

February 2015 Bar Examination

QUESTION 1

Mercury smart phones (Mercury) are the hottest new item in the electronics marketplace worldwide. Supply has not caught up with demand for cases for the Mercury. Grizzly manufactures the most popular aftermarket cases for all smart phones. Grizzly cases for the Mercury have not yet been introduced to the retail market in the United States.

Seller is a Georgia resident that imports electronic goods and sells them to retailers in the United States. Buyer is a Georgia resident that owns a retail store in Atlanta that sells smart phones and accessories.

Seller imported what he thought were 600 Grizzly Mercury cases. Seller placed an advertisement on Bobslist, a classified advertisements website, offering to sell all 600 Grizzly Mercury cases for \$10.00 each, for a total of \$6,000.00.

Buyer contacted Seller regarding the cases, and they agreed to meet at Buyer's store to discuss the sale of the cases. Seller took 100 of the cases with him to the meeting so Buyer could inspect them, and explained that the other 500 cases were stored in his warehouse. Buyer and Seller agreed on the \$6,000.00 sales price for the 600 cases.

Seller left the 100 cases with Buyer, and in return Seller accepted a negotiable check from Buyer drawn on Big Bank for \$3,000.00 with the understanding that Buyer would pay Seller an additional \$3,000.00 upon delivery of the additional 500 cases by Seller the next day.

Seller warehouses his electronic goods in a rental unit at the We Carry Storage Warehouse (We Carry) in Atlanta. The rent for the storage unit is \$1,000.00 a month. Due to the recent soft market for electronics, Seller is three months behind on his rental payments to We Carry.

Pursuant to the rental agreement, We Carry has properly padlocked Seller's storage unit denying Seller access to the unit until the \$3,000.00 back rent is paid in full. Immediately after the meeting with Buyer, Seller took Buyer's \$3,000.00 check to We Carry and properly indorsed the check to We Carry in payment of the past due rent to gain access to the other 500 cases and the other goods stored in the unit at We Carry.

Buyer sold three of the cases purchased from Seller to retail customers the same day he purchased them from Seller. Just before the close of business that day one of Buyer's three retail customers returned the "Grizzly" case for their Mercury to Buyer complaining that the sync cable slot and the AC/DC adapter slot (access slots) on the case did not properly align with the Mercury access slots. This made it impossible to sync or charge the Mercury while it was in the case.

Unbeknownst to Seller and Buyer at the time of their agreement, the cases that Seller sold Buyer were designed and manufactured by a third-party manufacturer, not Grizzly. The fact

that Grizzly did not manufacture the cases sold by Seller to Buyer was discovered only upon their later investigation of the problem. The third party manufacturer's case design was based on a stolen early prototype of the Mercury. Before the Mercury was released to the retail market, some design issues caused Mercury to slightly relocate the access slots on the Mercury. Thus the access slots on the stolen Mercury prototype and the Mercury later released to the retail market were just different enough that the access slots on the Mercury and the access slots on the cases sold by Seller to Buyer did not align properly.

Immediately after discovering the alignment problem, Buyer called Seller telling him the deal was off because the cases were defective. Buyer also demanded that Seller return his \$3,000.00 check.

Seller explained to Buyer that a deal was a deal and besides, he no longer had Buyer's check, but had used it to pay off other debts earlier that day.

Questions:

1. What Georgia laws apply to this transaction? Briefly describe why these laws are applicable.
2. Explain the application of the statute of frauds as it relates to the agreement between Buyer and Seller.
3. Discuss any express or implied warranties and how they may impact the rights and obligations of the Seller and Buyer.
4. Explain the significance of Buyer's opportunity to inspect the smart phone cases to Buyer's acceptance, rejection, or revocation of acceptance of the cases.
5. We are told in the facts that Buyer's check to Seller was a negotiable instrument and that it was properly indorsed by Seller to We Carry. Explain the application of the "holder in due course rule" and its impact on the rights and obligations of Buyer, Seller, We Carry, and Big Bank with regard to the check.

QUESTION 2

Wife and Husband's twenty-year marriage to one another ended in divorce in December 2009 in Atlanta, Georgia, after a two-day contested non-jury trial. Husband filed a new action in Atlanta against Wife last week, and she was personally served at her Atlanta home yesterday with a copy of the complaint, summons, the court's standing order, and rule nisi. Wife retained your senior partner this morning to represent her in the new action. The new action, which is the first court filing since the divorce, prays for modification of the legal custody and physical custody of the child and parenting time, modification of child support, and modification of alimony.

The averments of the new action are Wife's drug and alcohol abuse, Wife's co-habitation/meretricious relationship with a woman with whom she is romantically involved, wife's announced move with the child to Florida, and Husband's reduction in income since December 2009.

Husband demands a jury trial. The court has entered its standing order in the modification action. The standing order *inter alia* prohibits either party from removing the child from the jurisdiction of the court. The rule nisi schedules the temporary hearing in the modification action for seven weeks from now.

The Final Judgment and Decree awarded the following: (1) a total divorce to both Husband and Wife; (2) alimony to Wife for 10 years or until Wife dies or remarries or Husband dies, whichever first occurs; (3) primary physical custody of the then 9-year-old child of the marriage to Wife; (4) parenting time with the child to Husband; and, (5) child support to Wife. The court also awarded joint legal custody of the child to Husband and Wife. Various equities were divided in the decree, and Husband received his business. At the time of the divorce Wife was unemployed, but income was imputed to her of \$1,500 per month. Wife is still unemployed. Husband's monthly income was determined at the time of the divorce to be \$90,000. Husband alleges that his monthly income is now \$45,000.

Wife has provided to you a hand-written letter signed by the child, electing to live with Wife. She has also provided to you a copy of her letter to Husband giving him over thirty days advance notice that she and the child are moving to Florida tomorrow.

Wife has already sold her Atlanta home, and pursuant to the closing documents, she must surrender possession of the home tomorrow to the new owner. A moving service has been at her home for two days packing furniture and furnishings for the move to Florida.

Address each of the following questions in a memorandum to your senior partner:

1. Does the allegation that Wife and the child will move to Florida state a claim for relief?
2. Is the standing order enforceable against Wife?
3. What is the relevance of the child's written election to live with Wife?
4. Does the allegation of Wife's meretricious relationship state a claim for relief?
5. Does the allegation of Husband's reduced income state a claim for relief?
6. Does Husband have a right to a jury trial?

