SLO
Real Property
Spring 2022
Prof. C. Lewi

QUESTION 1

Hill lived on a slope running down to a road. He ran a sanitary sewer line from his house to the road, where he connected it to the city's line. Hill then subdivided his property, creating another lot between his house and the street, and built a house there, which he connected to the sewer line. He sold the lot and house to Valley, reserving an easement in the grant deed to Valley so that Hill could drive across Valley's lot to the road but not mentioning the sewer line. Valley discovered that Hill's sewer line crossed his property only after the line backed up and flooded his basement. Valley brought suit against Hill for trespass.

After Valley purchased the lot from Hill, the county built a new road along the border of Hill's property opposite Valley's lot, giving Hill direct access to a road.

Discuss:

1. Valley's probable chances of success against Hill for trespass with respect to the sewer line; and,

2. Hill's probable chances of success in asserting an easement to drive across Valley's lot.

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QUESTION 2

Alfred and Brenda owned neighboring parcels of land in a single family non-commercial neighborhood, Apple Acre and Banana Acre respectively. These parcels were part of a one (1) square mile development pursuant to a recorded development plan which designates the area for residential use, and sets out specific areas for a park and a small commercial area to serve the neighborhood (*e.g.*, a convenience market, a couple of local food shops, a very small hardware store, a UPS store.)

Alfred and Brenda entered into a mutual agreement, which they duly recorded against each of their parcels, promising for themselves and their respective successors, heirs, and assigns, that their properties would be used only for residential purposes.

A year later, Alfred leased his land to Carl. As part of the lease and lease negotiations, Carl was charged with knowledge of the record title of Apple Acre. Carl then used Apple Acre for his car washing business.

Brenda brought suit against Carl to prevent him from running his car washing business at the residence. What result?

You must (1) state which of the below possible answers is best and (2) also explain why each of the remaining answers is not the best.

(a) Brenda loses because U.S. courts do not recognize negative easements against business uses.

(b) Brenda loses because she is not in horizontal privity with Carl.

(c) Brenda wins money damages for breach of a real covenant.

(d) Brenda wins equitable relief for breach of an equitable servitude.

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QUESTION 3

Len, an excellent professional chef, installed a smokehouse in the large backyard of his residence three years ago to supply smoked meats to his friends and for promotional purposes for his business. This requires the smokehouse to be operating for at least 12-16 hours at a time.

Social media posts tout Len's "24/7" dedication to his craft with photos and videos of Len and his backyard smoker. As part of his social-media "branding," every two (2) months or so, Len invites about 40 people to come to his backyard for free ribs and brisket and "smokehouse vibes." Len plays music quietly during these events on a smart speaker from his house - cool jazz and blues - uses paper plates and plastic cups and paper towels for napkins, fold up chairs from his restaurant, and he bought a couple of strings of lights from Costco for less than $200. He makes sure that there are plenty of trash cans and that his guests are clean and respectful. These events are well attended - Len *is* a smokehouse master - and the attendants, though well mannered, do tend to get carried away at times and become a little noisy and there are some parking issues in the neighborhood.

Len's next-door neighbor, Michelle, enjoys the mild climate of San Luis Obispo and spends a lot of her time outdoors. She is annoyed by the smoke and smells from Len's property and by the hub-bub and parking congestion from Len's events. Michelle stopped having parties outdoors after receiving complaints from some of *her* guests. She asked Len multiple times to stop using the smokehouse and to stop doing the events, but he rebuffed her requests.

After a year or so, Michelle was fed-up and decided to take more aggressive action. As part of her efforts to have Len's backyard smokehouse stop, Michelle - who is best friends with the Mayor - asked for and was able to have City enact new City ordinance 12:03, which provides:

> "Effective in 90 days, all outdoor bbq, smokers, fire-pits, smokehouse and/or similar use is limited to three (3) hours/day for every residential property in the City."

Len says that if he stops using his backyard smokehouse and hosting the events, he will lose $10,000/year in lost income and further contends he has lost opportunity costs in an unspecified amount - it will damage his "brand." Len has not stopped with the smokehouse or the events and it has been more than 90 days since 12:03 was enacted.

1. If Michelle sues Len regarding his use of the smokehouse, (a) what claims, if any, may she reasonably raise, (b) what defenses, if any, may Len reasonably assert, and (c) what is the likely outcome? Discuss.

2. If Len sues City with respect to new City ordinance 12:03, (a) what arguments may Len reasonably assert and (b) what is the likely outcome?

Assume that there are no statute of limitations issues.

