IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DALE ENGLE, for and on behalf of himself and all others similarly situated, Plaintiff, vs. MUNICIPALITY OF ANCHORAGE and MARK MEW, in his official capacity as Chief of Police for the Anchorage Police Department, Defendants.	Case No. 3AN-10-7047 CI

OPINION

Introduction

The plaintiffs in this class action lawsuit dispute the constitutionality of Anchorage Municipal Code § 15.20.020, an ordinance governing the abatement of illegal homeless camps. Plaintiffs assert violations of due process and equal protection and also raise the issue of unreasonable search and seizure. Their central contention is that the ordinance's notice period and the time it provides for appeal are insufficient, especially given the ordinance's failure to provide for the storage and recovery of property after it has been seized.

For the reasons stated below, this Court finds that the most recent ordinance (see Appendix A) as written still does not comport with the due process required under Alaska law.

Background

I. Facts

The "First Ordinance" was enacted on July 7, 2009, and it permitted city officials to clean up ("abate") illegal camps after twelve hours' notice. AMC § 15.20.020(B)(15)(a). Individuals remaining in the camps at the time of the abatement were given twenty minutes to gather their belongings. Id. at (b). After the twenty minutes expired, any property remaining in the camp was considered abandoned, and city officials could dispose of it as waste. Id. at (c). The First Ordinance did not provide for an appeal process prior to abatement.

On June 22, 2010, the Municipality officially amended the Ordinance through AO 2010-43(S) (the "Second Ordinance"). The amendment extended the 12-hour notice period to 5 business days. AO 2010-43(S) § (B)(15)(a). It also added a section stating: "A notice of campsite abatement shall not be invalid for failure to identify the correct code provision, if the campsite is illegal under a different local or state law than the one stated on the notice." (B)(15)(a)(i); Pls' Amended Complaint at ¶ 47. The Second Ordinance further required that the posted notice include instructions on filing an appeal, and it contained a section on the procedures the Municipality must follow in addressing that appeal. (B)(15)(a)(iii); (B)(15)(b).

A third version of AMC § 15.20.020 was enacted on September 14, 2010 (the "Third Ordinance"). This version kept the 5-business-day notice period, removed the language excusing the Municipality from failing to identify the correct code provision in the notice, and added a 2-day automatic stay. (B)(15)(e).

II. Procedural History

Plaintiffs filed their initial complaint on April 28, 2010. Defendants filed a motion to dismiss on June 8th. By stipulation and Order dated June 8, 2010, a class was certified and issues of notice of representation were resolved. On June 25th, after the Municipality published the Second Ordinance, Plaintiffs filed an amended complaint asserting that, although the notice period was extended, the new Ordinance still lacked sufficient pre-deprivation procedures. Pls' Amended Complaint at ¶ 4. Specifically, Plaintiffs asserted that the Second Ordinance did not provide an opportunity for the storage and recovery of personal property after seizure by the APD. Pls' Amended Complaint at ¶ 7.

Defendants filed an amended motion to dismiss on July 12, 2010. Plaintiffs, in turn, moved for a temporary restraining order, which was granted following a hearing held on July 15, 2010, which was continued to July 19, 2010. Pursuant to that order, Defendants were enjoined from enforcing AMC 15.20.020(B)(15) as amended. After the July 19, 2010 hearing, the temporary restraining order became a preliminary injunction. See Order Entering a Preliminary Injunction (July 26, 2010). The Court's Order did not preclude the Municipality from enforcing other applicable statutes.

The parties then stipulated to a schedule for further briefing of the issues. Thereafter, and after further discussion between the parties, the Third Ordinance was enacted. Cross-motions for summary judgment followed and briefing ensued pursuant to the agreed schedule. Oral argument was held on November 17, 2010.

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Alaska R. Civil P. 56. Summary judgment is appropriate if the movant first establishes a prima facie case "showing that there is an absence of a factual dispute on a material fact and that this absence of a dispute constitutes a failure of proof on an essential element." Bradley v. Klaes, 181 P.3d 169, 175 (Alaska 2008) (quoting Greywolf v. Carroll, 151 P.3d 1234, 1241 (Alaska 2007)). Once the moving party has made this showing, the burden shifts to the non-moving party to produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence. Chikan v. ARCO Alaska, Inc., 125 P.3d 335, 339 (Alaska 2005).

To defeat a motion for summary judgment, the non-moving party may not rest on its allegations, but must put forth specific facts showing that there is a genuine, material factual dispute. Id. A genuine, material factual dispute requires more than a scintilla of contrary evidence. Id. In meeting their respective burdens, the parties may use pleadings, affidavits, and any other material that is admissible in evidence. Miller v. City of Fairbanks, 509 P.29 826, 829 (Alaska 1973). In evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. Chikan, 125 P.3d at 339. Reasonable inferences are those inferences that a reasonable factfinder could draw from the plaintiff's evidence. Alakayak v. British Columbia Packers, Ltd., 48 P.3d 432, 449 (Alaska 2002).

Discussion

I. Ripeness

The existing injunction, enacted July 19, 2010, precludes enforcement of the Third Ordinance. As a preliminary matter, the Municipality claims that Plaintiffs' pre-enforcement challenge is not ripe because the Third Ordinance has not yet been enforced. Ds' Op. at 14-16, 20-21. Plaintiffs, on the other hand, assert the claim is ripe because they face irreparable harm in the event that the Third Ordinance goes into effect. Pls' Op. at 5. For the reasons stated below, this Court finds that the Plaintiffs present a live case or controversy and that their claim is ripe for adjudication.

Alaska Statute Section 22.10.020(g) provides: "In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought." The statutory language "reflects a general limitation on the power of courts to entertain cases; similar language is used in federal law." Brause v. State, Dep't of Health & Soc. Services, 21 P.3d 357, 358 (Alaska 2001). Under the ripeness doctrine, a plaintiff's claim must allege that a legal injury was suffered or will be suffered in the future. Brause, 21 P.3d at 359 (citing Bowers Office Prods., Inc. v. Univ. of Alaska, 755 P.2d 1095, 1099). On a global level, the doctrine asks "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." Id. (quoting 13A Charles Alan Wright, et al., Federal Practice and Procedure § 3532, at 112 (2d ed. 1984)).

