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Lefcoe: Land Development Law: Cases and Materials

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RECENT BOOKS

BOOK REVIEWS

LAND DEVELOPMENT LAW: CASES AND MATERIALS. By *George Lefcoe*. Indianapolis: Bobbs-Merrill. 1966. Pp. xlix, 1681. $14.50.

A casual inspection of the table of contents of *Land Development Law* gives one the impression that this book is an enormous intellectual smorgasbord from which teachers of a variety of traditional law school courses could pick materials to nourish the minds of their students. For example, a course in the law of "vendor and purchaser" and "conveyances" could be based on the materials in chapters 2, 4, 6, and 7, which deal respectively with "Vendors and Purchasers in the Private Land Markets: The Predevelopment Stage," "The Post Development Period: Land Sale Contracts and Deeds," "Recording," and "Title Insurance."[1] If desired, chapter 8, entitled "Private Governments: Land Use Controls by Contract,"[2] or chapter 4, entitled "Land Finance,"[3] or both, could be added to such a course. On the other hand, a course in "public control of land use" could be constructed with the materials in chapters 1, 3, 9, and 10, which deal respectively with "Government as Vendor and Purchaser," "Land Development and Public Regulation," "Planning and Zoning," and "Real Property Taxation."[4] And, such a course could be expanded to include private land use controls simply by adding chapter 8, "Private Governments: Land Use Controls by Contract."[5]

It is clear, however, that Professor Lefcoe has planned his book on the assumption that law students should be presented with "a representative cross section of the intricate problems and competing solutions which confront property lawyers" (p. xii), and that he would object to the traditional division between the "private law" oriented course in "vendor and purchaser" and "conveyances" and the "public law" oriented course in "land use controls." Thus, in the preface to his book, he states:

> [T]he attorney for a land developer may need to condition his client's purchase on the availability of both appropriate zoning changes and acceptable financing. He should associate the rules of land sale contracts—the Statute of Frauds, indefiniteness, inadequacy of consideration—with the laws of zoning and the practice of lenders. [p. vi.]

Moreover, a course in property law should not place its whole em-

1. These chapters contain 434 pages.
2. This chapter would add another 202 pages.
3. This chapter would add another 244 pages.
4. These chapters contain 737 pages.
5. This chapter would add another 202 pages.

phasis on the role of "private" criteria in shaping official decisions. Professor Lefcoe thus further notes:

> [L]awyers cannot afford to assume that people always act on the basis of the narrowest possible perception of their own self-interests. We are members of a multitude of groups and possess a variety of interests that often conflict. The frequent task of the lawyer is to devise an argument to persuade against self-interest narrowly conceived. [p. xi.]

Materials on land use planning, zoning, subdivision control, and urban renewal provide an especially useful basis for a study of the norms used in resolving land development disputes.

Assuming that it would be desirable to consider all the subject matters included in *Land Development Law* in a single course—an assumption I am inclined to accept—is it possible to do so? The book, physically, is a monster of 1,618 pages, plus a twenty-four page bibliography and a thirty-nine page index. In terms of verbiage, however, the book is not too much longer than the widely used property course books by Casner and Leach[6] or Cribbet, Fritz, and Johnson;[7] and it is actually a bit shorter than the recently published property course book of which I am a co-author.[8] Yet even so, the sheer bulk of *Land Development Law* creates problems. If it were adapted to use in the first-year "basic" property course, it could easily be "covered" in an eight-semester-hour course (a rare commodity nowadays), and it could certainly be used in a six-semester-hour course (more common, but by no means universal) without too much difficulty. In my judgment, however, the book is too advanced for use in a first-year course. Hence *Land Development Law* will probably be used in second- or third-year courses in most law schools. And, since a six-semester-hour allotment of time for a second- or third-year course is hard to come by, it is probable that the book will actually have to be used as the basis for two three-semester-hour courses or, possibly, a four-semester-hour course. The latter, in fact, appears to be the time allotment at Professor Lefcoe's own law school, where the course is required.[9]

6. A. CASNER & W. LEACH, CASES ON PROPERTY (1951), with the 1959 Supplement, contains 1,388 pages exclusive of tables and index. The pages contain about as much material as those in *Land Development Law*.

