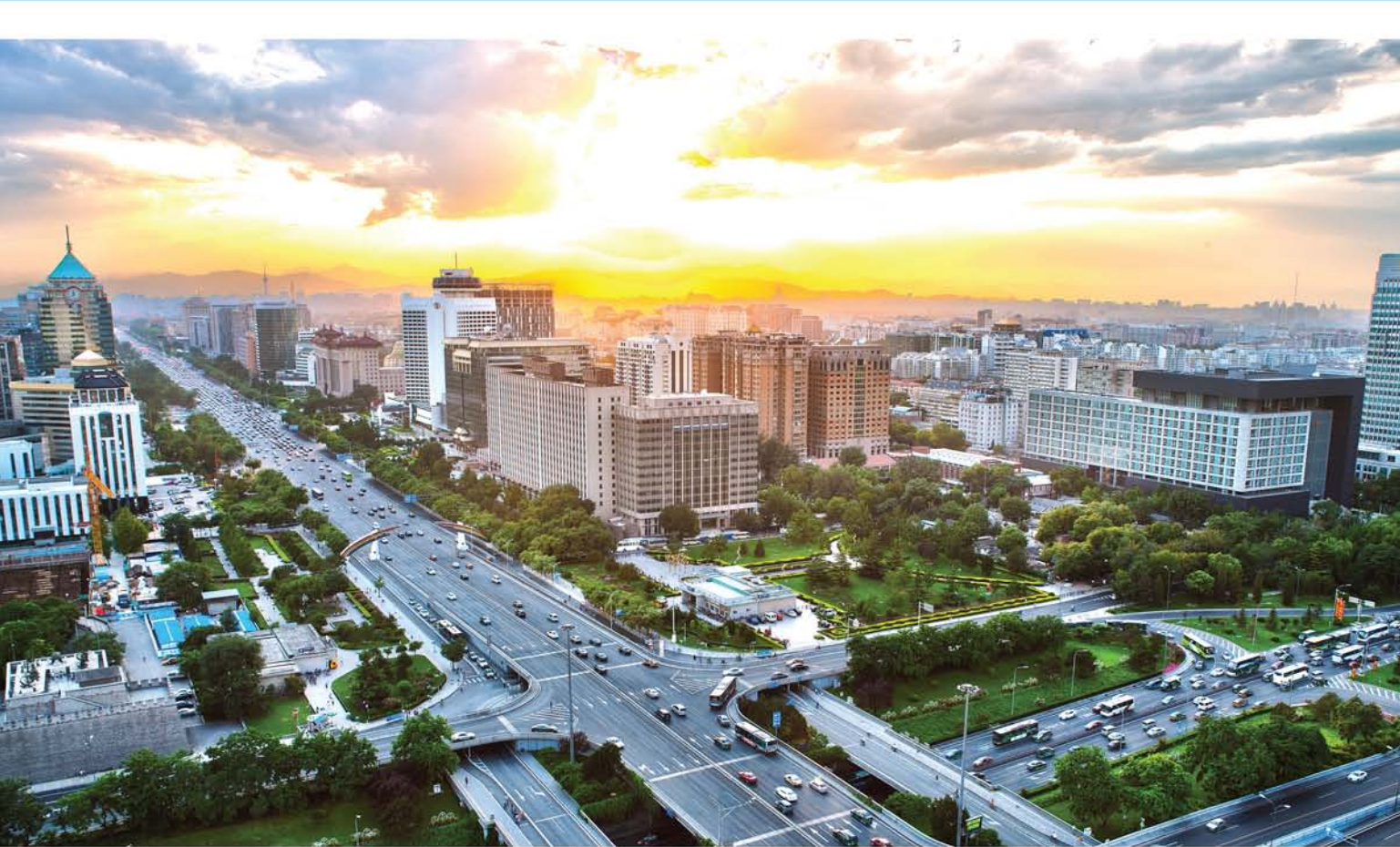


REAL ESTATE LAW



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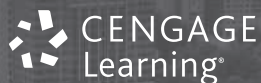
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REAL ESTATE LAW



ELEVENTH EDITION

MARIANNE M. JENNINGS



Australia • Brazil • Mexico • Singapore • United Kingdom • United States

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PREFACE

Since the time that the tenth edition of *Real Estate Law* was published, the traditionally dull, old area of real estate law has continued to occupy the front pages of newspapers. The real estate market collapse was nearly a decade ago, but the courts, legislatures, Congress, and administrative agencies are still working to finish out foreclosures and adopt and implement the laws and regulations that change everything from obtaining a mortgage, to disclosures about mortgages, to foreclosures of mortgages. The courts are finally hearing the cases on forgotten foreclosures and the damages caused by mortgagors walking away from their mortgages with most of the fixtures. There have been major reforms in mortgage financial disclosures as well as the closing process. The problem of “foreclosure blight” continues and local governments are trying everything from razing city blocks to eminent domain in order to contain the problems that abandoned properties bring.

In addition to the ongoing mortgage issues, there are new developments in solar rights and fracking. This textbook has always been at the forefront of covering current and potential issues in real estate law. The eighth edition covered the potential issues that were evolving because of subprime lending as well as the conduct of the flippers who were buying, selling, and turning over multiple properties at a time, often using the proceeds from the sale of one property for the down payments on several new houses that were closing simultaneously. Chapter 15 on financing in the eighth edition was ahead of its time, sounding a warning about what might happen as the frenzied market continued to climb on a tenuous foundation. The ninth edition dealt with the clean-up of those problems. The tenth edition focused on the fall-out and now the eleventh edition deals with the detailed laws and regulations on lending, closing, and foreclosure.

It feels as if muddling old real estate law has become the topic on the tip of everyone’s tongues. The conversations bring questions: What happens if I just walk away from my mortgage? Who is responsible for abandoned properties and their upkeep? There are also other active areas in real estate. How much power do owners’ associations have? Can the city really take my property from me in order to put in a Bass Pro Shop? And, this ARM of mine is still one hefty mortgage, so, can I get out of it? There are market pressures, fast-moving transactions, and even some who would take advantage of those who need help with their mortgage lenders. As a result, there are new laws and regulations affecting everything from loan applications to closing to owners’ associations to economic development and takings. Concerns about money laundering continue to affect real estate transactions via the Patriot Act and required disclosures on the transfer of property via escrow agents (see Chapter 16 for more information).

