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

Josett Banks, Kyla Friedenbloom, and Kristine Shawanokasic, Appellants, v. Municipality of Anchorage, Appellee.	)	Case No. 3AN-23-06779 CI
Joene Atoruk, Heather Wolfe Aragon, Leonly Fratis III, Seone Lima, Darrell Dean Miller, Beulah Moto, Lillian Sheakley, Gregory Michael Smith, Tracy Lynn Thompson, Della L. Tunkle, Larry C. Tunley, Brian Keith Vaughan, and Lucille Jane Williams, Appellants, v. Municipality of Anchorage, Appellee.	)	Case No. 3AN-23-07037 CI

ORDER DENYING MOTION FOR TRIAL DE NOVO

In these administrative appeals challenging actions of the Municipality of Anchorage, Appellants Josett Banks, Kyla Friedenbloom, Kristine Shawanokasic, Joene Atoruk, Heather Wolfe Aragon, Leonly Fratis III, Seone Lima, Darrell Dean Miller, Beulah Moto, Lillian Sheakley, Gregory Michael Smith, Tracy Lynn Thompson, Della L. Tunkle, Larry C. Tunley, Brian Keith Vaughan, and Lucille Jane Williams (collectively, "Appellants") filed a Motion for Trial de Novo. Appellee Municipality of Anchorage

(the "Municipality") filed an opposition, and Appellants filed a reply. Having reviewed the motion, opposition, and reply, the Court denies the Motion for Trial de Novo.

I. BACKGROUND

This consolidated appeal concerns the constitutionality of the Municipality's procedures for the removal of prohibited campsites and the abatement of unhoused campers.[1] Specifically, Appellants appeal the Municipality's abatement and related notices posted at Cuddy Park on May 24, 2023 and near Davis Park in east Anchorage on June 22, 2023. Appellants assert that the Municipality's notices of abatement and abatement violated the Anchorage Municipal Code, constituted cruel and unusual punishment in violation of Amendment VIII of the United States Constitution and Article I, Section 12 of the Alaska Constitution, and violated Appellants' due process rights under Amendment XIV of the United States Constitution and Article I, Section 7 of the Alaska Constitution. Appellants further assert that Anchorage Municipal Code 15.20.020(B)(15) is unconstitutional as applied to Appellants under Amendment VIII of the United States Constitution and Article I, Section 12 of the Alaska Constitution.

Appellants argue that a trial de novo is warranted because the records on appeal are inadequate for appellate review, and that a trial de novo will allow sufficient factual development of the claims at issue.[2] In addition, Appellants argue that a trial de novo is warranted because the Municipality violated Appellants' due process rights under the

[1] *See* AMC 15.20.020(B)(15).
[2] The Municipality filed a 4-page record for the appeal in Case No. 3AN-23-07037 CI and a 24-page record, most of which consists of materials supplied by Appellants' counsel, for the appeal in Case No. 3AN-23-06779 CI.

United States and Alaska Constitutions by failing to include a process for a person to be heard prior to the deprivation of their property.

The Municipality argues that the Court, acting in its appellate capacity, lacks subject matter jurisdiction to consider Appellants' constitutional claims, and any appellate review must be limited to the form or facts of the Municipality's posting and notice of the abatements. The Municipality argues that this appeal fails to satisfy the test for judicial review of Department of Corrections' decisions set forth in *Brandon v. State, Department of Corrections*[3] and *Welton v. State, Department of Corrections*.[4] The Municipality further argues that there is not a sufficient written record for the Court to determine if the Municipality's campsite abatement procedures comply with the Ninth Circuit Court of Appeals' ruling in *Martin v. Boise*.[5] The parties appear to agree that the current record on appeal is insufficient to address Appellants' constitutional claims, but the Municipality argues that an expanded record is not appropriate in this appeal because the constitutional claims are outside of the scope of the final administrative decision on appeal in this matter.[6]

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[3] 938 P.2d 1029, 1032 (Alaska 1997) ("[W]e have held that administrative appeals are proper from certain DOC determinations even when not authorized by statute. . . . [A]n administrative appeal is appropriate where there is an alleged violation of fundamental constitutional rights in an adjudicative proceeding producing a record capable of review.").

