ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

The Community Faith Center ("CFC") was a religious association with a large congregation and a building on property it owns in Alaska City. CFC was organized as a nonprofit company. The CFC building abutted a busy road that is one of the main corridors for traffic through Alaska City.

Alaska City recently took notice of traffic congestion issues around CFC. Several months ago, CFC's religious leader, Leader, told the congregation that some CFC's members had committed religiously unacceptable (although secularly legal) acts, and produced poster-sized enlarged photographs of the members engaged in the salacious (but not obscene) conduct. The offenders had come to Leader to ask for absolution, and consistent with CFC's teachings he directed other members of the congregation to stand outside of the CFC building in the parking lot with signs containing the photographs and the word, "SHAMEFUL." Shortly after the start of this practice, the congestion began to substantially worsen and interfere with traffic through town.

Alaska City passed an ordinance prohibiting the practice of holding up signs that interfere with the normal progress of traffic during rush hours, and declaring that a twenty-foot-wide "setback" band of CFC property abutting the road and painted as part of CFC's parking lot would be off-limits to foot or vehicle traffic (including parking). The setback does not affect ingress or egress from the parking lot, only the amount of available parking.

Immediately after these measures were enacted and enforcement began, traffic-flow returned to normal levels. CFC was not financially affected by the loss in parking.

CFC concedes that Alaska City's measures are reasonable time, place, and manner restrictions on speech, and does not contest their application on free speech grounds. Instead, CFC asserts that the new ordinance and regulation of property is a violation of the Free Exercise Clause of the Alaska Constitution and an impermissible Taking of its property without just compensation.

1. Discuss whether Alaska city's new ordinance is an impermissible violation of Alaska's constitutional free exercise clause as asserted by CFC.

2. Discuss whether Alaska city's new ordinance is an impermissible violation of Alaska's constitutional prohibition against taking CFC's property without just compensation.

GRADER'S GUIDE

*****QUESTION NO. 9*****

SUBJECT: CONSTITUTIONAL LAW

1) Discuss whether Alaska city's new ordinance is an impermissible violation of Alaska's constitutional free exercise clause as asserted by CFC. (50 points)

CFC asserts that Alaska City's effort to block its public shaming of some of its congregants is a violation of the Free Exercise Clause found in Article I Section 4, of Alaska's Constitution which states: "No law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof."

The Alaska Supreme court has long emphasized the importance of freedom of religion. In Frank v. State, the Alaska Supreme Court, echoing the U.S. Supreme Court held that: "No value has a higher place in our constitutional system of government than that of religious freedom."[1]

In Sands v. Living Word,[2] the Supreme Court held that religious shunning does not pose "some substantial threat to public safety, peace or order" as a matter of law in the context of a tort claim against a church on behalf of a shunned individual.[3] Instead, Free Exercise protection extends to any conduct that satisfies a two-part test.[4] First, three threshold requirements must be satisfied: (1) there must be religion involved, (2) the conduct must be religiously based, and (3) the person claiming protection must be sincere.[5] Second, the conduct must not "pose some substantial threat to public safety, peace or order," and there must be no "competing governmental interests that are of the highest order and [are] not otherwise served."[6]

Here, religion is unquestionably involved. As in *Sands*, public shunning and reproof have a long history in some religious practices, and in any event the conduct was directed by CFC's Leader and was in accord with its teachings. It is equally clear that the conduct was religiously based: nothing in the facts suggests that the signs or the congregants carrying them were personally motivated, and the purpose of the conduct was to obtain religious absolution for the alleged offenders. Finally, there is no evidence that the congregants carrying signs were anything other than perfectly sincere. Thus,

[1] 604 P.2d 1068, 1070 (Alaska 1979).
[2] 34 P.3d 955 (Alaska 2001).
[3] Id. at 959.
[4] Id. at 958.
[5] Id.
[6] Id.

the threshold inquiry is met and the shaming conduct must be protected unless it poses some substantial threat to public safety, peace or order.