Real Estate Law has been a practical and hands-on study of the laws affecting real property since the time of the first edition in 1984. However, now in its 32nd year and eleventh edition, *Real Estate Law* charts new territory with its clear and cutting-edge coverage of everything from the basics to the new issues and laws that were passed to grapple with the problems the previous editions noted as percolating into systemic issues.

This edition continues its focus on the three-step approach to understanding the laws that affect real estate:

1. A clear explanation of the applicable laws
2. An example, a case, or a Consider... question to help the reader see the application of the law in a particular circumstance
3. Review materials for self-testing on the concepts presented, such as more Consider... questions and Chapter Problems

You find no feudal land systems or archaic terms as a focus of this text. Brokers faced with dual-representation issues need clear discussions of the law and how to apply it. Partners, couples, and putative spouses continue to have their disputes over property with new categories of rights in those relationships. Homebuyers faced with questions about their owners' association need simple explanations of their rights (see Chapter 11). What the eleventh edition continues to offer is a format for learning and understanding.

Most real estate books favor a black-letter law approach in which the laws, rules, and terms are presented, but few or no cases and examples help students and professionals grasp the concept and understand how it affects their decisions, rights, and planning.

Real Estate Law is a book that continues to address the real-life situations that those involved in real property transactions encounter. The problems and cases in this and previous editions have been developed through classroom use and experience from 38 years of teaching. This teaching approach allows the students to really understand and grasp the material, and they are able to use their problem-solving skills in their professional and personal real estate transactions. If there ever was a remark I dreaded to hear from a student, it was, "I'll never use this." Each chapter shows students how they will use the material.

Real Estate Law has long been an innovative book that showed that the law of real property need not be a boring subject. Within the pages of the eleventh edition the reader will find a case on bedbugs and the landlord's responsibility for them under the warranty of habitability; a case in which a luxury homeowner on the shores of Lake Coeur d'Alene stripped the property clean prior to the foreclosure sale; a case in which a mortgagor got a house free and clear after a down and three monthly payments; a case that finds a law professor without the property her father promised her after leaving her job to help him with the ranch; and a case on how there is no title to land if the grantee is a nonexistent LLC. These cases illustrate how easy it can be to get into serious legal difficulty in real estate transaction when the parties do not know the basics of the law.

Readers can study what happens when buyers try to avoid a real estate agent in order to escape paying the agent's commission. They can also learn whether HOAs can enforce a no-smoking policy and whether tenants can be evicted for criminal

activity. And what happens when an owners' association tries to foreclose on your property for not paying your fines?

Real Estate Law does not turn its readers into real estate lawyers; however, it does train the layperson to spot legal issues and important areas in which extra caution, and perhaps legal advice, is warranted. The reader will understand the material, but the ghosts, the baseball players, and the eccentric nude tenant will help make the principles learned endure.

THE REVISED EDITION

As the saying goes, “If it ain’t broke, don’t fix it.” The first through tenth editions of *Real Estate Law* were well received by students and instructors. Indeed, many brokers, agents, developers, and lawyers have found it to be a useful handbook. It has proved to be a successful textbook as well as a practical guide for those in the industry. The eleventh edition continues the successful and unique features of previous editions.

However, we do listen to feedback, and the complexion of the real estate industry has changed over the 32 years of this book’s publication. This edition has the most recent case updates to date. There are so many cases available, particularly from 2012 to 2015, that incorporating their drama was needed. The cases chosen for this edition are short, easy to read, and memorable. The chapter on mortgages includes a new section that discusses the problem that have resulted from so many mortgage foreclosures and the time lags in getting to foreclosure. In addition, there is the aftermath—what happens when the foreclosure sales do not bring enough to satisfy the debt. The issue of unpaid HOA fees in foreclosure and their priorities is covered because of the owners walking away from their properties and those fees. There are also the liability issues—who is liable when properties that borrowers have abandoned fall into disrepair? The chapter on land development has, once again, been reorganized and revamped to reflect new issues and the effects of the downturn in real estate development. Impact fees are not the issue they once were because development has slowed, but whether a city can force a developer to finish a project is a big legal issue. This edition continues its coverage of current social issues related to real estate ownership, including group homes, social-issue zoning, issues related to the Americans with Disabilities Act, Section 8 housing, environmental issues and sustainability, and the evolving law on disclosures on so-called meth houses and other property use and location issues.

Real Estate Law, eleventh edition, has new materials, updated content, and some reorganization, but the color, excitement, and interest levels of the first ten editions have only increased, bringing even more real life to the study of real estate law.

ORGANIZATION

The eleventh edition carries through the four-part organization from earlier editions.

Part I covers the basics of real estate law: the nature of real estate and real estate interests, included to provide the students with a richer backdrop earlier

in the text. “Land Interests: Present and Future” (Chapter 2) gives students the big picture of the types of ownership and land interests before delving into specific issues related to land ownership, such as easements and liens. New to this edition is a Chapter 2 case that illustrates how you can lose title to property if you do not understand the centuries old Rule Against Perpetuity. Modern case law illustrates that not knowing these ancient rules still proves costly in real estate ownership. Chapter 3 includes updates on solar and wind power and the problems with nuisance issues related to these developing technologies. The issue of a landowner’s liability when others are on his property continues to be source of litigation and a new case illustrates that courts struggle with imposing liability, especially when the injured party was trying to save the landowner’s cattle.

Part 2 focuses exclusively on legal issues related to the types of land ownership. Chapter 8 includes new cases and discussions that are the result of the expansion of marital status and property rights. Courts continue to struggle with property rights before, during, and after marriage or just cohabitation and there are landmark cases to reflect the trends in this area of real estate law. There are tensions in landlord and tenant relationships over everything from ADA tenants affecting other tenants’ use and enjoyment of their property to the continuing struggles on tenant deposits and property conditions. The issues with HOAs are increasing as the number of HOA communities grows exponentially. New sections in this chapter cover the types of rules and relationship litigation that HOAs are experiencing in trying to manage community rules and architectural controls as well as the continuing problems of owners not paying their fees.

