Institution **Harvard Law School**
Course **F14 Smith - Property 2**

Instructor **NA**

Exam Mode **OPEN LAPTOP**

Exam ID **715137**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1936**	**8726**	**10642**
Section 2	**955**	**4171**	**5114**
Section 3	**1255**	**5819**	**7060**
Total	**4146**	**18716**	**22816**

Answer-to-Question-_1_

Fealty Bylaw and CC&R

The inhabitants of the CIC, and MM more particularly, have a claim against the HOA for the creation of a bylaw that calls for sworn fealty to a cat god. Putting something as important as religion in the bylaws is likely prohibited as we saw that the right to rent (Kiekel) was considered the kind of thing too important to be overridden by a simple majority in a CIC. The bylaws set forward enforcement and procedures (because they are established by the majority) while the CC&R sets forth the basic property rights of the owners (in part becaue a 75% vote is required and protects the owners). Though swearing fealty to a cat god is not technically dealing with ownership rights, these bylaws will likely fail as overreaching because it comes in after the fact and was not part of the original agreement or terms when the condos were purchased/rented and because they deal with the rights of the owners and tenants all the same.

Even if this kind of thing was put into the CC&R is would still likely faith to be upheld by the courts because MM could likely show it that is arbitrary, the burdens on freedom of religion/worship is far greater than the benefits (which might only be that there is a similar religion, and that it violates fundamental public policy. The last one in particular is extremely strong. Religion is such an important thing that to force everyone who lives there to accept it seems not only absurd but offensive. (Courts don’t like that)

This new bylaw might also be struck down as a restraint in alienation as it now makes it virtually impossible to sell or rent the condo now that anyone who lives in it must swear

fealty to the cat gods and to attend these “religious” meetings. On this alone the bylaw might get struck down.

It could also be considered a nuisance because it reduces the value so much but this seems like a stretch of the law of nuisance.

Ownership of Condo

The important thing to remember here is that equity abhors a foreclosure. Initially we need to know if this is a lien or title jurisdiction. If it is title then the bank started with title and retains it when mortgage isn’t paid through foreclosure, if a lien they have only an interest in the property here. MM likely has a claim because of B2’s shady foreclosure practices. The bank has a responsibility to meet statutory requirements for the foreclosure and to meet a duty of good faith and due diligence. They published the ad for the sale in Cat Fancy which sounds nice and under the circumstances sounds reasonable but it is not clear that this was sufficient effort to get the word out about the sale. They then only paid $5,000 more for the condo then they were owed so this immediately raises some eyebrows as not being a fair price. If a court were to find that this was sufficient due diligence then the bank will retain the property. If they find it short on due diligence they would call for the bank to pay the difference between what was paid and the fair price.

This also doesn’t look like a situation where enough money was paid ($75,000 of $350,000) to warrant not allowing a foreclosure. If the interest had been more the court may have forced them to resolve this in some other way but here MM’s interest is minimal when compared to the whole.

Felix's Lease

First, MM surely has the right to rent her condo (Kiekel) the lease between MM and CC was a term of years lease (has to be in the numerus clausus of leases) as it had a set a specific date for termination. CC may have breached her lease as she kept a labradoodle (which I am assuming is a dog) but I will discuss that below. When CC transferred her lease (she could also have surrendered the lease but that would have opened up a whole can of worms, she was wise to find an assignee) to Felix she transferred the entire interest(though the title "rental agreement doesn't give us any hints as to the intent here), he would have the lease until the ending date. Therefore this is very likely an assignment though if we knew who he was paying rent to that would be helpful. Once assigned (and as there doesn't appear to be any novation or assumption) he is in privity of estate with MM and therefore must keep all of the covenants that run with the land, likely all of the CC&R covenants because they add benefit to the property, people come to live here for the cat-friendliness. He is in privity of contract with CC who is privity of contract with MM.

Felix might have a claim that gives him a defense to paying rent. He can surely claim of a breach of the IWH and can possibly make out a claim for Constructive Eviction (CE). IWH requires that a premises used for residential purposes be delivered w/o defect as this one was but it also must be maintained without defect that would make it unlivable. A leak in the roof over the electric stove likely makes is unlivable and just dangerous. As an assignee it is on MM to fix that problem. CE is a harder case because Felix didn't abandon the premises in a reasonable time. It is true that the leak likely breaches the

convenat of quiet enjoyment and the landlord hasn't fixed it (therefore intends the natural and probable consequences of her lack of action) but he also didn't tell MM (at least not in the fact pattern) so he might fail on intent as well. He should just run with IWH.

