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George Lefcoe, Land Finance Law: A Symposium Review

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THE cadence of progress in curriculum and teaching material revision has been spotted and uneven. Those materials touted to offer substantial change sometimes accomplish this merely in a nominal sense; changes occur in substance infrequently. Perhaps the choice is a political one—whether the author believes change is fashionable at the time. *Land Finance Law* represents a change in perspective which is difficult to characterize and equally challenging to evaluate. The materials represent, to this reviewer at least, more of a break with tradition than is discernible by either the title of the materials, or the component characterizations of the various subparts and chapters.

Accepting the author's stated intentions that this is not simply another updated mortgage casebook, nor a casebook in the fine tradition of numerous reproduced judicial decisions, supplemented by legislation and other materials for clarification of the "case law," how then ought these materials be evaluated?¹ The simplest, most expedient, and surest way of performing the reviewing function would be to ignore the author's statements and compare these materials with other works using the same basic headings: Housing; Mortgages; Commercial Real Estate Transactions. This would (or could) lead to a discussion of the materials based upon the coverage of "basic ideas" in these stated fields—how the organization of each section, considered by itself and its relationship with other sections, furthers the transmittal of information necessary to the learning of these basic ideas, and how the collection of materials compares with the standards in the field of housing,² mortgages,³ and commercial real estate transactions.⁴ This form of a review is perfectly valid, so long as it is recognized that the sum of the parts may be something greater than and quite distinguishable from the parts themselves. Obviously, if the parts are insufficient in the coverage of basic ideas essential to the whole, then the materials will fail to achieve their greater objective. Lefcoe, while indicating that the materials could be used "separately"⁵ also indicates that he has not just bound

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1. The problem of selecting criteria for evaluation of a course-book is most delicate. A failure to adopt or even search for the proper perspective renders both the work and the review meaningless. This is particularly true where the work purports to introduce new ideas or new materials. One cannot evaluate materials and ideas in a conventional or traditional setting under these circumstances and be fair to the reader of the review.

2. See, e.g., J. KRASNOWIECKI, *HOUSING AND URBAN DEVELOPMENT* (1969); C. BERGER, *HOUSING* (1969). The latter work is a paperback reprint of the housing chapter in *CASES AND MATERIALS ON LAW AND POVERTY* (P. Dodyk, ed. 1969).

3. See, e.g., G. OSBORNE, *CASES AND MATERIALS ON PROPERTY SECURITY* (2d Ed. 1954); G. OSBORNE, *MORTGAGES* (1951); G. LEFEOE, *LAND DEVELOPMENT LAW* (1966); A. AXELROD, C. BERGER, & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* (Temp. Ed., Little Brown 1969).

4. See, e.g., G. LEFEOE, *LAND DEVELOPMENT LAW* (1966); A. AXELROD, C. BERGER, & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* (Temp. Ed., Little Brown 1969); A. DUNHAM, *MODERN REAL ESTATE TRANSACTIONS* (1952).

5. Pp. viii-ix. Lefcoe details alternative packaging arrangements for the materials.

these "disparate" areas together by chance or convenience—something is contemplated by the parts so juxtapositioned.⁶

If the changes, intended or possible, in the materials used, perspectives permissible, and coverage provided are as the author would have us consider them, then what are some of the alternative approaches to attempt an evaluation?

One approach which might be used is whether the author's objectives are discernible, whether his objectives are valid, and whether the materials in organization and content enable the realization of these objectives.⁷ Certainly, the evaluation of a set of classroom materials ought not to be whether they cover the area in an almost encyclopedic fashion. This is particularly true in the areas of housing, land finance, mortgage, and poverty law where the materials which are most relevant, even at a doctrinal level, are constantly changing. The question should be whether there is a sound conceptualization of the underlying processes for dynamic analysis and decision-making. If the understructure of the collection of cases, materials and problems is conceptually sound, then as any part of the materials needs either supplementation, or perhaps updating, the materials have continuing validity.⁸

