Real Property
Prof. Belle
Final Examination – Spring 2018
Answer Outlines -- Essay Qs

Q1 (HOA)

➔ *based on "notes on covenant rules and amendments" (pp. 1040-1044) and 03/08/18 in-class exercise*

• (a) through (c):
A substantial amount of case law holds that covenant changes must affect all parcels uniformly. Sometimes a court will so conclude, based on the notion that any nonuniform covenant will destroy a "common plan" – even though covenants, in general, may be enforced without a common plan. Often courts will conclude that a covenant amendment imposing unequal duties, or providing unequal benefits, is unfair and undesirable. Sometimes, a nonuniform covenant will be enforced so long as it is approved by members whose interest would be adversely affected; this is probably the most likely way a court would be inclined to enforce these proposals. (*ref.* "Uniformity," p.1042)

• (d):
There is nothing in the facts to indicate this is a "55+" or other "senior" development. The proposal is a clear violation of the Fair Housing Act, 42 USC §3602(k), which prohibits discrimination based on "familial status." (*ref.* p.405) No court would enforce it.

• (e):
Prohibitions on renting are common, and controversial. Many homeowners claim that renters don't maintain the property well, they are messy and noisy, they ignore HOA rules especially in re. use of common areas, etc. But homeowners who are currently landlords typically state that they (the owners) have an "inherent" right to rent their property, and that imposing a new prohibition on renting would be unfair, inconvenient, and would curtail their income and investment. Most likely, this proposal would be enforced if modified to grandfather in existing rentals – but consideration must be given also to practical problems, such as a rental where the tenant later moves out, or a rental that the owner later sells.

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Q2 (RLUIPA)

➔ *based on Cong. Kol Ami (p.1195ff), N.3 (p.1208), and 03/29/18 in-class exercise*

Part I

RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person … unless the government demonstrates that imposition of the burden … (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that … interest.

Land use regulations burdening free exercise of religion can be challenged under RLUIPA. Cases can involve zoning, fire codes, building codes, noise ordinances, etc. Plaintiff may assert that the land is so restricted that plaintiff may not freely conduct "religious" activities on it, either by directly preventing the activity or by imposing intolerable financial burdens. Since the law requires that the regulation further a compelling governmental interest, the "strict scrutiny" standard of review applies.

RLUIPA defines "religious exercise" broadly, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Further, "the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." The law does not define "substantial burden," so the courts are split in re. interpretations.

Parts II and III

Any proposed ordinance or any amendment to the General Plan must comply with the "religious exercise" and "substantial burden" provisions of RLUIPA. According to Weinstein (*ref.* N.3, p.1208), RLUIPA is "a proper accommodation of religious exercise in the land use context"; but we do not know "to what extent…local governments 'cave[] in' to unreasonable demands and sacrifice legitimate land use goals when threatened with a RLUIPA claim." According to Laycock and Goodrich (*ref.* N.3, p.1208) – who are squarely in the "pro-religion" camp on these issues – RLUIPA does not "give[] churches a free pass on zoning"; in fact, not only is RLUIPA "necessary, modest, and under-enforced," but a number of courts have adopted a "too restrictive" standard for determining "substantial burden," and can "undermine…or effectively repeal" this provision by "focus[ing] only on the legislative deference to Supreme Court precedent."