

FINAL EXAM
CAPITAL UNIVERSITY LAW SCHOOL
PROPERTY II-B
SPRING 1999
Professor Hirsch

Professor's Instructions: *Read Carefully*

1. At the beginning of this exam, you should have the following:
 - a. This 10-page exam packet.
 - b. A scantron form sheet for the multiple choice questions.
 - c. A #2 pencil to mark the scantron sheet, and a pen for writing the narrative portion of the exam.
 - d. Answer books.
2. Be sure to write your exam number on the exam envelope, your scantron sheet, each of your answer books and on your exam packet.
3. This is a two hour and fifteen minute (2:15) examination. It consists of two parts. I recommend that you spend 60 minutes on Part I, and 75 minutes on Part II. In grading the exam, I will allocate points in proportion to these recommended time allocations. Manage your time wisely. Make sure that you reserve enough time to answer all Parts of the exam fully.
4. While taking this exam, you may have with you and may refer only to an outline of the course that you have prepared with others or alone.
5. The multiple choice questions are to be answered only on the multiple choice scantron answer sheet. Review the instruction sheet for filling out the scantron forms (included in your exam envelope). Mark your answers on the scantron form by filling in the space for the letter that corresponds to the best answer for each question. If you erase, do so thoroughly. Otherwise the computer may grade your response incorrectly. Answers written on the exam packet itself will not be considered.
6. Write all your narrative answers on the colored answer books. Answers written on the exam packet itself will not be considered.

7. At the conclusion of the exam, please insert your exam packet, answer books, and scantron sheet into the envelope provided and then return this envelope to me. If you finish your exam early you may bring it to me in Room 535. Otherwise, I will come to collect your exam at the end of the exam time. **You may not make a copy the exam packet. Also, please refrain from talking about the exam since some of your classmates may not have taken it yet.**

GOOD LUCK

PART I
Multiple Choice
60 minutes

Instructions: In answering the multiple choice questions that follow you should select *the best* answer from among those provided.

Question 1: The term “nonconforming use” is best defined as:

- (A) A use of property that conflicts with a present zoning provision but existed lawfully prior to the enactment of that provision.
- (B) A use of property that violates the terms of a negative covenant.
- (C) A use of property that is at variance with other, existing uses in the subdivision.
- (D) A use of property that brings down the value of other properties in the area.

Question 2: In 1910, Otto Owner conveyed to Loretta Lessee a 99-year lease in Redacre, an undeveloped tract of land that he owned in fee simple. The lease was duly recorded. Loretta had intended to develop the land for commercial purposes but the conditions never seemed right and so she never entered into physical possession of the property. In 1920, Otto conveyed his entire remaining interest in Redacre to Betty Buyer by deed which expressly mentioned his lease agreement with Loretta. In 1930, Betty conveyed her interest in Redacre to Polly Purchaser by deed which did not mention Loretta’s lease. In 1945, Polly conveyed her interest in Redacre, which was still unoccupied and undeveloped, to Sam Speculator by deed which did not mention Loretta’s lease. Sam held onto the vacant land until 1988, at which time he sold it to Daisy Developer by deed which also failed to mention Loretta’s lease. Prior to purchasing the parcel from Sam, Daisy did a title search as far back as the 1930 deed from Betty to Polly and saw no mention of Loretta’s lease. She commenced building a subdivision on the land.

In 1989, Loretta’s heirs (who inherited Loretta’s entire interest in Redacre) brought suit against Daisy asserting that they are entitled to possession of Redacre until 2009 under the 99-year lease from Otto to Loretta. The jurisdiction in which Redacre is located, and under whose laws the suit will be decided, has a “marketable title” statute with a “root of title” search period of 40 years. There are no adverse claims in the record other than Loretta’s lease, recorded in 1910. The most likely result of Loretta’s heirs’ suit against Daisy is that:

- (A) Loretta’s heirs will win because Daisy should have seen the Loretta’s lease in the record when she performed her title search.
- (B) Assuming (for the purposes of this answer only) that Daisy *had* seen Loretta’s

lease when she performed her title search, Loretta's heirs would win.

- (C) Daisy will win because she has a clear chain of title back to her "root of title" which is 1948.
- (D) Daisy will win because she has a clear chain of title back to her "root of title" which is the 1945 deed from Polly to Sam.
- (E) Daisy will win because she has a clear chain of title back to her "root of title," which is the 1930 deed from Betty to Polly.

