

MONTEREY COLLEGE OF LAW

REAL PROPERTY

Final Examination

Spring 2016

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
Professor Justin O'Connell
Final Exam 2016

Question 1

Oscar bought Blackacre to build his home on. Blackacre is an odd-shaped parcel of undeveloped land, which is zoned for a single family dwelling, and for light commercial use. At all relevant times, the zoning ordinance regarding Blackacre provided:

No single family dwelling may be built within six-feet of the property boundary line, or within twenty-feet of a structure on an adjacent parcel of land.

No light commercial structure may be built within six-feet of the property boundary line.

Whiteacre is a parcel of property adjacent to Blackacre, and is subject to the same zoning ordinance as Blackacre. A commercial building is located on Whiteacre.

Oscar later applied for a building permit with the City Zoning Board to build a single family dwelling on Blackacre, but the permit was denied because the location of Oscar's proposed dwelling was within twenty-feet of the structure on Whiteacre. Due to the shape of Blackacre, no single family dwelling can ever be built on Blackacre because of the zoning ordinance.

Oscar applied for a variance with the City Zoning Board to allow construction of a single family dwelling on Blackacre within twenty feet of the structure on Whiteacre. In response to this request, the City Zoning Board conditioned the grant of a permit to Oscar only if he paid \$30,000 to the City for use in its school system.

Applying zoning and eminent domain principles, discuss Oscar's claims against the City, and the City's defenses.

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Question 2

Able and Charles, purchased Blackacre, acquiring title as tenants in common. Blackacre is a suburban property with a single family dwelling on it. Able paid 80% of the purchase price and Charles paid 20% of the purchase price.

After the purchase, Able and Charles moved into the residence on Blackacre. Without Able's knowledge, Charles spent \$10,000 to install a security system on Blackacre. Over Able's repeated objections, Charles spent \$2,000 to paint the exterior of the residence on Blackacre, and \$13,000 to install a fish pond in the front yard.

Thereafter, Able moved off the property, and for the next four years paid for all the property taxes for Blackacre. At the time Able moved out, Charles sent Able a letter telling Able not to ever try to move back onto Blackacre.

Able recently died with a valid Will stating that David was to receive all rights, claims and interest Able had at the time of his death related to Blackacre.

What interests do Charles and David each have in Blackacre, including rights of partition and accounting?

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Question 3

In 2000, Oscar bought Blackacre, which was undeveloped real property. Blackacre is adjacent to a public road, Central Drive. At the time of Oscar's purchase, Adam owned Whiteacre, which is a parcel of land adjacent to Blackacre on the far side away from Central Drive.

In 2001, Oscar gave Adam oral permission to drive back and forth from Whiteacre across a 20-foot wide strip of grassy land on Blackacre to access Central Drive. At that time, Adam agreed he would not place gravel on that access way or pave it.

In 2002, Oscar visited Blackacre and found that Adam had placed gravel along the entire access way to make the access way easier to use. Oscar was not pleased, and told Adam to not use the access way anymore. Adam felt bad, so he immediately removed the gravel, and went back to using the access way on a weekly basis.

In 2008, Oscar built a home on Blackacre in the middle of the access way Adam routinely took across the property. Adam asked Oscar if Adam could use another route across Blackacre, and Oscar said he could, but it had to be in writing this time. Also in 2008, Adam drafted up a deed for Oscar to sign granting a new access way to Adam, and gave the deed to Oscar to sign, which he did not, so Adam stopped travelling across Blackacre.

In 2016, Adam sold Whiteacre to Charles, and, at that time, told Charles an easement existed across Blackacre for the benefit of Whiteacre

Discuss the rights of Oscar and Charles, as to each other, regarding the use of the access way.

1)

===== Start of Answer #1 (787 words) =====

Oscar purchased Blackacre with the intent of building a single family dwelling on the property. His building permit has been denied.

Variance

A variance is an exemption granted to an individual property owner pertaining to a specific parcel of property. When a zoning ordinance is enacted and the enforcement of that ordinance would, in essence, amount to a taking or quasi-taking then the local zoning authority may issue a variance to the particular owner. The variance may pertain to either area/spatial requirements within the regulations, or limitations based on use. The issuance of the variance provides an escape valve for both the zoning authority and the property owner to avoid the unique hardship that would otherwise be imposed upon the property owner if she were bound by the regulations. The issuance of the variance must result in a use that is substantially compatible with the regulations, does not conflict with the public welfare, and is indeed necessary to prevent the unique hardship mentioned above.

