

ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Paul Petitioner, a 43-year-old resident of Alaskopolis, Alaska has decided to work from home for his own convenience. Paul presently offers a telephone answering service from a small office, but desires to move his office to one of the rooms in his house. Paul lives in a dense neighborhood near downtown Alaskopolis.

Carol Competitor runs a similar telephone answering service out of her home on the outskirts of Alaskopolis. Carol lived downtown prior to moving to the suburbs, but was aware of a zoning restriction that dated to the founding of Alaskopolis, prior to statehood, and prohibited any commercial use of houses downtown so that all of the commercial traffic would stay in the downtown commercial district. She moved to her present house for the express purpose of avoiding these zoning restrictions. Homes in suburban Alaskopolis may permissibly be used for any lawful purpose, including commercial purposes. The zoning restriction was never extended to the suburbs because, unlike downtown, there is not much traffic, and parking is not a problem.

The Alaskopolis Zoning Commission learns of Paul's intended use of his home and sends an officer to investigate. The officer discusses the matter with Paul and confirms that Paul intends to use the home for commercial purposes. On this basis, the officer issues a written warning to Paul that his intended use of the property is prohibited.

Paul timely (and not prematurely) sues for a declaration that his intended use of his home is protected under the due process and privacy clauses of the Alaska Constitution. He also seeks a declaration that the disparate treatment of citizens in downtown Alaskopolis as compared with those in suburban Alaskopolis is prohibited by the equal protection clause of the Alaska Constitution.

1. Discuss and analyze Paul's assertion that his intended commercial use of his home is protected under the due process and privacy clauses of the Alaska Constitution as applied to his circumstances.
2. Discuss and analyze Paul's assertion that permitting suburban home-owners to make commercial use of their homes while prohibiting the same use of downtown home-owners is prohibited by the equal protection clause of the Alaska Constitution.

GRADER'S GUIDE

*** QUESTION NO. 7 ***

SUBJECT: CONSTITUTIONAL LAW

1. Discuss and analyze Paul's assertion that his intended commercial use of his home is protected under the due process and privacy clauses of the Alaska Constitution as applied to his circumstances. (60 pts)

Paul will argue that the use of one's home is a fundamental right under the privacy clause of the Alaska Constitution as interpreted in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), and other cases. Paul's case is properly understood as coming under the due process clause, which compares the public interest in enforcement of a law to the private right at stake.

a. Privacy

The standard for analyzing whether the Alaska Constitution's protection of privacy creates a fundamental right to enjoy an activity remains the standard set in *Ravin*. See *State v. Planned Parenthood*, 171 P.3d 577, 581 (Alaska 2007) (citing and applying *Ravin*); *State v. Crocker*, 97 P.3d 93, 94 (Alaska App. 2004) (*same*). Article I § 22 of the Alaska Constitution, created by amendment in 1972, provides explicitly that "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." A right to privacy has also been identified in Article I § 1, which enumerates a fundamental right to "life, liberty, and the pursuit of happiness." *Breese v. Smith*, 501 P.2d 159 (Alaska 1972).

The Alaska Supreme Court has recognized a fundamental privacy interest in one's body, *Planned Parenthood*, 172 P.3d at 581, one's appearance, *Breese*, 501 P.2d at 168, and in one's home. *Ravin*, 537 P.2d at 504. See generally *Sampson v. State*, 31 P.3d 88 (Alaska 2001). On the other hand, the Court has expressly refused to recognize a generalized right to consume substances or manufacture substances for consumption. *Ravin*, 537 P.2d at 502. These fundamental rights are not absolute in either scope or effect. The holding of *Ravin* that privacy in the home is a fundamental right was expressly limited to private, non-commercial uses of the home. *Id.* The right recognized was further limited in that it "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." *Id.*

The courts will find a fundamental constitutional right if such a right is found to be “within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.” *Sampson*, 31 P.3d at 92 (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970)). The courts will consider the history and tradition of the right in Alaska, with a particular eye to whether the right was or could have been within the contemplation of the drafters of the privacy clause. *See id.*

Here, the problem stipulates that the zoning restrictions date to a time prior to statehood. Thus, the history and tradition militate against a recognition of a fundamental right to privacy encompassing commercial uses of one’s home. Certainly a prohibition on such uses does not interfere with civilized life or ordered liberty. Thus, Paul’s interest in commercial uses of his home likely does not rise to the level of a fundamental right under the privacy clause of the Alaska Constitution.

