QUESTION 1:

For three years, Alexa and Bart lived on a farm which they owned in joint tenancy with right of survivorship. During her occupancy, Alexa refused to pay her pro rata share of the property tax bill. Bart paid the entire tax bill for those years.

Recently, Alexa signed and delivered a deed transferring all of her interest in the property to Xena. Xena properly recorded the deed and moved onto the farm. Shortly thereafter, Alexa died.

Discuss:

1. Whether Alexa, before she sold the property, was responsible for any of the property taxes paid by Bart;

2. How the farm is currently owned and the rights of the respective parties; and,

3. Whether Bart can obtain legal title to all, or a portion, of the farm.

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DISCUSSION FOR QUESTION 1:

1. Alexa is liable for half the property tax bill. A co-tenant, not in sole possession, who pays more than his [or her] pro rata share of property taxes . . . has a right of contribution. Here, Bart and Alexa are joint tenants sharing possession of the farm. As joint tenants, they have a unity of interest; each owns an equal fractional share. Therefore, Alexa and Bart each own a one-half share in the ranch and each is responsible for one-half of the property tax bill.

2. Bart and Xena own the property equally as tenants in common. Although Bart and Alexa initially owned the ranch as joint tenants, which gave a right of survivorship to whomever survived the other, Alexa's transfer of her share to Xena severed her interest and defeated Bart's survivorship tight. Such a transfer converted the joint tenancy into a tenancy in common held by Bart and Xena. At the time of Alexa's death, she held no interest in the ranch. Therefore, her death effected no change in ownership of the ranch.

3. Absent some agreement to the contrary, Xena, as a co-tenant of the farm, has equal rights to occupy the farm with Bart.

   As co-tenants, Bart and Xena can voluntarily agree to sever the ranch into two parcels, or agree to sell it and share the proceeds or, of course, one could buy out the other or they can agree to any other shared ownership arrangement. If they cannot do this, Xena or Bart can compel partition as a matter of right (as can any co-tenant, except for a tenant by the entirety). Although equitable defenses to partition are sometimes available, no facts suggest that they would be appropriate here. Partition can be in kind (a physical division of the property into two parcels), or by sale (selling the property and dividing the

proceeds between the co-tenants). Although partition in kind has been traditionally favored, partition by sale is more common, because a fair and equitable physical division of property usually is impossible.

So, Bart and Xena learn to get along or the farm probably gets sold on the open market and the net sale proceeds are divided 50/50 to Bart and Xena.

QUESTION 2:

Greenacre is a twenty acre parcel of vacant rural land owned by Owner. It is bounded on three sides (north, west, and south) by a county wildlife preserve. The preserve is secured by a high chain link fence around its entire perimeter. Along Greenacre's east boundary lies County Road #1, the parcel's only public access road.

In 2001, Owner sold and conveyed the east half of Greenacre to Buyer. After the closing, Buyer proceeded to build and permanently maintain a high chain link fence around the entire boundary of his property. Owner retained no access easement benefitting the western half of Greenacre.

Immediately after closing, Owner left the country and did not return to visit Greenacre until early this year. When he returned, Owner discovered Buyer's fence denying access to the county road from Owner's parcel.

Today, Owner read in the newspaper that the county had contracted to build a new public road through the wildlife preserve late in 2020. This new road will abut Owner's half of Greenacre.

Assume that the local statute of limitations (statutory period) is ten years in all civil matters.

QUESTIONS:

1. Discuss whether Owner has any right of access to his parcel.

2. Discuss the legal effect, if any, of Owner's nonuse of his parcel from 1989 to 2006.

3. Discuss the legal effect, if any, of the proposed new county road on the rights of the parties.

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DISCUSSION FOR QUESTION 2:

1. Was any easement created when Greenacre was conveyed to Buyer?

First, there is no evidence of any contract or agreement between Buyer and Owner that governs the analysis.

The common law doctrine of ***easements implied from necessity*** can only be invoked when (a) unity of title existed; (b) the parcel was severed (a larger parcel has been severed by an owner into smaller parcels and one or more of the resulting parcels is conveyed to another party); (c) the necessity for an easement came into existence at the moment of conveyance, e.g., landlocked parcel; and (d) the necessity was caused by the severance of the larger parcel. These necessary conditions would have been met in 2001 when Owner conveyed the east half of the parcel to Buyer.