Part 3 remains a collection of all the legal issues involved in all types of transfers of title to property. It takes the transfer of property from listing agreement to financing to closing of escrow. Brokers and agents still face litigation and ethical issues regarding their obligations to disclose psychological factors on properties, such as when a home has been the site of a murder or suicide and Chapter 12 includes updates and new cases and situations on this evolving issue. Contracts for the sale of property will always cause contention that ripens into litigation, particularly when the simple rule of following the statute of frauds is not followed. A new case on a daughter suing her father makes the vivid point of the need for written and clear contracts. A new case and discussion of deeds remind us of the simple need to be sure the land description in a deed is complete and accurate. Because of new regulations (that took effect on August 1, 2015) from the Bureau of Consumer Protection, the escrow disclosures and forms have changed and Chapter 16 covers these new requirements.

Part 4 continues to cover the issues related to land use and development such as zoning, environmental concerns and sustainability, and constitutional rights and constraints. The Walmart expansion issue is covered in the zoning chapter (Chapter 18) as a city council attempts to shut out the retailer through procedural loopholes. In Chapter 19, the 2015 U.S. Supreme Court decision on the use of disparate impact under the Fair Housing Act is available along with a discussion of its impact on developers and local governments and zoning boards. Thanks to insights from text users on their experiences in real estate development, Chapter 21 has a new structure with the finance segments now in the first part of the chapter. With this new order of coverage, those who

develop real estate will understand the need for having both a liability shield and financing in place prior to even beginning a project or seeking zoning approval.

The structure of the eleventh edition still allows instructors to cover chapters as they see fit and even reorder the coverage. Cross-references in all chapters help with such restructuring and can show students how the chapter pieces fit together to supply them with an understanding of all the laws and regulations affecting real property.

TEXT FEATURES

Cases

Very few real estate law books have the benefit of reported cases. The cases used in this edition are new, but continue to offer colorful illustrations of points covered in the descriptive materials. Each case has a one-line summary to help students remember what the case was about and retain its significance. The facts of the cases have been rewritten in order to simplify the court's language and help students attain a clear grasp of the facts before they begin to read and understand the judicial opinion. After the judge's name is listed, the language of the court begins. However, the opinions chosen have also been carefully edited and reduced in length in order to ensure students understand the meaning and the court's analysis. There are numerous new cases throughout this edition, many of them with 2014 and 2015 dates.

Case Questions

The restatement of case facts and significant editing help students grasp even the most complex judicial decisions on real property law. However, to be sure that the students understand the case decisions, each case is followed by Case Questions. These questions ensure that the readers understand both the facts of the case and the conclusion of the court, while encouraging students to think about what they have read and how to apply it. Some questions ask students to think more about how the problems in the case could have been prevented or what steps would help as they move forward.

Practical Tips

These highlighted suggestions for avoiding legal problems and litigation in real estate (Practical Tips) have been updated and appear in each chapter. The Practical Tips include lists, questions, and ways to avoid the problems that caused the litigation as described in the chapter cases and Consider... questions. These Practical Tips provide yet another practical component to the text and increase its value as a handbook.

Consider... Questions

Numbered Consider... questions, appearing immediately after their applicable text material, help readers grasp the segments of each chapter as they read

along. These questions refine reading habits as well as improve comprehension. There are new Consider... questions throughout the eleventh edition.

Ethical Issues

Continuing this popular feature, this edition includes updated Ethical Issues for each chapter. These real and hypothetical problems allow students to discuss and debate real-world dilemmas that real estate professionals face regularly.

Charts, Diagrams, and Illustrations

Throughout the book, charts, diagrams, and illustrations aid readers' understanding of lengthy and complex topics. For example, there are charts and diagrams depicting the relationships of land interests, Article 9 security interests, easements, the relationships between and among contractors and subcontractors, and how mortgage transfers affect the rights of parties. The cases that involve easements and descriptions include diagrams to help readers visualize boundaries and placement.

Cautions and Conclusions

Each chapter concludes with Cautions and Conclusions, a feature that wraps up the issues addressed in the chapter. In some chapters, there are precautions, recommendations, or points critical for real estate transactions and professionals in the real world. In other chapters, these are conclusions to be drawn from reading the material covered.

Chapter Problems

Appearing at the end of each chapter, most of the Chapter Problems are actual cases, with case citations. They are short enough to spark interest and yet detailed enough to allow discussion and review of the chapter concepts. Many Chapter Problems were taken from cases in previous editions and some of the full cases are included in the Instructor's Manual. Each chapter includes at least one new Chapter Problem. Answers to the Chapter Problems are provided in the Instructor's Manual.

New Feature: CPA Problems Review

Most chapters in the eleventh edition have a new feature: the addition of multiple-choice questions appearing at the end of the chapter that are taken from the AICPA exams. Collected over the years, these CPA problems are an excellent way to review and test your knowledge about the principles covered in the chapter. These questions require integration of the principles and allow students to see application at a level that will prepare them for transactions and even employment in any of the many fields of real estate. The answers to the CPA Problems Review appear at the end of the chapter.

Glossary

The glossary of key terms appears at the end of the text and provides short definitions of the terms that are boldfaced in the text.

SUPPLEMENTAL ITEMS

The following supplements to *Real Estate Law* are available at this text's companion site at CengageBrain.

Instructor's Manual

The Instructor's Manual for *Real Estate Law* is written by the author, and is designed to help in lecture preparation. Each chapter is outlined in detail, with examples and illustrations of each of the chapter points. The cases from the book are briefed within the outline as they appear in the chapter. Answers to all Case Questions, Consider... questions, and Chapter Problems are provided in the Instructor's Manual. Also included are discussion suggestions and resolutions for the Ethical Issues features.

Each chapter in the Instructor's Manual has a Resources section, which lists books and law review articles that have been updated for this edition. These Resource materials provide further information on the chapter contents and can be used to enhance the instructor's understanding of a topic.

Some cases that were eliminated from previous editions have been added to the Instructor's Manual to provide supplemental readings or for in-class use. Interactive learning exercises for each chapter, called In-Class Exercises, are again provided in this edition.

