

FINAL EXAM
CAPITAL UNIVERSITY LAW SCHOOL
PROPERTY II-A
SPRING 2005
Professor Hirsch

Professor's Instructions: *Read Carefully*

1. At the beginning of this exam, you should have the following:
 - a. This 12-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 or computer for writing the narrative portion of the exam.
 - d. An answer book.

You may not have a cell phone or personal digital assistant (PDA) with you during the exam. Please bring all bags, books, cell phones and PDA's up to the front of the room, if you have not done so already. If you need access to your cell phone for health or other emergency reasons, discuss this with me prior to the start of the exam.

2. *Please write your exam number on the front of your envelope, the upper right hand corner of your exam packet and on your answer book.*
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 11 multiple choice questions and two essays. I recommend that you spend 60 minutes on the multiple choice questions, 60 minutes on the first essay and 30 minutes on the second 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. **There are page limits on the essays. For Essay 1, you may write no more than four pages (6000 character limit for those of you working on computer). For Essay 2, you may write no more than two pages (3000 word character limit). Note that page limits refer to one-sided pages, not two-sided. I will not read that portion of the answer that exceeds the page limit.** If you are handwriting your exam and cross out

lines then you may add the same number of lines at the end. If possible, you should use the same answer book for both of your essays.

6. 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.
7. *At the conclusion of the exam, please insert your exam packet, answer book, scantron sheet and scrap paper 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. Unless otherwise stated, you should assume that all the cases that we read this semester apply in the jurisdiction where the question is situated.

Question 1: 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 2: Adam and Bruce were good friends and liked to go hunting together. In 1990, Bruce moved to Blackacre, a large property that included 10 acres of woods and fields that were home to many deer and game birds. Adam lived 20 miles away on Whiteacre, a much smaller property. Several times year, Adam would visit Bruce's home so that the two could go hunting together on Blackacre. In 1999, Bruce decided to move to California for work and got ready to sell Blackacre. Bruce knew how much Adam loved to hunt on the property. He therefore conveyed to Adam, in writing, an easement that permitted Adam to use the woods and fields of Blackacre three days per year for hunting purposes. The easement was recorded in November, 1999. In January 2000, Bruce sold Blackacre to Cindy. Cindy did not like the idea of people shooting guns on her property. Later that year, when Adam showed up for a day of hunting, Cindy barred him from the property. If Adam sues Cindy to enforce the easement, the most likely result of the suit is that:

- (A) Adam will win because the burden side of an easement in gross runs with the land.
- (B) Adam will win because the burden side of an appurtenant easement runs with the land.
- (C) Adam will win because the burden and the benefit side of an appurtenant easement run with the land.
- (D) Adam will lose because the burden side of an easement in gross does not run with the land.
- (E) Adam will lose because this is not an appurtenant easement.

Question 3: David Debtor had found his dream home and wanted to purchase it. The price was \$250,000, but Debtor only had \$25,000 in cash. He used the \$25,000 as a downpayment and took out a 15-year mortgage loan from Lenders Bank for the remaining amount. Five years after the purchase, Debtor lost his job and defaulted on his payments to Lenders Bank. At that time, Debtor had paid Lenders \$150,000 in loan payments, of which \$100,000 had gone to interest and \$50,000 had gone to principal. Lenders foreclosed on the property and sold it for the fair market value at the time, which was \$225,000. The amount of the proceeds from the foreclosure sale payable directly to Debtor is:

- (A) \$175,000
- (B) \$100,000
- (C) \$ 50,000
- (D) \$ 25,000
- (E) Zero.

Question 4: The small town of Wildwood is located in the northern mountains of Wyoming.

Until recently, this secluded town has been reachable only by a winding mountain road that is occasionally impassable in the winter. The town has no zoning laws. Recently, and without alerting the townspeople to what it was doing, Aviation Anywhere (AA), a private company, purchased a parcel of land on the edge of town and built a small airport there. Aviation Anywhere flies its planes to the airport during both day and night. The planes bring much-needed supplies for the town and make it easier to evacuate injured or ill people to hospitals, where necessary. They also bring tourists who are interested in hiking in the beautiful mountains that surround Wildwood. This has led to the development of a tourist industry that is adding substantially to the town's economy. The airport has also caused some significant problems for the people of Wildwood. The floodlights that it keeps on during the night, and the noise from the planes flying in overhead, make it very difficult for those who live near the airport to sleep. These neighbors complained to Aviation Anywhere. The company responded that it is using the only possible flight path through the mountains. In addition, the night flights are critical to its economic success and, without them, it would not be able to remain in business. After months of sleepless nights, a group of neighbors have brought a private nuisance suit against Aviation Anywhere seeking both damages and an injunction against flying planes into or out of the airport, or using the flood lights, after 9:00 p.m.. Which of the following will be *least helpful* to the plaintiffs in maintaining their nuisance suit:

- (A) The fact that Aviation Anywhere built its airport in a quiet, secluded area that had no other noisy businesses or activities.
- (B) Aviation Anywhere failed to properly inform the members of the town about its plans prior to beginning construction of the airport.
- (C) Most of the individuals whose homes lie in the flight path are experiencing sleep problems due to the lights and noise of the planes.
- (D) Residents who close their windows at night are still affected by the sound of the planes overhead.

