

# LAND TRANSACTIONS, FINANCE & DEVELOPMENT

Spring 2019

**Wednesdays 2:10 to 4:50 p.m.**  
**Nina Thomas Classroom**

## Marc Mihaly

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## Description

This introductory land use course, a companion to Land Use Regulation, provides knowledge essential for a career as a land use regulator, land trust attorney or project manager, developer, or environmental advocate in the land use arena.

The course covers the private side of land use: how land is surveyed and divided, the dynamics at play as around the conveyance, from the initial contract to the final execution. The course examines land and development finance in some detail, as well the development process. At every stage in the process, we examine the roles of attorney, realtor, land transaction seller and buyer, developer, lender, equity investor, architect, engineer, planner, regulator, and others involved in the effort to create our built environment. During the course students will draft and negotiate a purchase and sale land development contract.

## Texts

The texts are:

- George Lefcoe's multidisciplinary text, REAL ESTATE TRANSACTIONS, Sixth Edition, LexisNexis, 2009, cited in this syllabus as "*Lefcoe*." This text, addressing a practical area, generally uses problems rather than cases. We will cover many of the problems in class. It's available in bound and loose-leaf form at the bookstore.
- A course pack with excerpts from Miles *et al*, REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS, Urban Land Institute. This is the 4<sup>th</sup> edition from 2009, superior in my view to the latest 5<sup>th</sup> edition. This work is cited as "*ULI Development*" with the applicable chapter and page numbers.

- I've asked the bookstore to stock a few copies of Hamilton and Booth, *Business Basics for Law Students*, Aspen, 2006. It isn't required for the course, but it's straightforward, accessible, and will help you in various courses as well as this one.

## Requirements

- Read the materials and participate in class. Class participation accounts for part of the grade in the class.
- Complete problem sets during the term. These allow you to synthesize and apply what you're learning from the reading and class. We'll go over the problems in class.
- Participate in the land development and sale contract negotiation.
- Complete a final take-home exam or write an AWR.

## Section I: Introduction

### Class 1 (Wednesday, January 9).

**History of Land Disposition and Development.** This class examines the history of land development in the United States from the Colonial period to the present time. This essential background serves to introduce the precursors of the modern built environment in which we live.

- *ULI Development*, Ch. 4: "The Colonial Period to the Late 1800's"
- *ULI Development*, Ch. 5: "The Late 1800's to World War II"
- *ULI Development*, Ch. 6: "Post- WW II to the Present"
- *ULI Development*, Ch. 3: "Developers and Their Partners," but just pp. 39-53. We'll cover the other players in this chapter later in the class.
- *Lefcoe*, Ch. 1: "Buying and Selling Real Estate in the United States," pp. 1-7. (Real Estate Sales, Useful Definitions)

Total: 92 pages

## ***Section II: The Creation of Marketable Plots of Land***

### **Class 2 (Wednesday, January 16).**

**Surveys and Land Description.** This first “nuts & bolts” reading provides basic information on the creation of marketable parcels of land in the United States, essential information for anyone working in land use. Read *Lefcoe* Ch. 18 slowly and carefully.

- *Lefcoe*, Ch. 18: “Surveys, Land Descriptions and Boundary Disputes”
- *Lefcoe*, Ch. 33: “Obtaining Entitlements...,” pp. 805-808 (Subdivision Map Act, Parts A and B)

Total: 29 pages

**Title and Deed.** Essential information for attorneys and other actors in the land use game, we examine here the dysfunctional, but prevalent, system for recording title, and for creating attorney’s opinions or title insurance addressing title validity. Review for those of you who had it in Property, new for others, and requires careful reading.

