

KERN COUNTY COLLEGE OF LAW

REAL PROPERTY

Final Examination

Spring 2020

Prof. L. Holder

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination. Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Question 1

Jed has recently constructed and opened a group “halfway house” for newly released adult prisoners. The home is located in a residential area in City and is the only such home in City. In response to Jed’s neighbors’ objections, City passes a zoning ordinance prohibiting the operation of any group home for recently released prisoners in any residential area of City, on the grounds that such houses tend to introduce crime into a neighborhood. City makes the ordinance effective immediately, even as to existing group homes. Jed seeks to enjoin the application of the ordinance against her, claiming it would be an unconstitutional taking of her property without due process.

- (a) You are City’s attorney. How would you advise City regarding the zoning change?

In settlement of Jed's challenge seeking to enjoin the application of the ordinance, City rezones Jed's lot to multifamily use so that Jed can continue to operate the halfway house. Jed's lot is the only parcel in the area rezoned to multifamily use. Other residents near the parcel sue the zoning board and Jed, arguing that the rezoning is invalid because it constitutes spot zoning.

(b) How would you advise City regarding the other residents' suit?

In resolution of the other residents' lawsuit arising from City's rezoning of Jed's lot to multifamily use, City requires Jed to apply for a variance or a conditional use permit.

(c) How would you advise City regarding granting Jed a variance or a conditional use permit?

Finally, trying to put the matter to bed for once and for all, City passed a zoning ordinance prohibiting more than three unrelated people from living together in a single-family dwelling.

(d) Jed challenges the zoning ordinance as unconstitutional. Is it?

KCCL
Real Property Final Exam
Spring 2020
Prof. L. Holder

Question 2

Josh buys a one-acre parcel of vacant oceanfront land in City, intending to build a house on the land. At the time of Josh's purchase, given local zoning restrictions, the land has no other practical value except as the site for a house. At the time Josh makes his purchase, there is no restriction on building close to the ocean in City, except for a long-existing zoning regulation that requires a small 20-foot buffer between any structure and the high-tide boundary of the ocean. Two years after Josh's purchase, City, worried about coastal flooding and erosion, passes a regulation whose effect is to permanently prohibit Josh from building any structure on his land. Josh sues City, arguing that because City's regulation has deprived him of all economically viable use of his land, City has in effect condemned his land and must pay the land's fair market value.

Will Josh's suit succeed?

KCCL
Real Property Final Exam
Spring 2020
Prof. L. Holder

Question 3

Toby and Zoey, neighbors, enter into a written agreement whereby they and their successors agree to pay \$25/month into a bank account for the maintenance of a wall between their two properties. The wall is locally partially on each tract. Toby conveys his property to CJ, and Zoey conveys hers to Abby. The deeds to CJ and Abby each contain the wall maintenance commitment. Abby defaults on payment into the bank account. CJ would like to make sure that Abby pays.

On what theories should CJ bring suit, and on which theory(ies) will she prevail?

Spring 2020 – Real Property Final Exam

Question 1 – Answer Outline

- (a) Zoning ordinance prohibiting the operation of any group home for recently released prisoners in any residential area of City, effective immediately, even as to existing group homes.

Jed's use of the property has become a *non-conforming use* under the new ordinance. As such, it cannot be eliminated immediately, because that would constitute an unconstitutional taking without due process. Instead, the due process clause probably requires that Jed be allowed a substantial period of time (typically multiple years) in which to close the home, so that she can recoup her investment in the property. Such treatment is viewed as a compromise between the rights of the property owner and the needs of the community. Once that period of investment-recoupment is over, it's unlikely that Jed has a due process or other constitutional claim to continue her use—City must merely be "rational" in its zoning decisions, and requiring halfway houses to be located in non-residential areas is probably rational.

RELATED ISSUE: Say the home burns down. Jed could not reconstruct it as a non-conforming use; once the non-conforming use is destroyed, any new structure built must conform to the zoning regulations.

RELATED ISSUE: Say Jed wanted to *expand* the home to double its present size. She couldn't do so. A non-conforming use can continue only until the owner has recouped her investment in the property; she cannot expand or enhance the non-conforming use.

- (b) Only parcel in the area rezoned to multifamily use; spot zoning.

Although *spot zoning* is generally illegal (and this is clearly spot zoning, because it applies to a single parcel), such rezoning is valid where the general welfare of the community justifies it, and the rezoning is part of a comprehensive plan to alleviate a problem.

- (c) Granting variance or a conditional use permit.

First, the variance must be necessary to avoid imposing undue hardship on the owner of the land in question. (Undue hardship "involves the underlying notion that no effective use can be made of the property in the event the variance is denied.") To show hardship, the owner must first have made reasonable efforts to comply with the zoning ordinance — say by trying, in the case of an undersized lot, to sell it to, or buy additional land from, a neighbor, in either case at a fair price. And the owner's hardship must not have been self-inflicted, such as by earlier disposing of part of his land with the result that what was left fell short of area requirements. Second, "the grant of the variance must not substantially impinge upon the public good and the intent and purpose of the zoning plan and ordinance." This requires paying attention to "the manner in and extent to which the variance will impact upon the character of the area."

In granting a variance, zoning boards may impose reasonable conditions related to the use of the property that minimize the adverse impact of the use on neighbors. Such conditions may relate, for example, to fences, landscaping, outdoor lighting and noises, and enclosure of buildings. On the other hand, zoning boards may not condition a variance upon use of the property by the original applicants only, as this has no relation to ameliorating the effects of the proposed land use and is unrelated to the legitimate purposes of zoning. A variance thus must "run with the land."