Question 3: An "enabling act" is best defined as:

- (A) A statute that enables the State to pass zoning ordinances.
- (B) A statute that delegates zoning authority from the State to the locality.
- (C) An action of the local zoning authority that allows land owners to exceed the zoning restrictions for their area.
- (D) An action of the local zoning authority that triggers the zoning ordinance and brings it into effect.
- (E) None of the above.

The following facts govern Questions 4 and 5: On May 1, 1999, Sam Seller and Betsy Buyer sign a contract in which Betsy agrees to purchase Sam's home and the four-acre parcel of property on which it stands for \$200,000. The property is surrounded by a "stockade" fence *with the "offensive side" facing out*. The contract states that Sam will provide Betsy with "marketable title, free and clear of all encumbrances." It further states that Betsy takes the property "as is" and that she agrees to purchase the property "subject to all restrictions and easements of record." The parties set a closing date of July 1, 1999.

Question 4: For the purposes of this question only, assume that in early June, 1999 Betsy learns that the property is subject to a long-standing zoning ordinance that requires all residential buildings to be set back from the road by at least 100 feet. She further learns that the home she has agreed to purchase is only set back 95 feet from the road. Betsy brings this new piece of knowledge to Sam and asks that he lower the price they had agreed on. He refuses, saying that the municipality has never sought to enforce this restriction against him and so it should not pose a problem. Betsy then brings suit to rescind her contract with Sam on the grounds that he cannot convey "marketable title" to her. Which of the following is the most likely result:

- (A) Betsy will lose because she agreed to purchase the home "subject to all restrictions and easements of record."

- (B) Betsy will lose because the municipality has given no indication that it intends to enforce the zoning ordinance against her.
- (C) Betsy will win because Sam did not fulfill his duty to tell her about the zoning ordinance.
- (D) Betsy will win because the existing violation of the zoning ordinance exposes her to an unreasonable threat of litigation.

Question 5: For the purposes of this question only, assume that in early June, 1999, Betsy learns that the crime rate in the area where the property is located has risen each year from 1990 to the present. Based on this new knowledge, Betsy no longer feels that she will be safe living in the home she is getting ready to purchase. Betsy brings suit to rescind the contract on the grounds that Sam should have told her about the rising crime rate. The most likely result is that:

- (A) Betsy will lose because she agreed to purchase the property “as is.”
- (B) Betsy will lose because the rising crime rate is observable by a purchaser exercising due care.
- (C) Betsy will win because the home now has much less value to her than she had previously thought.
- (D) Betsy will win because Sam did not tell her about the rising crime rate, even though he knew or should have known about it.

Question 6: “Cumulative zoning” exists where:

- (A) The legislature passes a new zoning ordinance that adds restrictions onto those imposed by a prior ordinance.
- (B) The zoning scheme segregates different types of uses so as to prevent harmful externalities from occurring.
- (C) Under the zoning scheme, lesser-impact uses can be placed in areas zoned for greater-impact uses.
- (D) None of the above.

Question 7: On **May 1, 1998**, Olivia Owner conveyed Greenacre, a parcel of open fields, to Diane Developer for \$15,000. Diane neither recorded the deed nor entered into possession of Greenacre. A few weeks later, Fred Farmer happened to be passing by Greenacre and saw that it

was unoccupied. Believing that Olivia still owned the land, he approached her about purchasing it. Without telling Fred that she had already sold the land to Diane, Olivia conveyed Greenacre to Fred for \$10,000 on **June 1, 1998**. Fred did not record the deed, but he did enter into possession and began farming the land. On **September 1, 1998**, Diane saw that Fred was farming the land. She went down that day to the county recorder's office and recorded her deed from Olivia. On **October 1, 1998**, she went to see Fred and told him to get off her land. Fred insisted that it was *his* land and, just to be sure, went that day and recorded his deed from Olivia. Diane then brought a quiet title action against Fred asserting her claim to the Greenacre. *The jurisdiction under whose laws the suit is to be decided follows the "notice" rule of recording priorities.* The most likely result of Diane's action is that:

- (A) Fred will win because he was the first to enter into possession of Greenacre and thereby provided notice to Diane of his claim to it.
- (B) Fred will win because he knew nothing of Diane's purchase at the time he paid \$10,000 for Greenacre.
- (C) Diane will win because she was the first to provide record notice of her purchase.
- (D) Diane will win because she was the first to purchase the land from Olivia.

