

**ID:** 1920822  
**Exam Name:** Property II Kochan Final section 01  
**Instructor:** \* Kochan

1) Please type the answer to Question 1 below. (Essay)

The answer to question 1 is B.

Short Answer 1

A title insurance policy is a contract of indemnity under which the insurer - for valuable consideration - agrees to indemnify the insured for specified amount against loss through defects of title. The purpose of title insurance is twofold. A title insurance company guarantees that the company has searched the appropriate indices and public records, and - except for such defects that are specifically excepted from coverage in a policy - protects against ANY defects of title in the public records. One, it protects sellers from selling fraudulent title by giving them a mechanism by which they can have their title examined professionally and often even more thoroughly than they could do themselves. This furthers their "certainty" - the idea that they know exactly what they have - and helps them set the appropriate value for their home, inform prospective buyers about exactly what they are buying, and helps them understand what their property is worth in relation to other sellers. Certainty increases marketability for those reasons, and title insurance is the best way to achieve certainty. Two, prospective buyers may purchase title insurance because they want to know exactly what they are buying, and title insurance provides them the means by which to do so. If one is going to buy a house or a piece of land, one wants to know exactly what they are buying. It would affect your willingness to purchase a piece of property if the estate is subject to an easement or even worse - to a competing ownership claim. One should search the records themselves, but Title Insurance is an even better way of finding out the defects in a piece of land and *in addition* giving the buyer some peace of mind. Even a diligent search of the records by the buyer will not protect the buyer if he happens to be wrong or make a mistake, where as a title insurance policy indemnifies him against loss. The necessity of title insurance, and the corresponding market need for it, was even greater before the computer age and the digitalization of all records, because title was all recorded by hand in a recorder's office. Back when deeds had to be taken to the courthouse, notarized, and recorded by hand, the title insurance system was invaluable because a layman simply couldn't fathom all of the possible defects to his title and also had to undertake quite a day's worth of work if he wanted to see the state of his estate. He had to go to the courthouse, search through indexes (both a grantee AND a grantor index, if he wanted to be sure), search for his name (all while guarding against idem sonans mistakes... Koshin instead of Kochan, and such), and then examine the records by hand (often done in different handwriting if they weren't typewriter-ed up, and even if they were, probably by a disenfranchised title clerk with something better to do), and if he missed ANYTHING, he was in trouble if his property was all of a sudden subject to a competing claim. That's how the recording system made title insurance a necessity. Modernly, title insurance is still important, but mostly for the idea of *insurance against loss* (as distinct from the strict necessity - if you'll excuse the term - of having title insurance in the past simply to figure out exactly what your *title* was). Even today, when you can do a computerized search in some jurisdictions for title, you still want to be able to have somebody "get your back," as it were, over any mistakes you might

have made. And, when you are searching title on a piece of property, you might not be as familiar with the recording system and its nuances in that particular area (say, if you're moving to Denver and you are from Los Angeles) and so the title insurance company indemnifies you against loss and searches the title for you. So, even in the age of computerized records, it's still necessary to get title insurance in most cases if a buyer or a seller wants to increase his certainty (describes above) and enhance (by completely and accurately defining) the value of his property.

#### Short Answer 2

*Sic utere tuo ut alienum non laedas* means "so to use your own as not to injure another" and is a quote from Giles Jacob from 1729. Essentially the sic utere principle has three parts... one, no man is to deprive another of his property, or disturb him enjoying it. Secondly, every person is bound to take due care of his own property, so as the neglect thereof may not injure his neighbor. Thirdly, all persons must so use their right that they do not damage their neighbor's property."

The sic utere principle is a common thread that runs throughout the fabric of all types of land use control. However, its specific applicability is most clearly demonstrated by the concept of nuisance law and judicial land use controls in general. The sic utere principle - specifically the idea that one must not "disturb [his neighbor] enjoying it," - is basically the legal justification for the creation of nuisance law. When the judiciary declares a particular use a nuisance, it is saying to the defendant "you never had the right to do this action in the first place." It is basically declaring a particular use of the land *illegal* under the common law. For an activity that is not prohibited by statute to be declared illegal is - if not extraordinary - at least evidence that a strong public preference or policy is in place to regulate against "uses" that offend a private party. Where did this presumption against harming a neighbor come from? The 18th century, and this idea that "one may not use his land to injure another." That's what sic utere is all about, and that's how it relates to the idea of a judicial land use controls. Judges use the sic utere principle every time they declare an activity a private or a public nuisance. The whole "unreasonable substantial interference" concept is basically "don't use your land to injure another" in so many words.

