This memo addresses four potential lawsuits. First, it addresses CTC's claim against Exergen for breach of covenant. Second, it addresses Godric's claim against the state of Agraman for a taking. Third, it addresses LPC's claim against Nearen for violation of RLUIPA. Finally, it addresses whether Thomas holds an easement on Stephen's land.

CTC v. Exergen for breach of covenant(contract)

CTC is seeking its $1,500 back, indicating a real covenant (a servitude/contract based in law seeking damages), despite the lease language saying "covenants run with the land" which would indicate an equitable servitude because real covenants run with *estates* in the land.[1]

The covenant involved is affirmative, as it involves a promise to do something, to return the deposit. Because Exergen and CTC are not in contract with one another, to determine if Exergen can be sued by CTC under the covenant, it must be established that the burden (duty to perform the covenant) runs to him. Because CTC is an original party to the contract, the benefit certainly "runs."

For the burden to run, the statute of frauds must be satisfied by the original parties and because the lease was in writing, it clearly was. Second, it must be the original parties' intent that successors be bound. This is often presumed if the covenant touches and concerns the land, but even if it did not, the lease language stated it should run with the land, indicating the parties' express intent. Thirdly, the covenant must touch and concern the land. That means it must bear some reasonable relationship to the use and enjoyment of land. CTC will argue payment of rent has always been an exception to the traditional rule that payment does not touch and concern the land, and the security deposit is essentially rent because it is used to cover in case he misses a

[1] However, because equitable servitudes are met if real covenants are met, the analysis will address real covenants.

payment. Further, under the modern test set forth in Neponsit (the substantial effect test), the security deposit would certainly go toward the land, like a homeowners fee, because it can be used to make repairs should the land need it or to pay for the rent. Exergen will argue the security deposit is not rent, and an obligation to pay has traditionally not touched and concerned the land, because the money does not necessarily go directly to the land. It could argue the payment is exactly what it purports to be, security, it is simply money switching hands over time to ensure payment. Ultimately, it is likely that CTC will prevail based on the traditional exceptions and substantial effect test, leaving privity and notice requirements.

Traditionally, both horizontal and vertical privity were required for the burden to run, though most courts do not require horizontal privity anymore.[2] Notably, horizontal privity exists, as CTC was in a lease with the original owner, Dryden. Vertical privity refers to the relationship between Dryden and CTC. The transfer in the interest must be the entire estate for the burden to run, and because no facts indicate Exergen did not buy everything, it will almost certainly be satisfied.

This leaves the notice requirement. Notice can be actual, constructive, or inquiry. That said, CTC will argue by taking on the leases, especially when this sort of provision is standard practice, Exergen was on notice of its existence. Exergen will argue buying a realty company does not assume he knows or should know of any standard and there are no facts to indicate he that he knew of the lease terms involved.

As stated above, because CTC is an original party, the benefit is certainly involved (even if it weren't, the lesser standards required for benefits would be met as above), leaving only

[2] Horizontal privity refers to the relationship between the original contracting parties.

whether the covenant was terminated. No facts give any indication this is the case, despite any changed conditions, there is no indication those changed traffic conditions have any bearing on a security deposit.[3]

A court would likely rule in favor of CTC, assuming they can show they have met all of their obligations to receive the security deposit, and Exergen would be responsible for repaying the $1,500, because the burden of the covenant between Dryden and CTC ran to him.

Godric v. Agraman for unconstitutional taking

The Fifth Amendment, which has been applied to states via the Fourteenth Amendment, reads "nor shall private property be taken for public use, without just compensation."

The dispute involves private property, as it centers on land now owned by Godric, leaving only whether it is a public use, a taking, and if so, what would be just compensation, in question.

Public use refers to police powers of the state to handle matters of public health, safety, and welfare. Godric will argue the wetlands do not involve health, safety, or welfare because there is no indication they are used for anything other than preservation, the true purpose is not noted. She will argue it would be within the police power to allow her to continue the easement and build the homes as it would improve the social welfare of the farmers and herself. Agraman will argue in Kelo, the Supreme Court expanded the public use doctrine to include public purpose, and preserving wetlands is in the public interest for property values and environmental reasons, though many states immediately restricted Kelo.

[3] For the benefit to run, a lesser standard is involved and even if CTC were not an original party, it would likely run as it holds a partial interest from the original party.

Assuming a public purpose, the issue is whether a taking occurred. There was no physical occupation, nuisance control (as this involved beneficial use), or total regulatory wipeout, leaving only a balancing test set forth in Penn Central to determine if the regulation had gone "too far" (Penn Coal).

The court will look at the economic impact of the regulation. Godric will argue not being able to move soil and build lands will decrease her property values, especially when it is difficult to obtain a permit. The 25 acres in question are rendered almost useless to her, though not enough to constitute a total regulatory wipeout. Agraman will argue there is no prevention of return because 2/3 of her land is still suitable for building and she could obtain a permit, as could any other owner with some specificity.[4]

The extent the regulation interfered with investment backed expectations is also considered. This refers to whether she is able to use the land for the purpose she planned. Godric will argue she intended to build homes, and is no longer able to do that on 25 acres. Also, she will argue the government's perpetual easement will over-burden her estate if she is not able to fill the soil as planned. Agraman will have a strong argument that it only affects 1/3 of her land, leaving 2/3 to build homes, and she could have received a permit with more specificity on her part. The court in Palazzolo indicated that a pre-existing regulation is a factor to be considered, and this regulation was in place in 1987, she did not acquire the land until 2006. While this is just one factor, it certainly strongly bears on the government's argument, despite a likely argument by Godric that the estate was held for her family before the ordinance passed, so she could not have truly known of its existence beforehand.

