SAN LUIS OBISPO COLLEGE OF LAW

# Real Property

Final Examination

Spring 2024

Prof. C. Lewi

Instructions:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

**Real Property**
**Spring 2024**
**Prof C. Lewi.**

## QUESTION 1

In the town of Greenfield, a longstanding conflict has arisen between two neighboring property owners, Alice and Bob, concerning the operation of their respective properties. Alice owns and operates a small dairy farm on her property which she has done since 1990, while Bob owns a quaint bed and breakfast situated adjacent to Alice's farm, which he has done since 2010. Assume Bob and Alice have all necessary permits for their respective uses.

The dispute centers around the noise, odor, and traffic generated by Alice's dairy farm, which Bob argues is negatively impacting the tranquility and enjoyment of his bed and breakfast, thereby causing him economic harm, i.e., Bob claims that he could do $150,000/yr in profit if Alice was enjoined from her uses, but that at best he does $75,000/yr in profit with Alice operating her farm next door.

Discuss the legal principles and considerations involved in analyzing Bob's potential claim against Alice under the nuisance doctrine. (Do not address any public nuisance issues that may or may not arise here and assume that there are no statute of limitations issues.)

In your response, address the following:

1. Define the legal concept of nuisance and how the nuisance doctrine attempts to balance the rights of property owners with the interests of the community?

2. Assess the factors courts typically consider in determining whether a nuisance exists, and any particular factors that apply in the context of noise, odor, and traffic complaints associated with agricultural operations.

3. Explore the potential defenses Alice may raise against Bob's claim of nuisance. Are there any legal doctrines or principles that might shield Alice from liability?

4. Discuss any relevant case law or legal precedents that may guide the resolution of this dispute in Greenfield. How have courts historically addressed similar conflicts between agricultural activities and neighboring land uses?

5. Finally, analyze the potential remedies available to Bob if the court finds in his favor and concludes that a nuisance exists. What types of relief could Bob seek, and how might the court balance his interests with those of Alice and the broader community?

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**Real Property**
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QUESTION 2

Amy owned Blackacre and Redacre, which were 10 acre parcels next to each other. Amy lived on Blackacre.

In 2000, Amy sold Redacre to Bob and, as part of that transaction, Bob gave Amy a written promise that Amy could travel across Redacre to come and go from Blackacre ("ingress and egress.") That signed, notarized agreement was given to Amy and she put it in a box at her house with other important papers. Amy did not record the written promise given to her by Bob and it has never been recorded. Amy did travel across Redacre for ingress and egress and a definite dirt roadway was identifiable on Redacre from that use.

In 2010, Amy sold Blackacre to Cathy. Amy did not tell Cathy about her agreement from Bob and Cathy never knew about that agreement. Amy died in 2015.

Cathy did continue Amy's use of Redacre for ingress and egress to and from Blackacre. Bob did not object and indeed, would wave at Cathy as she passed by from time-to-time and they had good neighborly relations.

In 2020, Bob sold Redacre to David. Bob did not tell David or in any other way communicate to David that Bob had made a written promise to Amy in 2000. Bob died two (2) weeks after he sold Redacre to David (killed in a car accident.)

David then put up a barrier across the roadway that Cathy used, preventing Cathy from using Redacre for ingress and egress. There is another way for Cathy to come and go from Blackacre directly to a main roadway but it would cost her $100,000 to develop that alternative access road.

Cathy removed the barrier and resumed her use of Redacre for ingress and egress.

In 2021, David sued Cathy for a Court order requiring Cathy to stop using Redacre for ingress and egress and quieting title to Redacre in favor of David and against Cathy. The pertinent statute of limitations is 5 years.

Evaluate and discuss in your answer

1. David's arguments in favor of his requested relief;
2. Cathy's arguments in support of her position;
3. The reasonable likely outcome.

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QUESTION 3

The city of Maplewood is located in the State of WashiOreFornia. That state has a law which provides:

> "The State hereby delegates to all local governing entities within the State the power to issue appropriate rules, ordinances, and regulations to promote the public health, safety, welfare, or morals."

Jane owns a commercial property in the downtown area of Maplewood. Maplewood is a rapidly growing and desirable suburban town. As a result, Maplewood has a housing crisis and it is difficult for people who want to live and work in Maplewood to find housing there.