(d) Three unrelated people living together in a single-family dwelling

Zoning ordinances *can* prohibit more than a very small number of *unrelated* people from forming households together to further goals like preventing overcrowding (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)), whereas a zoning ordinance *cannot* prohibit family members (related by blood or marriage) from doing so.

Spring 2020 – Real Property Final Exam

Question 2 – Answer Outline

The facts are comparable to those in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, the Supreme Court announced a categorical rule that compensation is due whenever a “regulation denies [the owner] *all economically beneficial or productive use* of [his] land[.]” And that’s true even though the government is acting in support of a strong interest in mitigating public harm (as long as the harm is not something that the state’s “background principles of . . . property and nuisance [law]” would have allowed the state to prohibit).

Because the facts here stipulate that Josh would have been permitted to build the house before the present regulation, we know that the house could not have constituted a prohibitible “nuisance” under standard state law principles. We also know from the facts that there is no other economically-sensible use to which Josh can put his property. Therefore, the *Lucas* principle applies, and City must pay the fair market value of the property (judged as of the time just before it passed its regulation), just as if it had expressly condemned the land.

The *Lucas* principle applies only where the government has deprived the landowner of *all* economically-viable use of his property. A regulation that merely takes away a lot, or even most, of a parcel’s economic value does not qualify (though it may count as a taking under *non-Lucas* principles, depending on the strength of the interest that the government is pursuing). So, for instance, if the maximum size of the house that Josh was able to build was reduced from 3,000 feet at the time of purchase to, say, 1,200 feet, it’s pretty clear that *Lucas*’ “all economically beneficial use” rule would not have been violated. In that situation, in all probability neither *Lucas* nor any other principle would require City to pay damages to Josh for having carried out a “taking” of his property.

Spring 2020 – Real Property Final Exam

Question 3 – Answer Outline

CJ should sue on the theories that the agreement is enforceable as a real covenant and as an *equitable servitude*.

Real covenant. Under the traditional rules governing *real covenants*, CJ would *not* be able to recover damages. That’s because Toby and Zoey had no pre-existing property relationship when they did the maintenance agreement (they were “strangers to each other’s title”), and this fact prevented them from having the horizontal privity traditionally required for the running of a real covenant. So in a state that maintains traditional rules on real covenants, CJ will have to recover on an equitable servitude theory (i.e., get an order of specific performance) or not recover at all (since he can’t get damages, which require a real covenant).

Equitable servitude. The agreement meets all requirements for an equitable servitude: it touches and concerns *both* pieces of land (since the money is used to maintain the wall, which is part of both premises and benefits both), there was intent on the part of the original parties (Toby and Zoey) that the benefits and burdens would run to their successors; and Abby took with knowledge of the servitude (because his deed from Zoey contained the servitude, putting him on constructive notice of it). Therefore, CJ will be entitled to an order of specific performance, requiring Abby to make the past-due and future payments.

1)

QUESTION NO. 1

(a) *How would you advise the City regarding the zoning changes?*

Zoning

Zoning ordinances are created by states that may enact statutes to reasonably exercise police power of the use of land for the protection of the health, safety, morals, and welfare of its citizens.

The zoning power is based on the state's police power that is limited (1) to the Due Process Clause of the 14th Amendment, (ii) the Equal Protection Clause of the 14th Amendment, and (iii) the "no taking without just compensation" clause of the 5th Amendment. A zoning ordinance is unconstitutional only if its provisions are clearly arbitrary and unreasonable, with no substantial relation to the public health, safety, morals, or general welfare. The burden to prove that the ordinance is invalid is upon the party challenging the law. As a legislative act, a zoning or rezoning classification must be upheld unless: (i) opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals or general welfare, or (ii) that the classification amounts to a taking without compensation.

It is within the City's discretion to pass any zoning ordinance that it believes will protect the majority of its citizens with relation to public health, safety, morals, and general welfare. Here, the burden would fall onto Jed to prove (1) that the classification is unsupported by any rational basis related to promoting the public health, safety, morals or general welfare, and (2) that the classification amounts to a taking without compensation. The City argues that halfway house tends to introduce crime into a neighborhood. So here, the City's classification is supported on the rational basis to promote the public safety. However, given the time frame that the City has instituted on Jed to move his residents to a halfway house out of any residential area of the City, Jed could have an argument that this time frame amounts to a regulatory taking without compensation. Additionally, Jed could argue that this violates his Doctrine of Vested Rights (explained below), and that she has been denied due process (explained below).

Doctrine of Vested Rights

The doctrine of vested rights protects property owners and developers from changes in zoning after they have made substantial expenditures in reliance on a building permit.

The fact pattern is silent as to whether Jed had already obtained a permit originally for his halfway house, but the facts state that her halfway house was recently constructed. So assuming that she acquired a permit prior to constructing her halfway house, it can also be assumed that she has spent a considerable sum in constructing this halfway house. Once a government has granted permission through a building permit, the party has the right to rely on that permission. However, this would not apply if no permit has been granted to the construction and running of Jed's halfway house.

Due Process

The 14th Amendment to the U.S. Constitution, which is applicable to the states, prohibits the deprivation of life, liberty, or property without due process of law.

