ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Beth bought a lot in a new subdivision in 1997. The subdivision had covenants and restrictions including requirements that homeowners with dogs have fully fenced back yards, and that trees be planted within the first year after occupancy of a new home. The operation of businesses on the properties, and the long-term parking of trailers and recreational vehicles in the subdivision were prohibited. When Beth purchased her lot, Larry's home was already built on the lot next door.

During construction of Beth's house in 1998, she saw Larry landscaping his back yard. Larry's yard sloped, and he was building several retaining walls to flatten the slope. One wall looked to be right along the property line Larry shared with Beth. When Beth's house and landscaping were complete in 1998, the contractor performed an as-built survey of her lot. The survey showed that Larry's retaining wall crossed into Beth's lot by several feet. Larry used that portion of the land as his own and had built a permanent playhouse on it for his children.

Beth tele-commuted several days a week out of her home office. She got a small house dog but did not feel the need to fence her back yard. Beth and Larry at first got along; however, they had a falling out several years later. Larry began to operate a sound and light company for stage and musical productions out of his garage. As a result, he and several employees came and went at all hours of the night, which often woke Beth. Larry also kept a large trailer that contained his equipment parked in his driveway except when he was using it at a show. Beth was also annoyed that Larry never planted any trees as required in the landscaping portion of the covenants.

Beth met with Larry and tried to resolve their issues. She asked Larry to rebuild his retaining wall on his side of the property line and to remove the playhouse. Larry refused. The homeowners association, which was largely inactive, refused Beth's requests to force Larry into compliance with the covenants.

Beth finally brought an action against Larry in 2005. She sued for: (1) trespass and ejectment regarding the retaining wall that crossed onto her property and the playhouse; and (2) to enforce the covenants and restrictions against Larry's operation of a business, his parking of the trailer in his driveway, and his failure to plant trees.

Larry responded to Beth's suit. He argued that Beth cannot enforce the covenants because: (a) the homeowners association is the only entity that can bring suit to force compliance; and (b) Beth violated the covenants herself by

operating a business out of her house, and having a dog without fencing her back yard.

1. Discuss the merits of Beth's trespass and ejectment claims and any defenses Larry might have.

2. Discuss the merits of Beth's claim to enforce the covenants and restrictions, the defenses Larry has raised, and any other defenses Larry might have.

GRADER'S GUIDE

***** QUESTION NO. 2 *****

SUBJECT: REAL PROPERTY

1. Discuss the merits of Beth's trespass and ejectment claims and any defenses Larry might have. [50 points]

A. Merits of trespass and ejectment claims. [10 points]

Beth will prevail on her trespass and ejectment claims. Alaska law defines trespass as "an unauthorized intrusion or invasion of another's land, including subsurface areas." *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.* 995 P.2d 657, 664 (Alaska 2000). "Trespass liability may result from an actor's intentional, negligent, or ultrahazardous conduct." *Id.* Here, there is no doubt that Larry's retaining wall was an unauthorized intrusion or invasion of Beth's land. Larry has not disputed that his wall extends on to Beth's land, and the as-built survey shows the intrusion. Beth should prevail on her trespass claim unless Larry has one or more valid defenses to the claim (discussed below).

Beth's ejectment claim is governed by AS 09.45.630 which provides: "A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it . . . ." (The Alaska Supreme Court has noted: "To prevail in an action to quiet title to real property, a plaintiff must prove possession of the property; otherwise the proper cause of action is ejectment." *Miscovich v. Tryck*, 875 P.2d 1293, 1297 (Alaska1994)). Here, Beth has the legal title to the property, but not possession. Again, Larry has not disputed Beth's title and Beth should prevail on her ejectment claim unless Larry has one or more valid defenses to the claim (discussed below).

B. Adverse possession. [20 points]

Larry will likely assert the defense that he has adversely possessed part of Beth's property. He will not succeed. Alaska Statute 09.45.052 defines adverse possession:

(a) The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give

title to the property except as against the state or the United States. . . .

Here, there are no facts that support the claim that Larry's possession was "under color and claim of title," therefore he would have to prove the "uninterrupted adverse notorious possession of real property for 10 years or more" and a good faith but mistaken belief regarding the property line. Larry built the wall in 1997 or early 1998 and Beth brought suit in 2005, less then 10 years later. Therefore Larry will not prevail regardless of his good faith or belief regarding the property line. *See* AS 09.45.052(a).

C. Statute of limitations. [20 points]

Larry will assert a statute of limitations defense to Beth's 2005 trespass and ejectment claims. Two separate statutes of limitations apply.

