the coastal commission pays for the easement. The coastal commission denies the owner's application and permit to build, claiming it is reasonably exercising its police power.

Does the coastal commission have to pay for the easement across the owner's beachfront?

Yes! The coastal commission has not merely restricted the owner's use of their land, it has required the owner to deed an interest away in the form of a frontage easement.¹³

Conditioning a permit to build on the granting of an easement to the public is a *taking* which requires **reimbursement** to the owner from the governmental agency. The coastal commission did not show the easement related to a legitimate state interest to constitute eminent domain. Instead, the government agency's action — in this case, demanding an easement as a condition of administratively granting a permit — leads to the taking of real estate and is **inverse condemnation**.

However, most California *inverse condemnation* cases filed by owners fail. California courts do not want to burden local governments with the obligation of paying for any diminution of property values which result each time it regulates or downgrades the use of real estate.¹⁴

¹² *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419

¹³ *Nollan v. California Coastal Commission* (1987) 483 US 825

¹⁴ *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1989) 210 CA3d 1353

State and local governments also regulate the crucial **power to tax** real estate activities to generate revenue and fund state and local governmental functions under their police power.¹⁵

The power to tax

For example, a city passes an ordinance which imposes an **inspection fee** on all landlords renting residential properties. The fee charged is based on a flat rate per unit, not on current property values.

A landlord subject to the ordinance claims the ordinance is unenforceable since the city **must** have voter approval before adopting an ordinance which imposes a **regulatory fee** on property.

The city claims the ordinance is enforceable without voter approval since the **fee** is imposed on a **use** of the property — renting — not on the mere ownership of the property, which requires voter approval.

Here, the ordinance **imposing** the inspection fee on landlords based on a flat rate per unit **offered for rent** is enforceable. Voter approval is only required when fees and taxes are imposed on owners simply because they own real estate. Fees and taxes imposed on the owner's exercise of his uses and rights which come with owning the property do not require voter approval.¹⁶

The federal government's authority to **regulate real estate** also comes from the U.S. Constitution.

Federal authority to regulate

Like the state, the federal government has the **power to tax** and the power to **take private property for public use**.¹⁷

However, the federal government has no police power. In its place, the federal government has a powerful clause to **regulate areas of national concern**, called the **commerce clause**.

The federal government has the right to regulate all commercial enterprises which affect **interstate commerce**.

interstate commerce
The flow of goods and services between and within states.

Originally, the clause was designed to combat attempts by local states to pass protectionist laws under their police powers which would inhibit the flow of goods between states — *interstate commerce*.¹⁸

Today, the clause also applies to local and intrastate activities which have an indirect effect on the flow of goods, services and people from state to state.

For example, the federal government's interest in the flow of commerce between states outweighs a motel owner's right to exclude specific classes of patrons. The owner's exclusion interferes with the flow of commerce – which includes the mobility of people.¹⁹

¹⁵ Calif. Const., Art. XIII D §6

¹⁶ **Apartment Association of Los Angeles v. City of Los Angeles** (2001) 24 C4th 830

¹⁷ U.S. Const., Amend. XVI; Calif. Const., Art. 1 §19

¹⁸ **Gibbons v. Ogden** (1824) 22 US 1

¹⁹ **Heart of Atlanta Motel, Inc. v. United States** (1964) 379 US 241

The federal government's ability to regulate a purely local activity even extends to local real estate brokers' activities within their trade unions.

For example, a broker sues the local board of realtors for federal **antitrust violations**, claiming the association **fixes rates** charged by its members for their services.

The association ostracizes brokers who refuse to comply with the fee-setting policies established by the association based on the maintenance of a minimum acceptable level of income for its union members.

The association claims the federal government may not regulate their activities as their services are purely local and have no effect on interstate commerce.

Do the federal antitrust laws cover local brokerage activities?

Yes! The association's fee-setting of the charges for their members' services affects housing locally, which in turn affects the desire to live in the area, which in turn affects the mobility of people in interstate commerce.²⁰

Federal and state law conflicts

States have the *sovereignty* to regulate within their own borders. At the same time, the federal government has the right to regulate local activities affecting commerce.

What happens when federal and state law conflict? Consider the following example.

An airport is established under the Federal Aviation Act of 1953. The airport expands its number of late-night and early-morning flights. The residents around the airport complain of the noise during late and early hours.

The city where the airport is located passes an ordinance restricting the number of flights between 11 p.m. and 7 a.m.

The airport objects, claiming it was established under the sole jurisdiction of federal law and the Federal Aviation Act of 1953, set forth by the Federal Aviation Administration (FAA) which has no restriction on flights between 11 p.m. and 7 a.m.

Does the federal law **preempt** (supersede) state law?

Yes! The goals of national flight service and the role of the FAA outweigh local laws inhibiting flight times.²¹

A federal law will *preempt* state and local statutes and ordinances when:

- federal interests outweigh local interests;
- the federal law is so pervasive as to exclude inconsistent state law; and
- inconsistent treatment nationwide would result if state law controls.

²⁰ *McLain v. Real Estate Board of New Orleans, Inc.* (1980) 444 US 232

²¹ *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 US 624

Thus, it is possible for federal and state law to regulate the same real estate activity.

For example, federal and state **fair housing** laws prohibiting discrimination exist. Both the state and federal governments can regulate *fair housing*. The state may provide more, but may not allow less, protection than the federal law.²²

The U.S. Constitution gives owners guarantees when the federal or state government attempts to abuse their powers.