Oscar has applied for a building permit for a single family residence on his parcel. He has been denied due to a lack of compliance with the ordinance. Specifically, the proposed home on Blackacre was to be within twenty feet of the commercial building on Whiteacre. Oscar has applied for a variance and the city has responded with a conditional approval based on a \$30K payment for the city school system.

As to the variance, the construction of a family residence is not possible without a variance and Oscar may claim this as a unique hardship. Indeed it would be if a residence were the only permissible structure. The zoning scheme, however, also provides for light commercial use. The City will state that the regulations were in effect at the time Oscar purchased the property and with the possibility available for Oscar to build a commercial structure, there can be no Taking as Oscar might suggest. The potential for economic utility still exists on Blackacre and the City is not required to

issue a variance due to the lack of a purchaser's diligence in inquiring as to the zoning regulations.

The proposed home that Oscar hopes to build is certainly compatible with the general scheme and there is no apparent affront to the public welfare. The violation is the placement of the home within twenty feet of the commercial structure on Whiteacre, a situation that would appear to be only to the detriment of Oscar. It would seem, according to Oscar, that no good reason exists to deny the variance. But with the possibility of Oscar still realizing economic gain from the purchase of Blackacre via commercial use, the issuance of a variance would actually become more of a spot zoning scenario than a mere variance.

The City is under no obligation to grant a variance to Oscar.

Exaction

When a property owner has applied for a permit that is ostensibly compliant with the zoning authority's regulations and the ZA then grants permission but only if conditioned upon a concession the property owner must make to the ZA then the situation is referred to as an exaction. Exactions are generally found by courts to Takings under the Fifth Amendment. The Takings Clause of the 5A requires that the government's use for which the exaction is claimed must be for public use and the property owner must be compensated. Further, there must be a rational relationship between the government action and the purpose it attempts to achieve. The public use element is usually an easy hurdle for the government to cross. The nexus between the action and the purpose must be constructed so as to rationally achieve the goal. Courts generally offer deference to local municipalities in their efforts to achieve local goals. Thus, local governments usually succeed in achieving their goals; the question for the courts is usually one of compensation. Is the taking "compensable" under the 5A?

Here, the City is requiring Oscar to pay \$30K for a building permit. On its face this may look like an exaction but, as described above, with no actual "right" to a building permit for a non-compliant residence, Oscar is hard-pressed to frame this as an exaction. Further, the request of a variance, in legal principle, would seem to defeat from within a

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claim that an exaction is occurring. This would be the government's position. An exaction cannot occur when the property owner has no baseline entitlement to the permit. And the request of a variance is evidence of Oscar's acknowledgment that there is no existing entitlement.

It appears that Oscar's lack of due diligence in the purchase of Blackacre will cost him \$30K if he wants to build a family residence on the parcel.

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===== End of Answer #1 =====

2)

===== Start of Answer #2 (1562 words) =====

Question 2

In a Tenancy in Common both parties have a distinct, proportional, undivided interest in the land without right to survivorship. A Tenancy in Common occurs when all tenants have an equal interest in possession of the property; both tenants may have paid an unequal percentage of the whole value of the property and would be entitled to their equal share plus or minus the cost of any improvements or repairs made. Here, Able (A) paid for 80% of the purchase price and Charles (C) paid for 20% of the purchase price, which means that if no other improvements or repairs were made that altered the value of the property A would receive 80% of the sale price and C would receive 20% of the sale price. A Tenancy in Common is alienable inter vivos and is also divisible and descendible. If this were a Joint Tenancy with right of survivorship A would not be able to leave his interest in Blackacre to D and upon A's death C would absorb A's interest. However, since this is a Tenancy in Common, the will does effectively pass all rights, claims, and interests that A had to D. Therefore, without considering any repairs or improvements and any type of partition or action for accounting, C is entitled to 20% and D is entitled to 80% of the sale price of Blackacre.

