

MONTEREY COLLEGE OF LAW

**REAL PROPERTY**

Final Examination

Spring 2018

Prof. Justin O'Connell

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

## **REAL PROPERTY**

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### **Question 1**

A owns Lot #1, located in a residential subdivision and the end of a cul-de-sac named Stone Street. Lot #1 is the only lot at the end of Stone Street. Lot #2 is owned by B, and is adjacent to Lot #1 on Stone Street. Lot #3 is owned by C, and is several hundred yards away from Lot #1 on Stone Street. A, B, and C are the original owners of their respective lots. They each bought their lot about 13 years ago when lots were created by the original owner of all the land that became the subdivision.

There is a public park behind Lot #1 that was built 15 years ago. The park is accessible from other public streets. At least once per week since they purchased their lots, B and C have walked across Lot #1 to reach the park. They have always taken the same route, just inside the boundary of Lot #1. Eventually, B and C wore a path along this route. In spring months, B has maintained the path by filling in holes with gravel, and clearing brush on Lot #1. This footpath would be visible to anyone inspecting Lot #1. If B and C could not cross Lot #1, they would have to travel several miles to reach the park.

Neither B nor C has ever spoken with A about using the footpath. On a few occasions, A has seen B and C as they walked along the footpath. At no time has A given express permission to B or C to use Lot #1, nor has A ever taken any action to prohibit this use.

After 13 years of ownership, A sells Lot #1 in fee simple to D. One week later, B sells Lot #2 in fee simple to E. The deeds and other documents underlying these sales make no mention of any rights of access across Lot #1. In the days immediately following the sale of Lot #1, C and E continue to use the footpath. Within two weeks of purchasing Lot #1, D builds a fence across the entrance to the footpath. When C and E inquire about the fence, D tells them that they are not allowed to cross Lot #1.

This jurisdiction has a 10 year statute of limitation for prescriptive easement.

Explain the easement claims that C, E might assert and the defenses to such claims that D might assert.

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**Question 2**

Four years ago, Adam and Charles acquired Blackacre as joint tenants. Blackacre is a small residential lot with a single family home on it. When they acquired Blackacre, Adam and Charles verbally agreed that Charles could live at the property without paying Adam rent if Charles paid for the property taxes.

Immediately after the purchase, Charles moved into the residence on Blackacre, and without Adam's knowledge, Charles spent \$10,000 to remodel the kitchen, and spent \$40,000 to build a detached garage, with an apartment above it, on Blackacre. After the apartment was completed, Charles began renting it to tenants for \$1,000 per month, and he did not provide any of the rental income to Adam.

About a year after the purchase, unbeknownst to Adam, Charles stopped paying the property taxes for Blackacre, and the amount due is now \$5,000.

About three years after the purchase, without Adam's knowledge, Charles obtained a mortgage secured against his interest in Blackacre. Several months later, Charles died with a valid will gifting all of his estate to David. David immediately paid off the balance of the mortgage, and filed a partition action.

In the partition action, what ownership and accounting claims might Adam and David assert? If a partition is ordered, will the Court likely order a partition by sale or partition in kind, and why?

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Question 3

Three months ago, Peter purchased Blackacre, which is a 150-acre tract of land consisting of 160 separate legal lots inside the city limits of Greenville. At the time of the purchase, Blackacre was not subject to any zoning regulations. Blackacre is undeveloped, with the exception of a one-acre lot that has a five-unit apartment building on it, which was built 20 years ago. Peter purchased Blackacre for the purpose of developing 1,000 townhouses on the undeveloped portion of the land.

Several weeks after the purchase, Greenville created the Greenville Zoning Ordinance, and Blackacre now falls in a large zoning district where use is restricted to single-family residences on lots at least one acre in size, and all dwellings must be set back at least 40 feet back from public streets. The Greenville Zoning Ordinance provides that the 40-foot setback may be reduced by a vote of over 50% of all property owners within 100 yards of any property for which setback relief is sought. The Greenville Zoning Ordinance also provides for a standard variance request process, although it provides that the 40-foot setbacks are exempt from the variance process and are subject to change only by the neighbor voting process.