While the inquiry on the second part of the Free Exercise test is closer than the first, it still probably cuts in favor of CFC's claim. The Court has not given clear guidance as to the level of threat that is necessary before the government may impose burdens on the free exercise of religion, but the level must be quite high. For instance, the government's interest in protecting the emotional well-being of shunned- or shamed-individuals does not rise to the appropriate level, even when a failure to protect them results in their attempted suicide and permanent disability.[7] In any event, here the only identified interest of Alaska City was to reduce traffic congestion. This probably does not rise to the level of a "competing government interest … of the highest order". On the other hand, the government may argue that it does have a competing interest of the highest order in protecting the safety of motorists and the public from drivers who may be distracted by the spectacle of the "shunners." Alaska's Supreme Court has not yet articulated a standard of causation to be applied in these circumstances – it is not clear whether an attenuated risk of potential danger, without any evidence of an actual increase in accident frequency or severity, will support an infringement of a group's religious beliefs. In any event, on the facts as given and as applied to CFC's conduct in publicly shaming its congregants, the new ordinance likely runs afoul of the Free Exercise clause.[8]

2) Discuss whether Alaska city's new ordinance is an impermissible violation of Alaska's constitutional prohibition against taking cfc's property without just compensation. (50 points)

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).[9] An action that results in a physical intrusion on property or the elimination of substantially the entire economic benefit of it is a taking *per se*.[10] An action that affects only part of a piece of property or eliminates less than all of its economic value, however, requires a further and more nuanced analysis.[11] In order to determine whether a taking has occurred, the decision-maker should consider three factors:

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[7] See Sands, 34 P.3d at 958-59.

[8] Applicants may raise and address cases in which picketing or solicitation were at issue. These cases have arisen in the context of the Free Speech clauses of the Alaska and US Constitutions, not the Free Exercise clause: they are not directly relevant to this case. In any event, the result should not be much different under that analysis: as those cases make clear, a government regulation of speech based on its content is generally impermissible.

[9] State v. Hammer, 550 P.2d 820, 824 (Alaska 1976); U.S. Constitution, Amend. V.

[10] R&Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 (Alaska 1991).

[11] Id.

(i) the character of the governmental action;
(ii) the economic impact of the action; and
(iii) the interference, if any, with reasonable, investment-backed expectations.[12]

This provision is interpreted liberally to favor the property owner.[13] Alaska's prohibition on taking applies to personal property.[14] 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.[15] Even temporary takings are compensable under Alaska's law.[16] "The finding of a taking, finally, depends on whether someone has been deprived of the economic benefits of ownership, not whether the State captures any of those benefits."[17] On the other hand, damages must be reasonably certain and not based on mere speculation and wishful thinking.[18] Claims that depend on unrealized contingencies are not compensable.[19]

A. Character of Governmental Action

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.[20] 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.[21] Courts have also considered whether the government's action "directly" or "indirectly" affected the property.[22]

Here, the government action did not effect a physical invasion: the government did not actually intrude on the setback band, it merely regulated the use of the property to prohibit its present use as parking and a place for congregants to post and hold signs. But the effect of the government's action was direct, and created a burden. Moreover, the burden was substantial: the government effectively robbed the encumbered portion of the property of its

[12] Anchorage v. Sandberg, 861 P.2d 554, 557 (Alaska 1993) (listing factors, now referred to as "Sandberg factors," although they were inherited from federal jurisprudence). See also Hageland Aviation Svcs., Inc. v. Harms, 210 P.3d 444, 450, n.21 (Alaska 2009) (explaining that, despite prior cases, there are only three factors and the occasionally asserted fourth is merely an aspect of the first).
[13] Sandberg, 861 P.2d at 557.
[14] Hammer, 550 P.2d at 823.
[15] Id. at 823 – 826.
[16] Waiste v. State, 10 P.3d 1141, 1154 (Alaska 2000).
[17] Hageland Aviation Svcs., 210 P.3d at 450;Waiste, 10 P.3d at 1154.
[18] Hammer, 550 P.2d at 824-25.
[19] Id. at 825.
[20] Sandberg, 861 P.2d at 558.
[21] Id.
[22] See, e.g., R&Y, Inc., 34 P.3d at 294.

value for its intended purpose as parking space. Thus, this factor cuts in favor of finding a taking.