On a more practical level, courts consider a series of factors when analyzing whether a claim is ripe for adjudication. Brause, 21 P.3d at 359. Issues include whether judicial energies would be better reserved for litigants in need of real official assistance, whether refusal to decide the case would spur practical problem-solving efforts, whether defendants would be forced to bear the costs of litigation without sufficient justification, whether defendants would have to defend against abstract and hypothetical possibilities, and whether a decision would constitute unnecessary lawmaking. Id. (citing Federal Practice and Procedure § 3532.1, at 114-15). "The need to decide is a function of the probability and importance of the anticipated injury. The risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision." Id. (quoting Federal Practice and Procedure § 3532.1, at 114-15).

In the case at bar, judicial energies are appropriately applied because the Plaintiffs face a concrete and significant threat of harm. The Municipality "concedes the Third Ordinance is reasonably likely to be applied against members of the Plaintiff class, as well as persons not class members." Ds' Op. at 21. As observed in Thomas v. Anchorage Equal Rights Commission, 102 P.3d 937, 942 (Alaska 2004), where "the record shows a recent history of active enforcement[,] and the commission does not disavow the possibility of future enforcement," the court is not willing to "hold that the [plaintiffs] must rely on [defendants'] good graces and hope for the best until [defendants] file[] charges." Compare State v. ACLU of Alaska, 204 P.3d 364, 371 (Alaska 2009) (finding that fear of enforcement was speculative).

In Thomas, plaintiffs challenged AS § 18.80.240 and AMC § 5.20.020, both of which prohibit landlords from discriminating against renters or potential renters based on marital status. Thomas, 102 P.3d at 939. Before reaching the merits of the claim (which it ultimately rejected), the court addressed the issue of ripeness:

> Ripeness is an aspect of standing, and we have often noted that Alaska's standing requirements are more lenient than their federal counterpart, since they favor ready access to a judicial forum. We have consistently found this difference to be important, emphasizing the need to follow our "own unique ... jurisprudence if Alaska standing doctrine is to retain its quality of relative openness."

Id. at 942 (citing Brause, 21 P.3d at 359 n. 6; Trustees for Alaska v. State, 736 P.2d 324, 327 (Alaska 1987); Bowers Office Prods., Inc., 755 P.2d at 1097 n. 5). While in Brause the court found that the plaintiffs' brief lacked "any assertion that they have been or in their current circumstances that they will be denied rights that are available to married partners," in Thomas, "it seem[ed] obvious that the landlords [stood] to suffer actual prejudice if the state or municipality enforces the challenged laws against them." Brause, 21 P.3d at 360; Thomas, 102 P.3d at 942.

Similar to the defendants in Thomas, the Municipality of Anchorage does not dispute that it will enforce the Third Ordinance once the injunction is lifted. "[T]he record shows a recent history of active enforcement; and the commission does not disavow the possibility of future enforcement." Thomas, 102 P.3d at 942. The court is not willing to subject the homeless to the Municipality's good graces "and hope for the best before it files charges" against illegal campers. Id.

Another analogous case is State v. Planned Parenthood of Alaska, 35 P.3d 30, 34 (2001) ("Planned Parenthood I"), in which the court found that the injuries alleged —

severe penalties under the parental consent or judicial authorization act — were "more than trifling" and the claims raised were "important questions of principle." The court held that "[t]he parental consent or judicial authorization act would require both doctors to change their current practices and would expose them to civil and criminal liability if they failed to comply; this suffice[d] to establish more than a trifling or speculative injury." Id. (citing AS 18.16.010(c), (e)).

Plaintiffs in the instant case stand to lose their personal property in contravention of their due process rights if the Municipality enforces the Third Ordinance. The probability and importance of the Plaintiffs' anticipated injury outweighs any risk of decision. The facts are sufficiently developed to enable this Court to make an informed ruling. Brause, 21 P.3d at 359.

II. A Facial Challenge is Appropriate

Plaintiffs argue that the Municipality's policy as set forth in the Third Ordinance violates due process. This is because the policy, even with the recent amendments, "continues to permit the seizure and disposal of all property, without regard to its value or validity of claim of ownership, after abatement of the campsite." Pls' MSJ at 37. Plaintiffs also argue that the notice period is inadequate and unconstitutional, and that the 2-day automatic stay following the administrative hearing officer's ruling is similarly deficient given the high stakes. Id. "[A] camper who wished to exercise his right to appeal would have little to no meaningful chance of recourse," because once the abatement proceeds, any property remaining in the campsite and deemed abandoned will be destroyed. Id.

By definition, a facial challenge alleges that a statute is unconstitutional on its face, and as a result, always operates unconstitutionally. Blacks Law Dictionary (2001). "A statute is facially unconstitutional where it is incapable of being constitutionally applied, or where it is overbroad and infringes on values protected by the First Amendment." Gilmore v. Alaska Workers' Comp. Bd., 882 P.2d 922, 929 n. 17 (Alaska 1994), *superseded by statute on other grounds*, (citing United States v. Salerno, 481 U.S. 739, 745 (1987)). Alaska courts will "uphold a statute against a facial constitutional challenge if 'despite any occasional problems it might create in its application to specific cases, [the statute] has a plainly legitimate sweep.'" State v. Planned Parenthood of Alaska, 171 P.3d 577, 581 (Alaska 2007) ("Planned Parenthood II") (quoting Treacy v. Municipality of Anchorage, 91 P.3d 252, 260 (Alaska 2004)).

Although the U.S. Supreme Court in Salerno stated that the challenger to a statute "must establish that no set of circumstances exist under which the Act [could] be valid," Alaska has interpreted this language loosely, finding that the "'no set of circumstances' language is not a rigid requirement." Planned Parenthood I, 35 P.3d at 35 (citing Salerno, 481 U.S. at 745); Treacy, 91 P.3d at 260 n. 14. Instead, applying a flexible approach, a court should focus its inquiry on "the group for whom the law is a restriction, not the group for whom the law is irrelevant." Id. (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 894 (1992)).

