2015

Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance, 6th Ed.

Gerald Korngold

New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_books

Part of the Law Commons

Recommended Citation
http://digitalcommons.nyls.edu/fac_books/13

This Book is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Books by an authorized administrator of DigitalCommons@NYLS.
EDITORIAL BOARD

ROBERT C. CLARK
DIRECTING EDITOR
Distinguished Service Professor and Austin Wakeman Scott
Professor of Law and Former Dean of the Law School
Harvard University

DANIEL A. FARBER
Sho Sato Professor of Law and Director, Environmental Law Program
University of California at Berkeley

SAMUEL ISSACHAROFF
Bonnie and Richard Reiss Professor of Constitutional Law
New York University

HERMA HILL KAY
Barbara Nachtrieb Armstrong Professor of Law and
Former Dean of the School of Law
University of California at Berkeley

HAROLD HONGJU KOH
Sterling Professor of International Law and
Former Dean of the Law School
Yale University

SAUL LEVMORE
William B. Graham Distinguished Service Professor of Law and
Former Dean of the Law School
University of Chicago

THOMAS W. MERRILL
Charles Evans Hughes Professor of Law
Columbia University

ROBERT L. RABIN
A. Calder Mackay Professor of Law
Stanford University

CAROL M. ROSE
Gordon Bradford Tweedy Professor Emeritus of Law and Organization and
Professorial Lecturer in Law
Yale University
Lohse Chair in Water and Natural Resources
University of Arizona
UNIVERSITY CASEBOOK SERIES®

REAL ESTATE TRANSACTIONS

CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE

SIXTH EDITION

by

GERALD KORNGOLD
Professor of Law
New York Law School
and Visiting Fellow
Lincoln Institute of Land Policy

PAUL GOLDSTEIN
Lillick Professor of Law
Stanford University

FOUNDATION PRESS
To David,
Ethan, Ellie, Gabriel and Benjamin,
Margaret and Matt,
and, especially, Alice
G.K.

To Jan
P.G.
American real estate practice over the past thirty-five years has been marked by significant changes. The U.S. mortgage finance crisis beginning in 2008 and its aftermath triggered the largest upheaval in residential and commercial mortgage loans since the Great Depression, and its effect on business and legal structures continues to evolve. What began as a cataclysm in the secondary market for American home mortgages became a global financial crisis because many lenders held secondary market securities or had issued "credit default swaps" that effectively made them insurers of the securities. When the value of the securities dropped, the closely tied financial system was on the brink.

The 2008 financial crisis was emblematic of one of the key changes in U.S. real estate transactions over recent decades—a move in many areas towards nationalization and uniformity in what is technically an area of the law within the purview of state regulation. For example, the growth of title insurance has increased the security and efficiency of real estate transactions and contributed to the evolution of a national market for real estate finance. Because title policies are backed by large, resourceful institutions and generally follow nationally uniform standards, title insurance has drawn major institutional lenders and sophisticated financing schemes into every corner of the country. The federal government, the secondary mortgage market, and securitization of mortgage debt have played an increasingly important role in nationalizing and systematizing real estate finance; formal mortgage documents promulgated and required by national lenders and insurers are increasingly replacing local finance documents. Enhanced federal and state environmental regulation influences virtually every real estate sale, exposing the parties to potentially devastating liability; public sector incentives as well as private commitment have led to green building initiatives across the country. The civil rights and consumer movements have also left their mark, principally on residential real estate sales. Globalization has increasingly affected American real estate transactions, as U.S. companies expand abroad and U.S. real estate debt is held by non-U.S. entities and individuals. Technology and new service providers across the country have brought competition and commoditization of aspects of work, resulting in changes in how lawyers represent clients in transactions.

The 2008 mortgage crisis was triggered by a combination of various factors: the value of residential mortgage-backed securities in the secondary market crashed, due to speculative lending practices, an unmanaged subprime market, and the bursting of the bubble of an overheated property market. The secondary market essentially collapsed and as of today has only partially rebounded. Federal agencies are still grappling with implementing rules to prevent risky lending behavior and defining permitted credit default swaps for the future. Various agencies have recently settled actions with lenders packaged and sold misleading mortgage-backed securities, with more likely to come. Fannie Mae and Freddie Mac, quasi-governmental agencies that insured home mortgages and facilitated the secondary market, were placed into conservatorship by the federal government because of
looming liabilities; their future has not yet been resolved. The story of the secondary market continues to evolve.

