**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

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

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

**MOTION FOR TRIAL DE NOVO**

In these consolidated appeals from "campsite" abatements brought by unhoused persons, the administrative records produced by the Municipality[1] are wholly insufficient to allow for appellate review, creating a due process deficiency. Under well-settled Alaska Supreme

[1] The Municipality of Anchorage produced agency determination records in appeal nos. 3AN-23-06779-CI and 3AN-23-07037-CI on July 31 and August 29, 2023, respectively. This court consolidated the appeals on September 26 and instructed Appellants to file their Opening Brief by October 26.

Court precedent, this situation requires a trial de novo so that appellants have a full and fair opportunity to develop and litigate their claims. Collectively, Appellants therefore now move for a trial de novo. A trial de novo is required to remedy both the absence of agency records adequate for appellate review and the lack of due process afforded to Appellants under the Anchorage Municipal Code.

A properly developed record will support the conclusion that the Municipality of Anchorage violated the Anchorage Municipal Code; the Eight 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. But, absent factfinding through discovery and trial, Appellants are unable to produce a zealously argued, persuasive Opening Brief that helps the Court reach this conclusion. Denying them such an opportunity would be to deny them their right to due process.

## STATEMENT OF FACTS

### A. Anchorage Municipal Code Law Regarding Abatements

Anchorage Municipal Code chapter 15.20 governs "public nuisances." Section 15.20.020 enumerates public nuisances that are

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

prohibited in Anchorage, from littering[2] and "unsightly premises"[3] to significant health hazards.[4] Subsection 15.20.020.B.15 specifically governs the Municipality's treatment of "prohibited campsites." This prohibited "campsite" law is explicitly predicated first and foremost on the Municipality's penal code prohibitions against trespass, among other areas of the code.[5] This section of the code defines "camping" as:

> [U]se of a space for the purpose of sleeping or establishing a temporary place to live including, but not limited to: 1. Erection of a tent, lean-to, hut, or other shelter; 2. Setting up bedding or equipment in such a manner as to be immediately usable for sleeping purposes, whether indoors or outdoors, on or under any structure not intended for human occupancy; 3. Sleeping outdoors with or without bedding, tent, tarpaulin, hammock or other similar protection or equipment; or 4. Setting up cooking equipment, including a campfire, with the intent to remain in that location overnight.[6]

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[2] AMC 15.20.020.B.6.

[3] AMC 15.20.020.B.8.

[4] *E.g.*, AMC 15.20.020.B.8, prohibits "soot, cinders, noxious acids, fumes and gases in such place or manner as to be detrimental to any person or the public, endanger the health, comfort and safety of any such person or of the public."

[5] "A prohibited campsite is an area where one or more persons are camping on public land in violation of section 8.45.010 [Penal Code: Trespass], chapter 25.70 [Prohibited Conduct; Penalties], or any other provision of this Code." AMC 15.20.020.B.15.

[6] AMC 15.20.010 – Definitions.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

### 1. Types of "Prohibited Campsite" Abatement Notices and Other Parties Notified

For perceived violations of the prohibition against nuisance "campsites," the code establishes six categories of abatement notice that can be issued,[7] plus a provision for abatement "without prior notice" in "exigent circumstances posing a serious risk to human life and safety."[8] One of the categories is for a 10-days' notice "zone abatement," authorizing the Municipality to dispose of remaining belongings "as waste" unless the owner has given notice of intent to appeal, in which case the Municipality is required to store any remaining belongings, with exceptions.[9] The prohibited "campsite" law also requires the official who posts an abatement notice to inform, within 24 hours, the Anchorage Health Department, "community social service agencies," and nearby community councils.[10]

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[7] AMC 15.20.020.B.15.b.

[8] AMC 15.20.020.B.15.h.iii.

