

Property 4, Professor Fisher, May 17, 2006
Student ID: 806-12-753

Question 1 — 490 words

Will validity? — Under Massachusetts law, Ophelia's will must be a signed writing (but cannot be holographic) with two disinterested witnesses. If Ophelia's will is invalid, her estate passes via intestate succession and Steven and Daphne are entitled to equal shares under MGL §190:3(1).

The chalet — Assuming Ophelia's will is valid, it purports to give Steven a LE in the chalet. Ursula and Victor have: VRMSOs (Steven could have more children), VRMSDs (divests if they disclaim New England skiing by age 21), and ShEIs (to take their sibling's share if the sibling disclaims skiing by age 21). Steven's unborn children have CRMs (must be born). There's no RAP problem — when Steven dies the class closes (Rule of Convenience, and, besides, he's dead and can't have more children), and all ShEIs will thus vest within 21 years if at all (unless Steven's sperm is frozen; unclear how RAP handles fertility technology). Loophole: Ursula could disclaim skiing losing her VRMSD, then Victor could disclaim so Ursula's ShEI vests and she regains an interest either sharing with another child or in FS. The children might agree to each disclaim in turn and then convey a share to the last child to disclaim, or they might wait until after they turn 21 to disclaim skiing if they are inclined to disclaim at all.

Ophelia purports to give the chalet to Steven's children as JTs. If Massachusetts requires her to specifically mention a right of survivorship (because TCs are preferred to JTs), they will instead be TCs. If it isn't necessary to specify a right of survivorship they can easily convert JTs

to TCs by straw man conveyances. They can then bring a judicial action for partition and take their respective shares, lease the chalet and share rents, or oust one another and pay damages.

The cottage — Ophelia devised the cottage as an FSEL to Daphne and Eric as TEs, giving Daphne a ShEI in the cottage should Daphne and Eric divorce. Daphne and Eric fulfill the unities of time, title, possession and marriage, but they don't fulfill the unity of interest because they don't have identical interests measured by duration: Daphne's interest exceeds Eric's. Courts increasingly ignore the requirement that TEs hold equal shares, so they may allow Daphne and Eric to hold the cottage as TEs despite this difference in interest. Otherwise, it might declare that Daphne and Eric hold as TCs. An additional problem, however, is that the cottage is marital property and TEs are notoriously hard to destroy. Upon divorce, the court would normally equitably divide the property. Because the will gives Daphne a ShEI, it may be void as against public policy by "punishing" Eric as part of the divorce even though Massachusetts refuses to consider fault in dividing property. The court may thus strike out the condition subsequent back to the first comma, leaving Daphne and Eric with a FS in the cottage held as TEs.

Question 2 — 999 words.

Nuisance — The Pastorals (hereinafter P) should say the windmill is a nuisance. This is an intentional private nuisance per accidens: it interferes with P's use and enjoyment of land by disrupting the peace and blocking bird songs, it isn't a nuisance per se because it may be

reasonable in some circumstances, and it's intentional because Transient knows it's noisy. The court will consider:

- 1) Nature of the act — Transient's use for power is socially desirable as an alternative energy source.
- 2) Kind of harm — P's desire for quiet enjoyment is a basic property right courts respect.
- 3) Degree of harm — The constant noise interferes with P's ability to sleep and drowns out songbirds. It's a significant interference with peace and quiet. P's desire to peacefully enjoy the rural area isn't extra-sensitive.
- 4) Expediency — If the windmill is efficient it helps Transient, who is economically justified in producing power. However, if it is of questionable economic value using more resources than it produces (similar to Prah's solar panel's 3 percent return), expediency goes against Transient.
- 5) Custom/usage — Are windmills frequently used for power in Rolling Meadows?

Because Transient is "eccentric — living off the grid" — it's unlikely custom favors her. P will likely succeed since Transient's windmill significantly and unreasonably interferes with their quiet enjoyment. Based on Transient's meritorious use and possible economic efficiency, a court may give P the entitlement but protect it with a liability rule, like *Boomer*. Transient would pay damages but continue using the windmill. If the court instead enjoins Transient and this is inefficient, transaction costs will prevent a Coasian bargain: the bilateral monopoly may prevent bargaining and P may overvalue their entitlement based on androgynous preferences.