State and local governments are entitled, under their police powers, to enact and establish zoning laws for the welfare of their citizens. The Supreme Court has stated that a plaintiff does not have a property interest unless he can show that he has a legitimate claim of entitlement. Where there is a deprivation of life, liberty, or property interests, an individual is entitled to fundamentally fair procedural safeguards. The guarantee of due process ensures that laws will be fair and reasonable.

Jed will probably be able to show that denying her to continue running the halfway house would be a deprivation of her property interests. Without having any notice as to the rezoning and the immediate move out order, or from not having the opportunity to be heard, Jed may be able to provide an argument that her due process rights have been violated. Additionally, Jed may be able to argue that, according to the fact pattern, that the rezoning ordinance was granted based on simply one complaint.

Taking

The 5th Amendment to the U.S. Constitution, applicable to the states through the 14th Amendment, prohibits the governmental taking of private property without just compensation.

A land-use regulation is a taking if it denies an owner all reasonable, economically beneficial uses of his land. Here, since Jed is being ordered to cease his halfway house operations immediately and to move to outside of any neighborhood in the City, Jed could argue that he is being denied any reasonable, economically beneficial use of his land. To determine if a regulation has gone too far, the court generally engages in a balancing test: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental action (i.e., nonconforming use). Here, the economic impact of being forced to cease operations and move immediately will have a great economic impact on Jed. The facts are silent as to whether Jed had any investors, so it is unknown whether there would be any investment-backed expectations. A pre-existing non-conforming use occurs when a legal use of property is made illegal by a new zoning ordinance. Unless there is a gradual phasing out (amortization) or a variance granted, it may constitute a Fifth Amendment taking and require adequate compensation.

Amortization

Amortization is a periodic plan to allow a person a time frame and ultimate deadline for them to relocate their existing business.

Factors usually listed as relevant to an assessment of the reasonableness of a particular amortization period are the nature of the use in question, the amount invested in it, the number of improvements, the public detriment caused by the use, the character of the surrounding neighborhood, and the amount of time needed to "amortize" the investment. As Jed has just invested in her newly constructed halfway house, and undoubtedly has invested a considerable sum, she may need time to search for a new location that is outside of the neighborhood, and the time to raise the money to make the move. She will be unable to sell her current location until she has a dedicated new place to move her residents. A plan that would not end up being quite so economically detrimental is if the City had agreed to an amortization plan to give Jed a time frame in which she must be out instead of ordering an immediate move.

As counsel for the City, I would confirm that the City does have the discretion to rezone if they believe it will enable its citizens to feel safer in their homes. However, based on the lack of the city to provide an amortization plan, and to order that Jed immediately move out of the neighborhood into a

location far from any neighborhood in the City, Jed may have an argument that she is being denied due process as the decision to rezone was made after only one complaint, that she was not given the opportunity to argue on her own behalf, that the order to immediately move out would cause her economic duress, she may be able to argue that forcing her to immediately move is a regulatory taking under the Fifth Amendment, and she would be due just compensation. Based on this, I would advise the City to take the need to immediately move off of the table and to work with Jed to develop an amortization plan for her move. Alternatively, the City could offer her "fair" compensation for her property as it would no doubt constitute a regulatory taking.

(b) *How would you advise the City regarding the other residents' suit?*

Spot Zoning

Spot zoning is zoning changes typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district, and which dramatically reduce the value for uses specified in the zoning ordinance of either the rezoned plot or abutting property. (*State v. City of Rochester*)

Spot zoning is invalid where some or all of the following factors are present: (1) a small parcel of land is singled out for special and privileged treatment; (2) the singling out is not in the public interest but only for the benefit of the landowner; and (3) the action is not in accord with a comprehensive plan. If spot zoning is invalid, usually all three elements are present. Here, Jed's property is individually rezoned as a multifamily use so that she can continue to operate her halfway house. The facts indicate that Jed's lot is the only parcel in the area rezoned to multifamily use, so the first factor has been met. There are no arguable benefits to Jed's property being rezoned as a multifamily use as it provides no public interest. It only provides a benefit to Jed. Based on this, the second factor has been met. The facts are silent as to whether the City had a comprehensive plan, which would normally be present by a statement by the City, meeting minutes of the City, or something to that effect. As this is a unique rezoning of one piece of property amidst single family units, it appears that this rezoning of Jed's property was made without a comprehensive plan. This complies as the third factor.

The facts state that this is the only halfway house in the city. Had there been other halfway houses also within the city, and the city also made those lots for multifamily use, then the city would have an argument as to a comprehensive plan. In *State v. City of Rochester*, owners of single-family dwellings opposed the city's passing of an ordinance in which they rezoned a property that was

within a single family neighborhood into a multiple-family dwelling to accommodate the building of a "luxury condominium." The court stated that, "as a legislative act, a zoning or rezoning classification must be upheld unless opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare...." The plaintiffs will argue that there is no public interest or benefit to the people at large to singling out this property to be zoned differently. In fact, not only is it arguable that crime may increase by the presence of the halfway house, but also that property values will decrease. The scale is unbalanced, and it appears that the City has indeed initiated spot zoning when rezoning Jed's property into a multifamily use.

As counsel for the City, I would actually argue that the residents' suit shows merit. Based on the three factors defining a property as having been a product of spot-zoning, Jed's now multifamily property fits the elements. Based on this, it is likely that the other residents would be able to argue that there has been spot-zoning, which is invalid, upon Jed's home. As a possible remedy, if the City really is trying to keep Jed's property in its locality, the City might consider making settlement offers with those residents who live around Jed's property. That way, those who are most affected may be placated, and then prevented from bringing suit again. If a majority of the homeowners (those that live around Jed's property), were to drop their suit, then the remaining parties would have much less to argue on their own behalf as it would seem less likely that they would still argue a suit when they do not even live near the halfway house, especially since those who do live near it have settled out.

