KERN COLLEGE OF LAW

Real Property

Final Examination

Spring 2022

Prof. K. McCarthy

Instructions:

There are three (3) questions in this examination. You will be given three (3) 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

Hill lived on a slope running down to a road. He ran a sanitary sewer line from his house to the road, where he connected it to the city's line. Hill then subdivided his property, creating another lot between his house and the street, and built a house there, which he connected to the sewer line. He sold the lot and house to Valley, reserving an easement in the grant deed to Valley so that Hill could drive across Valley's lot to the road but not mentioning the sewer line. Valley discovered that Hill's sewer line crossed his property only after the line backed up and flooded his basement. Valley brought suit against Hill for trespass.

After Valley purchased the lot from Hill, the county built a new road along the border of Hill's property opposite Valley's lot, giving Hill direct access to a road.

Discuss:

1. Valley's probable chances of success against Hill for trespass with respect to the sewer line; and,

2. Hill's probable chances of success in asserting an easement to drive across Valley's lot.

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QUESTION 2

Alfred and Brenda owned neighboring parcels of land in a single family non-commercial neighborhood, Apple Acre and Banana Acre respectively. These parcels were part of a one (1) square mile development pursuant to a recorded development plan which designates the area for residential use, and sets out specific areas for a park and a small commercial area to serve the neighborhood (*e.g.,* a convenience market, a couple of local food shops, a very small hardware store, a UPS store.)

Alfred and Brenda entered into a mutual agreement, which they duly recorded against each of their parcels, promising for themselves and their respective successors, heirs, and assigns, that their properties would be used only for residential purposes.

A year later, Alfred leased his land to Carl. As part of the lease and lease negotiations, Carl was charged with knowledge of the record title of Apple Acre. Carl then used Apple Acre for his car washing business.

Brenda brought suit against Carl to prevent him from running his car washing business at the residence. What result?

You must (1) state which of the below possible answers is best and (2) also explain why each of the remaining answers is not the best.

(a) Brenda loses because U.S. courts do not recognize negative easements against business uses.

(b) Brenda loses because she is not in horizontal privity with Carl.

(c) Brenda wins money damages for breach of a real covenant.

(d) Brenda wins equitable relief for breach of an equitable servitude.

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QUESTION 3

Len, an excellent professional chef, installed a smokehouse in the large backyard of his residence three years ago to supply smoked meats to his friends and for promotional purposes for his business. This requires the smokehouse to be operating for at least 12-16 hours at a time.

Social media posts tout Len's "24/7" dedication to his craft with photos and videos of Len and his backyard smoker. As part of his social-media "branding," every two (2) months or so, Len invites about 40 people to come to his backyard for free ribs and brisket and "smokehouse vibes." Len plays music quietly during these events on a smart speaker from his house - cool jazz and blues - uses paper plates and plastic cups and paper towels for napkins, fold up chairs from his restaurant, and he bought a couple of strings of lights from Costco for less than $200. He makes sure that there are plenty of trash cans and that his guests are clean and respectful. These events are well attended - Len *is* a smokehouse master - and the attendants, though well mannered, do tend to get carried away at times and become a little noisy and there are some parking issues in the neighborhood.

Len's next-door neighbor, Michelle, enjoys the mild climate of San Luis Obispo and spends a lot of her time outdoors. She is annoyed by the smoke and smells from Len's property and by the hub-bub and parking congestion from Len's events. Michelle stopped having parties outdoors after receiving complaints from some of *her* guests. She asked Len multiple times to stop using the smokehouse and to stop doing the events, but he rebuffed her requests.

After a year or so, Michelle was fed-up and decided to take more aggressive action. As part of her efforts to have Len's backyard smokehouse stop, Michelle - who is best friends with the Mayor - asked for and was able to have City enact new City ordinance 12:03, which provides:

> "Effective in 90 days, all outdoor bbq, smokers, fire-pits, smokehouse and/or similar use is limited to three (3) hours/day for every residential property in the City."

Len says that if he stops using his backyard smokehouse and hosting the events, he will lose $10,000/year in lost income and further contends he has lost opportunity costs in an unspecified amount - it will damage his "brand." Len has not stopped with the smokehouse or the events and it has been more than 90 days since 12:03 was enacted.

1. If Michelle sues Len regarding his use of the smokehouse, (a) what claims, if any, may she reasonably raise, (b) what defenses, if any, may Len reasonably assert, and (c) what is the likely outcome? Discuss.

