KERN COUNTY COLLEGE OF LAW

Real Property

Final Examination

Spring 2021

Prof. K. McCarthy

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

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Question #1

Fresno's Tower District, which is one of the most culturally diverse areas of Fresno, has long been a positive feature of the City of Fresno. It attracts a diverse mix business (entertainment, bars, shops, etc.) and residents, and is the City's leading nightlife area.

The Tower Theater, a 2000+ square foot 1939 Art Deco masterpiece and national historic landmark, is the anchor and namesake property of the Tower District. The building where the Tower Theater is located is also home to several other businesses including bars and restaurants that serve alcohol. Other much smaller theaters are located in the area.

The entire Tower District business area is zoned Commercial Main Street in the City's development code ("City Code"), and rightly so. Businesses such as bars, restaurants and nightclubs that sell liquor have strict guidelines on where they can operate, and being zoned Commercial Main Street is key to maintaining the requirements for a liquor license permit.

To maintain the nature of the Tower District, in the 1990s the City also enacted the Tower District Specific Plan ("Plan") and appointed a Design and Review Committee ("Committee")., compromised of property owners in the Tower District. The Plan specifies that there shall be no religious services allowed in any facility over 1,000 square feet in space. Both the City Code and the Plan also prohibit the sale of alcohol within a 1,000 feet of a church.

Every business owner must obtain approval by the Committee before being issued a business license to operate in the Tower District. A business owner is also required to agree to abide by the Committee's rules ("Rules"), which include all of the use restrictions of the City Code and the Plan and include additional limitations on property use designed to maintain a mix of businesses within the Tower District.

Due to the pandemic, most of the Tower District businesses were required to shut down. A few restaurants remained open, serving take-out food or having outdoor dining. However, all of the theaters, including the Tower Theater had to fully shut down.

A Church and Tower Theater building owner entered into a short term lease, allowing the Church to have Sunday services. The building owner did not obtain approval or permits before entering into the lease. Business owners and residents were under the impression that the Church was only going to hold services until the pandemic shut down ended, and did not voice any complaints about the Tower Theater or Church being in violation of the law. Conducting church services in such a large venue within the Tower District is not allowed under the Plan and the Rules.

In December 2020, the owner of Tower Theater announced his intention sell the property to the Church. Upon hearing the news of the sale, business owners and residents of the Tower District began to log complaints to the City and the Committee. They feel the Church does not belong in the culturally diverse and liberal party atmosphere of Tower District. Their concerns include that (1) a large church would be inappropriate for the area, (2) it would compromise the ability of businesses to hold or obtain liquor licenses and sell their businesses, and (3) existing alcohol serving establishments would be in violation of the City Code, the Plan, and the Rules which all forbid the sale of alcohol within 1,000 feet of a church.

The Church refuses to stop the unauthorized use of the space, and also refuses to seek a rezoning of the property. It stated that church services are incidental to the theater use and thus rezoning is not required. The Church also claims that it will sue the City and Committee for zoning discrimination if the Plan and Rules are enforced and the Church is barred from conducting church services in addition to the shows it intends to present in the space.

Despite the objections, the Church and Tower Theater plan to go through with the sale.

A group of Tower District business owners and residents called The Friends of the Tower District ("Friends") oppose the sale. They are seeking your advice on how to proceed.

Please draft a memo analyzing the groups' (1) standing to make the challenge; (2) the ability to insist that the present zoning regimen remain in place; (3) the strength of the Church's position that the zoning is discriminatory; (4) the strength of the position of the bar and nightclub owners that the Church moving in will create licensing problems for them; and (5) the pros and cons with respect to the Groups' chances of a successful outcome.

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Question #2

Mr. and Ms. Perfect are a married couple close to retirement living in Ohio.

In 2009, they purchased a tenancy in common interest in a six-unit apartment building in the City of San Francisco, giving them ownership rights in one of the six apartment units. The purchase agreement requires the Perfects to work with the other owners to convert the tenancy in common interest into six individual condominiums.

Under the reasoning that a sufficient supply of residential rental units needed to be available within the City, San Francisco passed ordinances limiting the number of apartment buildings that could be converted into condos. The granting of permits to convert apartments to condos was based upon a lottery system.

Under this lottery system, if an apartment was approved to convert into a condominium, the converting owners could perform an "Owner Move In" eviction to end the rental, even if the tenant had not breached the lease. With the understanding that any rental of their unit could be terminated by them should they wish to move into their unit, the Perfects rented out their unit.

The Perfects and their fellow building owners entered the lottery to obtain approval to convert to the six apartment units into six individual condos, however, they never won the lottery. Therefore, the building was still owned by them as tenants in common when, in 2013, the City stopped the condominium conversion lottery and enacted a new ordinance.

This new 2013 ordinance allowed for more condo conversions, but the new ordinance also required that all applicants for conversion offer a lifetime lease to any non-owning tenants. Since the purchase agreement obligated them to cooperate with the other building owners in applying to convert the building, the Perfects joined in the application under the City's new 2013 conversion program to convert the entire building to condos.

In their application, the Perfects asked the City for a waiver of the lifetime lease requirement. They informed the City that the Perfects' tenant was much younger than them and, therefore, a lifetime lease would effectively prevent the Perfects from ever moving into their San Francisco retirement home.

The City indicated that failing to provide the Perfects' tenant with the lifetime lease would violate the 2013 ordinance. The City told the Perfects there would not be any waivers of the lifetime lease requirement and that, if they evicted their tenant to reclaim the unit as their own residence, the City would disqualify the conversion of the whole building to condos.

The Perfects filed a complaint alleging that the lifetime lease requirement was a taking of their property without just compensation and that the lifetime lease requirement violated the unconstitutional conditions doctrine. In a motion to dismiss the complaint, the City argued that the lifetime lease requirement was not an unconstitutional condition for the permit to convert to a condo. The City's motion was granted, and the Perfects' complaint was dismissed.

Please provide an analysis as to whether the City's lifetime lease requirement is a taking and advise the Perfects as to the arguments which could be raised on appeal of the order dismissing their complaint.

If you have the time, also discuss why the Perfects and their fellow tenants in common owners would want to convert to condominium ownership. Even more extra points will be granted if you have any creative ideas on how the Perfects can remain law abiding people and still have the opportunity to enjoy living in their San Francisco home without violating any ordinances or laws.

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Question #3

Two parcels of real property (Lot 1 and Lot 2) are adjacent to each other and for at least 50 years, the properties were owned by a single owner. On Lot 1 is a large apartment building ("Apartments") with an underground garage. Lot 2 is an L-shaped parcel on which there is a duplex, a concrete parking area, and a large undeveloped area in the rear. [Note to Students: Draw this out on a piece of scratch paper.]

While the lots were under common ownership, a driveway was built going into the underground parking under the Apartments on Lot 1 that encroached onto Lot 2. This driveway is the only means of access to the underground parking. The Apartments' tenants also used the undeveloped area of Lot 2 for parking and put in a garden. [Again, students, draw this out on a piece of scratch paper.]

Ms. Sly acquired both Lots in 2005. Ms. Sly continued to allow the tenants of the Apartments on Lot 1 to use portions of Lot 2 for access, parking, and as a garden.