Maplewood, historically, has strict land use regulations. Jane's property is zoned for commercial use only. Jane recently converted a portion of her commercial property into a residential 4-plex; she did not obtain the necessary permits from the local zoning authority but she did construct the 4-plex using a licensed general contractor and the building does comply with all building codes, is sound and habitable, and is ready to be rented out.

The Maplewood Code Enforcement Department has now issued a notice of violation to Jane, alleging that she has violated the town's zoning regulations by converting part of her commercial property into a residential building without authorization.

Interestingly, Maplewood's violation notice also states that Maplewood will grant Jane the necessary permits for the 4-plex if Jane transfers to Maplewood another property that Jane owns on the other side of town, in an area zoned "residential" so that Maplewood can turn *that* property into a city park (that property is worth $100,000.)

Jane contests the violation notice and further challenges Maplewood's "offer" that it will drop the case if Jane gives over the other property. Jane files suit and seeks an injunction and damages against Maplewood. Assume Jane's suit is timely and filed in the proper venue.

Discuss

1. Jane's arguments in support of her suit against Maplewood;
2. Maplewood's arguments in defense;
3. The reasonable likely outcome; and,
4. Alternative ideas for Jane to consider in getting Maplewood to give her the necessary permits.

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*SLO & HYBRID*
*Real Property -SLO & Real Property-SEC1*
*Spring 2024*
*Prof C. Lewi.*

*ANSWER KEY TO QUESTION 1*

- *Generally, property owner can use their property as they wish and in compliance with land use rules*
- *However, one cannot use one's property to the detriment of another's use and enjoyment of their property*
  - *This is the basic expression of the legal concept of nuisance.*
  - *The rule sounds easy but presents challenges in application*
- *Generally, in determining whether there is an actionable nuisance, the Court will balance*
  - *The utility of the offending use, against*
  - *The harm caused by the offending use.*
  - *If the harm outweighs the utility, generally this will be deemed a nuisance.*
    - *High utility needs high degree of harm to be a nuisance*
    - *Low utility needs lower risk of harm to be a nuisance*
  - *Some courts will focus much more on the harm and not so much on the utility*
    - *Dairy farmer's cows injured by power company's overhead transmission lines*
    - *The harm is real and serious and we do not much care that everyone needs electricity*
      - *Minority view but in given circumstances will apply*
      - *Harm is deadly, for example, will probably outweigh utility no matter what*
- *An actionable nuisance can support a claim for*
  - *Injunction, and/or*
  - *Damages*
- *Special rules tend to protect certain uses from nuisance claims, on the basis that these uses produce highly desirable products*
  - *AG uses are generally included within these types of protections*
    - *Farms are messy but everyone needs to eat*
- *Coming to the Nuisance – I was there first – is relevant but we have seen in Del Webb which is the feed lot case out of AZ and Hadacheck which is the brick-yard case out of California, over time residential and human uses tend to trump pre-existing messier uses, which are then declared nuisances (or zoned out as in the brickyard case)*
- *A person causing a nuisance under the Boomer case may be allowed to continue the nuisance as long as they are willing to pay for it.*
- *So, what does all this mean for our parties here?*
  - *Assuming the subject jdx has rules protecting AG use from private nuisance claims (as does CA), Bob will likely lose a nuisance claim and Amy will be allowed to continue to use her property as a farm*
  - *Assuming no such rules, Bob is in better shape but will have to prove the $75k damage to his business is enough harm to outweigh the utility of a longstanding and productive farm, which may not be an easy proof problem.*
    - *My view: Bob loses again, especially since he came after but, as we have seen, over time, messy AG uses will be phased out by nuisance doctrine in favor of human habitation*
  - *Under the Boomer case, Bob can ask that in lieu of Amy stopping she can pay Bob $75k/yr for the privilege of her continuing nuisance.*
  - *Conversely, in the unlikely event that Bob prevails, under the Del Webb case, the Court may require Bob to pay Amy the amount of money necessary to relocate Amy's farm or what it would cost Amy to shut down her farm. Be careful what you ask for Bob.*