QUESTION 3

On the night of the Super Bowl game, Defendant and Driver decided it was a good night to get rich. Defendant knew of a rented house that was used as a “shot house/frat house” where men congregated to drink whiskey, gamble on sports, play poker, and “hang out.” There was always a lot of money on hand.

Around 10:30 p.m., with Driver behind the wheel and armed with a .380 pistol, and with Defendant carrying an assault rifle, they arrived at the “shot house.” Defendant crossed the yard and sprayed bullets into the front of the house and through the open front door, while Driver remained in the car with the engine running.

Inside the house, Victims #1 through #6 were engaged in watching the game and hanging out. Victim #1 was killed during the initial spray of bullets. Victim #2 was wounded and paralyzed from the waist down. Victims #3 through #6 hit the floor and tried to low crawl to the back of the house. However, they all froze when Defendant yelled: “Give it up!”

Defendant kept the assault rifle pointed at them as he searched all six victims and took all of the money and guns that he could find. After spraying the ceiling with a burst of gun fire, he ran to the car and Driver sped off. Defendant and Driver were subsequently caught, arrested, and charged.

Questions:

1. State the crime with which Defendant might be charged regarding the homicide of Victim #1 and the wounding of Victim #2, giving the elements of each such crime.
2. As to the crimes charged, compare the status of the Defendant with that of Driver, who remained in the getaway car and never fired a weapon.
3. Within two (2) weeks of being arrested, Defendant was denied bond after a hearing before a Superior Court Judge. Because of delays in getting forensic reports from the crime lab, the case was not presented to the grand jury for several months. On the 95th day following his arrest, and prior to indictment, Defendant’s counsel filed a second motion for bail and brought it on for hearing on the 103rd day following arrest. In the intervening eight days, the Grand Jury indicted Defendant on the charged offenses, and the district attorney opted not to seek the death penalty. What are the considerations for bail? State whether the Court’s decision as to this second motion is discretionary, and explain why or why not.

4. Following his indictment, the Defendant was arraigned and entered a “not guilty” plea. Defendant’s counsel then filed a demand for speedy trial. Explain the purpose of this type of motion, and the duties, if any, imposed on the Court as to the setting of the case for trial.

QUESTION 4

Andy Adams owned three contiguous tracts of land (Parcels 1-3) located on the same city block very close to an access ramp off I-75 in Bibb County, Georgia (the "Adams Property"). Andy died in 1994 and, through a devise in his will, left the Adams Property to his sons, Ben and Charlie. Ben and Charlie received an executor's deed conveying title to the Adams Property. Neither the will nor the deed identified the form of ownership interest the sons were to receive.

1. Parcel 1 is leased to Gasco, a gas station and convenience store.
2. Parcel 2, which is located between Parcels 1 and 3, is vacant.
3. Parcel 3 is leased to tenant, Twenty-Four/Seven, a dine-in restaurant with a full-service menu, but famous for its breakfast items that are always available. The lease for Parcel 3 is a ground lease that was entered into by and between Ben and Charlie, as Landlord, and Twenty-Four/Seven, as Tenant, in September, 1996 (the "Lease"). The initial term of the Lease was for a period of three (3) years with options to renew. The ten (10) renewal options were for periods of five (5) years each.

Section 13 of the Lease includes a food service restriction that reads as follows:

"Landlord warrants and covenants that Landlord will not buy, sell, lease or otherwise make available any land either now controlled by Landlord or acquired subsequent to the date of this Lease within one city block or 1,000 lineal feet, whichever is greater, of the Demised Premises for operation of any breakfast-oriented restaurant for a period of five (5) years and for operation of Hot Shoppe, Eggs & Such, and Egger's for the entire term of the Lease. Landlord further agrees that Landlord will not convey any parcel of land within the restricted area except by lease or deed containing restrictive covenants equivalent to the above, which fully protect Tenant's interest herein. Any subsequent purchaser or lessee under Landlord does hereby agree to be bound by these same provisions and agrees that the foregoing covenant is attached to and running with the land."

There are 3 exhibits attached to the Lease:

1. Exhibit "A" – legal description of Parcel 3
2. Exhibit "B" – additional provisions/special stipulations regarding construction of the restaurant.
3. Exhibit "C" – another restrictive covenant, that reads as follows:

"Landlord warrants and covenants that Landlord will not sell, lease or otherwise make available the area which lies between the south side of Parcel 3 (leased to Tenant) and the north side of Parcel 1 (the existing Gasco parcel) for the operation of any freestanding restaurant for the term of the Lease and any renewal options thereafter. Landlord and Tenant further agree that said restricted area as mentioned above may be made available for food service purposes within the confines of a gas/convenience store or attached with a common wall, provided said food service operation does not derive more than 25% of its revenue from breakfast items, including, but not limited to, breakfast meats, eggs, donuts, waffles, pancakes, and breakfast sandwiches, biscuits, gravy and grits."

4. Exhibit "C" is the last page of the Lease. It is initialed by Tenant's authorized signatory and by Ben. Charlie did not initial this page of the Lease. No other Lease pages are initialed.

The Lease was recorded in the public records of Bibb County three months later, together with a document entitled Covenants and Restrictions Agreement (the "CRA").

The CRA is by and between Ben Adams and Tenant. Charlie Adams is not a party to this agreement. The Recitals in the CRA include acknowledgments that Ben and Charlie entered into a Lease with Tenant and that Tenant desires to establish certain restrictions with respect to Parcel 3.

Section 1 of the CRA reads as follows:

"Prohibited Uses. Ben covenants and agrees that he shall not consent to the sale, lease, use or operation of any portion of Parcel 2 for the operation of any freestanding restaurant for the term of the Lease and any renewal options thereafter. Notwithstanding the foregoing, the said restricted area may be made available for food service purposes within the confines of a gas/convenience store or attached to or with a common wall, provided said food service operation does not derive more than 25% of its revenue from breakfast items, including, but not limited to, breakfast meats, eggs, donuts, waffles, pancakes, and breakfast sandwiches, biscuits, gravy and grits."

Fast forward to 2014. Your firm represents Jim's, a fast food restaurant that wants to buy Parcel 2 and build/operate a freestanding restaurant on Parcel 2. A title search reveals the recorded Lease and the CRA in the public records of Bibb County. Jim's has asked your firm whether it can legally use the property for its intended purposes. Jim's is best known for its hamburgers, but has a full breakfast menu and a drive-through. The Lease with Twenty-Four/Seven is still in effect, the renewal options having been exercised each time for the appropriate renewal periods.

