Instructions

This examination consists of two essay problems of unequal weight. You have 2 hours to complete the examination. Suggested times for the problems reflect the respective weights to be given to them in determining the final grade on the exam, but you are free divide your time between the two problems as you choose. Be sure, however, not to bog down in one problem to the extent that you leave yourself insufficient time to deal adequately with the other.

You are permitted to have with you and to use during the examination your textbook, any class handout materials, your class notes, and any other written materials made by you (not photocopied from printed materials). These materials 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 Do not cite as authorities cases, statutes, or other materials that we have not studied in class.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 and on one side of a bluebook page only.

In answering these problems, 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 the questions in each problem carefully and answer those. Correct answers to questions that have not been asked will likely get you no points.

GOOD LUCK!
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Problem 1 (40%, 48 minutes)

S was the owner of two lots on Green Street, one of which (Lot 1) was on the corner of First and Green and the other (Lot 2) adjoining thereto on Green. S built a house on Lot 2, which connected to a sewer line that ran down Green Street. Thereafter S sold Lot 1 to B, who built a home on it. After the sale of Lot 1 to B, a problem developed in the Green Street sewer line that prevented its use from S’s house. S discussed the problem with B and B agreed to grant S an easement for a sewer line running underground along the back boundary line of B’s corner lot (Lot 1) to First Street. S was thus able to connect to a sewer line that ran along First Street. All this happened about 15 years ago. S paid B $100 for the easement, and the parties agreed to record a deed, but they never got around even to signing a deed, let alone recording it.

About 7 years ago, B sold his house and Lot 1 to P, who recorded the deed of transfer. At the time of purchase, P had no actual knowledge that an underground sewer line ran from S’s property along the back edge of Lot 1. He learned of its existence, however, after the line running across his property recently began leaking. P then demanded that S stop using P’s property for this purpose, but S refused, claiming that he had a valid easement but offering to pay for repair of the line and any reasonable cleanup costs P may have incurred. P demanded a payment of $10,000 for an easement, and when S refused that, P sought an injunction against S’s continued use of the line. S defends on the grounds that (1) S acquired an express easement from B, or (2) S has an easement by implication, or (3) S has an easement by necessity, or (4) S has an easement by estoppel, or (5) S has an easement by prescription. S maintains further that P in any and all such cases is bound by the easement thus created. The period for prescription is 10 years. Analyze S’s claims.

Model Answer

[Note: This question was intended to be a straightforward application of the various easement doctrines to some facts. Many answers failed to score well because the issue of whether an easement between S and B was confounded with the issue of whether P, B’s purchaser, would be bound. Indeed, many failed even to distinguish between B and P.]

Did B grant S an express easement? There seems to be little doubt that B and S agreed to the conveyance of an easement. Indeed, S paid B $100 in consideration, and B did not object when S made the sewer connection to First Street in reliance on the apparent grant. The grant of an easement, however, is a transfer of an interest in land. The Statute of Frauds requires a signed writing for such transfers to be effective. If the SoF were applied, it would invalidate the purported transfer even between B and S. The SoF is littered with exceptions, however, and one such exception often is found when the transfer is complete and both parties have fully performed. [Note: Not a single answer mentioned the possibility that the SoF has exceptions. This was pretty shocking.] There is also an estoppel exception that prohibits assertion of the SoF
to deny a transfer where one party relies with knowledge that the other has not objected. Either or both of these exceptions could apply between S and B, because B took S’s money, allowed him to place the pipe, and never objected to S’s use of the easement. As between B and S, a court might well find that an express easement was created. But even if S were to win on the SoF, he would still lose against P because S’s interest is not recorded (whether the jurisdiction has a notice or a race-notice recording statute).

Does S have an easement by implication? Here there was no so-called “quasi easement” resulting from S’s prior use while Lot 1 was still owned by S. This distinguishes our situation from that in the Van Sandt case. If there were an implied easement, it might be binding on P as well as B under the principle that recording is only required for interests in land that are created by recordable instruments. By definition, an implied easement is not created by such an instrument. Under this reasoning, if S did get an easement by implication from B, it is an interest in land that is not extinguished by a subsequent sale by B, any more that a prescriptive easement against B would be extinguished. On the other hand, the court in Van Sandt did consider the question of whether the ultimate purchaser of the property was on inquiry notice, stretching in that case to conclude that he was. The same issue arises in connection with S’s more viable claim of easement by estoppel, and is discussed further below.

