

Sample Exam Answer

LAW-518-002 Property Law

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Note: This exam answer addresses every significant issue that I observed while reviewing exam papers. This includes issues that are irrelevant, in order to explain their irrelevance. As a result, this answer is much longer and covers much more than what I would have expected anyone to write.

Footnotes are commentary on the sample answer, and not intended as part of the answer.

Essay 1

Anyone with a relevant property interest in the Zephyr Road house may have a cause of action against the government for a taking of property under the Fifth Amendment Takings Clause. A valid taking requires (1) a taking of private property, (2) public use, and (3) just compensation. Additionally, anyone with a relevant property interest may have a claim for trespass against the government. The analysis will proceed below by first identifying all of the private property interests subject to a potential taking, and then considering whether the government's actions constituted a taking of each interest.¹

¹The essay prompt asked about causes of action relating to the house. As a result, analyses of takings or conversion of the axolotl itself were outside the scope of the question. In any event, given that the government had not located the axolotl as of the end of the fact pattern, the government hasn't taken any actions regarding the axolotl that could give rise to a property claim.

Alice

Alice has an ownership interest in the Zephyr Road house, either as its owner or as a joint tenant as explained below with respect to Charlie.² The takings issue is then whether the tearing up of the daisies and installation of the axolotl monitoring devices constitute a taking. Since the Fish and Wildlife Service did not initiate condemnation proceedings against the house, Alice would have to show that the agency's actions are a regulatory taking, which may be either a per se taking or a taking under the *Penn Central* doctrine.

Physical occupation. The most likely case Alice would have is that the installation of the monitoring devices is a per se taking by physical occupation. Under *Cedar Point*, a permanent physical occupation of land by the government is a per se taking. Here, Alice would argue that the axolotl monitoring devices are taking up space in her backyard, constituting physical occupation akin to *Loretto* and *Cedar Point*. The government, on the other hand, might contend that the monitoring device will only be there so long as the axolotl is lost, suggesting that the occupation is not permanent. (To be sure, *Cedar Point* found a taking in a "temporary" occupation of land, but that occupation was indefinite and ongoing; here the monitors will presumably be removed permanently at some point.) Despite this argument, Alice would have a strong argument that the physical occupation is a serious infringement on her use and enjoyment of the daisy garden, and Alice is likely to succeed in showing a taking.

Total deprivation and *Penn Central*.³ Alice could also try to argue that the government's tearing up the daisies constitutes a total deprivation of value of the land; she is unlikely to succeed since she can still use the rest of the backyard. She might also argue under the *Penn Central* test if her per se argument fails, and could succeed on this argument given that the character of the government action is specifically targeted toward her and that she had investment-backed expectations in the daisy garden (namely growing daisies).

Public use and just compensation. Assuming that a taking is found, the government must show that the taking is for public use; it is likely to succeed under *Kelo* given the apparent public importance of the axolotl to pharmaceutical research. It must also pay Alice just compensation based on the market value of her property interests of which she was deprived, which a court would likely

²If you're curious about the names, they are the standard names used in cryptography textbooks.

³Even if you think that physical occupation is a good argument, you should still address the other pathways to a regulatory taking; they are potentially viable arguments too.

determine in a Tucker Act case that Alice could bring.

Trespass. Separately, Alice may have a cause of action for trespass against the government. As observed in *Jacque v. Steenberg*, the right to exclude is a core property right that is violated when a third party enters upon a property owner's land. Here, the government has plainly entered the daisy garden of the Zephyr Road house, causing damage to the garden—a classic trespass. However, the government would argue that the importance of finding the axolotl for pharmaceutical research is a sufficient public policy justification for its actions, rendering them non-trespassory under *Marsh v. Alabama* and *State v. Shack*. The difficulty with this response is that the government could also have negotiated with Alice for permission; one reason why property rights exist is to enable negotiation and facilitate efficient allocation of resources. As such, the government would likely be held liable for trespass, possibly owing compensatory and punitive damages, at least to the extent that they are not overlapping with any takings compensation.

