

FINAL EXAM
CAPITAL UNIVERSITY LAW SCHOOL
PROPERTY I I-B
SPRING 2007
Professor Hirsch

Professor's Instructions: *Read Carefully*

1. At the beginning of this exam, you should have the following:
 - a. This 14-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.
 - d. A two-page, lined bar essay sheet for writing the bar-style essay.
 - e. A colored answer book or computer for writing the longer essay.
 - f. A piece of scrap paper.

2. *Write your exam number on the front of your envelope, the upper right hand corner of your exam packet, on your bar essay sheet, and on your answer book.*

3. *Fill in the identifying information on your scantron form sheet, as indicated in the instruction sheet.*

4. This is a three hour (3:00) examination consisting of a multiple choice section, a bar-style essay question, and a longer essay question. I recommend that you spend sixty (60) minutes on the multiple choice questions, forty-five (45) minutes on the bar-style essay (Essay I), and seventy-five (75) minutes on the longer essay (Essay II). 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 not grade your response correctly. **Answers written on the exam packet itself will not be considered.**

6. The bar-style essay (Essay I) is to be answered **only on the two-page, lined, bar essay sheet** (this goes even for those taking the exam on computer). Write your answers in the space provided. **Any answer not written on the bar essay sheet will receive zero (0) points.**
7. Write the answers to the longer essay (Essay II) in the colored answer book (or, for laptop takers, on a computer). **You are limited to eight pages for this essay, with each page being a single side of a bluebook page with customary margins. For laptop takers, this translates to 12,000 characters. I will not read any material that exceeds the page limit.**
8. *At the conclusion of the exam, please insert your exam packet, scantron sheet, bar essay sheet, bluebook, scrap paper and pencil 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!

HAVE A GREAT SUMMER

MULTIPLE CHOICE

(60 minutes)

1. Sam Salesman decides to open a shopping center. On January 1, 2007, he enters into contract with Fred Farmer to purchase Blackacre, a 3-acre field that Fred has been farming for many years. Sam plans to build his shopping center on Blackacre. Given his intended use, Sam has to pay Fred more than the going rate for farmland. The contract states that Sam takes Blackacre “as is.” Closing is set for March 1, 2007. A few days before closing, Sam learns that, back in October 2006, the local zoning commission had passed an ordinance limiting the area in which Blackacre is located to agricultural uses only. Sam knows that, if he builds the shopping center on Blackacre as planned, it will violate this zoning ordinance. Sam asks Fred to be let out of the contract, but Fred refuses. Sam brings suit against Fred seeking rescission of the contract. The most likely result of this lawsuit will be that:
 - a. Sam will win because violations of zoning restrictions render title unmarketable.
 - b. Sam will win because Fred charged him more than the going rate for farmland.
 - c. Fred will win because Sam agreed to take Blackacre “as is,” and this includes any zoning restrictions.
 - d. Fred will win because zoning restrictions do not render title unmarketable.
 - e. Fred will win because a reasonably prudent purchaser would have known about the zoning restrictions prior to entering the contract.

2. 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. Many 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.
3. Assuming all the facts in Question 2 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.
4. Mary Mover was looking to move to a new home. She wanted to buy a property that would appreciate in value over time. She studied development patterns in the city and became convinced that the west side of town would soon experience substantial growth and a corresponding increase in property values. Carl Conveyor was looking to sell his west side home. He knew that the home was in good shape except for the fact that the basement flooded during heavy rains. This periodic flooding had caused the plaster in the basement to crumble and left ugly water marks on the basement walls. Mary saw Carl's "for sale" sign and visited his home. She did not ask to see the basement, and he did not tell her about the flooding problem. Mary liked the home and thought it looked attractive and soundly constructed. She accordingly entered into a written contract with Carl to purchase his home for \$200,000. Several weeks after signing the contract, but before closing, there was a major storm. Mary visited the home the next day and discovered a foot of water in the basement. She promptly asked Carl to be let out of the contract, but he refused. Mary has brought suit seeking rescission of the contract. The most likely result of her lawsuit will be that:

- a. Carl will win because Mary could have seen the flood damage had she bothered to inspect the basement during her initial visit.
 - b. Carl will win because he had no duty to disclose the flooding to Mary, just as she had no duty to tell him of the likelihood that property values would likely increase on the west side.
 - c. Mary will win because Carl knew of the flooding and did not disclose this material defect to her.
 - d. Mary will win because she could not have known of the defect prior to the rain storm.
 - e. Mary will win because Carl did not offer to show her the basement.
5. 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.
6. Abby and Bobby own adjoining parcels of land. They have been neighbors for some

years and, while friendly, have often felt competitive with one another. Their lots are relatively small, and their houses are located quite close to one another. Several years ago, Abby decided to add a story to her two-story home. She spared no expense with this addition, even installing slate floors and a hot tub in the new, extra-large third floor bathroom. The addition made Abby's house tower over Bobby's, a fact that she enjoyed each time she walked down the block. Not to be outdone, Bobby decided to level his house and build a new home even taller and more lavish than Abby's. However, when the builders excavated a hole for Bobby's new foundation, the weight of Abby's house (with its new third floor, slate flooring and hot tub) caused the soil around Abby's house to subside and spill into the excavation hole. This caused Abby's home to tilt and several of her walls to crack. Abby has sued Bobby for violation of his duty to provide support to her parcel. The most likely result of this suit is:

- a. Abby will win because Bobby has an absolute duty to provide subjacent support to her parcel.
- b. Abby will win because Bobby has an absolute duty to provide lateral support to her parcel.
- c. Bobby will win so long as his builders took reasonable care in conducting the excavation.
- d. Bobby will win so long as his builders took reasonable care in conducting the excavation, and so long as the subsidence would not have occurred but for the weight of Abby's house.

7. Ozzie Owner held fee simple title to Greenacre, a parcel of pristine pine forest. In 1980, Ozzie sold Greenacre in fee simple to Charles Conservationist by a valid special warranty deed that was promptly recorded. Charles wanted to preserve Greenacre with its beautiful pine groves for future generations. He did nothing to develop the property and seldom visited it. Barbara Builder had long had her eye on Greenacre and was not aware of Charles's purchase. In 1990, she approached Ozzie about buying Greenacre and he sold it to her in fee simple by general warranty deed. In 1991, Barbara constructed a cabin on Greenacre. In 2005, Charles paid a rare visit to Greenacre and discovered Barbara's cabin. He successfully asserted his superior title and demanded that Barbara vacate the property. Barbara removed the cabin and vacated the land. Barbara has sued Ozzie for violation of the covenants in the general warranty deed by which he conveyed Greenacre to her. The statute of limitations for actions on a deed covenant is 11 years. The most likely result of this suit is that:
- a. Barbara will lose because Ozzie conveyed Greenacre to Charles by special warranty deed, not general warranty deed.
 - b. Barbara will lose because Ozzie conveyed Greenacre to her more than 11 years ago.
 - c. Barbara will win if she sues under the covenant of quiet enjoyment.
 - d. Barbara will win if she sues under the covenant of seizin.
 - e. Barbara will win if she sues under the covenant of quiet enjoyment or the covenant of warranty.
8. Allison and Brendan were next door neighbors. Allison wanted to build a fence between their 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 Allison initiated the idea of the fence and it would be unfair for her to let it deteriorate.
 - c. Charlie will lose because, at the time of the agreement, there was no horizontal privity between Brendan and Allison.
 - d. Charlie will lose because maintaining the fence is an easy task that he could handle without difficulty.
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 both he and David are successors in interest to the original parties who reached the agreement.
 - c. Charlie will lose because, at the time of the agreement, Brendan and Allison were neighbors and did not stand in a grantor-grantee relationship to one another.
 - d. Charlie will lose if David purchased Allison's full property interest.
10. Bob and Bernice Borrower had just gotten married and were ready purchase their first home. After months of looking for the right house, they found the one they were looking for. The price was \$175,000, but the Borrowers had only \$35,000 in cash. They used the \$35,000 as a downpayment and took out a 30-year mortgage loan from First National Bank for the remaining amount. The Borrowers made their payments to the bank faithfully for 10 years. Then Bob became ill, incurred large medical expenses and had to quit his job. The Borrowers defaulted on their loan. By that point, the Borrowers had paid First National \$125,000 in loan payments, of which \$50,000 had gone to principal and \$75,000 to interest. First National foreclosed on the property and sold it for the fair market value at the time, which was \$230,000. The amount of the proceeds from the foreclosure sale payable directly to the Borrowers is:
- a. \$175,000
 - b. \$140,000
 - c. \$ 75,000
 - d. \$ 50,000

