ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

WidgetCo, a widget producer in Citytown, Alaska, recently invested a substantial amount of money into a new widget manufacturing machine, called a NewFuel Burner, which was delivered and installed last month. The Burner is a custom machine, built for WidgetCo's needs, and would not be useful to any other company. The installation required WidgetCo to disable part of its operations and build a new facility to house the NewFuel Burner, which is substantially larger than WidgetCo's old manufacturing machine. The new machine is more productive than its predecessor, and will result in lower costs of production to WidgetCo. WidgetCo reasonably anticipates that the new machine will increase its profit by $13 million each year, and will pay for itself in just a few years. WidgetCo intends to fire up the NewFuel Burner and begin manufacturing with it later this month, but has not done so yet.

In the right weather conditions, which prevail most of the time, NewFuel Burners will operate with almost no discharge. In unfavorable conditions, however, NewFuel Burners have a substantial risk of discharging pollutants. In Citytown, NewFuel discharge, if any, will likely kill about 80 trees on city-owned parkland. The determination of whether a particular Burner will emit pollutants requires an expert examination of the Burner after it is installed, and an analysis of the air, water, and soil quality at the Burner's proposed location. The cost of such study for one Burner is very high.

Every year, Citytown issues permits to individuals to harvest about 100 Citytown Spruce trees from public land, in order to manage the stand. The trees are used by local crafters and artisans, who sell crafts statewide for about $2 million per year.

The Citytown government has learned of WidgetCo's purchase and is concerned that WidgetCo's NewFuel Burner may impact the availability of Citytown Spruce. It is also concerned because many businesses in the area are considering NewFuel Burners. In order to avoid any danger that its signature tree would become unavailable to crafters, Citytown passed a new ordinance at the beginning of this month, as it was authorized to do under state law governing city park-land use, that did not conflict with any state or federal law. The ordinance requires any potential users of Citytown Spruce, including users who might only incidentally take trees (for instance, by destroying them as a consequence of operating equipment) to obtain a permit. Citytown will grant a permit only if the use of the trees itself results in direct economic advantage to the user, as shown by historical performance. Rather than requiring an individual determination, the ordinance presumes that operating a Burner will

incidentally take trees without direct benefit. This presumption can only be rebutted by compelling evidence of historical performance to the contrary.

WidgetCo has challenged the ordinance's application to WidgetCo under Alaska's Constitution. In particular, WidgetCo charges that the ordinance is invalid because it violates due process by failing to require an individualized determination at public expense of whether a particular NewFuel Burner is harmful, because it constitutes an unconstitutional taking on WidgetCo's business without just compensation, and because it treats local crafters' use of Citytown Spruce preferentially to WidgetCo's use.

1. Discuss WidgetCo's assertion that the Alaska Constitution's guarantee of due process requires that the ordinance provide an individualized determination at government expense of whether a particular NewFuel Burner is harmful.

2. Discuss WidgetCo's assertion that the ordinance is an unconstitutional taking because the Alaska Constitution prohibits Citytown from interfering with WidgetCo's business in this manner without compensating WidgetCo for doing so.

3. Discuss WidgetCo's assertion that the ordinance is invalid because the Alaska Constitution prohibits Citytown from treating crafters' use of Citytown Spruce preferentially to WidgetCo's use.

GRADERS GUIDE

*****QUESTION NO. 1*****

SUBJECT: CONSTITUTIONAL LAW

1. Discuss WidgetCo's assertion that the Alaska Constitution requires that the ordinance provide an individualized determination at government expense of whether a particular NewFuel Burner is harmful. (35 points)

Grader's Guide: Applicants should analyze this claim under the Mathews v. Eldridge, interest/risk/burden test. The interest at stake is economic. The risk of erroneous deprivation is high, given that some potential NewFuel Burner users will be denied their interest in using the Burner even if they would have done so without environmental harm. The burden of an individualized determination, however, is very high. Applicants will weigh these factors differently.

WidgetCo's assertion amounts to a claim that the ordinance denies WidgetCo due process. In essence, WidgetCo complains that the process provided by the ordinance is insufficient to protect WidgetCo's rights or interests.

