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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

APPELLANTS' REPLY BRIEF ON SUPPLEMENTED RECORD

Contrary to the Municipality's assertions, prohibited campsite decisions are reviewable under Alaskan administrative law standards, and Appellants have consistently alleged arbitrary enforcement. Moreover, the Municipality's asserted interest in its prohibited campsite law—to return the land to its designated use—fails to justify its substantial infringement of Appellants' constitutional rights. For these reasons, the Court should hold the prohibited campsite law and challenged decisions unconstitutional.

I. If the Municipality withheld relevant records due to attorney-client privilege or the work-product doctrine, a privilege log must be produced.

The Court's order was clear. "The Municipality must supplement the record with the information considered by the Municipality in reaching its decisions[.]"[1] In its brief, the Municipality alludes to the existence of other records that it considered but did not

[1] Order to Supplement the Record at *6 (Dated December 30, 2025).

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produce because of attorney-client or work-product privilege. [Ae. Supp. Br. 15] Courts routinely require a privilege log to determine whether invocation of these doctrines is appropriate.[2] Records protected by the deliberative process privilege, in contrast, are not part of the administrative record and thus do not require a privilege log.[3] Here, however, the Municipality does not invoke deliberative process privilege, nor would it have been appropriate to do so.[4] If the Municipality withheld relevant records based on attorney-client or work-product privilege, it should be ordered to produce a privilege log now.

II. The challenged prohibited campsite decisions are not shielded from judicial review and must be held arbitrary.

Contrary to the Municipality's assertions, this Court has authority to review whether the government "gave adequate explanation" for its prohibited campsite abatements. [Ae. Supp. Br. at 11–12] Under *Smith v. Anchorage*, superior courts are empowered to review prohibited campsite decisions and the related record.[5] If the Municipality gives an "inadequate[ly] reasoned explanation" for a challenged abatement, the Court can order supplementation, as it did here.[6]

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[2] *E.g.*, *Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1265–67 (D. Colo. 2010) (ordering a privilege log for records withheld for attorney-client privilege); *Thrive Hood River v. Loftsgaarden*, No. 3:22-CV-1981-AR, 2025 WL 689496, at *2 (D. Or. Jan. 6, 2025) (ordering same for records withheld under the work-product doctrine).
[3] *E.g.*, *Thrive Hood River*, 2025 WL 689496 at *2 (declining to order a privilege log for deliberative process materials).
[4] This privilege protects predecisional deliberative records from disclosure (*e.g.,* drafts, proposals, recommendations). *See Am. Petroleum Tankers Parent v. U.S.*, 952 F. Supp 2d 252, 265–66 (D.D.C. 2013). Here, however, the Municipality withheld "communications, memoranda, and the like [that] are attorney-client privileged or attorney work product." [Ae. Supp. Br. at 15] The deliberative process privilege caselaw it cites is thus inapposite to the records at issue here. [Ae. Supp. Br. at 15 n.29 (citing *id.* at 265)].
[5] *Smith v. Anchorage*, 568 P.3d 367, 374–76 (Alaska 2025).
[6] *Id.* at 375 (quoting *Se. Alaska Conservation Council v. State*, 665 P.2d 544, 549 (Alaska 1983)); *see also* Order to Supplement the Record at *6 (Dated Dec. 30, 2025).

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Per *Smith*, the record should be reviewed using the standards articulated in Alaskan administrative law cases, including *Southeast Alaska Conservation Council v. State*.[7] It is this case that Appellants relied upon in their brief and that the Court should apply here.[8] It articulates the importance of a decisional document and stands for the principle that if "an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary."[9]Applied here, this principle confirms the arbitrary nature of the challenged prohibited campsite decisions, as they failed to account for important factors. The Municipality identifies two sparse and incomplete spreadsheets as its decisional documents. [Ae. Supp. Br. at 14] Among the columns left blank in both documents are the number of people to be displaced and the number of shelter beds available for displaced people to use.[10] The failure to complete these columns in the decisional document indicates that these factors were not considered. The supplemented record confirms they were not.[11] The failure to consider these important factors necessitates a finding that the challenged decisions were arbitrary.[12]

A. Appellants have not waived the argument that the challenged decisions were arbitrary—it has always been part of their due process claims.

