MONTEREY COLLEGE OF LAW

REAL PROPERTY

Final Examination

Spring 2019

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

In 2008, Oscar bought Blackacre and Whiteacre, which were adjoining, expansive, heavily forested, undeveloped parcels of real property. Blackacre is adjacent to one public road, Central Drive, and Whiteacre is adjacent to another public road, Ranch Way. That same year, Oscar built a home on Whiteacre. He also graded a continuous dirt road connecting Central Drive and Ranch Way across Blackacre and Whiteacre that he occasionally used to cross Blackacre to access Central Drive. He also paved a driveway from his home to Ranch Way as the primary ingress to Whiteacre.

In 2009, Oscar sold Blackacre to Charles. The parties did not discuss, nor did their sale documents reference, any Oscar's right to use the dirt road across Blackacre. However, at the time of the sale, Oscar told Charles that Charles could use the dirt road across Whiteacre so Charles could build his home on Blackacre. Charles immediately began using the dirt road for that construction, with heavy construction trucks and equipment crossing several times a week. Oscar continued to occasionally drive on the dirt road to cross Blackacre to Central Drive.

In 2011, Charles' home was still not completed, but he built a permanent, sturdy fence along the common property line that crossed over the dirt road, including across the dirt road. Several days later, Oscar discovered the fence, tore down the portion across the dirt road, and placed a gate across the dirt road that only he had the key to unlock. Oscar continued to occasionally drive on the dirt road to cross Blackacre to Central Drive.

In 2012, Charles tore down the gate to allow heavy construction trucks and equipment access to complete his home, which was completed within a month. Several months later, Charles began using the dirt road across Whiteacre as weekly access for heavy construction trucks and equipment to construct an enormous barn and for ongoing timber clearing projects on Blackacre.

In 2019, Oscar blocked the dirt road at its point of origin at Ranch Way thereby preventing its use by Charles. However, Oscar has continued to occasionally cross Blackacre on the dirt road until present. To this day, the barn remains only partially completed.

Assume this jurisdiction has a five-year statute for prescriptive easement.

Discuss the rights of Oscar and Charles regarding the use of the dirt road on each other's property.

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Question 2

In 2008, Harold and Wanda purchased Blackacre, taking title as "joint tenants." It was a cash purchase with no lender financing. Blackacre is a large residential parcel zoned only for a single-family dwelling, with a single-family home on it.

In 2009, Harold and Wanda deeded Blackacre to themselves and David "all as joint tenants." Soon afterwards, David entered into a personal services contract with a third party, and he provided the third party a mortgage secured against his interest in Blackacre for $200,000 to cover his potential liability for breach.

In 2010, Harold deeded his interest in Blackacre to himself as a "tenant in common with other owners."

In 2011, David paid $30,000 towards necessary re-roofing of the home on Blackacre, and $8,000 for a fountain on the front lawn. Harold also paid $30,000 for the re-roofing, but Harold and Wanda refused to pay for the fountain. Wanda refused to contribute to the re-roofing.

In 2013, Harold executed and recorded a deed stating he transferred his interest in Blackacre to himself as a "joint tenant with other owners."

In 2018, Wanda began leasing the whole of Blackacre to a tenant in a periodic lease. She did not notify Harold or David that she had leased Blackacre, and she kept all the rental income.

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

What claims could Harold, Wanda and Ed make regarding Blackacre, including rights of ownership, partition, and accounting?

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Question 3

Orieta bought Blackacre, a parcel of undeveloped land zoned for single-family dwelling and light-commercial use. Blackacre is located in downtown City. The relevant portion of the zoning ordinance regarding Blackacre provides:

> No single-family dwelling may be built within ten 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 four-feet of the property boundary line.

Orieta later applied for a building permit with the City to build a single-family dwelling on Blackacre, but the City denied the permit because the location of Orieta's proposed dwelling was within twenty-feet of a properly located light-commercial structure on a neighboring property. Due to the shape of Blackacre, and the existing light-commercial structures on neighboring properties, no single-family dwelling can ever be built on Blackacre because of the zoning ordinance.

Orieta applied for a variance from the City to allow construction of a four-story apartment building on Blackacre, which would be further than ten feet from the property line and twenty feet from the structure on Whiteacre. In response to this request, the City conditioned the variance and grant of a permit to Orieta only if she paid $30,000 to the City to improve City's libraries.