Two key constitutional guarantees exist for real estate owners:

- the **due process clause**; and
- the **equal protection clause**.

Under the *due process clause*, the government needs to deal fairly with real estate owners.

Even if the owner does not win their case, the courts oversee that the owner is treated fairly by the government.

The due process clause covers both:

- the content of laws, called **substantive due process**; and
- how the government procedurally applies those laws, called **procedural due process**.

For example, a city places a tax on parking lot owners to fund traffic services.

The parking lot owners feel the tax is excessive and an unfair burden on their business. They claim the tax violates the due process clause of the U.S. Constitution.

The city claims the parking lot tax is a reasonable exercise of its police power.

When the tax itself is unreasonably high and burdensome, it violates the due process clause in the U.S. Constitution and is invalid.²³

However, if the tax does not overly burden owners, the tax survives a *substantive due process* attack.

Procedurally, an owner needs to be given **notice** of any government action or law and an **opportunity** to be heard on the matter.²⁴

For example, a city passes a zoning ordinance restricting the extent to which a newsstand may block a city sidewalk. Additionally, the city delegates to itself the authority to seize and close newsstands it feels violate the ordinance.

Constitutional guarantees

due process

A constitutional guarantee of fair dealings between the government and property owners.

Procedural due process

²² CC §51

²³ *City of Pittsburgh v. Alco Parking Corp.* (1974) 417 US 369

²⁴ *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 US 306

A newsstand owner's business is closed by the city government without warning to the owner. The city claims it may do so since the ordinance exists.

Does the city's seizure and closing of the owner's newsstand violate the owner's due process rights?

Yes! The city did not provide the newsstand owner with a notice of the violation or an opportunity to be heard before their business was closed.²⁵

Equal protection

equal protection
A constitutional guarantee that similarly-situated persons be treated similarly under the law.

Equal protection laws provide for similarly-situated persons to be treated similarly under the law.

For example, a subdivision's **covenants, conditions and restrictions (CC&Rs)** contain a restriction limiting sales to non-minorities only.

A minority couple seeks to purchase a home, but the CC&R restriction is enforced by the association governing the subdivision.

Does the restriction violate the couple's rights to *equal protection* under the law?

Yes! Enforcement of the restriction unfairly separates buyers into arbitrary and suspect classifications.²⁶

Judicial decisions

The preceding discussion addressed the legislative authority to enact laws.

In theory, only the legislative branch may enact laws and no branch of the government may exercise the powers of another. However, the other two branches of government (the executive and judicial) also create law.

Every time a judge interprets a statute or a prior case decision, a new *common law* is created by the opinion produced in their decision. It is as if the legislature introduced and passed an amendment into existing law, and the governor signed the amendment into law.

For example, each time the Civil Rights Act is analyzed and applied to the facts of a case before a judge, the opinion is written in light of prior case law interpreting the Civil Rights Act.

Administrative agencies

As general real estate law becomes more specialized, the role of **administrative agencies** becomes increasingly important.

Many *administrative agencies* are given the powers of all three branches of the government: legislative, executive and judicial.

Consider a rent control board established by a local city council under **rent control ordinances**.

²⁵ *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 C3d 294

²⁶ *Shelley v. Kraemer* (1948) 334 US 1

The board is given authority to enact regulations to implement the *rent control ordinance*. This enactment of regulations is a legislative activity.

The board is also given the power to hear disputes between tenants and landlords, and dispense penalties for a landlord's failure to comply with the law. This is a judicial activity.

In this way, the administrative rent control board has the authority to enact regulations (entailing legislative authority) and hear disputes and administer penalties for noncompliance (entailing judicial authority).

A landlord may always challenge the board in court to determine whether the board has overstepped its power.

The courts continue to give administrative agencies the necessary powers to judge cases involving their own regulations. Thus, the courts are relieved of processing and resolving these disputes.

administrative agencies

A government entity created by the state or federal legislature and local governing bodies to oversee specialized matters. Most have legislative, executive and judicial authority.

The United States Constitution (U.S. Constitution) lists and explains the powers of the federal government. All other powers not given to the federal government rest with the individual states or with the people. A state may provide more constitutional protection than the federal government if it chooses, but it may not provide less.

Both the federal and state governments created under the U.S. Constitution are separated into three branches:

- the legislative;
- the executive; and
- the judicial.

The state and federal legislatures enact the codes and statutes which regulate most aspects of real estate interests. The executive polices the law and establishes regulations to carry out the administration of government as established by the legislature. The judiciary settles disputes and issues case opinions regarding the application of the law and regulations.

The authority of the California legislature to enact laws regulating real estate activities comes from three main constitutional powers:

- the police power;
- the power of eminent domain; and
- the power to tax.

The federal government has the right to regulate all commercial enterprises which affect interstate commerce.

Chapter 1 Summary

A federal law will preempt state and local statutes and ordinances when:

- the federal interests outweigh local interests;
- the federal law is so pervasive as to exclude inconsistent state law; and
- inconsistent treatment nationwide would result if state law controls.

The U.S. Constitution gives owners guarantees when the federal or state government attempts to abuse their powers. Two key constitutional guarantees exist for real estate owners:

- the due process clause; and
- the equal protection clause.

As general real estate law becomes more specialized, the role of administrative agencies becomes increasingly important. Many administrative agencies are given the powers of all three branches of the government.

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Quiz 1 Covering Chapters 1-2 is located on page 441.