

PROPERTY II
PROFESSOR CHRISTIANSEN
FINAL EXAMINATION BEST ESSAY ANSWER
SPRING 2006

Part II, Essay Question A

Bert (“B”) is obviously not happy with his property purchase from Sonja (“S”), and will try to either rescind the sale, receive damages from S, or a combination of the two while he divides the property and keeps some of it for himself. B’s arguments center around three primary issues.

Issue 1: Can B rescind or receive damages from S because of fraud in the sale of S’s Hunting Huts regarding hut #1, the size of the lot, and the condition of the log cabin?

Rule: Fraud can either be fraudulent misrepresenting fraudulent concealment, or fraudulent nondisclosure.

Analysis: First turning to the condition of hut #1. Because it is damaged on the inside, B is likely to say S fraudulently misrepresented and fraudulently non-disclosed its condition. As for fraudulent concealment, S never took active steps from preventing B from determining the condition for himself (this might be a defense for all of B’s claims, which is addressed later on). A fraudulent misrepresentation is an affirmative statement about a known material fact, which the other relies on to his detriment. In this case, S probably knew of the fire in hut #1. A fire-damaged interior is definitely a material fact which would influence a buyer’s decision to purchase a hut, because who wants a scorched hut? S did affirmatively tell B that the other huts were “nice enough,” and in that context, a reasonable person could understand such a statement to be an expression that huts #1 and #2 were significantly similar to hut #3. One problem is the timing of the fire. It did happen after S offered the property to B and he paid the down payment, but before he took possession. Under a traditional approach, B would be responsible for such an event.¹ However, modern courts disfavor this rule because the seller who still has actual possession is in a better position to take care of the dwelling, and in a better position to collect insurance compensation. “Double dipping” should be avoided. Another problem, and S’s best defense is that B had a chance to look around, and failed to discover an obvious condition. This might be seen as a waiver of his right to later claim fraud.

As for the fraudulent non-disclosure of hut #1, if a party is under a duty to disclose material and non-obvious facts, and fails to do so, resulting in injury to the other party, they can be liable. The obvious problem is if B and S shared enough of a close relationship because they were “sorta friends after all these seasons.” It is not clear, and because it appears B has some sophistication (as deduced from his ability to easily raise \$600,000 cash), and court is unlikely to find a duty for S to disclose the condition of hut #1, the log cabin, or the fact the lot is only 9.6 and not 10 acres.

As already mentioned, B will try to say that writing 10 acres and telling him the property is 10 acres, when in fact it is only 9.6 is fraudulent misrepresentation. B has a better claim here because no change occurred in the time between when he purchased the land and S delivered title. The land did not spontaneously shrink. Additionally, property owners are deemed to know the exact boundary lines of their property. As such, S has no excuse that the size of the

¹ “Equitable conversion.”

property was unknown to her. The lack of 0.4 acres is probably material because it would affect a reasonable person's intention to purchase. B would likely have purchased anyway, but he most likely would not have paid \$300,000 for that piece. Therefore, he suffered damages by paying for 10 acres and only receiving 9.6.

Lastly, B will try to show that S fraudulently concealed the water damage in the log cabin's basement. Fraudulent concealment is the active concealment of a known material fact, which the other relied upon and suffers damages. The inspec[ti]on shows that S probably knew of the water damage. Additionally, water damage is a material fact because it could lower the value of the log cabin. Whether or not B relied on the concealment of the water marks is hard to prove. He never went into the basement, so it is hard to determine that his decision to buy was induced by water-damage-free basement walls. A more appropriate argument would be fraudulent misrepresentation or non-disclosure.

Conclusion: It is not very likely that B will succeed in a fraud case of action against S ~~because no duty existed~~. B did not rely on most of the statements/conditions of the property, and most of B's damages are negligible. If a court did find fraud (especially with the size of the lot), it is unlikely B could rescind the sale and would most likely be awarded some damages. A court could choose from three options: 1) the difference between the value paid by B and the fair market value of S's Hunting Huts, "as is"; 2) the difference between S's Hunting Huts with cured defects and the fair market value "as is," or 3) the percentage of diminution in value from the defects.

Issue 2: If B is not successful in the above arguments, can he assert a statute of frauds defense?