Alaska uses the familiar test from Mathews v. Eldridge, to determine whether an enactment provides sufficient process.[1] That test requires the decider to do three things: first, it must identify the private interest affected by the official action; second, it must evaluate the risk of erroneous deprivation and the value of any additional procedural safeguards; finally, it must balance the risk and interest against the additional financial and administrative burden on the state of providing alternative procedures.[2]

a. Private Interest At Stake

Here, the private interest at stake is a substantial economic interest in being permitted to use the NewFuel Burner. WidgetCo stands to increase its profits by $13mm per year by installing the NewFuel Burner, and has already made a substantial investment in purchasing the unit and installing it. WidgetCo may also argue that the interest includes its interest in avoiding the high cost of an expert determination. Either way, however, the interest is only a property

[1] Laidlaw Transit, Inc. v. Anchorage Sch. Dist., 118 P.3d 1018, 1026 (Alaska 2005). Applicants may assert that the minimum process that is due is notice and an opportunity to be heard, and that this should prove the starting point of the analysis. This is true in adjudicative proceedings. Hickel v. Halford, 872 P.2d 171, 179-80 (Alaska 1994). But in non-adjudicative proceedings, this minimum threshold does not apply and the appropriate analysis begins and ends with the Mathews test. Laidlaw, 118 P.3d at 1027.

[2] Id. at 1026.

interest – WidgetCo has not identified any liberty interest, and no fundamental right is at stake.[3] Thus, absent a substantial risk of deprivation and only a minimal burden on the state to provide additional procedures, no due process violation will be found.

Applicants may assert that WidgetCo does have a fundamental right at issue, namely the right to be free of erroneous takings or *ex post facto* laws. The takings argument is analyzed below, in response to Question 2. And this is not an *ex post facto* law. As an initial matter, it is not clear that the *ex post facto* clause of the Alaska Constitution even applies except when a new enactment modifies a criminal law.[4] Even if it does, however, an *ex post facto* law is a law "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."[5] The ordinance prohibits operation of a NewFuel Burner without a permit, but no such operation has occurred in Citytown. In any event, the facts do not indicate that the ordinance imposes penalties for operation of NewFuel Burners prior to the ordinance's effective date – it is likely entirely prospective. Thus, the only right at issue here is WidgetCo's property right.

b. Risk of Erroneous Deprivation

After identifying the private interest at stake, the decider must next determine the risk that the private interest will be erroneously deprived for the want of a better procedure. Here, the ordinance calls for a very simple procedure (with a concomitantly high likelihood of erroneous deprivation,) a denial of the ability to use the NewFuel Burner absent an expensive and cumbersome showing by the applicant that no harm will result. Because of the expense and difficulty of determining whether a particular use is likely to result in harm, almost all applications will be denied. Indeed, many potential applicants will not even be able to make the initial showing, owing to its cost. The facts indicate that only a minority of applications of the NewFuel Burner are likely to result in such harm, so the majority of deprivations will, in fact, be erroneous. Moreover, because it can never be certain whether a particular expert determination is correct or not, the ordinance may result in a *de facto* blanket denial of every single application.

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[3] An interest in property probably can never amount to a great interest. One's interest in his or her pet dog, for instance, outweighs an interest in most other forms of property including money. Haggblom v. City of Dillingham, 191 P.3d 991, 996 (Alaska 2008). Nonetheless, it is not as great an interest as one's interest in liberty or one's fundamental rights. The Court in Haggblom held that due process did not require notice to a pet owner of their rights in a hearing on whether to destroy a dog, even though the owner's interest in her dog was of the highest order, and even though the notice would have been cheap and easy to provide. Id. at 996-97. Where, as here, the economic interest is less important than one's interest in a pet, probably not much process is due.

[4] In re Estate of Blodgett, 147 P.3d 702, 711 (Alaska 2006).

[5] Id. (quoting Danks v. State, 619 P.2d 720, 722 n.3 (Alaska 1980) and BLACK'S LAW DICTIONARY 520 (5th ed.1979)).

