Sample Answer Ally PIT Aris OF
Propii (Kelly) A-SP07

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generally:

We must first assess whether the restrictive covenant in the by-laws of the CIC is binding upon Marcos. The requirements for establishing a covenant as binding are: Writing sufficient to satisfy the SOF, Intent to run, notice, touch & Concern, and Privity of estate; you must analyze for both the burden and the benefit. In this case there is a RC writen explicitly in the community declaration/by-laws which is sufficient and is therefore met. There is clear language that the burden is intended to run with the land because of the language in the RC which states all rules and restrictions ... are intended to bind all successor owners or possessors of the units in question. The promise is one made by all condo owner's intended for the benefit of the common interest community and thus the benefit is intended to run as well. Notice is satisfied for both sides because there is constructive notice by means of the duly recorded rules and bylaws, therefore Marcos would've had knowledge before purchasing the condo. We are also told that Marcos had actual knowledge of the by-laws because he chose this community because of their leasing provisions. Touch and concern is satisfy because you must show that the restrictions concern land use and will affect the use and enjoyment of the land. restrictive covenants have been held to meet this requirement because they are for the benefit of the community. Lastly, Marco's was in horizontal privity because the interest was instantaneous and created at the time of the sale.

Marcos & The Condominium Association:

The issue here is whether or not Marcos should be subject to the leasing restrictions as

amended which would effectively reduce his time to rent out his condo and would prevent him from being able to afford his condo. There is a presumption that restrictions and amendments created by the condo's board are valid unless unreasonable. In order to determine if this amendment is unreasonable we would have to look at the benefits to the community/society vs. the harms to the individual/owner's/society. In this case The question is whether or not the leasing restriction is reasonable. The board mentioned the reasons for wanting to have limited renters as: late parties, excessive noise and lack of shoveling. However, the late parties and excessive noise were also things that happened as a result of the owner's occupation of the units and the snow removal is a problem that will be remedied by the new RC amendment requiring snow removal at every unit no later than 24 hours after a snowfall. The burden on the individual unit owner from the snow restrictions is minimal and is good for the safety of the residents however the leasing restriction is another issue.

There already was a leasing provision in effect at the time of Marco's purchase which subjected leases to the prior approval of the board as well as thier renewals. By limiting the lease term they are not eliminating any of the issues that they discussed. Perhaps some of the benefits to the community could be:increased marketability due to more owner occupied units and better maintenance of properties, a better neighborhood community with mostly owners, safety of knowing people you live around, control, quality of life and perhaps the economic interdependence of knowing fees will be paid. However, there is a harmful effect on the individuals who want to lease their properties, because such a restriction for someone like Marcos will hurt his economic liberties and he will not be able to afford his mortgage, his property will become less marketable without the ability to lease it for all other seasons except ski/board season (21 days out of the year), he has made substantial investments in the property to enhance its marketability as a rental property and at the time of the purchase leasing was not restricted by any amount of time and he relied on this when purchasing his condo. To limit the

term to only 21 days per year is a substantial change. There is no indication that the restriction was created to retaliate against Marcos either. Also, placing such restrictions on property decreases its marketability in some markets, while increasing it in others. Overall, the court's genrally tend to enforce restrictive covenants made by majority vote and the board because it is what people sign up for when they buy a condo... they are giving up some control for the protection of their interests. Therfore, unless the restrictions are unreasonable and discriminatory the RC will usually be held valid. Considering that court's are likely to impose the restrictions of the board in condo associations if they are reasonable in regards to restraints on alienation and rights of first refusal it is likely that the restrictions that merely limit the time of leases and not the entire ability to lease are going to be held valid. Heck, even amendments restricting leasing all together are likely to be valid if they are not discriminatory.

The real question then is whether or not the post-purchase leasing restrictions should apply to marcos. There is a jurisdictional split in whether or not to enforce post purchase restrictions so it will depend where he lives with whether or not the restrictions will apply to him. The court's will take into account the fairness of the restrictions and the interests of the individual, community and society as discussed above. One arguement is that the owner should be bound by the post purchase leasing restrictions because they had notice in the declaration that the rules were subject to change by a majority vote at any time, and they agreed to this. therefore, they are bound by any amendments that arise after the sale has taken place. For example, in Woodside, a court applied this appraach and found that a post purchase lease restriction was valid as is was not unfair and was protecting legitimate community interests, and the owners had knowledge that he rules were subject to change so too bad for them. The trend is for court's to give these sorts of waiver clauses more weight. The other theory is that current owners are not bound by post-purchase changes that affect major economic rights, the amendments are only meant to be about trivial things, not something which has the ability to

affect the value of the property so substantially as leasing restrictions. Therefore, the restrictions would be perfectly okay in terms of the snow removal, but Marco would not be bound by the leasing amendment....he would be grandfathered in if you will. One approach taken by FL in statute in response to Woodside, goes along this theory that amendments restricting leasing only apply to new buyers or an owner who consented in the majority, this approach encourages real estate market and development. IN this case then Marco would not be subject to the restrictions because he was not a new buyer and he was not in the majority. personally, i think that a buyer like marco who relied on the fact that there were no leasing restrictions when he purchased should not be subject to leasing restrictions imposed in the future, because it will affect his economic liberties.