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

1)

Easement in Appurtenant

This is a dominant estate's non-possessory interest in the land of a servient estate. It is presumed to be perpetual and to match the reasonable needs of the dominant estate at this time and in the future. Such an easement runs with the land where notice was available to the servient estate. Notice can be actual, inquiry, or constructive notice. A bona fide purchaser with no notice of an easement will not be subject to the dominant estate's interest in the easement which would be considered terminated. The following are ways in which an easement can be created as discussed via Oscar and Charles's matter:

Easement by Prior Use - Oscar's continued use of the dirt road to access Central Drive

CREATION, SCOPE such an easement is created when a single parcel of land is divided and the dominant estate (grantor) continues to use a path that cuts through the grantee's property. If the dominant estate can show that the use was continuous and apparent, the use was reasonably necessary to the dominant estate, their intent was to continue to use the land is the same continuous way they had done prior to the sale/division, the easement may remain.

Here, Charles ("C") bought Blackacre upon which a dirt road existed that connected Central Drive to Ranch Way, cutting through both tracts of land. Oscar ("O) never discussed his use of the dirt road to C upon sale. Furthermore, O only used the road occasionally. Depending how hard it may be to access Central Drive otherwise, though his primary ingress was to Ranch Way (to satisfy the reasonably necessary element), O may construe "continuous" to include "occasionally" as long as it is at a regular rhythm of occasional. That being said, C has a strong argument that the occasional use of the dirt road is not continuous in the sense of a non-possessory interest. Furthermore, if O's use

was so occasional that grass was able to grow in between uses or leaves covered the tracks as to hide any tracks, this may affect the apparent element and C would have had no notice to satisfy this type of easement. This is may not be O's strongest argument if he wants to maintain interest in the dirt road to Central Drive.

Easement by Estoppel - Oscar's Oral Permission to Charles to access Ranch Way

CREATION, SCOPE such an easement is created where a party was given permission to cross the servient land which resulted in detrimental reliance to the dominant estate, the user of the easement. The scope of such an easement would extend so much to avoid injustice if the servient estate attempted to revoke their permission. If no reliance was made on the promise, such permission would be revokable absent creation through any other types of easements.

Here C appears to have relied on Oscar's ("O") offer of using Whiteacre's dirt road to access Ranch Way in purchasing Blackacre, realizing that he could use the road to let construction vehicles and equipment onto his new property to construct his new house. Depending on the exact timing of O's disclosure to C regarding his permission to cross Whiteacre, the sequence of events may not have caused C's purchase but came after he had already signed the documents. C would have a second opportunity to show detrimental reliance if he planned the construction of his house according to his ability to use the dirt road to access Ranch Way. Perhaps the size of his house would have been different had he not relied on this access. A fact that changes this analysis, however, is that C had not finished his home when he built a permanent sturdy fence, blocking access to the dirt road and to Ranch Way. Had he seriously relied, to his detriment, on the access to Ranch Way, he would not have blocked his own access prior to the home's completion. C could argue that the fence was temporary, though appearing permanent and sturdy, (if he had a good reason for this) as he eventually tore the fence down again to allow more

heavy construction trucks. This argument would most likely fail as this does not appear rational.

Easement by Prescription - Oscar's continued use of the dirt road to access Central Drive

CREATION, SCOPE such an easement is created upon the showing of (1) actual use, (2) open and notorious use, (3) hostility, (4) continuous use. Exclusivity is not required. Further, the use must continue in this fashion to satisfy the statute of frauds, necessary for that jurisdiction.