Plaintiffs' constitutional challenge of the Third Ordinance meets the standards for facial challenges under Alaska law. "A holding of facial unconstitutionality generally means that there is no set of circumstances under which the statute can be applied

consistent with the requirements of the constitution." ACLU of Alaska, 204 P.3d at 372 (citing State, Dep't of Revenue, Child Support Enforcement Div. v. Beans, 965 P.2d 725, 728 (Alaska 1998)). Even given the court's "duty to construe a statute, where reasonable, to avoid dangers of unconstitutionality," the Ordinance does not pass muster. Id. at 373 (footnote omitted).

The reasons for finding the Third Ordinance facially unconstitutional are set forth below.

III. The Third Ordinance Violates Due Process on its Face

Having found that Plaintiffs present a live case or controversy ripe for adjudication, this Court now addresses the merits of Plaintiffs' due process challenge. It does so while considering the statute as a whole and recognizing the unique characteristics of this class of Plaintiffs. These contextual matters are discussed first, followed by an examination of the merits of the constitutional claims.

A. Overall Considerations

1. The Court Considers the Statute as a Whole

"When we engage in statutory construction, we must, whenever possible, interpret each part or section of a statute with every other part or section, so as to create a harmonious whole." State, Dep't of Commerce, Cmty. and Econ. Dev., Div. of Ins. v. Progressive Casualty Ins. Co., 165 P.3d 624, 629 (Alaska 2007) (internal quotation marks and citation omitted).

This Court views the Third Ordinance as a whole in light of the Mathews three-part balancing test. Mathews v. Eldridge, 424 U.S. 319 (1976). It weighs the private

interest affected by the Ordinance; the risk of erroneous deprivation of that interest through the procedures used by the Municipality and the probable value, if any, of additional or substitute procedural safeguards; and the Municipality's interest, taking into account fiscal and administrative burdens that would accompany additional or substitute procedural requirements. Sands ex rel. Sands v. Green, 156 P.3d 1130, 1134 (Alaska 2007) (citing Varilek v. City of Houston, 104 P.3d 849, 853 (Alaska 2004)).

2. Who the Plaintiffs Are

Who the Plaintiffs are informs what due process is required. Alaska courts have "indicated that '[w]hat procedural due process may require under any particular set of circumstances depends on the nature of the governmental function involved and the private interest affected by the governmental action." Matter of K.L.J., 813 P.2d 276 (Alaska 1991) (emphasis added) (quoting Arctic Structures, Inc. v. Wedmore, 605 P.2d 426, 436 (Alaska 1979)); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 352 (Alaska 1988).

During the November oral arguments on the summary judgment motions, the Municipality conceded that Plaintiffs' class of homeless persons includes chronic public inebriates and the mentally ill. A January 2009 report published by the Municipal Department of Health and Human Services provides a definition of "chronic public inebriate":

> The term ... refers to persons who are homeless and alcohol-dependent, and who have histories of public inebriation, frequent emergency room visits, arrests, or co-occurring substance use disorders and mental health disorders. The majority of individuals in the targeted population are "chronically homeless", which means they are unaccompanied individuals with a substance use disorder, or co-occurring substance use and mental

disorder, who have either been continuously homeless for a year or more or have had at least four episodes of homelessness in the past three years.

Mun. Dep't of Health and Human Services, Human Services Div., Safety Links Program, Pathways to Sobriety Project III: Report on Services Provided (Jan. 2009).[1] Along the same vein, a 2009 publication of the Justice Center at the University of Alaska Anchorage quotes the federal definition of homelessness as provided in 119 U.S.C. 1 § 11302:

> [T]he term "homeless" ... includes —
> 1. an individual who lacks a fixed, regular, and adequate nighttime residence; and
> 2. an individual who has a primary nighttime residence that is —
> A. a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
> B. an institution that provides a temporary residence for individuals intended to be institutionalized; or
> C. a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

Alaska Justice Forum (Summer 2009) at 1. The same report states that "[i]n 2008, Alaska ranked tenth among the 50 states in concentration of homeless people." Id. at 1.[2] A single-night nationwide survey in January of 2008 led to estimates that almost 26% of the homeless were persons with severe mental illness and 37% were persons with chronic substance abuse issues. Id. at 2. The survey extrapolated that about 19% of the total homeless population were chronically homeless, and 30% of "homeless *individuals*" were chronically homeless. Id. at 3 (emphasis added). In Alaska, the 2009

[1] Citing The Substance Abuse & Mental Health Services Administration, TI-08-013, Development of Comprehensive Drug/Alcohol and Mental Health Treatment Systems for Persons Who Are Homeless, CFDA No. Homelessness/Federal Register, Vol. 68, No.17/Monday, January 23, 2003, 4019.

[2] Citing the 2009 Annual Homeless Assessment Report to Congress, U.S. Department of Housing and Urban Development, Office of Community Planning and Development.

count revealed that nearly 14% of the homeless have chronic substance abuse issues and roughly 11% are severely mentally ill. Id.

Given the Plaintiffs' lack of resources, it is likely that any administrative appeal they bring will be done as pro se litigants or with pro bono counsel. It is accepted in Alaska that "[i]n cases involving pro se litigants, courts relax some procedural requirements." Kaiser v. Sakata, 40 P.3d 800, 803 (Alaska 2002). The courts expect the litigants "to make a good faith attempt to comply with judicial procedures and to acquire general familiarity with and attempt to comply with the rules of procedure . . . ," but also accord them some leniency. Id. (citing Wright v. Black, 856 p.2d 477, 480 (Alaska 1993), *overruled on other grounds by* B.E.B. v. R.L.B., 979 P.2d 514 (Alaska 1999)). See also Metalf v. Felec Services, 938 P.2d 1023 (Alaska 1997) (taking into account pro se litigant's disability as justification for an additional time extension); Radich v. Fairbanks Builders, Inc., 399 P.2d 215, 217 (Alaska 1965) (noting that time limits governing appeals are not jurisdictional and "may be relaxed or dispensed with where a strict application would be unfair").

