

Case Study: A Capital City's Approach to the Unsheltered Community

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Martin v. City of Boise

(9th Cir. 2018) 902 F.3d 1031, superseded by

Martin v. City of Boise (9th Cir. 2019) 920 F.3d 584

[amending opinion and denying petition for panel rehearing
and rehearing en banc]

Boise – Issue and Holding

Issue

“[W]hether the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to.” (*Martin*, 920 F.3d at 603.)

Holding

“[A]n ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors on public property, when no alternative shelter is available to them.” (*Boise*, 920 F.3d at 604.) “We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is ***practically available*** in any shelter.” (*Id.* at 618, emphasis added.)

Boise – Rationale

Rationale

In *Robinson v. State of California*, the Supreme Court held a statute criminalizing the “status” of narcotics addiction unconstitutional under the Eighth Amendment. (*Martin*, 920 F.3d at 615-16.)

In *Powell v. State of Texas*, a plurality of the Supreme Court distinguished and upheld a statute criminalizing public drunkenness, interpreting *Robinson* not to preclude statutes that criminalize “involuntary conduct.” (*Id.* at 616.)

Concurring in the judgment, Justice Byron White observed that it might well be impossible for an unhoused alcoholic to comply with the Texas statute, which, as applied to them, may be unconstitutional. (*Ibid.*)

Boise – Rationale (Cont.)

Rationale Continued

In *Martin*, the Ninth Circuit read Justice White’s concurrence in the judgment in *Powell* together with a four-justice dissent to extract a controlling principle “that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.” (*Martin*, 920 F.3d at 616, internal quotation marks and citation omitted.)

Boise – Limitations

Limitations

“Our holding is a narrow one. . . . ‘[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.’” (*Martin*, 920 F.3d at 617, citation omitted.)

“Naturally, our holding does not cover individuals who **do** have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can **never** criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying or sleeping outside at particular times or in particular locations might well be constitutionally permissible. (Internal citation omitted.) So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures.” (*Id.* at 617, n. 8, emphasis in original.)

Boise – Limitations (Cont.)

Denial of Petition for Panel Rehearing and Rehearing En Banc

“On the merits, the opinion holds only that municipal ordinance that criminalize sleeping, sitting, or lying in ***all*** public spaces, when ***no*** alternative sleeping space is available, violate the Eighth Amendment.”
(*Martin*, 920 F.3d at 589, emphasis in original, citation omitted.)

Boise – Cities' and Counties' Questions

Questions Raised by Seven Cities in Orange County

What is the jurisdictional level at which *Boise's* rule must be applied?

What sort of accommodations must a shelter provide to substitute for camping on public property?

Whether and under what circumstances, other than religious mandates, do a shelter's policies render it unavailable to a particular unhoused individual?

When must an unhoused individual have access to shelter for purposes of enforcement?

(See Brief for Seven Cities in Orange County as Amicus Curiae, pp. 4-10, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.)

Boise – Cities’ and Counties’ Questions (Cont.)

Questions Raised by 33 Cities and Counties

Is shelter space “practically available” if it does not accommodate pets? Voluminous personal possessions? A significant other or relative?

Is a shelter with only unpartitioned beds “practically available” to an unhoused individual with a psychological condition who declines such arrangements?

Can shelter in a neighboring city be considered to determine the sufficiency of shelter, particularly for a small jurisdiction?

What if property is owned by one municipality and the citation is issued in another?

What if a county clears an encampment on county-owned property located within a city?

(See Brief for Cal. State Assn. of Counties, et al., as Amicus Curiae, pp. 10-14, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.)

Boise's Progeny

Shipp v. Schaaf (N.D. Cal. Apr. 16, 2019) 379 F.Supp.3d 1033

Aitken v. City of Aberdeen (W.D. Wash. July 2, 2019) 393 F.Supp.3d 1075

Gomes v. County of Kauai (D. Hawaii Aug. 26, 2020) 481 F.Supp.3d 1104

Boise's Progeny Continued

Blain v. Cal. Dept. of Transportation (N.D. Cal. July 22, 2022) 616 F.Supp.3d 952

Wills v. City of Monterey (N.D. Cal. Aug. 1, 2022) 617 F.Supp.3d 1107

Johnson v. City of Grants Pass (9th Cir. 2022) 50 F.4th 787, superseded by
Johnson v. City of Grants Pass (9th Cir. 2023) 72 F.4th 868
[amending opinion and denying petition for rehearing en banc]

Shipp v. Schaaf

Issue

Whether the City of Oakland's temporary closure of an encampment for eight hours "to clean the site thoroughly" violates the Eighth Amendment. (See *Shipp*, 379 F.Supp.3d at 1035.)