AS 09.10.050, which applies to the trespass claim, provides: "Unless the action is commenced within six years, a person may not bring an action for waste or trespass upon real property." Larry will argue that Beth's claim accrued in 1997 or 1998, when he first built his wall and is now barred in 2005 by AS 09.10.050.

Beth will respond that Larry's defense at best cuts off damages accruing more than six years before she filed suit but does not prevent her from recovering for an ongoing trespass.

The Alaska Supreme Court recognizes the doctrine of continuing, or ongoing trespass: "Under theories of continuing trespass or nuisance, each harmful act constitutes a new cause of action for statute of limitations purposes and, therefore, the accrual of a cause of action is not measured from the date of the initial trespass so as to bar the entire action." *Oaksmith v. Brusich*, 774 P.2d 191, 200 n.10 (Alaska 1989). However, the ongoing trespass rule likely would not apply here with respect to the construction of the wall. With respect to that claim there was only one act that constituted the trespass: the building of the encroaching wall. There was no series of "harmful act[s]" that would justify the application of the doctrine of ongoing trespass. An applicant could separately argue that Larry and his family's use of the encroaching area constitute ongoing trespass acts. These repeated trespass acts could satisfy the continuing trespass doctrine. *See id.*

AS 09.10.030(b), applicable to the ejectment claim provides:

(a) Except as provided in (b) of this section, a person may not bring an action for the recovery of real property or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained under this subsection for the

recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises within 10 years before the commencement of the action.

(b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under AS 40.17, in order to

. . .

(2) eject a person from that real property.

Here, there is no question that Beth's ejectment claim is timely because the action was filed within 10 years (1997 to 2005), and Beth or her grantor (the subdivider) had possession of the lot during that time period.

2. Discuss Beth's covenants claim and the defenses Larry has raised and any other defenses he might have. [50 points]

A. The Merits of Beth's Covenants Claim. [10 points]

The Alaska Supreme Court has held that covenants are to be:

> construed to effectuate the intent of the parties. Once the intentions of the parties to the covenant are known, their intention serves to limit the scope and effect of the restriction. Because restrictions are in derogation of the common law, they should not be extended by implication, and doubts should be resolved in favor of the free use of land.

Hurst v. Victoria Park Subdivision Addition No. 1, 59 P.3d 275, 278 (Alaska 2002) (internal citations omitted). Here, Beth charges that Larry has violated three covenants: the prohibition of the operation of businesses from his home, the prohibition against the long-term parking of recreational vehicles and trailers in the neighborhood, and the requirement of completing the planting of trees within the first year after occupancy of a new home in the subdivision.

Larry may argue that he is not operating a business from his home and that he is not parking his trailer "long-term" in violation of that covenant. These arguments on the merits are not likely to succeed. The facts make it clear that Larry has employees coming and going from his home which seems to place his property use squarely within the prohibition of operating a business from his

home. *See* 20 Am.Jur.2d *Covenants* § 177. Larry is also likely to lose on his argument that his trailer is not parked long-term because it leaves regularly to take his equipment to the shows. It is clear that the intention of the covenant is to keep the subdivision clear of large trailers and RVs and that Larry's use is violation of this intent. *See Hurst*, 59 P.3d at 279.

Larry does not have any basis for a legal argument regarding the requirement of planting trees as part of the landscaping. He may try to argue that the landscaping requirement of planting trees is a *de minimus* requirement, but that argument has no merit.

B. Larry's Defenses. [40 points]

(i) The homeowners association is the only entity that can bring suit to force compliance. [10 points]

Larry's defense that the homeowners association is the only entity that can bring suit to force compliance with covenants has no legal grounding. AS 34.08.810 provides that "A right or obligation declared by this chapter is enforceable by judicial proceeding." Moreover, the Alaska Supreme Court in *Kohl v. Legoullon*, held that:

> It is established that when a common grantor imposes restrictive covenants on a tract of land as part of a common plan or general scheme of development, an owner of a lot in the tract may enforce the covenants against the owner of any other lot in the tract.

936 P.2d 514, 516 (Alaska 1997); *cf. Persson-Mokvist v. Anderson*, 942 P.2d 1154 (Alaska 1997) (suit by subdivision lot owners against other owners regarding restrictions in plat).