Question 5: Assuming all the facts in Question 4 to be true, and further assuming that the residents win their private nuisance suit against Aviation Anywhere, the court is most likely to issue which of the following remedies:

- (A) An injunction shutting down the airport altogether.
- (B) An injunction requiring Aviation Anywhere to refrain from using its flood lights and flying planes into or out of the airport after 9:00 p.m.
- (C) A damages award compensating plaintiffs for their harms.
- (D) Both injunctive relief and a damages award.

Question 6: 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

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 1948.
- (B) 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.
- (C) 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.
- (D) 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.

Question 7: 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.

Question 8: Allison and Brendan were next door neighbors. Allison wanted to build a fence between the two properties to create more of a sense of privacy. She knew that this would affect her neighbor Brendan and asked him whether a fence would be acceptable. Brendan agreed to the fence on the condition that Allison pay to build and maintain it. The two signed and recorded a valid agreement in which Allison promised on behalf of herself and her heirs and assigns to maintain on her property an “attractive fence in good repair” that would run the length of the border between the two properties. Some years later, Brendan sold his full property interest to Charlie. In the meantime, Allison grew tired of painting and repairing the fence and stopped doing so. The paint began to peel and the fence slowly began to fall apart. Charlie asked Allison to repair the fence, but she did nothing. He accordingly brought a suit against her seeking damages for her failure to maintain an attractive fence in good repair. The most likely outcome of Charlie’s suit against Allison is:

- (A) Charlie will win because he purchased Brendan’s full property interest.
- (B) Charlie will win because, at the time of the agreement, Brendan and Allison shared a mutual interest in preserving the natural feel of their properties.
- (C) Charlie will win because Allison initiated the idea of the fence and it would be unfair for her to let it deteriorate.
- (D) Charlie will lose because, at the time of the agreement, there was no horizontal privity between Brendan and Allison.
- (E) Charlie will lose because maintaining the fence is an easy task that he could handle without difficulty.

Question 9: Same facts as in question 8 up until the point where Brendan sells his property. **Now assume that,** directly after Brendan sells his interest to Charlie, Allison sells hers to David. David fails to maintain the fence and Charlie then sues him for damages. The likely result of Charlie's suit against David is that:

- (A) Charlie will win because he purchased Brendan's full property interest.
- (B) Charlie will win because, at the time of the agreement, Brendan and Allison shared a mutual interest in preserving the natural feel of their properties.
- (C) Charlie will win because both he and David are successors in interest to the original parties who reached the agreement.
- (D) Charlie will lose because, at the time of the agreement, there was no horizontal privity between Brendan and Allison.
- (E) Charlie will lose if David purchased Allison's full property interest.

Question 10: 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 \$20,000 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 "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 \$20,000 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 notice the value of the land and so to decide to purchase it from Olivia.

Question 11: For the purposes of this question, assume that the facts are the same as in Question

10 up until and including the events of **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 had recorded on September 1, 1998). Undeterred, he went ahead with the deal and bought Fred's interest for \$22,000 on **September 20, 1998** and recorded his deed that day. On **October 1, 1998**, Diane, who had become aware of Bob's purchase, brought a quiet title action against Bob asserting her claim to Greenacre. *As in Question 10, assume that the suit is brought in a jurisdiction where the recording statute follows the "notice" rule for determining priority.* 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 Bob had record notice of her claim at the time that he purchased Greenacre from Fred.
- (D) Diane will win because she purchased Greenacre before both Fred and Bob.

ESSAY I
60 minutes
Four-page limit (or, 6000 characters on computer)

This essay asks you to analyze three lawsuits and identify the most likely outcome in each. You have only 60 minutes, and four pages (6000 characters for those of you writing on computer) to accomplish this. Stay within your time limit, and write concisely so that you do not go beyond the allotted amount of space. In drafting your answer, you should seek to use IRAC style. You are not being asked in this essay to provide long policy discussions or extensive legal background. Rather, you should focus on concisely identifying the issue, stating the relevant rule or rules, applying the rule(s) to the facts, and reaching a clear conclusion.

Annie invests in residential real estate. She made a lot of money on her last set of deals and has decided to use her profits to purchase additional properties, including a home for herself. After assessing the local real estate market, Annie engages in the three transactions described below, each of which leads to a lawsuit.