Question 8: For the purposes of this question, assume that the facts are the same as in Question 7 up until and including **September 1, 1998** only. Now assume that on **September 10, 1998**, Bob Buyer became interested in purchasing Fred's interest in Greenacre. He performed a title search and saw in the record Diane's deed from Olivia (which Diane recorded on September 1). Undeterred, he went ahead with the deal and bought Fred's interest on **September 20, 1998** and recorded his deed that day. On **October 1, 1998**, Diane, who had become aware of Bob's purchase from Fred, brought a quiet title action against Bob asserting her claim to Greenacre. *As in Question 7, the jurisdiction under whose laws the suit is to be decided follows the "notice" rule of recording priorities.* The most likely result of Diane's action is that:

- (A) Bob will win because Fred was in actual possession of the land at the time that he sold it to Bob.
- (B) Bob will win so long as this jurisdiction follows the "shelter rule."
- (C) Diane will win because she put Bob on notice of her claim when she recorded her deed on September 1, 1998 .
- (D) Diane will win because she purchased Greenacre before either Fred or Bob did.

Question 9: An administratively-authorized departure from the requirements of a zoning ordinance, granted in cases of extreme hardship, is known as:

- (A) Contract rezoning.
- (B) A special exception.
- (C) A zoning amendment.
- (D) A variance.
- (E) Spot zoning.

Question 10: Oscar Owner owned Whiteacre in fee simple. One day, when he was feeling especially generous, he signed and dated a deed conveying his entire interest in Whiteacre to his 18-year-old grandchild, Gabriela. Oscar then put the deed in an envelope with Gabriela's name on it and stored it in a safe that he kept at home and for which he held the only key. He never told anyone about the deed, not even Gabriela. Several years later, Oscar became short on money. To raise some funds, he sold Whiteacre by quitclaim deed to Paul Purchaser, a friend, who entered into possession. Subsequently, Oscar died. The executor of his estate found the key, opened the safe, and saw the envelope addressed to Gabriela. He promptly forwarded the deed to her. Gabriela then brought a quiet title action against Paul asserting her claim to the property. The most likely result of this action will be that:

- (A) Paul will win because Oscar never delivered the deed to Gabriela.
- (B) Paul will win because, while Oscar put the deed into escrow, he retained the power to revoke.
- (C) Gabriela will win because Paul received only a quitclaim deed from Oscar, and Oscar had no interest left to convey to him.
- (D) Gabriela will win because it was Oscar's intent that the property remain in the family.

Question 11: The area around Albany in upstate New York is home to a growing number of dairy farms. It is also the watershed for the Hudson River, the source of fresh drinking water for New York City. A study commissioned by the New York State Legislature has shown that rainwater run-off from dairy farms in the Albany area is polluting the Hudson River with animal waste and is threatening the quality of New York City's drinking water. In response to the report, the State Legislature has made a formal finding that dairy farming in the Hudson's watershed threatens the City's drinking water and has passed a statute prohibiting the construction or operation of any new commercial dairy farms within twenty miles on either side of the Hudson River. The statute does not provide for any compensation to the affected landowners. Your client purchased land in upstate New York prior to the passage of the statute with the intention of opening a commercial dairy farm on the property. The property is within the twenty-mile limit and the statute will prevent him from building and operating the farm as he

had planned. He wants to know whether he can challenge the statute under the U.S. Constitution as an unconstitutional taking without just compensation. Applying the Supreme Court's decision in *Lucas v. South Carolina Coastal Council* (the case involving South Carolina's regulation of beachfront property), you should advise the client that:

- (A) He will likely succeed in his taking claim so long as he can show that the statute substantially diminishes the value of his property.
- (B) He will likely succeed in his taking claim so long as he can show that the statute substantially diminishes the value of his property *and* that dairy farming is not a "nuisance" under New York State law.
- (C) He will likely lose on his taking claim because the Legislature has made a formal finding that dairy farming threatens the quality of New York City's drinking water.
- (D) He will likely lose on his taking claim because the statute takes his property for a valid "public use."
- (E) None of the above.