The necessity element has jurisdictional variations as to the level of necessity that will trigger the doctrine. These variations run from (a) strict (or sheer) necessity to (b) reasonable necessity to (c) significant need. **In California, the rule is absolute strict necessity.**

Also, here, because Owner could have controlled this outcome when he sold by reserving an express easement over Buyer's land, in most jurisdictions Grantors such as Owner are held to a higher level of necessity than Grantees such as Buyer because the Grantor made the transfer and could have included a reservation of easement in their conveyance. Accordingly, courts are reluctant to award Grantors access easements by implied reservation which would burden the lands they conveyed to their Grantees without placing a written reservation in their deeds. Under these facts most courts would hold Owner to a strict level of necessity (rather than the lesser requirement of reasonable necessity often used to create easements for the benefit of the Grantee).

But jurisdictional variations about strict-reasonable necessity will not matter under these facts. This is so because the west half of Greenacre retained by ***Owner is landlocked*** unless it enjoys an access easement across the east half to County Road #1. Being landlocked meets the highest level of necessity in all jurisdictions. *Kellog v. Garcia*. Thus, up until the new road is put in, Owner's parcel is landlocked and he should enjoy an implied easement by necessity over Buyer's land.

2. What is the legal effect on Owner's rights of his nonuse of the west half of Greenacre from 2001 to 2020?

If the required conditions for creating an Easement Implied from Necessity (unity of title, severance & conveyance, and necessity) all existed in 2001, then the mere nonuse of the implied easement by the dominant estate owner (Owner) should not defeat the implied easement. (text pg. 818.) The legal issue, first is **abandonment.** The dominant servient can abandon an easement on a showing of (1) an intent to abandon and (2) an affirmative act in furtherance of the intent. An examinee would be best to discuss whether 19 years of non-use of the easement meets that test. The better answer is "No".

We have little evidence other than neglect of either an intent or an affirmative act. Indeed, a dominant owner's property right in an unused implied easement by necessity may lie dormant upon the servient estate (Buyer) until needed for the enjoyment of the dominant estate. Periods of dormancy can be decades long (and even survive transfers of the servient and dominant estates to third parties, which is not an issue here). "Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible. " A servitude is extinguished [b]y the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise." (Cal. Civ. Code, § 811; *Reichhardt v. Hoffman* (1997) 52 Cal.App.4th 754, 767.

> "In order to justify extinguishment of an easement, "[t]he acts of the owner of the dominant tenement . . . must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement." (Smith v. Worn (1892) 93 Cal. 206, 213 [28 P. 944].) The interference with use of the easement must be material and permanent rather

than occasional and temporary in order to justify extinguishment. (People v. Ocean Shore Railroad (1948) 32 Cal. 2d 406, 418 [196 P.2d 570, 6 A.L.R.2d 1179].)" "*Reichhardt, supra*, 52 Cal.App.4th at 768.

The next legal issue is ***termination of the implied easement by prescription***. There can be no claim of adverse possession of Owner's fee simple by Buyer based on the stated facts. Buyer merely fenced his *own* land. Buyer never entered Owner's fee simple or occupied it openly, adversely, notoriously, exclusively, and continuously for the statutory period.

The statute of limitations and its doctrines of adverse possession & prescription can legally terminate an easement that is in actual use. Hostile conduct visibly and adversely interfering with the use of the easement, such as blocking off an access easement, and doing so continuously for the period of time prescribed by the statute of limitations (here, 10 years) could ripen prescriptive rights and terminate the easement. Such interference is necessary by the hostile servient estate owner such as Buyer. The mere nonuse of the easement by the owner of the dominant estate is not enough to terminate the easement. Examinees should nevertheless argue the question whether Buyer's construction and maintenance of his high chain link fence for over ten years was sufficient.