The distinction, polarized in the extreme, would appear to be that between a set of materials which because of organization and content confines you to the style, order, and coverage of the author—and—a set of materials which allows some degree of "freedom" in the use, timing and supplementation of that which is covered by the book.⁹ Thus, if a collection of published materials can be conceived as having ready utility for more than one "course" or "approach,"¹⁰ it is unlikely that the materials can be so complete as not to require

6. P. ix.

7. This is a particularly difficult evaluation to make. How does one select among intended consequences and the unintended consequences of a particular set of teaching materials? If the author has done his job properly, then the results that follow, even if they seem somewhat original to the user of the materials, may well be praise to the case-book editor. Having used *Land Development Law* in other courses, some arbitrary designations might be designed to segregate the intended and unintended consequences of the inclusion or exclusion of ideas and materials in *Land Finance Law*, but these would be primarily based upon the notion that Professor Lefcoe was striving to avoid duplication in materials and attempting to create an independent existence for *Land Finance Law*. Perhaps the better suggestion would be to read (or use) the two sets of materials together. The package they provide is relatively complete and highly sophisticated.

8. Continued viability of a scheme or set of materials relates directly to achieving one of the professed goals of legal educators—to prepare our students for the future as well as the present.

9. The distinction being set up here is largely a "strawman." Some extensively documented materials allow enormous latitude in selection for teaching purposes. See, e.g., Lefcoe's *Land Development Law*. Likewise, even if the central theme or concept of the author is clearly discernible, changes in style and order are generally capable of being made. The key appears to be whether the subparts allow for digression and whether they provide the basics for supplementation.

10. The fact that few teachers are wholly satisfied with any one set of case materials or their packaging has apparently led West Publishing Company to approach the problem by publishing Dodyk, supra note 2, in five paperback volumes entitled: P. Dodyk, *Cases on Income Maintenance*; M. Sovern, *Cases on Racial Discrimination in Employment*; C. Berger, *Cases on Housing*; W. Young, *Cases on Consumer Credit*; and, M. Paulsen, *Cases and Selected Problems in Family Law and Poverty* (1969).

supplementation. If the required supplementation is slight, or even moderate, then the materials serve the very useful function of allowing individual variations on the conformed scheme of things. If, however, the course conceived of requires heavy editing and supplementation of the materials, then either another set of materials ought to be selected, or the individual teacher should prepare his own. This is a question of choice—one which could be considered an advantage, rather than a drawback to a set of materials.¹¹

Other recent casebooks, including one by Lefcoe himself, provide some sense of comparison to discern the perimeters of coverage. While the materials in *Land Finance Law* are extensive they are not topically unique. Lefcoe's *Land Development Law*¹² covered public housing, the mortgage market, traditional mortgage considerations, taxation, shopping centers and the like. In the same tradition is Axelrod, Berger, and Johnstone's casebook, *Land Transfer and Finance*.¹³ Both *Land Development Law* and *Land Transfer and Finance* are broader in topical coverage than *Land Finance Law*. Both can be said to be transactionally oriented—the flow of the materials leads through the market chronology of purchase, sale, development, and perhaps redevelopment of land. Likewise, they both contain materials which are urban and suburban in nature. The major distinctions between these materials and *Land Finance Law* lies in the depth of coverage accorded specific areas within the housing, mortgage and commercial real estate transactions area, the materials used to exemplify these processes, and the perspectives to be gained from a reading of the selections so juxtaposed.