Your senior partner has asked that you prepare a memorandum addressing the following:

1. Discuss the types of ownership interests (tenancies) that are recognized in Georgia.
2. What type of tenancy was established when Ben and Charlie inherited the Adams Property?
3. Discuss whether Jim's will be restricted from building and operating its restaurant on Parcel 2 under (i) Section 13 of the Lease, (ii) Exhibit "C" of the Lease, or (iii) the CRA?
4. Is it relevant that the Lease was recorded? Please explain your answer.

Applicant Number

11/15/15 10:00 AM
MPT-1
MULTISTATE PERFORMANCE TEST
215

MPT-1

215



In re Harrison

**Read the directions on the back cover.
Do not break the seal until you are told to do so.**



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In re Harrison

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FILE

Barbour, Lopez & Whirley
Attorneys at Law
788 Washington Blvd.
Abbeville, Franklin 33017

MEMORANDUM

To: Examinee
From: Esther Barbour
Date: February 24, 2015
Re: Daniel Harrison matter

Last year, our client Daniel Harrison bought a 10-acre tract (the Tract) of land in the City of Abbeville from the federal government, which had used the property as an armory and vehicle storage facility. The Tract is currently zoned for single-family residential development. Harrison applied for a rezoning of the property for use as a truck-driving training facility, but the City has denied the application.

Harrison wants to know whether he can pursue an inverse condemnation case seeking compensation from the City based on the denial of his rezoning application. Inverse condemnation is a legal proceeding in which a private property owner seeks compensation from a governmental entity based on the governmental entity's use or regulation of the owner's property.

Please draft a memorandum to me identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. Note that there has been no physical taking, so do not address that issue. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Barbour, Lopez & Whirley

MEMORANDUM TO FILE

From: Esther Barbour
Date: February 23, 2015
Re: Summary of interview of Daniel Harrison

Today I met with Daniel Harrison regarding a 10-acre Tract he bought from the federal government. He provided the following background information about the Tract's zoning, its prior use, and his plans for development.

- From 1978 to 2014, the Franklin National Guard operated an armory and vehicle storage building on the Tract. The buildings and parking lot are located on approximately three acres, and the remaining seven acres are undeveloped, heavily sloped, and wooded.
- In 1994, the City of Abbeville enacted an R-1 (single-family residential) zoning ordinance, restricting development to single-family housing and prohibiting all commercial and industrial uses on the Tract.
- The Guard operated the armory and storage building without objection from the City until March 2014, when the property was decommissioned and the Guard began looking for buyers. The buildings were (and still are) in good shape, but they contain levels of asbestos and lead paint that may pose environmental hazards if the buildings are renovated or demolished.
- The Tract borders a City park and baseball field and is near the municipal airport. The area surrounding the Tract has had very little residential growth since the 1960s.
- In June 2014, Harrison purchased the Tract from the Guard through a bid process for \$100,000 (about \$10,000 per acre), intending to use the existing Guard buildings for commercial purposes. He believed that the Tract was "grandfathered in" and not subject to the 1994 residential zoning ordinance.

- There were several other bids on the Tract, ranging from \$20,000 to \$88,800. Harrison anticipates that the City will point to his winning bid and the other bids submitted as proof of the Tract's value. However, the other bids were made before the City rejected Harrison's proposed non-residential use of the Tract, and Harrison believes that the other bidders bid on the Tract believing (as he did) that the zoning ordinance would not be enforced.
- Harrison also believes that it is not feasible to develop the Tract for residential use (see attached emails).
- In August 2014, Harrison negotiated a lease of the Tract to a truck-driving school. After negotiating the lease, Harrison contacted the City and was informed that the City intended to enforce the residential zoning ordinance.
- He then submitted an application to the City's Planning and Zoning Board requesting that the zoning of the Tract be changed from R-1 (single-family residential) to C-1 (general commercial/industrial) to allow the Tract to be used as a truck-driving school.
- The Board recommended approval of the rezoning application, but the Abbeville City Council voted unanimously to deny it.
- At the Council meeting, some Council members were concerned about the proximity of the Tract to a park; one suggested that with a special-use permit, the property could be used for a church, medical or dental clinic, business office, or day-care center. Harrison believes that these other uses are not feasible because the Tract is in a remote area of the City with little traffic and no growth, and because of the prohibitive cost of renovating the existing structures for such non-industrial uses.
- Harrison wants to keep the Tract, but he's very concerned about losing money on it. The Tract would be worth \$200,000 if used for industrial purposes (see attached appraisal). But because the City denied his rezoning application, the Tract is not producing and will not produce any income. Harrison estimates that if the Tract is not rezoned, he will lose between \$10,000 and \$15,000 per year due to maintenance, taxes, insurance, and deterioration.

MASTER APPRAISALS LLP

3200 Barker Road
Abbeville, Franklin 33020

Mr. Daniel Harrison
1829 Timber Forest Drive
Abbeville, Franklin 33027

January 9, 2015

SUBJECT: Market Value Appraisal for Harrison Tract

Dear Mr. Harrison:

Master Appraisals LLP submits the accompanying appraisal of the referenced property. The purpose of the appraisal is to develop an opinion of the market value of the fee simple interest in the property based on the highest and best use value of the property, if zoned for general commercial/industrial use. The appraisal is intended to conform to the Uniform Standards of Professional Appraisal Practice and applicable state appraisal regulations.

The subject is a parcel of improved land containing two buildings and a parking lot and consisting of an area of 10.0 acres or 435,600 square feet. The property is zoned R-1 (single-family residential) but has been used as a military armory and vehicle storage facility. The existing structures appear to be perfect for conversion to an industrial or training facility of some kind. That appears to be the highest and best use of the property, in its "as-improved" state. Thus, the appraisal assumes that the property will be used for industrial or training purposes.

VALUE CONCLUSION

Appraisal Premise: Market Value

Date of Value: January 6, 2015

Interest Appraised: Fee Simple

Value Conclusion: \$200,000 total (\$20,000/acre)

If you have any questions or comments regarding the information contained in this letter or the attached report, please contact the undersigned. Thank you for the opportunity to be of service.