From *Kellog v. Garcia* (2002) 1-02 Cal.App.4th 796, 803-804:

"The circumstances for the creation of an easement by necessity in California are well known: "An easement by way of necessity arises by operation of law when it is established that (1) there is a strict necessity for the right-of-way, as when the claimant's property is landlocked and (2) the dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity." (Moores, supra, 38 Cal. App. 4th at p. 1049; accord, Roemer v. Pappas (1988) 203 Cal. App. 3d 201, 205-206 [249 Cal. Rptr. 743] (Roemer); Daywalt v. Walker (1963) 217 Cal. App. 2d 669, 672 [31 Cal. Rptr. 899] (Daywalt); Reese v. Borghi (1963) 216 Cal. App. 2d 324, 332-333 [30 Cal. Rptr. 868] (Reese).)

A way of necessity " 'is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. Such a way is the result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. Thus, the legal basis of a way of necessity is the presumption of a grant arising from the circumstances of the case. This presumption of a grant, however, is one of fact, and whether a grant should be implied depends upon the terms of the deed and the facts in each particular case.' " ([*804] Daywalt, supra, 217 Cal. App. 2d at pp. 672-673, citing 17A Am.Jur. (1957) Easements, § 58, pp. 668-669.)

Hence, the law " 'never imposes . . . an easement by necessity contrary to the express intent of the parties' " since it is based on an inferred intent arising from the strict necessity of access for the conveyed property. (Daywalt, supra, 217 Cal. App. 2d at p. 673.)

In addition, ***"[a way of necessity], having been created by the necessity for its use, cannot be extinguished so long as the necessity exists***." (Blum v. Weston (1894) 102 Cal. 362, 369 [36 P. 778].) An easement by necessity may persist even though the original grantor and grantee no longer own the properties in question: An "easement of necessity may be asserted by remote grantees in the chain of title long after the easement was created by the original common grantor, despite the failure of a prior grantee to exercise the right; and the 5-year statute of limitations on quiet title actions [Code Civ. Proc., §] 318) does not apply." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 459, p. 637, citing Lichty v. Sickels (1983) 149 Cal. App. 3d 696, 700-701 [197 Cal. Rptr. 137] (Lichty).)

However, "'a right of way of necessity ceases when the owner of the way acquires a new means of access to his estate, as where he acquires other property of his own over which he may pass, or where a public way is laid out which affords access to his premises; and the fact that a former way of necessity continues to be the most convenient way will not prevent its extinguishment when it ceases to be absolutely necessary.' " (Daywalt, supra, 217 Cal. App. 2d at pp. 676-677; accord, Moores, supra, 38 Cal. App. 4th at p. 1051.) But the burden of proof that an easement by way of necessity has ceased is on the party opposing the easement "to show by acceptable evidence that a new right of way was in fact made available to the plaintiff." (Daywalt, supra, 217 Cal. App. 2d at p. 677.))

The stated facts deal with a dormant implied easement which is not in actual use and was blocked off by a chain link fence for the requisite time of prescription. The issue could be argued both ways on the question of whether a dormant easement implied from necessity (such as Owner's) can be terminated by prescription (such as Buyer fencing it off for the statutory period of time). The better argument here, on the facts, is "No", because it would be contrary to the implied intent of the grant and that an easement by necessity is not terminated involuntarily until such time that the necessity is terminated.

3. What is the legal effect of the proposed new county road?

The duration of an Easement Implied from Necessity lasts only so long as the necessity that created the easement continues to exist. Accordingly, should the planned new county road actually be completed and opened at some future date, providing public access to Owner's west half of Greenacre, then at that time the necessity that created an implied reservation of easement across Buyer's east half of Greenacre will have ended. This would result in the ternination of the implied easement.

QUESTION 3:

A developer bought 200 acres of wooded land on which he began the construction of a residential subdivision development. The subdivision was originally intended to include 200 lots, and he filed a plan displaying 200 one-acre residential lots with the county records office. The developer sold the first 100 lots of the subdivision on the southerly side, where development had originated, by deeds that included the following provision: "The Grantor, for himself and his heirs and assigns, and the Grantee, for himself and his heirs and assigns, mutually agree that the premises conveyed herein shall be used solely for residential purposes."

A county official then pointed out to the developer that the increasing residential development of the land would necessitate construction of another elementary school in the district. The developer thought that the subdivision's residents would like the school to be nearby, so he contracted to sell to the county, at market rate, six acre lots in the subdivision. The deed stated that the sale was "in lieu of eminent domain proceedings" and expressly restricted the use of the lots to use as a public elementary school. When the purchasers of the first 100 lots learned of the sale, they objected, fearing an adverse impact on traffic in the neighborhood. They sued the county based on the recorded plan and the restrictions in their deeds.

