Kern County College of Law

REAL PROPERTY

Spring 2023

Professor Kathleen J. McCarthy

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.

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Property Law
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Essay Question #1

The City, has a trap, neuter, and release ("TNR") Program for feral cats. The Program involves catching, vaccinating, and sterilizing feral cats, then releasing them. The feral cats are supposed to be released where they were caught, but they are sometimes released elsewhere in the City.

Ms. Barks, who owns property in the City, comes to you complaining that the TNR Program relocates the feral cats with no regard as to whether there is appropriate care or sustenance at that location and without regard to the impact to property values or damage to private property. She claims the cats have established a feral cat colony residing near, or at times, on, her property, risking her exposure to diseases carried by the cats as well as damage to her property from the cats' excrement and urine. She tells you the feral cat colony near her property has contained dozens, if not tens of dozens, of feral cats since the short time the TNR Program has been in effect. They at times have taken over her backyard preventing her from enjoying the space herself. To some this might be kitty heaven but Ms. Barks finds the cats beyond annoying.

Ms. Barks said she had at one time tried to sell her property but the party preparing to make an offer to purchase told her they decided not to do so because of the feral cats. She believes her property will now appraise for less than her purchase price because of the existence of the colony of feral cats near and on her property caused by the TNR Program.

Ms. Barks wants to sue the City, the mayor of the City, and the director of the City's Animal Welfare Department, who is in charge of the TNR Program. Under what legal theories would you proceed in a complaint on behalf of Ms. Barks? What arguments do you anticipate will be proposed by the defendants? What additional information do you need about the situation and/or the TNR Program to decide the strengths of the various theories and arguments? What factual and legal research do you need to do? What remedies would you request for each cause of action?

Some of the members of the feral cat colony enjoying Ms. Barks' picnic table in her backyard.

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Essay Question #2

On July 15, 1887, William C. Allen (the "Allen") conveyed by deed (the "1887 Deed") to the Lee Monument Association ("LMA") a round piece of property (the "Circle"). The terms of the 1887 Deed required the grantee, LMA, to use the Circle as a site for a monument to Confederate General Robert E. Lee (General Lee) and LMA was to hold the Circle "only for the said use." Several months after the 1887 Deed was recorded, LMA commissioned an equestrian statue of General Lee ("Statute"), erected the Statute on the Circle and sought to donate both to the State.

On December 19, 1889, the State Legislature passed a joint resolution (the "1889 Joint Resolution"), authorizing the Governor to accept the ownership of the Circle and the Statute. The 1889 Joint Resolution authorized the Governor to accept the gift with the guarantee that the State would hold the Statute and the Circle "perpetually sacred to the monumental purpose to which it has been devoted." The 1889 Joint Resolution stated the public policy of the State in erecting the Statute was as a tribute to the Confederacy's "Lost Cause" and as a memorial to the southern white citizenry's continued belief in the virtue of their cause, which defended their pre-Civil War way of life, including the practice of owning humans of African descent as chattel.

On March 17, 1890, LMA executed a deed (the "1890 Deed") conveying ownership of the Statute and the Circle to the State. The 1890 Deed was signed by LMA, the Governor, and Allen. The Governor's signature on the 1890 Deed indicated that he was executing the document pursuant to the terms and provisions of the 1889 Joint Resolution and in token of the State's acceptance of the gift and acknowledgement of guarantee that the State will "hold the Statute and the Circle perpetually sacred to the purpose to which they have been devoted and faithfully guard and affectionately protect it".

In the 1930's the area surrounding the Circle was designated as a National Historic Landmark District (the "Historic District"), which imposed certain restrictions upon all the land within the Historic District, including the Circle. The Rules limited how structures in the area could be altered. Deeds in the chain of title for many of the properties within the Historic District contained racially restrictive covenants.

In June 2020, the current Governor announced his intention to have the Statute removed from the Circle and placed elsewhere. In response to Governor's announcement, the owners of properties within the Historic District filed a complaint contending that the Governor has no authority to remove the Statute because the 1889 Joint Resolution binds the State to perpetually maintain the Statute on the Circle based upon enforceable property rights created in the 1887 and 1890 Deeds and under the Historic District's Rules. Some of the plaintiffs in the suit are the successors and descendants of Allen.

Are the covenants in the 1887 Deed and the 1890 Deed and the Historic District's Rules enforceable? Do the successors and decedents of Allen have any other basis to claim the Statute can only be moved if they approve of the action?

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Essay Question #3

Arney and Barney each had $50,000 to invest in real estate. They purchased adjacent vacant lots in New Town in 2010 which at the time did not have any zoning laws in place.

Arney paid $50,000 for his lot. He had no further money to invest in the land at this time and decided to hold it vacant, planning to develop the land in the future.

Barney paid $10,000 for a smaller lot next to Arney's. He used his remaining $40,000 to build and equip a small grocery store on the premises. The store earns Barney a ten-percent net profit each year, in addition to his salary.

Ten years later, in 2020, the city of New Town passed a zoning ordinance, zoning both Arney's and Barney's land for single-family dwellings only.

In 2020 Arney's lot was still vacant land. He had not yet been able to gather enough funds to execute his development plans for the lot. However, he had gotten an architectural drawing of a building designed especially for a hot room (Bikram) yoga studio, which Arney always dreamed of operating. As a result of the enactment of this ordinance, the value of Arney's vacant land has been reduced to $12,500.

Barney's store was still operating at the same level of business. As a result of the enactment of this ordinance, the value of Barney's land has been reduced to $2,500 in value.

1. Does Arney have any constitutional grounds or other legal theories on which he might rely to prevent New Town from enforcing its zoning ordinance with regards to his land? What arguments might he expect New Town to make in response, and what is the likely outcome?

2. What constitutional grounds or other legal theories might Barney rely on to prevent New Town from enforcing its zoning ordinance with regards to his land? What arguments might he expect New Town to make in response, and what is the likely outcome?

3. If Arney and Barney are to be treated differently under the law, what justification exists, if any, for this different treatment?

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Essay #1
ANSWER

Trespass or Nuisance

The first two causes of action I would consider including in the complaint are trespass and nuisance. There are similarities to these causes and some differences.

A cause claiming an intentional trespass does not have the substantial injury requirement of intentional nuisance. An intentional trespasser is liable notwithstanding the reasonableness of his conduct or the "feasibility" of compensation.

Trespass protects only possessory interests, whereas nuisance also protects non-possessory interests. Since Ms. Barks owns the property on which she lives and that is being negatively impacted by the TNR Program this is not a problem in her case.

There may also be different statutes of limitation for the torts of trespass and nuisance. However, since the program has not been in effect for long and the presence of the cats is ongoing I do not have much concern about the statute of limitations but I will investigate the various limitations and make sure I don't miss any deadlines.

Trespass.

Looking at the photo it is clear the cats themselves are trespassing on Ms. Barks' property. The question is whether the cats are agents of the City. Has the City taken on the responsibility of herding the cats who they have gathered up and moved? I would need to do legal research on the issue of whether an animal can be the agent of the City.

If the cats on the property can be treated as if the City itself were trespassing, then Ms. Barks could have a strong case against the City for trespassing.

Her remedies could include money damages and a permanent injunction. Ms. Barks would like to stop the TNR Program or at least to prevent the continued dumping more cats at her house. Ms. Barks would probably want an order compelling the City from cleaning up her yard and gathering up and removing the cats that are in her area now.

