



民商法精要系列·影印注释本

West Nutshell Series

不动产法

(第三版)



[美] 贝哈安特 著

董安生 查松 注

汤树梅 校



 中国人民大学出版社

 WEST GROUP

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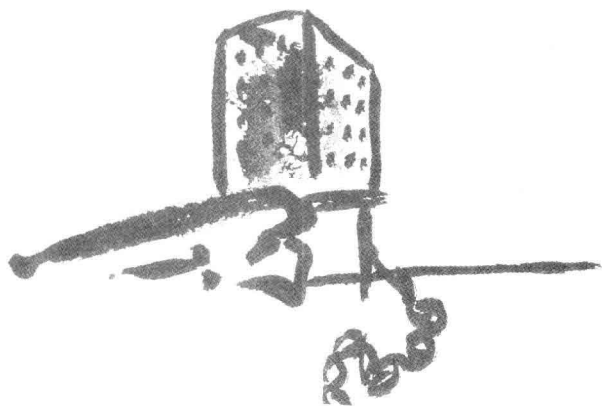
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REAL PROPERTY (Third Edition)

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WEST GROUP

REAL PROPERTY
IN A NUTSHELL
THIRD EDITION

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ST. PAUL, MINN.
WEST PUBLISHING CO.
1993

图书在版编目 (CIP) 数据

不动产法: 第3版/(美) 贝哈安特著; 董安生等注
北京: 中国人民大学出版社, 2002
(民商法精要系列·影印注释本)

ISBN 7-300-03697-X/D·536

I. 不…

II. ①贝… ②董…

III. 不动产-民法-研究-美国-英文

IV. D971.23

中国版本图书馆 CIP 数据核字 (2000) 第 83447 号

民商法精要系列·影印注释本

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出版发行: 中国人民大学出版社

(北京中关村大街 31 号 邮编 100080)

发行部: 62514146 门市部: 62511369

总编室: 62511242 出版部: 62511239

E-mail: rendafx@public3.bta.net.cn

经 销: 新华书店

印 刷: 三河市新世纪印刷厂

开本: 787×980 毫米 1/16 印张: 35.25 插页 1

2002 年 4 月第 1 版 2002 年 4 月第 1 次印刷

字数: 578 000

定价: 39.00 元

(图书出现印装问题, 本社负责调换)

导 读

美国贝哈安特教授所著的《不动产法》是美国西方出版公司出版的系列法学教材之一，该书自1975年第一次出版发行以来，先后于1981年和1993年两次再版。中国人民大学出版社首次在国内以影印注释本的形式出版发行，对于我国法律学者、法学院学生及律师学习、研究美国不动产法大有裨益。

作为美国许多大学法学院第一学年的入门课程，不动产法历来被认为是具有高度技术性、晦涩难懂、规则性强的一门课程。本书作者力求以简明的语言、扼要的结构、合理的分析使学生对不动产法有一个概括的了解，以便其迅速掌握要点，从而使教师能够把更多的精力投入到引导学生进行更进一步的研究中去。

由于不动产法深奥难懂，西方许多同类教材过于追求严谨的风格，以至于语法结构复杂、法律用语生硬，无形中增加了我国广大法律工作者阅读原版法律著作的难度。而本书语言流畅、通俗易懂，在注重法律英语严密的语法结构的同时，做到了简洁明快、深入浅出，作者在每一章的开始都有提纲挈领的简述，有助于读者从整体上把握整章内容。为了方便广大读者直接阅读，注者本着保持原著风格的原则对书中所涉及的一些固定法律术语作了必要而有限的注解，以更有利于读者独立地阅读英文原版法律著作并领会其含义。

本书的另一显著特点是“以案说法”。案例教学是美国法学教育的鲜明特色，其目的在于通过让学生接触大量的案例，培养其独立分析、思考、解决案子的能力。而这一点也正是当前我国法学教育改革所要努力的方向之一。本书作者在书中运用了大量生动、恰当、易懂的案例来说明不动产法的有关问题。几乎每阐述一个理论或原则，后面都附有若干个由真实案例改编的范例（illustration），有助于读者对不动产法深奥的规则和理论的理解与运用。

本书共二十章，主要阐述了三个方面的问题：（1）土地上的各种权益；（2）不动产转让；（3）各种有关财产权的学说。现就各主要问题简要介绍如下：

一、土地上的各种权益

这一部分包括前六章的内容。在第一章中，作者首先从占有与所有的区别入手对占有的性质进行了分析，进而提出了无权占有（adverse possession）的概念，即无权占有是指通过占有他人不动产达到法律规定的一定期限而取得该不动产的

所有权。一种占有是否构成无权占有，主要看这种占有是否公开、公示、实际、排他、持续并能够对外主张权利。从性质上看，无权占有是一种不动产物权的原始取得方式，与取得时效制度紧密相连。无权占有的规定体现了美国不动产法更注重对不动产占有人的权益进行保护的精神。第二章用了十节的篇幅着重介绍了普通法对不动产物权的規定，包括不动产物权的分类、性质、转让及限制、衡平法对用益权的規定、对土地的毁损与救济以及对夫妻土地财产权的規定。第三章是有关共有不动产物权的規定，涉及共有的种类、特征、各种共有不动产物权的效力次序、共有的分割以及不动产区分所有权等内容。在第四章中，主要阐述了不动产租赁的种类、承租人的权利、租金的支付以及租赁合同的终止、转让等内容。第五章地役权介绍了地役权的性质、类型、范围、转让与消灭。第六章主要分析了不动产物权发生转移时，与之有关的某些合同权利义务亦随之转移的情况，例如地役权，这种转移应当以合同及合同当事人均符合規定为前提，并应遵从一定的限制。

