There are two theories on which the homeowners can sue: nuisance and servitudes.

**Nuisance:** The owner of Unit 1A has an incentive to argue nuisance only, maintaining that he is not part of a common scheme, does not have to pay dues, and is not responsible for the Association’s actions. The nuisance argument is relatively strong to the extent that the homeowners can argue that the blight and the teen presence interfere with use and enjoyment of their property. The “unreasonable” part of the definition is even more easily met since there is no utility in failing to address the blight. The strongest counterargument involves the legal status of the Association (see below). I gave the most credit to those who linked their analysis to the common law criteria for nuisance.

**Violation of the servitude to maintain the common areas and of the obligation to pay Association fees.**

1. Did a common scheme come into existence and, if so, when?

The common grantor clearly contemplated a common scheme when she sold the first two units as condos. There was a common grantor, master plan, and notice at least to Units 1A and 1B. So express restrictions bound the first two units, and arguably all of the remaining property to the condo plan in accordance with a scheme of implied reciprocal servitudes. [Note: this is the only possible basis on which to hold 1D to an obligation to pay fees, and those fees would be limited to $1000, not $2000, per year.]

2. Was the condo plan rescinded?

The grantor succeeded in getting an express agreement to rescind from Unit A, but not Unit B. It was therefore still in effect and could be enforced by Unit 1B. However, the grantor clearly abandons the condo plan afterwards, and sells the remaining units on different terms. Analysis:

Recission: Didn’t happen. Abandonment: Yes, by grantor and Unit 1A. No real indication of intent to abandon by 1B, but not many facts. Waiver: Unit 1B does nothing while the grantor makes clear her intention to implement a new scheme (see below). Estoppel: The grantor arguably relies on 1B’s inaction in implementing a new plan, and the new purchasers, who are presumably unaware of the 1B’s incapacity, may rely on the lack of objection in pursuing their own plans. It is unclear, however, whether 1B can be said to be responsible for the failure to respond given his incapacity. Changed circumstances: By the time the law suit is brought, the condo plan has clearly been replaced by a new master scheme, and it’s not clear that 1B would benefit from continuation of a
condo scheme as opposed to a townhouse association.

3. Notice: if the condo scheme was still in place, did subsequent purchasers have notice?

The deed provisions in Units 1A and 1B were recorded and conveyed constructive notice in a jx in which buyers are on notice of deeds from a common grantor. The condo plan was on display in the developer’s office, and a physical inspection of the premises would indicate common areas that appeared open to all of the residents. The key arguments against notice would be the provisions contradicting the existence of a condo plan such as the use of the term “Parkside Village Homes” in marketing, and the express provisions in the later deeds indicating a different master scheme. The purchaser of Unit 1B, in particular, though, should have had notice of the express restriction is his chain of title, which was never rescinded. [Note: although the grantor did not intend a common condo scheme at the time lot 1D was sold, the purchaser of 1D may arguably be on notice of the common scheme that may have come into existence when 1A and 1B were sold.]

4. Did a second master plan come into existence with the sale of Complexes 2, 3, 4 and 5? With these later sales, there was a common grantor, a master plan, and express restrictions. Arguably, at some point during the sales of these units, the master plan created a system of implied reciprocal servitudes binding all of the remaining units to the second plan.

5. Were the purchasers of Complex 6 and 7 on notice of the scheme? When the diocese purchased Complex 6, it should have been aware of: a) the condo plan in the developer’s office; b) the two different schemes on record, if the jx views deeds from a common grantor as imparting constructive notice; and c) the physical appearance of the premises suggesting common areas and single family living arrangements. Notice to the owners of Complex 7 would have been somewhat weaker in that they could observe the shared living arrangements and lack of deed restrictions with respect to Complex 6. The grantor’s representations, if any (none were mentioned in the problem), the inconsistency in the deed provisions, and the inconsistency between the condo plan on display in the developer’s office, and the town home advertising may have undermined the effectiveness of the notice, however.