In 2011, Ms. Sly defaulted on her mortgage, and both properties were sold to lienholders: the Lot 1 to the C Bank and Lot 2 to JP Bank. Accordingly, as of the summer of 2011, for the first time in over 50 years, the two properties were <u>not</u> under common ownership.

The tenants of the Apartments on the Lot 1 continued to use portions of Lot 2 as before, including for access, parking, and recreational purposes. The driveway was used at least 100 times a day. The parking spaces on Lot 1 were used daily. C Bank, the owner of Lot 1, not only maintained the garden on Lot 2 but also invested in improvements, including put in an irrigation system which was tied to the water lines for Lot 1, therefore, C Bank actually paid for the watering of the garden. JP Bank actually had no means to water the garden from Lot 2.

In 2017, a new owner, Mr. Hay, acquired the Lot 2 from JP Bank and shortly thereafter he filed a complaint against the C Bank (owner of Lot 1) to quiet title. One of several of Mr. Hay's arguments was that the use of Lot 2 by the tenants of the Apartments on Lot 1 was permitted by the prior owners and he was now simply revoking that permission. C Bank cross-complained for an order finding an easement over Lot 1.

The statute of limitations for a cause of action for quiet title after discovery of the title issue is five years. Also, the relevant time needed to establish a prescriptive easement is five years.

Please discuss the issues that may arise in this litigation between Mr. Hay and C Bank.

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Answer Outline- Real Property – SLO & KCL
Spring 2021
Prof. C. Lewi & K. McCarthy

Q-1-Model Answer

Summary of the Issues.

The real property uses in the Tower District are regulated by City Code, which are City wide, and also a specialized zoning just for the Tower District as set forth in the Plan. Finally, the business owners in the area have all entered into mutual contracts with the Committee, which contain the Rules, in order to receive licenses to operate in the area. These contracts could be viewed as creating a common interest community ("CIC") of the Tower District businesses.

The issues in this case involve whether these limitation on the use of property with the Tower District contained in the City Code, the Plan and the Rules are valid and can be enforced.

Standing To Make The Challenge.

The State may enact statutes to reasonably control the use of land for the protection of the health, safety, morals, and welfare of its citizens. Zoning law are such land control statutes.

Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited.

The City has enacted City Code which is effective over the entire City and specific zoning laws for the Tower District in the Plan. It is clear that the City itself has the standing to enforce such. The City alone can enforce the zoning laws. If the only claim that could be logged against the Church moving into the Tower Theater was the violation of these zoning ordinances, in the City Code and the Plan, the Friends have no standing.

The question is do the Friends have standing for any other claim?

Friends is a group comprised of residents and business owners in the Tower District who are anticipating that their businesses and the vibe of the community will be changed should the Church buy the building. In a sense, they view the Church as a nuisance and would like to stop it coming to their area. If the Church can be labeled as a nuisance perhaps an anticipatory claim to stop the introduction of a nuisance could be filed by the Friends. However, nuisance claims are usually only ripe after the offending event occurs. Zoning laws came into being so as to avoid nuisances from occurring because of this limitation of nuisance law.

In trying to label the Church as a nuisance the Friends are not claiming churches are annoying. They are simply saying that the Church does not belong in the Tower District. A nuisance may be merely a right thing in the wrong place – like a pig in a parlor instead of the barnyard.

Finally, the Friends who are business owners who had to obtain licenses to operate from the Committee could also argue they have standing as being part of a CIC. In order to obtain the right to operate within the District everyone has to enter into the same contract agreeing to comply with the Rules. Although not officially labeled as an association, the common contract does have elements of an association. The mutually agreed to limitations on the use of property could be viewed as restrictive covenants. As members of the

CIC the business operators would have standing to seek enforcement of the restrictive covenant that no church could be conducted in a large theater.

The Friends who are merely residents of the area have a weaker claim to standing.

The Ability To Insist That The Present Zoning Regimen Remain In Place.

Zoning is designed to prevent harmful neighborhood effects before they occur. Nuisances can be avoided by proper zoning.

The Standard State Zoning Enabling Act (1922) empowered municipalities to regulate and restrict various aspects of property including the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Zoning regulations are to be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

Segregation of uses is desirable because it is assumed that different uses harm each other.

The current City Code, the Plan, and the Rules all prevent the sale of alcohol within a 1,000 feet of a church. The Plan and Rules also specify that there shall be no religious services allowed in any facility over 1,000 square feet in space.

The Friends don't want these limitations to change. Although they do not have legal standing to bring suit to stop a change in zoning laws they can exert political pressure on the City government and the Committee to not allow a change. Furthermore, the business operators in the Tower District, as member of the CIC, could insist on the enforcement of the Rules.

To the extent that a change in the zoning laws could be labeled as a taking of their private property interest the Friends might also claim an unconstitutional taking.

The Strength Of The Church's Position That The Zoning Is Discriminatory.

There are a limited number of ways to challenge zoning statutes and ordinances such as the City Code and the Plan? You can claim that (1) an ordinance is not authorized by the Enabling Statute, (2) that the Enabling Statute and/or ordinance is void for vagueness, (3) that due process issues exist or (4) that the Enabling Statute and/or ordinance is unconstitutional.

These ordinances have been in place since the 1990s and any claims of non-authorization, vagueness, or due process have long expired. The only apparently viable claim the Church has against the current zoning in the City Code and Plan is that these are unconstitutional. Even restrictive covenants, such as the Rules, which are generally given greater deference than zoning regulations, can be invalidated if they are found to be unconstitutional.
Restraints prohibiting the transfer or use of property to or by a person of a specified racial, religious, or ethnic group are not enforceable under the Fourteenth Amendment. Judicial enforcement of a covenant forbidding use of property by persons of a particular race is discriminatory state action forbidden by the Fourteenth Amendment to the United States Constitution. [*Shelley v. Kraemer*, 334 U.S. 1 (1948)]

Measures based on the content of communication are said to be subject to strict judicial scrutiny. This means that the government must prove that the regulation in question furthers a compelling state interest and is narrowly tailored so as to be the least restrictive or intrusive means to achieve that interest.

In contrast, restrictions that simply regulate the time, place, and manner of communication without regard to content receive intermediate judicial scrutiny, requiring only a substantial (as opposed to compelling) state interest and a means of advancing it that does not impose burdens substantially more than necessary.

Even private agreements, such as the Rules, can be invalidated if the restrictions contained therein are deemed discriminatory.

When enforcing equitable servitudes, courts are generally don't question agreed-to restrictions. This rule does not apply, however, when the restriction does not comport with public policy.
Equity will not enforce any restrictive covenant that violates public policy. Property use restrictions based on sex, race, color, religion, ancestry, national origin, or disability are void.

Can a zoning ordinance exclude churches from residential areas?

The U.S. Supreme Court in the case of *Sherbert v. Verner*, 374 U.S. 398 (1963) held that land use controls can limit religious conduct (but not religious beliefs), but if the limitations place substantial burdens on the free exercise of religion, the government must show that its regulatory measures advance a compelling state interest and represent the least restrictive means to advance that interest.

After the decision in *Sherbert v. Verner* the Religious Freedom Restoration Act of 1993 ("RFRA") was enacted. After RFRA was declared unconstitutional and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") was enacted by the U.S. Congress.

In RLUIPA cases the Courts ask (1) Did the government regulation burden the exercise of religion? (2) If so is the burden a "substantial" one? Substantial is anything that is significantly oppressive. RLUIPA also provides, under the equal terms provision, religious assemblies cannot be treated differently than non-religious assemblies.

