ESSAY QUESTION NO. 3

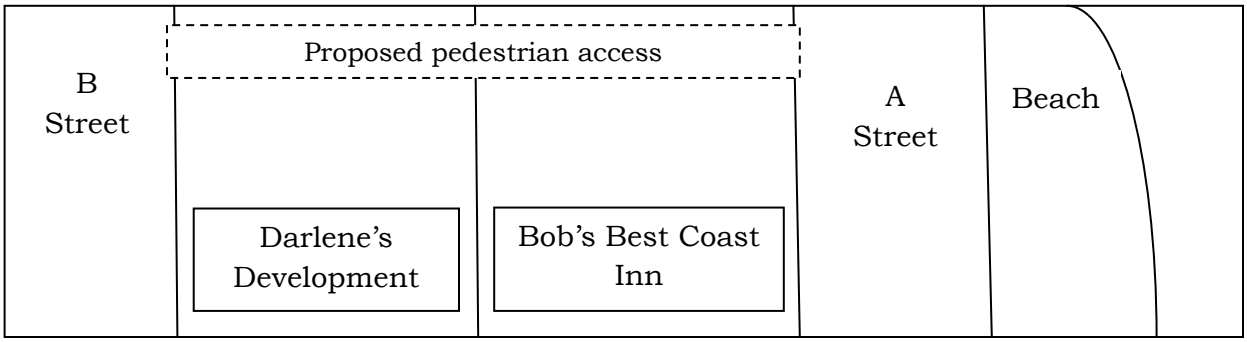
Answer this question in booklet No. 3

Andrew moved with all of his possessions to Alaska to take a four-month job processing fish. Bob, owner and manager of Bob's Best Coast Inn, a local extended stay motel, had previous experience with seasonal workers becoming a nuisance by making what Bob considered to be unreasonable demands for amenities and repairs. Bob had no interest in again being a landlord on call. However, concerned that the tourist season may be slow, Bob, with knowledge of Andrew's seasonal job, agreed to rent to Andrew a room with a kitchen and full bath but only on a week-to-week basis. Andrew agreed to pay $200 per week in rent, $200 in pre-paid rent, and a $400 security deposit.

Andrew returned to his room late one evening with several friends to celebrate a rare day off. During the festivities a friend damaged the exterior door to the room. Andrew then moved the party outside to the ground-level porch. The evening ended after Andrew broke his arm from a fall when a deteriorated porch railing collapsed. Bob promptly repaired the railing. He also repaired the door at a cost of $200.

Andrew was unable to work due to the injury. Andrew hired a local lawyer who called Bob and demanded that he pay Andrew's medical bills. After receipt of the call Bob posted a note on Andrew's door which stated that Andrew must vacate the premises immediately due to the door damage and the harassing phone call from Andrew's attorney. Andrew immediately moved out. Andrew brought suit against Bob in state court for wrongful eviction pursuant to Alaska's Uniform Residential Landlord and Tenant Act (URLTA).

Shortly thereafter Bob received a notice from the city which stated that the city was studying ways to increase tourism. The city notice further stated that the city was considering taking a portion of Bob's property to create a pedestrian access across Bob's land to improve public access to the beach by connecting "A" and "B" Streets. The notice contained the following diagram of the proposal:



Darlene purchased the lot adjacent to Bob 11 years ago and during this time she and other members of the community regularly used Bob's land as a shortcut to "A" Street and to the beach. Darlene consented to the proposed pedestrian access across her property because the proposed location of the access corresponded with the existing trail across Bob's land. Frustrated by the city's proposal and long irritated by people crossing his property, Bob erected a fence on his land along the property line between his lot and Darlene's lot. In the face of budget cuts the city abandoned the proposed taking and pedestrian access proposal. Darlene organized Citizens for Urban Trail Access (CUTA). CUTA did not attempt to continue the proposed taking. Instead CUTA filed a petition in state court seeking continued public access across Bob's property.

1. At the hearing on Andrew's claim against Bob for wrongful eviction Bob argued that URLTA did not apply to his agreement with Andrew because Andrew's occupancy of the motel was transitory. Discuss the merits of Bob's argument.