As the mortgage crisis spread into a larger financial crisis, borrowers defaulted on home mortgages when they lost their jobs. Often the values of their homes sank below the amounts they still owed on their loans. This led to widespread foreclosures. The foreclosures spawned significant litigation attempting to unwind assignments of mortgages from secondary market transactions and to determine whether the party bringing foreclosure truly had standing under centuries old doctrines. There was a spate of lender misbehavior in some of the foreclosure activities as well, triggering equitable relief and consumer law actions. Federal and state legislation was passed to assist troubled borrowers, including loan modification programs. While the number of foreclosure actions has decreased as of this writing, troubled borrowers remain and the residential real estate markets in many areas remain well below their 2008 levels. This too is a real estate story that continues to unfold.

Some of the recent changes in real estate transactions, such as the spread of title insurance, have taken work away from lawyers. Other changes, because they implicate a wide and complex range of legal issues, have magnified and complicated the real estate lawyer's role. It is no longer sufficient to know the law on title conveyancing and mortgages. The real estate lawyer today must also grasp at least the basics of federal income taxation, personal property security, environmental regulation, bankruptcy, and products liability law. After the 2008 financial crash, the real estate lawyer will also need to understand federal and state lending and consumer credit regulation and ongoing changes in that law. The attorney must also have a feel for the informal legal culture created by the many nongovernmental institutions and individuals involved in real estate transactions—brokers, title companies, surveyors, appraisers, lenders and their various trade associations.

And yet, despite the rise and effect of new forces, real estate practice still requires a firm grounding in fundamental concepts such as real estate contracts, mortgages and foreclosure, title systems, and brokerage. These are the vocabulary and the grammar of the sophisticated real estate lawyer. New judicial decisions, legislation, business practices, and transaction structures that respond to emerging economic and social demands are built on this foundation. For example, court opinions and legislative debate on the proper response to the post-2008 foreclosure crisis almost always have been framed within the context of applying or changing longstanding doctrines in order to achieve a desired result; alternative financing vehicles designed by lenders have been based on past precedent and practices.

The essential role of the real estate lawyer has also not altered over the years. This book continues to frame issues from the perspective of a lawyer assembling a successful transaction and not simply litigating a deal gone bad. The task of the transactional lawyer requires great sophistication, wisdom, and at times subtlety. All parties in a deal want
it to close, and according to the economists each should be in a better position if it does. Each party, however, wants to obtain as great of an advantage as possible. The skilled transactional lawyer will advance the client’s interest but also will ensure that the interests of all parties are aligned (or else the transaction ultimately will fail), the parties don’t walk away from the deal, and the long term relationship between the parties remains intact.

This book, therefore, encompasses emerging, as well as traditional, fields of real estate law. Part One covers the basic elements of real estate transactions, using the residential transaction and as-built commercial transaction as a vehicle for exposing the fundamentals of the role of the attorney, brokers, real estate contracts and conveyancing, title assurance, and secured financing. Part Two covers commercial real estate transactions, exploring contemporary innovations in financing and leasing techniques and examining current issues related to distressed properties, environmental regulation and green buildings, globalization of real estate transactions, and the development and operation of shopping centers. Part Three presents all tax materials, including residential and commercial issues.

Although real estate transactions have become increasingly subject to nationalizing influences, real estate law remains in many respects the creature of local rules. As a consequence, one message should be emphasized here: no real estate lawyer can safely ignore applicable state law when counseling on any transaction, large or small.

Real estate law is a happy blend of practical insight and academic perspective, a mix that we have tried to convey in the pages that follow. Colleagues in practice and in academe have provided helpful comments for the preparation of various editions of this book. We are particularly grateful to Todd Davis and Jonathan Adler for their help with the environmental law materials, Edward Hurtuk, Charles Daroff and Zachary Paris for their insights on new developments in real estate law, Andy Morriss for his ideas on many subjects, Leon Gabinet for his comments on the tax materials, and Hiram Chodosh and Erik Jensen for insights on globalization issues. We also appreciate Kevin McManigal's and Bob Lawry's comments on professional responsibility issues, Morris Shanker's comments on bankruptcy, and Bill Warren's ideas on shopping centers. Last but not least, Jim Hagy has been a generous and terrific source of wisdom on real estate law, lawyering, and pedagogy.

