Exam Name: **Property_FL2013**

Exam Instructor: **Professor Dinner**

ANSWER SUMMARY

Two model answers for Q1, one model answer for Q2, two model answers for Q3, two model answers for Q4, two model answers for Q5, and three model answers for Q6.

Question 1

Issue #1 - Was Dahlia 'ousted' from her tenancy in common during the time she was locked out, such that she can recover her costs of living in the hotel?

Rule: Tenancy in common has the right to use and occupy the entire property held in contenancy without liability to other cotenants (per Gilmor case). Each cotenant has the right to free and unobstructed possession of the property. To establish 'ouster', it is necessary to prove that a cotenant used the property in such a way that the 'ousted' cotenant was necessarily excluded. This requires either an act of exclusion or use of such nature that the cotenant is prevented from using the property. However, a cotenant out of possession must make a demand to allow use, and that demand must be denied, in order to establish ouster (see Gilmor).

Analysis: Here, Dahlia was obstructed from her use of the property when she was locked out by Zach. Although Dahlia might have held a reasonable belief that Zach had locked her out purposely, she did not take any reasonable action to make a proper demand on Zach to allow her use. She did not ring the doorbell nor did she attempt to contact Zach. Without demand and subsequent denial of use, there is no 'ouster'.

Conclusion: Dahlia cannot establish 'ouster' from her tenancy in common, and therefore cannot recover her costs of living in the hotel.

Issue #2 - Does Zach have the right to sublease his rights to the tenancy in common to Jerry?

Rule: Each tenant in common has a separate but undivided interest in the property. Each interest is separate in that it is independently descendible, conveyable, and devisable. (reference case book p. 596). Each tenant can unilaterally convey his/her interest to a third party.

Analysis: Since Zach is a tenant in common, he has the right to convey his interest via a sublease, assignment, or transfer of title.

Conclusion: Zach can sublease to Jerry.

Issue #3 - Can Dahlia get out of the undesirable tenancy in common?

Rule: Any tenant in common may sue for 'partition', or a dividing up, of property held as tenancy in common. Any cotenant can sue for partition for any reason, or no reason, and the request will be granted as a legal remedy by the court without further question as to the reason. Partition in kind, or a physical division of the property in question, has been historically favored over partition by sale. In current times, however, partition by sale is more common. Partition by sale is only allowed if the physical attributes make partition in kind impractical and if the interests of the owners are better promoted by sale. A party requesting a sale, rather than a portion in kind, has the burden of proof to show that a partition by sale is allowable.

Analysis: As per the analysis for Issue #2, above, Dahlia cannot evict Jerry from the home because Zach had the right to sublease. However, since partition is a legal remedy available to Dahlia, she can sue to end the tenancy in common. The court will grant the request for partition, and it will either mean that the property is divided or sold, with the proceeds of the sale being divided between Dahlia and Zach. If Dahlia wants to keep the house, she can request partition in kind, which will be favored by the courts, but if the house is not divisible (which it likely is not), then either Dahlia will keep the house and be required to pay Zach for his share of its value, or vice-versa. There is no way that Dahlia can fully ensure which of the two cotenants will keep the house, although she will likely have an advantage since she is currently in physical possession, whereas Zach has moved away. If the court rules to allow Dahlia to keep the house, she will still likely have to tolerate Jerry's presence until his sublease term expires. Alternatively, if Dahlia simply wants a sale of the house, she can request partition by sale, but then she will have the burden of proving that a partition in kind is impractical and that the interests of both Zach and Dahlia are better promoted by sale (see Delfino, where court determined that partition by sale did not serve best interests of one party who desired to retain possession of a portion of the property).

Conclusion: Dahlia can take legal action to partition the property, meaning she will be able to sever her tenancy in common, with a result that the court will enforce an action to either sell the house or award the house to one cotenant, with the other cotenant being compensated for his/her portion.

Question 1

Issue 1: Can Dahlia recover rent for the incident in January with the changed locks?

R: For Dahlia to recover rent for the week that she was unable to get into the home, she would have to prove that she was "ousted" from the property.

A: The definition according to *Gillmor* of oust is "acts in such a fashion as to necessarily exclude a fellow cotenant." It them defines exclusive as "it requires either an act of exclusion or use of such a nature that it necessarily prevents another contenant from exercising his rights in the property." It also explains, though, that "Mere exclusive use of commonly held properties by one cotenant is not sufficient to establish an ouster." This is because of the nature of tenants in common in which both cotenants have right to possess the entirety of the property. If that were all that the decision held, it would be very clear that Dahlia could recover rent. She was physically unable to get into the premises. It is difficult to find a better example of exclusion. The court, though, continues and states "We hold that when a cotenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other tenant's right to use the land, the tenant out of possession has established a claim for relief." It further holds that force is not necessary.

The question then becomes "did Dahlia make a 'clear, unequivocal demand' to enter the house?" This might hinge upon the court's definition of "demand." On one hand, Dahlia wanted to get into the house and there is hardly a clearer sign of that than her attempt to use her old key to enter the premises. More likely, though, a court might suggest that individuals in Dahlia's shoes make a phone call to their cousin and ask to be let in. In *Gillmor* the individual who was ousted

sent a letter asking the ouster to change his grazing patterns so that her sheep could graze. That is certainly a more affirmative step toward a "demand" than Dahlia made. Dahlia may be able to argue that she reasonably believed Zach had changed the locks out of spite due to their fight about the plants, but the court is not likely to be persuaded by this argument. It's not a persuasive argument because nearly every situation in which someone believes they are being ousted, a fight or a conflict is occurring. If courts had to resolve every issue that arose from poor communication, the system would be incredibly bogged down.

Even if Dahlia could recover rent, she would only be able to recover rent for the rate at which the house would rent. She would not be able to recover the $1000 she spent on the hotel.

C: Dahlia cannot recover for rent for the time she was unable to enter the house in January.

Issue 2: Was Zach's lease to Jerry legitimate? If so, does Dahlia have any legal remedies?

A: Each tenant in common "can unilaterally convey her interest to a third party..." (Casebook 596). Dahlia can sue for a partition of the property.

