SAN LUIS OBISPO COLLEGE OF LAW

Real Property

Final Examination

Spring 2024

Prof. C. Lewi

Instructions:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

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

Real Property
Spring 2024
Prof C. Lewi.

QUESTION 1

In the town of Greenfield, a longstanding conflict has arisen between two neighboring property owners, Alice and Bob, concerning the operation of their respective properties. Alice owns and operates a small dairy farm on her property which she has done since 1990, while Bob owns a quaint bed and breakfast situated adjacent to Alice's farm, which he has done since 2010. Assume Bob and Alice have all necessary permits for their respective uses.

The dispute centers around the noise, odor, and traffic generated by Alice's dairy farm, which Bob argues is negatively impacting the tranquility and enjoyment of his bed and breakfast, thereby causing him economic harm, i.e., Bob claims that he could do $150,000/yr in profit if Alice was enjoined from her uses, but that at best he does $75,000/yr in profit with Alice operating her farm next door.

Discuss the legal principles and considerations involved in analyzing Bob's potential claim against Alice under the nuisance doctrine. (Do not address any public nuisance issues that may or may not arise here and assume that there are no statute of limitations issues.)

In your response, address the following:

1. Define the legal concept of nuisance and how the nuisance doctrine attempts to balance the rights of property owners with the interests of the community?

2. Assess the factors courts typically consider in determining whether a nuisance exists, and any particular factors that apply in the context of noise, odor, and traffic complaints associated with agricultural operations.

3. Explore the potential defenses Alice may raise against Bob's claim of nuisance. Are there any legal doctrines or principles that might shield Alice from liability?

4. Discuss any relevant case law or legal precedents that may guide the resolution of this dispute in Greenfield. How have courts historically addressed similar conflicts between agricultural activities and neighboring land uses?

5. Finally, analyze the potential remedies available to Bob if the court finds in his favor and concludes that a nuisance exists. What types of relief could Bob seek, and how might the court balance his interests with those of Alice and the broader community?

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QUESTION 2

Amy owned Blackacre and Redacre, which were 10 acre parcels next to each other. Amy lived on Blackacre.

In 2000, Amy sold Redacre to Bob and, as part of that transaction, Bob gave Amy a written promise that Amy could travel across Redacre to come and go from Blackacre ("ingress and egress.") That signed, notarized agreement was given to Amy and she put it in a box at her house with other important papers. Amy did not record the written promise given to her by Bob and it has never been recorded. Amy did travel across Redacre for ingress and egress and a definite dirt roadway was identifiable on Redacre from that use.

In 2010, Amy sold Blackacre to Cathy. Amy did not tell Cathy about her agreement from Bob and Cathy never knew about that agreement. Amy died in 2015.

Cathy did continue Amy's use of Redacre for ingress and egress to and from Blackacre. Bob did not object and indeed, would wave at Cathy as she passed by from time-to-time and they had good neighborly relations.

In 2020, Bob sold Redacre to David. Bob did not tell David or in any other way communicate to David that Bob had made a written promise to Amy in 2000. Bob died two (2) weeks after he sold Redacre to David (killed in a car accident.)

David then put up a barrier across the roadway that Cathy used, preventing Cathy from using Redacre for ingress and egress. There is another way for Cathy to come and go from Blackacre directly to a main roadway but it would cost her $100,000 to develop that alternative access road.

Cathy removed the barrier and resumed her use of Redacre for ingress and egress.

In 2021, David sued Cathy for a Court order requiring Cathy to stop using Redacre for ingress and egress and quieting title to Redacre in favor of David and against Cathy. The pertinent statute of limitations is 5 years.

Evaluate and discuss in your answer

1. David's arguments in favor of his requested relief;
2. Cathy's arguments in support of her position;
3. The reasonable likely outcome.

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QUESTION 3

The city of Maplewood is located in the State of WashiOreFornia. That state has a law which provides:

> "The State hereby delegates to all local governing entities within the State the power to issue appropriate rules, ordinances, and regulations to promote the public health, safety, welfare, or morals."

Jane owns a commercial property in the downtown area of Maplewood. Maplewood is a rapidly growing and desirable suburban town. As a result, Maplewood has a housing crisis and it is difficult for people who want to live and work in Maplewood to find housing there.

