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Instructor Manual

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Table of Contents

Chapter Objectives

The following learning outcomes are addressed in this chapter (see PowerPoint Slide 1-1):

01.01 List the sources of real estate law, the topics covered in each source, and where to find the sources.

01.02 Discuss the concepts of legal reasoning, interpretation of statutes, and *stare decisis*.

01.03 Describe the costly significance of knowing and understanding real estate law.

[return to top]

Key Terms

American Recovery and Reinvestment Act of 2009 (ARRA): federal law that provided funding for infrastructure and had the goal of economic recovery

case precedent: doctrine of *stare decisis*; examining prior decisions to reach decisions in present cases

citation: legal shorthand referring to cases, statutes, regulations, and ordinances

cite: see *citation*

Code of Federal Regulations (CFR): compilation of regulations of federal agencies

common law: uncodified law found in cases or in the history of real property

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): The Superfund; a program for private payment by polluting industries for cleanup of toxic waste

Consumer Financial Protection Bureau (CFPB): created under the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFCPA); it will now assume that enforcement role

eminent domain: process of governmental entity's taking title to private property for public purposes

Equal Protection Clause: part of the Fifth and Fourteenth Amendments to the Constitution; requires that laws apply equally to all

Fifth Amendment: provision in United States Constitution that provides guarantee of due process

Fourteenth Amendment: application of due process rights to the states (including the Equal Protection Clause), which requires uniform application of laws and nondiscrimination; applied in cases in which land conveyances attempt to include racial restrictions

Mortgage Reform and Anti-Predatory Lending Act: federal law that regulates subprime, title, and other types of high-interest/high-default/high-repossession rate loans; provides requirements for disclosures and processes for consumers who obtain these types of loans

Ordinance: laws passed on a local level of country, state, or city governments

private law: laws between individual parties; e.g., landlord's rules and regulations or the terms of a contract

Real Estate Settlement Procedures Act (RESPA): federal statute regulating disclosure of closing costs in advance and prohibiting kickbacks for referring customers to title companies

United States Code (USC): compilation of all federal laws

United States Constitution: framework for federal government

[return to top]

What's New in This Chapter

The following elements are improvements in this chapter from the previous edition:

- New introduction that gives the full history on the saying, "Possession is nine points of the law."
- New case in Section 1-1i that illustrates the use of precedent on an issue of nuisance and hog-farming, *In Re North Carolina Swine Farm Nuisance Litigation.* This case is less complicated than the two previous cases on consent for mechanic's liens that were a little more difficult for students to understand. The hog-farming case is easily understood and interesting and remains an ongoing issue that deals with social responsibility and ethics issues. Extra references are provided in the IM for instructors to get updates on the 26 hog-farming cases.
- In Section 1-1i, new Ethical Issue 1.1 on the hog-farming dispute and the interests of the parties.
- New Consider 1.1 in Section 1-1i that draws on the findings in the hog-farming case on who can bring an action for nuisance.
- In Section 1-1, updated examples on constitutions, statutes, and new example on use of judicial decisions that involves a ban on fraternity houses by the City of Bowling Green trying to deal with Bowling Green students and rowdy behavior and

dropping property values in single-family neighborhoods, *Yoder v. City of Bowling Green.*

- Updated chapter problem #6 on what defines "living space."

[return to top]

Chapter Outline

In the outline below, each element includes references (in parentheses) to related content. "CH.##" refers to the chapter objective; "PPT Slide #" refers to the slide number in the PowerPoint deck for this chapter (provided in the PowerPoints section of the Instructor Resource Center); and, as applicable for each discipline, accreditation or certification standards ("BL 1.3.3"). Introduce the chapter and use the Ice Breaker in the PPT if desired, and if one is provided for this chapter. Review learning objectives for Chapter 4. (PPT Slides 1-3).

1-1 Sources of Real Estate Law—*USE POWERPOINT SLIDES 1-2 TO 1-12*

USE FIGURE 1.1 (THE PYRAMID) AND POWERPOINT SLIDE 1-3 TO HELP STUDENTS FOLLOW ALONG IN YOUR DISCUSSION OF THE SOURCES OF REAL ESTATE LAW.

