Question 1

Builder sold a shopping mall to Owner. The recorded deed from Builder to Owner conveyed the mall and parking lot where the parking spaces were numbered 1 to 100. The deed reserved to Builder the exclusive right to use parking spaces 15 through 20 as a place to set up a stand to sell sports memorabilia and sandwiches on Sundays. The shopping mall was located adjacent to an existing residential neighborhood.

Owner entered into a written 30-year lease with Lois leasing to her a store in the mall and parking spaces 1 through 20. Under the lease, Lois agreed to pay rent monthly and not to assign the lease without Owner's prior written approval. After occupying the leased premises for five years, Lois subleased the store and parking spaces to Fast Food for a term of ten years without first having obtained Owner's written approval.

Fast Food occupied the premises and paid rent to Owner. Fast Food, which operated a take-out restaurant on the premises seven days a week, used state-of-the-art equipment and operated in compliance with all local health ordinances. Notwithstanding this, on warm days when Fast Food was particularly busy, unpleasant cooking odors were emitted from Fast Food's kitchen. The unpleasant odors caused discomfort to many of the homeowners living in the adjacent neighborhood.

On the first Sunday after Fast Food opened its take-out restaurant, Builder set up his memorabilia and sandwich stand in parking spaces 15 through 20. Fast Food, not aware of the provision in the deed, complained to Builder about the competition of Builder's sandwich sales and the occupancy of parking spaces allocated to Fast Food. Builder ignored Fast Food's complaints. Fast Food then informed Owner that it would cease paying rent until Owner took steps to prevent Builder from using the parking spaces. Owner explained to Fast Food that there was nothing he could do about it, but Fast Food insisted that it would not pay further rent until Owner stopped Builder from setting up his stand. Thereupon, Owner hired a locksmith, who changed the locks on the space occupied by Fast Food, thus denying Fast Food access to the premises.

1. Did Lois violate the "no-assignment" provision in her lease with Owner? Discuss.

2. If Fast Food brings an action in trespass against Builder for his use of parking spaces 15 through 20, is Fast Food likely to prevail? Discuss.

3. Did Owner have the right to change the locks on Fast Food's premises? Discuss.

4. Can the homeowners establish a claim for nuisance against Fast Food? Discuss.

Answer A to Question 1

1)

1) No Assignment Provision

"No assignment" provisions in leases are enforceable; however, they are strictly construed as restraints on alienability. An assignment is the transfer by a tenant of all their remaining interest in a leasehold, whereas a sublease is a transfer of something less than the full interest remaining. In this case, Lois and Owner entered into a 30-year term of years lease, which, at the time of sublease, had 25 years remaining. Lois's sublease to Fast Food was therefore not an assignment, but a sublease, because Lois only subleased to FF for 10 years, and Lois and Owner remained in privity of estate and privity of contract. Owner would therefore be entitled to seek damages against Lois (who could then look to Fast Food for indemnification), but since the clause at issue was a "non-assignment" clause, the sublease of the premises to Fast Food did not violate the clause.

Owner will argue that the power to prevent an assignment includes the power to prevent a lesser transfer of interest, in this case the sublease. Although Owner is correct that an assignment confers a greater interest than an assignment, this argument is unlikely to be persuasive because of the fact that the court will strictly construe the non-assignment clause as prohibiting only assignments and not subleases.

Lois will be able to advance another argument in defense of her assignment to Fast Food: she will claim that Owner is estopped from arguing that an actionable violation occurred. Generally, a party who could otherwise assert a claim for violation of an agreement will be estopped from bringing the claim where he or she acquiesced in the violation. Here, even if Owner had a right to bring an action for damages or eviction based on violation of the non-assignment clause, he likely forfeited that right by accepting rent from Fast Food. Acceptance of Fast Food's rent indicates acquiescence and waiver of the right to enforce the clause, and since Fast Food (and, by extension, Lois) likely reasonably relied on Owner's acquiescence, Owner should be estopped from bringing an action for breach of the non-assignment.

2) Fast Food v. Builder

Fast Food's rights against Builder depend on whether the covenant in the original deed created an express easement in favor of Builder.

An easement is an interest in land that allows the holder to use the land for some designated purpose. Easements can arise from proscription, by express writing, or by implication. In this case, the deed form Builder to Owner expressly reserved the right of Builder to use spaces 15 through 20 for his commercial activities on Sundays. Since this easement benefits Builder alone, separate from his interest in land, it is an easement in gross rather than an easement appurtenant. Easements in gross generally do not run with

the land, except when the easement relates to economic or commercial activity. In this case, the use of the parking spaces for selling merchandise and food on Sundays relates to economic activity, and will therefore be valid even as against subsequent owners or interest-holders.