Does S have an easement by necessity? An easement by necessity may be found where the easement is necessary to the enjoyment of the dominant tenement (which seems to be the case here, because it’s pretty hard to enjoy a home with no sewage outlet) and where the necessity arises when the claimed dominant tenement is severed from the claimed servient tenement (text pp. 802, 807). Here, there was no necessity at the time S sold Lot 1 to B, because S had an apparently fine sewer connection to Green Street. Like a landlocked parcel, some right of way may be “necessary” in order to enjoy ownership of Lot 2, but necessity alone does not give rise to an easement by necessity. While S did once own Lot 1, so there was formerly “unity of ownership” between the two lots, once Lot 1 is sold and no necessity arises, the buyer (and a fortiori the buyer’s buyer) is a stranger. Necessity does not give rise to a right to claim interests in the property of a stranger (text p. 807). Had an easement by necessity been found against B, however, it too would have been valid against P to the same extent as for an easement implied from prior use (certainly binding on P if P is on inquiry notice and perhaps even if he is not).

Does S have an easement by estoppel? For the same reason that a court would likely ignore the SoF if S were litigating against B, B might well be estopped from denying S use of the sewage line. S invested not just the $100 he paid B but also the labor and other costs of laying the line across Lot 1. B knew that S was making these investments in reliance on his oral grant of the right to do so, so his “license” should be held irrevocable. The question is whether this is binding also on P. Estoppel is an equitable notion, designed to achieve a fair result when the parties have not dotted all their i’s or crossed their t’s. If S has an easement by estoppel, it arises from something other than a recordable instrument (unless a successful quiet title action is
brought) and so might be deemed binding on P as well. However, S was in position to protect
subsequent purchasers like P by the simple act of recording the express transfer of an easement to
him by B. P purchased without actual notice of the sewer line. While the court in *Van Sandt*
concluded that the purchaser there was on inquiry notice of the line, the facts here are a bit
different. Here, as far as P knew, S might have had a sewer connection to Green Street, a
potential outlet clearly unavailable to the claimant in *Van Sandt*. Moreover, what was a case of
easement implied from prior use, not by estoppel. That the court deemed notice relevant
indicates that it might *not* imply such an easement against innocent third parties. On the other
hand, the original claimant of the easement in *Van Sandt* was in the same position as S here in
that she could have reserved an express easement for the sewage line in her grant upon severance
of the property, just as S could have insured his right by recording the transfer from B. So,
easement by estoppel is a possibility here, even as against P, an innocent subsequent purchaser.

Does S have an easement by prescription? S points out that he has been using the sewage
line, as openly as a sewage line can be used, for over 10 years. P would argue that S does not
have a prescriptive easement, because the original use was permissive. This argument is invalid,
as was held in the Arizona case we discussed in class, *Paxson v. Cox*. [Note: Although we
discussed this case in class, where the basic issue was laid out in detail, not a single answer
referred to that discussion and only one or two even saw the possibility that S might have been
using the sewage line under a claim of right. Again, this is pretty shocking, especially on an open
book exam.] Here, as between S and B, S was using the “easement” under a claim of right, and
B never objected (nor could he). It was not “permissive” in the sense used in adverse possession
cases, because the only thing permissive about S’s use was that both parties agreed that S had the
right to make such use. This is no different from adverse possession of land occupied because of
a mistaken boundary. The use is “permissive” in the sense that both parties actually think the
occupied land belongs to the adverse possessor, but it remains “hostile” insofar as adverse
possession rights are concerned. So, as between S and B, S should have a prescriptive easement
to the sewage line. Does this bind P? If evidence of the easement were visible, there is no doubt
that it would bind P, even though nothing is recorded, just as P would be bound by the rights of
an adverse possessor whose possession began under his prior owner B. Here, however, we again
have the question of notice. Should P be subject to an easement that was invisible and
unrecorded? This is a difficult question. On balance, fairness seems to indicate that the harm to
S by denying the easement is much greater than the harm to P from recognizing it. S has shown
good faith by offering to repair the line and to pay the reasonable costs of cleaning up P’s
property. Beyond that, the sewage line does not interfere with P’s enjoyment of his property.

In sum, I would find that S has a prescriptive easement or an easement by estoppel, both
of which are binding on P, subject to S’s willingness to pay for the repairs and the necessary
costs of cleaning up P’s property.
The above diagram attempts to capture the geography of this problem. I hope it does so accurately, but if you find a contradiction that makes a difference in your analysis, either analyze both ways or choose the alternative that makes the problem harder, not one that makes it easier.)

