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EXAM NO.                   

**ARIZONA STATE UNIVERSITY COLLEGE OF LAW**

**PROPERTY LAW, SPRING 2004**

**Professor Karjala**

**FINAL EXAMINATION**

**Part 1 (Essay Question)**

**Model Answer**

Friday May 7, 2004

8:30 a.m.

*Instructions*

This part of the examination consists of one essay problem that you have 1 hour to complete. Your score on this part of the examination will account for roughly 1/3 of your final grade in the class.

You are permitted to have with you and to use during the examination the textbook, any class handouts (including printouts from the class web site), your class notes, and any other materials made by you personally or by your study group (not photocopied from printed materials). The materials we have studied constitute the legal authorities to which you are authorized to refer in answering the questions. Do *not* cite as authorities cases, statutes, or other materials that we have not studied in class.

Please write legibly, double space, and on one side of a bluebook page only.

In answering this problem, do **not** begin with an elaborate discussion of the facts. Indeed, mere repetition of the facts without relevant legal doctrine will not get you any points at all. Neither, for that matter, will abstract discussion of legal doctrine that is not tied to the facts of the problem. Your analysis should weave relevant legal doctrine together with the facts to create a response that is directly relevant to what has been asked. A corollary is that you should be sure to read carefully the claims that you are asked to analyze and addresses *those*. Correct answers to questions that have not been asked will likely get you no points. You are asked to analyze four claims arising out of a fact pattern, but they will not be weighted equally. Be sure to budget your time so that you can address all four. Failure to get to some, especially number (4), will cost you heavily.

**GOOD LUCK!**

## Problem

Cowman (C) has for many years owned and operated a cattle operation on about 10,000 acres of State, one of the western states of the United States. The land surrounding C's property for miles around is wholly undeveloped. In recent years all of this surrounding land sharing a boundary with C's property has been acquired by Environmental Protection Conservancy (EPC), a nonprofit organization devoted to acquiring and preserving in its natural form land that EPC's leaders deem important for conservation. EPC opens its land to hikers, backpackers, campers, and similar temporary users for recreational purposes but carefully monitors the total number of users in any given time period to insure against damage from overuse.

C staggers the grazing of his cattle to different parts of C's property to allow the grasses and vegetation on which the cattle feed to regenerate sufficiently to permit continuous operation of the cattle business. C has fenced his property to insure that his cattle do not graze on land belonging to EPC. However, the fence itself and the grazed territory are something of an eyesore to the recreational users of the EPC land.

After heavy lobbying by EPC, State duly adopts a statute declaring cattle ranching in any part of the state that is wholly surrounded by "protected property" to be a nuisance. The statute makes a legislative declaration that cattle ranching within otherwise undeveloped natural settings is harmful to citizens' psychological health and welfare, by destroying the natural aesthetic beauty, requiring fences (as a practical matter), and increasing unnatural odors to the detriment of recreational users of the surrounding land. It also declares that protection of this land in its natural state is expected to supply economic benefits, in the form of tourists attracted to natural environments. The term "protected property" is defined in the statute to be undeveloped property owned by any governmental agency or by any private organization whose charter prohibits development. The statute gives 5 years to any existing cattle operation to phase out of business. As it turns out, C's property is the only property in all of State that becomes a nuisance under this statute. C's property is not suitable for any other business operation presently known, other than charging recreational users a fee. Given the size of C's property and the porousness of its boundaries, however, attempting to collect a fee would cost nearly as much money as collection would generate. C, of course, is free keep the existing structures on his property, including his home. C can even build a new home if he wishes.

Needless to say, C is not happy. He brings an action against State in the appropriate superior court of State arguing that the statute is invalid as purported nuisance regulation because it (1) represents unconstitutional "spot zoning," (2) fails to "grandfather" (that is, permit to continue) preexisting uses that have become nonconforming, and (3) is based solely on aesthetics, placing it beyond the police powers of State. C also argues that (4) if the statute is valid nuisance regulation, it constitutes a "taking" for which C is entitled to compensation.

You are a clerk to the judge who must decide the case. She asks you to write a memorandum analyzing C's claims and advising her how she should rule on each. Please do so. State follows the federal authorities with respect to all takings and just-compensation issues. State has essentially no jurisprudence of its own on issues of nuisance but generally follows the common law and is respectful of decisions of courts from other states of the United States.

*Model Answer*

(1) Is the statute unconstitutional as "spot zoning"?

