Property II
Fall 2015 Final Exam – Top Answer

Question #1

1. The 14th amendment and Shelly v. Kraemer do not apply to this question therefore making a covenant to ban a race acceptable under the law at the time. This would be considered a real covenant in which one must have notice, the covenant must "touch and concern the land," there must be intent to bind successors and privity of estate is needed. Under common law for a burden to run one must have both horizontal and vertical privity where as for the benefit to run, one only needs vertical privity. The burden here is on lot 2 as the servient land and therefore we must look to see if both privitys are there. Abe owned the land at the time the covenant was mad and did not sell it to Bob till after. Under the common law, there has to be a separate land transaction other than just recording of the covenant to have horizontal privity. While it would look like Abe selling lot 2 to Bob would be horizontal privity, there was not a covenant attached at the time. Also because Abe and Bob are on the horizontal axes and there is nobody else involved there is no vertical privity. All of the Associations covenants also will not run based on the common law because there was not separate land transactions. Under common law, one was not required to look at surrounding properties for record notice and there were other African Americans living on the street that did not agree with the covenant therefore blocking inquiry notice. This covenant would touch and concern the land because at this time, having an all white community would increase the value of the property. Abe however did not have any intent to bind his successors.

2. For the same reasons as above, the covenant should not bind or run with lot 2. When looking alternatively at the argument that Bob should have been on notice based on inquiry notice Bob should also prevail. The court could and probably would find that while looking at the location of the property one might look around and see that all other properties were two or three stories tall. This would have the effect of putting Bob on notice had he been there. Back in 1920, it was very common for people to buy property based on someone's word without looking at it when planning on building as people moved west. This created lots of title issues and there was lots of fraud. However, even if Bob had been on notice, notice is only one of the elements and the Association fails to prove the other elements so Bob would prevail.

3. Bob will likely prevail. For an equitable servitude you do not need privity but you must have intent to bind successors, you must have notice, and the covenant must "touch and concern the land." Here the Association would argue that there was notice based on the records of the other property around as well as inquiry notice. Bob would shoot this down because it is only under modern law that we require the buyer to look at other property other than that which is being bought. Also, there were already 15 lots that did not agree to join that were not paying the fee making inquiry notice invalid. The covenant is concerned with the neighborhood which does or could be look at a touching and concerning the land because it effects the value, however Able had no intention of binding his successors to the covenant as he did not agree to it before selling the property. If there were only one person that did not agree it could go the other way but with so many opposed, the law will not force them into submission. Under equitable servitude you

can only seek an injunction and the Association would not be able to get the money back from lost payments if the court had ruled the other way.

4. The tower is on lot 2 Dominant and not 1 servient as the question asks and with that presumption, Dave should prevail. Able sold Bob Lot 2 with the covenant to cast a shadow which gives horizontal privity. Cam would be gaining the benefit on lot 2 so she would only need vertical privity. In modern jurisdictions the privity would continue down to the lessee however in common law a lesser estate does not run. Bob never recorded the deed with the covenant and covenants must be recorded. If Bob were to record the deed now then Cam would prevail. Cam however has the permission of Bob the owner and the one in privity so she can argue that she is building on Bob's land for him under his covenant. After all who would build a huge building with only a one-year lease and not reap the benefit of the building. If the court ruled for Dave they would have to balance the equities and either have an injunction or damages. In this case an injunction would probably be ordered. This could possibly be seen as an easement appurtenant to the land regarding the sunlight and airspace rather than a covenant. If it were an easement appurtenant, it would run with the land and the tower would be allowed.

5. Tim should prevail because Dave was on notice. Missouri is a notice state which encompasses actual notice, record notice and inquiry notice. Dave did a title search in March which showed that Tim recorded his deed earlier that year. While it is clear that there are problems with the title based on the search showing two owners, it is possible that Abe sold back to Oliver without recording a deed and Oliver sold to Tim as it is recorded. Whether or not this is true, Dave was on record notice that something was wrong with Abe's title making it unmarketable. Dave could now sue Abe on the GWD based on the covenant of seizen.

