1)
Question 1

Assuming the attorney was given power of attorney to act on behalf of her client for the purchase of real property the attorney can execute a land sale contract on behalf of the client. It sounds like the gated community is a common interest community. Generally such communities are created by a developer who subdivides a lot or multiple lots into similiarly sized residential lots. Often times the developer seeks to create a development that is in some general unity regarding each properties externalities. Externalities, the characteristics of the neighborhood can effect the value of the properties. For example, if you have a neighborhood where the majority of the homes are similiar in size, features, character and quality a few homes that are in poor condition and substantially different from these homes can lower the value. In order to create a modicum of unity developers will often create the lots based on a common plain or scheme.

The process of a common plain or scheme is developed throughout the sale and development of the lots. This can be done through covenants, conditions & restrictions (CC&Rs). One of these conditions could be that each lot sold will fall within the purview of a governing HOA who will be charged with enforcing the CC&Rs as well as mainting common areas, hiring employees for such maintenance and collecting money from owners towards such goals.

CC&R's must generally be in writing and are subject to the statute of frauds in most cases. The fact that the chain of title and the deed for the subject property does not mention these CC&Rs does not mean the will not be enforced under an implied negative reciprocal easment. The fact that the community is mostly vacant will play a part in this.

If the developer has sold some of lots some lots may contain a covenant or restriction for height. For a covenant to run with the land, i.e., create an enforceable promise in a subsequent purchaser it must be in writing in most cases. A covenant is basically an enforceable promise to do or not do something which carries with it a burden on the servient property and a benefit on the dominant property. Covenants can both create a burden and benefit on each property, such as reciprocal restrictive covenant not to build a two story house on either property. However for this to have an express effect on the subject property it would have to be in the deed. However if there is a restriction or a restricitive covenant in other deeds to other properties in the community this goes to common plane or scheme. The more lots that are subject to these covenant in the deed the more likely it will be enforceable as an implied negative reciprocal easment which is really a negative restrictive covenant. We will see later that even if there is a common plain or shceme creating such a restrictive covenant that it can be defeated.

For a covenant to be valid to other properties in the community and hence strenghten a legal argument for an implied reciprocal negative easment of the promise not to go over certain heights it must be in writing. Presumably as this seems like a recently developed community evidence by the fact that many lots are empty the covenants would not have been created by promises between adjacent landowners that effect the covenant running with the land to subsequent purchasers. It is more likely that the developer will introduce the common plain or scheme through a deed. A covenant in a deed is in writing to have the effect of running with the land it must touch and concern the land, there must be notice, and there must be intent. In this case covenants, conditions or restrictions that are in a deed restricting height will touch and concern the land as heigh limits affect value. The purchasers should be on actual notice as they will have to accept the deed and if not they will be on contructive notice if the deed is

recorded. The intent is clearly expressed in the written CC&R's in the deed.

If this is the case some of the developed lots may be subject to such restrictions in the deed and even if there undeveloped purchased lots it may be in the deed. However the majority of the lots are undevelped and this may make it difficult to show that the client, i.e. the lawyer who secured the land could have been on inquiry notice as to the CC&R's. It would have been an intelligent idea to check the chain of title and the recorded deeds on any other properties that had already been developed or conveyed before securing the property but it is not required.

Because the CC&R's were not in the subject properties deed the only real issue as to whether there is an effect of an implied negative reciprocal easment is whether the lawyer was on inquiry notice. She was not on constructive notice, because nothing was recorded as to the subject property and the adjacent properties chain of title and recorded deeds and encumbrances do not fall within constructive notice. However a buyer may be on inquiry notice. Inquiry notice is effective notice when the party could have or should have know that there were any covenants conditions or restrictions. In this case the attorney could have gone down to the community and looked around. It would have been something to question if none of the properties were two stories or seemed to go beyond a general or specific height requirement. It would be enough to alteast raise the question. However as the community was largely undeveloped it is doubtful that a view of the community could be sufficient enough to put the attorney who is really the client in this case on inquiry notice as to a restrictive covenant.

However, this is fives years later. Much may have occurred in the community since this purhcase and it seems much did happen because many of the neighbors seem to know about the CC&R's. Even if a negative reciprocal easment can be enforced upon the clients property based on a common plain or scheme there are a number of ways the right to enforce this could have been waived, abandoned or forfeited.