R: Dahlia cannot win that Zach's lease to Jerry was illegitimate because, as tenants in common, Zach had the right to convey his interest to a third party without Dahlia's consent. Zach was legally able to convey the entirety of his interests, which allows Jerry the same undivided right to the property that Dahlia has. She does have several options, though. She has the same rights that Zach did, so she can find someone else to take her place in the property. If she so desires, she can

find a replacement for herself and find another place to live and Zach will have no legal remedy. She also mentions that she believes that Jerry is untidy and rude. If she can win that his untidiness "ousted" her from her share of the property, she would be entitled to compensation. Unfortunately, it is difficult to imagine a situation in which untidiness or rudeness could rise to the level of ousting.

Dahlia's most severe option is asking for a partition. A partition can either be a partition in kind or a partition by sale. A partition in kind actually physically divides the property, while a partition by sale sells the property and splits the proceeds. "Any cotenant can sue for partition for any reason or no reason at all, and the court will grant the request without further inquiry into the justness or reasonableness of the request." (Casebook 598). *Deflino* outlines the ways that a court may decide which partition to apply. The two elements that must exist for a partition by sale are (1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable and (2) the interests of the owners would better be promoted by a partition by sale. For factor one, a house is a particularly difficult type of property to partition. Houses are built for one family, so they only include one of many different amenities (such as a kitchen for example). The current instance must also meet the second factor, though, which is that the interests would be better promoted by a sale. Certainly Dahlia's interests are better promoted by a sale. It is difficult to say for Zach, though. He is renting out the property currently, and he is potentially receiving profit on top of his monthly cost. Likely, though, the court will see that Zach is not in physical possession of the property and favor Dahlia who has to live there.

C: Dahlia's best legal remedy is partition.

Question 2

First, the court will examine if this right-to-farm statute creates a private nuisance for Beautiful Homes, which would question its constitutionality. According to *Hendricks v. Stalnaker*, established that a nuisance is a substantial and unreasonable interference with another's use and enjoyment of their land. To prove a private nuisance, the court has to find that the act is (1) intentional and unreasonable, OR (2) negligent or reckless, OR (3) results in abnormally dangerous conditions or activities. *Hendricks* looks at whether the placement of a septic tank was a private nuisance in the sense that it prevented a neighbor from installing wells, as with Beautiful Homes. The court here would likely find that the right-to-farm statute is valid according to the definition of unreasonable, which requires the balance of the gravity of harm as compared to the social value of the activity alleged to have caused the harm. The court would likely side with the Hendricks decision on this matter, because there is at least a 50/50 utility/burden balance here, as there is high social utility in farming and it is likely they would decide that the harms present do not outweigh the benefits. The courts could also examine *Boomer v. Atlantic Cement* in this decision, which would possibly favor Beautiful Homes. If this precedent case was examined, the pesticide runoff negatively impacting runoff would be viewed at as a negative externality that the courts could examine in determining how to handle the situation. THe courts could find that the farmers be required to pay damages to Beautiful Homes for the damages the runoff causes. These would be considerations regarding the constiutionality of the statute.

Another consideration for the constitutionality of the statute would be whether this kind of statute creates a regulatory taking on the land of Beautiful Homes. A regulatory taking here could put in question whether a statute such as this would create a 5th amendment violation

("Nor shall private property be taken for public use, without just compensation"). The present situation is similar to that found in *Lucas v. South Carolina Coastal Council*. Like Beautiful Homes, the plaintiff in this case had purchased lots for the purpose of real estate development beyond them. However, because of the Beachfront Management Act, the plaintiff was unable to conduct the business he had planned, just as Beautiful Homes can't build their retirement community. The court's decision here will hinge on both elements found in this case to create a regulatory taking, which is whether (1) there was complete denial of all economically beneficial and productive uses of the land and whether (2) a nuisance would have existed from the plaintiff's use of the land. A decision from the majority opinion of this case would likely support that this was in fact complete depravation of the economic uses of the land, as this was the reason they purchased the land. Also, all other real estate developments would be questione because of the runoff. However, if the court were to side with dissenting Blackmun, they would likely find that there are other available uses to Beautiful Homes, and more importantly, they still possess the ever important right to exclude. The decision regarding whether there was a nuisance would be similar to the discussion above, but more focused on whether Beautiful Homes building the retirement community would have been a nuisance. The benefits of a retirement home would have been weighed against the harms it causes to farmers farming. I think the constitutionality of the statute, in light of both of these situations, would be upheld.

Question 3

The challenge Sunrise Village's zoning ordinance restricting use to "single-family dwellings" will consist of a claim that the ordinance violates the due process clause of the US and Missouri constitutions. The first issue will be whether strict or rational basis scrutiny should be applied to Sunrise Village's zoning ordinance. The arguments on both sides of this case will be similar to Village of Belle Terre v. Boraas as well as Charter Township of Delta v. Dinolfo. The two cases came to opposite results considering "family zoning" ordinances restricting land to "single-family dwellings." Paul and John can argue that the fundamental rights of privacy, travel, freedom of association, and importantly the sanctity of the family are clearly implicated by restricting land use to such a narrow definition of family and that strict scrutiny should apply. Under the statute, Paul and John are explicitly prohibited from living with anybody else not directly related to them, and are limited in their freedom to raise their foster children where they please without being constrained by an intruding ordinance. Under the Boraas general rule, this argument would not prove as strongly as it would in a jurisdiction following Dinolfo. Boraas held that a family ordinance substantially similar to the one before us was merely social and economic regulation that did not involve either a fundamental right or a suspect class. The ordinance was upheld because it was a reasonable means to further the state's goals of reducing traffic congestion, parking, noise, and other urban problems caused by group living arrangements. Dinolfo was much more amenable to declaring a fundamental right was involved.