Rule: A purchase agreement ("SPA"²) must be in writing, identifying the parties, identify the land, identify the price, and he signed by the ... (?) once it is being enforced against.³

Analysis: The first problem is if a map is a writing. The courts are likely to find that it is because actual script~~ure~~ was written on it. A bigger problem arises because S never mentioned her or B on the map/receipt. It appears that one could deduce the price by looking at what was circled and the values next to them, and then subtracting the "\$150 received on 6/1/01" amount to come up with the final 7/1/01 amount. It appears that there is a statute of frauds violation, and furthermore, S did not sign the purchase sales agreement.⁴

S has an excellent defense however, and as a result, B will be unsuccessful in rescinding the contract for the purchase of Hunting Huts. The defense is that B delivered the final payment in exchange for a signed "Special Warranty Deed." Assuming the deed describes the property, parties, ~~price~~, and intent to convey Hunting Huts, B's exchange for the deed would waive his right to later raise the statute of frauds defense. Even though Joey ("J") kept the deed in his car and it was not physically handed over to B, B was in legal possession of Hunting Huts when the exchange was made. The traditional ceremony of exchanging a twig or branch is not needed to establish the transfer of property rights.

B might counter by saying he has possession, but has made no improvements⁵ and he can still rescind. S has the better argument because B paid the whole price and waived the defense.

² Professor note.

³ "Intent."

⁴ "Map with check? Two docs together."

⁵ "Part perf?"

Issue 3: Can B rescind the land deal or receive damages for non-marketable title or breach of a title covenant?

Rule: Sellers are obligated to buyers to deliver marketable title, without encumbrances. A failure to do so will leave open the option to rescind⁶ with the buyer. Purchasers can ask for further assurances through title covenants, which are either present covenant of seisin (?), right to convey, against encumbrances, or future covenants of warranty, quiet enjoyment, or further assurances.

Analysis: The main problem in this argument is S's special warranty deed⁷ and DiAnn's ("D") adverse possession claim. B's first argument should be that S's deed suffers from an encumbrance and he is free to rescind. D's property interest claim is an encumbrance. However, S will counter by saying she signed over a special warranty deed, which was accepted by an agent⁸ of the purchaser. Special warranty deeds do not require title covenants of ~~third parties~~⁹ like D, only that S has possession of Hunting Huts, and can convey it to B.¹⁰ This might be a good argument, but the "special warranty deed" is likely to be strictly construed by the courts. S's conduct is a good example of individuals taking on the role of an attorney in a real estate transaction, when they should not.

More likely than not, the harsh effect, combined with S's legal ineptitude will lead a court to construe the deed as a general¹¹ warranty deed. As such, S would not have delivered title without encumbrances, and B sue (?) monetary damages are available for any breach from S's conduct. If a future covenant of further assurances is found to be enforceable, S could be required to perform specific performance, and remove D or question (?) her adverse possession claim.

If D does not meet the prima facie adverse possession burden, she could be found to be a tenant in the sufferance and B could kick her out after adequate notice.

Conclusion: B will most likely get some damages from S regarding a breach of a title covenant. Furthermore, his claim to Hunting Huts is probably superior to D's, because she never recorded her adverse possession by suing for a quiet title. In a race statute jurisdiction, B would have superior rights because J went to the recorder's office and recorded the deed from S. A problem might arise if the jurisdiction has a notice statute. To have superiority over D, B would have to be a bona fide purchaser, i.e., a subsequent purchaser, for value, without notice. D never recorded at all so there can be no actual or constructive notice. However, inquiry notice¹² might exist because if B had done an adequate inspection, he would have found D living in hut #2. Even if D has adversely possessed hut #2 and B can do nothing, it would not change his possession rights as to huts #1, #3, the log cabin, and the rest of the lot that hut #2 does not sit on.

⁶ "PSA only."

⁷ Circled by professor.

⁸ Underlined by professor.

⁹ Crossed out by professor.

¹⁰ "SW --> liable for G's actions only.

¹¹ "?"

¹² Underlined by professor.

Part II, Essay Question B

As a representative of Independence City, my analysis of the Ortiz (“O”) family issue will be divided among their three lots along Linx Lake.

Issue 1: What impairment to the protection of Linx Lake will occur because of a condemnation of O’s lot A?