By contrast, additional safeguards would likely be of some value in decreasing the likelihood of erroneous deprivation. For instance, the individualized determination called for by WidgetCo would likely substantially reduce the number of erroneous deprivations, at least if the standard of proof Citytown employs is sufficiently low (say, a preponderance of evidence). And shifting the cost to the public will certainly result in more applicants having the opportunity to have the initial study performed.

c. Burden of Additional Procedural Safeguards

Finally, in order to evaluate whether the existing procedural safeguards are adequate, the decider must determine the burden to the government of implementing additional safeguards.

Here, the proposed additional safeguard would include an individualized determination of each proposed NewFuel Burner site, and an evaluation of the proposed procedures for handling the Burner, at public expense. The facts indicate that such an evaluation would require, at least, an expert analysis of the proposed Burner location and the actual installation of the Burner, together with an assessment of the procedures that will be put in place. Moreover, an individual determination would require monitoring, and periodic reevaluations. Finally, the government reasonably believes that several such evaluations will be necessary, as many businesses in the area may adopt the NewFuel Burner technology.

Assuring each proposed NewFuel Burner owner an individual determination is likely to be extremely expensive and cumbersome for the Citytown government, given the complexity of performing each evaluation and the number of evaluations that will be required. Moreover, if the public bears the expense of the evaluations then there are likely to be more of them. As a result, the additional cost to Citytown will not just be expert fees and testing, but also additional administrative costs for the evaluation of the expert opinions when they are received. Given that "many" such applications are anticipated, this cost and administrative burden is likely to be very high.

Thus, while there is a substantial likelihood that Citytown's ordinance will result in the erroneous deprivation of the benefits of a NewFuel Burner to at least some entities that would otherwise have obtained the benefit without destroying any Citytown Spruce trees, those benefits are merely economic and the risk is probably outweighed by the high cost and additional burden Citytown would have to take on in order to provide a more refined procedure for determining whether a particular NewFuel Burner should be permitted.

2. WidgetCo's assertion that the ordinance is invalid because the Alaska Constitution prohibits Citytown from interfering with WidgetCo's business in this manner. (25 pts)

Grader's Guide: Applicants should analyze the question as a taking, for which there is a 4-factor test that balances: (i) the character of the action; (ii) its economic impact; (iii) its interference with reasonable investment-backed expectations; and (iv) the legitimacy of the interest advanced. Here, the ordinance will have a large and negative net economic impact, and substantially interferes with WidgetCo's reasonable investment-backed expectations. WidgetCo should be compensated by Citytown for what amounts to a taking of its property. Note that Alaska's takings clause is broader than its federal counterpart because it includes mere damage to property, including damage to lost business profits.

Under the facts of the problem, it is clear that Citytown was aware of WidgetCo's investment in a NewFuel Burner at the time it passed the ordinance. Indeed, WidgetCo's installation of the Burner was explicitly one of the reasons that Citytown sought to limit the use of NewFuel Burners. The ordinance has the effect of taking the NewFuel Burner for public use without just compensation, and should be prohibited by the takings clause of the Alaska Constitution.

Article I, § 8 of the Alaska Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." This is broader than its federal counterpart, which provides only that private property will not be *taken* by the government (but permits the government to impair or damage property).[6] In order to determine whether a taking has occurred, the decision maker should consider four factors:

a. the character of the governmental action;
b. the economic impact of the action;
c. the interference, if any, with reasonable, investment-backed expectations; and
d. the legitimacy of the interest advanced by the action.[7]

This provision is interpreted liberally to favor the property owner.[8] Alaska's prohibition on taking applies to personal property.[9] Indeed, even a business's lost profits are recoverable as just compensation when the government impairs or damages a business's ability to obtain such profits.[10]

[6] State v. Hammer, 550 P.2d 820, 824 (Alaska 1976); U.S. Constitution, Amend. V.
[7] Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993).
[8] Id.
[9] Hammer, 550 P.2d at 823.
[10] Id. at 823 – 826.

a. Character of Governmental Action

The test of the character of the governmental action encompasses two different inquiries. In particular, the decisionmaker should consider whether the government is acting as a regulatory body or merely in the manner of a private entity (for instance, when acting as an employer or land-owner).[11] It is highly doubtful that a colorable taking claim can be established when the government is simply acting as a neighboring land-owner.[12]