## *ANSWER KEY QUESTION 2*

- *Real Covenant runs with the land – Not a great argument for Cathy but she can assert David had Inquiry Notice*
  - *Cathy's best defense is that she proves Bob's promise to Amy runs with Blackacre and Redacre*
  - *It most likely does not*
  - *There is horizontal privity between Bob and Amy, with proper consideration because part of Amy's sale of RA to Bob.*
  - *But there is no binding vertical privity that will bind David, the successor to RA which is the burdened parcel.*
    - *David is not on notice of the Bob to Amy covenant*
    - *Not recorded so no constructive ntc*
    - *No evidence that Bob or anyone else told David so no actual notice*
    - *Cathy's best argument is that David is on inquiry notice from the pre-existing roadway traveling across RA and going to BA*
      - *Inquiry Notice is sufficient legal notice but it is hard to prove*
      - *Still, given that the roadway was apparent, open, and obvious on the surface of the land, this is Cathy's best and only argument that David was on notice of the burden at the time he bought RA from Bob*
  - *On the benefit side, vertical privity between Amy and Cathy is present – voluntary transfer – and notice is not necessarily needed on the benefit side for the covenant to run with the land.*
- *Implied Easement – Not likely*
  - *Cathy can also argue she has an easement across RA.*
  - *No easement by necessity for Cathy across RA*
    - *No strict necessity*
    - *Cathy can develop alternative ingress/egress for BA*
    - *The $100,000 cost is immaterial, legally, under the majority view, and even under the emerging Restatement view, most likely $100,000 not a fatal expense to allow an easement by necessity*
  - *No Quasi Easement – Not Bad but proof problem*
    - *Cathy will argue common grantor in Amy with a pre-existing use, intent to create an easement in favor of BA and against RA, and reasonable necessity*
      - *Not bad*
      - *Intent is shown in the Bob to Amy covenant but . . .*
        - *Proof problem*
        - *The covenant is unknown to Cathy and David and Amy and Bob are dead*
      - *We do not have facts, one way or the other, of a pre-existing use, and if no pre-existing use, no quasi-easement.*
      - *However, if we presume pre-existing use at the time of severance (Amy selling RA to Bob), then . . .*
    - *There is nothing to imply because Amy obtained an express, written covenant for ingress/egress across RA at time of sale to Bob.*
    - *That it was not recorded is not material to this analysis*
    - *Cathy can, again, argue apparent notice because the dirt roadway was there when David bought RA and that is not a bad argument (see the Van Sandt v. Royster case) but because there was an actual express easement granted to Amy by Bob, an easement by implication may be precluded (assuming that any of the present litigants know about it that is . . . )*
- *Prescriptive Easement – No; lack of hostility for requisite statutory time period*

- *5 years statute of limitations and the David / Cathy dispute is only 1 year old so that limitations period has not expired yet*
- *Cathy has to tack onto prior uses to prove a prescriptive easement.*
- *Open and notorious and actual use in a clear and definite pathway are established by the facts.*
- *Hostility, however, is NOT.*
    - *Cathy's predecessor, Amy, was not hostile to Bob; She had express written easement*
    - *Cathy's use against Bob was for 10 years (2010 to 2020), longer than 5 years but was it hostile?*
    - *Best analysis – NO*
        - *Bob, at all times from 2010-2020, is still owner of RA and waved at Cathy as she passed by and they were good neighbors*
            - *We can presume a neighborly accommodation at least so not hostile*
        - *We can also argue with some merit that nothing had changed for BOB, that he had given his written easement to Amy and we presume he was OK with Amy's successor continuing to use the roadway under that same written agreement so NOT hostile.*
    - *Cathy will argue that lack of permission is "hostile: and that there is no evidence that Bob gave Cathy permission expect that there is evidence of that permission by way of neighborly accommodation and the prior written agreement.*

- *CONCLUSION:*
    - *David wins his lawsuit and can successfully prevent Cathy from using RA and Cathy has no interest in RA.*
    - *Cathy is not out of luck here; she can still access a roadway from BA; she is just going to pay for it.*

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## *ANSWER KEY FOR QUESTION 3*