Transient will argue P has "come to the nuisance" because she was operating her windmill first. This claim should fail because P's use isn't extra-sensitive and Transient can't

use the windmill to restrict a later use unless she has obtained a prescriptive easement, discussed later.

Trespass — Since the windmill tosses dead birds onto P’s land, they should bring a trespass action. Under strict liability, P will recover damages (limited to the expense of removing the carcasses). If the judge loves birds he may award punitive damage (unlikely). Because the trespass is continuing, P may get an injunction and Transient will either have to cease using the windmill or install a protective device (caging the blades?) to prevent birds from flying into the windmill or keep their carcasses from falling onto P’s land.

Underground Percolating Water — Transient’s well extraction interferes with the water level of P’s pond, so P might have an underground percolating water claim if the pond is underground water. If Ames has an absolute ownership rule, Transient wins because she’s not pumping water maliciously. If there’s a reasonable use rule, Transient still wins because she’s putting the water to use on the land by irrigating her gardens. If there’s a correlative rights rule, Transient still probably wins because her use, subject to a reasonableness analysis, is meritorious and “natural” (irrigating vegetables for subsistence) while P is disadvantaged but wasn’t using the pond for natural uses.

Prescriptive Easement — If P brings nuisance/trespass actions, Transient will say she has a prescriptive affirmative easement to continue operating the windmill. The easement is appurtenant because Transient’s benefit relates to her land, so if Transient later conveys the new owner could continue using the easement. P must find out when the windmill was built and the

length of the statute of limitations (SOL) for adverse possession in Ames. If the SOL hasn't yet run, P should immediately file suit, or at least notify Transient of their intention to contest the legality of her use (enough to toll the SOL in some jurisdictions). P could instead give Transient express permission to operate the windmill since permission is fatal to prescription. If Transient relies on this permission, though, she may have an estoppel claim and be able to use the windmill long enough to recoup her investment.

If the SOL period has run, a court will consider:

- 1) Hostility and a claim of right — some courts require a good-faith claim of right, so Transient would have had to believe she wasn't creating a nuisance. Transient likely had the acquiescence of previous owners, if Ames requires acquiescence, since they knew about the windmill but didn't contest it.
- 2) Open and notorious possession — Transient's use was visible -- public and flamboyant. P can argue the windmill wasn't operating in the winter, but a court will likely say they should have researched this (laches).
- 3) Continuous use — P must find out whether Transient operated the windmill at a certain time of year for the entire SOL. If she didn't use it for a year or two, a court may decide this isn't continuous use.

If Transient has used the windmill every spring for the SOL period, she probably has a prescriptive easement. She can't use the windmill during the winter, though.

Actions against Strong — If Transient has a prescriptive easement, P should bring suit against Strong. If they have a warranty deed, they can get money damages for the diminution in value. Warranty deeds are rare and more expensive, so Strong probably only conveyed a quitclaim

deed. Title insurance usually doesn't cover adverse possession and prescriptive easements aren't subject to recording systems, so P may lack recourse.

P might sue Strong for a latent defect. Strong will defend that it wasn't latent: the windmill was readily observable and P should have protected themselves. The reduced price should have put P on notice. Even if latent, Strong will argue the defect wasn't material. Some courts consider whether a reasonable person would find it material (Strong didn't), but others consider whether this buyer finds it material (P does). The remedy is damages, but the reduced price may already compensate P for the defect.

Finally, P should sue Strong for fraud since he purposefully misled them.

Question 3 — Option A — 749 words

Current incarnations of municipal zoning illustrate the problems of discretionary power. The Standard State Zoning Enabling Act (SSZEA) has resulted in rent-seeking behavior, discrimination masked by pretext, the elevation of homogeneity above creativity and originality, and reactive rather than progressive change. To address these problems, Ames must: 1) tighten comprehensive plan requirements to block rent-seeking behavior and ensure zoning becomes forward-looking; 2) prohibit protection of property values as a zoning objective to reduce discrimination; 3) invalidate aesthetic zoning to prevent oppressive homogeneity; and 4) modify historic zoning so owners of historic property aren't subjugated to the common good.