1-1a The United States Constitution

1. Found at the base of the pyramid because it is the basis of all other laws
2. Very general and provides the legal constraints within which the other laws must fall
3. Examples of U.S. Constitutional provisions affecting real estate:
   a. Fourth Amendment—covers unlawful searches and seizures and the issuance of search warrants for the search of property

   b. Fifth Amendment—due process protections

   See, e.g., *Fuentes v. Shevin,* 407 U.S. 67 (1972); debtors are entitled to notice before their property is taken.

   Mortgage foreclosures and due process with robo-signing and other ownership issues.

   c. Fifth Amendment—eminent domain procedures and protections

   See, e.g., *U.S. v. Causby*, 328 U.S. 256 (1946) (Chapter 3)—Farmer whose chickens were being killed and having nervous breakdowns because of noisy Air Force jets landing near the Causby farm was entitled to compensation for a taking.

   d. Fourteenth Amendment—same language as the Fifth Amendment but applicable to states; also includes the Equal Protection Clause.

See, e.g., brokers and steering—Brokers' and agents' control of racial composition of neighborhoods by steering potential buyers to prevent desegregation is an example of an equal protection issue.

More recently, prohibitions on group homes for retarded citizens and AIDS patients have been subject to equal protection challenges.

SEE CHAPTER 19 FOR MORE DETAILS ON CONSTITUTIONAL ISSUES RELATING TO REAL ESTATE.

1-1b Federal Legislative Enactments

1. Passed by Congress and found in the United States Code (U.S.C.)
2. Explain system of citation—title number precedes the U.S.C. and the section number appears behind
3. Use examples listed in the text and the following:

Dodd-Frank Financial Reform Act is part of U.S.C.

All federal financing agencies are established in U.S.C. and provide rules and regulations for loans, contracts, assumptions, secondary sales, etc. including:

Consumer Financial Protection Bureau
Department of Housing and Urban Development
Federal Reserve

Soldier's and Sailor's Relief Act (see Chapter 15)—requires special paperwork in the event a mortgage involves active enlisted people; provides for delays in foreclosure when mortgagors are active service people on duty outside the country. NOTE: War in Iraq caused an uptick in the use of this Act with many active duty soldiers afforded protection; national guard members called into active service with resulting pay cuts were protected.

The National Environmental Policy Act (see Chapter 20)—provides for maintenance and protection of the environment and imposes restrictions on use—see 42 U.S.C. Sections 4321 *et seq*.

The post-2008 market collapse resulted in the American Recovery and Reinvestment Act of 2009 (ARRA) with mortgage relief (Discussed in Chapter 15)

1-1c Federal Administrative Regulations

1. Federal agencies are created by Congress to enforce the U.S.C. statutes and to promulgate their own regulations on the topics covered in the statutes; will provide the details needed for compliance with the laws

   For example—forms for securities registration and property reports under Interstate Land Sale Full Disclosure Act (ILSFDA); forms for mortgage disclosures (adjustable rate mortgages)

2. Examples of federal agencies involved in real estate transactions

   EPA—Environmental Protection Agency

   HUD—Department of Housing and Urban Development—involved in providing low-cost housing and enforcement of Interstate Land Sales Full Disclosure Act

   FHA—Federal Housing Administration—provides low interest loans and insurance for lenders

   Department of Energy—energy policies

   Interior Department—management of federal parks and lands

3. Regulations are found in the Code of Federal Regulations (CFR)

   Paperback series; reprinted each year; updated daily by the Federal Register

1-1d State Constitutions

1. Will contain provisions similar to the U.S. Constitution—the organization of the state government

2. Will also contain specifics on real estate transactions

   a. Use examples from text
   b. Find examples in your own state's constitution
   c. Use the following:

      Texas—A section providing a homestead exemption (a protection from creditors discussed in Chapters 4 and 15)

      California—A section providing a right eminent domain for all frontages on navigable waters in the state (Article 10, Sect. 1)