Holding

Even assuming that plaintiffs face criminal sanction for failing to vacate the encampment, "remaining at a particular encampment on public property is not conduct protected by *Martin*, especially where the closure is temporary in nature." (*Id.* at 1037.)

Rationale

"The Ninth Circuit was clear: '[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.' (Internal citation omitted.) This is not a case where 'homeless plaintiffs do not have a single place where they can lawfully be' within the City." (*Ibid*, citation omitted.)

Aitken v. City of Aberdeen

Issue

Whether City of Aberdeen ordinances closing undeveloped, public property upon which approximately 100 people were camping, yet allowing them to camp upon public sidewalks outside the four-foot pedestrian access route required by the Americans with Disabilities Act, violate the Eighth Amendment. (See *Aitken*, 393 F.Supp.3d at 1078-81.)

Holding

“*Martin* does not limit the City’s ability to evict homeless individuals from a particular public place” (*Id.* at 1082.)

Rationale

“In keeping with *Martin*’s self-proclaimed restraint, courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization. *Miralle v. City of Oakland*, for example, held that Oakland could clear out a specific homeless encampment because ‘*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs’ option.’” (*Ibid*, citations omitted.)

Gomes v. County of Kauai

Issue

Whether a County of Kauai ordinance criminalizing the acts of camping in a county park without a permit, and constructing an unpermitted structure, violate the Eighth Amendment. (See *Gomes*, 481 F.Supp.3d at 1106.)

Holding

“[H]ad the County of Kauai ordinance criminalized sleeping at [the park], with or without a permit, such a restriction would not by itself violate the Eighth Amendment. Instead, *Martin* applies if the locality criminalizes the homeless sleeping on public property ‘on the false premise that they had a choice in the matter.’ (Internal citation omitted.) Here, all that is clear from the Complaint is that Plaintiffs could not sleep at one public park on Kauai.”
(*Id.* at 1109.)

Rationale

“Unlike the ordinance considered by *Martin*, which criminalized sleeping outside on public property *anywhere* in Boise, (internal citation omitted), [the County of Kauai ordinance] is limited to public parks, not public land.” (*Ibid.*)

Blain v. CalTrans

Issue

Whether, by posting notice on July 15, 2022, that on July 20, 2022, CalTrans would begin to clear out the Wood Street encampment in the City of Oakland and remove individuals, possessions, and structures, CalTrans violates the Eighth Amendment. (See *Blain*, 616 F.Supp.3d at 955.)

Holding

“Here, Caltrans solely seeks to prohibit the plaintiffs from living on a discrete property, so the concerns in *Martin* have not been shown to be present.” (*Id.* at 959.)

Rationale

“[T]he reason for [the *Martin*] holding is that prohibiting homeless people from sleeping in the entire city without providing shelter beds would be to criminalize something involuntary and status-based.” (*Ibid.*)

Wills v. City of Monterey

Issue

Whether City of Monterey ordinances which, taken together, criminalize camping overnight in a vehicle, tent or other structure, and obstructing any sidewalk at any time—though not sitting or lying on a commercial sidewalk overnight—when the City has insufficient shelter beds and no non-faith-based shelters for adults, violate the Eighth Amendment. (See *Wills*, 617 F.Supp.3d. at 1118-19.)

Holding

“The vast majority of individuals sleep during the evenings, not during daylight hours. The Court will not countenance that a city may constitutionally criminalize sleeping outdoors during the evenings so long as it provides some public space that is available during daytime hours. *Martin* cannot and does not stand for such a proposition.” (*Id.* at 1120-21.)

Rationale

“The key question under *Martin* . . . is whether the ordinances collectively criminalize sleeping ***anywhere*** in the City (particularly in the evening, the normal sleeping period for most people), or whether the ordinances merely criminalize sleeping in certain areas within the City.” (*Id.* at 1120.)

Johnson v. City of Grants Pass

Issue I

Whether the “involuntarily homeless” may sue a municipality as a class. (See *Johnson*, 72 F.4 at 885.)