If the county is successful in defeating the purchasers' suit, it will most likely be for which of the following reasons? Here are four choices. Please ***discuss each*** and pick one as the "best" answer.

(A) The deed to the County – "in lieu of eminent domain" -- is an equivalent of zoning.

(B) The sale to the county constitutes inverse condemnation.

(C) There is no written restriction in the county's deed.

(D) The county is not the proper defendant in this case because it was the developer who breached the restrictive covenant.

++

DISCUSSION FOR QUESTION 3:

The "best", albeit pretty weak, answer is: (A) the deed is an equivalent of zoning.

If an eminent domain proceeding would only constitute zoning in this case, there would be no "taking" as defined by constitutional precedents, and no compensation would be required. See e.g., *Euclid*. Arguably, a County decision that a school was needed is rationally related to the "public health, safety, welfare, and public morals" because educating the kids in the neighborhood helps us all. And, arguably, depending on how one analyzes the property rights of the 100 owners, there is no evidence that their property has been rendered entirely valueless by the "zoning" decision. *Lucas*. But, given that the residential restriction would likely be considered a property right, the denial of which would be a compensable taking under the Takings Clause of the 5th Amendment to the US Const, made applicable to the States by the 14th

Amendment, this argument is hardly guaranteed to succeed. Nevertheless, it is the best answer of the choices given.

(B) Incorrect. The sale to the county constitutes inverse condemnation.

If the sale to the county constitutes inverse condemnation, the county would be required to compensate the property owners for the rights taken. Zoning is not generally a compensable "taking" under constitutional precedents, but if the zoning so substantially limits the potential uses of the property that it constitutes a loss of property rights, it is called an "inverse condemnation" and just compensation for that "condemnation" is required. As such, a holding that the sale constitutes inverse condemnation would lead to success for the landowners--not the county.

(C) Incorrect. There is no written restriction in the county's deed.

The recorded subdivision plan, and maybe even just the consistent restrictions in the first 100 deeds, would be sufficient to establish a common scheme. As such, the failure of the grantor to include those restrictions in the deed to the county would not prevent a suit against the county and the grantor, but would in fact give rise to a cause of action against both the developer and the County.

(D) Incorrect. The county is not the proper defendant in this case because it was the developer who breached the restrictive covenant.

While the developer is a possible defendant for violating the common scheme and the restriction in the recorded subdivision plan, he is not the only possible defendant. The landowners can also sue the county on the ground that the county has, in effect, "taken" their property right in the restrictions by buying the property for use of the land for an elementary school. If the county had in fact brought a condemnation proceeding against the developer to take the land, the county would have been required to pay him just compensation. At the same time, however, the landowners would have a cause of action against the county in that the condemnation constituted a "taking" of their property right to restrict all of the lots to residential use only; they would be due just compensation for the loss of this right. Thus, under such a theory, the county is in fact a proper defendant. Also, the County may well be subject to a suit for injunctive relief for breach of the restrictive covenant – County bound by "common scheme", notwithstanding that no such restrictions appear in County's deed.

1)

Is Alexa Responsible for a her portion of taxes ?

Alexa is responsible to pay her proration of taxes due during her period of co-ownership with Bart.

Concurrent Interests:

There are three types of Co-owner, concurrent interests; Tenancy by Entirety, Tenants in Common and Joint Tenants. Each allow more than one person, at the same instant in time, to have an interest in land.

Here the fact pattern states that Alexa and Bart own the farm as joint tenancy with right of survivorship.

Creation of Joint Tenancy

A joint tenancy has an automatic right of survivorship by common law, however modernly it is best to call out the right of survivorship on the deed with specificity. Joint Tenants are considered one owner with each having an undivided interest in the property. An intent to create a Joint Tenancy must be clearly stated, especially in California where Tenants is Common is the default vesting. The primary benefit of a Joint Tenancy (JT) is the right of survivorship (ROS). An ROS is automatic so it avoids probate issues regarding a property so held.