It would be important to find out if any of the neighbors have violated the CC&R's with regard to the height. If so the doctrine of unclean hands may help the client to avoid enforcement as the CC&Rs have been violated by those who would attempt to enforce it. Another question is whether the condition of the neighborhood the CC&Rs exist to enforce has substantailly changed so that the CC&R's existence do not serve the the character of the neighborhood. This is probably not the case as neighbors seem to wish to enforce the CC&Rs which presumes they are not in violation of them themselves and the neighborhood still conforms to the common plain or shcheme.

It does not matter that the common plain or scheme was easily detectable through inquiry notice when the client brought the property. It has been five years and if the common plain or shceme developed around the client he may be enjoined from building the house. It is unclear though if the common plain or scheme that would be necessary to enforce CC&Rs not contained in his deed occurred. More information will have to be gathered regarding the neighboring properties, their deeds, the development of the common plain or scheme over time and the level of adherence to the scheme.

Access to his property will not be a problem in the end. Easements can be created expressly, by implication, by prescription or by necessity. An easment is the right to go onto the land in a possession of make a limited use thereon. Becuase the easment is not in the deed and no easment has been creating in writing between the owner and any property blocking ingress and egress there is not an express easement.

An easement by prescription is basically and adverse possession of a limited use on the

property of another, such as a prescriptive easement for ingress and egress along a driveway that may really be on another property owners property. To have a prescriptive easement use of the would be servient tenement must have been hostile, actual, open and notories, continous and for a set statutory period. Using a driveway for example or any means the owner used to get onto his property for the five years of ownership is an actual use as the land would be used, i.e. a road or pathway, it is definetly open and notorious, it is hostile as it is the use of anothers property and five yeras is continous. If it meets the required statutory period the client will have created an easment by prescription.

An easment can also be created by implication if there is a common grantor, the easment was in existence at the time of the severance of title, it was actual, continous and reasonably necessary to the grantor. This could also be the case as the developer probably built roads and driveways and subdivided the lots. If the matter of ingress and egress the owner has been actually using for five years continously was there when the title was severed and the property subdivided then the easment would have previously existed and been necessary to benefitting the lot where his house now stands. He may have an easment by implication.

Easments can also be created by necessity for land locked parcels. If the owner is cannot functionally ingress and egress from his property because he surrounded by properties over which he does not need an easement an easment by necessity can be created under operation of law.

2)
Question 2

Brief Prepared for City Council Members Re: AT&T Building Acquirement

As a matter of law there are two ways to acquire the AT&T building. The city can purchase the building or attempt to take the building for the benefit of the public. To purchase the building the city will have to enter in to a land sale contract or an installment contract. A contract for the sale of land is simply a contract upon which the completion of title will pass to the city most likely in the form of a deed. There are certain issues that arise specifically with a contract for the sale of land that may have an affect on the course the council wishes to pursue. It is important to understand that once a valid contract exists for the sale of land and the contract is in its executory stage the vendor (seller) and vendee (buyer) have certian rights and assume certian burdens.

Equitable Conversion

Between the time the contract is signed and the close of and fulfillment of all conditions of escrow the city would have and interest in the property and AT&T would have an interest in the money. This is not suprising but one of the effects of the exectory stage of the contract is to place the assumption of risk on the party with the equitable interest in the real property. This means that if before the close of escrow and passing of title the property is damaged in some way or its value is effected the city would bare the risk. For example if there was a fire on the property the city may still be forced to pay the purchase price and be subject to the damages which the building incurred.

This can and should be avoided in the initial contract stage by clearly stating who will bare the risk of certian types of damages. Assuming AT&T will agree to this the more specificity regarding the allocation of risk the less suprise and potential loss will be risked by the city.

Subsequent Bonafide Purchaser

It will also be important to investigate the chain of title on the property and insist on a general warranty deed. When escrow closes AT&T will pass title through a deed. The city should only purchase the property if a general warranty deed is included. A general warranty deed protects against all defects of title that are known to the possessor during the time they possess the property and prior to their possession. It includes all six covenants of title which would help to protect the city for various reasons to be discussed.