Holding

“[E]ven accepting [a Grants Pass police] officer’s assessment that there were approximately fifty homeless persons in the City, the numerosity requirement is satisfied. . . . Plaintiffs’ claims present at least one question and answer common to the class: ‘whether [the City’s] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws . . . against involuntarily homeless individuals violates the Eighth Amendment of the Constitution.’ . . . Pursuant to the class definition, the class includes only **involuntarily** homeless persons. . . . The class representatives’ claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter.” (*Id.* at 886-88, emphasis in original.)

Rationale

“While . . . the *Martin* litigation was not a class action, nothing in that decision precluded class actions. . . . A member of a class may sue as a representative party if the member satisfies . . . four prerequisites: numerosity, commonality, typicality, and adequacy of representation.” (*Id.* at 885.)

Johnson v. City of Grants Pass (Cont.)

Issue II

Whether City of Grants Pass ordinances that impose civil fines can be challenged under the Eighth Amendment when the Cruel and Unusual Punishments Clause provides post-conviction protection in criminal proceedings. (See *Johnson*, 72 F.4th at 889.)

Holding

“A local government cannot avoid [the] ruling [in *Martin*] by issuing civil citations that, later, become criminal offenses. . . . The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances’ Eighth Amendment infirmity.” (*Id.* at 890.)

Rationale

“*Martin* held the Cruel and Unusual Punishments clause ‘prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.’” (*Ibid*, citation omitted.)

Johnson v. City of Grants Pass (Cont.)

Issue III

Whether *Martin* protects homeless persons from being cited under the City of Grants Pass anti-camping ordinance, which prohibits use of any bedding or similar protection from the elements. (See *Johnson*, 72 F.4th at 889.)

Holding

“The only plausible reading of *Martin* is that it applies to the act of ‘sleeping’ in public, including articles necessary to facilitate sleep. . . . The City’s position that it is entitled to enforce a complete prohibition on ‘bedding, sleeping bag, or other material used for bedding purposes’ is incorrect.” (*Id.* at 891.)

Rationale

“*Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. (Internal citation omitted.) *Martin* noted that citation as an example of the anti-camping ordinance being ‘enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements.’ (Internal citation omitted.) *Martin* deemed such enforcement unconstitutional. (Internal citation omitted.) It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit ‘the most rudimentary precautions’ a homeless person might take against the elements.” (*Ibid*, citation omitted.)

**City of Sacramento's Response to
Boise and its Progeny**

Protection of Critical Infrastructure and Wildfire Risk Areas Ordinance (Critical Infrastructure Ordinance)

Sacramento City Code Chapter 8.140

“The purpose of the ordinance is to mitigate the threat of fire and other potential causes of destruction and damage to, and interference with, critical infrastructure and wildfire risk areas and similarly sensitive areas, in order to protect the health, safety and welfare of the public, by authorizing the removal of persons and their personal property in, on, or near those areas.” (Staff Rpt. Re: City of Sac. Ord. No. 2020-0009, pp. 2-3.)

“The proposed ordinance is an exercise of the City’s authority to protect the public health, safety, and welfare as recognized by the Ninth Circuit The ordinance is geographically limited. Possible summary abatement under the ordinance does not apply to the entirety of the City. It is limited to real property upon which the presence of unauthorized personal property poses a heightened threat to the health and safety of residents. Encampments and associated personal property of unsheltered homeless persons would not be subject to such summary abatement on the remainder of property in the City.” (*Id.* at p.4.)

Critical Infrastructure Ordinance

Camping and storing personal property is prohibited:

- On, within 25 feet of, and within 25 feet of a pedestrian or vehicular entrance to, or exit from, critical infrastructure;
- On portions of a public right-of-way that, under local, state, or federal law, must remain free of obstruction to first responders;
- Within hollow sidewalks; and
- In wildfire risk areas.

(Sac. City Code, § 8.140.030, subs. A-B.)

Critical Infrastructure Ordinance

Except for violations that pose an imminent threat to public health or safety, which the City may abate immediately, the City may abate any violation upon 24 hours' notice. (Sac. City Code, § 8.140.040, subs. A.)

Should any person willfully, prevent, delay, resist, obstruct, or otherwise interfere with the City's abatement, they are subject to enforcement action. (See Sac. City Code, §§ 8.140.050-060.)