Further, the sic utere principle - the idea that land ought to be used not to injure another - is the framework behind most zoning laws. Zoning laws are in place primarily to enhance societal goals (which, as explained above, usually involve not letting a particular use harm another person) AND to control "externalities." Externalities are a concept from Demsetz that refer to uses of a property that harm others (in the case of negative externalities, which for the purpose of this essay I am using as the synonym of just "externalities"), the costs of which are not internalized by the harmful user. Industry produces a ton of externalities - bad smells, loud noises, lots of traffic - that are essentially inescapable elements of "industry." It's just not possible to run a coal plant without creating some pretty undesirable factors that are going to affect nearby land owners. Controlling these uses and keeping them away from uses that depend on cleanliness and peace (residential uses, for example) is a method of controlling externalities, keeping these competing uses away from each other is in keeping with the sic utere principle (all persons must use their right that they do not damage their neighbor's property), and keeping these uses segregated is the backbone of most zoning laws. So, zoning by nature is usually done with the sic utere principle in mind. The legislative land use controls are thus interwoven with the sic utere principle.

#### Essay #1

In 1985, it is **Time Zero**, and Delilah splits Grayacre into two pieces, White and Black acre. When Delilah splits her property, she takes the quasi-easements in her land and creates from them possible easements implied by prior use. Easements are non-possessory interests in the land of another, entitling the holder to use the land according to the scope of the easement. A quasi-easement is a use that exists on a parcel of land that is reasonably necessary for the enjoyment of that land, but that cannot actually be considered an easement because it is not possible to hold an easement in your own land. Delilah probably has created potential easements in her land when she split it into two parts, because enjoying whiteacre requires being able to use blackacre to get to the adjacent lake. When she creates two parcels of land and transfers one, she creates "easements" for the holder of whiteacre such that whiteacre's use depends on being able to cross blackacre. Easements are a form of a *private land use control*, which is the use of private means like contracting and covenants to enforce your preferences as to how land is used.

However, in **1986, Time One**, Delilah takes the "quasi-easements" or potentially implied easements from her severance and creates an actual easement when she transfers the property to Peter. Her act of retaining certain rights to blackacre has the effect of creating an easement - described above - by an express reservation. Basically, Delilah creates an easement by describing exactly what rights she wants to retain to blackacre in her deed to Peter. Express easements must be in writing and satisfy the statute of frauds, and it appears from the facts that this express reservation (called a reservation because Delilah is "reserving" some rights in the land for herself) was in fact signed and delivered to Peter. Delilah has likely created an express easement by reservation. The easements created are the rights to all the coal on blackacre as well as the right to go onto blackacre to mine and retrieve the coal. In this case, Delilah has reserved for herself a **profit** as well as an affirmative easement. (an affirmative easement is the right to DO something on a land, as distinct from a negative easement which is an agreement not to do something) A profit is the right to not only go onto the land of another, but to take away and carry off some part of the land itself. Here, Delilah is reserving for herself a profit in the coal on blackacre, so that she can continue to carry off the coal and sell it or process it, or whatever. a holder of a profit holds an easement - even if unwritten, it is held by estoppel - to go onto the land as necessary to make use of his profit, so Delilah would - because she would reasonably rely on access to blackacre in order to successfully use her profit to carry off the coal - be able to enter Blackacre under an **easement by estoppel** (an easement that arises out of reliance) even if she did not have an express easement. Fortunately, she does. She reserved for herself the rights to go upon blackacre to retrieve the coal. This easement is most likely "in gross." An easement in gross is an easement whose benefit is personal to the holder of the easement. The use of the easement is not tied to a particular parcel, but is specific to the easement holder. It is likely that Delilah wanted this coal for herself, because she used to own it. She would not likely intend for the owner of a particular parcel of land to have her coal, but instead she would want to keep the coal forever. If she were ever to move from Whiteacre, she would still want the coal and all the economic benefits she could derive from mining coal, and so she kept an easement in the land for her own benefit. Easements in gross are distinguished from easements appurtenant, which are easements designed primarily to benefit a particular piece of land and whoever lives on that land. The right to the coal is NOT particularly tied to Whiteacre per se, but to Delilah. Other factors affecting the scope of the easement are the time/place/ and manner by which Delilah is allowed to come onto blackacre to take her coal. It's not clear from the grant when and how she is able to use blackacre, just that she has the right to come mine the coal. The court would probably have to determine the scope of the easement based on the traditional ways to mine coal, and figure out the traditional times, since the intent of the parties seems to be to allow her unfettered access to the coal.