Covenants of title are either present or future covenants. There is a covenant of title of seisin, which warrants the city to the fact that AT&T does indeed have and indefeasable interest in the building and property in quality and possession. This is a present covenant of title and will protect the city from the date of conveyance. The right to convey will warranty the city that AT&T is indeed the owner and has the right to convey the property. This is also protected from the time of the conveyance. The covenant against encumbrances is a future covenant protects the city against all known encumbrances, such as easments and covenants. The covenant of further assurance assures that AT&T will not convey the land to another who could hold paramount title to the property. The covenant of quiet use and enjoyment guarantees the city quite and reasonable use of the property and protects againt those who may have paramout title to the property. There is also a covenant called general warranty that would protect against an valid legal claims as to those who may have paramount title. The last four covenants are future based meaning the protection begins if the city was partially or actually evicted.

The type of person that could cuase problems with the tilte are called subsequent purchasers, who if the property is conveyed to for valid consideration without notice of the city's contract could have legal title over the property. A title report and chain of title inquiry should let the city know if anyone has recorded a deed regarding the property. The city will still be afforded the protections under the general warranty deed but it may not gauranty legal title to the property. The bottom line is that the city should enter the contract, close escrow with all conditions met, accept delivery of a valid general warranty deed and immediately record the deed. This is the most protection the city can afford itself. If there is a subsequent purchaser and they do not have notice about the contract with the city actually or constructivelly and they receive a deed which the gave consideration for and record it before the city the city may loose legal title before ever acquiring it.

There are many different jurisdiction and statutes based on recording. It is suffice for our purposes that the city know to enter into an agreement for the sale of the building and upon acquiring title through a general warranty deed to immediately record it. This is the most protection the city can have in acquiring the AT&T building.

However, if any of the above fails and the city is unable for any reason to purchase the building the city may be able to excercise eminent domain over the building and acquire it this way. The fifth amendment due process clause as applied to the states through the fourteenth amendment will not be violated if the government takes private property for a public benefit and pays just compensation. As there is 3 million didicated to this assuming the buidling is not worth more then this just compensation will not be the problem.

The main concern the city should have, and the reason why in my opinion it will be more

efficient and quieter to purchase the building, is that the city plans to resell the building immediately to a developer. Where this raises concerns in that the city will have to argue it is taking the building for public use and turning it over to a private party whose use of the property will actually be for public use. This is not per se illegal according to the Supreme Court of the United States. There is a famous case called *Kelo* in which a city did this and the supreme court ruled it was not a violation of due process. If the city is not planning to resell the property for some legitimate benefit to the public the city should not consider eminent domain an option.

If the city is planning to resell the property after taking it from a private party for a legitimate governmental interest and the benefit of the public through the private party it is legal but almost universally condemened. Just to be legal the use of the private party will have to benefit the public. This is based on constitutional law. However it is important to understand the difference between federal and state constitutional analysis. The government acting in its federal capacity and excersicing eminent domain is only allowed to do it because the federal constituition says they can. The government, in this case the city, is not allowed to do things unless the state consitition says the cannot. To this point in the aftermath of the *Kelo* decision many states which are allowed to afford a higher degree of protection through their state constitituions then required under the federal constituition amended their state constitiutions dissallowing eminent domain through a taking from a private party and placed in the hands of another private party even if it is for the public good.

An indepth look into any amendments made to the sate constitituion on the subject are necesary. Furthermore even if it passes substantive due process in that it advances a legitimate governmental interest through an eminent domain for the benefit of the public the city is risking a huge outcry from the public. This should be considered, and because the money exists to purchase the property even though it may be more expensive then justly compensated AT&T for a taking I am of the opinion a contact for the sale of land is the prudent and quiet course for the city.

The laser light show could become an issue. It may simply be that AT&T gave a license to the theatre for the adverstising. A license can be oral or in writing but can be revoked at anytime be the licensor unless the licensee, the theatre, detrimentally relied or incurred expense on the belief they had the right to do the laser show and not be a trespasser.

It could also be a covenant between the parties which means that it should be in writting and is a promise from the coventor AT&T that the coventee, theatre, has the benefit of using outside of the building and AT&T has the burden of allowing it. However this should not be an issue if the city purchases the land or takes the land through eminent domain. In order for a purchaser of a burdened property to be subject to the burden there must be mutual privity, i.e. horizontal privity between AT&T and the Theatre. This does not just mean that they promised to allow the lightshow it means that there must be some other independnet interest the two properties share, such as an easment or a tenancy. Because no independent interest in the land seems to exist between the two parties they are not in mutual privity and the city as purhcaser cannot recieve the burden.

Furthermore under eminent domain the city may be able to extinguish licensees an or covenants.

A further discussion should be had regarding these issues.