2. Andrew argued that the eviction was unlawful under URLTA for the following reasons: (1) the damage to the door was an invalid basis for eviction; (2) the eviction based on his demand for medical bills was improperly retaliatory; and (3) the note did not provide him with sufficient notice. Discuss the merits of Andrew's arguments regarding his eviction, assuming the application of URLTA.

3. Assume that CUTA has standing and discuss the merits of CUTA's petition for continued public access.

GRADERS' GUIDE
*** * * QUESTION NO. 3 * * ***
REAL PROPERTY

Alaska has adopted the Uniform Residential Landlord and Tenant Act (URLTA) (AS 34.03.010 - .380). Andrew has brought suit under URLTA. Bob has argued that URLTA does not apply and, in the alternative, if it does apply, his actions were lawful under URLTA.

1. **Discuss the merits of Bob's argument that URLTA does not apply. (30 points)**

The threshold question is whether URLTA applies to Andrew's claims. The Alaska Supreme Court applies its independent judgment to the interpretation of Alaska statutes and will interpret statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." In Re Tracy C, 249 P.3d 1085, 1089 (Alaska 2011)(quoting Native Village of Elim v. State, 990 P.2d 1, 5 (Alaska 1999)). AS 34.03.010 provides that a purpose of URLTA is to "simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlord and tenant." AS 34.03.330(b) provides in relevant part: "[u]nless created to avoid the application of this chapter, the following arrangements are not governed by this chapter: . . . (4) transient occupancy in a hotel, motel, lodgings, or other transient facility . . . ."

Bob argues that as a motel the inn is specifically excluded from the URLTA as a transitory occupancy under AS 34.03.330(b). However, the statute does not exclude a motel occupancy per se; it only excludes transitory occupancy of a motel. Here there is a question of whether Andrew's occupancy was transitory. Bob holds out the inn as an extended stay motel. Further, Bob had knowledge of Andrew's four-month job and provided Andrew a room with a kitchen — implying that Bob recognized that Andrew's occupancy would be longer than a typical transitory motel guest and certainly longer than the week-to-week arrangement. Bob also required $200 in pre-paid rent and a $400 security deposit – requirements inconsistent with a typical short term motel room rental. Moreover, Andrew moved into the room with all of his possessions and there are no facts to suggest that he maintains any other residence or that he intends to leave at the conclusion of his seasonal work. Therefore, the facts suggest that Andrew's occupancy of the motel is not transitory and thus the exclusion is not applicable and URLTA applies.

A second issue with Bob's contention is the exception to the exclusion. The exclusion applies unless the arrangement was "created to avoid the application of this chapter. . . ." Thus, if Bob intentionally entered into the agreement to rent the motel room to avoid the application of URLTA and his landlord duties, the exclusion is inapplicable and the court would apply URLTA to the agreement. Here there are facts to suggest that Bob intentionally made

his arrangement with Andrew in an attempt to avoid the landlord duties imposed by URLTA. Bob had prior experience with seasonal workers and he believed that they made unreasonable demands for amenities and repairs to the premises. Further, the facts state that Bob had no interest in being a landlord despite his agreement to rent the room on a week-to-week basis and requirement that Andrew pay a security deposit and prepaid rent. These facts suggest that Bob intentionally structured the arrangement to avoid his landlord duties and application of URLTA. Therefore, it is probable that Bob's argument that URLTA is not applicable by way of the AS 34.03.330(b) exclusion would fail because Andrew's occupancy was not transitory or, in the alternative, because Bob intentionally made his arrangement with Andrew in an attempt to avoid the landlord duties imposed by URLTA.

2. Discuss the merits of Andrew's arguments regarding his eviction assuming the application of URLTA. (40 points)

Bob's note gave two reasons for terminating Andrew's tenancy: (1) the damage to the exterior door and (2) Andrew's demand that Bob pay his medical bills. Andrew argued that (A) the termination of his tenancy lacked a basis under URLTA; (B) was retaliatory; and (C) without sufficient notice.