Delilah also reserves an easement appurtenant - described above, a benefit to a particular parcel of LAND that is enjoyed by the owner of that land - to the owner of whiteacre to get in and out of blackacre to enjoy the adjacent lake. This easement also is somewhat ambiguous in scope, but since lakes can be enjoyed at all hours, it seems as though the holder of whiteacre can come onto blackacre whenever and however necessary to enjoy the lake. I suppose Peter at this point might want to point out that this is dangerously close to reserving an easement to a "stranger to the deed," since future owners of whiteacre are not mentioned in this reservation and reserving an easement appurtenant involves quite a burden on whiteacre's land - showing that the reservation might be improper, but most modern courts are fine with people reserving interests in land to strangers to the deed, and plus Whiteacre is not Peter's, so the restraint on alienability would probably not affect his case. Peter also agrees in the deed to never plant trees or any other wildlife that will obstruct the rights of the owner of whiteacre. This is a negative easement, an agreement NOT to do something on one's own property that one would otherwise have the right to do which usually increases the value of the dominant parcel and decreases the value of the burdened parcel, and it basically forces Peter not to affect the rights of the holder of whiteacre. Now, this is a little tricky, but I think Peter might be able to argue that any action he takes that is inconsistent with Delilah's use of Blackacre's COAL is NOT what is being prohibited here, since Delilah probably intended to make an easement in gross. Her rights to the coal - then - are coincidentally related to her ownership of whiteacre and not really related to whiteacre at all. Therefore, if Peter were to - hypothetically - take some action ADVERSE to HER access to the coal, it would NOT be a violation of this negative easement. The only way he could violate this negative easement would be to take some action that blocked Whiteacre's use of the adjacent lake, since those are the only rights reserved to WHITEACRE - as distinct from rights granted to Delilah. Delilah would probably argue "yes, but I own whiteacre, so any action you take against me, you take against whiteacre." Especially since at the time of the conveyance, she kept whiteacre, so her argument would be pretty strong. But hey, I'm an intake attorney.

This negative easement may also be a covenant running with the land at law. Covenants require privity between parties and to successors in interest and an intent to bind the land, as well as the requirement that they must "touch and concern" the land. This is probably not a covenant because there is no specific language binding successors and an easement is a stronger property interest than a covenant anyway, so the parties were probably trying to make an easement.

The deed is recorded, which protects against a whole host of trouble. I think California is a race-notice jurisdiction. But under ANY jurisdiction, promptly recording is important to make sure you actually get your title into the recording system and can market it and have certainty and all sorts of benefits. See answer to #1, above. And again, this fact that Delilah kept whiteacre would bolster her claim that any obstruction with her rights is a violation of both the easement she holds and the negative easement she created.

**From Time One 86 through 2000**, Peter plants and profits from a flower garden on the coal reserves and the "right of way" to them (and presumably to the lake) retained by Delilah. This action is directly against the terms of the easement and constitutes a trespass. However, because it involves him using the land of another (because don't forget, using the rights that another possesses on your land in a manner that is ADVERSE to those interests is the same as trespassing on an interest - because they own it!), his actions are actually potentially ending the easement burdening his land by **prescription**. Easements may be established **AND TERMINATED** by prescription, which borrows the elements from the law of adverse possession

- you can't sleep on the rights of your easement and expect to keep them. That's why we allow easements to be created and extinguished by *statutorily prescribed* elements. An easement terminated by prescription must be done in the following ways. 1. The use of the easement must be adverse and under a claim of right. In this case, Peter is using the land in direct opposition to the strictures he agreed to when he signed the deed and bought the land from Delilah. He is directly and openly violating the terms of the easement by taking action that is outright incompatible with her use of the land the way she reserved for herself. Not only does he cover the coal reserves, he covers the entire right of way to the lake that she wanted to use, ALL with what must be a pretty giant flower garden. This is clearly adverse to her use, and his profiting from the flowers (presumably selling them as his own) is evidence that he views all of this land and his land, and nobody else's. 2. The use must also be "open and notorious" - which means that the use must be open for the general public and *especially* the owner of whiteacre (or whoever owns the easement he is ending by prescription. for the coal, just Delilah, for the access - whoever lives on whiteacre) to see. This is also likely met by Peter, who is operating this giant flower garden which is emanating a smell that affects the neighbors. There is no doubt that he is on land that he is not entitled to block, and anybody can come by and notice his giant interruption of the land interest that Delilah retained... especially Delilah, who specifically knows that she ought to have the right to use land that he planted flowers on. 3. Continuous and without interruption. This is clearly met by the fact pattern... for 14 years, he used this flower garden. 4. For the period of prescription. The fourteen year time period exceeds the 10 years that are usually required by statute. So, it is likely that Peter will be able to extinguish Delilah's easement to accessing the lake and to the coal reserves by **prescription**.