Critical Infrastructure Ordinance

“Critical infrastructure” is defined as “[l]evees; or [r]eal property, whether privately or publicly owned, as approved by resolution of the city council, that the city manager designates as being so vital and integral to the operation or functioning of the city that its damage, incapacity, disruption, or destruction would have a debilitating impact on the public health, safety, or welfare.” (Sac. City Code, § 8.140.020.)

The City Manager has designated as critical infrastructure—and the City Council has adopted the City Manager’s designation as critical infrastructure of—parcels or facilities that house vulnerable populations, government operations, utilities, healthcare providers, public safety and transportation infrastructure, and public gathering spaces. (City of Sac. Res. Nos. 2021-0227, 2022-0322, 2023-0252.)

Emergency Shelter and Enforcement Act

City of Sacramento Measure O (November 8, 2022)

- Directs the City Manager to authorize new emergency shelter spaces equal to at least 12% of the estimated unsheltered homeless individuals in the City. After that, authorization of additional spaces is contingent upon 60% utilization of then-existing spaces. The City Manager also must perform regular outreach to homeless persons;
- Provides that, once the City Manager has authorized the requisite number of spaces, a person may be cited for unlawful camping if a space is available and offered to that person, but that person rejects the offer and refuses to relocate;
- Makes it unlawful and a public nuisance to do the following in an encampment (four or more persons camping together or within 50 feet of each other, without permitted power, water, or bathrooms): camp, occupy camp facilities, or use camp paraphernalia; or accumulate or fail to properly dispose of waste;
- Creates a mechanism for residents harmed by unlawful camping or storage on City-owned property to commence abatement proceedings against the City and recover costs and attorney's fees if the City is ordered to abate a nuisance; and
- Directs the City Manager to fund Measure O first from external resources, then with up to 50% of unobligated General Fund year-end resources, not to exceed \$5 million.

Emergency Shelter and Enforcement Act

Measure O City Of Sacramento Emergency Shelter And Enforcement Act Of 2022 (Vote for 1)

	Total	
Times Cast	146,258 / 273,414	53.49%
Undervotes	11,814	
Overvotes	24	

Candidate	Party	Total	
YES		70,016	52.09%
NO		64,404	47.91%
Total Votes		134,420	

Source: Sacramento County Registrar of Voters, <https://eresults.saccounty.net/>

Balance: Rights and Needs of the Unhoused and Community Health and Safety

Homelessness in the United States

1.2 Estimates of Homelessness by State

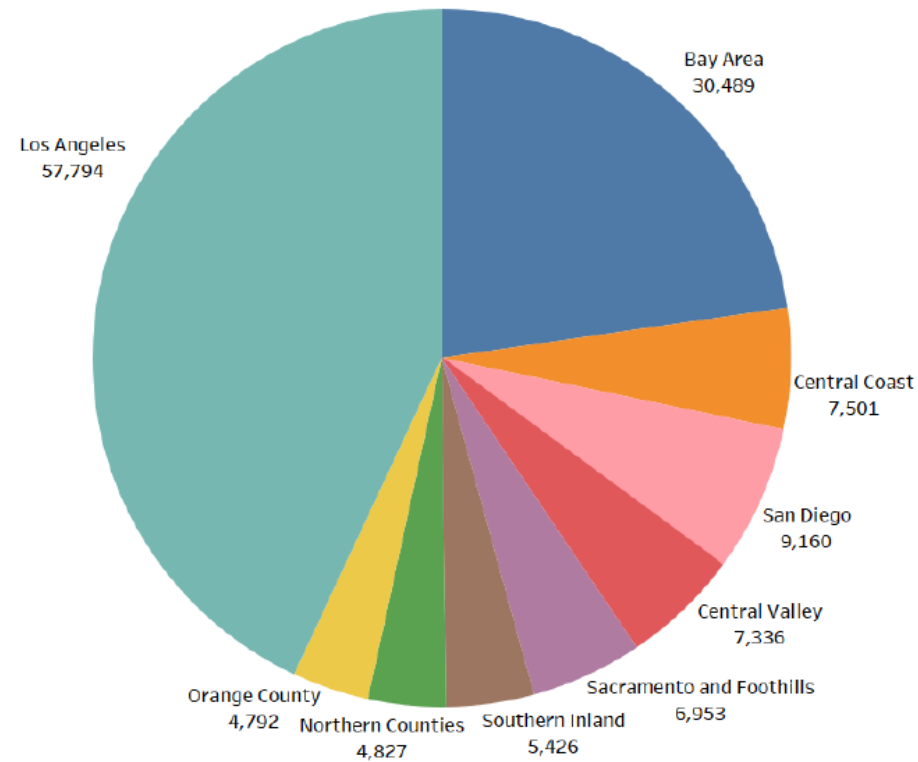
Exhibit 1-6: Estimates of People Experiencing Homelessness by State, 2022