Many law teachers who used various editions of this casebook have been generous with their suggestions. For their thoughtful comments, we are indebted to Professors Steven B. Baslaw, J. Wendell Bayles, Roger Bernhardt, Zareh H. Beylerian, William M. Blackburn, Michael Braunstein, Pamela W. Bray, John D. Briggs II, D. Barlow Burke, Jr., K.C. Collette, John W. Fisher II, Robert L. Flores, Ken Harmon, Theodore B. Hertel, Jr., John F. Hicks, Alex Johnson, John W. Larson, Carl H. Lisman, Ward F. McDonald, George K. Miller, Thomas Mitchell, C. Robert Morris, Phillip J. Nexon, Lindsay F. Nielsen, John R. Nolon, Georgette Chapman Poindexter, Patrick A. Randolph, Jr.,

A Note on Style. Most of the cases and other materials appearing in these pages have been edited. The deletion of sentences and paragraphs is indicated by ellipses; the deletion of citations is not indicated. Most footnotes have been excised. The remaining footnotes retain their original numbering. Authors’ footnotes are lettered.

G.K.
P.G.

New York, New York
Stanford, California
September, 2014
# SUMMARY OF CONTENTS

**PREFACE** .............................................................................................................. V

**TABLE OF CASES** ................................................................................................. XXIII

**PART ONE. BASIC ELEMENTS OF THE REAL ESTATE TRANSACTION**

Chapter I. Arranging the Deal ....................................................................................... 3  
A. An Introduction to the Conveyancing Industry ....................................................... 3  
B. Lawyers ................................................................................................................. 15  
C. Brokers ................................................................................................................... 29

Chapter II. Performing the Contract ........................................................................... 73  
A. Risk of Loss ........................................................................................................... 73  
B. Statute of Frauds .................................................................................................. 82  
C. Contract Conditions ............................................................................................... 91  
D. The Calculus of Remedies .................................................................................... 121

Chapter III. Closing the Contract .............................................................................. 157  
A. The Formalities of Transfer .................................................................................. 158  
B. Liabilities That Survive the Deed........................................................................ 187

Chapter IV. Assuring Title ......................................................................................... 237  
A. The Record System ............................................................................................... 237  
B. Abstracts, Opinions and Title Insurance .............................................................. 286  
C. Increasing the Efficiency of Title Assurance ....................................................... 313

Chapter V. Financing the Purchase ........................................................................... 337  
A. The Forms, Sources and Terms of Home Finance .............................................. 337  
B. Junior Liens ........................................................................................................... 409  
C. Transfers of Mortgaged Property and Mortgage Interests .................................. 426  
D. Mortgage Default .................................................................................................. 451  
E. Financing Through the Land Sale Contract ............................................................ 520

Chapter VI. Building on the Basics: Condominium and Other Communal Arrangements for Home Ownership ......................................................... 535  
A. Management and Control ..................................................................................... 542  
B. Restraints on Alienation ....................................................................................... 547  
C. Restrictions on Occupancy and Use ..................................................................... 551

**PART TWO. ELEMENTS OF THE COMMERCIAL REAL ESTATE TRANSACTION**

Chapter VII. Commercial Land Finance ................................................................... 563  
A. Mortgages ............................................................................................................... 565  
B. The Ground Lease and Leasehold Mortgage ........................................................ 670

Chapter VIII. Properties in Distress .......................................................................... 695  
A. Workouts and Lender Remedies ........................................................................... 696
B. Bankruptcy .............................................................................................................. 708

Chapter IX. The Environment and Real Estate Transactions: From Regulation to Green Buildings ............................................................ 735
A. Environmental Liability: CERCLA and Related Statutes ................................................................. 735
B. Green Buildings and Leases ......................................................................................... 787

Chapter X. Globalization of American Real Estate Transactions and Finance ......................................................................................... 803
A. Foreign Investment in U.S. Real Estate ........................................................................ 804
B. American Investment in Foreign Real Estate ........................................................................ 815

Chapter XI. Building on the Basics: The Shopping Center Development .................................................................................................. 833
A. The Concept ................................................................................................................. 834
B. Finance and Land Use Approval .................................................................................. 842
C. Leasing and Operations ............................................................................................... 847

PART THREE. FEDERAL INCOME TAXATION AND REAL ESTATE TRANSACTIONS

Chapter XII. Residential Property ..................................................................................... 907

Chapter XIII. Commercial Ownership and Development .......................................................... 921
A. Tax Planning: How Property Is Held ............................................................................ 921
B. Deductions: Leverage, Depreciation and Tax Shelter ..................................................... 940
C. Disposition: Deferring the Recognition of Gain (and Loss) ............................................ 957
D. Sale-Leaseback Transactions ......................................................................................... 981

INDEX ........................................................................................................................................... 995
TABLE OF CONTENTS