(ii) Beth cannot prevail because she violates covenants herself. [20 points]

Larry's defense that Beth cannot prevail on her covenant claims because he alleges she is in violation of other covenants herself is not likely to succeed. Larry's defense is probably best characterized as an "unclean hands" defense. "The doctrine of unclean hands is an equitable remedy." *Wirum & Cash, Architects v. Cash*, 837 P.2d 692, 708 (Alaska 1992). The Alaska Supreme Court has outlined the application of the doctrine of unclean hands in *Knaebel v. Heiner*, 663 P.2d 551 (Alaska 1983):

> In order to successfully raise the defense of "unclean hands," the defendant must show: (1) that the plaintiff perpetrated some wrongdoing; and (2) that the wrongful act related to the action being litigated.

> Although "'equity does not demand that its suitors shall have led blameless lives,' as to other matters, it does require that they shall have acted fairly and without fraud or deceit *as to the controversy in issue.*"

Id. at 554 (*quoting Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)).

Some applicants will likely argue that Beth's alleged breaches of other covenants are related enough to Larry's breaches of the covenants to provide the basis for an unclean hands defense to Beth's claims. There is some support for this argument in at least one treatise: "Ordinarily, an owner of a lot in a tract who has violated the building restrictions cannot enforce them against others. Minor violations, however, do not have this result, especially if they are wholly different from those with which the defendant is charged." 20 Am.Jur.2d *Covenants, Conditions, and Restrictions* § 276 (1995) (The Alaska Supreme Court has cited different sections of the Covenants section of the treatise in *Hurst v. Victoria Park Subdivision Addition No. 1*, 59 P.3d 275, 278 nn.9-13 (Alaska 2002) citing 20 Am.Jur.2d *Covenants* at §§ 16 & 171). However, the Alaska Supreme Court has indicated in analogous circumstances that this defense may not be viable. *See Estate of Lampert Through Thurston v. Estate of Lampert Through Stauffer*, 896 P.2d 214, 219 (Alaska 1995), citing *Brees v. Cramer*, 586 A.2d 1284, 1288 (Maryland 1991), for the proposition that a "breach of a covenant in a [nuptial] agreement does not, *ipso facto*, excuse performance of another covenant by the other party."

Beth's response will be that her violations, even if proved, are minor compared to Larry's and do not provide a defense to her claims. Beth will further argue Larry can pursue remedies as to her alleged violations with the homeowners association, in a separate court case, or as counterclaims in this case and should not prevent her from obtaining relief on her claims in this case.

It does not matter which conclusion applicants come to regarding the likely success of this defense.

(iii) Other defenses. [10 points]

Larry may raise a laches defense to Beth's covenant claim. "[L]aches is an equitable defense against equitable causes of action, but not a legal defense against actions at law." *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 730 (Alaska 2000). "The defense requires unreasonable delay by a plaintiff resulting in prejudice to the defendant." *Lake & Peninsula Borough v. Local Boundary Comm'n*, 885 P.2d 1059, 1065 (Alaska 1994).

Here, Beth has a relatively strong argument that she is asserting a property right under the covenants and that the equitable doctrine of laches does not

apply at all. *See id.* at 1065; *Laverty*, 13 P.3d at 730. Furthermore, although the facts are not clear as to how long Beth delayed bringing suit on her various claims, Larry will probably have a difficult time showing both unreasonable delay and any prejudice to him related to the delay. *See* 20 Am.Jur.2d *Covenants* § 279 ("Generally, mere delay or lapse of time in bringing suit does not in itself constitute laches. For instance, it has been held that laches was not established where the period between the violation of the restriction and the action to enforce it was as great as 12 years.").

Larry may argue that the covenants have been abandoned or that Beth has waived the right to enforce the covenants against him. This argument is not likely to be successful. The Alaska Supreme Court has held that "covenants will be deemed waived if the 'evidence reveals substantial and general noncompliance.'" *Kalenka v. Taylor*, 896 P.2d 222, 226 (Alaska 1995) (quoting *B.B.P. Corp. v. Carroll*, 760 P.2d 519, 523-24 (Alaska 1988)). The Court further stated that "a failure to enforce covenants against a single property [in a development] does not constitute abandonment." *Id.* Further, the type of covenant violations Beth seeks to remedy are less susceptible to waiver/abandonment arguments: "Generally speaking, violations as to types of buildings, as distinguished from use violations, will be given greater weight as evidence of abandonment, since the former violations create permanent changes which are not easily corrected by the violator." *See* 20 Am.Jur.2d *Covenants* § 238. Here, there are no facts to support Larry's argument of substantial and general noncompliance in the subdivision.

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Alaska
Bar Examination

JULY
2005

This Book is for your answer to

Question **No. 2** *Only*

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Question 2.

