Policy and Legal Considerations in Serving the Unsheltered

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Challenges Facing California Cities in the Wake of *Martin v. City of Boise* and its Progeny, *LA Alliance for Human Rights v. City of Los Angeles*, and the COVID-19 Pandemic

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Reducing homelessness and the impacts of encampments on public property pose great challenges for California cities and the attorneys who advise them. This paper discusses how important cases have shaped issues related to homelessness and cities' responses through legislation and litigation. Additionally, the COVID-19 pandemic has compounded the issues cities already faced, adding new and emergent challenges to homelessness.

I. Public Camping: What Federal Courts Have Found Cities Must Do and Mustn't Do.

A. Navigating Case Law and its Open Questions.

1. Martin v. City of Boise

In recent years, federal courts in California have expressed no reluctance admonishing public agencies as to what they must do, and mustn't do, with respect to encampments occupied by persons experiencing homelessness on public property. These same courts have been much less forthcoming with intimations, much less express guidance, as to how public agencies may effectuate their purported obligations or strike a balance between the needs of unhoused persons and the community at large.

Three years after the Ninth Circuit Court of Appeals published its opinion, the case name *Martin v. City of Boise* echoes in halls of government throughout the circuit, likely nowhere more so than in California, and thus, requires no lengthy recitation here. Indeed, a refresher of the merits suffices. The central question at issue in *Boise* is whether an ordinance that prohibits sleeping outside, as applied to persons experiencing homelessness with no access to alternative shelter, violates the Eighth Amendment to the United States Constitution. (*Martin v. City of Boise* (9th Cir. 2018) 902 F.3d 1031, 1046, superseded by *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 [denying petition for panel rehearing and rehearing en banc].) The Ninth Circuit held in the affirmative. (*Ibid.*) The Court's line of reasoning is as follows.

The Eighth Amendment places substantive limits upon what government may criminalize. (*Ibid*, citing *Ingraham v. Wright* (1977) 430 U.S. 651, 667.) In *Robinson v. State of California*, the Supreme Court held a California statute criminalizing the "status" of narcotics addiction unconstitutional under the Eighth Amendment. (*Boise, supra*, at 1047, citing *Robinson v. State of California* (1962) 370 U.S. 660.) Distinguishing and upholding a Texas statute criminalizing public drunkenness, a plurality of the Supreme Court in *Powell v. State of Texas* interpreted *Robinson* not to preclude statutes that criminalize "involuntary conduct." (*Boise, supra*, at 1047, citing *Powell v. State of Texas* (1968) 392 U.S. 514, 533.) Yet, Justice Byron White, concurring only in the judgment, 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. (*Boise, supra*, at 1047, citing *Powell, supra*, at 551.) Reading Justice White's concurrence in the judgment together with a four-justice dissent, the *Boise* Court extracted from *Powell* 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." (*Boise, supra*, at 1048 [internal quotation marks omitted].)

In *Boise*, the Ninth Circuit opined that the "conduct at issue here is involuntary and inseparable from status – they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying or sleeping." (*Boise, supra*, at 1048, quoting *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, 1136, vacated by *Jones v. City of Los Angeles* (9th Cir. 2007) 505 F.3d 1006 [internal quotation marks omitted].) Consequently, the Court held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." (*Ibid.*) That is, "'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number

of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public." (*Boise, supra*, at 1048, quoting *Jones, supra*, at 1138.) In its concluding remarks, the Court imposed a further requirement—that alternative sleeping space in any shelter must be "practically available." (*Boise, supra*, at 1049.)

2. Boise*'s Limitations*

The Ninth Circuit characterized its holding in *Boise* as "a narrow one." (*Boise, supra*, at 1048.) Sure enough, by its own terms, *Boise* applies only to the issuance of criminal penalties for sitting, sleeping, or lying outside to persons experiencing homelessness who cannot obtain shelter; and it does not apply to the issuance of penalties—criminal or otherwise—for unlawfully sitting, sleeping, or lying on private property. (*Ibid.*)

Moreover, the Court qualified its holding, expressly stating that it was not suggesting "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." (*Boise, supra*, at 1048, n. 8, citing *Jones, supra*, at 1123 [emphasis in original].)

Concurring in the Court's denial of the City of Boise's petition for panel rehearing and rehearing en banc, Judge Marsha Berzon, author of the panel opinion, reiterated in emphatic terms the "limited nature of the opinion." (*Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584, 589 [denying petition for panel rehearing and rehearing en banc].) Indeed, "the opinion holds only that municipal ordinances that criminalize sleeping, sitting or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment." (*Ibid,* citing *Boise, supra,* 902 F.3d at 1035 [emphasis in original].)

The panel opinion and concurrence in the denial of petition for panel rehearing or rehearing en banc suggest two paths to enforcement of an "unlawful camping" ordinance: first, a municipality might lawfully enforce such an ordinance throughout its jurisdiction so long as it first makes available "shelter" to its unhoused population, or, second, that it might lawfully enforce such an ordinance that does not apply to "all public spaces," but rather, leaves "alternative sleeping space" available, even outdoors.

3. Questions remain

Notwithstanding its self-described "narrow" holding, the Ninth Circuit's opinion in *Boise* left many observers in a quandary. Thus, it is not surprising that, in support of the City of Boise's petition to the United States Supreme Court for writ of certiorari to the Court of Appeals, stakeholders including advocacy organizations, business associations, cities and counties, individuals, neighborhood groups, labor unions, nonprofit organizations, and states filed briefs as amici curiae. Several, fervent questions left unanswered by the Ninth Circuit in *Boise* are perhaps best articulated in these amicus briefs.