Although Alaska has established due process rights of pro se litigants, it has not yet developed case law involving homeless litigants. This Court thus turns to other jurisdictions that have specifically addressed the rights of homeless people. Of particular use is a decision by a district court in Florida, which cites a sociology expert's opinion on the plight of the homeless and the particular issues they face on the streets:

> Professor James Wright, an expert in the sociology of the homeless, testified that most homeless individuals are profoundly poor, have high levels of mental or physical disability, and live in social isolation. He further testified that homeless individuals rarely, if ever, choose to be

> homeless. Generally, people become homeless as the result of a financial crisis or because of a mental or physical illness.

Pottinger v. City of Miami, 810 F.Supp. 1551, 1557 (S.D. Fla. 1992). Pottinger chronicles the expert's opinion that homelessness aggravates health problems "due to a variety of factors such as exposure to the elements, constant walking, sleeping and eating in unsanitary conditions, lack of sleep and poor nutrition." Id. The opinion touches on the fact that homeless individuals "have no place to store medication, no clock to determine when to take a pill, and no water with which to take it." Id. at 1558. They lack transportation, which hampers their ability to obtain follow-up medical care. Id. The homeless also struggle with substance abuse. One expert "testified that many homeless people do not begin drinking until they become homeless; they use alcohol as a self-medication to numb both psychological and physical pain." Id.

Pottinger also recognized that the homeless struggle with chronic unemployment. "Joblessness among homeless individuals is exacerbated by certain barriers that impede them from searching for work, such as health problems, the fact that they have no place to bathe, no legal address, no transportation and no telephone." Pottinger, 810 F.Supp. at 1558. An average day "is predominated by a quest to obtain food and shelter." Id. This Court discerns no reason why the homeless in Alaska would have significantly different demographics than the homeless in other areas, and therefore accepts the findings of Pottinger as persuasive. The problem is real and pervasive in Anchorage. See Associated Press, "Anchorage Homeless Shelter at Full Capacity," Fairbanks Daily News, Nov. 13, 2010 (noting that "[o]fficials at the Brother Francis shelter in Anchorage say the homeless shelter has reached full capacity as the nights

get colder"); Rosemary Shinohara & Megan Holland, "Man Found Dead in Homeless Camp," Anchorage Daily News, July 3, 2010 (observing that the number of deaths had risen to 23 in a year's time); Mark Horvath, "Interview with Anchorage Mayor Dan Sullivan on Homelessness," Huffington Post, Mar. 8, 2010 (discussing the alcohol problems and the lack of community programs). The Court considers Engle's case in light of the homeless' extenuating circumstances.

B. The Initial 5-Day Notice Period is Inadequate

Under the Third Ordinance as currently amended, the Municipality must post a notice of camp abatement 5 full business days prior to clearing out an illegal campsite. AMC § 15.20.020(B)(15)(a). Officials are to affix the applicable notice on each shelter designated for removal or, if there are no shelters, place it in a conspicuous location near the objects designated for removal. Id. The notice must "[s]tate the approximate location of the campsite, the code provision under which the campsite is illegal, that the campsite may be removed at any time after a specified date without further notice, and that any personal property remaining is abandoned and shall be disposed of as waste." Id. at (i).

Plaintiffs allege that 5 business days is an insufficient period within which to infer abandonment. Pls' MSJ at 45-46. They argue that instead, "[15] days is a frequently used benchmark to grant a party to abate a nuisance or reclaim unattended property." Id. at 46. While this Court declines to dictate an appropriate time frame, it does find the parties' discussions of comparative Anchorage Municipal Code (AMC) and Alaska Statute sections, set forth in abbreviated fashion below, useful.

1. Comparative Sections of the Municipal Code and the Alaska Statutes

Other sections from the Anchorage Municipal Code and the Alaska Statutes are instructive when considering what period of notice is sufficient. Comparative statutes and Code sections cited by the parties in their briefs include those on the disposition of abandoned vehicles (AMC § 15.20.040) and junk vehicles (AMC § 15.20.060), actions involving public nuisances (AMC § 15.20.120), property classified as evidence, found, or safekeeping (AMC §§ 7.25.010 -090), and the property of departed tenants (AS § 34.03.260).

Starting with AMC section 15.20.010, a vehicle is deemed abandoned after it has been left unattended for 72 hours. The Municipality will hold an abandoned vehicle for at least 20 days. AMC § 15.20.040(B)(5). If no one claims the vehicle after that 20-day waiting period, the director may publish notice of public auction, to take place after an additional 10 days. Id. at (C).

Junk vehicles, in contrast, are defined as those vehicles not currently registered under state law for operation, not displaying a current seasonal waiver tab, or not operable due to a wreck or a mechanical failure. AMC § 15.20.010. It is unlawful for a junk vehicle to remain in public view for more than 5 days. AMC § 15. 20.050(A). Notice is affixed to the vehicle, and, if it has not been removed from the public eye within 5 days, it may be impounded and sold at a public auction pursuant to the procedures listed under section 15. 20.040(C) (which requires an *additional 10 days* as noted above). AMC § 15.20.060(A) & (B). It can also be privately sold or destroyed without further notice. Id. at (B).

Another Code section, the one addressing public nuisances (defined as "any act or condition forbidden by any provision of [Chapter 15] and any act or condition that annoys, injures or endangers the safety, health, comfort or repose of the public") requires the Municipality to post a notice of violation and an enforcement order. AMC § 15.20.120(A). This order directs abatement of the nuisance within 15 days of service; if a public health hazard exists, the timeframe may be shorter. Id. at (B). The violator must address any appeals to the Administrative Hearing Office within 15 days of service; otherwise, the enforcement order is final. Id.

Another relevant section of the Code discusses "found" property. Property classified as "found" becomes disposable property 10 days after it comes into possession of the Anchorage Police Department (APD). AMC § 7.25.030(A)(2). The APD may publish a weekly notice describing the property in the local newspaper, to extend for one month. AMC § 7.25.050(A). However, section (C) contains a disclaimer that the section "does not apply to items of $50.00 or less" destructible property, or property deemed abandoned. Id. at (C).

