

REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT

CASES AND MATERIALS

Seventh Edition

Grant S. Nelson
Dale A. Whitman

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**CASES AND MATERIALS ON
REAL ESTATE
TRANSFER,
FINANCE, AND
DEVELOPMENT**

Seventh Edition

By

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*To
Judy and Marjorie*

*

Preface

This is the seventh edition of a book on which we began collaboration more than 30 years ago. Despite its reputation for stability, the law of real estate finance has changed radically in many ways during that period. In this new edition we have tried to ensure that all important changes are represented, while at the same time giving thorough treatment to the basic concepts of mortgage law and conveyancing.

To a remarkable extent, the development of the law of mortgages is driven by interest rate fluctuations. We have seen the completion of an extraordinary period of low rates—lower than at any time in more than a century. Rates have now begun to rise, although whether to merely “ordinary” levels or far beyond that is impossible to predict. We can, however, expect that borrowers who sell their properties will once again, as in the past, engage in a litany of devices to hide their sales from their lenders, and the law surrounding due-on-sale clauses will once again become critically important.

The current wave of refinancings could have been accomplished with significantly lower cost to consumers if the courts had accepted a broader version of the concept of subrogation than most jurisdictions have adopted. Subrogation has the potential to eliminate the necessity of new title insurance protection when mortgages are refinanced. We have continued to expand and refine our coverage of that principle in this edition.

The concept of “predatory” lending—that is, loans on highly disadvantageous terms, typically made to individuals with low incomes and little sophistication in financial matters—has continued to grow in importance. This edition gives even more extensive coverage than in the past to the attempts of legislative bodies and courts to protect borrowers from such transactions.

Numerous other legal developments are highlighted in this edition. The Uniform Commercial Code has been changed to do away with the unrealistic requirement that one paying off a mortgage debt must first demand to see the original promissory note. The Bankruptcy Code was revised in 2005, with important implications for both consumer homeowners and entities that operate income-producing properties.

Almost every area of the law of real estate financing has been brought up to date in this edition. For example, we have largely rewritten our coverage of planned communities, condominiums and cooperatives, reflecting the large share of the market for new housing that these sorts of projects represent and the continuing evolution of the law governing them. The material on real estate brokerage has been reworked to correspond to new and innovative shifts in the market for brokerage services.

While this edition has been completely modernized, the order of coverage and basic organization remain identical to previous editions. Hence, teachers who have used the book in the past will find the transition to this edition easy.

Because there is far more here than can be used in a single law school course, a few comments about ways law teachers can implement the book may be in order. The first two chapters, dealing with sale contracts and conveyances, can form the basis of a short “Property II” course for students whose first year property class did not cover conveyancing. Alternatively, selected portions of the first two chapters can be added to the material in chapters three through seven, which deal with basic mortgage law concepts, to support a three credit or four credit “real estate transactions” course. The material in chapters nine through eleven, which cover government regulation and real estate development, can be covered in a separate “real estate development” course or can be selectively added to the basic mortgage material in chapters three through seven and the material on governmental regulation of real estate financing in chapter eight.

There are three other books, all available through West Group, that both students and teachers (especially those teaching this material for the first time) may find useful. Our treatise, *Real Estate Finance Law*, currently in its fourth edition, closely parallels the organization of the mortgages material in this casebook. It is available in both a student edition and a two volume practitioner's edition; the latter includes more complete coverage of subrogation and marshaling, material on financing of condominium and planned communities, and an extensive collection of forms that is not found in the student edition. Our book in West's “Black Letter” series, *Land Transactions and Finance*, is more succinct and less costly but follows an order of presentation similar to that of this book. Finally, the Restatement (Third) of Property (Mortgages) (1997), of which we were the reporters, provides an authoritative discussion of most important mortgage law concerns in a traditional restatement format.

In the present casebook we have edited the cases liberally to focus on the significant mortgage law issues. Ellipses denote omissions in the text of the cases, but we have not indicated omissions of footnotes. Where footnotes are retained, they keep their original superscript numbers.

Each of the notes following the principal cases begins with an italicized topic heading to guide the reader in studying them.

We are most appreciative of all those whose work we have built upon here: the judges, clerks, and lawyers who contributed to the judicial opinions we have reprinted, and the countless people with whom we have discussed the concepts of real estate law with which this book deals: students, faculty colleagues, practicing lawyers, and especially members of the American College of Real Estate Lawyers, the American College of Mortgage Attorneys, and the Section of Real Property, Probate and Trust Law of the American Bar Association.

A special word of thanks is in order to two of our colleagues at other law schools, Professors Patrick Randolph of the University of Missouri–Kansas City and Roger Bernhardt of Golden Gate University. Both of them work energetically to keep the academy and the legal profession up to date on property and mortgage law developments. They, as well as many others, have helped us clarify our thinking and formulate strategies for teaching the concepts in this book. We must take full responsibility for any errors, but others are due much credit for the good that may be found in the book.

Finally, we thank our families and especially our wives, Judy Nelson and Marge Whitman, for their enduring support and patient understanding during the hours we spent in preparing this new edition.

GRANT S. NELSON
DALE A. WHITMAN

June 2006

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