*Chapter 24*

# Real Property

# and Environmental Law

Answers to Learning Objectives/

Learning Objectives Check Questions

at the Beginning and the End of the Chapter

**Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***What is a fixture, and how does it relate to real property rights?*** A fixture is a thing associated with realty (attached into or; permanently situated on the property by means of cement, plaster, bolts, nails, roots, or screws; at­tached to another fixture; or simply intended by the owner to be a fixture). Fixtures are included in the sale of land unless the contract provides otherwise.

**2A.** ***What is the difference between a joint tenancy and a tenancy at common?*** A *tenancy in common* is a form of co-ownership in which each of two or more persons owns an undivided interest in the whole property. On the death of a tenant in common, that ten­ant’s interest passes to his or her heirs. In a *joint tenancy*,each of two or more persons owns an undivided interest in the property, and a deceased joint ten­ant’s interest passes to the surviving joint tenant or tenants. This right distin­guishes the joint tenancy from the tenancy in common.

**3A.** ***What are the requirements for acquiring property by adverse possession?*** The adverse possessor’s possession must be (1) actual and exclusive; (2) open, visible, and notorious, not secret or clandestine; (3) continuous and peaceable for the statutory period of time; and (4) hostile and adverse.

**4A.** ***What is contained in an environmental impact statement, and who must file one?*** An environmental impact statement (EIS) analyzes the following:

**1.** The impact on the envi­ronment that an action will have.

**2.** Any adverse effects on the environment and alternative actions that might be taken.

**3.** Irreversible effects the ac­tion might generate.

An environmental impact statement (EIS) must be prepared for every major federal action that significantly affects the quality of the environment. An action is “major” if it involves a substantial commitment of resources (monetary or otherwise). An ac­tion is “federal” if a federal agency has the power to control it.

**5A.** ***What are three main goals of the Clean Water Act?*** The three main goals of the Clean Water Act are (1) to make waters safe for swimming, (2) to protect fish and wildlife, and (3) to eliminate the discharge of pollutants into the water.

## Answers to Critical Thinking Questions

**in the Cases**

**Case 24.1—Critical Thinking—Economic Consideration**

***Why would the owner of a life estate refuse to pay the taxes and insurance premiums on the property of the estate? Should this reason have influenced the court’s decision in this case?*** The owner of a life estate would most likely refuse to pay the taxes and insurance premiums on the property of the estate due to a lack of funds to make those payments. This may be a result of any number of economic constraints—sudden unforeseen obligations, poor returns on investment, a job loss or medical issue, or a lack of foresight in planning to meet one’s financial goals, for example. This circumstance seems most likely because a simple refusal to pay based on something less would represent an unnecessary risk to the existence of the life estate.

Whatever the reason, however, it does not seem that it should have influenced the court’s decision in this case. The proper focus is on the balance of the equities between the parties to the case—who paid or did not pay, and the effect of these payments and the ongoing situation on those parties.

# Case 24.2—Critical Thinking—Ethical Consideration

***Assuming that Ackley’s behavior was unethical, was it because she failed to tell Stambovsky something about the house that he did not know, or was it unethical because of the nature of the information that she omitted? What if Ackley had failed to mention that the roof leaked or that the well was dry—conditions that a buyer would normally investigate? Explain your answer.*** Yes. Using a values-based ethical approach, it would be wrong for Ackley to withhold information that she knew—or should have known—would potentially impact Stambovsky’s decision to purchase the house. Ethically, a party should disclose all material facts to the other party in negotiating contracts. [This answer could go either way depending on the ethical models and theories discussed in class.].

