

LEGAL SERVICES

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MEMORANDUM

February 20, 2015

SUBJECT: Limitations on sales by nonlicensed owner/builder (HB 81)

TO: Representative Cathy Tilton
Attn: Heath Hilyard

FROM: Kathleen Strasbaugh
Legislative Counsel

You have asked whether the limitations that HB 81's amendment of 08.18.161 imposes on the sale of a building constructed by an owner who is not a licensed construction contractor have any constitutional implications under art. 1, sec. 1 of the Constitution of the State of Alaska¹ associated with an unwarranted restraint of trade. It does not appear to me to be either.

You have asked for a detailed analysis, but it is not entirely clear what aspect of art. I, sec. 1 is of concern, and time was too short to permit a consideration of all of the possible concerns a person might raise under this section. However, the memo will briefly discuss the basis for the conclusion above.

Article 1, sec. 1 is most frequently cited in cases concerning the guarantee of equal protection.² In this case, the owners in question are exempt from licensure requirements unless their conduct involves repeated building for resale that is presumed to be done as a

¹ Article I, sec. I of the Constitution of the State of Alaska provides:

SECTION 1. Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

² Equal protection may be raised by treating owners and nonowners differently under existing law, it does not appear to me that the two groups are sufficiently similarly situated to implicate this right. Likewise, license requirements do not appear to rise to the level of an inverse condemnation.

business. If the issue is the pursuit of a trade or business, then the question may be whether the state has a legitimate interest in regulating construction by an owner.³

Setting aside the question of whether there is any right of constitutional dimension here (and it is not apparent that there is), no such right is absolute. Article I, sec. 1 so states by its very terms that the inherent rights it declares are accompanied by "corresponding obligations to the people and the State." Compliance with laws related to public health and safety may be among those obligations. Public health and public welfare considerations also derive from have a state constitutional base. *See* art. VII, sec. 4 ("The legislature shall provide for the promotion and protection of public health") and sec. 5 ("The legislature shall provide for public welfare.")

While a person has an interest in pursuing a trade and developing private property, the state has the authority to regulate an industry or activity under the police power.⁴ If the purpose of the law is legitimate, a court considering a challenge will examine the means used to accomplish the legislative objectives and the reasons advanced for them. The court must then determine whether the means chosen further the goals of the enactment.⁵ The application of this principle in zoning ordinances, which have an impact on an owner's use of land, is instructive. In upholding a city's determination that a private school was incompatible with an area zone for residences, the Alaska Supreme Court observed:

For federal constitutional purposes, a zoning ordinance enjoys a presumption of validity when challenged on due process grounds,^[6] and an ordinance which limits an area largely to single-family residences is not inherently unreasonable. As the Supreme Court has explained,

³ I assume that your question is not related to either to interstate commerce, or to AS 45.50 (Monopolies; Restraint of Trade). In any case, AS 45.50.572 excludes activities required by a regulatory agency under most circumstances.

⁴ *Compare Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 37 - 38 (Alaska 1980) (municipality could require license for facility providing adult entertainment). *See also Kingery v. Chappelle*, 504 P.2d 831, 836 (Alaska 1972) (upholding motorcycle equipment regulation). *Application of Peterson*, 459 P.2d 703, 707 n. 10 (Alaska 1969) (requiring a bar examination for a license to practice law is a reasonable exercise of the police power).

⁵ *Hilbers, Kingery, supra*.

⁶ The test for evaluating whether legislation is reasonable or arbitrary is matter of substantive due process under art. I, sec. 7, of the Constitution of the State of Alaska. *Id.* at 1297. This analysis seems relevant to your question.

a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). In our view a municipal body does not act arbitrarily and beyond its powers when it concludes that a residential area should be free of the noise, traffic, and other nuisances which a school may engender.

Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1298 (Alaska 1982) (footnotes omitted). Likewise, a personal or business activity can be regulated in the public interest. Here, the legislature previously determined that it was in the interest of the public to license persons involved in construction to "protect the public from incompetent and irresponsible contractors."⁷ Presumably the legislation is designed to clarify existing law, or to address a problem that has arisen, with respect to the law. A governmental action taken pursuant to its police power will be sustained against a constitutional challenge if it bears a rational relationship to a legitimate end. *See Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1263 - 1264 (Alaska 1980). Licensing an occupation is an exercise of the police power. *Hilbers, supra*. It does not appear from the information available that the limitation on the exemption is outside of the broad power of the legislature to regulate in this area.

If I may be of further assistance, please advise.

KJS:lem

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⁷ *Sumner Development Corporation v. Shivers*, 517 P. 2d 757, 761 (Alaska 1974) (upholding bar to lien for unlicensed contractor).