1. Beth's trespass and ejectment claims

Beth claims trespass against Larry for erecting a playhouse and a wall on her property and operating his business with equipment on his property in violation of subdivision covenants. We are to assume that the ejectment was to remove the retaining wall in trespass, not to remove Larry from his property for nuisance, i.e., disturbing Pam's peaceful enjoyment of the property all hours of the night.

The trespass claim is good as her as-built survey shortly after Beth moved in proved Larry was occupying her property without her permission with his retaining wall and playhouse. Larry, however, has defenses. He was first to build or at least lived there before Pam purchased her property. He may claim an implied easement or a legal interest in the property. The retaining wall was not a necessity but it did level his yard. Larry's defense that only the homeowners' association could enforce covenants or force compliance with boundaries, etc. is invalid. The covenants run with the land. The easement is not in writing, first implied or by necessity. Larry may claim that Pam's waiting several years after notice of his infringing on her property strengthened his argument of an implied easement by consent. Working against this is the fact that the subdivision was new in 1997 and Beth purchased in 1998 and sued only a few years later.

Breach of covenants

2. Larry's defense that Beth also ran a business out of her house, a telebusiness, in violation of the covenants of the subdivision is less persuasive than Beth's claim that Larry parked equipment from his business on the property and moved it all day and night. The purpose of the covenant was aesthetic; similarly for trees. Larry makes a better argument about Beth's lack of fencing for her dog, but we are not told that the dog barked or ran on other's property, or even went outdoors. Clearly, Larry's operating a sound and light company out of his garage with several employees all hours of the hight is the type of activity proscribed by the covenants. Beth, as a result could property sue for nuisance, which interfered with her implied covenants of quiet and enjoyment of the property. While Larry might argue that she"came to the nuisance" Larry is liable for a breach of covenant and is probably a nuisance to other neighbors as well.

Beth would succeed in her trespass action and either have the wall removed or settle for a sum with an express easement allowing Larry's wall and playhouse to remain on her property. Her failure to bring this action for several years would not negate her property claim. Larry could not claim adverse possession in the short time both have lived in the subdivision.

Any adverse possession claim would have been for the statutory time, adverse, hostile and continuous. None of these factors are evident in the facts. Pam knew of the wall's infringement and did nothing for only a short period of time, several years. Nothing indicated that Larry's trespass was hostile, though continuous.

Larry's failure to plant trees in violation of covenants was not so serious as his operating the business out of his garage and parking his trailer in his driveway. His breach could be enforced. On the other hand, Beth's lack of a fence with a dog, while in breach of covenant, presents no problem with barking or noise as does Larry's business. Beth's telebusiness is apparently unobserved by the community and subdivision and presents no problem. Larry may only know of the business by conversations with Beth when they were on better speaking terms. Beth in good faith did plant trees.

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This Book is for your answer to

Question **No. 2** *Only*

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Question 1

Beth's Trespass + ejectment

1.a. The issue is whether Larry trespassed by entering Beth's property by building the wall + playhouse?

A person trespasses when a person enters or causes an object to enter another's property. Here there is evidence that Larry trespassed on Beth's property. By building the wall + playhouse. Even though the facts state that "One wall looked to be right along the property line Larry shared with Beth." + Larry may have thought he was building on the right line it would still constitute as Trespass. ~~Beth did not bring a claim for trespassing until 2005 Larry may have thought he had built correctly and did not intentionally trespass.~~

Her claim for eject should be granted & Larry may be forced to tear down the

Wall + playhouse unless Larry can successful raise defenses. Larry may also have to pay damages for any damage caused by His wall or Playhouse.

1b. Larry's Defenses: Adverse possession + Prescription EASEMENT.

1. Did Larry, under color of title, continuously possess the strip of Beth's property for 7 years to be an adverse possesor? to bring a claim of adverse possession the claimant must have occupied the property open + notorious, continuously + exclusively for the statutory period and acted as true owner of property w/o Actual owners permission.

Here Larry did openly occupy the property w/o the true owners permission. Presumptively,

it was exclusive, though the facts don't specifically state. He acted as a true owner by building a wall + play house for his children. The real issue is whether he used for the statutory period. The statutory period is 7 yrs under the Color of title. James didn't have title to the land. He may not be able to bring a claim for adverse possession.

2. Larry may succeed w/ a claim of prescription easement.

The main issue is whether Larry used the land for the statutory period of 7 years to qualify as for prescription easement?

