

Jessica B. Willoughby
Jason A. Thomas
Assistant Municipal Attorney
Email: courtdocs@muni.org

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOSETT BANKS, et al.,)	
)	
Appellants,)	
)	
vs.)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	
Appellee.)	
)	Case No. 3AN-23-06779CI
JOENE ATORUK, et al.,)	
)	
Appellants,)	
)	
vs.)	
)	
MUNICIPALITY OF ANCHORAGE,)	
)	Case No. 3AN-23-07037CI
Appellee.)	
)	

RESPONSE IN OPPOSITION TO MOTION TO CONSOLIDATE APPEALS

COMES NOW, the Appellee, by and through the undersigned, and the Appellee hereby opposes the Appellant's Motion to Consolidate Appeals. The cases involve radically different underlying facts and actions between the parties. While the same body of jurisprudence will be applied to both cases, the law will be applied to radically differing facts and consolidation is not practical.

**MUNICIPALITY
OF
ANCHORAGE**

**OFFICE OF THE
MUNICIPAL
ATTORNEY**

P.O. Box 196650
Anchorage, Alaska
99519-6650

Telephone: 343-4545
Facsimile: 343-4550

Standards for Consolidation

The court may consolidate appeals under Alaska Rules of Appellate Procedure Rule 602 upon its own motion or upon motion of the party.¹ As the Appellant has stated,² there is not a specific standard for consolidation. Appellant has also stated that Alaska R. Civ. P. Rule 42(a) would be helpful in this court's decision:³

“[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.”⁴

The Appellee agrees with the Appellant that Rule 42 would be helpful to this court in evaluating if it should consolidate the appeals. Therefore, this honorable court should evaluate the common questions of fact and law as stated in Alaska R. Civ. P. Rule 42.

Differing Facts and Application of Law Make Consolidation Impractical

The jurisprudence common to both cases on appeal is: *Martin v. City of Boise*⁵ and *Johnson v. City of Grant Pass*⁶, and their district court progenies. However, the decisions in the federal district courts are far from uniform and each case evaluates radically different facts.

The two 9th Circuit appellate cases, *Martin v. Boise* and *Johnson v. City of Grant Pass*, are both cases that prohibit the criminalization of homelessness through the issuance of criminal or civil citations. In *Martin v. Boise*, the City of Boise issued numerous

¹ Alaska R. App. P. Rule 602(i)

² Appellant's Motion to Consolidate Appeals p. 2.

³ *Id* at 3.

⁴ Alaska R. Civ. P. Rule 42(a).

⁵ *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

⁶ *Johnson v. City of Grant Pass*, 72 F.4th 868 (2023)

criminal citations for camping⁷, and in *Johnson v. City of Grant Pass*, the City of Grant Pass issued civil citations for using items to protect oneself from the elements while camping outside.⁸ In essence, Grant Pass sidestepped the prohibition for issuing criminal citations for camping while homeless under *Martin v. Boise* by issuing civil citations for using blankets or other items homeless people need to protect themselves from the elements when no shelter is available.⁹ This method of civil citing homeless people was prohibited. However, these two cases are not a blanket prohibition against all restrictions on homeless camping.¹⁰ Instead the court left open the question on how to limit the time and place of camping.

If the Appellee had issued criminal or civil citations for camping or using items commonly used to protect oneself from the elements, the facts between the two cases under consideration would have common law and facts to make consolidation practical. The only facts required for analysis for criminal or civil violations would be the lack of adequate shelter and the issuance of a criminal or civil citation for an aspect of being homeless. A blanket court decision that prohibits issuing citations, criminal or civil, would easily remedy this violation and does not require any evaluation of the underlying facts in relation to camps.

**MUNICIPALITY
OF
ANCHORAGE**

**OFFICE OF THE
MUNICIPAL
ATTORNEY**

P.O. Box 196650
Anchorage, Alaska
99519-6650

Telephone: 343-4545
Facsimile: 343-4550

⁷ *Martin v. Boise*, 920 F.3d 584, 608 (9th Cir 2019).

⁸ *Johnson v. City of Grant Pass*, 72 F.4th 868, 876 (9th Cir. 2023) (amended from *Johnson v. City of Grant Pass*, 50 F.4th 787 (9th Cir. 2022)

⁹ *Id.*

¹⁰ *Id.* 70 F.4th at 877 (“Martin made clear, however, that a city is not required to “provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place.”)

However, the Appellee's actions were not the issuance of civil or criminal citations. Instead, the Appellee's actions were abating campsites from two distinct areas and with differing underlying facts. As this case involves the noncriminal time and place restrictions left open by *Martin v. Boise* and *Johnson v. Grant Pass*, the differing facts and underlying actions¹¹ in the two cases will directly affect the court's analysis. Because of the differences outlined below, the court should evaluate the facts separately and issue opinions addressing the facts involved in each of the cases.

Cuddy Park, the property at issue in *Banks*, was rented by a third party and a permit issued for the Summer Solstice Festival for an event on the last weekend of June¹² An abatement notice was then posted to close the park to the public to allow for setup for the event.¹³ After waiting the time period required under the Anchorage Municipal Code, the Appellee abated the campsites and offered to store the property of anyone who appealed the abatement.

