

ESSAY QUESTION NO. 3

Answer the question in booklet No. 3

Denaliville has an ordinance regulating portable electrical signs within its border. The ordinance permits portable signs if they are not placed in a right-of-way, and if they are properly connected to an electrical outlet and properly secured. A person who wishes to display a portable sign must apply for a permit to do so. A memorandum accompanying the ordinance states that the purpose of the ordinance is to fulfill Denaliville's responsibility to set standards for community aesthetics, enhance the community's natural resources, to protect property values, and to promote public safety. The memorandum expresses particular concern with portable signs, explaining that they pose potential safety hazards because they can be placed in rights-of-way, can be improperly connected to electrical outlets, and can be unsecured and subject to blowing down or away in wind storms.

According to the ordinance, the display of an unpermitted portable sign will result in immediate seizure of the sign upon the determination by a municipal official that the sign presents a safety hazard; otherwise the sign-owner is subject to a citation and fine for displaying an unpermitted sign. The memorandum explains that immediate seizure is intended to protect the public from the hazard and to preserve evidence of violations. Within 24 hours of the seizure the sign-owner is entitled to a hearing to determine whether the sign may be returned.

The hearing is held in front of an administrative officer, both parties have the right to present evidence and cross-examine witnesses, and the officer's decision is final and unappealable. The sign-owner may have his sign returned if he can demonstrate that he has a pending application for a permit and that the sign was not unsafely displayed when it was seized.

Andrew owns a flower shop in Denaliville. He sought a permit to display a portable sign. However, the permit process is backlogged. Six months after his application he has not received a decision on the permit. Because he has an upcoming sale he wishes to advertise, Andrew places a portable sign next to his shop. He secures the sign, has it properly connected to electrical outlets, and ensures that it is not placed in a right-of-way. The next day, Brenda, an employee of Denaliville, comes and takes the sign, serving Andrew with a notice of the seizure pursuant to the ordinance, and of Andrew's right to a hearing within 24 hours.

At the hearing, Brenda is the administrative officer presiding over his case. Following the hearing, Brenda issues a decision in which she finds that, although Andrew has a pending permit application, he did not show that his sign was safely displayed. Brenda therefore denies return of the sign.

1. Discuss Andrew's claim that the manner in which Denaliville seized his portable sign violated his right to due process under the Alaska Constitution.

2. Discuss Andrew's claim that the Denaliville's ordinance regulating portable signs violates Andrew's free speech rights under the Alaska Constitution.

GRADERS' GUIDE
***** QUESTION NO. 3 *****
CONSTITUTIONAL LAW

I. Discuss Andrew's claim that the manner in which Denaliville seized his portable sign violated his right to due process under the Alaska Constitution. (70 points)

Article I, section 7 of the Alaska Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.”

“The crux of due process is an opportunity to be heard and the right to adequately represent one's interests.”¹ But what that means in a particular context may differ because due process calls for “notice and opportunity for hearing appropriate to the nature of the case.”² Due process also requires a neutral and unbiased decision-maker who presides over proceedings that are fair and that have the appearance of fairness.³ (5 points)

State Action Recognition (5 points)

A. Seizure of the Sign (40 points)

1. Matthews v. Eldridge Test (10 points)

Alaska has adopted the test enunciated in *Matthews v. Eldridge* to analyze procedural due process claims. This requires consideration of

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the [probable] value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴

Because Andrew has a property interest in his portable sign, Denaliville may not deprive him of it without due process of law. Therefore, whether the process afforded by Denaliville was constitutionally sufficient turns on whether it was appropriate to the proceeding.

¹ Smith v. State, Dep't of Corr., 872 P.2d 1218, 1224 (Alaska 1994).

² Copeland v. Ballard, 210 P.3d 1197 (Alaska 2009).

³ Id.

⁴ Jurgens v. City of N. Pole, 153 P.3d 321, 331 (Alaska 2007).