e. Zero.

1. Bennie Buyer was moving to town to start a new job and needed to purchase a home. He identified the neighborhoods in which he wanted to live and began to visit all the homes that were for sale. On his first day of looking, he fell in love with the house that Velma Vendor had put on the market. However, he wanted to look further before making a definite commitment. Bennie and Velma signed a written agreement in which Bennie paid \$3000 for a 2-month “option” to purchase Velma’s home for her asking price of \$200,000 (meaning that Velma would sell to Bennie for this price, and would not sell to anyone else during the option period). Bennie was excited about the prospect of this purchase until he visited the home that Sarah Seller had put on the market for \$275,000. This was truly his dream house. Bennie told Sarah that he had purchased a 2-month option to buy another home, but that he would let the option run out and purchase Sarah’s home instead if she would sell it to him for \$250,000. Sarah accepted this price and entered into a verbal agreement with Bennie to sell him her home for \$250,000. When Bennie asked that the agreement be put into writing, Sarah assured him that she would live by her promise to sell him the house. She added that she preferred to operate on the principles of trust, not formal legal agreements, so as to avoid having to pay lawyers’ fees. The two did not sign a written document. In reliance on the verbal agreement with Sarah, but prior to the closing, Bennie allowed the option to run out on his purchase of Velma’s house. Velma promptly sold her home to someone else. Soon after, Sarah entered into a written contract to sell her home to Peter Purchaser for \$300,000. Upon learning of this, Bennie looked again for suitable housing but could find nothing that pleased him. Bennie’s new job was starting soon and he needed a place to live. Bennie therefore brought suit against Sarah seeking specific performance of their verbal agreement and requesting a judicial order that Sarah sell the property to him for their agreed upon price of \$250,000. The most likely result of Bennie’s lawsuit will be:
 - a. Bennie will lose on his claim for specific performance but may be able to force Sarah to pay him back the \$3000 that he spent on the purchase option.
 - b. Bennie will lose on his claim for specific performance because his agreement with Sarah violates the Statute of Frauds.
 - c. Bennie will win on his claim for specific performance because he relied on Sarah’s verbal promise in giving up his option to purchase Velma’s home.
 - d. Bennie will win on his claim for specific performance because an agreement to sell real property does not need to be in writing.

ESSAY I
(Bar-Style Essay)
45 Minutes

In 1995, Orlando Owner lived in a small house on Blueacre, a five-acre parcel of land that Orlando owned in fee simple absolute and that was adjacent to the main road for the area. Orlando's neighbor to the east, Adriana Applewhite, did not have direct access to main road and had to drive a considerable distance on small, dirt roads in order to reach it. In 1996, Adriana asked Orlando whether she could drive across his property to get to the road. Orlando liked Adriana and knew that her birthday was coming up. For a birthday gift he presented her with a written easement to cross his property in order to reach the road. The easement complied with all legal formalities. Adriana promptly recorded it. In the years that followed, she drove across Orlando's property so regularly that she wore out a visible path between her property and the main road.

