

**PROPERTY II MINI-HYPOTHETICAL QUESTION & ANSWER, FINAL
REVIEW**

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Here please find a simple essay question and, starting the next page, a sample answer. To best practice for the exam, try writing your answer first, before looking at the model.

Mini-Hypothetical Essay Question

Miller owned in fee simple absolute a flour mill, and the large parcel of land on which it sat, just outside the limits of City. The parcel was large enough to ensure that no neighboring property would experience dust from the mill's operation. With an aim to earn greater returns from his assets, Miller subdivided the property, creating a lot suitable for residential development. To ensure that his new neighbor would not interfere with the mill's operation, Miller inserted in the lot's deed a provision stating that, "Miller reserves the right to continue operating his flour mill, regardless of dust it might cast on" the newly created lot.

Miller sold the new lot to House using the aforementioned deed. House did not record the deed. House built a residence on the property and moved in. She discovered, however, that dust from the mill irritated her nose, causing her to sneeze uncontrollably.

House considered bringing suit against Miller but, before she could do so, City annexed her land and Miller's, placing both under a zoning regulation that forbade all but residential uses. City simultaneously condemned House's property for use as a public park, paid her just compensation, and recorded title to it in fee simple absolute.

City now demands that Miller shut down his mill. The jurisdiction has enacted a race-notice recording statute. Discuss Miller's rights and remedies against City under the law of property.

Sample Essay Answer

Answering this question may take you through some seemingly paradoxical twists, but if you break it down step-by-step you should find it easy to hit the main issues. It makes most sense to start with the question of Miller's property rights, since he will have no claim if he owns nothing at all. From there, you should turn to the questions of what wrongs (if any) City has inflicted on Miller's rights. There are two major interrelated issues on that front: Did City take Miller's easement? Did City take Miller's land? We address each in order.

I. What does Miller Own?

The facts tell us that Miller owned the flour mill and the property on which it sat in fee simple absolute, so we don't need to spend any time pondering that question. But did Miller also have an easement to emit dust onto the servient estate?

It is certainly possible for a grantor to reserve an easement upon conveyance of title in a property, allowing the grantor's whole interest to pass and revesting a newly created interest—here, an easement—in the grantor. See the discussion in *Willard v. First Church of Christ, Science*, p. 769 of the casebook; see also note 2, p. 773. And this does look to be an easement—specifically, an easement appurtenant (i.e., tied to an estate rather than a person), allowing the owner of the dominant estate (the mill parcel) the right to make use (by subjecting it to dust) of a designated servient estate (the residential parcel purchased by House). See pp. 767-68 for some of the relevant basic principles of easements.

It thus seems very likely that Miller has a fee simple interest in his land and an easement to use the lot House owned and that City condemned. Did City transgress those rights? Let's start with the question of City's impact on Miller's easement, because our answer to that will have an impact on the question of whether Miller suffered a regulatory taking of his fee simple absolute. Why so? Read on.

II. What is the Relation Between Miller's Easement and Miller's Claim to a Regulatory Taking of his Fee Simple Estate?

As we will see below, Miller's claim that the newly imposed zoning regulations constitute a taking of his fee simple estate depends in part on whether the mill's operation constituted a nuisance. That, in turn, depends on the validity of his easement. We must thus ask whether Miller has better claim to an easement over the property that City condemned than the City does to owning that same property in fee simple absolute. If Miller prevails over City on that count, than City owns compensation not just to House (for taking the fee simple) but also to Miller. For what would City own Miller? If it condemns Miller's easement, forbidding further ejection of dust onto the land formerly owned by House, City must at least compensate Miller for the loss of that valuable estate. City would arguably also then owe Miller for the loss, via regulatory zoning, of the value of using his mill, given that only destruction of the easement makes the mill a nuisance subject to a ban under City's police power. If the mill is not a nuisance, City might (or might not) face a regulatory taking claim, and would have to either forego imposing the zoning limits on Miller or compensate him for the loss of the mill's use. The following sections explain.

III. Miller's Easement

A. As Regards the Easement, Between Miller and City, Who Prevails?

We know we are in a race-notice jurisdiction, meaning that the first *bona fide* (i.e., notice-free) purchaser for value who records prevails over other claimants to the property interest in question. City was first to record the easement (Miller should not have relied on House, but instead should have recorded the easement himself). But was City on notice of Miller's interest? Consider that, in the process of condemning House's property, City must have demanded and inspected the deed. That would have put City on actual notice of the easement. We cannot be absolutely sure, but it looks very likely that City had notice, and thus cannot benefit from the recording statute.

B. What if Miller's Claim to the Easement Prevails Over City's?

In the absence of the recording statute's effect, the common law rule obtains: The first party to obtain an interest prevails over later parties. Miller had an easement over House's property before City condemned the property, so Miller prevails in the fight to establish the easement. City must either respect the easement, allowing the dust to fall on its new park, or (more likely) condemn the easement and pay Miller just compensation.