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ANSWER: Q1

1. **Valley=s probable chances of success against Hill for trespass re the sewer are not great. Hill will likely be able to prevail on a theory of implied easement from prior existing use.**

Type of Easement in Favor of Hill for the sewer line:

There is nothing in writing for the sewer line so no express easement or any other type of express agreement or covenant will not apply. However, Hill will likely be able to obtain an order from the Court for an Aimplied easement from prior existing use@ for the sewer line.

Rule: (1) Unity of Title / Common Grantor; (2) Apparent Existing Use Prior to subdivision / Notice to Successor and (3) Reasonable Necessity of Use. All elements are satisfied on the given facts

Analysis; Hill owned the whole parcel, built a house and ran a sewer line from that house to the City sewer main; then subdivided and built another house on *that* parcel, hooking its sewer line up to the sewer line that services the older house and in turn connects to the City sewer main. [Common Grantor / Unity of Title. / Prior Existing Use] Hill then sold the subdivided parcel and newer house to Valley. Was the sewer line apparent so as to give Valley Anotice?@ Valley will, argue ANo@ B it was buried and old and well out of sight and thus he had no notice but Valley will likely lose that argument. The Court in *Van Sandt v. Royster* found on similar facts that someone in Valley=s position at least should have known from the lay out and chronology of the adjoining properties that the shared sewer line was there B that it was Aapparent@ from all relevant facts and circumstances. One needs sewerage for one=s house, there was a house on each parcel and they must have had sewerage goes the argument from *Van Sandt*, and thus Valley was on notice of the prior existing use at the time he bought his parcel from Hill, at least that is the conclusion of the Court in *Van Sandt*. Hill=s continued use of the now shared sewer line is reasonably necessary. [Notice and Reasonable Necessity.] An implied easement by necessity from prior existing use will likely be found in favor of Hill for his continued use of the shared sewer line and Valley=s trespass case will fail.

For extra credit B other easement theories?

An easement by necessity requires strict necessity, which here the facts do not establish. Hill could use a septic tank or a sump pump, for instance, and does not have to run the sewer line across what is now Valley=s property.

There is no evidence of a license or other facts supporting estoppel.

There is no evidence of adverse use for the statutory period C a necessary element of prescription.

2. Hill=s probable chances of success in asserting an easement to drive across Valley=s lot.

In what is not a close call, Hill will win. There is an express easement granting him this right and there is no evidence such easement has been revoked, released, abandoned, or destroyed by prescription. That Hill may have different access to a new road does nothing to change the express easement. This is NOT an easement by strict necessity case.

ANSWER:

Question 2

(a) *ABrenda loses because U.S. courts do not recognize negative easements against business uses.@* NO. Not the best answer. Though true, the claim is irrelevant because Brenda could enforce her rights via a covenant and/or an equitable servitude and stay clear of the somewhat problematic negative easement argument, not to mention that historically, negative easements were limited to light, air, support, and water flow, and the Aresidential use@A only covenant is none of these. And, there is a better argument that Brenda will win here, at least for injunctive relief.

(b) *ABrenda loses because she is not in horizontal privity with Carl.@* NOT the Best though close. Historically, horizontal privity of estate was necessary for the burden of a real covenant to run, but not the benefit. While true that Brenda is not in horizontal privity with Carl B the burden of a promise between neighbors without any further consideration or coupled with a grant or settlement, etc. will not run with the land. Now, though, the trend is that horizontal privity of estate is not required. See p. 851 (which, admittedly, could be a bit more clear about the current state of the law). And, there is a better argument that Brenda will win here, at least for injunctive relief.

(c) *ABrenda wins money damages for breach of a real covenant.@* NOT the Best. Because Carl, as a tenant and not the holder of fee simple absolute, has a lesser estate, the burden of the real covenant does not run, even though he has constructive notice of it. And, we have the issue of the burden of a promise between neighbors without any further consideration or coupled with a grant or settlement, etc. will not run with the land. We would need further information that Carl agreed to be bound by the covenant, and we have no such information. Brenda could sue *Alfred*, for money damages, who remains the owner of the parcel and bound directly to Brenda by the covenant (we have no evidence that Alfred was released when he leased Apple Acre to Carl.)

(d) *ABrenda wins equitable relief for breach of an equitable servitude.@* BEST answer. For an equitable servitude to apply and run with the land, privity is not strictly necessary. Carl is charged with constructive notice of the covenant between Brenda and Alfred

that is recorded against the parcel he leased from Alfred (we are told that the lease imposed this on him), and Carl knew or should have known from the nature of the SFR neighborhood and the prior recorded development plan that the negative covenant was consistent with the primarily residential nature of the recorded development plan (common scheme). Moreover, that common scheme creates on its own a valid basis for Brenda to seek injunctive relief against Carl based on an equitable servitude..