Respectfully submitted,

MASTER APPRAISALS LLP



Margaret Jane Charleston
Certified General Real Estate Appraiser
Franklin Certificate # FR-053010

[Balance of APPRAISAL REPORT omitted]

January 19, 2015, Email Correspondence Between Harrison and Real Estate Agent

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>
Subject: Development options for my land

Hi, Amy. Remember the 10-acre tract of land that I bought last year? I've been trying to get the tract rezoned as C-1 commercial so that I can lease it to a truck-driving school that wants to open a new training facility in Abbeville. The City Council denied my rezoning application and told me that the only development it will allow is single-family residential. Frankly, I just don't think anyone would want to live way down there. You've been a real estate agent for 15 years. What do you think?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

I agree. I don't think the land is suitable for residential development. Assume that you could build three houses per acre—that would be 30 homes on the 10-acre tract. Typically, it costs between \$15,000 and \$20,000 per lot to develop land for single-family housing, including grading the land and installing utilities and drainage systems. That's a reasonable investment if the land is near a business district because people will pay a premium to live close to work.

But your land is almost 45 minutes southeast of the business district. There are several single-family lots a few miles from your tract, priced at \$4,500 each, and they aren't selling. I think you'd be lucky to get \$5,000 per lot if you developed the land, assuming you could sell the lots.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>

That's what I thought. I wasn't sure about the numbers, but I didn't think it was doable.... You've seen the tract — do you have any idea what it would cost to tear down the existing buildings and parking lot and clear the wooded areas of the tract?

From: Amy Conner<amyc@abbvillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

In other deals I've worked on, I've seen it cost \$25,000 or more to demolish a building or parking lot. Here, the property has two buildings with likely environmental issues, and a parking lot and shrubs and trees to remove. You're probably looking at a minimum expense of \$75,000.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbvillerealty.com>

I just don't have that kind of money.... If I can't lease the land to the truck-driving school and I can't develop it for residential housing, what do you think it's worth in its current condition?

From: Amy Conner<amyc@abbvillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

Not much. Maybe a few hundred dollars an acre. But that's about it.

LIBRARY

Franklin Constitution, Article I, Section 13

No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person

United States Constitution, Fifth Amendment ("Takings Clause")

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Newpark Ltd. v. City of Plymouth
Franklin Court of Appeal (2007)

This appeal involves an inverse condemnation claim in which a developer (Newpark Ltd.) contends that the City of Plymouth's denial of its rezoning application effected an unconstitutional regulatory taking of property. We affirm the trial court's judgment against the developer.

The property at the center of this dispute consists of 93 acres of land acquired by Newpark for \$930,000 (\$10,000 per acre). The tract is located in an area zoned "SF-E" (single-family residential development). The area has been zoned for one-acre-minimum lots since 1967. The tract was used primarily for pastureland at the time of purchase. While Newpark was unaware that the tract was zoned for one-acre-minimum lots when it signed the purchase contract, it was aware of the zoning by the time of closing.

In August 2000, after closing on the tract, Newpark applied for a zoning change to allow the development of 325 single-family lots on the 93 acres with a density of approximately 3.5 units per acre. The City Council considered and denied the application. Newpark then sued the City,

seeking damages for inverse condemnation.¹ The trial court found in favor of the City, and this appeal followed.

At the outset, we note that the fact that the zoning restriction had already been enacted when Newpark bought the tract does not bar it from bringing a takings action against the City, regardless of whether Newpark had notice of the restriction. Unreasonable zoning regulations do not become less so through the passage of time or title. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (rejecting argument that post-zoning purchasers cannot challenge a regulation under the Takings Clause).

The Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use

¹ Inverse condemnation occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking. Because the property owner in such situations is the plaintiff, the action is called *inverse* condemnation because the order of the parties is reversed as compared to a direct condemnation action where the government is the plaintiff who sues a defendant landowner to take the owner's property.

without just compensation. *Id.* A taking can be physical (e.g., land seizure, continued possession of land after a lease to the government has expired, or deprivation of access to the property owner), or it can be a regulatory taking (where the regulation is so onerous that it makes the regulated property unusable by its owner). See *Soundpool Inv. v. Town of Avon* (Franklin Sup. Ct. 2003). The constitutionality of a regulatory taking involves the consideration of a number of factual issues, but whether a zoning ordinance is a compensable taking is a question of law.

The state of Franklin's prohibition against taking without just compensation is set forth in Article I, Section 13, of the Franklin Constitution and is comparable to the Takings Clause of the United States Constitution, despite minor differences in wording. See *Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006). Therefore, Franklin courts look to federal cases for guidance in these situations.

The United States Supreme Court recently clarified the types of regulatory taking: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the

challenged regulation goes "too far"; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development). *Lingle v. Chevron*, 544 U.S. 528 (2005).²

Here, Newport does not argue that the City has physically taken its property, nor does it assert a partial regulatory taking or a land-use exaction. Thus, we need only consider the first type of regulatory taking: whether the City ordinance restricting development of Newport's land to one-acre-minimum lots constitutes a total regulatory taking.

A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of

²The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not "substantially advance" a legitimate governmental interest. In *Lingle*, the United States Supreme Court rejected the "substantially advances" formula under federal constitutional law. Its continuing validity is still an issue under Franklin law, but the parties have not raised it. Thus, we need not determine whether the "substantially advances" test remains valid in a regulatory takings case under the Franklin state constitution.

the common good. This type of regulatory taking was first articulated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A *Lucas*-type total regulatory taking is limited to the extraordinary circumstance when no productive or economically beneficial use of the land is permitted and the owner is left with only a token interest.

Newpark contends that the only way to achieve an economically productive use of the property is for the City to allow single-family development of some type. This argument not only mischaracterizes the zoning ordinance but also misapplies the *Lucas* test upon which the argument is premised. The SF-E zoning *does* permit the development of a single-family residential subdivision, albeit in one-acre-minimum lots. The appraisal experts for both parties testified that, due to market conditions and the current zoning, the cost to develop one-acre lots would exceed the potential for revenue. The City's appraiser testified that the highest and best use of the property is to hold the property for the future.

Although the testimony established that the development would not be profitable under current conditions, the absence of profit

potential does not equate with impossibility of development. To the contrary, the takings clause does not require the government to guarantee the profitability of every piece of land subject to its authority, although lost profits are a relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner.

