

QUESTION 1

O Had

Freehold Estate

Free Simple Absolute Having both the current possessory interest and future interest.  
With all the rights and duties.

O Had

During the life of A a reversionary interest. Had B&C divorced during A's lifetime the remainder interest would have been divested. Leaving O with the reversion. Having the reversion O would have the right to protect his future interest. Injunction for waste etc.

O Has

The possibility of reverter minority view

The right of reentry majority view

O was the grantor

A Had a life estate was a grantee was the life tenant. Waste: Affirmative/Voluntary  
Permissive, Ameliorative.

B & C had during A's lifetime (closest to) vested remainder in fee simple subject to complete defeasance/divestment (but no shifting executory interest) The right to protect their future interest.

After A's death Fee simple determinable. "So long as" not set off by any commas.  
disfavored majority view now a fee simple subject to a condition subsequent.

Tenancy by Entirely time, title, interest, and possession - there must also be the fifth  
unity of marriage Broken by divorce Tenants in common.

Adverse possession

D Periodic Tenancy Non Freehold estate Privity of Estate Privity of Contract  
Implied warranties to put D into possession.

D steps into B's so has right to use all of the property.

C has a right an "accounting of profits"

QUESTION 2

Confidential Attorney/Client  
Memorandum

To: County Administrator  
From: Deputy County Counsel

RE: PLANNED EXPANSION OF OUR COUNTY'S REFUSE DISPOSE SITE

This Memo addresses, at first blush, potential legal issues associated with the planned expansion. It is not intended to be an in-depth analysis and is based on limited facts.

In order to promote the general welfare and public health/safety the disposal of refuse has been and continues to be a core function of government. The planned necessary expansion requires the acquisition of two parcels of land. The owners being unwilling to sell, an eminent domain action will be required. Throughout the course of this project attention should be given to ensure all reasonable steps are taken to minimize the negative impact this project will have on the adjoining property owners.

Eminent Domain

There are often questions surrounding the use of our police powers to take land from an unwilling seller. Clearly, the purpose of a public refuse disposal site is within the bounds of acceptability. The issue of the Constitutionality of such action is often raised. It is the 5<sup>th</sup> Amendment as applied to the states under the 14<sup>th</sup> that provides the framework for this taking. The parties will receive notice and have a meaningful opportunity to be heard. That's due process. The compensation provided to the owners will be determined by a jury. We will have our experts testify as to the "fair market value" the owners will have the same opportunity.

The current standard is fair market value but there is a strong minority view that the standard should be fair market value plus the added incentive necessary to win over an unwilling seller. Hopefully, this case will not be the one to see that minority opinion become the majority.

As for the homeless encampment, I am not commenting on the political issues, from a legal standpoint it could be beneficial. The presence of the encampment is certainly going to have a negative impact on the value of the property. These squatters may raise the issue that they own the property under adverse possession. It is unlikely they will be able to prove the elements: actual possession, done openly, hostile to the true owner, exclusively, and continuously and paying the taxes. But, the legal claims to the property if any are not an issue for the county. The focus should be on the fact that we are acquiring two parcels of land. It does not matter if there is but one owner or over a hundred. How the proceeds of the action are divided up is their problem. We simply do not have a horse in that race.

Page 2 of 2

Confidential Attorney/Client  
Memorandum  
PLANNED EXPANSION OF OUR COUNTY'S REFUSE DISPOSAL SITE

## Nuisance

Not all negative impact on adjoining property is actionable. Based on the facts that this is an expansion of an existing facility without a change to its nature and quality it is highly unlikely that this expansion will endanger the health of a considerable number of persons or offend public morals or interfere with the use and enjoyment of a considerable number of people which is the standard for a public nuisance. This is only an increased area/volume situation.

Individual property owners could bring a private nuisance or trespass action. The key question: do the site's activities unreasonably interfere with the use and enjoyment of the individual property owner. Generally the court looks at 1) location of the claimed nuisance 2) the character of the neighborhood 3) the nature of the thing complained of 4) the frequency of the intrusion 5) the effect upon the plaintiff's life, health and property.

There will obviously be mitigation efforts to minimize the noise, smell, traffic, dust, etc. But, these efforts will not insulate us from a claim. The fact that a permit will be obtained along with a license from the state will not provide a defense. Also, there was a case up in Oregon where the court disregarded with all of the government's experts and found a nuisance based on odor at a waste treatment plant. (Affirmed on appeal)

The general remedy for a nuisance is an order prohibiting the conduct - an injunction. There are however exceptions. Here, even if a nuisance is caused there is a balancing process the court will embark on. What is the public good what is the burden (Cost-Benefit Analysis.) The law recognizes that society needs refuse disposal sites. Therefore, injunctive relief should not be available to any plaintiff. The law does provide for substituted damages based on diminution in value to the burdened property. If a plaintiff's property is rendered near useless the owner could claim we have "taken" the property and we could be faced with an inverse condemnation action.

There are other issues in dealing with any disposal site i.e. ground water contamination, lateral support, etc. but time does not permit further discussion. If you have any questions my direct line is 867- 5309

Real Property  
Professor Larry Ornell  
Fall 2009 Semester Issue Outline