
PART II- ESSAY QUESTION
SPECIAL INSTRUCTIONS

1. This question constitutes 1/3 of the exam.
2. There is one rather compound question; be sure to respond to all issues you find in it.
3. Read the facts carefully. Answers based on incorrect facts are incorrect answers.
4. If you think important facts are missing or badly stated, make explicit assumptions about them. Do not make assumptions that are unreasonable or that make issues vanish.
5. Read the call of the question carefully; don't answer questions that haven't been asked.
6. Try to organize your thinking beforehand, so that points are put in the right places.
7. Type or answer in blue books. You may abbreviate where appropriate. Write legibly on every other line and one side of each page only. **Illegible answers are not read.**

Treat each of the four questions that follow the basic story as completely independent of each other, so that I can grade each part entirely on its own and not affected by what has been said in any of the other parts. Assume that all documents you may want to discuss are similar to those in the casebook or the forms packet (and indicate in your answer to the form or provision that you are using)

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ID:

(Exam Number)

Exam Name:

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Instructor:

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Grade: _____

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1)

A. Advise to the city attorney

Statutory Authority

First it is important to understand that land use regulation is a state police power. That right can be (and has been) delegated to cities and most counties to regulate. They may exercise this power only to the extent that the state has delegated it.

General Plan

Many states require the creation of a "general plan" before the cities may begin regulating land use. The regulation of land use through zoning and other land controls must be in line with this general plan.

Zoning

Zoning ordinances divide the jurisdictions into zoning districts and regulates the land use in each district. Here the land is zoned for (C1) which allows the shopping center, but does not allow for the movie theatre (which is only authorized in (C2) and (M) districts).

Conditional Uses

Conditional uses are used to regulate certain beneficial land uses that impose a significant burden on the area where they are located. It looks like the Planning Board voted in the theatre as a "conditional use/variance" permit. These are very different. A conditional use is already written into the law. Conditional uses are actually written into the "general plan". The general plan explicitly states the movie theatre in the shopping center is contradictory to their plan. This

is going to be a hard fact to overcome.

Ultra Vires

A land use regulation may be considered ultra vires if it exceeds the scope of the states enabling act. It is possible that this may be challenged as outside the cities authority to regulate.

Variance

The planning board also voted in the theatre using the term "variance". Most zoning ordinances authorize a variance from the zoning code when its enforcement would cause unnecessary hardship because the affected property's unique features. The issue here is that it may be very difficult, if not impossible, to meet the hardship requirement. An unnecessary hardship would need to be shown. Diverse would have to be able to show that they can not use the property or obtain a reasonable return from it as zoned because of its unique features. ✓

Ultra Vires

Because these circumstances don't meet the requirements for variance, an argument could be made that this exceeds the scope of the states enabling act.

Amendments (Rezoning)

It is far more likely that Diverse would prevail over an amendment to the zoning map. Diverse could request that the Planning Board amend the zoning map to make just their lot zoned to allow the theatre. This could be done in a couple of ways. If the parcel was zoned to (C2) and in a jurisdiction that allowed for higher uses in lower uses districts, the shopping center and the theatre would be appropriate land uses. If this is not allowed in this jurisdiction the Planning Board could also zone the parcel as (C1) & (C2) allowing for both the shopping center and the ✓

theatre as well.

Restrictions

Because rezoning usually only benefits one land owner it is subject to greater judicial scrutiny and legislative restriction, but it looks like the Planning Board is very willing to accommodate a change in order to allow for the theatre, so it may be possible.

Neighbor Protest

The neighbors may be a concern. Many states provide that a "supermajority" vote is required by the local legislative body when a certain number of affected neighbors protest the change. It sounds like there are a fair number of people protesting, but even if there are enough to require a "supermajority" vote (i.e. 75% instead of 51%) the enthusiasm of the mayor regarding increased sales tax may be enough to get the votes needed to pass the rezoning.

Administrative

There is also the fear in this situation that the courts will construe the rezoning of a single parcel as administrative, which eliminates the deferential presumption of validity that legislative acts hold, but this characterization has not been made by all courts.