A. Damage as basis for termination (20 points)

With regard to the door damage, AS 34.03.120(a)(5) provides that "[t]he tenant. . .may not deliberately or negligently destroy, deface, damage, impair, or remove a part of the premises or knowingly permit any person to do so." AS 34.03.220(a)(1) provides landlord may terminate a rental agreement for intentional and substantial damage:

> [i]f the tenant or someone in the tenant's control deliberately inflicts substantial damage to the premises in breach of AS 34.03.120(a)(5), the landlord may deliver a written notice to quit to the tenant under AS 09.45.100-09.45.105 specifying the act constituting the breach and specifying that the rental agreement will terminate upon a date that is not less than 24 hours after service of the notice; for purposes of this paragraph, damage to premises is "substantial" if the loss, destruction, or defacement of property attributable to the deliberate infliction of damage to the premises exceeds $400;

Bob has the burden to prove that Andrew's friend intentionally inflicted the damage to the door and that the damage is substantial. Here it is unlikely that a court would find in Bob's favor. Andrew would argue that the damage was unintentionally caused by a friend and there are no facts to suggest otherwise. Further, the facts state that the damage cost $200 to repair which is significantly less than the $400 substantial damage threshold prescribed by the statute. Therefore, Bob's termination pursuant to AS 34.03.220(a)(1) is

unlawful and Andrew would probably prevail on his claim of wrongful eviction arising out of the damage to the door.

B. Retaliation (10 points)

Bob's second reason for terminating Andrew's tenancy is Andrew's demand that Bob pay his medical bills arising out of his injury sustained when the porch railing collapsed. URLTA imposes an obligation of good faith on the landlord and in all actions taken under the act. As 34.03.320. The Alaska Supreme Court in McCall v. Fickes held that the obligation of good faith under URLTA prohibits certain retaliatory conduct:

> The retaliatory conduct with which the statute is concerned is clearly conduct which is undertaken in retaliation for actions by the tenant. As a defense, 'retaliatory eviction' is addressed to conduct which deters the assertion of tenant rights. We think it logically untenable to assert that an act which benefits the landlord is one which will result in retaliation.

556 P.2d 535, 540 (Alaska 1976). AS 34.03.310(a) prohibits a landlord from retaliating against a tenant "by increasing rent or decreasing services or by bringing or threatening to bring an action for possession after the tenant has . . . sought to enforce rights and remedies granted the tenant under this chapter." Andrew would argue that Bob had a duty to provide safe common areas per AS 34.03.100(a)(2) and that AS 34.01.160(b) provides a remedy to Andrew for Bob's alleged failure to maintain the porch railing. However, here there is a question of whether Andrew's demand for payment of his medical bills is an assertion of a tenant right under URLTA.

In Helfrich v. Valdez Motel Corp., the Alaska Supreme Court considered whether a demand by a tenant to pay medical bills arising out of an injury which occurred on the premises constitutes the assertion of a right by a tenant under URLTA. In holding that it does not the court reasoned:

> We have emphasized that Alaska's adoption of URLTA "accord[ed] tenants previously unrecognized rights by recognizing the contractual nature of the landlord-tenant relationship." URLTA grants the tenant a right to require the landlord to "maintain fit premises" and provides a remedy for damages if the landlord fails to do so. But URLTA does not expressly grant the tenant a right to be free from the landlord's negligence or a remedy to recover consequential damages for personal injuries resulting from such negligence if fitness and habitability are not in issue. Nor does it do so implicitly. Alaska's tort law, not URLTA, confers this right and this remedy. We conclude that tenants' personal injury claims seeking recovery for injuries resulting from landlords' alleged negligence do not "[seek] to enforce rights and remedies granted

> the tenant under [URLTA]." Alaska Statute 34.03.310(a)(2) therefore does not protect tenants from eviction if they threaten or file personal injury lawsuits.

207 P.3d 552, 559 (Alaska 2009)(footnotes and citations omitted). If Andrew had requested that Bob repair the railing before the injury Bob would have had an obligation under AS 34.03.100(a)(2) to make the repair and any eviction attempt by Bob in response to the request would probably be considered to be retaliatory. However, here Andrew's demand was for payment and not for repair. Per Helfrich an enforcement of such a demand sounds in tort, thus Bob's termination of Andrews's tenancy in response to the demand is not retaliatory. Therefore, Bob's termination in response to Andrew's demand for payment of his medicals is probably lawful if Bob met the notice requirement under URLTA.