The standard of review under this law is still being debated. Strict scrutiny standard or only violated if the religious group is treated less well than similar non-religious groups?

What remedies does a religious group have if RLUIPA is violated is also still uncertain? What is "appropriate relief against a government" provided in the statue mean? Money damages?

Zoning law regarding the separation of uses of a church and an establishment that sells alcohol, such as the City Code, merely limit religious conduct not religious beliefs. The review of the limitations in the City Code would be reviewed under a forgiving standard of review since such a limitation on the location of a church is not a substantial limitation.

The Plan and Rules in this case, however, also limit the size of the operation of a church within the Tower District. Only places less than 1,000 square feet can be used for a church. The Church could argue that this discriminates against the content of communication of large gatherings. The Theater could be used for a political gathering, a concert, or a comedy show but not for the spreading of God's word.

However, even if the Church is able to obtain a ruling that the Plan and Rules are discriminatory the question remains what is the remedy for such.

The Church might also complain that there is a spot zoning problem. Spot zoning are zoning changes, typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district, and which dramatically reduce the value for uses specified in the zoning ordinance of either the rezoned plot or abutting property.

Spot zoning is invalid where some or all of the following factors are present: (1) a small parcel or land is singled out for special and privileged treatment; (2) the singling out is not in the public interest but only for the benefit of the landowner; (3) the action is not in accord with a comprehensive plan. The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or said another way, the three statements may be merely nuances of one another.

In this case the Tower Theater is the only theater in the area that cannot be used for church. This is because it is the only theater which is too big for use of a church under the Plan and the Rules. The Church could argue that such limitation singles out the Tower Theater and is an inappropriate spot zoning.

The Strength Of The Position Of The Bar And Nightclub Owners That The Church Moving In Will Create Licensing Problems For Them.

The concern of the businesses that the Church moving into the area centers around the limitation on use contained in the City Code, the Plan and the Rules that alcohol cannot be served within 1,000 feet of a church and that such would cause their current liquor licenses to be deemed invalid.

A use that does not conform to a zoning law is called a nonconforming use. A use that exists at the time of passage of a zoning ordinance and that does not conform cannot be eliminated at once. The right to continue a nonconforming use runs with the land in order to protect the vested right that the owner is thought to have. Otherwise, should the owner have to sell, he could most likely sell only at a reduced price and hence would suffer the very diminution in value that nonconforming-use doctrine is meant to avoid.

Generally, the nonconforming use may continue indefinitely, but any change in the use (e.g., tearing down an old building and replacing it with a new one) must comply with the zoning ordinance. Some statutes provide for amortization—i.e., the gradual elimination of nonconforming uses (e.g., the use must end in 10 years).

The right to maintain a nonconforming use runs with land; hence it survives a change of ownership. *But see Village of Valatie v. Smith*. As to change of use, some jurisdictions provide that nonconforming uses may expand, especially to meet natural changes such as increased demand. Moreover, some allow one nonconforming use to be changed to another nonconforming use, but usually only if the change reduces (or at least does not increase) the impact of the use on the zone in question.

The liquor license holders in the Tower District who operate too close to the Tower Theater if it is used as a church have a legitimate concern that their license could be revoked in the future and the value of their business would be reduced. Although the right to continue a nonconforming use generally runs with the land there are qualification for such. Any time you create uncertainty in the ability to continue a business the value of the business is negatively impacted.

Variance is an administratively-authorized departure from the terms of the zoning ordinance, granted in cases of unique and individual hardship, in which a strict application of the terms of the ordinance would be unconstitutional. The grant of a variance is meant to avoid an unfavorable holding on unconstitutionality. Variances anticipate occasional permission to engage in what is otherwise prohibited.

Variances are designed to deal with a whole range of difficulties and ill fits that can't be predicted in any specific way even though they are known, in general, to arise. A variance from the literal restrictions of a zoning ordinance may be granted by administrative action. The property owner must show that the ordinance imposes a unique hardship on him and that the variance will not be contrary to the public welfare. To qualify for a variance two tests must be satisfied: (1) the applicant must show exceptional and undue hardship; (2) the applicant must show that to grant a variance would not be detrimental to the area.

Undue hardship means in essence that without a variance the property in question could not be effectively used. The hardship, however, must not be self-imposed. Moreover, the court will consider efforts by the property owner to alleviate the hardship.

The Church could ask that they be granted a variance for the use of the Tower Theater as a church even though the Plan and the Rules are violated by such use. However the Church might have difficulties proving that any undue hardship is not self-imposed since they knew the zoning issues and limitation on uses prior to buying the property and the current residents in the area clearly view the introduction of the Church into the areas will cause a detriment to the community.

The Pros And Cons With Respect To The Groups' Chances Of A Successful Outcome.

The U.S. Supreme Court had stated: "[W]e have consistently held that when a municipality adopts or amends a zoning ordinance, it acts in a legislative capacity under its delegated police powers. As a legislative act, a zoning or rezoning classification must be upheld unless opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare, or that the classification amounts to a taking without compensation. . . . Our narrow scope of review reflects a policy decision that a legislative body can best determine which zoning classifications best serve the public welfare."

Should this matter go to Court, whatever zoning the City enacts will be given great respect. Therefore, the important thing for the Friends to focus on, if they want to prevent the Church from operating in the Tower Theater, is convincing the City to maintain the current zoning laws in the City Code and the Plan and not allow a variance for the Church. The Friends should work on impressing upon the City to not change the laws and to cite the Church for any violation of those laws.

Q2 Model Answer

Pursuant to the Takings Clause in the U.S. Constitution, the government cannot take private property for public use without just compensation. The question in this case is whether the enactment of the 2013 ordinance by the City violates this Takings Clause.
The Takings Clause raises "three basic questions": (1) what the private property is; (2)whether that property has been taken; and (3) how much just compensation is due.
Was There "An Interest in Property"?

One of the first inquiries in a Takings cases such as the Perfects' case is whether there has been a "taking" of a property interest. In the analysis of a Takings case, the determination as to what the property interest is at issue is critical.
The question in this case is whether the right to live in an apartment you own in the future is "an interest in property"?

In a Takings case, the loss in value of the affected property composes the numerator but the issue is what value supplies the denominator?
In the case of *Penn Central*: "the parcel as a whole" formed the denominator. The Court held that the there is a "bundle" of rights conveyed with a property and "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."
In the case of *Murr v. Wisconsin*, regarding regulation of property near the St. Croix River, the Supreme court noted that an objective, three-factor balancing test should be utilized for identifying the unit of property to serve as the focus of a court's regulatory takings analysis. As stated by Justice Roberts in the *Murr* case the Takings Clause protects private property rights as the state law creates and defines them. The question as to what the private property is determined by state law. This holding was reiterated in the *Stop the Beach* case.
Therefore, the Perfects need to convince the Court of Appeal that the law in the State of California considers the right to live in the future in an apartment you own is an interest in property separate from the other bundle of rights associated with the ownership of the property.
There is a functional dimension to real property. There can be a claim that specific property right has been taken, rather than point to physical effects on the property. In *In Hodel v. Irving*, for instance, the Court required compensation for a taking of the rights of descent and devise.
Even if the right to live in an apartment you own is seen as a personal property right instead of a real property interest a taking can still occur. In the case of *Horne v. Department of Agriculture* the Supreme Court held that an appropriation of personal property is as much a taking as an appropriation of real property.
Apparently, the trial court in the Perfects' case did not think there was a "property interest" such that preventing the future occupation of the unit was a taking. On appeal, it should be argued that the right to occupy your own property in the future is one of the essential sticks in the bundle of rights an owner has in real property.