*Jane's challenges to the Zoning Rule:*

- *Beyond the Enabling Statute – NO*
    - *Jane will argue that local zoning decision "commercial only" is not authorized by the enabling statute, which delegates the State's police power to town to enact zoning rules for the "public health, safety, welfare, or morals."*
    - *That challenge will fail under the applicable rational basis test*
    - *"Commercial only" does not involve "fundamental rights" and neither does "residential only"*
    - *Town had a rational basis in creating a zone for commercial enterprises*
        - *Mixing residential uses where peace and quiet and less congestion is desirable is inconsistent with commercial uses*
- *Void for Vagueness -- NO*
    - *Jane will argue that the enabling statute's broad delegation of power for "public health, safety, welfare, or morals" is so broad that it is incapable of being reasonably understood by the reasonable person and/or incapable of being enforced in a consistent way.*
    - *That challenge will fail under the same rational basis standard of review*
    - *We all know was zoned "commercial" means vs zoned "residential"*
- *Under Euclidean Zoning principles, a residential use in a commercial zone is OK and thus not a violation – Old idea and probably NO*
    - *Zoning rule does not expressly forbid residential uses*
    - *But Euclidean zoning is an older idea largely phased out and Jane should not rely on this being a winning argument*
- *Zoning Rule is Unconstitutional – NO*
    - *Jane can argue that the "commercial zone" rule is invalid under the US Const*

- *This challenge will fail because property ownership is not a "fundamental right", thus, at best we apply the rational basis standard of review and the ordinance will be upheld*
- *Jane may argue the one's choice of where to live is fundamental under Moore v. City of Cleveland, but this is not a "who can live there" rule or a restriction on household make-up*

*Jane's challenge to Maplewood's Exaction:*

- *Jane may do better in her challenge to town's requirement that in order for the zoning violation to be dropped, Jane can give an unrelated $100,000 property to town.*
- *This, arguably, is a taking, for which Town must pay Jane under the Takings Clause.*
- *Exactions analysis – Nolan / Dolan*
  - *An exaction is a fee or land dedication that a property owner must give in exchange for developing property, which offsets the effect of the development. So, for instance, if the development is on an open lot in which children often play, the requirement of creating a park for children in part of the space is such a nonmonetary offset.*
  - *Exactions are a legal exercise of police power that generally arise within the development approval process. Provided that the public purpose underlying the fee or dedication is both reasonably related and roughly proportional to the impact of the development, the exaction is not a taking*
    - *1. Legitimate Gov't interests furthered by the ask;*
      - *Yes, public parks and open space is legit govt interest*
    - *2. Essential nexus between the legitimate gov't interest and the exactions,*
      - *Probably not*
      - *Jane wants to put a residential property in an already impacted commercial zone; not locking up open space that needs to be offset; and,*
    - *3. Rough proportionality between the gov't's demands and the legitimate interest.*
      - *No. Asking for a $100,000 property for park does not reasonably offset a requested permit for a 4 plex in a commercial area miles away.*
  - *If Town wants that property, has to pay Jane for it.*

*Jane's Better Efforts Directed at Obtaining a Variance or Special Exception or Spot Zoning or a Change to the Commercial Only zoning:*

- *Variance - NO*
  - *Granting the variance will avoid undue hardship on Jane*
  - *But no self created hardships and Jane herself built the units without permission*
- *Special Exception -- MAYBE*
  - *This may work for Jane*
  - *An exception is a use permitted by the ordnance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched closely*
  - *Hospitals in residential areas*
  - *A gas station in light industrial area*
  - *A 4 plex in a commercial zone in a City that really needs the housing may not be necessarily incompatible*
- *Spot Zoning -- MAYBE*
  - *Jane could attempt to get her 4 plex specifically and specially zoned as OK*
  - *Lots of money and influence needed but . . . City needs housing*
- *Change to Commercial zone to allow residential too – Good Thought*
  - *Zoning regs are political decisions and can be changed by political process*
  - *Jane may be able to have this happen . . . City needs housing*

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1)

**1. Define Nuisance/Balancing the rights of property owners with community interests.**

NUISANCE

Private Nuisance is the substantial and unreasonable interference with another's quiet use and enjoyment of their land. For a nuisance claim to be actionable, the problem complained of must be offensive to an average member of the community. Nuisances may be the result of an intentional conduct that is a substantial and unreasonable interference or the result of unintentional conduct resulting from abnormally dangerous activities such as blasting or chemical manufacturing. Nuisance is measured two ways, 1) just by the conduct itself and 2) by a balancing test asking whether the harm caused to plaintiff is outweighed by the utility of the defendant's conduct.