Normally "spot zoning" is a (pejorative) label that is applied where a single parcel has been singled out for special or privileged treatment, benefitting the landowner whose land is specially zoned. Here we may have what might be called a "reverse spot zoning," where one landowner's land is essentially zoned out of its only commercially beneficial use, for the benefit of the owner(s) of neighboring land. Usually spot zoning problems occur at a local level and raise suspicions of improper influence in the zoning process. Courts therefore often apply a stricter scrutiny to analysis of the costs and benefits arising from the rezoning, sometimes saying that the zoning decision is "quasi-adjudicative" rather than fully "legislative." Here, however, the legislative action has been taken at the highest government level of State, passed by the legislature and (presumably) signed by the governor. Courts, by their nature, must be deferential to the decisions of their state legislatures. The legislature has found continued cattle operations under the circumstances engaged in by C would be injurious to psychological health and welfare. If State has acted within its traditional police powers (the subject of C's third claim), this court simply lacks the power to overturn the legislative determination.

The spot zoning label is also applied sometimes when the special treatment is inconsistent with the comprehensive plan. In this case, of course, we are dealing at the state, not the local, level, and there is nothing analogous to a comprehensive plan. However, if we reason by analogy, what State is trying to do here is to bring C's property in *conformance* with the current uses of the surrounding property. This, too, makes the spot zoning analogy somewhat inapt.

(2) Is the failure to grandfather nonconforming uses unconstitutional?

Our sister state Pennsylvania holds that an existing lawful nonconforming use confers a vested right on a landowner that cannot be abrogated without compensation unless it is a nuisance. *PA Northwestern v. Zoning Board* (text p. 974). Pennsylvania would not allow even a reasonable period of amortization to permit the landowner to recover his investment in the nonconforming use. Most states, however, do not go so far as Pennsylvania and find zoning statutes constitutional if they supply a reasonable period of amortization. I recommend adopting the view of the concurrence in *PA Northwestern* that a community should have the right to change its character without being locked into earlier definitions of what uses are optimal. Under this view, the issue becomes whether the 5-year amortization period of the statute is reasonable.

Factors said to be relevant to the reasonableness issue are the nature of the use, the number of improvements, the public detriment caused by the use, the character of the surrounding neighborhood, and the amount of time need to amortize the investment. As to the last (which actually seems to include the second - the number of improvements), we could probably use more information concerning the nature of cattle ranching to analyze in detail what amortization period would be reasonable. What is the relative investment in long-term assets like barns, fences, feeding troughs, etc. versus the investment in more current assets like cattle feed and medicine and the cattle themselves? If most of the money is tied up in current assets, and if cattle are sold for slaughter after 1-2 years of grazing, a 5-year period gives C roughly three generations of cattle before he must stop completely. Without more, this would seem to be a reasonable period. The first, third, and fourth factors are also related in this case, because the public detriment *is* the specific character of the use caused by its effect on the surrounding neighborhood. Whether or not C can recover his investment in 5 years, it is hard to see how these factors would change the analysis to require a longer amortization period.

If the 5-year period is found not to be reasonable, or if the court chooses to follow Pennsylvania in recognizing vested rights in preexisting nonconforming uses, the issue of whether this is valid nuisance regulation must be addressed. While courts are increasingly allowing aesthetic considerations to enter the analysis of the validity of zoning, very few have done so without attempting to tie the aesthetics to surrounding property values. Here the legislature has made no findings concerning property values, and indeed property values would seem to be irrelevant because, by its nature, EPC plans to hold its surrounding property undeveloped in perpetuity. Its primary mission is to make sure that its property does *not* increase in value. Of course, the value of EPC's property for its allowed recreational uses is diminished, at least arguably, by the existence of C's cattle operation, but, given the low level of user fees that can be charged by C if C's land were to be used for those same purposes, the case for lower economic value of the surrounding land is quite weak. Moreover, except perhaps for the odor, this is not a traditional nuisance, notwithstanding the legislature's determination of an adverse effect on psychological health and welfare. And while odors have been treated as nuisances in residential cases, where the same neighbor is subjected to it day after day, here the "harm" from the odors is not constant for any given user and the users themselves tend to be different people each day. It is difficult to make out a case of traditional nuisance here.

Finally, it is important to observe that C was using his land for cattle grazing before EPC and the environmentalists got into the picture. The case for nuisance was much stronger in *Spur Industries v. Del Webb* (text p. 766), because there the threat was to the physical health of a much larger number of people. Even in that case, however, while finding the cattle operation to be a nuisance, the court ordered the defendant Del Webb to pay the damages of relocating the cattle business. Here, too, it seems that EPC has "come to the nuisance." Unfortunately, EPC is not a party to this lawsuit, because C is suing State. It is therefore not possible in the present posture of the case to enforce the statute while ordering EPC to pay damages to C. But this does show the weakness of the case that this statute represents traditional nuisance regulation.

I therefore recommend that the court find that there is no nuisance here that would justify abolishing a reasonable amortization period, that the court not follow the minority of states that treat nonconforming uses as vested rights, and that the court conclude that the 5-year period for amortization provided by this statute, absent additional evidence to the contrary, is reasonable.