ANSWER
Question 3

1. Michelle vs. Len B Nuisance for the Smokehouse and Events

a. Private Nuisance

A private nuisance is a substantial and unreasonable interference with another person=s use and enjoyment of their property interest.

I. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, Michelle finds the smoke and smell and the hub-bub of the events annoying, so much so that she stopped having parties. While relevant, Michelle=s subjective reaction is not dispositive. It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse and the events. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. And the events appear to be pretty low-key, really; the facts state Aquiet music@, low intensity lighting, that the attendants are mostly courteous and clean and they occur only every two months or so.

If the smoke and smells and/or the hub-bub from the events are found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended but it is possible that a Court would find that Len=s uses are not Asubstantial@, and if so, that would be the end of Michelle=s private nuisance claim. Assuming for the sake of analysis that Len=s uses cause Asubstantial harm@, we move on.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. There are two different approaches; one involves the severity of the actual harm to the specific plaintiff=s property interest without regard to the benefit of the of defendant=s conduct, *i.e.*, the dairy farmer under the power lines. However, under the majority view, this is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse and/or the events is/are unreasonable because it/they prevent(s) her from enjoying the outdoors in the way which she had done for years. Furthermore, she is prevented from having her parties, and likely the smoke and smells and hub-bub depreciates her property somewhat.

However, L will counter that the smokehouse and events enable him to hone his skills as a chef and provide smoked meats to his friends and promotes his business and to earn a little income and up until recently, was perfectly lawful under the relevant land-use regulations. He will argue that these activities are of substantial benefit to him and the community and are not unreasonable (and that they are a relatively low impact activity.)

However, because we assume for the sake of analysis that L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse and events will more likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. The introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke and noise and parking issues are not a trespass onto Michelle=s land B no physical interference B and therefore there is no actionable interference.

M will counter that the smoke and smell component of the nuisance is fundamentally particulate in nature, because of how noses work. Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property. Michelle will also complain about the noise from the events, which, if loud enough, may qualify as an actionable nuisance (though the facts state the music is quiet and that the guests largely are courteous and behave themselves.) Because there is some degree of physical trespass, M will likely succeed in demonstrating interference.

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance. Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence and the noise and hub-bub from the events (which we do not necessarily assume), M could succeed in an action for private nuisance.

Remedy:

Generally, the remedy for a private nuisance is money damages and/or an injunction to stop the offending activity. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages are preferred. Of course, while a temporary protective order (TPO) may issue, no preliminary or final injunction will issue if it appears the plaintiff does not have a reasonable likelihood of success on the merits regardless of any balancing of the hardships.

Here, L's smokehouse serves a limited economic purpose, and does not benefit the community as a whole. If we assume that M will likely prevail on the merits of her nuisance claim B which we do not B M will likely receive an injunction (her money damages claims are very speculative.)

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large. And we now have City ordinance 12:03 and its limitation on backyard smokey-activity.

I. Standing

Generally, where a public use ordinance is allegedly being violated, it is up to the public entity to enforce the ordinance and seek a remedy; no private cause of action is established by the ordinance. However, a private individual can sue for Apublic nuisance@ in certain circumstances. In order to state a cause of action for public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. M=s objection to the events, for the same reasons, is not going to provide her a cause of action in public nuisance. Therefore, M lacks standing to bring a public nuisance cause of action.

2. Len vs. City for Invalid Zoning / Land Use Ordinance and Regulatory Taking:

Len will argue (1) that 12:03 is an invalid zoning or land use ordinance and/or (2) that ordinance 12:03 is a Ataking@A because it goes too far and deprives him of a valuable property right without compensation. Len=s arguments will likely fail.

a. 12:03 is a Valid Zoning / Land Use Ordinance.

City is allowed to enact zoning and land use ordinances as a valid exercise of the State=s police powers delegated to City through the relevant enabling statute(s). We presume here that the enabling statute does properly and clearly authorize the type of land use restriction like 12:03 and make no analysis based on the enabling statute itself.

i. *Is 12:03 void for vagueness?* No.

Is 12:03 clear enough so that a reasonable person will know what it is they have to do to comply and what would be a violation? Yes. 12:03 states expressly the type of use that is regulated (Aall bbq, smokers, firepits, smokehouse and/or similar@), what is a permissible use (Alimited to three (3) hours/day@ per residence in the City) and when it becomes effective (90 days from the date it is enacted.) Len may argue that the term Aevery residential property@ is vague, *i.e.,* does that mean every apartment in an apartment building, but as applied to Len B which is a proper application of rule to fact (see *City of Issaquah*), who owns and lives at the residence, there can be no doubt that 12:03 applies only to him and the other occupants at Len=s property. Not void for vagueness.

ii. Is 12:03 unlawful on constitutional grounds? Probably not.