In 2002, it is **time Two**, and the flower garden has been running for sixteen years. Charlie moves next door into Red Acre and is upset because fumes from the flower garden are messing with his kids allergies. Charlie will likely bring a nuisance claim against Peter. A nuisance is a judicial land use control, which follows the sic utere principles described in short answer 2 above. A nuisance action may be maintained when a defendant uses his land in such a way as to interfere with the use and enjoyment of the plaintiff's land. If defendant's land had been declared a nuisance it is the equivalent of saying that the defendant never had the right to use his land in such a way in the first place. The courts will balance the gravity of the harm to the plaintiff against the utility of the defendant's conduct to determine the reasonableness of the nuisance, and the interference that a reasonable person would face with the normal enjoyment of his land in determining whether or not there has been a substantial interference. In this case, Charlie is going to have to first prove that irritation from the flower garden is a substantial interference. He will likely show that his kids are getting messed up by the flowers and claim that the use of the land to make these nasty fumes is substantially interfering with his kids respiratory development. However, a reasonable person might not really be that angry about living next to a flower garden. Typically flower gardens smell pretty good and keep everybody in a good mood. The "burden" of living next to one is probably not that high, Peter will argue. Charlie will point toward his sneezing child and say "look, this is obviously substantial, my kid is sick all the time!" So he will likely be able to show a substantial interference. At common law, that would have been good enough for Charlie. However, nuisance law now typically hinges on the "reasonableness" of the conduct, and so Charlie will have to show that the use of Blackacre as a flower garden is unreasonable. The defendant's conduct, Charlie will argue, is hardly reasonable. It's not very important for Peter to be able to run a flower garden in the middle of a residential area. Especially a huge flower garden! Why should Peter be able to do something so obviously unreasonable and something that is only helping him make money? There's no utility in flower gardens that make money for only one person, that create terrible fumes that mess up the whole neighborhood, and potentially use fertilizers whose long term effects are

deleterious to children (obviously, Charlie will bring in his sneezing brat at this point) and could screw up the soil, long term? Peter will argue that first of all, flower gardens are beautiful and make the neighborhood as a whole an exciting place to live. Property values have probably all increased in the 16 years that he has been running the garden, because giant beds of flowers simply look fantastic. So his use of the land is reasonable just on that basis. Second of all, the "fumes" are arguably really nice smells. The fact that one landowner is coming and claiming that it doesn't smell good "smells fishy" (if you'll pardon the pun) because I'll bet Peter can bring in *plenty* of people from the neighborhood who like the way flowers smell and will testify that fumes shouldn't really upset a reasonable person. But, most compelling is Peter's ultimate argument... Charlie moved into the nuisance. It's the coming to the nuisance defense - which asserts that a plaintiff who comes onto his land with knowledge of defendant's uses assumes the burden of what might be a nuisance, because defendant was the first user and as such is entitled to keep using the land the way he was before. Charlie moved onto the land after this flowerbed had been running for sixteen years. He probably purchased the land at a *higher* value for the flower bed, but even if he didn't, he certainly knew what he was getting into and it would be inequitable for him to move in and regulate on Peter just because he didn't do his research about his kid's allergic tendencies. "A first user can't limit development in an area!" Charlie will cry, but in this case I don't think the court will allow this claim, because a flower bed is only limiting development in the sense that really sensitive people can't move in next door, or people whose kids can't take the smell of pollen, and even then, they are on **plenty** of notice of the condition because the flower bed is huge. So I think Charlie would fail a nuisance claim.

Back up to 2001, **time 1.5**, and Peter sells Blackacre to Florence (so please assume in the previous paragraph that Florence would make all of Peter's arguments in Time 2). Peter reveals nothing to Florence about any encumbrances on the land. Florence should have bought title insurance (see short answer 1), but since she didn't (we assume), she doesn't know about anything. Peter was obligated to tell her about the encumbrances since all states require **General Warranty Deeds** - which are deeds that provide six particular warranties against defects in title. He did not tell her about an encumbrance on the land, which he should have because he took title with notice of the multitude of reservations made by Delilah against his property. However, he will argue that he extinguished all of these easements by **prescription (see above)** and so should not have had to tell her anything about any encumbrance. However, I don't think it's possible to adversely possess the coal under the ground without taking some action inconsistent with the ownership of the mineral itself. So, even though he blocked the right of way to the coal and extinguished the easement of access Delilah reserved for herself, if he does not tell her that she still owns a profit in the land, he is breaking his warranty and will be liable in damages. He thus breaks his "covenant of seisin" in the land - the grantor is supposed to warrant that he **owns** the estate he is attempting to convey. You can only sell what you have, and Peter's sale of Blackacre to Florence **must** mention that he does not own the entire estate in fee simple. The rights to the coal itself are still owned by Delilah. Or at least, that will be Delilah's argument. Peter will argue that there's no real difference between "the rights to the coal" and "the rights to access the coal," and thus by blocking access to the coal he is essentially also - by means of prescription - destroying Delilah's rights to the coal itself. I'll go into this more if somebody brings suit.

