

Property
Spring 2019
Prof. Ford

Take-Home Final Exam

This take-home final exam is worth 75% of your course grade. You have eight hours to complete the exam (or twelve hours if you have been granted extra time). This exam consists of five questions, with points allocated as indicated. **Do not use more than 4000 words total for your responses. When finished, name your file “[exam number], Property, Ford.pdf.” Email your responses to registrar@law.unh.edu with the subject line “[exam number], Property, Ford.”**

You may consult any existing material you wish while completing this exam, though answers discussing cases, doctrine, or principles that were not assigned or discussed in this course will receive no credit. You must write your entire response, yourself, during the exam period; you may not paste any previously written material into your answers, whether written by you or anyone else. You may not discuss the exam with anyone until everyone has finished taking it. Type the following at the top of your exam (without copying and pasting!): *I affirm that I have not discussed this exam with other students or anyone else during its administration. I further affirm that I understand and have complied with the word and time limits governing this exam.*

The formatting instructions in this paragraph are very important, and you should follow them or expect to lose points. Type your responses. Format them similarly to this document: single-spaced, with 1.5-inch margins, numbered pages, and empty space between paragraphs. Use 12-point Book Antiqua, Cambria, Century, Constantia, or another high-quality serif font appropriate for body text. Do not use Times New Roman, which is a terrible font. Do not include your name or any identifying info. Instead, place only your assigned exam number on the top right of your responses. Include your total word count at the end of your exam.

As in legal practice, writing counts, so take time to outline your responses and leave some time for editing. Follow standard practices of good writing: use topic sentences; break up your text into paragraphs, each focused on a single idea; use short, complete, grammatically correct sentences.

If any questions are unclear or missing information, draw reasonable inferences from the available information and explain why you draw those inferences or, if no such information is available, state any assumptions you make and explain how your answer depends on those assumptions.

Good luck and have a wonderful summer!

Question 1 (40%)

After the events recounted in the midterm, Jessy Tang took your advice and decided to sue Matt Enloe for conversion, fraud, and breach of contract. During the discovery process, Tang discovered evidence that Enloe had been ripping off retirees for years. Tang tipped off federal prosecutors, who raided Enloe's offices and charged him with tax evasion, securities fraud, and several counts of mail and wire fraud. The feds eventually recovered about \$8 million in back taxes and penalties, of which Tang received one third as a reward. Tang decided to use the money to open an incubator for cryptocurrency and blockchain startups.¹ Tang called the incubator ICONic, for ICO Neo-Incubator Corp.² To find the perfect space for ICONic, Tang hired a real-estate agent, who identified two potential sites, sites A and B. Tang also asked you to advise on the property search. You do some research and learn the following:

- Site A is a five-bedroom house that is available for sale. The house is located in a neighborhood that is mostly residential, on a block with other houses, but it's around the corner from a major commercial street lined with stores and offices. There are no recorded covenants or servitudes on the property, but of the other 11 houses on the block, one has a deed that says "In view of the character of the neighborhood, Owner agrees and promises for the benefit of the neighbors never to use the property for any purpose other than residential housing."
- Site A is currently leased by a local college fraternity for overflow housing for 14 students, though the lease is up in three months. It will probably require significant work to make the house usable for ICONic. The seller / landlord says she has decided not to renew the lease due to noise complaints from neighbors. You're pretty sure the neighbors were also disturbed by the persistent smell of beer and marijuana, which was almost overwhelming when you drove by at noon on a Tuesday.
- Site A is zoned for residential and "professional commercial" use. Under the town's zoning ordinance, a "professional commercial" use is defined as a "law, medicine, engineering, architecture, consulting, or other professional office of a similar character that is reasonably expected not to disturb or disrupt a property's neighbors."

1. Cryptocurrencies and blockchains are the hot tech trend of the moment, for inexplicable reasons; you don't need to know anything about them for purposes of this exam. An incubator is a place where early-stage startups can work before they're big enough to need their own offices. Usually, it provides infrastructure like desks and internet access. Besides taking care of these needs, an incubator can help startups by putting them in close proximity to other startups, so they can make connections, bounce ideas off each other, and so forth.