Neither a backyard smokehouse nor holding periodic events at your house for a commercial purpose will be deemed Afundamental@ rights (and Aproperty ownership@ is not a Afundamental right@) and thus under the forgiving Arational basis@ standard of review, City will likely be able to establish that 12:03 was enacted for purposes of Apublic health, safety, welfare, or morals@ as a valid exercise of the State=s police powers.

Len will argue that the practical effect of 12:03 is an unconstitutional infringement on his fundamental right to assemble (if no smokehouse, then no events he will say). Assuming for the sake of argument that this is true Bwhich we do not B then 12:03 will be subject to a A@strict scrutiny@ standard of review where City will be required to show that it has a Acompelling interest@ in enacting 12:03 and balancing the benefits of the ban on backyard smokey goodness for more than 3 hours/day against the harm caused by 12:03 will come out on the City=s side. This may be a close call.

City will assert that smoke is a health hazard (there is some newish science that also suggests charred meat is cancer causing), and that City has a compelling interest in its residents= health that will trump Len=s rather tenuous unfettered rights of assembly. If City residents want bbq and smoked food, they can go to the commercial parts of the City where it is perfectly lawful and enjoy them there (and even take them home.) Further, 3 hours is plenty of time to cook nearly anything on a backyard grill or smoker and 12:03 allows for that use. Nor does 12:03 ban the parties or events at all B only more than 3 hrs/day of the smoke and smells from bbq and smokers. And 12:03 does not touch the parking issues at all, leaving no impact on Len=s use and other residents= use. On balance, in a close call, City should win.

iv. Len=s best argument is that he is Agrand fathered in@.

Len will argue that prior to the enactment of 12:03, his backyard smokey happiness and events were compliant and perfectly lawful, which we presume for sake of this analysis to be correct, and thus he is Agrand fathered@ in and does not have to comply with 12:03. That is a good argument with solid, long-standing support in the case law.

Nevertheless, the better view is that City is allowed to make changes to its zoning and land use ordinances over time and is not required to permanently allow what are now non-conforming uses to continue B AA community should have the right to change its character without being locked into pre-existing definitions of what is offensive.@ (Dissent, *PA Northwestern Distributors, Inc.*) B particularly where City creates a period of time for what is now a non-conforming use to become compliant B the so called Aamortization@ period.

While our text teaches that the cases are mixed on the issue, in general, in assessing the reasonableness of the amortization period, courts have looked at 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 (or recapture)) the amount invested in the non-conforming use. (Pg. 921) B in other words, is it reasonable in light of all the facts and circumstances. Here, we do not have any actual facts as to how much Len invested in his backyard Asmokehouse@ but we do know it is in the backyard of his home in a residential neighborhood and that he does not appear to have made any other real Aimprovements@ B he uses paper plates, plastic cups, paper towels for napkins, uses his home smart speaker for the music, strung a couple of lights from Costco , and uses folding chairs that he brings from his restaurant. Probably will not take a lot of time for Len to reclaim his minimal investment. As for public detriment, that one is harder B lots and lots of people like to bbq and may have it running for longer than 3 hrs on any given day. Still, City should be allowed to dictate that the neighborhood not always smell and look like a smokehouse and make that change at the proper time without locking in all prior existing uses for all time. To be clear, this is a close call and if I were advising Len, I would tell him that this is by far his best chance of success in challenging 12:03 is invalid (least as to him) but he should be prepared to lose.

B. 12:03 Does not Constitute a Taking.

Having concluded that 12:03 is a valid zoning ordinance and that Len should expect that he will have to comply after 90 days, Len will next contend that 12:03 has put him out of business in his backyard and downgraded the utility of his property B a taking without just compensation. Len will lose.

I. *Was there a taking at all?*

A taking generally results where there is an actual appropriation, destruction, or permanent physical invasion of one's property. *Loretto*. That did not happen here. Unlike *Loretto*, nothing about 12:03 requires Len to allow any permanent physical occupation of his property. City makes no entry nor does 12:03 require Len to allow any other person access to install anything on his property. Thus, 12:03 does NOT constitute a *per se* taking

However, the enactment of a regulation can result in a taking. The term Ataking@ now encompasses some governmental action that significantly damages property or impairs its use that diminishes economic value and interferes with reasonable, investment-backed expectations of its holders.

ii. Is Len=s Property Interest Taken Thru A Regulation?

Regulatory taking questions often arise in connection with states' exercise of their police power (*i.e.*, the power to legislate for the health, welfare, safety, morals, of the people). Whether the government is required to compensate a landowner depends upon whether the act of the government is deemed to be a taking or merely a regulation.