Question #1

1. Ted now owns Baltic through adverse possession. For adverse possession Ted must apply the 4 elements, 1) Entry, 2) Open and Notorious, 3) Continuous, and 4) Adverse under a claim of right. Ted moved onto what he thought was Mediterranean which was the actual entry onto Baltic. He was there publicly and acted as the true owner would have satisfying both element 2 and 3. Element 4 would be the only element up for question. Under common law, to be adverse under a claim of right Ted would have to be an aggressive trespasser with knowledge that it was not his land and intent to stay anyway. Here, Ted originally believed that he was on his own land which would put him in good faith. However, when Hillary showed him the corrected survey, it put Ted on notice that there was something wrong with his title and he then claimed he wasn't leaving regardless making him an aggressive trespasser. Ted would have had a claim under color of title because there was something wrong with his title but when he claimed the property under adverse possession, he forfeited his claim to ownership. Marco's claim is invalid because this is not a race jurisdiction where he was the only recorded claim. Even if the sale to Ted was invalid, Marco later sold both places to Hillary. In order to have a land sale like this the statute of frauds comes into play though I am not sure it was in place in the 20's. Assuming I am young and wrong, there are two exceptions to the SOF, 1) Part Performance and 2) Estoppel. Here there was at least part performance due to the full price being paid. This shows that Hillary did have legal title but because she waited till after the SOL ran for AP, Ted now owns Baltic and Hillary only owns Mediterranean.

2. The 5th amendment -"nor shall private property be taken for public use, without just compensation." There are two types of takings, 1) regulatory and 2) physical. Here the government or this Planning Commission did not make any new regulations. They also did not physically take because they have not put anything permanent on the land. So far they have merely suggested that Rand hire someone to build a bridge. They in no way have required it. Had this been part of a city plan and the commission could come in and put up a bridge and use eminent domain to serve the public and help with traffic. This action is premature due to the fact it is only a suggestion and not a taking yet. The facts hint that the Commission may be putting a condition on the hotel of building the bridge (exaction). In order for there to be this condition it has to be related to the hotel. It could be argued that it is related as the Commission said it would help people get to his hotel.

3. This would not be a taking based on Hadacheck where nuisance control does not make for a taking. Here the smell of the marijuana was a nuisance as it was blowing over to the jail on the property next door and causing harm to the jail as prisoners were trying to escape. The 50 foot screens were to be placed around all marijuana growers and not just this one in particular. It was a reasonable was of controlling the nuisance and was a proper and valid exercise of the police power. Under Hadacheck, because there is no taking, the government or the Commission does not have to pay just compensation to Bernie.

4. Bernie's rights were not violated when the pipes burst. If there was a taking it was only a temporary taking as shown in Loretto. Loretto explained that there must be a "permanent physical occupation" in order to have a taking. First we look at the land that was flooded. The water was a physical occupation but it was only temporary as it did not create a lake but rather

the water would soon seep back into the soil (probably helping his crop in upcoming year). The second possible taking is due to the damage to the land and crops however it is said that it was after harvest so no crops were taken and the soil moved a little on its own due to the natural flow of water but there was no taking from the event. Bernie's 5th amendment rights were not violated.

5. Although aesthetic regulation is permitted in Stoyanoff, the order cannot be strictly subjective in nature, making it vague and violation of the due process clause in Issaquah. This could also be an unconstitutional spot zoning since it is only focused on Donald. A moratorium is not a complete taking as Donald could use the place where the wall is for other purposes as shown in Lucas. However the call of the question asks about the Commissions authority which they do not have. The legislature may create Commissions and Boards to look into such circumstances but here the guidelines are too vague and give the Commission too much discussion which cannot legally be granted to them. This vagueness is shown where Donald asks for an explanation and the Commission cannot even give one. If the legislature had made more strict rules and explained what was allowed and what was not allowed and guided the Commission in their discussion making then it would have been fine. As it stands, Donald should not be stopped from building his brick wall. Donald did what he could to come into compliance with the Commission and he also provided a way for the public to access the beach which would have been held under the public trust doctrine.