Property II Final Exam

Question 1:

CTC

In response to CTC's inquiry, I would advise CTC that it will likely prevail in a suit against Exergen Realty to recover the security deposit. Because CTC wants money damages (its $15,000 deposit), I would advise CTC to file this suit as a real covenant. A real covenant running with the land is a contract between two parties, which, because it meets certain technical requirements, has the additional quality that it is binding against one who later buys the promisor's land, as Exergen did here. In order to recover, CTC must prove that the burden of the covenants in its lease with Dryden Realty run to Exergen. The burden runs when the covenant meets five requirements: there is a writing that satisfies the Statute of Frauds, intent to bind successors, obligations must touch and concern the land, vertical privity of the entire interest of the promisor, and notice of the covenant.

Here, the covenant to return the security deposit if the tenant pays all of the rent owed was written in the lease, signed by the original parties, and properly recorded. The intent to bind successors is shown in the lease itself, which states that all of the covenants in the lease run with the land, meaning it binds all successive owners. To touch and concern land, the covenant must concern occupation and enjoyment of land and must affect the parties' interests as landowners. Because this is an affirmative restriction to pay money, Exergen will argue it is more of a personal benefit. It was a personal insurance for Dryden to ensure CTC paid rent. However, CTC will argue requirements to pay rent runs with the land, so a security deposit tied to rent payment also runs with the land. The burden of returning the deposit is inseparably attached to the land concerned in the lease. Thus, the covenant does touch and concern the land.

CTC will also argue there is vertical privity because Exergen bought the entire building from Dryden, presumably in fee simple. Finally, there was notice of the covenant because it was recorded in the lease, which Exergen likely received a copy of when it purchased the building. Even if Exergen had no actual notice, because it was recorded in the lease and because the payment and return of security deposits was standard practice in Barnaty, Exergen had constructive notice of the covenant and should have known of its existence.

Therefore, because the burden likely runs to Exergen, I would advise CTC to file suit for the security deposit. I would also advise CTC that if it wanted specific performance (a common equitable remedy) of the return of the security deposit, as stated in the lease contract, it could also file suit in equity under the theory that the lease covenant was an equitable servitude. This would involve the same analysis, with the exception that privity would not be required.

Gail Godric

Next, I would advise Gail Godric not to pursue a takings claim against the City of Agraman. The 5th Amendment Takings Clause prohibits the Federal Government from taking private property for public purposes without paying the private owner for the property. At times, a regulation may so drastically interfere with the private owner's use of her property, or with the value of that property, that the court will conclude that there has been an implicit "taking," known as a regulatory taking. The U.S. Supreme Court has distinguished two categories of regulatory takings: (1) categorical regulatory takings (*Lucas*) and (2) *Penn Central* balancing regulatory takings. The categorical type of regulatory taking analysis applies when a regulation eliminates all economically beneficial or productive use of land (regulatory wipeout). Here, Gail will argue she suffered a regulatory wipeout because she can no longer make use of any of her 75

acres. Not only did the easement allowing permanent flooding of the 50 acres below 220 feet make that land unusable, but the WPA's denial of her ability to place soil or fill material on the 25 acres above the 22 feet make that land unusable as well. However, I would advise Gail against using the *Lucas* test because the regulation did not result in a *complete* loss of use or value of the property. Gail was still allowed to request a permit to fill the 25 acres and, even if a permit could not be obtained, she could still use the land for fishing, camping, etc., meaning it retained beneficial use and enjoyment. Further, the WPA was not regulating a common law nuisance, so no exceptions to the *Lucas* test apply.

Therefore, I would advise Gail to pursue her takings claim assessing the constitutionality of the regulation using the *Penn Central* balancing test. The test seeks to establish whether particular private property owners are being forced to bear an unfair share of the burden of a law designed to protect or enhance the public at large. First, Gail must prove the regulation has an economic impact on her property. While no exact numbers indicating a diminution in value are given, Gail will argue because the permit was denied the potential resale value of the property has likely been substantially diminished. Next, Gail will assert the regulation interferes with her distinct investment-backed expectations for the property. She bought the property intending to build a home and several guest houses. Although she likely knew the WPA existed because Hatimaton, who held assets for the benefit of Gail's family, received notice from the WPA that a permit would be required to fill the land, Gail had development plans for the property that now cannot be realized. In response, Agraman will likely argue that Gail could have acquired a permit if she had cooperated in providing additional details about her project. Her investment-backed expectations could have been realized. Further, as of now, she has only made plans to build; she has not made actual improvements to the land, meaning she has made no added investments in

the property. Additionally, Gail knew of the requirement for a permit (WPA passed in 1987) and should have factored such a requirement into her plans to build. Gail will counter that even if one purchases land with notice of the regulation enacted earlier, the owner can still bring a suit for a regulatory taking. (*See Palazzolo*).

Whereas Gail may have an argument that her investment-backed expectations cannot be met, she will likely not be able to overcome the remaining factor: the character of the government action. The WPA seeks to protect wetlands and preserve the environment, both valid state interests. Agraman also took it upon itself to limit the severity of the WPA by allowing one to obtain a permit to fill her land to curb the unfairness of the WPA and the burden that an individual would be forced to bear because of the act. However, because Gail did not provide a valid permit application, even when given the chance to improve it, she caused her own "taking." Thus, I would advise Gail not to sue and, if possible, to submit another permit application.