1-1e State Legislative Enactments

1. Describe name/cite of your state statutes:

   For example–Florida Statutes Annotated—F.S.A. 689.91; Colorado Revised Statutes C.R.S. 39-5-12; West's Annotated California Code West's Ann. Cal. Fin. Code 31401

2. Subject matter of state legislative enactments:

   Real estate licensing
   Insurance law
   Contract law
   Water rights
   Partnership and corporation law
   Lien laws
   Wills, trusts and probate
   Deeds and recording

1-1f State Administrative Regulations

1. Same purpose and set-up as federal regulations

2. Describe the agencies (name) in your state responsible for each of the following:

   Real estate licensing
   Corporations
   Securities registration
   Contractors' licensing
   Insurance licensing and regulation
   Utilities regulation

1-1g County, City, and Borough Ordinances

1. Passed at the city, county, or borough level

2. Discuss some examples in your area relating to:

   Zoning
   Construction, inspection, and permits
   Curfews
   Parking limitations
   Parks
   Building and construction codes

1-1h Private Law

1. Created by individuals to control their relationships
2. Areas of private law

   Landlord/tenant—pool use, cleaning deposits, noise regulations, and other lease terms

   Deed restrictions—square feet minimums, architectural controls, parking restrictions, limitations on pets

   Homeowner Associations—rights of use, association fees, liabilities

   Transfer restrictions—fee simple determinable

   Age zoning and restrictions
3. Private land ownership rights as found in public records

1-1i Court Decisions

1. Interpretation of all laws is necessary

   For example—A city ordinance prohibits “the use of any vehicle in any form in a city park.” Does the ordinance apply to the following?

   Bicycle—no
   Child's tricycle—no
   Car—yes
   City maintenance truck—no
   Emergency vehicle—no
   War memorial with a vehicle—no

   Reason for variations in the answers is that intent of the ordinance is probably safety and noise reduction in city parks.
2. Language of the law is examined
3. Legislative intent is examined
4. Law is applied in each case
5. Court cases are reported and published

   Cases appear throughout the text

   Explain your state court system and the appellate review of cases

USE THE FOLLOWING CASE AND POWERPOINT SLIDE 1-12 TO DISCUSS WHEN A NUISANCE SUIT CAN BE FILED AND BY WHOM.

CASE BRIEF: *In Re North Carolina Swine Farm Nuisance Litigation*
2017 WL 5178038 (E.D.N.C. 2017)

FACTS: Twenty-six individuals (plaintiffs) who lived near hog-farming operations in eastern North Carolina brought suit against Murphy-Brown, LLC, the owner and operator of the hog operations (Defendant). The nuisance claims related to the smells, flies, and general muddy messes resulting from the large operations that raised hogs for slaughter. The court consolidated the cases into one suit for purposes of addressing the same legal issues in all of the cases prior to each case proceeding to trial. The issue addressed in this decision related to the type of land interest a plaintiff must have in order to bring a nuisance suit.

The plaintiffs in the cases were not actually property owners but were adults related to the property owners who lived on the properties near the hog-farming operations either in the actual owners' residences or on trailers parked on the properties. The plaintiffs do not have rental agreements for their use of the homes or the space for their trailers and have not paid rent.

The defendant asked for a motion for summary judgment on the issue of lack of property interest as a requirement for a nuisance claim.

ISSUE: Can those who occupy the land of another (without ownership rights, a lease, or payment of rent) have standing to bring a nuisance suit?

DECISION: The court held that those who are on the property in a non-trespassory manner do have standing to bring a suit.

The court noted that without such a conclusion those who were married to someone but did not have their name on the deed for the land on which they lived could not bring a nuisance suit.

The court used a prior case that involved a beauty shop owner having to leave her shop because the smells from the plastic factory were too great for her customers to endure. She had left the premises and was not paying rent. However, the court found that her lease interest at the time of her leaving was sufficient standing to pursue a nuisance claim.

Defendant additionally contends that two plaintiffs, Gertie Jacobs and Eddie Nicholson, Jr., have not even occupied any affected property. In support of this contention, defendant relies on the fact that Jacobs' voter registration and driver's license and Nicholson's voter registration, driver's license, and medical records reflect addresses different from the affected properties at which they claim to live. Defendant urges the court to disregard these plaintiffs' deposition testimony regarding the discrepancies on the ground that the testimony is "self-serving." The court declines to do so.