[9] AMC 15.20.020.B.15.b.v. As to the exceptions, AMC 15.20.020.B.15.c.i states, "Junk, litter, garbage, debris, lumber, pallets, cardboard not used to store other personal items, and items that are spoiled, mildewed, or contaminated with human, biological or hazardous waste shall not be stored and may be disposed of summarily"; while B.15.c.ii provides for discrete handling of a "weapon, firearm, ammunition or contraband."

[10] AMC 15.20.020.B.15.d.

### 2. Appeal Procedures

The prohibited "campsite" law includes no means for a person to be heard prior to being deprived of their belongings—whether those belongings are fated to be stored or to be destroyed. Instead, the code affords a person whose belongings are targeted for abatement 30 days to initiate appeal procedures in the superior court.[11] Any stay of enforcement that might otherwise apply pursuant to an appeal having been filed is caveated by a provision that gives the Municipality the authority to "remove personal property and store it until either the appeal is withdrawn, settled, or a decision is issued and any subsequent appeal rights expire."[12] In other words, even if a person files an appeal, they can be deprived of their belongings until the appeal is resolved.

These prohibited "campsite" appeal provisions stand apart from the appeal provisions that apply to all other public nuisances enumerated in Chapter 15.20. Persons deemed responsible for any other public nuisance are afforded 15 days from receipt of service of an enforcement order to appeal to the Administrative Hearing Office.[13]

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[11] AMC 15.20.020.B.15.e.

[12] AMC 15.20.020.B.15.f.ii.

[13] AMC 15.20.120.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
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The detailed provisions of the code governing administrative hearings include those for requesting a hearing,[14] for pre-hearing procedures,[15] and for the hearings themselves,[16] among others, affording appellants a means to exercise their due process rights to be heard, to develop a factual record, and to challenge the Municipality's determination that they have created a nuisance in violation of Municipal law. Upon an adverse decision from the Administrative Hearing Office, an "appeal may be filed in the superior court for the state within 30 days of issuance of the final decision."[17]

Apart from the ability to file an appeal in superior court, nuisance "campsite" appellants are afforded none of the explicit due process safeguards afforded all other nuisance appellants. There are *no* provisions allowing this category of litigant to obtain a hearing, do document discovery, or develop a factual record.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[14] AMC 14.30.050.

[15] AMC 14.30.080.

[16] AMC 14.30.090.

[17] AMC 14.40.010.

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1057 W. Fireweed Ln. Suite 207
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FAX: 907.263.2016
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## B. Banks Appellants

On May 24, 2023, the Municipality of Anchorage posted "Notice of Zone Abatement" signs in and around Cuddy Park.[18] On June 5, the American Civil Liberties Union of Alaska (ACLU) sent the Municipal Attorney a letter describing the ACLU's position that noticing the location for abatement appeared to be unconstitutional and enclosing thirteen signed notices of intent to appeal the notice. Between June 6 and June 18, the Municipality nevertheless abated the "campsites" that remained within the zone, dispossessing at least three residents of their belongings and placing those belongings in storage.

On June 16, three persistently homeless residents, the Banks appellants, appealed the Municipality's determination that their belongings constituted a violation of the prohibited "campsite" law and were therefore subject to abatement, in administrative appeal case no. 3AN-23-06779-CI.

On July 31, as directed by the superior court, the Municipality transmitted its agency record, containing a mere twenty-four pages. It

[18] The text of the notice signs defined a targeted zone area to include "Loussac Library, Cuddy Park, & Old Archive Site," alternatively described as "36th Ave. to the S. Municipal Property Line / Denali to B St.," and further identified in a map image on the notice. Transmittal of Agency Record, *Banks v. Anchorage*, 3AN-23-06779 (July 31, 2023) (hereinafter Banks Agency Record), p.3 of 24 (stamped: Record 2 of 23).