Maplewood, historically, has strict land use regulations. Jane's property is zoned for commercial use only. Jane recently converted a portion of her commercial property into a residential 4-plex; she did not obtain the necessary permits from the local zoning authority but she did construct the 4-plex using a licensed general contractor and the building does comply with all building codes, is sound and habitable, and is ready to be rented out.

The Maplewood Code Enforcement Department has now issued a notice of violation to Jane, alleging that she has violated the town's zoning regulations by converting part of her commercial property into a residential building without authorization.

Interestingly, Maplewood's violation notice also states that Maplewood will grant Jane the necessary permits for the 4-plex if Jane transfers to Maplewood another property that Jane owns on the other side of town, in an area zoned "residential" so that Maplewood can turn *that* property into a city park (that property is worth $100,000.)

Jane contests the violation notice and further challenges Maplewood's "offer" that it will drop the case if Jane gives over the other property. Jane files suit and seeks an injunction and damages against Maplewood. Assume Jane's suit is timely and filed in the proper venue.

Discuss

1. Jane's arguments in support of her suit against Maplewood;
2. Maplewood's arguments in defense;
3. The reasonable likely outcome; and,
4. Alternative ideas for Jane to consider in getting Maplewood to give her the necessary permits.

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SLO & HYBRID
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ANSWER KEY TO QUESTION 1

- *Generally, property owner can use their property as they wish and in compliance with land use rules*
- *However, one cannot use one's property to the detriment of another's use and enjoyment of their property*
    - *This is the basic expression of the legal concept of nuisance.*
    - *The rule sounds easy but presents challenges in application*
- *Generally, in determining whether there is an actionable nuisance, the Court will balance*
    - *The utility of the offending use, against*
    - *The harm caused by the offending use.*
    - *If the harm outweighs the utility, generally this will be deemed a nuisance.*
        - *High utility needs high degree of harm to be a nuisance*
        - *Low utility needs lower risk of harm to be a nuisance*
    - *Some courts will focus much more on the harm and not so much on the utility*
        - *Dairy farmer's cows injured by power company's overhead transmission lines*
        - *The harm is real and serious and we do not much care that everyone needs electricity*
            - *Minority view but in given circumstances will apply*
            - *Harm is deadly, for example, will probably outweigh utility no matter what*
- *An actionable nuisance can support a claim for*
    - *Injunction, and/or*
    - *Damages*
- *Special rules tend to protect certain uses from nuisance claims, on the basis that these uses produce highly desirable products*
    - *AG uses are generally included within these types of protections*
        - *Farms are messy but everyone needs to eat*
- *Coming to the Nuisance – I was there first – is relevant but we have seen in Del Webb which is the feed lot case out of AZ and Hadacheck which is the brick-yard case out of California, over time residential and human uses tend to trump pre-existing messier uses, which are then declared nuisances (or zoned out as in the brickyard case)*
- *A person causing a nuisance under the Boomer case may be allowed to continue the nuisance as long as they are willing to pay for it.*
- *So, what does all this mean for our parties here?*
    - *Assuming the subject jdx has rules protecting AG use from private nuisance claims (as does CA), Bob will likely lose a nuisance claim and Amy will be allowed to continue to use her property as a farm*
    - *Assuming no such rules, Bob is in better shape but will have to prove the $75k damage to his business is enough harm to outweigh the utility of a longstanding and productive farm, which may not be an easy proof problem.*
        - *My view: Bob loses again, especially since he came after but, as we have seen, over time, messy AG uses will be phased out by nuisance doctrine in favor of human habitation*
    - *Under the Boomer case, Bob can ask that in lieu of Amy stopping she can pay Bob $75k/yr for the privilege of her continuing nuisance.*
    - *Conversely, in the unlikely event that Bob prevails, under the Del Webb case, the Court may require Bob to pay Amy the amount of money necessary to relocate Amy's farm or what it would cost Amy to shut down her farm. Be careful what you ask for Bob.*