- *Lefcoe*, Ch. 14: “The Recording Acts”
  - pp. 243-254 (*Introduction and System of Public Land Records*)
  - pp. 261-263 (*III. Notice, race-notice and race compared*)
  - pp. 265-267 (*Doctrine of Shelter*)
  - pp. 278-279 (*Wild Deeds*)
- *Lefcoe*, Ch. 17: “The Deed,” 335-346 (I. Deed Formalities)

Total: 28 pages

**I’ll hand out the first Short Exercise.**

### **Class 3 (Wednesday, January 23).**

**First Short Exercise due in class and discussed.**

#### **Reading:**

**Title Insurance.** Title insurance has largely (but not entirely—see Vermont, for example) replaced attorney title opinions as the method to provide confidence in the land deeds sold and bought in the typical real estate transaction. Here we learn the basics of how title insurance functions.

- *Lefcoe*, Ch. 15: “Title Insurance”

Total: 21 pages

### ***Section III: The Basic Land Transaction from Site Control to Closing: The Purchase and Sale Agreement, Deed & Closing Process***

#### **Class 3 continued:**

**The Purchase and Sale Agreement: Statute of Frauds and Parties.** Written purchase and sale agreements (“P&S Agreements”) dominate the initial real estate transaction with pre-printed offer/acceptance forms in the residential market and more elaborate contracts in the commercial setting.

- *Lefcoe*, Ch. 4: “Purchase-and-Sale Agreements: Statute of Frauds and Parties to the Agreement”
- *Lefcoe*, Ch. 5: “Purchase-and-Sale Agreements: Following the Money”

Total: 39 pages

**I’ll hand out the second Short Exercise.**

#### **Class 4 (Wednesday, January 30).**

**Second Short Exercise due in class and discussed.**

**Purchase and Sale Agreement: The Subject Property.** This reading delves further into how the agreement addresses the subject property.

- *Lefcoe*, Ch. 6:
- “The Subject Property”

Total: 21 pages

**The Quality of Title, Performance, Doctrine of Merger, and Termination.** The agreement has to contain mechanisms to ensure the quality of the title to be passed. Once escrow closes, the purchase and sale agreement is superceded by (i.e., “merged” into) the deed. When the seller or buyer backs out, the remedies are special and important.

- *Lefcoe*, Ch. 7: “The Quality of Seller’s Title”
- *Lefcoe*, Ch. 8: “Contract Provisions Regarding the Time for Performance and the Presumption of Merger”

- *Lefcoe*, Ch. 9: “Terminating, Real Estate Contracts”

Total: 35 pages

### **Class 5 (Wednesday, February 6).**

**Closing the Deal.** Escrow and closing bring it all together.

- *Lefcoe*, Ch. 16: “Real Estate Closing and Escrows”
- *Lefcoe*, Ch. 17: “The Deed,” pp. 346-359.

Total: 33 pages

### ***Section IV: Basic Real Estate Finance***

#### **Class 5 continued:**

**The Institutional Setting.** We start with the sources and flows of capital in the United States, and learn the major financial players on both the lending (debt) and ownership (equity) sides.

- *ULI Development*, Ch. 7: “Real Estate Finance: Background,” pp. 156-175 (“Capital Markets” and “The Real Estate Finance Cycle”).
- *ULI Development*, Ch. 19: “Stages Four and Five: Contract Negotiation and Formal Commitment,” pp. 450-458 (Arranging Financing: The Construction Lender, The Permanent Lender, The Mezzanine Lender, Sources, and The Common Thread).

Total: 27 pages

### **Class 6 (Wednesday, February 13).**

**Real Estate Finance.** This class and the next introduce you to concepts that dominate the lives of anyone involved with land use efforts, whether representing project developers, lenders, government partners or regulators, project opponents, or groups with specific interests such as low-income housing, habitat preservation, transportation, etc. Topics include net operating income, debt service ratios and related measures, net present value, discounted cash flow, internal rate of return, residual value, and the project financial performance projection spreadsheet, known in the business as the “pro forma.” A basic working knowledge of these concepts provides an essential tool for anyone concerned with the modern land use endeavor. Most everyone in the real estate world comes to understand these concepts, but initially this is difficult material to learn,

especially if you have no economic or finance background. We'll go over it in class. Read slowly, thinking through each paragraph and table.

- *Lefcoe*, Ch. 27: "Methods of Financial Analysis for Real Estate Investment," pp. 591-606.