If the court accepts Paul and John's argument that strict scrutiny should be applied to the zoning ordinance, Sunrise Village would have to prove that the ordinance is narrowly tailored for a compelling government interest. If the court chooses to apply a rational basis test instead, the next argument for whether the means of the statute have a satisfactory relationship with the legitimate government goals listed above in the Boraas opinion, is the same regardless of the

level of scrutiny. Paul and John can argue that the statute is not reasonably related (or narrowly tailored) to the government goals of preserving traditional family values, maintaining property values and maintaining density controls, because the family distinction is arbitrary (both over and under inclusive) and is discriminatory against groups such as Paul and John. It is under inclusive because, if the government's goal is to reduce density problems such as traffic and noise, it does not limit the number of family members that can live in one household. The possible absurdity of this underinclusiveness is explained in Dinolfo: "Under the instant ordinance, twenty male cousins could live together, motorcycles, noise, and all, while three unrelated clerics could not." Which leads to Paul and John's argument that the ordinance is over inclusive. It is overinclusive because the legitimate public interest in reducing public noise, traffic, etc. is not hampred at all by a single-family such as Paul, John and their three foster children. If the ordinance was created to foster traditional family values, it is actually working against itself by refusing to allow an established couple and their three kids to live in an area designated for families. Paul and John are unlikely to contribute any more noise, pollution, traffic, etc., than any other single family allowed by the statute. The statute is arguably discriminatory because it places harsher standards on same-sex couples and other groups than on more traditonal family groups as well. One final point that Paul and John can bring up is that, like Moore v. City of East Cleveland the ordinance is actually working to cut through legitimate family ties, in this case the foster family of Paul, John, and their kids. Although this group may not be considered a "traditional family" as in Moore, Paul and John can argue that the Constitution protects family members and close familial relations. If the court chooses to follow Boraas, they will likely find that the broad police powers delegated to municipalities by the state include the power to make such family zoning ordinances and will likely deny Paul and John's claim. However, if the Missouri courts follow Dinolfo , Paul and John are likely to succeed in

challenging the constitutionality of the zoning ordinance.

Question 3

The following short memorandum will explain the arguments that Paul and John can make under both the U.S. Constitution and the Missouri Constitution. I will discuss the federal issues first and then the state issues.

In the realm of zoning law, there are two predominant forms of zoning, use zoning and density controls. Here, a zoning ordinance restricting its land use to single family dwelling will fall under the bucket of density controls. Density controls are distinct from restrictions on use. Its usual purpose it to maintain the communities attractive appearance, avoid overburdening of public facilities, and sometimes exclude undesirable residents. When evaluating such a zoning ordinance, the ordinance can be determined through a rational relation test or a strict scrutiny test. A rational relational test applies when a zoning action differentiates between two classes of people or between two uses and will not violate the equal protection clause as long as it bears a rational relation to a permissible state objective. On the other hand, strict scrutiny will be applied when the zoning ordinance affects a persons fundamental right such as race, religion, sex, etc. In the instant case, a rational relation test will be applied to evaluate whether the zoning ordinance restricting single family dwellings applies.

A federal court will most likely rule in favor Paul and John if they apply the standard in Moore by holding the zoning ordinance is underinclusive. Here, the ordinance defines family to mean: "one or more person related by blood, adoption, or marriage; or no more than two person not related by blood, adoption or marriage." Such an ordinance is early similar to the one in Moore v. City of East Cleveland, whether city was trying to create a "nuclear family." Just as the ordinance defined a family narrowly there, so too here, the ordinance defines a family too narrowly. Therefore, Paul and John, being same sex partners who moved into a home with three

foster children would be in violation of the city's ordinance.

Furthermore, a court will most likely agree with the Moore holding when the court ruled that freedom of choice in matter of family life is one of the liberties protected by the due process clause. The court furthered its holding by explaining that the ordinance had the effect of "slicing deeply into the family itself" which showed the city could not find a strong enough connection between the ordinance and its objectives. Essentially, the court found the ordinance to be unconstitutional because the ordinance was underinclusive - in other words, it did not include larger families. If so, the ordinance will not pass the rational relation test because the ordinance does not set out to meet the purpose of ordinance, which was prevent overcrowding, minimize traffic, and avoid financial burdening of local schools. In the instant case, the ordinance is underinclusive because it does not take into account same sex partners who have multiple foster children.

On the other hand, if the court applies the Boraas standard, Paul and John's claim will not survive in federal Court. In Borass the court explained that an ordinance constructed broadly to include larger families is more rationally related to the state's objectives in instituting the ordinance. The court continued to explain that the ordinance was constitutional because the ordinance did not limit the size of biological families, yet limited households of two unrelated persons. There, the court said that more than two unrelated persons had no fundamental right to live together because the ordinance expressly permitted two unrelated person to live together. Basically, family relations in characterized with fundamental rights status, not the right of individuals to choose with whom they live. Here, a federal court may have a hard time distinguishing between the Boraas court and the case at hand. Just as in the Boraas case the court held that six unrelated college students did not have a fundamental right question, so too here, three unrelated foster children will most likely not be found to have a fundamental right.

Therefore, comparing the Moore holding to that of Boraas makes it undeterminable as to whether Paul and John will succeed in Federal Court. Either way, my sense is that a court will this case to be analogous to Boraas and find the ordinance to be constitutional.

Secondly, according to the Missouri Constitution, there is a due process clause which protects the fundamental rights of its citizens. While Missouri Courts do not apply strict scrutiny to classifications on the basis of sexual orientation, strict scrutiny shall apply regardless because it violates Paul and John's right to association and right to privacy. Strict scrutiny will be given to any classification, which affects a fundamental interest. Here, the right to association and the right to privacy are fundamental interests at play. Paul and John have a right to associate themselves with whomever they choose and by a city having a zoning ordinance which defines a family to be only those related by blood, adoption, etc.. prevents them from living together and prevents them from housing their three foster children. Moreover, Paul and John have a fundamental right to association. There right to associate with whomever they choose should not be affected by a family zoning ordinance. That is in clear violation of a person fundamental right. In other words, this ordinance is prevents Paul and John to associate together in a house that they have chosen to purchase and prevents them from fostering three children which are not adopted in accordance with the ordinance.

Lastly, the state has not shown from the fact pattern that there is a compelling interest in having such a zoning ordinance. If so, the state has no defense to Paul and John asserting that the ordinance shall be struck down. Similarly, the police power that a state is not taking into account the general welfare of the state. While the city may have an ordinance that prevents single family dwelling to certain types of people, the Southern Burlington Court has explained that the State does not have infinite police power. In fact, the state has to promote the general welfare of the people and that is accomplished by each municipality having their fair share of the state's needs.

Here, the fair share of the state's needs is to provide Paul, John, and their three foster children an opportunity to live in the house they purchased.

