Question 3

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.

2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.

3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.

Answer A to Question 3

3)

A lease or "leasehold estate" is an interest in land whereby the landholder ("landlord") grants another person (the "tenant") the exclusive use of the land for a limited period of time, subject to certain terms and conditions, if any, set forth in the lease. The lease between Mike and Olive was a lease "for years," which means that it was for a specific period of time, after which the lease would automatically terminate. Therefore, here, Mike's lease terminated automatically at the conclusion of 30 years, in favor of Olive.

1. Olive v. Mike

Waste is an action initiated by a person with an interest in land (usually a holder in fee or a remainderman), against the occupier of the land, for harm to the land caused by the occupier's actions. Here, Olive is arguing that Mike's failure to renew the parking easement harmed the downtown office building [and] constituted waste, since this action set off a chain of events leading to Olive's inability to rent out all of the office spaces, thus decreasing the value of the office building.

Typically, an action for waste lies when the occupier's action is physically damaging the land - such as where the occupier removes trees or minerals for commercial use. Therefore, Olive's claim for waste based on Mike's failing to renew the easement is unusual. However, the existence of an easement appurtenant, as exists here, is in fact an interest in land that is "attached to" the office building itself. Thus, a court could find that loss of the easement is tantamount to harm to the land, and allow Olive to proceed with the waste action. It seems, however, that this would be highly unusual and therefore it is most probable that, since Mike's failing to renew the easement did no physical harm to any land, Olive is not likely to prevail on this theory. (She should try a breach of lease theory, since the facts state that the renewal requirement was a term of the lease.)

2. Olive v. Toby

Ejectment is an action at law whereby one claiming a superior interest in a parcel of land seeks to have the present occupier removed. (Modern courts, including California, use the unlawful detainer action to accomplish substantially this remedy.) Olive's ejectment action against Toby can only succeed of [sic] Toby is not entitled to occupy his office.

Sublease

Absent any provision in the lease to the contrary, a lease is freely alienable, meaning that it may be freely assigned and subletted. A sublease is an interest in land created when a tenant transfers part of his leasehold interest to another party. Here, Mike subletted Toby's office for 5-year renewing terms. However, the last time that Mike renewed Toby's sublease, there were less than five years remaining in Mike's term. An estate can never last longer than the estate on which it depends, which is why an assignment or sublease can never be for a longer period of time than the sublessor has remaining in his term. Therefore, while earlier subleases to Toby may have been proper, the last sublease, made

only a week before Mike's lease terminated, was improper. Accordingly, Tony's sublease automatically extinguished upon the termination of Mike's lease. At that point, Olive was entitled to possession of Toby's office.

Therefore, Olive is likely to succeed in her action to eject Toby.

Fixtures and Merger
Under the doctrine of fixtures and merger, when an occupier of land affixes any object to the land, or to any structures built upon the land, those items merge into the land. The general rule is that an occupier is not entitled to remove fixtures from the occupied property when the estate terminates. Therefore, under this general rule, Toby should not be permitted to remove the expensive custom lighting and wall treatments he added to his office space. However, some courts will permit a tenant to remove trade fixtures (equipment used in carrying out a specific business or occupation) if the circumstances suggest that the tenant intended to be able to keep them and if they can be removed without significantly harming the property. Here, since: (1) the lighting and wall treatments that Toby installed were custom-made for him; (2) the items were expensive; and (3) Toby had installed them very recently (which means that he probably has not received the benefit of buying them), a court will probably allow Toby to remove these items, if this can be done without significantly harming the building.

3. Olive v. BZA
Zoning ordinances are laws restricting the use of land, and are a valid exercise of the police power inherent in the states and their political subdivisions.