Charlie

Charlie can make the same arguments for a taking or trespass as Alice, so long as he can show a property interest in the Zephyr Road house. Bob originally held title as a joint tenant with Alice.⁴ Thus, Charlie must show that Bob validly conveyed a property interest to Charlie.

Gift validity. Because Charlie paid Bob nothing for the house, the conveyance is a gift, which to be valid requires (1) donative intent, (2) delivery, and (3) acceptance. Donative intent is plainly present by Bob's words "Great, it's yours." As for delivery, Charlie would argue that Bob's inclusion of the text of a quitclaim deed via text, and the words "Signed, Bob," constitute sufficient delivery of a written deed conveying the interest to Charlie. On the other hand, the ephemerality of texts might suggest that Bob was not especially serious about the transaction, and the lack of formality might lead a court to consider that delivery was incomplete, especially in view of courts' typical expectation for clear demonstrations of delivery per *Estate of Evans*. Finally, there might be an argument over acceptance: Charlie says "Thanks uncle" suggesting acceptance of the gift, but then never takes any steps to move in, record the deed, or otherwise take physical action to accept the gift.

⁴Given that the essay prompt stipulated that Alice and Bob received the house as joint tenants with right of survivorship, there was no need to recite or analyze the four unities.

Statute of Frauds. Furthermore, there is a good question of whether the Statute of Frauds was complied with in Bob's conveyance to Charlie. The Statute of Frauds requires that conveyances of property be in writing and signed (along with other formal content requirements that are assumed to be satisfied by Bob pasting the statutory quitclaim deed text). While Charlie might argue that a text message is a writing and Bob did say he "signed" the deed, text messages don't necessarily offer the same permanence as a physical written document, which might lead a court to conclude that the text messages do not comply with the Statute of Frauds.

Recordation. The facts do not indicate whether Charlie recorded the deed; presumably he didn't. In jurisdictions where recordation is required for a severance to be effective, Charlie's failure to record could defeat his property interest.

As a result, there are at least some serious impediments to Charlie showing that he received a proper gift conveyance from Bob.

If Charlie did receive a conveyance, then he owns half of the Zephyr Road home as a tenant in common, because Bob's conveyance severed the joint tenancy with right of survivorship with Alice. In that case, Charlie has the same cause of action for a taking and trespass against the government as Alice does. Just compensation or damages would be split between them since each of them would own a half interest in the entire house.

The Red Cross

The Red Cross has no interest in the house. If the gift from Bob to Charlie succeeded and worked a severance, then after Bob's death the house is owned by Alice and Charlie as tenants in common. If no severance occurred, then upon Bob's death, Alice received complete ownership of the house by right of survivorship, so Bob's will is irrelevant.

For the Red Cross to have an interest in the house, it must prove (1) that Bob's conveyance to Charlie was defective, as discussed above, and (2) that the joint tenancy was severed by some other act. The following are possibilities:

Ouster. First, it is possible that Alice ousted Bob by taking over the first floor of the house for her axolotl environment. This is unlikely to succeed because Bob was not ousted from the second floor, and courts like *Martin v. Martin* typically require "exclusive possession of the entire jointly held property" before finding an ouster.

Abandonment. Second, the Red Cross could contend that Bob abandoned his share of the house when he announced he was "never going back to that place

again.” Again, this is unlikely to succeed at least because mere relinquishment of the right to possess is not tantamount to abandonment; Bob could still rent his share, use it for storage, or any other purpose.

Lease to Dave. Third, the Red Cross might argue that when Alice leased the house to Dave without Bob’s consent, that effected a severance. Whether a lease severs a joint tenancy depends on the local jurisdiction’s law, but here it doesn’t matter because the lease to Dave occurred after Bob’s death. So assuming that the conveyance to Charlie was defective (as the Red Cross must argue), Alice owned the whole house by the time she leased it to Dave, and there was no joint tenancy to sever.