Taxes

Property taxes, even if paid by one cotenant without the others knowledge are still owed to the paying cotenant to the non-paying cotenant because property taxes are viewed by the court as an essential cost to owning the property. However, the property taxes are not split equally amongst the cotenants, they are divided based on the percentage of the property they own. Here, A would be responsible for paying 80% and C would be responsible for paying 20% of the property taxes. However, A paid the entirety of property taxes for four years, therefore, C is responsible for paying A 20% of the amount of the property taxes that A paid. Since A has died and passed all rights, claims, and interests in Blackacre to D, C must pay D the fair share of taxes he did not pay.

Ouster

Ouster occurs when one cotenant prevents the other cotenant from possession of the property. Here, after A moved out C sent a letter to A telling him "not to ever try to move back". If a cotenant is ousted from the property they may recover the rental fair market value (fmv) for the property for the length of time that they were denied possession.

Therefore, if C effectively ousted A, A would be entitled to *mesne profits* because he has been denied possession of the property for the length of time he was denied possession. D is likely to argue that A moved away as a result of the dispute with C and did not return to the property because the letter C sent to A put A in reasonable apprehension of what would occur to him if he returned to the property. C would likely argue that there was no effective ouster because he did not physically prevent A from possession of the property. The court is likely to agree with C because an ousted cotenant must be denied possession of the property, here, A did not attempt to return to the property so there was no real instance of denial. D would not be entitled to mesne profits.

Repairs

Unless there is an express agreement establishing that one cotenant will reimburse the other cotenant for repairs made, there is no obligation to reimburse the party that conducted the repairs. This is because of the subjective nature of determining which repairs were necessary or unnecessary including the extent to which the repairs were done and the expenditure to make those repairs. C could argue that he made a necessary repair when he painted the exterior of the home, however the facts do not indicate and A would likely assert that the paint was not chipped or peeling or that the value of the home would be compromised if the exterior was not painted and therefore these repairs were not necessary. If C had sought A's approval to paint the home, C would be entitled to \$1,000 from A, his fair share of half the cost of the improvement.

Improvements

There is no obligation to reimburse the cotenant who made the improvements if the

other cotenant did not expressly agree to the improvements. C has made improvements both without knowledge and with knowledge but without consent from A so C is not entitled to reimbursement of his fair share of the expenses of improvements.

Partition

If the cotenants cannot come to an agreement as to how to equitably divide the property a cotenant may enter an Action for Partition in order to separate their fair share from their cotenants fair share. There are two different forms of partitions. The first is a Partition in Sale where the property is sold and the purchase price is divided equally and the second is a Partition in Kind where the property is equitably divided amongst the cotenants. The preference of the courts is to allow the properties to retain their fair share without having to sell the property, however, when the property includes a single family dwelling as opposed to a walnut tree farm the court recognizes that the dwelling cannot be equitably divided and will require a Partition in Kind.

Kind

Blackacre "is a suburban property with a single family dwelling on it" which means that the physical property cannot be equitably divided without harming one of the cotenants interest in the property. To afford D the single family dwelling and give C the remaining 20% of the backyard would not be equitable because there are vastly different values associated with each. Therefore, even though the courts prefer this method, they are likely to enforce a sale of the property.

Sale

If Blackacre is sold by court order resulting from an Action for Partition D is entitled to the inherited 80% interest and C is entitled to 20%. However, when the court divides the proceeds they do take into account any repairs made or improvements that create an added value to the property. Therefore, since C has spent a significant amount of money on the property C would ask the court for an Accounting.

Accounting

Accounting is the process by which the court evaluates the different improvements made to the property and then assigns an interest to each party that reflects their expenditures on the property and is different from their original interest each owned at the outset of the TIC. The court does not consider the costs of the improvements, but only the added value. This means that the improving cotenant bears both the "upside" and "downside" of any improvements made on the property.

Security System

If the security system adds value to the property C is entitled to the increase in the value of the property as a result of this improvement. Therefore, if the security cameras add \$20,000 to the value of Blackacre, C would be entitled to 20%+\$20,000. However, if the property value increase only by \$5,000, C is entitled to 20% + \$5,000 and would bear the burden of the downside and be out of pocket \$5,000.