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

included, in total: one cover sheet; one page containing what appear to be two rows from a spreadsheet (one header row and one row with entries indicating, among several other details, that 70 structures and one van were in the targeted zone); a copy of the abatement notice sign that had been posted; a two-page letter from the ACLU that accompanied thirteen notices of intent to appeal, which were also included, and that described the ACLU's position that the abatement plans appear to be unconstitutional and should not be executed; and six pages of the Municipality's "Storage Form" and supplemental pages thereto.[19]

**C. Atoruk Appellants**

On or around June 23, 2023, the Municipality of Anchorage posted a "Notice of Zone Abatement" sign defining a targeted zone area from "McCarey to Boniface [Roads], Mt. View [Drive] to Glenn Hwy."[20] This area is adjacent to space that the Municipality regularly uses to dump snow collected by the Municipality in winter and is commonly referred to as the "snow dump." The zone was further identified in a map image on the notice. On or around the same date, the Municipality

[19] Banks Agency Record.

[20] Transmittal of Agency Record, *Atoruk v. Anchorage*, 3AN-23-07037 (Aug. 31, 2023) (hereinafter Atoruk Agency Record), p.3 of 4 (stamped: Agency Record MOA0002 of 3).

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

also posted "Notice of Zone Abatement" signs defining a targeted zone area located in "Davis Park, N. Pine Street to McPhee Ave. to Mt. View Drive," and including a map image to further describe the targeted area.

On June 28, thirteen persistently homeless residents, the Atoruk appellants, appealed the Municipality's determination that their belongings constituted a violation of the prohibited "campsite" law and were therefore subject to abatement, in administrative appeal case no. 3AN-23-06779-CI. The Atoruk appellants on the same day also filed a Motion for Stay Pending Appeal and a Motion for Expedited Consideration. On June 30, counsel for the Municipality informed counsel for the Atoruk appellants that the Municipality could "agree to take down the signs at Davis Park (including the snow dump) and not abate."[21] Counsel for the Atoruk appellants then voluntarily withdrew the Motions for Stay and for Expedited Consideration.

On August 29, as directed by the superior court, the Municipality transmitted its agency record, containing only four pages. That total includes, in its entirety: one cover sheet; one page containing what appear to be three rows from a spreadsheet (one header row; one row

[21] Exh. 1: June 30, 2023 email from Municipal Attorney Anne Helzer to Ruth Botstein of the ACLU of Alaska.

with entries indicating, among other details, that twenty-eight "camps" were located in the Davis Park zone and that abatement plans had been cancelled; and one row with entries indicating, among other details, that 78 "camps" were located in the "Mountainview Snowdump" [sic] zone and that abatement plans had been cancelled); and a copy of each of the two abatement notices that had been posted.

**D. Abatement Notices**

All three locations' notice signs declared that the zone is "not a legal area for storage or shelter" and declared that "[a]ny personal property in or around this zone at the end of 10 days shall be removed and disposed of as waste," citing AMC 15.20.020B.15, the prohibited "campsite" law. The notice signs also explained that property placed in the relevant zone subsequent to the sign's posting and before the abatement date would be placed into storage. And it described appeal rights, including that "[t]his notice serves as a final decision of the Municipality of Anchorage that this posted zone/campsite is subject to abatement" and that one "may appeal this decision to the Alaska Superior Court within 30 days of the posting date." It added, "Written notice to the Municipal Attorney's Office of an intent to appeal is also sufficient notice. If the Municipality is able to confirm that either an

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TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

appeal or intent was timely received, that person's property shall be stored as described" in the section above.

### E. Low-barrier Shelter Capacity in Anchorage

At the end of May 2023, the Municipality ceased operating a low-barrier, congregate shelter facility it had run during the prior winter, at the Sullivan Arena.[22] Periodic review of daily data that the Municipality publishes on its "Shelter Capacity Dashboard," indicates that, after the closing of the Sullivan Arena, Anchorage has been without a low-barrier, walk-in shelter facility.[23] According to the dashboard, the only other shelter facilities open to adults have been completely full or overfull since May. Further, none of the listed shelter facilities qualify as truly low-barrier, as they are all either religious or family shelter facilities.

