



**PROPERTY II FINAL EXAM**  
**Spring 2011**  
Friday, May 6, 2011  
*Professor Donald J. Kochan*  
*Chapman University School of Law*

## ***SPRING 2011 FINAL EXAM***

### INSTRUCTIONS:

The examination is a three-hour modified open book examination – each student may use his/her text, any assigned supplemental materials, any supplemental materials specifically provided by Professor Kochan (like the powerpoints), any notes or outlines which that student prepared, any group notes or outlines to which he/she made a *significant* contribution in preparation, and a general usage English and/or legal dictionary. No commercial outlines, treatises, or similar materials will be permitted for use during the examination. Other than ExamSoft and requisite hardware, no electronic materials or devices may be used during this exam.

All notes and copies of the exam questions must be turned in at the conclusion of the exam, although only official answers on ExamSoft or in Bluebooks will be considered in the evaluation of your grade.

Should it become relevant, assume that the statutory period for adverse possession is 10 years and that the relevant jurisdiction loosely borrows that period for purposes of interpreting its law on prescriptive easements. All instructions given during the semester as to subjects which should not be discussed or have been stated as non-testable apply.

**There are 3 Essays**  
(and no multiple choice)  
**Total points = 100**

**Please Note: *Essay 1* should be approached in the typical manner appropriate to a fact intensive hypothetical with issues raised at every point in the narrative that should be discussed within an answer, supplemented with focused answers guided by some specific pinpoint questions.**

***Essays 2 and 3* ask more discrete issue questions and call for analysis focused around and guided by the specific questions presented.**

**ESSAY 1: (65 points)**

Ben owns in fee simple a large tract of land named Blackacre. All of Blackacre is in an area zoned exclusively residential (with an allowance for utility easements and other uses ancillary to residential living). Ben is facing financial difficulty and is having trouble paying his \$2 million mortgage. To relieve his financial burden, Ben decides to subdivide Blackacre into 10 equally sized lots, retain one for himself where his home currently stands, and offer the remaining 9 undeveloped lots for sale. As an avid conservationist and lover of the beauty of natural growth, and to further help satisfy his financial needs, Ben (who is not a lawyer) drafts the following language that he affectionately calls the “No Plastic Pink Flamingos and Other Things Clause” (the “PPF Clause”) intending that it be included in the deeds of all 10 lots:

“For the mutual benefit of grantor, grantee, and all contiguous landowners, grantee and all those who succeed to his/her interest agree that the conveyed lot shall be used only for residential use and that no lawn decorations or yard enhancements – including but not limited to artificial flora or fauna or the replication of the same in an artificial or unnatural way – shall be erected or contained on the exterior of any lot. Grantee and all those who later own the property agree to plant or preserve and maintain the health of at least one natural growth tree in front and at least one natural growth tree behind each erected structure on the conveyed lot. Grantor, his heirs, assigns, and successors agree to maintain one cell phone transmission tower on Lot 1 for the benefit of Lots 1-10. Grantee, his heirs, successors, and assigns further agree to make payments on the mortgage of Grantor on Blackacre in the amount of \$10,000 per year, every year until the mortgage has been paid in full.”

Before selling any of the Lots, Ben grants an express, valid written easement to Verizon for the construction and maintenance of a cell phone tower on Lot 1, which is the Lot Ben is retaining after subdivision. Verizon builds and maintains the tower.

Ben files a subdivision plan with the City including a Declaration of Restrictions that included the PPF Clause, records the plan, and proceeds to offer Lots 2-10 for sale,

retaining Lot 1 for himself and his home. He immediately sells Lots 1-8, all with the PPF Clause in the deed. Ben then sells Lot 9 to Nina with the PPF Clause in the deed for Lot 9. The deeds for all Lots 2-9 were properly and immediately recorded the day of sale. Nina the next day sells Lot 9 in whole and in fee simple to Nigel by General Warranty Deed and Nigel immediately records.