Nuisance.

Another possible theory of liability against the City is the claim that the TNR Program has created a nuisance. The statutory definition of nuisance appears to be broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property.

From the case of Morgan v. High Penn Oil Co. we learn that a nuisance is a substantial nontrespassory invasion of use and enjoyment of land that is caused by (1) negligent, reckless, or ultrahazardous activities, OR (2) activities that are intentional and unreasonable.

If the nuisance is intentional, the court says, it is irrelevant that the defendant exercised great care in an effort to avoid it. In this context, "intentional" means acting for the purpose of causing the invasion, or knowing that it is resulting or is substantially certain to result from the conduct in question.

Cal.Civ.Code § 3479 defines what constitutes a nuisance: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

The defining characteristic of nuisance is a substantial nontrespassory invasion of use and enjoyment of land that is caused by negligent, reckless, or ultrahazardous activities, or by activities that are intentional and unreasonable.

If the cats are not classified as agents of the City then there is no trespass by the City and the effect of the cats on Ms. Barks' property is a nontrespassory invasion.

Intentional or Unintentional Nuisance.

An interference with use and enjoyment of land, in order to give rise to liability, must be substantial; it must also be either (1) intentional and unreasonable or (2) the unintentional result of negligent, reckless, or abnormally dangerous activity. See Restatement (Second) of Torts §§821F, 822 (1979).

An intentional nuisance is interference with use and enjoyment of land—from air and water pollution, noise, odors, vibrations, flooding, excessive light (or inadequate light)—that continues over time and is known by the defendant to result from its activities. Nuisance liability arises in such intentional nuisance circumstances only if the resulting interference is substantial and unreasonable.

"Intentional" means acting for the purpose of causing the invasion, or knowing that it is resulting or is substantially certain to result from the conduct in question.

The act of placing the cats in the neighborhood was "intentional" in that the TNR Program operators had to know the animals would wonder around and produce excrement and urine causing pollution noise and odors.

An intentional invasion is "unreasonable" if, (1) as before, the gravity of the harm caused outweighs the utility of the actor's conduct; or if, (2) alternatively, "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."

Unintentional nuisance - Liability is based on traditional tort categories—negligence, recklessness, abnormally dangerous activities—all of which "embody in some degree the concept of unreasonableness."

Under the utilitarian test an intentional nuisance is unreasonable not only if the gravity of the harm caused outweighs the utility of the defendant's conduct (operating without controls on the nuisance), but also if there is serious injury and the defendant could compensate for this and like injuries and still stay in business. The relevant inquiry is said to concern the level of interference that results from the conduct — particularly, whether the interference crosses some threshold that marks the point of liability. The test compels one to consider whether "the gravity of the harm outweighs the utility of the actor's conduct. . . ."

Just leaving an entire colony of cats in an area with no plan to care for them is "unreasonable" and "reckless". The act of dumping cats without a plan for their care is negligent or reckless and therefore an unintentional nuisance. The harm outweighs the utility of the random cat dumping not in the area where the cats were collected and without concern for the continuing care for the cats.

There Are Two Types Of Nuisances – Public And Private.

A public nuisance, according to the Restatement, "is an unreasonable interference with a right common to the general public." Any member of the affected public can sue, but usually only if the person bringing suit can show "special injury" (or "special damage," or "particular damage"). An injury or damage of a kind different from that suffered by other members of the public.

Cal.Civ.Code § 3480 defines a public nuisance as one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

A public nuisance, according to the Restatement, "is an unreasonable interference with a right common to the general public." Any member of the affected public can sue, but usually only if the person bringing suit can show "special injury" (or "special damage," or "particular damage"). An injury or damage of a kind different from that suffered by other members of the public.

Cal.Civ.Code § 3481 defines a private nuisance as every nuisance which is not included in the definition a public nuisance.

A private nuisance on the other hand arises from interference with the use and enjoyment of land, and only owners of interests in land can bring suit. A private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or incorporeal right of another's property.

A private nuisance is a thing or activity that substantially and unreasonably interferes with a plaintiff's use and enjoyment of her land. The interference with plaintiff's use and enjoyment must be substantial--that is, it must be offensive, inconvenient, or annoying to an average person in the community. A plaintiff cannot, by devoting his land to an unusually sensitive use, make a nuisance out of conduct that would otherwise be relatively harmless. Here, given that normal people living in the area are not bothered by the activities of the manufacturer, there is no nuisance.

I would argue that the TNR Program is effectuating both a public and a private nuisance. The entire community is being affected by the feral cat colony but Ms. Barks, as a property owner, is suffering a particular harm in that the cats are invading her real estate and imposing upon her quiet enjoyment of her own backyard.

Everyone who happens to walk in the neighborhood and is forced to step around the "stuff" left by the cats is annoyed. However, Ms. Barks is particularly affected because she is prevented from even enjoying her own backyard.

I would like to interview Ms. Barks's neighbors and find out how they are being affected.

Defense Argument That The TNR Program Is Authorized By Statute.

Under Cal.Civ.Code § 3482, acts under statutory authority not a nuisance. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

The City might try to claim that the ordinance they enacted to start the TNR Program causes it to be immune from classification as a nuisance. However, the ordinance is not the problem. The nuisance was caused because the City is not following the rules set up in the ordinance by dumping cats in areas where they were not picked up.

A Taking Under the Fifth Amendment.

The Fifth Amendment to the United States Constitution proscribes taking of private property "for public use, without just compensation." The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.

The City has certain responsibilities related to the feral cats at issue in this case. The City did take on the responsibility to reduce the feral cat population throughout the City the question is whether the government's actions in administering the TNR program could legally constitute a taking because any injury "was incidental" to the exercise of "police powers" and did effectuate a taking of the "property for public use."

Based upon the 1915 case of *Hadacheck v. Sebastian* the City may argue the "nuisance" test of takings law. This test provides that so long as the use controlled by the ordinance can reasonably be regarded as a nuisance — detrimental to the health and comfort of the community — it can be regulated. However, the City is not allowed to exchange one nuisance for another. Moving the cats from one area to another is not "controlling" the nuisance.

In the 1922 case of *Pennsylvania Coal Co. v. Mahon* the Court created the diminution in value test and held that while property may be regulated, "if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Ms. Barks should not be the only one paying for the change in the way the City is handling the overpopulation of cats.

The Ad Hoc Rule was created in the case of *Penn Central*. The rule considers (i) the social goals sought to be promoted; (ii) the diminution in value to the owner; and (iii) whether the regulation substantially interferes with distinct, investment-backed expectations of the owner. Regulations that merely decrease the value of property (e.g., prohibit its most beneficial use) do not necessarily result in a taking, as long as they leave an economically viable use for the property. The Court looks at the impact of the regulation on the whole property, and mere diminution in its value, standing alone and without regard to the uses permitted, does not amount to a taking.

The social goal of addressing the cat problem favors the City but the diminution in value to Ms. Barks property and her expectation of being able to use her own backyard weigh in favor of a finding of a taking.

The case of *Loretto* promoted the concept of a *per se* physical taking, the government has physically taken property for itself or someone else by whatever means. This category applies when the government uses its powers of eminent domain to condemn property formally, or when the government "physically takes possession of property without acquiring title to it." This category extends further to encompass generally all "government-authorized invasions of property," even those that are limited in duration or that cause only trivial economic loss. This per se takings test was affirmed in the *Cedar Nursery* case.

