

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 7 \*\*\*

#### SUBJECT: CON LAW

#### I. John Smith's Claims

##### A. Takings Clause – Article I, Section 18 – 40%

The Department of Transportation and Public Facilities adopted a regulation that resulted in the temporary loss of his house. This raises the issue of whether the state has violated the Takings Clause of the state constitution.

Article I, Section 18, states that “private property shall not be taken or damaged for public use without just compensation.” This provision requires the state to pay just compensation for property that it seizes through the process of eminent domain. However, it also requires the state to pay compensation for inverse condemnation that occurs when the state adopts a regulation that has the effect of taking the property. The Alaska Supreme Court uses the United States Supreme Court’s analysis for determining when a regulatory taking occurs. There are two classes of per se takings: (1) cases of physical occupation and (2) cases in which a regulation denies a landowner all economically feasible use of his property. Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993). When a case does not fall into either of these categories, the courts must engage in a case specific inquiry. The courts must weigh (1) the character of the governmental action, (2) the economic impact of the regulation, (3) the regulation’s interference with reasonable investment backed expectations, (4) the legitimacy of the interest advanced by the regulation. Id. at 557.

The Alaska Constitution also protects personal property and ensures compensation for temporary takings. Waiste v. State, 10 P.3d 1141, 1154 (Alaska 2000).

Smith has a valid claim for the taking of his property, both the residence and the equipment left behind. By forcing Smith out of his residence and including it in the security zone, the state has physically occupied the residence and the personal property left behind. Moreover, the regulation probably denies him all feasible economic use of the property. The property consists of his residence and equipment used in guiding. The regulation permits the occupation of property if it is a business related to the airport. There is nothing in the facts to indicate that the property could be converted to some permissible economic use related to the airport.

## **B. Right to Travel – Article 1, Section 1 – 20%**

The Alaska Supreme Court has recognized that there is a right to interstate or intrastate travel. Stanek v. Kenai Peninsula Borough, 81 P.3d 268 (Alaska 2003). The Alaska Supreme Court appears to have only analyzed this right in terms of the Equal Protection Clause. The court must decide whether the residency requirement creates an improper distinction between residents. Id.; Alaska Pacific Assurance Company v. Brown, 687 P.2d 264, 271 (Alaska 1984). In general, the suspicion with which the supreme court views infringements of the right to travel depends upon the degree to which the challenged law can be said to penalize the exercise of the right. Brown, 687 P.2d at 271. When evaluating a residency requirement, the court will balance the nature and extent of the infringement caused by the classification on the right to travel against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification. Id. at 271 n. 10.

Other states have addressed the right to travel in the context of a regulation limiting a person's ability to travel. The Idaho Court of Appeals' decision in State v. Wilder, 67 P.3d 839 (Idaho 2003) is typical. The Idaho court first reviewed the federal law on the right to travel, noting that the right is firmly embedded in federal constitutional jurisprudence. Id. at 841. The federal right includes the right of a citizen to move from state to state, but a state may impose reasonable restrictions on the right to travel. Id. In Idaho, a person has a constitutional right to travel on the public highways, but that right is subject to reasonable regulation under the state's police powers. Id. In Wilder, the court upheld regulations requiring a valid license to drive and the provision of a social security number to get a license. Id. at 842.

If the court applied the standard contained in Brown, it would first determine whether there was disparate treatment, or a distinction created between residents. In this case, Smith is being treated differently from all other residents of the village. He cannot use the airport. The prohibition against being at the airport impacts Smith's right to travel. He lives in a remote village on the Aleutian chain. The village is accessible only by boat or plane, and there is no ferry service. Therefore, the ban effectively denies Smith his right to travel anywhere. Because Smith had reservations for a flight, the ban also actually denied him his right to travel. The state's purpose in creating the distinction is its need to protect the airport. Although security is a reasonable goal, the ban does not necessarily bear a fair and substantial relationship to that goal. The officer's conclusion that Smith is a security risk was based on Smith's agitated reaction to being told that he had to leave his house. Although Smith's comment suggests that he might be a threat because he stated that citizens should resist, the comment does not necessarily connote violent behavior.

### **C. Procedural Due Process – Article I, Section 7 – 30%**

Smith probably has a due process claim. He was summarily banned from the airport. Due process requires notice and a hearing when the state takes action impacting a protected interest. In Mathews v. Eldridge, 96 S.Ct. 893, 902-03 ((1976), the Supreme Court set out the basic test for determining the amount of process due. A court must consider three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional safeguards against the government's interest, and (3) the government's interest, including the fiscal and administrative burden that additional safeguards would entail. The Alaska Supreme Court uses the Mathews v. Eldridge standard when reviewing procedural due process issues. Whitesides v. State, 20 P.3d 1130,1135 (Alaska 2001).

The state security officer prohibited Smith from using the airport. Generally speaking, citizens have a constitutionally protected right of travel. See Gilman v. Martin, 626 P.2d 120, 125 (Alaska 1983)(referring to right of travel). The security officer's action impacts Smith's right by isolating him on the island.

The officer did not give Smith much process at all. Based on Smith's comment about resisting the government, he concluded that Smith might be a security risk and banned him from the airport. Although the process can be contemporaneous with the offending action, the officer must explain the reason for his action and give the person an opportunity to explain his or her side of the story. The security officer neither explained his decision nor gave Smith an opportunity to explain himself. This procedure is fraught with the risk of an erroneous deprivation. Smith was agitated because he had just been told that he had to move out of his house. If he had had a chance to calm down, he may have been able to persuade the officer that he was not a security risk.

The state has a strong interest in protecting the airport and air travel. It would not, however, cost the state much in either time or money to hold a hearing.

### **D. Substantive Due Process – Article 1, Section 7 - 10%**

Substantive due process requires that a statute have a reasonable relationship to a legitimate governmental purpose. State v. Niedermeyer, 14 P.3d 264, 267 (Alaska 2000). The court does not evaluate the statute to determine whether it is wise. Id. The court only ensures that the statute is not arbitrary. Id.

Protecting the airport is a legitimate governmental purpose. However, Smith should argue that the security zone does not have a rational relationship

to that purpose. The regulation only permits the occupation of buildings within the zone if they house a business related to aviation. This is both under and over inclusive. The buildings and their businesses do not pose a threat. It is the occupants that pose the threat. A guide like Smith may pose no threat at all to aviation, while a truck driver working at a fuel dump may pose a significant threat. By focusing on the occupations and not the occupant, the regulation misses the point.