At common law, 4 unities were required to create a JT. The Unity of Time, meaning the property was vested at the same time. The Unity of Title, meaning the interest in the property was acquired at the same time. The Unity of Interest, meaning the interest is the same type and duration. Lastly, The Unity of Possession, meaning that each JT has the identical rights to enjoyment.

Here, Alexa and Bart own it and live there together so each has an undivided 1/2 interest as JT with ROS.

Incidents of Co-Ownership

Possession:

Each party in a co-ownership has certain rights and responsibilities. Any tenant has the right to possession, but no co-tenant has the right to exclusive possession. In most jurisdictions a co-tenant in possession has the right to retain profits gained by her use of the property and she is not required to share the profits with her co-tenants, nor reimburse for the use of the property unless there has been an ouster or agreement to the contrary. Co-tenants must share in the rents from third parties and profits.

Here we are told that both Alexa and Bart lived on the farm for three years. They both were in possession of the farm.

Encumbrances:

A JT may place a mortgage on her interest of the property but may not encumber the other tenants interest. A mortgage has the potential to sever the JT if it is a Title theory jurisdiction.

There is nothing in the fact pattern to suggest that a mortgage was placed on the property.

Contributions/Duty of Fair Dealing:

A co-tenant is responsible for contributions for the expenses of the preservation of the property. A co-tenant who pays more than their fair share of repair costs may be entitled to compensation by the other parties. Typically there is no requirement of contribution for improvements however, for mortgages and taxes there is a requirement. A party may be ordered by the court to remedy the discrepancy.

Here, we are told that Alexa refused to pay her pro rata share of the property tax bill. Bart paid the entire tax bill for the 3 years that they were in possession together. Alexa is required in good faith and fair dealing to pay 1/2 of the taxes for the period of three years. If she does not, Bart may seek assistance from the court. Bart may be entitled to Owelty, which is when the court orders a party to pay compensation to the party who has been shorted.

Alexa is required to pay her pro-rata share of 1/2 the taxes to Bart for the period of 3 years. If she does not, Bart can seek assistance from the court.

How the Farm is currently held.

Termination of a Joint Tenancy

A JT may be terminated in several ways. When one of the unities that created the JT is severed the JT will turn into a tenancy in common. This can also be done by an express mutual agreement. In *Riddle v. Harmon*, the court held that one joint tenant may unilaterally sever the joint tenancy by conveying her interest to another,

Here, Alexa recently signed and delivered a deed transferring all of her interest in the property to Xena. Xena properly recorded the deed and moved onto the farm. So long as the grant deed from Alexa to Xena was properly executed, Alexa successfully transferred her 1/2 interest in the farm to Xena.

In order for the deed between Alexa and Xena to be valid, the statue of frauds requires it be in writing, signed by the granting party and notarized. It must contain a legal description and the parties must be properly described. The parties must be competent to make the conveyance and receive the grant of the property. The deed must include a granting clause with operative words like "I hearby grant". Finally the deed must be delivered with the intent to convey and it must be accepted. It does not have to be recorded, but it should be because otherwise the transfer is not protected by the recording statutes.

Here the fact pattern states that Alexa recently signed and delivered the deed, for the purposes of the exam, it is presumed that it was in proper form and properly executed. Xena accepted the deed and promptly recorded it. Land transactions are presumed accepted unless stated otherwise. This is reinforced by the immediate recording.

Title for Xena and Bart

The co-tenancy is not held as Tenants in Common. No right of survivorship exists. Bart and Xena have a separate but undivided interest each to 1/2. Their interests are divisible and descendable and may be conveyed by deed or will. The interest is also freely alienable by inter-vivos and testamentary deeds. It is inheritable and subject to any creditor's claims. There is only one unity required and that is possession.

Here Xena promptly moved onto the farm so the requirement of unity of possession has been met. The fact that Alexa is dead is of no consequence because her death occurred after the transfer and the JT ROS was severed at that time.

Does Bart have legal title to all or a portion of the Farm

Bart now has a 1/2 interest in the farm as a tenant in common with Xena. The deed from Alexa to Xena severed the JT and as such any right of survivorship. With Alexa dead, he may be able to attach her other assets to get the money he is owed for taxes.

END OF EXAM

2)

Q2

Owner (O) in the sole possession of the Greenacre, conveyed eastern part of his land to the Buyer (B), and by this act, created landlocked parcel on the western half of the Greenacre (G).

