Question I

The question asked for a discussion of Carl's rights and remedies (a) if Dinah refuses to proceed with the closing and b) with respect to any of the other parties mentioned.

a) Carl v. Dinah If Dinah refused to proceed with the closing, the issue would be which party breached the contract first, Dinah or Carl? Dinah would claim that:

1. The contract of sale called for either a warranty deed showing good marketable title or a title insurance policy guaranteeing title free and clear of all encumbrances except for easements and encumbrances of record and the seller could supply neither. [The key to this question was to recognize that Carl had the choice of supply either one, at his option.]

Dinah would argue that the title was unmarketable because of the housing code violations and the asbestos problem. You should have discussed the definition of marketability in the cases, concluding that title was likely to be held to unmarketable (although noting Camp to the contrary).

Dinah would also have to show, in addition, that the title insurance policy, because it excluded encumbrances not in the record, did not meet the terms of the contract of sale. [It was more impat to note that the insurance policy did not meet the terms of the contract of sale than to note that it did not cover]
the asbestos, although it would also have been appropriate to list the reasons that the policy did not cover this situation.

2. Carl would emphasize in response that 1) Dinah agreed to accept the place "as is" and that Carl's promise to supply marketable title should be read to expressly exclude any encumbrance resulting from the ceiling defects and b) that Dinah, in accordance with the doctrine of equitable conversion, assumed the risk of a change in city ordinances after the contract of sale was signed. Dinah would respond that her agreement to accept the place "as is" extended only to the ceiling defects and not the asbestos, and that the existence of a city ordinance requiring removal of the asbestos is irrelevant because it is the presence of the asbestos itself, not the existence of a city ordinance requiring its removal, that should be held to vitiate the contract of sale.

A court is unlikely to hold Dinah to the contract of sale, but the precise ground for the holding could be handled in a number of different ways.

3. Remedies

If Dinah prevails, the court will rescind the contract of sale and award her return of her down payment and probably compensation for the repairs made, although Carl can argue he will need to remove the repairs to remove the asbestos and that he will not be unjustly enriched. Specific performance and loss of bargain damages are unlikely, but should have been mentioned.

If Carl prevailed, he would want specific performance or loss of bargain damages.
b. **Carl v. the others**  

Carl v. Betty  

Carl could sue Betty and the broker for failure to disclose the problems with the ceiling or misrepresentation or perhaps even fraud in representing the ceiling as "newly refinished." Betty and the broker would respond that the statement is accurate and that they were unaware of any larger problems. In the broker's case, liability will depend on a duty to inspect. For Betty, liability is unlikely unless she had reason to know about the problems.

Carl could also sue Betty for breach of the covenant against encumbrances if the statute of limitations had not run (Which I told you to assume) and the housing code violations were viewed as encumbrances.

Carl v. Anthony  

Carl could sue Anthony or the developer for breach of the covenant against encumbrances, if assignable, and if the statute of limitations had not run. A cause of action for breach of future covenants is unlikely, but worth mentioning.

Carl v. Builder/Developer  

The builder is potentially liable for breach of the IWH to the extent the defect is latent and manifests itself within a reasonable time. Two key issues: 1) is 12 years a reasonable time? and b) is the builder liable in a case where he was hired by the developer and never held an ownership interest in the property?

Carl v. Insurance Co.
Carl’s claims may be stronger than Dinah’s because Carl had no knowledge of the problems at the time the policy took effect, but there would still be the question of exclusions for defects not discoverable from the record.

Remedies: If Carl could recover from Betty or the broker for misrepresentation or nondisclosure or the builder, he could recover the full extent of his loss. Recovery from the insurance company would be limited to the amount of the policy, and recovery under any of the deeds would be limited to the purchase price.
Question II

A. Reciprocal Negative Servitudes

1. Implication

The first issue concerns the existence of any limitations restricting the lot to single family residential use. Since there were no express limitations on the lot, the major question was whether a reciprocal negative servitude could be implied. The best answer was no, because at the time the grantor sold lot 2, only lot 1 had been sold. One restricted lot is not enough of a basis for a common scheme in the absence of a written common plan, a common pattern of development or some specific communication of a common scheme to the buyer.

2. Notice

Moreover, even if there is a basis for implying such a servitude, it is questionable whether the buyer would have been on notice. There was nothing in the record, no indication that at the time of the purchase the buyer of lot 2 could have detected from the undeveloped lots in the subdivision a common residential scheme and, even if on constructive notice of the deeds from a common grantor, the existence of the single restriction on lot 1 would probably not be enough to constitute constructive notice of the servitude.