2. An ICO is an initial coin offering, the crypto-world analog of a company's initial public offering (IPO).

- Site B is an office condominium unit in a ten-story building in the downtown commercial district. (Office condos are rarer than residential condos, but they work the same way: owners own individual units, which are subject to a reciprocal covenant that creates a management association with certain governance responsibilities and powers. Office condos are typically older buildings.) The other tenants in the building are mostly lawyers, financial advisors, therapists, and similar white-collar professional services; many have been there for decades.
- Site B's condo association collects periodic fees and special assessments and uses the money to maintain the common areas of the building, do periodic heavy maintenance (for instance, replace the roof every 20 years or so), pay certain utilities that aren't metered for each individual unit, and provide security guards posted during business hours at the building's front desk. The association has been in the news recently for its overzealous security guards, who have harassed passersby and even shot at one (missing, thankfully). The association has also been sued by three plaintiffs in their 20s who allege they were discriminated against and assaulted by the guards. The plaintiffs are demanding more than \$20 million, though the association has only minimal reserves.
- Site B's association hasn't taken steps to restrict how units are used, other than enforcing a rule (in the covenant from the beginning) prohibiting medical offices. Other rules include one stating that "no unit may be used in any way to disturb the user of another unit, including disturbances due to noise, smells, vibrations, or other annoyances," and one, for some reason, that prohibits snakes.

Tang is interested in both properties. They like the location of Site A and the flexibility it might offer. For instance, it would allow founders of incubator companies to live in the house or to just use it as an office. But they're also concerned that if the incubator is active late into the night, as is common with tech startups, neighbors might get annoyed or cause trouble. Tang likes many of the amenities that Site B provides as a matter of course, and the fact that it's basically in move-in condition, but is concerned that startups won't fit into the building environment and that founders won't want to work in a boring office building. And they haven't considered whether either site presents any significant legal problems.

Advise Tang on the potential legal issues that could arise with each parcel, including any options for responding to those issues and the likelihood that each issue would be a significant obstacle. Based on your analysis, should Tang prefer one site to the other?

Question 2 (15%)

Oregon Jones died in 2009, leaving Arugula Grove, his 900-acre farm in upstate New Vermont, “to my beloved wife, Amie Kaplan-Jones, for life, remainder to my children and their heirs.” At the time of his death, Oregon was 61 years old; Amie was 53; and the couple had three children, Bedminster Jones (32), Cybil Jones-Capulet (29), and Damian Jones (26). (Neither Oregon nor Amie ever had any other children.)

After Oregon died, Amie continued to operate the farm. But over time, the loss of her husband (the farming expert in the family) and the aftereffects of an ill-advised U.S. trade war with China (which slashed the prices that Arugula Grove was able to get for its crops) caused the farm to suffer financially. Amie coped for a few years by laying off some farm workers and absorbing losses. Eventually, though, she concluded that she couldn’t continue maintaining the farm, since she was losing too much money, and farming takes a lot of time that she could otherwise spend on pony care and traveling to visit her kids. Plus, none of the kids seemed likely to be future farmers: Bedminster is a heart surgeon in Seattle; Cybil is vice president at a hedge fund in New York; and Damian runs a nonprofit organization in Baltimore dedicated to fighting police violence. So Amie decided that the family should sell.

Amie asked around and learned that the farm was quite valuable. A nearby industrial-farming conglomerate heard that she was thinking of selling and immediately offered \$6.5 million for the farm. Amie is confident that if she solicited bids she could get more. But when Amie broached the subject with her kids, to her surprise, they mostly didn’t want to sell. Bedminster has invested in a startup working on a strain of arugula that reverses heart disease, and he’s convinced that the arugula market is going to explode soon. Cybil works 100-hour weeks at the hedge fund and would love a quiet place to spend weekends and vacations. And Damian was convinced that the farm was going to provide his retirement nest egg, since running a nonprofit isn’t very lucrative. He had no idea the farm had been having trouble, though, and now seems conflicted. Collectively, the kids could probably afford to buy out mom’s life estate, except that Bedminster just had to contribute \$2.5 million to his surgical practice group so it could settle a malpractice case brought against a partner of his, and Cybil just became a partner at her hedge fund and had to make a capital contribution of \$1.8 million. (Damian has no major savings.)