2. If Len sues City with respect to new City ordinance 12:03, (a) what arguments may Len reasonably assert and (b) what is the likely outcome?

Assume that there are no statute of limitations issues.

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Professors Lewi (SLO) & McCarthy (KCL)

ANSWER: Q1

1. **Valley=s probable chances of success against Hill for trespass re the sewer are not great. Hill will likely be able to prevail on a theory of implied easement from prior existing use.**

Type of Easement in Favor of Hill for the sewer line:

There is nothing in writing for the sewer line so no express easement or any other type of express agreement or covenant will not apply. However, Hill will likely be able to obtain an order from the Court for an Aimplied easement from prior existing use@ for the sewer line.

Rule: (1) Unity of Title / Common Grantor; (2) Apparent Existing Use Prior to subdivision / Notice to Successor and (3) Reasonable Necessity of Use. All elements are satisfied on the given facts

Analysis; Hill owned the whole parcel, built a house and ran a sewer line from that house to the City sewer main; then subdivided and built another house on *that* parcel, hooking its sewer line up to the sewer line that services the older house and in turn connects to the City sewer main. [Common Grantor / Unity of Title. / Prior Existing Use] Hill then sold the subdivided parcel and newer house to Valley. Was the sewer line apparent so as to give Valley Anotice?@ Valley will, argue ANo@ B it was buried and old and well out of sight and thus he had no notice but Valley will likely lose that argument. The Court in *Van Sandt v. Royster* found on similar facts that someone in Valley=s position at least should have known from the lay out and chronology of the adjoining properties that the shared sewer line was there B that it was Aapparent@ from all relevant facts and circumstances. One needs sewerage for one=s house, there was a house on each parcel and they must have had sewerage goes the argument from *Van Sandt*, and thus Valley was on notice of the prior existing use at the time he bought his parcel from Hill, at least that is the conclusion of the Court in *Van Sandt*. Hill=s continued use of the now shared sewer line is reasonably necessary. [Notice and Reasonable Necessity.] An implied easement by necessity from prior existing use will likely be found in favor of Hill for his continued use of the shared sewer line and Valley=s trespass case will fail.

For extra credit B other easement theories?

An easement by necessity requires strict necessity, which here the facts do not establish. Hill could use a septic tank or a sump pump, for instance, and does not have to run the sewer line across what is now Valley=s property.

There is no evidence of a license or other facts supporting estoppel.

There is no evidence of adverse use for the statutory period C a necessary element of prescription.

2. Hill=s probable chances of success in asserting an easement to drive across Valley=s lot.

In what is not a close call, Hill will win. There is an express easement granting him this right and there is no evidence such easement has been revoked, released, abandoned, or destroyed by prescription. That Hill may have different access to a new road does nothing to change the express easement. This is NOT an easement by strict necessity case.

ANSWER:

Question 2

(a) *ABrenda loses because U.S. courts do not recognize negative easements against business uses.@* NO. Not the best answer. Though true, the claim is irrelevant because Brenda could enforce her rights via a covenant and/or an equitable servitude and stay clear of the somewhat problematic negative easement argument, not to mention that historically, negative easements were limited to light, air, support, and water flow, and the Aresidential use@A only covenant is none of these. And, there is a better argument that Brenda will win here, at least for injunctive relief.

(b) *ABrenda loses because she is not in horizontal privity with Carl.@* NOT the Best though close. Historically, horizontal privity of estate was necessary for the burden of a real covenant to run, but not the benefit. While true that Brenda is not in horizontal privity with Carl B the burden of a promise between neighbors without any further consideration or coupled with a grant or settlement, etc. will not run with the land. Now, though, the trend is that horizontal privity of estate is not required. See p. 851 (which, admittedly, could be a bit more clear about the current state of the law). And, there is a better argument that Brenda will win here, at least for injunctive relief.

(c) *ABrenda wins money damages for breach of a real covenant.@* NOT the Best. Because Carl, as a tenant and not the holder of fee simple absolute, has a lesser estate, the burden of the real covenant does not run, even though he has constructive notice of it. And, we have the issue of the burden of a promise between neighbors without any further consideration or coupled with a grant or settlement, etc. will not run with the land. We would need further information that Carl agreed to be bound by the covenant, and we have no such information. Brenda could sue *Alfred*, for money damages, who remains the owner of the parcel and bound directly to Brenda by the covenant (we have no evidence that Alfred was released when he leased Apple Acre to Carl.)

