

Part II: Short answer questions. (Estimated time 10 minutes each, 50 minutes total).

Answer each question on only one bluebook page (or the approximate equivalent on your computer). (Don't bother repeating the question in your bluebook; just write your answer.)

1. Discuss, and either agree or disagree, with the following statement: "It is reasonable for a city's zoning ordinance to allow a longer amortization period for nonconforming structures than for nonconforming uses of conforming structures."

2. In *Penn Central*, the Court stated that one factor to be considered in deciding whether a regulatory taking had occurred was the existence of an "investment-backed expectation" (sometimes termed a "RIBE"). In your opinion, is this doctrine consistent with the holding, in *Palazzolo*, that one who acquires land with full knowledge of a highly restrictive regulation can still bring a claim based on regulatory taking? Discuss.

3. A city government proposes to use its power of eminent domain to acquire one square block of old, run-down houses and to sell the land thus acquired to a developer who will construct a "fitness complex." The facility to be built will be privately owned and operated for profit; it will include a swimming pool, weight rooms, and a running track. The city has no similar facility, public or private, at present. Is the city's use of the eminent domain power for this purpose legal? Discuss.

4. *Loretto* holds that a permanent physical invasion of private land by the government is a "taking" for which compensation must be paid. The Court's opinion in *Nollan*, on the other hand, suggests that the coastal commission might have required the Nollans to install a "pull-out" viewpoint for passing motorists on their land without paying them compensation. Can these two positions be reconciled? Discuss.

5. *First English* holds that an owner whose land is subjected to a regulatory taking may recover compensation (for a "temporary taking") even though the government, after litigation, withdraws the regulation. Can this holding be reconciled with the Court's position, in *Tahoe-Sierra*, that a moratorium on building, even one lasting several years, does not give rise to a compensable taking? Discuss.

Essay Question (60 minutes estimated time)

Don Developer was interested in building a hotel and conference center in the City of Columbia, State of Anxiety. Don was experienced with such projects, and he located a 12-acre parcel of land that was zoned commercial. After acquiring an option to buy the property, he applied for a conditional use permit from the City, since its ordinance required such a permit for hotel uses in commercial zoning districts.

A hearing on the conditional use permit application was held by the Planning and Zoning Commission, which had authority to issue such permits. On September 1, 2004, the Commission granted approval of the permit, attaching a series of conditions relating to number of parking spaces, signage, and the like. These conditions were all acceptable to Don. However, there was one additional condition: that Don return to the Commission within 3 months for its final approval of his parking lot configuration. The Commission's findings of fact and conclusions of law stated that the project was otherwise eligible for the permit he sought, but that the Commission wished to be sure the parking lot circulation was compatible with surrounding street traffic, and for that reason reserved the right to review the final parking lot design.

After the Commission meeting on September 1, Don exercised his option and purchased the site for \$1.2 million. He also asked his architects to prepare drawings that showed the site and the parking lot in a configuration that he believed would satisfy the Commission.

Don was expecting to obtain a hotel franchise agreement with Sheerton Hotels, an international chain with which he had franchised all of his other hotel projects. However, Sheerton filed Chapter 11 Bankruptcy on October 1, 2004, and announced that it would not be entering into any new franchise agreements. Don now became extremely worried about the potential success of his project, since he feared that without the name recognition of a large hotel chain it might be a financial failure.

On November 1, Don was approached by Pat Atkinson, the Pastor of the Church of What's Happening Now, a "new age" religious movement. Atkinson had heard about the hotel project, and offered to buy the project from Don when it was completed for \$8.5 million, with closing on August 1, 2005. Atkinson intended to use the buildings for a "retreat center" for his church members. Don

entered into an agreement to sell the project to Atkinson's church upon completion

When neighboring residents, most of whom were conservative Christians, learned of Atkinson's proposed acquisition of the project, they became virulently opposed. They began lobbying the City Council to stop the project in any way possible. As a result, on November 20, the City Council adopted a resolution directed to the the Planning and Zoning Commission, instructing the Commission not to give final approval to Don's project. This action was highly unusual, since conditional use permits, were, by ordinance, issuable only by the Commission and not subject to review by the City Council.

Nonetheless, when Don returned to the Planning and Zoning Commission on December 1, bringing with him the parking lot plans, the Commission (without reviewing the parking lot plan) adopted a resolution revoking the conditional use permit. It gave no reason and adopted no findings of fact or conclusions of law. After the meeting, two members of the Commission told Don informally, "We don't care what your parking lot looks like. There is no way we are going to let that bunch of religious nuts into our town."

Don has now consulted you, asking you about the advisability of bringing suit against the City and the individual members of the City Council and the Planning and Zoning Commission. Please advise him on the following issues:

1. Does Don have a vested right to proceed with his project?
2. Does Don have a plausible procedural Due Process claim against the City?
3. Does Don have a plausible substantive Due Process claim against the City?
4. Does Don have a plausible Fifth/Fourteenth Amendment "takings" claim against the City?
5. Does Don have a plausible claim in Federal Court under 42 U.S.C. §1983 against:
 - a. the city?

- b. the individual City Council members who voted against his project?
- c. the individual Planning and Zoning Commission members who voted against his project?

6. Is Don's claim ripe for adjudication in Federal Court under 42 U.S.C. §1983? If not, what else does he need to do?