



May 21, 2010

The Honorable Dick Traini
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STUDENT ADVISORS

Re: AO No. 2010-43
Constitutional Issues

Chair Traini:

Thank you for the opportunity to submit written testimony regarding Anchorage Municipal Ordinance AO No. 2010-43, set for Public Hearing on Tuesday, May 25, 2010.

As you know, the American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several significant concerns with the proposed ordinance.

Below we set forth the general principles under federal and state constitutional jurisprudence which protect the rights of homeless persons potentially affected by the AO under consideration. Following that summary, we detail specific deficiencies with the proposed AO, along with suggested amendments and policy considerations.

1. Legal Protections for Property Rights

The legal standard is that property is only abandoned once the owner has shown the intent to relinquish the item permanently. *Brooks Range Exploration Co., Inc. v. Gordon*, 46 P.3d 942, 946 (Alaska 1973) (“‘Abandoned property’ is property whose owner has manifested an intention to relinquish all title, possession, or claim to the property.”). A Municipal Ordinance and resulting policies could not overrule established Supreme Court case law relating to property rights, and the Municipality may not treat

property as abandoned simply because the owner has not yet removed it in the time the government has allotted. *See A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998).

If the Municipality intends to take action with respect to individuals' private property, whether homeless or not, whether legally situated or allegedly not, it must adopt a system for marking, packaging, and preserving the confiscated property for its rightful owner. The property owner must have an opportunity to locate and retrieve their confiscated possessions. Thus, following seizure, the Municipality would provide information relating to the process for claiming property. (Of note, San Francisco avoided being subject to an injunction in a suit brought by homeless persons in large part because of a policy that "property of value found in encampment or other public places is to be **bagged, tagged and held at a dispatch office for its owner within ninety days**." *Joyce v. City and County of San Francisco*, 846 F.Supp. 843, 864 (N.D. Cal. 1994), (emphasis added).) We would note that the Municipality applies this principle in other spheres. For instance, the Municipality stores potentially abandoned vehicles for 20 days to allow owners to reclaim them. AMC 15.20.040.

2. Freedom from Unreasonable Search or Seizure, Expectation of Privacy

All persons also benefit from constitutional protections against unreasonable search and seizure, along with the right to privacy and due process. For example, a California court granted injunctive relief against the City of Fresno, finding that the plaintiffs had established a likelihood of prevailing on the merits of the claim that property had been seized from homeless camps without due process. Similar cases have also resulted in favorable verdicts for homeless plaintiffs. *Justin v. City of Los Angeles*, No. CV0012352LGBAIX, 2000 WL 1808426, at *9-*11 (C.D. Cal. Dec. 5, 2000) (issuing a temporary restraining order against the city of Los Angeles as plaintiffs would likely succeed on claim that their property had been illegally seized by the city).

As stated in *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992), "the property of homeless individuals is due no less protection under the [F]ourth [A]mendment than that of the rest of society." Individuals camping on public property have a constitutionally cognizable expectation of privacy in their tents under the Fourth Amendment. *U.S. v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993).

A practice of seizing and destroying the "abandoned" possessions of homeless persons on public property or in camps is generally disapproved by federal courts. *Kincaid v. Fresno*, No. 1:06-CV-1445 OWW SMS, 2006 WL 3542732, at *38 (E.D. Cal. Dec. 8, 2006) ("Here, the process provided by the City is constitutionally inadequate, particularly in light of the fact that the City is seizing from homeless people the very necessities of life: shelter, medicine, clothing, identification documents, and personal effects of unique and sentimental value.") Such policies and practices violate the plaintiffs' right to be free from unreasonable searches and seizures.

Further, “Alaska’s search and seizure clause is stronger than the federal protection [afforded by] . . . the Fourth Amendment,” *Anchorage Police Dep’t Employees Ass’n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001),

The Municipality must not enact any ordinance that would abridge these rights.