二、不动产转让

第七章到第十二章主要介绍了不动产转让及相关的法律制度问题。第七章着重论述了不动产经纪人制度。在美国的不动产转让中，经纪人起着非常重要的作用，主要是融资方面，通常由卖方雇请经纪人。美国法律对经纪人的资格有着严格的规定，同时明令禁止经纪人从事法律事务、不正当竞争等行为，并规定了相应的责任。

在第八章不动产买卖合同方面，作者首先阐述了不动产物权的适销性 (marketable)，以及违反适销性规定时卖方应当采取的补救措施以及买方寻求救济的权利。其次，不动产的买卖涉及一条重要的法律原则，即“衡平法上的移转原则” (the doctrine of equitable conversion)，它包含了两层含义：(1) 不动产可因买卖合同当事人一方的死亡而转化为动产，从而使与不动产有关的权益归属发生改变。(2) 如果不动产在买卖过程中遭受第三人侵害，买方有权起诉侵害人，只有当买方拒绝行使诉权时，卖方才有权起诉 (因侵入不动产造成损失的除外，此时的诉权应归占有该不动产的一方当事人)。最后是有关风险的划分、合同的履行及违约救济的内容。

第九章通过契据的产权转让，论述了契据的种类、使用方法、送达以及法律对受损的受让方的保护等。第十章通过对美国不动产产权登记制度的介绍，使我们了解美国是如何保护不动产转让过程中多个受让人的相应合法权益的。第十一章介绍了美国的产权保险制度。第十二章主要阐述了不动产抵押的意义、手续、性质、后果以及抵押物与抵押权的转让等问题。

三、各种有关财产权的学说

第十三章至第十九章的内容分别涉及与不动产物权有关的空域、水、支撑物、约定边界、定着物、侵入与妨害等法律问题。美国不动产法历来强调保护财产所有人的权利，直到 20 世纪的中期，法律才逐渐倾向于对财产权作必要的限制，使财产所有人的权利日益服从于公共利益的调整规则，即“禁止权利滥用”原则。正如美国最高法院在其支持分区制（zoning）的案例中宣称：“直到近年前为止，都市生活相对比较简单。但是，随着人口的急剧增长和集中，问题越积越多，并日益严重。这就要求对城市私人土地的占有和使用作进一步的限制。”因此作者在第二十章着重论述了美国不动产法对土地使用管理的规定，包括土地管理的类型（分区管理、再分区管理、对人口增长的管理、对名胜古迹的保护、环保、国家征用）、管理程序（管理主体、计划的制定、司法审查制度）。

学习美国不动产法，对于我们了解美国的财产法律制度，尽快建立完善我们自己的物权法律体系，有着十分重要的意义。当前，我国物权法正在积极制定当中，其中不动产物权部分，由于我国与美国的社会政治经济结构不同，生产资料所有制也不同，我们不可能一概照搬美国的规定。但是对于那些于我们的经济发展有利，又不违背宪法规定的原则和规定，还是可以吸收利用的。例如，美国对不动产抵押、买卖及租赁的规定，对于完善我国房地产法律制度有一定的可取之处。随着我国经济迅速发展，对土地的管理应当尽快完善和加强，但是我国现行的《土地管理法》并不能有效解决城市发展中的土地规划问题，对此，我们可以借鉴美国不动产法中有关土地管理的规定。例如，有关分区管理土地的理论、规划城市人口的理论以及有关土地的环境保护理论等等，对这些理论的吸收和利用将有利于中国的未来城市建设规划以及农村土地的管理与规划。笔者相信，认真学习和研究美国不动产法的立法例、判例与学说，对于促进我国的不动产物权立法、加强对房地产业的管理以及建立系统、合理的土地规划制度，都将发挥积极的作用。

值此书付梓之际，谨书数语，是为导读。本书注解如有不当，敬请广大读者不吝指正，以便下次再版时订正。

INTRODUCTION

No other course in the first year of law school seems to involve as many rules as does Real Property. This feature too often makes the course terrifying to students and grim to professors. Students suffer under the sheer number of rules thrown at them, and professors chafe at the monstrous amount of class time consumed in the brute articulation of all of these rules. This book is an attempt to remedy that a little. For the students it offers a brief compilation of all or most of the rules which are covered in the standard casebooks on the subject, organized so as to minimize their seeming randomness and arbitrariness. For the professors it offers an opportunity to free up class time for an exploration of how the rules came to be, how they operate (or how to operate around them), and whether they work. My goal is to make the mechanical statement of the rules the beginning rather than the end of the study of Property in law school.

Anyone who finds this book helpful should also thank Jo Walker whose editorial assistance converted a lot of random notes into a coherent text.

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