A prescription easement is when

a non owner uses property of a servient estate continuously, openly + exclusively as a true owner w/ out permission for the Statutory period. Here James has used the property openly, Pam noticed when surveys done, presumptively exclusively since playhouse for children, seemingly continuously. The facts do not say whether Pam ever told James it was o.k to use even though she knew so would satisfy the Hostile requirement. The real issue is the ~~Hostile~~ Statutory period. The years are the only fact presented. If it is short by months then James may fail + Pam would prevail on her ejectment claim. But if

James satisfyed the SOL. The Jones may be granted a Prescription easement.

Question 2

1. Beth's claim to enforce the covenants.

Can Beth as a home owner in the sub division bring a claim to enforce the covenants? Any homeowner can bring a claim to enforce the covenants though she may have to see the association to have the causes of action brought.

2. Larry's defenses.

Did Larry have Actual, Constructive or inquiry notice to bind him to the covenants? Depending on when Larry moved into the

neighborhood Larry may not have had notice and not held to the covenants.

Covenants must be in Writing + recorded.

If not then Covenants are only good between those a party + anyone w/ notice.

Actual notice

There is nothing in the facts that indicate that Larry had actual Notice.

Constructive.

If It was written in Plat or Deed the Larry will be charged w/ Constructive.

Inquiry

If it is Apparent that other homeowners don't run businesses, all have trees, pet owners have

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2)

1. Discuss the merits of Beth's trespass and ejectment cliams and any defenses Larry might have.

Covenants are also known as equitable servitudes. These are often found when there is a restriction on the use of a freehold estate. A covenant has four requirements:

1. Must touch and concern the land
2. Notice that the land is restricted
3. Privity of estate
4. The covenant must run with the land

Here, the covenant is for a subdivision. The subdivsion does not allow dogs in unfenced backyards, and trees must be planted in the first year of occupancy of a new home. No operation of businesses on the properties, and the long term parking of trailers and RV's are prohibited.

a. BETH

Trespass to land is the intentional entrance onto the land of another without permissio, or interference with the true owner or posessors use. Beth claims that Larry has trespassed on her land and wants him ejected. The facts show that Larry has encroached onto Beth's land. Beth and Larry are next door neighbors. The question

concerns if Beth waived her right to eject him for failure to eject him in a timely fashion. In 1998 Beth knew of Larry's wall on her property and she did nothing to enforce her rights. However this will not waive her rights. Beth will likely succeed in her ejectment and trespass action. The statutory changes in adverse possession do not give Larry the right to obtain her property because 10 years have not passed. Larry was also violating other restictions of the subdivision, and while none were being enforced, this will not prevent Beth from pursing and winning in an ejectment action. Larry is on her property a few feet, which is a significant amount of space. Beth may also be entitled to actual and nominal damages from the trespass and removal of the wall.

b. LARRY's DEFENSES

Larry may raise the defense of adverse possession. However, there has been a statutory change in the law of adverse possession. While boundary line disputes may exist, the statute of limitation has not run. Larry will argue that his use was uninterruped, hostile, and adverse. And, that he was under a good faith but mistaken belief that the property was his, and title should go to him. However, before 7/03 if the statutory period of 10 years had run, and all elements met by a clear and convincing standard, then title would have vested. However as the facts show, the statutory period would have begun in 1998 when Larry began building. Ten years did not pass for title to vest, therefore the statutory period would have to start over. Larry will not meet the requirements to own the property by adverse possession.

Larry is also likely to argue that Beth waived her rights because she allowed him to use,

build and maintain until 2005. That she had notice of the building and she did nothing, thereby allowing Larry to put much time and effort into building and maintainging, only to eject. Larry is also likely to argue that Beth cannot enforce rights when she herself is in violation of other rights.

2. Discuss the merits of Beth's claim to enforce the covenants and restrictions, and the defenses Larry has raised, and any other defenses Larry might have.