(c) *How would you advise the City regarding granting Jed a variance or a conditional use permit?*

Variance

A variance is an exemption granted to an individual property owner pertaining to a specific parcel of property.

The facts state that the City is requiring Jed to apply for a variance or a conditional use permit. An owner may be exempt from a zoning ordinance if variance can be granted. Variance may be granted by administrative action if the property owner shows (i) that the ordinance imposes a unique hardship on him, and (ii) that the variance will not be contrary to the public welfare. Undue hardship means in essence that without a variance, the property in question could not be effectively used. The hardship must not be self-imposed. To show hardship, the owner must first have made reasonable efforts to comply with zoning ordinances. The court considers: (i) efforts by the property owner to alleviate the hardship; (ii) if variance granted would not be detrimental to the zone plan for the area, and (iii) applicant shows the variance would not have an undue adverse impact.

Jed should be able to show that the ordinance would impose a unique hardship. Running a halfway house is a unique business/calling. The hardship would manifest in a number of ways. One way is that typically those who are living in a halfway house are with very little means. Living within walking distance, or maybe just a rather short bus ride to get to a number of destinations may be all that those living in the halfway house can afford. Forcing Jed to move the halfway house further out would present a hardship on Jed that he now needs to provide transportation to the residents -- that on top of running the house. The second element, showing that the variance will not be contrary to the public welfare, is an element that may take time to prove. If given time, Jed may be able to prove that just because the halfway house is situated among those living in single family dwellings, there are no facts to substantiate that crime will increase because of the halfway house.

With regards to the court's consideration, Jed can show provide the expenses he has recently incurred by recently building the halfway house, the money he will lose in trying to recoup his money by selling it, and the cost to not only purchase another property and to move all of his residents, but also to show the inconvenience and increased cost of traveling further and having to provide transportation for his residents. Both of the remaining court consideration factors might not be immediately available to prove to the court, but given time, Jed may be able to show that the granted variance has not been detrimental to the zone plan for the area, nor has the variance created an undue adverse impact on the surrounding neighborhood.

Conditional Use Permit

A conditional use permit is a zoning exception which allows the property owner use of his land in a way not otherwise permitted within the particular zoning district.

The use of a conditional use permit is very vicarious in that it could closely resemble spot-zoning, particularly if there were objections to permitting its use. This could also be defined closely with granting a variance. Both grant permits or zoning exceptions which allow a property owner a use of his property that is unique to his property and not others.

As counsel to the City, I would advise them to steer away from a conditional use permit as it could easily be construed as spot-zoning, with would invalidate the permit. Jed could make arguments to fulfill the elements of the requirements for a variance, so the advice would be to grant a variance so that Jed would be allowed to continue his halfway house in its current location.

(d) *Is Jed's challenge to the zoning ordinance unconstitutional?*

Exclusionary Zoning

Zoning regulations may be used to enhance and preserve public welfare.

When the government intrudes on choices concerning living arrangements, a Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. Historically, cases that involve zoning regulations that are exclusionary, the courts have ruled widely. Although the following examples are not set in stone, they are examples that are sometimes followed by the courts:

Permissible zoning examples could include: (1) minimum lot-size requirements that are upheld when found justified by the conditions of the community in question; (2) minimum setback requirements because they increase light and air, reduce the danger from fire, and advanced aesthetic concerns; and (3) regulating the household composition of unrelated individuals. The case *Village of Belle Terre v. Boraas* was a situation where a homeowner leased out a home in Belle Terre to six college students who were not related or married. Belle Terre had a zoning ordinance which restricted land use to one-family dwellings. As a result, the Village of Belle Terre cited the student house for being in violation of this ordinance because they were not a "family." The Supreme Court ruled that economic and social regulations are generally upheld against equal protection challenges where the law is reasonable and bears a rational relationship to a proper state objective. In this case, the Court ruled that the ordinance was not arbitrary because it was designed to reduce noises and traffic, and to provide quiet and open spaces for children to play. Further, the ordinance was not unconstitutional because, for example, it did not prohibit racial minorities from living within the city, it did not burden fundamental rights such as the right to vote, the right of association, the right of access to the courts, or any right of privacy.

Impermissible zoning examples could include: (1) minimum housing-cost requirements; (2) minimum floor-area requirements; and (3) household composition of related individuals.

While the halfway house would appear to be more similar to those in the *Village of Belle Terre v. Boraas* residents, Jed may be able to challenge the zoning ordinance as unconstitutional because it could appear to be singling out people of low income. The caution is to not appear to close an entire community to unwanted group. As discussed above, Jed's residents would likely be of low means, and requiring them to move out much further could be seen as an undue hardship placed on them because of their lack of means for transportation. Likewise, as churches are normally located in and near neighborhoods, it would not easily give the halfway house residents easy access to any nearby churches. Although arguments could be made for either side, I believe Jed could have an argument for the zoning ordinance being unconstitutional.

2)

TAKINGS

Under the Fifth Amendment, the government may not take private property for public use without first providing just compensation.

Possessory Taking

A possessory taking occurs when the government physically occupies, either partial or total, a person's private property. *Loretto* held that a permanent physical occupation authorized by the government is a taking.