In their amicus brief, seven cities located in Orange County, California, recite a litany of questions that *Boise* left unanswered. (See Brief for Seven Cities in Orange County as Amicus Curiae, pp. 4-17, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.) They ask: what does it mean for shelter to be "available?" Where must the shelter be located? What kind of shelter must be available, and what accommodations must it offer? Whether and under what circumstances do a shelter's policies render it unavailable for a person experiencing homelessness? When must a person experiencing homelessness have access to shelter? How must shelter availability be measured? (*Ibid.*)

In their amicus brief, MaryRose Courtney and the Ketchum-Downtown YMCA agree that "[a]mbiguties in the Ninth Circuit decision abound." (Brief for MaryRose Courtney and Ketchum-Downtown YMCA as Amici Curiae, p. 4, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.) They elaborate, "the opinion leaves ambiguous who is considered homeless and what counts as appropriate shelter. As a result, there is no clarity as to how much housing a jurisdiction must build before it will be permitted to regulate encampments to provide for the safety of both homeless people and residents." (*Id.* at 16.) And, "[a]lthough requiring the jurisdiction to provide beds for all their homeless, the court did not define what constitutes the relevant 'jurisdiction.'" (*Ibid.*)

In its amicus brief, the City of Los Angeles contends not only with the foregoing questions, but also with *Boise*'s "sweeping language" suggesting "that a local government cannot prohibit any conduct that arises from a condition a person is 'powerless to change,' or that is an 'unavoidable' result of being human." (Brief for City of Los Angeles as Amicus Curiae, p. 17, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674 [citation omitted].) The City of Los Angeles asks: does *Boise*'s language mean that a local government must allow a homeless individual to store food in the public right of way and cook with an open flame? What about urination and defecation in public? (*Id.* at 18.)

In a one-sentence memorandum, the Supreme Court rejected pleas for clarity from the City of Boise and amici curiae: "[p]etition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied." (*City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.) In so doing, the Court left *Boise*'s ambiguity unresolved and open questions unanswered for stakeholders to resolve before lower courts.

4. Boise*'s Progeny*

Despite numerous challenges and many more threatened actions, litigation over the past three years has produced just three, published federal court orders in the Ninth Circuit—only one of which was issued by a federal court seated in California—all of which only scratch the surface of *Boise*'s ambiguity and do little to answer the greater questions posed above.

In *Shipp v. Schaff*, two unhoused residents of Oakland, California, filed suit against the city after receiving notice that its Department of Public Works would "temporarily close the encampment" they occupied on one of two days, for approximately eight hours, "to clean the site thoroughly." (*Shipp v. Schaff* (N.D. Cal. Apr. 16, 2019) 379 F. Supp. 3d 1033, 1035.) The notice they received advised that property left behind would be removed and stored, except for unsafe or hazardous property, which would be discarded immediately. (*Ibid.*)

The United States District Court for the Northern District of California found that "[*Boise*'s] holding does not extend to the situation here." (*Id.* at 1046.) First, the Court observed that "the City's decision to require Plaintiffs to temporarily vacate their encampment does not, by itself, implicate any criminal sanctions that would trigger Eighth Amendment protections." (*Ibid.*) More importantly, quoting *Boise*'s eighth footnote, the Court found that, "even assuming (as Plaintiffs do) that [the City enforces the temporary closure via citations or arrests], remaining at a particular encampment on public property is not conduct protected by [*Boise*], especially where the closure is temporary in nature." (*Ibid.*) Indeed, "[t]his is not a case where the 'homeless plaintiffs do not have a single place where they can lawfully be within the City.'" (*Ibid*, quoting *Pottinger v. City of Miami* (S.D. Fla. Nov. 16, 1992) 810 F. Supp. 1551, 1565.) Consequently, the Court denied Plaintiff's motion for preliminary injunction under the Eighth Amendment. (*Shipp*, *supra*, at 1039.)

In *Aitken v. City of Aberdeen*, unhoused occupants of an unimproved parcel owned by the City of Aberdeen, Washington, known as River Camp, filed suit against the city after it proposed an "Eviction Ordinance" that would effectuate their removal from River Camp, and expanded its "Anti-Camping Ordinance" in a manner that would punish camping on public property with a civil infraction, except when shelter is unavailable, in which case camping would be allowed on portions of any public right-of-way not expressly reserved for vehicular or pedestrian travel. (*Aitken v. City of Aberdeen* (W.D. Wash. July 2, 2019) 393 F. Supp. 3d 1075, 1078-79.)

The United States District Court for the Western District of Washington first observed that other "courts have been reluctant to stretch [*Boise*] beyond its context . . . ," citing *Miralle v. City of Oakland* for the proposition that a city may "clear out a specific homeless encampment because '[*Boise*] does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.'" (*Id.* at 1081-82, quoting *Miralle v. City of Oakland* (N.D. Cal. Nov. 28, 2018, No. 18-cv-06823-HSG) 2018 WL 6199929, at *2; also citing *Le Van Hung v. Schaff* (N.D. Cal Apr. 23, 2019, No. 19-cv-01436-CRB) 2019 WL 1779584, at *5.) Here, too, the Court held that "[*Boise*] does not limit the City's ability to evict homeless individuals from particular public places . . . ." (*Aitken, supra*, at 1082.) Consequently, the Court denied Plaintiff's motion for a temporary restraining order enjoining enforcement of the "Eviction Ordinance." (*Id.* at 1086.)