Larry's operation of the business:

Beth will argue this Larry's operation of the business was a breach of the covenant. In addition she could argue that it is a private nuisance for her to have to listen to the music and noise of constant coming and going of people. While Larry did live there first, this is only one factor. Larry may argue that the business is recreational in nature and does not violate the covenant. Beth will argue that the easement that Larry has to use the road is violated by the increased traffic. The court is likely to hold in favor of Beth if she can prove that the music company is a business for profit and that he is violating the covenant. RV: Again, beth is likely to have a strong argument in favor of the RV restricting the covenant. Larry may argue that it is not a recreational vehicle, if the court finds it is one, they will likely order it to not be in plain view in his driveway. Beth will argue that the RV is unappealing and that the covenant should be enforced. This touches and concerns the land in its astheatic value. Failure to Plant Trees: Beth is not likely to win on this. The covenant says in the first year trees shall be planted. Because no one brough suit and the amount of time that has passed, she is unlikely to

win for him not planting the trees. Can only the homeowners association bring suit: Larry is incorrect in asserting that Beth is the wrong entity to bring suit. In Alaska, anyone who meets the requirements for being part of the subdivision plan (Privity, Notice, Runs with land, Touches and Concerns land) may bring suit to enforce the restrictions. Here, they are in privity by both owning property in the single subdivision, there is a question of notice, but a common plan or scheme for a subdivision may put one on notice, and they touch and concern the land, and arguably run with the land.

Beths violation of the covenants by: Dog without fence: Beth will argue that her dog is small, and perhaps she doesnt let it run wild. If she doesnt let it loose, she may have a good argument that a fence is unnecessary. However, Larry will have a strong case here to enforce the covenant. The purpose of the fence arguably touches and concerns the land and a court would likely find that a fence would be necessary for animals who can run around in the neiborhood. Operating a business: Here Beth will argue that she only works sometimes in her home and it is incidental to her residence. She will likely argue that she does not have clients coming and going, nor that she spends all her time there. Larry will argue that the amount of time she works there amounts to the operation of a business. Beth will likely win on balance because she does go to work somedays, and only tele-commutes other days.

Other Defenses Larry may have: Larry may argue that he was unaware of the restrictions of the subdivision. However, this argument is likely to fail because of the common plan and scheme of the community would put him on actual, constructive, or inquiry notice. However, it is a new subdivision, so the trees would not have been built

yet, and the houses and plots may not all be built. If it was not recorded in the proper place and district at the time he purchased the property, he may also claim that prevented him from being aware of the restrictions, and hence, not being liable for not following them. Larry may also argue that uneforcement of the covenants by the homeowners association waives the covenants as no one was following through with keeping then up. Larry may also have a statute of limitations defense. For a tort, the statute of limitations is 2 years and for breach of a contract it is three years. Regardless of the theory on which it is brought, she may have waived her right to bring suit based on the statute of limitations.

Larry's strongest argument is that Beth has violated the covenants herself, and therefore has unclean hands. She waived the right to enforce the

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2)

1. Beth's Trespass and Ejectment Claims and Larry's Defenses

A landowner has the right to eject trespassers from her property. In this case, Larry's retaining wall and playhouse are on Beth's land. She normally would have the right to have Larry ejected. Larry, however, has several strong defenses.

First, Beth may be estopped from pursuing the ejectment under the doctrine of laches. Under the doctrine of laches, a landowner who sees a neighboring landowner investing in something that may violate the landowner's possessory right to there land but does nothing about it at the time may be estopped from doing so later when they could have raised the issue at the time and saved the other time and resources.

In this case, Beth saw Larry builing the retaining wall in 1998. She did nothing about it at that time and in fact waited until 2005 to raise the issue in court. Larry could argue that Beth should not be able to bring the suit now because she knew what he was doing at the time he built the wall and didn't do or say anything about it.

Beth, on the other hand, could argue that she didn't know at the time that Larry was building on her property. It wasn't until Beth had the survey done, after Larry was done building, that she learned that he had built on her property. While Larry was building, the facts state that Beth thought the wall was just traveling right along the property line.

Second, Larry could argue that he now owns the easement under the doctrine of adverse possession (a prescriptive easement). Alaska recently did away with adverse possession where there is no color of title but does still allow one to acquire an easement through adverse possession. The occupancy of the easement must be continuous for the statutory period, hostile, open and exclusive.

The statutory period is 10 years if there is no color of title and 7 years if there is color of

title. There is nothing in the facts indicated that Larry had color of title so he would need to have possessed the land for at least 10 years. It is not clear when Larry's possession began. He was buidling the wall in 1998 while Beth was building. However, the facts do not indicate whether the particular wall in question had been built earlier or not. If the wall was built earlier, Larry could tack that time onto the time he possessed the land against Beth's interest (who bought in 1997) and may be able to assert that his possession was continuous for the requisite amount of time. He would need to show ten years up to the 2005 lawsuit.

Larry's possession was hostile. A possession is hostile if there is no permission from the landowner. Here, there may have been permission since Beth saw the wall and playhouse and the facts say that Beth and Larry got along over the issue until some years later when Beth finally asked Larry to move the wall. Beth would argue that she had impliedly given Larry permission by not doing anything about it until some years later. Beth giving Larry permission for part of that time would have tolled the time running on the statutory requirement.