Felix may claim that he cannot be evicted by the bank after the foreclosure because his lease continues but he better agree to the increase in rent if he wants to stay because a term of year lease requires no notice for termination. The title v lien theory comes into play here against because it is unclear that the ownership has really changed. In either case it largely won't matter because rent and the conditions of the CC&R likely still run with the land as they were likely intended to and they touch and concern the land because of the added value they bring to the property.

HOA v Labradoodle

The HOA may have a claim against MM who may have a claim against CC for allowing the labradoodle on to the property (again assuming this creature is a dog) in breach of the CC&R. MM was required to keep the CC&R because the lease specifies it. CC, like in Nahrstedt, could claim that the CC&R is unreasonable because peanuts is "highly reputable" and would never chase cats or cause any other problems but as in Nahrstedt, the unreasonableness of the CC&R is not viewed as applied to a specific case but is nit arbitrary generally. Here, in a place full of cats, it doesn't seem to be the case. It doesn't seem that the cost substantially outweighs the benefit as there is certainly a market for an all cat condominium (so maybe there is a dog one too) and it doesn't violate public policy fundamentally, this isn't about race or sexual orientation, it is about dogs.

Nuisance

Felix likely has a nuisance claim against the owner of the yowling cat. The cat is causing a substantial and unreasonable interference with the private use and enjoyment of the condo and it is continuous. The owner could claim that it is not unreasonable in a CIC full of cats for them to yowl at night. It is a tough call because I don't know more about cat habits but if I were the judge I would likely enjoin this nuisance and have the owner work with this cat to fix it. Sleep is too important. The good news is that he automatically wins on the new law passed by the legislature, maybe wait to bring it.

Possible nuisance against Felix for Blogging but this will surely fail as it doesn't substantially prevent the enjoyment of property. The other option might be to argue disproportionate harm. The benefit he gains by blogging is not enough to counterbalance all of the damage he is doing. This will fail because 1st amendment rights are pretty important (I know not really property but disproportionate harm is now I thought I should mention it).

As a second argument the Felinoids could claim that there right of publicity is being breached and that his traffic on his blog is only because of how famous and well-known they are. This will fail as he isn't using their likeness or some distinctive feature, only bashing on them and rants get traffic all of the time, even if they aren't about famous people. Plus, what gain is he getting by traffic? It would be hard to justify an injunction without some proof of harm though they could argue that the statues are a harm caused by his vociferous and antagonistic blogging. This is likely where nuisance or some such thing comes in but as established above, it is hard to argue that digital communication

harms real property or the enjoyment thereof. Maybe if he was trolling the website or something we could have a conversation (intel).

HOA v B2

The HOA could have a claim against B2 for not paying the association fees, etc. after foreclosing on the house. This is especially true if they maintain Felix as a resident who can enjoy the use of the amenities paid for. IF they have a tenant a court would likely require them to pay as under a claim of unjust enrichment. They are getting the benefit of a tenant who might not be there or pay as much if not for these amenities at the HOA's cost.

Regulatory Takings

There are two possible takings here. The statue that kills the requirement of pet ownership could kill this market diminishing the value of the CIC considerably. It doesn't "wipeout" the value and it isn't a permanent invasion so it isn't a per se taking. The ad hoc test would show so decrease in the value, maybe a considerable decrease. It could be said that this interferes with reasonable investment backed decisions for the the HOA, the owners of the condos and especially the Felinoids. The have moved here in mass because, in large part, everyone in the community must have a pet cat. Also, there is no physical invasion of the property and it looks like it is just adjusting the benefits and burdens of those who live then and those who may want to live there. I think you also need to look at average reciprocity of advantage here, the benefit to those on the outside is quantifiable but the burden is exclusively born by those in the community who came here for that reason. The best argument the legislature may have is that they were worried about

restraint on alienation and housing markets, it isn't about taking but allowing for greater participation in the market. If the gov't loses they would have to pay just compensation (which is never actually just), namely the difference between the value of the land as it was pre-legislation and as it is now.

The second one is the statute declaring meowing after 11 to be nuisance. The as above, is going to d

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Answer-to-Question-_2_

Conversion, Accession, but not mistaken Improver

The owner of the canvases likely has a claim of conversion against AA. There was clearly an intent to abandon the furniture and appliances (they were broken and on the curb) but it is no so clear that the canvases were abandoned. They were pristine and not at the curb but in the yard. Now, that isn't a good place to leave anything, especially under the circumstances but it looks like a close case and a reasonable person could find that there was no intent to abandon.