Source: The 2022 Annual Homelessness Assessment Report to Congress, U.S. Department of Housing and Urban Development

Homelessness in the State of California

California's 134,278 Homeless by Region¹



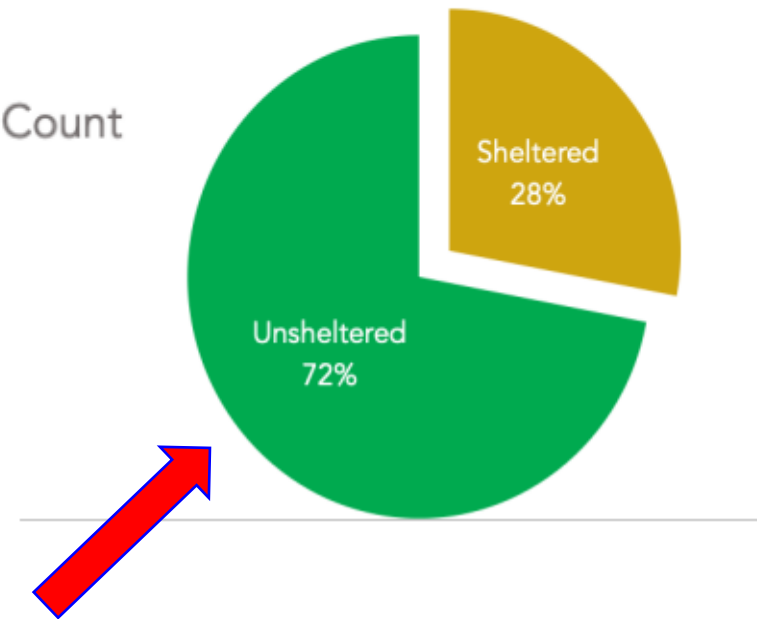
Source: Homelessness Task Force Report (2018), Institute for Local Government

Homelessness in the County of Sacramento

Figure 1 | Sheltered vs. Unsheltered Individuals in the 2022 Homeless Count

Results of the 2022 Homeless Count

6,664 Unsheltered
2,614 Sheltered
9,278 Total Individuals



Source: Homelessness in Sacramento (2022) Sacramento State University, Division of Social Work and the Center for Health Practice

Homelessness in the County of Sacramento

Table 1 | Sleeping Locations

Sheltered Locations	2,614	28%
Emergency Shelters	1,105	12%
Motel /Hotel programs*	874	9%
Transitional Housing	635	7%
Unsheltered Locations	6,664	72%
Tents	2,809	30%
Vehicles	1,782	19%
Other Locations**	2,073	22%
Total Nightly Homless	9,278	100%

*this includes Project Roomkey & other efforts to shelter people in "non-congregate shelters"

**sleeping with tarp, under bridge, abandoned building, city warming center

Source: Homelessness in Sacramento (2022) Sacramento State University, Division of Social Work and the Center for Health Practice

Citywide Homelessness Response Protocol

- A Citywide effort to balance the rights and needs of PEH versus Public Health and safety issues arising from encampments. **Most importantly, the Protocols do the following:**
- Create an Integrated Management Team to coordinate departments and with partners:
 - Sacramento Police Department, Sacramento Fire Department, Park Rangers, and Code Enforcement Division, County teams, etc.
- Set objective criteria for:
 - Outreach efforts;
 - Encampment management;
 - Compliance with state law and local ordinances.
- Implementing three types of coordinated responses:
 - General Response;
 - Rapid Response;
 - Coordinated Response.