Part one of *Land Finance Law* deals with Housing for Moderate Income Families and the Poor. The materials seem to deliberately attack the preconceptions of the student both by their nature and the ideas they convey. Thus, the selections describe a reality which has no easy solution; the "bad guys" are not really the slum lords, the fault lies with a system which cannot maintain control over all the variables affecting the decision whether to build, for whom to build, whether to maintain property, improve or demolish it. Reality operates (or is operative) in a contextual frame of market decisions (if there be any such decisions left) unaffected by public intervention and the reality of numerous public policies, federal, state, and local—rarely coordinated, haphazardly reaching desirable results—if desirable results can ever be discerned. The selectively interposed cases illustrate the futility of judicial decision-making without full consideration of the factors presented by the non-judicial materials—the economic dilemma of the "slum lord," the practices of building code inspectors, the reverse subsidies of federal tax laws, and so forth. Lefcoe's logic is com-

11. We are using *Land Finance Law* at the State University of New York at Buffalo for a land use course. The materials which Lefcoe selected for his casebook provide slightly over one-half of the assigned readings during the semester. It has proven relatively satisfactory, particularly since this is the first time through the course; other materials were prepared to cover subdivision regulation, zoning, and eminent domain.

12. G. LEFCOE, *supra* note 3.

13. A. AXELROD et al. *supra* note 3.

elling. Code enforcement, rent strikes, and rent abatement are, judicial remedies to problems which may clearly be aggravated rather than resolved by their imposition.

The next subject covered in *Land Finance Law* is the "non-market" situation, i.e., public housing, or public subsidies to housing managed for or owned by the classes they are intended to benefit. Sections 221(d)(3), 235, 236, 221(h) and the like are given extensive treatment in chapter 2 of part one. At this point, the student should have some notion of the operation of the private market, the professed goals of public intervention, and some conception of the role of the judiciary in the housing process. They can also, by selective readings assigned from the materials following part one, begin to develop some basis for evaluating notions of why the federal statutes were designed as they were, where the housing market secures its funds, what some of the competition for these funds is, what problems developers have in the non-public market, what classes buy what kinds of housing and where, and, finally, a fair notion of the control, through financing practices, that financial institutions and local governments can exert on the timing and nature of new housing construction in the suburbs.

With some supplementation,¹⁴ the suburban—urban housing markets can be readily compared, and the housing consumer by class, and other characteristics can be moved from one setting to another to highlight selected problems. By this device, much of the subsequent material in *Land Finance Law* can be drawn forward to create an interesting housing course. By supplementing the materials with selected subdivision problems, zoning problems, and perhaps eminent domain questions, an interesting advanced land use control course can be structured.

Financing considerations are at the heart of the land use control process. Lefcoe, to a lesser extent, brings this theme out in *Land Development Law*. Whether financial backing is available for housing in commercial development, how it is to be obtained and under what conditions, determine the fact of development or non-development as directly as expropriation or police power restrictions. In fact, the efficacy of police power restrictions, for example, subdivision controls and zoning, may well depend upon the leverage obtained by economic reality where to challenge a regulation ensures the failure of a development (the no time problem)¹⁵ or a below acceptable rate of return on the investment. The interplay of these forces was deemed worthy of consideration in the classic casebook of Haar, *Land Use Planning: A Casebook on the Use, Misuse and Re-use of Urban Land* (1959) and later in Lefcoe, *Land Development Law*. Neither, however, provided the sophisticated set of materials that *Land Finance Law* contains in part two on the internal man-

14. The readings on New Towns, part one, chapter 2, were a good point to supplement the materials with Planned Unit Developments, Subdivision Extractions, and the like.

15. While Lefcoe brought this point out in *Land Development Law*, his construction financing materials in *Land Finance Law* and the Barrington Plaza Project fiasco, treated in chapter 6, really bring the point home to the students.

agement policies of institutional lenders, the overview and control sought by federal manipulation of money markets, and the interplay of traditional mortgage policies of debt to equity ratios, variable interest ratios, foreclosure, and so forth.

While part one of *Land Finance Law* addresses Housing For Moderate Income Families And The Poor, the materials are clearly capable of supporting the "unfashionable" perspective of the total housing picture. Governmental intervention on behalf of the poor most clearly illustrates the leverage points which affect middle and upper middle income groups—factors which affect both the purchaser and the developer-builder. Further, if there is to be a class struggle for limited funds for the housing market, these considerations ought to be approached in the same light as opportunities other than real estate investments. For those "pragmatists" among the student body who see poverty and welfare materials as a necessity, their appetites for the "practical" can be satisfied.