Test Bank

Also written by the author, the Test Bank for *Real Estate Law* assists instructors with test preparation by providing sample examination questions. There is a generous selection of true/false, multiple-choice, and essay questions for every chapter. The true/false questions are easier and can be used for a quick review quiz. The multiple-choice and essay questions require the students not only to know the laws and materials covered but to think and apply them to various scenarios that differ from any presented in the Case Questions, Consider... questions, and Chapter Problems within the chapter. The Test Bank is available through Cognero.

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

- author, edit, and manage test bank content from multiple Cengage Learning solutions
- create multiple test versions in an instant
- deliver tests from your LMS, your classroom or wherever you want

PowerPoint® Slides

A comprehensive set of PowerPoint® Slides for *Real Estate Law* will fast-track class preparation by providing ready-made lecture materials. This edition also offers even more PowerPoint® slides for instructors to use that include the figures from the chapters as well as additional diagrams, problems, illustrations, and charts to help with teaching. These valuable learning aids also enable students to better synthesize key concepts.

DEBTS OF GRATITUDE

Although only my name appears on this book, I cannot claim it as my book alone. As with all achievements in my life, my finished work is the result of the cooperation, work, and sacrifice of many. I cannot name everyone who has helped me in my continuing evolution as an author, but there are those who warrant special note for their efforts in bringing this work to publication:

- Dick Crews, my original editor, who had the educational foresight to see the need for this book and who has been proven correct through the success of ten previous editions. In 1983, Dick said, “Your book will be around for a long time.” Thirty-two years and counting.
- James Moody, my dad, a never-ending source of stories, fodder, and the right thing to do when buying and selling real estate.
- Vicky True-Baker, a longstanding presence in the publishing world and my life as an author, who was my editor for many years.
- My patient and tolerant Content Developer Sarah Blasco and Associate Product Manager Tara Singer who followed along closely as they provided feedback and encouragement. Their advance work and scheduling made this edition a pleasure to do because there was time to add new features and search longer for that one case with color, charm, and the best instructive qualities.
- My students, who continue to teach me how to improve *Real Estate Law*.
- The many students around the country and the world who use this book and write to me with questions, suggestions, and insights. It is reassuring to know that there are students who study so hard that they can have a discussion with an author who enjoys seeing their mastery of the material.
- Kris Tabor, my long-suffering friend and assistant, who handles the unenviable tasks of word-processing my scribbles into a polished Instructor’s Manual and Test Bank.
- The instructors who use *Real Estate Law* and communicate with me via e-mail to update me, correct me, and offer their insights on teaching.
- The reviewers for this edition who have been willing to share their experiences and expertise in offering improvements and suggestions.
- All of the Realtors, developers, lenders, lawyers, and companies that have consented to have their forms and works reproduced in this text in order to make the experience of learning hands-on for the students. Their dedication to education is evidenced by their complete cooperation in granting permission for these items to be used.
- Last, but certainly not least, I am grateful to my husband, Terry, and my children, Sarah, Sam, and John, who sacrifice some of their quality time with me as I hover over the computer. Their “How many chapters do you have left?” keeps me going. I am grateful that they care and are involved. Their presence with me in my office over the eleven editions has changed from lying on the floor doing their homework as I work, to now actual users of my books as they complete their undergraduate and law degrees. I cherish the time we spent together working toward all of our deadlines. I continue to be grateful for their grounding force in my life. Were it not for my family, I would not be as efficient or as organized. Love and structure are wonderful gifts.

A WORD FOR STUDENTS

In using this book, read the material that describes the law first. Follow that by reading the cases that appear in each section. Answer the Case Questions after each case to make sure that you understood the case and that you grasped the issues and principles of law. Try to solve the Consider... questions and Chapter Problems on your own before the instructor gives you the answers. If you can solve them all, then you understand the chapter material. Then move into those CPA questions—the final step in full understanding and application. The figures in chart form are designed to streamline ideas and summarize lengthy topics so that you can commit the concepts to memory. The charts are an excellent form of review for examinations and quizzes.

If you would like to consult the Uniform Commercial Code, especially Article 9 on secured transactions, you can go to <http://www.uniformlaws.org> or to <http://www.law.cornell.edu/ucc/ucc.table.html>.

Finally, remember to apply what you have learned when your course is over. Application is the true test of learning. Good luck with the book and its application. Enjoy the color and flavor of real estate law—it is abundant in this book. And I am always happy to hear from you at marianne.jennings@asu.edu.

Marianne M. Jennings



CHAPTER

1

INTRODUCTION AND SOURCES OF REAL ESTATE LAW

Possession is nine points of the law.

Source unknown

The above quote is but one example of an old adage on property ownership. In some areas of real estate law, this old adage remains the guiding principle. While the source of this particular principle of real estate law may be unknown, there are well-known and detailed sources of real estate law, and this chapter explains where real estate law can be found. One distinguishing feature of real estate law is that its problems are not solved by turning to a single statute or ordinance: A zoning issue cannot be resolved by examining only city ordinances, and a question on adverse possession is not always answered by turning to a statute.