In contrast, the abatement for Davis Park at issue in *Atoruk*, did not involve a closure for an event, but instead the prohibition on camping was influenced by public safety reasons.¹⁴ The land is owned by the United States Department of Defense and was part of JBER until it was rented to the Municipality of Anchorage and used as a park.¹⁵ The

¹¹ The agency record for appellate review has been lodged in *Banks v. Municipality of Anchorage*, Case No. 3AN023096779CI. An agency record has not been filed in *Atoruk v. Municipality of Anchorage*, Case No. 3AN-23-07037CI; however there is sufficient facts in the record proper from the exhibits attached to Appellant's Motion for Stay Pending Appeal and other factual assertions plead in other pleadings between the parties to evaluate issues of fact for the purposes of consolidation.

¹² Banks Record at p. 1

¹³ Id. at p. 24

¹⁴ Appellant's Motion for Stay Pending at p. 24

¹⁵ Id at p. 86-124

Appellant acknowledges the safety motivations behind the Appellee's actions to post the notice to abate campsites on that property.¹⁶ This area was not closed to the public unlike at Cuddy Park. Also unlike Cuddy Park, the Municipality removed the notices of abatement and did not abate the campsites at Davis Park, as noted in the withdraw of the Motion for a Stay Pending Appeal as part of the record proper.

As there were no citations issued, the court must evaluate the two sets of noncriminal time and place restrictions on homeless camping Anchorage imposed, or threatened to be imposed, in relation to other court decisions. Following *Martin v. Boise* and *Johnson v. Grant Pass*, the federal district courts have come to very fact specific decisions with rulings both allowing certain actions while prohibiting others. In each case, the facts are radically different and the analysis of time and place restrictions are very fact specific.

In *Gomes v. Cty. of Kauai*,¹⁷ the City of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands. In *Miralle v. City of Oakland*,¹⁸ the city was allowed to abate a single homeless camp because *Martin v. Boise* not create a constitutional right to occupy public property at the Plaintiff's option.

However, certain facts have led to courts restraining government entities from abating homeless campsites. In *Sacramento Homeless Union v. County of Sacramento*, the

**MUNICIPALITY
OF
ANCHORAGE**

**OFFICE OF THE
MUNICIPAL
ATTORNEY**

P.O. Box 196650
Anchorage, Alaska
99519-6650

Telephone: 343-4545
Facsimile: 343-4550

¹⁶ Id at p. 24

¹⁷ *Gomes v. Cty. of Kauai*, 481 F.Supp.3d 1104, 1109 (D. Haw. 2020)

¹⁸ *Miralle v. City of Oakland*, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018)

County of Sacramento was prohibited from abating a campsite during a heatwave.¹⁹ In *Blain v. California Dept of Transportation*, the government gave the homeless population inadequate notice before abatement and because of the lack of time to find other shelter, the court issued a restraining order stopping the government from abating the campsite.²⁰

When the federal district courts have encountered differing facts, the opinions and reasoning have widely differed. Each district court decision has involved very fact specific cases based on time and place restrictions. In the two cases at issue here, one case involves the Municipality of Anchorage abating camping on land owned by JBER to address public safety concerns without closing it to the public. After the posting and the filing of the notice of appeal, the Appellant took down its abatement notice and did not abate the camps in Davis Park. In Banks, the Appellant abated campsite in Cuddy Park and closed it to the public to facilitate a pre-permitted festival. In considering how *Martin v. Boise* does not prohibit all restrictions against camping in certain places or during certain times, the court must look at each time and place restriction individually to evaluate the restriction and make a fact specific determination in its ruling. The facts between these two cases are too different for this honorable court to consolidate the appeals.

Additionally, for the reasons stated above, and points raised in the record proper by the Appellant, the Appellee believes that *Atoruk v. Municipality v. Anchorage*, Case No. 3AN-23-07037CI should be dismissed for mootness as no abatement took place, and

**MUNICIPALITY
OF
ANCHORAGE**

**OFFICE OF THE
MUNICIPAL
ATTORNEY**

P.O. Box 196650
Anchorage, Alaska
99519-6650

Telephone: 343-4545
Facsimile: 343-4550

¹⁹ *Sacramento Homeless Union v. County of Sacramento*, 617 F.Supp.3d 1179, 1199 (E.D. Cal. 2022)

²⁰ *Blain v. California Dept of Transportation*, 616 F.Supp.3d 952 (N.D Cal. 2022)

Motion

Banks, Josett et al v MOA; Case No. 3AN-23-06779CI

Page 6 of 7

additionally both cases should be dismissed for lack of subject matter jurisdiction. The Appellee will file a separate motion to dismiss.

WHEREFORE, the Appellee prays the court to:

1. DENY the Appellants' MOTION TO CONSOLIDATE APPEALS, or
2. Any other just and required relief.

Respectfully submitted this 21st day of August, 2023.

ANNE R. HELZER
Municipal Attorney

By: /s/ Jason A. Thomas_____
Jessica B. Willoughby
Assistant Municipal Attorney
Alaska Bar No. 1305018
Jason A. Thomas
Assistant Municipal Attorney
Alaska Bar No. 2005028

Certificate of Service

I certify that on 8/21/23 I caused to be mailed
a true and correct copy of the foregoing to:

Ruth Botstein
Melody Vidmar
Eric G. Glatt
courtfilings@acluak.org

/s/ Jason A. Thomas
Jason A. Thomas
Municipal Attorney's Office

**MUNICIPALITY
OF
ANCHORAGE**

**OFFICE OF THE
MUNICIPAL
ATTORNEY**

P.O. Box 196650
Anchorage, Alaska
99519-6650

Telephone: 343-4545
Facsimile: 343-4550

Motion
Banks, Josett et al v MOA; Case No. 3AN-23-06779CI
Page 7 of 7