Rule: Governments have an inherent power of eminent domain, but the Fifth Amendment of the US Constitution requires that such use only be used for public use and just compensation be given as a result.

Analysis: As to whether the condemnation of O’s lot A is for the public use, *Mitkitt* has shown that as long as the purpose behind the taking serves some portion of the government’s police power, than the “public use” requirement is satisfied. Independence City is exercising its police power in taking lot A to improve the welfare of the Linx Lake community by installing a tourist-friendly study center, which will likely lead to increased tourism revenue which will increase the welfare of citizens of Independence City. This element is easily satisfied in almost all cases, and so it is here.

The harder issue is giving the Os just compensation for lot A. Just compensation has been defined as “fair market value,”¹³ or what a willing buyer¹⁴ would pay a willing seller. So, is \$500,000 fair market value? Most likely. Even though it does not account for individual structures like the boathouse and corral, Independence City is not condemning those structures. Instead the whole lot is being condemned, and \$500,000 reflects the value of a similar lot at fair market value, which a ready buyer would pay a willing seller. Furthermore, the historical family ties of O will not affect the amount because they are not recoverable. Future value of the land could be accounted for, but it appears that O had no intent to put lot A to any use of a different land in the future. A subsequent purchaser might however, because of the new technology-based developments. The lot is worth more if a reasonable person would buy it with the reasonable expectation that it could be put to use in that way.

Conclusion: Independence City can definitely take lot A from O through eminent domain because it serves a public purpose. As for just compensation, \$500,000 might be too low considering the new use the land can be put towards. As such, my advice would either be to D pay a premium so O will be satisfied and not sue, or 2) accept O’s offer to eminent domain lot B for \$25,000. This will be cheaper and will serve some purpose. The \$25,000+ in saved expenses could be put towards the construction of a better tourist center.

Issue 2: What impairment to the protection of Linx Lake will occur because of the zoning of lots B and C as Env-4?

Rule: Government regulations that “go too far” are considered regulatory takings and the government must give just compensation to the property owner (Justice Holmes from Penn. Coal).

Analysis: Little guidance was given by this rule, so courts have used several tests to determine if a zoning of this sort is a regulatory taking.

¹³ Underlined by professor.

¹⁴ Underlined by professor.

First, a court will consider if the zoning ordinance is legal. The federal government passes police powers to states to protect their citizens and promote their health, welfare, and morals. Most states have enacted a zoning enabling act which gives to a city council the ability to adopt a comprehensive plan, enact zoning ordinances, and delegate administrative authority to a zoning board to grant variances or special exceptions. Assuming Independence City is in compliance with these rules, it must be determined if this zoning is a new regulation or an amendment. If it is an amendment, some courts assume they are legitimate unless they lead to “spot zoning” (in which it does not appear to be the case here because the North Lake plan zones a large portion of the north part of Linx Lake and not small portions independently), as other courts will not allow amendments unless they are to correct a mistake or change in physical condition from the first ordinance. It appears that a comprehensive plan existed, but no specific zoning ordinance affected the north part of Linx Lake. Therefore, it appears to be a new ordinance.

The next step is to see if the North Lake Plan falls into one of three regulatory *per se* categories, and therefore requires just compensation. The categories are:

1. A permanent physical invasion (*Loretto*);
2. Elimination of all economically beneficial use (*Lucas*) subject to nuisance and property law exceptions¹⁵; and
3. The expropriation of core property rights (*Babbitt*).

Nothing suggests that the North Lake Plan imposes a permanent physical invasion. The fact that development use of lots B and C can be done with the issue of a permit, and that they can be put to other economic uses besides development (for example, charging the Boy Scouts to have an annual campout on the lots) suggests the North Lake Plan does not fall into the second *per se* takings category. Finally, the expropriation of any property right is minimal. The issue in *Babbitt* was the taking of an owner’s ability to convey a property interest in fee simple absolute. It is unlikely a court will find that the destruction of only some rights of free property use would qualify for this *per se* takings exceptions.

The third step is to consider the North Lake Plan under the Penn Central Balancing¹⁶ Test. The factors a court would consider are:

1. The economic impact (diminution in value) to the owner;
2. The interference with reasonable investment-backed expectations; and
3. The character of the government actions.