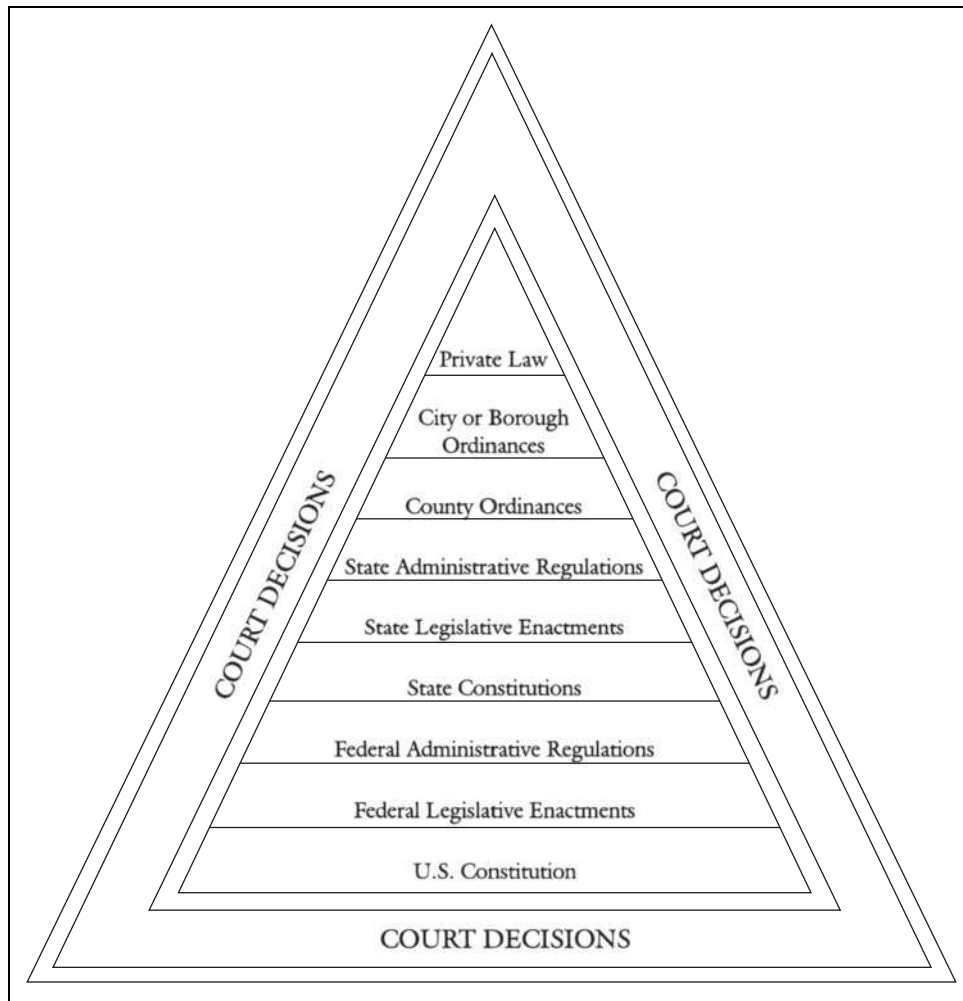
As its name implies, real estate law is not one simple body of law. Rather, it is made up of different types of laws that have been passed by different bodies at all levels of government. No single governmental body issues laws that are complete or exclusive sources of real estate law. Those who are involved with real estate should be familiar with who and what are involved in the making of real estate law. This knowledge helps ensure that those involved in real estate transactions do not overlook legal issues, rights, or processes. Knowing the legal issues involved in real estate transactions helps prevent major problems, dissatisfaction, and perhaps even litigation.

1-1 SOURCES OF REAL ESTATE LAW

If all the sources of real estate law were diagrammed in a scheme depicting their relationships, such a scheme would probably take the pyramidal form depicted in Figure 1.1.

The discussion of these sources of law will begin at the bottom of the pyramid with the United States Constitution. All other sources of real estate law must be consistent with the constitutional rights depicted as the foundation of this pyramid.

FIGURE 1.1 Sources of Real Estate Law



Court decisions, the final area of discussion, have their surrounding position in the pyramid because court decisions deal with the interpretation and application of all the laws in the pyramid.

1-1a The United States Constitution

The **United States Constitution** has several provisions that affect real estate transfers and ownership. The Fourth Amendment affords property owners the right to be secure in their “houses,” and from this language has sprung a long series of cases on property owners’ rights regarding searches and seizures on their property, as well as the proper issuance and execution of search warrants.

The provisions of the Constitution most relevant to real estate law are two similar clauses found in the Fifth and Fourteenth Amendments. The **Fifth Amendment** prohibits the federal government from depriving any person of “property without due process of law” and from taking private property for public use “without just compensation.” The due process provisions have resulted in many cases that deal with obtaining judgments against a person’s property and

foreclosing on a security interest or mortgage in real property. (See Chapters 5, 15, and 19.) For example, with the subprime mortgage market collapse, foreclosure rights have been front and center with homeowners/debtors challenging the right of a lender to foreclose when the lender is not listed as holding the mortgage. (See Chapter 15 for more details and examples.) Such challenges are due process challenges by the homeowner/debtors.

The just compensation provision of the Fifth Amendment relates to land owners' rights when the government is taking their property for public purposes. This practice, referred to as **eminent domain**, has resulted in a long series of litigated cases involving questions such as, When is the government actually taking property? and What constitutes just compensation. For example, one issue that the U.S. Supreme Court recently addressed is whether a local government has sufficient public purpose for taking private land when the reason for the taking is economic development. The court issued a decision in a controversial and emotional area: When can local governments take private property allow a different use? (See Chapter 19.)

The **Fourteenth Amendment's** language is almost identical to the Fifth Amendment, but it applies to state governments. The Fourteenth Amendment provides that no state may "deprive any person of ... property, without due process of law." The amendment puts further restrictions on state laws by making it unconstitutional for any state law to interfere with any rights given to citizens in the U.S. Constitution. The Fourteenth Amendment includes the **Equal Protection Clause**, which requires the states to apply the law equally so that all citizens enjoy the same protections, rights, forms of relief, and equal opportunities for land ownership. Racial discrimination cases involving leases, lending, and land purchases and sales have their grounding in the Fourteenth Amendment.

The constitutional foundation of the pyramid sets the parameters for minimum rights that cannot be violated by the laws enacted at other levels of government. Constitutional provisions seem broad and general, but they protect basic and critical rights in real estate ownership, transactions, and processes.

1-1b Federal Legislative Enactments

The United States Constitution establishes a legislative branch of the federal government, which passes laws to carry out the objectives of the Constitution and for the operation of the federal government. Congress, as the legislative branch created in the Constitution, can pass statutes, some of which regulate real estate transactions. All Congressional enactments are printed in a series of volumes called the **United States Code (USC)**. The major Congressional enactments affecting real estate transactions are discussed in great detail in subsequent chapters, but the following examples illustrate the types of laws found in the United States Code.

- The **Mortgage Reform and Anti-Predatory Lending Act** is part of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act. Details on the act's protections for mortgagors, including appraisals and subprime mortgage loans, can be found at 12 U.S.C. §§ 1715 *et seq.* and 15 U.S.C. §§ 1629 *et seq.*, and are covered in Chapter 15.
- The **Real Estate Settlement Procedures Act (RESPA)** deals with maximum closing costs and good-faith estimates of closing costs. 12 U.S.C. §§ 2601 *et seq.* (discussed in Chapter 16).