[return to top]

Additional Activities and Assignments

Answers to Case Questions

1. *What are the differences between the plaintiffs in this case and the owner of the beauty shop in the Kent v. Humphries case*?

Kent v. Humphries	*In Re North Carolina Swine Farm Nuisance Litigation*
Plaintiff paid rent	Plaintiffs did not pay rent
Plaintiff had some form of lease—her name was associated with the property	Plaintiffs were not on the property title; plaintiffs did not have leases
	Some plaintiffs did not list the property as their addresses for mailing and voting purposes
Plaintiff was not occupying the property	Plaintiffs were occupying the property
Plaintiff left the property because of the smells	Plaintiffs remained on the property
Plaintiff lost the investment in her business	Plaintiffs had no economic losses because of the alleged nuisance
Commercial operations by both plaintiff and defendant	Commercial operations by defendant and none by plaintiffs

2. *What effect will the court's finding on the standing required for plaintiffs in nuisance cases have on nuisance claims*? The scope of cases has broadened—more people will be able to bring nuisance cases as a result—they need not own property or even live in the area as long as they can show a right to be there. The case may make nuisance recoveries an industry with moving plaintiffs who take possession of land near nuisances and then move along to the next nuisance recovery.

3. *Does the court's use of the precedent change the nature of nuisance recovery?* The recovery is now not economic-based—losing the right to use your land productively, losing the right to peaceful co-existence—recovery is the goal not abatement of the nuisance.

The finding is a widening of the scope of plaintiffs in nuisance cases. Without any financial or ownership or economic requirements for occupying the land, nuisance claims can be brought by squatters or those who use others' property for purposes of litigation. In short, they have no skin in the game. In the 26 cases, the plaintiffs did not ask for injunctive relief (stopping the operations). They only asked for actual and punitive damages so that the farms would be put out of business.

Additional Case Information

The hog-farm litigation in North Carolina is a study in civil procedure and a host of other issues as the doctrine of nuisance and litigation were used as a means to shutting down hog-farming operations.

One of the interesting questions in the cases, beyond the nuisance issues, was the desire of the defendants to have the discovery sealed. They argued that the discovery in the case had significant information about their operations, their finances, and other business information that would affect their ability to compete. The decision of the court of appeals, after the lower court decisions on this issue, was that the defendants failed to overcome the common law presumption of access. Thus, a great deal of information about the hog-farming operations, particularly useful to animal rights activists, became public. *In Re North Carolina Swine Farm Nuisance Litigation,* 2020 WL 119736 (E.D.N.C. 2020).

The suits continued after this and other determinations on general procedural issues:

> "Through five trials, held from April 2018 to March 2019, juries awarded 36 plaintiffs a total of $550.5 million. (The awards were later reduced to approximately $98 million due to a state law that places a limit on punitive damages.) Those verdicts have put family farmers out of business and taken a toll on our rural communities." https://www.ncfarmfamilies.com/farmkeepersblog/all-eyes-on-richmond-an-update-on-murphy-browns-appeal-of-nuisance-lawsuits.
>
> The cases are now on appeal in the federal fourth circuit court of appeals. For an excellent summary of the issues in the case, see https://www.ncporkreport-digital.com/ncpq/0319_fall_2019/MobilePaged Article.action?articleId=1523953#articleId1523953.

The issue of the amount of damages is central to the appeals, particularly punitive damages. Also central to the cases has been the North Carolina statute that limits nuisance recovery when property occupants have moved to the nuisance. There is more on these nuisance cases in Chapter 3.