Was The Perfects' Property Interest Actually "Taken"?

A taking generally results where there is an actual appropriation, destruction, or permanent physical invasion of one's property. However, the enactment of a regulation can result in a taking also. In this case, the City did not invade the Perfects' property so there was no "actual" taking.
A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. But a taking can still be found.
The concept of a governmental taking probably originally contemplated only physical appropriations of property. But the term now encompasses some governmental action that significantly damages property or impairs its use that diminishes economic value and interferes with reasonable, investment-backed expectations of its holders.

Was The Perfects' Property Interest Taken Thru A Regulation?

Taking questions often arise in connection with states' exercise of their police power (i.e., the power to legislate for the health, welfare, safety, morals, of the people).
Whether the government is required to compensate a landowner depends upon whether the act of the government is deemed to be a taking or merely a regulation.
While the government must fairly compensate an owner when her property is taken for public use, it need not pay compensation for mere regulation of property. Thus, whether government action amounts to a taking or is merely regulation is a crucial issue. The question is one of degree.
When a state validly regulates for health, safety, or welfare purposes under its police power, then the government action merely amounts to a regulation without payment of compensation. Yet even though the general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. This is called a regulatory taking.
Regulations on the property generally do not require compensation to the owner, even if the government reduces the value of the property. There is a regulatory taking if the regulations leave no economically viable use for the property. *Lucas v. South Carolina Coastal Council*

In the *Lucas* case it was argued that the State's zoning ordinance, adopted after owner purchased lots, amounted to a taking because the ordinance prohibited owner from erecting any permanent structures on his lots.

The Court held that land use regulations that prohibit all economic uses of property are takings unless the prohibited uses are common law nuisances. If a government regulation denies a landowner of all economic use of his land, the regulation is equivalent to a physical appropriation and is thus a taking unless principles of nuisance or property law that existed when the owner acquired the land make the use prohibitable.

It is a "categorical" taking when the value of land is essentially wiped out.

Wipeouts are much like actual physical appropriations, can hardly be seen as involving reciprocal advantages, and compensation for them will not unduly burden the government because they rarely occur. Wipeouts "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." "In order not to constitute a taking, a land use regulation must substantially advance a legitimate state interest and not deny the owner all reasonable economically viable use of his land ." There are certain government actions which are treated categorically as always amounting to takings those that effectively wipe out all economic value, the *Lucas* rule.

In the *Stop the Beach* case Justice Scalia, joined by Roberts, Alito, and Thomas, held "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." The plurality in that opinion found there are "settled principles" in property law that confer rights on a private party. Abrogating these rights amounts to an unconstitutional taking whereas simply clarifying ambiguous rights does not.

The Justices in the the *Stop the Beach* case noted that it is possible that in future cases, a state court decision declaring that an "established" property right "no longer exists" may constitute a taking.

In this case there is still an economic use but what about the right for personal use of your own property? Isn't that as important as a right for an owner then being able to make money from the property? The right to exclude others from your private property has always been seen as an essential stick in the bundle of rights. Isn't the right to live in your own apartment an "established" property right "no longer exists" for the Perfects because of the new regulation?

In the case of *Eastern Enterprises v. Apfel* the Supreme Court in a Split opinion held that retroactive legislation is generally disfavored since to deprives citizens of legitimate expectations and upsets settled transactions. In that case a reach-back clause in the Coal Act imposed liability on the company and the magnitude of the liability raised substantial fairness question. The Court found the Coal Act's imposition of retroactive liability on the company violated the Takings Clause.

Isn't the reach-back clause in the City's new regulation also cause hardship on the Perfects? Why shouldn't the regulation be limited to only new applications for condos?

If a government regulation limits the uses of private property to such a degree that the regulation effectively deprives the property owners of economically reasonable use or value of their property to such an extent that it deprives them of utility or value of that property, even though the regulation does not formally divest them of title to it.

Factors in determining whether there has been a regulatory taking are (1) The economic impact of the regulation on the property owner, (2) the extent to which the regulation interferes with the owner's reasonable, investment-backed expectations regarding use of the property and, (3) the character of the regulation, including the degree to which it will benefit society, how the regulation distributes the burdens and benefits among property owners, and whether the regulation violates any of the owner's essential attributes of property ownership, such as the right to exclude others from the property.

The Perfect need to demonstrate that these factors demonstrate that there has been a regulatory taking. In this case the economic impact on the Perfects is a complex thing to factor. The only right being taken from them is the right to occupy the property in the future. They can still rent it out and use it as an investment property. However, this change in their plans could have a financial impact on them. Can they still afford to live in the City without being in this unit? What are the tax implications? The Perfects had a reasonable, investment-backed expectation that they would be able to use the property as their home in the future given

the status of the law before 2013. This regulation also does not distribute the burdens and the Perfects' essential attribute of property ownership by never allowing them to occupy the unit themselves.
Public Use.

Another inquiry is whether maintaining a supply of apartments for rent is a sufficient "public use". The "public use" limitation has been liberally construed. The Court will not review underlying policy decisions, such as general desirability for a particular public use or the extent to which property must be taken therefor. A use will be held to be "public" as long as it is rationally related to a legitimate public purpose, e.g., health, welfare, safety, moral, social, economic, political, or aesthetic ends.
The government may even authorize a taking by private enterprise, as long as the taking will redound to the public advantage (e.g., railroads and public utilities).
The public-use requirement is a matter of concern to the Perfects for at least two reasons. "Just compensation" often results in payment in an amount less than what they would demand in a voluntary sale. The very fact of a forced transfer, no matter what the compensation, might seem unjust. In this case the Perfects plan was to live out their retirement in the City in this unit.
It's clear that the government may not just take property from an owner solely to transfer it to another private party, notwithstanding just compensation is paid; but it's equally clear that the government may transfer property from one private party to another if "use by the public" is the underlying purpose.
Literal public use in the sense of "use by the public" is not the test.
The question is whether the regulation serves a "public purpose," such as a plan to clear and reclaim a blighted area, even if some of the taken land is not blighted (Berman), or such as a program to eliminate a land oligopoly and its associated evils (Midkiff).
This case is similar to the *Kelo* case in that the Perfects' ability to reside in their own home is effectively being given to their tenant for the tenant's entire lifetime. In the *Kelo* case, unblighted properties were taken by the government and essentially given to a private corporation for use to develop a business center. The Court held this was still a public use. However, the *Kelo* case was highly criticized.
Is the taking of a right to live in a house from the owner and giving it to a tenant a legitimate and traditional function of government? The answer to this question depends on how one views the term public use.
There are two basic opposing views of the meaning of "public use": (1) that the term means advantage or benefit to the public (the so-called broad view); and (2) that it means actual use or right to use of the condemned property by the public (the so-called narrow view).
It appears that the lower court in the Perfects' case accepted the broad view that "public use" means for the benefit of the public because it would not have denied their claim unless there was a determination that providing rental units in the City was within the public use.
On appeal it should be argued that the narrow view that "public use" means only actual use by the public. Taking property for the use of only one tenant is not a public use under this narrow definition.
The Perfects should also argue that "public use" should be considered from the vantage point of the means of the government. Is eminent domain really necessary to accomplish whatever aim the government has in mind? Under this view taking away the Perfects' ability to live in their unit is not necessary to ensure sufficient rental properties within the City.
It appears that the Court viewed the term "public use" from the vantage point of the government's end goal. Finding that the ends are sufficiently public in one sense or another the test is passed. All that is needed is the objective to serve the public interest. Under this view providing sufficient rentals could be seen as serving a public interest and therefore a "public use".
Unconstitutional Conditions Doctrine.
Court have held that development permits may be conditioned on concessions by the developer that they build access roads or donate land to a park. Such conditional permits do not violate the takings clause IF: (1) An essential nexus between legitimate state interests and the conditions imposed on the property owner (i.e., the conditions substantially advance legitimate state interest); AND (2) A rough proportionality between the burden imposed by the conditions on property owner and the impact of the proposed development.