ANSWER KEY QUESTION 2

- *Real Covenant runs with the land – Not a great argument for Cathy but she can assert David had Inquiry Notice*
    - *Cathy's best defense is that she proves Bob's promise to Amy runs with Blackacre and Redacre*
    - *It most likely does not*
    - *There is horizontal privity between Bob and Amy, with proper consideration because part of Amy's sale of RA to Bob.*
    - *But there is no binding vertical privity that will bind David, the successor to RA which is the burdened parcel.*
        - *David is not on notice of the Bob to Amy covenant*
        - *Not recorded so no constructive ntc*
        - *No evidence that Bob or anyone else told David so no actual notice*
        - *Cathy's best argument is that David is on inquiry notice from the pre-existing roadway traveling across RA and going to BA*
            - *Inquiry Notice is sufficient legal notice but it is hard to prove*
            - *Still, given that the roadway was apparent, open, and obvious on the surface of the land, this is Cathy's best and only argument that David was on notice of the burden at the time he bought RA from Bob*
    - *On the benefit side, vertical privity between Amy and Cathy is present – voluntary transfer – and notice is not necessarily needed on the benefit side for the covenant to run with the land.*
- *Implied Easement – Not likely*
    - *Cathy can also argue she has an easement across RA.*
    - *No easement by necessity for Cathy across RA*
        - *No strict necessity*
        - *Cathy can develop alternative ingress/egress for BA*
        - *The $100,000 cost is immaterial, legally, under the majority view, and even under the emerging Restatement view, most likely $100,000 not a fatal expense to allow an easement by necessity*
    - *No Quasi Easement – Not Bad but proof problem*
        - *Cathy will argue common grantor in Amy with a pre-existing use, intent to create an easement in favor of BA and against RA, and reasonable necessity*
            - *Not bad*
            - *Intent is shown in the Bob to Amy covenant but . . .*
                - *Proof problem*
                - *The covenant is unknown to Cathy and David and Amy and Bob are dead*
            - *We do not have facts, one way or the other, of a pre-existing use, and if no pre-existing use, no quasi-easement.*
            - *However, if we presume pre-existing use at the time of severance (Amy selling RA to Bob), then . . .*
        - *There is nothing to imply because Amy obtained an express, written covenant for ingress/egress across RA at time of sale to Bob.*
        - *That it was not recorded is not material to this analysis*
        - *Cathy can, again, argue apparent notice because the dirt roadway was there when David bought RA and that is not a bad argument (see the Van Sandt v. Royster case) but because there was an actual express easement granted to Amy by Bob, an easement by implication may be precluded (assuming that any of the present litigants know about it that is . . .)*
- *Prescriptive Easement – No; lack of hostility for requisite statutory time period*

- *5 years statute of limitations and the David / Cathy dispute is only 1 year old so that limitations period has not expired yet*
- *Cathy has to tack onto prior uses to prove a prescriptive easement.*
- *Open and notorious and actual use in a clear and definite pathway are established by the facts.*
- *Hostility, however, is NOT.*
    - *Cathy's predecessor, Amy, was not hostile to Bob; She had express written easement*
    - *Cathy's use against Bob was for 10 years (2010 to 2020), longer than 5 years but was it hostile?*
    - *Best analysis – NO*
        - *Bob, at all times from 2010-2020, is still owner of RA and waved at Cathy as she passed by and they were good neighbors*
            - *We can presume a neighborly accommodation at least so not hostile*
        - *We can also argue with some merit that nothing had changed for BOB, that he had given his written easement to Amy and we presume he was OK with Amy's successor continuing to use the roadway under that same written agreement so NOT hostile.*
    - *Cathy will argue that lack of permission is "hostile: and that there is no evidence that Bob gave Cathy permission expect that there is evidence of that permission by way of neighborly accommodation and the prior written agreement.*

- *CONCLUSION:*
    - *David wins his lawsuit and can successfully prevent Cathy from using RA and Cathy has no interest in RA.*
    - *Cathy is not out of luck here; she can still access a roadway from BA; she is just going to pay for it.*

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<u>ANSWER KEY FOR QUESTION 3</u>

Jane's challenges to the Zoning Rule:

- *Beyond the Enabling Statute – NO*
    - *Jane will argue that local zoning decision "commercial only" is not authorized by the enabling statute, which delegates the State's police power to town to enact zoning rules for the "public health, safety, welfare, or morals."*
    - *That challenge will fail under the applicable rational basis test*
    - *"Commercial only" does not involve "fundamental rights" and neither does "residential only"*
    - *Town had a rational basis in creating a zone for commercial enterprises*
        - *Mixing residential uses where peace and quiet and less congestion is desirable is inconsistent with commercial uses*
- *Void for Vagueness -- NO*
    - *Jane will argue that the enabling statute's broad delegation of power for "public health, safety, welfare, or morals" is so broad that it is incapable of being reasonably understood by the reasonable person and/or incapable of being enforced in a consistent way.*
    - *That challenge will fail under the same rational basis standard of review*
    - *We all know was zoned "commercial" means vs zoned "residential"*
- *Under Euclidean Zoning principles, a residential use in a commercial zone is OK and thus not a violation – Old idea and probably NO*
    - *Zoning rule does not expressly forbid residential uses*
    - *But Euclidean zoning is an older idea largely phased out and Jane should not rely on this being a winning argument*
- *Zoning Rule is Unconstitutional – NO*
    - *Jane can argue that the "commercial zone" rule is invalid under the US Const*

- *This challenge will fail because property ownership is not a "fundamental right", thus, at best we apply the rational basis standard of review and the ordinance will be upheld*
- *Jane may argue the one's choice of where to live is fundamental under Moore v. City of Cleveland, but this is not a "who can live there" rule or a restriction on household make-up*

Jane's challenge to Maplewood's Exaction:

- *Jane may do better in her challenge to town's requirement that in order for the zoning violation to be dropped, Jane can give an unrelated $100,000 property to town.*
- *This, arguably, is a taking, for which Town must pay Jane under the Takings Clause.*
- *Exactions analysis – Nolan / Dolan*
  - *An exaction is a fee or land dedication that a property owner must give in exchange for developing property, which offsets the effect of the development. So, for instance, if the development is on an open lot in which children often play, the requirement of creating a park for children in part of the space is such a nonmonetary offset.*
  - *Exactions are a legal exercise of police power that generally arise within the development approval process. Provided that the public purpose underlying the fee or dedication is both reasonably related and roughly proportional to the impact of the development, the exaction is not a taking*
    - *1. Legitimate Gov't interests furthered by the ask;*
      - *Yes, public parks and open space is legit govt interest*
    - *2. Essential nexus between the legitimate gov't interest and the exactions,*
      - *Probably not*
      - *Jane wants to put a residential property in an already impacted commercial zone; not locking up open space that needs to be offset; and,*
    - *3. Rough proportionality between the gov't's demands and the legitimate interest.*
      - *No. Asking for a $100,000 property for park does not reasonably offset a requested permit for a 4 plex in a commercial area miles away.*
  - *If Town wants that property, has to pay Jane for it.*

Jane's Better Efforts Directed at Obtaining a Variance or Special Exception or Spot Zoning or a Change to the Commercial Only zoning:

- *Variance - NO*
  - *Granting the variance will avoid undue hardship on Jane*
  - *But no self created hardships and Jane herself built the units without permission*
- *Special Exception -- MAYBE*
  - *This may work for Jane*
  - *An exception is a use permitted by the ordnance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched closely*
  - *Hospitals in residential areas*
  - *A gas station in light industrial area*
  - *A 4 plex in a commercial zone in a City that really needs the housing may not be necessarily incompatible*
- *Spot Zoning -- MAYBE*
  - *Jane could attempt to get her 4 plex specifically and specially zoned as OK*
  - *Lots of money and influence needed but . . . City needs housing*
- *Change to Commercial zone to allow residential too – Good Thought*
  - *Zoning regs are political decisions and can be changed by political process*
  - *Jane may be able to have this happen . . . City needs housing*

1)

BOB V. ALICE

The overall issue is whether Bob has a successful nuisance claim against Alice and, if so, the potential remedies available to Bob.

PRIVATE NUISANCE

Does Bob have a successful nuisance claim against Alice?

A private nuisance is a substantial and unreasonable interference of another private individual's use or enjoyment of their land.
A substantial interference is an activity that would offend, annoy, or disrupt the use or enjoyment of the land of a reasonable person of that community.
An unreasonable interference is an activity where the burden to the person affected is greater than the benefit of the activity to the community as a whole. This balancing test is how the nuisance doctrine attempts to balance the rights of the property owner in their use or enjoyment of their land with the interests of the community through the benefits of continuance of the activity. Also, the availability of alternatives can matter.