While the government must fairly compensate an owner when her property is taken for public use, it need not pay compensation for mere regulation of property. Thus, whether government action amounts to a taking or is merely regulation is a crucial issue. The question is one of degree. When a state or local entity validly regulates for health, safety, or welfare purposes under its police power B regulating a nuisance B then the government action merely amounts to a regulation without payment of compensation. Yet even though the general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Regulations governing use of property generally do not require compensation to the owner, even if the government reduces the value of the property. There is, however, a regulatory taking if the regulations leave no economically viable use for the property. *Lucas v. South Carolina Coastal Council*. Here, the best analysis is that 12:03 is mere regulation and does not constitute a taking.

Factors in determining whether there has been a regulatory taking are (1) The economic impact of the regulation on the property owner, (2) the extent to which the regulation interferes with the owner's reasonable, investment-backed expectations regarding use of the property and, (3) the character of the regulation, including the degree to which it will benefit society, how the regulation distributes the burdens and benefits among property owners, and whether the regulation violates any of the owner's essential attributes of property ownership, such as the right to exclude others from the property.

Len is far from wiped out in his use of the property (it is still his residence, he can bbq and smoke 3 hrs/day, and is not prohibited per se from hosting events and the loss of $10k/yr plus some speculative lost opportunity costs will probably not come close establishing that Len has no economically viable use for the property.) Len=s reasonable investor backed expectations are more reasonably tied to his use of the property as his residence and not for a collateral back-yard hobby and business development program and are not therefore frustrated by 12:03 to he degree necessary to find a regulatory taking has occurred. 12:03 itself is not overly burdensome B it still allows smokey backyard cookery, just on a limited number of hours per/day; it promotes a neighborhood that is not constantly dominated by the smells of a smokehouse, which City could reasonably conclude would be irksome and undesirable in a residential neighborhood. The Aburden@ of 3 hrs/day of smokey cooking is spread out over every resident and is not unduly targeted and distributes the benefits of 12:03 throughout the City. And, as set forth above, 12:03

does not violate any essential attributes of property ownership (though this one is close and we can argue that we love smokey cooking and firepits and desire it at all times as part of our bundle of rights as property owners.) Moreover, there is no permanent physical occupation effected by 12:03 – no taking -- and, arguably, 12:03 is regulating the "nuisance" of too much bbq smoke and smells – again, no taking – and just the reasonable exercise of City's police powers for the public health, safety and welfare.

Finally, Len may argue the Agrand fathered@ use card again, this time under *Stop the Beach* B "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." That is what happened here says Len. He had an Aestablished@ right in his smokehouse which Ano longer exists@. But this can be said for any grand fathered use that gets regulated out over time and it is true that Len can still use his home property for all sorts of things, have his events, and even run a bbq or grill for 3 hrs/ day, and thus there is no credible argument that his Agrand fathered@ economic value was taken for purposes of it having to be paid for by City as a taking.

No taking and Len will lose.

1)

Valley v. Hill

1) Valley's Probable chances against Hill for trespass for sewer.

Easements

Easements are rights in the land of another. In this case, there are two lots in which the easements constructed are appurtenent because they abut one another and form a relationship of use. Valley's lot is the servient lot because it is being used to the benefit of Hill's lot, the dominant.

Prescriptive Easements

Prescriptive easements form when an individual uses the land of another, but without permission (hostile). The use must be continuous for a statutory period, against the owner's wishes (adverse), open and notorious.

Here, Hill's use of Valley's property almost, but not quite meets the requirements of prescriptive easements. The use of Valley's land has been continuous because the sewer was installed, and remain installed during the duration of the fact pattern. We do not know what the statutory period is in this jurisdiction (in CA it's 5 years). Additionally, the use was hostile because the land owner did not give permission, indicated by the fact that Valley was unaware of the use until the sewer line burst into his basement. Hill's use, however, is not open and notorious. The use in this case was hidden, without the owner's knowledge of the pipe. Nothing in the grant deed made reference to the existence of the sewer pipe, and indeed, Valley was surprised when it burst. Defendant Hill may argue that the use was open and notorious because he did not take any affirmative steps to conceal the use, but that burying the sewer is required based on the inherent requirements

of this type of project. This argument will fail, however, because the use required by prescriptive easement is that the owner of the land has notice of the use and the purpose of this style of law (adverse possession) is to promote the active engagement with the land by the owner. If the use was secreted, this defeats the intent of adverse possession, in that rewarding secreted use wouldn't promote the utilization/monitoring of land by landowners.

As such, Defendant's potential defense of prescriptive easement will fail.

Implied Easement → HOORAY !!! But what about Unity + common Grantor?

Implied easements are those easements which are demonstrated by the prior consistent use of a property, prior to its subdivision. Implied easements require only that the use be *reasonably* necessary.