## STANDARDS FOR ORDERING A TRIAL DE NOVO

When the superior court sits as an appellate court reviewing an administrative agency determination, as here, Rule of Appellate

[22] *See, e.g.*, Emily Goodykoontz, *A Final Scramble as Anchorage's Sullivan Arena Homeless Shelter Closes*, Anchorage Daily News (May 31, 2023) https://www.adn.com/alaska-news/anchorage/2023/05/31/a-final-scramble-as-anchorages-sullivan-arena-homeless-shelter-closes.

[23] Shelter Capacity Overview, Municipality of Anchorage, https://experience.arcgis.com/experience/d6f142677f5c485fb58c5aa25af9838c.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

Procedure 609(b)(1) gives the superior court discretion to "grant a trial de novo in whole or in part." The Alaska Supreme Court has "upheld or directed" de novo review where, among other possible reasons, "the agency record is inadequate" or "the agency's procedures are inadequate or do not otherwise afford due process."[24]

## ARGUMENT

### A. It would violate due process to proceed in Appellants' appeal without an adequate record developed through a trial de novo.

#### 1. An adequate record is necessary for appellate review.

It is axiomatic that to review an administrative agency determination on appeal, the superior court requires a record that's suitable for review. The development of such a record affords appellants the opportunity to develop the relevant facts. It also affords appellants the opportunity to raise defenses to claims made against

[24] *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 774, 778 (Alaska 2007) (citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 270 (Alaska 2004), which held that a "trial de novo is particularly appropriate . . . when the present record is inadequate" or "when the procedures of the administrative body are inadequate, for instance when they do not provide due process," citing *Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 102 (Alaska 1992), *State v. Lundgren Pac. Const. Co.*, 603 P.2d 889, 896 (Alaska 1979), and *City of Fairbanks Mun. Utilities Sys. v. Lees*, 705 P.2d 457, 460 (Alaska 1985).).

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

them. Indeed, the development of such a record through adversary procedures is a cornerstone of the constitutional right to due process before being deprived of "life, liberty, or property."[25] As the United States Supreme Court has held, "A fair trial in a fair tribunal is a basic requirement of due process."[26] The Alaska Supreme Court was equally clear when it held, "The crux of due process is opportunity to be heard and the right to adequately represent one's interests."[27]

**2. The Municipality's agency records are inadequate for appellate review.**

Of the twenty-four pages in the agency record delivered in appeal case no. 3AN-23-06779-CI, only one contains anything suggesting any kind of agency procedure: a fourteen-column, two-row spreadsheet, four columns of which are left blank. The remainder of the record consists of a cover letter, a copy of the notice signs that were posted after the agency determination, fourteen pages of material that Appellants and their counsel sent the Municipality to initiate the present matter, and

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[25] U.S. Const. amend. 14, §1; AK Const., art. I, §7.

[26] *In re Murchison*, 349 U.S. 133, 136 (1955) (reviewing allegations of bias in the application of Michigan's "one-man grand jury" provisions).

[27] *Matanuska Maid, Inc. v. State of Alaska*, 620 P.2d 182, 192 (Alaska 1980).

six pages produced regarding the abatement proceedings themselves, itemizing people's belongings taken into storage.

In the spreadsheet appearing to reflect the totality of the Municipality's considerations, the only rationale for abating the site states, "Summer Solstice Concert Event– Area is rented. Close facinity [sic] to Parks & established areas. AMC 15.20.020B.15.h.iv."[28] This suggests the existence of several potentially relevant facts that Appellants have not been afforded the opportunity to interrogate. For one, the administrative record contains no record of or elaboration upon the concert event or rental agreement alluded to, or how and why the decision was made to prioritize a for-profit event over the lives of vulnerable homeless persons. For another, the section of the Municipal Code cited does not appear appropriate to the circumstances. Specifically, the section of the code relied upon, AMC 15.20.020B.15.h.iv, provides in its entirety:

> When the public land where a prohibited campsite is located is clearly posted with no trespassing signage, no camping signage, or as not being open to the public, including posting of closed hours, the abatement of the campsite may proceed without additional notice, and after the occupants of the prohibited campsite are provided at least one hour to remove their personal property. Personal property removed under

[28] Banks Agency Record, p.2 of 24 (stamped: Record 1 of 23).