C. What if City's Claim to the Easement Prevails Over Miller's?

This would be the worse case scenario for Miller. He would not be owed anything for the taking of his (putative) easement, because City would have better title to it. Also, and perhaps more significantly, losing the easement would subject Miller to a nuisance claim by City, which would have the right to complain about dust from Miller's flour mill destroying City's use and enjoyment of its new park. Miller would lose both his easement and the use of his flour mill. Recall, though, that this scenario comes about only if you conclude that City had no notice of Miller's interest in the easement—not a very likely outcome.

D. What if City Condemns Miller's Easement?

As mentioned above, it is most likely that Miller's claim to the easement—even if only to establish that he deserves compensation for its taking—prevails over City's. For reasons detailed below, if Miller retains an easement over the land formerly owned by House and since condemned by City for a park, City will probably not be able to claim that the flour mill is a nuisance. In that event, Miller could argue that City cannot simply regulate his flour out of existence. In other words, Miller's easement would force City to either forego enforcing the zoning rule against him or, if it insists on shutting down the mill, to bring condemnation proceedings against him and prepare to pay him just compensation for enjoining the mill's operation. See below for more on that count.

It is most likely that City will condemn Miller's easement, either as a matter of course, because the easement is inconsistent with the new use (see p.9. 841-42), or later, after realizing that the dust poses a problem for the park and the easement protects Miller from suit. In either case, if City condemns the easement, it will have to pay Miller the sum required by the usual rule: fair market value of the easement at the time of the taking (something that the aforementioned portion of your text could have made more clear).

How much is the Miller's easement worth? He can argue that the easement, because it alone prevents his mill from becoming a nuisance, is as valuable as operation of the mill itself. He faces a telling counterargument, though, that here as generally "just compensation" means *fair market value* at the time of the taking. Could Miller counter that FMV here would include his winning bid? He could try, to be sure, but that does sort of argument does not ordinarily prevail. Those subject to condemnation generally do not get recompense for idiosyncratic values. At the same time, one might hope that a court would see the injustice of effectively taking Miller's mill but paying him only a negligible amount for the loss of the easement. Query whether that salient injustice would give rise to a 14th Amendment Due Process claim. Probably not.

IV. Miller's Fee Simple Absolute and Mill

A. Did Miller Suffer a Regulatory Taking?

City's newly imposed zoning regulations almost certainly decrease the value of Miller's property by banning all industrial uses on it. The property remains valuable for residential purposes, however, meaning that the *Lucas* test for a regulatory taking—that the regulation destroy all (or almost all) economic value—is not satisfied.

Lucas having failed to kick in, we would ordinarily look to *Penn Central* to determine whether there was a taking. Here, though, we first ought to consider whether the *Hadacheck* rule applies. If, after all, City was merely preventing a nuisance-like use of the property, there can be no claim for a regulatory taking—not even under *Lucas*, much less under *Penn Central*.

B. Did the Flour Mill Create a Nuisance?

We here encounter an interesting problem: It is arguably City's fault if the flour mill constitutes a nuisance. More than just an interesting problem, that may have an impact on City's ability to cite the supposed nuisance as justification for refusing to pay just compensation. To see why, let's walk through the three-element test for a nuisance.

1. First, a nuisance requires an act by one property owner that interferes with the use and enjoyment of another owner's property. Prior to Miller's subdivision of his property, dust from the flour mill could not have been a nuisance because no neighboring property was affected by it.

Did a nuisance exist *after* the subdivision? We then had two owners, so the first element is at least in play. We have two tests, a majority and minority one, to determine whether that element is satisfied.

Most courts look for an unreasonable use—i.e., a substantial and uncustomary one. Here, the dust might be a substantial interference with the use by House of the property as a residence, or the use by City of the property as a park, but it hardly looks like an uncustomary one, given that the flour mill predated those incompatible uses. It is arguably not likely that a nuisance existed even after Miller subdivided the property, therefore. We should recognize, however, that cases such as *Euclid* and *Hadacheck* appear to allow government authorities broader leeway to proclaim public nuisance-like uses than a court might allow to a private party. We should thus carry on with the analysis.

Consider in the alternative the minority approach, embraced by R. (2d) Torts, which would have a court apply a multi-factor balancing test. See also R. (2d) Torts § 826(b), which says an intentional nuisance obtains if (1) the harms of the suspect use outweighs its benefits (possibly true here) or (2) the harm is serious and the costs of paying it would not make the offending enterprise close down (also possibly true, here). Under any of these minority

approaches, then, it looks possible that the flour mill constituted a nuisance after the subdivision.

2. Second, supposing the first element of a nuisance claim is established, we consider the question of whether the plaintiff—be it House or the successor in interest, City—was first in time. Neither House nor City was first in time; Miller was operating the flour mill earlier than both. That works in Miller's favor, but is not a perfect defense to a nuisance claim. See, e.g., *Spur Industries*.

