

FINAL EXAM
CAPITAL UNIVERSITY LAW SCHOOL
PROPERTY II-B
SPRING 2003
Professor Hirsch

Professor's Instructions: *Read Carefully*

1. At the beginning of this exam, you should have the following:
 - a. This 11-page exam packet.
 - b. A scantron form sheet for the multiple choice questions and a scantron instruction sheet.
 - c. A #2 pencil to mark the scantron sheet, and a pen for writing the narrative portion of the exam.
 - d. Answer books.
2. ***Please write your exam number on the front of your envelope, the upper right hand corner of your exam packet and on each of your answer books.***
3. ***Please fill in the identifying information on your scantron form, as indicated in the instructions on the front of the form.***
4. This is a two hour and thirty minute (2:30) examination. It consists of a multiple choice section, and an essay. I recommend that you spend 60 minutes on the multiple choice questions, and 90 minutes on the essay. In grading the exam, I will allocate points roughly 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.
5. The multiple choice questions are to be answered only on the multiple choice scantron answer sheet (this goes even for those taking the exam on computer). 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 the answers to the essay in the colored answer books (unless you are taking this exam on a computer). If you write more than one answer book, number the books sequentially (e.g. Essay, book 1; Essay, book 2, etc.) 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. Then place the envelope in the box at the front of the examination room. **You may not make a copy of or otherwise reproduce the exam packet.***

GOOD LUCK!

MULTIPLE CHOICE
(60 minutes)

Instructions: In answering these multiple choice questions you should select *the best* answer from among those provided. You should also assume that all the cases that we read this semester apply in the jurisdiction where the question is situated.

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 that expressly mentioned his lease agreement with Loretta. In 1930, Betty conveyed her interest in Redacre to Polly Purchaser by deed that made no mention of Loretta’s lease. In 1945, Polly conveyed her interest in Redacre, which was still unoccupied and undeveloped, to Sam Speculator by deed that also did not mention Loretta’s lease. Sam held onto the vacant land for many years waiting for the right developer to come along and purchase it from him. In early 1988, Daisy Developer became interested in building a subdivision on Redacre and entered into a contract with Sam Speculator to buy it. Prior to closing, she conducted a title search and reviewed all recorded documents as far back as the 1920 deed from Otto Owner to Betty Buyer. Following the closing on May 1, 1988, Daisy commenced building a housing subdivision on the land.

In 1989, Loretta’s heirs (who inherited Loretta’s entire interest in Redacre) brought suit against Daisy asserting that they were 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 (and her heirs’) claim under the 1910 lease, and Loretta’s heirs have never filed a “notice of claim” with respect to the leasehold interest. The most likely result of Loretta’s heirs’ suit against Daisy is that:

- (A) Daisy will win because she has a clear chain of title back to her “root of title” which is 1949.

- (B) 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.
- (C) Loretta’s heirs will win because the 1920 deed from Otto Owner to Betty Buyer, which Daisy reviewed as part of her title search, should have put her on actual notice of Loretta’s leasehold interest.
- (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.

Question 3: In 1995, Polly Purchaser bought a single-family home on a half-acre of land for \$150,000. Since Polly only had \$15,000 available as a downpayment, she took out a 30-year mortgage loan from Bankers & Co. for the remaining \$135,000. Polly made all payments due to Bankers & Co. under the Note until January, 2001, when she lost her job and defaulted on the loan. Shortly thereafter, Bankers & Co. foreclosed on the property and held a lawful foreclosure sale at which the property sold for \$175,000. Assume that, at the time of the foreclosure sale, Polly still owed Bankers & Co. \$115,000 in debt principal and had not taken out any other loans secured by the home. The amount of the proceeds from the foreclosure sale payable to Polly should be:

