

Constitutional Analysis of a Land Disposal Program for the City of Larsen Bay, January 24, 1984



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MEMORANDUM TO JIM REEVES

RE: LARSEN BAY LAND DISPOSAL PLAN

INTRODUCTION

You have requested a constitutional analysis of a land disposal program proposed for the City of Larsen Bay, Alaska. Briefly, the City wishes to convey municipally-held real estate at terms which are advantageous to its long-term residents. As you have described it, Larsen Bay currently has an acute housing shortage. The proposed land disposal program would encourage residents to build new homes to alleviate overcrowding.

Briefly, the City most likely may prefer its residents over non-residents if it disposes of municipally-owned real property. Residency should be defined by the more subjective test of domicile and/or by durational residency limited to a reasonable time period.

DISCUSSION

1. Generally.

Alaskan local governments justifiably are leery of imposing any residency or durational residency restrictions on programs, which might be construed as "public aid," programs, in the wake of recent Alaska Supreme Court decisions, several of which were analyzed further by the U.S. Supreme Court. However, the courts did not intend to delete residency restrictions, or for that matter durational residency requirements, from government assistance programs. Residency clearly may be imposed as a pre-requisite to program participation so long as a reasonable purpose is articulated and a rational nexus exists between the requirement and its purpose. Once residency presents a legitimate hurdle for program participation, a subjective domicile test clearly may be used to establish residency. A much harder question is whether a durational residency requirement also may be employed to test the "bona fides" of an individual's claim of residency. Although duration requirements arguably are subjected to more enhanced judicial scrutiny, even they are permissible so long as the governmental interest clearly outweighs resultant interference with individual fundamental rights.



2. Residency Requirement.

An initial consideration is the extent to which a court will scrutinize classifications based on residency. As you know, the higher the level of analysis (e.g., strict scrutiny), the less likely it is that a reviewing court will favorably judge a classification scheme.

Alaska's highest court has indicated it will apply the toughest test, the federal strict scrutiny standard (or "compelling state interest" test), in those instances where federal constitutional law would require it. Williams v. Zobel, 619 P2d 448, 453 (Alaska 1980) (hereinafter "Zobel II"). However, the same court made it clear in Gilman v. Martin, 662 P2d 120 (Alaska 1983), that it will not strictly scrutinize residency requirements:

"The right to interstate or intrastate travel is impinged upon only when a governmental entity creates distinctions between residents based on the duration of their residency, and not when distinctions are created between residents and non-residents. (Citing McCarthy v. Philadelphia Civil Service Commission, 424 US 645, 96 Sct 1154, 47 LEd2d 366 (1976) and Memorial Hospital v. Maricopa County, 415 US 250, 255, 94 Sct 1076, 1080, 39 LEd2d 306, 313 (1974)).***

This does not mean that the residency requirement is free from scrutiny under the equal protection clauses of the United States and Alaska Constitutions; it only means that the requirement is not subject to the strict scrutiny applied when a fundamental right, such as some aspects of the right to interstate travel is at issue." 662 P2d at 125.

The Alaska court concluded in Gilman it would apply, "at a minimum," the more easily satisfied rational basis test. That test has been characterized in Isakson v. Rickey, 550 P2d 359, 362 (Alaska 1976) as follows:

"[T]he classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."



Even if the federal rational basis standard is satisfied, a residency requirement still must pass under the equal protection clause of the Alaska Constitution. The Alaska Supreme Court prescribed a "sliding scale" test for state equal protection claims in State v. Erickson, 574 P2d 1 (Alaska 1978). The same court recently summarized the Erickson test in State v. Ostrosky, 667 P2d 1184 (Alaska 1983):

In contrast to the rigid tiers of federal equal protection analysis, we have postulated a single sliding scale of review ranging from relaxed scrutiny to strict scrutiny. The applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.¹³ As legislation burdens more fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny at a more elevated position on our sliding scale. ***

Having selected a standard of review on the Erickson sliding scale, we then apply it to the challenged legislation. This is done by scrutinizing the importance of the governmental interests which it is asserted that the legislation is designed to serve and the closeness of the means-to-ends fit between the legislation and those interests. As the level of scrutiny selected is higher on the Erickson scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-ends fit will be tolerated. (footnote omitted, emphasis added)

It is apparent from the emphasized language from Ostrosky that residency requirements are still subject to heightened scrutiny under state equal protection. Thus, the court's statement in Gilman that it would, "at a minimum," look to the rational basis standard articulated in Isakson, should not be given undue credit. At a maximum, "any residency requirement should



be tailored to satisfy the upper end of the Erickson scale, which apparently is not far removed from a strict scrutiny standard a residency requirement, such requirements in other Alaskan programs have run afoul of these simpler standards.