Public Policy Protections for Certain Industries

As a matter of public policy, the offensive conduct of certain industries is protected from nuisance actions because these industries are deemed to be important for society. For example, agriculture is often shielded from nuisance actions by Right to Farm laws. This is because the utility of farms is critical to people's needs in a modern society. Energy producers also often get special consideration for the utility of their conduct as benefitting society as a whole as compared to the harms caused by the nuisance conduct.

Regulations for public health, safety, and morals.

The government is within its police powers to enact regulations to prevent nuisance activity when it is to protect the public health, safety, and morals. Human habitation is also typically given priority over a nuisance industry (as in the case of

good

the *Haddacheck* case/brickmaking operations that were forced to stop operation due to nuisance in favor of the expanding residential community.)

**2. Factors considered by the court in determining a nuisance (noise, odor, AG traffic).**

Here, Bob is operating a bed an breakfast adjacent to a small dairy farm, owned by Alice. The conduct Bob is complaining of is the noise, odor, and agricultural traffic associated with the dairy farm. Animal farming odors are offensive to an average person. They can be quite strong, particularly if the Bed and Breakfast is downwind from the farm and it is hot outside, exacerbating the strong odors. The guests at the bed and breakfast would not be able to open their windows or enjoy relaxing lemonade on the porch of Bob's very quaint and tranquil bed and breakfast in the small town of Greenville.The noise complained of could be substantial for several reasons, including: milking cows moo, the equipment used to milk the cows can have machinery noise associated with the operations, and if the milk is processed onsite it may also be noisy. It is commonly known that farm operations begin literally when the sun comes up, even just before sun up. The mooing and cow noises and machines or tractor noises to bring feed to the cows would begin at the crack of dawn and is likely to disturb the guest's sleep at the bed and breakfast. The tractors can be operating early too and this would disturb the bed and breakfast guests. The tractor traffic entering and exiting the fields bring big clumps of mud up onto the roadway and large equipment like heavy AG tractors is likely to damage roads and make it unpleasant for guests to drive on and access the bed and breakfast. At times, agriculture equipment can take up the entire roadway and obstruct the road so much that no traffic can pass until the tractor exits the road. All of these things are likely to impact the economic earnings of the bed and breakfast. Thus, a dairy farm is likely to be found as a nuisance.

this is well done + well presented

**3. Defenses, Alice v Bob.**

DEFENSES

COMING TO THE NUISANCE

Alice will argue that she was farming long before Bob established the bed and breakfast and can argue coming to the nuisance because the farm began operations in 1990 and the bed and breakfast was established in 2010. Bob would have been on notice that there was a dairy farm next to the home. It may even be that the old farmhouse was originally part of a larger farm and then the property was subdivided and turned into a B&B by Bob. There's nothing in the facts to suggest that Alice significantly expanded operations, so Bob should have been aware that the small dairy farm would have odors, noise, and AG traffic. Thus, coming to the nuisance would be a valid defense for Alice.

RIGHT TO FARM → bingo!!!

Additionally, as stated above, for public policy reasons, many industries that are critical to modern society and human existence are protected from nuisance actions as a matter of law.

Alice can argue that she has the right to farm and AG protections because she is a small dairy farm that produces food for human consumption. Thus, this is a valid defense for Alice.

BOB IS TOO SENSITIVE → good

Alice can also argue that the quaintness of her small farm enhances the experience of the B&B guests as being particularly representative and immersive experience of small-town charm and living. Alice may also argue that Bob is being overly sensitive to the odors,

noises and AG traffic. These arguments are likely to fail because farming smells and noises are offensive to most people.

**4. Relevant caselaw/legal precedents for resolution in Greenfield.**

*Del Webb v Arizona Rancher*: A residential planned community filed a nuisance actions against a longtime Arizona Rancher Feed lot for nuisance associated with AG industry. The human habitation was prioritized over the Rancher/feed lot, however, the rancher argued a coming to the nuisance defense and Del Webb paid damages to buy out the rancher.

Here, Alice's dairy farm is likely to be found as a nuisance. But if she successfully argues coming to the nuisance as a defense, then a possible similar remedy would be for Bob to purchase Alice's dairy farm, as was the case in *Del Webb*.

**5. Remedies available to Bob if the court finds in favor of Bob and balancing Bob's, Alice's, and the community's needs.**

REMEDIES

Typical remedies for nuisance are injunctions and money damages. Additionally, sometimes the remedy will be like the *Boomer Rule*: if an industry can pay enough damages, it is permitted to continue the nuisance conduct (as was the case in *Boomer v. Atlantic Cement*).