- (A) \$60,000
- (B) \$45,000
- (C) \$40,000
- (D) \$15,000
- (E) \$ 0

Question 4: Omar Owner owned Blackacre in fee simple. In 1980, Omar conveyed Blackacre to Ivan Investor but reserved the mineral rights to himself (*i.e.* these were not included in the conveyance). This conveyance was duly recorded. In 1983, Ivan sold Blackacre to Chester Chump by general warranty deed that purported to convey the entire parcel, including the mineral rights. Chester took possession and began living on the property. In 1995, Omar sold Blackacre’s mineral rights (which he had retained) to Martha Miner. Several weeks later, Martha showed up at Blackacre with her digging equipment and began exploring for minerals. Chester, who lived on the property, was outraged. He tried to eject Martha from the property but found she had good title to the mineral rights. He therefore brought suit against Ivan for violation of the covenants in Ivan’s general warranty deed to Chester. The jurisdiction has a 10-year statute of limitations for actions on deed covenants. Chester will have the best chance of success in his lawsuit if he asserts a violation of:

- (A) The covenant of further assurances.

- (B) The covenant against encumbrances.
- (C) The covenant of seizin.
- (D) The covenant of quiet enjoyment.

Question 5: 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 6 and 7: On May 1, 1999, Sam Seller and Betsy Buyer signed a contract in which Betsy agreed to purchase Sam’s home and the four-acre parcel of property on which it stands for \$200,000. The contract stated that Betsy takes the property “as is” and that she agrees to purchase the property “subject to all restrictions and easements of record.” The contract contained no express provision regarding marketability of title. The parties set a closing date of July 1, 1999.

Question 6: 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 25 feet. She further learns that the home she has agreed to purchase is only set back 20 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 contract did not expressly require Sam to provide her with marketable title.
- (C) Betsy will lose because the municipality has given no indication that it intends to

enforce the zoning ordinance with respect to this property.

- (D) Betsy will win because Sam did not fulfill his duty to tell her about the zoning ordinance.
- (E) Betsy will win because the existing violation of the zoning ordinance exposes her to an unreasonable threat of litigation.

Question 7: For the purposes of this question only, assume that in early June, 1999, there is a torrential rainstorm and the basement of the home becomes flooded with six inches of water. Prior to this event, Sam had no knowledge that the basement was subject to flooding as it had remained dry throughout his time in the house. Betsy brings suit to rescind the contract on the grounds that Sam should have disclosed to her the likelihood that the basement would flood during heavy rains. The most likely result is that:

- (A) Betsy will lose because she agreed to purchase the property “as is” and, in so doing, voluntarily assumed responsibility for existing defects such as the basement’s propensity to become flooded.
- (B) Betsy will lose because, at the time the contract was signed, Sam had no knowledge that the basement was likely to become flooded.
- (C) Betsy will lose because the contract did not expressly require Sam to provide her with marketable title.
- (D) Betsy will win because she now knows the home to be much less valuable than she originally believed it to be at the time she signed the contract.
- (E) Betsy will win because an “as is” clause does not eliminate a seller’s duty to disclose material defects that are not readily observable by the purchaser.

Question 8: Abner and Betty were neighbors who lived alongside one another with Abner to the west and Betty to the east. The county built New Road along the eastern border of Betty’s property. New Road led directly into town. Betty built a driveway that led from her property to New Road and used this route to drive to town. Abner had access to Old Road from his property, but not to New Road. He would also have liked to use New Road since it provided a far more convenient way to get to town. Abner asked Betty whether she would be willing to extend her driveway to his property so that he might use it to gain access to New Road. He offered to pay for the work. Betty verbally gave Abner permission to extend the driveway and to use it. Abner paid for the driveway extension at a cost of \$3500.00. Abner also moved his garage next to the new driveway at a cost of \$1500.00. Twelve years after building the driveway extension, Betty sold her property to Abner’s ex-girlfriend, Cindy. Cindy was still angry at Abner about their break-up. After moving in, she put a chain across the driveway preventing Abner from using it and denying him access to New Road. Abner sued Cindy to force her to

remove the chain. The most likely result of this lawsuit is:

- (A) Assuming a 10-year prescription period for this jurisdiction, Abner will win because he can establish an easement by prescription.
- (B) Abner will win because his use of the driveway will allow him to establish an easement by prior use.
- (C) Abner will win because he can establish an irrevocable license by estoppel.
- (D) Abner will lose because his agreement with Betty was never reduced to writing.
- (E) Abner will lose because the burden side of an appurtenant easement does not run with the land.

