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, Appellee.	)	Case No. 3AN-23-07037CI

COMES NOW, the Appellee and hereby prays the court to deny the Appellant's Motion for a trial *de novo* because this court lacks the subject matter jurisdiction to consider the constitutional claims the Appellant seeks to address through a trial *de novo* when sitting as an appellate court. Instead of ordering a trial *de novo* to create a record for actions after the administrative action under this court's limited appellate subject matter jurisdiction for claims after the administrative decision, the court should deny the motion

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

for a trial *de novo* and examine the subject matter jurisdiction as a whole. An original action in superior court is the appropriate action to address the Appellants' claims. The Appellee further concedes that the Appellants would not be foreclosed from filing such action for not exhausting any administrative remedies.

The Appellants are correct that a larger record is needed to address constitutional claims of homeless camp abatements, but establishing such record is not appropriate when the superior court sits in its limited appellate jurisdiction and such record would not relate to the administrative notice and procedure. As described in more detail *infra*, the question decided by courts regarding homeless citizens camping on public land started with a simple "across-the-board" decision prohibiting criminal charges being filed for camping on any public property while homeless, when adequate shelter is not available in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). Criminalizing camping was cruel and unusual punishment and thus prohibited under the Eighth Amendment of the United States Constitution. What was left undecided was the limitations a municipality can put on the time and place of camping by homeless citizens. *Id* at 1048.

Criminal citations are not being issued in Anchorage, nor are the cities' attributes the same. Unlike the counties and cities that have been involved in litigation under *Martin v. Boise* and its progeny, Anchorage has over ten thousand acres of municipal park land and is larger than Rhode Island. The court needs to examine the factual circumstances of the parties and the municipality to render a complete decision in this case and such fact-finding is outside of the administrative appeal that is in front of the court in its limited appellate decision.

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

This Court Lacks Subject Matter Jurisdiction to Hear Appellant's Constitutional Claims and to Conduct Discovery and Trial

The Superior Court is a court of general jurisdiction when acting a trial court. However, the Superior Court has limited appellate jurisdiction to act as an appellate court for appealing administrative decisions. *See* A.S. 22.10.020 and Part IV the Alaska Rules of Appellate Procedure.

In this case, the municipality has the authority to abate prohibited campsites pursuant to AMC 15.20.020(B)(15) and dispose of any property at the prohibited campsite. There is a requirement of posting notice to abate and a waiting period. The abatement ordinances permit superior court jurisdiction to hear an appeal from such action by the Municipality, under AMC 15.20.020(B)(l5)(e), which states that "[a] posted notice of campsite abatement is a *final administrative decision* and appeals shall be made to the superior court within 30 days from the date the notice of campsite abatement is posted, in accordance with the Alaska court rules." The camp occupant(s) has/have a right to appeal the decision, and their property will be stored pending the appeal. *See* AMC 15.20.020(B)(l5)(f)(ii).

Record on Appeal

The records on appeal[1] consist of: the abatement notices, (*Aturok* R. at 2-3.) (*Banks* R. at 2); a spreadsheet memoralizing tent counts, reasoning of abatement, relevant dates of postings, cleanup dates, and closure dates; and other notes; (*Aturok* R. at 1) (*Banks* R. at

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

[1] As this is a consolidated appeal with two separate records, the undersigned will reference the records by the captioned appellant and page number of the record regarding the associated record, e.g., "*Atoruk* R. at [page no.]" or "*Banks* R. at [page no].

1), and in the *Banks* record, a letter from the ACLU's counsel and the associated notices of appeal (*Banks* R. at 3-23). A fact not clear from the record is the shelter space available; however, the undersigned concedes adequate shelter space did not exist at the time of either abatement.

The needs for the abatements and the completion status differ between the cases. In *Banks*, the abatement was due to a permitted event, and the abatement was completed. (*Banks* R. at 1). In the *Atoruk* case, the abatement was planned due to lease requirements of the underlying land with JBER; however, the abatement was cancelled. (*Atoruk* R. at 1).

The Appeal and Requested Trial De Novo is a Request Outside of This Courts Jurisdiction

At the very least, filing an appeal gives the parties more time to work with the municipality to prevent the disposal of the appellant's belongings. But it also gives the parties the ability to challenge the postings for defect as to form or facts, e.g., the posting was posted at the wrong place, described the wrong place, or was deficient in its form. This is not an adversarial action or adjudicative proceeding with findings adverse the parties' interests.