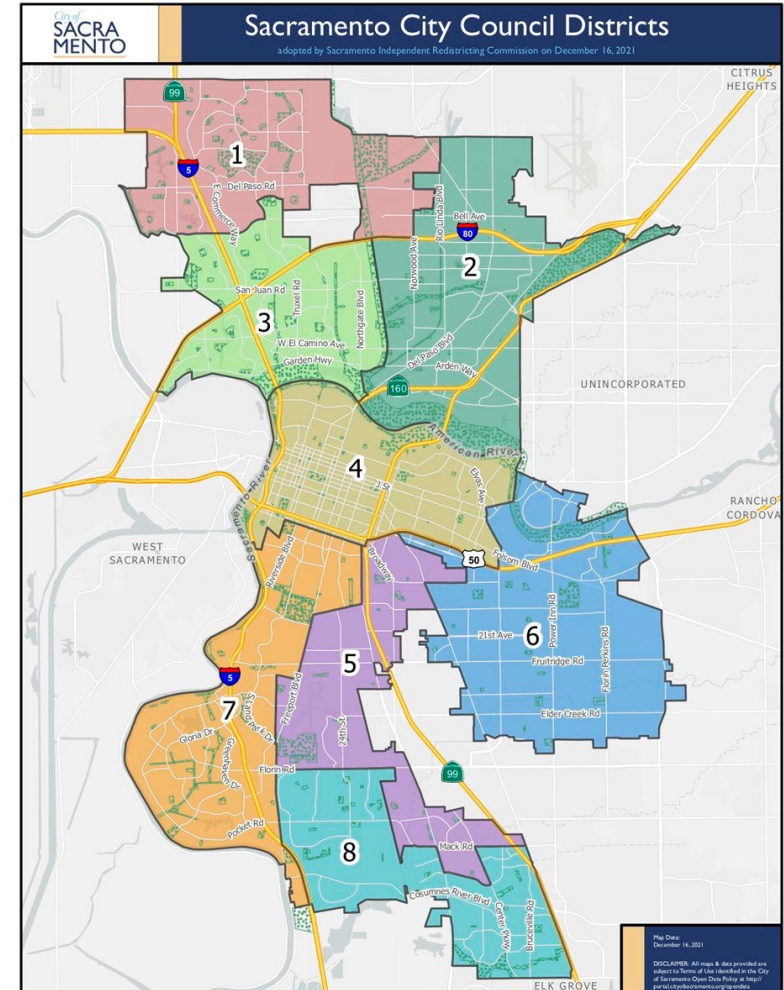
Types of Encampment Locations

1. Property owned or leased by the City;
2. Public right of way or City easement;
3. Located within the City Limits, on property owned or leased by another public entity, if the City has signed a written agreement authorizing the City to conduct outreach and abatement
 1. (e.g., ARFCD, RD 1000).



Citywide Protocols Set Priority Levels

- Level 1 – High Priority
- Level 2 – Moderate Priority
- Level 3 – Low Priority



Level 1 – High Priority

- An encampment adjacent or blocking access to, an essential location; or
- An encampment where there is a public health and safety risk that necessitates urgent relocation of the unhoused.
- An encampment in violation of state law or City ordinance.



- **Encampments:**
 - Adjacent to a school or along a route that children must take to arrive at the school;
 - Obstructing sidewalks;
 - Posing an imminent threat of fire.
 - Located within Cr levees, threatening structural integrity of critical infrastructure.
 - Encampments posing an imminent danger to Critical Infrastructure: public utilities; levees; transportation infrastructure; government buildings.
- Encampments otherwise:
 - posing an imminent threat to public health and safety;
 - involving a disproportionate number of documented community concerns or complaints.