Here, the noise, odor, and traffic generated by Alice's dairy farm may very well offend, annoy, and disrupt the use or enjoyment of land of any reasonable person of that community. If the town of Greenfield is primarily composed of dairy farms, the interference may not be offensive or annyoing to the average person of the community because they may be used to the smell, noise, and traffic typical of a dairy farm, depending on the size and density of the dairy farm. But if most people of the community are not associated with dairy farming, or if Alice's dairy farm is unusually noisy, odiferous, or busy compared to the rest of the community, then the interference would likely be substantial. Bob's estimated cost loss alone demonstrates substantial interference with Bob's use of his land, as any reasonable person would be disrupted by a loss of a potential $75,000 in profits annually.

The key factor in this case is how unreasonable the interference is when balanceing the burden to Bob as compared to the benefit to the community of the dairy farm. Bob's quaint bed and breakfast likely mostly benefits him, and possbily brings in a small amount of tourism to the area. Whereas Alice's

dairy farm, given that it is viewed by Bob as a nuisance, probably is large enough to employ more people in the community and support others who supply feed and transport dairy products and possibly livestock. Importantly, dairy products help feed many people. Agriculture is seen as an essential industry, which weighs against the interference being unreasonable on balance. Also, if reasonable alternatives exist that can mitigate some of the traffic (another entrance), odor (methane capturing technology), or noise (different area for pasture or noise-abating insulation on the barns), this could factor in on how unreasonable the current levels of noise, odor, and traffic are.

ALICE'S DEFENSES

Alice's potential defenses were suggested above. To summarize:
(1) If the town is primarily composed of dairy farms, the noise, odor, and traffic generated by Alice's dairy farm may not be offensive or annoying to the average person of the community;
(2) The benefits of her farm to the community are greater than the burden to Bob; and
(3) Agriculture is an essential industry. This, itself is a fact that should generally shield Alice from liability.

An additional line of argument in Alice's favor is that Bob came to the nuisance. That is, Alice's dairy farm was already in operation - producing noise, odor, and traffic - prior to Bob opening his bed and breakfast. So, Bob should have known of the situation.
The fact that Bob came to the nuisance is not itself a defense, but it can be a consideration weighing in Alice's favor. This consideration also can affect potential remedies in requiring Bob to pay for any relocation costs if injunctive releif is granted mandating Alice to cease operations.

LEGAL PRECEDENTS

With a party coming to the nuisance, there is long-standing legal precedence for whomever comes into the nuisance being required to pay relocation costs if injunctive relief mandates ceasing operations.
So, based on precedent, Bob should be required to pay for any relocation costs if injunctive releif is granted mandating Alice to cease operations.

However, the key legal precedent is that agriculture is viewed as an essential industry, and is generally

shielded from nuisance liability.
Thus, Alice will likely be shielded from liability to Bob, and will likely prevail.

POTENTIAL REMEDIES AVAILABLE

If, however, the court finds in Bob's favor and concludes that an actionable nuisance exists, there would be several remedies available to Bob.

The court could allow Alice to continue operations in order to benefit the community but be required to pay ongoing damages for the impact to Bob. Annual damages of $75,000 to Bob based on his estimate of lost income would be most obvious and reasonable, although perhaps lower taking into consideration that Bob came to the nuisance.

The court could allow Alice to continue operations but be required to mitigate the nuisance. If reasonable alternatives exist that can mitigate some of the traffic (another entrance), odor (methane capturing technology), or noise (different area for pasture or noise-abating insulation on the barns), these may be court mandated.

The court could decide for injunctive relief of mandating that Alice must stop all significant noise, odor, and traffic generated by her dairy farm. Because Bob came to the nuisance by operating his bed and breakfast beginning 20 years after Alice's dairy farm was already in operation, the court may follow precedence and require Bob to pay for Alice's relocation costs.

2)

DAVID V. CATHY

EASEMENT

The central issue in this case involves easement, in particular whether Cathy has a vaild easement to use Redacre for ingress and egress from Blackacre.

An easement is the nonexclusive use of a portion of another person's property for a determinite purpose. An easement is nonexclusive because it allows use for both the property owner and the easement holder.

There was an original express easement between Amy and Bob, in a written, signed, and notarized agreement at the time of conveying Redacre to Bob. Because they were seller and buyer and had the written agreement, there was horizontal privity between Amy and Bob. The easement is an appurtenant easement since the benefit attaches to a parcel, and not simply to a person or entity.

An easement "running with the land" means that the agreement is binding on successors of the parcels. So, the key question is whether the easement agreed to between Amy and Bob runs with the land to bind Cathy and David.