In 1997, Best Oil Co. ("Best") approached Orlando about purchasing the mineral rights to the westernmost acre of his parcel. Best believed that oil existed beneath this land. Later that year, Orlando sold Best the mineral rights to the acre of land for fair market value. Best did not record the deed. In 1998, Best constructed a small oil well on the property and began pumping oil. The oil well extended above ground and was visible from the road.

In 1999, Orlando needed some money to send Karen, his only child, to law school. He took out a \$50,000 mortgage loan from Capital Mortgage Co., using Blueacre as the mortgaged property. Capital did not record the mortgage.

In 2002, when Karen graduated, she decided to move to Florida. She suggested that Orlando, who was growing older, sell Blueacre and move there as well. Later that year, Orlando sold his fee simple interest in Blueacre to Paula Purchaser. Orlando was in a rush to sell so that he could invest in a Florida property. Paula was therefore able to negotiate a good price and bought Blueacre for 10% less than fair market value. Paula did not record her deed right away.

In 2003, Best gained actual knowledge of Paula's purchase. Best went directly to the county courthouse and recorded its mineral rights deed. A month later, Paula recorded her fee simple deed from Orlando. A month after that, Capital Mortgage Co. recorded its mortgage from Orlando.

In 2004, Paula sold Blueacre in fee simple to Peter Procurer for fair market value. Peter promptly recorded the deed and moved into the house on Blueacre. Peter did not like having Adriana drive across the property that he had purchased in fee simple. He accordingly put a chain across the path and sent a letter to Adriana demanding that she stop driving on his property. Adriana wrote back stating that, under the easement, she had a right to drive on the property to get to the main road. Peter also did not like having the oil well on his property. He sent a letter to Best demanding that it stop operating the oil well and remove it from the property.

Best responded that it owned the mineral rights to the 1-acre portion and would continue to make use of these rights.

In 2005, Orlando defaulted on his loan from Capital Mortgage. Capital brought an action to foreclose on the Blueacre property and have it sold to pay off the debt. Peter, who was now the owner of Blackacre, objected to the foreclosure on the ground that his ownership of the property took priority over Capital's interest.

In 2006, Peter filed actions in the local court against Adriana, Best and Capital. Each action sought a declaratory judgment that Peter owned Blueacre in fee simple absolute and that the defendant had no legally cognizable interest in the property. *Who will win Peter's action against Adriana? Against Best? Against Capital? Explain your answer using good IRAC format. Assume that the jurisdiction in which Blueacre exists follows the **notice rule of recording priorities.***

ESSAY II

75 Minutes

The Township of New Madison, OH, population 3500, is located 40 miles west of Columbus, OH. Until recently, New Madison has always been an agricultural area consisting largely of small, family farms growing corn, soybeans and other crops. The Village of New Madison, located in the center of the Township, contains retail and commercial businesses located in historic, brick buildings, as well as Victorian era homes.

In 1995, Porky Pig Inc. (“Porky”) purchased a large parcel of land in the southeastern corner of the Township and built a large-scale pig farm on the property housing 5000 animals. The facility generated a huge amount of pig waste which, in turn, produced terrible odors that spread to surrounding properties. The pig farm was far enough away from the Village that the odors only reached it on rare occasions. However, the crop farmers living nearby experienced the full brunt of the odors for several hours each day. At these moments, the smells were so bad that the neighboring farmers had to wear masks or go indoors. Porky has instituted best management practices recommended by its industry for controlling odors, but this has not meaningfully reduced the stink.

The Township has also been undergoing another change in the past decade. As the population of nearby Columbus has grown, so has the demand for both high-end and affordable housing within commuting distance of the city. No new residential developments have as yet been built in New Madison Township. However, beginning in 2000 the local paper began to report on land speculators buying up properties in the area with the idea of later building residential housing on them. Most of this land acquisition has taken place in the southeastern portion of the Township, the area closest to Columbus (and also the part of the Township where Porky’s pig farm is located).