C. Sufficiency of notice (10 points)

AS 09.45.100(c)(2) allows written notice to be left at the premises. The facts indicate that Andrew received actual notice by way of Bob's note posted to Andrew's door; thus, receipt is not at issue. Here the question is whether Bob provided appropriate notice to terminate Andrew's periodic tenancy. Bob demanded that Andrew vacate the premises immediately and the facts indicate that Andrew did so. AS 34.03.290 provides that "[w]hile rent is current, the landlord or the tenant may terminate a week to week tenancy by a written notice given to the other at least 14 days before the termination date specified in the notice." Andrew's rental agreement was week-to-week and there are no facts to suggest that Andrew was behind on the rent. Thus, Bob's notice to quit was not sufficient and his ouster of Andrew was unlawful.

3. Assume that CUTA has standing and discuss the merits of CUTA's petition for continued public access (30 points)

The public would have a right of continued access across Bob's property if the public has an easement. "An easement creates a nonpossessory property right to enter and use land in the possession of another [the servient estate owner] and obligates the possessor [of the burdened land] not to interfere with the uses authorized by the easement." Hansen v. Davis, 200 P.3d 911, 913 n. 1 (Alaska 2010)(quoting Restatement (Third) of Property: Servitudes § 1.2(1) (2000)). In Alaska an easement may be created by an express grant, by oral grant and estoppel, by necessity, by implication or by prescription. Freightways Terminal Co. v. Industrial & Com. Const., Inc., 381 P.2d 977, 983-84 (Alaska 1963). Applicants may briefly raise and eliminate the theories of express grant, oral grant and estoppel, necessity and implication but there are no facts to support any of these theories.

An easement may be created by an express grant in writing. Methonen v. Stone, 941 P2d 1248, 1251 (Alaska 1997)(finding that the intention to create a servitude must be clear on the face of an instrument and that ambiguities are

resolved in favor of use of land free of easements)(citation omitted). Here there are no facts to suggest the creation of an express easement by way of writing. An easement may also be created by oral grant and estoppel when there is an attempted oral grant of an easement and the intended grantee makes improvements for the purpose of exercising the easement. Freightways Terminal Co., 381 P.2d at 984. The easement is then recognized and enforced in equity. Id. Here there are no facts in support of an oral grant and estoppel theory. An easement may arise out of necessity when an "owner of land conveys to another an inner portion which is entirely surrounded by lands owned by the conveyor or by the conveyor and another." Id. at n. 16 (citations omitted). Here there are no facts in support of an easement by necessity. An easement may be created by implication and "arises when there is '(1) a quasi-easement at the time of contract of sale or conveyance, (2) which is apparent, (3) reasonably necessary for the enjoyment of the land retained or the land conveyed, and (4) continuous in nature.' " Williams v. Fagnani, 175 P.3d 38, 40 (Alaska 2007)(quoting Demoski v. New, 737 P.2d 780, 783-84 (Alaska 1987)). On these facts a claim for an easement by implication would fail on the first prong as there are no facts regarding a conveyance.

The call of the question asks for a discussion of CUTA's petition for access, which is a claim for a public prescriptive easement. In Interior Trails Preservation Coalition v. Swope, the Alaska Supreme Court summarized the public prescriptive easement doctrine: "[o]btaining rights in another's property by prescription is similar to obtaining rights by adverse possession. 'Both doctrines permit acquisition of property rights through the passage of time, if certain conditions are met, but prescription is applied to servitudes while adverse possession is applied to possessory estates.' " 115 P.3d 527, 529 (2005)(quoting Restatement (Third) of Property: Servitudes § 2.17, cmt. A (2000)).

Because of the close connection between the prescriptive easement doctrine and adverse possession, applicants may discuss the 2003 amendments to AS 09.10.030 and AS 09.45.052(a), the statutes governing adverse possession; however, these amendments do not impact the public prescriptive easement doctrine. In 2003 AS 09.10.030 was amended to include an exception to the 10-year statute of limitation applicable to actions to quiet title and for ejectment. The Alaska Supreme Court in Hansen v. Davis found that these amendments did not eliminate a prescriptive easement claim. 22 P.3d 911 at 915 (Alaska 2009). In 2003, AS 09.10.052(a) pertaining to the burden of a private adverse possession claimant was also amended. The Alaska Supreme Court described this amendment in Hansen:

> To prevail under the amended adverse possession law, claimants must now show that they believed in good faith that the disputed land lies within the boundaries of their property in addition to proving, as they had been required to prove prior to the 2003

> legislative amendments, that their use of the land was continuous, open and notorious, exclusive and hostile to the true owners for the statutory period.