PART II
Essay
75 minutes

After losing the Presidential election in the year 2000, Al and Tipper Gore and their four children decide to move out into the country with their good friends Bill and Hillary Clinton and their daughter Chelsea. The four friends decide upon an old walnut orchard and farmhouse in rural Arkansas outside of Little Rock which is owned by Webster Hubbell, a pal who needs some cash due to recent legal expenses. On December 1, 2000, Al and Tipper purchase Hubbell's farmhouse and the one-acre plot on which it stands. Two weeks later, on December 15, 2000, Bill and Hillary purchase Hubbell's 20 acres of walnut trees, on which they build their own small home. The two couples settle in for a happy life raising their children in the country, the perfect antidote to eight years in the Nation's capital. They particularly like living in this area because there are no zoning laws.

Due to their recent campaign expenses, Al and Tipper are strapped for cash. To make some extra money, they decide to turn the farmhouse into a small hotel called the "Walnut Grove Bed & Breakfast" (the B&B). Bill and Hillary think that this is a great idea and want to help the venture along. They sign an agreement with the Gores in which the Clintons "promise" on behalf of themselves and their "heirs and assigns" not to cut down the 20 acres of walnut trees so long as the B&B is operating; in return, the Gores "promise" on behalf of themselves and their "heirs and assigns" not to alter the farmhouse and, in addition, to provide free music lessons to the Clintons' children. The next day, they take the agreement down to the county recorder's office and record it. On their way back, the four take a walk on the trails that lead through the walnut trees. Bill and Hillary, feeling in a particularly generous mood, tell the Gores that they will always allow guests from the B&B to walk amongst the trees.

With these agreements in place, the Gores feel confident enough to invest a substantial sum furnishing and decorating the farmhouse with antiques (although not altering its structure). This investment turns out to be a good one. During the next 20 years, the Walnut Grove B&B prospers. Businesses from Little Rock expand into the area, including some light industry, auto dealerships and the like. The Walnut Grove B&B, with its old farmhouse and location near to a walnut orchard, becomes one of the last "rural" spots in the area and is the most popular choice for a place to stay. Guests routinely wander through the walnut orchard and enjoy the trees.

In 2020, the two couples have a falling out when Al mistakenly refers to Hillary as "Monica." Bill and Hillary sell their entire estate to Newt Gingrich and his wife who have ten children ranging in age from three to eighteen. The deed of sale makes no mention of the Clintons' agreements with the Gores. However, while Bill and Newt are haggling over price, Bill describes the agreements that the Clintons have reached with the Gores, including the Clintons' promise to let guests from the B&B wander through the orchard and not to cut down the trees. Newt complains loudly about this "socialist" arrangement. To calm him down, Bill drops the price by 10 percent.

When the Gingriches move in they promptly erect a fence and post signs to keep guests from the Walnut Grove B&B off their property. They also construct a small landfill on the site. The landfill is a commercial success since the new businesses in the area are creating a lot of waste and the community is running out of landfill space. However, it frequently emits strong and unsavory odors and creates loud noises from trucks loading and unloading heavy metal trash dumpsters. When Al complains about this, Newt replies: “sorry buddy, it’s my property and I can do what I want on it!” He then tells Al that he plans to cut down most of the walnut trees and expand the landfill to cover much of the 20-acre site.

The installation of the small landfill next door is starting to hurt the Gores’ profitable B&B business, and the landfill expansion will destroy the business. The Gores try to mobilize community support against the expansion but meet with little success as there are few residential owners left and the businesses in the area favor the landfill. The Gores offer to buy the Gingriches’ land for a reasonable price, but they refuse to sell. Finally, the Gores tell Newt that he must abide by the agreements to let B&B guests wander the grounds and not to cut down the trees. Newt just laughs at this and tells the Gores that if they even think about enforcing any agreements he will require that they hold up their end of the bargain by keeping the farmhouse intact and providing music lessons to all ten of the Gingrich children.

* * *

The Gores have come to you for legal advice. They want to know what legal action they can take against the Gingriches to stop them from cutting down the walnut trees and expanding the landfill. They also want to know whether Newt can prevent them from altering the farmhouse (they want to add a new wing) and whether he can force them to provide music lessons to his ten children.

Write the Gores a memo advising them of their legal position. In the memo, describe all conceivable actions that the Gores could bring *against the Gingriches* (you should only be concerned with actions against the Gingriches here) and the remedies that they could seek in each such action. Also, evaluate the merits of these actions and reach a conclusion regarding the Gores’ chances of success. Finally, address the Gores’ concerns about having to keep the farmhouse intact and provide music lessons to the Gingrich children.