There are four main types of easements: express easement, prescriptive easement, implied easement from strict necessity, and implied prior use easement (quasi-easement).

DAVID'S ARGUMENTS IN FAVOR OF COURT MANDATE FOR CATHY TO STOP USING REDACRE FOR INGRESS AND EGRESS AND QUIETING TITLE IN FAVOR OF DAVID

No implied easement from strict necessity

An implied easement from strict necessity requires there to be no other possible access to the property, not just that it would be costly.
Here, it would be costly for Cathy to develop an alternative access road ($100,000), but it would be possible.

Therefore, Cathy does not have an implied easement from strict necessity.

No prescriptive easement

A prescriptive easement is aquired when there is: (1) actual use, which is (2) open and notorious, (3) continuous, and (4) hostile.

Here, Cathy's use was (1) actual, not just symbolic, because she used it so much that she created a dirt roadway through her use. Her use was (2) open and notorious because Bob was aware. Cathy's use was (3) continuous because she used it continuously for more than the 5 year statute of limitations (10 years) with Bob. But Cathy's use was not (4) hostile because Bob gave Cathy implied consent by waiving at her from time-to-time as she passed by, showing that he did not object and they maintained neighborly relations. Therefore, Cathy did not acquire prescriptive easement rights while Bob had Redacre.

Importantly, Cathy also did not acquire prescriptive easement rights. Her use was (1) actual because she used it enough that David tried to stop her. David knew about her use, so her use was (2) open and notorious. Cathy's use was certainly (4) hostile once David took over Redacre since David opposed her use and but a barrier to try to prevent her use. But Cathy's use was not (3) continuous for the statutory 5 year requirment while hostile, because David only owned Redacre for a year while Cathy had hostile use. Therefore, Cathy did not acquire prescriptive easement rights while David had Blackacre.

CATHY'S ARGUMENTS FOR COURT TO RULE AGAINST DAVID AND ALLOW CATHY TO CONTINUE USING REDACRE FOR INGRESS AND EGRESS FROM BLACKACRE

Express easement

An express easement is a written agreement. It is the strongest form of easement.
For an express easement to run with the land, it requires: (1) agreement in writing, (2) intent to run with the land, (3) touch and concern with the land, (4) veritical privity, and (5) notice to the burdened party.

Here, there was (1) an agreement in writing between Amy and Bob because they had a written promise that Amy could travel across Redacre to come and go from Blackacre. The written agreement was signed and notarized.
Cathy would argue that (2) the original parties intended the easement to run with the land beacause they wrote the agreement at the time of transaction and it would be reasonable to think that successors to Amy would also wish to use the dirt roadway established by Amy for ingress and egress.
Granted, David would argue that, if Amy and Bob had intended for the easement to run with the land, they would have expressly stated that the easement would apply to all successors, and this was not included. Whether this element is met in this case is ambiguous, and not the most salient problem.
Here, there is (3) touch and concern with the land. Touch and concern is where there is a benefit to the dominant parcel and a restriction on the servient parcel or a requirment to do something. So, there is touch and concern here because Blackacre (dominant parcel(benefits by use of part of Redacre (servient parcel).
Vertical privity (4) exists with both Redacre and Blackacre because Amy sold Blackacre to Cathy (vertical privity) and Bob sold Redacre to David (vertical privity). They were not acquired via hostile means that would break privity.
Notice to the burdened party (5) can occur via actual notice, constructive notice, or inquiry notice. None of these apply here. Bob did not have the written agreement, so he did not pass it to David as actual notice. Amy never recoreded the written promise from Bob, so there was no constructive notice. Even if the existing dirt road should have led David to inquire about any possible notice, the original parties were both deceased and the written promise was not recorded, so David had no notice.

Because there was no notice to the burdened party, David, there is no express easement, so Cathy's argument based on express easement would fail.

Implied prior use easement (quasi-easement)

An implied easement from prior use is when the owner of the servient estate should reasonably realize that that an easement was in place, it would be unreasonable (but not necessarily impossible) for access other than the existing use, and the easement use was in place at the time of severance.
Here, the easement was in place at the time of severance when Amy sold Redacre to Bob. Because the dirt road and Cathy's use of it was obvious, David had apparent notice of the easement. And building an alternative road would be unreasonably costly for Cathy, even if not impossible.