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

> this exception may only be disposed of in accordance with chapter 7.25 or subparagraph B.15.c.

But the record provides no evidence that the location was "clearly posted with no trespassing signage, no camping signage, or as not being open to the public, including posting of closed hours." Furthermore, the abatement notices that the Municipality posted cited a different provision of the code, AMC 15.20.020.B.15.b.v, which are those for a 10-days' notice "zone abatement."

Similarly, of the four pages in the agency record delivered in appeal case no. 3AN-23-06779-CI, only two rows in a single spreadsheet appear to provide any justification for a determination that a prohibited nuisance has occurred. In addition to entries describing the rough locations of the "camps," their number, the dates that notices were posted, and the dates of potential enforcement action, the agency official(s) who prepared the spreadsheet provide only a cursory justification for their determination, under the heading Rational for Abatement, "We are abating to meet the terms of the lease we have with the landowner (JBER)."[29] No lease or other evidence regarding its terms is included in the record.

[29] Atoruk Agency Record, p.2 of 4 (stamped: MOA0001 of 3).

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

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In short, between the two appeals, there are but three lines in two spreadsheets that implicitly claim to establish sufficient facts for a determination that Appellants violated the Municipal Code and that their temporary shelters were appropriately subject to abatement—that is, a determination that the Municipality had the rightful authority to deprive Appellants of the entirety of the belongings they rely on for protection from the dangers inherent to living homeless in Anchorage. What's more, the first entry on these spreadsheets—listing the dates that notice of the final determination was first posted—suggests that these are not records of a deliberative process that led to a determination but, instead, records of enforcement procedures that *followed* the outcome of whatever process the Municipality undertook to make its determinations. That is, the records that should reflect the basis for the Municipality's determinations are actually just cursory conclusions that justification to abate exists.

Finally, absent from either set of records is any indication that the Anchorage Health Department, any social service agencies, or any nearby community councils were notified, as required by AMC 15.20.020B.15.d, that Appellants' temporary shelters had been noticed for abatement.

### 3. Appellants have a right to a trial de novo to cure the lack of a record suitable for appellate review.

Alaska Supreme Court law is clear that where an administrative appeal record is insufficient, trial de novo is a necessary remedy to effectuate due process. In *Eufemio v. Kodiak Island Hospital*, for example, the court held that a "superior court may be faced with choosing . . . trial de novo in whole or in part" where it determines "that the present record is inadequate."[30] In *Yost v. State, Division of Corporations, Business and Professional Licensing*, it went further, holding not only that "may" the superior court grant a trial de novo "in its discretion" per Rule of Appellate Procedure 609(b)(1)—but also that "an appellant has a *right to* a trial de novo if an administrative adjudicative procedure does not afford due process."[31] In *Yost*, the Court

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[30] 837 P.2d 95, 101–02 (Alaska 1992) (citing *State v. Dupere*, 721 P.2d 638, 639 (Alaska 1986) (noting the superior court's discretion to order a trial de novo in the review of a governmental agency determination); *State v. Lundgren Pacific Const. Co.,* 603 P.2d 889, 892–94 (Alaska 1979) (noting that "a person may have a right to a trial de novo of certain matters under some circumstances even though Rule 45 [now Appellate Rules 602 and 604] is applicable").