Question 4

Clark grants Blackacre to Carla for life, then to Sylvia and her heirs, but if Sylvia does not use Blackacre as a school, then to Jacob and his heirs. What interests are created?

Carla: Life Estate in Carla

Clark: Reversion

Sylvia: Vested remainder in fee simple in Sylvia

Jacob: Subject to divestment by the executor interest in Fee simple in Jacob (Shifting)

Question 4

Clark: Nothing.

Carla: Present interest held in life estate.

Sylvia: Future interest held in fee simple remainder subject to executory limitation

Jacob: Future interest held in an fee simple shifting executory interest.

Question 5

Issue: What Rule or Standard can be created in order to decide the oil extractors?

Rule: The Rule to adopt is "first-in-time, first-in right". That is, a person who (1) controls or holds the property, with or without claim of ownership, (2) with an intent to possess, is the original possessor with greater rights than the world, no one will be able to take from him, even if it travels under joining lots.

Effect: This rule has the effect of Calebresi Rule three where the Defendant is unable to stop/continue taking from the oil that P put work and effort into finding.

Advantages:

Rules are cheaper/easier to enforce/obey, and can be used to decide things Ex Ante.

The advantages of this rule is that it would be simple and easy to enforce. In this instance, Plaintiff will have rights over everyone else because he extracting from this pool of oil first, and therefore it is his. He was the first on to control the pool of oil, whether it be on the neighbors property or his. Simply put, he found these resources, and he controlled them first therefore it is his, and no one elses. This theory is known as the **desert theory** where a person should get the rewards of their affirmative actions. This promotes innovation and investment. *INS v. AP.* In INS, the plaintiff sued the defendant for stealing from his hard work and effort, and its initial input. The court held that AP needed time to reap the benefits of the news it gathered, therefore it should get to use it exclusively while it has commercial value. Similarly, Plaintiff should be able

to use the oil, for as long as it deems fit, due to him being the first to find the oil and put resources into using it. No matter whether it be on his neighbors property it should be plaintiff's exclusively.

Additionally this promotes, investment into the business. The dissent in Pierson noted that if an individual invests time in the hunt, they have rights to the animal. Here, Plaintiff invested time and effort into acquiring the oil. They worked for months upon months, and used countless amount of money, and in the end it was taken from them, by a man who swooped in at the last minute to benefit off of the other labor. Defendant here, is simply profiting off of Plaintiffs hard work. This rule, counters this exploitation and provides that the one who puts effort into their work will take on the property. The rule promotes investment and calls for less deceit and trickery.

Another advantage is that it supports the Lockean Theory of labor. Mixing labor with earth makes something property as long as you leave enough for others. One's body is his property and you mix that with your work makes your own property. Here, Plaintiff is mixes his labor by investing in the resources to find the oil. He finds the oil and now the oil is his property.

Fourth, this may decrease the likelihood of Hardens Tragedy of the Commons. If only one party may use the plot of oil to his benefit he may regulate it to a proper amount. He will not have to worry about others coming in, such as Defendant, taking lots of the oil out of the ground. In turn, due to one person managing and regulating the oil, the resources will not be "shared" and there will be no individuals independently and for their own self-interest depleting the resources as fast as they can to receive the short-term gains (this has an assumption that P will do the right thing

as regulate the resource). Assuming this same assumption, property rules will emerge when the cost of internalizing the property is lower than the payoff that most society receives from that internalization. Pocono. Plaintiff will realize that because the oil is all his, he can watch for the negative externalities, like pollution that may be created if he exploits the land too much.

Disadvantages:

Rules are not always the best way to achieve overall goal of the rule being created in the first place.

This rule may however result in a monopoly over publicly needed goods. Oil is a publicly needed goods and if we take the first person to find the oil and make it his, then the first person to find has a monopoly over all the oil. Here if the oil pool expands, not only the neighbors plot but for 100's of miles, that would mean that Plaintiff has control over all of that oil. This will create problems in society, because he can charge whatever he likes for this oil, and not have to worry about any competitors. This bilateral monopoly over this oil pool will create a scenario of one seller one buyer, which will create problems in negotiations and often result in one person being forced to over pay the true value of the property being sold. Hinman.

Second, this rule goes against the Ad coelum doctrine, where a property owner should own the soil, the sky and the depths of the earth. Hinman. This rule, takes away property that should rightfully be there's because they own the land above. Here Defendant will lose all the property below his land and therefore his Bundle of sticks is being taken from. It is not fair that he will

not be able to exploit the land under his property, just because P found it first. Grey. Moreover is goes against the ruling in Jacque where there is harm in every trespass, even if there is no damage to the land. Here there is damage to the land, Defendants oil under his land it being taken and Plaintiff is profiting off of it.

Third, this also goes against the rule goes against the majority in Keeble, where a property owner has a right to make a lawful use of their property for livelihood without malicious interference. Although you may consider D a malicious interferer, similar to Hickeringill, Defendant has a right to use his property for pleasure and commerce. It is both of their livelihood's that derive off of this oil, and it would simply be easier to have the land under Plaintiffs land to be his oil part of the pool and the land under Defendants to be his oil part of the pool.

Standard: A standard for deciding this case would be to allow the first person to find a the resource a reasonable amount of time to use the resource and then both parties must share it based on the proportions that are under their land. Alternatively, both parties may also negotiate to decide who takes control over the oil.

Advantages:

The advantages of standards are that they are better for achieving the intended result of the created standard.

In the Brandeis decent in INS, Brandeis stated that we should encourage innovation by allowing all parties access and build on others ideas freely. Curtailing INS (in AP Case) punishes foreign paper that relied on it for the news and had no party in the mater as well as punishes readers who

do not have access to the AP paper. Here, the standard emphasizes that you should allow Plaintiff the time to profit. He may profit from taking from the resources until he can be put on a leveled playing field with Defendant who may come in after a reasonable amount of time. Now, both parties may take from the resource at a fair proportion due to the amount that is under their land. This allows for both, investment in finding the oil by the person who finds it first may profit off of it and it provides for fairness within land distribution, in that the person who holds the land governs the land below. Hinman.

The livelihood of both parties will be furthered. Unlike Pierson v. Post where someone can swoop in at the last minute and steal the hard work and effort you put in and make it theirs, this promotes the investment because that party may take the time to exploit. Pierson.