Here O occasionally used Blackacre's dirt road to Central Drive when it was owned by C from 2009 to 2019. This may satisfy the SOL. This is actual use to access Central Way. O most likely used the dirt road in an open and notorious way. If C was managing a construction crew to build his new home, one would think he was around to see O drive on the road. That being said, the facts state that the terrain is expansive, heavily forested and initially undeveloped. Furthermore, if the construction crew was coming from Ranch Way, there is a possibility that the only point of convergence where O's use may be open and notorious is at the property line, depending where the home was built in relation to the dirt road. Also, despite a fence being built, torn down, a gate going up, and being torn down, there are no facts to indicate that the parties were in a quarrel or were aware that these things were happening until they happened. This lends to the belief that the dirt road was not used enough to know what was happening at all times as it must take over a day to construct or take down these things. It could be argued that O, building the gate at the property line, inferred his use of the dirt road as he could be the only one to access the road. However, this is not a strong argument. The hostility element can be construed from the various ways the parties attempted to block the other from using the dirt road. C never gave permission to O to use the road and his conduct reflected this. For O to establish an easement by prescription, he must also show that his use was continuous. As long as he could attest to using the road at regular intervals, similarly to the way he would

use his own road to Ranch Way, the continuous element may be met. However, unless due to the remoteness O and C and local neighbors only left to go into town "occasionally," occasionally might not be enough to maintain interest in the dirt road to Central Drive.

Easement by Prescription - Charles's continued use of the dirt road to access Ranch Way

CREATION, SCOPE (see above)

Here C actually used the road to Ranch Way to build his house on Blackacre. He did so in an open and notorious way, using the road for construction crew and equipment. While the road may be so forested and at a distant corner that use would be hidden from view, even if crew members came and left all at once, the heavy equipment and construction trucks would leave a mark on a dirt road, especially if they came onto the property between 2009 to 2011 and then from 2012 to 2019. O gave C permission initially but it may be inferred that he took it back by putting up a locked gate in 2011. However, C destroyed the continuous nature of his use by erecting a fence in 2011 as well. The SOL would most likely run when C tore down the gate in 2012. From this point, C use the road continuously to build his house and it was arguably without O's permission, satisfying the hostility requirement. As C used the dirt road to Ranch Way, satisfying the four elements from 2012 - 2019, he has a good case to establish an easement by prescription as he maintained his interest beyond the SOL which was 5 years.

Upon this theory, C can petition the court to order a mandatory injunction against O to allow his access to Ranch Way. At the same time, he may petition for a prohibitory injunction to stop O from using the dirt road though the facts to expressly state that C has an issue with O using the road or that he was even aware the O was using the road.

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END OF EXAM

2)

Joint Tenants

Joint tenancy is a possessory interest in land with rights to the whole created by the four unities of time, title, interest and possession with right of survivorship. That is at the same time they enter by instrument into joint tenancy with equal shares and rights to possess the whole. Here, H and W purchased BA in 2008 as JTs. From here, I will need to talk about each individual owner and subsequent purchaser in turn before discussing partition and concluding on the whole.

H

H was a co-tenant in a JT with W in 2008. In 2009 he conveyed with W at the same time, with the same title and interest as well as possession with D. At that time, the original JT was severed and all three H, W, D became JTs. In 2010, H severed from the joint tenancy by conveyance from himself to himself as a Tenant in Common with the JTs W and D. A tenant in common has right to possession of the whole and is divisible, descendible and alienable. At that time his interest was 1/3 with W and D possessing each the same 2/3 interest as JTs. In 2013, H attempted an invalid transfer of interest where the facts don't seem to indicate anyone else was in privity as a JT with W and D. As that Deed should be void as it lacks the four unities of TTIP, at present H is a TIC with a 1/3 interest.

W

W entered into a a purchase with H in 2008 as JT with him. In 2009--supra--she became a JT with D and H. In 2010 she maintained her 2/3 interest as a JT with D but H severed and remains as a TIC with W and D to the present.

D

D under the four unities entered as a JT with H and W in 2009. That same year, D granted a mortgage against his interest to a 3P. Whether his interest was severed at that time depends on whether we are in a title or lien theory jurisdiction. That discussion will take place below and give analysis for the disposition re E. However, if D did sever and end up as a TIC then his will as to E is valid. If not, the will as to E is invalid.

E

E's fate to be decided below.

Severance

Parties may sever there joint tenancy by conveyance, creditor sale, mortgage or death.