Id. at 916 n. 7; see also Cowan v. Yeisley, ___ P.3d ___, 2011 WL 2084008 at *5 (Alaska May 27, 2011) (describing "[t]he net effect of these changes was to limit Alaskans' adverse possession claims to cases where the claimant had either color of title or a good faith but mistaken belief that the claimant owned the land in question" and noting that "[t]he Legislature's 2003 revisions essentially abolished the bar on the original landowner's remedy and were intended to prevent adverse possession under [AS 09.10.030]".).

Importantly, the 2003 revisions to AS 09.10.030 and the new burden of a good faith but mistaken belief imposed on a private adverse possession claimant under AS 09.10.052(a) are not relevant to a public prescriptive easement analysis. AS 09.45.052(d) provides:

> Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use, including construction, management, operation, or maintenance, of private land for public transportation or public access purposes, including highways, streets, roads, or trails, by the public, the state, or a political subdivision of the state, for a period of 10 years or more, vests an appropriate interest in that land in the state or a political subdivision of the state. This subsection does not limit or expand the rights of a state or political subdivision under adverse possession or prescription as the law existed on July 17, 2003.

AS 09.45.052(d)(emphasis added). Thus, the 2003 amendment to AS 09.45.052(d) continues Alaska's public prescriptive doctrine as it existed on July 17, 2003.

In Alaska courts have "long recognized prescriptive easement claims brought on behalf of the general public as well as private individuals." Interior Trails, 115 P.3d at 530 (footnote omitted). To prevail on a claim for a public prescriptive easement a claimant must prove by clear and convincing evidence that "(1) the use was continuous and uninterrupted for the same ten-year period that applies to adverse possession; (2) the claimant acted as an owner and not merely as a person having the permission of the owner; and (3) the use was reasonably visible to the record owner." Id. (citations omitted). Lastly, the scope of a prescriptive easement is to be defined narrowly to include the use that created it and closely related ancillary uses. Price v. Eastham, 75 P.3d 1051, 1058 (Alaska 2003).

The nature of the use sufficient to meet the first element is dependent upon the character of the property. McDonald v. Harris, 978 P.2d 81, 83

(Alaska 1999). Thus, the relevant inquiry is whether the claimant of the easement used and enjoyed the property as an average owner of similar property would use and enjoy it. Id. Here the facts state that Darlene and other members of the public used the trail over Bob's land as a shortcut to access A Street and the beach. Using one's property as an access to a public way is a reasonable use that an average owner of a property similar to Bob's would enjoy. With regard to the continuity element, the facts state that Darlene and other members of the public used the trail without interruption for at least the past 11 years, thus meeting the minimum 10 period prescribed by the statute.

The second element requires the claimant to act as the owner and not merely with permission — the so-called hostility requirement. The hostility requirement is an objective test "which simply asks whether the possessor acted toward the land as if he owned it, without the permission of one with legal authority to give possession." Id. at 84. The claimant must overcome a presumption of permission. Id. at 85. Further, "[a] claimant's use is adverse or hostile if the true owners merely acquiesce, and do not intend to permit a use. The key difference between acquiescence and permission is that a permissive use requires the acknowledgment by the possessor that he holds in subordination to the owner's title." Id. (internal quotations and citations omitted). Here there are no facts to suggest that Bob granted Darlene or any other member of the public permission to cross his land. The facts suggest just the opposite as Bob was frustrated with people crossing his property and built a fence to block access.

Lastly, CUTA must prove that the public use was reasonably visible to Bob – the notoriety requirement. The relevant inquiry is whether a duly alert owner would have known of the adverse use. McDonald, 978 P.2d at 84. Here CUTA should be able prove this element without difficulty: Bob was the owner and manager of an active business located on the property and expressed irritation with the public use of his land, demonstrating his knowledge of the use.

Therefore, it is likely that CUTA's petition would be granted and the court would recognize a public easement vesting with the city pursuant to AS 09.45.052(d). The scope of the easement would be limited to the typical use of creation. The facts indicate the existence of a "trail" implying at least pedestrian use; however, more facts are needed for a full scope analysis.