Property deemed evidence is treated in the same manner as found property, as is property classified as "safekeeping." "Safekeeping means any non-evidentiary property in the possession of the Anchorage Police Department placed into temporary custody on behalf of a known owner." AMC § 7.25.020. An arrestee's personal property is "protected simply by placing it in a 'property bag,' .. or other segregated, secure place or container and storing it in a reasonable manner." Reeves v. State, 599

P.2d 727, 736 (Alaska 1979). The Municipality can likewise protected from claims of loss or damage by a simple inventory. Id. at 736-37.

Finally, landlord-tenant law states that if a tenant vacates a residence and leaves behind personal property, and the landlord reasonably believes that the property is abandoned, the landlord may send a notice explaining that if the property is not removed within 15 days of delivery or mailing of the notice, the property may be sold (or, if deemed valueless, destroyed). AS § 34.03.260(a)(1) & (2). During the 15-day period, the landlord is to "store [the] personal property of the tenant in a place of safekeeping and shall exercise reasonable care of the property ...". Id. at (b). The property is deemed abandoned if the tenant does not make a timely response. Id. at (c).

As demonstrated by the above statutes and Code sections, the State and Municipality typically provide individuals with a minimum of 10 to 15 days before classifying property as abandoned, even if that property is ultimately deemed waste and is destroyed. While there is an exception for immediate destruction of junk vehicles, the Court does not interpret Plaintiffs' claim as requesting the Municipality to save trash and/or hazardous materials. Instead, they seek preservation of property that they deem valuable. The problem is that the Code fails to provide a definition of what is "valuable," and it also fails to accord Plaintiffs the amount of time provided for other property deemed abandoned. See AMC § 15.20.040(B)(5) (holding abandoned vehicles for at least 20 days).

2. The Notice Violates Procedural Due Process

Turning to the notice section of the Code, this Court follows Alaska precedent in applying the Mathews three-part balancing test to a party's procedural due process claim. D.M. v. State, Div. of Family and Youth Serv., 995 P.2d 205, 212 (Alaska 2000); Waiste v. State, 10 P.3d 1141, 1148 (Alaska 2000) (both citing Mathews, 424 U.S. at 335). This test considers "(1) the private interest at risk; (2) the degree to which an adversarial hearing, as opposed to an ex parte hearing, will reduce the risk of erroneous deprivation; and (3) the State's interest, including that in avoiding an additional burden imposed by a preseizure hearing." Waiste, 10 P.3d at 1148 (citations omitted).

Here, the private interest at risk is the homeless campers' interest in their personal property. A person's right to "life, liberty, and property" is protected in the first section of the first article of the Alaska Constitution and in the Bill of Rights. By definition it qualifies as an interest of "sufficient importance to warrant constitutional protection." Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd., 524 P.2d 657, 659 (Alaska 1974). The fact that the homeless camps often house all of the worldly belongings of the individuals who live in them makes the preservation of the property that much more critical. See Pottinger, 810 F.Supp. at 1573 (finding that "the City's interest in having clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed"). A homeless person whose property is destroyed suffers irreparable harm. Id. There must be "adequate notice and a meaningful opportunity to be heard" before denying the homeless of their property.

Providing Plaintiffs with a longer notice period would significantly reduce the risk of erroneous deprivation. It is undisputed that Plaintiffs' class includes chronic inebriates and the mentally ill. A longer notice period would enable Plaintiffs to gather their belongings and find another place to live, either through the help of social service agencies or independently. Additionally, there is no evidence that increasing the notice period would impose a significant administrative burden on the Municipality; any inconvenience that the Municipality faces in waiting to clear out the homeless camps is outweighed by the danger to Plaintiffs of erroneous deprivation. As noted, the private interest affected and risk of harm are both high.

The Municipality cites public safety, health, and welfare as its justification for the 5-day notice period. Ds' Op. at 46. However, as discussed above, the other statutes and Code sections identified by the parties generally provide a longer period before seizing or inferring abandonment of property. "Pre-seizure notice is not dependent upon the value of the property." Kincaid v. City of Fresno, 2006 WL 3542732 at *37 (E.D. Cal., Dec. 8, 2006) (citations omitted).

This Court finds that the Plaintiffs have established a prima facie case demonstrating an absence of disputed material fact with respect to the Third Ordinance's notice period and the accompanying procedures applied by the Municipality. Bradley, 181 P.3d at 175 (finding summary judgment is appropriate if the movant first establishes a prima facie case demonstrating an absence of material fact). Defendants do not dispute this evidence. The Court finds that this section of the Ordinance, as a facial matter, violates due process.

C. The Appeal and the 2-Day Automatic Stay

Section (15)(h) of the Third Ordinance explains the appeal procedure. The appellant —acknowledged to be a homeless person who may be a chronic inebriate and/or mentally ill — must file a notice of appeal, in writing, under AMC § 3.60.035, citing the decision from which he or she wishes to appeal (*e.g.*, the notice of camp abatement). This must be done within the 5-day notice period. If an administrative hearing officer subsequently affirms the decision to abate the homeless camp, there is a 2-day automatic stay of abatement. After the two days expire, the camp may be "cleaned up," with any remaining property deemed "waste" destroyed. The danger in this course of action is that if Plaintiffs' property is destroyed, Plaintiffs are left with no meaningful recourse. They are effectively denied a meaningful appeal, and their due process rights are thereby violated.