The first question is whether the feral cat colony constitutes government occupation of Ms. Barks property. If the cats are agents of the City there has been an invasion of her property by the animals and the "stuff" they leave behind. The entry of the cats onto her property could then be classified as a *per se* taking.

A *per se* regulatory taking, however, requires Ms. Barks to show either "a *permanent* physical invasion of her property" or that the regulation deprives her of "*all* economically beneficial use of her property."

The City itself did not enter Ms. Barks' property. And it does not appear that the City actually placed the cats on her property. The cats themselves decided to entered Ms. Barks' property on their own. No one herded them there. Herding cats is a notorious difficult task which it does not appear anyone attempted in this case.

Defense Argument That TNR Program Is An Important Activity And Damages Or Issuing An Injunction Is Not Proper.

The Restatement's reasoning regarding *§826(b)* is: "It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying."

The process of weighing the gravity of the harm against the utility of the conduct assesses the social value of the actor's activity in general.

"The action for damages does not seek to stop the activity; it seeks instead to place on the activity the cost of compensating for the harm it causes. The financial burden of this cost is

therefore a significant factor in determining whether the conduct of causing the harm without paying for it is unreasonable."

The City might argue that it must continue with the program because the cat problem is City wide and offer negligible compensation to Mr. Barks to cover the cost of clean up or the loss of value in her house.

An injunction can be granted, subject to conditions imposed by applicable statutes, on a showing of; an inadequate remedy at law, meaning that compensation would be insufficient; a serious risk of irreparable harm absent injunctive relief; a likelihood that the plaintiff will prevail on the merits of the underlying controversy; and a comparison of the harm to defendant in issuing an injunction versus the harm to plaintiff in withholding it, which on balance favors the plaintiff.

The TNR Program is important in preventing the entire City from being overrun by the continued breeding of feral cats but rehoming the "fixed" cats in Ms. Barks' backyard is unreasonable. Admitting the program is important does not injure the probability of success in Ms. Barks' case. The program itself is not the problem it is the fact that the City is not executing it as planned.

The only way to fix the issue is to enjoin the City from operating the program as it is currently.

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Essay #2
ANSWER

Is There A Servitude?

Servitudes are nonpossessory interests in land arising out of private agreements. They create a right to use land possessed by someone else. Traditional classification of Servitudes is not based on function but on history. There are two main types of servitudes: Easements and Covenants.

Servitude is used with the term easement, a right of some benefit or beneficial use out of, in, or over the land of another. Servitude is a device that ties rights and obligations to ownership or possession of land so that they run with the land to successive owners and occupiers.

The parcel of land that benefits from the easement is call the Dominant property. The Servient property is the parcel of land that provides the easement. In this case the Circle is the Servient property.

In an Appurtenant Easement the right to use adjoining property that transfers with land. The benefits and burdens of Appurtenant Easements pass automatically to assignees of the land to which they are appurtenant, if the parties so intend and the burdened party has notice of the easement. If the Servitude is deemed an Appurtenant Easement the ability to enforce any obligations regarding the Statute and Circle would only exist in those who own property in the area and then only if it is clear the it can be shown they intended the rights under the easement to transfer.

An Easement In Gross means the right to use another person's land for as long as the owner owns that land or the holder of the easement dies. Under the old rules, if the benefit is in gross, the benefit is generally not be assignable. Yet some Court now allow Easements In Gross to be transferred.

A negative easement is the right of the dominant owner to stop the servient owner from doing something on the servient land. A negative easement does not grant to its owner the right to enter upon the servient tenement. It entitles the privilege holder to compel the possessor of the servient tenement to refrain from engaging in activity upon the servient tenement that, were it not for the existence of the easement, he would be privileged to do.

Courts historically recognized negative easements only for light, air, subjacent or lateral support, and for the flow of an artificial stream. However, every once in a while, a new negative easement may be created by the courts.It appears the Plaintiff would like the Court to find a negative easement exist pursuant to the Deeds which they claim prevents the State from removing the Statute.

Today, a negative easement is simply called a negative or restrictive covenant.

Is There A Covenant?

After the law courts refused to recognize new types of negative easements, landowners looked for a new doctrinal basis for their attempts to impose restrictions on the use of land. They found one in the law of contracts, but with a twist. What the landowners wanted was judicial recognition of a contract right respecting land use enforceable not only against the promisor landowner, but against his successors in title as well. Some sort of property right that is enforceable by and against subsequent purchasers of Whiteacre and Blackacre. Not just a mere contract right where there is only the right of the original promisee to sue the original promisor. Thus the creation of covenants which run with the land.

A Covenant, normally found in deeds, is a written promise to do something on the land or a promise not to do something on the land. Covenants must be in writing signed by the Promisor meaning the Statute of Frauds applies. Acceptance of a deed can bound a grantee to a promise contained in the deed. The State is the promisor or servient property holder. The Governor back in the 1800's signed the Deeds and therefore the Statute of Frauds has been satisfied.

Is There A Negative or Restrictive Covenant?

A negative covenant is a restriction on the use which can be made of the servient land. The language of the 1887 and 1890 Deeds appear to create a restrictive covenant. A restrictive covenant is a disfavored property right. The question is whether this restrictive covenant is reasonable and enforceable when it purports to bind the State to perpetually maintain and protect the Statute, and whether a joint resolution passed by the General Assembly in 1889 legally prohibits the current Governor from moving the location of Statute from the Circle owned by the Commonwealth.

Plaintiffs assert that the State traded its sovereign right to control the Circle and the Statue in perpetuity in exchange for the gift to the State.They claim that the 1889 Joint Resolution concerning the gift is "binding" on the State and that Governor's order to remove the Statute from the Circle violated the 1889 Joint Resolution.

They also claim that they are the beneficiaries of enforceable restrictive covenants, created by language in the 1887 Deed and in the 1890 Deed, which facilitated the donation of the Statute and the Circle to the State. Based on their status as beneficiaries of those restrictive covenants, they assert that they have the right to prohibit the State from moving the Statue from its property, the Circle.

They argue that the 1887 Deed and the 1890 Deed create enforceable restrictive covenants because the language of the 1887 Deed and the 1890 Deed are consistent with the public policy expressed in the 1889 Joint Resolution, which is the current public policy of Virginia,

The Governor responds that the 1887 Deed and the 1890 Deed did not create a valid property interest because the language in the 1890 Deed is ambiguous and did not create a restrictive covenant. The Governor also notes that the property interest described in the 1887 Deed and the 1890 Deed is unknown in law, inasmuch as "plaintiffs claim that they possess something that

could perhaps most accurately (but paradoxically) be called an 'affirmative negative easement:' a right to compel the State to use land that it owns in one single way in perpetuity." The Governor avers that the Plaintiffs "identify no case in which such a purported agreement has ever been enforced against any property owner—much less against the sovereign." Finally, he contends the restrictive covenants are still unenforceable because enforcement of the restrictive covenants would contradict public policy and be unreasonable in light of changed circumstances.

Does the Covenant Run With The Land?

Real Covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. To run with the land, however, the benefit and burden of the covenant must be analyzed separately to determine whether they meet the requirements for running.