The City's expert testified that the property's value is approximately \$5,000 per acre. Newpark's expert testified that the property is worth \$2,000 per acre. Both experts testified that Newpark paid more for the property (\$10,000 per acre) than it is worth. The court reasonably concluded that Newpark had assumed certain risks attendant to real estate investment. But such risks have no place in a total takings analysis because the government has no duty to underwrite the risk of developing and purchasing real estate. Although investment-backed expectations are relevant to a *partial* regulatory taking analysis rather than a total taking analysis, we note that when such expectations are measured, the historical uses of the property are critically important. Here, the zoning always required one-acre-minimum lots, and the historical use of the property was farmland.

Newpark’s expert testified that the value of the property, if capable of being developed, is \$25,000 per acre. Expert testimony on both sides provides a range of value for the property in an undeveloped state from \$2,000 to \$5,000 per acre. Newpark claims that the \$2,000 constitutes no value at all.

We do not read *Lucas* to hold that the value of land is a function of whether it can be profitably developed. To the contrary, the economic viability test “entails a relatively simple analysis of whether value remains in the property after governmental action.” *Sheffield*. The appropriate *Lucas* inquiry is whether the value of the property has been completely eliminated. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *Id.*

Newpark also argues that the property is valueless because if it cannot be developed as a residential subdivision, it will remain vacant, with a value equivalent to that of parkland. The fallacy of this approach is that it equates the lack of availability of a property for its most economically valuable use with the condition of being “valueless.” Although the regulation in *Lucas* precluded the development of oceanfront property, the property still had value. The owner could

enjoy other attributes of the property: he could picnic, camp, or live on the land in a mobile trailer. The owner also retained other valuable property rights—the right to exclude others and to alienate the land. *Id.* (Blackmun, J., dissenting); see also *Wynn v. Drake* (Fr. Sup. Ct. 2003) (no taking when zoning left owner with only recreational and horticultural uses). Here, the court could reasonably conclude that the property retains residual uses and therefore some value.

Newpark’s insistence that it is virtually impossible to find a tract of land without value is instructive. The fact that a piece of land will rarely be deemed utterly lacking in economic viability is consistent with the *Lucas* limitation of such claims to extraordinary circumstances. Here, because the property has a value of at least \$2,000 per acre, we conclude that those extraordinary circumstances are not present. Because the ordinance does not completely eliminate the property’s value, there has been no unconstitutional taking.³

Affirmed.

³ We note that a necessary result of a taking under these circumstances—had Newpark prevailed—would be that upon payment of adequate compensation, the City would own the property. Thus, had Newpark prevailed in its claim for inverse condemnation, Newpark would have been required to transfer title of the property to the City.

Venture Homes Ltd. v. City of Red Bluff
Franklin Court of Appeal (2010)

Appellant Venture Homes Ltd. owns two apartment buildings in the City of Red Bluff. After the City rezoned adjacent land, Venture sued the City, alleging that the rezoning had reduced the value of its property. The trial court granted the City's summary judgment motion. We affirm.

Background

In 1999, upon application of developer Austin Inc., the City created Planned Unit Development No. 12 (PUD 12). (A PUD is an alternative to traditional zoning containing a mix of residential, commercial, and public uses.) PUD 12 is a 195-acre mixed-use development, consisting of multi-family housing, shopping centers, and office buildings. The original development plan allowed a maximum of 900 apartment units to be built on the site. Austin built two apartment buildings, containing 800 units, which Venture subsequently purchased in 2002. Austin retained ownership of the remaining land in PUD 12.

When Venture bought the 800-unit apartment complex, it assumed that only

100 additional apartment units could be built in PUD 12. Because Venture thought that a 100-unit apartment building would be too small to be commercially viable, and because Venture believed that the City needed Venture's consent to allow additional apartment units in PUD 12, Venture assumed that it effectively had 100 additional units in reserve for future expansion of the two apartment buildings that it had purchased.

However, in April 2006, at Austin's request, the City carved out an area from PUD 12 and rezoned it. Austin then filed an application for creation of a new PUD within the boundaries of PUD 12. After public hearings, the City passed an ordinance creating PUD 30, an eight-acre tract zoned for 350 additional multi-family units.

Discussion

Venture alleges that creation of PUD 30 gives rise to a claim for inverse condemnation under the Franklin Constitution. Venture does not claim that its

property was physically invaded or that the City's zoning regulations eliminated all economically beneficial uses of its property. Rather, Venture argues that the City's creation of PUD 30 amounted to a partial regulatory taking for which Venture should be compensated.

A. Partial Regulatory Takings Test

A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Because the Franklin Constitution's takings clause is similar to the Takings Clause of the Fifth Amendment to the United States Constitution, we look to federal law to analyze Venture's takings claims. *See Newpark Ltd. v. City of Plymouth* (Franklin Ct. App. 2007).

For a partial regulatory taking to occur, the governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking.

There is no bright-line test for determining whether a partial, *Penn Central*-type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry using the following guiding factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006) (citing *Penn Central*).

Our goal is to determine, after analyzing and balancing all relevant evidence, whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

Our analysis must not be merely mathematical. Rather, while applying the balancing test, we must remember that purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite those risks.

(1) Economic Impact of the Regulation

The first *Penn Central* factor, the regulation's economic impact on the property owner, is undisputed for the purpose of this appeal. Venture presented expert testimony that the value of its apartment properties was reduced from \$65.6 million to \$62.9 million. The City stipulated to Venture's figure for purposes of this appeal. While significant in absolute terms, this diminution in value of \$2.7 million reflects a loss of only about 4%.

The City cites several cases that suggest that such a small diminution in value is rarely if ever held to be a taking. The City claims that because Venture's loss was a small part of its property's value, Venture failed to show that creation of the new PUD unreasonably interfered with its use of the property. Although this one factor is not dispositive, the City is correct when it asserts that the small relative amount of Venture's loss weighs heavily against Venture's claims.

(2) Interference with Reasonable Investment-Backed Expectations

The second *Penn Central* factor requires us to consider the extent to which the regulation has interfered with Venture's reasonable investment-backed expectations.

The record shows that the ordinance at issue caused minimal interference with Venture's *reasonable* investment-backed expectations.

Venture concedes that the only harm it has suffered is increased competition and a resulting diminution in the value of its property. The City has not rezoned Venture's property to prohibit a current or proposed use, nor has the City substantially altered the character of the surrounding land use. The City simply increased the number of multi-family units permitted within the original boundaries of PUD 12, which already included a significant number of multi-family units.

In *Sheffield*, the Franklin Supreme Court held that the existing and permitted uses of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations.