Question 2:

LPC

First, I would advise LPC that it will likely prevail in a suit against the City of Nearen for a claim that the city's zoning plan is unconstitutional under a theory of religious discrimination. In its constitutional attack, LPC will argue Nearen's acceptance of its conditional use permit with exceptions prohibiting holding weddings and funerals violates the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA applies when the state program received federal financial assistance, when interstate commerce is affected, and when a substantial burden is imposed on the implementation of individualized assessment of land use. Here, LPC will argue RLUIPA applies both because the state of Monrotha received federal financial assistance and

because the Nearen Zoning Board considered the individualized assessment of land use. Though there is no indication the Zoning Board itself is supported by federal funds, the creation of a comprehensive zoning plan and the Board could not have ben possible without funds from a federal program designed to assist states in growth management practices. Further, RLUIPA applies when the government takes into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use. Here, NZB looked at exactly what uses LPC would make of the new church building before granting the permit and in its consideration of those uses, denied some it found too burdensome on the city. Thus, RLUIPA applies in evaluating LPC's claim.

Under RLUIPA, land use regulations that impose substantial burdens on religious exercise are prohibited unless the government demonstrates that the regulation is in furtherance of compelling governmental interest and is the least restrictive means of furthering that interest. LPC will argue the conditional use permit exceptions prohibiting weddings and funerals imposes a significantly oppressive burden on LPC because the entire purpose for the church was to worship, marry, and conduct funerals. They wish to do what all normal religious groups are permitted to do in their churches. Without the ability to marry and conduct funerals in their new church, the members of LPC will have no other place to hold such sacred ceremonies. While NZB may argue weddings and funerals are not religious exercises like worship is, these ceremonies are a religious exercise under RLUIPA, which has a very broad standard of religious activity in that the activity only need be religious in nature. It does not need to be compelled by or central to a religious institution, which these weddings and funerals would be if performed in the LPC by the congregation leader. Thus, the regulation imposes a substantial burden on LPC's religious exercise.

However, NZB will argue the regulation is in furtherance of a compelling state interest because the exceptions were made to prevent the large traffic problems that accompany such events. Traffic and the air pollution that results are putting Nearen residents in danger, as Nearen children are experiencing increased incidences of asthma due to air pollution. The exceptions are designed to protect the health, safety, and welfare of Nearen residents. Moreover, they will decrease noise from traffic congestion, reduce street accidents, and promote quiet seclusion and clean air ideal for families. In response, LPC will argue the government also has a compelling state interest to ensure religious freedom and these zoning exceptions operate by reference to a suspect class (religion). The state has a higher burden to meet when impacting a fundamental right (free religious exercise), which they likely cannot meet here unless all other churches and religious groups are subject to the same exceptions for weddings and funerals. Though NZB will argue they have already furthered their interest in the least restrictive means by permitting the church members to worship, LPC will argue this is not the narrowest way to achieve their interest. Nearen could limit the number of cars permitted at weddings and funerals or require carpooling of attendees. Restrictions on the number of cars would achieve their interest (protecting clean air and reducing traffic) in a less discriminatory manner than the current exceptions. Thus, I would advise LBC to pursue their claim because they will likely prevail.

Stephen

I would advise Stephen that Thomas likely does hold an easement over Victory Farm. An easement is a non-possessory right to use the land in possession of another for a specific or limited purpose. Here, there is no express easement between Stephen and Thomas because nothing was ever put in writing, so if Thomas does hold an easement is will be implied.

Thomas may argue he holds an easement by prescription over Victory Farm. With an easement by prescription one must show continual, hostile, open and notorious, exclusive, and actual use for the statutory period. Here, Thomas actually used the pipe continuously and exclusively for 20 years to drain water from his farm. The question is whether his use was hostile. From 1980 to 2010, when Zachary still owned the servient estate, his use was not hostile because he had permission from Zachary to be on the property. Because Zachary knew of Thomas' use (open and notorious) and granted permission for Thomas to be there, Thomas did not acquire an easement by prescription. Nonetheless, because Stephen did not know about the pipe and he did not grant permission for Thomas to have the pipe on his land, the clock started running on a prescriptive easement when Stephen took ownership in 2010. However, because Stephen removed the pipe (terminated the potential easement by physically preventing the easement from being used), Thomas does not have and will not acquire an easement by prescription.

Thus, Thomas' best argument and the one that will lead me to advise Stephen that Thomas does hold an easement over Victory Farm will be to argue he has an easement created by estoppel. With an easement by estoppel, Thomas must show the owner (Zachary at the time) granted permission and that Thomas relied on this permission to his detriment. Thomas had permission from Zachary to lay his drainage pipe across Victory Farm and has been using the drainage pipe to protect his farm from flooding for the past 20 years. In response, Stephen will argue Zachary only granted a license, which in this case was the oral permission to use his land for his drainage pipe. A license is revocable at will. Here, when Stephen dug up Thomas' drainage pipe to repair his sewer line, he effectively revokes Thomas' license to use his land. After 20 years, Thomas has more than recovered the value of his investment in the pipe, so the

license was freely revocable. However, Thomas will argue, if what Zachary granted was a license, it became revocable when Thomas expensively and reasonably relied on it. Zachary told him it was an easement, so he spent money buying and installing the drainage pipe and assumed his use of it would continue indefinitely, as most easements do. If the license became irrevocable or if this was an easement by estoppel, Thomas likely holds a valid easement and can sue Stephen to have the pipe restored.

However, I will also advise Stephen that if Thomas does nothing in response to Stephen's removal of his pipe and continues to do nothing for 20 years (the prescriptive period), Stephen will have terminated the easement by prescription. When a servient tenant wrongfully and physically prevents the easement from being used for the prescriptive period (and satisfied all elements of prescription), the easement is terminated.

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