**Case 24.3—What If the Facts Were Different?**

***Suppose that O’Malley had been licensed to remove the asbestos. Would the result have been different? Why or why not?*** No, if O’Malley had been licensed to remove asbestos, it is not likely that the result in this case would have been substantially different. O’Malley was hired to remove and dispose of the asbestos insulating the pipes in Pinski’s building. Regardless of whether the removal and transport of the asbestos was done properly—the facts in the case indicate that it was not—the disposal of the material in an abandoned farmhouse, a dumpster, and a vacant lot, was clearly in violation of the Clean Air Act. O’Malley was convicted of removing, transporting, and dumping asbestos in violation of the Clean Air Act. Had he been licensed to remove the asbestos, his acts would most likely have been held to be in violation of the terms of the license. In any circumstance, his conviction for dumping the hazardous waste would likely have stood.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

**1A.** ***Requirement***

To establish a common law cause of action for nuisance, each plaintiff would have to identify a distinct harm caused by the pollution that was separate from that affecting the general public. In other words, they would need to show how each of them was individually harmed by Cotton Design’s emissions.

**2A.** ***Standard***

Major stationary sources of air pollution are required to use the maximum achievable control technology to reduce emissions. The EPA issues guidelines as to what equipment meets this standard, and the guidelines may vary depending on whether the source is new or existing and whether the area is clean or polluted.

**3A.** ***Fines***

For violations of the Clean Air Act in these circumstances, the EPA can assess fines of up to $25,000 per day.

**4A.** ***Information***

Under the Safe Drinking Water Act, as amended, suppliers of drinking water are required to send an annual statement describing the source of its water, the level of contaminants contained in the water, and any possible health concerns associated with the contaminants. Thus, the city must send a statement that includes this information every year to every household it provides with water.

Answer to Debate This Question in the Reviewing Feature

at the End of the Chapter

***Under no circumstances should a local government be able to condemn property in order to sell it later to real estate developers for private use.*** The Constitution’s Fifth Amendment is clear about giving the power of condemnation to government.  Such power can only be used to take private property for public use (and with appropriate compensation, of course).  When a local government uses this taking power to condemn property that it later sells to private developers for a shopping mall development or nicer houses and apartments, that government is acting in violation of our Constitution.

Sometimes, local governments face tough economics times and must do what they can to raise more taxes.  If a blighted area is never going to “upgrade” itself, then local governments should be able to step in and speed up the process by a taking, as provided for in the Fifth Amendment to the U.S. Constitution.  The public good will be served in two ways:  the blighted area will be transformed for the better and the local government will obtain more taxes revenues from the businesses located in this area.

Answers to Issue Spotters

at the End of the Chapter

**1A**. ***Bernie sells his house to Consuela under a warranty deed. Later, Delmira appears, holding a better title to the house than Consuela has. Delmira wants Consuela off the property. What can Consuela do?*** . This is a breach of the warranty deed’s covenant of quiet enjoyment. The buyer can sue the seller and recover the pur­chase price of the house, plus any dam­ages.

**2A.** ***ChemCorp generates hazardous wastes from its operations. Disposal Trucking Company transports those wastes to Eliminators, Inc., which owns a site for hazardous waste-disposal. Eliminators sells the property on which the disposal site is located to Fluid Properties, Inc. If the Environmental Protection Agency cleans up the site, from whom can it recover the cost***? The Comprehensive Environmental Response, Compensation, and Liability Act regulates the cleanup of haz­ardous waste disposal sites. Any poten­tially responsible party can be charged with the entire cost of cleaning up a site. Potentially responsible par­ties include the person that generated the waste (ChemCorp) the person that trans­ported the waste to the site (Disposal), the person that owned or operated the site at the time of the disposal (Eliminators), and the current owner or operator of the site (Fluid). A party held responsible for the entire cost may be able to recoup some of it in a lawsuit against other po­ten­tially responsible parties.

Answers to Questions and Case Problems

at the End of the Chapter

Business Scenarios and Case Problems

**24–1A *. Property ownership***

As a general rule, the deed holder has the right to possess and use the property. This right allows the deed holder to evict others from the property as if they were trespassers. There is an exception to this rule when the person occu­pying the premises is able to claim title by adverse possession. Adverse posses­sion gives the person in possession better title than the deed title holder, and thus the per­son in possession cannot be removed from the land by the original deed owner. In this case, Lorenz has met all of the four requirements for ad­verse possession: (1) he has occupied the property solely and exclusively and fenced it in; (2) he has openly claimed the property as his, as indicated by the sign above the gate; (3) he has occupied the land uninterruptedly for twenty-two years (most states require uninterrupted possession for ten years); and (4) his occu­pation was hos­tile and adverse—that is, he lived on the land without the owner’s permission and exerted dominion over it (had trespassers removed). Lorenz thus has title to the land by adverse possession. Reese has lost his prop­erty and cannot evict Lorenz and his family.