3. Reasonable Notice and Opportunity to be Heard

Finally, the United States Supreme Court has many times held that “individuals whose property interests are at stake are entitled to ‘notice and an opportunity to be heard.’” *Dusenbery v. U.S.*, 534 U.S. 161, 167 (2002). The Court has stated that “the right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner.’” *Fuentes v. Shevin*, 407 U.S. 67, 72 (1972). In general, acceptable procedures will afford *some* balance of sufficient notice and a pre- or post-deprivation opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Additional due process rights are afforded under Article I, § 7 of the Alaska Constitution.

Thus, any ordinance enacted must provide clear and effective notice to homeless residents of the exact date and time period that a campsite will be cleared. And homeless campers must have sufficient opportunity to contest the break-up of their campsites and the seizure of their property. Any notice provided should clearly explain what violation is occurring, what the basis for breaking up the camp is, and provide a reasonable means for contesting the proposed demolition.

4. AO 2010-43 Lacks Any Provision for Required Safeguarding of Property

As a threshold matter, we note that the procedures outlined in AO 2010-43 do not provide any process for protection of individuals’ property while the issue of lawful presence or status of property as abandoned or not is being adjudicated. Such an absence places the Municipality of Anchorage in a unique position with regard to judicial decisions in this arena and renders any proposed scheme immediately constitutionally suspect. The entirety of our subsequent comments should be understood in light of this fact.

In the absence of property storage, the prevention of wrongful destruction of property under the proposed ordinance depends entirely on the accuracy of the notice and its actual receipt by the individual whose property is taken. Should the officers who provide the notice leave a defective notice (as has already happened) or should the officers mistakenly clear the camp before the assigned date, the property owner will have no recourse, since his property will already have been destroyed. Should the property owner not receive actual notice because the posting was destroyed by weather, torn down by a third party, or simply fell from its posting place, or if the camper arrived after the camp had already been posted, the property owner would not know that the camp was to be cleared. Property storage would prevent many of the harms caused by inevitable human errors.

5. Insufficient Notice: Section 1, 15.20.020(B)(15)(a.)

While we appreciate that the Municipality has changed its proposed notice period from 12 to 72 hours, and in the current proposal to five business days (page 1, line 34), in the absence of protections for property, this notice period remains constitutionally inadequate.

AO 2010-43 maintains the most concerning provision of the existing ordinance: it seeks to *declare* property to be “abandoned” when the only legally sanctioned method for property to become abandoned is for the owner of the property to demonstrate that she never intends to reclaim the property.

It appears as if the Municipality wishes to establish some period by which it might argue that – in the absence of efforts to relocate property in a posted area, or a request to contest the posting – it is reasonable to assume an “intention to abandon” the property at issue. While no bright line rule exists to establish when such an intention is evidenced, the ACLU suggests it would not be unreasonable to argue that inaction after 10 full business days, along with a second site posting are potentially indicia of property abandonment. (We note that often times, due to circumstances beyond their control, homeless individuals may not be able to retrieve their property during a 5 business day window.)

A notice period of 10 full business days is consistent with other municipal ordinances. For instance, the current and proposed ordinances describe public camping as a nuisance. Other public nuisances must be abated within 15 days of notice. AMC 15.20.120. The Municipal Code currently allows 15 days notice to those maintaining attractive nuisances dangerous to children, to those keeping a “swimming pool or other dangerous excavation in the earth, including but not limited to a gravel pit, kept, maintained or permitted to be in an uncovered, unprotected or otherwise dangerous or hazardous condition,” and to those discharging “wastewater, liquid waste, garbage or other putrescible waste . . . in such a way that the transmission of infective material may result thereby.” AMC 15.20.020.

While acknowledging that some camps may pose safety or health concerns, generally these risks should not be appreciably worse than other nuisances prohibited by the public nuisances ordinance. Further, the interest of an individual in keeping the materials that comprise her home and sole protection from the elements are much stronger than the interests of an individual in keeping his swimming pool or excavation uncovered. That fifteen days of notice are required for the abatement of most nuisances and a mere five business days are being considered for the destruction of the belongings of homeless camps would be notable to any reviewing judicial authority.