Larry's possession was open. Possession is open if the use is apparent to the landowner. Here, Beth clearly saw Larry building the walls and saw the particular wall in question.

Larry's possession was exclusive. Possession is exclusive if the use is incompatible with the landowner's use of the land at the same time. Here, Beth couldn't use the land as her own with Larry's permanent playhouse sitting on it and a wall around it.

So if Larry could show that he satisfied the statutory period and that his use was hostile, he may obatin the land through prescriptive easement.

2. Beth's claim to enforce the covenants and restrictions and Larry's Defenses

Covenants and restrictions can be enforced against one bound by them by any other landowner bound by the same covenants. Consequently, Beth can seek to enforce the

covenants against Larry without the Homeowner's Assocation doing it for her. Here, it says that the Association is largely inactive, indicating that its refusal to pursue Beth's claims for her are not based on the merit of her claims but rather based on the fact that they don't want to do much of anything. At any rate, Beth, as a landowner bound by the same covenants, is entitled to pursue enforcement of the covenants herself.

Beth must first show that the covenants are part of a general plan or scheme of development. If they are, and the purchasers had notice of them, the covenants can be enforced against them. Covenants and restrictions run with the land if there is privity of contract, notice of the covenant, intent of the original parties for the covenants to run with the land and that they touch and concern the land. Here, the facts indicate that both Beth and Larry live in a new subdivision and that the covenants and restrictions were placed on the whole subdivision. There is nothing to indicate that Larry is not bound by the covenants as a preliminary matter. He apparently had notice of them since they would have been recorded as part of the subdivision plan and is thus bound by the subdivision plan.

Larry, however, may raise several defenses to the enforcement of the covenants against him. First, covenants are considered abandonded if they are largely not complied with. In this case, Beth herself operates a business out of her home even though the operation of a business in the subdivision is prohibited. Larry would want to gather facts about whether other people in the subdivision are doing the same thing. If they are, Larry may be about to make out a good case for claiming that the particular restriction against businesses out of the home has been abondonded through the other's noncompliance.

Beth on the other hand would argue that the nature of their businesses is very different. Since her business takes place only in her home, it is not bothering anyone. Larry's business on the other hand is very loud, includes a lot of traffic during all hours and is generally incompatible with residential living. Based on this, Beth could argue that her business does not

fall in the type that was meant to be prohibited and Larry's is.

Additionally, Beth could argue that sometimes covenants do not need to be strictly complied with so long as the intent of the covenant is being complied with. Here, the restriction against businesses is probably meant to keep the subdivision compatible with residential living. People want a nice quiet place to live without too many outsiders coming in and making noise. Beth's business complies with that intent since her business makes no noise and does not draw the public into the subdivision. Larry's business, on the other hand, is very noisy and draws the public into the subdivision, uses not compatible with residential living.

In response, Larry could argue that where a covenant or restriction on land is ambiguous, Alaska courts will interpret it to allow for free use of the land. Here, since it doesn't specificy what type of business is prohibited, if Beth wants to argue that her's is OK, she should be estopped from arguing that it does restrict his when the issue is not clear on the face.

Regarding Larry's trailer and the planting of the trees, Beth can push for enforcement of the covenants prohibiting the long-term parking of such vehicles and requiring landscaping. As discussed above, Beth is in a position to enforce the covenant as another landowner bound by the same covenant and Larry is bound by the covenant since he purchased property that is bound by covenants as part of a general plan or scheme of development and the developer intended all purchasers to be bound by the same covenants. Additionally, Larry is in privity with the developer and apparently has notice of the covenants. Larry could argue, however, that he is not bound by the parking restriction since it does not touch and concern the land. It does deal with the use of the property, however, so a court would probably find that it does touch and concern the land. The requiring landscaping covenant definitely touches and concerns the land since the trees will be planted directly into the land.

Beth could respond to Larry's counterclaim against her about her failure to build a fence by arguing that she was unable to do so since Larry had his wall and playhouse on her property

by the time she had her house built and got a dog. A person may be estopped from making an argument when they have made it impossible, through their own actions, for the other to do the thing that they are arguing the other should do. Here, Beth could not properly fence in her backyard with Larry's permanent structures sitting on it. Consequently, he should not be able to make the claim against her.