When the government is acting in its capacity as sovereign, however, the "character" inquiry amounts to the question of whether the complained-of action can be characterized as a physical invasion, or if it is merely a burden on the use of the property.[13] If it is a burden, it must be substantial in order to constitute a taking: government actions become takings when the property owner is forced to bear an unreasonable burden as a result of the government's exercise of power in the public interest.[14]

Here, the government was plainly acting as sovereign. The ordinance does not amount to a physical invasion – the NewFuel Burner will be the same after the ordinance as it was before it. But the ordinance does have the effect of diminishing the economic value of the equipment and thereby "damaging" it. If the Burner cannot be operated, it is effectively useless. Worse, because it is a custom machine, it likely has little resale value. Because of the ordinance, WidgetCo will bear a substantial and unreasonable burden.[15]

b. Economic Impact of the Action

"Private property is taken or damaged for constitutional purposes if the government deprives the owner of the economic advantages of ownership."[16] The economic advantage of ownership of a custom NewFuel Burner is the efficiency gain and concomitant profit gain to be had by operating one in place of less-efficient technology. The ordinance eliminates substanstantialy all of this economic advantage.

c. Interference With Reasonable, Investment-Backed Expectations

A reasonable, investment-backed expectation is more than a unilateral expectation or abstract need.[17] It is not "a business gamble."[18] Instead, the

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[11] Sandborg, 861 p.2d at 558 n.8.
[12] Id.
[13] Id. at 558.
[14] Id.
[15] See also Hammer, 550 P.2d at 827 (holding that the profits lost to relocation were a "damage" to a business affected by a government condemnation of land).
[16] Sandborg, 861 p. 2d at 558; Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 p.2d 610, 614 (Alaska 1990).
[17] State, Dep't of Natural Rsrcs. v. Arctic Slope Regional Corp., 834 P.2d 134, 140 (Alaska 1991).

expectation must be reasonably certain and not contingent.[19] But WidgetCo's expectations were unequivocally reasonable in this sense – but for the government interference, WidgetCo would have enjoyed the use of its NewFuel Burner and obtained a $13mm annual benefit. Moreover, the facts indicate that WidgetCo invested substantially in these expectations, by purchasing the equipment, modifying its factory, and paying for installation. Citytown's conduct substantially interfered with these expectations.

d. Governmental Interest

Finally, if the government's interest is illegitimate than it should not take private property to further that interest. Here, the government's interest appears to be legitimate, and nothing in the facts suggests otherwise.

Because the ordinance effectively destroys the value of WidgetCo's new machine, it is a taking in contravention of the takings clause of the Alaska Constitution. WidgetCo should be compensated by Citytown for its loss.

3. Discuss WidgetCo's assertion that the ordinance is invalid because the Alaska Constitution prohibits Citytown from treating craftsperson's use of Citytown Spruce preferentially to WidgetCo's use. (40 pts)

Grader's Guide: This question should be analyzed under both Alaska's equal protection clause, and the Article VIII natural resource clauses. Article VIII serves to subject governmental action to a more stringent review than it would have received if only the equal protection clause applied. Under Alaska's sliding-scale equal protection analysis, the decider balances the nature of the impaired interest, here merely economic, against the means/ends fit of the law. Where the interest is not important, as here, the purpose of the law need only bear a "fair and substantial relationship" to the means employed. Thus, the ordinance passes equal protection muster. But, because what is at issue is disparate treatment of natural resources, the ordinance is held to a stricter standard. Ultimately, the expressed purpose of the ordinance is to save trees, but craftspeople destroy 25% more trees each year than even a leaky NewFuel Burner would, so the enactment will not pass Article VIII scrutiny.