The "essential nexus" test was established in the case of *Nollan v. California Coastal Commission*: An exaction as a condition of development is not a taking so long as there is some logical connection — a "nexus" — between the burdens that would be created by development and the conditions imposed by the Commission.
The "rough proportionality" test arose in the case of *Dolan v. City of Tigard*. No "precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."
In this case the right to convert to a condo is conditioned on offering the tenant a lifetime lease. The state interest is to provide sufficient rental units within the City and the condition imposed does appear to be connected to that goal by preventing at least one more person looking for rental housing within the City. However, it should be argued that this condition is overly burdensome on the Perfects. Why should this owner, who only has one unit within the City, be burdened with the requirement to rent it out instead of living in the unit. Isn't this asking the Perfects to take on more than their fair share of the burden?
Why would the Perfects want to convert to condominium ownership?

Condominiums are a form of shared ownership where each unit owned separately form of fee simple but the exterior walls, the land beneath, hallways and other common areas are owned by the unit owners as tenants in common.

Condo ownership is important for many reasons - mortgage financing, insurance, utilities, real estate taxes, and a pro rata share of common area fees. The owners of individual units are bound to contribute to the support of common property, or other facilities, or to support the activities of an association, whether or not the owner uses the common property or facilities, or agrees to join the association.

All homeowners in the condo community are automatically HOA members. HOAs manage the common property. HOAs also enforce servitude that are set forth in the declaration. Enforcement is accomplished by fines and lien on the offending property. HOA has the power to raise funds reasonably necessary to carry out its functions. HOA can adopt new rules and amend old rules or CC&Rs which are reasonably necessary to manage common areas.

Extra credit options for the Perfects:

Pay off the tenant to move out. The cost of this quantifies the damages should the Court of Appeal overturn the dismissal and the Perfects are able to proceed with the Takings Case.

Find some other basis to lawfully evict the tenant. The ordinance requires a lifetime lease but does not excuse the tenant of any breach of that lease. The Perfects simply no longer have the prior option of a move in eviction which did not require a breach by the tenant.

Sell their interest in the tenancy in common to the other tenants in common owners of the building.

Q3 Model Answer

The claims of quiet title and a cause of action to establish an easement are really just different sides of the same coin. The question to be answered in both cases is who has the right to use a particular section of land.

In this case, there are three potential uses of Lot 2 by the tenants on Lot 1 that could be potential easement uses: the driveway, the parking spaces and the garden. In the analysis these uses should be considered separately.

Easement.

An easement is a type of servitude. It is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. An easement is a property right that gives its holder an interest in land that's owned by someone else.

There is also such a thing as a Quasi-Easement which is a right in the nature of an easement enjoyed over a plot of land for the benefit of another plot owned by the same person. It would be an easement if the two plots of land were owned and occupied by different persons. This concept is not really relevant in this case given the analysis below. A prescriptive easement cannot be created over property for the benefit of other property owned by the same owner.

In this case C Bank, the owner of Lot 1, and his Apartment tenants are seeking to establish that they have an easement over Lot 2 owned by Mr. Hay for use of the driveway parking spaces and garden.

Appurtenant Easement.

An appurtenant easement is a right to use adjoining property that transfers with the land. Benefits the easement owner in the use of land belonging to that owners. The parcel of land that benefits from the easement is the dominant tenement. The servient tenement is the parcel of land that provides the easement.

Since these lots are connected and so it appears C Bank is seeking an appurtenant easement. The benefit of an appurtenant easement over an in gross easement is the benefit of the easement transfers with the land. This ability to use the adjoining land increases the potential sale price for Lot 1.

The use of part of Lot 2 for the driveway is clearly an appurtenant easement. The parking spaces are not as clearly in this category and the use of the garden is even less clear. However, since it appears that only those living in the Apartments on Lot 1 are using the parking area and garden the argument that any easement is appurtenant is more likely to be accepted. If the general public was using these spaces the analysis would be different.

Servient and Dominate Estates.

The parcel of land that benefits from the easement is the dominant tenement. The servient tenement is the parcel of land that provides the easement.

In this case, now that the properties are owned by different parties, Lot 2 is the servient estate and Lot 1 is the dominate estate. So long as the properties remained in one ownership there could be no such thing as a

dominant and servient tenement estates because one cannot have an easement over one's own property, even they are separate parcel numbers.

The burden is on the servient estate owner, Mr. Hay, to be attentive to his rights. Therefore, on most issues in this litigation Mr. Hay will have the burden of proof.

Creation of An Easement.

Generally, to create an easement a writing signed by the party to be bound is required. However, under some circumstances an easement can be created by estoppel, necessity or prescription.

Easement by Estoppel.

Restatement (Third)'s position (the minority position) is that an easement by estoppel possibly avoids expenditure of disproportionate amounts of money to make use of land, enhancing the value of the land.

The easement by estoppel doctrine should operate only when there are assurances that the landowner allocated the easement values its use most highly. If the servient owner objects immediately when the improving landowner starts using the easement, the improving landowner must bargain for the easement. By giving oral permission and then taking no action when expenditures begin, the servient owner indicates that the use is not a substantial interference with his rights, i.e., detrimental reliance.

In the case at hand, the improvements to the garden could possibly create an easement by estoppel for those uses. The prior owner of Lot 1 said nothing when C Bank made the improvements to the garden and even Mr. Hay let C Bank keep paying for the upkeep and water for the garden.

Mr. Hay could be prevented from asserting that the Apartment tenants are trespassing when they use the garden under the theory of easement by estoppel.

Easement By Necessity.

An easement of way by necessity will be implied when a tract is divided so as to deprive a portion of the tract from access to a public road. The easement is implied over the portion of the tract with public access.

What is the degree of necessity required for an easement by necessity? "If property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section."

The degree of necessity required to imply an easement in favor of the conveyor is greater than that required in the case of the conveyee. Generally no easement will be implied where there is another possible means of access, even if that access is shown to be inconvenient, difficult, or costly. Moreover, such an easement continues only as long as the need for it exists. Thus, if adequate alternative access becomes available, the easement terminates because it no longer serves to promote the underlying public policy considerations.

In the case at hand, the only potential easement by necessity is in relation to the driveway. The use of the additional parking spaces and the garden are not "necessities" but access to the underground parking is since the driveway is the only means of access. Perhaps Mr. Hay could argue that the necessity is self-imposed but since when these structures were built there was a common ownership so the idea of an easement was not an issue.