Here, Defendant has a strong defense with the concept of implied easements. The facts provide that the sewer line was preexisting to the subdivision of the property. The use was already in motion before the lots were divided, and based on the use of the property in this manner, Defendant will be permitted to continue using it in this way. Additionally, the presence of the sewer meets the qualities of reasonably necessary, because the sewer (should have been) laid in the most direct route to the sewer main. In this construction, traveling across Valley's property may be reasonably necessary because an alternative route, or the installation of other sewage remediation, may be prohibitively or burdensomely expensive to Hill. This is a very strong argument for Hill to proceed on.

what about apparent notice?

Necessity

Easements of necessity are those that are required by the condition of the land, in that the land's nature prevents access to another's property, but for traveling across the servient

land. These easements require that the necessity be absolute, and that the two parcels were once one continuous lot of land.

Here, the lots were previously contiguous, single lots because the facts provide that Hill subdivided his single lot into the two that are present in this case. Further, absolute necessity requires that there is no feasible alternative exists. That may, or may not, be present in this case. Defendant Hill will argue that absolute necessity is present in this matter. He will argue that the only direction to the city's sewer line is through the adjacent parcel, and that diverting around the parcel would be impossible based on the soil composition, or a rocky cliff, or some other natural condition that limits the direction of the sewer through any direction but Plaintiff's. Defendant will also have to argue that there is no feasible alternative to waste disposal, such as a septic system, that may be likewise impossible to install given the nature of the soil. Plaintiff will argue that there are reasonable alternatives, such as diverting away from Valley's parcel, or installing a different system for waste disposal.

The facts do not provide enough information to conclude conclusively to this scenario, but it is likely that necessity is unavailable to the defendant because of the number of likely alternative sewage remediation techniques.

Grant/Express

A grant or express easement is one that is set in writing, which reflects the intent of the parties to engage in the easement relationship.

Here, there is no express easement because the facts provide that Hill did not mention the sewer in the deed, and that Valley was surprised by the presence of the sewer on his property. This will not be a successful defense for Defendant Hill.

Conclusion

Nice ... so proud.

Valley's overall chance of success in pursuing Hill for trespass is low, chiefly because there is an implied easement present. The other defenses fail on a few of the elements, but implied is the strongest because of the preexisting use, which existed before the conforming nature of the land. The court may not favor the apparent hiding of the sewer line by Defendant, and probably should require him to pay damages for the basement, but the sewer line itself should remain. → right on !!!

2) Easement to drive across lot

Prescriptive

Rule, see above.

Here, the nature of Hill's easement was open and notorious because the road would have been easily seen by the Plaintiff, and the use was not attempted to be hidden from the Plaintiff. This use is open because it is done without attempting to disguise the use. Additionally, the use is open and notorious because the conveyancing deed expressly made mention of that use. Indeed, the deed's mention of the use defeats another element of prescriptive easement, because by assenting to the terms of the deed, Plaintiff has given permission to the Defendant to travel across the property, defeating the hostile and adverse requirements of this form of easement. The use appeared to be continuous, at least for the duration of the fact pattern (statutory period is unknown) because Hill would have presumptively used the road regularly to access his home. Continuity matters however, and if Hill stopped using the easement when the new road was constructed, but before the statutory period lapsed, the prescriptive nature would not be met.

There are not enough elements to conclude on this form of easement, but it appears that there may not have been one because the county built the road after Valley's purchase, which indicates the construction occurred shortly after the sale/purchase of the lot.

Implied

Rule, see above.

The Defendant will want to argue Implied Easement to add to his assortment of defenses for this action. An implied easement may be present here, but it depends upon the earlier use of the land before it was subdivided by Hill, prior to the sale to Valley. If the road was preexisting to the subdivision, then this style of easement is met.

Necessary

Rule, see above.

This style of easement is implicated because the facts provide that the road was present so that "Hill could drive across Valley's lot to the road." While at one time, this may have been a valid defense, this style of easement requires that the necessity be *absolute*. In this case, we are provided that the county constructed a new road along the border of Hill's property opposite Valley's lot, which gave "Hill direct access to a road." Because there is an alternative route that Hill may take to access his property, there is not "absolute" necessity here.

As such, this is a failing defense for Hill.

Grant

→ this is a winner

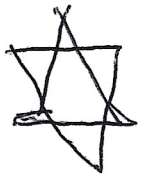
Rule, see above. Express is the gold standard.

This is the strongest defense that Hill has to argue here. The easement to travel across Valley's property was expressly granted in the form of a reservation in the deed conveying the land from Hill to Valley. The parties both had knowledge and the intent to make the present transfer of property ownership, with Valley making the express reservation of a

partial interest in the property. As such, the express grant was made in the deed, and Hill would be well served to rely upon this defense.