Land Finance Law can be supplemented to provide a basic mortgage course.¹⁶ To cover all the nuances of basic mortgage law might well require the addition of relatively extensive materials. The trade-off for suffering this burden, however, is the rejuvenation that can be accorded the treatment of mortgage law. Were I to consider such a course, Lefcoe's *Land Development Law* and *Land Finance Law* would seem to present an ideal package. In addition to these, what materials might be used for this purpose are beyond the expertise (or memory from his own mortgage law class in law school) of this reviewer.¹⁷

Part three of *Land Finance Law*, Structuring the Commercial Real Estate Transaction, ought not to be thought of as an independent set of materials or readily severable from the remainder of the book. With selected readings assigned from part three, sections 1 and 2 provide the main body of a tight land finance course. The eleven hundred and some odd pages are too difficult to handle in a three or four credit hour course, other than by assigned outside reading from the casebook. Thus, chapter 19 on federal taxation might well be assigned earlier in the semester.¹⁸ Since many second and third year law students will have had the basic course in taxation (perhaps an advanced one as well) the materials may well be a review for them in the specific context of land finance. Likewise, The Lease as a Financing Device (chapter 11) and Public Sale of Real Estate Securities (chapter 13) can be brought forward to part two

16. "The *aficionados* of mortgage law, as it has traditionally been taught, may deserve a book cut more closely to their needs. The brothers of this venerable fraternity would, I assume, applaud an updated, but conventional, mortgage law casebook. . . . I would not expect those who have occupied this field to protest the changes in emphasis invited by changed economic conditions. Further, if I have been glossy or inept at setting forth some of the doctrinal intricacies, I have tried to provide an appropriate place where others, from their deeper expertise and with greater patience, can fill the gaps and correct the improper inferences." P. vii.

17. Osborne's classic works, *Cases and Materials on Property Security* and *Mortgages*, *supra* note 3, should be reviewed on this point. In addition, one might consider Lefcoe's *Land Development Law* and Axelrod, Berger & Johnstone's *Land Transfer and Finance*, *supra* note 3.

18. It looks as if this might be useful in conjunction with part one, chapter 1, § B

for a consideration of mortgages, financing methods and controls. To round out the picture, one might well want to supplement these materials by additional selections on equity financing, real estate syndication, and real estate investment trusts.¹⁹

Chapter 12, *Landlord and Tenant: The Shopping Center*, is an educational novelty. This is not to say that topically the materials are not elsewhere considered, but rather the form of presentation is calculated to approach the student from a vantage heretofore virgin area. The chapter consists of two parts, introductory materials on the nature, function, and problems of the shopping center, designed to put the second part, the "Century Square Lease" into perspective. This perspective is useful for housing analysis as well as commercial considerations. Then follows approximately 37 pages of a complex shopping center lease, extensively annotated with cases and questions. This forces the student to question the reasoning behind each provision in the lease and provides some basis for discussion. In addition, it introduces the student, albeit however subtle, to the "care and feeding" of the "form book." This chapter, like the others in part three, can be pieced back into parts one and two.²⁰

The materials present so many potential perspectives and opportunities that simple justice cannot be done them in review form. My primary bias is as one who used them this past semester. If one test of a set of published materials, in an era where few materials can satisfy all the people for whom they are designed, even within the limits of the same basic course, is their adaptability to different techniques and courses, then Professor Lefcoe has admirably succeeded. The materials provide a sound basis for relying on the selections and perspectives of the author. Where digression or deviation from the published pattern is desirable, the materials provide more than ample leeway. Together with *Land Development Law*, the packaging of these two sets of materials is a major contribution to legal education.

19. See, e.g., A. AXELROD, C. BERGER, & Q. JOHNSTONE, *supra* note 3.

20. The Gruen excerpt on pp. 1067-71 can be profitably used in conjunction with part one, chapter 2—in my case with the materials on pp. 272-302, *New Towns*.