On balance assuming the court rules that Alice's farm has great utility and benefit to society but the city is growing and must accommodate newer businesses such as the B&B, Bob can seek injunctive relief of money damages.

Here, Bob is claiming that he is losing $75,000 because of the dairy farm nuisance. Bob could seek a total injunction for the dairy farming operations. Bob could also seek money damages to offset his expected losses, but Bob is going to have to prove those damages with real evidence not simply Bob saying he would double his buisness if not for the farm. A remedy from the court that balances Bob's interests with the Dairy farm interests would be where the farming operations stop and Bob or some other entity purchases the property.

**END OF EXAM**

This is Super good work
Excellent job.

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2)

Easements

An easement is an interest in the land of someone else that is non-exclusive, creating a right for that person to use the land for a defined purpose. The party benefitted by an easement is the dominant tenement and the party allowing access to its property is the servient tenement. An easement can be express, implied, or prescriptive. An express easement is written down and is recorded into the public record. An express easement runs with the land, meaning it is attached to the specific land that is home to the easement right, and survives any changes in ownership of the property or the associated tenaments. Here, Amy and Bob agreed in writing to create an easement, allowing Amy to traverse across Bob's property for ingress and egress purposes. While this agreement was written down and notarized, it was not recorded, therefore it does not qualify as an express easement and would not run with the land on that basis.

A prescriptive easement is a trespass that occurs for a long enough period of time, defined by statute, that is open, obvious, notorious, hostile to the true owner, and is comprised of a clear and definite path. Here, the easement across Redacre was not considered a trespass, as both Amy and Bob agreed on Amy's use of the road for ingress and egress. Even when Amy sold Blackacre to Cathy, Bob continued to welcome Cathy across Redacre in a friendly neighborly manner, as the facts indicate that he would wave and they had good relations. Given that the use of Redacre by Amy and Cathy was not only permitted but welcomed by Bob, this easement would not qualify as a prescriptive easement.

good

An implied easement can come in two forms: one of strict necessity and the other from prior existing use, or a quasi-easement. An easement by strict necessity exists when an original owner divides property into multiple parcles, creating a landlocked parcel. The

landlocked parcel would need access across another parcel for ingress and egress, but the need must be strictly necessary. If there are alternative methods for accessing the landlocked parcel, the easement would not qualify as strictly necessary. However, the courts do not aim to bankrupt a party attempting to secure ingress and egress access to property, nor will the court financially ruin the servient tenament in an effort to secure an implied easement by strict necessity. If the alternative is too expensive, the court will likely uphold an easement by strict necessity.

Here, Amy originally owned both Blackacre and Redacre. Since both properties had a common owner, the court would likely determine that the properties were joined together prior to Amy's sale of Redacre to Bob. The facts indicate that Blackacre is not landlocked, and there exists an alternate means of ingress and egress, so on its face, the roadway across Redacre is not strictly necessary for the current owner of Blackacre, Cathy, to come and go from Blackacre. However, the alternative for Cathy would cost her $100k to develop, which is a significnt amount of money. While the facts do not indicate Cathy's financial status or occupation, one could assume that a $100k expense would spell financial ruin for a vast majority of people. Due to the gravity of the cost for the alternative access way, Cathy could argue that the easement across Redacre is one of strict necessity. On balance, David would likely point to the alternate route and claim it is sufficient enough for the court to rule Cathy cease and desist traversing Redacre.

An implied easement from prior existing use results from a common property owner who divides property at the time of the original sale, and there existed the use of the easement at the time of the property sale. In this instance, there is no mention of the easement in any deed or recording, and the easement need only be reasonably necessary. The servient tenament must have apparent notice of an easement from prior existing use in order for this type of easement to be deemed legitimate by the court.