Here, the government did not physically occupy Josh's land, rather, they placed a restriction on building close to the ocean.

Therefore, there is no possessory taking.

Regulatory Taking

Total Taking (Per Se) Taking

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. (Lucas) There are various factors to consider in determining if there is a per se taking.

Government Restrictions on Development =Benefit>Burden

Government restrictions on development, such as zoning restrictions, must be justified by a benefit that is roughly proportionate to the burden imposed or there will be a taking. If benefit is proportional to the burden, then no regulatory taking. If burden is excessive in relation to the benefit, there is a regulatory taking.

Here, the facts indicate that Josh bought the one acre parcel of vacant ocean front land with the intent to build a house on the land. There was no restriction on building close to the ocean in City, except for a long existing zoning regulation that required a small 20 foot buffer between any structure and the high-tide boundary of the ocean. Josh will argue that he will be burdened by the regulation because he will be deprived of all economically viable use of his land. At the time Josh bought the land, there was no other practical value to the land except as a site for a house. Josh

may be able to use the one acre parcel of land to go camp at the beach or other day use purposes, however, that was not what he intended when he bought the land and those are not economic viable uses of the property.

City will argue that the regulation was enacted because they are worried about coastal flooding and erosion. City will contend that in enacting the regulation they will be protecting the homes and investments of those that live near the coastline. This will protect against flooding and possible destructions of homes and foundations.

However, while there is a benefit, the benefit is not proportional to the burden placed on Josh. As in Lucas, Josh will suffer total deprivation of beneficial use of the property which has the same effect as a permanent physical invasion of property that renders a land owner powerless to use the property.

No Requirement that Regulatory Taking Existed When Acquired

A property owner may still bring a takings challenge against regulations even if those regulations existed when the property was acquired. No requirement that the regulation be enacted subsequent to acquisition.

The regulation was not in effect when Josh bought the land. The land had no restrictions on building close to the ocean in City, except for a zoning regulation that required a buffer between any structure and the high tide.

Temporary Denial

Temporary denial of development of property is not a taking if the government's action is reasonable.

There is no temporary denial in this instance. City passed a regulation whose effect is to be permanently prohibit josh from building any structure on his land.

Conclusion

Therefore, the court is most likely to conclude that there is a per se taking and Josh is entitled to just compensation. Just compensation at the time of the taking must be paid to the owner of the property, which is the fair market value measured in terms of loss to the owner. Gain to the government is irrelevant.

Partial Taking

A regulatory taking that is not a "per se" taking will also be considered a "taking" under the Fifth Amendment if the taking does not pass the Penn Central balancing test. While there is no set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons, the Supreme Court has set forth the following balancing test to be applied to the particular circumstances of each case: the nature of the government's action; level of diminution in value of the owner's property, and the property owner's reasonable investment-back expectation.

Here, if the court find that there is no "per se taking" Josh can argue for a partial taking.

Nature of Government Action (Public Use-Kelo)

A restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact on the owner's use of the property. The court in *Kelo* held that as long as the legislative branch decided that private property need to be condemned in order to accomplish purposes, it would defer to that decision. The public use requirement is satisfied if the government acts under reasonable belief that taking will benefit the public.

As discussed previously, City will argue that the regulation was enacted because they are worried about coastal flooding and erosion. City will contend that in enacting the regulation they will be protecting the homes and investments of those that live near the coastline. This will protect against flooding and possible destructions of homes and foundations. Protecting the safety and welfare of its citizens is a public purpose.

Level of Diminution in Value of the Owner's Property

While the facts are silent as to how much Josh bought the property and how much it will be worth if he is not allowed to build, we do know that the land has no other practical value except as a site for a house. Therefore, it can be assumed that value of the owner's property will diminish significantly.

Property Owner's Reasonable Investment-Backed Expectations

Here, the facts indicate that the regulation imposed by the city interfered with Josh's investment. Josh will argue that he bought the parcel of land knowing that the land was invaluable unless a

home was built. Therefore, Josh will assert that he intended to build a home when he bought the land.

City may counter that city issued the regulation two years after Josh purchased the land and that Josh had yet to build the home or invest in the start of the building of a home. However, the facts are silent as to what Josh actually did or if he had started the process of building the home.

The court will most likely conclude that the taking interfered with Josh's investment.

Conclusion

Based on a balancing of all the factors, the court will most likely find that there is a partial taking and Josh will be entitled to remedies. The remedy for a government's partial taking is to compensate owner or terminate the regulation and pay the owner for damages that occurred while the regulation was in effect.

END OF EXAM

3)

TOBY AND ZOEY CROSS-EASEMENT

Easements

Easements are the grant of a non-possessory interest that entitles its holder to some form of limited use or enjoyment of another's land called the servient land. There are two types of easements: affirmative and negative.

Negative

A negative easement can only be created expressly by a writing and gives the easement holder the right to prevent the servient owner from using her land in some way that would otherwise be permitted. A person may acquire a negative easement for light, air, support, stream water from an artificial flow, and in minority states for scenic view. Negative easements are always appurtenant because they protect the owner of the easement in her enjoyment.

Here, the agreement between Toby and Zoe is requiring them both to pay for maintenance of a wall between their two properties. The wall is locally partially on each tract. The wall is meant for enjoyment of the land and not preventing them from using the land.

Therefore this is not a negative easement.

Affirmative

An owner of an affirmative easement has a right to go onto the land of another (the servient land) and do some act on the land. Most easements are created by prescription, implication, necessity, or express grant.