Gilman v. Martin, supra, is obviously critical to an analysis of the Larsen Bay plan. That case involved a lottery-type land distribution program in the Kenai Peninsula Borough. A borough ordinance required participants to have been borough residents for a year preceding their application. The stated purpose of the ordinance was to sell "certain parcels of Borough selected lands. . . to adjoining property owners or to leaseholders so as to resolve existing controversies regarding access and title." 662 P2d at 126. Noting that 56 percent of all privately owned parcels in the Kenai Borough were owned by non-residents, the court concluded that the residency requirement violated even the minimal rational basis standard articulated in Isakson:

"In view of the avowed purpose of the sale to 'resolve existing controversies regarding access and title' to properties, the decision of the Borough to restrict the sale of its land to Borough residents -- and thereby assist only forty-four percent of the land owners in resolving existing controversies regarding access and title -- is a 'display of arbitrary power' rather than 'an exercise of judgment.' The classification is unreasonable and does not 'rest upon some ground of difference having a fair and substantial relation to the [avowed] object of the legislation, so that all persons similarly circumstanced [are] treated alike.' Isakson v. Rickey, 550 P2d at 362. (Quoting State v. Wylie, 516 P2d at 145.) We therefore agree with the Superior Court that Ordinance 79-53 is unconstitutional to the extent it requires participants to have been residents of the Borough at the time of their applications." 662 P2d at 126-127.

In dictum, the court stated that the residency requirement "might have been worthy of consideration if the Borough had stated . . . that the purpose of the lottery was to benefit its residents." 662 P2d at 126. However, the court qualified this comment with the following footnote:



"We note, however, that 'discrimination on the basis of residence must be supported by a valid . . . interest independent of the discrimination itself. Zobel III, 457 US 55, 70, 102 Sct 2309, 2318, 72 LEd2d 672, 684 (Brennan, J., concurring). Furthermore, as we indicated in Lynden Transport, Inc. v. State, 532 P2d 700, 711 (Alaska 1975), 'benefiting [the] economic interests of residents over non-residents is not a purpose which may constitutionally vindicate discriminating legislation. . .'. We do not hold that residency requirements are per se invalid. At the least, however, when a purpose is stated for the requirement, the purpose must be a valid one that is substantially furthered by the classification." 662 P2d at 126 fn. 6.

It is evident from Gilman that a governmental entity must, at a minimum, have "substantial purpose" for preferring residents in land disposal programs. Such purposes should be carefully and precisely articulated since possible reasons for favoring residents were considered and rejected by the U.S. Supreme Court, in Zobel v. Williams, 457 US _____, 102 Sct 2309, 72 LEd2d 2309 (1982) (hereinafter Zobel III). The State of Alaska argued that its Permanent Fund distribution scheme, among other things, would provide residents with an incentive to remain in Alaska. The U.S. Supreme Court was not impressed with this reasoning, finding that such an objective was "not rationally related to the distinctions" the State sought to make between long-term residents and new arrivals. It is important to note that the Court rejected the "incentive" argument, even under a rational basis analysis, due to the sliding scale durational residency aspect of the dividend plan (which created too many classes of residents). Such a purpose is likely equally invalid even for pure residency requirements due to the heightened scrutiny suggested by State v. Erickson, supra and State v. Ostrosky, supra.

Another purpose articulated by the State in support of the Permanent Fund distribution plan, that dividends constitute a reward for past residency, was also considered illegitimate by the U.S. Supreme Court. The Court looked to Shapiro v. Thompson, 394 US 618, 632-633, 89 Sct 1322, 22 LEd2d 600 (1969), where it had said:

"Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and



old residents on the basis of the contributions they have made to the community through the payment of taxes. . . Appellant's reasoning would permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of State services." (original emphasis) Quoted in Zobel III, 102 SCT at 2314.