LIKELY OUTCOME (CONCLUSION)

Therefore, the court should rule that Cathy has a valid implied prior use easement to use the dirt road on Redacre for ingress and egress to Blackacre and deny David his claim.

3)

Takings

Under the Fifth Amendment of the Constitution, there is an implied right for the government to take personal property for a public purpose if they pay the landowner just compensation. Takings can occur by eminent domain or condemnation, regulatory takings, or exactions.

Exactions

An exaction is a fee or land dedication that a government can demand in return for a permit for development. The exaction must have an underlying public purpose. In assessing whether an exaction is a taking the court will start by asking whether the fee or dedication would be a taking if it had nothing to do with a permitting process. If no, then there is no taking. If yes, then the court further analyzes whether: 1) there is a legitimate government purpose for the exaction, 2) whether there is an essential nexus between the fee or land dedication and the legitimate government purpose and 3) whether there is rough proportionality between the burden to the land owner and the benefit to the city. Here, Maplewood (M) has issued Jane (J) a violation notice that states that she has violated the town's zoning ordinance by converting part of her commercial property into residential building without authorization. In exchange for granting J a permit, M has asked that J transfer to M another property that she owns on the other side of town, in an area zoned "residential" so that M can turn that property into a city park. The court will begin the takings analysis by asking whether the fee or dedication would be a taking if it had nothing to do with a permitting process. Here, J will argue that this would be a taking if it had nothing to do with a permitting process because it would be the equivalent of an eminent domain taking. Without the offer to give J permits in exchange for the land, M would be taking a private piece of property from J that is worth $100,000. She will argue that under an eminent domain analysis, even if the government had a legitimate interest, they would have to compensate her justly for the taking of her private property. The court will likely agree with J and find that this would have been a taking if permits were not involved.

Nolan/Dolan Analysis

1. Does the city have a legitimate government interest underlying the land dedication?

Next, the court will analyze whether the city has a legitimate government purpose underlying the

dedication. Here, M will argue that they do have a legitimate interest because the city is rapidly growing and there is now a housing crisis and people are having a hard time finding housing in the city. M will argue that they have an interest in the public welfare by ensuring that their residents have homes and an economic interest in developing their town to accommodate the growing population because it means it will expand their tax revenue and their housing market. They will argue that even though housing is not a fundamental right under the Constitution, it is a legitimate interest for the city to develop sufficient housing for their residents because housing developments are in the best interest of the city both economically and socially. They will argue that the purpose of the land dedication is to ensure that as part of the growing housing development, there are open and green spaces for families and children. They will argue that city parks are a social good because they make neighborhoods more desirable, offer recreation for their citizens and attract families to the area. The court will likely find that the city has a legitimate government interest underlying the land dedication.

2. Is there an essential nexus between the fee or land dedication and the legitimate government purpose?

Under the Nolan case, the Supreme Court found that for an exaction to be valid there must be an essential nexus between the land dedication and the legitimate government purpose. Here, the city will argue that there is an essential nexus because the legitimate interest in ensuring there is sufficient housing for the growing population also requires that all other social services be developed simultaneously to accommodate the needs and interests of new residents. For example, residential neighborhoods tend to have public schools near them and open green spaces such as parks for their residents to enjoy. These are all services that are important to ensure exist as a residential neighborhood is being developed because it satisfies the city's interests in providing for the public welfare and wellbeing. J will argue that even if there is a legitimate government interest, there is no essential nexus because the city is exchanging a permit in a commercial area and taking J's land on the other side of town. She will argue that the property she is trying to get permitted exists in downtown but the property they are trying to take is in a whole other part of town. The city will counter that this is reasonable and legitimate because the area where they are seeking a land dedication is zoned as residential. What they are trying to achieve is to fully and in a well rounded way develop the residential area. They will further counter that the only reason that the land dedication is on the other side of town and not in the area near J's existing commercial property or that they are not asking for a dedication of commercial property is because J already violated the ordinance by developing residential so they are trying to help her out and set up a mutually beneficial situation where she gets to have her 4-plex, which houses more people and addresses the housing crisis while the city gets to develop the

residential area to accommodate more residents. They will argue that they are not interested in developing a park in the commercial area because it is mostly for commercial purposes which means people come and go from the area but not many people (other than J's 4-plex tenants) will live there and enjoy a park near their home. **The court will likely find that there is an essential nexus between the and dedication and the legitimate government interest.**

3) Is rough proportionality between the burden to the land owner and the benefit to the city?