Question 9: 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 \$12,000 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. *Assume that the suit is brought in a jurisdiction where the recording statute follows the "race-notice" rule for determining priority.* The most likely result of Diane's action is that:

- (A) Fred will win because his possession and farming of the land 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 \$12,000 for Greenacre.
- (C) Diane will win because she was the first to record her purchase.
- (D) Diane will win because she was the first to purchase the land from Olivia.

Question 10: 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. Doug Dairyman 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. His property is within the twenty-mile limit and the statute will prevent him from building and operating the farm as he had planned. Doug brings suit under the U.S. Constitution challenging the New York Statute as an unconstitutional taking of private property 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), which of the following is the most accurate assessment of Doug's chances of success in his lawsuit:

- (A) He will likely succeed in his taking claim so long as he can show that the statute renders his property valueless.
- (B) He will likely succeed in his taking claim so long as he can show that the statute renders his property valueless *and* that dairy farming is not a nuisance under New York State common law.
- (C) He will likely succeed in his taking claim so long as he can show that the statute diminishes the value of his property *and* that dairy farming is an important industry for New York State.
- (D) 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.
- (E) He will likely lose on his taking claim because the statute takes his property for a valid "public use."

Question 11: Abner owned Blackacre in fee simple and lived on the property. One day, Abner decided to make some improvements to his home. Lacking the necessary funds to do so, he took out a home improvement loan from the Small Town Bank and secured it with a mortgage on Blackacre. This mortgage interest was not recorded. Some years later, Abner conveyed Blackacre to Brenda in fee simple by general warranty deed. This deed, which was recorded, failed to mention Small Town Bank's mortgage interest in the property and Brenda had no knowledge of this title defect. Brenda soon wanted a larger home. She accordingly sold Blackacre to Charlie in fee simple by special warranty deed that was promptly recorded. This deed, too, failed to mention the Small Town Bank mortgage interest since Brenda did not know of it. Several years later, Charlie decided to sell Blackacre to Diana. Diana had a friend who worked at Small Town Bank and, in casual conversation, happened to mention to him that she was interested in purchasing Blackacre. Her friend informed her of Small Town Bank's

mortgage interest in the property. When Diana brought this to Charlie's attention he had to reduce the purchase price by \$25,000 (the amount still remaining to be paid to Small Town Bank). Charlie has now sued Brenda for violation of the covenants in her deed to him. He seeks damages of \$25,000. The most likely resolution of this lawsuit will be that:

- (A) Charlie will win because he did not receive from Brenda the full property interest that he thought he was purchasing.
- (B) Charlie will win because Brenda breached the warranties in her deed to Charlie.
- (C) Brenda will win because she conveyed the property to Charlie by special warranty deed, not general warranty deed.
- (D) Brenda will win because she made no affirmative misrepresentations to Charlie.

Question 12: 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.

ESSAY
(90 minutes)

The town of Ahab (pop. 4000), is a quaint fishing village nestled on the eastern shore of Lake Cheery in the State of Grace. To the east of the town there are farms, but the local economy is mainly based around the fishing trade. Many adults work on fishing boats that ply the waters of Lake Cheery. Others work at Friendly Fishsticks, a company with 100 employees that purchases the local fish, prepares and packages it, and sells it as frozen fishsticks. In recent years, the economy in Ahab has been weak. The fish catch has not been as plentiful as in the past and fewer people can make a decent living on the fishing boats. Many of the young people have been leaving for the nearby City of Growth located 50 miles to the east. Being a small town, Ahab has never needed zoning laws and does not have any.