Again, the U.S. Supreme Court's reasoning in Zobel III is directed at the durational residency requirement. However, it is unlikely such an articulated purpose would have any more validity when used to justify a pure residency requirement.

By far, the most plausible argument supporting residential preference is that the very purpose of the municipal land disposal program is to alleviate substantial overcrowding. It is understood that Larsen Bay's experience, much like that of other rural Alaskan communities, is that large family units are crowded into limited living spaces.¹ This problem would likely be alleviated by transferring municipally-held lands to presently impacted residents. It is probable that Larsen Bay's per capita income is significantly lower than larger urban areas in Southern Alaska. If the City of Larsen Bay were to begin selling its real property at prices low enough to be afforded by its residents, quite understandably more well-to-do Alaskans from other communities could successfully outbid current Larsen Bay residents if the land disposal necessarily is conducted pursuant to the bidding procedures of AS Chapter 29. The only manner in which the municipality might ensure that its residents receive the proffered lands, thus achieving the desired objective of easing overcrowding, would be to favor residents in the bidding procedure.

Another possible purpose for preferring residents in the land disposal program probably would not satisfy Zobel and Gilman. The land disposal program will result in a significant amount of property going from tax-exempt to taxable status, resulting in a substantial increase in the City's property tax

¹ This point is supported by the recent "Alaskan Statewide Housing Needs Study" prepared by Citz ? M. Hill in March, 1983.



base. However beneficial this is to the City, it is not rationally related to a preference for residents. Larsen Bay's property tax base will be affected by the land disposal plan regardless whether the land is transferred to residents or non-residents. In fact, if non-residents are able to bid, they will likely drive up sale prices, inflate land values, and the City's revenues would be higher. Therefore, any arguments along that line likely would be considered insufficient.

3. Testing the "Bona Fides" of Residency.

Of course, requiring that program participants be local residents is but an initial step. It will be necessary to prescribe some sort of standard clarifying what is meant by a "resident." Physical presence in a locale for a described duration, e.g., thirty (30) days, is a common objective indicator of residency. This objective standard is often coupled with a more subjective "domicile" test, i.e., an individual's manifestation of intent to maintain primary abode in a given location. Domicile is apparent from indicia such as primary year-round residence, where licenses are maintained, etc. It is recommended that both durational residence for a reasonable period and domicile be established as "residency" requirements for land disposal program eligibility.

a. Durational Residency. It is not an entirely easy task to determine the extent to which durational residency requirement might be subjected to federal and state equal protection analysis by Alaska courts. With regard to the federal clause, the State Supreme Court said in Zobel II that it would "no longer regard all durational residency requirements as automatically triggering strict scrutiny." 619 P2d at 448.²

² Early Alaska cases applied the federal strict scrutiny standard and for the most part struck down durational residency requirements. State v. Van Dort, 502 P2d 453 (Alaska 1972) (75-day residency requirement for voter registration struck down); State v. Wylie, supra (one-year residence requirement for state employment struck down); State v. Adams, supra (one-year residence requirement for initiation of divorce proceedings struck down); Hicklin v. Orbeck, supra (one-year residence for petroleum and pipeline related jobs struck down). In these earlier cases, the Alaska court indicated that infringement on the fundamental right to interstate migration alone compelled application of the strict scrutiny standard. However, these cases did not consider the U.S. Supreme Court's ruling in Memorial Hospital v. Maricopa County, 415 US 250, 94 Sct 1076, 39 LEd2d 306 (1974) that a durational residency requirement will be struck down only if it "penalizes" the right of interstate travel by depriving a recent migrant of a "basic necessity of life" or infringes on a fundamental right other than travel. Thus, interstate migration, standing alone, apparently is not a fundamental right in and of itself.