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."[23] In analyzing the economic impact of government conduct, the fact-finder should weigh the loss attributable to government conduct against the total value of the relevant parcel.[24] Here, we have no facts whatever on the economic value of the setback band, or of the property as a whole. But the facts do tell us that CFC saw no negative economic effect from the loss of parking. To the degree this factor is relevant at all, it cuts against finding a taking.

C. Interference With Reasonable, Investment-Backed Expectations

A reasonable, investment-backed expectation is more than a unilateral expectation or abstract need.[25] It is not "a business gamble."[26] Instead, the expectation must be reasonably certain and not contingent.[27] "While this analysis is essentially an *ad hoc*, factual inquiry, it is nonetheless an *objective* one. The subjective expectations of the [claimants] are irrelevant."[28]

Here, the facts are unclear as to what, if any, investment CFC made in its parking lot. Presumably it made some – the facts do not provide an indication that CFC received the lot and its maintenance and upkeep *gratis*. It is slightly more evident that CFC reasonably expected that it would be permitted to use its parking lot as a parking lot. There is nothing to suggest that CFC was on notice, prior to the city's action, that it should not paint the parking lot or use it for parking. Its expectation was objectively reasonable. Moreover, because CFC had previously used the land in the manner proposed, the expectation was not contingent, but certain. This factor cuts in CFC's favor, but only to the extent (which we cannot know on the facts provided,) that CFC invested in using the setback area as a parking lot.

D. Weighing the Factors

The question of whether a taking has occurred requires a weighing of private and public interests.[29] This is a case-specific analysis, guided by the Sandberg factors and the underlying principle that the allocation of economic

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[23] Sandberg, 861 p. 2d at 558; Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 p.2d 610, 614 (Alaska 1990).
[24] See R&Y, Inc., 34 P.3d at 294.
[25] State, Dep't of Natural Rsrcs. v. Arctic Slope Regional Corp., 834 P.2d 134, 140 (Alaska 1991).
[26] Sandberg, 861 P.2d at 560.
[27] See id.
[28] Hageland, 210 P.3d at 451 n.27 (quoting Chancellor Manor v. United States, 331 F.3d 891, 904 (Fed.Cir. 2003)) (emphasis in original).
[29] R&Y, Inc., 34 P.3d at 297.

burdens between the encumbered individual and the general public should be fair.[30]

The particular circumstances and character of the regulations at issue may dictate the result. For instance, government land-use regulations that restrict activity consistent with the general purpose of the neighborhood are most likely to indicate a taking.[31] Moreover, when a regulation applies only to one or a few landowners, it is more likely to trigger a finding of a taking.[32] The Court will examine how the regulation allocates burdens and benefits, and will uphold an allocation when the disputed regulation: 1) applies broadly to many landowners; 2) directly benefits those that it burdens; and 3) permits burdened landowners to engage in viable alternative economic uses of their land.[33] An individual affected by a government regulation from which they do not disproportionately benefit may not be made to disproportionately pay.[34]

Here, the character of the government conduct and CFC's reasonable investment-backed expectations both suggest that a taking occurred. The remaining Sandberg factor cuts slightly in the other direction. But on an analysis of the actual allocation of burdens and benefits, it is apparent that a taking has occurred. The regulation of CFC's parking lot property applies only to CFC, and to no other landowners. It provides no benefit to CFC, unlike, say, a generally applied wetlands-preservation policy or zoning rule. And nothing in the facts suggests that CFC has a ready and viable alternative economic use of the encumbered property. If there is a benefit in alleviating traffic congestion from the regulation, the entire burden of achieving that benefit is on CFC (and its tenant, see below). The regulation does not fairly allocate burdens and benefits, and is, therefore, a taking without compensation in violation of Alaska's Constitution.

[30] Id. at 300.
[31] R&Y, Inc., 34 P.3d at 297-98.
[32] Cf. id.
[33] Id. at 299.
[34] See Hammer, 550 P.2d 826.