PREFACE.................................................................V

TABLE OF CASES..................................................XXIII

PART ONE. BASIC ELEMENTS OF THE
REAL ESTATE TRANSACTION

Chapter I. Arranging the Deal.................................................3
A. An Introduction to the Conveyancing Industry.......................3
United States Department of Housing and Urban Development, A
Study of Closing Costs for FHA Mortgages.................................8
Notes....................................................................................12
B. Lawyers..............................................................................15
In re Lanza..............................................................................17
Notes....................................................................................21
C. Brokers..............................................................................29
Beth E. Nagalski, Note, Ending the Uniformity of Residential Real
Estate Brokerage Services: Analyzing the National Association
of Realtors’ Multiple Listing Service Under the Sherman Act .... 29
Notes....................................................................................32
1. Seller’s and Buyer’s Liability to Broker.................................36
Business Consulting Services, Inc. v. Wicks.............................36
Tristram’s Landing, Inc. v. Wait..............................................41
Notes....................................................................................44
2. Broker’s Duties to Seller and to Buyer.................................48
Joseph M. Grohman, A Reassessment of the Selling Real
Estate Broker’s Agency Relationship with the Purchaser ....48
Daubman v. CBS Real Estate Co..............................................51
Hoffman v. Connall........................................................................60
Notes....................................................................................66

Chapter II. Performing the Contract.......................................73
A. Risk of Loss.........................................................................73
Brush Grocery Kart, Inc. v. Sure Fine Market, Inc........................73
Notes....................................................................................78
B. Statute of Frauds...................................................................82
Hahne v. Burr............................................................................82
Notes....................................................................................87
C. Contract Conditions...........................................................91
1. Financing..............................................................................92
Homler v. Malas........................................................................92
Notes....................................................................................94
2. Marketable Title...................................................................96
Caselli v. Messina......................................................................96
Notes....................................................................................100
3. Other Problem Areas........................................................103
a. Zoning..............................................................................103
Dover Pool & Racquet Club, Inc. v. Brooking................................103
### Table of Contents

**D. The Calculus of Remedies**

1. **Specific Performance**
   a. Buyer’s Right to Specific Performance
      - American Law Institute, Restatement of the Law of Contracts—Second
      - Kelley v. Leucadia
   b. Seller’s Right to Specific Performance
      - American Law Institute, Restatement of the Law of Contracts—Second
      - Mohrlang v. Draper

2. **Damages**
   a. Buyer’s Damages
      - Beard v. S/E Joint Venture
   b. Seller’s Damages
      - Kuhn v. Spatial Design, Inc.

3. **Recession**

4. **Vendee’s and Vendor’s Liens**
   a. Vendee’s Lien
      - New York Law Revision Commission, Recommendation to the Legislature Relating to the Vendee’s Lien on Land to Secure Restitution or Damages
   b. Vendor’s Lien
      - Askren v. 21st Street Inn

**Chapter III. Closing the Contract**

John H. Kupillas, Jr., Attorney Etiquette at Residential Real Estate Closings

A. The Formalities of Transfer
   - McDonald v. Plumb

Notes

1. Deed Elements and Construction
   - Priest v. Ernest W. Ball & Associates, Inc.
   - Note

2. Delivery and Escrow
   a. Delivery
      - Wiggill v. Cheney
      - Note
   b. Escrows
      - *In re Akivis*
      - Notes
### 3. The Description

Donald A. Wilson, Reading, Interpreting, and Writing Land Descriptions, in Land Surveys: A Guide for Lawyers and Other Professionals (Mitchell G. Williams, ed.) ........................................... 177

Marshall v. Soffer ........................................ 180
Notes ...................................................... 184

### B. Liabilities That Survive the Deed

Reed v. Hassell ........................................ 187
Notes ...................................................... 191

#### 1. Fitness of the Premises

a. Liability of Seller

i. Tort

Stambovsky v. Ackley ........................................ 194
Notes ...................................................... 199

ii. Warranty

Wawak v. Stewart ........................................ 205
Blagg v. Fred Hunt Co., Inc. .......................... 209
Notes ...................................................... 211

b. Liability of Lenders and Others

Rice v. First Federal Savings and Loan Ass'n of Lake County ........................................ 220
Jeminson v. Montgomery Real Estate and Co. ......................................................... 221
Jeminson v. Montgomery Real Estate and Co. ......................................................... 225
Notes ...................................................... 226

#### 2. Title

Brown v. Lober .......................................... 229
Notes ...................................................... 230