2. Constitutional Presumption in Favor of Pre-deprivation Hearing (10 points)

The Alaska Supreme Court has consistently held that the government must provide a pre-deprivation hearing unless there is some emergency requiring an immediate seizure.⁵ The court will uphold a post-deprivation hearing if all or most cases in a class involve an exigency justifying an immediate seizure.⁶

The Alaska Supreme Court uses the balancing test from *Mathews v. Eldridge* to determine whether the state's interest justifies a blanket exception to the requirement for a pre-deprivation hearing. In this context, the test requires consideration of (1) the private interest at risk, (2) the degree to which an adversarial hearing, as opposed to an *ex parte* hearing, will reduce the risk of erroneous deprivation, and (3) the state's interest, including that in avoiding any additional burden imposed by a pre-deprivation hearing.⁷

3. Discussion (20 points)

As discussed previously, the private interest at stake is Andrew's ownership interest in his sign. It is certainly arguable that an adversarial hearing would reduce the risk of erroneous deprivation. Denaliville may contend that since display of all unpermitted portable signs is illegal, there is scant marginal value to a pre-deprivation hearing. But a pre-deprivation hearing would require Denaliville to prove that Andrew's sign was a safety hazard, and give Andrew an opportunity to present evidence that his sign was not. Andrew's sign was not in a right-of-way, not unsecured and was not improperly connected to electrical outlets. A pre-deprivation hearing would have permitted him to present the evidence which would have demonstrated that his sign did not present a safety hazard. There is thus some risk of an erroneous deprivation.

Arguably, the danger presented by a portable sign, as discussed in the memorandum accompanying the ordinance, justifies the lack of an adversarial hearing prior to Denaliville's seizure of the sign. As the memorandum discussed, portable signs have caused enforcement problems involving safety, such as being placed in rights-of-way, being improperly connected to electrical outlets, and being unsecured and subject to blowing down or away in wind storms. Denaliville may argue that the safety problems presented by portable signs constituted the exigency based on which it may forego a pre-deprivation hearing. In addition, immediate seizure may only occur when a municipal

⁵ Hoffman v. State, Dept. of Commerce and Economic Development, 834 P.2d 1218, 1219 (Alaska 1992); Waiste v. State, 10 P.3d 1141, 1145 (Alaska 2000)

⁶ Waiste, 10 P.3d at 1145-46.

⁷ Waiste, 10 P.3d at 1148.

official has determined that the sign presents a safety hazard.

To the extent that Denaliville's interest is in its responsibility to set standards for community aesthetics and to enhance the community's natural resources, these do not justify dispensing with the general rule that a hearing is required prior to seizure.

Denaliville may also argue that the expense and burden of a pre-deprivation hearing is too great to justify requiring it. However, given the fact that the ordinance calls for a hearing within 24 hours of seizure, the additional burden presented by holding the hearing prior to seizure is probably not great.⁸

Critically, however, there is no procedural safeguard that precedes the seizure. A Denaliville employee may seize the sign without seeking approval from any neutral government official. There is no requirement that the municipal employee file an affidavit and that the seizure be authorized, ex parte, by a magistrate or judge.⁹ The United States Supreme Court has upheld seizures like this to protect the public from contaminated food,¹⁰ bank failure,¹¹ misbranded drugs,¹² to aid in the collection of taxes,¹³ or in the war effort.¹⁴ It is dubious whether, under Alaska law, the danger presented by a portable sign rises to the level of the threats posed above justifying summary seizure.

B. The Hearing (20 points)

1. Neutral Decision-Maker (10 points)

Due process calls for a neutral and unbiased decision-maker who presides over proceedings that are fair and that have the appearance of fairness.¹⁵ An impartial tribunal is a "basic requirement of due process."¹⁶ This applies to administrative agencies as well as to courts.¹⁷ "When an administrative official has participated in the past in any capacity against the party in question, fundamental fairness is normally held to require that the former advocate take no part in rendering the decision."¹⁸ Because Brenda was the officer who initially investigated the case and whose decision to seize the

⁸ See, Waiste, 10 P.3d at 1151.

⁹ See, eg, id. (considering whether ex parte seizure of fishing vessel complied with due process in light of fact that executive officials seek forfeiture but that magistrate or judge reviews it ex parte prior to seizure).

¹⁰ North American Cold Storage v. Chicago, 211 U.S. 306 (1908).

¹¹ Coffin Bros.& Co. v. Bennett, 277 U.S. 29 (1928).

¹² Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

¹³ Phillips v. Commissioner, 283 U.S. 589 (1931).

¹⁴ United States v. Pfitsch, 256 U.S. 547 (1921).