Recordation. Alternatively, the Red Cross might argue that the conveyance to Charlie was successful but unrecorded, such that the Red Cross, as a later-in-time recipient, might take the property under the relevant recording statute. However, all the recordation statutes presented in this class apply only to purchasers for consideration, and the Red Cross as a devisee is not one.

Accordingly, the Red Cross likely has no property interest in the house. (If it does, then it would have claims for takings and trespass as described above with respect to Charlie.)

Dave

Dave, as a lessee, holds a property interest in the house,⁵ namely a leasehold, probably for a term of years depending on the nature of the lease agreement with Alice. Thus, as a property interest holder, Dave has a takings and trespass claim against the government for the same reasons that Alice does.

Dave’s just compensation would likely be based on the more limited value of his leasehold, namely the value of possession of the house for the remainder of the lease. Alice’s (and possibly Charlie’s) just compensation would also be accordingly adjusted to account for the fact that Dave is in current possession of the house.

⁵A common argument was that Dave and/or Eve had no takings interest because they didn’t “own” the house. But remember that, per *Monsanto*, the Takings Clause can reach any property interest under state law. Leaseholds and easements are property interests. So Dave and Eve would at least want to argue for a share of the takings pot, and very likely would succeed under modern takings law.

Eve

Eve might have a takings claim against the government based on an easement by prescription. For this claim to succeed, she must show that (1) she has an easement by prescription and (2) the government has performed a regulatory taking of that easement.

Easement by prescription. Eve would argue that she has an easement by prescription to pick daisies from the Zephyr Road garden. The elements of an easement by prescription are use that is (1) open and notorious, (2) hostile, and (3) continuous for the statutory period. Here, Eve has been picking daisies for four decades, well over the 20-year statutory period, and Alice has seen Eve pick the daisies, making Eve's use open and notorious. Furthermore, Alice has yelled at Eve to stop trespassing, suggesting that Alice did not give permission to Eve and so Eve's use was hostile. One might argue to the contrary that Alice's ongoing inaction constituted implied permission for use. But insofar as the very point of the doctrines of adverse possession and prescriptive easements are intended to spur record owners to take action when they know of adverse possessors or users, it would be contrary to that rationale to say that Alice's inaction could defeat Eve's prescriptive easement. Accordingly, Eve likely has a prescriptive easement to pick daisies from the garden.

Adverse possession. Eve almost certainly cannot show adverse possession of the daisy garden. Adverse possession requires possession of land that meets all the same elements of a prescriptive easement, plus exclusivity. Here, Eve picked flowers from the garden, but there is no indication that she took other actions to water, plant, or otherwise tend to the garden, suggesting that she was not possessing the garden in the way a typical owner would. Furthermore, while nothing in the stated facts says anyone else was using the garden, someone presumably was taking care of it. That someone was most likely Alice, making Eve's use of the garden non-exclusive. So it would take several unusual and unlikely additional circumstances beyond the stated facts for Eve to succeed in showing adverse possession. (If she did adversely possess the garden, then Eve surprisingly becomes the only person with a takings or trespass claim.)

Takings—total deprivation. In terms of takings, Eve could make the same arguments that Alice could about physical occupation, since the axolotl monitoring devices are sitting in the daisy garden that she was otherwise allowed to use based on the easement. Eve further has an argument that the government has totally deprived her of beneficial use of her property interest, by tearing up the daisy garden. Under *Lucas*, where a government action totally deprives a

landowner of beneficial use of their land, a per se taking has occurred.

Here, Eve's sole property interest in the land is to pick daisies, and the government tore all the daisies out, meaning that there is no remaining beneficial use of Eve's easement. To be sure, *Lucas* dealt with full ownership of land while Eve's interest is a mere easement, but given that *Monsanto* recognizes that a wide range of property interests are subject to the Takings Clause, a court would likely find Eve's easement interest sufficient as well.