(3) Is the statute beyond the police power of State?

C apparently argues that the statute regulates what we might call “pure aesthetics” and that such regulation is beyond the power of the legislature. The weight of authority is against C, in two ways: First, the statute at least purports to regulate more than visual aesthetics. Second, regulation of “pure aesthetics” is within a state’s police power, at least if the regulation is sufficiently clear that citizens subject to its reach know what is required of them.

The legislature in this case has determined that natural aesthetic beauty would be destroyed by cattle operations within an otherwise protected area. It has also found, however, that the psychological health and welfare of its citizens would be harmed by such operations and that the odors from such operations harm the interests of users of neighboring land. Regulation of odors and sound has long been deemed to be within the police power of the state. That alone is enough to uphold the statute, unless it appears that there is no rational basis for the finding. There is no evidence before this court to show absence of a rational basis, and in cases like this the burden of proof is on the person challenging the statute. Consequently, in view of the absence of evidence, the court must find for State.

Furthermore, even if this were purely aesthetic regulation, courts have generally come to accept its legitimacy (text p. 1019). While courts will sometimes scrutinize the application of aesthetic considerations carefully and may overturn zoning rules based on aesthetics if they are arbitrarily applied (*Anderson v. Issaquah*, text p. 1020), there is no lack of clarity alleged in the statute involved in this case. C may not like it, but there is no question that his property is surrounded by “protected property” and that therefore cattle operations are prohibited.

I therefore recommend that the court reject C’s challenge to the statute as being beyond State’s police power.

(4) If the statute is valid, does it constitute a “taking” for which compensation must be paid?

Here there has been no physical occupation of C’s property (permanent or otherwise), so C cannot claim the benefit of *Loretto*. Moreover, zoning regulations are usually routinely upheld, even against a claim of a near-total loss in value of the property. Indeed, if health and safety regulation is involved, even a total loss in value may not be compensable. In between these two extremes, courts attempt to follow the balancing test set up by *Penn Central*, looking at the goals of the regulation, the effect on the landowner, and the interference with the landowner’s “distinct investment-backed expectations.”

However, the more recent *Lucas* case creates another per se rule that, when a regulation is directed at something other than a traditional nuisance and effects a total wipeout of economic value, there is a taking. Here, as discussed at length above, the state has not engaged in traditional health and safety regulation, although the legislature did find that cattle operations in an area such as C's would injure psychological health and welfare. The issue under *Lucas* would therefore seem to come down to whether there was a total wipeout in value. Here that appears to be the case, because the one economically valuable use is to charge user fees, and to attempt to do so would likely cost more than it would generate. The land probably does have some small value as for a residence – there is probably *somebody* somewhere who would like to retire to a remote area like C's property and who would pay *something* to be able to do so. However, to find such a value sufficient to take this case out of the *Lucas* per se rule would render that case totally irrelevant to takings analysis. This court should not lightly assume that the United States Supreme Court acts for no purpose. I believe that this case falls under the *Lucas* rule and would find a taking per se, obviating the need for further takings analysis.

If the case is deemed outside the *Lucas* per se rule, we must apply the balancing tests of *Penn Central*. Here the goals of the governmental regulation are laudable, namely, to preserve land in its natural state for the aesthetic enjoyment of present and future generations. This goal is not obviously different in kind from that upheld in the *Penn Central* case itself (preserving historic buildings). On the other side, however, is the effect on the landowner and the landowner's expectations. Here the effect is devastating, essentially wiping out the business that C has been operating for many years. In *Penn Central* the landowner was allowed to continue the business for which the building was initially constructed (railroad station) and was still making money in that business. C has moved to his current location and lives there. If he has to find a new business, he cannot remain, even though his land remains suitable for residential purposes. And how can he remain without any source of income? The record does not show how much money C has invested in the property and business, nor does it show how much he would lose after the 5-year phaseout period has expired. But it seems it would be substantial.

Other elements are at work here as well. Justice Stevens dissented in *Lucas* because the statute there purported to regulate the entire South Carolina coastline. It did not, in the Justice's opinion, target particular landowners as a part of this statewide policy. Here, however, while there is no overt indication that C's operation was specifically targeted, it is difficult not to believe that EPC, which lobbied heavily for the statute, was unaware that only one landowner in all of State would be affected. While this court must not presume that EPC's knowledge was necessarily passed on to members of the legislature, when the effect of legislation does fall entirely on one citizen it is reasonable to assume that that citizen was, indeed, a target of the legislation's supporters. The risk seems unavoidable that "private property is being pressed into . . . public service under the guise of mitigating serious public harm" (p. 1173, Scalia, J.).

I recommend that the court find that the statute in this case constitutes a taking and that C is entitled to just compensation.