In 2002, time Two again, Delilah sells Whiteacre to Duke Coal Company who wants to profit from the coal and also use the lake. This brings up that interesting dilemma from before. When Delilah sells whiteacre, she is definitely selling the easement appurtenant to whiteacre (provided it still exists), because easements appurtenant attach to the land. However, is she also selling her rights to the coal? She would argue (I would think) that she owns these rights

in gross. So, when she transfers the property to Duke, I am going to assume that she also transfers that easement, but I think it's important to note that she would have to specifically transfer that right to Duke, since otherwise the benefit to the coal - not inextricably tied to whiteacre in the same way as an easement of access to the lake is - would stay with her.

In 2008, it is time **three**, and the EPA sets a moratorium on coal extraction. This moratorium constitutes a diminution in value and would give rise to a takings claim. A takings claim introduces the concept of eminent domain, which allows the government to take property from private landowners for public use, so long as they pay just compensation. Since whoever wants to mine coal is going to run into problems thanks to this regulation, I'll analyze the situation to see if the action constitutes a regulatory taking. The 5th amendment provides that "nor shall private property be taken for public use without just compensation," and that's exactly what somebody is going to claim California is doing in this case. The fifth amendment can be broken down into its constituent parts to see whether a "regulatory taking" is occurring.

Nor Shall Private Property - The taking in this case would involve the private rights to the coal. The coal is essentially being regulated into worthlessness by the regulation against coal mining, and there is no doubt that the coal is owned privately and the dispute as to who owns it is a private dispute.

Be Taken - This is where the heart of the matter lies. Does the restriction against mining coal operate as such a restrictive land use regulation that it may be deemed a compensable taking? There are several ways to determine if a taking has occurred, the first of which - a procedural condemnation - can be ruled out simply because it's not happening by California. CA, in this case, is merely regulating for the welfare of the state. It's not admitting to a taking at all. In addition, any permanent physical occupation would be a taking, but there is no physical occupation in this case, so we can leave that one alone also. The final way (to find a *categorical taking*) is to determine whether or not all economically viable use of the property has been destroyed by the regulation. In this case, Duke will probably try to claim that it has been taken, since the only reason they bought the property was to mine coal, and now they can't do that thanks to this regulation. Even assuming *arguendo* (I hope I am using that term right, I mean "for the sake of argument") that they are correct in that all viable use has been removed, they probably STILL won't be successful in claiming a taking. All viable use may be, for a time, completely restricted as long as it serves a legitimate public interest and is for a reasonable time that is not permanent. In *Tahoe*, the court established that this sort of regulation is not a taking. As long as the restriction against coal mining is just a moratorium and NOT a total, permanent restriction against development or value, the regulation is appropriate and not a violation of the fifth amendment prohibition against regulatory actions that "take" property. However, it would be difficult for Duke to even get this far. The regulation against coal mining does not remove the land of all its economically viable use. Delilah has been living on blackacre for years now without even using the coal. In fact, she allowed Peter to build and maintain a flower garden on the land for many many years without doing a thing about it. So, it's not likely that the court will find that the standards in *Lucas v South Carolina* that mandate that a taking has occurred when all economically viable use has been destroyed have even been met. Further even though Duke wanted to mine coal, they also wanted to get to the lake. You don't typically need to get to a lake except to use it for your enjoyment... so that suggests that a reasonable owner of Whiteacre - in fact, that the owner of whiteacre in question, Duke - still has **plenty** of economically viable use. However, Duke will argue that the court should engage in conceptual severance of the property. Conceptual severance - the splitting of the parcel conceptually to determine the value of the different "parts" of the land independent from one another - is an analysis the court will undertake to determine whether or not the value

retained by the coal company (in this case) has any relevance to the reasonable investment backed expectations that they were using to inform their purchase of the property in the first place. In this case, the court might conclude that conceptual severance is appropriate and rule that the coal company has lost all its economically viable use thanks to the regulation. CA will argue that first of all, moratoriums are fine under Tahoe (see above), but also that conceptual severance is inappropriate given the character of the neighborhood (residential for at least 20 years dating back to 86) and the fact that Duke - under the facts - wants to be able to get to the lake, which arguably suggests that Duke itself sees some value in the land independent of the coal under the earth. That would indicate that conceptual severance would be inappropriate since Duke purchased the land considering the value of the entire estate, not just the coal.

For Public Use - no problems here for California, since Coal extraction is probably environmentally appropriate for the period of the moratorium. Perhaps Duke could engage in creative rent-seeking to get powerful lobbyists to disagree, but that would be a stretch.

