

# LAND TRANSACTIONS, FINANCE & DEVELOPMENT

Spring 2021

Once a week, Fridays 9:55 a.m. to 12:35 p.m.

The Platform will be Zoom

Canvas is the LMS

## Professor 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 around the conveyance of land, from the initial contract to the final execution, and how development is planned and financed. 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. It's available at the bookstore, and if you're not in South Royalton they can ship to you.

- A course pack with excerpts from Miles *et al*, REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS, Urban Land Institute (“ULI”). This is the 4<sup>th</sup> edition from 2009, superior in my view to the latest ULI 5<sup>th</sup> edition of the same work. This work is cited as “*ULI Development*” with the applicable chapter and page numbers. This course pack is available from the bookstore.
- 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.
- I’ve also asked the library to put on reserve a copy of Lefcoe, a copy of the full version of ULI Development, as well as two additional books that may be of interest to you: Long, *Finance for Real Estate Development*, ULI; and Peiser and Hamilton, *Professional Real Estate Development: The ULI Guide to THE BUSINESS*.

## Requirements

- Read the materials and participate in the virtual class, both the time together on Friday mornings (that is “synchronous”), and the web-based content (“e-synchronous”). Class participation accounts for part of the grade in the class.
- Complete the graded exercises, and other web-based activities during the term. These allow you to synthesize and apply what you’re learning from the reading and class. We’ll go over the problem sets in class.
- Participate in the graded land sale contract drafting and negotiation exercise.
- The seven graded exercises and negotiation substitute for a final exam.

## ***Section I: Introduction***

### **Week 1 (Class Session Friday, January 15)**

**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. This material is from the course pack and is referred to here as “*ULI Development*.”

**Reading:**

- *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

- Review the excerpts from the U.S. Constitution and questions in the short document found under Module 1 in the Canvas LMS.

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

### **Week 2 (Class Session Friday, January 22)**

#### **Exercise 1**

***The first Short Exercise will be available on Canvas this Friday, January 22, (and is due uploaded onto Canvas and emailed to Kendall Watts & Marc Mihaly Thursday January 28 at or before 12:00 noon.)***

**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.

**Reading:**

- *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.

**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

**Week 3 (Class Session Friday, January 29)**

**Exercises**

***The first Short Exercise is due uploaded onto Canvas and emailed to Kendall and Marc Thursday January 28 at or before 12:00 noon.***

In class: First Short Exercise will be discussed.

***The second Short Exercise will be available on Canvas on this Friday after class, (and is due uploaded onto Canvas and emailed to Kendall & Marc on Thursday, February 4<sup>th</sup> at or before 12:00 noon.)***

**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.

**Reading:**

- *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.

**Reading:**

- *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

### **Week 4 (Class Session on Friday, February 5)**

**Exercises**

- ***The second Short Exercise is due uploaded onto Canvas and emailed to Kendall & Marc on Thursday, February 4<sup>th</sup> at or before 12:00 noon.)***
- Second Short Exercise will be discussed in class
- ***Exercise 3 will be available after class. It’s connected to reading for Week 5 (a sample P&S agreement).***

**Reading:**

**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 superseded 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

## **Week 5 (Class Session on Friday, February 12)**

### **Exercise 3**

- Read carefully the Sample Purchase & Sale Agreement (posted on Canvas).
- ***Then, after reading the P&S Agreement, complete Exercise 3 (available after class on last Friday, February 5) and upload and email to Kendall & Marc at or before 12:00 noon on Thursday, February 11<sup>th</sup>.***
- We will discuss the sample P&S Agreement and Exercise 3 in class
- ***Exercise 4 will be available after class on this Friday (and is due next Thursday, February 18)***

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

### **Reading:**

- *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***

**Week 5 continued:****Reading:**

**The Institutional Setting for Finance.** 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

**Week 6 (Class Session on Friday, February 19). (Negotiation Exercise Begins).****Exercise:**

- ***Complete Exercise 4 and upload to Canvas and email to Kendall and Marc before 12:00 noon on Thursday, February 18th.***
- We’ll discuss Exercise 4 in class.