Annie v. Blake

Annie decides to purchase Blackacre, a half-acre parcel with a four-bedroom house. She visits the property and takes a look around. The house appears to be in fine shape. Annie negotiates a price with Blake, the owner of Blackacre and, on April 15, 2005, enters into a contract with him. The contract complies with all legal formalities. Annie pays Blake \$5000 as an earnest money deposit. The closing is set for May 15, 2005.

On May 1, 2005, Annie is having coffee at the local diner and runs into John who operates a construction and home repair business in town. Annie has employed John in the past. She tells him that she is in contract to purchase Blackacre. John tells her that Blake had asked him some months earlier to inspect the foundation of the Blackacre house. John says that he told Blake that the foundation was crumbling and would need major repairs, but Blake never hired him to perform the work. This is news to Annie, since Blake had never mentioned to her any problems with the foundation. Annie enlists an expert to evaluate the foundation who confirms that it is, in fact, crumbling and will require expensive repairs. She calls Blake to tell him that the deal is off and to request return of her earnest money. However, Blake says that he is going to hold her to the contract. On May 8, Annie brings suit against Blake alleging breach of the duty to disclose defects and seeking rescission of the contract and return of her earnest money deposit.

Annie v. Caroline

Annie also decides to purchase Redacre, an undeveloped one-acre lot that is near a golf course and shopping mall. Annie believes “empty-nesters,” those who are nearing retirement and no

longer have children at home, will be attracted to this area. Annie plans to build ten town houses on the property and market them to people who fit this profile. On April 16, 2005, Annie enters into a contract with Caroline, the owner of Redacre, for the purchase of the property. The contract specifies a closing date of May 16, 2005 and states that, on the date of closing, Caroline will provide Annie with “marketable title.” Annie pays Caroline an earnest money deposit of \$3000. The contract complies with all legal formalities.

On May 2, 2005, Annie is reading through the local zoning ordinance and discovers that the district in which Redacre is located requires all residences to be built on lots of ½ acre or larger. This means that Annie will only be able to put two residences on Redacre, not the 10 that she had planned, unless she can get a variance. This makes the deal far less attractive from an investment standpoint. Annie calls Caroline and says that she no longer wants to purchase the property and that she wants her deposit back. Caroline responds that she is going to hold Annie to the contract and will not return the deposit. On May 10, Annie brings suit against Caroline alleging breach of the duty to provide marketable title and seeking rescission of the contract and return of the earnest money deposit.

Annie v. Darius

Annie becomes interested in Whiteacre, an old estate that sits on a hill overlooking a river. Annie plans to build four, smaller homes on the lot, each with views of the river. This will be in accordance with all zoning ordinances. On March 15, 2005, she enters into a contract with Darius, the owner of Whiteacre, for purchase of the land. The deal successfully closes on April 15, 2005 when Darius conveys to Annie, by general warranty deed, title to the property. The deed states that it conveys fee simple title to Whiteacre, with no exceptions.

On May 15, 2005, Central Power Company (CPC) contacts Annie. The company explains that the owner before Darius had conveyed to CPC an oil pipeline easement over that portion of Whiteacre that runs along the river. The company plans to begin building the pipeline the following month. It will be above ground and will run alongside the river, detracting greatly from the scenic view. This is the first time that Annie has heard about the easement. The next day, Annie’s attorney confirms that CPC does, indeed, own the pipeline easement. This will harm Annie’s development plans for the property and substantially diminish the property’s value. On June 15, 2005, CPC begins construction of the pipeline. On July 1, 2005, Annie brings suit against Darius alleging breach of deed warranties and seeking damages for the decreased value of the property due to the pipeline.

Who is likely to win the cases of Annie v. Blake, Annie v. Caroline, and Annie v. Darius, and why is that party likely to win? Assume that the cases we read this semester are binding law in this jurisdiction, unless otherwise stated. If two or more cases conflict, assume that the case representing the majority rule applies.

ESSAY 2
30 minutes

Two-page limit
(or, 3000 characters on computer)

This question focuses on the standard of review that the courts should use in evaluating whether governmental use of the eminent domain power is consistent with the public use clause.

The case of *Hawaii v. Midkiff*, which we read this semester, dealt with the use of the eminent domain power to break up concentrated land ownership in Hawaii. In that case, the Supreme Court held that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose” it is consistent with the public use clause. The case thus creates a rational basis, deferential standard of review for courts to use in determining whether governmental exercise of the eminent domain power is consistent with the public use clause.

Recently, this deferential standard of review has been criticized, especially as applied to cases where the government uses the eminent domain power to take property from one private owner and give it to another private owner. The case of *Kelo v. City of New London*, which was the subject of class readings and an in-class exercise, gives the Court a chance to reconsider the appropriate standard of review for cases of this nature. When it decides the *Kelo* case, should the Court apply the rational basis, deferential standard of review that it employed in *Midkiff*? Or, should it adopt a more stringent standard of review (e.g. “heightened” or even “strict” scrutiny)? Identify the standard of review that the court should employ, and explain the reasons for your recommendation.