There are essentially two subsets of easement by necessity – (1) implied easement from prior use involving common grantor where the standard is reasonable necessity, and (2) easement by necessity involving a

common grantor, a landlocked parcel, and truly strict necessity. In this case since there is a common grantor and a prior existing use. Therefore the only question remaining is whether there is a reasonable and/or strict necessity for the use. It appears to be such in relation to the driveway but not for garden and any parking spaces used by the dominant tenement holder.

Prescriptive Easement.

Easements by prescription are similar to the doctrine of adverse possession but in some ways distinctly different. In adverse possession cases the issue is possession of land, whereas, in an prescriptive easement case the issue is the use of land.

A prescriptive easement is a right established in someone else's property by using that property in a consistent way over a period time. In this case we are told that the required time is five years. The easement holder starts out as a trespasser, and if the true owner does not take action to stop the trespass, or establish that the use is permitted, they lose, meaning the trespasser's non-exclusive use of someone else's property becomes a vested right in the trespasser

To establish a prescriptive easement the party claiming it must show use of the property that has been open, notorious, continuous, and adverse for an uninterrupted period of five years. An essential element necessary to the establishment of a prescriptive easement is visible, open, and notorious use sufficient to impart actual or constructive notice of the use to the owner of the servient.

One purpose of prescription is to protect the status quo because of the difficulty of proving stale claims. Another purpose of prescription is to quiet titles, including record titles that are costly to prove because of the information costs of digging up ancient matters.

The use need not be exclusive in the sense that it must be used by one person only. Rather, the right must not depend upon a similar right in others. In most states, the user can acquire a prescriptive easement even though the easement is also used by the servient owner.

Scope Of Prescriptive Easements.

A prescriptive easement is not as broad in scope as an easement created by grant, by implication, or by necessity.

Although the uses of a prescriptive easement are not confined to the actual uses made during the prescriptive period, the uses made of a prescriptive easement must be consistent with the general kind of use by which the easement was created and with what the servient owner might reasonably expect to lose by failing to interrupt the adverse use.

Interrupting The Prescriptive Period.

To prevent a prescriptive easement from being acquired, the owner must effectively interrupt or stop the adverse use. Mr. Hay is trying to do such by filing the compliant, but he is too late to interrupt the prescriptive period because his Lot 1 had been used by those living on Lot 2 for over five years prior to his acquiring Lot 1.

Some Elements For Prescriptive Easement Easily Met.

In this case the elements of open, notorious, and continuous are easily satisfied. The facts demonstrate that use of the driveway, parking spaces and garden have been very obvious and have continued for many years.

The years in which there was a common owner of Lots 1 and 2 cannot be considered when determining whether the required time has passed for a prescriptive easement. However, the two lots were owned by different parties since 2011 and the litigation was not initiated until 2017 so more than five years have passed with open and notorious use of the driveway, parking spaces and garden.

Adverse.

The one element in issue is whether the use was adverse. The concept of "adverse" in this context is essentially synonymous with "hostile" and "under claim of right" A claimant need not believe that his or her use is legally justified or expressly claim a right of use for the use to be adverse. Instead, a claimant's use is adverse to the owner if the use is made without any express or implied recognition of the owner's property rights or simply, without permission or even in the mistaken belief that the trespasser is using his/her own land.

In other words, a claimant's use is adverse to the owner if it is wrongful and in defiance of the owner's property rights. To be adverse to the owner a claimant's use must give rise to a cause of action by the owner against the claimant. This ensures that a prescriptive easement can arise only if the owner had an opportunity to protect his or her rights by taking legal action to prevent the wrongful use, yet failed to do so. "Adverse use" means only that the claimant's use of the property was made without the explicit or implicit permission of the landowner.

Whether the use is hostile or is merely a matter of neighborly accommodation, however, is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties.

Where a possession commences with the consent of the owner, which is the presumption when one tenant in common is in sole possession, there can be no adverse possession until there has been a disclaimer by the assertion of an adverse title, and notice thereof to the owner, either direct or to be inferred from notorious acts.

This is the element Mr. Hay is trying to prevent the Court from finding in favor of C Bank by saying permission for the use of Lot 1 by those living on Lot 2 had been given by the prior owners going back to the days when the two lots were owned by the same parties.

License.

Mr. Hay is also trying to claim that the use was pursuant to a license and he is revoking that license. In general a license is revocable but the theory of estoppel applies.

As a matter of law, a licensee is conclusive presumed to know that the license may be revoked "'at the pleasure of the licensor.'" (Holbrook v. Taylor, supra, 532 S.W.2d 763 at p. 764, quoting Lashley Telephone Co. v. Durbin (Ky. 1921) 190 Ky. 792, 793,) But when the license includes the right to build upon the land and acquire interest through an easement and improvements to the easement the licensor may not revoke the license once the licensee has exercised that right. (Ibid., quoting Lashley Telephone Co. v. Durbin, supra, 190 Ky. 792 at p. 793, (quotations omitted).)

A non-exclusive right becomes irrevocable through estoppel when the licensee has spent money in reliance on the permission and it would be unfair to permit revocation. The Third Restatement provides that there is a presumption that irrevocable licenses are treated the same (i.e., have the same duration) as easements unless the parties intend that they remain irrevocable only so long as necessary to permit the user to recover expenses.

Even if Mr. Hay successful in his claim that the use was pursuant to a license, he still may not be able to revoke it without paying C Bank back for the improvements.

Was The Use Permitted?

Obviously when the two lots were owned by the same party the use was permitted. However, such is irrelevant given that the doctrines of prescriptive easement and license do not apply when property is singly owned. The real issue is whether JP Bank ever gave C Bank permission to use Lot 2. The facts listed in the question are insufficient to come to a conclusion on this point. When proceeding with discovery this

1)

(1) Standing to make the challenge

To have standing, one must have a sufficient interest in the outcome of the litigation to ensure substantial advocacy and an interest in the subject matter being disputed.

The business owners and residents of the Tower District do have a sufficient interest in the outcome because if the Church ends up buying the property from Tower Theater and using the property as a Church, then this affects all of the businesses in Tower District. It affects these businesses because they are already there and the City Plan and Code prohibit the sale of alcohol within 1,000 feet of a church. The restaurants currently serving alcohol would then be prohibited from doing so if they are within 1,000 feet of the church, this would harm those business owners and the residents would no longer be able to obtain drinks from these places. To do those reasons, the business owners and residents also have an interest in the subject matter being disputed. The business owners have standing. However, it can be argued that the residents do not as they do not if they do not own the businesses being affected, then they would have an interest but not a sufficient interest in the outcome to ensure substantial advocacy.

(2) Ability to insist that the present zoning regimen remain in place

Zoning

The state can enact statutes to reasonably control the use of land for the protection of the health, safety, morals, and welfare of its citizens. Zoning is the division of a jurisdiction into districts where certain uses and developments are permitted or prohibited. Such a zoning power is based on the state's police power and is limited by the Due Process Clause of the 14th Amendment, Equal Protection Clause of the 14th Amendment, and the "no taking without just compensation" clause of the 5th Amendment. Noncumulative zoning is where land may be used only for the purpose for which it is zoned.