Appellants have consistently alleged that the broad language of the Municipality's

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[7] *Smith*, 568 P.3d at 375 (discussing *Se. Alaska Conservation Council*, 665 P.2d 544).
[8] At. Supp. Br. at 3–5 (citing *Se. Alaska Conservation Council*, 665 P.2d at 548–49, and its progeny (*e.g.*, *Phillips v. Houston Contracting, Inc.*, 732 P.2d 544, 547 (Alaska 1987); *Pacifica Marine, Inc. v. Solomon Gold, Inc.*, 356 P.3d 780, 790 (Alaska 2015); *Usibelli Coal Mine, Inc. v. State*, 921 P.2d 1134, 1149 (Alaska 1996))).
[9] *Se. Alaska Conservation Council*, 665 P.2d at 548–49.
[10] *See* Exc. at 69–70.
[11] Nowhere in the supplemented record is the summer population at either location tallied, the availability of shelter beds discussed, or either fact considered before deciding to notice both locations for abatement. [At. Supp. Br. at 4]
[12] *Se. Alaska Conservation Council*, 665 P.2d at 548–49. *See also* At. Supp. Br. at 3–5.

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prohibited campsite law opens the door to arbitrary or uneven enforcement in violation of their due process rights. [At. Opening Br. at 11, 16–17, 23, 26–28; At. Reply Br. at 16–17] The supplemented record now confirms that arbitrary enforcement occurred. [At. Supp. Br. at 3–5] This fact lends further support to Appellants' arguments that the broad language of the Municipality's prohibited campsite law violates their due process rights.[13]

B. *Yankee v. Juneau* supports Appellants' claims for judicial review.

Reviewing the challenged decisions and holding them unconstitutional would not contradict *Yankee*. As the Municipality concedes, *Yankee* recognizes the importance of judicial review to guard against due process violations by arbitrary or capricious agency actions.[14] [Ae. Supp. Br. at 13] Appellants have raised such due process concerns since the inception of this case. [At. Opening Br. at 26–28; At. Reply Br. at 16–17]

Moreover, the facts of *Yankee* differ meaningfully from the facts here. First, *Yankee* concerned an administrative decision *not* to enforce.[15] Here, Appellants challenge an affirmative governmental decision to deprive them of their essential personal property and infringe upon their liberty. The due process concerns at the heart of this case are thus far greater than any that could have been implicated in *Yankee.*[16] Second, *Yankee* concerned the scope of judicial review in the absence of an ordinance explicitly providing for such review.[17] Here, however, "appeal *is* provided by law."[18] Thus, contrary to the

[13] At. Opening Br. at 26–28; *see also Marks v. Anchorage*, 500 P.2d 644, 646 (Alaska 1972) (requiring statutes to be written in specific terms as a guard against arbitrary or uneven enforcement).
[14] *Yankee v. Juneau*, 407 P.3d 460, 463 (Alaska 2017) (quotations omitted).
[15] *Id.* at 464 (discussing the agency's "decision not to take enforcement action").
[16] *Cf. id.* at 467 (noting that the plaintiff did not actually allege a due process violation).
[17] *Id.* at 464 & 464 n.14 (finding that the law only provided for administrative review).
[18] *Smith*, 568 P.3d at 365 (citing AMC 15.20.020.B.15.e) (emphasis in the original).

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Municipality's assertions, the Court would not be giving itself "extra-textual authority" by reviewing the challenged decisions. [Ae. Supp. Br. at 13]

III. The Municipality fails to refute the applicability of criminal law constitutional protections.

The Municipality's characterization of prohibited campsite abatements as purely civil law enforcement continues to be factually and doctrinally false. [Ae. Supp. Br. at 5–7] To support its arguments, the Municipality engages in a selective reading of the record and fails to contest with the nuances of *Department of Revenue v. Nabors*.

A. The record does not identify the Parks and Recreation Department as the final decision-maker for prohibited campsite determinations.

As a factual matter, the supplemented record fails to substantiate the Municipality's claim that the Parks and Recreation Department "made the final decision" regarding the challenged prohibited campsite determinations. [Ae. Supp. Br. at 5] The "decision" referenced by the Municipality appears to be an email updating JBER that "We are getting ready to address the illegal camps in Davis Park." [R. 24] This email, however, appears to simply relay a decision made by the Mayor's Office earlier that week. [R. 32 (email from Mario Bird, Office of the Mayor, directing Parks and Recreation "to address incursion from Davis to JBER")]

Moreover, the supplemented record indicates that high-level Parks and Recreation employees believed that abatement in the absence of adequate shelter was illegal. The Director is on record as stating his belief that *Martin v. Boise* prevents the Municipality from abating unless there is vacant shelter capacity.[19] [R. 170] Similarly, the Parks and

[19] *See Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), *abrogated by Grants Pass v. Johnson*, 603 U.S. 520 (2024).

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Recreation Superintendent stated that "[u]ntil there is adequate shelter space available, the Municipality will be unable to abate camps and will be limited in its availability to move campers out of parks." [R. 121–122] Given these statements, it appears unlikely that Parks and Recreation would assist with prohibited campsite abatements in the absence of adequate shelter, unless directed to do so by another department or office.