Without Just Compensation - without a taking, we don't get to this analysis. Which is good... I'm running out of time.

in **2007, it is time 2.5**. Florence erects a fence between Whiteacre and Blackacre to keep out Duke. Florence clearly thinks that she owns the entire parcel of land and is subject to no encumbrances. Duke finally attempted, 21 years later, to use the easement Delilah reserved for herself in a grant to Peter, but Florence prevented her use with a shotgun. This easement has probably long since been extinguished (see above) but assuming it has not, Duke can bring an action for trespass or seek damages for violation of his express easement. However, if he does not, Florence has essentially taken action that is inconsistent with the easement and if she keeps it up for 10 years, she could adversely repossess the right to her land that she already believes that she owns. Same goes for the shotgun interruption in **2009, time 4**. However, in this case, I don't think Duke will EVER lose his trespass claim, because I don't see how Florence could repossess the right to the coal under the earth unless she actually started mining it herself. So Duke would have a trespass claim.

I'd also like to add that I think that at the end of all the litigation, if the court concludes that Delilah or Duke still owns the coal UNDER blackacre, then they have a profit which carries with it an inextinguishable easement by estoppel to go onto the land however necessary to get the profit. So that would still be there, even after all of this, assuming they kept the coal.

## PINPOINTS

1. Peter and Florence sue for a Declaratory Judgment. I think they would claim that Peter extinguished the easements in the deed by prescription. See discussion above at "from time 1 86 to 2000." I think Delilah and Duke would claim that they permitted Peter to use the flower garden the whole time. Obviously they didn't care that he was selling flowers, or they would have come out and stopped him from doing so. I am not sure if they can use the notoriety of the action against Peter, but I would try. Clearly they knew they had the rights to the lake the whole time, they just enjoyed the benefits of the flower garden and decided to let him use the land that way the whole time. if the flower garden was at all popular, it's likely that Delilah and Duke talked about the flower garden with their neighbors or said something to the effect of "oh yeah, that's our land, but we sure do love that garden!" These sorts of statements would establish that the garden was there with their permission and would form evidence that Peter's "prescription" claim would fail. I think they would *persuasively* be able to argue that they still own the coal under the earth. They may have lost the right of way to the lake by prescription,

but they didn't lose the coal because the coal was never mined. The coal sat there and nobody took any action that was adverse to its ownership, which means that Delilah still owns it and her reasonable expectation that she would be able to mine it somebody was never really interrupted. It's far from clear that Peter ever considered the coal, he just happened to block the easiest access to the coal. Additionally, him blocking the access to the coal with his flower garden doesn't mean that the coal is completely unreachable. You can put a drill into the ground anywhere as long as you keep the land from subsiding (assuming Delilah's deed to him was not a broad form deed, which would have furthered her claim to the coal since she could drill ANYWHERE without even worrying about the damage to the flower garden). But, I think Peter and Florence would win. They now own all of their land, extinguishing by prescription any easements Delilah and Duke reserved.

2. Delilah and Duke would sue for trespass against Florence for standing on their easement. A trespassory physical invasion of their easement, if found, would expose Florence to criminal liability. The court would probably enjoin her shotgun justice and order her to pay damages, or even expose her to criminal liability. However, as discussed, I think the trespass claim would fail because I think the easements have already been repossessed by prescription. They may also sue for violation of a covenant, if the court determines that a covenant was formed between Delilah and Peter back in Time 1. However, I don't think this was a covenant, and even if it were, covenants can be extinguished like all other servitude's, so the prescriptive methods undertaken by Peter would have extinguished it also.

3. Charlie's nuisance suit described above.

4. Delilah and Duke's taking suit described above.

## ESSAY 2

Anthony opens in 2001 (TIME ZERO ) a hog farm USA, in Pinkacre. The area is barren and undeveloped, so probably not subject to zoning restrictions at time zero. The hog farms success brings sprawl outward, leading to residential development next to the hog farm. This is an example of NO zoning, the type of which they use in Houston, except in Houston everything needs a permit. In this particular jurisdiction, it's not clear that any of this land has been zoned for anything. So there is essentially no zoning and the hog farm is fine. in 2006, time ONE, new residential neighborhoods are fully justified in building houses because any type of land use is permitted in this particular area.

Pink acre's' neighbors sue Anthony for the smells, and so they likely would bring a nuisance claim. See above for what a nuisance claim entails. Anthony would argue that his use of land is reasonable because it involves a commercial use of land that has brought plenty of dollars into the local economy, because he was there first, because no zoning restriction prohibits his actions, and because if anything, Patricia "came to the nuisance" (see above) by moving into the land that had hog farms on it. Patricia would not have much of a case that there was a total nuisance and be able to get a permanent injunction, but since courts use the same factors to determine a remedy for a nuisance, she MIGHT be able to get a temporary injunction or get the court to award her a "forced sale" and make the hog farm pay her a little bit of money to continue the nuisance. However, because she came to the nuisance, Anthony will likely win and be able to continue using his property any way he wants. (this all happened in time TWO in 2007) She will, however, be able to argue that the legislature has already given a clear statement of what it considers "reasonable use of the land" when they rezoned the whole area while the lawsuit was pending to incorporate residential goals. An independent judiciary might

consider this when they examine the nuisance claim, given that independent judiciaries tend to uphold legislative bargains. However, I think her nuisance claim is still pretty weak.

in 2008 (time THREE), the city rezones the whole area residential. Zoning is an example of a legislative land use control that regulates the use of land by the public. Zoning is generally done on the local level with the goal of reducing externalities (see *sic utere* discussion above) and enforcing societal preferences. In this case, the city is probably trying to enforce the preferences of landowners in the area who 1. don't want bad smells and want that externality controlled and 2. want to live around other families.