(d) *ABrenda wins equitable relief for breach of an equitable servitude.@* BEST answer. For an equitable servitude to apply and run with the land, privity is not strictly necessary. Carl is charged with constructive notice of the covenant between Brenda and Alfred

that is recorded against the parcel he leased from Alfred (we are told that the lease imposed this on him), and Carl knew or should have known from the nature of the SFR neighborhood and the prior recorded development plan that the negative covenant was consistent with the primarily residential nature of the recorded development plan (common scheme). Moreover, that common scheme creates on its own a valid basis for Brenda to seek injunctive relief against Carl based on an equitable servitude..

ANSWER
Question 3

1. Michelle vs. Len B Nuisance for the Smokehouse and Events

a. Private Nuisance

A private nuisance is a substantial and unreasonable interference with another person=s use and enjoyment of their property interest.

I. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, Michelle finds the smoke and smell and the hub-bub of the events annoying, so much so that she stopped having parties. While relevant, Michelle=s subjective reaction is not dispositive. It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse and the events. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. And the events appear to be pretty low-key, really; the facts state Aquiet music@, low intensity lighting, that the attendants are mostly courteous and clean and they occur only every two months or so.

If the smoke and smells and/or the hub-bub from the events are found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended but it is possible that a Court would find that Len=s uses are not Asubstantial@, and if so, that would be the end of Michelle=s private nuisance claim. Assuming for the sake of analysis that Len=s uses cause Asubstantial harm@, we move on.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. There are two different approaches; one involves the severity of the actual harm to the specific plaintiff=s property interest without regard to the benefit of the of defendant=s conduct, *i.e.*, the dairy farmer under the power lines. However, under the majority view, this is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse and/or the events is/are unreasonable because it/they prevent(s) her from enjoying the outdoors in the way which she had done for years. Furthermore, she is prevented from having her parties, and likely the smoke and smells and hub-bub depreciates her property somewhat.

However, L will counter that the smokehouse and events enable him to hone his skills as a chef and provide smoked meats to his friends and promotes his business and to earn a little income and up until recently, was perfectly lawful under the relevant land-use regulations. He will argue that these activities are of substantial benefit to him and the community and are not unreasonable (and that they are a relatively low impact activity.)

However, because we assume for the sake of analysis that L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse and events will more likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. The introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke and noise and parking issues are not a trespass onto Michelle=s land B no physical interference B and therefore there is no actionable interference.

M will counter that the smoke and smell component of the nuisance is fundamentally particulate in nature, because of how noses work. Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property. Michelle will also complain about the noise from the events, which, if loud enough, may qualify as an actionable nuisance (though the facts state the music is quiet and that the guests largely are courteous and behave themselves.) Because there is some degree of physical trespass, M will likely succeed in demonstrating interference.

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance. Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence and the noise and hub-bub from the events (which we do not necessarily assume), M could succeed in an action for private nuisance.

Remedy:

Generally, the remedy for a private nuisance is money damages and/or an injunction to stop the offending activity. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages are preferred. Of course, while a temporary protective order (TPO) may issue, no preliminary or final injunction will issue if it appears the plaintiff does not have a reasonable likelihood of success on the merits regardless of any balancing of the hardships.

Here, L's smokehouse serves a limited economic purpose, and does not benefit the community as a whole. If we assume that M will likely prevail on the merits of her nuisance claim B which we do not B M will likely receive an injunction (her money damages claims are very speculative.)

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large. And we now have City ordinance 12:03 and its limitation on backyard smokey-activity.

I. Standing

Generally, where a public use ordinance is allegedly being violated, it is up to the public entity to enforce the ordinance and seek a remedy; no private cause of action is established by the ordinance. However, a private individual can sue for Apublic nuisance@ in certain circumstances. In order to state a cause of action for public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. M=s objection to the events, for the same reasons, is not going to provide her a cause of action in public nuisance. Therefore, M lacks standing to bring a public nuisance cause of action.

2. Len vs. City for Invalid Zoning / Land Use Ordinance and Regulatory Taking:

Len will argue (1) that 12:03 is an invalid zoning or land use ordinance and/or (2) that ordinance 12:03 is a Ataking@A because it goes too far and deprives him of a valuable property right without compensation. Len=s arguments will likely fail.

a. 12:03 is a Valid Zoning / Land Use Ordinance.

City is allowed to enact zoning and land use ordinances as a valid exercise of the State=s police powers delegated to City through the relevant enabling statute(s). We presume here that the enabling statute does properly and clearly authorize the type of land use restriction like 12:03 and make no analysis based on the enabling statute itself.

i. *Is 12:03 void for vagueness?* No.