Accordingly, Eve would likely succeed in showing that the government has effected a taking of her easement. The public use analysis is the same as discussed above, and her just compensation would be based on the value she received from picking daisies.

Trespass. Eve may have a claim for trespass against the government. The complexity here is that an easement is a property interest that grants the right to use, not the right to exclude. However, insofar as the government's occupation and destruction of the daisy garden have eviscerated the sole value of Eve's property interest, it stands to reason that a trespass action ought to be available to her, and a court would likely award her damages (mindful of overlap with her takings claim).⁶

IP rights. Eve has a copyright in the photo she took of the axolotl. However, by posting the photo publicly on Instagram, Eve would have given everyone an implied license to view it, so she cannot claim anything against the government for viewing it. There are no rights of publicity involved because an axolotl is not a person, and no trademark issues involved because nothing is being used to mark goods or services in commerce.⁷

The Neighbors

Alice, Charlie, Dave, Eve, and the Red Cross (to the extent that any of them have property interests in the house) have no claim for nuisance, since any injury caused to their property interests was a trespassory injury. However, the neighbors (perhaps including Eve) may have a nuisance claim against the government, if the axolotl monitoring devices installed on the daisy garden are loud, obnoxious, or an eyesore. This is unlikely as a factual matter (it's hard to believe that an animal monitoring device is much larger or louder than a residential air conditioning unit), but determinable based on additional facts.

⁶You weren't responsible for knowing this, since we didn't discuss easement holders' rights against third parties.

⁷None of this was required.

Essay 2

Lease Actions

Because Dave is leasing the house from Alice, Dave would have causes of actions against Alice based on the conditions of the lease, particularly relating to the flooding of the house.

Constructive eviction. Dave is unlikely to be able to show a constructive eviction based on the flooding. A constructive eviction requires that a landlord's act or omission substantially interfere with the tenant's use and enjoyment of the property, and after notifying the landlord, the tenant leaves within a reasonable amount of time. Here, Alice would have a good argument that third parties caused the water line break that flooded the basement and first floor, so her acts or omissions were not the cause of any substantial interference with Dave's tenancy. Furthermore, Dave did not vacate the house, since he was living in the top two floors. Accordingly, Dave is unlikely to be able to show a constructive eviction.⁸

Quiet enjoyment. Beyond constructive eviction, Alice may also have violated a duty by failing to provide Dave with quiet enjoyment. Under the covenant of quiet enjoyment, a landlord must not substantially interfere with a tenant's use or enjoyment of the premises; factors that courts consider include the purposes of the lease, the foreseeability of the problem, the potential duration, and the degree of harm. A violation of the covenant can subject the landlord to an action for damages.

Here, Dave could point to the flooding of the house as a substantial interference. He could also point to the crowds outside the house trying to view the axolotl, who are probably making it difficult for him to get into and out of the house. He could also point to Eve, both because her persistent use of the garden interferes with Dave's enjoyment with a part of the house and because her potential prescriptive easement or adverse possession of the garden, as described above, means that Dave has not received possession of the full value of the lease. For similar reasons, if Charlie does have an interest in the house, Dave could point to the potential for Charlie to enter or use the house at any time as a further substantial interference with Dave's enjoyment.

Alice's best response would be that none of the aforementioned interferences

⁸Some states allow for a "partial constructive eviction" which does not require the tenant to vacate. Dave may be able to show that, in a jurisdiction where it exists. Because we did not cover this doctrine in this class, you were not responsible for it.

were caused by or foreseeable to her. Alice has no reason to know of Charlie's property interest, given her lack of knowledge about Bob's secret conveyance. While Alice did know about Eve and so could have discerned her potential prescriptive easement, Alice could argue that someone merely picking daisies from a garden is not a substantial interference with Dave's use of the house for residential purposes. And the possibility of Eve's Instagram photo triggering massive crowds and an accidental flooding of the house is far from foreseeable—sure the axolotl is super-cute, but so are lots of other pets, and predicting what will go viral on the Internet is a fool's errand. As a result, Dave would have a substantial uphill battle to prove that Alice violated the covenant of quiet enjoyment based on the aforementioned facts.