Next, the Court observed that other "[c]ourts have also limited [*Boise*] to situations involving criminal sanctions . . . ," citing *Butcher v. City of Marysville* for the proposition that a city may evict homeless occupants without implicating the Eighth Amendment because it "does not extend beyond the criminal process." (*Aitken, supra,* at 1082, quoting *Butcher v. City of Marysville* (E.D. Cal Feb. 25, 2019, No. 2:18-cv-02765-KAM-CKD) 2019 WL 918203, at *1-2; also citing *Shipp, supra,* at 1033.) In *Aitken,* however, the Court granted "a brief stay of

enforcement" of Aberdeen's "Anti-Camping Ordinance," in large part "to determine whether [*Boise*'s] rationale concerning criminal sanctions extends to the civil penalties imposed by the Anti-Camping Ordinance." (*Aitken, supra*, at 1082.) Consequently, the Court granted Plaintiff's motion for a temporary restraining order enjoining enforcement of the "Anti-Camping Ordinance." (*Id.* at 1086.) Approximately two months later, in a minute order and without further analysis, the Court vacated its order enjoining enforcement of the Anti-Camping Ordinance. The parties settled and the case was dismissed six weeks later.

Finally, in *Gomes v. County of Kauai*, unhoused occupants of a county park, Salt Pond Beach Park, filed suit against the county after they were cited under the Kauai County Code on multiple occasions for illegal camping and constructing an illegal structure, even though the County of Kauai has only one homeless shelter with a maximum capacity of 19 occupants, and more than 500 persons experiencing homelessness countywide. (*Gomes v. County of Kauai* (D. Hawaii Aug. 26, 2020) 481 F. Supp. 3d 1104, 1106.)

Quoting *Aitken, supra*, the United States District Court for the District of Hawaii observed that "[*Boise*] does not limit the [c]ity's ability to evict homeless individuals from particular public places." [Citation omitted] [internal quotation marks omitted.] Nor does it 'establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.'" (*Id.* at 1109, quoting *Miralle, supra*, 2018 WL 6199929, at *2.) Here, the Court found that, even if "the County of Kauai ordinance criminalized sleeping at Salt Pond Beach Park, with or without a permit, such a restriction would not by itself violate the Eighth Amendment." (*Gomes, supra*, at 1109.) That is because, "[u]nlike the ordinance considered by [*Boise*], which criminalized sleeping outside on public property *anywhere* in Boise [citation omitted], [the County of Kauai ordinance] is limited

to public parks, not public land." (*Ibid.*) Consequently, the Court granted the County's motion to dismiss, albeit with leave to amend. (*Ibid.*)

B. The City of Sacramento's Response.

In California's capital city, the Sacramento City Council adopted an ordinance on February 25, 2020, entitled, "Protection of Critical Infrastructure and Wildfire Risk Areas." (City of Sac. Ord. No. 2020-0009.) Citing at least 1,009 fires associated with encampments occupied by persons experiencing homelessness over a six-month period in 2019 and ensuing damage to one Department of Utilities (DOU) facility, impeded access to another DOU facility and to the Sacramento Water Treatment Plant, and damage to levees related to such encampments, city staff's report explains that "[t]he 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.)

By its terms, the ordinance identifies as critical infrastructure levees and any other real property or facility that the city manager designates, and that the city council approves by resolution, "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." (See Sac. City Code, 8.140.020.) After a months-long assessment of real property and facilities as well as consultation with subject matter experts and stakeholders, the city manager designated as critical infrastructure additional parcels and facilities that house vulnerable populations, government operations, utilities, healthcare providers, public safety and transportation infrastructure, and public gathering spaces. (Mem. from City Manager Howard

Chan to Mayor and City Council Members, July 20, 2021.) The city manager's designation of critical infrastructure is Attachment 1 hereto. In July 2021, the Sacramento City Council adopted the city manager's designation. (City of Sac. Res. No. 2021-0227.)

In general terms, the ordinance prohibits camping and storing personal property (1) on, within 25 feet of, and within 25 feet of a pedestrian or vehicular entrance to, or exit from, critical infrastructure, (2) on portions of a public right-of-way that, under local, state, or federal law, must remain free of obstruction to first responders, (3) within hollow sidewalks, and (4) in wildfire risk areas. (See Sac. City Code, § 8.140.030, subs. A-B.) The ordinance provides that, except for violations that pose an imminent threat to public health or safety, which the city may abate immediately, the city may abate the foregoing violations upon 24 hours' notice. (Sac. City Code, § 8.140.040, sub. 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.) The Protection of Critical Infrastructure and Wildfire Risk Areas ordinance is Attachment 2 hereto.

As city staff's report explains, "[t]he 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." (Staff Rpt. Re: City of Sac. Ord. No. 2020-0009, p. 4.)

C. Welfare and Institutions Code section 17000 and its Applicability to Cities.

Welfare and Institutions Code section 17000 provides, "Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Section 17000 requires counties "to provide indigent residents with emergency and medically necessary care." (*Fuchino v. Edwards-Buckley* (2011) 196 Cal.App.4th 1128, 1134.) However, section 17000 does not require counties "to satisfy all unmet needs," and it does not "mandate universal health care." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1014.) "The Legislature has eliminated any requirement that counties provide the same quality of health care to residents who cannot afford to pay as that available to nonindigent individuals receiving health care services in private facilities." (*Ibid.*) Instead, counties need only provide "subsistence medical services" or "medical services necessary for the treatment of acute life-and-limb-threatening conditions and emergency medical services." (*Id.* at 1014-15.)

In *LA Alliance for Human Rights v. City of Los Angeles*, plaintiffs sued the City of Los Angeles and County of Los Angeles over homelessness in a downtown neighborhood referred to as Skid Row. (*LA Alliance for Human Rights, et al. v. City of Los Angeles, et al.* (C.D. Cal. Apr. 20, 2021, No. LA CV 20-02291-DOC-(KESx)) 2021 WL 1546235.) Plaintiffs brought 14 causes of action, including, in part, violation of mandatory duty under section 17000, inverse condemnation, waste of public funds, violations of the California Environmental Quality Act, the California Disabled Persons Act, and the Americans with Disabilities Act, as well as Due Process and Equal Protection claims.

