SOCIAL SECURITY NO.

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAMINATION.

SANTA CLARA UNIVERSITY
SCHOOL OF LAW

FINAL EXAMINATION

PROPERTY, 104
PROFESSOR CARBONE
3 QUESTIONS

MAY 7, 1990
SPRING SEMESTER
3 1/2 HOURS

THE REVISED EXAMINATION RULES ISSUED IN JUNE 1988 APPLY TO THIS EXAMINATION.

INSTRUCTIONS: The exam consists of three questions and you must answer all three.

Please begin each question in a separate bluebook. Identify the question you are answering on the outside of the bluebook. You should write only on one side of every page and on every other line.

This is an open book examination. You may consult the textbook, and your notes, but not commercial outlines or hornbooks.

The examination takes place in a recently established, mythical jurisdiction. There are very few cases in this jurisdiction deciding property issues, and the courts tend to be strongly influenced by property precedents from other states. If the other states split on a particular issue, you should discuss the majority and minority positions and indicate which position you think should be adopted.

THE STATUTE OF LIMITATION FOR ACTIONS IN REAL PROPERTY IN THIS JURISDICTION IS FIVE (5) YEARS. THE JURISDICTION HAS A RACE-NOTICE STATUTE IDENTICAL TO THE CALIFORNIA STATUTE ON PP. 707-708 OF THE TEXTBOOK.

Each question contains directions at the end which indicate how you should approach the answer. If, in your opinion, there are errors in a question, please note the error, assume a reasonable position, and note your assumptions.

The weight given to each question is proportional to the time allowed. Added together, the times for each question total 2 hours and 50 minutes. The additional time provided is for you to allocate as you wish.
QUESTION I (1 hr.)

Developer hires Builder to construct a house. The Builder uses asbestos insulation, standard at that time, in the ceiling and attic, but installs it using substandard materials to encase the asbestos that violate local housing codes. Developer, who is unaware of any problems, sells the house to Anthony, with a general warranty deed. Anthony, who is also unaware of any problems, sells the house a year later to Betty, with a general warranty deed. 12 years later, the ceiling, which should have been built to last a lifetime, starts cracking and flaking, releasing asbestos particles into the air. Betty patches and paints the ceiling and sells the house to Carl, using a general warranty deed. The brochure the real estate agent prepared in listing the house emphasized the house's "newly refinished walls and ceilings." Shortly after Carl moves in, the ceiling cracks and flakes again. The repairman Carl calls tells him that ceiling has never met local housing codes and that the cracking will continue because of the substandard materials used. Carl, who has received an unexpected transfer to another city, decides to sell the house "as is," and enters into a contract of sale with Dinah, for $35,000 less than he paid Betty. The contract provides that:

Seller will convey to Buyer a warranty deed with an abstract of title, certified to date showing good marketable title, or an Owners Policy of Title Insurance in the amount of the sale price, guaranteeing said title to Buyer, free and clear of all encumbrances except for easements and encumbrances of record.

Buyer agrees to accept the property in its present condition, including the cracked and flaking ceiling.

Carl also allows Dinah to move into the house immediately and to begin repairs. Four weeks later, after having completed $5000 worth of repairs, Dinah discovers that the flaking material is asbestos and, in accordance with new city ordinances passed after she signed the contract of sale, she will have to remove all of the asbestos at an estimated cost of $50,000. In the meantime, Carl is eager to proceed with the closing and is prepared to deliver a title insurance policy that is identical to the one at pp. 671 - 680 of your textbook and identical to the one he received when he purchased the property from Betty.

Dinah is unwilling to proceed with the closing and Carl comes to you for advice. Advise Carl as to his rights and remedies and any liability he may face a) if Dinah refuses to proceed with the closing and b) with respect to any of the other parties mentioned in the question.
You may assume for purposes of this question that a) none of the applicable statutes of limitations have run; b) neither Betty or Carl knew that asbestos insulation had been used in the house; and c) flaking asbestos is associated with higher cancer rates and that, even without the new city ordinance, Dinah would not want to live in the house without removing the asbestos.

**QUESTION II (1 hr., 10 min.)**

Developer owns 20 contiguous 1/2 acre lots. He sells Lot 1 in 1971, restricting it to single family residential use. He sells Lots 2 and 3 shortly afterwards with no restrictions. Between 1972 and 1974, he sells lots 4 - 20 with restrictions providing that each lot sold is to be restricted to single family residential use for the benefit of the other lots in the subdivision and that the "Grantor agrees on behalf of himself, his heirs, successors and assigns, not to use any of the land in this subdivision for anything other than single family residential use." All of the deeds are recorded.