Under the Rule of Spencer's Case for a contract to bind one's successors to an interest in land four requirements must be met:(1) agreement must be in writing, (2) parties must intend to bind future successors, (3) the promise "touched and concerned" the land, and (4) there was privity of estate between the parties.

The requirements for Burden to Run include Intent, Notice, Horizontal Privity, Vertical Privity and Touch and Concern. If all requirements are met for the burden to run, the successor in interest to the burdened (servient) estate will be bound by the arrangement entered into by her predecessor as effectively as if she had herself expressly agreed to be bound.

As the servient estate holder, if the requirements are met, the State will be bound to abide by the promise to maintain the Statute at the Circle.

Horizontal Privity means that at the time the promisor entered into the covenant with the promisee, the two shared some interest in the land independent of the covenant. Just being a neighbor is not enough. In this case Allen and LMA were the grantors with the State being the grantee and horizonal privity exists.

The Vertical Privity requirement means that to be bound, the successor in interest to the covenanting party must hold the entire durational interest held by the covenantor at the time she made the covenant. Allen gave the Circle to LMA who gifted it to the State and the State is still the owner of the burdened property. Thus, vertical privity is also there.

The Deeds appear to easily meet most of these requirements. The Deed and the Resolution are in writing, the language in them makes it clear that they intended the burden of maintaining the Statue as is should and bind the State forever and there was privity of estate between Allen, LMA and the State.

The one remaining issue is whether the agreement to maintain the Statue at the Circle "touches and concerns" the properties. The promise is obviously connected to the Circle but what about the neighbors? How does having a particular statute in the Circle effect their property? Does the Historic District designation require this particular Statue remain? Or can another one, or a mere

pedestal, satisfy the historical rules? If these questions are not answered in favor of the Plaintiffs the covenant will not run with the land.

Are the Covenants Still In Exisitance?

Generally, covenants, express or implied, which restrict the free use of land, are not favored and must be strictly construed. Courts will only enforce restrictions on the use of land where the intentions of the parties are clear and the restrictions are reasonable. Enforceable restrictions on the use of property may become unenforceable because of changed circumstances or because the restriction violates public policy.

The reasonableness of a restrictive covenant is to be determined by considering whether it is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public.

Due to changes of conditions outside the restricted area under the Changed Conditions Doctrine restrictive covenants can be terminated.

In determining the validity of a restriction the court must examine its purpose and actual operation under the circumstances and conditions existing when it was imposed as well as at present. The question to be determined is whether or not there has been such a radical change in conditions as to defeat the purpose of the restrictions.

Are The Covenants Terminated As Violating Public Policy?

Servitudes are invalid if they violate public policy. When enforcing equitable servitudes, courts are generally disinclined to question the wisdom of agreed-to restrictions. This rule does not apply, however, when the restriction does not comport with public policy. Courts generally should enforce servitudes, but that they should make an exception, even regarding contracted servitudes, with respect to restrictions that fail to comport with public policy.

Equity will not enforce any restrictive covenant that violates public policy. *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948) is the landmark case holding that judicial enforcement of discriminatory racial covenants is state action forbidden by the 14th Amendment. In 1948, the U.S. Supreme Court unanimously ruled that the judicial enforcement of racially restrictive covenants—similar to the restrictions advertised by the developers of the property surrounding the Circle—violates the Equal Protection Clause.

Shelly v. Kraemer dealt only with the constitutional issue of whether judicial enforcement of them by injunction was forbidden state action denying the African-American plaintiffs equal protection of the laws under the Fourteenth Amendment. The Court held that the covenants, standing alone, do not violate the Fourteenth Amendment; they are merely private agreements, and the Fourteenth Amendment only prohibits discriminatory action by a state. However, the Court also helds judicial enforcement of the restrictive agreements is state action by the judicial arm of government that is prohibited by the Fourteenth Amendment. The final conclusion is that

the discriminatory covenants are valid, but they cannot be enforced by a court. Judicial enforcement of a covenant forbidding use of property by persons of a particular race is discriminatory state action forbidden by the Fourteenth Amendment to the United States Constitution.

Courts will also not enforce as equitable servitudes those restrictions that are arbitrary, that is, bearing no rational relationship to the protection, preservation, operation or purpose of the affected land. The Historical District to the extent the Statue and no other can be in the Circle is arbitrary.

Assuming arguendo that the Plaintiffs are correct in claiming that the language in the 1887 Deed and the 1890 Deed created restrictive covenants, those restrictive covenants are unenforceable as contrary to public policy.

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Essay #3
ANSWER

Zoning.

The zoning power is based on the State's police power. The State may enact statutes to reasonably control the use of land for the protection of the health, safety, morals, and welfare of its citizens. These statutes are called zoning laws. New Town ("NT") presumably has been granted the authority by the State to enact zoning laws through the delegation of the State's power.

Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited. Zoning is designed to prevent harmful neighborhood effects before they occur. In Euclidean zoning districts are graded from "highest" (single family residences) to "lowest" (worst kind of industry). Therefore, with the zoning as single family residence, the store and planned yoga studio not would be allowed.

The zoning power is limited by the Due Process Clause of the Fourteenth Amendment. Other limitations are imposed by the Equal Protection Clause of the Fourteenth Amendment and the "no taking without just compensation" clause of the Fifth Amendment.

Zoning and land use regulations have real economic, and social, impacts on our lives. The usual justification for zoning is that it solves the problem of externalities in environments where bargaining (servitudes) or judicial determination (nuisance law) are not sufficient.

Single family residence zoning has been criticized as suppressing housing production and increase housing prices.

Arney vs NT.

Does Arney have any constitutional grounds or other legal theories on which he might rely to prevent New Town from enforcing its zoning ordinance with regards to his land? What arguments might he expect New Town to make in response, and what is the likely outcome?

Arney is not going to be able to stop the application of the new zoning and he will not likely win in a suit to receive compensation for the loss in value to his lot effectuated by the zoning. Arney's best course of action is to seek a variance which will allow him to continue to build a yoga studio on his lot.

Under the holding of the case of *Village of Euclid* the introduction of zoning into NT would be a proper exercise of state police power to institute zoning ordinances after Arney purchased his lot.

Arney would not be able to stop the zoning and the change is zoning would not be considered a taking. Arney has no grounds to sue the NT for the loss of value in his lot. Zoning ordinances are routinely upheld in the face of takings allegations so long as they leave the property owner with some reasonable use. Arney could still build a house on his lot and so he still has a reasonable use of the lot available to him.

However, Arney might be able to seek a variance so as to allow him to still pursue his dream of building a yoga studio. For Arney to be allowed to use the land in a manner not otherwise permitted (as a yoga studio instead of a single family residence) Arney must request NT to deviate from the zoning requirements by getting a variance.

A variance is one traditional means for building flexibility into Euclidean zoning. A variance from the literal restrictions of a zoning ordinance may be granted by administrative action. To qualify for a variance two tests must be satisfied: (1) the applicant must show exceptional and undue hardship; AND (2) the applicant must show that to grant a variance would not be detrimental to the area.

First, the variance must be necessary to avoid imposing undue hardship on the owner of the land in question. Undue hardship "involves the underlying notion that no effective use can be made of the property in the event the variance is denied." The hardship must not have been self-inflicted.

Second, "the grant of the variance must not substantially impinge upon the public good and the intent and purpose of the zoning plan and ordinance." This requires paying attention to "the manner in and extent to which the variance will impact upon the character of the area."