- The **American Recovery and Reinvestment Act of 2009 (ARRA)** provides federal funds to stimulate the economy, including financial assistance for residential mortgagors. 26 U.S.C. §§ 1 *et seq.* (discussed in Chapter 15).
- The **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)** is a federal act that authorizes the cleanup of disposal sites for hazardous waste and permits the government to collect cleanup costs from current and former property owners. 42 U.S.C. §§ 9601 *et seq.* (discussed in Chapter 20).

Notice that each of the statutes includes an abbreviation such as “26 U.S.C. § 1” after its name. This abbreviation is referred to as a **citation** (or **cite**) with the number preceding “U.S.C.” being the title or volume number of the United States Code where the statute may be found. The symbol § (or §§ for multiple sections) after “U.S.C.” means “section”; it is followed by the section number, which represents the location of the statute within the particular volume. For example, “12 U.S.C. § 2603” would be a cite for a statute that could be found in the 26th volume of the U.S.C, where Section 2603 appears. This particular section describes what is required for a Uniform Settlement Statement for close of escrow. A cite with “U.S.C.” in it tells you that a federal law affects the issue, transaction, or property. Using the citation system, you can find the exact language of the statute cited.

1-1c Federal Administrative Regulations

For each federal legislative enactment passed by Congress, a new agency is created, or an existing agency is assigned to implement and enforce the law. For example, the new laws on mortgage lending and disclosures are enforced by the **Bureau of Consumer Financial Protection** (now known as the **Consumer Financial Protection Bureau [CFPB]**), which is located within the Federal Reserve. The CFPB is required to develop regulations on credit counseling as well as new disclosure forms for consumer mortgage lending. Like all agencies, the CFPB will be filling in the details for general statutory provisions with procedures, forms, and enforcement.

The Restoring American Financial Stability Act of 2010 was passed by Congress in a general form and was intended to regulate the serious problems that had developed in mortgage lending, particularly in terms of required disclosures in creating the mortgage relationship and in foreclosure processes should the debtor default. The CFPB has now developed the required disclosures to consumers as well as the forms lenders must use (see Chapter 15). The regulations of an administrative agency fill in the details on the Congressional statute’s skeletal purpose.

Another example of a federal regulatory scheme is that created by the Environmental Protection Agency (EPA) under authority granted by Congress in CERCLA. CERCLA authorized the EPA to clean up sites contaminated by toxic wastes (42 U.S.C. §§ 9601 *et seq.*; see Chapter 20). The federal regulations fill in the details with a list of 700 substances that are considered toxic wastes that require cleanup and result in liability for the failure to perform the cleanup to rid the land of any of the toxic substances (40 C.F.R. § 302). Congress established the statutory authority, and the EPA handles the details and enforcement.

All federal regulations appear in a series of volumes referred to as the **Code of Federal Regulations (CFR)**. When an abbreviation, citation (or cite) such as “12 C.F.R. § 226” appears in a book or a real estate document, you know that a

federal regulation applies and, using the cite, you can find the regulation. In the example, 12 is the volume number within the CFR, and 226 is the section number of the regulation within that particular volume.

The CFR is a series of paperback volumes that is reprinted every year because of the many changes in administrative agency regulations. In addition, an update to the CFR, called the *Federal Register*, is published each working day and includes changes and proposed changes in existing regulations.

1-1d State Constitutions

State constitutions are similar to the U.S. Constitution in that they provide a framework for state legislative bodies and agencies, and their authority and limits. However, most state constitutions tend to be more detailed than the U.S. Constitution, which emphasizes government structure and powers. For example, California's state constitution has a provision covering *usury*, or charging in excess of a certain maximum interest rate in a credit transaction (Cal. Const. Art. 15, § 1) (see Chapter 15). Five additional examples of provisions from state constitutions are as follows:

1. California—has several sections that provide exemption of certain types of property from taxation, including property used for religious worship or higher education (Cal. Const. Art. 13, § 3).
2. Arizona—allows any person who holds a real estate broker's or salesman's license to draft and fill out any forms related to the sale or leasing of real property, including earnest money receipts, purchase agreements, deeds, mortgages, leases, bills of sale, and other necessary documents (Ariz. Const. Art. 26, §§ 1-3).
3. New Jersey—exempts real property used exclusively for religious, educational, charitable, or cemetery purposes from taxation (NJ. Const. Art. VIII, § 1, Paragraph 2).
4. Minnesota—makes leases of agricultural lands for longer than 21 years void (Minn. Const. Art. I, § 15).
5. Georgia—covers the requirements for an easement by necessity (Ga. Const. Art. 1, § 3).

These examples illustrate that state constitutions tend to be more specific than the U.S. Constitution and are sources for real estate law in the states.

1-1e State Legislative Enactments

Just as at the federal level, the legislative bodies in each state enact laws that affect property rights and transactions, including procedures for obtaining licenses for selling real estate, methods of financing real estate purchases, time periods for adverse possession, and provisions for creating a will or probating an estate. The details of real estate law are found largely in state legislation.

State legislation also contains the so-called uniform laws, a great many of which are important in real estate transactions. Uniform laws are drafted by representatives of industry, academia, and the legal professions. Examples of uniform laws adopted by states that affect real estate transactions include the Uniform Marital Property Act, the Uniform Probate Code, the Uniform Commercial Code, the Uniform Partnership Act, and the Model Residential Landlord/Tenant Act.

These state legislative enactments are found in volumes for each state. In Texas, the legislative enactments are found in *Vernon's Texas Codes, Annotated* (for example, V.T.C.A., *Water Code*, § 1.001). In Illinois, the state statutes are found in *Smith-Hurd's Annotated Illinois Statutes* (for example, S.H.A. Ch. 96, § 4601). Maine's statutes are called *Maine Revised Statutes* (for example, 1 M.R.S. § 2).

1-1f State Administrative Regulations

Again, as at the federal level, state legislative bodies create or assign administrative agencies to enforce legislation. These state agencies also provide the details, forms, and procedures necessary for compliance with state laws. For example, all states have laws on the licensing of real estate agents and brokers. In each state, an agency is responsible for collecting licensing fees, administering exams, and disciplining agents and brokers who violate laws and regulations (see Chapter 12).