3. Third, moving to the last element of a nuisance, we ask whether House or the members of the public using City's park would have to be ultra-sensitive to find the dust annoying. There is no evidence that House as ultra-sensitive, and it is next to impossible that every member of the public would be, so this element looks unlikely to get in the way of a nuisance claim.

In conclusion, all we can say with confidence is that City might or might not prevail in a nuisance claim against Miller—if, that is, he lacks the easement. The next heading explains why.

C. Would Miller's Easement Bar the Nuisance Claim?

You might be tempted from the above to stop at the conclusion that the flour mill became a nuisance after Miller subdivided his property, first afflicting House and then City. Note, however, that it was not a nuisance when House owned the property because House was bound by an easement that allowed the supposedly objectionable use. Essentially, House waived via the deed any right to sue Miller for the nuisance. That, in truth, is Miller's easement: An exemption from nuisance. See, relatedly, *Bormann v. Board of Supervisors in and for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), the case I discussed in class holding that "right to farm" legislation effectuated a takings by abolishing the right to sue in nuisance.

Interestingly, the same defense that Miller would have enjoyed against House might also work in his challenge to City. Why? Because unless and until City takes Miller's easement he will have the right to subject the servient estate—formerly House's residence but now City's park—to dust. Whether or not Miller has such an easement depends

on whether the easement survived City's condemnation of House's land. We will saw above that it is most likely that City took the easement automatically (as a use inconsistent with the park) or that it would do so soon thereafter (upon discovering the incompatibility of the use. In that event, City could arguably treat the flour mill as a nuisance and regulate it out of existence without paying a penny. Query, though, whether that legal slight-of-hand would satisfy the 14th Amendment's requirements of due process and equal protection of the law. There is thus at least a triable argument that City cannot simply regulate the flour mill out of existence—not, that is, without paying Miller just compensation.

D. What if City Cannot Treat the Flour Mill as a Nuisance?

Suppose that City does not take the easement. Perhaps, after all, City reasons that it would have to pay something for the easement and that it can avoid that expense by simply regulating the flour mill out of existence. In that case, Miller would have a good argument that, if the flour mill is not a nuisance, or even, under the same reasoning, *nuisance-like*, then City does not have an unmitigated power to regulate it out of existence. Consider the case of *PA Northwestern Distributors, Inc. v. Zoning Hearing Board*, where the court held, "A lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain. . . ." P. 948. If City cannot establish that the flour mill is a nuisance, or at least *nuisance-like*, City will have to either forego zoning the flour mill out of existence or deal with Miller's claim that City owes him compensation shutting the mill down.

Alternatively, under the amortization policies valid in some jurisdictions, City may be able to shut the mill down without paying compensation by giving Miller a reasonable period to wrap up his affairs. Courts have upheld periods ranging from 1-30 years. See p. 952 of the casebook for discussion.

E. Does Miller Have a Takings Claim Against City?

Suppose that Miller retained the easement, that the mill was not a nuisance thanks to the easement Miller retained, that City cannot *make* the mill a nuisance by condemning only the easement and paying for it a nominal fee, and that City cannot regulate the mill out of existence either immediately or after amortization. In that event, Miller could claim that City took his private property (the right to use his mill) for public use (to keep the park clean) without just compensation (on the assumption that paying fair market value for the easement alone does not suffice). Miller would then have the genesis of a good takings claim. Here's the problem, though: Because he cannot use *Lucas* (not having suffered the practical obliteration of all economic value of his property), he has to fall back on *Penn Central's* multi-factor balancing test. Here are some elements mentioned in the Court's opinion, on p. 1120 of the casebook:

1. The economic impact on the claimant—especially with the claimant's "distinct investment-backed expectations" (this works in favor of Miller);
2. The character of the taking—whether it is a physical invasion or a public program "adjusting the benefits and burdens of economic life to promote the common good" (this works against Miller); and
3. Whether the taking effectuates average reciprocity of advantage (might work in favor of Miller, as the facts speak only of him suffering the effects of the new zoning regulations, but City might argue that the ban makes his property more valuable for residential uses.)

Here as generally, *Penn Central* gives equivocal results.

We should recognize, however, that governments have remarkably broad powers to restrict property uses by way of zoning. Procedurally speaking, Miller would probably bear the burden of proving that City has exceeded the bounds of its police power under the rational basis test. That is very hard to do, since Miller would have to show that City acted arbitrarily or capriciously. A court thus might well uphold City's ban on the flour mill without careful consideration of whether, in this particular case, it was a nuisance. For many courts, for better or worse, it would

suffice that flour mills, like other non-residential uses, often constitute public nuisances.

In conclusion: It likely that Miller will at most get only nominal compensation for the taking of his easement. The City might even get away with paying him nothing because that it has sufficient police power to zone his nuisance-like mill out of existence. That would render Miller easement moot, so City could simply let him keep it. Having lost the right to run his flour mill under the new zoning regulations, Miller would pose little risk of dumping dust on City's park. Miller would end up with a useless easement, a large City lot zoned for only residential uses, and no compensation for his losses.