1. Whether O has any right to access his part of the land?

EASEMENT

Easement is non-possessory interest in use of the land of another. There is affirmative easement, when the person receives the right to enter and make affirmative use of the land, and negative easement, that usually limited to water, air flow, subjacent and lateral support, that gives right the person to prevent the owner of the land from some act on his own land.

Easement appurtenant

The easement appurtenant benefits its owner in the physical use of the land of another. The land benefited is the dominant tenement, the land burdened is the servient tenement. Easement appurtenant runs with the land and the subsequent owner will be bond with the easement (unless bona fide purchaser without a notice).

Easement in gross

Easement in gross gives personal right to use the servient land. It does not run with the land, and is not transferrable, with exception to commercial easements.

Creation of easement

Easement can be created by express grant (must meet Statute of Fraud (SOF) requirement, be in writing and signed by the party to be enforced), by implication (by prior use or by necessity), by prescription, by estoppel, or equitable easement.

Express grant

There is no fact that O preserved right to use landlocked parcel by express grant. He failed to expressly state such easement in deed and properly record it, and now have to find the way to access his land by any other available means.

Easement by implication

Easement by prior use, or quasi-easement.

There are three prerequisites in order to claim easement by prior use: (1) there must be unity of the ownership on two parcels before they are severed to dominant and servient tenements, (2) the easement must exist prior the severance, and (3) there must be reasonable necessity in use of the easement.

Even though O was indeed in sole possession of the G before he severed into two parcels, the second element is lacking, because there is no fact that the owner used easement trough the eastern part of the G. The question remains open - by what means O had egress and ingress to his land prior the sale since there was only one Country Road available at that time? It could be assumed that his house was on the very end of eastern part of the land, and when he divided the land he sold his house and intended to build new home upon return. Or it could be suggested that he indeed used the easement prior severance and still has reasonable necessity for its continuous use. The facts are silent to these assumptions, and it would be presumed that there was no easement at the time of severance of parcels, and the O cannot claim easement by prior use.

Easement by necessity

There must be three prerequisites, similar to quasi-easement, that must be met in order to claim easement by necessity.

(1) Unity of possession prior the land was divided to dominant tenement and servient tenement. O was a sole owner of G.

(2) Severance resulted in necessity to use one parcel (servient) for benefits of another parcel (dominant). O severed G to eastern part with only access to Country Road, and conveyed it to B, and remained interest in western part of the G with no access to Country Road.

(3) The necessity must be strict. The court considers strict necessity as a determinative point prior to put encumbrance on the land of another, such necessity must be absolute, without any feasible

means of access. Since G is bounded on three other sides - north, west, and south, by a county wildlife preserve, that is properly fenced and restricted from any private use, there is no alternatives feasible to the O to build another drive way to access Country Road in avoidance of crossing part of the land belonging to B.

Prescriptive easement

In order to claim easement by prescription the claimant must prove that there is an actual entry to the land, open and notorious, adverse to the owner's interest and continuous for statutory period of time. Since O left the country soon after conveyance, and had not returned until early this year, he unlikely be able to prove requirement elements of prescriptive easement.

Easement by estoppel

When the person receive express permission to access and use the land, and in reliance to this permission he performed some affirmative actions to his detriment, he might be entitled to claim the easement by estoppel. Here that are no facts that O performed any action in reliance to permission, moreover B did not give him either express or implied permission to egress or ingress of his land, therefor O unlikely can claim easement by estoppel.

Equitable easement

The court can grant equitable easement in exceptional circumstances when there is no another way to grant and when it is right to do so, in return the grantee of the easement may be required to pay a fee to the owner of the servient land to preserve the right. Since O could be more thoughtful about his right in land prior conveyance, and had a clear opportunity to preserve his right in a deed and properly record it, his negligence to do so shall not be remedied by the court in detriment to B.

Conclusion: O would be more successful in his claim for easement by necessity rather than prior use. Since conveyance of G to B created landlocked parcel, that has no alternatives to access Country Road other than crossing B's land, O more likely receives right for easement for the period of time while strict necessity exists.

(I found logical to discuss N3 prior N2 after discussing creation of easement.)