FF can bring an action against Builder for trespass, which is the physical invasion of one's land by another without consent or privilege to do so, but Builder will assert that he has been expressly granted the right to do so in the deed to Owner. Although FF was not a party to this deed, he will be bound by the easement so long as the easement has not been extinguished. Extinguishment of an easement can occur by several different means, including condemnation, proscription, express agreement, estoppel, end of necessity out of which the easement was created, merger of two parcels of land where an easement appurtenant is involved, and abandonment combined with physical actions indicating intent to never use again. None of these circumstances seem present here, and thus FF will be bound by the easement. Binding FF to this easement will not be unjust, as he had notice of Builder's reservation of his rights in the original deed. The deed was recorded, and even if FF did not have actual notice of the easement, he will nonetheless be bound because easements run with the land and FF had record notice of the easement.

3) Owner's Changing the Locks

_____Owner's rights against FF are determined by landlord-tenant law. The issue is whether a landlord may engage in self-help and evict a tenant who has breached a duty.

A tenant has a duty to pay rent. If FF actually refused to pay rent (rather than simply stating that it would not pay), FF is in breach of his duty. However, the remedies for a landlord with respect to a tenant in possession that has breached a duty are limited to a) initiating eviction proceedings, and b) allowing the tenant to remain while suing for damages. Self-help is strictly prohibited. By changing the locks, landlord has evicted FF without engaging in the required formalities of eviction proceedings, and therefore did not have the right to change the locks.

Whether Owner had a right to evict or sue FF for damages isn't clear from the facts of the question. If FF merely stated that he would not pay rent (but was otherwise current with his rental payments and had breached no other duty), Owner's rights as against FF would not have ripened. Owner would be required to wait until an actual breach occurred prior to initiating eviction proceedings or suing for damages. On the other hand, if FF was in actual present breach of his duty to pay rent, Owner would be permitted to seek relief in one of the two ways mentioned above, but never by engaging in self-help by causing the actual eviction of FF.

4) Homeowners v. FF

_____A public nuisance is defined as activity by the defendant in the use of his land that

causes interference with the health, safety, or well-being of the public at large. A private individual may only bring action based on a theory of public nuisance if he has suffered some particular injury to his property as a result of defendant's conduct. Since the facts indicate discomfort, but not threats to health or safety, public nuisance doctrine is not likely applicable to the claims of homeowners.

Private nuisance claims can be brought where defendant's activity in connection with the use of his land create a substantial and unreasonable interference with plaintiff's use and enjoyment of his land. Unpleasant odors might create a close factual case as to whether the interference with the use of homeowners' land was "substantial" enough, especially because they only emanated from FF on warm days when FF was particularly busy; that question would be for the trier of fact. While it seems pretty questionable that the interference was substantial enough, assuming for the purposes of this question that it is, homeowners would also be required to show that the interference with their land was unreasonable.

That inquiry involves weighing the utility of FF's conduct, as well as considering the general neighborhood conditions. Another factor the court would consider is FF's compliance with the local health ordinances, although that evidence would not be conclusive. A final factor the court would consider is FF's investment in the property, which in this case seems substantial. In total, this presents a close case. The utility of a restaurant located close to a residential neighborhood is high. FF's conduct has been approved by local health codes, and only occasionally interferes with homeowners' use of their land. FF has invested in the restaurant by obtaining state of the art equipment, a factor that also indicates that this cooking cannot be performed in any less annoying or interfering manner. However, if the court were to determine that the hardships balanced in favor of the homeowners, they could obtain (under the strict minority view) an injunction against FF's cooking conduct that created the odor, and would further be entitled to damages for the interference with their use and enjoyment of their land. But given that this is a close call, and the high utility of FF's conduct to the residential community, homeowners would likely be required to compensate FF for the expense of relocating their operations.

Answer B to Question 1

1)

Assignment

Lease is valid. Under the Statue of Frauds, a contract such as a lease, that conveys an interest in land for a period longer than a year must be in writing and signed by the person to be charged. Therefore, in order for O to enforce the lease provisions against L, the lease between O and L must have been in writing and signed by L. We know that L and O entered into a 30-year lease. Therefore the SOF applies. Further, we know that the lease was in writing. However, it is unclear if the written lease was signed by L. If the lease is signed by L then the written terms of the lease are enforceable against L.

Assignment is valid. As a general matter, a lease is assignable unless the lease agreement specifically states that the lease cannot be assigned. Courts do not favor complete limitations on assignments so these provisions are interpreted narrowly. In this case, the term is not a complete limitation on assignment. The lease term permits assignment with the prior written consent of the owner. In this case, the limitation is in the written lease and allows for some flexibility. Therefore, upon reviewing the lease in an action between L and O, the limitation is [sic] in the written lease will be enforced by the court.

Sublease v. Assignment - An assignment occurs where a tenant assigns his rights and obligations to a subtenant for the entire term of the lease. A sublease occurs where the tenant transfers his rights and obligations to a subtenant for a portion of the term of the lease. The important difference between the two types of agreement is that the T has remaining rights to the property when an [sic] sublease occurs and does not have remaining rights when an assignment occurs. In this case, T entered into a lease agreement with FF for a period of 10 years. T had only occupied the property for 5 of the 30 years of the lease term. Therefore after the 10 years given to FF is [sic] completed, T will still have the rights under the lease for 15 more years. Therefore, T entered into a sublease with FF.