**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.

**Reading:**

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

Total: 15 difficult pages

Then read more of the finance chapter plus a very brief introduction to tax matters in real estate.

- *Lefcoe*, Ch. 27: “Methods of Financial Analysis for Real Estate Investments,” pp. 606-615.
- *Lefcoe*, Ch. 28: “Tax Matters in Real Estate,” pp. 623-top of 628.

Total: 14 difficult pages

### **Drafting Exercise begins in class**

- **In class on 2-19: Drafting/Negotiation Exercise begins.** (No assignment yet.) We will divide the class into buyer and seller groups, and distribute the Drafting/Negotiation Exercise seller and buyer facts and instructions. Completed offers are due on March 11<sup>th</sup>, the Thursday after you return from Spring Break.

## **Week 7 (Class Session on Friday, February 26)**

### **Real Estate Finance 2**

#### **Reading:**

- *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).



- Review carefully the Post Office-Library text and pro forma at *Lefcoe* pp. 617-620

Total for the reading: 24 difficult pages

**Spring Recess, February 27-March 7** (Note: P&S offers are due the Thursday after the break)

### ***Section V. The Most Common Financing Device: The Classic Mortgage***

**Week 8 (Offers due Thursday, March 11; Class Session on Friday on March 12)**

#### **Drafting/Negotiation Exercise**

- ***Seller and buyer offers are due uploaded onto Canvas and emailed to Kendall and Marc on or before 12:00 noon on Thursday March 11<sup>th</sup>..***
- Note: In class on this Friday, March 12<sup>th</sup> we will assign buyer and seller groups to each other for the negotiation. You will have until March 25<sup>th</sup> to negotiate a final P&S Agreement or produce a Failure Memorandum

#### **Reading:**

**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

### **Week 9 (Class Session on Friday, March 19)**

#### **Reading:**

#### **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

### **Week 10. (Negotiated P&S Due on Thursday, March 25th; Class Session on Friday, March 26)**

#### **Drafting/Negotiation Exercise**

- ***Negotiated P&S Agreement or Failure Memorandum is due, uploaded on Canvas and emailed to Kendall and Marc at or before 12:00 noon on Thursday, March 25<sup>th</sup>.***
- We’ll discuss results in class on Friday with some teams presenting.

#### **Reading:**

**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

### **Week 11. (Class Session on Friday, April 2)**

*The fifth Exercise will be available on Canvas after class on Friday, April 2, (and is due at or before 12:00 noon on Thursday, April 8th.)*

#### **Reading**

##### **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"

Total: 12 pages

### ***Section VI. Commercial Finance***

#### **Week 12. (Class Session on Friday, April 9)**

##### **Exercises**

- *The fifth Exercise is due uploaded onto Canvas and emailed to Kendall and Marc at or before 12:00 noon on Thursday, April 8th.*
- In class: We'll discuss the 5<sup>th</sup> Exercise
- *The Sixth Exercise available on Canvas on this Friday, April 9 after class (and is due at or before 12:00 noon on Thursday, April 15).*

**Reading:**

**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

**Week 13 (Class Session on Friday, April 16)****Exercises**

- *The 6<sup>th</sup> exercise is due uploaded onto Canvas and emailed to Kendall & Marc at or before 12:00 noon on Thursday, April 15.*
- The sixth exercise will be discussed in class.
- *Seventh Exercise will be available on Canvas after class on this Friday (and is due at or before 12:00 noon on Thursday, April 22<sup>nd</sup>).*

**Reading:**

**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

## **Week 14 (Class Session on Friday, April 23)**

### **Exercise 7**

- ***Seventh Exercise is due at or before 12:00 noon uploaded onto Canvas and emailed to Kendall & Marc on Thursday, April 22<sup>nd</sup>***
- Seventh Exercised discussed in class.

### **Reading:**

**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.

- *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'll spend some time reviewing the contents of the class.