3. Legal effect of proposed new country road on the rights of the parties.

Termination of the easement

Easement can be terminated by: written release, abandonment, merger, forfeiture, condemnation, termination by prescription, or when necessity ends.

Necessity

In order for easement by necessity to become terminated, the strict necessity must end. It could end by the possibility to build another access way, changes in conditions of the neighboring land, receiving permission to access landlocked parcel (license), or merger to a sole parcel.

Presuming, that O had not received his right for easement by necessity yet, and read about foreseeability of the road construction that will abut his half of the G, does he have, if at all, a valid claim to easement by necessity.

Since the necessity exist at that moment, and if O intended to use the land for personal residence and deprivation from access to Country Road precludes him from use and enjoyment of his own parcel at all, the court may take into consideration that strict necessity at this moment is established and grant him right for implied easement.

On the other hand, the courts are resilient as to impose obligations by burdening his land of another, when there is an obvious opportunity to receive egress and ingress in the nearest future through another road. Since O still has an existed necessity, it could be right to suggest to grant O the easement in gross, i.e. license to use B's land until condition subsequent occurs. License does not run with the land and can be revoked by B if O abuse such access to the land and neglect to build another road as soon as the construction project is completed in late 2020. This alternative may work well for both parties, unless B will assume that O cannot claim any rights of easement because it was terminated by prescription or abandoned

2. Legal effect of O's nonuse of his land from 2001 till 2020 (19 years)

B can object all allegations by O because the right to claim of easement was terminated by prescription.

Termination by prescription

Such termination occurs when the owner of the servient tenement precluded the owner of dominant tenement from use of easement. This preclusion must be open, notorious, adverse and continuous for statutory period.

Open and notorious

B erected fence around perimeter of his entire land soon after the closing. This was open and notorious act, and O should have known about would he inspected his land or check it after the conveyance. B is not required to notify the O about any construction work on his land, but since the fence was built soon after he purchased the land and existed ever since, this fact confirm element of open and notorious physical preclusion from access of land by O.

Adverse

B will state that it is obvious that he erected the fence to prevent any crossing his land by unwelcome trespassers, including O. O did not have permission to trespass B's land and B openly claimed his adverse act against O's interests.

Continuous for statutory period

Statutory period for any civil claims in local jurisdiction is 10 years. It is exceed the time while O was absent from the country and could reasonably claim his right for the easement on B's parcel.

O would try to object on the reasons that his absence from the county was emergent and he had no opportunity to return early, and he paid taxes on property and entitled to have access to landlocked parcel, he did not know about SOL of ten years. The court would be resilient to make exclusion, and may suggest for parties to mitigate damages.

B can also claim termination by abandonment, however, since the easement was not granted yet, it cannot be abandoned. Moreover for termination by abandonment, the party must have an intent and some affirmative act to abandon the easement. O was lack of intent.

Conclusion: The court unlikely grants easement by necessity to O, even if O proves that strict necessity exists and it is unknown when the new construction project to be completed, because B would be more persuasive in claiming termination of easement by prescription. O would be left to wait for construction project completion.

END OF EXAM

3)

Question 3

A) Likely not the best answer: The deed to the County - "in lieu of eminent domain" - is an equivalent of zoning. It is not zoning.

There is no indication that eminent domain would actually occur. Eminent domain is the process by which a governing body takes public property for legitimate purposes (public use). The Fifth Amendment states that private property cannot be taken for public use without just compensation. The process for eminent domain starts with the government trying to settle for the property. The county official just pointed out to the developer that the increasing residential development of the land would necessitate construction of another elementary school in the district. This does not mean that the the county would have tried to start eminent domain proceedings against the owner of the property and that the school would to have come from those 200 one-acre residential lots. The land for the school could have had to have been required to be purchased somewhere else in the county via exaction. Exaction is a fee or land dedication that a property owner must pay in exchange for developing a property. He bought the land for residential purposes, but that in itself does not require him to build a school without the county requiring exaction. In this case, neither eminent domain or exaction was initiated by the county; the developer came up with the idea to grant the land to the county on his own.