Exterior Paint

As discussed above, since there was no express agreement for the reimbursement of repairs C would not be entitled to reimbursement for A's fair share (\$1,000). However, C is likely to argue that the exterior paint on the home was not a repair to the home because there was no chipped paint, instead what C did was improve the home by adding a fresh coat of paint that was brighter and in general more lustrous than the older color. If C's paint job did increase the marketability of the home and its overall value he would be entitled to the increase this improvement had on the property. D would likely argue either that the paint was a repair undertaken through the natural course of owning a home and therefore not an improvement, merely changing the color from one shade of beige to another shade of beige adds no degree of marketability or value.

Fish Pond

C installed a \$13,000 fish pond on the front yard. The unique nature of this feature means that it is not likely that this has increased the marketability or value of the home. If C and D are not able to find a purchaser of the home who values this feature and

instead have to sell the home at a discount because of its unsightly nature C would bear the downside of this improvement. Therefore, however much the fish pond decreases the property, C's 20% interest will be adjusted accordingly.

Conclusion

Since A was likely not ousted from Blackackre D is not due any mesne profits. D is due whatever C's fair share of the four years of property taxes is. If the security camera, exterior paint, or fish pond add value, C will be entitled to that increase in fmv of the property; conversely, if the improvements have an overall negative effect on the fmv of the property C's interest will be 20% less the decrease in fmv as a result of improvements.

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===== End of Answer #2 =====

Blue Book

NAME

SUBJECT

INSTRUCTOR

EXAM SEAT NO.

SECTION

DATE

GRADE

~~James~~

Real Property Final

O'Connell

Q3 BB1021

April 28, 2019

Q3

Oscar + Charles

Oscar owns blackacre, which is adjacent to a public road. Charles purchased whiteacre, also adjacent to B, from Adam.

Charles will likely try to ~~enforce~~ enforce an easement on the 20 foot wide strip.

Easement

An easement is the granting of a nonpossessory interest in another's land that benefits the holder in their use or enjoyment.

An easement is either affirmative or negative, and then either appurtenant or held in gross.

An easement cannot be created orally, and seemingly oral easement is actually a license.

License

A license is a freely revocable oral promise to use another's land. Licenses only become irrevocable by estoppel, where the licensee puts in substantial time or money or labor into the licensee's contribution.

In 2001, O gave A oral permission to use the access way. This created a freely revocable license.

Then in 2002, A placed gravel on the access way and O said A couldn't use the accessway any more.

This conduct revoked A's license to use the accessway.

Estoppel will likely ~~not~~ apply because placing gravel is not substantial money or labor.

Therefore, A's license was revoked in 2002. E will only have a claim if an easement was created thereafter.

Affirmative / Negative

An easement is affirmative when it benefits the easement holder's ~~own~~ use and enjoyment of their property. A negative easement prohibits something that would otherwise be allowed.

Here, A used the accessway on O's property to better reach the public road. This benefits A's use and enjoyment of his land b/c he can easily drive back and forth to the road and his house.

Therefore, A would have an affirmative easement.

Appurtenant / Held in Gross

An easement is appurtenant when two parcels are involved, and one parcel is the dominant holder and the other is the servient. The ~~is~~ servient holder, through the use of the easement, is ~~to~~ serving the dominant estate in their use or enjoyment of land. ~~An easement appurtenant is created by deed.~~

An easement is held in gross when one parcel is involved, and the dominant holder is receiving some sort of personal or commercial gain.

An easement held in gross is considered personal to the holder, while an easement appurtenant runs with the land automatically.

Here, there are two parcels: B+W. W/O is serving B/A in the use or enjoyment of B. Therefore, A has an easement appurtenant.

A is the dominant tenement while O is the servient holder.

Therefore, C would have a claim for an affirmative easement appurtenant.

Creation

An easement can be created by prescription, implied by prior use, implied by necessity, or expressly granted.

Prescription

An easement is created by prescription when the elements of adverse possession are satisfied. So the dominant tenement's use of the easement must be continuous, open, notorious, actual, and hostile. The use does not need to be exclusive.

Continuous

Use of an easement is continuous when the dominant is regularly using the easement in its intended manner.

Here, the facts indicate A first used an accessway from 2001-2007. Then in 2008 O built a home on the accessway, and O allowed A to use a different accessway.