The party in this case who wants the land the most will be able to bargain for it, this promotes the interest of the person who cares about it more. Kaldor.

Disadvantages:

The disadvantages of standard are that they are more expensive to decide/enforce and make people rely on ex post judgments of their actions. *Shack. This will create lots of litigation and funding for the best use of the land to the court system.*

Unfortunately, this standard is based off of many false assumptions and critiques that follow both the Coase Theorem and the Kaldor hicks efficiency model. One it assumes that people have money to pay off the other. Right now in this situation, Defendant has much more money that

Plaintiff who unable to control what he may truly want to control. It also assumes that people are rational actors, this may promote self-help, in that the parties will not be able to bargain therefore they will fight.

Outline:

Wealth-effects

Endowment Effect

Tragedy of the Commons

Conclusion:

In conclusion the better method to use is the Standard, the parties will be able to negotiate the use of the land to the best of their ability, the person who wants it the most will be able to keep it. It will combat all the bad effects of the rule above.

Question 5

Answer 5 - Policy

It would be difficult for me to justify enjoining Defendant from profiting from what has been found on its own property. In *Keeble v. Hickeringill* the court draws a distinction between fair competition and malicious interference in another's trade. The court reasoned that malicious interference, when a party is not engaged in any productive activity, is not acceptable. Fair competition, when the interfering party makes use of the resource, is acceptable. This is analogous to this case. Defendant is interfering with Plaintiff, but not without making use of the resource.

Locke would argue that Plaintiff has mixed its labor with the resource (at considerable cost) and therefore has an exclusive right in it. This is a valid argument but is at contrast with the doctrine of *ad coelum*, which means that a property owner owns from the skies to the core of the earth. While this cannot be taken literally, it certainly applies to resources mixed in with the land, such as oil, that are not prohibitively deep within the ground. I cannot justify taking this right from Defendant, though there is some inequity done to Plaintiff.

This is in keeping with a Blackstonian theory of property. Each party has sole and despotic dominion over its property. In this case, their use of their property happens to affect their neighbor.

This ruling can be applied as a strict rule, which is more efficient. A property owner owns their property and anything that is in or mixed in with that property. In cases like this where there is a common, shared resource, both parties have an equal right to exploit it. To rule for Plaintiff would create a standard that is inefficient and difficult to apply. Each case would be drawn out to determine in which circumstances a party can claim an exclusive right to a shared resource. A

strict rule for the first finder would be unfair in some circumstances. There would need to be a requirement of expense in finding the resource. The issue in determining what cost is sufficient to establish a right would be difficult and applied inconsistently.

This situation is similar to a true tragedy of the commons. It is not an open access regime as the parties are limited to the property owners under which the oil was found. There would be no tragedy of the commons in this case. The oil is a limited, non-renewable resources. It does not matter how many parties have access, it will be depleted. There are benefits to allowing more parties access, though, such as increased competition. There is concern that this ruling will result in parties racing to exploit resources, which may result in waste. This is an unwanted consequence, but it also brings the benefit of maximum exploitation of resources and competition that our society thrives on. If access were limited to Plaintiff, it could drive up the price of oil in the region, which only benefits Plaintiff.

For these reasons, I would rule in favor of Defendant. I believe that Defendant's right should be applied as a property rule, not a liability rule. As a property rule, Defendant is free to allow or bar access and, more importantly in this case, bargain with Plaintiff to cease its operations. A property rule leaves the parties to bargain amongst themselves. In this case the parties' rights are reciprocally harmful. As the Coase theorem states, parties will, in the absence of transaction costs, bargain to maximum efficiency. If Plaintiff wants exclusive rights to the oil, it can bargain with Defendant for that right. Plaintiff can also bargain to limit the amount of oil Defendant extracts.

This is in keeping with the Kaldor-Hicks efficiency theory. The theory states that the system works efficiently when the party who values the property most is able to claim a right to it. Therefore, if Plaintiff values the exclusive right to the oil at an amount greater than Defendant values its right to the oil, Plaintiff can pay that amount to Defendant for it to stop its operations.

Both of these theories have objections. People are not always rational. A party may over-value a right or have an unhealthy attachment, thus driving up the price. There is also the issue of wealth effects. One party may not be financially able to pay what the other demands. I believe that these issues are best left to the free market. It is not for the court to determine what a rational price is for any individual. Private parties are better able to determine fair market value than courts or the government.

Question 6

There are three overreaching legal issues presented by the fact pattern which contain a multitude of subsidiary arguments. These three issues include the creation of a Yoga Studio by the cooperative, the Razing of Bill Brown's Property at his death and the purported discrimination against Janice

Yoga Studio

First, in examining the issue of constructing the yoga studio, the cooperative is confronted by the covenat entered into by Tom Green. For the *burdent* to run with the land, there must have been 1) intent 2) Horizontal privity 3) vertical privity and 4) the servitude must touch and concern the land. The fact that Green and Hunter both included the restriction on the deed of their property implies that they intended the restriction to run with the land. Though one could argue that if they intended the restriction to run with the land they would have included such a provision. However this is a weak argument. Second, Green and Hunter had horizontal privity as the one large property, Greenacre, was split into two by the sale to Hunter. Third, vertical privity was arguably maintained throughout the transactions as the mansion was devised to her son, then sold by her son to the cooperative. However, one could argue that the transfer to the some did not have any consideration and thus any restrictions did not transfer at this point. Finally, the servitude touches and concerns the land since the burden of the covenant is not a "personal burden" but a "limitation on legal rights" (Eagle Enterprise v. Goss). Additionally, even if a court found vertical privity to be lacking, according to Tulk v. Moxhay, a conventant can be enforced against a subsequent purchaser who has notice of the contractual obligation even if the obligation does not technically run with the land. In this case, said notice is available on the deed and through inquiry notice.

Second, the same agreement could be framed as Equitable servitude, even if privity had not been maintained. In this case, for the burden to run the servitude would require: 1) intent 2) notice and 3) that the burden touches and concerns the land. The first and third standard are met equally by the equitable servitude as they were by the coventant. And, there was both actual notice of the burden available on the deed, as well as inquiry notice of the burden since the property was commonly called "greenacre." As such, a reasonable person would inquire into Green's deed even if Hunter's deed had not contained the provision. As such, either due to an existing equitable servitude or a real covenant, the duty not to use the property for commercial activities exist.