b. Due Process

To analyze whether the due process clause of the Alaska Constitution is violated, the court will first measure the weight and depth of the individual right at stake “so as to determine the proper level of scrutiny with which to review the challenged legislation. If this individual right proves to be fundamental, we must then review the challenged legislation strictly, allowing the law to survive only if the State can establish that it advances a compelling state interest using the least restrictive means available.” *Planned Parenthood*, 171 P.3d at 581. “In cases involving the right to privacy, the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is determined, at least in part, by the relative weight of the competing rights and interests.” *Id.* If the individual right at issue is something less than fundamental, the State must “identify a legitimate governmental purpose and show that the challenged limitation bears a close and substantial relationship to that purpose” if the statute is to be upheld. *Sampson*, 31 P.3d at 91-92.

Here, as noted above, Paul’s interest in the commercial use of his home is unlikely to be considered a fundamental right. Thus, the State’s interest will be upheld if the State can identify a legitimate governmental purpose and show that the zoning law bears a close and substantial relationship to that purpose. Here, the State can easily meet this burden. The State has to manage competing interests. On the one hand, it seeks to encourage commercial activity in appropriate zones. On the other hand, it seeks to alleviate parking and traffic congestion caused by a steady stream of commercial visitors to dense neighborhoods.

Restricting commercial uses in some areas bears a close and substantial relationship to both purposes, because it drives commercial traffic to commercial zones and alleviates commercial traffic in residential zones.

Examinees may argue that the restriction is not narrowly tailored, because it prohibits commercial activity (like Paul's) that is unlikely to create a substantial increase in traffic or parking constraints. A less restrictive alternative might include requiring that homes that are used for commercial purposes have sufficient off-street parking for all contemplated visitors, or restricting the number of visitors a home might have. But, because Paul's interest is likely less than fundamental, the restriction need not be narrowly tailored or the least restrictive available.

Because Paul has not been denied notice and a hearing and has not yet suffered any penalty, procedural due process is not implicated. Therefore, discussion of procedural due process is not responsive to the facts and call of the question.

2. Discuss and analyze Paul's assertion that permitting suburban home-owners to make commercial use of their homes while prohibiting the same use of downtown home-owners is prohibited by the equal protection clause of the Alaska Constitution. (40 pts)

Paul equal protection argument amounts to the argument that there is insufficient motivation for classifying downtown home-owners differently than suburban home-owners for purposes of the application of zoning laws. Alaskan courts analyze equal protection claims under a sliding scale approach which places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved. *Glover v. State, Dep't. of Transportation*, 175 P.3d 1240, 1257 (Alaska 2008). If the right impaired by the challenged legislation is not very important, the State need only show that its objectives are legitimate and that the legislation bears a substantial relationship to its purpose. *Id.* At the other end of the continuum, legislation that impairs one of the most important individual interests will be upheld only if it furthers the State's compelling interest and if it is the least restrictive means available to achieve the State's objective. *Id.* Thus, the analysis is nearly identical to the due process analysis, except that the issue is not application of law to an individual but, rather, the disparate application of laws to two or more individuals. As a threshold matter, then, it must be shown that there is disparate treatment, as "[w]here there is no unequal treatment, there can be no violation of the right to equal protection of law." *Id.* (quoting *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 397 (Alaska 1997)) (internal quotations removed).

Here, there is some disparate treatment. The class of individuals living in suburban Alaskopolis is treated differently, and less-restrictively, than the class of individuals living in downtown Alaskopolis. As discussed above, the individual right to use one's home for commercial purposes is close to the "less important" end of the continuum. Thus, the State's disparate classification will be upheld if its objectives are legitimate and the restriction bears a substantial relationship to those objectives.

Here, as above, the government interest is likely to manage parking and traffic congestion while encouraging commercial activity in appropriate locations. In suburban areas, where there is little parking or traffic congestion, the government may have determined that permitting commercial activity wherever it springs up serves its goals. At the same time, restricting commercial activity in some areas is also in service of legitimate goals. Thus, the disparate classification is likely to be upheld over Paul's challenge.