6. If a common scheme came into existence with the sale of Complexes 2, 3, 4 and 5, was it terminated?

Abandonment: No indication that 2, 3, 4 or 5 intended to abandon.

Waiver: The home owners should have been aware that Complexes 6 and 7 were being used for shared living arrangements, which are arguably not fully residential and not single family, and they failed to object. Complex 6 turned the three individual units into a joint facility, used it to house unrelated individuals, and included offices for a around the clock professional staff. Complex 7 retained the individual character of the units, and housed couples, but still included shared activities and professional staff.

Responses: a) the shared living arrangements did not necessarily violate the single family provisions. “Family” is not defined, and may include brothers and sisters, unmarried couples,
non-intimate (and unrelated) roommates. If family is defined to include unrelated small groups, it may include Complexes 6 and 7. b) It’s not clear that the single family restriction prohibits combining units, and whether the resulting unit is then limited to single family or multi-family use. c) Even if these uses arguably violate single family residential restrictions, it is a reasonable accommodation, given the physical handicaps of the occupants, to permit this type of assisted living, and the term “family” should be interpreted in light of federal law. d) The failure to do so may constitute discrimination on the basis of handicap, and void the restriction as applied here. e) Waiver of the single family provision may not necessarily negate the rest of the provisions including the common areas/association fees clauses. On the other hand, the residents may have separately waived the ability to collect fees, but given the lack of prejudice to Complexes 6 and 7, this argument is less likely to prevail than waiver of the single family provisions.

Estoppel: Complexes 6 and 7 arguably relied on the inaction of then grantor and other homeowners in purchasing the units, and renovating them. They are unlikely to have suffered a detriment, however, from the failure to collect fees. For this argument to work, therefore, it has to be made as a whole, maintaining that Complexes 6 and 7 relied to their detriment on their non-inclusion in the Association plan since their intended use of the complexes (shared living) was at odds with the plan, and they would not benefit from the tennis courts and playground.

Changed circumstances: Complexes 2, 3, 4, and 5 arguably still benefit from continuation of the common scheme so this argument is unlikely to terminate the plan if it extends to 6 and 7.

Note: even if you limited your discussion to the fees issue, you should have included some discussion of whether Complexes 6 and 7 were part of the common scheme, since the waiver, estoppel issues is relevant to the Ass’n’s ability to collect fees.

7. Does the requirement to pay fees for maintenance of the common areas “touch and concern” the land? Jx split on the requirement to pay money. In this case, however, it is linked to maintenance of the common units, which clearly touch and concern. In addition, Neponsit settles the issue of whether a homeowners’ association can be said to be in privity with, and appurtenant to, the individual lots in the community.

8. Intent. The facts do not specifically refer to “heirs, successors, and assigns” so this was open for discussion, but likely to have been intended to run with the land.

9. Is 1A a third party beneficiary of the later restrictions? The fact that 1C and 1D are not restricted raises an issue as to whether the second common scheme included Complex 1 at all. It is arguable, though, that the grantor viewed the entire community as a single entity, and 1A is likely to have been an intended beneficiary even if not bound by the later scheme. [If 1A is an intended beneficiary, then the same analysis would apply to 1B, 1C, and 1D, but the facts specify that only 1A is seeking to sue. Third party beneficiary analysis cannot create new restrictions, and therefore cannot be a basis for binding 1B or 1D to the plan that comes into existence after they are sold. They are bound, if at all, to the original condo plan, which provides for $1000 fees discussed above.] 7B cannot be said to be a third party beneficiary because it’s sold after the restrictions are created, and either it is part of a scheme of implied reciprocal servitudes at that point, or it is not part of a common plan. If the former, third party beneficiary analysis adds
nothing to the IRS analysis; if the latter (i.e., if it is not part of the common plan), it cannot be a TPB. **QUESTION B**

**Easement Implied From Prior Use:**

The key question here is whether the Club land is landlocked at the time of sale, which depends on whether an easement by prescription or estoppel has arisen over the park land. So it was useful to discuss those issues first.