Instead, the parties are seeking to challenge the abatement actions and removals following the post-final administrative decision of posting the zone abatements. These claims and requests for a trial *de novo* are outside of the courts subject matter jurisdiction.

The court does have discretion to have a trial de novo pursuant to Alaska R. App. P. Rule 609(b). However, such trial would still be limited to the final administrative action for which the court exercises jurisdiction.

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

In dismissing a similar administrative appeal for a camp abatement in *Vaughan v. Municipality of Anchorage*, Case No. 3AN-21-07931CI (Alaska Anchorage Sup. Ct. June 16th, 2022), the superior court stressed its limited subject matter jurisdiction:

> The only aspect of the campsite abatement proceedings that this court would have had jurisdiction over in this case would have been the process surrounding notice and whether the Municipality posted notice and instituted campsite abatement proceedings in accordance with the law.

Vaughan v. Municipality of Anchorage at 5.

This court would have discretion to order a trial *de novo* if a fact is unknown or disputed regarding the posting. Instead, the appellants challenge the abatement itself and the constitutional questions under *Martin v. Boise* and its progeny which are outside the limited jurisdiction and question of the posting and notice of the abatements.

There can be an exception for unreviewable decisions under the *Brandon* test as stated in *Welton v. State, Dep't of Corrections*, 315 P.3d 1196 (Alaska 2014):

> [i]n Brandon, we stated the test for when the exception is applicable: "an administrative appeal [from a DOC determination] is appropriate where there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review."

Welton v. State, Dep't of Corr., 315 P.3d 1196, 1198 (Alaska 2014). Regardless of the jurisdiction to review actions after an administrative decision, the two prongs of the *Brandon* test; an adjudicative proceeding, and a record capable of review; are not satisfied in these cases. For the Appellants to request this honorable court to review the constitutional claims under *Martin v. Boise*, when sitting as an appellate court, there must be an adjudicative proceeding producing a record capable of review. An adjudicative proceeding is described in *Welton:*

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

> The essential elements of adjudication include adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in question. *Id.*

In these abatement cases, there is not an adjudicative proceeding. Instead, the final agency action is the posting of the abatement notice without a hearing. The last prong is the presence of a record capable of review. For determining if the procedure and form of the notice was followed, there is a sufficient record to determine such. Copies of the notices along with the notes of the municipality regarding the notices are included in the records. However to address the questions raised under *Martin v. Boise* and its progeny, there is not a sufficient record for review.

In general, *Martin v. Boise* prohibits issuing criminal citations to homeless citizens for camping on public property when inadequate shelter space exists. *See Martin v. Boise*, 902 F.3d 1031 (9th Cir. 2018) However, this decision was a narrow decision: Our holding is a narrow one. Like the Jones panel, "we in no way dictate to the City that it must 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." *Martin v. City of Boise,* 902 F.3d 1031, 1048 (9th Cir. 2018), opinion amended and superseded on denial of reh'g, 920 F.3d 584 (9th Cir. 2019). The limits of the Appellee's ability to regulate the time and place of homeless camping on public land is what the appellants are challenging through their request for a trial *de novo*, not the procedure of the administrative decision of posting an

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

abatement notice. The written record is insufficient for this court to make a fact specific inquiry into the limits the Appellee may place on homeless citizens camping in certain places or at certain times. The proper place for discovery and trial to determine 8th Amendment cases as requested by the appellants is an original action, not an administrative appeal. In *Vaughan*, the court stated that the appellants are free to challenge the constitutionality of the ordinance through a civil action, and that is what the appellants should have to do, not expand this courts subject matter jurisdiction to include discovery and trial into actions after an administrative decision.

WHEREFORE, the Appellee prays the court to deny the trial *de novo* and examine its subject matter jurisdiction over these two cases a whole.

Respectfully submitted this ___ day of November, 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 11/14/2023 I caused to be mailed a true and correct copy of the foregoing to:

Ruth Botstein
Melody Vidmar

MUNICIPALITY OF ANCHORAGE

OFFICE OF THE MUNICIPAL ATTORNEY

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

Telephone: 343-4545
Facsimile: 343-4550

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