There are 20 lots on Blackacre along the edge of that property, that are slightly smaller than one acre, and for which it is not possible to build a single family dwelling further than 40-feet from the lot line. Peter obtained the vote of his neighbors who own lots within 100 yards of those 20 non-conforming lots, and none of the neighbors voted to allow him to modify the setback as to those 20 lots because they did not like Peter.

About a week after the zoning ordinance was passed, the Greenville City Attorney sent Peter a notice that he had to cease leasing the apartment building on Blackacre within two months, and remove that building within eight months, because such use did not conform with the Greenville Zoning Ordinance.

Peter applied to Greenville for variances 1) to allow for the continued, permanent use of the apartment complex, 2) to allow for the development of the townhouses, 3) to reduce the one acre requirement as to his 20 non-conforming lots, and 4) reduce the setback for the 20 non-conforming lots. Greenville denied the first three variance requests on the grounds that granting any of the requests would cause Blackacre to be used in a manner that does not conform to the purpose of the Greenville zoning plan. Greenville denied the fourth, setback variance request finding that the neighbor voting process was Peter's sole remedy.

Peter has now filed suit against Greenville. What zoning-related claims might he assert in the litigation?

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## Question 1

Easement implied by prior use

- Any claim against A applies to D (existing encumbrance, if any)
- Common owner initially (not issue with A to D transfer)
- Park existed prior / no indication of use
- Anything apparent to A?
- Reasonable necessity to access a park?

Easement implied by necessity

- No facts indicate B and C are landlocked

Express easement

- Facts indicate never in writing

Prescriptive easement

- Actual
- Open/Notorious
- Hostile
  - A knew and did nothing
  - Just neighborly or sleep on rights
- Time period
- Tacking to D
- B and C appurtenant or gross
  - Proximity of properties
  - If gross to B can was it transferred to E

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**Question 2**

JT presumption of equal ownership – possibly limited accounting

- But there was an oral agreement contrary to no accounting rule

Charles (through David)

- \$10k remodel – right to recover or just increased value
- \$40k garage - right to recover or just increased value
- How are the improvements arguably different
- Mortgage pay off – Charles' debt so not reimbursable but added to David's equity ledger

Adam

- Lien theory or title theory jurisdiction – if lien then Adam takes property and no partition
- Claim to rent to Charles
- No ouster, so no claim directly against Charles (D) for rental value of C's occupancy
- Taxes due by Charles by agreement not equally
- Oral agreement / partial performance by Charles and Adam
- Charles violated by non-payment and remaining on site
- Claim against Charles' interest (D) for unpaid taxes

Type of partition

- Law favors in kind, but not practical here

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**Question 3**

No variance for apartments:

- Prior non-conforming use
- denial would result in "unnecessary hardship" to the owner (Investment-backed expectations);
- need for the variance is caused by a problem unique to the owner's lot;
- variance inconsistent with the overall purpose of the ordinance, or inconsistent with the general welfare of the area?
- Should he receive perpetual use or for a more reasonable period (amortization)

Development of townhouses

- denial would result in "unnecessary hardship" to the owner (Investment-backed expectations?)
- need for the variance is caused by a problem unique to the owner's lot;
- variance inconsistent with the overall purpose of the ordinance, or inconsistent with the general welfare of the area?

One-acre rule

- denial would result in "unnecessary hardship" to the owner;
- need for the variance is caused by a problem unique to the owner's lot;
- variance inconsistent with the overall purpose of the ordinance, or inconsistent with the general welfare of the area?