7. J. CRIBBET, W. FRITZ & C. JOHNSON, CASES ON PROPERTY (2d ed. 1966) contains 1,263 pages exclusive of tables and index. Since the pages contain substantially more material than those in *Land Development Law*, the total number of words is about 14/15 of the number of words in *Land Development Law*.

8. O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW (1966) contains 1,199 pages exclusive of tables and index. Since the pages contain considerably more material than those in *Land Development Law*, however, the total number of words in *Basic Property Law* is substantially in excess of the number of words in *Land Development Law*.

9. The University of Southern California Law School Bulletin for 1965-1967, in describing the courses available, lists "Land Development II" as a four-semester-hour

Laying aside the difficulties of fitting a comprehensive, advanced course in "land development law" into the law school curriculum, how good a coursebook is *Land Development Law*? In my opinion, it is a very good book indeed. The choice of materials, both "legal" and "nonlegal" is excellent. It is not only comprehensive but well-designed to stimulate and maintain the interest of law students. As Professor Lefcoe points out:

> Provocative and important inquiry will result from studies which depict the context in which the lawyer works. Our students are worldly and want to participate in shaping their surroundings; they will not pursue a study enthusiastically when its only worldly references are the ambiguous and blurred abstractions from old cases and histories. [p. viii.]

In general, the choice of cases and problems for inclusion in *Land Development Law* is excellent, and much of the supplementary text is superb.[10] But there are, of course, some points on which the book can be subjected to at least mild criticism. I will deal with these points on a chapter-by-chapter basis.

Chapter 1. The choice of "Government as Vendor and Purchaser" as a starting point is open to question, since most of the land currently available for development is privately owned and is available without any need for government intervention through urban renewal or other public programs for land development or redevelopment. It would seem that the subject matter of chapter 2 would have been a more logical starting point, leaving "public" programs of development and redevelopment for later treatment on a comparative basis.

Chapter 2. This chapter, entitled "Vendors and Purchasers in the Private Land Markets: The Predevelopment Stage," deals at some length with the doctrine of specific performance of contracts

course dealing with "[e]minent domain; vendor and purchaser; recording; titles; land security devices; private controls of land use—easements, covenants, equitable servitudes; zoning; subdivisions; controls [sic]; land taxation." This course is required in the fourth semester of law study. "Land Development I," which is a three-semester-hour required course in the third semester of law study, is described as including "[h]istory of real property law; estates; introduction to future interests; restraints on alienation; concurrent interests (including condominiums and cooperatives); modern landlord and tenant problems." First-year required courses include a two-semester-hour course called "The Institution of Property," which is described as including "[p]roperty as an idea and a process," and "[f]unction of law in allocating, protecting, limiting and legitimating control over natural resources and new forms of wealth."

It might be noted that the University of Southern California Law School Bulletin for 1967-1969, in describing the courses available, omits "Land Development II"—presumably because of Professor Lefcoe's departure for the Yale Law School.

10. As the preface indicates (p. xiii), a good deal of this supplementary text is based on Professor Lefcoe's empirical research into the operation of land development law in Southern California. *See, e.g.*, pp. 188-99 (discussion of the operations of Property Research Corporation).

for the sale of land, but all other aspects of the land-sale contract (the earnest-money contract, not the installment-sale contract) are postponed to chapter 4, which deals with the "postdevelopment period." The same is true of the material on escrow and delivery and deeds. And there is no discussion at all of the law relating to options. Yet all these matters are surely involved in the "predevelopment stage," when the developer is concerned with the purchase of land. It can also be argued that title search and recording problems are more likely to cause serious difficulty to the developer at the "predevelopment stage" than in the "postdevelopment period." Indeed, it is doubtful whether the problem of marketable title, considered in chapter 2, can really be understood without some knowledge of the recording system and its defects—a matter which is not dealt with until chapters 6 and 7. Land finance is also involved in the "predevelopment stage," both in connection with the developer's purchase of land and the arrangement of a construction loan, but it is obviously impossible to deal with everything at once. It therefore seems desirable to postpone the consideration of land finance, as Professor Lefcoe has done, to a subsequent chapter.