**24–2A. *Environmental laws***

Fruitade has violated a number of federal environmental laws if such actions are being taken without a permit. First, because the dumping is in a navigable waterway, the Rivers and Harbors Appropriations Act, has been violated. Second, the Clean Water Act, as amended, has been violated. This act is designed to make the waters safe for swimming, to protect fish and wildlife, and to eliminate discharge of pollutants into the water. Both the crushed glass and the acid violate this act. Third, the Toxic Sub­stances Control Act was passed to regulate chemicals that are known to be toxic and could have an effect on human health and the environment. The acid in the cleaning fluid or compound could come under this act.

**24-3A. *Implied warranty of habitability***

At common law the landlord was under no duty to repair the leased premises or to war­rant that the premises were habitable. The tenant took the property “as is” and as­sumed the obligation to make repairs. Today, the common law has been replaced by the implied warranty of habitability. The implied warranty of habitability requires the landlord to furnish to the tenant premises that are in a habitable condition and to main­tain them in that condition for the duration of the lease. A roof that seriously leaks when it rains causes the premises to be uninhabitable. In addi­tion, once the landlord starts to make repairs, the repairs must be done prop­erly. The failure to complete or per­form repairs properly subjects the landlord to liability based on negligence. Thus, in ab­sence of agreement, Frank has the responsibility to repair the roof and make the prem­ises habit­able. Sarah basi­cally has four remedies available if Frank refuses to repair the roof:

**1.** Withhold rent and place the amount in escrow.

**2.** Repair the roof and deduct the cost of repairs from the rent.

**3.** Claim constructive eviction and terminate the lease without liability for rental payments.

**4.** Sue the landlord for damages based on the cost of repair or the dif­ference be­tween the defective and repaired property’s rental values. In addition, should Sarah be injured due to the dangerous condition to the premises, Frank would be liable for Sarah’s injuries.

**24–4A *.* Business Case Problem with Sample Answer—*Adverse possession***

The McKeags satisfied the first three requirements for adverse possession:

**1.** Their possession was actual and exclusive because they used the beach and prevented others from doing so, including the Finleys,

**2.** Their possession was open, visible, and notorious because they made improvements to the beach and regularly kept their belongings there.

**3.** Their possession was continuous and peaceable for the required ten years. They possessed the property for more than four decades, and they even kept a large float there during the winter months.

Nevertheless, the McKeags’ possession was *not* hostile and adverse, which is the fourth requirement. The Finleys had substantial evidence that they gave the McKeags permission to use the beach. Rather than reject the Finleys’ permission as unnecessary, the McKeags sometimes said nothing and other times seemingly affirmed that the property belonged to the Finleys. Thus, because the McKeags did not satisfy all four requirements, they cannot establish adverse possession.

**24–5A. *Superfund***

All of the parties are potentially liable for the costs to clean up the site. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, when a release or a threatened release of hazardous chemicals occurs at a site, persons who may be held liable for the cost of cleaning up the site include the person who generated the wastes disposed of at the site, the person who transported the waste to the site, the person who owned or operated the site at the time of the disposal, and the current owner or operator. These are referred to as potentially responsible parties. Liability cannot be avoided through transfer of ownership. Thus, selling a site does not relieve the seller of liability, and the buyer also becomes liable. Liability also extends to those that merge with or buy corporations that have violated CERCLA. Liability under Superfund is usually joint and several. CERCLA authorizes a party who has incurred clean up costs to bring a contribution action against any other person who is liable or potentially liable for a percentage of the costs.

In this problem, person who generated the wastes disposed of at the site include the original seven phosphate fertilizer plants, Planters Fertilizer & Phosphate Co., and Columbia Nitrogen Corp. The current owners or operators of the site include Allwaste Tank Cleaning Inc., Robin Hood Container Express, the city of Charleston, and Ashley II of Charleston, Inc. Under the principles stated above, liability extends to all of these parties for at least a portion of the clean up costs. Because liability cannot be avoided through transfer of ownership, Holcombe and Fair may also be liable. Ashley could bring an action against any or all of these parties to recover.