Set backs:

- Procedural due process?
  - Entitled to a hearing, an impartial tribunal, and an explanation of the government's decision?
  - Granting right to affected public
    - Is it an impermissible delegation of legislative duty
- Reverse Spot Zoning?
  - Even if public can decide, is it possibly arbitrary?
  - Is it possibly singling out for improper purpose
- No matter the procedure, denial would result in "unnecessary hardship" to the owner;
- need for the variance is caused by a problem unique to the owner's lot;
- variance inconsistent with the overall purpose of the ordinance, or inconsistent with the general welfare of the area?

1)

ISSUE: Easements

RULE: An easement is a non-possessory interest in land. They can be dominant servient appurtenant and in gross. When analyzing an easement we look to the creation and scope.

ANALYSIS: The facts suggest that there may be an easement across lot #1 for ingress and egress to access the park. The rights of D, C and E will all vary as they all have slightly different claims to an easement. D will claim there is no easement, C will claim an easement implied by prior use, E will claim that he has a right to an easement by estoppel.

CONCLUSION: The rights of the parties must be evaluated individually.

ISSUE: D' rights against C and E.

RULE: An easement is appurtenant it runs with the land. The servient owner is burdened by the easement and purchased the easement as part of his bundle of property rights. An easement by necessity is created when a common owner severs an estate and the necessity is created. A dominant owner will usually choose where the easement will be.

Analysis: C and E may try to say that there is an easement by necessity because if they do not use the foot path they will have to travel several miles to reach the park. D will say that that does not create a necessity, that the burden to travel a few miles does not give them the need to walk across his land. Also D will point out that while Lot #1 has recently changed owners, the parcel was not split creating a necessity and therefore the easement by necessity does not apply.

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CONCLUSION: D will prevail if C and E try to claim an easement by necessity.

ISSUE: Easement by prescription

RULE: An easement by prescription is created, when the use has been actual, open and notorious, hostile, exclusive and meets the statute of limitations. This is similar to adverse possession, but the dominant tenant gains right of access not ownership.

ANALYSIS: C and E may claim that there is a prescriptive easement created by use of B and C over the last 13 years. C and E will say that their use meets the elements that they actually used the path, that it was open and notorious as any passerby would assume they had permission, that it was hostile because A never gave them permission, and exclusive as B and C were the only ones using the path. D will argue that using the path at least once a week was not frequent enough, that once a week is insufficient to justify creating an easement. C and E will counter that it was at least once a week so that the use some weeks was three or four times a week, and that it is a sufficient actual use. Additionally C and E will argue that A was aware they were using the easement because A had seen them as they walked along the path. Also B and C used the path for the entire ten year statutory period. D will argue that while C may have a prescriptive easement but that E certainly does not. Since E was not the party who used the path over the past 13 years only C would have a claim for a prescriptive easement. E will counter that the easement created by B's use is appurtenant, that it was not exclusively for B but any successor in interest to Lot #2.

CONCLUSION: C and E will succeed in the claim for a prescriptive easement.

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ISSUE: Easement by Estoppel

RULE: An easement may arise by estoppel if it begins as a license and the dominant tenant detrimentally relies on the license by making improvements to the land. If the servient tenement changes owners then the new Bona Fide Purchaser must have actual, inquiry or record notice.

ANALYSIS: B made improvements to the path by filling in holes with gravel and by clearing brush from the path. E will argue that B gained an easement by estoppel arose by B's actions and that the easement was appurtenant, and that when E acquired Lot #2 from B that E acquired the easement with it. E will argue that since B had detrimentally relied on the use of the path, by making improvements, E detrimentally relied on the use of the path when he bought Lot #2. D will say that B's actions were not improvements. That filling holes with gravel and clearing brush are insufficient to warrant actual reliance. Also C and E will argue that D must have been aware of the path when he purchased the property, that while there was not actual or record notice a reasonable person buying a home would have inspected the property and noticed the path. D will argue that B and C had no more than license to use the path which is freely revokable. He will argue that even if there was an easement by estoppel that it was in gross, granted only to B and C and that it did not run with the land.

CONCLUSION: C and E will prevail in their argument for an easement by estoppel.