¹⁵ Copeland v. Ballard, 210 P.3d 1197 (Alaska 2009).

¹⁶ In re Robson, 575 P.2d 771, 774 (Alaska 1978).

¹⁷ Id.

¹⁸ Id (quoting In re Cornelius, 520 P.2d 76, 84 (Alaska 1974)).

sign is being reviewed, she may not be the decision-maker without violating Andrew's due process rights.

2. No Right to Appeal (10 points)

In addition, the hearing probably violated Andrew's right to due process because Andrew may not appeal from it.¹⁹ Opportunity to appeal from an adverse decision is required by due process, and where an administrative proceeding does not comport with due process, the person adversely affected is entitled to trial de novo.²⁰

The applicant may come to different conclusions regarding whether Denaliville's practice accords with Alaska procedural due process. The applicant should be graded based on the applicant's knowledge of the applicable tests and quality of analysis.

II. Discuss Andrew's claim that the Denaliville ordinance prohibiting portable signs violates Andrew's free speech rights under the Alaska Constitution. (30 points)

A. Core Principles of Free Speech (10 points)

According to Article I, § 5 of the Alaska Constitution, "Every person may freely speak, write, and publish on all subjects, being responsible for abuse of that right." A state may restrict speech when necessary to further a significant and legitimate government interest.²¹ The Alaska Constitution protects free speech "at least as broad[ly] as the U.S. Constitution' and 'in an more explicit and direct manner.'"²²

However, the government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others."²³ The ordinance at issue does not implicate this principle. The ordinance is content-neutral, and does not regulate speech based on the viewpoint represented. Andrew cannot point to any evidence of bias or censorship in the Denaliville's enforcement of the sign ordinance against his.

¹⁹ See *State v. Lundgren Pac. Const. Co. Inc.*, 603 P.2d 889, 893-94 (Alaska 1979).

²⁰ *Id.*

²¹ *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska 1989).

²² *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 197 (Alaska 2007) (internal citations omitted).

²³ *Id.* (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

B. Commercial Speech Commands Less Protection (10 points)

Under the United States and Alaska Constitutions, “commercial speech commands less protection than noncommercial speech.²⁴ “The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”²⁵ The test for analyzing the constitutional validity of a governmental restriction on commercial speech is different from the test for more fully protected speech. That test is:

- 1) Commercial speech is protected only if that speech concerns lawful activity and is not misleading.
- 2) A restriction on commercial speech is valid if it
 - A) Seeks to implement a substantial governmental interest;
 - B) Directly advances that interest;
 - C) Reaches no further than necessary to accomplish the given objective.²⁶

C. Discussion (10 points)

Here, the commercial speech concerns flower sales, a legal activity. There is no evidence that the speech is misleading. The government’s interest in aesthetics is legitimate and substantial.²⁷ So too is its interest in public safety. Because the ordinance is justified by substantial governmental interests, it is valid if it directly advances that interest and is not overly restrictive.

Because the sign restriction is an incidental restriction on Andrew’s commercial speech, it is probably valid. Although Andrew has not yet been able to obtain the needed permit, the ordinance does not restrict Andrew from advertising his business in other ways, such as by placing ads in radio, television, or publications, or other means in the period before Denaliville decides his permit applications. The ordinance is content-neutral and does not

²⁴ Holding v. Municipality of Anchorage, 63 P.3d 248, 252 (Alaska 2003).

²⁵ Barber, 776 P.2d at 1037 (quoting Central Hudson Gas & Elec. Corp. v. Public Service Comm’n, 447 U.S. 557, 562-63 (1980)).

²⁶ Barber, 776 P.2d at 1037 (citing Central Hudson Gas & Elec. Corp., 447 U.S. at 563-66).

²⁷ Barber, P. 2d at 1037 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981)).

contain any restriction on what the signs may say. The ordinance only restricts the physical characteristics of, and locations of, the signs.²⁸

For the foregoing reasons, the ordinance restriction on portable signs does not violate Andrew's free speech rights under the Alaska Constitution.

²⁸ See *United States v. Grace*, 461 U.S. 171, 177 (1983); see also *Marks v. Anchorage*, 500 P.2d 644, 647 (Alaska 1972) (government can limit even noncommercial speech in specific places under limited circumstances).