1. see above, Patricia would make a nuisance claim
2. Anthony CAN sue city, but he will probably not need to.

one, he is affected by a zoning ordinance that makes the use requirements more stringent, and as a pre-existing user, he is now a lawful non-conforming user of the property. Non-conforming uses are protected against regulation because of the takings clause, so the city is likely to have to let Anthony continue to operate his pig house for as long as he wants without being able to make him stop. Or they can take it from him after a reasonable amount of time, called an *amortization period*, that gives him a chance to recoup his investment and find another place to farm pigs. Courts have held that these amortization periods, as long as they are reasonable, do not violate a user's constitutional rights. However, if the city tries to use its regulatory power to condemn Anthony's land too quickly, he can sue them for a takings claim. The elements of a takings claim are described above. Nor shall private property be taken for public use without just compensation.

Private property - the land is clearly private and Anthony owns it.

Be taken - For the sake of argument, it seems like the city will say that this is a valid regulation backed by the power to re-zone the city as necessary. Anthony is not being deprived of all his economically viable use because he could still build a pretty pink house on pink acre and have a ton of money. He would counter that the court should rule that taking him completely out of business is a diminution of all his economically viable use. I don't think he would win on this since they could always just have given him a reasonable amount of time to find a new use (under the non-conforming use principles) and then it would have been completely ok. So the court is not likely to agree that a suit brought to quickly constitutes a taking. But they might!

For public use - Anthony could argue that this taking benefits nobody, but that's a tough argument to make. Under *Kel*, virtually any regulation that helps the city in even a tangential way is "for a public use." In this case, zoning regulations are usually presumed to be for the public good, unless Anthony could prove that the regulation was discriminatory. But I don't think he could.

Just compensation is out.

If he wanted to keep his hog farm going, Anthony could seek a variance from the city. Variances are exceptions in zoning ordinances that allow a user of a property to start using the land in a way not permitted by the ordinance. You apply for them especially and they are granted at the discretion of the zoning authority. Anthony could apply for one of these and argue that the public benefits of his hog farm - he basically revitalized City - are so great that he deserves to be able to keep his hog farm operational there. Without that hog farm, city goes

down the drain!

3. If Patricia loses in litigation, claiming that Anthony is a nuisance, she can play the game! The Game is basically the process that a landowner can navigate her way through to try to achieve her goals through legislative means. Step one for her would be to go to Anthony and try a "private land use control." Try to contract a covenant saying he won't do smelly things at certain hours in exchange for some money. If that doesn't work, she's already failed her judicial land use options, so she would probably have to switch to legislative land use controls. She's a step ahead of the game since the city already zoned the whole area residential, but she should also go to the environmental agencies and try to get them to force the regulatory agencies pass a regulation against the "highly toxic odors" emanating from the hog farm. No doubt they are extremely dangerous to the ozone layer, or something equally environmentally destructive. If she doesn't have the economic power to convince the regulatory agencies by herself, she should start cruising around the neighborhood looking for other people in the adjacent neighborhoods to help add economic power to her claim. As a group, they all will be able to more easily convince a regulatory agency that societal preferences (and a great deal of corresponding votes and the extension in terms of service that those votes will provide - all part of the game!) will be satisfied by giving this group of people what they want - regulations that shut down Anthony. Unfortunately, Anthony probably has a ton of money, and with a ton of money comes a lot of concert tickets, sports games, and other ways to convince legislators that the economic gains realized by Hog Farm Anthony should continue for the greater good of City. That's the tension in the game. Additionally, Patricia faces free-rider problems from neighbors (why should I come help you in this suit? you're going to do it anyway, more power to you!) and collective action problems (it's tough to get everybody mobilized for a common good - they all have to take time off of work, meet somewhere, agree on a plan of action, etc.) and then ALSO there's a chance that some neighbors are going to downright hostile to the idea of shutting down good ol' Hog Farm Anthony altogether, because you don't revitalize a community and run a hog farm for seven years without making a ton of friends. So it's an uphill battle for Patricia, and that's probably why she started with the judicial land use control.