In granting a variance, zoning boards may impose reasonable conditions related to the use of the property that minimize the adverse impact of the use on neighbors.

Zoning boards may not condition a variance upon use of the property by the original applicants only, as this has no relation or ameliorating the effects of the proposed land use and is unrelated to the legitimate purposes of zoning. A variance thus must "run with the land."

Arney must show that his lot is suitable for a particular use other for that which it is zoned and that his property is unique, that the zoning restriction imposes and undue hardship or practical difficulty, that the circumstances were not self-created by him and that the issuance of the variance comports with the master plan and will not change the character of the neighborhood or cause harm or decreased value to his neighbors. Those opposed to the variance would counter that a variance would alter the intent of the comprehensive zoning plan which intended to make the neighborhood single family residences.

Arney could reasonably argue that since his lot borders Barney's lot which has an operating store the development of his lot into a yoga studio is worthy of a variance.

If Arney is able to obtain the variance there would be no diminution of his property and the problems created by the zoning ordinance would be resolved.

If Arney is unable to get a variance he may argue that the zoning was a taking under the fifth amendment. However, Arney would have a hard time winning this argument.

Regulation of private property may be so onerous that it violates the Takings Clause of the Fifth Amendment and requires the government to provide compensation. A *per se* regulatory taking occurs where government requires an owner to suffer a permanent physical invasion of her property or a regulation completely deprives an owner of *all* economically beneficial use of her property. a regulation may create a taking under standards the Supreme Court set forth in The case of *Penn Central* which identified particular factors that should guide judicial inquiries—

(1) the economic impact of the regulation on the landowner,
(2) the extent to which the regulation had interfered with distinct, investment-backed expectations,
(3) whether the government had physically invaded land,
(4) whether the regulation was aimed at curtailing noxious uses of property, and
(5) whether the regulatory scheme produced an average reciprocity of advantage.
(6) Additionally, the more a landowner was singled out for burdens that are more justifiably imposed on the community as a whole, the more likely the courts would be to find an implicit taking.

Under the *Penn Central* ad hoc test Arney would need to prove that this is an impermissible zoning regulation that amounts to a taking even though it does not interfere with Arney's present use or prevent Arney from getting a reasonable return on his investment. The court would consider the character of the government action, here Euclidian zoning, the economic impact and the extent that the zoning interfered with the distinct investment backed expectations of Arney. Given that all he has done is get a design for the building, Arney has not invested much into his dream.

Barney vs NT Zoning.

What constitutional grounds or other legal theories might Barney rely on to prevent New Town from enforcing its zoning ordinance with regards to his land? What arguments might he expect New Town to make in response, and what is the likely outcome?

Barney could make all of the same arguments as Arney and seek a variance. However, Barney also has some additional arguments which he could make to avoid the application of the zoning to his lot.

Barney can claim he has a vested rights based upon the Law of Non-conforming Uses. Barney can argue that the zoning code was introduced after he had already established his store and that he was grandfathered into the use he currently enjoys.

Actual non-conforming uses are protected generally by being "grand fathering" under the concept that the interest in the use is vested. Under estoppel, a proposed non-conforming use may be allowed if enough time and treasure was put forth in good faith on existing zoning which were then changed to the detriment of the property owner. There must have been detrimental reliance in good faith.

At the outset of zoning, non-conforming uses were tolerated — presumably because zoners thought that terminating them would amount to unconstitutional takings (unless the use was a nuisance) and because condemnation was too expensive. The hope was that non-conforming uses would simply fade away; once they did, the property in question would have to be used in conformity with zoning requirements. But some non-conforming uses didn't fade away. So zoners tried some other approaches: prohibiting resumption of non-conforming uses once they were abandoned (but they were seldom abandoned, and the land, when sold, carried with it the right to continue the use; forbidding maintenance and repair (but this just turned well-maintained non-conforming uses into shabby ones).

A use that exists at the time of passage of a zoning ordinance and that does not conform usually cannot be eliminated at once. Therefore, the nonconforming use may continue indefinitely, but any change in the use must comply with the zoning ordinance.

To address the problem of continuing nonconforming uses, some statutes provide for amortization—i.e., the gradual elimination of nonconforming uses (e.g., the use must end in 10 years). Amortization provides for a reasonable period of time during which owners could maintain the pre-existing uses and after which the uses were to be terminated. The notion is that the reasonable periods would be equal to the remaining life of the uses, so owners could realize on their original investment. The concept of investment-backed expectations.

The right to continue a non-conforming use runs with the land in order to protect the vested right that the owner is thought to have.

If NT grants the prior nonconforming use of a store on his lot than Barney can continue to operate the store for either a set a period of time. If NT grants Barney this permit then there would be not be grounds for a takings action.

If the ordinance requires Barney to discontinue his nonconforming use immediately, the courts almost surely would declare it unconstitutional as a taking of B's property. If NT seeks to close Barney's store, then Barney would have a claim for a taking under eminent domain.

Barney could argue that the zoning amounts to an actual taking. The argument is that his investment in the building and business would be destroyed by immediate termination and removal and interfere with his vested property rights. Barney can show reasonable investment backed expectation that are provable to a court in the sense of 10% net profits and $40k spent to build the store and the now diminution in value to $2,500 for the land.

Barney would seek compensation for the FMV at the time of the taking of his property rights. Since this is not a per se taking, he can still develop the land into a single family home, it would fall under the same multi-factor *Penn Central* analysis. Barney has operated the store for 10 years and a court may decide that the $10k Barney spent on the land and $40k on the building, plus the 10% profit per year and salary B has earned on the $50k initial investment plus the still $2,500 in value has given B a reasonable rate of return. However, since Barney has gotten a return on his investment and the entire value in the property is not "wiped-out" there is a strong possibility that a court would find there has not been a taking under the Penn Central analysis.

Different Treatment of Arney and Barney.

If Arney and Barney are to be treated differently under the law, what justification exists, if any, for this different treatment?

IZf the zoning ordinance were to be unconditionally enforced the value of Arney's land is reduced from $50,000 to $12,500 — for a loss of $37,500. The value of B's land is reduced from $10,000 to $2,500. In addition, Barney must stop his business and will lose the value of the $40,000 investment in a building (assuming the store has no value as a single-family dwelling). Therefore it looks as if B is losing more. But B has had a 10-percent net profit each year, and thus after 10 years has recovered the $50,000 cost of his investment.
In addition Bareny has a going business which may well be moveable and continue to reap a return in a different location. It also may be that some part of Barney's 10-percent profit was due to monopoly returns given him by the zoning ordinance zoning out competing uses.

In terms of both economic loss and fairness, then, it may be difficult to sustain the proposition that the burden on Barney is greater than the burden on Arney.

Why should courts protect the nonconforming use? Perhaps it is because Barney has used his land productively by developing it, and society is especially interested in having land developed to provide housing, jobs, industry, etc. If nonconforming uses were not protected, investors would be less likely to risk their capital in productive enterprises.

On the other hand, society may be thought to have no particular interest in protecting the expectations (speculations?) of a person who buys land and holds it for future development. It is the actual development which moves the court to extend protection. But is this justified? Does not the speculator perform useful social functions by holding land open for future for other valuable development opportunities?