The right of access to the courts is an "important" one under the Alaska due process clause. State v. Native Village of Nunapitchuk, 156 P.3d 389, 405 (Alaska 2007); Sands ex rel. Sands, 156 P.3d at 1134 (citing Bush v. Reid, 516 P.2d 1215, 1217-20 (Alaska 1973)). It is more expansive than the right provided under federal law. Access to the courts is typically implicated when the government "erects a direct and 'insurmountable barrier' in front of the courthouse doors." Id. (citing Varilek v. City of Houston, 104 P.3d 849, 853 (Alaska 2004)). For example, in Varilek, the plaintiff brought a due process claim challenging the borough's refusal to waive a mandatory $200 administrative filing fee (Varilek claimed indigence and requested a few waiver). Varilek, 104 P.3d at 850-51. The court opined that, in a previous case,

> Although only [plaintiff's] property interests were at stake, we held that "the very quality of his future existence may be dependent upon the outcome" of the case, and the denial of access to the court would constitute a "grievous loss" of his property interests. Varilek's property interests in this case include his business and livelihood, the loss of which certainly might affect the quality of his future existence.

Id. at 854 (citing Bush, 516 P.2d at 1219-20).

Significantly, it was the state and not a private individual that threatened the plaintiff in Varilek; the court noted that it was not a situation in which the judicial system should be a last resort. Id. (citing Matter of K.A.H., 967 P.2d 91, 94 (Alaska 1998). The supreme court found that the superior court failed to "address potential alternatives to the city's mandatory fee policy, nor did it weigh the benefit of such fees against the social costs inherent in a policy that effectively prohibits indigents from protecting their rights and interests against state actions." Varilek, 104 P.3d at 855. The court similarly found that "access to the courts to litigate a property interest is an 'important right'" in Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1379 (Alaska 1988). Id. at 854.

The rules of appellate procedure (Rule 603(a)) provide that a 2-day stay is normal for appeals from district court case, but administrative appeals are also covered by the Administrative Procedures Act, which allows for a 30-day appeal. See AS § 44.62.560(a). However, a 30-day appeal period rings hollow when the appellant's property is already destroyed. As acknowledged decades ago, "[c]ourts in Alaska have authority to relax the strict requirements of the rules in order to avoid surprise or a serious miscarriage of justice, or otherwise in aid of their appellate jurisdiction." Matanuska-Susitna Borough v. Lum, 538 P.2d 994, 997 (Alaska 1975) (quoting McCarrey v. Commissioner of Natural Resources, 526 P.2d 1353, 1355 (Alaska 1974)).

This Court finds the holding in Bush v. Reid applicable: "Given this utter vacancy of rationale for the continued deprivation of access to the judicial process, we hold that AS 33.15.190, insofar as it suspends ... the access of parolees to civil courts, violates the due process clauses of the Alaska and United States constitutions." Bush, 516 P.2d at 1220.

D. Storage

There is no provision in the Third Ordinance for storage of property found at an abated campsite. In addition, although Defendants testify that "valuable" property will be saved and held, nowhere in the Ordinance is there a definition of what "valuable" property entails. Pottinger, cited earlier, made the following observations about the property of homeless individuals: It is generally found in the areas where the homeless reside or congregate and is "reasonably identifiable by its nature and organization; it typically includes bedrolls, blankets, clothing, toiletry items, food, identification, and a means for transporting the property such as a plastic bag, cardboard box, suitcase or shopping cart". Pottinger, 810 F.Supp. at 1559. Further, "the homeless often arrange their belongings in such a manner as to suggest ownership — *e.g.*, they may lean it against a tree or other object or cover it with a pillow or blanket," which indicates that the property is not abandoned. Id.

Destruction of a homeless person's property can be devastating, not merely inconvenient.

> [T]he loss of items such as clothes and medicine affects the health and safety of homeless individuals; ... the prospect of such losses may discourage the homeless from leaving parks and other areas to seek work or medical care; and ... a homeless person's personal property is

> generally all he owns; therefore, while it may look like "junk" to some people, its value should not be discounted. .... [T]he seriousness of the loss of such property cannot be overemphasized.

Pottinger, 810 F.Supp. at 1559. If the individual loses his identification, as was the case in Pottinger, it will take him longer to obtain employment and find a place to live. Id.

Like the Municipality in Engle's case, the city in Pottinger "contend[ed] that logistical problems associated with gathering, inventorying and storing personal property belonging to homeless persons [would] be unduly burdensome." Pottinger, 810 F.Supp. at 1572. The court rejected this contention. The city already had in place a procedure for handling evidence, found property and personal property, which required the police to mark, tag, package, and inventory any property taken into custody. Id. at 1572-73. "[F]ollowing [the city's] own established procedure in treating the property of a homeless individual should place no more of a burden on the City than it does with respect to the property of any other person." Id. at 1573. The court added: "Additionally, contrary to the concern expressed by the City, the City would not be expected to gather and store mattresses, cardboard shelters, lumber or illegally possessed shopping carts. The City would be required to do no more than follow its own written policy." Id.

Similarly, the Municipality of Anchorage provides an estimate of costs for dealing with property left at campsites. Exh. M at 3. It states that "valuable" property is handled according to procedures in AMC §§ 3.04.000 – 3.04.020, and places the responsibility for removal of the "abandoned" property on ARBRA or the Community Work Service crews. Ds' Op. at 39. Regarding the burden of storing property, Defendants state:

"storage of tents, sleeping bags, and other items that often are in wet condition require drying rooms, and logistical planning for handling and transporting to storage." Ds' Op. at 52 (citing testimony of Assemblymember Honeman, Exh. B at 79-81). Lt. Gilliam "provided by affidavit a very conservative estimate of the direct labor cost per campsite of $4,866 for posting, retrieving, processing, storing and finally disposing of personal property if the police were to do so." Id. (citing Exh. F at 65-66). They add: "[t]he annual operating costs for direct labor alone for those processes are more than double the current labor costs presently required for processing all evidence seized by police." Id. "[T]he costs of the civil process of abating illegal campsites are borne by the Municipality and ARBRA, currently estimated to cost the Municipality $912.60 per campsite." Id. at 53.