Implied Warranty of Habitability. Dave may also contend that Alice has violated the implied warranty of habitability. In most states, a residential lessee shows such a violation where the lessee shows that the premises are not “safe, clean and fit for human habitation.” *Hilder v. St. Peter*. Dave would argue that being forced out of half of the house and having to walk through mud to get out the front door render the house unsafe and unclean at a minimum. Alice might respond that the top floor is fine for living, but that argument seems weak in view of the purpose of the implied warranty as a protection for tenants and Dave's expectation that he would have a fully usable house that he can enter and exit easily.

Assuming that Dave succeeds in showing a violation of the implied warranty of habitability, he has a variety of potential remedies, including withholding rent from Alice, terminating the lease, suing Alice for damages, and charging Alice for the costs of repairs.

Waste. Alice may respond that Dave is liable to Alice for waste. Although *Jackson v. Brownson* observes that waste is typically a factual question for a jury, for Alice to show waste she must at least prove voluntary waste involving affirmative acts, or permissive waste involving omissions, that permanently devalued the property. Dave would argue that his intentional acts or omissions did not cause the flooding; it was a third party axolotl viewer over whom he had no control. Alice might respond that Dave's failure to disperse the crowds led to the water line break, which ultimately caused the flooding. Again, given the respective bargaining strengths between landlords and tenants, it is likely that a court would be inclined to say that responsibilities for managing the property fall to Alice, not Dave, and would thus not hold Dave liable for waste.

Bailment and Related Actions

Alice may have a cause of action against Dave for failing to care for the axolotl properly and causing its loss. The law of bailments offers a property-based analytical framework here. For Alice to succeed, she must first show a bailment relationship and then show a breach of a duty running through that relationship.

Creation. Alice would argue that Dave is a bailee of Alice's axolotl. A bailment arises when a bailor delivers personal property to a bailee, on an express or implied contract with the expectation that the bailee will return the property to the bailor or otherwise dispose of the property according to the bailor's instructions. Here, the axolotl is Alice's personal property, which she delivered to Dave by virtue of handing Dave the keys to the habitat on an agreement that Dave would care for the axolotl in exchange for a rent reduction. Alice of course would have expected to get the axolotl back after her work trip.

Dave's argument that Alice never physically delivered the axolotl to his hands is unlikely to succeed. *See Hyatt Regency*. Furthermore, the fact that Alice only gave Dave six months' worth of axolotl food doesn't defeat her intended bailment creation; she presumably expected Dave to buy more food as needed.

Accordingly, a bailment relationship likely exists.

Duty. Assuming a bailment relationship between Alice and Dave, Dave as bailee owes Alice a duty of care over the axolotl. Jurisdictions differ on the exact standard of care, but a typical obligation is a negligence standard. Here, Dave might argue that he wasn't responsible for the axolotl going lost, since third party crowds caused the loss. Alice, in turn, might argue that Dave could have been more careful when walking about the basement, such that he wouldn't have tripped and broken the axolotl habitat glass.

On balance, given that Dave made a promise for substantial value and that we want to encourage bailees to diligently protect property, it seems that he would likely be held to a high standard of care and thus be liable to Alice, likely for the value of the axolotl.

Contract-based actions. Dave's duty of care might also arise from an explicit contract, possibly a term of the lease. In that case, the problem would be a matter of contract law beyond the scope of this exam and course. (The lease term is almost certainly not a covenant running with the land, since caring for someone's pet is a personal service that wouldn't touch and concern the land, and Alice likely did not intend or even anticipate that assignees of the lease would care for her axolotl.)

Even with such a contract, though, there's a good chance that Alice and Dave

did not consider all contingencies relating to the axolotl's care—Alice and Dave aren't necessarily detail-oriented lawyers. The law of bailments thus serves an important function of filling in implicit gaps about rights and duties with respect to personal property.