[4] 315 P.3d 1196, 1198 (Alaska 2014) ("[A]n Alaska inmate has a right to judicial review of DOC administrative decisions 'when issues of constitutional magnitude are raised.' In *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.'" (alterations in original) (quoting *Brandon*, 938 P.2d at 1032)).

[5] 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019).

[6] *See* Opp'n to Mot. for Trial de Novo at 2 ("The Appellants are correct that a larger record is needed to address constitutional claims of homeless camp abatements, but establishing such record is not

II. LEGAL STANDARD

Under Alaska Rule of Appellate Procedure 609(b)(1), "[i]n an appeal from an administrative agency, the superior court may in its discretion grant a trial de novo in whole or in part." The Alaska Supreme Court has "emphasized 'that a trial de novo is "a departure from the norm."'"[7] While a trial de novo "is 'rarely warranted[,]' [d]e novo review is appropriate 'where the agency record is inadequate; where the agency's procedures are inadequate or do not otherwise afford due process; or where the agency was biased or excluded important evidence in its decision-making process.'"[8] To warrant a trial de novo, an administrative due process violation "should be alleged with particularity and a showing of prejudice."[9] "Broad assertions" of procedural due process violations do not entitle an appellant to a trial de novo.[10]

III. DISCUSSION

The limited question before the Court at this time is whether a trial de novo is warranted. Appellants' assertions that the present record is inadequate and that the Municipality's procedures were inadequate are linked to their claims on appeal

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appropriate when the superior court sits in its limited appellate jurisdiction and such record would not relate to the administrative notice and procedure.").

[7] *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 794 (Alaska 2015) (quoting *Gottstein v. State, Dep't of Nat. Res.*, 223 P.3d 609, 628 (Alaska 2010)).

[8] *North Slope Borough v. State*, 484 P.3d 106, 113 (Alaska 2021) (quoting *S. Anchorage Concerned Coal., Inc. v. Mun. of Anchorage Bd. of Adjustment*, 172 P.3d 774, 778 (Alaska 2007)); *see also Laidlaw Transit, Inc., v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1023 (Alaska 2005) ("[W]hen an administrative proceeding fails to conform to the minimum requirements of procedural due process, the superior court may not review the case on the agency record but must instead remand for a new agency hearing or grant a trial de novo as needed to cure the procedural defect.").

[9] *Fairbanks Gold Mining, Inc. v. Fairbanks N. Star Borough Assessor*, 488 P.3d 959, 969 (Alaska 2021) (quoting *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010)).

[10] *Keiner v. City of Anchorage*, 378 P.2d 406, 409 (Alaska 1963).

challenging the constitutional validity of the ordinance and the Municipality's actions. However Appellants' claims are broad assertions of procedural due process violations and fail to show prejudice.

Appellants' claims present disputed legal issues not factual issues. The Alaska Supreme Court has upheld denials of requests for trials de novo where the basis of the requests pointed to disputed legal issues.[11] Moreover, while the Alaska Supreme Court has addressed the constitutionality of an ordinance through an administrative appeal, it has noted that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures."[12] Here, a trial de novo is not necessary to address the legal questions raised in this appeal.

The Alaska Supreme Court has determined that if an agency procedure violates due process, a trial de novo is warranted where the trial de novo would cure the due process violation. In *Yost v. State, Division of Corporations, Business and Professional Licensing*, a doctor seeking licensure in Alaska encountered a problem with her medical license application and entered into a settlement agreement subject to the approval of the medical board.[13] Dr. Yost argued that the state medical board, which approved the

[11] *See North Slope Borough*, 484 P.3d at 114 (determining that the superior court did not abuse its discretion by denying a request for a trial de novo where the claims were "not factual disputes" but were instead "disputes about legal conclusions"); *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 270 (Alaska 2004) ("[T]he superior court acted well within its discretion in not granting a trial de novo on the broad question of the constitutional validity of the ordinance."); *Sandidge v. Alaska Pro. Teaching Pracs. Comm'n*, No. S-8779, 2000 WL 34545802, at *5 (Alaska May 3, 2000) ("[T]he propriety of the commission's reliance on res judicata and collateral estoppel has no bearing on the issue of whether a trial de novo is necessary.").
[12] *Treacy*, 91 P.3d at 270 n.90 (quoting *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).
[13] *Yost v. State, Div. of Corps., Bus. and Pro. Licensing*, 234 P.3d 1264, 1267-68 (Alaska 2010).

