ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

In 2007, Jim bought a lot and built a home in a new subdivision in Alaska. The subdivision had fifty lots and had a number of covenants and restrictions that were properly recorded as a part of the subdivision development. The subdivision was created as a common interest ownership development under Alaska Statute. The covenants and restrictions prohibited permanent structures other than the main residential structure (the house) and one small storage shed. The covenants also prohibited the long-term parking of recreational vehicles and trailers. The covenants required that homeowners with dogs fully fence their back yards.

Jim, a life-long Alaskan, owned recreational vehicles, a boat and several trailers. He called them his toys. As soon as he moved in, Jim began storing his toys in his driveway and backyard. Using some of his toys, Jim caught hundreds of fish each summer. To process some of the fish, Jim built an eight foot by eight foot smokehouse in his backyard next to his small storage shed.

Tanya, Jim's neighbor, disliked the cluttered look of Jim's driveway and yard. She also got tired of smelling the alder smoke and smoked fish odors wafting into her open windows during the summer.

Tanya wrote a letter to the homeowners association about Jim's non-compliance with the covenants. The homeowners association wrote Jim a letter addressing his violations. Jim then walked around the neighborhood with a "petition" to amend the covenants by eliminating those that he was violating or to waive his violations. Jim collected 26 signatures on his petition.

Tanya sued Jim. Jim argued in defense: that his smokehouse was not a permanent structure for purposes of the covenants because it was built on skids instead of a real foundation; that Tanya could not bring suit because she owned a dog and her back yard was not fenced, in violation of the covenants; and that based on his petition the homeowners have amended covenants and/or waived his violations.

Analyze the arguments Jim has raised in his defense.

GRADER'S GUIDE

***** QUESTION NO. 5 *****

SUBJECT: REAL PROPERTY

Analyze the arguments Jim has raised in his defense. [100 points]

Jim has raised four arguments in his defense: each will be discussed below. Some applicants may discuss whether Tanya has the ability to directly pursue her covenant violation claims against Jim. Under Alaska law it is clear that an individual homeowner, in addition to the homeowners' association, has the right to pursue covenant violation claims. AS 34.08.810 provides that "A right or obligation declared by this chapter is enforceable by judicial proceeding." In *Kohl v. Legoullon*, the Alaska Supreme Court held:

> 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).

1. Permanent structure [25 points]

Jim has argued that his smokehouse is not a permanent structure for purposes of the covenant barring permanent structures other than the primary living residence and one small storage shed.

The Alaska Supreme Court has opined that interpreting restrictive covenants should be governed by several judicial canons of construction:

> Interpretation of restrictive covenants is guided by several canons. Where the language of the covenant is not ambiguous, the plain meaning governs. Where the language of the covenant is ambiguous, judicial construction is necessary. Covenants are construed within their own four corners. They are also construed to effectuate the intent of the parties. Once the intentions of the parties 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 footnotes and citations omitted). In *Hurst*, the Court analyzed whether a low, split-rail wood fence was a "permanent structure" for purposes of restrictive covenants. *Id.* The Court, finding that the term was ambiguous looked to the intent of the restriction and related provisions in the subdivision's other restrictions.

Here, the covenants also do not define permanent structure and there is little guidance in Alaska case law on the subject except that, as noted above, prohibitions in covenants must be interpreted to give meaning to the intent of the parties.

Without the benefit of the entire covenants and restrictions document for Jim and Tanya's neighborhood, applicants cannot fully analyze whether the intent of the restriction would bar Jim from having a smokehouse in his back yard. Applicants should recognize that the type of foundation, skids, does have some weight in the question of whether the structure is permanent. Additionally, the facts state the Jim used the smokehouse only during the summer fishing season.

On the other hand, the covenants recognize that a shed is a permanent structure (by allowing one small storage shed as an exception to the restriction) and many storage sheds are built without permanent foundations. In addition, there is a logical stand-alone argument that Jim's smokehouse is a "structure" and is permanent because he has used it for several years in the same location. Finally, there is an argument based upon the other covenant referenced in the facts prohibiting the parking of recreational vehicles and trailers that the covenants should be interpreted to keep yards and driveways from being cluttered with structures, vehicles and other items, including the smokehouse.

2. Violation as bar to bringing claim. [25 points]

Jim has asserted as a defense that Tanya cannot prevail on her covenant claims because she herself is in violation of a separate covenant. His defense is not likely to succeed. Jim'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)).

Jim's argument is that Tanya's breach of the covenants for failing to fence her back yard when she owns a dog is related enough to his own breaches of the covenants to provide the basis for an unclean hands defense. 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."

Tanya's response will be that her violation is minor compared to Jim and not related to his alleged breaches. Tanya will also argue that Jim can pursue remedies for her violation with the homeowners' association, in a separate court case, or as a counterclaim in this case and should not prevent her from obtaining relief in on her claims in this case.

Jim's defense is not likely to succeed.

3. Amendment [25 points]

Jim has argued that his collection of 26 signatures on his petition to amend the covenants has successfully amended the covenants to

eliminate those which he his violating. Alaska Statutes lay out the process for amending covenants. AS 34.08.250 provides in relevant part:

a. . . . [A] declaration, including any required plats and plans, may be amended only by vote or agreement of unit owners of units comprising at least 67 percent of the allocated interests in the association or a larger percentage if specified in the declaration. . . .

. . .

b. Each amendment to the declaration must be recorded, and a plat or plan that accompanies the amendment filed and recorded, in each recording district in which a portion of the common interest community is located and the amendment is effective only upon recording. . . .

. . .

c. An amendment to the declaration required by this chapter to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by an officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

Here, Jim's petition fails to satisfy the requirements to successfully amend the covenants in a number of ways. First, his petition garnered only 26 signatures, short of the 67 percent required by AS 34.08.250(a) (or 34 homeowners of the 50 total).

Jim also failed to record the amendment, as required by AS 34.08.250(b), or be granted the power by the association to execute and record the amendment, as required by subsection (e).

4. Waiver. [25 points]

Jim argues that his petition has waived his violations. There are two general ways that waiver can occur in the context of enforcing restrictive land covenants. First, the homeowners association as the governing body of the common interest community can formally waive covenant violations by official act of the organization. Second, waiver can occur through nonenforcement and other inaction.

The first concept of waiver requires the homeowners association to formally act to waive covenant violations. The facts do not lay out whether the association's declaration provides for action by "petition" of its members. Alaska Statutes do not directly address whether such a petition process is legally allowed, although the structure of the statutes suggests that such a process is not allowed. AS 34.08.390, addressing meetings of the association requires for instance that all members of the

association receive by mail or hand delivery notice of the meeting with the agenda of the meeting. Here, a court is likely to find that Jim's petition does not suffice to formally waive violations.

The Alaska Supreme Court has addressed the concept of waiver in the context of non-enforcement or inaction in *Kalenka v. Taylor*, 896 P.2d 222 (Alaska 1995). There, the Court stated "covenants will be deemed waived if the 'evidence reveals substantial and general noncompliance.'" *Id.* at (*quoting B.B.P. Corp. v. Carroll*, 760 P.2d 519, 523-24 (Alaska 1988). There is no indication from the facts in this case that waiver of this type has occurred through non-enforcement or inaction. In addition, the facts provide that Jim bought his lot in the "new" subdivision in 2007, so his covenant violations have not been ongoing long enough to support a claim of waiver through inaction.