Turning to the first element, there has been some diminution in value to O’s lots B and C as a result of the North Lake Plan. O or a subsequent owner would have to incur some costs to obtain a permit to do any development on those lots. That extra opportunity cost could decrease the price a buyer would pay O. Furthermore, the diminution in value is spread across both lots, not just a portion of O’s property. In all likelihood, the economic impact to O as a result of the North Lake Plan is small and it is less likely to be a regulatory taking.¹⁷

Turning to the second element, the Plan may interfere with O’s investment-backed expectations. O has been talking to a developer to sell lots B and C because of the new

¹⁵ Underlined by professor.

¹⁶ “Balancing” circled by professor.

¹⁷ “Consider FMU before and after zoning – sig. diff.”

technology which makes their development possible. The plan would interfere with this because the company might be unable to purchase the lots and use them as they wanted.

On the other side, permits are available, and a company could develop. Furthermore, it is foreseeable that a municipality could enact an ordinance that would impose restrictions on development. After all, almost all cities do the same thing through similar use zoning ordinances. All in all, the North Lake Plan does not appear to interfere enough with O's investment-backed expectations to be classified as a regulatory taking.

Lastly, the character of Independence City's actions must be considered. The ordinance was enacted to protect the community from harmful mudslides, not to merely convey some benefit to them. Because it appears to be a legitimate government interest, the North Lake Plan is less likely to be a regulatory taking.¹⁸

Conclusion: It appears that the North Lake Plan will not be considered a regulatory taking by a court, and Independence City is free to keep the ordinance in place. If a court were to find that the plan was a regulatory taking, an analysis of what just compensation O should receive would be required, and would reflect the analysis from lot A, above. Another option for Independence City (and the one I would advise) would be to repeal the ordinance in favor of one that is less likely to be a regulatory taking.¹⁹ In this way, the City could still accomplish its comprehensive plan but avoid the costly expense of paying just compensation.

Issue 3: What impairment to the protection of Linx Lake will occur because of the conditions imposed on O regarding cattle grazing on lot C?

Rule: This type of action could either be classified as a contract zoning problem, or an exaction.

Analysis: If the jurisdiction looks at this as a contract/conditional zoning issue because O agrees to build the mudslide abatement in exchange for the right to graze cattle on lot C, the first question is what type of contract exists. It appears to be a unilateral contract²⁰ because the city receives no additional benefit from O, save the abatement. As such, courts are generally likely to allow them.

On the other side, if O does not like the condition, they can bring an inverse condemnation²¹ suit against Independence City because the condition is an exaction.²² If that is the case, the court would use the *Nollan/Dollam* Test to determine if the city has gone too far and is required to pay just compensation to O.

The *Nollan/Dollam* Test is looking for two things:

1. An essential nexus between the exaction and the legitimate government interest; and
2. A rough proportionality between the exaction and the probable impact of the development.

¹⁸ "Other factors?"

¹⁹ Underlined by professor.

²⁰ Underlined by professor.

²¹ Underlined by professor.

²² "Exaction" circled by professor.

Turning to the first element, the condition to build mudslide abatements shares a connection with the City's interest in preventing flooding to residents of the south side of Linx Lake. The construction of mudslide abatements would eliminate that danger. As already discussed, that is a legitimate action Independence City because it falls within their police power.

The second element is more troublesome. There is no proportionality between the condition to build the abatements and the use of the land to graze cattle. The city council enacted ordinances with the knowledge that mudslides are more likely on developed land and a particular high risk during construction periods. Grazing cattle is a non-development activity, with no construction period. As such, there is no rough proportionality for purposes of the *Nollan/Dollam* Test. In the event a court agrees with my conclusion, the city would be required to rescind the condition. As such, my advice would be to rescind the current condition in exchange for placing the abatements on behalf of the city. This of course would require just compensation for the permanent physical invasion, but it would be cheaper than a pending lawsuit to justify its use.

Conclusion: Independence City should go forward with the zoning ordinance of lots B and C. The City could go forward with condemnation of lot A, but taking lot B instead presents a cheaper alternative with less negative results. The only plan the city should not continue is the condition of O's cattle grazing of lot C because O is likely to win and this would seriously impair the city's ability to protect the Linx Lake area, per their comprehensive plan.