Abby Apple owned in fee simple a large farm a mile outside of Ahab that had been in her family for three generations and was surrounded by other farms. In 1990, she sold half of her fee simple interest by special warranty deed to Bob Builder, retaining the other half of the property for herself. As part of the deal, she required Bob to sign a formal document in which he “promised” that he and his “heirs and assigns” would use the property for residential purposes only, and not for commercial or industrial ones. This document was recorded along with the deed the following day. In 1992, Abby leased the remaining portion of the property for 25 years to her nephew, Charles Chuckles. Charles moved into the old family home on the property. Abby, who was getting on in years, moved to Florida.

In 1995, Bob sold his portion of the property to Fetid Fertilizer Corporation (FFC), a company that specialized in making fertilizer out of fish byproducts. Bob did not tell FFC about the document he had signed restricting the property to residential use. FFC built a fertilizer manufacturing facility on the site at a cost of \$ 1 million which began operations in 1996. The company purchased leftover fish parts from Friendly Fishsticks and processed them into fertilizer. The FFC plant employed 75 people, or 10 percent of the entire Ahab workforce. Unfortunately, the fertilizer production process gave off an awful odor. During the several hours per day when the winds blew towards Ahab the smell was terrible throughout the town. Charles, living right next door to the plant, experienced the odor continuously.

Fred Fisherman, a resident of Ahab, was one of the many residents bothered by the smell. Fred had grown up around fish all his life but the odor from the FFC plant was on a different scale entirely. During the hours when the odor drifted towards the town Fred could not go outside without becoming nauseated. He could only tolerate the situation by remaining indoors and keeping his windows closed, even during the hot summer months. Due to the odor problem the value of his home dropped from \$150,000 to \$125,000. FFC could have significantly reduced the odor by cooling the interior of its factory to 50 degrees. However, this would have cost the facility an additional \$125,000 in equipment and energy costs, expenses that might have made the plant a losing venture. In addition, the cooler temperatures would have made the conditions inside the plant uncomfortable for the workers. FFC did not to take this measure.

In 1998, Dave Developer purchased a large tract of land to the east of Ahab. His plan was to build thousands of homes for commuters who worked in Growth but preferred to live in a rural area near the lake. The initial homes he built were far enough away from the FFC plant that the odor did not have much effect. However, by 2002 Dave's residential development had expanded to within 1 mile of the plant and the odor had become a major problem. Like the residents of Ahab, the people moving into these homes experienced nausea and discomfort during the several hours per day when the wind blew their way. Over 200 new homeowners were affected in this manner. In addition, once word of the problem got out, Dave was unable to sell any of the other homes he had built within a mile of the plant.

In 2003, the following three lawsuits were filed in state court against Fetid Fertilizer Company: (1) Fred Fisherman sued FFC for **private nuisance**. By way of relief, he sought damages and an injunction requiring the facility to stop emitting the nauseating odors; (2) Dave Developer sued FFC for **public nuisance**, and sought an injunction forcing the facility to stop emitting the odors; (3) Charles Chuckles sued FFC for **violating the agreement** that Abby Apple had signed with Bob Builder limiting the property to residential use (Charles did not sue for nuisance). Charles sought both damages and an injunction requiring the facility to move off the property.

Analyze these three lawsuits, discussing each in a separate section of your essay. Evaluate whether the plaintiffs are likely to win their respective suits. In your evaluation be sure to identify the legal issue(s), set out the governing legal rules, and apply these rules to the facts to reach a conclusion. Where a party seeks more than one remedy (e.g. damages and an injunction) be sure to analyze the plaintiff's chances of success in obtaining each remedy. Assume that none of these suits are barred by a statute of limitations, and that all cases we read this semester are binding law in this jurisdiction.