[31] 234 P.3d 1264, 1274 (Alaska 2010) (emphasis added) (internal quotations omitted) (citing *Lundgren Pac. Const. Co.*, 603 P.2d at 895 (Alaska 1979), holding that a "right to trial de novo is created if an administrative adjudicative procedure does not afford due process").

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

contrasted the facts presented with those in an earlier case, *Keiner v. City of Anchorage*.[32] The *Yost* Court observed that in *Keiner*:

> [W]e held that the requirements of procedural due process were satisfied in the administrative adjudication context when . . . [the administrative body] made its findings only after due notice and full opportunity to be heard; the conduct of the hearing was consistent with the essentials of a fair trial; there is no assertion that the [administrative body] was anything but impartial; and a complete record of the proceedings was kept so that the reviewing court was able to determine that there was no substantial failure to observe applicable rules of law and procedure, and that in all other respects [the appellant] was afforded a fair hearing.[33]

In contrast, when the *Yost* Court reviewed the superior court's decision not to order a trial de novo on behalf of a doctor whose license had been suspended by the state medical board, it "conclude[d] that it was error to affirm the Board's decision without first conducting a trial de novo to determine the existence of a condition precedent."[34] Due process required a trial because the administrative proceedings below did not extend to a critical issue on appeal, and the appellant had not been given the opportunity to litigate this fundamental aspect of her claims:

> Dr. Yost had the right to a trial de novo on the issue of a condition precedent because the administrative proceedings . . . did not afford her due process on this outcome-determinative issue. The administrative proceeding lacked

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[32] 378 P.2d 406 (Alaska 1963).

[33] *Yost*, 234 P.3d at 1274 (quoting *Keiner*, 378 P.2d at 409–10).

[34] *Id.* at 1274.

> important hallmarks of procedural due process, such as notice and an opportunity to be heard. This is, of course, because there was no agency proceeding which considered the existence of a condition precedent. Thus, due process entitled Dr. Yost to a trial de novo on this issue. The court's decision, which made factual findings without the benefit of live testimony or cross-examination, does not satisfy the requirement of due process.[35]

The same is true here: the facts similarly and clearly establish a right to a trial de novo. Indeed, the facts here are even more compelling than in *Yost*, where the medical board did conduct some factfinding—but without benefit of challenges and cross-examination, the due process violation that a new trial was required to remedy. Here, the Municipality does not even appear to have engaged in any formal procedure before making its determination, let alone to have created and maintained a record of any such procedure. Nor did the procedures allow Appellants any means to develop a meaningful record as to whether the Municipality's actions complied with the law, as would have been the case had Appellants been able, for example, to request an administrative hearing.

Because the Municipality's records contain no more than a few, implicit, unchallenged assertions as evidence that Appellants violated the prohibition against "camping" on public land; contain no facts

[35] *Id.* at 1275.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

developed through established, adversary factfinding procedures; and contain no evidence that the Municipality fulfilled its obligation to inform relevant bodies as required, this court should order a trial de novo to establish an appropriate record.

Due process requires a trial de novo both to assess the Municipality's technical compliance with the Code's abatement provisions and to address Appellants' more expansive constitutional claims. On their face, the abatement notices raise questions about their conformance with the Code, and the administrative records suggest that the Municipality did not comply with the social service reporting requirement of the code—both proper issues for appeal that require factual development. The Appellants' constitutional claims also require factual development, because they likely turn on the availability of indoor shelter options in the Municipality at the time that abatements were noticed[36]—a question on which the meager administrative records here are completely silent.

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[36] *See Martin v. Boise*, 920 F. 3d 584, 617 (9th Cir. 2019).

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

### B. The Municipal Code's administrative determination procedures are structurally deficient and denied Appellants their right to due process.

It is unsurprising that the Municipality's agency records are inadequate for review, as they are the product of inadequate administrative agency procedures. As noted above, the Municipal Code does not provide any adversary proceedings at the administrative level for people whose temporary shelters are deemed a public nuisance. Instead, the first time when property owners learn that their shelters have even been subjected to scrutiny is when notice is posted informing them that a final determination of a violation has already been made and that enforcement action is soon to commence. Compounding the due process violation, property owners are then faced with the dilemma that enforcement action commences not only before an appeal has been adjudicated; it commences before the window to *initiate* an appeal has even closed.