Is 12:03 clear enough so that a reasonable person will know what it is they have to do to comply and what would be a violation? Yes. 12:03 states expressly the type of use that is regulated (Aall bbq, smokers, firepits, smokehouse and/or similar@), what is a permissible use (Alimited to three (3) hours/day@ per residence in the City) and when it becomes effective (90 days from the date it is enacted.) Len may argue that the term Aevery residential property@ is vague, *i.e.,* does that mean every apartment in an apartment building, but as applied to Len B which is a proper application of rule to fact (see *City of Issaquah*), who owns and lives at the residence, there can be no doubt that 12:03 applies only to him and the other occupants at Len=s property. Not void for vagueness.

ii. Is 12:03 unlawful on constitutional grounds? Probably not.

Neither a backyard smokehouse nor holding periodic events at your house for a commercial purpose will be deemed Afundamental@ rights (and Aproperty ownership@ is not a Afundamental right@) and thus under the forgiving Arational basis@ standard of review, City will likely be able to establish that 12:03 was enacted for purposes of Apublic health, safety, welfare, or morals@ as a valid exercise of the State=s police powers.

Len will argue that the practical effect of 12:03 is an unconstitutional infringement on his fundamental right to assemble (if no smokehouse, then no events he will say). Assuming for the sake of argument that this is true Bwhich we do not B then 12:03 will be subject to a A@strict scrutiny@ standard of review where City will be required to show that it has a Acompelling interest@ in enacting 12:03 and balancing the benefits of the ban on backyard smokey goodness for more than 3 hours/day against the harm caused by 12:03 will come out on the City=s side. This may be a close call.

City will assert that smoke is a health hazard (there is some newish science that also suggests charred meat is cancer causing), and that City has a compelling interest in its residents= health that will trump Len=s rather tenuous unfettered rights of assembly. If City residents want bbq and smoked food, they can go to the commercial parts of the City where it is perfectly lawful and enjoy them there (and even take them home.) Further, 3 hours is plenty of time to cook nearly anything on a backyard grill or smoker and 12:03 allows for that use. Nor does 12:03 ban the parties or events at all B only more than 3 hrs/day of the smoke and smells from bbq and smokers. And 12:03 does not touch the parking issues at all, leaving no impact on Len=s use and other residents= use. On balance, in a close call, City should win.

iv. Len=s best argument is that he is Agrand fathered in@.

Len will argue that prior to the enactment of 12:03, his backyard smokey happiness and events were compliant and perfectly lawful, which we presume for sake of this analysis to be correct, and thus he is Agrand fathered@ in and does not have to comply with 12:03. That is a good argument with solid, long-standing support in the case law.

Nevertheless, the better view is that City is allowed to make changes to its zoning and land use ordinances over time and is not required to permanently allow what are now non-conforming uses to continue B AA community should have the right to change its character without being locked into pre-existing definitions of what is offensive.@ (Dissent, *PA Northwestern Distributors, Inc.*) B particularly where City creates a period of time for what is now a non-conforming use to become compliant B the so called Aamortization@ period.

While our text teaches that the cases are mixed on the issue, in general, in assessing the reasonableness of the amortization period, courts have looked at the nature of the use in question, the amount invested in it, the number of improvements, the public detriment caused by the use, the character of the surrounding neighborhood, and the amount of time needed to amortize (or recapture)) the amount invested in the non-conforming use. (Pg. 921) B in other words, is it reasonable in light of all the facts and circumstances. Here, we do not have any actual facts as to how much Len invested in his backyard Asmokehouse@ but we do know it is in the backyard of his home in a residential neighborhood and that he does not appear to have made any other real Aimprovements@ B he uses paper plates, plastic cups, paper towels for napkins, uses his home smart speaker for the music, strung a couple of lights from Costco , and uses folding chairs that he brings from his restaurant. Probably will not take a lot of time for Len to reclaim his minimal investment. As for public detriment, that one is harder B lots and lots of people like to bbq and may have it running for longer than 3 hrs on any given day. Still, City should be allowed to dictate that the neighborhood not always smell and look like a smokehouse and make that change at the proper time without locking in all prior existing uses for all time. To be clear, this is a close call and if I were advising Len, I would tell him that this is by far his best chance of success in challenging 12:03 is invalid (least as to him) but he should be prepared to lose.