Operators of destructive NewFuel Burners are, effectively, using Citytown Spruce trees in competition with craftspeople. The ordinance unquestionably favors the craftspeople's uses – it places potentially insurmountable obstacles in front of NewFuel Burner usage, while permitting craft usage of the trees at relatively low cost. Thus, the ordinance creates a disparity of treatment

[18] Sandberg, 861 P.2d at 560.
[19] See id.

between NewFuel Burner operators and craftspeople. WidgetCo's argument is that this disparity of treatment violates Alaska's Constitution. Two sets of provisions might be implicated: first, Alaska's Equal Protection clause generally prohibits the government from treating similarly situated individuals differently; second, the provisions of Article VIII of the Alaska Constitution generally require the government to ensure that natural resources are equally available to all Alaskans.

a. Equal Protection

Equal protection claims under the Alaska Constitution are analyzed on a sliding scale that places a higher or lower burden on the government to justify a classification depending upon the relative importance of the individual right involved.[20] Thus, as a threshold matter it first must be determined whether the enactment under consideration actually treats similarly situated individuals differently.[21] If there is such disparate treatment, the decider must then consider the importance of the implicated individual right.[22] If the right is not very important, then the government must only show that its purpose is legitimate and the enactment bears a substantial relationship to its objective.[23] At the other end of the continuum, an enactment that impairs a fundamental right will be upheld only if it is the least restrictive means to further a compelling government interest.[24]

Here, the ordinance is facially silent as to its application. To the degree that its effect is to permit certain uses of the trees and prohibit others, that alone does not indicate disparity of treatment. After all, if the craftspeople wanted to install a NewFuel Burner, they would face the same set of prohibitions as WidgetCo in doing so. Put differently, the ordinance does not distinguish between *users* of Citytown Spruce trees, but instead between *uses*. This is a permissible exercise under the equal protection clause, and an argument premised on that clause is likely to be unavailing because it fails the threshold disparity analysis.

However, the ordinance goes further – it requires that the showing of direct economic advantage be made by reference to historical performance. This is a standard that WidgetCo, and other NewFuel Burner users, will never be able to meet because there simply is no history of such a use. Thus, WidgetCo (and other entities that have never before harvested Citytown Spruce) could only

[20] Bridges v. Banner Health, 201 P.3d 484, 493-94 (Alaska 2008).
[21] Glover v. State, Dep't. of Transp., 175 P.3d 1240, 1257 (Alaska 2008) (citing Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 397 (Alaska 1997)). Cf. Bridges, 201 P.3d at 494 (holding that there was no need to apply equal protection analysis when statute did not facially discriminate, and treated different types of specialists similarly in practice).
[22] Glover, 175 P.3d at 1257.
[23] Id.
[24] Id.

possibly obtain a permit under the ordinance if it established that it would do no harm to the trees. Thus, similarly situated actors are treated differently.

The next step of equal protection analysis is to ascertain the private interest at stake. Under the facts as given, the interest is purely economic. WidgetCo can continue its business with or without the NewFuel Burner, although it will enjoy less profit. A merely economic interest on the part of the private party requires only a legitimate purpose on the part of the government, and a substantial means/ends fit. Here, Citytown's purpose in preserving its trees and town character is unquestionably legitimate, and limiting the use of NewFuel Burners to those that are unlikely to impact Citytown Spruce bears a substantial relationship to that purpose. The Alaska equal protection clause is not violated by Citytown's ordinance.

b. Article VIII Natural Resource Rights

Sections 3 and 17 of Article VIII of the Alaska Constitution provide that government-owned natural resources are held for the common good, not any particular individual's benefit, and that enactments governing the use of such resources must be applied equally to all persons similarly situated.[25] Exclusive or special privileges to utilize natural resources are prohibited.[26] Among other things, this means that enactments which burden one groups' use of a natural resource in favor of another groups' should be held to a stricter standard than the equal protection clause alone would normally warrant.[27] In particular, "[i]n reviewing legislation which burdens the equal access clauses of [A]rticle VIII, the purpose of the burden must be at least important. The means used to accomplish the purpose must be designed for the least possible infringement on [A]rticle VIII's open access values."[28]

As noted above, the government purpose in this case is "at least important." The means chosen to implement that purpose, however, are not the least possible infringement on the open access values of Article VIII. In particular, Citytown's ordinance will trade around $13mm in additional profit to WidgetCo and other companies in favor of about $2mm in income to craftspeople, and about $30k in licensing fees to the city. More importantly, it will protect about 80 trees from destruction by NewFuel Burner, in order that 100 may be destroyed by craftspeople. In short, it is poorly suited to the purpose of preserving trees or sustaining their economic value and the town's character. Thus, under the stricter analysis given to enactments that differentiate between users of natural resources this enactment violates Alaska's Constitution.