Bonus issue: The servitude came into existence, if at all, at the time the grantor sold lot 2. The facts at the time Galen and the AIDS hospice purchase their lots are accordingly irrelevant to the existence of the servitude. It is arguable,
however, that if a reciprocal negative servitude in fact came into existence at the time lot 2 was sold in 1972 (or thereafter), that the hospice owners would be on inquiry or constructive notice. Inquiry notice is problematic, though, due to the presence of the nursery and the dry cleaning establishment and constructive notice is also problematic in that a search of the records would reveal that at the time that restrictive covenant had to come into existence (i.e. in 1972 or thereafter), there was only the single restriction on lot 1, and therefore not a sufficient basis on which to imply a reciprocal negative servitude. Accordingly, the hospice owners may not have been on notice, even if the original purchaser of lot 2 was on notice.

**Who can sue?**

If a reciprocal negative servitude exists and if the AIDS hospice is on notice of the restriction, all of the lot owners bound by the reciprocal negative servitude can sue. If no servitude exists, no one can sue. Therefore, there are no situations in which 3rd party beneficiary theory would be applicable.

It was worth mentioning, however, the possibility that the dry cleaning establishment on lot 3 or the nursery on lot 4 might give rise to a defense of unclean hands or abandonment.

3. **Defenses**

**Frustration/changed circumstances** This argument was relatively weak since the subdivision as a whole clearly retains its residential character and continues to benefit from the
restrictive covenants. The strongest argument was to emphasize the changed character of the street on which the hospice was located, but given the role of the street as a buffer, that argument would probably still lose.

**Public policy** A strong argument was that the restriction was void as against public policy. The key points were to note a) that the statute was evidence of such a public policy and b) that effectuating such a policy requires placing hospices in residential neighborhoods. The latter point is debatable.

It was also possible to argue that the efforts to enforce the covenant were discriminatory and violated the statute on that ground. (I gave credit for either argument so it was not necessary to raise both issues.)

**Construction of the covenant** It was also possible to argue that the AIDS hospice did not violate the restriction to "single family use," but given the subdivision of the lot as well as the nature of the hospice, the argument was relatively weak.

B. The Driveway

This was a very difficult question and no one got it completely right. The secret was to work through the facts one by one.

1. The Neighbors

The neighbors used the part of the driveway over lot 2 exclusively and without interruption for over 5 years. They therefore have a claim of either adverse possession or prescriptive easement. Lot 2’s key defenses are that it was a mistake that either was not easily detected (and therefore not
The only defenses to the prescriptive easement claim would be the lack of exclusivity, met by the common driveway exception, and the permissiveness of the use, a weak argument given the lack of any relationship between the owners of lots 1 and 2 and the urban environment.

If the owners of lot 2 failed in their efforts to claim a prescriptive easement, they have a claim of estoppel based on their reliance on the driveway to build the guest cottage. Lot 1 could argue, however, that Lot 2 was not actually prejudiced because Bryant and Harry still had access to the guest cottage over other parts of lot 2 and that Bryant would presumably have built the guest cottage whether or not he had a right to use the part of the driveway on Lot 1.

3. Easement by Implication

The owners of Lot 2 could acquire a right of way over Lot 1 only through a prescriptive easement because there was no prior use or necessity at the time Lots 1 and 2 were divided. Harry and the AIDS hospice, however, could acquire an easement by implication over Galen's property at the time the front part of the lot and the back part of the lot were divided.

The first issue therefore is to determine at what point the two lots were divided, and that depends on when the deed was delivered. Bryant executed the quitclaim deed and gave it to his mother in 1982. If the delivery to his mother was an effective conveyance, the property was severed in 1982 and Harry is a grantee. If the delivery was not effective in 1982, then the property was severed at the time of the sale to Galen "several
years later," and Harry and the AIDS hospice stand in the shoes of the grantor. There is no possible argument that the delivery to Harry was never effective because the deed was actually delivered to Harry and the mother clearly had the authority to do so. The only question is when the delivery occurred. The question is a close one and I accepted either answer, although, as judge, I would be more inclined to find the delivery effective at the later date.

If the delivery to Harry became effective only after the sale to Galen, then there can be an easement by implication only through strict necessity in some jurisdictions. It probably does not matter, though, since both prior use and strict necessity exist. (Quere: if lot 2 acquired a prescriptive easement over lot 1, would the AIDS hospice right to use the two-thirds of the driveway on lot 1 defeat the existence of strict necessity?)

The more interesting question is what the AIDS hospice acquired by implication. The hospice could only acquire rights Galen possessed. Therefore, if Lot 2 had no right to use the common driveway, or at least no right to use the portion of the driveway on Lot 1, then the hospice could not acquire such a right through implication. Strict necessity would still exist, however, and the hospice would argue for an easement over Galen's land that was not in any way limited to the land currently constituting the driveway.