In 1972, the owner of Lot 1 installs a driveway. Two-thirds of the driveway is on his lot; one-third is on Lot 2. (See map on last page.) The driveway is used only for the benefit of Lot 1. In 1978, Bryant buys Lot 2. He builds a three room guest cottage on the back part of his lot, using the driveway on the border with Lot 1 to transport the necessary equipment and materials to the building site. After the guest cottage is completed, Bryant permits his brother Harry, a recovering alcoholic, to use the guest cottage as an office in an effort to revive Harry's lagging legal practice. Harry and his clients use the driveway for access to the guest cottage.

In 1982, Bryant draws up a quitclaim deed conveying the guest cottage to Harry in fee simple (CDEF on the map) and providing, on behalf of himself, his heirs, successors and assigns, that property taxes shall continue to be levied on the property (ABEF) as a single unit and the owner of the front part of the lot (ABCD) shall pay all of the taxes assessed. Bryant gives the deed to his mother, saying that "I don't want to give this to Harry until I'm sure he has stopped drinking for good, but if anything happens to me you should give this deed to Harry." Several years later, Bryant suffers irreversible brain damage in an automobile accident. To raise money for Bryant's care, his mother, acting as guardian, divides the property as indicated on the map below and sells part ABCD, the part on which Bryant's house is located, to Galen, giving him a general warranty deed. Shortly after closing on the sale, she gives Harry the quitclaim deed to the property on which the guest cottage is located. Harry,
however, resumes drinking and sells the guest cottage to a non-profit organization planning to open an AIDS hospice. The owners of the AIDS hospice immediately record the deed from Bryant to Harry and Harry's deed to them. Galen records his deed shortly thereafter.

When Galen learns of the plan to open an AIDS hospice in the guest cottage, he and the owner of Lot 1 barricade the driveway blocking access to the cottage. He and the owners of Lots 1, 3 and 4 then sue. They are concerned that the hospice will change the character of the neighborhood, lower property values and increase traffic over the driveway in particular and in that area of the subdivision generally.

You represent Galen. Advise him as to 1) whether he and/or the owners of Lots 1, 3 and 4 can enjoin operation of the hospice on the grounds that it is not a single family residential use (you may assume for purposes of this question that the jurisdiction follows Sanborn v. McLean); 2) whether the owners of the AIDS hospice are likely to prevail in their counterclaim seeking access to the driveway; and 3) whether they will prevail in their effort to compel Galen to pay the taxes on their property. Galen informs you that the owner of Lot 3 operates a dry cleaning establishment on the premises, built three years ago, the owner of Lot 4 runs a nursery school in her house, and there are plans to build a shopping center across the street. Your preliminary research further discloses that the state has passed a statute barring discrimination in housing, employment, education and public accommodations on the basis of AIDS or AIDS related illnesses.

Be sure in answering this question that you consider alternative arguments and defenses. For example, in the unlikely event that you decide that the restrictive covenant is unenforceable because the grantor did not properly acknowledge the deed, you should still discuss any defenses that the hospice owners would have if the grantor had acknowledged the deed.

QUESTION III (40 minutes)

Los Diablos County passes two unrelated ordinances. One requires that all new homes constructed in the county incorporate active solar heating into their design, and that county inspectors be allowed on the property at least once a year to inspect operation of the solar units. The other ordinance, passed several months later, requires that all new home designs be "submitted to an Architectural Review Board (ARB) for approval before construction begins." Henry buys lot H in 1968 and, with ARB approval, builds a large house with cathedral ceilings near the border with lot I. He also
plants a row of shade trees near the rear border with lot I. (See map on last page.) Julia buys lot J in 1970 and several years later, also with ARB approval, builds a home with solar panels near her border with lot I. Irene now wishes to construct a house on lot I, and she submits plans to the Architectural Review Board which rejects them. The rejected plans feature an experimental solar heating device that would be placed on the roof of the new house. The Architectural Board rejected the plans because the solar heating device, which is large, black and arguably ugly, would be visible from the road and considerably taller than any other structure in the neighborhood.

Irene comes to you for advice. She explains that, given the location of Henry's house and trees, only this experimental device will be able to supply enough energy to meet all of her needs and that, even with the experimental device, the roof is the only place on the property where the unit will receive enough sunlight to be effective. She fears that if she is unable to proceed with the plans as designed that she will be unable to build on the property at all and still comply with the ordinance requiring use of solar heating. Her problems are compounded by the fact that the County requires new homes to be a minimum of 3000 square feet, at least 30 feet back from the road and at least 20 feet from the rear property line.

Irene also tells you that Henry plans to sue if she proceeds with her plans because he believes the experimental solar cells will be noisy and that Julia plans to sue because Irene's proposed plans will partially block her access to the sunlight she needs for the operation of her solar panels.

Advise Irene on how to proceed. In particular, you should advise her as to 1) any likely relief, including any possible basis for a constitutional challenge to the county ordinances either separately or together; 2) (a) the likelihood that, if Irene succeeds in obtaining relief from the county ordinances, either Henry or Julia will then prevail in their threatened lawsuits and (b) if they do prevail, the likely remedy.

END OF EXAMINATION