### Chapter IV. Assuring Title

A. The Record System

Notes ...................................................... 237

#### 1. Types of Statutes

Corwin W. Johnson, Purpose and Scope of Recording Statutes ........................................ 239

Argent Mortgage Company, LLC v. Wachovia Bank, NA ......................................................... 241
Notes ...................................................... 245

#### 2. The Conditions of Protection

a. Notice

Corwin W. Johnson, Purpose and Scope of Recording Statutes ........................................ 247
Kinch v. Fluke ........................................ 249
Sanborn v. McLean ........................................ 253
Notes ...................................................... 256

b. Purchaser for Value

Corwin W. Johnson, Purpose and Scope of Recording Statutes ........................................ 260
Anderson v. Anderson ........................................ 262
Note ...................................................... 266
c. Circuitous Liens ................................................................. 267
   In re Distribution of Proceeds from Sheriff’s Sale of
   Premises 250 Bell Road, Lower Merion Township,
   Montgomery County ....................................................... 267

3. The Title Search .................................................................. 270
   a. The Indices .................................................................. 270
      Note, The Tract and Grantor-Grantee Indices ............. 270
      Notes ........................................................................ 272
   b. Title Standards ............................................................ 274
      Lewis M. Simes & Clarence B. Taylor, Model Title
      Standards .................................................................... 274
      Note .......................................................................... 278
   c. Extent of Search: The “Record Chain of Title” Problem .. 279
      Morse v. Curtis ............................................................ 279
      Sabo v. Horvath .......................................................... 281
      Corwin W. Johnson, Purpose and Scope of Recording
      Statutes ....................................................................... 284
      Notes .......................................................................... 285

B. Abstracts, Opinions and Title Insurance .............................. 286
   1. The Abstract and the Lawyer’s Opinion .......................... 287
      Joyce Palomar, 1 Patton and Palomar on Land Titles .... 287
      Seigle v. Jasper ........................................................... 290
      Notes ........................................................................ 295
   2. Title Insurance .............................................................. 298
      D. Barlow Burke, Law of Title Insurance ........................ 298
      Laabs v. Chicago Title Insurance Co. .............................. 302
      Notes .......................................................................... 307

C. Increasing the Efficiency of Title Assurance ....................... 313
   1. Marketable Title Acts, Statutes of Limitations and Curative
      Acts ............................................................................ 314
      H & F Land, Inc. v. Panama City-Bay County Airport and
      Industrial District ....................................................... 315
   2. Title Registration: The Torrens System ......................... 323
      John L. McCormack, Torrens and Recording: Land Title
      Assurance in the Computer Age .................................... 323
      In re Collier .................................................................... 325
      Notes .......................................................................... 334

Chapter V. Financing the Purchase ....................................... 337
A. The Forms, Sources and Terms of Home Finance .............. 337
   1. Forms .......................................................................... 337
      American Law Institute, Introduction to the Restatement of
      the Law of Property (Third): Mortgages ....................... 337
      C. Phillip Johnson Full Gospel Ministries, Inc. v. Investors
      Financial Services, LLC .................................................. 339
      Notes .......................................................................... 346
   2. Sources ......................................................................... 350
      a. Changes in the Primary Lending Market ...................... 350
b. Secondary Market and Securitization .................................................. 355
Kurt Eggert, Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine .............................. 355