4. Taxes

The tax provision could have been treated as either a real covenant or an equitable servitude as horizontal privity (between
Bryant and Harry) and vertical privity (between Bryant and Galen and Harry and the hospice) exist. Intent is supplied by the magic words. The two key questions were touch and concern and notice.

Touch and concern -- The modern trend is to hold that taxes touch and concern the land and they certainly affect the value of the lots. The agreement between Bryant and Harry is so clearly a personal matter, though, that unless there were some independent reason to tax the lots as a single unit, I would expect a court to hold that the agreement did not touch and concern the land.

Notice -- This is a race-notice jurisdiction and the hospice recorded first. So while Galen had no actual notice and no way to find out about the covenant, he would ordinarily be penalized for not recording sooner. Two issues arise, however. 1) The notice requirement for enforcing an equitable servitude is a creation of equity, not statute. Did the race-notice statute intend to preempt the common law rule re: equitable servitudes as opposed to title? This is a question of statutory construction and it should have been discussed by reference to the statute (although the statutory language is not clear and I accepted either answer.) 2) Is the deed from Bryant to Harry within Galen's chain of title? Jurisdictions are split on the need to search the record for deeds from a common grantor.

Question III

1. Solar Energy
open and notorious) or not adverse (split in jurisdictions). If 
the neighbors do not prevail on these claims, however, they may 
prevail on estoppel (reliance during the period the driveway was 
constructed if the violation of the boundary line was fairly 
clear) or acquiescence/agreed boundaries, if the boundary line 
was unclear.

2. Prescriptive Easement

If the neighbors acquired a prescriptive easement (or 
adverse possession), they acquired an exclusive right to use the 
entire driveway and the common driveway analysis would not apply. 
Lot 2 could therefore claim a prescriptive easement only in 
jurisdictions willing to recognize shared use (i.e., Lot 2 would 
lose in Texas.)

If the neighbors did not acquire an exclusive right to use 
the driveway, then the common driveway analysis would apply and 
the owners of lot 2 would have a fairly good claim for a 
prescriptive easement. [A note on the facts: The question states 
that Bryant builds the guest cottage shortly after he buys the 
property in 1978 and that Harry and his clients use it 
thereafter. Bryant draws up the quitclaim deed in 1982 and 
suffers brain damage (he is still alive at the time of the 
problem) "several years later." Under any conceivable 
interpretation of those facts, Bryant and Harry, with Harry 
acting under Bryant's authority as the owner of lot 2, used the 
driveway for more than the 5 year statute of limitations. Even 
if Harry acquired title to the property in 1982, he could still 
tack his use during the period Bryant owned the property to his
a. The yearly inspection requirement is the grant of an easement. As such, it is an actual physical invasion and it is arguably a taking. The county should, instead, have conditioned the grant of a building permit on the grant of such an easement.

b. Otherwise, the solar energy requirement is rationally related to legitimate state interests and clearly constitutional.

2. Architectural Review Board

The statute is vague, broad and without guidance and it arguably serves only aesthetic purposes. Nonetheless, the modern trend is to hold such ordinances constitutional.

3. Takings

Taken together, the ordinances, Irene argues, deprive her of all use of her property. The two key county responses are 1) that Irene may use the property for other purposes, e.g., a flower garden, assuming that the land is not zoned residential and 2) it is extremely unlikely that no possible solar unit can be designed that will meet county approval. Your answer depended on your interpretation of the facts. If Irene is left with virtually no possible use of her property in order to promote neighborhood aesthetics, the court may well find a taking.

4. Nuisance

Assuming that the noise is substantial [it was necessary to suspend disbelief and accept the fact that an experimental active solar device could be noisy], then Irene could be liable for nuisance if her choice of the device was unreasonable, and that depended on the alternatives. If this device is the only one that would meet county requirements, and if there were no way for
Irene to lessen or redirect the noise, no nuisance is likely to be found. If, on the other hand, alternatives existed to lessen the noise, or if the effect of the constitutional rulings were to free Irene from the county requirements altogether, then Irene might be liable. If liable, Irene might be enjoined if alternatives were available, otherwise damages would be favored.

5. Solar energy

Traditionally, no easement for light will be implied and nuisance doctrine was not used for that purposes. *Prah v. Moratti* reviews the precedent, and the existence of the county ordinance would strengthen Julia’s case.

The remedies depend on the facts. If there is no other place to put Irene’s solar unit and Julia’s can be easily moved, then the court should order Irene to pay damages equal to the cost of moving Julia’s unit. If Irene can move her unit to a different location more cheaply than Julia, an injunction is appropriate. If Irene will be able to build only if allowed to place her unit in that location, and Julia cannot move her unit, then damages are probably in order.