In the actual case on which this problem is based, on Ashley’s claim to recover the costs from PCS Nitrogen Inc. (CNC’s successor after a series of mergers) and PCS’s claims for contribution against the other parties, the court found PCS a potentially responsible party jointly and severally liable. The court found the other parties, including Ashley, potentially responsible parties, each liable for an allocated portion of the costs. The U.S. Court of Appeals for the Fourth Circuit affirmed.

**24–6A. *Environmental impact statements***

Yes, an environmental impact statement (EIS) is required before the U.S. Forest Service (USFS) implements its proposed travel management plan (TMP). An EIS must be prepared for every major federal action that significantly affects the quality of the environment. An action is “major” if it involves a substantial commitment of resources. An action is “federal” if a federal agency has the power to control it. An EIS must analyze (1) the impact on the environment that the action will have, (2) any adverse effects on the environment and alternative actions that might be taken, and (3) irreversible effects that the action might generate.

Here, the resources committed to the implementation of the USFS’s TMP could include the resources within the wilderness and the time and effort dedicated by the agency. The wilderness resources would include the soil, the vegetation, the wildlife, the wildlife habitat, any threatened or endangered species, and other natural assets impacted by the TMP. The agency’s resources would include its funds and its staff—to design, map, maintain, and enforce the TMP. These resources seem substantial. Of course, the implementation of the TMP is federal because the USFS has the power to control it.

As for the aspects of the environment that the agency might consider in preparing the EIS, some of the important factors are listed above—the soil, vegetation, wildlife, wildlife habitat, and threatened or endangered species. Other aspects of the environment impacted by the TMP might include cultural resources, historical resources, and wilderness suitability, and on other authorized uses of the wilderness. There is a potential for impact by every route that is designed to be part of the system, as well as the “dispersed vehicle camping” to be permitted on the terrain.

In the actual case on which this problem is based, the USFS considered all of the factors listed above. The agency then issued an EIS and a decision implementing the TMR. On a challenge to the EIS, a federal district court issued a judgment in the USFS’s favor. The U.S. Court of Appeals for the Ninth Circuit affirmed. “The Forest Service took the requisite hard look at the environmental impacts.”

**24–7A *. Landlord-tenant relationships***

The court could impose liability on PI based on its ownership of the premises on which the injury occurred. Depending on the provisions of the lease, Pretty Girl could be the liable party. Kumar might be at least partially responsible for her injury if it was a result of her own negligence.

Landlords must comply with any applicable state statutes and city ordinances regarding maintenance and repair of buildings. Generally, a landlord is required to maintain the premises in good repair. A tenant is responsible for any damage to the premises that he or she causes, intentionally or negligently. Unless the parties have agreed otherwise, however, the tenant is not responsible for ordinary wear and tear. State statutes often allow tenants and landlords flexibility negotiating the terms of a commercial lease. The liability of either a landlord or a tenant for injury to a third person by the condition of the premises may be reduced by the third party’s own comparative negligence.

In this problem, Pretty Girl leased certain premises from PI to operate an apparel store. Kumar tripped over a defective portion of the sidewalk in front of the store, suffering an injury, and sought to recover from PI. The landlord filed a cross-claim against its tenant. Depending on the terms of the lease, and the parties’ negligence, if any, liability could be imposed on the tenant, the landlord, or both, and could be reduced proportionately by the third party’s actions.

In the actual case on which this problem is based, the lease between PI and Pretty Girl provided that the “Tenant, shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto.” The lease also provided that Pretty Girl would indemnify PI for all claims incurred as a result of the tenant’s breach of the lease. Despite these provisions, the court issued a judgment against PI on all claims. A state intermediate appellate court reversed, however, and remanded for a new determination of liability, taking into consideration Kumar’s negligence, if any.