1)

1. Ms. Barks could sue the City, the mayor of the City, and the director of the City's Welfare Department ("defendants") for nuisance.

Nuisance is a tort in which a plaintiff's right to use and enjoy land has been unreasonably, significantly, and substantially interfered with by the defendant's action, whether it be intentional, negligent, reckless, or caused by an abnormally dangerous activity. One's right to enjoy and use their land has been unreasonably interfered with if a reasonable person would find the conduct or behavior creating the nuisance offensive, overly burdensome, or annoying. The plaintiff's injuries caused by the defendant must outweigh the benefit of the defendant's activity or behavior.

There are three types of nuisance: private nuisance, public nuisance, and nuisance per se.

Private nuisance

Private nuisance involves an activity or action that causes a substantial, significant, and unreasonable interference which infringes on an individual's right to use and enjoy their land. Ultimately, in the event the injuries caused by the defendant outweighs the benefits of the defendant's actions, Ms. Banks will be able to establish an action for private nuisance.

Here, Ms. Barks will argue that the city has violated her right to use and enjoy her land because the TNR program relocates the feral cats with no regard to the impact to property values or damage to private property. She will further argue that she cannot enjoy her home because she is in fear of contracting diseases from the cats and because the cats cause damage to her property from their excrement and urine. She will further argue that the cats have taken over her backyard, which has subsequently prevented her from her use and enjoyment of the backyard.

It is likely that a reasonable person in Ms. Barks' position would be offended, annoyed, or burdened by the increased presence of cats that have taken over her backyard, leaving their excrement and urine behind, thereby decreasing the value of her property and making her backyard unenjoyable.

Ms. Barks will ultimately argue that the cats should either be released back where they were found or should be placed in a public park or outside of the residential zoning so as to prevent this type of nuisance.

While Ms. Barks' arguments are strong, the defendants will likely rebut her arguments by saying that they ultimately do not have control as to where the cats roam once they are released; and, in the event Ms. Barks wants to enjoy her backyard while they are in her yard, she can scare them off and still utilize the space. Their program is not negligently, intentionally, or recklessly causing Ms. Barks to experience a nuisance because they are actually making the neighborhood safer and healthier.

They will further argue that the TNR program is an attempt to lessen the risk of exposure of communicable diseases while actually decreasing the amount of feral cats on the streets by vaccinating and spaying and neutering them. The defense, in response to Ms. Barks' argument that the feral cats are released "with no regard as to whether there is appropriate care or sustenance at that location," would argue that a) the cats were already feral to begin with and are not at risk of being abandoned or neglected by the TNR program, and b) this likely would not offend a reasonable person in the City, as they would likely be aware that this is an effort to curb the overpopulation issue with the cats.

More information regarding the location of the releases, as well as the amount of times the cats have been released in Ms. Barks' neighborhood, would be needed to decide whether there is sufficient information to establish whether a reasonable person would be adversely affected by the release of the cats. More research on the effects of cat excrement and urine on public health would be beneficial as well to determine whether Ms. Barks is actually being exposed to diseases carried by the cats.

Ultimately, the defendants would argue that the disturbance Ms. Barks is experiencing will be lessened overtime with the TNR program eliminating the amount of feral cats on the streets.

In the event Ms. Barks could prove that a reasonable person would be affected by the influx of cats who have taken over her backyard and have littered her yard with urine and excrement (which is likely), Ms. Barks may be successful in a private nuisance action.

Public nuisance

Public nuisance involves the substantial, significant, and unreasonable interference of a right common to the general public of more than one person. This includes, but is not limited to, the public's access to highways, issues revolving air pollution, or enjoyment of public parks and other public areas.

Here, Ms. Barks will argue that she is not the only person whose right common to the general public has been substantially, significantly, and unreasonably interfered with by the TNR dump of cats in the neighborhood. She will argue that she, and her neighbors, have been affected by the City's lack of regard to the impact of the property values or damage to private property in the neighborhood caused by the released feral cats. The feral cats have formed a cat colony in her neighborhood, she will argue, exposing her entire neighborhood to diseases carried by the cats as well as damage to private property and the lack of enjoyment of the public sidewalks or spaces in the neighborhood.

Ms. Barks will further argue that while her home has lost value due to the cats, her neighbors' property values have also dropped because of the feral cats taking over the neighborhood's streets and sidewalks as well as defecating and urinating all over the neighborhood. She may also argue that the defecation and urination of the cats may be a public health issue, making it unsafe for herself and others to be outside.

While the facts do not indicate whether others have complained of the stray cats to the defendants, it is likely the defendants will argue that there have been no other complaints of the cats invading the public space available to Ms. Barks' neighbors. They will further argue, again, that they do not control where the cats roam once they are released, but they can assure the public that the cats can no longer breed and carry infectious diseases because of the TNR program, making the area safer and healthier for everyone.

More information pertaining to other complaints about the TNR program's release locations would be necessary to evaluate the weight of Ms. Barks' argument. It would also be helpful to have comments from the public regarding the benefits of the program to see if the TNR program is adversely affecting the public. It would be helpful to have any information about the amount of cats treated and released and the expected drop in the feral cat population because of the TNR program. This would help corroborate that the program is doing more

good than harm. Research regarding the positive effects of TNR programs in other similar-sized cities with similar overpopulation issues would be necessary to determine whether this TNR program can actually provide the support necessary, or if the release of cats is more of a nuisance than an aid.

In the event Ms. Barks can prove the nuisance affects more than just her, and that there is a harm to herself and others who want to be outside because of the cats' presence, she will more likely than not be successful in asserting a public nuisance claim.

Nuisance per se is a strict liability tort whereby a defendant is automatically liable if they violate a statute.

There are no facts that indicate any statute that would be violated by this program, unless the program itself was codified into municipal law and called for the cats to be released where they were caught and not anywhere throughout the city. In the event that were a statutory requirement, the defendants would be liable for nuisance per se.

2. Ms. Banks could request damages; or, if damages are insufficient, an injunction to preclude the defendants from releasing cats in her neighborhood.

The type of relief sought by nuisance is mainly monetary damages. Plaintiffs can recover the loss of value in property caused by nuisance as well. In the event damages are insufficient to make the plaintiff whole, the plaintiff can ask for equitable relief in the form of an injunction.

Ms. Banks argued that she once tried to sell her property but the buyer backed out because of the presence of the cats. She has also argued that her property will now appraise for less than her purchase price because of the existence of the colony of feral cats near and on her property caused by the TNR program. Ms. Banks can assert that the defendants should compensate her in monetary damages for the loss in value of her property as well as the costs to repair the damage to her property caused by the influx of cats.

The defense will likely argue that there is no indication that the property would appraise for less than the purchase price simply because there is a presence of cats in the neighborhood and near her property. They will argue that her home's appraisal value has decreased for reasons outside of the defendant's control and liability.

Ms. Banks can further argue that an injunction to preclude the defendants from releasing feral cats in her neighborhood would be just based on the injuries to her property. The defense will rebut by arguing that precluding the defendants from releasing the cats would create more damage than positive results, as they would not be able to fix as many cats, thereby making the whole program less productive for the City.

It is likely Ms. Banks may be able to recover damages, but it is unlikely she will be successful in receiving an equitable remedy in the form of an injunction against the defendants.