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[25] McDowell v. State, 785 P.2d 1, 5-6 (Alaska 1989).
[26] Id.
[27] See Owsicheck v. State, Guide Licensing and Ctrl. Bd., 763 P.2d 488, 498 n.17 (Alaska 1988).
[28] McDowell, 785 P.2d at 10.

BUSINESS LAW

ESSAY QUESTION NO. -----

(Answer this question in Answer Booklet No. ____)

Since 1995, Joe has owned a trucking business, Ice Roads Inc. specializing in hauling heavy loads over ice roads on Alaska's North Slope. The legal titles to the two trucks used in the business are in Joe's name. Joe is Ice Roads' sole shareholder and employee, and Joe serves as President and Treasurer, while his wife, Lois, is the secretary. Joe and Lois do all of their personal and business banking through their one personal bank account. Lois makes a point of keeping a very organized notebook that contains corporate minutes of annual shareholder meetings and articles of incorporation and bylaws. She also dutifully files Ice Roads' corporate tax return each year.

In early 2008, Joe decides to start a business to transport tourists by bus. Joe incorporates Clear Roads Inc. in Alaska, and lists his wife Lois as the sole shareholder and President. He selects a corporate form of business to avoid personal liability. Lois maintains a proper notebook with Clear Roads' articles, bylaws and corporate minutes of its first shareholder meeting. In March 2008, Joe causes Clear Roads to lease

one bus for a term of two years. The bus is to be delivered in Fairbanks May 10, 2008.

Joe calls cruise ship companies hoping to get a contract to move passengers between airports and seaports in the state. In April of 2008, Joe, acting as the general manager of Clear Roads enters into a contract with the Queenland Cruise Ship Company to provide twice weekly bus transportation for passengers between Fairbanks and Anchorage starting June 1. During the negotiations, Queenland asks Joe if Clear Roads Inc. currently meets the minimum requirement of owning two buses and Joe says it does. In accordance with the contract, Queenland pays Clear Roads $20,000 to equip its two buses with specialized wheel chair lifting equipment to serve Queensland's customers. Even though Joe tells Queenland that he will purchase the specialized equipment, he has no intention of doing so.

Instead of buying the specialized equipment required by the contract, Joe designs his own passenger lift using a sling and pulley he removed from part of the rigging attached to one of his trucks. Joe deposits the $20,000 into his personal bank account and draws on these funds to cover his personal bills and the bus' fuel bills. Within two weeks of starting performance under the contract, Clear Roads fails to keep up with Queenland's time schedule. Queenland quickly learns that Clear

Roads only has one bus and thus can't perform when mechanical issues arise. Queenland also receives passenger complaints about bruises and bumps caused by Joe's homemade sling and pulley system. Before the end of the 3rd week, Queenland cancels the contract and demands the return of its $20,000 together with other monetary damages caused by Clear Roads' fraud. Joe does not respond to the demand.

Joe comes to you with Queenland's complaint which alleges fraud by Joe individually and also by Clear Roads Inc. The complaint seeks damages that far exceed Clear Roads Inc.'s assets.

1) Describe whether Joe could be found individually liable for Queenland's cause of action against Clear Roads Inc. and the facts that would support a finding that Joe was personally liable. Do not discuss agency law.

2) Discuss whether Joe is insulated from Queenland's fraud claim against him in his individual capacity because he was acting as an employee of the corporation.

3) At the time of Clear Roads Inc.'s corporate formation, describe how Clear Roads Inc. could be made a wholly owned subsidiary of Ice Roads Inc. and who its incorporator should be.

GRADERS' GUIDE

* * * QUESTION NO. ____ * * *

SUBJECT: BUSINESS LAW

Question (1) Describe whether Joe could be found individually liable for Queenland's cause of action against Clear Roads Inc. and the facts that would support a finding that Joe was personally liable. Do not discuss agency law. (65 points)

Piercing the Corporate Veil of Clear Roads Inc.