1-1g County, City, and Borough Ordinances

A great amount of real estate law can be found in the smallest and most local entity, such as a county, city, or borough. For example, most of the laws relating to zoning can be found in the laws passed by local entities and are referred to as **ordinances**. Other topics covered by ordinances on a local level include building permits, building inspections, fire codes, building-height restrictions, noise regulations, and curfews. Many of the battles over economic development, the location of power plants, and even whether a new Walmart store can be built are grounded in the application and interpretation of these local laws. (The zoning discussion appears in Chapter 18. Chapter 21 includes a discussion of economic development issues.)

1-1h Private Law

One type of law in the pyramid comes from individuals and land owners: **private law**. Private law consists of those rules and regulations created by landowners. For example, landlords can create and post regulations on tenants' use of common facilities such as pools, laundry areas, parking lots, and walkways. (Chapter 9 includes a complete discussion of residential landlord-tenant relationships.) In some instances, private developers have restrictions and covenants on the use of property in their developments. Some residential developments permit only those above the age of 18 years to live as residents in the area. (See Chapter 19 for a complete discussion.) One area of private law that has increased significantly over the past decade is that of homeowners' associations. Litigation by homeowners against their associations almost always involves a question of whether the private rules of the association violate rights given by laws and constitutions (see Chapter 11 for more discussion).

Private law is also created through contracts for the purchase, sale, lease, or mortgage of real estate. The parties who enter into valid contractual obligations are bound by the terms of the contract as a form of private law. Contractual obligations can be enforced, like public laws, through the courts.

All private law is still subject to the boundaries and rights established in constitutional and statutory sources. A private law related

PRACTICAL TIP

Know how and where to find your state statutes and regulations along with your city and county ordinances. Learn the names of your statutes, regulations, and ordinances, and how they are organized. Request to be placed on mailing lists of state administrative agencies so that you are aware of enforcement actions and proposed rule changes. Check the agendas for city council meetings. When zoning issues appear, you can attend and provide input. Follow legislative sessions and proposed laws through the media or through professional organizations such as the National Association of Realtors.

to real estate may not abridge constitutional rights and freedoms. (See Chapter 19 for a full discussion of constitutional rights.)

1-1i Court Decisions

The prior discussions of the various sources of law seem complete, and it would be difficult to imagine that much more detail could exist in real estate law. However, constitutions, statutes, and ordinances are only general statements of the law that leave many terms undefined and also result in questions of application and interpretation. To whom does the law apply? When does the law apply, and how is it to be applied? Finding the answers to these questions requires interpretation of law from all levels, a process that is carried out by various courts in state and federal judicial systems. The role of the courts is to answer the questions of application and to clarify ambiguities in statutes, ordinances, and contracts.

For example, suppose that a state statute requires “good faith” by all parties in performing their contract obligations. The meaning of “good faith” will be established through court cases and judicial interpretation. Is a party acting in good faith when she is unable to obtain financing from one lender and refuses to apply with another lender? Is a broker acting in good faith when he lists a property and then does not advertise or otherwise promote its sale? Without case examples and judicial opinions on the definition of “good faith,” the statute would be meaningless.

Permanent records of courts’ decisions can be found in opinions published in books that far exceed in number the volumes devoted to statutes. These opinions are part of the law in that they give the complete meaning of a statute or ordinance.

In addition to their interpretive function, the courts also have the responsibility of making, applying, and analyzing **common law**. Common law is law that is not found in any code or statute. The concept of nuisance (see Chapter 4) was developed by the courts to prevent others from interfering with your use and enjoyment of your property. Nuisance examples and the requirements for establishing a nuisance as well as appropriate remedies are found in case law. The law on nuisance comes largely from the courts, not from statutes.

Common law originated in England and continues to exist within case law, and it is changing and growing on a case-by-case basis. Because most American real property concepts can be traced to the English rules on real estate ownership and transfer, common law remains an important source of real estate law.

Reliance on common law or prior court opinions in developing interpretations or resolutions to factually similar problems is also called following **case precedent**. Precedent can be used as a guideline for contracts and transactions that occur after the judicial decision. Once a court has interpreted a particular statute or contract, other parties can use and rely upon the court’s interpretation.

For example, all states require that landowners give consent for work or improvement to be done on their property before the person doing that work or improvement can place a lien on that property if the landowner who benefits from the work refuses to pay. “Consent” seems like a simple word and concept, but the following two cases illustrate that “consent” requires a great deal of judicial interpretation. While the rights of landowners and contractors who improve properties are covered in detail in Chapter 7, the *Waterview* and *Lighting and Lamp* cases illustrate how courts interpret general terms and their application to different sets of facts.

WATERVIEW SITE SERVICES, INC. V. PAY DAY, INC.

11 A.3d 692 (Conn. App. 2010)

Chipping Away at Consent

FACTS

James R. DeVito, a general contractor and partial owner of Waterview Site Services, had a lengthy history of doing business with Salvatore DiNardo, a real estate investor and partial owner of Pay Day, Inc. (Pay Day).

In 2001, Pay Day purchased 575 Asylum Street, Bridgeport, a vacant lot in an industrial area that was unoccupied and overgrown with weeds. DeVito and DiNardo entered into an oral agreement allowing DeVito to occupy the property. DeVito maintained that they both expected that there would be “extensive site improvements” and they would split the cost of those improvements. DeVito’s understanding was that after he had made the clean-up that the lot would be used for a rock crushing and processing operation and that in exchange for all his work, the title to the lot would be transferred to a company that DiNardo and DeVito would own in equal shares. DiNardo’s understanding was significantly different, and he maintained that he had a straightforward lease agreement that permitted DeVito to use the lot as a contractor’s yard or construction yard and that any site work would be credited against rent.

After DeVito (plaintiff) had spent a great deal of time and money to turn the lot into a crushing yard, the relationship with DiNardo went south. DeVito sent invoices for his work to DiNardo. The invoices totaled \$269,868.79. DeVito also filed a certificate of mechanic’s lien on October 7, 2004, in the same amount. On January 6, 2005, DeVito filed suits seeking (1) foreclosure of the mechanic’s lien and (2) damages for unjust enrichment. DiNardo (defendant) filed a counterclaim requesting compensation or a set-off against any recovery for valuable natural resources removed by DeVito without permission.