Chapter 3. This chapter, entitled "Land Development and Public Regulation," is excellent as far as it goes. But with the emphasis on planning one wonders why a consideration of zoning is postponed until chapter 9. Zoning is the most widely used form of public regulation of land development, and one of the major problems of the land developer at the "predevelopment stage" is likely to be the obtaining of needed zoning amendments, special exceptions (or special use permits), or variances. Moreover, the relation of planning to zoning, which is dealt with in chapter 9, is at least as close as its relation to subdivision regulation.

In connection with Professor Lefcoe's treatment of "the constitutional and statutory limits to subdivision exactions" in chapter 3—which is generally excellent—it is unfortunate that there is no mention of three recent cases sustaining subdivision exactions for school or recreational purposes against attack on constitutional and statutory grounds.[11] And a fuller treatment of special assessments as an alternative method of financing subdivision improvements would have been desirable, since much of the judicial and scholarly thinking about subdivision exactions is colored by the obvious analogy

11. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966); Jordan v. Menominee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). For a good discussion of these cases, *see* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 913-21 (1967). It should be noted that none of these cases is reprinted or discussed in O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW (1966) or J. CRIBBET, W. FRITZ & C. JOHNSON, CASES ON PROPERTY (2d ed. 1966).

to special assessments.[12] Special assessments *are* discussed in chapter 3 in connection with "the use of special districts to pay for utility installations" (pp. 363-67)[13] but the treatment is not really adequate.

Chapter 4. This chapter, entitled "The Post Development Period: Land Sale Contracts and Deeds," contains much material which, in my opinion, really belongs in chapter 2. I think a chapter on "the postdevelopment period" should concentrate on those legal and institutional characteristics of that period which differentiate it from the "predevelopment stage." Among those characteristics, of course, are the legal doctrines and institutions involved in the provision of "permanent financing" for purchasers of developed land.

Chapter 5. This chapter, entitled "Land Finance," is excellent as far as it goes; however, it seems particularly vulnerable to criticism because of important omissions. Since the chapter is obviously not designed to provide a substitute for the usual law school course in real estate mortgages or, more broadly, real estate security, the criteria for inclusion and exclusion of materials are crucial.

One wonders what criteria led to the inclusion of "equitable mortgage" problems (pp. 698-715) and the exclusion of problems arising in connection with mortgage assignments; the exclusion of all consideration of equitable redemption of mortgages in favor of a brief treatment of statutory redemption (pp. 782-84, 787-88); the omission of any substantial treatment of the respects in which a "trust deed mortgage" differs from an ordinary mortgage;[14] and dismissal of the rights and liabilities of grantees who either "assume" the mortgage debt or "take subject to" it in less than a page of text notes (pp. 839-40). Moreover, the discussion of the Federal Housing Authority (FHA) insured mortgage loan (pp. 623-27, 630-34) fails to indicate how the insurance contract protects the mortgage holder when there is a default, and there is no discussion at all of special "below market rate" FHA mortgage programs such as the 221(d)(3) program. Nor is there any treatment of the economics of the land contract market as compared to the mortgage markets. And, one wonders why the section dealing with equitable mortgages fails to raise the most important question likely to arise in modern times: Why is the equitable mortgage needed if the debtor is solvent, and what value does the equitable mortgage have if the debtor is insolvent and liable to be adjudicated a bankrupt?

Finally, it seems difficult to justify the inclusion in a chapter on

12. *See, e.g.*, Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1136-41, 1146-52 (1964); Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 407-12 (1963).

13. *Compare* Comment, *The Use of Special Assessment Districts and Independent Special Districts as Aids in Financing Private Land Development*, 53 CALIF. L. REV. 364 (1965).

14. The brief treatment at p. 780 is quite inadequate.

land finance of a section on "vendor and purchaser in the executory period" (pp. 715-50)[15]—the "executory period" being the period between the signing of the earnest money contract and performance of the contract by execution of a deed and mortgage or, alternatively, execution of a long-term installment land contract. This material clearly belongs in chapter 4, except for *Moses Bros. v. Johnson*,[16] which deals with waste by a purchaser in possession under an installment land contract.