Mortgage

In 2009, D granted a $200,000 mortgage to a 3P as security in the event of his default on their personal services contract. Contracts and conveyances in JT may be secretive and their effects may not be felt until the time of sale. Here, if we are in the minority of states dealing with a title theory state, then the title is held by the mortgagor and given back to the mortgagee at the end. This action breaks the unity as to title with the other JTs which means D becomes a TIC holding a 1/3 interest of the whole. This would also mean that his will is valid as to E as a TIC is descendible. However, if we are in a lien theory state (majority), the mortgagor holds only a lien and title remains with the mortgagee. If that is the case then he is still a JT with W each possessing their 2/3 interest and H possessing 1/3 as a TIC.

Partition

The parties have rights to partition in-kind where the property is divided up with respect to their individual interest. However, if for some reason division of the property is infeasible such as here where--although the lot is large--there is zoning for but one single-family dwelling, the court may do a forced sale of the property with subsequent division of interest. If there is a forced sale, then the parties are entitled to an accounting of their rents, profits and improvements less any liabilities proportional to their shares.

Accounting

Where a partition takes place and the forced sale is set to proceed, an accurate accounting of all the rents, profits, repairs, improvements and liabilities must be made to determine what is reimbursed to the parties with respect to their interest in the whole. Here, there will likely be a forced sale as partition in-kind is infeasible given that they cannot each live in a single family dwelling already occupied by a tenant.

Rents and Profits

W began leasing the whole in 2018 and did not notify H or D of this. Where rents are concerned, H and D are entitled to their share of the rents from the tenant but cannot go after the tenant for them and must take them from W unless there was ouster by one of the co-tenants. Here there was no ouster and the facts don't tend to show there was. This is a simple matter of figuring out what 1/3 of the rents are and dividing them up equally among the parties. Although there were no independent businesses, if there were, each co-tenant is entitled to profit from their own work on the land that does not stem from the taking of natural resources.

Improvements and Repairs

Each co-tenant is responsible for their share of the reasonable repairs to the property, and may also be reimbursed on the back end in the event of partition for any improvements that lead to the increased value of the land. However, they are also liable for any ameliorative waste, that is, improvements made that devalue the land. Here, H and D each had $30,000 of necessary roofing done on the home. W will argue that there was no need to do that kind of work and that the roof was fine in the state of utter disrepair that it had fallen into. If the work was necessary, D and H are entitled to recoup those costs at the close of sale. The $8,000 fountain is likely a nice touch and D will argue that it adds value to the home and he would like to be compensated for it. H and W will say it is a hideous fountain depicting a nude cherub urinating into a crocodiles mouth and that it devalues the property. If D is successful he will be able to recovery the fountain cost, if he fails, he will have to give $4,000 to H and $4,000 to W at the close of sale.

Conclusion

In the interest of picking a side, I will presume we are in a title theory state. Therefore, at the moment of his death D was a TIC with a 1/3 interest that passed to E when the valid will was executed. H was a TIC with a 1/3 interest who tried and failed to rejoin the pack as a JT. W is a JT with herself I guess with a 1/3 interest as well. The mortgage will not survive D's death and if he had an outstanding liability of $200,000 on his personal services contract and the close of sale occurs after death then the mortgagor is out of luck. At the close of sale (if there is a partition and they do a forced sale) H, W, and E each will go through the accounting process and receive their 1/3 shares in interest plus rents and profits and less liabilities.

END OF EXAM

Real Property
Spring 2019
Question 3

Variance.

This is the escape valve to zoned areas through which development that does not meet the zone's requirements may be possible. Upon a showing of (1) undue hardship; (2) lack of detriment to general welfare; & (3) lack of inconsistency with the general plan for the surrounding area, a landowner may appy for a variance & at the local zoning board. This means that the landowner must show that the hardship was not self-induced, they have tried to mitigate the harm, and there are no alternatives. And, this is such that would render the property useless without a variance. The landowner must also show that the permit for which they have applied is such that it would not cause harm to the neighbors or surrounding public. Aesthetics, property values, and investment backed expectations are considered. Finally, the landowner must show that their proposed plan would still blend into the general plan of the area.

(1) Undue hardship.

Here, Oneta ("O") is applying for a permit to build

a 4-story apartment building after having been denied a building permit for a single-family dwelling. O has a hard time showing undue hardship under this light as one still has the option for a variance to build a single-family dwelling. Secondly, it does not appear that O has tried to apply for a variance on her ~~s~~ initial building permit application. In fact, the difference in plans between a single-family dwelling and a 4-story building make it hard to see how much she invested, ~~as~~ whether its personal or commercial, as this is a huge jump in value, outcome, and use. O would need to try more avenues to assert that this would cause undue hardship.