The lease agreement specifically stated that an assignment of the lease is prohibited without the consent of the landlord. However, the lease was silent as to subleases. The lease agreement in this matter involved commercial vendors likely with business experience. In such cases, the court would be unlikely to imply that the prohibition against assignments prohibited subletting. Therefore, because the agreement between L and FF is a sublease (as discussed above) the prohibition does not apply and L is not in breach of the lease agreement.

Estoppel - However, an L can be found to have approved an assignment/sublease where the owner accepts rent from the subtenant without objection. This is true even where the lease requires that the lease is in writing. In this case, the L accepted rent from

FF. Therefore, L is estopped froom alleging breach of the assignment provision by L. Essentially, by taking the rent, L approved the sublease.

Trespass

In order to bring an action for trespass, the landowner of the person with exclusive right to the land brings an action against a person who without permission physically invades the land. In this case, FF will assert that B is invading the land by erecting the Sunday business on the property. However, a landholder cannot bring an action for trespass where the alleged trespasser has a right to use the land under an easement. Therefore, in this case, if B has a right to use the land, FF cannot bring an action for trespass.

Express Easement - In this case, B and O entered into an express easement as part of the deed when B sold the property to O. An express easement occurs where the owners of the benefited land and the owners of the burdened land expressly agree in writing giving a property interest in the other. In this case, the deed expressly conveyed the right to use parking spaces 15-20 for a once a week shop. This is an express easement because it was recorded in the deed.

Easement in Gross/Easement Appurtenant - An easement in gross occurs where a person grants an easement to another landowner that is specific to the person and not specific to the land of that person. An easement appurtenant is an easement that is granted by the owner of one parcel of land to another land owner that specifically relates to the land. In this case, the property right owned by B and held by deed is an easement in gross. Generally, an easement in gross is not transferable by the holder. However, the easement burden will transfer.

Notice - An express easement is enforceable against future owners when it is properly recorded. In this case, O leased the land to L. L's lease included the right to spaces 1-20. L occupied the property for 5 years. Presumably, B operated his shop on 15-20 during this time period. Therefore, L had notice of the operation. L then sublet the property to FF. Apparently, FF took the lease without notice of the easement. However, because the easement is recorded, FF cannot sue for trespass.

Change the Locks

Duty to pay rent - When a sublease occurs, the original T remains obligated to pay the rent unless there is a written agreement with L stating otherwise. In this case, L remained obligated to pay rent to O even though there was a valid sublease. As a result of the sublease, FF was also liable to pay rent to O. In this case, FF refused to pay rent to O.

Constructive Eviction - Constructive eviction occurs where a (a) the tenant notifies the landlord of a condition on the property that constitutes a substantial interference with

tenants' use and enjoyment of the property, (b) the landlord does not fix the problem after notice, and (c) the tenant leaves the premises. A constructive eviction eliminates a tenant's obligation to pay rent. In this case, FF was not subject to a constructive eviction. FF did notified [sic] B of the problem; there was no indication that he notified either O or L. Second, FF did not leave the premises. Therefore, constructive eviction did not release FF from its obligation to pay rent.

Self-Help Eviction - A L cannot evict a T through self-help eviction. Self-help eviction occurs where the L takes action to limit the T's ability to access or use the property without going through the judicial process. In this case, FF was subject to eviction for failure to pay rent. O changed the locks and evicted the tenant without going through the legal process. O did not have the right to change the locks without going though the judicial process.

Nuisance

A nuisance occurs where a person/entity ("offender") uses their land in such a manner that unreasonably interferes with another landowner's ("injured") quiet enjoyment of their land. A nuisance is different from a trespass. A trespass involves the physical invasion of the property: a nuisance involves no invasion. There are two types of nuisance: Private and Public. A private nuisance is where the activities of the offender's use interferes with one or a small number of injured's specific use of their land. A public nuisance occurs where the offender's activities unreasonably interferes with the property rights of the general public. In order for a person to recover damages for a public nuisance, the injured must show actual damages. In this case, the homeowner's [sic] are complaining of a private nuisance because they are complaining about an injury that is occurring to a [sic] identifiable group of individuals. While the alleged conduct effects [sic] "many of the homeowners" the result is a private nuisance because it does not effect [sic] the public at large.

In order to state a claim for nuisance the injured must make two showings: (a) that the conduct of the offender interferes with some property right, and (b) that the conduct is unreasonable. An interference occurs where the offender uses their property in a manner that is an annoyance and would be considered offensive or burdensome to a reasonable person. In this case, the nuisance complained of is that on warm days offensive cooking odors are emitted from the FF business and those odors cause discomfort to many of the homeowners in the adjacent neighborhood. A nuisance will not be found if the injured is hypersensitive. In this case, we know that many of the homeowners are effected [sic]. Because there is a large group that find the conduct offensive, the injured in this case is not hypersensitive. Further, in order to determine whether or not this conduct constitutes an interference, it would be important to know how many "warm" days there are in a given year. If there are only a few, then this is not likely to be a nuisance. However, if there are more than a few days in which the homeowners are subjected to the offensive smell, it is likely that a court would find that a reasonable person would be offended by the smell of unpleasant odors involved in this case.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.