In Zobel III, the U.S. Supreme Court did not comment on the Alaska court's stance since the Permanent Fund distribution plan failed even the rational basis test.³ It should be noted that prior to Zobel, the Alaska Supreme Court felt that durational residency requirements automatically triggered federal strict scrutiny. Hicklin v. Orbeck, 565 P2d 159 (Alaska 1977). However, in its review of that case, the U.S. Supreme Court limited its analysis to the Privileges and Immunities Clause of Article IV. Hicklin V. Orbeck, 437 US 518, 98 Sct 242, 57 LEd2d 397 (1978).⁴ Given this federal inattention to the Alaska court's thinking as to the applicable analytical standard, it must be asserted that the most recent pronouncement in Zobel II, that strict scrutiny might not ordinarily apply, is correct.

There might be an argument under the federal equal protection clause that a durational residency requirement should be analyzed under strict scrutiny since it conceivably impinges upon the fundamental right of interstate or intrastate

³ Zobel III involved a "sliding scale" durational residency scheme, that being Permanent Fund dividend distribution plan, which would have rewarded State residents with a \$50.00 dividend for each of Alaskan residency this plan was found violative of the equal protection clause since it would have discriminated between at least 20 different classes of residents. The use of such "sliding scale" durational residency was further foreclosed by the Alaska court in Gilman v. Martin, *supra*.

⁴ The federal Privileges and Immunities Clause is inapplicable since the proposed land disposal plan would discriminate only on the basis of local residency. An Alaskan residing in Fairbanks would be treated no differently under the proposed plan than would be a resident of Bismark, North Dakota.

travel⁵ or impacts a "basic necessity of life."⁶ These factors certainly raise the possibility that a state equal protection claim will be subjected to heightened scrutiny under the "sliding scale" approach of State v. Erickson, supra. Again, Erickson requires an analysis of three factors: (1) the legitimacy of the purposes for the proposed requirement; (2) whether the means chosen to accomplish the objectives actually do so; and (3) the balance between the governmental interest and any individual rights which might be transgressed.

The City might propose several legitimate reasons for favoring longer term residents over new arrivals but should avoid arguments which have failed elsewhere. As stated previously, the U.S. Supreme Court in Zobel III discounted a number of arguments raised by the State in support of its Permanent Fund Distribution Program. These included maintaining a financial incentive for individuals to maintain residence in Alaska and recognition for underlined

⁵ See footnote 1.

⁶ Although the U.S. Supreme Court noted in Hicklin v. Orbeck, supra, that it had never applied the "basic necessity" factor, at least one federal circuit court has hinted that "cheap alternative housing" or "shelter" might be a "basic necessity of life" which might require strict scrutiny. Hawaii Boating Association v. Water Transportation Facilities Division, 651 F2d 661 (9th Cir. 1981). However, this point was made in a footnote to a decision reviewing the legitimacy of non-residential mooring fees in a small boat harbor. To date, no federal court that I am aware of has expressly ruled that housing or land for housing constitute "basic necessities" triggering strict scrutiny. Such an opportunity was presented in Cole v. Housing Authority of the City of Newport, 435 F2d 807 (1st Cir. 1970), where the First Circuit Court struck down durational residency requirements for public housing eligibility. However, the court did not mention whether public housing constitutes a "basic necessity of life." Instead, it applied strict scrutiny after concluding that the durational residency requirement impermissibly interfered with the fundamental right to travel. This case, preceded Maricopa County and other federal rulings that infringement of the right to travel, by itself, will not trigger strict scrutiny. Thus, the case is weak for applying the federal strict scrutiny standard to any durational residency requirement on the basis that land for housing is a "basic necessity."





"contributions of various kinds, both tangible and intangible, which residents have made during their years of residency." 102 SCT at 2313. Again, there is probably little merit in postulating the same arguments in favor of the proposed Larsen Bay program.