The city in Pottinger addressed similar concerns. The court there concluded that "the City's interest in having clean parks is outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed." Pottinger, 810 F.Supp. at 1573. Likewise, in the case of Kincaid v. City of Fresno, the court considered the city's health and safety concerns when balancing the hardships. 2006 WL 3542732 at *33. The court observed that "[t]he type of property of homeless that the City has confiscated and immediately destroyed pursuant to its policy and practice includes property that is unique and irreplaceable, for which monetary damages cannot compensate and are not a full and adequate remedy." Id. Examples include shelter, medication, identification documents and family heirlooms. "The City's destruction of the property of the homeless has a devastating effect on the dignity of homeless people,

who live a precarious existence" already. Id. "The homeless experience severe, lasting mental anguish" when their only possessions are destroyed, and their "ability to obtain and maintain employment" is hampered. Id.

Based on the evidence of one clean-up, led by a reverend and a group of volunteers, the court found that "it is possible to effect a cleaning of an area where homeless reside without the necessity of confiscating and immediately destroying the property of the homeless." Kincaid, 2006 WL 3542732 at *33. In response to the city's contentions that storing property would pose an immediate health risk to city workers, the court responded that there were police department procedures in place for handling hazardous materials. Id. A set sum could cover training and additional materials and resources. Id.

Like the Municipality of Anchorage, the city of Kincaid also argued that storing the property "would expose the City to possible litigation expenses due to the risk of giving stored property to a person other than the rightful owner." Id. at *34 (citations omitted). The court responded that "the City provided no quantification or estimate of the value or cost of this risk and, other than this case, has cited to no actual litigation brought against the City by homeless persons regarding their property." Id. at *34. Finally, the court chastised the city by noting that it "[had] identified no area in the City where the homeless can go nor has the [C]ity itself provided shelter or any place for the homeless or their property." Id. (citations omitted). Although it is not the Court's intention to chastise the Municipality of Anchorage or become involved in the political

process, there is no doubt that Anchorage, like many other cities, could use additional detoxification beds and similar facilities for the homeless.

The Kincaid court found that the city's policy of deeming any property found during a sweep trash, and subject to immediate destruction, without legal justification. Kincaid, 2006 WL 3542732 at *36. It found the rule "demeaning as it places no value on the homeless' property and is not honest because the 'rule' purports to transmogrify obviously valuable property into trash." Id. "The interference with Plaintiffs' possessory interests is more than just 'meaningful;' it is total and irrevocable, since the City seizes and then immediately destroys all of the property that it seizes in its sweeps." Id. (citations omitted).

We agree with Pottinger and Kincaid that "[p]rotection of the public does not require the wholesale seizure and immediate destruction of all Plaintiffs' possessions and in any event 'is outweighed by the more immediate interests of the plaintiffs in not having their personal belongings destroyed.'" Kincaid, 2006 WL 3542732 at *37 (citing Pottinger, 810 F.Supp. at 1573). While cities have a valid interest "in keeping areas sanitary, orderly, and law-abiding, such interests [do] not outweigh or justify violations of fundamental constitutional rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution." Id. (citing Pottinger, 810 F.Supp. at 1556; United States v. Gooch, 6 F.3d 673, 677 (9th Cir. 1993); Justin v. City of Los Angeles, 2000 WL 1808426 (C.D. Cal. Dec. 5, 2000)). The Kincaid court found the case of Love v. City of Chicago, 1996 WL 627614 (N.D.Ill. 1996), distinguishable, as does this Court:

> In Love, the city had established a written procedure for sweeps that provided for at least three separate notices, and two additional forms of

> notice when possible. There was no evidence that the city would seize belongings that homeless people or their colleagues wished to move or that any property claimed by persons who were present had been lost under this procedure. City workers would save and inventory certain items of value so that the owner could reclaim them.

Kincaid, 2006 WL 3542732 at *39 (citing Love, 1996 WL 627614 at *3-4).

The Municipality already has in place procedures for dealing with property it seizes as evidence; it becomes disposable property 30 days after it is no longer required for purposes of investigation. AMC 7.25.030. Property classified as "found" or "safekeeping" becomes disposable after 10 days. Id. There is no reason why the Municipality cannot treat the property of the homeless in a similar fashion.

Conclusion

Based on the foregoing, this Court finds that the Third Ordinance violates Plaintiffs due process rights. Plaintiffs' Motion for Summary Judgment is Granted. Defendants' Motion for Summary Judgment is Denied. Defendants are enjoined from enforcing the Third Ordinance. Plaintiffs shall submit an appropriate form of judgment within ten days of the date of this Opinion.

DATED at Anchorage, Alaska, this 4th day of January 2011.

Mark Rindner
MARK RINDNER
Superior Court Judge

I certify that on 1-4-11 a copy was mailed to:
T. Stenson
MOA - Gates
Administrative Assistant

Submitted by: Chair of the Assembly at the Request of the Mayor
Prepared by: Department of Law
For reading: August 31, 2010

ANCHORAGE, ALASKA
AO No. 2010-63

AN ORDINANCE AMENDING ANCHORAGE MUNICIPAL CODE SECTION 15.20.020 REGARDING ABATEMENT OF ILLEGAL CAMPSITES AS PUBLIC NUISANCES.

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1. Anchorage Municipal Code section 15.20.020 is hereby amended to read as follows:

15.20.020 Public nuisances prohibited; enumeration.

A. No person shall allow, maintain or permit a public nuisance to exist or allow, maintain or permit recurrence of a public nuisance. Such existence, allowance, maintenance, permitting or recurrence of a public nuisance is a violation of this chapter.