Easement by Grant

An easement by grant in a deed allowing the grantee use of the property that must satisfy the statute of frauds requiring a writing, unless it is for less than one year, and the deed must be signed by the grantor manifesting an intent to create an easement identifying the parties involved.

Here, Toby and Zoey entered into a written agreement to pay \$25 a month for maintenance of a wall between their two properties. The agreement is writing; therefore it satisfies the SoF. The facts are silent as to if both signed the agreement, but since there is a creation of a cross-easement, it can be

assumed that both signed the agreement. Here, the parties agreed to creating a cross-easement for a party wall. Party walls are walls between two buildings which are used for the mutual benefit of the benefits. The essential requisite of a party wall is that it may not be enjoined entirely by one owner to the exclusion of an adjoining owner, but may be enjoyed by each of the adjoining owners as a matter of right. Therefore, if the wall falls out of repair, either one may, if he so choose, renew it and compel the other to pay his share of the expense. The agreement between Toby and Zoey intended to both pay for the wall jointly.

Therefore, the easement was created by an easement by grant.

Two Forms of Easements

There are two types of easements appurtenant and in gross.

In Gross

If an easement does not benefit its owner in the use and enjoyment of her land, but merely gives her the right to use the servient land, the easement is in gross. Easements in gross confer upon its owner a personal or financial commercial benefit not related to the use or enjoyment of the land.

Here, the easements benefit both owners in the use and enjoyment of the party wall

Therefore, it is not an easement in gross.

Appurtenant

If an easement benefits its owner in the use and enjoyment of her land, it is appurtenant to that land. An appurtenant easement requires two pieces of land: a dominant tenement (benefited land) and servant tenement (burdened land).

The facts indicate that Toby and Zoey created cross-easements, therefore, Toby and Zoey each being both dominant and servient tenants. The easement in this instance would be appurtenant because it involves two pieces of land.

Therefore, this is an easement appurtenant.

Scope of Easement

The scope of an easement is set by the terms or conditions that created it which is presumed to be of perpetual duration unless stated otherwise. The easement may only be used for the benefit of the

dominant estate and cannot be unilaterally expanded for the benefit of a non-dominant parcel. The dominant estate is responsible for making any necessary repairs to the easement and may enter the servient estate to do so. If one exceeds the scope the dominant estate may enjoin the use but does not terminate the easement.

Here, the scope is that both are to use the wall and that both agree to pay 25 dollars a month for maintenance. Since this is a cross-easement both are responsible for making necessary repairs to the easement and may enter the servient estate to do so.

Transferability of Easements

The easement appurtenant passes automatically with the dominant tenement regardless of whether it is even mentioned in any document or transfer. On the other hand, a servient tenement passes automatically with the servient land unless the new owner is a Bona Fide Purchaser without notice.

Since there are cross-easements, the easement appurtenant would pass automatically regardless of whether it is even mentioned in any document or transfer.

Therefore, when Toby and Zoey conveyed the property CJ and Abby separately, the easement appurtenant would transfer automatically.

Real Covenants

Real covenants are contractual limitations related to land that are enforceable at law for damages. There are two types of real covenants: negative and affirmative.

Negative

A negative real covenant is a promise to not to do a certain thing on land which binds the promisee and promisor and requires a writing.

The deeds contains the wall maintenance commitment which is asking them to do something.

Therefore, this is not a negative covenant.

Affirmative

An affirmative real covenant is a promise to do a certain thing on land which binds the promisee and promisor and requires a writing.

The deeds contain the wall maintenance commitment which is asking them to do something. It is presumed that the deeds were done in writing.

Therefore, this is an affirmative covenant.

Does the Covenant's Burden Run with the Land?

A covenant runs with the land when it is capable of binding successors. In order for the burden of the covenant to run with the land, the following elements must be satisfied: writing, intent, touch and concern, horizontal and vertical privity, and notice.

Writing

The original covenant must be in writing.

Here, the original covenant was in writing.

Intent of the Original Parties

The original parties must have intended the covenants to run with the land.

Here, the original parties entered into an agreement whereby they and their successors agreed to pay the \$25 a month for maintenance.

Both parties intended to be bound.

Touch and Concern the Land

The covenant must touch and concern the land which means that the person seeking enforcement must establish that the covenant affects both the promisee and the promisor as owners of land and not merely as individuals. This rule focuses on the reasonableness of having the covenant bind successors which is often indicating when the subject of the covenant under review is so connected to the use of the land that the original parties must have expected it to run.

Here, the covenant was regarding the party wall which touched and concerned both of the original parties land.

The covenant touches and concerns the land.

Vertical and Horizontal Privity

Both horizontal and vertical privity are needed for the burden to succeed from running from the promisor to the promisee

Horizontal Privity

Horizontal privity is a nexus between the original parties which requires that at the time the promisor enters into the covenant with the promisee, the two shared some interest in the land independent of the covenant.

Here, when Toby and Zoe entered into the covenant, there was no interest shared independent of the covenant. There was no concurrent estates, landlord-tenant, grantor-grantee, or mortgagor-mortgagee relationship.

Horizontal Privity not met.

Vertical Privity

Vertical privity is a nexus between the original party and the successor. Vertical privity requires a non-hostile connection to the entire intestate.

Here, there is vertical privity. As the properties were conveyed as a whole.

Notice

The person against whom the covenant is to be enforced must have notice (whether actual, record, or inquiry notice) of the servitude.