Town (T) was founded over 100 years ago as the hub of what was then largely a farming community, but in recent years T has been developing as an attractive community for tourism, artists, and other professional people. One of T’s main attractions for visitors is the river that flows west to east through the center of T. People use the river for a wide range of recreational activities. All of the riverbank above the high-water mark is privately owned, and nearly all of it has been developed with businesses or homes. By 5 years ago, only two lots on the river remained undeveloped. These two lots, which we will call A and B, adjoined one another, on the north side of the river with A to the west of B. T owned a small pier in the river, accessible by foot over a public path running north/south on the west side of A. T uses the pier for sightseeing boats and to rent paddle boats, canoes, and similar recreational items to tourists and townspeople.
Both A and B were 100 feet wide and extended 200 feet north from the river’s high-water mark. O_A and O_B were the owners, respectively, of lots A and B. Each purchased his respective lot many years ago for $10,000, with the thought of eventually building a home on it or selling it for profit should business sites on the river appreciate more than home sites. Five years ago, O_A sold the back (north) half of lot A to Jones, for $50,000. Consequently, at the time of the ordinance in question, O_A owned a 100’ x 100’ lot on the river, while O_B owned a 100’ x 200’ lot next door. The only zoning restrictions until last year were prohibitions on industrial manufacturing and refuse disposal on lots abutting the river. Also at that time (i.e., last year), the market value of O_A’s remaining half was $75,000, while the value of B, still wholly owned by O_B, was $125,000.

Last year Jones (who purchased the north half of A from O_A) erected a home on his lot. This caused members of the Town Council to get worried that further improvements on A or B would be harmful to the recreational activities that were based on T’s pier. They reasoned that it would be harder to see and find the pier from the main road, and, once one was at the pier, the pleasant view to the north would be impeded by any buildings that might be placed on the properties. The Town Council thereupon adopted an ordinance prohibiting any further building or improvement within 100’ of the high-water mark, although repairs would be permitted to maintain existing structures. The Council gave as its reason for the ordinance that “the economic, social, and psychological welfare of Town depends on healthy and active use of the river and that further building on lots abutting the river would present a serious risk of harm to such use.” After the adoption of this ordinance, the value of O_A’s remaining half of A was less than $5,000, while the value of B dropped to about $75,000. For reference purposes, Jones’s lot (the northern half of A, which remains unaffected by the ordinance because it is more than 100’ from the river) has an unimproved value of $65,000.

O_A and O_B bring action against T, claiming that the ordinance constitutes a taking. Analyze their claims. Assume the federal authorities we have studied apply to the issue of whether there was a taking.

Model Answer

Takings law is pretty much of a mess once one is outside the “categorical” rules that the Supreme Court has created, so it makes sense to look first to determine whether a categorical rule applies. Here, although the ordinance appears to be permanent, there has been no physical invasion of either lot. Therefore, the categorical rule that a permanent physical invasion is always a taking does not apply. The second categorical rule is that a total wipeout of economic value is a taking unless the ordinance in question was aimed at regulating a common-law nuisance. Here there can be no claim that improving the southern half of either lot A or B constitutes nuisance regulation under common law. There is no danger to health nor is there a risk of pollution, excess noise, odor, or the like, that would result from improving these
properties near the river. Indeed, the entire river is already lined with such improvements. While one might characterize the ordinance as protecting access to “light and air” by those using the river for recreation, even modern courts refuse to hold that ordinary uses are unreasonable, even where that ordinary use is putting up a building that blocks light on neighboring property (note 3, page 753 of the text). Town says it is interested in maintaining its economic, social, and psychological welfare, but according to Lucas it takes more than a mere statement to the effect that something is a nuisance to make it one for purposes of takings law. Had T started “protecting” such interests at an earlier stage, before the river was nearly fully developed, it would have more plausibility. Now the entire burden of this welfare, insofar as it is maintained by land-use regulation, falls upon O_A and O_B. Therefore, if the ordinance effected a total wipeout of economic value, there is a taking.

We consider the situation of O_A first. If he has not been totally wiped out, it is clear that O_B has not been totally wiped out, either. An important issue in determining whether there has been total wipeout is what we have called “conceptual severance.” For simplicity, let us begin by assuming that the southern half of A now has zero economic value. O_A would then claim that he has lost everything. But we recall that O_A once owned all of A, which he purchased for $10,000, and he earlier sold just the northern half to Jones for $50,000, a tidy profit. Had O_A retained the northern half, he would be in the same position as O_B, and O_A would not be able to claim a total wipeout of the whole of his property, even if (contrary to the actual facts as given) the value of the southern half of A had been totally wiped out. The Supreme Court in Pennsylvania Coal seemed to adopt the notion of separate property interests when the sale of an interest in the property took place at arms length prior to the adoption of the ordinance in question, but in that case the coal company expressly reserved the coal-extraction rights and the purchaser of the surface rights expressly agreed to assume the risk of subsidence resulting from coal mining beneath the surface. Thus, the coal company had not been paid the full value of its mining rights. Here, O_A sold the northern half of A to Jones without any promise by Jones that he would, for example, pay more if it later turned out that a zoning law would reduce the value of O_A’s remaining half. So, it is not clear that O_A has lost any more than O_B, except for the appreciation of the northern half due to O_A’s choice to sell while the properties were still appreciating. It is therefore far from clear that severance notions would or should be applied to O_A’s claim, even if the value of the half of lot A remaining in O_A’s hands were indeed zero.