B. The Municipality's legal arguments that its prohibited campsite law should be considered purely civil are also unavailing.

The Municipality continues to mischaracterize *Nabors* to assert that the civil vagueness standard applies. [Ae. Supp. Br. at 5–6] *Nabors* concerned a tax statute capable of civil or criminal enforcement; however, the statute only permitted criminal penalties if an individual engaged in *willful* tax evasion.[20] The court thus applied the civil standard because one could avoid criminal penalties by making a "good faith" effort to comply.[21] Here, the challenged law does not include any limitation on when criminal penalties can be pursued. Rather, "the Municipality can choose" when to use its criminal or civil enforcement tools. [Ae. Supp. Br. at 5] Because the imposition of criminal penalties does not turn on the intent of the individual, but rather the discretion of the government, this law is appropriately reviewed under the heightened criminal standard.

Moreover, Appellants could not make a "good faith" effort to comply with the Municipality's prohibited campsite law—the law is so broadly written that compliance is impossible. Wherever Appellants physically move their property, they will create a prohibited campsite subject to abatement.[22] And, wherever they physically move

[20] *Dep't of Revenue v. Nabors Inter'l Finance*, 514 P.3d 893, 900 (Alaska 2022).
[21] *Id.* at 900.
[22] AMC 15.20.020.B.15.

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themselves, they subject themselves to arrest for criminal trespass.[23] It is a violation of Appellants' substantive due process rights to present them with no viable legal option for sleeping or sheltering themselves when indoor shelters are unavailable.[24]

The Municipality's argument that Appellants had the option of acquiring housing, [Ae. Supp. Br. at 6–7], disregards a central fact in this litigation: Appellants cannot afford housing. [Exc. 22, 27, 32, 37, 42, 47, 52, 57, 62] Moreover, the Municipality's brief on this point relies exclusively upon the existence of shelter programs that post-date the challenged abatements.[25] These programs are thus irrelevant to the issues presented here.

IV. The Municipality's asserted interest in designating land-use priorities does not outweigh Appellants' fundamental constitutional rights

The Municipality makes no further attempts to substantiate its purported interest in health and safety.[26] Now, instead, the Municipality emphasizes a broad interest in "restor[ing] the parks to their dedicated purposes." [Ae. Supp. Br. at 2; *see also* 3–5, 8, 10, 14] The Court's constitutional analysis must balance this interest against those of Appellants. [At. Opening Br. at 34–35, 36–45, 45–49; Reply Br. at 10–13, 18–19] And, here, Appellants' interests in their essential property and liberty carry greater weight.

A. The failure to provide a predeprivation hearing remains unjustified.

In asserting its interest in designated land use, the Municipality does not claim an

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[23] AMC 8.45.

[24] *Cf. Gudmunson v. State*, 822 P.2d 1328, 1332–33 (Alaska 1991) (holding that the government violated defendants' due process rights when it made all available courses of action illegal (*e.g.*, when the relevant statutory and regulatory regime made it illegal both to transport and to leave a mistakenly killed big-game animal)).

[25] *See* Ae. Supp. Br. at 7 n.8 (relying on the "MOA Safety Net Shelter & Crisis System" guide (dated October 2025) and an *Anchorage Daily News* article (dated August 2025)).

[26] *Cf.* Ae. Response Br. at 36 & 36 n.119 (asserting that abatement "protects public health and public safety from the well-known threats that can be posed by prohibited camping").

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exception to the predeprivation hearing requirement.[27] [Ae. Supp. Br. at 8] Instead, it contends that such a hearing was unnecessary because it would not have "negate[d] the cited bases for these abatements." [Ae. Supp. Br. at 8] The hearing's purpose, however, is not so narrow. The Alaska Constitution *requires* an opportunity to be heard prior to depriving someone of their property, absent limited exceptions.[28] The rationale for this requirement is that "fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights."[29] Here, Appellants were denied an opportunity to explain their side of the facts—including the significance of their belongings and the lack of places for them to go—before the Municipality forcibly displaced them on threat of arrest and confiscated their property. This hearing need not be complicated.[30] For example, informal conversations with a government official with decision-making authority can constitute a sufficient opportunity to be heard.[31] At minimum, such an opportunity should have been provided to Appellants prior to the confiscation of their essential belongings. It was not.

B. The Municipality's asserted interest in the challenged abatements fails to render its seizure of Appellants' property reasonable.