Chapter 6. This chapter, entitled simply "Recording," is excellent, although (as previously noted) it might better have been included in chapter 2, dealing with "the predevelopment stage." Some criticism of the substance of chapter 6, however, can be offered.

The section dealing with the functions of the recording system overemphasizes its relatively minor function as a revenue producer (pp. 877-79), while omitting discussion of more important functions such as preservation of evidence and making the record copies of instruments affecting land titles admissible in evidence as "self-proving documents"—that is, documents which do not require independent proof of execution and delivery. The section dealing with the chain of title problem is decidedly inadequate. The leading case on this problem, *Capper v. Poulsen*,[17] is especially hard for students to understand unless they are told to assume that the affidavit filed by Poulsen was *not* indexed under the name of his grantee, Barnett. A case more clearly posing the chain of title problem could certainly have been chosen.[18] And the chain of title problems arising from application of the doctrine of estoppel by deed need more attention than they get—a one-half page text note (pp. 904-05).

It should also be noted that in chapter 6 mortgages to secure future advances are considered only in connection with the conflicts that may arise between the lien of such mortgages and mechanics' liens (pp. 947-57). While such conflicts are of major importance, future advance mortgages also come into conflict with other interests. Hence it would seem that the different legal theories as to the nature and operation of future advance mortgages and the different legal principles governing their priority in different jurisdictions of the purchase money mortgage should be dealt with in any chapter should be treated.[19] Further, it would seem that the special priority entitled "recording." A footnote defining "purchase money mortgage" is clearly inadequate (p. 196 n.12).

15. This section includes the following subsection headings: "(a) Devolution on Death," "(b) Dower," "(c) Risk of Loss and Insurance," "(d) Waste," and "(e) Rents and Profits."

16. 88 Ala. 517, 7 S. 146 (1890), reprinted in LAND DEVELOPMENT LAW 747.

17. 321 Ill. 480, 152 N.E. 587 (1926), reprinted in LAND DEVELOPMENT LAW 891.

18. *See, e.g.*, cases reprinted or noted in O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW 836-57 (1966).

19. *See, e.g.*, Ladue v. Detroit & M.R.R., 13 Mich. 380 (1865); Ackerman v. Hunsicker, 85 N.Y. 43 (1881).

Chapter 7. This chapter, entitled "Title Assurance," is excellent, although some discussion of the constitutional issues raised by the marketable title legislation[20] would seem to have been in order and some cases construing and applying the modern state statutes on quiet title actions[21] would have been welcome. Also—and this is perhaps the major criticism that can be leveled at chapter 7—the material on statutes of limitation (pp. 986-90) is clearly inadequate to show the complexity of the adverse possession doctrine, both in cases where there is a direct attack on a defective paper title and in cases where the marketability of title is in question.

Chapter 8. This chapter, entitled "Private Governments in Housing: Land Use Controls by Contract," is an interesting and, on the whole, successful attempt to pull together the relevant materials on "licenses, leases, covenants, conditions and easements as means of establishing and retaining rights in the land of another." Here again, however, a few criticisms are in order.

One looks in vain in the section dealing with easements by implication (pp. 1101-13) for materials on easements implied from subdivision plats showing streets or other "public" grounds, only to discover a rather tangential reference to such easements in a later section dealing with easements by estoppel (pp. 1120-30). And in connection with maintenance assessments (pp. 1138-48) and enforcement of restrictions by non-landowners (pp. 1156-68), one notes with surprise the omission of *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank.*[22] The second hand summary of *Neponsit* in a note (p. 1159) is neither adequate nor fully accurate. The single case[23] reprinted under the heading "Affirmative Covenants—Equitable Relief" creates a rather misleading impression as to the likelihood of equitable relief, since equitable enforcement of affirmative covenants has been granted in a majority of the cases.[24] And the report of *Nicholson v. 300 Broadway Realty Corp.*[25] is so severely edited as to make it impossible for the student to discover, from reading the report, that the consideration for the promise of The Embossing Company to furnish heat to Nicholson was Nicholson's permission (required under the local zoning ordinance) for Embossing to build a spur track across its own land to the main railroad track. Hence the student is likely to be mystified when he

20. *See, e.g.*, Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957). *But see* Board of Educ. v. Miles, 15 N.Y.2d 364, 207 N.E.2d 181 (1965).