Based on the ruling in the Dolan case, the Supreme Court has held that there must be rough proportionality between the burden to the land owner and the benefit to the city when balancing the interests. Here, M will argue that there is rough proportionality because although J will lose her property valued at $100,000, she will gain a permit to operate her 4-plex in a busy, desirable downtown location which in the long run will generate atleast $100,000 in income. M will argue that the city will only become more desirable once they develop the residential area to attract families and residents who want to live in the community. J will argue that there is no rough proportionality because she is going to lose a piece of property that is currently valued at $100,000 but that will increase in value as the city grows. She will argue that this is not proportional because although she didn't obtain the necessary permits, she did construct her 4-plex using a licensed general contractor and that it complied with all building codes so she already invested alot of money into that property. In balancing the two interests, the court will likely find that there is rough proportionality because, although J already invested into the 4-plex and will lose $100,000 property, she would likely not be able to operate the 4-plex without the permit and she will make an income so long as she keeps the property. Additionally, her business will continue to grow as the city grows in popularity and size so the burden to her is not great. Additionally, the city's benefit is for a legitimate government interest and it is mutually beneficial to J because the growth in the city population will benefit her as well. Additionally, the city gets to develop the residential area in a way that promotes public wellbeing and all property values will grow as the city expands. **The court will likely find that there is rough proportionality.**

The court will likely find the exaction was not a taking.

J will argue that in the alternative, the city should grant her the necessary permits through zoning protocols.

Zoning

Governments can pass zoning ordinances in accordance with their policy powers to provide for the

public health, wellbeing, morals and safety.

Enabling statute

Under enabling statutes, states can delegate their zoning police power to local municipalities. Here, there is an enabling statute that delegates the state's power to local municipalities. Therefore, the city's ordinances are authorized by enabling statute and are within their police power.

Zoning Variance

A zoning variance is an exception to the authorized uses by the zoning ordinance in that district. In order to be granted a variance, the landowner must show that there would be an undue burden to them as landowners if the variance is not granted and that the variance does not impinge on the public good and or the intent of the zoning ordinance. Here, J will argue that the city should grant her a variance for the 4-plex she developed in a commercial zone. She will argue that she will suffer an undue burden because she now has a 4-plex that cannot be rented out and that it deprives her of all economic use of her property if the variance is not granted. She will argue that she already developed it with a licensed general contractor and it is sound and habitable, ready to be rented out. If she's not granted the vairance, there is not other use for this property. Additionally, she will argue that it does not impinge the public good because it offers more housing during a housing crisis and that it does not impinge on the intent of the zoning because as the city grows, the ordinances will have to shift with the needs of the community so even though they have traditionally been strict, they don't have to continue being so strictly enforced. T**he city will likely find that J will suffer an undue burden and because the property offers housing during a crisis, it is for the public benefit, therefore, they will likely grant her a variance.**

Nonconforming Use

A lawful, nonconforming use is a vested property right that cannot be infringed upon unless it is a nuisance, abandoned, or extinguished by eminent domain. Here, J will argue that her property should be grandfathered in because she already developed it and has it ready to rent. The city will argue that she remodeled the property while it was zoned for commercial use so they won't find that she needs to be grandfathered in because her zoning never changed.

Spot Zoning

Spot zoning is an exclusion from ordinary use ordinance for a small plot of land to be zoned differently from the surrounding district.
Not valid if:
1) special treatment to the small plot
2) for the benefit of the landowner
3) not in accordance with the general plan

Here, J will argue that she should be granted a spot zoning for her property. However, the city will argue that she is asking for preferential treatment that benefits her for a use not in accordance with the general plan because she turned the property into residential while it was zoned for commercial so this would be an ask for preferential treatment because no other properties in the area did what she did. She made it a 4-plex while it was zoned for commercial which is not in accordance with the general plan. The city will likely not provide her with a spot zoning to avoid the look of corruption.

Defending against zoning
Enabling statute did not authorize the ordinance. J could argue that the enabling statute did not allow the ordinance that she is zoned under. This is not a strong argument.

the enabling statute or ordinance was void for vageuness

the enabling statute or ordinance violated constitutional rights

END OF EXAM