In 2004, Home Sweet Home, Inc. (HSH), a large Columbus-based developer, purchased 200 acres next to Porky Pig, Inc.’s livestock operation. This land was the cheapest in the entire Township due to the odors from the pig farm. HSH filed a plan with the Town indicating its intention to build 400 homes on its land, each on its own ½-acre lot. This new development would add substantially to the tax base of the town but, due to the low density of the development and high projected value of the homes, would not unduly burden the schools or local social services. HSH has not yet began construction of its housing project. Recently, HSH offered to buy Porky out and build on its land as well, but the price it offered was too low to interest Porky.

The market for pork has been very strong and Porky’s pig farm has been very profitable. In 2005, Porky invested some of these profits to enhance its operation. It spent \$300,000 on new equipment for its current facility, including a state-of-the-art conveyer belt system for feeding the animals. In addition, it spent \$300,000 to purchase another, nearby parcel of land and to lay the foundation for a second building capable of housing 2500 more animals. Construction of the

new facility has not progressed beyond this point, as of yet. Porky knew that, if the market for pork stayed strong, these investments would pay for themselves within five years.

On January 1, 2006, the elected members of the New Madison Town Council, some of whom have investments in Home Sweet Home, approved a zoning ordinance to govern the Township. The zoning ordinance divides the Township into four quadrants and permits a different mix of uses in each quadrant, as follows:

- Southeastern (the portion closest to Columbus, and the quadrant in which Porky's existing and future facilities are located): Permissible uses include crop farming (e.g. corn, soybean), detached, single-family residential housing of ½-acre or more, retail stores, and pre-existing residential (i.e. already in existence at the time of the zoning ordinance).
- Northeastern. Permissible uses include crop farming and pre-existing residential only
- Northwestern (the portion farthest from Columbus) – Permissible uses include crop farming, livestock farming, industrial and pre-existing residential.
- Southwestern. Permissible uses include crop farming and pre-existing residential only.

The ordinance provides a two-year amortization provision for all nonconforming uses, but does not provide the owners of these nonconforming uses with compensation. The Town Council approved a “statement of purpose” when it passed the ordinance which took note of the increasing pressure to build residential housing in the Township, particularly in the Southeastern quadrant, the portion nearest to Columbus. It stated that the zoning ordinance was intended to allow for this growth in a way that provided for healthful residential living conditions, preserved the Township's agricultural heritage, promoted economic development and improved its tax base while limiting pressure on schools and social services.

On June 1, 2006, the Town Zoning Officer served notice on Porky that it was in violation of the new zoning ordinance. He ordered the facility to cease operations by June 1, 2008. It further indicated that Porky could move to the far northwestern portion where the ordinance permits livestock farming.

Porky promptly filed a petition with the Board of Zoning Appeals, seeking a variance from the zoning ordinance. Porky argued that it could not remain in business if it were forced to bear the high cost of moving. Moreover, it maintained that pig farming was the highest value use for its parcels, and that the land would lose 75% of its value if this use were prohibited. On January 1, 2007, the Board of Zoning Appeals denied Porky's request for variance. The Board stated that to allow the variance would be inconsistent with the stated purpose behind the zoning ordinance since the odors emanating from the pig farm would make for unhealthy residential living in the Southeastern quadrant.

Several days later, the Chair of Town Council stated in an interview with the local newspaper that if Porky continued to fight the zoning ordinance, town officials would use their power of eminent domain to take Porky's property and sell it to Home Sweet Home for use in residential development.

Porky Pig, Inc., has come to you for legal advice. Porky wants to know how it can best protect its interests in light of the new zoning ordinance and potential eminent domain action. Write Porky an objective memorandum in which you analyze all legal actions or arguments that Porky can make with respect to: (1) the zoning ordinance; (2) the decision of the Board of Zoning Appeals; and (3) the possible exercise of eminent domain. Be sure to analyze Porky's chances of success in asserting each of these actions or arguments and, where they are relevant, to apply the cases we read this semester. For the purposes of this question, assume that the cases we read this semester are binding law in this jurisdiction.