The deed contains the wall maintenance commitment which is asking them to do something. Therefore they had actual and record notice.

Conclusion

The Burden would not run with the land as there is no horizontal privity.

Does the Covenant's Benefit Run with the Land?

A covenant runs with the land when it is capable of binding successors. In order for the benefit of the covenant to run with the land, the following elements must be satisfied: writing, intent, touch and concern, vertical privity, and notice.

Writing

The original covenant must be in writing.

Here, the original covenant was in writing.

Intent of the Original Parties

The original parties must have intended the covenants to run with the land.

Here, the original parties entered into an agreement whereby they and their successors agreed to pay the \$25 a month for maintenance.

Both parties intended to be bound.

Touch and Concern the Land

The covenant must touch and concern the land which means that the person seeking enforcement must establish that the covenant affects both the promisee and the promisor as owners of land and not merely as individuals. This rule focuses on the reasonableness of having the covenant bind successors which is often indicating when the subject of the covenant under review is so connected to the use of the land that the original parties must have expected it to run.

Here, the covenant was regarding the party wall which touched and concerned both of the original parties land.

The covenant touches and concerns the land.

Vertical Privity

Both horizontal and vertical privity are not needed for the benefit to succeed from running from the promisor to the promisee

Vertical Privity

Vertical privity is a nexus between the original party and the successor. Vertical privity requires a non-hostile connection to the entire intestate.

Here, there is vertical privity. As the properties were conveyed as a whole.

Notice

The person against whom the covenant is to be enforced must have notice (whether actual, record, or inquiry notice) of the servitude.

The deed contains the wall maintenance commitment which is asking them to do something. Therefore they had actual and record notice.

Conclusion

The Benefit Runs with the land.

Since there is no horizontal privity, CJ would not be able to sue under covenants. However, because equitable servitudes do not require privity CJ should sue under equitable servitudes and request the remedy of injunction.

Equitable servitude

An equitable servitude is a promise concerning the land that binds the original parties and their successors. Equitable servitudes are covenants about land use that are enforced at equity by injunction. To create an equitable servitude capable of binding successors the following elements are required: writing, intent, touch and concern, notice and equitable servitude.

Writing

The original covenant must be in writing.

Here, the original covenant was in writing.

Intent of the Original Parties

The original parties must have intended the covenants to run with the land.

Here, the original parties entered into an agreement whereby they and their successors agreed to pay the \$25 a month for maintenance.

Both parties intended to be bound.

Touch and Concern the Land

The covenant must touch and concern the land which means that the person seeking enforcement must establish that the covenant affects both the promisee and the promisor as owners of land and not merely as individuals. This rule focuses on the reasonableness of having the covenant bind

successors which is often indicating when the subject of the covenant under review is so connected to the use of the land that the original parties must have expected it to run.

Here, the covenant was regarding the party wall which touched and concerned both of the original parties land.

The covenant touches and concerns the land.

Notice

The person against whom the covenant is to be enforced must have notice (whether actual, record, or inquiry notice) of the servitude.

The deed contains the wall maintenance commitment which is asking them to do something. Therefore they had actual and record notice.

Equitable Servitudes

Unlike covenants, with an equitable servitude, a party seeking to enforce it need not show privity, but the party is limited to equitable remedies.

Therefore, CJ should bring suit under an equitable servitude to request that the court force Abby to make the payments into the bank account.

END OF EXAM

3)

Real Covenants

Real covenants are contractual limitation or obligations related to land that are enforceable at law for damages. There are two types of real covenants: negative and affirmative. A negative real covenant is a promise not to do a certain thing on land which binds the promisee and promisor and requires a writing. An affirmative real covenant is a promise to do a certain thing on land which binds the promisee and promisor and requires a writing.

Affirmative

Here, the covenant by Toby and Zoey is affirmative as both parties made a promise to pay \$25 per month into a bank account for the maintenance of a wall between their two properties and that agreement was made in writing. Therefore, the covenant was for the parties to do something relating to the land, hence it is affirmative.

Does the Burden Run with the Land?

A covenant runs with the land when it is capable of binding successors. In order for the burden of the covenant to run with the land, the following elements must be satisfied: writing, touch and concern, horizontal and vertical privity, and notice.

Writing: The original covenant must be in writing to satisfy the statute of frauds.

Here, the original promise was made by Toby and Zoey to pay the \$25 per month into the bank account for maintenance of the wall. The facts state that the agreement by the neighbors was in writing. Therefore this element is satisfied.

Intent: The original parties must have intended the covenant to run with the land.

The agreement made by the neighbors was to provide a monthly payment into a bank account so that the wall that is located partially on each tract would be maintained. This language was included in the original writing and in the deed that was provided to CJ and Abby, therefore it is established that the parties intended the monthly payment for maintenance (burden) run with the land.

Touch and Concern: The covenant must touch and concern the land which means the person seeking enforcement must establish that the burden affects both the promisee and the promisor as

owners of land and not merely as individuals. This rule focuses on the reasonableness of having the covenant bind successors which is often indicating when the subject of the covenant under review is so connected to the use of the land that the original parties must have expected it to run.

The covenant was to make a monthly payment into a bank account. Simply because the payment was made to a bank account does not mean that this element is not met. Rather, the reason for the payment was so that the parties could use that money to maintain the wall. This wall was located partially on each tract between the two properties, therefore the promise concerned the wall located on the land. Therefore, this promise touches and concerns the land.

