SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Josett Banks, et al., Appellants, v. **Municipality of Anchorage,** Appellee.	No. 3AN-23-06779-CI
Joene Atoruk, et al., Appellants, v. **Municipality of Anchorage,** Appellee.	No. 3AN-23-07037-CI

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Motion to Consolidate Appeals and Memorandum in Support

Appellants Josett Banks and Joene Atoruk are lead Appellants in two superior court appeals that raise identical legal issues and arise from closely-related facts. Because the appeals are so similar factually, legally, and procedurally, considering them jointly will be more practical and efficient for the parties and the court, and also will eliminate the risk of inconsistent decisions. For these reasons, Appellants move to consolidate the above-captioned appeals pursuant

to Alaska Rule of Appellate Procedure 602(i), as to all pretrial and trial proceedings—including but not limited to scheduling, briefing, discovery, oral argument, and trial *de novo*.

Standards for Consolidation

Appellate Rule 602(i) allows for joinder or consolidation of appeals brought from administrative agencies before the Superior Court if the interests of the parties render consolidation "practical." The analogous rule for consolidation of trial court matters allows for cases to be consolidated when they involve "a common question of fact or law."[1] Here, both standards are met. Consolidation would serve the interests of all parties and of the Court by promoting judicial efficiency, reducing unnecessary expenses, and avoiding the potential for inconsistent results.[2]

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[1] Alaska Civil Rule 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

[2] *See, e.g.*, *Dean v. Firor*, 681 P.2d 321, 329 (Alaska 1984) ("We are of the view that consolidation of the two actions wisely precluded the possibility of two separate trials to determine the status of the subject properties. This prevented rising costs and delay for both of the parties and unnecessary use of the court's time.").

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Procedurally, although Rule 602(i) provides that "[a]ppeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party," the appellate rules do not contain a specific procedure for a party to so move. Especially since both appeals are currently in superior court, Alaska Civil Rule 42(a)'s procedures—applicable to consolidation of original superior court actions—are analogous and helpful. Rule 42(a) provides that a "motion requesting consolidation shall be filed in the court where the case is sought to be consolidated. The motion shall contain the name of every case sought to be consolidated. A notice of filing together with a copy of the motion shall be filed in all courts and served on all parties who would be affected by consolidation." Accordingly, Appellants are moving for consolidation in the earlier appeal, No. 3AN-23-06779-CI, and filing a notice and a copy of this motion in the more recent appeal, No. 3AN-23-07037-CI. In accordance with the rules and accepted practice, the appeals should be consolidated in the first-filed matter, No. 3AN-23-06779-CI.

Arguments

Both appeals arise from recent efforts of the Municipality of Anchorage to "abate" camping areas in which the Appellants—indigent,

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homeless Anchorage residents—are or were living. Abatement means that the city forces campers to leave the areas where they currently are living. The appeals allege that appellants are living outside by necessity due to the lack of any shelter space or available housing in the Municipality, and that it violates the Alaska and United States Constitutions to abate homeless camping areas when there is no available indoor shelter in the city.

Both appeals raise the identical pure issue of law: whether, as the Ninth Circuit Court of Appeals has held, it is unconstitutional for the Municipality to abate homeless camps when there is no available indoor place for abated residents to go.[3] In both, Appellants claim that the Municipality of Anchorage violated the Alaska and United States Constitutions when it posted for abatement, less than one month apart, the respective "zones" in which Appellants were living. Specifically, both appeals include claims that the Municipality violated the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 12, and Article VII, Sections 4 and 5, of the Alaska Constitution.

[3] *Martin v. Boise*, 920 F. 3d 584 (9th Cir. 2019).

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Both appeals also concern common questions of fact. Specifically, the Municipality engaged in an aggressive strategy in late June and early July, 2023, to abate "prohibited campsites" that it claims constituted public nuisances—notwithstanding that the Municipality itself closed the only walk-in, low-barrier shelter in Anchorage earlier in the year, leaving hundreds of people without housing, shelter, or other alternatives. Although the appeals concern abatement of two different park areas, their similarities far outweigh their minor differences, as both challenged abatements arose in the identical context of the city's widespread abatement efforts within a few weeks' time. Review of the Statement of Points on Appeal in both appeals confirms the extent to which the appeals raise the identical questions; the points on appeal are virtually identical as well. Any legal defenses the Municipality might wish to raise also would be common to the two appeals.

Given their similarity, consolidating the appeals would promote efficiency. As well as presenting identical legal questions arising out of closely related facts, both appeals involve the same Appellee—the Municipality—and common legal representation for both parties. Both appeals are in a similar, early posture: Chambers for Banks' appeal, No. 3AN-23-06779-CI, issued its Notice Setting Appeal Procedure on

August 1, giving Appellant Banks until August 31 to file their appeal brief; chambers for Atoruk's appeal, No. 3AN-23-07037-CI, issued its Notice of Preparation of Record in an Administrative Appeal on July 19, giving the Municipality until August 28 to file its record. To align the briefing schedules further, Appellant Banks will file for a routine extension of time by notice, pursuant to Alaska Rule of Appellate Procedure 503.5(b), extending the date for the appeals brief until September 30.

Given the early stage and similar procedural posture of the appeals, consolidating them now will not cause any logistical problems or result in any duplicative efforts by the courts. Since the two challenged abatements occurred close in time and as part of the same city-wide effort, Appellants are further confident that the administrative records in both appeals will show that Appellee's administrative proceedings involved the same municipal departments and the same personnel or personnel working under the same supervision—further illustrating the appropriateness of handling the matters together. Alternatively, if the administrative records prove insufficient to enable meaningful appellate review, Appellants anticipate moving for trials *de novo*. That would be in keeping with well-settled Alaska Supreme Court case law establishing *de novo*

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review as the means to remedy lack of an adequate administrative record.[4] A single trial would be more efficient and practical than separate trials and would avoid divergent outcomes.

Conclusion

Because the two appeals raise identical legal issues arising out of nearly-identical facts, are similarly situated procedurally, and involve common parties and attorneys, consolidating them is well within the Court's discretion and would promote judicial efficiency, reduce unnecessary expenses, and avoid the potential for inconsistent results. For these reasons, the Court should grant this motion to consolidate the appeals and proceed with both appeals in No. 3AN-23-06779-CI.

Dated: August 10, 2023

American Civil Liberties Union of Alaska Foundation

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[4] *See, e.g.*, *Yost v. State, Div. of Corps., Bus. and Pro. Licensing*, 234 P.3d 1264, 1274 (Alaska 2010) ("Although a court normally reviews an agency's decision on the record, we have upheld or directed application of de novo review 'where the agency record is inadequate; where the agency's procedures are inadequate or do not otherwise afford due process; or where the agency. . . excluded important evidence in its decision-making process.'") (quoting *South Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 774, 778 (Alaska 2007)).

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CERTIFICATE OF SERVICE

On August 10, 2023, a true and correct copy of this Motion to Consolidate Appeals and Memorandum in Support, and Proposed Order Granting the Motion, was sent via email to:

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[PROPOSED] Order Granting Motion to Consolidate Appeals

IT IS HEREBY ORDERED THAT Appellants' Motion to Consolidate Appeals is GRANTED. All further pretrial and trial proceedings for both appeals shall be held in No. 3AN-23-06779-CI.

DATED at Anchorage, this _____ day of _____, 2023.

_____
The Honorable Judge Lamoureux
Superior Court Judge

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