c. The Subprime and Mortgage Finance Crisis of 2008 ....................... 361
Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis ........................................... 361
Notes ....................................................................................................... 365
3. Terms ................................................................................................. 367
Goebel v. First Federal Savings & Loan Association of Racine .................. 368
Notes ....................................................................................................... 374
4. Evaluating the Borrower and the Security ........................................ 382
United States Bureau of Consumer Financial Protection, Ability-to-Pay and Qualified Mortgage Standards Under Truth in Lending Act (Regulation Z) ..................................................... 382
J. Kevin Murray, Issues in Appraisal Regulation: The Cracks in the Foundation of the Mortgage Lending Process .............................. 386
Notes ....................................................................................................... 389
5. Discrimination, Subprime Mortgages, and Predatory Lending ........... 390
Associates Home Equity Services, Inc. v. Troup ........................................... 390
Notes ....................................................................................................... 402
B. Junior Liens ....................................................................................... 409
1. Refinancing ........................................................................................ 409
Aames Capital Corporation v. Interstate Bank of Oak Forest .................. 409
Notes ....................................................................................................... 416
2. Modification of the Senior Mortgage ................................................. 418
Burney v. McLaughlin ............................................................................. 418
Notes ....................................................................................................... 425
C. Transfers of Mortgaged Property and Mortgage Interests .................. 426
1. Transfers by the Mortgagor ................................................................. 426
a. Duties of the Transferee .................................................................. 426
First Federal Savings and Loan Association of Gary v. Arena ............... 426
Note ....................................................................................................... 432
b. Limitations on the Transferor ............................................................ 433
Notes ....................................................................................................... 434
2. Transfers by the Mortgagee ................................................................. 437
a. Payments on the Note .................................................................... 437
Giorgi v. Pioneer Title Insurance Co. ....................................................... 437
Doyle v. Resolution Trust Corporation .................................................... 439
b. Securitization and MERS ................................................................. 445
Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis .............................. 445
D. Mortgage Default ................................................................................... 451
   Federal Housing Finance Agency Office of the Inspector General,
   An Overview of the Home Foreclosure Process ........................... 451
   Notes ....................................................................................................... 454
   1. Methods of Foreclosure .................................................................. 459
      a. Strict Foreclosure ................................................................... 459
         Robert H. Skilton, Developments in Mortgage Law and
         Practice ............................................................................ 459
         Note ........................................................................................ 460
      b. Foreclosure by Court Action and Sale ........................................ 461
         Robert H. Skilton, Developments in Mortgage Law and
         Practice ............................................................................ 461
         United States Department of Housing and Urban
         Development v. Union Mortgage Company .......................... 462
         Notes ....................................................................................... 465
      c. Foreclosure by Power of Sale .................................................. 468
         Robert H. Skilton, Developments in Mortgage Law and
         Practice ............................................................................ 468
         Rosenberg v. Smidt ................................................................ 471
         Notes ........................................................................................... 481
      d. Foreclosure in the Era of MERS ........................................... 483
         Eaton v. Federal National Mortgage Association ................ 484
         Notes ....................................................................................... 492
      e. Deed in Lieu of Foreclosure .................................................. 495
         Jesse Saslow, Comment, Incentivizing Deeds-In-Lieu of
         Foreclosure: An Argument for Expansion of the Home
         Affordable Foreclosure Alternatives ("HAFA")
         Program .............................................................................. 495
         Notes ............................................................................................... 500
   2. Statutory Redemption .................................................................... 500
      Robert H. Skilton, Developments in Mortgage Law and
      Practice ............................................................................ 500
      Matcha v. Wachs ............................................................................ 503
      Note ........................................................................................ 508
   3. Deficiency Judgments and Antideficiency Legislation ............ 509
      Cornelison v. Kornbluth ................................................................ 509
      Notes ............................................................................................... 517
   E. Financing Through the Land Sale Contract .......................... 520
      Comment, Forfeiture: The Anomaly of the Land Sale Contract.. 520
      Skendzel v. Marshall ............................................................................. 523
      Dirks v. Cornwell ................................................................................ 526
      Notes ........................................................................................ 530

Chapter VI. Building on the Basics: Condominium and Other
Communal Arrangements for Home Ownership ........................ 535
   Notes ........................................................................................ 539
   A. Management and Control .................................................. 542
Comcast of Florida, L.P. v. L'Ambiance Beach Condominium Association, Inc. ...................................................... 542
Notes ...................................................................................... 545

B. Restraints on Alienation...................................................... 547
Jones v. O'Connell ..................................................................... 547
Note ...................................................................................... 550

C. Restrictions on Occupancy and Use ..................................... 551
Levandusky v. One Fifth Avenue Apartment Corp. .......... 551
Notes ...................................................................................... 558