Conclusion - Road

Hill has a high chance of success in asserting the ability to drive across Valley's lot. While the easement of necessity was destroyed by changing conditions of the access roads available to Valley, the express easement is clearly present, and also the strongest form of easement.



END OF EXAM

Winner. A few analytical quibbles but overall, you got it. Excellent work

83

2)

Really good. What about the recorded development plan + "common scheme"

D is the correct answer because Brenda brought a suit to prevent Carl from running his car washing business at the residence. That is a pursuit of injunctive relief therefore an action for equitable servitude. Equitable servitude is a promise regardless of whether it runs with land, equity will enforce the covenant against the successor if there is writing, intent, touches and concerns the land, and notice. (no need privity). For a writing, the original promise must be in writing. Here, Alfred and Brenda entered into a mutual agreement and duly recorded against each of their parcels promising that the properties would be used for residential purposes. Intent is where the original parties intended for the covenant to run with the land and bind all successors. Here, Alfred and Brenda mutually agreed and bound their successors by recording the intentions of their properties to be solely used for residential purposes. Touches and concerns the land requires that the covenant relate to the land. Here, the promise to the original parties was to keep the properties for residential purposes only. Notice requires that the successor in interest have actual inquiry or record notice of the covenant at the time of purchase. Here, Alfred leased the land to Carl and as part of the lease and lease negotiation Carl was charged with knowledge of the record title of Apple Acre, therefore he had notice of the covenant. Carl had breached this covenant (equitable servitude) when he used Apple Acre for his car washing business, and damages of equitable (injunctive) relief should be granted.

C is an incorrect answer. Brenda brought this suit for the purpose to prevent Carl from running his car washing business at Apple Acre. To seek prevention or injunctive relief falls within equitable servitude under covenants. Covenant is the promise to do or not to do something related to land. There are two types of covenants: real covenant and equitable servitude. A real covenant is a written promise between two parties, and we must determine whether a burden or benefit is at issue. In this case, a real covenant does

not apply because the breach of a real covenant would result in money damages, which Brenda is not seeking.

B is an incorrect answer. While B is a correct statement it is not the right answer. It is true that Brenda and Carl are not in horizontal privity because horizontal privity is between the original parties (Brenda and Alfred) and not a successor (Carl). Furthermore, Brenda is requesting the prevention of Carl running his car washing business from the residence, thereby triggering the issue of equitable servitude. Equitable servitude (supra.) only requires a writing, intent, touch and concerns the land, and notice; it does not require any privity between the original parties or the successor. → really good.

A is an incorrect answer. A negative easement restrict someone from doing something on a property. This statement does not apply to the issue because we are given no facts to indicate that an easement is involved at the suit at hand. Both Alfred and Brenda own their property and made a promise (covenant) to refrain from using their land for purposes other than residential means. They were not conferring any non possessory property interest rights.

END OF EXAM

Terrific work. Muy Sed.

85

3)

1a) Michelle's claims

Generally, a landowner should not use his land in such a way as to injure another. good

Nuisance

Nuisance is a substantial interference with the another's use of their own land. The action which creates the nuisance must either be intentional and unreasonable, or unintentional and negligent, reckless, or unusually dangerous.

Here, Michelle's best claim against Len is one in nuisance. She has a private nuisance because she is an individual who is impacted by Len's behavior, and although she has guests complain, she is the only party indicated in the facts as to have been negatively impacted by his behavior. Additionally, Michelle should pursue Len on the intentional and unreasonable components of nuisance. His behavior is intentional in that he is purposefully conducting himself to produce the smoke, creating noise, and inviting many persons into a residential area, which are the probable and foreseeable consequence of his repeated parties. Michelle will characterize the results of his behavior as being unreasonable by pointing to the repeated habit of guests to "get carried away at times" and become "a little noisy" and the repeated parking issues in the neighborhood and she will want to emphasize the frequency and duration of the smoke, the noxious nature of the smoke, the smoke impacting her quiet enjoyment of her own property, the obstreperous noise, and the impacted parking. To show that they are unreasonable, she may also wish to point towards existing, common uses throughout the community of backyards in a residential space.

1b) Len's defenses

Rule for nuisance, see above.

Len's defenses to Michelle's claims will be to minimize the apparent impact of his behavior to make it appear to be intentional and reasonable. Alternatively, he may point to the smoke, noise, parking as unintentional sequela but not negligent, reckless, or unusually dangerous.