This zoning regimen specifies that there shall be no religious services allowed in any facility over 1,000 square feet in space and the sale of alcohol within a 1,000 feet of a church is prohibited; this is noncumulative zoning. This present zoning regimen is in place and no facts indicate that it is temporary. One way for the zoning regimen to potentially be taken away is if it were to be found that zoning regimen is a partial taking of the Church by the government, and the remedy for a government's partial taking is to compensate the owner or terminate the regulation and pay the

owner for damages that occurred while the regulation was in effect. However, the Church is not currently the owner. If the church becomes the owner then they would move there in violation of the ordinance. Even if it were ruled a partial taking, the government would likely just compensate the owner.

Nuisance

Nuisance is an interference with the use and enjoyment of land, in order to give rise to liability, it must be substantial. It also must be either intentional and unreasonable or the unintentional result must be negligent, reckless, or abnormally dangerous activity.

Public Nuisance

An invasion by intangibles that unreasonably interfere with the health, safety, or property rights of the public.

Here, the Church is violating the zoning regimen and interfering with the property rights of the public, the bars and restaurants close by. Such violation is in fact a public nuisance.

(3) Strength of the Church's position that the zoning is discriminatory

The Church's position appears to be weak. The zoning requires that there be no religious services allowed in any facility over 1,000 square feet in space and that the sale of alcohol is prohibited within 1,000 feet of a church. The Church may argue that having to be in any area 1,000 square feet or less is very small. The Church can try to argue this to be discriminatory. However, the Church's argument is weak because the Tower District is aimed at entertainment, bars, shops, etc. The church would be an outlier as this district is also the leading nightlife area. I do not see why a church would want to be in that area, it would be loud as well. The zoning does do the Church a favor in prohibiting the sale of alcohol within 1,000 feet of the church. Thus, although 1,000 square feet is very small for a church to fit, the church may easily find space somewhere else that will not be too noisy and violate the church service. Therefore, the Church's position is weak.

(4) Strength of the position of the bar and nightclub owners that the Church moving in will create licensing problems for them

If the Church moves in, then the City Code and Plan prohibits the sale of alcohol within 1,000 feet of the Church. If the bars and nightclubs don't adhere to this prohibition, they may lose their liquor license. For the bars and nightclubs that are right next to the Church, this will greatly affect them. They would either have to stop selling alcohol, or run a high risk of losing their liquor license. This would result in a decrease in business either way. Thus, the strength of the position of these bar and nightclub owners is significant.

(5) Pros and Cons with respect to the Groups' chances of successful outcome

Pros

The successful standing.

The City Plan and Code make it likely that the Group will have a successful outcome.

The burden to the bars, restaurants, and nightclubs that are already in place if the Church moves in next door.

The Church fully knowingly violating the zoning regimen if the sale follows through.

The Church coming in would put the already established bars, restaurants, and nightclubs in violation of the Code and at risk of losing licenses.

Cons

The Church arguing that the zoning is discriminatory.

If the Church buys, the Church potential bringing a suit against the City for partial taking.

END OF EXAM

2)

Whether the 2013 ordinance constitutes a Taking under the Fifth Amendment and Arguments on Appeal

Under the Takings clause of the fifth amendment, private property may no be taken for public use without just compensation. Under the Taking clause public use does not follow the literal definition of public use, i.e., that the use must be one that is designated for the public as a whole, but rather that the use has some rational relationship to the general public, So, the question is whether the project serves a public purpose. However, there are two views on public use. However, the definition of public use is still somehow vague in its application and there are two opposing views. The broad view looks at the advantage being conferred to the public and the narrow view focuses on the actual use by the public. In other words, the broad view looks at the ends while the narrow view looks at the means.

Under the board view the taking would likely be justified because the public benefit would be two-fold. The general public would get the benefit of not having rental uncertainty being thrust upon renters through the arbitrary eviction of renters and would have more stability as lifetime leases would be provided for renters that were already in their locations. In addition, people who owned property would have the option to convert their property into community interest property. This has a benefit because it would help with mortgage financing, insurance, utilities, and real estate taxes by spreading the cost more evenly amongst all of the tenants in common and would allow for a blanket loan for important improvement projects that might not be done without the conversation of the property into a condominium.

Under the narrow view, however, the actual use by the public would be non-existent. The means employed by the city, i.e., only allowing for the conversation of a property to be converted in owners are forced to offer lifetime leases to non-owners would effectively deny owners their right to exclude people from their property while have no general public use. The public use would be specific only to people that were already renting the unit which is only a specific subset of the public. In addition, folks who actually had a possessory interest in the property would potentially be stripped of heir use of the property, as would be the case for the Mr. and Mrs Perfect.

That being said, however, the public use is only one consideration that is taken into account under the Takings clause. The other considerations include the economic impact of the regulation on the property owner. In this case, the economic impact to the Mr. and Mrs. Perfect would likely be

negligible if, not beneficial, because it would guarantee them compensation for the use of the property until either their own deaths or until the person renting their property decided that they wanted to move. In order a taking the occur the owner of private property must be stripped of their property without just compensation. If the Perfects are allowed to collect rental money from the property for the rest of their lifetime this would likely be seen as an economic benefit. And it certainly would be seen as foreclosing any and all economic benefits conferred onto the Perfects.

Part of the problem in determining if a taking has occurred is based upon the ambiguity as to whether or not a regulatory taking exists. The Supreme has so far been reticent to law down a definitive rule as to when, or even if, a regulatory taking can occur. In general, the rule has largely been one sided and has upheld that regulatory takings are not considered takings. Under the current Court precedent, the Perfects are likely to find it difficult to establish that a taking has occurred because they are being compensated and the regulations of property have become increasingly pervasive in contemporary times. In effect, the Court has largely stacked the deck against a person attempting to challenge a regulation as being a Taking and the Perfects would face a large uphill battle in convincing Court that there has actually been a taking.

Despite the fact that the hill is a steep one, that does not mean that the perfects are completely without arguments to make that a taking has occurred. First, the Perfects could advance the argument is that the regulation would be a substantial interference with the investment-backed expectation of the use of the property. When the Perfects bought the property, they bought it with the intention of using it as a retirement home and not as a rental property. The only reason that that they even agreed to entering into the initial lottery system was because the original ordinance came with a guarantee that when they were ready to move into the property they would be able to do so by evicting the current tenant regardless of whether a breach occurred. Their expectation at the time of the 2009 purchase was that they would be able to assume control of the property upon their retirement. If they had known at the time that that would not be the case, in all likelihood they would have probably invested in a different property or chosen not to invest in any property at all. It was precisely this certainty that lead them to rent out their property in the first place.

As part of corollary to this, the new ordinance violates their rights as owners of the property to exclude others from the property. Be by being forced to give offer lifetime lease on their property to a renter the government has effectively appropriated and invaded their property. for a use that does not serve any real rational public purpose. it does create a personal benefit to the person that is currently renting this property, but that benefit (as mentioned above) is highly specific as it only

relates to a small subset of people. In addition, the public purpose that was adopted by the initial 2009 ordinance has all but evaporated.

The 2009 ordinance was based upon the reasoning that there needed to be sufficient rental properties available in the City of San Francisco. However, this rational is contravened by the new ordinance because it's net effect would likely be to shrink the number of available properties, not grow it. If the property can be held by the current renter as a lifetime lease, and in fact chose to do so that would keep that property off of the market which simultaneously keeping the owners of the property from being able to actually use the property in the way that they intended which would have a net negative effect on the availability of housing in San Francisco.