Not a mistaken improver because he didn't

On the other hand AA has a defense under the doctrine of accession. AA transformed the canvases into paintings. Now, they still look like canvases and that counts against AA but they are substantially changed and therefore might be enough to move to the next inquiry. The value inquiry depends on when we make it. At their height, a court would surely rule that AA was not in bad faith (he certainly didn't seem to be, just overly optimistic) and the value increased so much that he should just pay for the canvases and be done with it. Yet, even at the low point of $1,000 this might be enough for AA to win. On the other hand, he has unclean hands and therefore might very well lose. If that is the case the TO would get the canvases back. AA could bring a restitution claim that that is already an

uphill battle without his fraudulent activity. He likely wouldn't win.

The bigger problem is, if the TO wins, CC was a GFPV. She couldn't have known that the canvases were taken and certainly paid value, in fact, too much. Therefore Nemo dat doesn't apply so CC would keep them (if she still as them at all as I will address below).

Breach of Fiduciary Duty (BFD)

CC could sue CallouS (SC) as she certainly breached her fiduciary duty of loyalty. He sold the corpus for way less than she thought it was worth and did not act in the best interest of the beneficiaries, CC and Cornell. SC could be removed from the her place as trustee and may have to pay damages (we will see).

It may not be possible to get "Everything" back from M because he was likely a GFPV. He paid 50k (certainly value) and it says that he was not art expert therefore he likely didn't have constructive notice of the value of the painting. He may have had inquiry notice because well, look at SC's name. Likely that would not be enough because there is little duty to inquire and he would get to keep the painting if he hadn't lost it. He at least had voidable title. Whether the person who got the painting in Ames City from gambling gets to keep it is an open question. By gambling she might be considered to have given value but is anything, especially paintings, won at a poker table not automatically something that demands further inquiry? So she may have been on notice in that way but custom probably says that possession is presumed ownership. We don't expect everyone at a craps table to ask for proof of ownership. This will likely be permitted and she gets to

keep the painting (though she won't be happy when she knows how much it is worth). Plus she may take under AP of chattels as it has been longer than 3 years but if it is hung in her house, it faith open and notorious.

The Rothko is likely a different matter when it comes to GFPV. CC's lawyer buying the Rothko is a problem on two fronts. It looks like she bought it at an extremely low price but also, as a lawyer and CC's lawyer in particular, she probably knew this was part of the corpus of the trust and should have called SC on this. She will have problems with the bar for this but that is not important on this test.

Cornell, could have a claim against SC for waste as the future interest holder. By selling the paintings they could argue affirmative waste, the value may have gone up. Once they find out the true value they may argue ameliorative waste because by changing the corpus from paintings to money SC may actually have increased the corpus' value because they actually had no value but it was such a significant change in the corpus that Cornell doesn't want that. This latter claim would likely faith but SC is still in big trouble.

SC will likely have to pay for the damages in the change in the Rothko price and if the Rothko case is any indication, she doesn't just have to pay 20 million but 50 million because of the increase in value, if they find sufficient bad faith.

Ponzi Scheme

It is unclear that all of the people affected by the Ponzi scheme and CC will be able to get there money back because GG's assets will likely be distributed between them (SEC v

Elliot). CC may be in a slightly different position than the victims in SEC because she wasn't in any sort of bad faith but that difference is probably not enough to change the outcome.

Cy Pres

If the money in the trust, after the diminution of value, is not sufficient to help Cornell in the way intended, Cy Pres could be used to change that use to one more suitable to the funds. It doesn't look like this will be a problem though because it just says that the remainder of the life interest is in Cornell, no use is specified.

Answer-to-Question-_3_

If the question should be read: when should private entitities be permitted to use eminent domanin (meaning, take property for their own use) my answer is *never* so I will assume that what is being asked is, when, if ever should private entities be permitted to use eminent domain(that is, effectuate a taking for public use)? I will answer the latter.

This seems like a sticky subject because private takings inject into the system individual or biased discretion if we are working from a model that everyone is reasonably self-interested. On the other hand, allowing some private eminent domain (ED) allows markets to dictate the best possible use of land. I will discuss the pros and cons, looking at both sides and then explain what I think would be the middle ground that would be both appropriate and efficient.