In creating PUD 30, the City has not altered the existing or permitted uses of Venture's property and therefore has not interfered with Venture's "primary expectation." Venture can continue to operate its 800-unit complex and can build an additional 100

units on its property, should it decide to do so.

(3) Character of the Governmental Action

The third *Penn Central* factor is the character of the governmental action. This factor is the least concrete and carries the least weight. This factor's purpose, when viewed in light of the goal of the takings test (to determine if the Constitution requires the burden of the regulation to be borne by the public or by the landowner) is to elicit consideration of whether a regulation disproportionately harms a particular property. If the rezoning was general in character, that weighs against the property owner, whereas if the rezoning impacted the owner's property disproportionately harshly, that weighs in the owner's favor that a taking did occur.

Venture asserts that the governmental action in this case targeted a small subsection of an otherwise cohesive PUD, thereby increasing competition for its apartment complex. Venture claims that the City created PUD 30 solely to satisfy Austin. The City disputes this and responds by citing language from the ordinance creating PUD 30 and public meeting minutes that suggest that the new

PUD was crafted to "create a more modern pedestrian-friendly and urban environment."

The issue is whether the City created PUD 30 for the public welfare or did so to benefit the private interests of Austin. Venture presented evidence that could lead a reasonable fact finder to conclude that one of the City's purposes, or perhaps even its primary purpose, for enacting the ordinance was to benefit Austin. That evidence does not preclude summary judgment for the City, however, because the other two *Penn Central* factors—particularly the first (the economic impact of the regulation)—weigh so heavily against Venture that, as a matter of law, there is no taking here.

B. The "Substantial Advancement" Takings Test

Venture also argues that the City's ordinance creating PUD 30 effects a taking of its property because the ordinance does not "substantially advance legitimate state interests." The United States Supreme Court rejected this test in *Lingle v. Chevron*, 544 U.S. 528 (2005). Prior to *Lingle*, the Franklin Supreme Court applied the "substantial advancement" test to state regulatory-takings claims, but it has not yet

addressed whether the test still applies in light of *Lingle*. Assuming that the test is still valid in Franklin, there was no taking under the “substantial advancement” test.

The “substantial advancement” test examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. This requirement is not, however, equivalent to the “rational basis” standard applied to due process and equal protection claims. The standard requires that the ordinance “substantially advance” the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective.

The City asserts that the new PUD promotes a mixed-use, pedestrian-friendly, urban development that will enhance the quality of life of its citizens. Venture contends that the City’s stated goal is a pretext—that its real goal was only to benefit Austin by making Austin’s land more valuable. Even if that were true, however, we are not required to consider the City’s *actual* purpose. Instead, we look for a nexus between the effect of the ordinance and the legitimate state interest it is *supposed* to advance. The City

could reasonably have concluded that increasing housing density in a PUD already zoned for multi-family housing, shopping centers, and office space would advance the legitimate state interest of enhancing the quality of life of citizens by decreasing traffic, lowering commuting times, and encouraging citizens to walk. Accordingly, the creation of PUD 30 is not a taking under the “substantial advancement” test.

Affirmed.

NOTES

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Applicant Number

MPT-2

215



*In re Community General
Hospital*

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In re Community General Hospital

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FILE

Jackson, Gerard, and Burton LLP
Attorneys at Law
222 St. Germaine Ave.
Lafayette, Franklin 33065

MEMORANDUM

To: Examinee
From: Hank Jackson, Partner
Date: February 24, 2015
Re: Community General Hospital; Response to OCR Audit

Our client, Community General Hospital, is subject to the Health Insurance Portability and Accountability Act of 1996, commonly called “HIPAA,” and its related regulations. Frances Paquette, the hospital CEO, sent me the attached letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services outlining three cases in which allegations have been made of improper disclosures of patient health information. She is very concerned about the inquiry and fears that the government may file an enforcement action resulting in penalties and adverse publicity. She needs our assistance in responding.

Please review the accompanying materials and draft a letter responding to the OCR and persuading it that no enforcement action under HIPAA is warranted. The OCR has discretion as to whether it brings an enforcement action. Take that into account in drafting your letter: be persuasive but not confrontational. Your response should cite the specific applicable regulations and apply them to the facts of each case.

An investigative report from the hospital’s medical records director is attached. To help orient you, I have also attached a short memorandum I wrote to the CEO when the federal HIPAA regulations, known as the “Privacy Rule,” were put into final form in 2002. While there have been updates to the HIPAA regulations since this 2002 memorandum was drafted, I have reviewed its content in light of those changes and have confirmed that the content is unaffected by subsequent additions or clarifications to the HIPAA regulations.

U.S. Department of Health and Human Services

Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

February 9, 2015

Community General Hospital
600 Freemont Blvd.
Lafayette, Franklin 33065

Re: Results of Audit for Compliance with HIPAA Regulations

Dear Community General Hospital:

As a result of complaints received and a recent audit of patient health care records at your facility, we preliminarily find that disclosures of protected health information may have been made in violation of the provisions of 45 C.F.R. § 164.500 *et seq.* We found no written authorization for disclosure of the protected health information in the medical charts of three patients: Patient #1 (reporting a wound to police over the patient's objection); Patient #2 (disclosing to police suspicions about arsenic poisoning of a decedent and then releasing the decedent's entire medical record); and Patient #3 (disclosing information relating to a patient's treatment which later resulted in the patient's arrest).

You are hereby notified that unless we receive a response justifying the disclosures within 20 days of your receipt of this letter, this office will consider pursuing an enforcement action and seeking appropriate civil penalties.

Please direct your response to the undersigned at the address noted above. Thank you.

Sincerely,



Robert Fields
Investigator

**COMMUNITY GENERAL HOSPITAL
INTRAOFFICE MEMORANDUM**

TO: Frances Paquette, CEO
FROM: Megan Larson, Medical Records Director
DATE: February 13, 2015
RE: Your request relating to Office of Civil Rights letter

As requested, I investigated the facts and circumstances relating to the patients identified in the Office of Civil Rights letter of February 9, 2015. I also reviewed the relevant health care records and interviewed hospital personnel. In each instance, the disclosure of the patient's health information was duly noted in the patient's chart. In no case does the chart contain a signed authorization from the patient or the patient's representative for release of protected health information on our usual form. My investigation discovered information beyond that which appears in the medical charts, information that would not have been available to the OCR when it conducted its audit of the charts.