PART TWO. ELEMENTS OF THE COMMERCIAL REAL ESTATE TRANSACTION

Chapter VII. Commercial Land Finance ........................................ 563
A. Mortgages ............................................................................... 565
1. Terms ...................................................................................... 565
a. Usury ...................................................................................... 570
NV One, LLC v. Potomac Realty Capital, LLC ................... 570
Notes ...................................................................................... 579
b. Recourse vs Nonrecourse Loans ........................................ 581
Heller Financial, Inc. v. Lee .................................................. 581
Note ...................................................................................... 587
2. Construction Finance .............................................................. 587
a. The Construction Loan ......................................................... 589
Philip D. Weller, Fundamentals of Construction Lending .... 589
J.I. Kislak Mortgage Corporation v. William Matthews Builder, Inc. ................................................................. 595
Note: Obligatory and Optional Advances .......................... 597
b. The Permanent Loan ......................................................... 601
Milton Davis, The Permanent Lender’s Role in the Construction Process .................................................. 601
Penthouse International, Ltd. v. Dominion Federal Savings and Loan Association ............................................. 604
Notes ...................................................................................... 633
c. Subordinated Purchase Money Financing .......................... 636
Middlebrook-Anderson Co. v. Southwest Sav. & Loan Ass’n .... 636
Notes ...................................................................................... 644
d. Other Construction Liens ..................................................... 646
i. Mechanics’ and Materialmen’s Liens ................................ 646
Williams & Works, Inc. v. Springfield Corp. ................. 646
Notes ...................................................................................... 654
ii. Fixtures ................................................................. 658
James J. White & Robert S. Summers, Uniform Commercial Code .......................................................................... 658
Capitol Federal Savings and Loan Association v. Hoger ........................................... 661
Note .................................................................................................................... 669

B. The Ground Lease and Leasehold Mortgage ........................................... 670
   Ira Meislik, Basic Principles of Ground Lease Agreements ...................... 670
   Nancy R. Little, Financeable Ground Leases: An Overview ................... 676
   1. Calculating Ground Rent ........................................................................ 681
      936 Second Avenue L.P. v. Second Corporate Development Co., Inc .................... 681
   2. Mortgaging the Leasehold and the Fee ................................................ 684
      Balch v. Leader Federal Bank for Savings .............................................. 684
      Notes ........................................................................................................ 690

Chapter VIII. Properties in Distress ............................................................... 695
A. Workouts and Lender Remedies ............................................................... 696
   Michael H. Goldstein & Adam M. Starr, Navigating the Distressed Real Estate Workout .......... 696
   Note ........................................................................................................... 704
   CUNA Mortgage v. Aafedt ................................................................. 704
   Note ........................................................................................................... 707
B. Bankruptcy .................................................................................................. 708
   Kenneth N. Klee, One Size Fits Some: Single Asset Real Estate Bankruptcy Cases .......... 708
   BFP v. Resolution Trust Corporation ...................................................... 712
   RadLAX Gateway Hotel, LLC v. Amalgated Bank .................................. 719
   Notes ........................................................................................................... 725

Chapter IX. The Environment and Real Estate Transactions: From Regulation to Green Buildings ......................................................... 735
A. Environmental Liability: CERCLA and Related Statutes ....................... 735
   1. Liability of Sellers and Buyers .............................................................. 737
      a. The Statutory Scheme ........................................................................ 737
         Michael P. Healy, Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach .................................................... 737
         Tanglewood East Homeowners v. Charles-Thomas, Inc .......................... 740
         Notes .................................................................................................... 745
      b. Avoiding Liability/Brownfields .......................................................... 752
         i. “Innocent Owner” Defense ............................................................... 752
            United States v. Serafini ................................................................. 752
         ii. “Bona Fide Prospective Purchaser” Defense ..................................... 759
            Spencer M. Wiehard, Note, The Brownfields Act: Providing Relief for the Innocent or Providing New Hurdles to Avoid Liability? ......................... 759
            PCS Nitrogen Incorporated v. Ashley II of Charleston, LLC .................. 763
            iii. By Agreement ............................................................................... 767
            Niecko v. Emro Marketing Company ................................................ 767
            Notes ................................................................................................ 770
## TABLE OF CONTENTS

### 2. Lender Liability
- United States v. Fleet Factors Corp. .................................................. 775
- Notes .................................................................................. 784

### B. Green Buildings and Leases
1. Defining Green Buildings
   - J. Cullen Howe, Overview of Green Buildings .................................. 787
2. Green Leases
   - S. Michael Brooks, Green Leases and Green Buildings ..................... 793
3. Owner Issues
   - Brandon Robinson & James Smith, Overview of Green Building and Associated Legal Issues .......................................................... 798
- Note .................................................................................. 800

### Chapter X. Globalization of American Real Estate Transactions and Finance

#### A. Foreign Investment in U.S. Real Estate
1. Economic and Political Forces
2. Federal Tax Issues
   - Fred B. Brown, Wither FIRPTA? .................................................. 808
   - Gregory W. Hummel & Steven R. Ratz, Withholding Requirements Under FIRPTA .......................................................... 810
3. Other Federal Regulation
4. State Regulation
   - Note: State Legislation .................................................................. 814
- Notes .................................................................................. 814