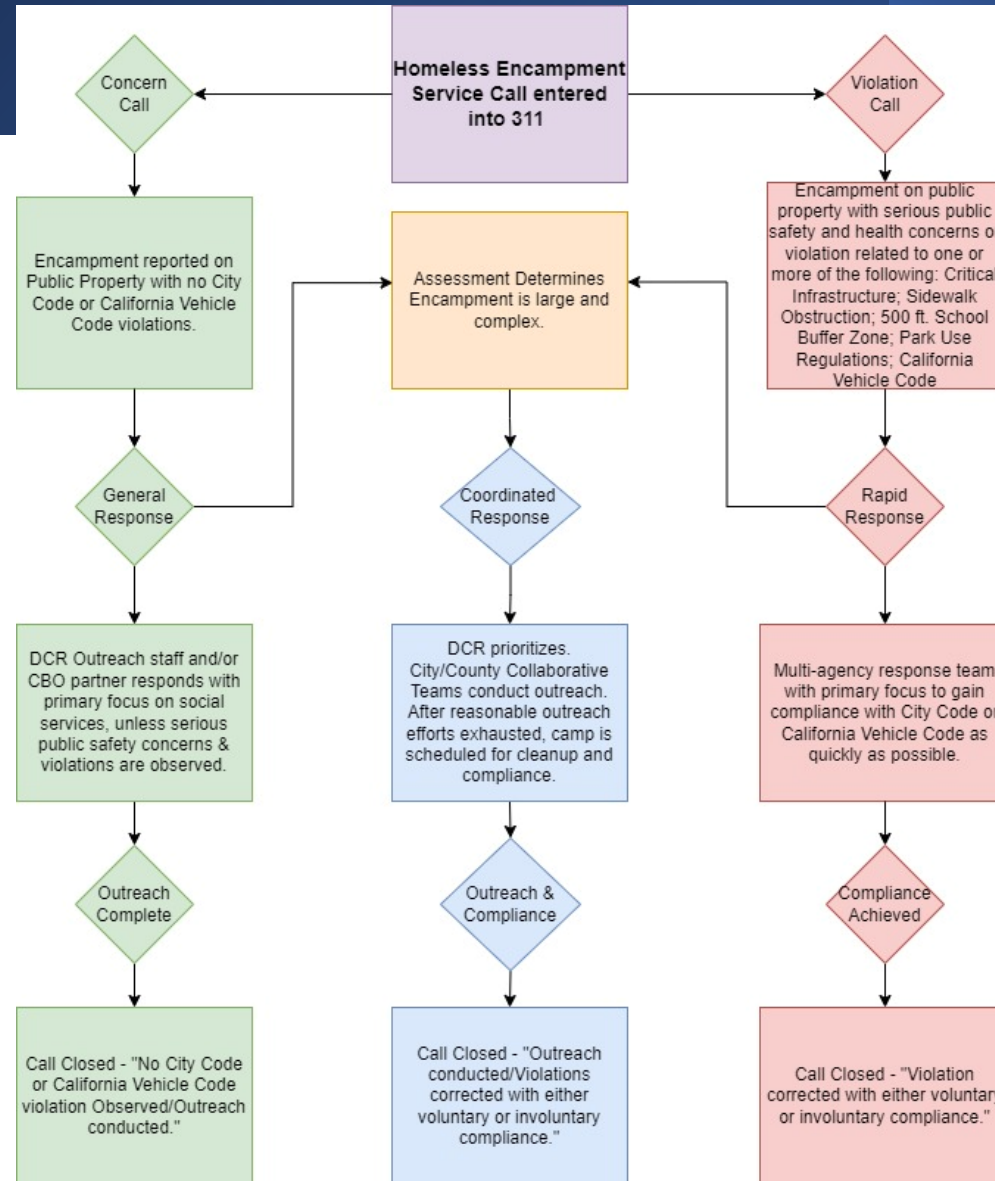
Level 2 – Moderate Priority

A Level 2 encampment does not require immediate relocation of the unhoused, but involves sustained increasing evidence of threats to public health and safety.



- Encampments with excessive trash and debris—where previous mitigation attempts such as repeated trash cleanups have failed.
- Encampments blocking or impeding traffic.
- Encampments involving an accumulation of needles, drug paraphernalia, feces, or other biohazards
- Encampments posing a significant increase in the presence vectors such as rodents, or insect infestations.
- Encampments involving an excessive accumulation of personal property, other than life necessities.

Steps to Relocate Encampments



Sidewalk Ordinance

“Sidewalk’ means the portion of the public right-of-way – including any landscaped areas – between a building or other property and the roadway, set apart for pedestrians to travel by curbs, barriers, markings, or other delineation.” (Sac. City Code, § 12.24.010.)



Sidewalk Ordinance

Sac. City Code, § 12.24.020(B)

Sidewalk Obstruction

1. Leaves less than four feet of width for the accommodation of pedestrians or vehicles;
2. Blocks the lawful passage of a vehicle; or
3. Requires another person or driver of a vehicle to take evasive action to avoid physical contact.