Procedural due process deficiencies are the direct result of the structure of the appeal processes created by the prohibited "campsite" law. First, the Code does not provide much guidance as to what facts an official needs to establish before determining that a violation of its prohibition against "camping" is occurring, other than, apparently, making an observation to their satisfaction that "one or more persons

are camping on public land" in violation of the code.[37] After its brief description of the violation, then, the code becomes preoccupied with the procedures governing enforcement action, i.e., abatement. Finally, it includes provisions to appeal an adverse determination—provisions that include no pre-deprivation hearing, including for circumstances such as those of Appellants, for whom their "campsites" are protective, life-sustaining shelters.[38]

These pre-deprivation provisions in the prohibited "campsite" law have been adopted notwithstanding that the Alaska Supreme Court has "consistently held that, except in emergencies, due process requires the State to afford a person an opportunity for a hearing before the

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[37] AMC 15.20.020.B.15.

[38] For most housed people, "camping" evokes an experience of leisure or recreation. But for someone experiencing homelessness, the ad hoc creation of a space within which to try to secure one's possessions and establish a modicum of protection from the elements is hardly similar. To the contrary, such spaces bear a closer relationship to the general definition of "shelter" in Black's Law Dictionary: "A place of refuge providing safety from danger, attack, or observation." (Black's Law Dictionary (11th ed. 2019)). That is, what the Municipality describes as "campsites" are more appropriately characterized as ad hoc shelters: They are places of refuge providing some safety from danger, including from the elements. Hence, Appellants use quotation marks when referring to the Municipality's prohibited "campsite" law throughout this brief.

State deprives that person of a protected property interest."[39] Without a proper record, Appellants cannot adequately challenge the Municipality's implicit claim that an "emergency" existed that outweighed Appellants' interest in maintaining possession of the belongings they rely upon for survival such that no pre-deprivation hearing was required.

Not only does the Municipal Code deny Appellants a pre-deprivation hearing prior to enforcement action; it also includes the curious feature of authorizing enforcement action before the thirty days have elapsed that the Code provides to initiate an appeal. This is true for each of the several notice periods established in the Code, whether no-, 24-hours', 72-hours', 10-days', or 15-days' notice—the latter two of which state that the Municipality is authorized to dispose of people's belongings as waste. That is, it is conceivable that persons in the position of Appellants—who were given 10-days' notice to find a new place to live—could have all their belongings taken from them and destroyed, notwithstanding that they still, on paper, have up to twenty

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FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

[39] *Hoffman v. State, Dep't of Com. & Econ. Dev.*, 834 P.2d 1218, 1219 (Alaska 1992) (citing *Graham v. State*, 633 P.2d 211, 216 (Alaska 1981)).

days to appeal the Municipality's determination that it has the right to so destroy their property.

Although the Code includes a store-instead-of-destroy provision for a property owner's belongings if that property owner initiates an appeal or "responds in writing . . . of the owner's intention to appeal," that does nothing to cure the underlying due process violation. First, it affords little time for the property owner to consider and weigh their options, including to retain and consult with counsel; instead of affording thirty days, it requires action within ten days. Second, storing instead of destroying property owners' belongings does nothing to resolve the owners' being deprived of those belongings for the duration of the appeals process. For homeless persons whose "campsites" are actually their best shelter from danger, it is an untenable proposition. Indeed, the very threat of dispossession—regardless of a right to appeal—forces all but the most desperate or stubborn residents to simply move their temporary shelters to other, equally-impermissible locations, where the same determination-notice-abatement cycle can be inaugurated once again at the Municipality's whim. Indeed, this ugly, ever-recurring, "disburse from the area"[40] cycle appears to have been a

[40] AMC 15.20.020.B.15.g.i.