[4] How the court addresses the denominator issue, that is, what constitutes the "whole" property will be key, and the Supreme Court has not dictated a clear standard.

Finally, the character of the government plan is considered. Godric will argue the government does not have a good purpose because building homes and guest houses could provide rentals that would bring people to the city. Agraman will argue governments routinely impose restrictions relating to environment preservation, she still has use of most of her land, and preserving wetlands is a key environmental interest of the government.

Ultimately, whether this works a taking seems a pretty even split, but likely a taking. I suggest Godric pursue her case in front of a jury (assuming a jurisdiction that allows jury trials for takings). Ultimately, she could only receive fair market value for the extent of the taking, with no sentimental value calculated, should there be any.

LPC v. Nearen for violation of RLUIPA

Zoning ordinances are imposed and upheld based on a landmark case Euclid. However, it is important to note that zoning ordinances must be clear and should the court determine this one is vague and does not provide sufficient standards, it cannot be upheld.

LPC should bring its case under the Religious Land use and Institutionalized Persons Act (RLUIPA) which prohibits regulations that impose substantial burdens on religious exercise unless there is a compelling government interest and it is the least restrictive means of furthering that interest. RLUIPA applies for two reasons: the government used federal funds to begin its zoning scheme and it involves the implementation of a land use regulation.

LPC would first argue this involves religious exercise and Nearen would have a hard time countering it because the definition of religious exercise, any exercise of religion, whether or not compelled by, or central to, a system of religious belief, is broad enough to include just about anything.

LPC must demonstrate a substantial burden, defined as significant oppression. It will argue they are not being offered alternatives, they are simply told they cannot exercise two of three main components of their religion. The traffic is increasing across the entire city, and they are being singled out for some reason and being told they cannot do 66% of what is most important to them. Nearen will argue they are still allowed to worship, which is a major part of religious exercise, and they simply are being prohibited from doing things that would bring in members outside the congregation.

The restriction must also involve a compelling government interest. LPC will argue the "So, since God is on your side, you must be exempt from zoning, then?" comment indicates more of a personal vendetta against their religion rather than furthering government interests. They will argue this is not a factory that would increase pollution and a church would not increase traffic greatly, and even when it does, it will likely be on weekends. Nearen would argue allowing weddings and funerals would stretch the fire and police services beyond their limits and they have a government interest and making sure they can provide safety to residents.

Finally, this must be the least restrictive means of furthering the interest. LPC will argue there are other alternatives, like adjusting the number of people allowed to come to those events or seeking funding for more police or volunteers. They will also point to the equal terms provision, which says religious assemblies and institutions cannot be treated differently than no-religious institutions. Meaning, if there are other groups being allowed to have weddings and funerals, that are not religious, it would be an automatic violation. Nearen will argue, though unsuccessfully, that they have to cut the traffic somewhere, and they are simply enforcing zoning ordinances.

LPC would likely prevail in a lawsuit against Nearen, especially because if this is found to be discriminatory, it would involve state action and courts cannot enforce discriminatory policies (Shelley).

Stephen v. Thomas for whether an easement exists

An easement is a non-possessory right to use the land of another. Easements can be classified in a number of ways, the one in question being an affirmative appurtenant easement because it is a right to do something on someone else's land that relates directly to that land, not personally to the owner or another. Wonderful Farm is the dominant estate, as it benefits from the easement, leaving Victory Farm as the servient estate, which provides the benefit.

The easement is not express, implied from prior existing use (no unity of ownership), or necessity (no unity of ownership), leaving only prescription or estoppel as options.

A prescriptive easement in America is based on adverse possession, requiring continuous, hostile, open/notorious, actual, exclusive use for the requisite time. Such easements encourage productive land use. Thomas will have no difficulty arguing continuous, actual and exclusive use. It was continuous because he never stopped the use; he used the drain as any ordinary owner would. Actual use, though not always required, is satisfied because the drain was physically used every time that it rained. It was exclusive because his use was independent of other's uses. The elements at issue are hostility, open/notorious, and time. Courts address hostility in two ways, but regardless, neither would be met because Thomas had permission to use the land. Under the subjective rule, his "good faith belief he is entitled to use the land" was verified by Zachary's permission. The objective rule would require any non-permissive use, but this use was permissive. Thomas might try and argue the land was "unimproved" when the drain was built,

and wild land is presumed hostile. Again, the fact that he had permission would almost certainly defeat this element. Even if the court turned a blind eye, there is a strong argument the easement was not sufficiently visible. Because the drain is underground, Zachery might not have seen it and unlike Van Sandt, where the use of sewage implied its visibility, Zachery's estate was not benefited. Ultimately, there is no prescriptive easement and Thomas must find another way. He might try and pursue a prescriptive easement against Stephen, though Stephen broke the continuity by capping it well before the statutory period of 20 years, and with it he capped Thomas's hope of a prescriptive easement.

Thomas's best chance of establishing an easement would be by estoppel. He could argue he relied on Zachery's word that he could use the drain and it is now to his detriment, as his land was flooded. However, under the doctrine of estoppel, it is likely Stephen would not be bound because he had no knowledge of the drain. Further, there would likely be some sort of other option for him to re-coop his loss; it is not as if he expended a large amount money in reliance like building a house.

Should the court entertain the easement, it has almost certainly expanded beyond its "scope" and begun to excessively burden the servient estate. Stephen cannot use his sewer with the drain in place. Courts are hesitant to allow increased scope of easements that do not arise from the parties' intent, and as this one clearly does not, Thomas should seek alternative means (like beginning an easement and paying Stephen for its use). Also, any argument Thomas might attempt that the easement was transferred would fail because it must be transferred from the dominant estate, you cannot transfer an easement to another servient owner without notice.

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