On April 12, 2021, Plaintiff sought a preliminary injunction, partially seeking to place

homeless individuals in shelter by October 2021. In a sweeping order, United States District Judge David O. Carter issued a preliminary injunction ordering city and county officials to take extensive action to mitigate the effects of those experiencing homelessness and to house homeless people living in Skid Row by October. As part of the ruling, Judge Carter ordered that Mayor Garcetti place $1 billion in an escrow account and explain why he had not issued an emergency declaration, that the City Controller create a report of all land available to house homeless individuals and that all sales and transfers of over 14,000 City properties cease until the report is finished; that, within 90 days, the City and County provide shelter immediately to all unaccompanied women and children living in Skid Row, in 120 days, to all families, and, within 180 days, to the general population of Skid Row; and that the City and County split the cost of providing operational services equally (*Id.* at *62.)

In a particularly small part of his 110-page order, Judge Carter found that, although Plaintiffs did not bring a section 17000 cause of action against the City of Los Angeles, the mandates of that section nevertheless apply to cities, reasoning that "the City, on many occasions, has decided to use vast swaths of [funds received from the state and federal government for homelessness] to provide services to the homeless." (*Id.* at *51.) The court further stated that, "under the aegis of local, state, and federal initiatives, the City and County together have become jointly responsible for fulfilling the mandate at least as it pertains to confronting the crisis of homelessness." (*Ibid.*) The Court then concluded that "the most reasonable interpretation of § 17000—the interpretation most in step with modern partnerships and funding arrangements between the City and County—is that it applies not only to counties alone, but to cities and counties when they undertake a joint venture directed to the goals of § 17000, such as a coordinated effort to alleviate homelessness in their jurisdictions." (*Ibid.*)

Defendants appealed this order to the Ninth Circuit on several grounds. Relevant to this discussion, the League of California Cities filed an amicus brief narrowly arguing the Court wrongly applied section 17000 to cities. Notably, Plaintiffs did not bring a section 17000 cause of action against the City of Los Angeles; yet, the Court sua sponte extended this claim to the City. First, amicus argues that basic statutory interpretation of section 17000 does not contemplate cities, as it applies to counties only. Next, amicus cites to the California Supreme Court case of *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1104, which outright rejected an argument that section 17000's mandate apply to cities. *Tobe*'s progeny has upheld this principle in various California court rulings. Despite acknowledging *Tobe*'s precedence in his order, Judge Carter overruled it, citing examples of city and county collaboration in addressing homelessness. Finally, amicus argues that the district court's order oversimplified the housing process, leading to broad implications that Judge Carter did not consider.

On July 7, 2021, Ninth Circuit Judges John B. Owens, Jacqueline Nguyen, and Michelle Friedland heard oral argument. Judge Owens, in response to a city attorney's statement that Judge Carter's order was "judicial overreach," signaled sympathy for the district court, stating, "[y]ou could also, I think, call it judicial frustration." The Ninth Circuit has yet to issue a ruling on the appeal.

II. COVID-19 Public Health Orders Compound Federal Court Rulings.

A. County of Sacramento Orders and the City of Sacramento's Response.

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency posed by the threat of COVID-19 in the State of California. On March 11, 2020, the World Health Organization characterized the COVID-19 outbreak a pandemic. The following day, Governor Newsom issued Executive Order N-25-20, providing authority for local officials to issue guidance

limiting, or recommending limitations on, attendance at public gatherings and conferences, and ordering residents to heed orders of state and local health officials. On March 13, 2020, the City of Sacramento declared a local emergency, which, among other things, directed the City Manager to spend up to $250,000 to purchase and distribute emergency sanitation and cleaning supplies and handwashing stations to facilities that provide services to the persons experiencing homeless and encampments.

On March 19, 2020, the Sacramento County Health Officer Issued a Stay-at-Home Order directing all persons to stay at home except for the performance of Essential Activities or Essential Governmental Functions, or for the operation of Essential Businesses.

On or around March 22, 2020, the Centers for Disease Control and Prevention published interim guidance on unsheltered homelessness and COVID-19, including considerations intended to inform the response of local and state health departments, homelessness service systems, housing authorities, emergency planners, healthcare facilities, and homeless outreach services. For homeless encampments, the CDC recommended allowing people who are living unsheltered to remain where they are if housing options are not available, and to work with community coalition members to improve sanitation in encampments and to ensure nearby restroom facilities have functional water taps, hand hygiene materials, bath tissue, and remain open 24 hours per day. Where toilets or handwashing facilities were unavailable nearby, the CDC recommended assistance providing access to portable latrines with handwashing facilities and hand sanitizer for encampments occupied by more than 10 people.

On May 22, 2020, the Sacramento County Health Officer, Dr. Olivia Kasirye, issued an order stating, in relevant part, at paragraph 7, the following:

> CDC guidance for those experiencing homelessness outside of shelters is to be strictly followed . . . . [A]llow people who are living unsheltered . . . in

> encampments to remain where they are, unless the people living in those locations are provided with a) real-time access to individual rooms or housing units for households, with appropriate accommodations including for disabilities, and b) a clear plan to safely transport those households.
>
> Do no cite, clear, or relocate encampments, or cars, RV's, and trailers used as shelter during community spread of COVID-19 . . . .
>
> Exceptions are encampments that pose an imminent and significant public safety hazard, such as a large excavated area of a levee.