Judicial decisions interpreting SSZEA have eroded the comprehensive plan requirements by claiming the future is too unpredictable for long-term planning. Shortsighted decision-making results in act utilitarianism ignoring future implications. An ordinance concentrating

low-income housing, for example, ignores the negative effects of concentrated poverty, including crime, demoralization, and low-quality schools and public services in areas that most need these services. Maintaining the exclusivity of suburban neighborhoods can devastate cities over time. Reducing comprehensive plan requirements also gives discretion to those in power who engage in rent-seeking, establishing ordinances partway through a locality's development to benefit residents grandfathered in at the expense of latecomers. Zoning ordinances react piecemeal to changing conditions in a city without a vision for the future.

It is imperative to reinvigorate the comprehensive plan requirement. Demanding that an ordinance articulate its goals/objectives serves the four social functions of formalities: protective (reduce hazards that abstract objectives will cover up rent-seeking behavior), evidentiary (avoid vagueness so courts understand precise zoning goals), cautionary (alert those crafting an ordinance to its future implications so they consider long-term objectives), and channeling (illuminate underlying objectives to help judicial interpretation). Most importantly, a comprehensive plan shifts zoning from a reactive enterprise to a forward-looking measure shaping the future. Social Planning Theory provides useful insight in how zoning can promote a good society that sustains the good life for communities.

Ames should also declare that protecting property values isn't a legitimate objective of zoning. Michelman's observation that justifying zoning on property values is "escapist reasoning" rightly reveals that diminution in value is symptomatic of other anxieties. Allowing zoning ordinances on this basis masks illegitimate objectives like racism or economic stereotypes. *Arkansas Release*, although sounding in nuisance, illustrates this concept. The court declared a halfway house a nuisance based on the decline of surrounding property values without addressing the possibility that this drop stemmed from unsubstantiated fears and biases

of residents. Ames must eliminate reduction in property values as a zoning justification to prevent a run-around of illegitimate goals and ensure zoning doesn't circumvent the constitution or anti-discrimination statutes.

Aesthetic zoning similarly is a pretextual justification masking a desire to maintain socioeconomic divisions. *Belle Terre* and *Berman* established dangerous precedent by declaring zoning can pursue spiritual and aesthetic aims and promote "spacious and quiet neighborhoods which promote family and youth values." No matter the intent, aesthetic ordinances result in the confinement of poor people to certain neighborhoods and reinforce the stereotypes that mobile homes detrimentally affect the public welfare. Aesthetic zoning also contributes to stifling homogeneity, trading cultural diversity for a narrow conception of beauty. If Gary Wolf wants his house to represent jazz music, it will enhance diversity by challenging a community's collective imagination. Architecture is expressive: people develop identities based on their homes and achieve self-realization as individuals and social beings by exercising choice in home design. Because aesthetic zoning restricts creativity and individuality, it short-sightedly sacrifices diversity.

Finally, Ames should be sensitive to the problems of historic zoning. Although historic landmarks contribute to education, legibility, and tourism, restricting their use demoralizes owners and stifles individual choice. Like IP or navigation systems, historic sites are a public good: consumption by one citizen doesn't impair enjoyment by others. These non-excluding characteristics create a market breakdown: those owning historic landmarks shoulder the burden while others reap the benefit. Ames could prohibit historic zoning and thus force the government to effect takings of historic landmarks upon paying fair market value to owners. Alternatively, Ames could create a special property right in historic sites similar to copyrights/patents where

owners of landmarks must maintain them but can charge others a visitor's fee. These options raise practical difficulties, but recognizing the problems of historic zoning may lead to better solutions.

By making these changes, Ames can ensure that zoning restricts haphazard discretion, curtails discrimination, eliminates constraints on creative expression and diversity, and promotes a vision for the future.