**Easement by Prescription:**

**St. of Limitations and Scope:** For the past six years, the Association has permitted outsiders to use the tennis courts, and most of the players have come through the park. So there is some use of the park to access the tennis courts. The first issue this raises is one of scope. If there is an easement by prescription (or estoppel), does it extend only to use of the tennis courts and not to the new swimming pool or more general use of Club facilities? Some students suggested that the easement would be limited to pedestrian travel, assuming that the tennis players had parked in the park and entered the tennis courts by foot. Whatever assumptions you made, you should have addressed the possibility that existing use might be limited.

**Continuous:** Use of the tennis courts was likely to have been occasional, but the availability of the courts appears to have been continuous. On the other hand, the park could argue that to the extent that the park was closed at night, or for repairs, these closings interfered with continuity.

**Open and notorious:** Crossing the park for use of the tennis courts would have been indistinguishable from other park use, but the park appears to have been aware of the practice.

**Adverse and hostile:** Given the park treatment of the tennis courts as part of the park facilities, the use of park access was arguably permissive. Jurisdictions are split, however, as to whether this standard can be met by an objective test that equates use that would otherwise establish a prescriptive easement with adversity.

**Exclusive:** This is clearly the biggest problem in that the tennis players are unlikely to have used any single route to traverse the park, and any route they did use was likely to be shared with other park users.

Note: No prescriptive easement across park property is likely to have arisen in favor of the public either since the park clearly consented to the public use, and is likely to have closed the park at times destroying continuity.

**Estoppel:**

**Reliance causing detriment:** The XYZ Club’s reliance would have to be purchase of the recreational facilities without an express easement. Note, however, that this argument is circular. There is probably an implied easement if no estoppel exists. If an implied easement exists, the only detriment would be the loss of convenient access from the park. Moreover,
detriment would depend on a showing that the Club could not resell the land for the same price it paid because of the lack of a right of way. If this is true, however, it is a strong argument for an easement by implication, which would defeat the detriment argument if it resulted in the ability to resell at the original price. In other words, the Club, which has not yet constructed anything, can show no real detriment unless it paid a higher price than the market would otherwise command based on the expectation of continued access through the park.

**Reasonableness of the reliance:** Buying land without a right of way in reliance on access through a park is arguably unreasonable. Construction of the new facilities in reliance on continued access (particularly if the Club were transporting the construction materials through the park) would create a stronger case for reliance, but that hasn’t happened here since the city won’t permit construction until the right of way is established. [Part of the reason that the reliance is unreasonable is that the park, which would otherwise have been aware of the permissive use, is unlikely to pay attention to the terms of XYZ’s purchase agreement, particularly in a case where the primary access to the courts before the sale was likely to have been through the townhome complex. Construction, in contrast, is a much more visible change of position.]

**Easement implied through prior use:**

**Common grantor:** This requires some explaining. Arguably, ownership of the Association (and the recreational facilities) is separated from ownership of the individual homes at the time of the sale of the individual units, and not at the point that the Association sells the facilities to XYZ. Conversely, the Association could be treated as an agent of the landowners, preserving common ownership until the sale to XYZ. Either way, a common grantor exists, but the timing of the prior use changes.

**Prior use and scope:** At the time of the sale of the individual units, the only use is through O’Purr’s complex and not the park. The scope is limited to Parkside Association use, however, not to the general public. This raises the question of whether the scope of any implied easement could be limited in terms of the volume of traffic. At the time of the sale to the Club, access through the Association has already been expanded to the general public, but relatively few outside individuals come through the complex driveways. So either way, the issue of the scope of any implied easement is an important one. [Most students failed to recognize that use by the Parkside Village Association members could constitute prior use.]