Amie would still like to sell, since the farm is losing money and the ponies are getting restless. She asks you what she should do. Advise her on her legal options, including which arguments she could make, any counterarguments, the likelihood that those arguments will succeed, and any practical difficulties.

Question 3 (15%)

When a cellphone is on and connected to a network, its location is tracked so the network can know which tower to use to communicate with the phone. Companies like Sprint and Verizon keep records of this location information for business purposes like billing and monitoring network congestion; they also sell it (aggregated and anonymized) for marketing purposes.

In *Carpenter v. United States*, decided in 2018, the Supreme Court considered whether the government can obtain historical location information for an individual phone without a search warrant. At oral argument, Justices Gorsuch and Alito engaged in a line of questioning with the government's lawyer (which I have shortened and edited for clarity), discussing whether there could be a property right in this information:

Justice Gorsuch: Let's say there is a property right, so that if someone were to steal my location information from T-Mobile I'd have a conversion claim, for example, against them for the economic value that was stolen. Wouldn't that, therefore, be a search of my paper or effect?

Mr. Dreeben: I suppose that if you are insisting that I acknowledge that it's a property right, some consequences are going to follow from that. I don't think you can make that assumption because it's not your paper or your effect.

Justice Gorsuch: Under my hypothetical, you have a property right in this information. Would it be a search? Yes or no.

Mr. Dreeben: I am not sure. And the reason that I am not sure is there has never been a property right recognized in information that's conveyed to a business of this character. It's a property right that resembles no property right that's existed.

Justice Alito: Yeah, Mr. Dreeben, along those lines, I was trying to think of an example of a situation in which a person would have a property right in information that the person doesn't ask a third-party to create, the person can't force the third-party to create it or to gather it. The person can't prevent the company from gathering it. The person can't force the company to destroy it. The person can't prevent the company from destroying it. And the customer doesn't even have a right to get the information.

Mr. Dreeben: Justice Alito, those are a lot of good reasons on why this should not be recognized as a property interest. I can't think of anything that would be characterized as a property interest with those traits. And it would be a watershed change in the law to treat transferred information as property.

Justice Gorsuch's hypothetical scenario would mean that a cellphone customer would have a property interest in location records concerning that customer's phone, even though those records are generated, used, and kept by the carrier instead of the customer.

Is this sort of location information something that—as a matter of property principles—the law should, or reasonably could, recognize as property, or is Justice Alito right that property is a poor fit for location information? In addressing that question, consider the different reasons that the law recognizes property rights and the ways in which location information is similar to, and different from, other forms of property we discussed this semester. Be sure to address arguments and examples pointing both for and against recognizing a property right in location information.

(Limit your discussion to property issues, not other legal issues like whether there was a search.)

Question 4 (15%)

“Nuisance law does a bad job of regulating relations between neighbors because it is impossible to know in advance if a court will hold that a particular use is a nuisance. Zoning does a better job of providing *ex ante* predictability. But zoning has its own problems, since it works by designating land in broad zones instead of looking at the context of a particular lot. A better approach would be to require landowners to get a permit before using land for a specific purpose. This would combine the benefits of zoning's *ex ante* predictability with nuisance law's site-specific contextualism.”

Assess this statement. Specifically, do two things: (a) Explain the statement. What is its argument? Give one example from a case or rule that we discussed that illustrates or supports the argument and one that goes the other way. Explain how they do so. (b) Evaluate the statement. Are there factual, doctrinal, or normative arguments that support it? Counterarguments? In view of these arguments, is the statement persuasive? Explain.

Question 5 (15%)

O conveys Blueacre, *inter vivos*, “to A and her heirs, but if it is ever not used for residential purposes, then to B and her heirs.”

- (a) Ignoring the rule against perpetuities, what is the state of title in Blueacre after this conveyance? List any contingencies.
- (b) Is the conveyance valid under the common-law rule against perpetuities? Explain.
- (c) Does it change the answer to part (b) if the conveyance instead reads “to A and her heirs, but if A ever uses it for nonresidential purposes, then to B and her heirs”? Explain.