The lower court ruled in favor of DeVito finding that he had indeed invested substantial sums in time and money in improving the lot. The lower court also ordered foreclosure on the mechanic’s lien and also found in favor of DeVito on his unjust enrichment claim, in the amount of \$224,959.24, which represented an adjusted amount after subtraction of \$36,000 for the fair rental value of the lot during the time that DeVito was there chipping away at creating a rock-crushing business. DiNardo appealed.

JUDICIAL OPINION

Alford, Justice

The defendant first contends that the court erred in finding that it consented to the site work performed by the plaintiff. It argues that consent for the purpose of the mechanic’s lien statute requires that the defendant not only knew that the work was being performed but also agreed that it may be liable for the materials or labor. We agree with the court’s finding that the required consent was present for the purposes of foreclosing the mechanic’s lien.

As an initial matter, we dismiss the defendant’s argument that because the court found no “meeting of the minds” in respect to the contract claims that DeVito filed, individually; it could not in turn enforce the mechanic’s lien under the theory of an implied contract. The trial court’s finding that there was no meeting of the minds on the contract governing the overall agreement, which controlled use of the property, site work, future dealings and purchase of machinery, among other things, does not preclude a finding of limited consent for the purposes of the mechanic’s lien.

General Statutes § 49-33, which governs mechanic’s liens, provides in relevant part:

“(a) If any person has a claim for more than ten dollars for materials furnished or services rendered ... in the improvement of any lot or in the site development or subdivision of any plot of land, and the claim is by virtue of an agreement with or by consent of the owner of the land ... then the plot of land, is subject to the payment of the [mechanic’s lien]....”

“Under ... § 49-33(a), the consent required from the owner ... is more than the mere granting of permission for work to be conducted on one’s property ... or the mere knowledge that work was being performed on one’s land.... The consent meant by the statute must be a consent that indicates an agreement that the owner of at least the land shall be, or may be, liable for the materials or labor.”

Whether the plaintiff consented to the performance of the defendant’s work is a question of fact. Our review of the trial court’s factual findings is limited to the question of whether the findings are clearly erroneous.

Because there was no written contract between the parties, the court’s conclusion that there was

consent for the purposes of foreclosure of the mechanic's lien rested primarily on its assessment of the weight and credibility to be accorded to the witness' testimony. In reviewing the record, we conclude that there is sufficient evidence to support the court's findings. DeVito testified to his belief that there was an agreement that the defendant would be responsible for the cost of site work. DiNardo frequented the property during the period of time the work was being performed and, in fact, explicitly directed certain actions. He also caused direct payment to be made to subcontractors for work performed at the site. The court may have credited these pieces of evidence in finding that the defendant consented to being held liable for the payments as required under the statute.

Furthermore, the defendant's position is that it intended to offset the rent by the cost of the site

work, which again supports the finding that the defendant consented to being held financially liable for materials and labor used for the site work. In light of this evidence, the court's finding that the defendant consented to the site improvements for the purposes of the implied contract, as required under the mechanic's lien statute, is not clearly erroneous. Accordingly, we affirm the court's decision in favor of the plaintiff.

The judgment is affirmed.

CASE QUESTIONS

1. Is there evidence of consent?
2. What is the significance of DiNardo having visited the property while the work was ongoing?
3. Is consent for a mechanic's lien something different from a "meeting of the minds" for a contract?

LIGHTING AND LAMP CORPORATION V. ATHENS LOFTS, L.L.C.

50 So.3d 1118 (Ala. 2011)

The Enlightened and Unpaid Creditor

FACTS

Between August 2006 and June 2007, Lighting and Lamp Corporation (plaintiff), a supplier of electrical fixtures and supplies, sold Jones-Williams Construction Co., Inc. electrical fixtures and supplies for the Athens Flatts project. Jones-Williams had contracted with Athens Lofts to do the electrical and lighting work for Athens Flatts. Jones-Williams charged those electrical fixtures and supplies to a specific account that Lighting and Lamp had set up for Jones-Williams for the Athens Flatts project. In June 2007, Jones-Williams abandoned the Athens Flatts project before completing its work.

On June 18, 2007, Adam Cohen, a member of Athens Lofts, met with Tim Pearson, Lighting and Lamp's credit manager, and Ronnie Vetrano, the Lighting and Lamp salesman assigned to the Athens Flatts project. Jim O'Brien, a business associate of Cohen's who did not own an interest in Athens Lofts, attended the meeting with Cohen. At the meeting, Pearson informed Cohen that Jones-Williams owed Lighting and Lamp approximately \$119,000 for electrical fixtures and supplies that Jones-Williams had purchased on credit for use on the Athens Flatts project. Pearson and Vetrano said that Cohen orally promised at the meeting that Athens Lofts would pay that amount in full in consideration for Lighting and Lamp's selling

Athens Lofts the additional electrical fixtures and supplies needed to complete the Athens Flatts project. Cohen, on the other hand, insists that he did not make such a promise but that he did orally promise that Athens Lofts would pay only for certain electrical fixtures that Lighting and Lamp was holding in its warehouse, which Athens Lofts needed in order to complete the Athens Flatts project, and for any electrical fixtures and supplies purchased after June 18, 2007, for use in completing the Athens Flatts project. O'Brien recalled only a discussion about a payment by Athens Lofts to obtain the release of the fixtures Lamp and Lighting was holding in its warehouse. He did not recall a promise by Cohen to pay in full the approximately \$119,000 that Jones-Williams owed.

Between June 18, 2007, and September 24, 2007, Lighting and Lamp allowed the electrician who was completing the electrical work on the Athens Flatts project to charge \$33,513.18 worth of electrical fixtures and supplies to the account Lighting and Lamp had set up for Jones-Williams for the Athens Flatts project. During that period, Athens Lofts paid Lighting and Lamp \$40,000. On September 24, 2007, Lighting and Lamp began requiring cash payment for all materials it provided for the Athens Flatts project, and Athens Lofts paid cash for all purchases from Lighting and Lamp after that date.