Question 4 — Option B — 749 words

The dichotomy between rules and standards pervades property law and demands reconciliation between bright-line efficiency and nuanced analysis. Social Planning Theory (SPT) resolves the tension between rules and standards by offering the guiding principle of the good life/society. For example, I intuitively support judicial discretion in distributing marital property upon divorce but I'm dismayed by inequality resulting from the absence of normative principles. SPT elevates need as a guiding principle and demands result equality over rule equality. While SPT doesn't eliminate case-by-case analyses, it helps *order* and *prioritize* considerations to achieve the consistency of rules while maintaining the flexibility of standards.

Consider how SPT illuminates the takings doctrine. The government's need to avoid collective action problems and exercise sovereignty illustrates the merits of eminent domain. Yet the ad hoc *Penn Central* test lacks weighted principles, *Kelo* essentially eliminates the public use requirement, and objective just compensation ignores subjective valuation. SPT offers guidance in applications of the *Penn Central* test and addresses public use and just compensation concerns.

The good society is, above all else, an equal society. This diminishes the significance of economic impact (EI) and investment-backed expectations (IBE) inquiries in regulatory takings analyses. Judges should consider EI and IBE only if a regulatory taking so severely impacts an individual it endangers her basic needs of food/clothing/housing/medical care. Because wealth distributions will be more equal, judges can easily ascertain whether a regulation threatens an individual's livelihood. IBEs should only matter to reward unequal effort or allow for Pareto superiority, so trade secrets, drug patents, and creative works may require greater protection. Conversely, taking domain names from cybersquatters should never require compensation because cybersquatters engage in rent-seeking by registering domains first.

Under SPT, the character of the government action (CGA) assumes increased importance and illustrates why eminent domain is meritorious and necessary. Because the good society promotes diversity, rich artistic traditions, and education, the government can target individuals to create constitutive communities and cultural diversity. Art preservation statutes and historic zoning promote human flourishing and should be upheld against takings claims. If a regulation doesn't contribute to the good society, CGA demands consideration of self-definition and the ability of individuals to control their environments and futures. If a regulation demoralizes and disenfranchises citizens without promoting the good society, it might be a taking.

To illustrate how SPT could affect a takings analysis, consider a judge adjudicating *Penn Central* and *Pennell*. In *Penn Central*, designating Grand Central a historic landmark didn't threaten the owners' basic needs because Grand Central retained broad income-generating uses. IBEs in increased office space would only marginally enhance society and instead increase the owners' wealth, flouting equality. The judge would thus prioritize CGA over EI and IBE.

Because preserving historic landmarks has widespread educational and legibility value there would be no taking.

If a landlord's ability to increase rent was limited by a hardship tenant in *Pennell*, a judge would first consider EI. By definition the landlord would likely own alternate housing, so unless the rental was his only source of income for food/clothing/medical care, the judge could ignore EI. IBEs are also unimportant because owning extra housing is not a creative enterprise demonstrating unequal effort. Once again, CGA is dispositive: lowering rent for hardship tenants promotes equality by increasing access to housing. The regulation would not be a taking.

This understanding of CGA also reinstates "public use" as a requirement when regulations don't substantially advance the good society. In *Kelo*, the desire to renovate a blighted neighborhood actually hurt poor people by taking their property and giving it to private businesses. SPT demands a stricter conception of public use to prevent interference with the good life and ensure a taking doesn't inadvertently promote inequality. Demanding public use would protect owners with a property rule and prevent the taking from occurring.

SPT also shifts how to calculate just compensation. Instead of paying objective market value in all cases, judges could consider whether a use deserves an extra reward for unequal effort. SPT would also allow larger payments when the owner intended to use the surplus in creative endeavors that advanced the public good. Equality and distributive justice would inform just compensation instead of objective fair market value.

SPT seems unrealistic by requiring extensive redistribution of wealth and the elimination of class divisions, but considering it as a way to reorganize the takings doctrine specifically and property law generally illuminates my understanding of the purposes of private property and my preference for standards organized by guiding principles.