21. *See* statutes reprinted in LAND DEVELOPMENT LAW 1011-13.

22. 278 N.Y. 248, 15 N.E.2d 793.

23. Furness v. Sinquett, 60 N.J. Super. 410, 159 A.2d 455 (1960).

24. *See* Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959), and cases cited therein. It might be noted that in New Jersey [the locus of Furness v. Sinquett, 60 N.J. Super. 410, 159 A.2d 1455 (1960)] it has consistently been held that affirmative burdens will not "run with land" either at law or in equity, except when created by covenants in a lease.

25. 7 N.Y.2d 240, 164 N.E.2d 832 (1959), reprinted in LAND DEVELOPMENT LAW 1178.

reads, in the student case note reproduced in part at the end of the case (p. 1182), that the court failed "to point out that mere consent to the laying of a track adjacent to one's land does not constitute a conveyance of any interest in land."

More broadly, one might object that it is hardly accurate to say that "[o]ne of the open questions in real property law is whether the technicalities which are said to be necessary in order for a covenant to run are required only when the covenant is to run at law, or whether they apply as well when the covenant is sought to be enforced only at equity" (p. 1176). Most of the cases either hold, state by way of dictum, or assume that neither privity of estate between the parties to the covenant,[26] nor a formal agreement under seal,[27] is necessary when a covenant is enforced as an equitable servitude. Of the four essentials of a real covenant (p. 1171) only the "touch or concern"[28] and "intention of the parties"[29] requirements are imposed in equity.

Chapter 9. This chapter, entitled "Planning and Zoning," is a superb collection of materials dealing with the basic concepts and the major problems in this area of the law. The choice of cases is excellent, and my criticisms are minor indeed.

In dealing with the various methods for altering zoning restrictions, it might perhaps have been better to consider first straight "rezoning" by amendment of the zoning ordinance, and then to compare other methods such as "contract zoning" (usually "rezoning," as a matter of fact), "floating zones," "special uses," and "variances," instead of putting the material on straight "rezoning" last (pp. 1297-350). And the treatment of the "special use" (pp. 1297-304) is subject to criticism because of the failure to indicate that the "special use" (or "special use permit") is really just the "special exception" (or a variant thereof) which is expressly authorized by section 7 of the Standard State Zoning Enabling Act and by most current state zoning enabling acts (though not by the Illinois act applicable to the situation in *Kotrich v. County of Du Page*).[30] Indeed, it would have been a good idea to reprint in the course book either the Standard Act[31] or a good modern zoning enabling act, or both.

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26. *See* 2 AMERICAN LAW OF PROPERTY 409-10 (Casner ed. 1952).

27. *See* 2 *id.* 404-09.

28. *See* 2 *id.* 412-15.

29. *See* 2 *id.* 415-21.

30. 19 Ill. 2d 181, 166 N.E.2d 601, *appeal dismissed*, 364 U.S. 475 (1960), reprinted in LAND DEVELOPMENT LAW 1297.

31. The Standard Act is set out in full, with the draftsmen's notes, in O. BROWDER, R. CUNNINGHAM & J. JULIN, BASIC PROPERTY LAW 958-66 (1966). It is also set out in full, but without the draftsmen's notes, in J. KRASNOWIECKI, OWNERSHIP AND DEVELOPMENT OF LAND 482-87 (1965) and in D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 594-99 (1966).

Chapter 10. This chapter, entitled "Real Property Taxation," appears to be an excellent treatment of that important topic, although I am not really competent to give an informed judgment on it.

Despite the relatively minor criticisms and reservations expressed in this review, I would like to reiterate the opinion stated earlier: *Land Development Law* is a very good course book indeed. I would welcome a chance to try it out in the classroom if the arrangement of courses at my own law school was such as to make this feasible.

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