B. 12:03 Does not Constitute a Taking.

Having concluded that 12:03 is a valid zoning ordinance and that Len should expect that he will have to comply after 90 days, Len will next contend that 12:03 has put him out of business in his backyard and downgraded the utility of his property B a taking without just compensation. Len will lose.

I. *Was there a taking at all?*

A taking generally results where there is an actual appropriation, destruction, or permanent physical invasion of one's property. *Loretto*. That did not happen here. Unlike *Loretto*, nothing about 12:03 requires Len to allow any permanent physical occupation of his property. City makes no entry nor does 12:03 require Len to allow any other person access to install anything on his property. Thus, 12:03 does NOT constitute a *per se* taking

However, the enactment of a regulation can result in a taking. The term Ataking@ 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.

ii. Is Len=s Property Interest Taken Thru A Regulation?

Regulatory 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 or local entity validly regulates for health, safety, or welfare purposes under its police power B regulating a nuisance B 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.

Regulations governing use of property generally do not require compensation to the owner, even if the government reduces the value of the property. There is, however, a regulatory taking if the regulations leave no economically viable use for the property. *Lucas v. South Carolina Coastal Council*. Here, the best analysis is that 12:03 is mere regulation and does not constitute a taking.

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.

Len is far from wiped out in his use of the property (it is still his residence, he can bbq and smoke 3 hrs/day, and is not prohibited per se from hosting events and the loss of $10k/yr plus some speculative lost opportunity costs will probably not come close establishing that Len has no economically viable use for the property.) Len=s reasonable investor backed expectations are more reasonably tied to his use of the property as his residence and not for a collateral back-yard hobby and business development program and are not therefore frustrated by 12:03 to he degree necessary to find a regulatory taking has occurred. 12:03 itself is not overly burdensome B it still allows smokey backyard cookery, just on a limited number of hours per/day; it promotes a neighborhood that is not constantly dominated by the smells of a smokehouse, which City could reasonably conclude would be irksome and undesirable in a residential neighborhood. The

Aburden@ of 3 hrs/day of smokey cooking is spread out over every resident and is not unduly targeted and distributes the benefits of 12:03 throughout the City. And, as set forth above, 12:03 does not violate any essential attributes of property ownership (though this one is close and we can argue that we love smokey cooking and firepits and desire it at all times as part of our bundle of rights as property owners.) Moreover, there is no permanent physical occupation effected by 12:03 – no taking -- and, arguably, 12:03 is regulating the "nuisance" of too much bbq smoke and smells – again, no taking – and just the reasonable exercise of City's police powers for the public health, safety and welfare.

Finally, Len may argue the Agrand fathered@ use card again, this time under *Stop the Beach* B "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." That is what happened here says Len. He had an Aestablished@ right in his smokehouse which Ano longer exists@. But this can be said for any grand fathered use that gets regulated out over time and it is true that Len can still use his home property for all sorts of things, have his events, and even run a bbq or grill for 3 hrs/ day, and thus there is no credible argument that his Agrand fathered@ economic value was taken for purposes of it having to be paid for by City as a taking.

No taking and Len will lose.

1)

1. Trespass for the sewer line

The primary issue here is whether Hill has an easement for the sewer line by any method, the most likely candidates are easement by implication/prior use, and by necessity.

Easement

An easement is a servitude which gives the easement holder a nonpossessory right to enter and use the land of another which obligates the owner of the servient easement to allow the use. Easements can be appurtenant or in gross and can be created in a deed by exception or by reservation. Easements can be created expressly in writing, by prescription, Implication/prior use, or necessity.

Easement Appurtenant vs. in gross

An easement appurtenant is carved from one tract of land, the servient property (Valley), to benefit an adjacent tract of land, the dominant property (Hill). Easements appurtenant are inseparable from the land and the benefits and burdens pass to successors in interest to the properties if that was the parties intent and the burdened party has notice. Whereas an easement in gross benefits a particular person rather than a piece of land.

Here the easements in question are appurtenant, because they both are for the benefit of the dominant parcel, driving across the lot to get to the road and the sewer line which must run downhill to get to the city sewer line.

Express easement

An express easement is created by written agreement, describes the rights conveyed by the easement, and identifies the servient property.

Here the facts indicate the an express easement was created by reservation in the grant deed to drive across valley's lot to the road. There was no mention of an easement for the

sewer line, thus there was no express easement created because that right was not described or conveyed in the easement or deed.