Here, once again, the court would see Amy, the original owner of both Blackacre and Redacre, as the common owner of the combined property who divided the property into separate parcels. When Amy sold Redacre to Bob in 2000, thereby dividing up her land, the written agreement was generated, which permitted Amy to cross over Redacre to come and go from Blackacre. This agreement existed at the time of the original sale. Despite the written agreement, the agreement was never recorded, nor was it articulated in the property deeds. Further, the later owner of Redacre, Cathy, would likely argue that the easement is reasonably necessary in that it avoids a $100k expense to develop an alternative means of accessing Blackacre. Cathy would also argue that the the current owner of Redacre, David, was on apparent notice of the easement when David purchased Redacre, since by 2020, when David purchased the property, there would have been a clearly defined dirt roadway cutting across Redacre. David would very likely have noticed the roadway prior to his purchasing Redacre, therefore David likely had apparent notice of the existing easement.

Based on the fact pattern, an implied easement from prior existing use likely existed between Amy and Bob, which would run with the land and provide Cathy ingress and egress rights across David's property. The most reasonable and likely outcome is that the court would recognize the existence of the implied easement from prior existing use and enjoin David from maintaining a barrier across the roadway used by Cathy for ingress and egress.

Very well done.

**END OF EXAM**

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3)

## Zoning

Zoning is an expression of the state's police power to regulate land use for health, safety, morals, and public welfare.

Here, Maplewood's zoning power comes from the state enabling legislation. Jane's property is in an area that is zoned commercial, but she has built four residential units without requesting a variance or getting a building permit. In response, Maplewood has issued a code enforcement violation. It's within the city's purview to zone appropriately and residential is not always compatible with commercial uses.

However, Maplewood has a housing crisis and has offered to grant Jane a permit if she gives the city another parcel she owns so they can build a park.

## Takings

Under the takings clause of the 5th amendment, as applicable to the states under the 14th amendment, private property may not be taken for public use without just compensation. Just compensation is fair market value.

## Exaction

Good

Exaction is the conditions that government seeks in exchange for permission to build. The court uses the tests developed under Nollan and Dolan to determine whether an exaction is a taking: 1. If there was no permit involved, would it be a taking? 2. Is there a legitimate government interest? 3. Is there an essential nexus between the legitimate government interest and the condition imposed? and 4. Is there a rough proportionality between the condition imposed and the impact of the development?

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1. Here, Maplewood's request that Jane grant them a property would be a taking if there was not a permit at issue. It would be private property taken for public use, a park in this case, and just compensation of $100,000 would need to be paid.

2. Building a city park is a legitimate state interest. Citizens need open spaces for recreation and parks increase the livability and attractiveness of a city.

3. There is a nexus here--the city wants a park and Jane's property would meet that need. However, the city has a housing crisis and the parcel they want to build the park on is zoned residential. It's unlikely that the park is the best use for that particular parcel and perhaps the nexus isn't "essential." → GOOD . . .

4. There is not a rough proportionality between the city's desire for a park and Jane's residential four-plex. It's likely that no more than eight people will live in the four-plex, which does not necessitate the need for an entire city park. The exactions inquiry is weak on the essential nexus, but fails completely on rough proportionality. → GOOD . . .

Jane will claim this exaction is a taking.

**Challenging zoning regulations**

good

Since Jane will not agree to the city's request for her residential property, she will want to challenge the existing zoning as an alternate path to permits. That can be done in a number of ways. She would be unsuccessful in challenging the enabling legislation because there is an applicable state law. She could challenge the constitutionality of the law, but it's unlikely that there is a fundamental right in play or a lack of reasonable state interest in the underlying zoning.

She can engage in the political process to get the zoning changed, which is likely to be successful in this case because the city needs more housing. If Jane seeks a variance, or a

change in the overall zoning, she has a good argument because the city already let her know it would be willing to permit her existing four-plex if she gave them her other property. Mixed-use zoning is a popular way to include more residential units in existing commercial areas, and it appears that this is what Jane has done with her property. Jane could also work with the city on plans for her other residential parcel. Perhaps a more appropriate nexus and proportionality would be an agreement to include income restricted units as part of that development.

The city will argue that this is a straightforward zoning violation and that Jane knowingly build four residential units in a commercial zone without permits. This would be a strong argument but for their attempted exaction.

**Likely Outcome**

Jane has a good case against the city in the exaction claim. It's likely the court will find that the city's attempted imposed condition would amount to a taking. Additionally, she might have a chance to win her injunction against the city's code enforcement violation because they already said that they would grant "as-built" permits. But her damages claim is less likely because so far she has not incurred damages. She also has a good chance at obtaining her permit through a process with the city.

**END OF EXAM**

This is good work + I agree w/ your exactions analysis.