Notice: Under common law, a subsequent purchaser of land that was subject to a covenant took the land burdened by the covenant whether or not she had notice. However, modernly the successor must have notice of the covenant at the time the successor acquired the interest. Notice can be actual, inquiry or record.

Here, both subsequent parties, CJ and Abby took the property from Toby and Zoey subject to the covenant. The facts do not state whether Toby and Zoey recorded their agreement, therefore record notice is unclear. However, the parties had actual notice because the successors were noticed of the agreement in the deed that they were provided with. Had that not been the case, the successors likely could have been charged with inquiry notice as a reasonable person who sees a wall between two properties would have implied notice to inquire as to whether there are any restrictions, or covenants concerning the wall. Here, the notice element is met.

Horizontal and Vertical Privity:

Both horizontal (HP) and vertical privity (VP) are needed for the burden to succeed in running from the promisor to the promisee. HP is a nexus between the original parties which requires that at the time the promisor entered into the covenant with the promisee, the two shared some interest in the land independent of the covenant.

VP is a nexus between the original party and the successor which required a non-hostile connection to the entire durational interest in the estate between the original party and the successor at the time the deed was conveyed.

Toby provided a deed to CJ when he conveyed his property to him and Zoey provided Abby with a deed when she conveyed her property to her. The original promisors (Toby and Zoey) therefore had a nexus with their successors (CJ and Abby) to the entire interest in property when the deed was conveyed. Thus, vertical privity exists between them.

However, the original parties, Toby and Zoey do not have a nexus between one another. Although the wall is located between both properties and partially on each tract, this is not an interest in land independent of the covenant. For Toby and Zoey to have a shared interest there must be grantor/grantee, landlord/tenant, or mortgagor/mortgagee relationship. Here, that is not the case. Instead, the parties are simply neighbors who happen to have a shared wall in between their properties and did not share an interest in the land independent of the agreement. The horizontal privity requirement is not met in this case.

Termination of Covenants

Covenants can be terminated on a number of grounds. However, here there are no facts indicating that the covenant has been terminated by either Toby nor Zoey. Simply because one of the successors, Abby, has defaulted on payments to the bank does not mean the covenant is terminated. Instead, CJ is wanting to make sure that she pays.

Remedy

Since all elements must be met for a real covenant to run, CJ will not be able to seek damages from Abby for defaulting payments because the original parties, Toby and Zoey did not have horizontal privity. However, CJ can seek remedy by equitable servitude.

Equitable Servitudes

An equitable servitude is a promise concerning the land that binds the original parties and their successors. Equitable servitudes are covenants about land use that are enforced at equity by injunctions.

Does the Burden Run with the Land?

To create an equitable servitude capable of binding successors the following elements are required: writing, intent, touch and concern, notice, and equitable servitude.

Writing: The majority view is the the equitable servitude must be in writing to satisfy the statute of frauds. Under the minority view, a writing is not required.

As mentioned, the original promise was made by Toby and Zoey to pay the \$25 per month into the bank account for maintenance of the wall. The facts state that the agreement by the original parties was in writing. Therefore this element is met.

Intent: The original parties must have intended the servitude to run with the land.

The agreement made by the neighbors was to provide a monthly payment into a bank account so that the wall that is located partially on each tract would be maintained. This language was included in the original writing and in the deed that was provided to CJ and Abby, therefore it is established that the parties intended the monthly payment for maintenance (burden) run with the land.

Touch and Concern: The covenant must touch and concern the land which means the person seeking enforcement must establish that the burden affects both the promisee and the promisor as owners of land and not merely as individuals. This rule focuses on the reasonableness of having the covenant bind successors which is often indicating when the subject of the covenant under review is so connected to the use of the land that the original parties must have expected it to run.

The covenant was for the original parties to make a \$25 monthly payment into a bank account. Simply because the payment was made to a bank account does not mean that this element is not met. Rather, the reason for the payment was so that the parties could use that money to maintain the wall. This wall was located partially on each tract between the two properties, therefore the promise concerned the wall located on the land. Therefore, this promise touches and concerns the land and this element is met.

Notice: The person against whom the servitude is to be enforced must have notice, whether actual, inquiry, or record notice of the servitude.

Here, not only did CJ have notice from Toby's deed when he conveyed his property to him but so did Abby through the deed given to her by Zoey when she conveyed her property to her. This was actual notice as Abby was made aware of the covenant included in the writing. Therefore, notice is met.

Equitable Servitude: Unlike with a real covenant, with an equitable servitude, a party seeking to enforce it need not show privity, but the party is limited to equitable remedies.

As mentioned, there was vertical privity between Toby to CJ and from Zoey to Abby. However, Toby and Zoey were simply neighbors who shared a wall and came up with an agreement to pay \$25 per

month to maintain the wall. The parties did not share horizontal privity. But under an equitable servitude, the fact that horizontal privity does not exist does not matter as privity is not required.

Termination of an Equitable Servitude

Equitable servitudes can be terminated on a number of grounds. However, here there are no facts indicating that this covenant (servitude) was terminated. Therefore, CJ can move forward with seeking a remedy for Abby's default on the monthly payments.

Remedy

Since the elements for an equitable servitude (writing, intent, touch and concern, and notice) are all satisfied, the remedy available for the party seeking enforcement is injunction or specific performance. CJ will prevail in bringing his claim against Abby for specific performance so that she is ordered to make the \$25 per month payment into the bank account for maintenance of the shared wall.

END OF EXAM