Ben then entered into negotiations with Tenley for Lot 10. Tenley hires her own personal agent (who has no duties to the seller) to broker the deal. Tenley's agent assures her that there are "no restrictions included" on the property. So, without reading anything, Tenley signs the paperwork including the deed to Lot 10 which included the PPF Clause. When she got home, Tenley read the deed and was horrified. The initial deed was not recorded. Tenley called up Ben and said, "I am not agreeing to this." Ben said, "fine, I will fix it." Ben drafted and executed a "Corrected General Warranty Deed for Lot 10" which omitted the PPF Clause. Tenley signed the Corrected Deed and immediately recorded that deed.

After all ten lots are sold, Verizon enters into an agreement with Whapman College to attach weather monitoring devices (for the exclusive use and benefit of Whapman's research teams) to the tower Verizon constructed on Lot 1. The weather monitoring devices emit an intermittent high frequency noise at various times of the day and night that can be heard only by some dogs on Lots 1-10; and the weather monitoring devices attached to the tower are barely visible and cannot be seen from the ground with the naked eye.

(Since the time of initial conveyance, Lots 1-9 and their owners have all been in compliance with the restrictions in the deeds related to the prohibition on certain lawn decorations, the planting of trees, and the payments on the mortgage and remain so at the time of any litigation that arises under these facts.)

Tenley built a home, maintained a natural growth tree in front and one in back and otherwise "complied" with spirit of the PPF Clause whether she was bound by it or not. She never made a payment on the Blackacre mortgage however. One year after the initial sale of Lot 10, Tenley sells Lot 10 in whole and in fee simple to Rhead and conveys to

Rhead by the “Corrected” Lot 10 deed. Tenley explains to Rhead that “the deed and records speak for themselves” as regards any encumbrances on Lot 10.

Rhead takes possession and never pays on the Blackacre mortgage either. Indeed, when asked to make such a payment by Ben immediately after buying Lot 10, Rhead refused to do so saying that he was under no such obligation.

Rhead moves in to Lot 10 and takes residence in Tenley’s old house. Rhead decides to open a day care inside his new home. Because the kids need a sanitary environment and “nature is dirty”, Rhead decides to “sterilize” the backyard which he plans to use as a playground for the kids. Rhead stops a neighborhood boy, Jimmy, riding his bike in front of his house and says, “Hey, kid, want to make some money? I need some trees and other nature removed from my backyard. I’ll pay you \$100 to help.” Jimmy verbally agrees. Rhead then says, “Let’s make it official.” Rhead pulls out his spiral notebook and pens the following: “I give permission by easement for Jimmy to come onto my property and cut down my trees and stuff, but he has to leave when he is done or when I tell him to whichever comes first. In consideration, I will pay Jimmy \$100.” Both Jimmy and Rhead sign the paper and Jimmy comes over the next two days and helps with the nature removal. On the third day when there was still work to be done, Rhead sees Jimmy being lazy in the sun and says “Go away Jimmy and don’t ever come back.” The next day, while Rhead was at work, Jimmy came by and commenced with digging and raking up several wheelbarrows worth of shrubs and branches.

(A) Rhead learns of this and sues Jimmy. What are the claims and defenses of the parties?

Jimmy never comes back but Rhead keeps working on his backyard project. The tree and most of the other “nature” have been removed. He puts down artificial turf and places green plastic trees and fake rubber plants all around the yard. He also installs speakers to add to his rainforest feel that play the sounds of wild birds, monkeys, and the occasional growl of gorillas on a repeating 15-minute loop throughout the day and all through the night. Having completed all of these renovations, the next day he opens the day care.