Zoning is an exercise of the police power to protect health, safety, welfare, and morals. States have enabling statutes which delegate the state's police power to lower governing agencies so then they can develop an enact zoning regulations. The body of zoning regulation is called a comprehensive plan and is a statement of objectives and standards for development. It could be argued that the building of an elementary school would help protect health, safety, welfare, and morals by caring for children. From the county official, the only indication that there might be an underlying zoning requirement is his statement that "increasing the residential development of the land would necessitate construction of another elementary school in the district." Assuming this is not an off-hand comment, it again does not require it to be within the 200 acres. Also, zoning must actually exist for it to be enforceable. There cannot be "the equivalent of zoning" as the answer choice suggests. The "equivalent of zoning" supposedly requiring a school to be built on those 6 acres was created by the developer, not the county.

If there were a zoning restriction, the general rule is that whatever is more restrictive, the zoning restriction or the preexisting covenant, prevails. Zoning cannot get rid of a covenant as long as the original purpose of the covenant can still be accomplished with substantial benefit. In this case, the covenant requiring residential use (see below) would be more restrictive than the possible zoning requirement of building an elementary school somewhere in the district. So had there been a valid zoning regulation, it would not prevail over the covenant.

B) Likely not the best answer. Inverse condemnation is when a state or federal law, usually a zoning or land use regulation, so weakens the property owner's rights to their property that it constitutes a taking. In actions for inverse condemnation, the plaintiff is trying prove a taking occurred so they can get compensation. This could be through a permanent physical occupation, an exercise of police power to stop a nuisance (not a taking), a regulation going too far, or looking at economic impact and interference with reasonable investment back expectations. There are no facts to indicate the government took any action in relation to the property other than to buy it from the developer at the developer's request. The government did not take anything from the developer. The developer initiated the sale of the six acres. The developer thought that the subdivision's residents would like the school to be nearby, so he contracted to sell to the county six acre lots in the subdivision. It was based on his own whims, instead of any official action by the county. While a county official made a comment to him, no official action of taking had been started. If it had, there would not have been a requirement for it to be on those six acres. It could have been anywhere in the district.

C) Likely not the best answer. Just because there is no written restriction in the county's deed does not mean that the county is not subject to a covenant via an overall common scheme.

The type of covenant that applies here is likely an equitable servitude. The purchasers of the first 100 lots feared an adverse impact on traffic in the neighborhood. They would likely want an injunction to stop the building of the school to prevent the traffic, instead of monetary damages. When seeking equitable relief, equitable servitudes could be the basis. Equitable servitudes are enforceable by injunction with no regard to privity, so long as the promise touches and concerns the land, there was an intent for it to apply to the successor, and the subsequent purchases has notice of the covenant. It may be implied instead of in writing, though California requires it to be in writing. Here, there was a writing. The developer filed a plan displaying 200 one-acre residential lots with the county records office. The promise touches and concerns the land because it restricts the use of the land to residential purposes. The residential subdivision development was intended to include all 200

lots. A further implication of intent could be found in the deeds to the first 100 lots which stated that "the premises conveyed herein shall be used solely for residential purposes." While that only applied to the premises conveyed herein, that align with the previous intention found in the filed and recorded plan, creating an reasonable expectation for the purchasers.

The purchasers would also argue that the county was on notice. There are three types of notice: actual (direct communication), constructive (recorded), and inquiry (facts that would cause a reasonable person to inquire into other interests). An argument could be made that the county was on actual notice because the plan displaying the 200 one-acre residential lots was filed with the county itself at the county records office. However, notice upon one government office is not necessarily notice upon all. Whether there was constructive notice would depend on which index the jurisdiction uses. A tract index apprises people if there is a recorded instrument that is not on their property, but concerns their property. This would put the county on constructive notice. If the jurisdiction used a grantor/grantee index, they would not be on notice because it only discusses the property itself. If there was not actual or constructive notice, the purchasers could argue that there was inquiry notice because there were 100 nearby lots that were all residential.

D) Likely the best answer. First, the developer contracted to sell to the county the six lots. It is possible that the sale has not yet been fully completed and that the purchasers could stop the sale. Second, an equitable servitude was likely created (see analysis above). This, if valid, requires the full 200 lots to be used for residential purposes. The developer was the owner of the other 100 lots and then sold 6 of those to be used for an elementary school, breaking the covenant. While the county could be sued for their intended use for the land, the developer was the one who initially breached the covenant.

END OF EXAM