It is important to note here that Olive is requesting a variance to a zoning ordinance requiring off-street parking, and not simply a permit to which she has an entitlement if certain requirements are met (as may be defined by statute with respect to some kinds of permits). Therefore, the BZA was free to deny her permit, and that denial will be deemed lawful unless it was: (1) arbitrary or capricious in violation of the Fourteenth Amendment to the United States Constitution; (2) an unlawful taking of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution; or (3) otherwise illegal (e.g., unlawfully discriminatory or otherwise violative of state or federal law).

Arbitrary and capricious. Olive will argue that the denial of the permit based solely on the fact that the nearby parking lot owner objected was arbitrary and capricious, especially in light of the fact that the BZA had recently granted a parking variance for a nearby building under very similar circumstances. While these are factors that the court will consider in determining whether the denial of the permit was improper, Olive will have the burden of proof here, and if the court can find rational basis for upholding the denial of the permit, it will do so. It is likely that the court will be able to find such a rational basis for the denial of the application - as just about any valid reason will do.

Taking. Olive may argue that the denial of the variance requests is causing her so much harm that it amounts to a taking of her property without just compensation, in violation of the Fifth Amendment to the United States Constitution as incorporated against the states and their political subdivisions through the Fourteenth Amendment. It is true that if the BZA's exercise of its police power in executing the zoning ordinances created such a severe economic harm to Olive, that is not justified by the denial of the permit, this could constitute a taking, which would be invalid unless the city paid Olive just compensation. However, even though it appears that Olive did incur economic harm because she was not able to obtain the permit, this "taking" argument will still be a stretch given the fact that Olive was never entitled to the permit in the first place, and thus never had a property interest in it.

Otherwise unlawful. The facts do not indicate that BZA's denial of the permit to Olive was in violation of any other laws or the federal Constitution.

Based on the above, Olive is not likely to prevail in her appeal of the BZA's denial of her variance request.

CONCLUSION

Based on the foregoing, Olive should not prevail in her action against Mike for waste. She should be successful in her action to evict Toby, but the court will probably allow him to remove the lighting equipment and wall coverings if he can do so without harming the property. Finally, Olive is unlikely to succeed in her appeal of the BZA's denial of her variance request.

Answer B to Question 3

3)

Olive v. Mike

A landlord can sue a tenant for "waste" where the unreasonable acts of the tenants cause a diminution in value of the leased property. Normally the issue of waste involves physical property damage, but it can involve a loss of a right such as an easement. Certainly the loss of the occupancy permit greatly diminished the value of the property. It was also arguably "unreasonable" for Mike to fail to renew the lease, particularly in light of the fact that the Theatre was apparently willing to grant such a renewal.

A cause of action for "waste" would require Olive to prove that Mike caused a diminution of the value of the office building. Here, she could most probably prove the loss of the easement diminished the value of the office building. The easement was an "easement appurtenant" that benefited the office building (the dominant estate), as opposed to the easement in gross, which would only benefit an individual person. An easement appurtenant can increase the value of land and is a real interest.

As a defense, Mike can argue that there was no guarantee that the lease would be renewed and that, since Olive had no real interest in the easement past its original term, the loss of the easement was not "waste" because it did not diminish the value of the leased property. The value of the property was that of an office building with an easement that was set to expire. An anticipated right (such as the optional renewal of an easement) is not part of the "value" of the property, since there was no guarantee that the easement would be renewed at all.

Olive would most probably be better off suing Mike under a contract theory for a breach of his lease agreement.

Olive v. Toby

Toby's Sublease

Modern law generally favors the assignability of leases. An assignment of an entire leasehold is called "an assignment," whereas the partial assignment of a leasehold is considered a sublease. An assignment novates the lease wher[e]as a sublease does not absolve the original lessor of liability.

Even though assignability is favored, a tenant can never assign or sublease any more than his or her interest under the master lease. In this case it appears that, at a point when he only had a week left on his master lease, Mike attempted to grant Toby a 5 year sublease. This sublease would be invalid because Mike only had one-week's worth of interest left under his master lease. Because Mike cannot sublease out an interest greater

than he possesses, the sublease to Toby is invalid (at least insofar as it extended past a week).