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1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

central feature of the Municipality's response to persistent homelessness in the community for years. That is, the *threat* of abatement does the lion's share of the Municipality's work of coercing homeless persons to cease living in particular areas of Anchorage—a threat of criminal sanction and forcible removal.

In sum, the appeal provisions created for "prohibited campsites" are structurally unsound and deprive personal property owners the due process they are guaranteed under the United States and Alaska Constitutions. For homeless residents of Anchorage—at whom this section of the code is clearly aimed, notwithstanding the use of a term of recreation to describe the behavior the Municipality seeks to curtail—such deprivation is not only unjust. It is no exaggeration to say that such deprivation represents a matter of life or death.

## Conclusion

For the reasons described above, the Court should grant this motion and order a trial de novo because it is necessary to afford the Appellants due process.

Dated: October 26, 2023

**American Civil Liberties Union of Alaska Foundation**

/s/ Eric Glatt
Eric Glatt

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

Alaska Bar No. 1511098 (Emeritus)
(216) 270-3811

/s/ Ruth Botstein
Ruth Botstein
Alaska Bar No. 9906016

Melody Vidmar
Alaska Bar No. 2305044

ACLU of Alaska Foundation
1057 West Fireweed Lane, Suite 207
Anchorage, AK 99503
(907) 258-0044

*Pro Bono counsel for Appellants*

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

## CERTIFICATE OF TYPEFACE

This brief uses a 13-point New Century Schoolbook typeface.

## CERTIFICATE OF SERVICE

On October 26, 2023, a true and correct copy of this Motion for Trial de Novo was sent via email to:

Anne Helzer, anne.helzer@anchorageak.gov
Jason Thomas, jason.thomas@anchorageak.gov
Jessica Willoughby, jessica.willoughby@anchorageak.gov
Municipal Attorney's Office
632 West 6th Avenue, Ste. 730
Anchorage, Alaska 99501

/s/ Eric Glatt

Eric Glatt
1057 W. Fireweed Ln., Suite 207
Anchorage, AK 99503
(216) 270-3811
eric.glatt@outlook.com

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

ACLU OF ALASKA FOUNDATION
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

# Exhibit 1

June 30, 2023 email from Municipal Attorney Anne Helzer to Ruth Botstein of the ACLU of Alaska

**Subject:** RE: Davis Park Appeals, Motion for Stay Pending Appeal, Motion for Expedited Consideration
**Date:** Friday, June 30, 2023 at 4:26:20 PM Alaska Daylight Time
**From:** Helzer, Anne
**To:** Ruth Botstein
**CC:** Willoughby, Jessica B., Melody Vidmar, Eric Glatt, Gunther, Charles J, Bird, Mario L., Braniff, Michael M.
**Attachments:** image001.jpg

Hi Ruth,
We are open to discussing a new timeline and we can agree to take down the signs at Davis Park (including the snow dump) and not abate on July 5. We will respond to your motion for expedited consideration, if that still necessary, by Monday at noon.
Thanks,
Anne Helzer

**Anne R. Helzer**
*Municipal Attorney*
Municipality of Anchorage
Department of Law – Civil and Criminal Divisions
632 W. 6th Avenue, Suite 730
Anchorage, Alaska 99501
(907) 343-4545
www.muni.org/Departments/Legal/

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

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

**ACLU OF ALASKA FOUNDATION**
1057 W. Fireweed Ln. Suite 207
Anchorage, Alaska 99503
TEL: 907.263.2006
FAX: 907.263.2016
EMAIL: *courtfilings@acluak.org*

**[Proposed] Order Granting Motion for Trial de Novo**

IT IS HEREBY ORDERED THAT Appellants' Motion for Trial de Novo is GRANTED.

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

_____
The Honorable Judge Lamoureux
Superior Court Judge