**END OF EXAM**

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2)

### JOINT TENANCY (JT):

Created by two or more people with the right of survivorship and four unities of time, title, interest and possession. A JT is alienable, but not divisible or discendible.

### TENANCY IN COMMON (TIC):

Created by two or more people with no right of survivorship. Each co-tenant (co-T) can have unequal interests in the property, and each co-T's interest is alienable, divisible and discendible.

Here, Adam (A) and Charlies (C) were JTs of Blackacre for about four years. After about three years of ownership, C obtained a mortgage against his interest in Blackacre without A's knowledge, and died with a valid will a few months later, gifting his estate to David (D).

Under a JT, a co-T may mortgage his own interest without knowledge or consent of the other co-Ts. Depending on the state, a mortgage may or may not sever a JT. Under a title theory state (the minority), the mortgage causes a severance because the unity of title is destroyed, and the mortgage takes legal title. Under a lien theory, the mortgage acts as a lien on the property and does not sever the JT, unless the borrower defaults on the payments and the mortgage is foreclosed and later sold. Here, we'll presume this is a title theory state that caused a severance of the JT between A and C, and D takes as a TIC with A. All of D's claims, interests, and liabilities that C willed to him will be addressed below under the accounting claims.

### RIGHTS AND DUTIES OF CO-TENANTS

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Rents: A co-T is not liable to pay rents to other co-Ts. When A and C acquired Blackacre, they verbally agreed that C could live at the property without paying Adam, which they didn't need to do as each co-T has the right to possess the whole. But the agreement also held that it would be on condition that C pay for the property taxes, which C could argue that he wouldn't be bound to do under a contractor theory later, because he wasn't giving up a legal right to live on the property w/out paying rent because he was already entitled to do that.

Taxes and Mortgage: Each co-T is responsible for their fair share of the property taxes. C paid property taxes for about a year, and then stopped. If C and A's oral agreement isn't enforceable (for reasons cited above), Adam may be able to compelled to pay for his fair share of the property taxes for 4 years, but would not be compelled by D to pay for the mortgage payments on C's interest.

Improvements: A co-T does not have a right to contribution for improvements, but may recoup the costs in an action for partition. If the improvements add value to the property, the improver is entitled to the full create of the improvement (the upside) but if the improvements decrease value, the improver bears the liability. Here, C spent \$10k to remodel the kitchen, \$40k to build a detached garage with an apartment above it. D will argue in partition that a kitchen remodel was an improvement that adds value to the home, that any potential buyer of a single family home would benefit from it. D will also argue that the detached garage is also a benefit to future home buyers of a single family home, as it not only provides passive income from the rent, but also could potentially increase the property values of the surrounding neighborhood as well.

Rents from Third Parties: a co-T in possession has right to pay other co-Ts for rents from third parties. After C built the apartment upstairs above the garage, he was collecting \$1000/month rent, and did not pay rent to A. A will argue that he is entitled to his fair share of all the rents that C collected from the tenants. D will argue at partition that A is

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A will assert claims to the monthly rents from the apartment based on his ownership (fair share) is in Blackacre. This is likely the only equitable adjustment the court will make during the partition proceeding.

For D's claims:

Kitchen Remodel: D will claim that he is entitled to the \$10k he spent on the kitchen remodel if this was in fact an improvement that added value to the property for the reasons cited above.

Detached garage: D will claim that he is entitled to the full \$40k of the detached garage plus his fair share of rent collected from the apartment.

Mortgage payments: D paid off the balance of the mortgage, which he may not have been required to do, as most mortgages dissolve when the mortgagor dies, so he may not be entitled to any equitable adjustments for his payments.

Unpaid property taxes: Before the court divides the proceeds of Blackacre between A and D, it will deduct the property taxes because the government is first in line with debts that encumber a property.

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**END OF EXAM**

3)

ISSUE: Zoning

RULE: a state may create use restrictions on land as a valid use of its police power to provide for the safety, health welfare and morals of it's citizens.

