

Kochan, Property II – Issues & Concepts Checklist

*Please note that this list is not meant to be exhaustive but only representative of some of the primary issues you should cover in preparing for the exam.

Transfers & Title Issues

Statute of Frauds
Waiver
Estoppel
Part Performance
Marketable Title (defects, remedies, risk of loss)
Merger
Quiet Title
Quitclaim Deed
Caveat Emptor
Implied Warranty of Quality Deeds
❖ General Warranty
❖ Special Warranty
❖ Quitclaim Covenants (or "covenants for title")
❖ Covenant of Seisin
❖ Covenant of Right to Convey
❖ Covenant Against Encumbrances
❖ Covenant of General Warranty
❖ Covenant of Quiet Enjoyment
❖ Covenant of Further Assurances
Deed
Delivery of the deed
Recording Acts
❖ What interests must be recorded?
❖ What interests are not recordable?
Indexes
Three Types of Recording Acts
Notice
❖ Actual
❖ Constructive
 • Record (Chain of Title)
 • Inquiry Notice

LAND USE CONTROLS

Four Possible Systems of Land Use Controls
❖ State of Nature
❖ Market Contractual Controls
❖ Market Contractual + Judicial Remedies
 • Liability Rule (damages)
 • Property Rule (injunction)
❖ Regulatory Controls
 • Preventative
 • Abatement
 • Compensatory

Judicial Land Use Controls

→ Nuisance (private / public)
Nuisance Calculus
Trespass vs. Nuisance
Lateral Support
Subjacent Support
Ⓢ Sic Utere
R.2d Torts § 827-28
Ⓢ Externalities, Coase, Right to Exclude, Right to Include
Coming to the Nuisance

→ Remedies
❖ Injunction
❖ Permanent Damages
❖ Dell E. Webb
Environmental Nuisance: Is nuisance law sufficient?
Ⓢ Traceability
Ⓢ Collective Action problems
Ⓢ Free-Rider
Ⓢ Holdouts

Private Land Use Controls

Servitudes
Invalid Servitudes (R.3d Servitudes §§ 3.1, 3.5)
Conservation Easements
→ **Easements**
Distinguish from Profits, Licenses
Dominant tenement
Servient tenement
→ Appurtenant vs. In gross
Commercial Easements
→ Scope
Intensity
Location
Divisibility
Assignability
Duty to repair & maintain

Ⓢ Sui generis
→ Creation of Easements
❖ Prescription
 • Lost Grant Theory
❖ Express
 • Quasi Easements
❖ Necessity
❖ Estoppel
❖ Eminent Domain
→ Termination of Easements
❖ Terms of the Grant
❖ Purpose ends
❖ Merger
❖ Forfeiture for misuse
❖ Release
❖ Abandonment
❖ Estoppel
❖ Prescription
❖ Recording Acts
❖ Eminent Domain

Modification of Location of Easements
❖ Established rule
❖ Restatement rule

→ Real Covenants

Binding the Estate
Touch and Concern
❖ Bigelow test (p879)
Affirmative vs. Negative covenants
Distinguish running of benefits vs. burdens
Ⓢ Encumbrances on the land; free alienability; where and why is running disfavored?
R.3d Servitudes § 7.12
R.3d Servitudes § 2.4
→ **Equitable Servitudes**
Ⓢ Richard R. Powell ("sinks its tentacles into the soil")

→ Negative Easements

Traditional negative easements
Destruction of an equitable servitude
→ Restatement view on real covenants and equitable servitudes

Legislative Land Use Controls

→ Zoning

Purpose for zoning
Ⓢ Ex ante vs. ex post rules
Police powers
Euclidean zoning
Euclid rule (clearly arbitrary and unreasonable, no substantial relation to public health)
Comprehensive Plan
Master Plan
Standard State Zoning Enabling Act
Ⓢ PA Northwestern Distrib. (general limits for zoning authority)
Aesthetic regulation & Free speech
Architectural regulation
Moral regulation
→ Rezoning
❖ Amendments
❖ Conditional rezoning
❖ Contract rezoning
❖ Spot zoning
❖ Floating zones
❖ Cluster zoning & PUDs
→ Zoning Exceptions
❖ Variances
❖ Special Exceptions
❖ Exactions

→ Four Approaches to Confiscatory

Rezoning

❖ Grandfathering
❖ Amortization
❖ Taking
❖ No protection
Constitutional Restrictions on Zoning
❖ Confiscatory zoning (lawful nonconforming pre-existing uses)
❖ Estoppel
❖ Vested Rights

Constitutional Protections
❖ Substantive Due Process ("natural rights")
❖ Procedural Due Process
❖ Takings Clause
❖ Equal Protection Clause
❖ Free Speech
❖ Freedom of Association
❖ Freedom of Religion
Termination of Nonconforming Uses
❖ Destruction
❖ Abandonment

→ Eminent Domain

→ Fifth Amendment language
Property rule / Liability rule
Ⓢ Source of Authority (government as sovereign)
Ⓢ Rationale for Takings
Ⓢ Rationale for Compensation
→ Judicial Deference
❖ Chevron standard

→ Rational Basis standard
→ Public Use as Public Purpose
→ Blight
Ⓢ Rent-Seeking
→ Types of Takings
❖ Conventional condemnation
❖ Inverse condemnation
❖ Regulatory takings
❖ Exactions
→ Categorical takings
❖ Loretto
❖ Lucas
→ Non-Categorical takings
❖ Penn Central
 • Ad Hoc factual inquiry
 - Character of the governmental action
 - Economic impact (Distinct investment-backed expectations)
 • Measuring/Balancing test
 - Diminution in value test
 - Average reciprocity of value test
→ Regulatory takings
❖ Only takings when a regulation "goes too far" (Penn Coal)
❖ Ⓢ "Government could hardly go on" if it could not regulate
❖ Nuisance control (Hadacheck)
❖ No economically viable use
❖ Substantive Due Process takings
Conceptual Severance
❖ Vertical Severance
❖ Horizontal Severance
❖ Temporal Severance (First English)
→ Exactions: Four Step Test
❖ Governmental purpose
❖ Essential Nexus (Nollan)
❖ Impact of owner's activity
❖ Rough Proportionality (Dolan)

Conservation, Mining Law, Etc.

Reasons for Conservation
Valid Existing Rights
Federal Land Policy and Management Act
Mining Law of 1872
Mineral Leasing Act

General Policy

Ⓢ What does *Loretto* tell us about the importance of the right to exclude?
Ⓢ What do *Lucas* and *Penn Central* tell us in comparison about the importance of the right to include?
Ⓢ In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. Madison, Federalist 51.
Ⓢ The public good is in nothing more essentially interested, than the protection of every individual's private rights. Blackstone.
Ⓢ Adam Smith's "invisible hand"
Ⓢ Coase Theorem

Key

→ Major issue-spotter/analysis point
Ⓢ Policy point