The formation of a corporation generally shields its owners from personal liability for the acts of the Corporation. AS 10.46.438.

The corporate form will be disregarded in two circumstances: (1) if the corporation is a mere instrumentality of the owner; Uchitel Co. v. Telephone Co., 646 P2d 229, 234 (Alaska 1982); or (2) if the owner uses the separate corporate form "to defeat public convenience, justify wrong, commit fraud, or defend crime." McKibben v. Mohawk Oil Co. Ltd., 667 P2d 1223, 1229 (Alaska 1983).

A. Analysis of the "Mere Instrumentality" test (45 Points)

In Uchitel, 646 P.2d at 235, the court set forth a six part test for determining whether a corporation was a "mere instrumentality" of the owner:

(a) Does the owner sought to be held liable own all or most of the stock of the corporation?

(b) Has the owner subscribed to all of the capital stock of the corporation or otherwise caused its incorporation?

(c) Does the corporation have grossly inadequate capital?

(d) Does the owner use the property of the corporation as his or her own?

(e) Do the executives or directors of the corporation act independently in the interest of the corporation or simply take their orders from the owner in the latter's interest?

(f) Are the formal legal requirements of the corporation observed?

Applying these six factors to Joe and his conduct in relation to Clear Roads Inc., it is pretty clear that there is sufficient evidence to disregard the corporate form on grounds of "mere instrumentality".

(a) Joe was not a share holder in Clear Roads Inc. in that he had placed ownership of all of the stock in his wife's name. However, in McCormick c. City of Dillingham, 16 P3d 735 (Alaska 2001), the court was faced with an owner who had transferred all of the stock ownership to his wife, yet continued to operate the corporation as before. There the court held, "when a court considers whether to pierce the corporate veil, it does not simply ask who owns the corporation's stock, but also inquires who controls the company. If other factors militate in favor of piercing the corporate veil, a court may impose personal liability on the control person even if he owns no stock." Id. at 744. In this case, there is no question that Joe was the "control person". The fact that he was not a shareholder will not end the inquiry. But other factors must demonstrate that the corporation is a mere instrumentality of Joe in order for the corporate veil to be pierced under this theory.

(b) Joe was the original incorporator of Clear Roads Inc. although the stock was in his wife hands. He was the catalyst behind the

creation of Clear Roads Inc. Its purpose was to supply him with a summer occupation. Thus, this factor would likely be met.

(c) The facts suggest that Clear Roads Inc. was grossly undercapitalized. It had no separate bank account or capital. What start up money it received from Queenland for buying the special transport equipment was put into Joe's personal bank account and used to pay personal bills as well as bus fuel bills. There was no other capital invested in Clear Roads Inc. The corporation owned no real property and equipment and thus lacked capital assets. Even the sling and pulley were borrowed from Ice Roads Inc. The bus was leased and not owned. The business had only one customer and operated only three weeks and then shut down, so it had little cash flow. Thus, it is likely that this factor would be met.

(d) Clear Roads did not appear to own any assets except the funds it was paid by Queenland and the bus lease. The facts do not suggest that Joe used the bus for personal purposes. But, Joe deposited Clear Roads' $20,000 payment from Queenland into his personal bank account and Joe used these funds in part to cover his personal bills. It is likely that this factor would be met.

(e) The question would appear to ask whether Lois acted independently as owner and President of Clear Roads Inc. or simply took orders from Joe, who was not even a director or owner of Clear Roads. McCormick is instructive on how this factor should be applied in such circumstances. The court described this factor as "corporate independence" and noted that the controller whose liability was at issue, controlled the corporation as if he were the sole owner, and affirmed the trial courts' finding that this factor was met. Id. at 745. Here there is no question that Joe is controlling the corporation, and that Lois, the sole shareholder is merely a passive participant in the operation of the business, even though she does keep the records. There is no evidence that anyone but Joe controlled the conduct of the operations, or the corporation's future direction. It is likely a court would find this factor to be met.