settlement agreement in its entirety, breached the terms of the agreement by failing to honor a condition precedent that would have allowed Dr. Yost an opportunity to be heard before the board made its decision.[14] On appeal, the Alaska Supreme Court concluded that "Dr. Yost had the right to a trial de novo on the issue of a condition precedent because the administrative proceedings—in this case, a vote by the Board to adopt the [settlement agreement]—did not afford her due process on this outcome-determinative issue."[15] The Alaska Supreme Court held that Dr. Yost was entitled to a trial de novo on the issue of the existence of a condition precedent because there was no agency proceeding which considered the issue.[16] Because there was a dispute regarding whether Dr. Yost had been promised an opportunity to address the board prior to the adoption of the agreement, and the board did not allow Dr. Yost to address the board prior to the adoption of the agreement, the Alaska Supreme Court concluded that the failure to conduct a trial de novo to determine whether Dr. Yost had been promised an opportunity to address the board prior to the adoption of the agreement was not harmless error.[17]

In *Nash v. Matanuska-Susitna Borough*, a forester challenged a local board of adjustment's decision upholding the cancellation of a timber contract between the forester and the Matanuska-Susitna Borough.[18] The Alaska Supreme Court determined that the board of adjustment's procedures had denied Nash due process by limiting

[14] *See id.* at 1271.
[15] *Id.* at 1275.
[16] *Id.*
[17] *Id.* at 1277.
[18] *Nash*, 239 P.3d at 693.

witness testimony and "effectively render[ing] Nash unable to present his case."[19] Because Nash "was prohibited from presenting relevant, material evidence, and was thereby effectively denied due process . . . a trial de novo [was] appropriate in the superior court."[20] Like in *Yost*, the trial de novo would cure the due process violations at the agency level by allowing Nash to present witness testimony before the superior court as the court considered his contract claims.[21]

This appeal does not fit into the circumstances outlined in *Nash* and *Yost*, where an appellant alleged a specific due process violation that could be cured via de novo proceedings in the superior court. Here, Appellants' broad assertions of due process violations are insufficient to compel this Court to order a trial de novo. While both parties appear to agree that the agency record is inadequate for the Court to address Appellants' constitutional claims against the Municipality, Appellants have not specifically alleged how more information from Appellants or the Municipality would enable Appellants to succeed in this administrative appeal. In addition, Appellants have not alleged how the lack of a pre-deprivation hearing at the agency level could be cured by de novo proceedings in this Court.

Based on the information before the Court at this time, the Court is unable to determine whether the Municipality violated Appellants' due process rights or how such violations might be cured through a trial de novo before the Court. It appears that

[19] *Id.* at 699.
[20] *Id.* at 701.
[21] *See id.*

Appellants wish to engage in the sort of discovery that is more appropriately suited to an original action in superior court rather than an administrative appeal of the Municipality's campsite removal postings. The Court notes that the legal issues related to whether due process was afforded through the Municipality's procedures have been raised as points on appeal in this case and may be properly addressed in the briefing based on the record.[22]

The Court concludes that this appeal does not present the rare circumstances in which the Court should exercise its discretion to order a trial de novo. In resolving this limited question, the Court does not resolve the scope of review or the subject matter jurisdiction arguments contained with the briefing.

IV. CONCLUSION

For the foregoing reasons, the Court denies the Motion for Trial de Novo. Appellants' Opening Brief must be filed by March 5, 2024.

DATED at Anchorage, Alaska this 5th day of February, 2024.

Yvonne Lamoureux
Superior Court Judge

I certify that on 2-5-24 the above was served on the parties of record:

E. Glatt; R. Botstein; M. Vidmar;
A. Helzer; J. Thomas; J. Willoughby

B. Cavanaugh, Judicial Assistant

[22] *See* Statement of Points on Appeal, Case No. 3AN-23-06779 CI ¶ 4; Statement of Points on Appeal, Case No. 3AN-23-07037 CI ¶ 4.