Property II Spring 2001 Prof. Nivala

## **QUESTION 1**

In 1933, the Orville Land Company subdivided a large tract of land into 140 lots. The subdivision was named Lake Webster Estates and was shown on a plan recorded in the Camelot County Registry of Deeds.

In 1934, OLC conveyed Lot 2 on that plan to Fred Bird. Lot 2 was situated on Lake Webster. The deed to Bird contained the following language:

The beach fronting said lot and a right of way at least 10 feet in width to same shall be forever kept open for use of owners of land at said Lake Webster Estates and their families and guests.

Subsequently, OLC sold many subdivision lots. None of these deeds granted a right to use the beach fronting Lot 2 or access to the beach over Lot 2.

In 1973, Fred Bird sold Lot 2 to Sam Bigelow. This deed recited that Lot 2 was subject to rights created by the OLC deed but did not recite the language used in the OLC deed. In 1974, Sam Bigelow conveyed all the property acquired from Fred Bird (together with additional lots in Lake Webster Estates) to the Young Albert Company. This deed recited that Lot 2 was "subject to beach rights and ten-foot right of way thereto as the same may be in force and effect."

In 1975, YAC conveyed all the land which YAC had acquired from Sam Bigelow (together with additional lots in Lake Webster Estates) to Mega Land Holding Company. The deed contained no reference to beach rights or a right of way over Lot 2.

In 1988, MLHC recorded a plan in the Camelot County Registry of Deeds which divided Lot 2 into Lot 2A and Lot 2B. This plan contained no reference to beach rights or a right of way over Lot 2. In 1994, MLHC conveyed Lot 2A to Charles Dovecote who owned a home on an adjacent lot. The deed to Lot 2A did not mention beach rights or a right of way.

After the sale, Dovecote erected a fence on Lot 2A which prevented access to the beach and which also prevented use of the beach fronting Lot 2A. Dovecote has received a letter from

Flo Putoff, a neighbor in Lake Webster Estates who does not have direct beach access and who was accustomed to crossing the former Lot 2 to gain access to the beach fronting it. The letter demands that Dovecote remove the fence. Dovecote has also received a letter from the attorney representing the town of Lake Webster Woods which includes all lots in Lake Webster Estates. This letter also demands removal of the fence.

Dovecote has asked for our advice regarding these two demands. Assume that both Putoff and the town are willing to sue. Also assume that any lawsuit would be timely. What claims could they raise and what responses could we make on behalf of Dovecote? Please analyze the merits of the claims and the responses.

## **QUESTION 2**

In 1995, Oscar and Olivia Overmyer purchased a lot in the town of Mountainair. In 1996, the Overmyers asked a state-certified site technician to design a septic system. They told the technician that they wanted to build a four-bedroom house on the lot. The technician visited the lot with Howard Bergman, Mrs. Overmyer's father who was to serve as the general contractor for the house. After examining the soil, the water table, the lot grading, and the lot configuration, the technician designed a septic system for a three-bedroom house. When she delivered the plans to Bergman, the technician told him that the lot's small size and other characteristics prevented installing a septic system large enough for a four-bedroom house. The plans stated that the technician should be notified and the system inspected before it was covered.

The Overmyers relied on Bergman to obtain all the necessary permits and to build the house in compliance with them. In June 1996, Bergman obtained a building permit which provided that "all construction was to be completed in accordance with the applicable Mountainair laws." Mountainair's zoning laws require the owner of a newly constructed home to apply for a certificate of occupancy which is issued only after the home is inspected and found to comply with the applicable permits. The zoning administrator enforces the laws through fines and through actions to "restrain, correct, abate, or prevent any use constituting a violation" of the laws. Bergman also obtained a septic permit which provided that the system was "to be constructed in accordance with the design of the site technician . . . and to be inspected by her upon completion, written notice of which must be received prior to issuance of a certificate of occupancy."

Bergman built a four-bedroom house on the lot. He did not follow the site technician's

septic or grading plan. Instead, Bergman installed a substandard septic system with numerous defects and poor grading. The technician never inspected the system; Bergman never obtained a certificate of occupancy. The Overmyers had no knowledge of these circumstances.

In November, 1999, the Overmyers sold the house to Irving Dumstone. During the negotiations leading up to the sale, the Overmyers made no representations regarding the septic system or the lack of a certificate of occupancy. The Overmyers gave Dumstone a warranty deed with a covenant stating that the property was free from encumbrances. State law requires town clerks to

keep a general index of transactions affecting the title to real estate . . . including every deed, conveyance, mortgage, lease, or other instrument affecting the title to real estate, and including each writ of attachment, notice of lien, or other instrument evidencing or giving notice of an encumbrance on real estate.

In January, 2000, Dumstone was unexpectedly transferred to another job and had to sell the house quickly. Sam and Sue Preston bought the house that month and received a warranty deed with a covenant stating that the property was free from encumbrances. In July, 2000, the Prestons noticed that the grass in their backyard above the septic system was unusually lush, a condition that continued through the winter. This spring, the Prestons noticed a fetid odor coming from the same site followed in a few weeks by effluent surfacing in the backyard. They had the system inspected and the defects were discovered. The Mountainair zoning administrator has notified the Prestons that they need to replace the entire system as well as take other steps in order to obtain a certificate of occupancy. Without it, they can not occupy the house. The Prestons will have to spend over \$40,000 to obtain the certificate.

The Prestons have asked our firm to represent them. I would like a memo from you analyzing this matter including the strengths and weaknesses of possible actions we could take or claims we could make and the possible reactions or defenses offered by those involved.