Moreover, here there appears to be some residual value for O_A, although less than 10% of the value prior to adoption of the ordinance. The real issue is just what the Supreme Court means by a total wipeout of value. In practice, essentially any property will have some economic value (except perhaps the rare economic sinkhole, as in Pocono Springs, text p. 921). In the Lucas case itself, many on the Court expressed skepticism over the trial court’s finding that the statute there involved resulted in a total wipeout. Even the majority opinion merely accepts that factual finding without expressing any endorsement. Unless we are to treat Lucas as essentially a meaningless case, it is hard to distinguish O_A’s situation from that of the landowner in Lucas,
especially in view of Pennsylvania Coal’s separate treatment of interests created prior to the action leading to the alleged taking. Therefore, if Lucas has any meaning at all outside its specific facts (and assuming willingness to sever the northern half of A from O’s investment), it should mean that O has suffered a total wipeout and is entitled to compensation.

The situation of O raises the conceptual severance issue in a different form. In Palazollo, the unaffected value of an “upland” portion of the property was sufficient to prohibit any conclusion that there had been a total wipeout. Thus, the Supreme Court refused to entertain the conceptual severance issue, but that was because it was not argued in the lower court. Here, we have a different situation. B will argue conceptual severance, namely, that he has suffered a total wipeout of the southern half of his property. Even if he wins that battle, however, he may still lose the war. Lot B is worth now $75,000, and apparently its northern half, unattached to its southern half is worth about $65,000. Thus, the southern half of B has some residual value of about $10,000, at least as long as it is still attached to the northern half. Presumably the reason for this is that a buyer could purchase the whole lot B, build on the northern half, and use the southern half for recreational purposes on the river. So, even if we conceptually sever O’s southern half from his northern half, the southern half appears to have a value of around $10,000. That is down considerably from the $75,000 it had before the ordinance, but it does not look like a total wipeout.

It therefore appears that there has been no total wipeout in either case, but if there is ever going to be a case of total wipeout, it probably applies to O. Consequently, I conclude that O has a moderately strong case, on the authorities we have studied, that he falls under the categorical rule that he has suffered a total wipeout under a regulation not aimed at a common-law nuisance. The primary argument against O would be that he already made a good return on his “investment-backed expectation” when he sold the northern half of his property to Jones, so he should be treated no more favorably than O. O cannot bring himself within the categorical rule, because he has not suffered a total wipeout.

All is not lost for O, however, or even for O should he lose on his claim to compensation under the categorical rule. Both cases must be analyzed under Penn Central’s balancing test. The factors to be considered are the impact of the regulation on the claimant, particularly the extent to which the regulation interferes with “distinct investment-backed expectations,” the character of the government action, and whether it appears that the claimant has been “singled out” to endure financial hardship for the good of the many (text pp. 1159, 1161). For O, the loss is less than 50% of its previous value, which is certainly less extreme than in some of the cases in which no taking was found, such as Hadacheck. On the other hand, the character of the government action is not true nuisance control nor is it of very general application. True, other landowners whose property abuts the river cannot expand, but they have already made their investments, just as the Penn R.R. had in Penn Central. Here, the brunt of the burden falls on O and O, as the last property owners to build. They are essentially the only
ones covered. It is not really an answer to O_b that he paid only $10,000 for property that is now worth $75,000. All the time the property was appreciating, O_b was essentially making a new investment, because he could have sold it just prior to the regulation for $150,000. He did not do so because he wanted to continue to invest in that property, thinking it would continue to increase, or at least maintain, its value. He has lost half of that investment, and that is a significant loss. While not as heavy percentagewise as in some other cases, the need for the government action is much less clear than in the nuisance cases. Even Justice Stevens, dissenting in Lucas, would worry if a given regulation appeared to “target” particular landowners. That does appear to be what is happening here. No other landowner is asked to do anything to contribute to the “economic, social, and psychological health” of the community in any significant way, such as by taking down all or part of existing buildings. O_b has at least a reasonable case that his property has been taken under the Penn Central balancing approach.

O_A, of course, has an even stronger case under Penn Central, should that be necessary. His percentage loss (assuming severance) is much greater than O_b’s, he is being singled out just as much, and the justification for the government action is no stronger. I would say that O_A would win under Penn Central, if he does not already win under the categorical rule.