(f) There is no evidence that Joe and Lois did not adhere to the provisions of the corporation's articles of incorporation or by-laws. The facts indicate that Lois kept very accurate and neat annual shareholder and meeting records. It is likely a court would find that the formal legal requirements of the corporation were being observed by Lois and Joe and that this factor standing alone does not support piercing the corporate veil. However, given the short

duration of the active life of this corporation, there is not much of a track record, nor could there have been many meeting notes.

It is not necessary for all six factors to be satisfied before a finding of "mere instrumentality" can be made. Nerox Power Systems, Inc. v. M-B Contracting Co. Inc., 54 P. 3d 791, 802 (Alaska 2002). In this case, however, the weight of the factors overwhelmingly supports the conclusion that the "mere instrumentality" theory could be used to pierce the corporate veil of Clear Roads Inc.

B. Analysis of the use of corporate form "to defeat public convenience, justify wrong, commit fraud, or defend crime" test. (20 Points)

An owner or controlling party can be held personally liable for corporate actions where the corporate form is used to defeat public convenience, justify wrong, commit fraud or defend crime. Uchitel at 234. This basis for piercing the corporate veil exists regardless of whether the factors demonstrating "mere instrumentality" exist. Id.

The mere fact that Joe might have consciously selected the corporate form for his tourism business, so that he and Lois could avoid liability, would not alone be sufficient proof that they were trying to defeat public

convenience since limitation of liability is a legitimate and recognized characteristic of a corporation.

However, it is pretty clear that Joe caused the corporation to commit an act of fraudulent misrepresentation. His belief that he could do so with impunity because it was the action of the corporation and not an act as an individual was mistaken. Joe lied during the contract formation stage by misrepresenting how many buses the business had. He also had no intention of honoring Queenland's requirements for manner of loading handicapped customers. His pocketing of the $20,000 under these false pretenses likely qualifies as a criminal act and his commission of this crime would also support the piercing of the corporation veil under this theory. Joe does not appear to have any facts he can point to as a defense against this theory for piercing the corporate veil.

The corporate veil could likely also be pierced under the "use of corporate form to commit fraud" theory.

Question 2- Discuss whether Joe is insulated from Queenland's fraud claim against him in his individual capacity because he was acting as an employee of the corporation. (20 points)

Corporate Employee's personal liability for Fraud

In Casciola v. F.S. Air Service, Inc. 120 P.3d 1059, 1063 n11 (Alaska 2005), the Alaska Supreme Court stated, "All persons may be found liable for their own intentional tortious conduct, including acts of fraudulent misrepresentation. The corporate form does not shield corporate officers or employees who commit torts on behalf of their employer from personal liability." Joe made intentionally false statements concerning Clear Roads having two buses in possession, when in fact Clear Roads had no buses at the time of contracting and only intended to have one bus on hand for performance of the contract. In addition, Joe agreed to the terms for the special loading equipment knowing that he had no intention of honoring them. Even though Joe was acting as an employee of Clear Roads when he caused the corporation to enter into the contract with Queenland and did not sign the contract in his individual capacity, he is still personally liable for his fraudulent conduct. As such, a judgment against him for fraud could be rendered and his personal assets seized to satisfy the judgment, notwithstanding the fact that his actions were in his capacity as a corporate officer or employee.

Question (3) At the time of Clear Roads Inc.'s corporate formation, describe how Clear Roads Inc. could be made a wholly owned subsidiary of Ice Roads Inc. and who its incorporator should be. (15 Points)

Ice Roads Inc. cannot act as the incorporator of Clear Roads Inc. Incorporators must be natural persons. AS 10.06.205. Ice Roads Inc. therefore cannot sign the Articles of Incorporation as an incorporator of the new Alaska corporation.

Therefore, either Joe or Lois, as natural persons, would have to serve as the incorporator of Clear Roads Inc. Joe or Lois would file Articles of Incorporation with the Alaska Department of Commerce, Community & Economic Development, Division of Corporations, Business and Professional Licensing, and indicate in the Articles of Incorporation that Ice Roads Inc. owned all of the stock. This would result in Clear Roads Inc. becoming the wholly owned subsidiary of Ice Roads Inc.

A less efficient process would have the Articles of Incorporation reporting the initial stock as being owned by Joe or Lois; subsequently, Joe or Lois would then have to transfer the stock to Ice Roads Inc.