A used the first accessway on a weekly basis. This would satisfy the continuous element.

However, in 2008 A stopped traveling across B when O did not sign a deed granting the easement.

Therefore, A had certain use from 2001 to 2007. But A did not have certain use from 2008 - 2016.

Actual

A dominant tenement's use is actual when they are actually using the easement in the way it should be used.

Here, A drove across the access way from 2001 - 2007. But A stopped traveling across B in 2008, so he did not actually use the easement from 2008 - 2016.

Open + Notorious

A dominant tenement's use is open and notorious when they are doing nothing to hide or conceal their use, and the servient would reasonably be put on notice if present.

Here, A used the access way on a weekly basis from 2001 - 2007. The facts do not indicate A did anything to conceal his use.

Therefore, A's use was open + notorious from 2001 - 2007, but no use occurred 2008 - 2016.

Hostile

A dominant tenement's use is hostile when they do not have the servient's consent to use the access way.

Here, O gave A permission to use the accessway in 2001. O then revoked his permission after A placed gravel in 2002. Then O granted permission ^{in 2005} ~~in 2005~~ it was in writing.

A's use was not hostile in 2001. Then, A's use became hostile when O revoked his permission in 2002, ~~but granted~~

So A's use was hostile from 2002 through 2007. A stopped using the access way in 2008. ~~the~~ and never put the easement in writing. A's use would have been hostile in 2001 if he continued use without the written deed, as that was O's condition.

So A's use was only hostile from 2002 through 2007.

Therefore, A would have created a prescriptive easement if the statutory period of the jurisdiction is satisfied with the period of 2002 through 2007.

Implied by Prior Use

An easement is implied by prior use when the two parcels ~~were~~ once had ^a common ownership, and the dominant expected the easement to survive division b/c the use was apparent and reasonably necessary to the use and enjoyment.

Here, B + W never had common ownership, as O owns B and A owned W. So this creation method doesn't apply.

Implied by necessity

An easement is implied by necessity when the two parcels had a common owner, and the parcels are divided, leaving one landlocked. An easement is necessary to the use and enjoyment of the land.

Here, B + W did not have common ownership and W is not landlocked, so this creation method does not apply.

Expressly Granted

An easement is expressly granted when it is put in writing and signed by the parties. It does not need to be recorded to be valid.

Here there was a deed but O never signed it. So no easement was expressly granted, as both parties must sign.

Scope

An easement's scope is defined by its terms and cannot be unilaterally changed.

Here, the license terms were ~~to~~ using the access way on a weekly basis and O did not want gravel.

Then, the easement terms in 2008 would have been allowing A use of the ~~road~~ different accessway. But this ~~was~~ never expressly granted.

Also, O stated A could only use the access way of ~~it~~ way in winter, which is another term that defines the scope.

Notice

For an easement to transfer to ~~to do~~ upon sale ~~of the dominant tenement of land~~, there must be actual inquiry, or recorded notice.

Here, AS sold his dominant tenement to C. A explicitly told C of the easement, which constitutes actual notice.

Termination

An easement is terminated upon abandonment, misuse, overuse, necessity ending, written release, or prescription.

Here, A stopped using the easement in 2008, which may constitute abandonment. However, A did not do any overt act that showed he was abandoning use. So if an easement was created, A did not abandon.

Because A removed the gravel in 2002, O could not claim A misused the easement.

There is no claim for overuse, necessity ending, or a written release.

O's strongest claim is under prescription. If A's use of the access way creates a prescriptive easement within the applicable statutory period, the court will also likely find O's conduct terminated it.

A servient owner terminates a prescriptive easement by interfering with the dominant's prescriptive use, in accordance with the terms of adverse possession.

Here, O built a home in the middle of the access way in 2008. Up until then, A had been using the access way in accordance with the elements of adverse possession.

O's building of the house then interfered with A's use of the access way.

therefore, O terminated any prescriptive easement A held ~~it~~ up until 2008.

Because A stopped using the easement after that, C has no claim for a use of an easement for an access way.

~~If~~ O revoked the license in 2002. Then, if A created a prescriptive easement in 2002, O terminated it in 2008.

then no use of an easement occurred after 2008. so C does not have an easement for the access way.

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