Len will want to minimize the impact of his behaviors by demonstrating to the court that the nature is reasonable for a backyard. Many Americans enjoy the past-time of smoking meats, and it may be common place in the community in which Len and Michelle find themselves. Additionally, these parties only occur once every two months, music is played softly, and guests to his property are only 40 persons or so, and the property may be sufficiently large to accomodate them. The frequency of the events are important to demonstrate that the burden on Michelle is not unreasonable but is acceptable based on a neighborly attitude.

Len should also attempt to demonstrate that the smoke drifting, noise, and parking are unintentional consequences of his behavior. He (will claim) that he is not in control of the direction of smoke, that the guests are responsible for where they park, and that the noise is unintentionally carried into her property. This argument will fail because, while Len is not in control of the direction of smoke, smoke is a natural by-product of his intentional behavior.

1c) Outcome

The likely outcome of matter will result in the finding for Michelle. This is a likely finding because, not only is the smoke frequently interfering with the use of her property, the court should also evaluate the purpose and intention of Len in the use of his own property. It is clear that Len's motivations here are to use the space in a commercial

sense, by his own admission he will be losing $10k/year and untold damages to his "brand." This reasoning will make it much easier for the court to find that the improper use is intentional and substantial. Nice

2a) Ordinance 12:03

Zoning

A municipality may create ordinances which regulate land use, when the purpose of the ordinance is to regulate for the health, safety, welfare, and morals of the community. A municipality must be specifically granted the exercise of these police powers by the state government through an enabling statute or law.

The California state constitution has an enabling statute provision, and so for the purposes of analyzing zoning with the city of San Luis Obispo, it should be assumed that an enabling statute is operative here. Additionally, the city of San Luis Obispo is well justified in having a zoning regulation which regulates the reasonable use of meat smoking and parties within a residential community because there is a direct relationship between the health, safety welfare, and morals of the community. Smoke is hazardous and noxious to the surrounding residents, and so there is a clear health component. The number of persons entering Len's property presents a potential safety risk, particularly with the back drop of fire safety and crowd control in those situations. Welfare is endanger because it negatively impacts the satisfaction of the town, and morals may be present because the city wants to promote an outdoors loving, friendly community of respect. Additionally, the statute can not be attacked for vagueness, as it specifically establishes expectations for the community. As such, the zoning law will be permitted to regulate Len's behavior, but he may have other avenues to pursue his claim.

Non-Conforming Use & Amortization

The government may prescribe a set period of time (the amortization period) for a landowner to bring non-conforming property into conformity with the regulation, where the use predated the creation of the zoning regulation. If the zoning regulation is for a non-nuisance purpose, and the government is forcing the business to come into conformity with the zoning regulation, the government must pay for this as a taking. If the zoning regulation is to stop a nuisance, then the regulation is not a taking.

Here, the government is regulating the use of smokers with the purpose of curbing a nuisance (see above). As such, the government may prescribe an amortization period and this will not be considered a taking.

Eminent Domain

The Fifth Amendment guarantees the implicit right of the government to take private property, but requires that any such taking for the public use be compensated to the original owner.

Public use has been construed modernly to mean any foreseeable public purpose. Here, the public purpose test is satisfied because the regulation is purposed to benefit the surrounding community of Len's home.

Eminent Domain - Inverse Condemnation

Inverse condemnation is a regulatory taking by the government. The taking is incidental to the primary purpose of the law, but impacts private property rights. To be considered a taking, the government must have permanently physically occupied the space or fully deprived the owner of all economic benefit of his home. Under the Penn Station ad hoc analysis, the court will weigh if there is a legitimate government interest, the extent to which the property owner is impacted, and the impact on investor's and their prospective investment outcome. Regulations for nuisance are by definition not takings.

Here, Len will want to assert this concept but will ultimately fail. The government is not permanently physically occupying his space, but is instead restricting Len's use of his property. The government is not fully depriving Len the full economic use of his property because the property that they are regulating is not a business but his home, and the primary purpose of the home is residential, and so the property value of the home is essential to the determination that economic value is not reduced because the business use of the home is incidental to its primary function, and the business still exists and functioning to generate income. Further, the governmental interest here is clear and legitimate because the government has an obligation to protect the health, safety, welfare, and morals of its community members. The extent to which the owner is impacted here is slight because, while providing an "authentic smokehouse vibes" might be important, there are reasonable alternatives her could pursue, such as hosting the events at his business, a park, or some other more appropriate space to mitigate his exposure to damages. Further, as discussed above, the government is regulating a nuisance, and therefore this regulation is per se not a taking.

b) likely outcome of Len's complaint

While Len's *best* argument is to claim that there is a taking occurring under the 5th amendment, this argument is likely to fail because the government is regulating a nuisance, and there are ways that Len can help to mitigate whatever economic exposure he may have.

END OF EXAM

Really, really good

Grandfathering? Check

Nuisance + regulating it? Check