As Justice Brennan noted in his concurrence in Zobel III, a durational residency requirement is constitutional if "used to test the bona fides of citizenship." Zobel III, *supra*, 102 SCT at 2318. However, if, the "bona fides" of citizenship constitute the sole purpose for a durational residency requirement, the duration of residence required must be reasonable and bear a substantial relation to the governmental purpose sought to be achieved. Gilman v. Martin, *supra*, 662 P2d at 127, fn. 7. Thus, in the absence of any other legitimate purpose, the question becomes for how long local residency may be required to ensure an individual's bona fide intent to remain a resident. The six-month residency requirement enacted by the Alaska Legislature for the Permanent Fund distribution plan (in lieu of the sliding scale payment scheme) might be as good a yard stick as any. The six-month rule is likely intended to discourage "outsiders" from flocking to Alaska and too easily obtaining easy money. The State's normal 30-day residency standard obviously would do little to child such opportunism. The same rationale could legitimately support a six-month residence requirement for the Larsen Bay land disposal program. Arguably, more than 30 days is necessary to discourage outsiders from temporarily setting up a tent in Larsen Bay in order to obtain an inexpensive site for a summer home or hunting/fishing. A six-month requirement would tend to discourage those who depend on jobs outside of Larsen Bay. At the same time, it would not seem unduly harsh on individuals who truly desire to live there on a year-round basis. A six-month trial period would seem a most reasonable test of such resolve.

The final step in the Erickson analysis requires that the means chosen to promote the purpose be balanced against affected constitutional rights. While an infringement of the right to travel by itself is not sufficient to trigger federal strict scrutiny, travel is a basic right which calls for enhanced scrutiny. State v. Ostrosky, *supra*. The infringement of this right must be balanced against the means employed to carry out the governmental interest. Given the strong interest in requiring bona fide local residency so that the current victims of overcrowding, current residents, are granted relief, on balance any infringement on the right to intrastate travel is comparatively minimal.



4. Domicile.

Durational residency constitutes an objective showing of intent to live in a particular geographical area. This objective test can be supplemented or supplanted by a more subjective test of domicile.⁷ While it is preferable that the domicile test complement a durational residency requirement, it might be useful by itself should the durational requirement be struck down by a reviewing court.

A recent Alaska Attorney General's opinion offers a good summary of the "domicile" test:

"A common-law distinction between 'domicile' and 'residence' has been incorporated into modern law. The terms are often used interchangeably, though they are not synonymous. Every person has at all times a domicile, but only one, either assigned by law, or if capable under the law, assigned by choice. However, one may have established residency in a number of states. Residency merely indicates a factual place of abode.

There are three types of domicile -- (1) domicile of origin; (2) domicile of choice; and (3) domicile at law. A person's domicile of origin is the domicile of her/his parent, the head of the family, or the person on whom she/he is legally dependent, at the time of the child's birth. It is generally the place of birth. Domicile of choice is the place a person has affirmatively chosen to displace a previous domicile. Domicile by operation of law is a domicile which the law attributes to a person, independent of her/his own intentions, because of a legal domestic relation (*i.e.*, spouse's domicile arising from the marriage; child's domicile based on parents).

⁷ The State presently applies both tests. For instance, AS 14.40.306(4) defines a "resident" for state educational loan purposes, as "a person domiciled in Alaska who has resided in Alaska for at least two years. . ."



Proof of domicile by choice and a determination of whether domicile by operation of law is controlling are the two areas that create confusion in determining whether an educational loan applicant is an Alaskan resident.

Domicile by choice requires actual physical presence in the State, although temporary absence does not destroy domicile, coupled with the state of mind of intending to acquire a new permanent abode and abandon the old. Domicile may be termed as a bona fide residency, not merely to live in a place, but to make a home there. In Hicklin v. Orbeck, 565 P2d 159, 171 (Alaska 1977) reversed in part on other grounds 437 US 518, 57 LEd2d 397 (1978), the Alaska Supreme Court explained that '[d]omicile or bona fide residence contains an objective requirement of physical presence and a subjective intent requirement.' See also State v. Adams, 522 P2d 1125, 1131 (Alaska 1974). To determine if the subjective intent element has been met, objective criteria can be utilized, such as whether a person receives any benefits from another state -- voting, car registration; driver's license; employment compensation; public assistance; 'resident' tuition rate for unemancipated children; professional and occupational licenses -- as well as considering the state where one resides 'year-round', owns property, and files tax returns. No one criteria is controlling.

Mere length of residency in a locality does not convert physical presence into domicile without the intent to permanently remain." (Footnotes omitted, original emphasis) August 28, 1979 Op. Atty. Gen., pp. 2-4.

Obviously Larsen Bay's land disposal ordinance should include in any residency requirement a domicile standard which incorporates the common-law factors discussed above.

Doug Parker

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