Even so, it is still possible for the cooperative to use their building for a yoga studio because commercial activity, as limited to retail stores and businesses may not include a yoga studio
(ignore the below)
And if commercial activity is interpreted broadly to include an activity such as a yoga studio, the forty years of commercial activity as a cooperative may grant adverse possession rights to the Cooperative. In the first place, it is reasonable to interpret a yoga studio as a non-retail business in a narrow sense. And if the interpretation is broadened, the cooperation has existed as a commercial entity for the past forty years. Since this existence has been actual, exclusive of the restriction, open and notorious since multiple groups lived at the cooperative, continuous and adverse to the deed, for 40 years, which is greater than any usual statute of limitation, the cooperative could argue that the right to use the land for commercial activity has been adversely possessed by their 40 years of activity.
(Ignore the above)

If the cooperative did go through with the yoga studio, Brown may choose to sue the cooperative for a private nuisance. In this case brown would argue that opening the studio was intentional and the additional traffic created by the studio would unreasonably interfered with the enjoyment of his property. However, Brown would be unlikely to prevail in this action since a yoga studio is unlikely to produce an excessive amount of traffic and would not impose any other major injuries on Brown's property. If the yoga studio chose to stay open late into the night playing loud (and peaceful) music, there may be justice in limiting the scope of the business, but a yoga studio is not an unreasonable use of property and thus would not count as nuisance. (Hendricks v. Stalnecker)

Razing the House

Next, the issue of razing Brown's house upon his death creates several legal issues. First of which, the removal of all pipes would be problematic for four reasons: Easement by Implication, easement by necessity, easement by etopple and prescriptive easement.

Easement by Implication requires prior unity of title, prior manifest use of one parcel to benefit the other and necessity to enjoyment of servient title. In this case all three standards are met because 1) the need for the sewage pipe existed at the point of splitting greenacre 2) before it was sold, the original house's pipe crossed the other section of greenacre and 3) the routing of the pipe was necessary because Hunter did not have any other means of connecting to the public sewer line since the line cannot cross through the park. However, Brown may argue that connecting to the public sewer system is not necessary because the building could install its own finger based sewer system. However this may be illegal under statute and it is not certain that the

property has sufficient space for a safe sewage system.

Easement by Necessity requires that there was prior common ownership and that the sale by the common owner produced a landlocked parcel in the grantee. In this case both standards are met because: 1) the property had originally been greenacre before being partially sold by Green to Hunter and 2) Sale of part of the land created the landlocked parcel in Hunter, not Green. If it had been green that became landlocked, he would not have had a claim under necessity and suffered the fate of the grantor in Schwab v. Timmons who landlocked their property thorough a sale of a parcel which had given them access to the road.

Easement by estopple requires that 1) the owner gave permission 2) the user relied on the possession to his detriment and 3) it would injustice for the to revoke the permission. In this case there was implied permission to use the pipe since it was basically sold with the parcel, and the ability to use this pipe was certainly relied up on when Hunter razed the old house and built a new house using this pipe. Thus, to over 40 years later revoke the ability to use this pipe would be clear injustice because it would render the house built uninhabitable.

Finally, the pipe could be owned under prescriptive easement. Prescriptive easement requires that the use 1) is open and notorious 2) continues 3) adverse under a claim of right and 4) definite line of travel. The Cooperative would argue that the pipe was open and notiouse since green should know about his own house before he sells it 2) the use was continuous since they used the pipe for more than 40 years 3) adverse under a claim of right because they didn't have a deeded easement and 4) it had a definite line for travel since exit was fixed underground. However, brown may argue that the pipe was not open and notiouse citing to Morengo cave v.

ross which found that since the owner didn't know that the cave went under his land, adverse possession didn't start until the cave was surveyed. But considering the notice inherent to the original house being owned by green, this case is distinguishable from the adverse possession claim in Morango cave.

However, aside from the fact that the sewage pipe should be protected, the possibility of Brown's home being razed upon his death is still possible. In general, the intent of a testaor in his will is upheld by the court. However, in the case of Eyerman v. Mercantile Trust Co. the court weighed the intentions of the testator against the public policy concerns of waste. In particular this Missouri court found that since the enforcement of the will would constitute a private nuisance to the housing addition's look, would be wasteful and would destroy a historical building, they refused to enforce the will. Even though there would be a similar destruction of value, it is unlikely that a court would rule in the same manner in the case of brown because 1) the creation of a park does not constitute a private nuisance, and 2) the Brown house has not been declared a historical building (though it is commonly called greenacre). Further, the history of having already razed the other home on the property would make it difficult to claim that razing Brown's house would be problematic (though that had occurred in the Eyerman case as well)

Discrimination

Next, the cooperative is presented with the issue of discriminating against Janice. However the cooperative will generally be protected against such a suit because of 40 west 57th street v. Pullman extended the business judgment rule to cooperative's board of directors. As such courts assume (unless proven otherwise) that actions on the part of cooperatives are done for business

reasons.

Janice is unlikely to have a successful claim but may file under the fair housing act or the 14th amendment's equal protection clause. Janice's claim would fail under the fair housing act because it only protects groups on the basis of "race, color, religion, sex, familial status or national origin." Since her claim is based on her status as a "Starving Artist," she does not fall under the acts protection.

This leave the possible protection of the 14th amendment's equal protection clause. However, since this particular housing opportunity does not constitute a fundamental right and "starving artists" are only protected under the rational basis, it is unlikely that she will find any protection under the 14th amendment. To find protection under the 14th amendment she would have to prove that there was a compelling state interest in ensuring her equal access to housing. And fortunately or unfortunately, the united states does not consider the ability to attain any housing a fundamental right, much less the right to acquire specific housing. From a policy perspective, the united state would be very unlikely to impose the burden of accepting a financially uncertain (with 150,000 in debt) tenant on any landlord, or cooperative. Such a burden could be very economically harmful because housing agencies would have to accept all applicants (who could all say they were artists), despite financial hardship until they had proven to be incapable of paying.