Marcos may also be able to argue that the amendments should not be enforced against him because of relative hardship. He must show that the burden on him (the servient estate) outweighs the benefit to the other condo owners (dominant estate). This is extremely hard to prove, the harm must be greater than the benefit to a considerable magnitude and if there is any benefit at all then the court's tend to lean towards the dominant estate holders. Marcos harm is the loss in rental income, his 1000 investment in the property to suit renters, and his being forced to sell the property because he cannot afford the mortgage payments. The benefits to the community are more owner occupied units, control, safety and the benefit of a tight knit and safe community. The court will likely favor the community, especially because Marcos has the opportunity to sell his condo, he is not stuck with land he cannot use or develop.

Marcos & Ned:

The question is whether or not Marcos can claim an easment over the property of Ned for the portion of his half pipe and wall that reside on Ned's property. An easement is a property right in

which one gives irrevocable access to their property to another that cannot be revoked. There is no express easement between Ned and marcos so if he is to be allowed to continue to use the property he must get a court to find that an implied easement exists. In this case Marcos could try to argue that he would have an easement by estoppel. In order to prove this you must show that the owner granted permission and that the claimant relied on this permission to thier detriment. Therefore, Because Ned only informed Marco that part of the wall was on his land he did not tell him that he must stop construction and he did not complain once the walls were completed. Ned did not say anything until the walls were started and he had a whole winter before to notice that part of the half pipe was on his property, and he constantly watched Marco without saying anything to Marco About it after informing him of the property line. therefore, it could be safe for Marco to assume that he had Neds permission to be on his land. Marco also relied to his detriment by expending \$1000 on building the two walls to make his half pipe stronger. Marcos had the expectation that he would be granted further permission once the walls were built. Therefore, to protect marcos reasonable expectation backed investment which is surely worth more than just the 1000 dollars because it also enables him to rent out his condo at an rate higher that MV for the half pipe, he would probably be granted the easement for purposes of equity.

Ned's arguement wil probably be that he never gave Marco permission to use his land for his half pipe and thus any reliance that he may have had was misplaced and unreasonable and threfore, he cannot apply the theory of Easement by Estoppel.

I do beleive this will turn on whether or not Ned gave permission to Marcos. I beleive that he has acquiesed to Marcos' use of the property and thus should be estopped from asserting that he did not grant permission. Further, he did not mention anything when the half pipe was on his land and being used by Marcos in the past.

Marcos & Beatrice

When participating in a transaction for sale of land the buyer and seller have certain obligations towards one another. The issue here is whether or not Beatrice can get out of the P & S agreement that she and Marcos entered into after having found out about the leasing restrictions.

A P & S agreement requires that the seller will provide marketable title to the property as well as in some cases record title. That is not an issue in this case, there is no indication that the title is not marketable. However, there is also the obligation of the seller to inform the buyer about any of the properties deficiencies and failure to do so will allow the buyer to get out of the agreement before or after closing. At common law the courts favored the doctrine of caveat emptor which favored the seller and provided that the buyer beware, the seller was under no duty to disclose information to the buyer. However, recently the national trend is to restrict caveat emptor and require that if the seller knows of a material fact affecting the value of the property that is not readily observable or unknown to the buyer then they have a duty to disclose such information. Failure to do so results in breach and the buyer may seek remedies such as damage, specific performance (although probably unwanted in this case), rescission of the K, or a vendee lien. The duty to disclose also includes the duty not to make false representations (fraud) towards the buyer. The seller makes a fraudulent misrepresentation when... (1) they make a false statement of a material fact, (2) known to be false when made, (3) intended to induce another to act, and (4) injury because party relied to thier detriment on misrepresentation.

In this case Beatrice probably has a good arguement that Marcos has committed fraud and thus breached the P & S agreement which would allow her to rescind the K without Penalty. Because Marcos did not tell Beatrice of the leasing restrictions on the property coupled with the

fact that his website made reference the great investment property and the fact that he had successfully and frequently rented his condo at a profit in the past, he could be liable for fraud. Beatrice can attempt to show that he concealed the fact from her about the leasing restrictions because he did not tell her and a 21 day renting restriction would have a material affect on the value of the property to someone who the property was marketed to with the knowledge and informatin provided that renting the property had been worthwhile. Furthermore, Marcos representations on the website could be considered an inducement to Beatrice to buy for rental purposes and while they are not false, he did get a profit from the condo in renting it in the past, it is clear that having put this information out there in the manner in which he did, trying to sell the property, and doing so with the hopes that someone would buy before the leasing restriction went into effect, shows his intent to conceal from Beatrice the fact that there would be such restrictions on her ownership. therefore, his concealment of the fact that the leasing provision was going to change was a violation of his duty to disclose and Beatrice can get out of the K.

Policy behind letting Beatrice out of this deal is that we want to encourage fair dealing in marketplace transactions, protect the interests of innocent buyers, and encourage better quality housing. Also, it is the seller who is better suited to know of hidden facts (as this was because Beatrice would have no way of finding out about the new amendment because it was not yet recorded at the time of the P & S and still would not be recorded when closing occurred). Had it not been for Ned, she would not know until after closing that the restrictions were on her property.