Total: 15 difficult pages

Then read the rest of the finance chapter plus a very brief introduction to tax matters in real estate. Study carefully the pro forma at the end of Chapter 27.

- *Lefcoe*, Ch. 27: "Methods of Financial Analysis for Real Estate Investments," pp. 606-620.
- *Lefcoe*, Ch. 28: "Tax Matters in Real Estate," pp. 623-top of 628.

Total: 20 difficult pages

### **Drafting Exercise.**

- We will hand out the Drafting Exercise seller and buyer facts and instructions.

## **Class 7 Wednesday, February 20).**

### **Real Estate Finance 2**

- *ULI Development*, Ch. 8: "Real Estate Finance: The Logic Behind Real Estate Financing Decisions," pp. 177-186 (up to and not including "Returns to Equity Investors").
- *ULI Development*, Ch. 9: "Discounted Cash Flow: The Equity Perspective in More Detail," including discounted cash flow analysis, and determining a discount rate. pp. 203-207 (to end of the page); pp. 212-213 (Gateway Business Center case study described); and its pro forma "Gateway Business Center: leveraged Property Analysis. pp. 224-227 (Figure 9-14).
- *ULI Development*, Ch. 13: "The Roles of the Public Sector," pp. 314-320 (Public/Private Roles in Planning and Financing Infrastructure—Public capital, Impact Fees, Special Taxing Districts, Privatization, and the Illinois TIF example at Figure 13-9).

Total for the reading: 24 difficult pages

## ***Section V: Real Estate Finance: The Classic Mortgage***

### **Class 8 (Wednesday, February 27).**

**The Residential Mortgage: An Introduction.** The mortgage is the oldest, traditional, and most pervasive form of financing for acquisition of both land and improvements, as well as the development of improvements. In this and the following classes, we examine the concept in some detail. This is the core of the traditional real estate course since attorneys draft these documents, and still review them, and in the commercial context, author the principle documents. This class begins with the simplest mortgage, the residential version.

- *Lefcoe*, Ch. 10: “Residential Mortgage Lending”

Total: 27 pages

**The Commercial Mortgage.** An introduction to commercial lending, and prevalent, if more sophisticated terms and concepts.

- *Lefcoe*, Ch. 11: “Commercial Mortgage Lending”

Total: 10 pages

### **Mortgage Prepayment.**

- *Lefcoe*, Ch. 12: “Prepayment of Mortgage Loans”

Total: 13 pages

### **Drafting Exercise**

- Seller and buyer offers are due in class.
- We will assign buyer and seller groups to each other for negotiation. You will have until March 20 to negotiate a final P&S Agreement or produce a Failure Memorandum

### **Spring Recess, March 3-11**

### **Class 9. (Wednesday, March 13).**

#### **Selling Mortgages and Notes.**

- *Lefcoe*, Ch. 13: “When the Borrower Sells or Pledges Mortgaged Property”

Total: 15 pages

**Allocation of Risk between the Mortgagor and the Mortgagee (lender) and Lessee Status as the Landlord Gets in Trouble.**

- *Lefcoe*, Ch. 19: “The Mortgagee’s Interest in the Security Property”
- *Lefcoe*, Ch. 20: Section IV: “Lessee’s Status Following Landlord’s Mortgage Default and Foreclosure,” pp. 420-426.

Total: 23 pages

### **Class 10. (Wednesday, March 20).**

**Foreclosure.** Here’s how it ends when owners cease to pay the mortgage and the mortgagee elects to terminate. Many aspects of the original purchase and sale contract and the earlier relationship reflect “What If’s” that relate to foreclosure.

- *Lefcoe*, Ch. 21: “Mortgage Foreclosure”

Total: 31 pages

### **Drafting Exercise**

- ***Due Today:*** Negotiated P&S Agreement or discussion of reasons for failure to agree.

### **Visiting Professor Kathy Beyer, VP for Development at Housing Vermont.**

- Congressional Budget Office: *Federal Housing Assistance for Low Income Households (2015)*
- Von Hoffman: *History Lessons for Today’s Housing Policy* (Joint Center for Housing Studies Harvard University, 2012)
- Office of the Currency, Administrator of National Banks: *Fact Sheet: Low-Income Housing Tax Credit Program.*

Total: 26 pages.