### ESSAY THREE

"We must not expect that a new government may be formed as a game of chess may be played, by a skilful hand, without a fault." The analogies to the game we learned about in property class are most obvious when examining the complexity of the Game in property and the multitude of different ways that the game can be played to achieve your preferences. A game of chess can be skillfully played without fault and won - even if you are playing a computer - because the rules of chess are knowable and predictable. A government - and by extension, anyone attempting to understand the government, as anyone playing the legislative land use control game is trying to do - simply doesn't work in the same fashion. One of the main things we observed in learning about the game is how the game can create strange bedfellows. The environmentalist may get in bed with the big corporation if the big corporation will agree to take environmentally conscious actions or simply will advance a goal that the two may share against either a landowner or a competing business. On the other hand, a landowner might convince an environmentalist that he needs a particular land because it involves a non-destructive use that a corporation (or industry) is threatening to influence. It would be akin to the White Queen switching sides occasionally, or the goal of chess being to trap the rook all of a sudden. You can't expect to play the game as though the players are always going to be advocating for the same goal. And Ben Franklin expands on this idea as he continues, "the players of our game so many, their ideas so different," which is analogous to all the different players in the legislative land use game. Anytime a landowner's preferences

change, any time somebody or something causes a particular agency or owner to redefine how much he values a piece of land (according to a change in his ideas,) moves start to be contested in a such a way as to make the entire game unpredictable. In other words, their particular interests, as Franklin says, are so independent of the general interests, seem so opposite, and their prejudices can be so strong and so various, that trying to predict what is going to happen in The Game as a whole becomes almost impossible. I think it's this impossibility that makes *understanding* the Game so important, and why we spent so much time understanding the players and their ideas in class.

We've learned about the enforcement of property law all semester, and the ways in which it is formed and the paradigms surrounding the law (see the *sic utere* principle above), but understanding property law also comes down to understand the general ideas of what Franklin is saying here. In some cases, it's not sufficient or particularly possible to try to learn the "elements" of a particular concept the way one would learn the elements of chess. Instead, in property law - at least where it concerns the legislative land use and its interplay with the judiciary - we have to understand that the circumstances of a particular situation inform how the conflict or development or lawsuit will resolve itself. It's not enough just to learn the law. We have to understand the motivations of each of the parties in the game. If we don't understand things like collective action, holdouts, and free-rider problems, we won't understand how land users can affect the game each time their land or its use becomes threatened. If we don't understand what variances are, what spot-zoning is, what can be declared a nuisance and what can't be declared a nuisance, we won't have the tools to understand why a particular situation resolves itself in the fashion that it does. Often it seems from the outside that the results of a particular "game" (such as the one we played in class) are rather nonsense. Why would the government take the side of the environmentalist over the corporation, or why would the regulatory agency agree with the industrialist? "The numerous objections (at least to our common sense) confound the understanding," as Franklin says. But, "the wisest must agree to some unreasonable things, that reasonable ones of more consequence may be obtained." I think this statement can be applied to both our understanding of the game, and to the players in the game. First, to the latter, in the sense that the players who are playing the game, to achieve what they really want in a particular scenario, may have to agree to some unreasonable things. For example, if the business owner really wants a particular parcel of land, he may be able to induce the environmentalist to team up with him and regulate against certain uses to achieve certain result - whether by forcing other owners to sell and eliminating the holdout problem, or by regulating away a particular power of the landowner that makes his property much less worthwhile, or by simply using their power (that is to say, using their influence) to convince the legislators through rent-seeking that he ought to have what he wants. However, he has to balance this on-its-face unreasonable decision - putting himself in bed with the environmentalist may mean later that other commercial uses are influenced to make way for a bird sanctuary and ruin his own competitive needs or expose him to tremendous ill will from other commercial users - with the "reasonable one of more consequence," the approval and ability to build the retail center of his dreams. The players in the game are constantly facing this interplay between reasonable and unreasonable agreement to achieve their goals. And secondly, it's important for our study of property law that we understand that these particular conditions are in place in every instance of The Game. We can't approach the game as though certain elements must be met - going back to the game of chess analogy - and expect to understand property. We have to instead understand that what appears to be chance - what in any given situation is as predictable as "*tric-trac* with a box of dice," - is influenced by the preferences of regulatory agencies, the preferences of the legislature, the preferences of the judiciary and their corresponding willingness to uphold the preferences of the legislature, the preferences of individual landowners who want to do what they want with their own land but also

don't want competing uses to interfere with their own use, and the preferences of lobbyist groups who want to control how land is used for the benefit of society. In other words, "the players of our game are so many, their ideas so different, their prejudices so strong and so various, and their interests...seeming so opposite," that the only way to fully understand the concepts of Property II is to understand the game and the reasons people play it. That's how I think Benjamin Franklin's analogies have meaning within the context of what we've learned about property law this semester.

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**END OF EXAM**