Patient #1

Patient #1, an 18-year-old male, was brought to the Emergency Department on September 20, 2014, with a gunshot wound to his right calf. Patient #1 said that he was the victim of a gang dispute. The treating physician told Patient #1 that the physician would have to report the gunshot wound to the police. Patient #1 vehemently objected, saying that any report would further endanger him because a police inquiry would certainly prompt retribution from gang members.

After treating the wound, and despite the patient's objection, the treating physician called the Lafayette Police Department and reported the wound. The next day, the physician sent a written report by first-class mail to the police department. See Attachment A. The report contained no additional records.

I was told that the patient's family had filed a complaint with the OCR.

Patient #2

Patient #2, a 67-year-old man, was admitted to the hospital on November 7, 2014, and died at the hospital on November 9, 2014. On admission, the patient complained of severe headaches and diarrhea, confusion, and drowsiness. Soon after admission, the patient began vomiting, complained of stomach pain, and experienced severe convulsions. Nursing staff observed leukonychia (white fingernail pigmentation). After death, an autopsy was conducted. The pathologist concluded that the cause of death was multi-system organ failure caused by arsenic poisoning. See Attachment B, pathology report.

Our executive vice president knows the decedent's family, which owns a large-scale manufacturing business in Lafayette. She was also aware of considerable strife between the decedent and members of the family over ownership of the business. She reviewed the pathology report the day after the decedent's death. That same day, she invited a police detective to lunch and informed him of the patient's death, of the conclusion of the pathology report, and of her awareness of the serious conflict between the patient and other members of his family. Later that day, she told the Medical Records Department to give to the detective the entirety of the records of the patient's last two hospital stays (the most recent stay and one six months before his death), including the admission records, his progress notes, and the pathology report. The hospital provided the earlier records because the pathologist had used those records to rule out other causes for the fatal illness.

A family member learned of the disclosure to the police and is quite upset. He has filed a complaint about the disclosure to the OCR.

Patient #3

Patient #3, a 35-year-old male, was admitted to the Emergency Department on December 17, 2014, accompanied by his sister. The sister said that a neighbor had called her to the patient's apartment after hearing loud noises. The sister had found the patient emptying his cupboards and throwing plates and glassware against the wall. The sister persuaded the patient to come to the hospital with her.

An interview with the patient eventually established that he had taken PCP ("angel dust"), together with alcohol. Throughout the interview, the patient became increasingly agitated and belligerent. His speech was rapid, and his thoughts were disorganized and chaotic. He

reported being threatened by persons who his sister later stated had died years ago. By the end of the interview, the patient had focused his agitation on his employer, saying that he was angry about work conditions and constantly felt belittled and undermined at his workplace.

The patient wanted to leave the hospital. The treating physician advised him not to leave, but the patient insisted. The patient began shouting, "I hate my boss and I hate what she's done. I'm going to get her . . ." He then ran out of the hospital. The patient's sister then told the hospital staff that she thought the patient had a gun at home.

Shortly thereafter, a Franklin state trooper came into the Emergency Department on an unrelated matter. Because of a concern for the safety of others, the treating physician reported to the trooper Patient #3's name, his combative demeanor, and the threat to his employer, but not a specific cause of the patient's combative behavior. Patient #3 was later arrested on the street two blocks from his workplace, but was unarmed. The County Jail released him shortly thereafter. Patient #3's lawyer has complained to the OCR about the treating physician's disclosure of protected health information to the trooper.

**COMMUNITY GENERAL HOSPITAL
EMERGENCY DEPARTMENT**

Luke Ridley, M.D.
600 Freemont Blvd.
Lafayette, Franklin 33065

September 21, 2014

Via First-Class Mail, USPS

Chief of Police Alexander Mason
Lafayette Police Department
Municipal Building
1102 Third Avenue
Lafayette, Franklin 33065

Re: Report of gunshot wound

Dear Chief Mason:

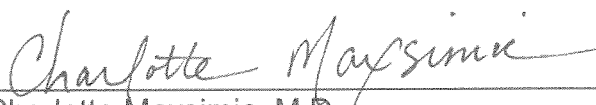
Following up on my telephone call to you yesterday, this is to report that on September 20, 2014, I treated David Meyers of 55 Baker Street, Lafayette, Franklin 33065, at Community General Hospital in Lafayette, Franklin, for a gunshot wound to his right calf.

Sincerely,



Luke Ridley, M.D.

Community General Hospital Pathology Report	
Patient Name: Stewart Weller	Case No.: CGH-0-03-13231
DOB: 1/16/1947	Collected: 11/9/2014
Sex: Male	Received: 11/10/2014
MRN: 51552435	Deliver to: File
Provider: Blue Cross / Blue Shield	
POST-MORTEM PATHOLOGY REPORT	
Diagnosis:	Arsenic poisoning
Tests:	Admission and Emergency Department records Physical examination Stomach wash Blood (10 ml), hair, urine, feces
<p><i>Admission and ER records:</i> On admission on 11/7/2014, patient complained of headaches, diarrhea, confusion, drowsiness. In the Emergency Department, patient vomited, suffered severe convulsions, and complained of stomach pain. Patient pronounced dead on 11/9/2014 at 20:43.</p> <p><i>Physical examination (post-mortem):</i> Observable white fingernail pigmentation (leukonychia), including transverse white lines across fingernails (Mee's lines). Faint garlic odor around mouth. Irritation of nasal mucosa, pharynx, larynx, and bronchi. Fatty yellow liver. Lungs display excessive accumulation of serous fluid. Degenerative changes to liver. Heart displays excessive accumulation of serous fluid.</p> <p><i>Blood, hair, urine, feces:</i> Toxic levels of arsenic compounds, more than 12 times expected from normal environmental exposure, and most likely ingested as arsenic trioxide.</p>	
Conclusion:	Death resulting from multi-organ system failure caused by acute arsenic poisoning.


 Charlotte Maxsimic, M.D.
 CGH Pathology

November 10, 2014

Jackson, Gerard, and Burton LLP

Attorneys at Law

222 St. Germaine Ave.
Lafayette, Franklin 33065

MEMORANDUM

To: Frances Paquette, CEO, Community General Hospital
From: Hank Jackson, Partner
Date: August 30, 2002
Re: Federal HIPAA Regulations, or the "Privacy Rule"

You asked me to review the new federal HIPAA regulations and to provide you with an introduction to them as they relate to the privacy of health information held by Community General Hospital. This memo is a very brief summary of what is known as the "Privacy Rule" and what can happen if the Hospital does not comply with the Privacy Rule's provisions.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 201 *et seq.*, required creation of published standards and regulations for the exchange, privacy, and security of patient health information. The regulations were published in final form on August 14, 2002. Community General Hospital is a "covered entity" under the regulations.