There is an express easement to drive across Valley to get to Hill, but no express easement for the sewer line

Implied/Prior use easement

An implied/prior use easement requires a preexisting servitude that predates the division or separation of the property, continuous use of the easement and some level of need, but not strict necessity.

The Sewer line was installed from the house on Hill to the city sewer line in the road before the division and sale of Valley, thus it predates the separation of the properties. The sewer line was in continuous use in that for entire time since it was installed it was used to service Hill, and later the house on Valley was tied into it as well. Lastly there appears to be a relatively great need as the sewer must run downhill, thus the only way to get to the sewer in the road was to cross Valley.

There is an implied prior use easement for the sewer line across Valley to the road.

Easement by Necessity

Easement by necessity occurs when a property is divided the separation creates an absolute necessity for the easement as there is no other means of access or service. The level of necessity required is higher where the conveyor is requesting the easement by necessity than the conveyee.

In the event that the court does not find there to be an implied prior use easement Hill can claim an easement by necessity. Here, the partition of the property and separation of ownership created a necessity for both the sewer access across Valley and the driving access across Valley because, by the facts given to us there does not appear to be another way for Hill to access wither the road or the City Sewer, both of which are necessary to utilize the Hill property and home. Even though Hill was the conveyor, his need for the

sewer line appears to be absolute, unless another sewer line is available or the property is rural enough that a septic system is an option.

Hill will have an easement for the sewer line by necessity if not by implication/prior use.

Valley's trespass action will fail.

2. Easement to drive across Valleys Lot

Because it is already established that Hill has an express easement to drive across Valley to get to the road, the question here is whether the new county road bordering Hill in any way revokes that easement

Easement Termination

An easement can terminate in a number of ways; Release, Abandonment, Merger, prescription, estoppel, destruction, Eminent Domain, or it can end by loss of necessity, expiration of stated event. (RAMPEDEEE).

Release

To comply with the statute of frauds the release of an express easement must be in writing.

There are no facts indicating there was a written release.

Abandonment

Non use of the easement coupled with circumstances clearly manifesting an intent to abandon the easement.

As mentioned above a written release is required to satisfy the statute of frauds so abandonment cannot apply. Further, there are no facts indicating whether Hill abandoned the easement at or whether he is still using the express easement across Valley.

End of Necessity

If there is an easement by necessity and that necessity ends, the easement is extinguished.

Here, while the criteria for an easement by necessity existed when the parcels were separated, that is not how the easement was created. Had the easement to drive across Valley been by necessity than the new road bordering Hill would terminate that easement by necessity.

Merger, Prescription, Estoppel, Destruction and Eminent Domain

None of these methods of termination are implicated at all by the facts and did not occur here

That did not occur here.

There is an express easement for Hill to drive across Valley to get to the road, unless there was language that terminated the easement upon the occurrence of an event,like if other means of access came to be, the express easement is still in full force and Hill's easement to cross Valley remains in force.

2)

Real Covenant

A real covenant is a promise related to land in deed that is enforceable through legal (money) damages, or through equity (injunction). If it is done in equity it is an equitable servitude. A real covenant can be positive or negative. A real covenant is transferable. The benefit and burden must both be analyzed to see if they transfer.

The land that Alfred is leasing to Carl is burdened by the real covenant. For the burden to run, there must be: a writing; intent; touch and concern; privity; and notice.

Writing

A covenant must be in writing to satisfy the statute of frauds, unless the promise made was for less than one year.

The covenant was in writing, shown by the fact that they were able to record it, since you can't record an oral agreement. This satisfies the statute of frauds, since the promise was that the properties would be used for residential purposes indefinitely. Without an end date, it can be assumed that the agreement will be for over a year.

There is a writing.

Intent

There must be a stated intent by both parties that the burden will transfer with the land.

Here, Brenda and Alfred entered a mutual agreement to use the land only for residential purposes for themselves as well as their successors, heirs and assigns, which will burden the land for anyone that comes after them.

There is intent.

Touch and concern

The promise must have something to do with the land, either through an affirmative or negative restriction.

The promise that Alfred and Brenda made was to not do anything with their land that was not for residential purposes. This places a negative restriction on the land, which will burden anyone who owns the land after them.

The promise touches and concerns the land.

Privity

There must be vertical and horizontal privity. Vertical privity is an agreement between the owner of the land and his successors, heirs and assigns. Horizontal privity is between the promisor and promisee when the agreement is made. For horizontal privity there must be some relationship beyond simply neighbors, such as landlord/tenant, mortgagor/mortgagee.