2)

1. Are the covenants in the 1887 and 1990 Deed and the Historic District Rules enforceable?

A. The 1887 Deed

Covenants are a promise to do something or to refrain from doing something related to the use of land. Covenants are enforced through legal (monetary) relief. Covenants may either be affirmative or negative. Affirmative covenants promises to do something related to the use land, while negative (or restrictive) covenants restrict one's ability to do something on the land regarding to the use. For a burdened covenant to run with the land, it must touch and concern a legal relation or issue, the original parties must intend to bind successors, there must be vertical privity between the original covenanting parties and the successors, there must be horizontal privity between the covenanting parties that consist of a transactional relationship involving a conveyance, and there must be notice of the promise. For a benefited covenant to run with the land, it must touch and concern a legal relation or issue, there must be intent to bind successors, and there must be vertical privity between the original covenanting parties and the successors.

Here, the 1887 deed was an affirmative deed was conveyed to the Lee Monument Association, which promised to use the Circle as a site for a monument to Confederate General Robert E. Lee and to hold the Circle "for the said use." The covenant was affirmative because the covenanting parties promised to use the land as a monument for General Lee only. The LMA commissioned an equestrian statue of General Lee and erected it on the Circle, seeking to donate both to the state.

The deed burdens the land because the Circle is required to comply with the conveyance and its promises. As such, the deed will be analyzed to determine whether it touches and concerns a legal relation or issue, the original parties intended to bind successors, if there is vertical privity between the original covenanting parties and the successors, if there is horizontal privity between the covenanting parties that consist of a transactional relationship involving a conveyance, and if there is notice of the promise.

Touches and concerns

For a burdened covenant to run with the land, it must touch and concern a legal relation or issue. Here, the 1887 deed touched and concerned the property rights, ownership, and use of the Circle,

which was conveyed to LMA. It concerned the use, which was to memorialize General Lee at the Circle. It therefore touches and concerns the legal issue.

Intent to bind successors

The original covenanting parties must intend to bind successors for a burdened covenant to run with the land. The facts state that the deed, which was recorded, was said to hold the circle "only for said use" of commemorating General Lee. LMA also sought to donate both the Statute and the Circle to the State, a successor. The originally covenanting parties therefore successfully intended to bind its successors.

Privity

Vertical privity is a transactional relationship exists between an original covenanting party and a successor. Horizontal privity is a transactional relationship between the originally covenanting parties. Here, Allen conveyed the deed to LMA, who both intended to bind successors to the covenant, which established horizontal privity, as Allen conveyed to deed to LMA which included the promise to use the Circle to honor General Lee. The conveyance from LMA to the Governor was a transactional conveyance and therefore satisfies horizontal privity. However, vertical privity is not satisfied.

Notice

Notice exists if an individual had actual or constructive notice of the covenant. Actual notice is actual knowledge of the covenant, while constructive notice is notice that would have reasonably existed if one diligently searched. Here, there is constructive notice because the deed was recorded, meaning LMA should have reasonably known.

Therefore, the covenant in the 1889 deed was not enforceable as a covenant.

Equitable Servitudes

An equitable servitude is a restriction on the use of land and relief is sought through equitable relief, such as injunctions. The equitable servitude must touch and concern a legal issue or right, be in writing, intend to bind successors, and provide notice of the restriction. Privity is not required.

Here, it may be argued that the use of the land was to restrict uses of the Circle other than for the said use, which was to memorialize Robert E. Lee. The promise concerned a legal issue or

right. Here, the 1887 deed touched and concerned the property rights, ownership, and use of the Circle, which was conveyed to LMA. It concerned the use, which was to memorialize General Lee at the Circle. It therefore touches and concerns the legal issue. The deed was also in writing. It intended to bind successors — the facts state that the deed, which was recorded, was said to hold the circle "only for said use" of commemorating General Lee. LMA also sought to donate both the Statute and the Circle to the State, a successor. There was constructive notice because the deed was recorded.

As such, it is more likely than not that the deed was an equitable servitude, not a covenant.

B. The 1890 Deed

Covenants are a promise to do something or to refrain from doing something related to the use of land. Covenants are enforced through legal (monetary) relief. Covenants may either be affirmative or negative. Affirmative covenants promises to do something related to the use land, while negative (or restrictive) covenants restrict one's ability to do something on the land regarding to the use. For a burdened covenant to run with the land, it must touch and concern a legal relation or issue, the original parties must intend to bind successors, there must be vertical privity between the original covenanting parties and the successors, there must be horizontal privity between the covenanting parties that consist of a transactional relationship involving a conveyance, and there must be notice of the promise. For a benefited covenant to run with the land, it must touch and concern a legal relation or issue, there must be intent to bind successors, and there must be vertical privity between the original covenanting parties and the successors.

Here, the 1890 deed included the covenant that the state "hold the Statute and the Circle perpetually sacred to the purpose to which they have been devoted and faithfully guard and affectionally protect it." This was a promise by the State to LMA and Allen to continue to memorialize General Lee and the the Confederacy's Lost Cause. It was an affirmative deed to continue to uphold the 1887 Deed's covenant.

The deed burdens the land because the Circle is required to comply with the conveyance and its promises. As such, the deed will be analyzed to determine whether it touches and concerns a legal relation or issue, the original parties intended to bind successors, if there is vertical privity between the original covenanting parties and the successors, if there is horizontal privity between the covenanting parties that consist of a transactional relationship involving a conveyance, and if there is notice of the promise.

Touches and concerns

For a burdened covenant to run with the land, it must touch and concern a legal relation or issue. Here, the 1990 deed touched and concerned the property rights, ownership, and use of the Circle, which was conveyed to the State. The State subsequently promised to continue to the terms and provisions of the 1887 deed, guaranteeing to hold the statue and the Circle perpetually sacred. It therefore touches and concerns the legal issue.

Intent to bind successors

The original covenanting parties must intend to bind successors for a burdened covenant to run with the land. The facts state that the 1890 Deed was to hold the Statute and the Circle perpetually, or forever, which indicates that successors will also be required to be bound to the covenant. The covenanting parties therefore successfully intended to bind its successors to the covenant.

Privity

Vertical privity is a transactional relationship exists between an original covenanting party and a successor. Horizontal privity is a transactional relationship between the originally covenanting parties. Here, the original conveyors are Allen and LMA, who were in horizontal privity at the time of the conveyance. LMA and the State are in horizontal privity because they are the original covenanting parties. Vertical privity also exists, as the deed was conveyed to the State, signed by the Governor. Privity therefore exists.

Notice

Notice exists if an individual had actual or constructive notice of the covenant. Actual notice is actual knowledge of the covenant, while constructive notice is notice that would have reasonably existed if one diligently searched. Here, there is constructive notice because the deed was recorded, meaning the government should have reasonably known that there was a covenant in place.

Therefore, the covenant in the 1890 deed was enforceable.

C. Can the covenants be terminated?

Covenants and equitable servitudes can be terminated by destruction, release, estoppel, abandonment, merger, change in condition, or condemnation by eminent domain.