**I will hand out the third Short Exercise.**

### **Class 11. (Wednesday, March 27).**

**Third Short Exercise due in class and discussed.**

### **Allocating Leftovers and Anti-deficiency Protection.**

- *Lefcoe*, Ch. 22: “Allocating Foreclosure Sale Proceeds and Understanding Anti-Deficiency Legislation”



Total: 14 pages

**Alternatives to Foreclosure; “Workouts.”** This is the most frequent approach when commercial mortgagees get into trouble.

- *Lefcoe*, Ch. 23: “Alternatives to Foreclosure: Workouts and Deeds in Lieu of Foreclosure”
- Review of the P&S Agreement Negotiation; Two groups will present.

Total: 12 pages

**Drafting Exercise.**

- We’ll discuss results, with some teams presenting.

## ***Commercial Finance***

### **Class 12. (Wednesday, April 3).**

**Development Financing 1.** In this and the following class we learn the basics of how everyone in the business analyzes real estate transactions, whether as proponents, opponents, regulators, or land trust officials. This class examines the basics of development financing, construction loans, and construction lender’s risk management

- *Lefcoe*, Ch. 24: “Development and Construction Financing.”

Total: 26 pages

In this class we also examine now prevalent alternatives to the classic mortgage including the reverse mortgage, price adjusted, shared appreciation, convertible, and wraparound mortgages, as well as installment sale contracts, equity sharing, and mezzanine financing.

- *Lefcoe*, Ch. 30: “Alternatives to the ‘Plain Vanilla’ Mortgage”

Total 30 pages

**Forth Short Exercise (financing exercise) handed out.**

### **Class 13 (Wednesday, April 10).**

**Forth Short due in class and discussed.**

**Development Financing 2.** This class examines the now common use of ground leasing and the sale/leaseback.

- *Lefcoe*, Ch. 31: “The Lease as Financing Device”. Read 725-top 735; 737-738 [(f) + 2(a), (b) and (c); 740 F to 742 (Subleases) and II. “Sale Leaseback,” but pp. 741-2 (Part A) only.

Total: 22 pages

## ***A Brief Overview of Development***

### **Class 13 continued:**

**A Quick Review of Modern Regulation.** Some of you have studied some of this modern regulatory repertoire, so this may be review of the contemporary regulator’s options for addressing development.

- *Lefcoe*, Ch. 33: “Obtaining Entitlements for Real Estate Development,” pp. 810-842 (modern zoning, master plans, vested rights).

Total: 32 pages

### **Class 14 (Wednesday, April 17).**

**The Development Process.** This class develops in some detail how modern development works, who are the characters involved, and what are their respective interests. We focus here primarily on so called “vertical development”—that is building the use. The lessons here pertain whether the use is residential, commercial or industrial. We may have a guest developer, a low-income housing advocate present a case in this or the next class.

- *Lefcoe*, Ch. 32: “Commercial Leasing,” pp. 751-774 (From II “Parties to the Lease” through V B (“Percentage Rent Formulas”).
- *Lefcoe*, Ch. 25: “Construction Contracts,” pp. 541-557 (From III “Owner-General Contractor Agreement” through end of chapter.
- *ULI Development*, Ch 19: “Stages Four and Five: Contract Negotiation and Formal Commitment,” pp. 465-485 (Decisions about Design and Contractors, Checklist for Construction Contracts; Bidding vs. Negotiation: Fixed Prices vs. Cost Plus; Fast Tack Construction; Bonding; Decisions about Major Tenants; Decisions about Equity; The Government as Partner; Commitment, Signing Contracts, and Initiating Construction).
- *ULI Development*, Ch 21: “Stage Eight: Property, Asset, and Portfolio Management,” pp. 507-531.

Total: 84 pages

**Review:** I will also hand out in the class a list of terms you should know, and I'll spend some time reviewing the contents of the class.