**24–8A. *The Clean Water Act***

No, ICG’s discharge of selenium into the water surrounding ICG’s coal mining operation does not violate the Clean Water Act (CWA). The CWA established a permit system—the National Pollutant Discharge Elimination System (NPDES)—to regulate discharges from point sources of pollution. Under the NPDES system, a polluter must obtain a permit before discharging wastes into surface waters. An authorized state agency can issue an NPDES permit for a discharge that will not violate water-quality standards.

In this problem, KDOW, an authorized state agency, issued an NPDES permit to ICG for the operation of a surface coal mine. KDOW knew when it issued the permit that mines in the area could produce selenium but did not specify effluent limits for the element in ICG’s permit. Instead, the agency included a one-time monitoring requirement, which ICG met. In these circumstances, ICG obtained the required permit from an authorized agency before discharging selenium and complied with the permit’s monitoring condition, which qualifies as a “water-quality standard.”

In the actual case on which this problem is based, Sierra Club filed a suit in a federal district court against ICG, alleging that the discharge of selenium violated the CWA. The court issued a judgment in ICG’s favor. The U.S. Court of Appeals for the Sixth Circuit affirmed. ICG’s permit shielded the company from liability for the discharge.

**24–9A . A Question of Ethics—*Adverse possession***

**1.** No, Mansell’s occupation of Hunter’s property did not vest title in her by adverse possession. Adverse possession is a means of obtaining title to land without delivery of a deed. Essentially, when one person possesses real property for a certain statutory period of time (generally no more than thirty years), that person acquires title to it. There are four elements that must be satisfied: (1) possession must be actual and exclusive; (2) possession must be open, visible, and notorious; (3) possession must be continuous and peaceable for the required period; and (4) possession must be hostile and adverse to any other party’s interest or claim.

Because Mansell initially occupied the property under an informal agreement with Hunter, who owned the property, there was no adverse possession. At no time did Mansell notify Hunter that she was claiming adverse possession so that the required time period of hostile possession could begin. Mansell’s occupation of the property might be characterized as a lease or a license. In either case, when Hunter sought the removal of the garage, Mansell’s permissible occupation of the fourteen feet of her neighbor’s property ceased. At that time Mansell’s garage was trespassing on Hunter’s property.

In the actual case on which this problem is based, the court affirmed that the property belonged to Hunter and ordered the encroaching structure removed as a continuing trespass.

**2.** The ethics of Mansell’s conduct is arguable. She initially encroached on her neighbor’s property with the neighbor’s permission, which was withdrawn only after nearly three decades. Her attempted assertion of title might be justified, given the long passage of time and the cost to remove, or at least move, the garage. But her filing of a suit against Hunter to obtain that title rather than offering to buy the property, to negotiate a permanent lease, to work out a land swap, or to come to some other arrangement with Hunter is less understandable, and of seemingly no benefit to anyone but herself.

***Critical Thinking and Writing Assignments***

**24–10A. Business Law Critical Thinking Group Assignment**

**1.** An easement arises by prescription when one person exercises an easement, such as a right-of-way, on another person’s land without the landowner’s consent, and the use is apparent and continues for the length of time required by the applicable statute of limitations. In much the same way, title to property may be obtained by adverse possession. The requirements are that the possession of the property must be actual and exclusive—sole occupancy or use, for example—the possession must be open, notorious, and visible—not secret—and the possession must be continuous and peaceable for a required period of time. In this problem, Drake’s use of the driveway meets all of the requirements for either easement by prescription or adverse possession. Drake’s use was open and notorious, over a uniform route, and continuous and unin­terrupted for a ten-year period. And the permission of the owners was not sought when the driveway was extended, nor did they object to the extension.

**2.** The court should rule in favor of Drake, whose use of the driveway satisfied all of the requirements for either easement by prescription or adverse possession, as explained in the answer to the previous question.

**3.** As stated in the text, there are a number of public-policy reasons for the adverse possession doctrine. These include society's interest in resolving boundary disputes, determining title when title to property is in question, and ensuring that real property remains in the stream of commerce. More fundamentally, policies behind the doctrine include rewarding possessors for putting land to productive use and punishing owners who sit on their rights too long and do not take action when they see adverse possession.