On appeal the Perfects could argue that the the violated both their substantive Due Process Process Rights and the Equal Protection Clause. The ordinance would be a violation of their Due Process rights because forcing the Perfects to offer a lifetime lease to their tenant would be both arbitrary and capricious. As discussed above, the original rational for the 2009 ordinance has all but evaporated and there is no reasonably related benefit to public health, welfare, or safety. The ordinance would arbitrarily deny the Perfects the right to choose what type of lease the enter into with a renter, or if they already have a lease agreement in place would effectively supplant that lease with a new lease while providing little in the way social benefit. Since the lifetime lease would be offered to the person who was already in the property, it would do nothing to reduce the potential for homelessness, as discussed above could in fact even contribute to a housing crisis. At the very least, it would have no net positive change on the availability of rental properties in the city while causing a substantial burden to the Perfects.

Secondly, it violates the Perfects equal protection rights because it would equally apply to all similarly situated people. In this case, the class of similarly situated people would be the other common owners. Not every common owner would be required to offer a lifetime lease to someone. Thus, despite the fact that all of them have the same ostensible interest in the property not all of them would be able to receive the same benefits. If every owner finds themselves not receivin the same benefits as their other common owners that should be viewed as a violation of the Perfects Equal Protection Rights. And as discuss above, there does not appear to be any legitimate government interest that is being maintained as the public health, safety,, and welfare are either (a) substantially unchanged or (b) negatively affected by the reduction of available rental units

END OF EXAM

3)

The question presented in this case is whether the the owner of Lot 1 (C Bank) has any legal interest in continuing to use Lot 2 for access, parking, and recreational purposes.

EASEMENTS

The easement is the grant of a non-possessory interest that entitles its holder to some form of limited use or enjoyment of another's land. An affirmative easement gives its holder the right to do something on another's land.

There are easements appurtenant and easements in gross. An easement appurtenant is a right to use adjoining property that transfers with the land. There are two parcels involved in an easement appurtenant, the parcel that derives the benefit is called the dominant tenement and the parcel that bears the burden is called the servient tenement. An easement in gross is a legal right to use another person's land, only one parcel is involved.

In this case, there are multiple types of easements. The driveway will be considers an affirmative easement appurtenant because there are two parcels involved; Lot 1 is the dominant tenement because the tenants of the apartments on Lot 1 are the ones using the driveway daily, and Lot 2 is the servient.

The parking lot and the garden will be considered affirmative easements in gross because only one parcel is involved, Lot 2.

CREATION OF EASEMENT

Easements can be created by prescription, implication, necessity, and grant.

Easements most commonly arise from an **express grant** by the owner of the servient tenement to the easement holder. Absent an exception to the statute of frauds, the grant must be in writing to be enforceable.

There is no express easement by grant in this case.

An easement can arise from the subdivision of land if such an easement is **strictly necessary** to the use of and enjoyment of a subdivided lot. Without the easement, a parcel could be landlocked and impossible to access without either trespassing or getting permission from the other owner.

C Bank's argument here is that an easement arose when the lots were sold in 2011, the first time the two properties were not under common ownership in 50 years. The use of the dominant tenement's underground parking lot would be virtually impossible without the driveway that encroaches on Lot 2. C bank may have an argument for the driveway, but not for the parking or the garden. The facts do not say why the apartment tenants park on Lot 2 or why the garden was planted.

C Bank likely has an easement by necessity only for the appurtenant easement (driveway) but not the easements in gross (parking lot and garden.)

A **prescriptive easement** is created when the easement holder has made use of the servient tenement in a manner analogous to adverse possession. The use must be open and notorious, adverse, and continuous for the statutory period. Unlike adverse possession, the use does not need to be exclusive.

C Bank's argument here is that the prior use of the driveway, parking lot, and garden has gone for longer than the statutory five-year period. C Bank acquired the property in 2011 and has been using the easements until Mr. Hay acquired Lot 2 in 2017. The use of the driveway has been continuous because it is used at least 100 times a day. The continuous use of the parking lot and garden on Lot 2 is not discussed. The use of all three have been open and notorious because they can be seen from Lot 2. C Bank never received permission to use the driveway, parking lot, or garden, so they are adverse. Mr. Hay argued that when he acquired Lot 2 from JP Bank he was revoking the permission that Lot 1 previously had, but that fact is not disclosed. There is nothing in the facts that says C Bank had permission from the previous owners.

The driveway meets the requirements for prescriptive easement, but the parking lot and garden do not because they were not continuous.

An easement may be created by **implication**, in that it is implied from prior use. Continuation is reasonably necessary to the dominant's land use and enjoyment.

The appurtenant easement (driveway) will also meet this requirement, while the easements in gross (parking lot and garden) will not because their continual use was not disclosed. Had the parking lot

and garden been used daily or even more than once a week, C Bank would have an argument for the easements in gross to have been created by implication.

There is a valid easement appurtenant for the underground driveway.

TRANSFERABILITY

An easement appurtenant runs with the land - that is, it remains in effect upon the transfer of the dominant tenement. An easement in gross, by contrast, is personal to the easement holder and does not run with any specific parcel of land. Easements that run with the land retain their effect even if they are not identified in the applicable deeds or other transaction documents. The burden will pass to the servient land unless the new owner is a Bona Fide Purchaser (BFP) without notice.

The easement appurtenant (driveway) will run with the land, while the easements in gross (garden and parking lot) will not. Easements in gross are not transferrable unless they are for commercial purposes, and the easements in gross were not properly created through grant, necessity, implication, or prescription. It is unclear whether the new owner, Mr. Hay, is a BFP. A BFP must have purchased the land for substantial pecuniary value and the facts only say he "acquired" Lot 2 from JP Bank.

The easement appurtenant (driveway) was transferred when Mr. Hay took ownership of Lot 2.

TERMINATION

An easement can be terminated by: Estoppel, Necessity, Destruction, Condemnation, Release, Abandonment, Merger, or Prescription.

It does not appear that the appurtenant easement (driveway) has been terminated in any of these ways.

LICENSE

The parking lot and garden on Lot 2 may have been licenses. A license is a property owner's permission to another person to make a specified use of the property.

If Mr. Hay is correct that the previous owner had given C Bank permission to use the Lot 2, then the parking lot and garden could be considered a license. One significant difference between an easement and a license is that a license creates no right or legal interest in the licensor's property. A license also expires upon the licensor's transfer of the licensed property. Therefore, in this case, when Mr. Hay became the new owner of Lot 2, the license expired.

A license can be made irrevocable by estoppel, which effectively turns the license into an easement. However, the licensee had to reasonably and detrimentally relied on the license's continued validity, such as by spending money to improve the parking lot or garden. There is nothing in the facts to say that C Bank detrimentally relied on the parking lot. C bank invested in the garden on Lot 2 by putting an irrigation system which was tied to the water lines for Lot 1. There were no means to water the garden on Lot 2 so C Bank paid for the watering of the garden.

The garden will likely be considered a license by estoppel which bars revocation.

CONCLUSION: C Bank has a legal interest in continuing to use Lot 2 for access (driveway = appurtenant easement) and recreational purposes (garden = irrevocable license,)

END OF EXAM