On June 12, 2020, Dr. Kasirye issued a subsequent order, superseding all prior orders, and revising paragraph 7 relating to those experiencing homelessness, stating, in relevant part, the following:

> CDC guidance for those experiencing homelessness outside of shelters **should be** followed . . . . [L]ocal governments should allow people who are living unsheltered . . . . in encampments **on public property** to remain where they are, unless the people . . . . are provided with a) real-time access to individual rooms or housing units for households, with appropriate accommodations including for disabilities, and b) a clear plan to safely transport those households . . . .
>
> Exceptions are encampments that pose an imminent and significant public safety hazard **or adversely impact critical infrastructure as designated by local, state, or federal law, regulations, or orders**

B. Sacramento Police Department's COVID-19 Unsheltered Response Policy.

In response to the COVID-19 pandemic, the Sacramento Police Department (SPD) issued an Unsheltered Response Policy that placed responsibility for responding to homelessness camping issues with the SPD Impact Team, including direction to evaluate each situation based on current CDC guidelines, educate the unsheltered community about current COVID-19 guidelines, and facilitate connection to services. Consistent with CDC guidance, the SPD Impact Team's policy was to leave all persons camping on public property where they were and not move them unless they were blocking a sidewalk, roadway or alley that is regularly used by the public, or needed for emergency access, or where an posed an imminent and significant public safety

hazard or adverse impact on critical infrastructure.

Where homeless campers were located on private property, the SPD Impact Team encouraged property owners and managers to utilize non-emergency means of contact to report complaints and work with the campers to coordinate removal of their personal belongings. Where necessary, SPD issued notices of trespass at the request of an owner whose property campers declined to vacate voluntarily. The SPD Impact Team's overriding focus during the COVID-19 pandemic was to facilitate connection to services and removal of excessive property or junk and debris.

C. Legal Challenges Regarding Homelessness Arising During the Pandemic.

Alleging that the City of Sacramento and County of Sacramento violated a mandatory duty to provide medical care by failing to provide housing, because homelessness causes and exacerbates health problems, and that "basic shelter" is a medical necessity, persons experiencing homelessness and their advocates filed a petition for writ of mandate in Sacramento County Superior Court. In general terms, the Court rejected their argument because case law has, notwithstanding *LA Alliance for Human Rights v. City of Los Angeles*, established that cities and counties have no mandatory duty to provide permanent shelter. The Ninth Circuit unequivocally denounced this very theory in *Boise, supra*, 920 F.3d 584. Indeed, the Ninth Circuit states, "Our holding is a narrow one. Like the *Jones* panel, 'we 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.'" (*Id*. at 617.) While identifying housing for all residents remains a laudable goal, local agencies are not legally bound to do so.

In the City of San Diego, two pandemic-related lawsuits have been filed related to homelessness. First, in June 2020, a group of persons experiencing homelessness and disabled

individuals filed a lawsuit against the City of San Diego, the County of San Diego, the San Diego Housing Commission, and the Regional Task Force on the Homeless for failure to provide them hotel or motel rooms. In response to the spreading pandemic, the defendant entities explained, first, that homeless shelter bed configurations did not allow proper social distancing, and thus, were problematic considering the CDC guidance, and second, that hotel and motel rooms would require procurement to provide individuals with a need to quarantine and isolate a place to safely do so. To overcome these issues, the defendant entities took a two-pronged approach.

The defendant entities moved three shelters into the San Diego Convention Center, where the exhibit halls provided for the CDC-recommended six feet between beds. Homeless individuals not residing in shelters were encouraged to utilize the Convention Center, and many did. The defendant entities consolidated many services and programs into the Convention Center, which included an intake area staffed with County nurses and provided for routine surveillance, COVID-19 testing, on-site facilities, and other services. The Convention Center model was largely successful, and many toured the facility to replicate its success in other cities. Additionally, the County of San Diego procured hotel rooms for use by those who required a place to isolate or quarantine. Some of these rooms were designated "high risk rooms" and were given exclusively to homeless individuals who were considered "high risk" under the CDC guidance. The majority of procured rooms, however, were allotted for those who tested positive for COVID-19 or were exposed and required isolation.

Plaintiffs in *Price, et al. v. City of San Diego, et al.*, 2020-00019535, filed suit alleging that the defendant entities, including the City, had a ministerial duty under Code of Civil Procedure section 1085 (writ of ordinary mandate) to provide them with hotel and motel rooms and that the entities violated the California Disabled Persons Act (CDPA), the Fair Employment and Housing

Act, the Unruh Civil Rights Act, and discriminated in state-funded programs (Cal. Gov. Code, § 11135). In a recent demurrer ruling, the San Diego County Superior Court dismissed the writ and CDPA causes of action without leave to amend, finding no ministerial duty to provide hotel rooms, and that the CDPA does not apply to public entities. The Court sustained the City's demurrer with respect to the FEHA and Unruh causes of action with leave to amend, and allowed the Government Code section 11135 claim to proceed.

Throughout the lawsuit, the City has maintained that the County procured the hotel rooms; thus, the City had no control over them. Plaintiffs' arguments incorporating the City relate to the City of San Diego's Homeless Outreach Team (HOT), which includes San Diego Police Department officers and County public health nurses who conduct daily outreach and make contact with persons experiencing homelessness in an effort to provide them with shelter and other services. Plaintiffs argue that the HOT is an "access point" to the hotel rooms, providing "linkage" to the hotel room program.

These arguments exemplify one legal issue that can arise when city and county entities work collaboratively to combat issues surrounding homelessness. When one entity supports access to another entity's programs or services, do legal duties of the latter apply to the former? Even news conferences and press releases can blur the legal responsibilities of each entity when a mayor announces a county program, or when a supervisor discusses a city program.

In a second, related lawsuit, Plaintiff, Fifth Ave Landing (FAL), which owns a marina, parking lot, and grassy event space adjacent to the San Diego Convention Center, filed suit against the City of San Diego under Civil Code section 3479, asserting that the City created a nuisance when it began utilizing the Convention Center as a homeless shelter, as the increased presence of persons experiencing homelessness disturbed FAL's property with alleged criminal activity. FAL

hired a security guard during this time, claims that the City failed to control those residing at the Convention Center and failed to protect FAL's property from criminal activity.