A change in condition is relevant and can be used to destroy the covenant. In 1889, the Joint Resolution stated the public policy of the State in erecting the Statute was a tribute to the Confederacy's "Lost Cause" and as a memorial to the southern white citizenry's continued belief in the virtue of their cause, which defended their pre-Civil War way of life, including the practice of owning humans of African descent as chattel. There has obviously been a change in condition of the public police in 2020, as the vast majority of people likely do not support the "pre-Civil war way of life" as people in the late 1880s did. The change in condition likely would reflect a more inclusive and realistic telling of history which would not depict General Lee as a man who should be placed on a pedestal, and would therefore not bind the State to perpetually maintain the Statue on the Circle. The property rights created in 1887 and 1890 deeds and under the Historic District's Rules have likely been changed and outlawed and would therefore prohibit the Governor from destroying the covenant and equitable servitude and moving the statues. It is also likely public police to rescind all racially restrictive covenants contained within the Historic District.

D. Do the decedents of Allen and successors have any other basis to claim the Statue can only be moved if they approve of the action?

It is possible the decedents and successors could argue that the 1887 covenant was actually an equitable servitude because it was restricting the use of land for any other purpose than for the monumental purpose. They can therefore argue that the equitable servitude was improperly violated and can seek an injunction to preclude the governor from removing the statue. They can argue that the 1890 equitable servitude is enforceable and the Governor can be precluded via injunction. While the successors and decedents may try to do so, they will likely fail to preclude the Governor from removing the statute, as the property was conveyed to him and to the State.

The successors and decedents may be able to argue the Governor is violating the Takings Clause under the United States Constitution. The United States is allowed to take personal property for their own use or the use of another but have to compensate the owner. The successors and decedents may argue that the government's action in removing the statue is considered a illegal taking and therefore either needs to be stopped via injunctive relief, or the decedents and successors must be fairly compensated for the taking. This will likely be an unsuccessful argument, however, because the Statue and the Circle were both conveyed to the State in 1890, and it is more likely than not that the decedents vacated their property rights to the statue and the Circle when that deed was conveyed.

3)

1. Arney's land

Zoning

The government may enact laws to reasonably control land use and development in a way that protects the welfare, safety, and health of the public. Cities and municipalities must be authorized by an enabling act to do so. The laws must be reasonably regarding the welfare of the public and cannot be racially discriminatory or violate any federal or constitutional laws or statutes.

Landowners can get government permission, known as a variance, to be exempt, or vary, from literal restrictions of a zoning ordinance if they prove that the ordinance produced undue hardship and the exemption is not contrary to the public welfare. Once lawful, existing uses for property that are now deemed non-conforming under a new zoning law is considered a non-conforming use. The government cannot zone unless just compensation is paid or the owner receives amortization, or payments to the land owner over a set period of time until the landowner retains value.

Here, the city of New Town passed a zoning ordinance which zoned Arney's land for single-family dwellings only. At the time the ordinance was passed, Arney's lot was still vacant, but he planned to execute his development plans for the lot. These included constructing a building designed especially for a Bikram yoga studio. Although Arney did not act on his development plans by the time the ordinance was passed, he had gotten an architectural drawing of the building.

Arney may have a difficult time asserting any defenses to the zoning ordinance because at the time, his lot was vacant land. While he had dreams of operating a hot room yoga studio, he had not built it on the lot. He had only began the process of planning to do so, as he still did not have the funds to execute his plan.

While Arney may attempt to get a variance to be exempt from the restrictions of the singe-family dwelling ordinance, he may be successful if he proves that forcing him to comply with the zoning ordinance would cause him undue hardship. Arney may argue that he invested $50,000 into the lot already to build the yoga studio, and because of the ordinance, his land

value has significantly decreased. He will likely argue that even if he were to sell the land and find another plot of land to build his studio, he would face undue hardship because he would lose money on the sale of the property. His yoga studio would also not be contrary to public welfare as it would not cause any threat to public health or safety.

Arney would also attempt, though likely unsuccessfully, that his property falls under nonconforming use and he should be exempt from having to follow the zoning ordinance. He will argue that his once lawful property, which he planned to make into a commercial business and yoga studio, would no longer be acceptable. However, it is likely New Town would argue that that Arney's use was not nonconforming because his property was not used for that purpose at the time the ordinance was passed. His land was simply a vacant lot that he eventually planned on using for a yoga studio. The City will further argue that it had been 10 years since Arney purchased the plot of land and had still not built the yoga studio on the land. New Town will further argue that Arney cannot blame the zoning ordinance for the reduction in value of his property.

Because Arney's property was a vacant plot of land and he did not actually have a business on the property, just a plan to create one, it is likely Arney's attempt at preventing New Town from enforcing its zoning ordinance will fail.

2. Barney's land

Zoning

The government may enact laws to reasonably control land use and development in a way that protects the welfare, safety, and health of the public. Cities and municipalities must be authorized by an enabling act to do so. The laws must be reasonably regarding the welfare of the public and cannot be racially discriminatory or violate any federal or constitutional laws or statutes.

Landowners can get government permission, known as a variance, to be exempt, or vary, from literal restrictions of a zoning ordinance if they prove that the ordinance produced undue hardship and the exemption is not contrary to the public welfare. Once lawful, existing uses for property that are now deemed non-conforming under a new zoning law is considered a non-conforming use. The government cannot zone unless just compensation is

paid or the owner receives amortization, or payments to the land owner over a set period of time until the landowner retains value.

Here, the city of New Town passed a zoning ordinance which zoned Barney's land for single-family dwellings only. Barney purchased the smaller lot next to Arney's for $10,000 and used the remaining $40,000 to build and equip a small grocery store on the premises. The small grocery store had been operating at the same level of business ten years after he built it when the ordinance passed.

It is likely that Barney can successfully argue for a variance to become exempt from the restrictions of the ordinance. Although the ordinance zoned Barney's land for single-family dwellings only, Barney has been operating the small grocery store for 10 years and is essentially "grandfathered in" to the land because of the amount of time it has been established on that land. Barney would face undue hardship in the event he would be forced to comply with the zoning requirements and shut down his small business store. He would lost out on about 10 percent net-profit each year. Barney would ultimately have to decide if he was going to find another building or plot of land to house his grocery store, which would be a large expense, or decide to shut down and not rebuild, losing out on income.

Barney can also argue that his grocery store is a nonconforming use that lawfully existed at the time the new zoning law was enacted, and that he should not be forced to comply with the zoning law for that reason.

The City will likely argue that they can just compensate Barney for the store or provide him amortization, or payments over a set period of time until Barney recovers the value of the store and the loss of income. They will argue that the land is better served for single-family residential dwellings.

Ultimately, Barney will likely be successful in requesting a waiver as a variance to the zoning ordinance. It is possible, however, that the city will successfully argue that they can justly compensate Barney through amortization for the fair value until Barney recovers the value of the store, even though the store served a nonconforming use.

3.

Regulatory takings

Under the 10th Amendment, the government can seize personal property for their own use or the use of another with just compensation. A regulatory taking is one whereby the government regulates one's personal property to the point that it decreases the value of the personal property.

Both Arney and Barney have a cause of action for a regulatory taking by New Town. Arney paid $50,000 for his property with the intent to build a yoga studio. His property value dropped to $12,500. Barney purchased the smaller lot next to Arney's for $10,000 and spent $40,000 building and equipping the grocery store on the premises. The value of his land reduced to $2,500 in value.

Because of the regulatory taking, both Barney and Arney would likely be unsuccessful in recovering a fair amount for their land in the event they sold it because of the regulatory taking caused by the government. They would therefore be treated differently by those seeking to buy property because they would not be able to sell their property for the full value.

END OF EXAM