Pros of Private Takings for Public Use (including public interest)

As I mentioned above, there is some serious incentives to allow markets to come in an revitalize neighborhoods and effectuate the most efficient use of land and resources. In one way, we already do this with Planned Unit Developments and the trend is toward using them more. The local governments get together with a contractor and together they work out what would be best for the community. Obviously in the model proposed the government would not be involved here though it may be wise to use government

regulations or other standards to give private takings some legitimacy.

In addition to freeing up land for the most efficient use, there is also the benefit of freeing up capital and in some sense, saving owners stuck with rundown buildings or residences who want to get out of them. By giving them further capital to invest, we get three birds with one stone. Movement of financial capital, movement of human capital, and an increased/better use of real property.

Finally, there is the added benefit of reducing the cost to taxpayers and to possibly increasing what should be just compensation. A private party would be willing to pay more than market value if it meant getting the land together to use it more efficiently. They, unlike the government, would have the capital to do this. This would also prevent the government, with its sluggish bureaucracy from having to handle these issues. After New London, SCOTUS has essentially given the government wide-birth to act in the "interest of the public." This indicates that there could be more ED in the future and by allowing a private party to take charge of that we pass the benefits and burdens to the private party while still maintaining much of benefit to the public without the cost to the taxpayers.

Cons of Private Takings for Public Use (including public interest)

There are several potential problems with this change. Foremost, the groups most likely to get the short end of the stick here are those who already have so little power, the run down neighborhoods that are likely to get taken are, statistically, going to be populated by minorities and the indigent. They are the ones, as Justice Thomas said, who are most

likely to be displaced, have their neighborhoods replaced by buildings offering rents they can't afford and gain very little benefit form this plan. It could be argued that by doing this taxpayer dollars will be freed up to help the indigent but this would have to be something set forth before putting the plan in place. An open promise would do little to house or feed them.

Next, there is the question of overall legitimacy. Nothing looks so illegitimate as a government who allows a private party come in and take the homes and businesses of its citizens. ED rubs people the wrong way as it is, imagine a corporation stepping in to do the same thing. This might make those on the right feel a little better but would do nothing for those on the left. A system needs both sides to thrive and if the system isn't seen as legitimate it won't thrive.

Next, it probably wouldn't save money in reality. What government agencies would oversee this kind of action? Surely the costs by the agency to oversee this kind of difficult form of ED could likely overshadow the taxpayer money saved.

My View

In my view the system of ED is broken. Takings for public interest sounds like a great idea but the fact of the matter is that there are so many competing rights that to do what is in the interest of the community is surely going to trample the rights of some. I do think that to let the markets lose a little here might improve some things but as mentioned above it will obviously also cause problems.

My solution is some kind of mixture of the two. ED as it now stands does not give sufficient compensation to be "just" in my view. To analyze and consider property independent of subjective value is too look at an incomplete picture. Clearly, there is no way to calculate full value because subjective value varies so much but there is a way to improve it. When we look at reciprocity of advantage, it is hallow if all i am offered is fair market value for my home. Surely, that was much more valuable to me as it was than than this new use will make up for. This is where private companies come in. If a developer is willing to pay 120% of market value to the owner and if, for every residency premise destroyed 2 of at least equal value must be created (somewhere else, not include in the public interest of the current project - this is kind of like the cutting down a tree rule, you cut one down you must plant three) then this project must be very valuable.

More money would go to those who lose their property, it would still prevent holdouts because the price would be set but by giving them some windfall they would feel far less poorly used. It also shows respect for property right, valuing them above the simple market value shows that as a society we think that owning property is more than just assets and money but part of our basic rights.

Now, that doesn't mean that if one doesn't own property they have no use or value to society. We demonstrate that by requiring that lessees that are displaced will have a place at the residence required if ones are to be torn down. This could still lead to displacement but with proper regulations this would keep the displacement from being too great and it would prevent a housing shortage.

The argument could be made that this is extremely *in*efficient as it increase the cost of taking this land substantially. That is fine. It still opens up a market that wouldn't have existed before and if the market can't bare it then we are no worse off than we are now, no takings will happen. If they do happen though, rundown or inefficiently used areas would be revitalized and the vast majority of us would be better off. Obviously all of this would be regulated, as it must be if fairness is to be preserved but it would make society think twice about taking property if it isn't seriously necessary and extremely useful. The next step is to improve on the regulatory takings doctrine but that is question and a discussion for a different test.