Answer to Consider (1.1)

a. *A farmer leasing property for purposes of growing crops who does not live on the property.* The lease interest would give the farmer standing because the value of his lease and crops might be affected by the nuisance.

b. *A child who does not live on the property but will inherit the land from his parents.* A future interest is what the child holds (see Chapter 2 for more information). There is some precedent for future land interest holders to stop the use of the land by the current owner in order to preserve its value—and there is some interest in the land.
c. *A mortgage lender on the property.* The ability of the lender to foreclose and obtain a price for the land that will cover some or all of the mortgage amount is affected by the value of the land. And the value of the land can diminish when there is an unabated nuisance. The type of mortgage (see Chapter 15) would also influence this outcome—some states have the lender hold title and some merely have a lien, but the value of their interest is affected.
d. *A parent living with a child who owns the property.* They would be lawfully on the property and under this decision need not pay rent or have a lease in order to bring a nuisance action.
e. *Employees who work daily on the property.* It is possible that this one might qualify as a public nuisance (see Chapter 3 for more discussion). But they do not have a land-interest connection. It might be more difficult for them to recover under private nuisance doctrine.
f. *A co-owner who does not live on the property.* They would have an ownership interest and could bring an action for nuisance because of the effect on the value of their interest.

Answer to Ethical Issue (1.1)

The property owners have a claim related to the inability to use their property. For example, they can no longer hang their clothes outside because of the smell and there is a line at the coin laundries for drying clothes. They line up at 5:30 AM to be in there first to get their clothes dried. There are no longer outdoor gatherings in these communities because of the smells.

On the other side, there is a need for food production. The farm operations are not the kind of thing that can be shut down completely.

However, the owners of the farms and their operators could propose a compromise on the wet livestock waste—there are means for containing it and developing it into fertilizer as a by-product that would cut down on the lagoons and the smell and the waste retention. The processes would require additional expense, but it would be a means of balancing the interests of the parties—relief from the nuisance with production continuing but with more environmentally friendly processes. With ethical issues, there are nearly always compromises to be made on both sides, but the parties have to be willing to acknowledge the sentiments from the other side. How would I feel if I were on the property? How would I feel if it were my family business that I was running for a big company and I lose my means of support?

Justification for Studying Real Estate Law: Some Cautions and Conclusions

- ✓ Explain to the students the complexities of real estate transactions such as recording, second mortgages, etc.
- ✓ Explain the costs of not understanding the type of financing and security involved with your property.
- ✓ Explain the need for a working knowledge of terms to be able to negotiate.
- ✓ Explain how knowing the law can help a buyer, seller or broker ask the right questions in a real estate transaction.
- ✓ Competence in legal issues can increase returns on investment by decreasing troublesome legal questions and costly litigation.

<u>The Most Frequently Asked Real Estate Questions</u>

Discuss the questions with the students. A possible class exercise is to survey the students to determine whether they have had or do have the questions as they are listed.

Answer to Consider (1.2)

1. State statutes; state regulations; local ordinances, private law (the rental agreement); case law
2. State statutes; state regulations; private law (the listing agreement/sales contract); case law
3. State statutes; state regulations; private law (the sales contract/escrow instructions); case law
4. State statutes; state regulations; case law
5. State statutes; state regulations; private law (the sales contract); local law (recording process); case law
6. State statutes; private law (insurance contracts); case law
7. State statutes; private law (antenuptial/prenuptial agreements); case law
8. State statutes; private law; case law
9. State statutes; private law (mortgage contract; note)
10. State statutes; case law
11. State statutes; local laws; case law; private law (deeds)
12. Federal statutes; federal regulation; case law
13. State statutes; private law (listing agreement); state regulations; case law
14. State statutes; local laws (recording); case law
15. State statutes; local laws (recording); case law
16. Private law for HOA rules, Constitution for rights in the event the HOA seeks to lien the property and its rights to foreclose and collect on the lien, state laws that govern HOA structure and requirements
17. Local ordinances on short-term leases, private law such as HOA restrictions on short-term leases, local and state laws on landlord and health requirements; state and local

licensing requirements for being an ongoing landlord, private law for the terms of such a short-term lease

Answers to Chapter Problems

1. The most recent legislation is Mortgage Reform and Anti-Predatory Lending Act, which was part of the Dodd-Frank Act. There are specific disclosure requirements as well as rights in foreclosure, with more protections on subprime mortgage loans. Chapter 15 includes more detailed information.

2. Interstate Land Sales Full Disclosure Act—federal statutes, United States Code (USC); possibly state laws on fraud and related state and federal regulations.