The agreement between Alfred and Brenda stated that all their successors, heirs and assigns would be bound to the agreement that the property would be used only for residential purposes, so there is vertical privity, as the the burden will run with the land for whoever comes next. However, Alfred and Brenda are only neighbors, there is no deeper relationship between them that would create the horizontal privity needed for the covenant's burden to run. Without the horizontal privity between Alfred and Brenda, the promise is not one that will burden the land in a real covenant.

There is vertical but not horizontal privity.

Notice

For the covenant to transfer, there must be actual notice to the successor in interest, inquiry where the successor should have known, or record notice to the successors in interest.

Here, Alfred and Brenda have recorded their promise, and the facts state that Carl is charged with knowledge of the record title through the lease negotiations with Alfred.

There is actual notice.

There is a writing, intent, touch and concern, and notice for the agreement between Alfred and Brenda, but without the horizontal privity there is no privity, so there is no real covenant that allows the burden to run.

Equitable Servitude

If the real covenant is not enforceable legally, there might still be a possibility that Brenda can enforce an equitable servitude through an injunction.

For the burden of an equitable servitude to run, there needs to be writing, intent, touch and concern, and notice.

All the analyses for the elements have been discussed above, and all of them are present in this fact pattern.

Brenda can enforce the promise in equity.

D is the correct answer.

A is incorrect.

Easement

An easement is an interest in land that allows someone to use the land of another for a specific purpose. An easement is affirmative if it allows the use of someone else's land, or negative if it prohibits the use of someone else's land for a specific purpose. An easement appurtenant is created between two adjoining parcels of land; the dominant tenement which has the benefit of the easement, and the servient tenement which has the burden of the easement. An easement appurtenant is transferable and stays with the land. A negative easement can only be created by express grant.

Brenda and Alfred made an agreement to not do something on their land, which is a negative easement. Since Brenda's land would receive the benefit of Carl not having his car wash business, she has an easement appurtenant. The easement was created in writing and recorded, so it is by express grant. Brenda could argue she has a negative easement that would not allow Carl to build the car wash on the land.

U.S. courts do recognize negative easements against business uses, since a negative easement is a restrictive covenant, and they are enforceable even as against business uses.

B is incorrect.

Horizontal privity between Brenda and Carl is not necessary in any of the situations, since Carl is not taking the entire possessory interest in the land, he is only leasing it from Alfred. If Brenda wanted to

create another real covenant between her and Carl, there would still not be any horizontal privity, but again since Carl has no ownership interest in the land, it is a moot point.

C is incorrect.

There is not a real covenant here, since horizontal privity between Brenda and Alfred does not exist. She cannot enforce the covenant for legal damages.

3)

(1) If Michelle sues Len regarding his use of the smokehouse:

(A) What claims, if any, may she reasonable raise

Nuisance

Nuisance is defined as a substantial and unreasonable activity by a landowner that significantly interferes with the use or enjoyment of another's property.

Here, Michelle will be able to sue Len for a nuisance claim. She will argue that she loves the weather in San Luis Obispo and she loves to spend her time outside. However, when she invited guest over due to the smoke and smell from Len's property and by the hub-bub and the parking congestion from Len's events. She had to stop having parties outdoors due to her guest complaining. Therefore, Michelle will argue that due to the unreasonable activity that Len is doing it is significantly interfering with the enjoyment of her property because now she can not invite guest over or go outside in the backyard because of this problem.

Nuisance Per Se

A nuisance that violates an existing statute is called nuisance per se.

Here, Michelle will further argue that the new statue that is effective with the city new ordinance 12:03 which provides "effective in 90 days, all outdoor bbq, smokers, fire-pits, smokehouse and/or similar use is limited to three (3) hours/day for every residential property in the city". Here, Michelle will argue that its been 90 days and Len is still not following the new ordnance. Therefore, he is in a violation of nuisance per se.

Public Nuisance

A nuisance that affects the health, safety, or enjoyment of use of land for more than one person is referred to a public nuisance.

Here, Michelle will argue that Len is in violation of public nuisance because the smoke effects her safety, her enjoyment of using her own land and property and this is considered a public nuisance. She will further argue that she has asked multiple of times to stop using the smokehouse to stop

duing the events but he just Len just rebuffed her request. Therefore, she no longer could enjoy her time outside or invite her friends over because of the parking space.

Private Nuisance

A nuisance that violates an individuals right to quiet enjoyment of his or her land is referred to as a private nuisance.