Spot Zoning

When a rezoning singles out a single parcel of land for benefits that are generally unavailable to other properties in the zoning district, a court may invalidate it as spot zoning unless special circumstances justify the preferential treatment. The court may hold that the rezoning is arbitrary, inconsistent with the "general plan" or a violation of the equal protection clause. This may be an issue in this case. It is clearly against the "general plan" and it would single out a parcel for a

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benefit. The best argument may be that other parcels in the area would not be interested in being rezoned as (C2) as heavy commercial. Diverse could argue that it would not in fact be a benefit to any other parcels except theirs due to the desire to place the theatre inside the shopping mall.

Contract Rezoning

Diverse could also attempt to have the parcel rezoned by abiding by special use restrictions or by granting special benefits to the community in return. They may offer to restrict the hours of the theatre or shopping mall operation, or dedicate an area of land to the school. This is also subject to many of the same arguments from before; ultra vires, of state enabling legislation, illegal spot zoning or contracting away of legislative zoning powers.

B. Advise to Diverse

Contract

In order for there to be a valid contract for the sale of land the parties must intend to be bound, their must be consideration, and it must be in writing. Last Chance did accept the offer for \$1 million. For the sake of the question it is assumed that all this was handled in writing considering the size of the deal and the involvement of attorneys.

Risk of Loss

Before execution of the contract, all risk of loss from destruction of the premises is on the vendor. After the contract has been consummated and the purchaser owns the legal and equitable titles, the risk of loss is theirs. But there are arguments to be made regarding who bears the risk of loss during the contract period.

Equitable Conversion

In a majority of states, equitable conversion makes the purchaser the equitable owner, therefore Diverse would bear the loss. It will be very important to figure out what jurisdiction the transaction is taking place in.

In a minority of states the contract includes an implied provision that the vendor will transfer the premises to the purchaser in the same condition as when the contract is made. This is what Diverse should be hoping for. In this case, there would be a good argument for a price reduction or a right to withdraw.

Uniform Vendor and Purchaser Risk Act

In this case the risk of loss is on Last Chance unless Diverse has taken possession. If Diverse has yet to take possession of the property this would also be a beneficial jurisdiction.

The parties could have contracted otherwise, but there are no facts that indicate they have.

Damages

If the Diverse chooses to withdraw without a valid defense; Last Chance may seek specific performance or damages.

Specific Performance

On the principle of mutuality of remedies the courts may require Diverse to pay the purchase price of the property, but this is unlikely in that money is not unique like land.

Damages

Last Chance may sue to recover benefit of the bargain damages which would be the difference between market value and the contract price. Last Chance may also be able to sue liquidated damages. Often this is the deposit amount if damages would be difficult to ascertain. If the property has appreciated in value since Diverse breached Last Chance may just terminate the contract, return the deposit minus out of pocket expenses.

C. Advise to Last Chance

The broker owes a duty of loyalty, duty of care and a fiduciary duty to their clients. This issue here is whether or not the Broker was an agent of Last Chance. Normally a Broker's duty is to the Seller, which would be Last Chance, unless the Broker specifically agrees to be the buyers agent. Here the Broker approached Last Chance with the offer from Diverse. The Broker may have signed an agreement with Diverse to be their broker. If this is the case, the Brokers actions are appropriate, they were working in their clients best interest.

An argument could be made that the seller is the one who would be paying the Broker therefore they owe a duty to the seller as well. If that was the case the broker may have breached their duty by urging Last Chance to purchase indicating that this was an excellent price when that was not actually the case.

The broker may be liable to Last Chance under a negligence theory, malpractice.

D. Advise to Nora

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Options to purchase run with the land. Her option to purchase is valid against future purchasers.



Recording

Some states permit recording options to purchase others do not. Equitable conversion can give the contract purchaser rights in the land. Nora's failure to record did not likely change her right to the option to purchase.



Nora should be able to enforce her right to purchase.