On demurrer, the City argued, first, that the City could not have caused FAL's harm based on the intervening criminal acts of third parties. Second, the City argued that it was immune under Government Code sections 820.2, 845, and 846, as its decision to use the Convention Center as a shelter was discretionary and that it had no duty to provide police protection to FAL's property, or make arrests. The City also argued immunity under Civil Code section 3482, asserting that the nuisance was expressly authorized in the Memorandum of Agreement establishing the Convention Center shelter. The demurrer was heard on August 27, 2021. The Court found discretionary immunity applied, but nevertheless granted leave to amend. The day the amended complaint was due, Plaintiff dismissed the case.

III. Conclusion

While the challenge that California jurisdictions face in the wake of *Boise* and the COVID-19 pandemic are numerous and complex, cities continue innovating to both reduce homelessness and mitigate adverse impacts of encampments on public property. In so doing, even in litigation, they provide guidance to other municipalities regarding their options and obligations with respect to persons experiencing homelessness.

ATTM. 1

ORDINANCE NO. 2020-0009

Adopted by the Sacramento City Council

February 25, 2020

An Ordinance Adding Chapter 8.140 to the Sacramento City Code, Relating to Protection of Critical Infrastructure and Wildfire Risk Areas

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Chapter 8.140 is hereby added to the Sacramento City Code to read as follows:

Chapter 8.140 PROTECTION OF CRITICAL INFRASTRUCTURE AND WILDFIRE RISK AREAS

8.140.010 Findings and purpose.

The City Council finds as follows: (1) a principal threat to the public health, safety, and welfare is the potential destruction of, damage to, or interference with, infrastructure that is critical to the provision of public services such as law enforcement, fire prevention, transportation, and utilities including communication, water, and waste disposal; (2) destruction of, damage to, or interference with, critical infrastructure is caused by fire, contamination, restricting access, or other causes; and (3) destruction of, damage to, or interference with, critical infrastructure is often caused by persons whose activities are not permitted or authorized in, on, or near critical infrastructure.

The purpose of this chapter to mitigate the threat of fire and other potential causes of destruction and damage to and interference with, critical infrastructure, 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 critical infrastructure.

8.140.020 Definitions.

When used in this chapter, the following words and phrases have the following meanings:

"Camp" has the same meaning as in section 12.52.020.

"Camp facilities" has the same meaning as in section 12.52.020.

"Camp paraphernalia" has the same meaning as in section 12.52.020.

"Critical infrastructure" means each of the following:

1. Levees; or

2. Real property or a facility, 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.

Critical infrastructure may include, but is not limited to, government buildings, such as fire stations, police stations, jails, or courthouses; hospitals; structures, such as antennas, bridges, roads, train tracks, drainage systems, or levees; or systems, such as computer networks, public utilities, electrical wires, natural gas pipes, telecommunication centers, or water sources.

"Debris" has the same meaning as in section 13.10.010.

"Facility" means a building, structure, equipment, system, or asset.

"Fire prevention official" means the fire chief, a deputy fire chief, the fire marshal, or a fire prevention officer.

"Garbage" has the same meaning as in section 13.10.010.

"Hazardous waste" has the same meaning as in California Public Resources Code section 40141.

"Hollow sidewalk" means a sidewalk that has been determined to be a hollow sidewalk in "Raised Streets & Hollow Sidewalks" survey report of July 20, 2009, prepared by Page & Turnbull, Inc. for the City of Sacramento.

"Infectious waste" has the same meaning as in California Code of Regulations, title 14, section 17225.36.

"Solid waste" has the same meaning as in section 13.10.010.

"Wildfire risk area" has the same meaning as in California Code of Regulations, title 24, part 9, section 202.

8.140.030 Prohibited activities.

A. It is unlawful and a public nuisance for any person to camp, occupy camp facilities, or use camp paraphernalia at the following locations:

1. Critical infrastructure;

2. Within 25 feet of critical infrastructure;

3. Within 25 feet of a vehicular or pedestrian entrance or exit of critical infrastructure;

4. On those portions of a right-of-way that are required by local, state, or federal law to be free of obstruction to first responders, including but not limited to members of law-enforcement, fire-prevention, or emergency-medical-services agencies;

5. Within a hollow sidewalk; or

6. Wildfire risk area.

B. It is unlawful and a public nuisance for any person to store personal property, including camp facilities and camp paraphernalia, in the following locations without the written consent of the owner, except as otherwise provided by resolution of the city council:

1. Critical infrastructure;

2. Within 25 feet of critical infrastructure;

3. Within 25 feet of a vehicular or pedestrian entrance or exit of critical infrastructure;

4. On those portions of a right-of-way that are required by local, state, or federal law to be free of obstruction to first responders, including but not limited to members of law-enforcement, fire-prevention, or emergency-medical-services agencies;

5. Within a hollow sidewalk; or

6. Wildfire risk area.

C. It is not intended by this section to prohibit overnight camping on private residential property by friends or family of the property owner, so long as the owner consents and the overnight camping is limited to not more than one consecutive night.

D. Nothing in this chapter is intended to prohibit or make unlawful the activities of an owner of private property or other lawful user of private property that are normally associated with and incidental to the lawful and authorized use of private property for residential or other purposes; and nothing is intended to prohibit or make unlawful the activities of a property owner or other lawful user if such activities are expressly authorized by the Planning and Development Code or other laws, ordinances, and regulations.

8.140.040 Summary abatement.

A. Any violation of section 8.140.030 may be abated by the city upon 24 hours of prior notice; but a violation of section 8.140.030 may be abated immediately by the city without prior notice, if the violation poses an imminent threat to public health or safety.