Sidewalk Ordinance

Sac. City Code, § 12.24.020(B)

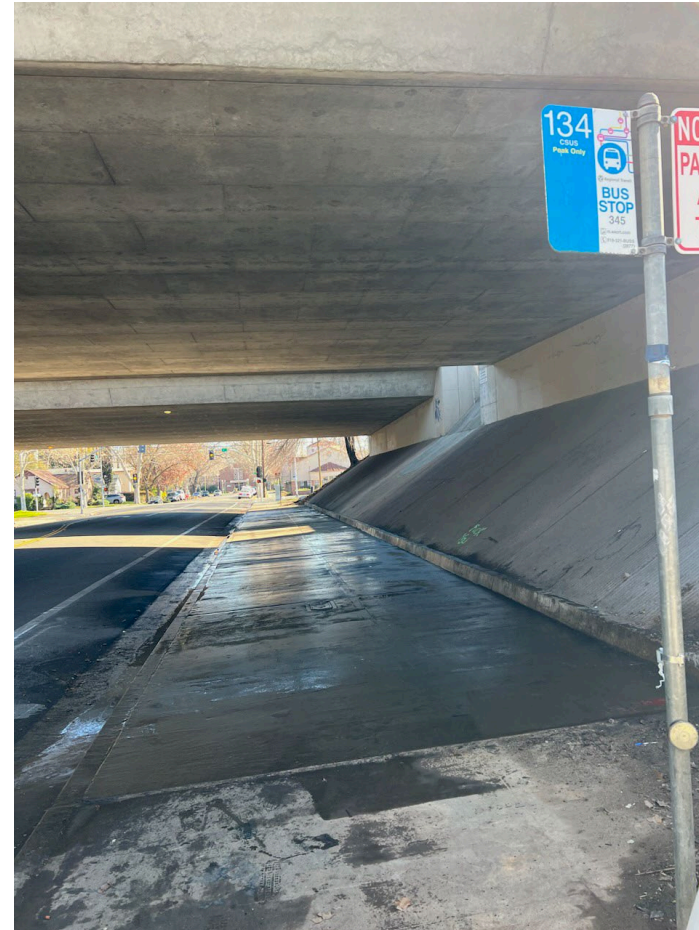
Requirement for Violation

“No person, after first being ordered to move by the city manager and being offered a location to place or store the person’s possessions that is not in violation of the provisions of this code”

- This **does not** require the City to store the property; but
- This **does** require that the person be given the option to move the possessions to a location that does not violate SCC Chapter 12.24.



Before and After



Novel Approaches to Address Homelessness

Department of Community Response

On July 1, 2021, the City of Sacramento created the Department of Community Response (DCR) as a stand-alone department. DCR consists of two primary divisions.

The Homeless Services Division handles numerous agreements that provide services and programming for families and individuals experiencing homelessness.

The Community Outreach Division deploys social workers and outreach specialists who perform outreach to households experiencing homelessness and connect them to services.

Since its creation through June 30, 2023, DCR has assisted 5,607 people in moving off the streets of Sacramento – many of which moved on to positive temporary or transitional housing, or permanent housing. Additionally, as of the beginning of this current year (2023), the Community Outreach Division has responded to 19,125 calls for service.

City of Sacramento and County of Sacramento Partnership Agreement

On December 6, 2022, the City of Sacramento and the County of Sacramento entered into a Partnership Agreement. The key provisions of the agreement are as follows:

- 5-year term with annual updates.
- Outlines roles and responsibilities of each agency.
- Addresses key provisions of the Emergency Shelter and Enforcement Act of 2022.
- Demonstrates shared commitment to the Sacramento Local Homeless Action Plan (LHAP) and Coordinated Access System.
- Sets forth provisions for accountability and measuring progress with reports in open session to both City Council and Board of Supervisors every 6 months.

In furtherance of the Partnership Agreement, the City of Sacramento and County of Sacramento established Collaboration Protocols. The key provisions of the protocols are as follows:

- Training and data sharing.
- Creation of Outreach Engagement Teams.
- Coordination of shelter and respite services.
- Planning and accountability.

Are JPA's the Future?

Effective July 10, 2023, AB 129 has made substantive changes to the Homeless Housing, Assistance and Prevention (HHAP) program (Health & Safety Code § 50216 et seq.). In particular, Health and Safety Code section 50233 sets forth a “regionally coordinated homeless action plan” for HHAP Round 5 eligibility.

AB 1086 (McCarty, Hoover, and Nguyen) seeks to authorize the County of Sacramento and the cities of Sacramento, Rancho Cordova, Elk Grove, Citrus Heights, and Folsom to form a joint powers authority (JPA) to address homelessness.

Thank you!

Questions?