#### B. American Investment in Foreign Real Estate
1. Limitations on Ownership
   - Michael Boreale, Note, Beachfront Property in Arizona? Loosening the Restrictions on Foreign Acquisition of Mexican Real Estate and the Implication for Arizona Investors .................................................. 815
2. Foreign Real Estate Systems
3. U.S. Legal Restrictions
Notes ............................................................................................... 829

Chapter XI. Building on the Basics: The Shopping Center Development ........................................................................ 833
A. The Concept .................................................................................. 834
   Dennis L. Greenwald, The Reinvention of the Shopping Center .... 834
   Michael D. Beyard & W. Paul O'Mara, Shopping Center Development Handbook ...................................................... 837
B. Finance and Land Use Approval .................................................... 842
   Michael D. Beyard & W. Paul O'Mara, Shopping Center Development Handbook .......................................................... 842
   Notes ............................................................................................... 845
C. Leasing and Operations ................................................................. 847
   1. Coordinating Landlord and Tenant Interests .......................... 847
      Michael D. Beyard & W. Paul O'Mara, Shopping Center Development Handbook ...................................................... 847
   2. Tenant Rights and Obligations ................................................. 852
      a. Tenant’s Rights and Obligation to Use the Premises .......... 852
      Oakwood Village LLC v. Albertsons, Inc ............................... 852
      b. Tenant’s Business Activities—Exclusive Rights and Restricted Activities ................................................................. 864
         In re Trak Auto Corp. ............................................................ 871
      c. Tenant’s Right to Assign ....................................................... 877
         Rowe v. Great Atlantic & Pacific Tea Co., Inc ..................... 877
      d. Tenant’s Percentage Rent Obligation ................................... 881
         Hartig Drug Company v. Hartig .......................................... 881
      e. Tenant’s Obligation to Landlord’s Mortgagee ...................... 886
         Miscione v. Barton Development Company ......................... 886
   Notes ............................................................................................... 901

PART THREE. FEDERAL INCOME TAXATION AND REAL ESTATE TRANSACTIONS

Chapter XII. Residential Property ................................................... 907
Nicholaus W. Norvell, Comment, Transition Relief for Tax Reform’s Third Rail: Reforming the Home Mortgage Interest Deduction After the Housing Market Crash ........................................ 907
Joseph A. Snoe, My Home, My Debt: Remodeling the Home Mortgage Interest Deduction ......................................................... 908
Dennis J. Ventry, Jr., The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest ............................................................. 912
Notes ............................................................................................... 915

Chapter XIII. Commercial Ownership and Development .................. 921
A. Tax Planning: How Property Is Held ............................................ 921
   Malat v. Riddell ........................................................................... 922
   Biedenharn Realty Co., Inc. v. United States ............................... 924
   Notes ............................................................................................... 936
<table>
<thead>
<tr>
<th>B. Deductions: Leverage, Depreciation and Tax Shelter</th>
<th>940</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Tax Shelter Through Depreciation Deductions</td>
<td>940</td>
</tr>
<tr>
<td>Commissioner of Internal Revenue v. Tufts</td>
<td>940</td>
</tr>
<tr>
<td>Notes</td>
<td>949</td>
</tr>
<tr>
<td>2. Reform of Tax Shelters</td>
<td>952</td>
</tr>
<tr>
<td>a. The 1986 Tax Reform Act</td>
<td>954</td>
</tr>
<tr>
<td>b. The Revenue Reconciliation Act of 1993</td>
<td>956</td>
</tr>
<tr>
<td>Note</td>
<td>957</td>
</tr>
<tr>
<td>C. Disposition: Deferring the Recognition of Gain (and Loss)</td>
<td>957</td>
</tr>
<tr>
<td>1. Tax-Free Exchanges</td>
<td>957</td>
</tr>
<tr>
<td>Welton James Fischer, Tax Free Exchanges of Real Property Under Section 1031 of the Internal Revenue Code of 1954</td>
<td>957</td>
</tr>
<tr>
<td>Starker v. United States</td>
<td>963</td>
</tr>
<tr>
<td>Biggs v. Commissioner of Internal Revenue</td>
<td>972</td>
</tr>
<tr>
<td>2. Taxes on the Installment Plan</td>
<td>979</td>
</tr>
<tr>
<td>Notes</td>
<td>980</td>
</tr>
<tr>
<td>D. Sale-Leaseback Transactions</td>
<td>981</td>
</tr>
<tr>
<td>Frank Lyon Co. v. United States</td>
<td>981</td>
</tr>
<tr>
<td>Notes</td>
<td>993</td>
</tr>
<tr>
<td>INDEX</td>
<td>995</td>
</tr>
</tbody>
</table>