B. Public nuisances include, but are not limited to, the following acts and conditions:

* * * * * * * * *

15. *Illegal campsites.* An illegal campsite is an area where one or more persons are camping on public land in violation of Chapter 25.70 or any other provision of this code. An illegal campsite is subject to abatement by the municipality. The municipal official responsible for an abatement action may accomplish the abatement with the assistance of a contractor, association or organization. Notwithstanding any other provision of this chapter, the following procedure is required to abate an illegal campsite:

a. At least five full business days prior to beginning the removal of an illegal campsite, a notice of campsite abatement shall be posted on each tent, hut, lean-to, or other shelter designated for removal, or, if no structure for shelter exists, a notice shall be affixed in a conspicuous place near the bedding, cooking site, or other personal property designated for removal. The notice shall:

i. State the approximate location of the campsite, the code provision under which the campsite is illegal, that the campsite may be removed at any time after a specified date without further notice, and that any personal property remaining is abandoned and shall be disposed of as waste. [A NOTICE OF CAMPSITE ABATEMENT SHALL NOT BE INVALID FOR FAILURE TO IDENTIFY THE CORRECT CODE PROVISION, IF THE CAMPSITE IS ILLEGAL UNDER A DIFFERENT LOCAL OR STATE LAW THAN THE ONE STATED ON THE NOTICE.]

ii. Also be given orally to any persons in or upon the illegal campsite or who identifies oneself to the responsible official as an occupant of the campsite.

iii. State the process for filing an appeal, and include the address and facsimile number for the administrative hearing office.

b. Within 24 hours after posting the notice of campsite abatement, the municipal official responsible for posting is directed to inform the director of the department of health and human services, or a designee, of the notice posting and illegal campsite location, and the department of health and human services is directed to provide written or electronic notification to community social service agencies within the first work day after receipt of the notice. The purpose of the notices under this subsection is to encourage and accommodate the transition of campsite occupants to housing and the social service community network. Failure of notice under this subsection shall not invalidate the abatement. To facilitate the social service community network, the notice will include:

i. The location of the camp; and

ii. The date for removal; and

iii. An estimate of the number of structures to be removed and of the number of residents of the camp.

c. Before abatement, the responsible municipal official shall verify whether an appeal of the notice of campsite abatement was filed with the administrative hearing office within the applicable time period. If no timely appeal was

filed removal of the campsite may proceed forthwith. If an appeal to the hearing officer was timely filed, the municipality shall either:

i. stay abatement of the campsite area until a decision is issued, or

ii. remove all personal property and store it until a decision is issued. If stored, a written notice of the whereabouts of such property and a contact phone number shall be served on the appellant or posted in the area of the removed campsite. Stored property may be released to the appellant prior to a decision.

d. At the time removal is to begin, if any individuals are present at the campsite, they shall be verbally notified the campsite is illegal and to be removed forthwith. Prior to actual removal:

i. The individuals shall be given at least 20 minutes to gather their personal property and disperse from the area; and

ii. The responsible municipal official or persons working under their authority shall not prevent individuals claiming personal property from removing that property immediately, unless the personal property is unlawful or otherwise evidence of criminal activity.

e. If there is no stay on abatement in effect [IS NOT STAYED BY THE FILING OF A NOTICE OF APPEAL], personal property remaining at the illegal campsite after the notice period and the 20-minute wait period expire is abandoned and may be disposed of as waste.

f. Exceptions:

i. Nothing in this section shall prevent a peace officer from conducting an investigation, search, or seizure in a manner otherwise consistent with the state and federal constitutions, or federal, state or local law.

ii. Nothing in this section shall prevent lawful administrative inspection or entry into an illegal campsite, nor prevent clean-up of garbage, litter, waste or other unsanitary conditions on public

land at any time.

iii. Where exigent circumstances posing a serious risk to human life and safety exist, the abatement of a campsite may proceed without prior notice. Personal property removed under this paragraph may only be disposed of in accordance with chapter 7.25 or other applicable code provision. Written notice of the whereabouts of such property and a contact phone number shall be posted in the area of the former campsite.

iv. When the public land where an illegal 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 illegal campsite are provided at least one hour to remove their personal property. Personal property located on and removed from no trespassing areas of public land without additional notice under this exception may only be disposed of in accordance with chapter 7.25 or with the procedures of this subsection 15.20.020B.15.

g. The right of action provided in section 15.20.130D. is not available when the public nuisance is an illegal campsite located on public property.

h. *Appeal procedure.* A posted notice of campsite abatement is final if a campsite occupant does not file a notice of appeal under section 3.60.035 with the municipal administrative hearing office by the date indicated on the notice. To be filed with the administrative hearing office, the notice of appeal must be received prior to the time and date on the posted notice after which abatement may commence. An appeal is filed with the administrative hearing office upon receipt of a written notice mailed or transmitted by facsimile, or upon personal appearance of an appellant camper with a written or verbal request to appeal. Upon receiving a notice of appeal, the administrative hearing office shall schedule a hearing as soon as practicable and no later than five (5) business days following receipt of the appeal. The notice of the administrative hearing shall be served on the appellant personally, by mail or facsimile if such information for that purpose is provided

by the appellant, or posted at the same place or area where the notice of abatement being appealed was posted. The administrative hearing shall not proceed unless there is proof of service or posting at least two (2) business days prior to the hearing. Proof of service or posting may be submitted by affidavit, and may be accomplished by any municipal employee or a person qualified for service of process under the Alaska court rules. [THE ISSUES AT THE HEARING ARE WHETHER (I) THE CAMPSITE IS ILLEGAL AND (II) ALL THE PROPERTY FOUND THEREON MAY BE DISPOSED OF AS WASTE FORTHWITH.] If the administrative hearing officer affirms the notice of campsite abatement, the abatement is stayed for at least two days after the date of distribution of the decision. After this automatic stay the municipality may proceed to abate the campsite [WITHOUT DELAY] and all personal property found thereon disposed of as waste. Except as otherwise provided in this subsection, the appeal hearing shall be conducted as a quasijudicial proceeding under chapter 3.60. When an appeal is taken to the superior court, the appellant may obtain a stay of proceedings to enforce the notice of abatement by following the procedures set forth in Alaska Rule of Appellate Procedure 603(a).

* * * * * * * * *

(GAAB 16.68.110, 18.15.020, 18.15.030, 18.20.030, 18.20.060; CAC 8.10.020, 8.10.050; AO No. 113-76; AO No. 78-48; AO No. 79-63; AO No. 93-173(S), § 3, 2-24-94; AO No. 95-42, § 3, 3-23-95; AO No. 2001-145(S-1), § 12, 12-11-01; AO No. 2003-130, § 4, 10-7-03; AO No. 2009-83(S), § 2, 7-7-09)

Section 2. This ordinance shall become effective immediately upon its passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 2010.

_____
Chair of the Assembly

ATTEST:

_____
Municipal Clerk