**Necessity:** If the timing is fixed at the point of the sale of the last home, rather than the sale to the Club, there may be strict necessity since neither prescription nor estoppel over park land would have arisen at that point, and access through the complex would be the only means of access. The counterargument would be that access through the park, which was open to the public, which may have included pubic roads, and which eventually included park agreement to provide access to the tennis courts, eliminated strict necessity even without estoppel or prescription.

Reasonable necessity: Only reasonable necessity, however, is necessary for an easement implied from prior use. At the point where the last home is sold, the lack of a right of way, as opposed to permissive use, would have made an easement reasonably necessary. Moreover, since the Parkside occupants were the primary users of the facilities, an easement for their
benefit would clearly be implied from the arrangement requiring the Association to maintain the facilities for their benefit. At the time of the sale to the Club, the Association may have also acquired some right to use park facilities. If the Club were still expected to provide access to Parkside residents, however, some continued access would have been reasonably necessary.

**Conclusion:** At a minimum, the grantor must have intended that the Association have a right of access through the complex for Parkside residents and Association employees by the time the last homes were sold, which would be enough to imply an easement. If the ownership is treated as joint at that point, then the implied easement would have come into existence at the time the property was sold to the XYZ Club, when prior use would have been even more clearly established. To the extent that the sale price reflected full market for the land, and to the extent that the Club’s plans to open use to the general public were understood (and they would be obvious absent an express provision requiring continued operation of the facilities for the benefit of Parkside members), an easement would almost certainly have been contemplated by the parties.

**Insurance:** Insurance policies ordinarily include provision for a right of way. The major exclusion would be problems that do not result in a loss, and XYZ would suffer no loss here if it has an easement by implication. Nonetheless, the insurance company should have reported the lack of access as a matter of record when it completed the preliminary report. Many students mentioned that the lack of access should have been obvious from a physical inspection of the property. The counterargument, however, is that you can’t tell from a physical inspection whether the record provides for a right of access over neighboring land. In this case, the obvious means of access was through the Association driveways.

**Nuisance:** Operation of the XYZ Club could result in nuisance to the extent that a) Club member routinely trespass by parking on Parkside property; b) the Club operates during unreasonable hours; c) the volume of traffic becomes unreasonable. The biggest counterargument is that none of this has happened yet.

**QUESTION C**

This was intended as a short answer question, focused on distinguishing between the two scenarios. If you understood what the question was looking for, and something about takings doctrine, then it should have been relatively straightforward. Only Scenario B posed a substantial constitutional issue; Scenario A did not.

The first scenario specified that the XYZ Club had no easement as a matter of right. This means that the city was under no obligation to give them one. What the City proposed was a swap: the easement for public access to the Club. There is not much of a constitutional issue at all because a) the City could have refused to the easement altogether; b) the City could quite justifiably refuse an easement to build to a Club without a right of way; and c) the deprivation of economically feasible use of the land arose from the fact that the Club was foolish enough to buy a landlocked parcel, not from the City’s refusal to grant an easement. Even if you conducted a Nollan-Dolan analysis, the answer would not change; the rough proportionality between the grant of an easement and public access to the Club would be considerably greater than the proportionality between the permit to build, and public access. The Lucas analysis was misplaced because the state action did not cause the lack of economically feasible use.
The second scenario, as stated, lacks any proportionality and may lack a nexus. The problem is that the rationale for the permit condition was not given. Many students simply assumed that the condition was purely extortionate; that is, the City wanted the public access, did not want to pay for it, and had no other justification. If the City had any hope of prevailing it would have to show that a) construction of the swimming pool and opening of the private club had some impact on the public, such as increased traffic, or concentration of activities in that location, and b) public access was roughly proportional to the increased burden. No basis was given in the problem for such a showing, and there is every reason to believe that such a showing would be very difficult to make.

I awarded one third of the credit for this answer for correcting identifying the stronger scenario, and one third for the analysis of each of the two scenarios. A few students did not choose between the two, losing all credit for the first part.