Conclusion

1) The Cooperative must show that a Yoga Studio is not a retail business to open it

2) The Cooperative will be able to protect its connection to the public sewer system, but probably won't be able to prevent the destruction of Brown's house

3) The Cooperative is unlikely to face discrimination liability from Janice

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Question 6

Answer 6 - Issue Spotter

The first issue to address is whether Walford Cooperative Apartments ("Walford") has a right to deny Jewel a unit. Their denial should be upheld by a court. I would first encourage the court to adopt the business judgment rule. This rule allows the court to defer to the cooperative's rules. There are three exceptions: if the cooperative board acted outside the scope of its authority, in a way that did not legitimately further their purpose, or in bad faith. Walford did not meet any of these exceptions in denying Jewel. Determining if an applicant will be able to keep up with payments is within the scope of their authority. Denying applicants that cannot prove an income sufficient to pay their fees legitimately furthers their purpose. Walford did not act in bad faith in denying Jewel as she has no assets and is a recent college grad with no proven income and a large amount of debt.

Jewel will likely dispute the third exception. She will claim that the board acted in bad faith by discriminating against her based on her status as a starving artist. Even if Jewel's claim prevails, the court will likely not find in her favor based on common law. To my knowledge, this is not a protected class. In addition, Jewel's status as a starving artist proves it was reasonable to deny her the apartment. The label "starving artist" infers she is too poor to afford food, much less a unit in the co-op. Her claim that she will soon be making over $100,000 is not secure enough for the co-op to risk. There has been no evidence, other than her claim that she's up-and-coming artist. There is no evidence to support this claim. She also recently obtained a Ph.D. in bioengineering. This seems a dubious degree for an up-and-coming artist and shows poor decision making. Walford's denial of her application is well founded.

The second issue is that of the yoga studio. Brown will claim that it is in violation of a covenant formed by the original owners. The issue is whether the covenant runs with the land. For a covenant to run with the land it must have been intended to run, horizontal and vertical privity must be established, and it must touch and concern the land.

The original owners, Hunter and Green, intended the covenant to maintain the property value. This purpose would be defeated if the covenant did not run with the land. They also included it in the deed, presumably for future owners.

Horizontal privity is established as Green had granted the land to Hunter. Vertical privity is established each transfer of interest, from Green to Brown and from Hunter ultimately to Walford, was for the full term.

The main issue is whether the covenant touches and concerns the land. In *Sanborn v. McLean,* the court, once a covenant had been established, found that a restriction on commercial activities touched and concerned the land and did not allow a gas station to be built. The difference in this case is that nothing new will be built on the land. It is difficult to overcome, though, the objection that what the land is used for touches and concerns the land. Walford may argue that the primary use of the land is residential. The commercial use is only to support the residential use. The court will likely find that a covenant exists and is enforceable.

Brown can also argue for an equitable servitude to enforce the injunction. Historically, equitable servitudes were used when seeking an injunction. The requirements are similar: an intent for it to run with the land, notice (actual, inquiry, or constructive), and that it touches and concerns the land. The requirements of intent and touch and concern are the same as noted above, the only difference is the requirement of notice. This is easily established as the restriction is noted in the deed.

The third issue Walford faces is the destruction of the sewer lines. On this issue Walford

should prevail. Walford can establish an easement for use of the sewer lines in several ways. Easements typically are required to be in writing, but there are four exceptions. Once an easement is established, it is irrevocable and Brown would not be able to discontinue an existing easement.

Walford can establish an easement by implication. The requirement are that there be prior unity, prior use obvious and manifest to show permanence, and necessity. The property was originally one unit owned by Green. During that time, the sewer lines were hooked up to a home on what is now the Walford property. As the home had indoor plumbing, it was obvious that there were sewer lines connected to the home. The only issue is necessity as it is a strict standard. It may be argued is that indoor plumbing is not necessary. Walford is free to install a septic system or outdoor facilities not connected to the sewer lines. If indoor plumbing in considered a necessity, an easement can be established. There is no other way to hook the property up to sewer lines as it is surrounded by a park.

Walford can also establish an easement by necessity. The requirements are that there be prior common ownership, sale by the common owner produces a landlocked property (or sewer line-locked in this case), and necessity. Again, Green was the prior common owner. When he sold the property, it was surrounded by a park and the other property. The only option was to use the sewer lines across Green's property. The necessity standard is not as strict and should be easier to establish. It would be unreasonable to expect Walford to install a septic system or use outdoor facilities.

Walford may be able to establish an easement by estoppel as well. The requirements are the true owner has granted permission, reliance on that permission that materially changes one's financial position, and inequity in ending the permission. The main issue is if that of permission. There is no evidence of express permission, but it may be argued that Green granted his tacit

permission to Hunter. Green was aware Hunter was building a new house and likely knew that it would be hooked up to the old sewage lines. In doing nothing, it could be argued that Green granted permission tacitly. Hunter's reliance on that permission materially changed her financial position. Rather than investing in another option, she counted on the use of the old lines. It would be inequitable to now end that permission as Walford would have to invest in a new sewage system.

Finally, if all else fails, Walford can establish an easement by prescription. The requirements are that the use be open, notorious, continuous, adverse, and in a definite line of travel. The use was open and notorious. As noted above, Green must have been aware that Hunter was using the lines. Brown may argue that it was not open and notorious as the lines are hidden underground. It was continuous as the home has been occupied since the parcel was split. It was (if easement by estoppel fails) done without permission. This point is debatable, but will determine if the easement is by prescription or estoppel. Sewer lines clearly are in a definite line of travel. This claim will also depend on the statute of limitations, which is not known. It would be advantageous if it could be established during Green's occupancy.

Once one of these easements is established, it is important to prove that the easement is appurtenant, not in gross. An appurtenant easement belongs to a parcel of land and passes from owner to the next. An easement in gross belongs to a specific individual. Even if an appurtenant easement is not found, Walford should be able to establish an easement by necessity or implication.

In conclusion, Walford should prevail on if Jewel brings a claim and in its request for an injunction of Brown's removal of sewage lines. It will likely fail if Brown brings action enjoining the yoga studio and it would be advisable not to invest in the yoga studio.

Question 6

"Bill Brown" (Brown) will argue that there is a restrictive covenant on "Walford Cooperative Apartments" (WCA) tract of land. They will argue that this easement limits their use of land for residential purposes, and limits their ability to build a yoga studio to make profits. Since Brown seeks to injunction WCA from building and operating a yoga studio, he only needs to argue that there is an equitable servitude in which the burden runs to WCA. Under an equitable servitude the burden runs if: the original parties intended the burden to run, the burdened party had notice of the servitude, and the covenant must touch and concern the land.