(2) detriment to surrounding area

City is zoned for single-family dwelling and light commercial use. Blackacre is specifically in the downtown area of city. Neighbors of Blackacre are light-commercial use structures. ~~A~~ A four-story apartment building does not seem to cause intense negative impact to the surrounding area. Unless the downtown area was having problems with traffic, overpopulation or noise, an apartment building would ~~[illegible]~~ in [illegible] Building the

structure could cause traffic and noise but it would not be temporary. As the property does not appear too large and it is proposed at only four stories, permanent traffic caused by the apartment dwellers would have to be considered but would be minimal. As there are light-commercial properties surrounding, traffic and noise is less of a problem than purely residential areas. Furthermore, downtown areas are often more busy and could possibly provide public transit or walkable distances to avoid the extra traffic caused by an ~~apper~~ apartment building.

(3) ~~not substantially incompatible with the general plan~~ If the area was zoned solely for single-family dwellings, a 4-story apartment building may stand out or impede view or landscape. However, an apartment building amoung light-commercial use properties tends to blend in a little more. ~~The proposed variance does not seem substantially incompatible.~~ There may be neighbors ~~are~~ or citizens of city that relied on the lack of apartment buildings in moving to city or investing in property in city. Apartment dwellers can seem like "parasites" in a city that take up resources

and space without giving back in taxes. In this case, it would depend on how many, if any, other apartment buildings there are. If this is the only one, it may be better as it an exception versus a common occurrence of zoning boards tendancy to accept fees for permitting apartment buildings where only multi-zoning, per the statute/ legislation expressly states only single-family dwelling or light-commercial use should go. This may then be considered "spot zoning" and is not permissible.

As the facts seem to portray a picture that O ~~is~~ would not, as of yet, suffer undue hardship if her variance was not granted, ~~as City's conditional variance~~ there would most likely be no quasi-taking if O's variance was not granted. As such, it would follow that a conditional variance is permitted without implicating her Constitutional rights.

~~City's defense.~~
~~O's claim against City~~ - Exaction
The policepower of a city to conduct landuse control must adhere to the principle that, in seeking to assert its power, it may not be capricious or ambiguous.

Scorus further analyzed this as meaning that when providing a developer with a conditional building permit in exchange for an exaction, such must be in favor of a legitimate public interest.

Exaction

*Zoning board, pursuant to police powers, may enable developers to build provided they contribute or give land towards the public welfare. It must be shown that in providing the conditional permit, (1) the interest in public welfare had an essential nexus to the exaction; and (2) there was a rough proportionality to the detriment the public would receive from the construction and the benefit they would receive from the exation. If ~~no~~ neither of these are met, the government will have been deemed to have taken without providing just compensation contrary to the takings clause (a.k.a. inverse condemnation).

Here, D paying $30 000 to the city for library improvements may have an essential nexus in that an apartment complex adds more citizens which causes more strain on public resources. By helping to improve these resources, like libraries, the apartment building would lessen its impact on the community.

Under the rough proportionality test, it would depend on the state of the libraries, how many condos/apartments are actually being built, and whether the city will use the money effectively. It would appear that ~~the~~ if the apartment building was being built with a high budget and the area was of high standards, this would be proportionate. However, if the neighborhood was ~~decrepit~~ in a poor state and this 4-story building was being built for not much more than a few hundred thousand, $30,000 might be alot.

All in all - a public library maintains the police powers general goal of public welfare, safety, morals and health. As O's variance/denial hereof would NOT cause a "taking" ~~as such~~ under the current zoning ordinance ~~and her previous attempts of lack thereof to apply for variances~~, As such, the City is within their right to offer the conditional variance upon the exaction of $30000.

O's claim

To try and combat this exaction, O must state that the denial of her variance would be ~~was~~ a taking and she ~~could~~ as she can not build a

single family dwelling on the property and is forced to try another route of building. If they deny her variance or require an exaction, she needs to receive just compensation for the value of the property or her investment backed expectation

The City could rebut stating she had no investment backed expectation as she dramatically changed plans.