6. Exigency Not a Basis for Property Destruction

Again, we appreciate the significant changes which the Municipality has proposed with respect to the Section on Exceptions (page 3, lines 26 *et seq.*). By and large, these revised provisions adequately recognize important constitutional rights.

However, while exigent circumstances such as a serious risk to human life and safety could reasonably allow immediate abatement (page 3, lines 42 – 44), the wholesale disposal of *all* property under Code Chapter 7.25 (page 3, lines 46 – 47) is constitutionally unsound. Only that property which poses the threat is subject to abatement and destruction. Absent property safeguard procedures, any non-hazardous possessions remain subject to the constitutional protections outlined above.

This same reasoning applies to the proposed immediate abatement and property destruction proposed in subsection (D)(iv) at page 4, line 22.

7. Some Policy Considerations

While the problem of homelessness in Anchorage is both serious and complex, some facts which may inform Assembly debate on this matter include: the Anchorage rental housing market is both tight and expensive, showing a median monthly rental cost of \$900 and a 4.5% vacancy rate. Alaska Housing Finance Corporation, 2009 Alaska Annual Rental Market Survey. Small efficiency apartments – the first step up from homelessness – have a median monthly cost of \$740 and are similarly scarce. *Id.*

While some may characterize chronic homelessness as a choice, the number of homeless in Anchorage has grown from 1,653 in 2007, to 2,199 in 2008, to 2,952 in 2009, nearly doubling in two years. It seems reasonable to assume that the depressed economic conditions in the state and the high unemployment rate coupled with rental housing that is both expensive and hard-to-find – not choice – are significant causes of homelessness in Anchorage.

Camp sweeps do little to combat homelessness. Typically, sweeping these camps simply forces the homeless into another camp in another location in Anchorage. It is difficult to determine whether the camp sweeps deter the homeless from setting up camp and encourage them to seek shelter. In this regard, we would note one suggestion we had proposed to the Municipality, that would encourage involvement of social service agencies in outreach to the homeless when camps are posted. We would hope the Assembly would consider inclusion of language such as that following in the AO:

In order to encourage the transition of homeless individuals into housing, the Municipality shall, within 24 hours of providing initial notice consistent with subsection ___ of this ordinance, notify any designated social service agency,^[1] by written or electronic means, of:

^[1] See City of Portland, Oregon, Policy & Procedure 835.20 (requiring the notification of JOIN, a Portland-area social service agency, prior to posting notice at an illegal camp for removal)

- i. *the location of the camp;*
- 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.*

Between five (5) and ten (10) days prior to the scheduled removal of the camp, a representative of the Municipality shall conduct a second visit to the campsite, verify that the notices previously posted remain posted, and post new notices consistent with the requirements of subsection ___ in any location where previously posted notices have been removed or fallen down. The representative shall again provide oral notice consistent with the requirements of subsection ___ to anyone present in the camp at the time of the visit.^[2]

Conclusion

The ACLU acknowledges the serious challenges facing the Municipality and the Assembly in addressing the complex issue of chronic homelessness, and the progress made to date by the Administration.

We hope that the Assembly will recognize the narrow focus of our comments and the constitutional reasoning underlying our suggested revisions.

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^[2] In such a case as this, where there is no clear means of assurance that the intended recipient of the notice will actually receive the notice, the Municipality should take additional precautions to diminish the possibility that notices will be removed by other individuals or be knocked down by wind, rain, or snow. In a case where a police officer placed a sticker on a vehicle stating that it must be moved, then ordered the removal of the vehicle eleven days later, the sticker was judged to not be “reasonably calculated” to give notice to the car owner, in part because the officer could not be sure that the sticker had not been removed or fallen off. *Graff v. Nicholl*, 370 F.Supp. 974, 983-84 (N.D. Ill. 1974).

Thank you again for the opportunity to share our concerns. Please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

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