Tom Green and Heather Hunter intended to enter into an equitable servitude where they restricted their properties to residential uses and prohibited commercial activities (including retail stores and businesses), because they were "both concerned about maintaining the high property values of their houses". WCA can argue that the parties did not intend for the servitude to run with the land because their purpose was to maintain the property values of their homes. Since they are both gone, neither of them have an interest in maintaining the property value of the homes. Brown will argue that there is not time stipulation limiting this to their life time, and that Mr. Green at least desired for the servitude to run with the land and maintain the property value of the home for his successor in interest. WCA can respond that Brown does not have an interest in maintaining the property value of his house because in his will he transfers ownership to the St. Louis Society for the Preservation of Native Flora, and has the house removed. Therefore, even of the parties intended the servitude to run with the land, it should no longer do so because neither party has any interest in upholding the restrictive covenant that the original parties instituted it for.

For the burden of the restrictive easement to run with the land the burdened party must have notice of it. There does not seem to be any conflict between the parties here. Regardless,

this is established by constructive notice because the covenant is filed and recorded in the deed. (*Sanborn v. McLean*) The covenant must also touch and concern the land. Brown will maintain that this requirement is met because the purpose is to maintain the property value of the house, and will support this by evidence from *Sanbourn* where similar covenants for the same reason were upheld. WCA could differentiate this covenant from *Sanbourn* because there are only two parties here and so the purpose is to maintain the property value of the homes and not the entire residential community. Therefore, since the property value of WCA's tract would be benefitted by the yoga studio, and Brown no longer has an interest in maintaining the property value of his home, the covenant should not be upheld.

Brown may also try to argue that the restrictive covenant is a real covenant supported by: Intent of the parties, horizontal and vertical privity, and the covenant touches and concerns the land. To make this argument he must establish that it was the intent of the original parties to form a restrictive covenant that would run with the land. It is clear that they intended to form a restrictive covenant that bound both parties, yet the same arguments made above apply to their intent for the covenant to run with the land. There is clearly horizontal privity between the original parities because there was a transfer of land and a deed that was recorded. There is vertical privity between both parties and their predecessors because the transfer of interest was for the entire duration of the interest of the land. Brown and WCA will make the same arguments as above that the covenant touches an concerns the land.

WCA can sue Brown and argue that they have established an easement through Brown's land for the use of their sewer lines. While this easement is not in writing, they can argue that they established it through implication, necessity, and either estopel if permission was given or prescription if they did not have permission. WCA can argue that there is an easement by implication because there was prior ownership of the land, in which the sewer lines from the

north section of the land were connected to the sewer lines from the house on the south section of the land. This prior use to benefit the house on the south section was manifest and obvious because that was the only possible way for the house to have a connection to sewer lines. This remains to be the only way that the house on the south section can connect to sewer lines, and so it ought to be enforced because it is necessary. (*Shwab v. Timmons*)

WCA can also argue that they have an easement by necessity. There was prior common ownership of both parcels of land, and the south side was granted away to land lock the grantee. The only way for the grantee to possibly have connection to sewer lines is through the north parcel of land that was retained by the grantor. (*Shwab*) WCA can also try to argue that there is an easement by estopel if they can establish that Mr. Green gave Mrs. Hunter permission to connect her sewer lines to his. WCA will argue that this permission was given because when he sold her the tract of land he sold her a house that was already connected to his sewer lines. Mrs. Hunter relied on this permission when she built her mansion and connected to the same sewer lines. It would be inequitable to revoke this access because Mrs. Hunter would suffer a material detriment. The easement established by Mrs. Hunter runs with the land, and binds WCA and Brown. Brown will argue that his predecessor never gave permission to Mrs. Hunter to use his sewer lines, and so she cannot have an easement by estopel.

If Brown is correct and permission was not given for the use of the sewer lines, WCA can argue that it has an easement by prescription. Mrs. Hunter connected her mansion to the sewer lines that ran through Mr. Green's land. This use was open and notorious because there was no other way for her to have access to sewer lines, and so it was obvious that she was using Mr. Green's sewer lines. Even if Mr. Green did not know this, he should have reasonably known and the statute of limitations would have begun running there. (*Marengo Cave Co v. Ross*) The use of these sewer lines has been continuously used from 1928 until 2013. If Mr. Green did not give his

permission and did not intend to (as argued by Brown above), then the use of the sewer lines by Mrs. Hunter was adverse. There is a definite line of travel determined by the path of the pipes. The average statute of limitations for this type of claim is ten years. This was easily met by Mrs. Hunter, and the easement runs with the land to her predecessors and grantees. If the statute of limitations is longer than the period of time that Mr. Hunter lived on the land, the time that John Hunter lived there can be tacked on.

"Janice Jewel" (Janice) has threatened to sue WCA for refusing to admit her to the cooperative under a claim that their refusal was discrimination against her status as a starving artist. In *40 West 67th Street v. Pullman,* the court ruled that the business judgment rule should be applied to community in commons (cooperatives). This means that a court should defer to a cooperative board's determination if evidence supports that: 1) the board act for the purpose of the cooperative, 2) the board acts within the scope of its authority, 3) the board acts in good faith. If the court does not follow the *Pullman* precedent WCA will still be able to argue that it's decision was reasonable based on the same arguments.

Under this ruling Janice should not be able to win a suit against WCA. WCA was clearly acting for the purpose of the cooperative in denying membership to someone who posed "too great a financial risk." The members of the cooperative all own shares in the interest, and if Janice was not able to make her rent payments the members of the cooperative would be suffer financially because they would be responsible for it. The board acted within the scope of its authority, by acting in the function that it was designed for. The board has the authority to review the financial background of applicants and make sure that they are not under financial risk that may effect the rest of the coop. The board will acted in good faith when making this decision, they made a fair assessment of the information provided by Janice. Janice argues that the board did not act in good faith because it was clear that she would be able to make her payments off of

her predicted income. The board's response is that this is only a predicted income, and that Janice does not know for sure what her future income will be. At that time she was a financial risk to the cooperation.

END OF EXAM