Nigel is the owner of Lot 9 next door to Lot 10. He hates the view of plastic next door, can't sleep and gets headaches from the artificial animal sounds, and is disturbed in his ability to read, write, think and otherwise exist with the noisy kids next door every day and the flow of traffic from the parents dropping kids off at 6 am and picking them up around dinner time. All the distractions also disturb his dog, who seems increasingly irritable since Lot 10's new landscaping. Actually, Nigel's dog has been acting up ever since the new weather monitoring devices were added to the cell tower on Lot 1.

(B) Nigel sues Rhead. What are the claims and defenses of the parties?

(C) Nigel sues Ben. What are the claims and defenses of the parties?

(D) Nigel sues Verizon. What are the claims and defenses of the parties?

(E) Ben sues Rhead. What are the claims and defenses of the parties?

(F) Ben sues Verizon. What are the claims and defenses of the parties?

(G) City sues Rhead. What are the claims and defenses of the parties?

(H) On a separate note, what are the legal and practical consequences of the pre-existing mortgage on Blackacre for the owners of Lots 2-10? Please explain.

Meanwhile, while all of this litigation is pending, in order to increase coverage in the area, Verizon petitions the government for a permit to exceed a generally applicable mandatory height restriction on cell towers. Verizon wants to build a replacement cell tower that is 10 feet higher than its present tower which has a valid existing permit. The government denies the new permit for the replacement tower citing the height regulation. (I) What are Verizon's options?

– ***EXAM CONTINUES ON NEXT PAGE*** –

**ESSAY 2: (15 points)**

Z, fee simple owner of Blackacre, conveys it to X. X does not record. X conveys to Y. Y records. Then Z executes a deed to B. B records. B executes a deed to C. C records. Neither C nor B knew of the deeds to X and Y. Blackacre is still vacant land with no one in actual physical possession. Y then moves onto Blackacre and C sues to eject Y and for a declaration of priority ownership and superior claim against Z, X, Y, and B.

- 1) In a common law system with no recording acts, who would/should prevail and why?
  
- 2) In jurisdictions with recording acts, who prevails in each type of jurisdiction (race, notice, or race-notice)? And, most importantly, explain – with specificity – why the party you identify as prevailing will have priority vis-à-vis all other competing claimants.
  
- 3) In *no more than* a 2 or 3 sentences, *briefly* explain the purpose and utility of recording acts generally.

– ***EXAM CONTINUES ON NEXT PAGE*** –

### **ESSAY 3: (20 points)**

“If at first you don’t succeed, try and try again.” This well known adage aptly applies to the resolution of certain problems and the satisfaction of preferences regarding particular types of land use as connected with what we have been calling the land use dynamic circle.

- 1) Please explain what that second statement means – Why does the adage apply to the land use dynamic circle?
- 2) Explain further by analyzing the complicated problem to be resolved or preference to be satisfied that potentially requires a land use control when it comes to the specific dispute between coal bed methane (“CBM”) owners and coal deposit owners? Remember that, at its core, the CBM/coal owners dispute arises because CBM is a resource that exists inside a coal seam resource and the two resources are often separately owned. If you extract the coal, existing methane will escape and be lost forever. If coal owners must wait until the CBM resource is depleted, their coal must remain in place for a long period of time. It is very difficult to have simultaneous access to the resources by both parties. In your answer, the following issues should guide your analysis and generally be addressed:
  - a) In your answer and in no more than one paragraph, explain in more detail the basic conflict of competing and priority rights between the owners of coal bed methane and coal owners. What is the nature of the dispute, how does it arise, and why does the initial assignment affect the CBM or coal owners preferences and options and how does it steer them in and between land use control mechanisms? (Please note that while you should mention how Coase relates, among *many* other things, you do not have enough information to do a full Coase-related analysis and none is expected)
  - b) Using the CBM/coal owners conflict as an example, explain the meaning of the above adage (“If at first you don’t succeed . . .”) and describe a pursuit of alternative land use controls to resolve that specific conflict. In your answer, explain the advantages and disadvantages/opportunities and barriers of each alternative mechanism to resolving the dispute.

**-- END --**