3. The issue raised here is one of eminent domain and economic development. There is more on this issue later in the text. However, the law covering the situation would be constitutional law and the Fifth Amendment takings clause as well as local ordinances and zoning laws and local procedural laws.

4. Local laws on zoning and perhaps a case of misrepresentation under state law. Also, covenants and deed restrictions could help.

5. California Code Annotated—State regulatory body and related regulations.

6. Should have been drafted more clearly, but garages and porches are generally not livable areas even though they are under the roof and would not be included. The key here will be the interpretation of "living" in front of space. Can one live in an unfinished basement? That would be an interesting discussion for the court. Because of these debates on square footage, many real estate agents and homeowners are not describing their square footage very carefully, using terms such as "approximate" and inserting "finished" in front of "living space" or even just stating the amount of square footage in the basement and describing it as "unfinished." In short, leave nothing ambiguous in descriptions.

7. Case law would be helpful in defining "living space."

8. The EPA has authority to mandate clean-up under federal environmental statutes and federal regulations.

9. These federal land exchanges are quite complex and require the individuals involved to go through their Congress members, state, and local officials (including zoning boards at city and county levels). Virtually every agency at the federal and state levels is also involved from HUD to BLM to city hall.

10. State laws on broker relationships; state regulations on broker; private law which would include their listing contract and case law which has addressed this issue specifically (see Chapters 12 and 13).

11. Not even a close call—there was no agreement between the McClures and Simpson. The VPHOA had the contract and would have the right of lien enforcement, but such a lien was not possible because there was no contract between the McClures and the HOA related to tree removal. In fact, the court concluded that it was a wrongful lien filing. Not even remotely close to consent. The court even used the word “vindictive” in describing the conduct of the McClures.

    For the defendants to succeed on their motion for summary judgment, the court must find that no express or implied contract existed requiring that the defendants provide labor or supplies to the plaintiffs. The plaintiffs in this case have not asserted that such a contract existed between them and the defendants. To the contrary, the plaintiffs have asserted that Simpson and the VPHOA performed this work without their knowledge and consent. Likewise, the defendants do not allege that such a contract existed. The undisputed facts reveal that Simpson, on behalf of the VPHOA, removed trees from some property that was within the view of the plaintiffs' home. The plaintiffs placed a lien on Simpson's home as a result of his actions. Because no contract was alleged and there was no meeting of the minds, the court finds that the first element required for a mechanic's lien has not been satisfied. Since the first element has not been satisfied, it is unnecessary to discuss the remaining elements.

    The court further finds that the plaintiffs are not the proper parties to file the mechanic's lien. It was Simpson and the VPHOA who performed the services. For this reason, it would have been Simpson and the VPHOA who could have placed a mechanic's lien as security for the work they performed. In order for the plaintiffs to claim a lien on Simpson's residence, the plaintiffs would have had to provide labor or supplies to Simpson. This did not occur in this case. Simpson provided services, but not pursuant to a contract; thus, neither party owed a debt to the other. *McClure v. Fisher Attached Homes*, 882 N.E.2d 61 (Ohio 2007).

In-Class Exercises

Have the students play the role of a real estate agent and have them decide which sources of law should be consulted to provide them with the answers to the following questions:

1. How would I find out when and where I renew my license?
2. I am selling some 200-acre ranch lots in Prescott, Arizona. Where can I find out if the developer has complied with all the laws on disclosure? On land use? How would I find out who maintains the roads? Where would I find the zoning restrictions on the property?
3. I have a buyer who wants to finance the purchase of a home. How do I make sure that the lender has given him all of the necessary foreclosures?
4. I have two clients who would like to do a property exchange, but neither one of them understands what happens from a tax perspective? Where can they find help?

5. I have clients who are buying a home in a gated community with a homeowners' association. What source of law tells me the requirements and rights of owners in the community?
6. My neighbor has constructed a chicken coop and is now raising chickens and eggs. How would I find out if the chicken coop is legal?
7. I have a group of three clients who want to go together and purchase an apartment building. How would I find out what types of business they could form to do this?

[return to top]

Resources

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[return to top]