ANALYSIS: The Greenville Zoning Act (Act) creates several problems for Peter. The City will have a good argument that it enacted the ordinance for the purpose of creating neighborhoods in compliance with the general plan of the city. They will argue that if Peter(P) builds 1000 townhomes on 150 acres, with just 160 lots then the neighborhood will be overcrowded, there will be issues with parking, traffic and safety that are inconsistent with the kind of healthy, orderly neighborhoods that the city envisions. P will argue that the undeveloped land was un-zoned at the time he purchased it and that if he had known about the Act imminent implementation he would have reconsidered. As the facts state the city is not concerned with P's plan to build townhomes and have enacted a valid zoning ordinance with clear criteria for the zoning authority and procedural safeguards for appeal to variances and voter approval process.

CONCLUSION: On it's face the Act seems to be a valid Zoning ordinance within the city's regulatory power.

ISSUE: P's request for a variance regarding the continued permanent use of the apartment complex.

RULE: A pre-existing non-conforming use occurs when a legal use of property is made illegal by a new zoning ordinance. Unless there is a gradual phasing out (Amortization) or a variance granted, it may constitute a Fifth amendment taking and require adequate compensation.

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ANALYSIS: P will have a strong argument regarding the apartment building. When he purchased the land the building was already 20 years old. P will argue he had an expectation of continued use of the building as a rental income. Since he was planning on developing the property the Apartment building would be a good source of funding for the development. He will argue that if he is not allowed to realize the return on his investment with regards to the Apartment building that he should be provided with adequate compensation. He will assert that if the city wants him to remove the building then he may be willing to comply but they should provide for a gradual phasing (amortization) out of the building until he can realize the return on the investment.

CONCLUSION: the city will either agree to amortization of the apartment or provide P with adequate compensation.

ISSUE: P's request for variance to allow development of the townhouses and to reduce the one acre requirement for his 20 non-conforming lots.

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

ANALYSIS: Peter will argue that the Act creates a unique hardship for him and that it will not be harmful to the general welfare to go through with his development plan. He will argue the hardship that he has invested significant amounts in the planing of the 150 acres and that only he is being harmed by the Act. He will argue that building townhouses is not contrary to the general welfare and in fact he will be providing affordable housing options for 1000 people and families. P will argue that he should be granted the variance and if he is not then he may have another claim that the city has made his land impossible to develop and that he should receive adequate compensation.

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The real problem would become what compensation would be adequate, as P purchased the property as a development and investment opportunity that he has now been zoned out of. Would it be what he paid for the land or would it be what the value of the land with the 1,000 townhouses. Also since P's application for the variances has been denied, the city should have provided him with an opportunity for appeal before bringing suit. P may well have a claim that the Act is unconstitutional if there are not sufficient procedural safeguards in place for judicial review of variance request denials.

CONCLUSION: Since he had no opportunity for appeal and the Act likely constitutes a taking P is entitled to adequate compensation.

ISSUE: P's request to reduce the setback for the 20 non-conforming lots.

RULE: The government may not delegate duties of elected officials to non-elected entities.

ANALYSIS: "The Act provides for a standard variance request process, but the 40 foot setbacks are exempt from that and subject to a change only by a neighbor voting process." This is a delegation of the zoning authority to a group of un-elected officials. The police powers of the state are only a tool for the state. The facts state that the the city of Greenville enacted the Zoning Ordinance. An ordinance is enacted by a legislative body of elected officials. A legislative body cannot delegate its power to unelected officials, because then there is no political accountability. If Peter doesn't like the Decisions of the city counsel that implemented the Act then he can work for them to suffer the political consequences of getting voted out of office. But if the decision about the setbacks is left to his neighbors who base there decision on the fact that they don't



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like him then he has no recourse. P will have a good argument that the neighbor voting process is an unconstitutional delegation of elected officials authority.

CONCLUSION: The Neighbor voting process is likely a invalid delegation of elected officials authority.

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**END OF EXAM**