Here, Michelle will argue that this is a private nuisance claim also because she is Len neighbor and she love being outside but due to the smoke smell she can not be outside and is violating her individual right to quiet enjoyment of her own land and her own property.

Zoning:

Zoning ordinance are created by states that may enact status to reasonably exercise police power of the use of land for the protection of the health safety and morals and welfare of the citizens.

Here, Michelle will argue that she asked the mayor who is her friend to assert this new zoning ordinance.

(b) What defenses, if any, may Len reasonably assert

Invasion must be unreasonable

Abnormally sensitive individual of the interference is not unreasonable. A test for unreasonable looks at the gravity that outweighs the utility and the harm is serious and expensive. Unreasonable behavior includes negligent and reckless conduct and abnormal dangerous acts.

Here, Len will reasonably assert that he is a professional chef and he has purchased his residence three years ago. For approximately three years every two months or so Len invites 40 people over to come to his backyard for free ribs and briske to create the smokehouse vibes. He will further argue that he only does this every two months or so that every two months for only one day his neighborhood will have parking problem. If you do the math that is only 5 days throughout the entire year that he has guest over that may and could have be a problem for Michelle but however, he will further argue and let the court know that it's only 5 days throughout the entire year. He will further assert and let the court know that when he does have guest over he plays music very quietly during these events where the speaker is located in his house.

Furthermore, he will let the court know that he only plays cool jazz and blues music, he uses only paper plates and makes sure that HIS residential is neat and tidy after words by not having trash everywhere. He wants the court to know that he is a professional chef and the people that come to his house are well mannered and they never get too carried away. Of course when there are 40 people coming to your house for any event there will be some kind of parking issues but he only has these events about 5 times a year. He will assert that he does not have reckless conduct and abnormal dangerous acts.

Harm must be substantial and significant

The harm must be real and appreciable more than a feeling. The location must be considered when deciding whether the harm is substantial. Duration of invasion is important but is lengthy innovation is not required. A one time event may amount to a nuisance. Ongoing invasion are likely to be substantial.

Here, Len will argue that he only has these events about 5 times a year which is not longterm because it's not likely he is having these events 3 times a month or something which may be substantial harm. Therefore, Len will argue that considering the event is at his house only has these events only 5 times a year.

C. What is the likely outcome?

Conclusion

Abnormally sensitive individual

The courts, while determining the unreasonableness of the interference, will consider whether the individual that is harmed from the nuisance is overly sensitive or usually sensitive to the interference. If the party is found to be not representative of most people in relation to their sensitivities to do same or similar interference than this may be a bar to a claim to a nuisance.

Here, the court will most likely rule that due to the fact that Len only has their events 5 times a year not every month or so where there will be parking problem and smoke problem the event is okay to do every month. However, due to having his business operating from his backyard for 12-16 hours a day and the smoke can be a substantial harm for Len.

(2) If Len sues the City with respect to new city ordinance 12:03

(a) what arguments may Len reasonably assert;

Zoning:

Zoning ordinance are created by states that may enact status to reasonably exercise police power of the use of land for the protection of the health safety and morals and welfare of the citizens.

Doctrine of vested rights

The doctrine of vested rights protect property owners and developers from changes in zoning after they have made substantial expenditures in reliance on a building.

Due Process

The 14th Amendment of the United States Constitution which is applicable to the states, prohibits the deprivation of life and liberty of property without the due process of law.

Taking

The 5th Amendment of the United States constitution application to the states of the 14th Amendment prohibits the government taking of the private property without just compensation.

Here, Len will have a possible taking arguments. If the city wants him to run his business only for 4 hours a day will have to pay him for $10,000 year for the loss of his business.

(b) what is the likely outcome.

Variance

A variance may be granted if there is a unique hardship and it does not endanger the general welfare.

Here, a variance may be granted to Len because even after the city ordinance "effective in 90 days, all outdoor bbq, smokers, fire pits, smokehouse and/or similar use is limited to three (3) hour/day for every residential property in the city". Here, a variance may be granted to Len because of this new sudden ordnance he will lose income up to $10,000 a year. He will ask and maybe the court will grant it to 8 hours a day for him which will let him run his business.

Conditional use of the permit

A conditional use of the permit is a zoning exception which allows the property owner to use of his or her land in a way not otherwise permitted within the particular zoning district.

Here, the city will most likely put a conditional use of the permit due to the loss of his business. He will told to do something with the smoke maybe build some kind of fences where it does not go Michelle house.

END OF EXAM