To determine whether a property seizure was reasonable, courts must balance the public and private interests at stake.[32] [At. Opening Br. at 45–49] Here, the government's

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[27] Nor could it: "returning land to its dedicated uses" does not qualify as an emergency or a health and safety situation warranting summary action. [At. Supp. Br. at 12–13 (citing *Anderson v. Alaska Hous. Fin. Corp.*, 462 P.3d 19, 29–30 (Alaska 2020))]
[28] *Anderson*, 462 P.3d at 29–30.
[29] *Homer v. Campbell*, 719 P.2d 683, 685-86 (Alaska 1986). *See also* At. Reply Br. at 6-7.
[30] *Frontier Saloon, Inc. v. Alcoholic Bev. Control Bd.,* 524 P.2d 657, 661 (Alaska 1974).
[31] *E.g.*, *Patrick v. Anchorage*, 305 P.3d 292, 300 (Alaska 2013).
[32] *See San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005) ("[W]e balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.") (internal quotation marks and citations omitted)).

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interest in designated land-use does not justify seizing Appellants' personal belongings, which they need to survive in the absence of indoor shelter. The federal *Smith* decision relied upon by the Municipality is distinguishable on this point. [Ae. Supp. Br. at 4] There, the court held that the seizure of an unhoused plaintiff's property was reasonable because the Municipality had a health and safety interest in seizing it, and there were adequate procedural safeguards to protect the plaintiff's property interests.[33] By contrast, here, the record does not support a health or safety interest in the challenged abatements or property seizures. [At. Supp. Br. at 10, 13] And, Appellants maintain that the procedural safeguards were inadequate: stored property was inaccessible and Appellants had nowhere to legally move their property. [At. Reply Br. 9 at n.28, 19–20]

C. The Municipality fails to identify a compelling governmental interest that would justify infringement on Appellants' liberty.

The Municipality asserts that it does not need to identify a compelling interest, because individual abatements do not infringe upon Appellants' fundamental liberty. [Ae. Supp. Br. at 7] This argument, however, fails to address the substantial burden imposed on Appellants' liberty by the underlying law challenged here. [At. Reply Br. at 18–19] As discussed above, the Municipal Code fails to provide a way for Appellants to lawfully remain in Anchorage. Wherever they move themselves and their property, they will be

[33] *Smith v. Anchorage*, 797 F.Supp.3d 922, 1010-11 (D. Alaska 2025). Contrary to the Municipality's characterization, [Ae. Supp. Br. at 4 n.1], when the *Smith* court states that its peers "routinely recogniz[e] that these are important government interests," it is referring to the government interest in public health and safety, not designated land use. *Id.* at 1010 & 1010 n.100. Moreover, two of the three cases cited by the *Smith* court to illustrate this trend held that the government's interest in health and safety did not outweigh the constitutional interests of the unhoused plaintiffs. *Id.* at 1010 n.100 (citing *Pottinger v. Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992); *Kincaid v. Fresno*, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006)).

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subject to prohibited campsite abatement and arrest for criminal trespass.

This burden on the Appellants' fundamental liberty interests cannot withstand strict scrutiny. [At. Supp. Br. at 9–11] The Municipality does not contend that its interest in designated land use is compelling, nor has it ever been identified as such.[34] Even assuming that such an interest did qualify as compelling, the Municipality's prohibited campsite law is not narrowly tailored to achieving its asserted interest. The law does not require the land to be dedicated to a particular purpose or zoned in a particular way. Rather, it prohibits an individual from sleeping or sheltering themselves on any "public land" in Anchorage.[35] Such a broad and sweeping law cannot stand.

CONCLUSION

The Municipality is correct: its land-use choices—the "dedicated purposes" it assigns to public lands—are central to this case. Its current land-use choices, however, are incompatible with Appellants' constitutional rights. At a minimum, its choices must account for the existence, and the rights, of Anchorage's unhoused residents. Here, as Appellants have shown, and as the supplemented record illustrates, the Municipality failed to do so. For these reasons and those stated in Appellants' prior briefing, the Court should hold the Municipality's prohibited campsite law and the challenged determinations, notices, and abatements unconstitutional. Appellants would welcome the opportunity to provide oral argument to this effect if the Court would find it helpful.

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[34] *Cf. State v. Sturch*, 921 P.2d 1170, 1178 (Haw. Ct. App. 1996), *as amended* (June 27, 1996) (classifying it as a "legitimate interest" for the purposes of equal protection analysis); *Smith*, 797 F. Supp. at 1010 (classifying it as a "legitimate public interest[]" with respect to procedural due process and seizure claims).
[35] AMC 15.20.020.B.15.

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On March 19, 2026, a true and correct copy of the foregoing Reply Brief on the Supplemented Record was served on:

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