Additionally, Beth could argue again that the intent of the covenant requireing people with dogs to fence in the backyard was to keep dogs from running all over the neighborhood. Since Beth's dog is a house dog, it stays inside, is not running around outside, and so she does not need to build a fense to keep it in. Larry would argue that it has to go outside sometimes and at any rate, the covenant is clear on its face, stating that people with dogs must fence in their backyard.

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Question **No. 2** *Only*

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1. Beth has sued Larry for trespass and ejectment, because his retaining wall and playhouse cross onto Beth's property.

There are several merits to Beth's suit. First, since 2004, there is no more adverse possession in Alaska - a landowner can sue at any time for trespass and ejectment. However, there are several exceptions - utilities; the government; and ~~"new~~ adjoining landowners who have a good-faith belief the land is theirs - can claim title by adverse possession. The statutory period is 10 years.

Because Larry built structures on Beth's property, Beth could ~~change~~ sue as described above. But Larry could claim the adjoining-landowner exception as a defense. The facts do not specifically state when Larry built the wall and playhouse (though the facts note he "was building" some walls in 1998). If he meets the 10-year period, he could claim the exception - if his use of Beth's property meets the other requirements of adverse possession, including a good faith belief the land was his - open, notorious, exclusive & adverse/hostile to Beth's ownership.

Larry may also be able to claim ~~an adverse~~ a prescriptive easement. This interest shares the elements of adverse possession but is for use, not ownership.

2. Beth has also sued to enforce the restrictive covenants against Larry's operation of a business, his trailer parked in his driveway, and his failure to plant trees. Larry argues in response that only the homeowner's association can sue to enforce compliance, & that Beth violated the covenants herself by operating a business out of her home and by having a dog without building a fence.

Beth's suit to enforce the covenants has several merits.

First, a property owner of a subdivision lot can sue the owner of another lot to enforce a restrictive covenant. For the covenants to be enforceable against all owners there must be a common development plan or scheme of which the owners have notice - either actual, constructive (via a title search - not a mere inquiry made to the seller) or inquiry (ie they inspected the property & should have noticed all lots had the same characteristics).

The facts support Beth's suit against Larry for violation of the covenants - however the facts do not specify whether the restrictive covenants were in ~~deed~~ each lot's deed, or in a plan on file with the city/borough, or what all the other lots looked like (these would be points Beth would need to argue). Larry was operating his sound and light business out of his garage, which clearly

violates the prohibition of businesses "on the property." The facts state that Larry kept a trailer containing equipment in his driveway except when at shows - ~~& Beth can argue this~~ however the covenant prohibits "trailers & RVs" parked "long-term" in the subdivision (as discussed below, this may tilt in Larry's favor). Finally Larry ~~didn't~~ planted no trees - a ~~clear~~ violation of the covenant that trees be planted "within one year ~~of~~ after occupancy of a new home" - though the facts do not specify whether Larry purchased his home new.

Larry defends Beth's suit on the grounds that only the homeowners assoc. can sue & that Beth violated the covenants herself by operating a business & having dogs without fencing her yard. Larry's argument that only the homeowners association can sue is incorrect. Any property owner in a subdivision with a common plan or scheme can sue another property owner, as discussed above. Even if that was a requirement, Beth asked them to force Larry to comply & they refused, which would allow her to sue herself.

Larry's argument that Beth is herself violating the restrictive covenants is a form of the defenses of "~~clean hands~~" unclean hands" - that one can't sue to enforce a rule

one is also breaking. However, while Larry is correct that Beth owns a dog but has not fenced her back yard, violating the restrictive covenant, he is incorrect that she is violating the ~~was provision~~ prohibition on operating businesses out of her home — merely telecommuting to her business which is located elsewhere does not fit that definition.

Larry may be able to defend on the grounds that his actions do not ~~further~~ fall under the prohibitions. The covenant requiring trees be planted states that that must be done "within the first year after occupancy of a new home." The facts do not state whether Larry's home was new when he moved in — but that might prove a defense.

Larry could also argue that the restrictive covenant is ambiguous. Ambiguities in restrictive covenants should be resolved in favor of free use of the land. Here, "long term parking of trailers & recreational vehicles" is prohibited. The covenant is unclear how long "long term" is, and is unclear as to whether "trailers and rv's" means camper-type/mobile-home-type residential trailers, or whether it might include the storage trailer Larry keeps his theater equipment in. Larry also takes the trailer with him when he goes to shows — the facts do not state the

frequency or length of these trips, but they might bring Larry's actions outside of the ~~restrictio~~ prohibitions. Either way, he could argue that the restrictive covenants are ambiguous, as a defense.