

EXAMINERS' ANALYSIS OF QUESTION NO. 12

1. Prescriptive Easement: Michigan allows for the creation of easements by prescription. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676 (2000). A prescriptive easement may arise in a manner similar to adverse possession resulting from "use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 118 (2003) (citations omitted). Use need not be exclusive. *Plymouth Canton Community Crier*, 242 Mich App at 679-680. Generally, prescriptive easements benefit only particular properties (an easement appurtenant) or individuals (an easement in gross). See *St. Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 576-577 (1921); *Greve v Caron*, 233 Mich 261 (1925). Easements appurtenant can be created by tacking previous possessors' usage to that of current possessors, though some form of privity is required. *Matthews v Natural Resources Dep't*, 288 Mich App 23 (2010).

It is clear that Billy has used the path for at least 15 years. Billy apparently has walked on the path openly and notoriously during football season. The path is also visible from the street and the ground is worn down. He had not received any official permission from YDC, at least until YDC built the fence a year ago, which would have been far too late to block the creation of his easement since his use goes back decades. Finally, because his usage need not be exclusive, it does not matter that others, the students and residents of Peaceful, have also used the easement. Therefore, Billy's usage meets the requirements for a prescriptive easement, and he could legally prevent Peggy from building over the path.

Examinees could debate whether Billy's use is in fact "continuous." If Billy has only used the path to attend football games, he has not used it more than about seven times a year. That said, seasonal use can be enough to establish a prescriptive easement. *von Meding v Strahl*, 319 Mich 598, 613-614 (1948) ("it is not required that a person shall use the easement every day for the prescriptive period. It simply means that he shall exercise the right more or less frequently, according to the nature of the use to which its enjoyment may be applied.") (quoting *St Cecelia Soc v Universal Car & Service Co*, 213 Mich 569, 577 (1921)). Therefore, as long as Billy has used the path continuously for football games for at least 15 years, his use is probably continuous enough to satisfy the requirement for an easement.

2. Gordon's Defenses: With respect to Peggy's money claim for back rent, Gordon could claim that he was lawfully withholding rent under *Rome v Walker*, 38 Mich App 458 (1972). It is clear that his apartment is in substantial disrepair and, indeed, may not even be habitable, violating the statutory covenant of reasonable repair. MCL 554.139. This defense is therefore very likely to succeed.

With respect to Peggy's claim to recover possession of the property, Gordon could allege that the termination of tenancy is retaliatory. There is a rebuttable presumption in favor of the defense of retaliatory eviction if a tenant shows that s/he officially complained about conditions to a "court or other governmental agency" within 90 days of the beginning of proceedings. MCL 600.5720(2). The landlord must show by a preponderance of the evidence that the eviction was not retaliatory. *Id.* Gordon complained to the housing commission within 90 days. However, Peggy could present evidence that her decision to evict Gordon was not retaliatory but connected to her recent purchase of the property and desire to develop it. She sought possession from other tenants as well, and she acted promptly. It is therefore unlikely that Gordon will succeed in this defense.