Ejectment

The owner of real property has the right to eject any person on the property without a legal right to be there. Toby has no valid lease or sublease, because Mike couldn't grant him a lease that extended beyond the ma[s]ter lease's 30-year term. Accordingly, Olive can bring an action for Toby's ejectment.

Retention of Improvements

Absent a contrary provision in a valid lease, the owner of real property is not entitled to retain possession of fixtures installed by a tenant or a third-party (in this case a third party with an invalid sublease). The landlord is only entitled to retain the improvements if they are "permanently affixed" to the real estate.

It would be a question of fact as to whether Toby's improvements are "permanently affixed." The custom lighting, if it is track lighting that can be removed without damaging the structure, is probably not a "permanently affixed" item that the landlord has a right to retain. A "wall treatment" might be something that is permanently affixed, depending on its size and how it was attached to the structure. This would be a matter for the finder of fact to determine.

Of course, if Olive is owed any unpaid sums due to Toby's use of her real property, she would probably be entitled to a lien on any of Toby's property within the office building, including the fixtures and wall treatment.

Olive v. BZA

A local government has the authority to pass zoning ordinances under general police power to legislate for the well-being of citizens. This power, however, cannot be employed in a way that violates a citizen's right to due process or equal protection, or that amounts to an "unauthorized taking" of private property.

BZA is a government entity and, therefore, any actions by BZA constitute "government activity" implicating the U.S. Constitution.

It appears that Olive was given the opportunity to be heard and notice of any proceedings, therefore her procedural due process rights were most probably not violated. No fundamental rights are implicated by the BZA's decision to deny a variance for lack of parking, so it appears unlikely that any substantive due process rights were violated. Olive can argue that the failure to provide her with a variance when a similar variance had been recently granted to a similarly situated applicant violated her substantive due process rights because the action was not "rationally related to a legitimate state purpose." The BZA,

however, will res[p]ond that requiring parking for office space rationally related to the legitimate state purpose of a unified zoning scheme, and that granting variances to all applicants would diminish the uniformity and purpose of that scheme. Olive will argue that the zoning ordinance gives the board unfettered authority to grant or deny variances, which might be a problem for the BZA if they can't establish that the[y] follow guidelines or standards in determining what variances to grant. Olive will most likely fail in her attempt to argue that the refusal to grant her a variance was so "irrational" as to constitute a due process claim.

In this case, Olive's best argument would be that the denial of the variance was a violation of equal protection. Unless a fundamental right or a suspect classification is implicated, a zoning regulation or determination by a zoning board will be evaluated under the rational basis test and will be upheld if the regulation is reasonably related to a legitimate state purpose. In this case Olive can argue that the government created a classification by treating her differently from the other applicant who was granted the variance, and that the disparate treatment was irrational. The burden would be on Olive to demonstrate that the BZA's action in treating her differently was not reasonably related to a legitimate state purpose. In this case, Olive will argue that the different treatment could not possibly be rational because the applicants were so sim[i]lar. The BZA will most likely respond that it can only grant a limited number of variances, and therefore classifying among applicants in[h]erently requires some degree of discretion and they often grant variances on a "first come first served" basis.

Because the "rational basis" test is so deferential to the government, Olive is unlikely to succeed in her due process or equal protection claims.

Citizens are also protected from any "takings" of property without just compensation. Olive can argue that the refusal to allow her to use her property for offices if she does not secure parking amounts to a "taking." She is also unlikely to prevail on this claim. A property owner can sue for "reverse condemnation" if a government agency enacts regulations that preclude virtually any reasonable use of the real estate, but here the BZA has not denied Olive any use. She can still rent out some of the offices, and she is free to continue to seek commercial parking elsewhere so she can regain the use of the offices that she currently can't use. Accordingly, Olive's claim of an "unjust taking" will most likely fail.