The regulations govern the circumstances under which a covered entity may disclose to others information in any form or medium, whether electronic, paper, or oral, that can be individually identifiable with a patient. "Individually identifiable" health information means that the information identifies the individual or provides a reasonable basis to believe that it can be used to identify the individual. The Privacy Rule refers to such information as "protected health information" (PHI).

A covered entity may not disclose PHI, except either (1) as permitted or required by the Privacy Rule or (2) as authorized by the identified individual (or personal representative) in writing. PHI includes information, including demographic data, that relates to

- the individual's past, present, or future physical or mental health or condition;
- the provision of health care to the individual; or
- the past, present, or future payment for the provision of health care to the individual.

As a general proposition, Community General should not disclose PHI to outside persons unless permitted by the regulations or upon a patient's written authorization. Community General may, of course, disclose PHI internally to the individual. Community General may also use and disclose PHI internally without written authorization for purposes of its own treatment, payment, and health care operations. Other permitted disclosures include certain public interest and benefit activities and certain carefully defined research, public health, and health care operations.

The Privacy Rule also permits use and disclosure of PHI without an individual's authorization for several national priority purposes. Some of these national priority purposes permit disclosures to public health authorities responsible for protecting public health and safety, or to agencies responsible for auditing and investigating the health care system and public benefits programs. Still others relate to disclosures required in judicial or administrative proceedings, or to disclosures concerning decedents to coroners, pathologists, medical examiners, and funeral home directors.

Finally, several of these national priority purposes relate to disclosures required by law or for purposes of law enforcement or public safety. They permit a covered entity to disclose PHI without individual authorization under the following circumstances:

- As required by law (including by statute, regulation, or court order).
- For law enforcement purposes, in six carefully defined circumstances, including:
 - (1) as required by law or by administrative requests;
 - (2) to identify or locate a suspect, fugitive, material witness, or missing person;
 - (3) to respond to a law enforcement official's request for information about a victim or suspected victim of a crime;
 - (4) to alert law enforcement to a person's death, if the covered entity suspects that criminal activity caused the death;
 - (5) when a covered entity believes that PHI is evidence of a crime that occurred on its premises; and
 - (6) in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

- Where the covered entity believes that disclosure is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone it believes can prevent or lessen the threat (including the target of the threat).

In most cases, when the Privacy Rule *permits* Community General to disclose PHI, it requires Community General to make reasonable efforts to limit the information that it discloses to the “minimum necessary” to accomplish the intended purpose of the disclosure. While the “minimum necessary” standard applies to many uses and disclosures, there are situations (specified in the HIPAA regulations) in which covered entities are not subject to this “minimum necessary” limitation.

The U.S. Department of Health and Human Services Office for Civil Rights (OCR) is responsible for administering and enforcing compliance with the Privacy Rule and may conduct complaint investigations, review compliance, and impose substantial civil money penalties for violations of the Privacy Rule.

LIBRARY

Excerpt from Franklin Statutes

Chapter 607. Professions and Occupations, Mandatory Reporting

§ 607.29 Gunshot or stab wounds to be reported. The physician, nurse, or other person licensed to practice a health care profession treating the victim of a gunshot wound or stabbing shall make a report to the chief of police of the city or the sheriff of the county in which treatment is rendered by the fastest possible means. In addition, within 24 hours after initial treatment or first observation of the wound, a written report shall be submitted, including a brief description of the wound and the name and address of the victim, if known, and shall be sent by first-class U.S. mail to the chief of police of the city or the sheriff of the county in which treatment was rendered.

**Excerpts from Health Insurance Portability and Accountability Act (HIPAA) regulations,
45 C.F.R. §§ 164.502 and 164.512**

45 C.F.R. § 164.502 Uses and disclosures of protected health information: general rules.

(a) **Standard.** A covered entity may not use or disclose protected health information, except as permitted or required by this subpart

(1) **Covered entities: Permitted uses and disclosures.** A covered entity is permitted to use or disclose protected health information as follows:

(i) To the individual;

. . . and

(vi) As permitted by and in compliance with this section, [or] § 164.512

* * *

(b) **Standard: Minimum necessary**

(1) **Minimum necessary applies.** When using or disclosing protected health information or when requesting protected health information from another covered entity . . . , a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.

(2) **Minimum necessary does not apply.** This requirement does not apply to:

(i) Disclosures to or requests by a health care provider for treatment;

* * *

(v) Uses or disclosures that are required by law, as described by § 164.512(a); and

(vi) Uses or disclosures that are required for compliance with applicable requirements of this subchapter.

* * *

(f) **Standard: Deceased individuals.** A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.

(g) (1) **Standard: Personal representatives.** As specified in this paragraph, a covered entity must . . . treat a personal representative as the individual for purposes of this subchapter.

* * *

- (4) **Implementation specification: Deceased individuals.** If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

* * * *

45 C.F.R. § 164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual . . . in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a) Standard: Uses and disclosures required by law.

- (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.
- (2) A covered entity must meet the requirements described in paragraph . . . (f) of this section for uses or disclosures required by law.

* * *

(f) Standard: Disclosures for law enforcement purposes. A covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if [any of] the conditions in paragraphs (f)(1) through (f)(6) of this section are met, as applicable.

(1) Permitted disclosures: Pursuant to process [or] as otherwise required by law.

A covered entity may disclose protected health information:

- (i) As required by law including laws that require the reporting of certain types of wounds or other physical injuries

* * *

(3) **Permitted disclosure: Victims of a crime.** Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime . . . if:

- (i) The individual agrees to the disclosure; or
- (ii) The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, provided that:
 - (A) The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;
 - (B) The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and
 - (C) The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(4) **Permitted disclosure: Decedents.** A covered entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

* * *

(j) **Standard: Uses and disclosures to avert a serious threat to health or safety.**

(1) **Permitted disclosures.** A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

- (i) (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
- (B) Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat;

* * *

(4) **Presumption of good faith belief.** A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) . . . of this section, if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

* * *

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.