B. Abatement pursuant to subsection A may include, but is not limited to, removal of camp facilities, camp paraphernalia, personal property, garbage, hazardous waste, infectious waste, junk, or debris; and securing the perimeter of the property with fencing, gates, or barricades to prevent further occurrences of the nuisance activity.

C. Regardless of the city's authority to conduct abatement pursuant to this section, every owner, occupant, or lessee of real property, and every holder of any interest in real property, is required to maintain the property in compliance with local, state, and federal law; and is liable for violations thereof.

D. The cost of abatement, including all administrative costs of any action taken hereunder, may be assessed against the subject premises as a lien, made a personal obligation of the owner, or both, in accordance with procedures in article VIII of chapter 8.04.

8.140.050 Interference with summary abatement.

No person shall willfully prevent, delay, resist, obstruct, or otherwise interfere with a city official, employee, contractor, or volunteer in their execution of an abatement

pursuant to this chapter.

8.140.060 Violation—Penalty.

A. In addition to any other remedy allowed by law, any person who violates a provision of this chapter is subject to criminal sanctions, civil actions, and administrative penalties pursuant to chapter 1.28.

B. Violations of this chapter are hereby declared to be a public nuisance.

C. Any person who violates a provision of this chapter is liable for civil penalties of not less than $250 or more than $25,000 for each day the violation continues.

D. All remedies prescribed under this chapter are cumulative and the election of one or more remedies does not bar the city from the pursuit of any other remedy to enforce this chapter.

Adopted by the City of Sacramento City Council on February 25, 2020, by the following vote:

Ayes: Members Ashby, Carr, Guerra, Hansen, Harris, Jennings, Schenirer, Warren and Mayor Steinberg

Noes: None

Abstain: None

Absent: None

Attest:

/s/_____
Mindy Cuppy, City Clerk

The presence of an electronic signature certifies that the foregoing is a true and correct copy as approved by the Sacramento City Council.

Passed for Publication: Not applicable
Published: To be published in its entirety
Effective: March 26, 2020

ATTM. 2

City of SACRAMENTO
Office of the City Manager

Howard Chan
City Manager

City Hall
915 I Street, Fifth Floor
Sacramento, CA 95814-2604
916-808-5704

MEMORANDUM

DATE: July 20, 2021

TO: Mayor and City Council Members

FROM: Howard Chan, City Manager

SUBJECT: **CRITICAL INFRASTRUCTURE SUMMARY**

On February 25, 2020, the City Council adopted the Protection of Critical Infrastructure and Wildfire Risk Areas Ordinance (No. 2020-0009), which added Chapter 8.140 to the Sacramento City Code. "critical infrastructure may include, but is not limited to, government buildings, such as fire stations, police stations, jails, or courthouses; hospitals; structures, such as antennas, bridges, roads, train tracks, drainage systems, or levees; or systems, such as computer networks, public utilities, electrical wires, natural gas pipes, telecommunication centers, or water sources." (Sac. City Code, 8.140.020) The Ordinance recognizes the necessity for the City of Sacramento to ensure the operational readiness and continuity of essential services from certain real property and facilities during all-hazards.

The designation of a parcel or facility as "critical infrastructure" is a thoughtful and deliberate process. The City Manager designates a location as critical infrastructure, but the location becomes critical infrastructure for the purposes of Chapter 8.140 only after approval by the City Council.

Pursuant to direction received by City Council, the City's Director of Emergency Management brought together subject-matter experts and stakeholders to recommend, justify, and validate key parcels and facilities in the City to be designated as critical infrastructure by the City Manager. Stakeholders and key leaders included both internal city staff and external partnering agencies, notably:

- Office of Emergency Management
- Department of Utilities
- Sacramento Fire Marshal
- Sacramento Police
- Public Works
- Information Technology
- Sacramento Municipal Utility District (SMUD)

Each component of potential critical infrastructure was additionally validated, based on guidance from publicly available reference materials of the United States Department of Homeland Security and the Federal Emergency Management Agency regarding federally designated critical infrastructure. The result is the attached Critical Infrastructure List, which was developed over several months as city leaders and subject-matter experts conducted a comprehensive assessment of facilities and property parcels that serve critical purpose to preserve public safety.

Therefore, as City Manager, I designate any and all locations on the Critical Infrastructure List as "critical infrastructure" for the purposes of Chapter 8.140 of the Sacramento City Code. The locations on the Critical Infrastructure List are so vital and integral to the operation or functioning of the City of Sacramento that their damage, incapacity, disruption, or destruction would have a debilitating impact on the public health, safety, or welfare.

2021 City of Sacramento Critical Infrastructure List

Vulnerable Population Sites	Government Operations	Utilities	Healthcare	Public Safety	Transportation	Gathering Areas
Adult Residential (parcel)	City Hall (facility)	Air Release Station (parcel)	General Acute Care Hospital (parcel)	Fire Stations (parcel)	Airport (parcel)	Sports Arenas (facility)
Child Care (parcel)	Official Fueling Stations (parcel)	Booster Station (parcel)	Medical Health Facility (parcel)	Jail (facility)	Bus Terminal (facility)	College/University (facility)
Social Rehabilitation Facility (parcel)	City Fleet Maintenance (parcel)	Dewatering Station (parcel)		Police Stations (parcel)	Light Rail Stop (facility)	Convention Center (facility)
Navigation Centers (parcel)	City Corporate Yards (parcel)	Storage Facility (parcel)		Fiber and Communication Network (facility)	Train Station (facility)	Community Centers (facility)
	Community Centers (facility)	Sump Station (parcel)		Evacuation Shelters (facility)	Light Rail Tracks	
		Treatment Plant (parcel)			Rail Lines	
		Turnout (parcel)			Bridges (facility)	
		Drainage Canals (parcel)				
		Levees (parcel)				
		Potable Wells (parcel)				
		Rivers/Creeks				
		SMUD Power Infrastructure (Facilities)				
		PG&E Gasline Infrastructure				

External County Data
Internal City Data
Other External Data

Critical Infrastructure List and Justifications	10/15/2020	
Air Release Station	Air release valves are appurtenances located on water transmission mains throughout the City. A portion of the piping of an air release valve is above ground. There are over 650 air release valves located throughout Sacramento within City right-of-way.	These facilities are located within City ROW or easements.
Booster Station	One potable water booster pump station exists within the City of Sacramento at 4299 Astoria Street. It maintains the pressure in a historically lower pressure area of the city.	4299 Astoria Street
Dewatering station	Relief wells are installed to prevent levee failures. The relief wells provide a controlled discharge point for under-seepage during high river levels. Without relief wells, the under seepage may cause weakness in the levee and failure of the levee. Relief wells act like valves to relieve the water pressure that may otherwise undermine the levee.	The wells are in located within levee's which are within City R/W. Some wells may be in other agencies R/W therefore DOU will have an operation and maintenance agreement with those agencies.
Government Operations	This includes key locations where governance is conducted, and support to the community is administrered from. This oft includes administration buildings where plans, procedures, and fees may be processed; additionally, this can include locations that host community services, such as: sheltering, childcare, youth programs, etc.	These facilities can be on a parcel or part of another critical facility
Storage Facility	The City currently has 16 water storage facilities: 11 distributed storage tanks located throughout the City, and five clear wells located at the water treatment plants (three at the SRWTP and two at the FWTP). One additional storage facility is under construction and will be in service in 2021. The storage facilities, or reservoirs, store water and pump water into the transmission main system for distribution into neighborhoods, mostly during periods of high demands.	The storage facilities, or reservoirs, are facilities and are located at 14 different sites.
Sump Station	Wastewater and drainage is collected in underground pipes and flows to a collection point at a lower elevation which is a sump station. At the sump station wastewater is pumped to a force main pipe that conveys wastewater to a treatment plant for treatment. At the drainage sump, the water is pumped to a force main pipe that conveys the water to creeks and rivers. These facilities are essential to prevent flooding during rain events and to reduce sewer outflows.	Sump are facilities and are located on city owned parcels
Treatment Plant	The City treats surface water diverted from the Sacramento and American Rivers through the Sacramento River Water Treatment Plant and the E.A. Fairbairn Water Treatment Plant. These two water treatment plants provides 80% of the annual potable water supply for the City of Sacramento and wholesale customers.	The WTPs are facilities and are located at 301 Water Street and 7501 College Town Drive.
Turnout	The City maintains seven metered wholesale/wheeling connections to other adjacent agencies and 21 additional emergency interties. The turnouts are located throughout Sacramento within City right-of-way. The turnouts/interties are used for emergency water supply.	These facilities are located within City ROW or easements.
Drainage Canals	Drainage canals and channels are critical conveyance elements that deliver rainfall runoff from urban areas to receiving waterways. Channels can have multiple pump stations pumping flows into them. It's critical to maintain channel side slope integrity to prevent erosive action. Failure in channels/canals can lead to significant flooding for large areas of the city.	these facilities are located over long stretches and pass through multiple neighborhoods
Levees	Levees protect the Sacramento area from flooding due to high river or creek/stream levels caused by rainfall events that produce high volumes of runoff. Without the ability to maintain these facilities the flood risk to Sacramento residents is increased.	Most levees around Sacramento have flood control easements along rivers/creeks/streams. Levees are not typically on a single parcel or within the right-of-way
Potable Wells	The City currently is permitted to operate 28 groundwater wells. Twenty-six (26) are located in the northern portion of the City, north of the American River and two are located south of the American River. Two additional wells are currently under construction south of the American River. Groundwater wells provides 20% of the annual potable water supply for the City of Sacramento and wholesale customers.	Potable wells are facilities and are located at 28 city owned parcels throughout Sacramento.
Rivers/Creeks	Rivers and Creeks are important elements of the City's drainage system as they pass storm flows from distant areas through our city as well as collect drainage from city neighborhoods. The City is protected from high flows in rivers and streams by the levee systems that border these water coarses. Maintaining levees per guidelines is mandated by regulating State and Federal agencies. Access for monitoring during high flows is critical. Failure of this asset can lead to catastrophic flooding in our City	Rivers and Creeks traverse through or are adjacent to much of our City.
SMUD Power Infrastructure	SMUD provides electrical service to DOU Water, Wastewater, and Drainage facilities. Loss of SMUD service may result in potential flooding, sanitary sewer overflows, and no water production and treatment.	These facilities are typically on a parcel associated with a critical facility
PG&E Gas line infrastructure	PG&E provides gas service to DOU Water, Wastewater, and Drainage facilities. Loss of PG&E service may result in potential flooding, sanitary sewer overflows, and no water production and treatment.	These facilities are typically on a parcel associated with a critical facility

Fire Stations	Fire Stations provide critical services for fire and emergency medical responses in our city and community. If there is a disruption of service, due to the fire department's inability to access or leave from the location, or damage to the station, the city and community would suffer due to delays in emergency response.	These facilities are typically on a parcel associated with a critical facility
Police Stations and Facilities	Police Stations and Facilities are critical to the safety of the community as they house dispatch communication, peace officers, their vehicles, and equipment. If those facilities are damaged or prevented from being used, it would negative impact the Police Departments ability to provide community services, thereby threatening the safety of our City.	These facilities are typically on a parcel associated with a critical facility
Gathering Areas	Gathering areas across the City often consolidate the largest number of persons in a confined area, which have historically been ideal targets for extremist and terror attacks. Gathering areas are also often ideal locations to conduct mass care and shelter for evacuees given the range of onsite support to host large groups of people.	Typically just the facility is critical and the parcel consists of parking lots and/or additional business enterprise.

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