



## City Council Agenda Item

**City Council Meeting Date:** August 15, 2023

**TO:** Honorable Mayor and City Councilmembers

**FROM:** Jeff Malawy, City Attorney  
Jmalawy@awattorneys.com

Kevin Martin, Chief of Police  
kmartin@ci.lompoc.ca.us

Christie Alarcon, Community Development Director  
c\_alarcon@ci.lompoc.ca.us

**SUBJECT:** Discussion of Legal and Practical Constraints on Addressing Homelessness

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### **Recommendation:**

Staff recommends the City Council receive report from City staff; provide direction to staff if desired.

### **Background:**

At the City Council meeting on June 20, 2023, the City Council requested an informational presentation on the constraints on addressing homelessness faced by the City, including legal constraints and staffing and operational needs.

At the broadest level, addressing homelessness means addressing at least three separate but related issues: (1) addressing the impacts of homelessness on homeless individuals, (2) addressing the causes of homelessness to prevent people from becoming homeless, and (3) addressing the impacts of homelessness on a community in which homeless people live. Each of these issues is complicated and none afford easy solutions. However, one way to move toward solutions is to clarify the constraints that are currently placed on the City in order to ensure that any proposed solutions will be both legal and practically feasible. That is the goal of this staff report.

### **Discussion:**

#### **Legal Constraints on Addressing Homelessness**

There are very few, if any, legal constraints on addressing the impacts of homelessness on homeless individuals or addressing the causes of homelessness. Cities may pass

laws to provide for the welfare of the public and use public money and resources to support programs that benefit the public.

This would include funding and supporting programs aimed at helping homeless people to find and obtain homes, jobs, food, services, etc. It would also include funding and supporting programs to provide affordable housing, job training, shelters, food pantries, subsidized public transportation, etc.

Most of these programs and services, and funding, are traditionally the responsibility of the County and State rather than cities, and also are provided by nonprofit organizations. The more serious constraints on addressing these issues are usually practical and financial, not legal.

There are, however, several legal constraints on actions that cities can take to address the impacts of homelessness on the community in which homeless people live.

### **1. Cities May Not Punish Homelessness or the Unavoidable Consequences of Being Homeless**

Being homeless is not a crime and cities cannot punish people merely for being homeless.<sup>1</sup>

Furthermore, a federal court in the case of *Martin v. Boise* held that cities “may not criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets or other property open to the public when no sleeping space is practically available in any shelter.”<sup>2</sup> A subsequent case has clarified that sleeping includes using items that are necessary to facilitate sleeping outdoors and to stay warm and dry, including blankets and sleeping bags.<sup>3</sup>

The implications and scope of *Martin v. Boise* remain unclear and are being worked out in the courts. Some of the open questions are as follows:

*Does Martin v. Boise apply to actions other than sleeping or camping?* Likely, yes. A federal appeals court has found that a city cannot punish people for sleeping in their car at night when there is nowhere else in the city for them to go.<sup>4</sup> Furthermore, at least one

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<sup>1</sup> *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007) (“The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment”).

<sup>2</sup> *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019).

<sup>3</sup> *Johnson v. City of Grants Pass*, No. 20-35752, 2023 WL 4382635, at \*19 (9th Cir. July 5, 2023).

<sup>4</sup> *Johnson v. City of Grants Pass*, at \*22 (“We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.”).

court has opined that cities cannot punish homeless people for relieving themselves in public when there is no alternative to doing so.<sup>5</sup>

*Does Martin v. Boise only apply to criminal enforcement?* Likely, yes, with one caveat. Several courts have held that *Martin v. Boise* only applies when there is a criminal penalty or prosecution.<sup>6</sup> This means that *Martin v. Boise* would not apply if the only penalty was an administrative fine. At least one court has held that the “clean and clear” of a public park was not subject to *Martin v. Boise* because it did not require any arrests.<sup>7</sup> However, a federal court of appeals has held that *Martin* also applies if there is a sequence of punishments that eventually results in criminal punishment, even if the first punishments are non-criminal.<sup>8</sup>

*Does this mean a homeless person can sleep wherever they want whenever they want?* No. *Martin v. Boise* holds that “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.”<sup>9</sup> The Boise ordinance that was struck down banned “camping” on *all* public property at *all* times. However, several courts have held that the government may evict or punish people sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep.<sup>10</sup> Cities can also limit the times during which people can sleep or camp on public property. However, at least one court has found that *Martin* does not

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<sup>5</sup> *Mahoney v. City of Sacramento*, No. 220CV00258KJMCKD, 2020 WL 616302 (E.D. Cal. Feb. 10, 2020).

<sup>6</sup> *Hous. is a Hum. Right Orange Cnty. v. Cnty. of Orange*, No. SACV19388PAJDEX, 2019 WL 8012374 (C.D. Cal. Oct. 28, 2019); *Quintero v. City of Santa Cruz*, No. 5:19-CV-01898-EJD, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019); *Young v. City of Los Angeles*, No. CV2000709JFWRAO, 2020 WL 616363 (C.D. Cal. Feb. 10, 2020); *Yeager v. City of Seattle*, No. 2:20-CV-01813-RAJ, 2020 WL 7398748 (W.D. Wash. Dec. 17, 2020); *O’Callaghan v. City of Portland*, No. 3:21-CV-812-AC, 2021 WL 2292344 (D. Or. June 4, 2021).

<sup>7</sup> *Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019).

<sup>8</sup> *Johnson v. City of Grants Pass*, at \*18.

<sup>9</sup> *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

<sup>10</sup> See, e.g., *Bilodeau v. City of Medford*, 2022 WL 17853323 (D. Or. 2022) (distinguishing City of Medford anticamping ordinance from *Martin* because it does not impose a city-wide ban); *Sausalito/Marin Cnty. Chapter of California Homeless Union v. City of Sausalito*, No. 21-cv-01143-EMC, 2021 WL 5889370, at \*2 (N.D. Cal. Dec. 13, 2021) (“*Martin* prohibits a ban on all camping, not the proper designation of permissible areas.”); *Shipp v. Schaaf*, 379 F.Supp.3d 1033, 1037 (N.D. Cal. 2019) (“However, even assuming ... that [eviction from a homeless encampment by citation or arrest] might occur, remaining at a particular encampment on public property is not conduct protected by *Martin*, especially where the closure is temporary in nature.”); *Aitken v. City of Aberdeen*, 393 F.Supp.3d 1075, 1082 (W.D. Wash. 2019) (“*Martin* does not limit the City’s ability to evict homeless individuals from particular public places.”); *Gomes v. Cty. of Kauai*, 481 F.Supp.3d 1104, 1109 (D. Haw. 2020) (holding the County of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands); *Miralle v. City of Oakland*, 2018 WL 6199929, at \*2 (N.D. Cal. Nov. 28, 2018) (holding the City could clear out a specific homeless encampment because “*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs’ option”); *Le Van Hung v. Schaaf*, 2019 WL 1779584, at \*5 (N.D. Cal. Apr. 23, 2019) (holding *Martin* does not “create a right for homeless residents to occupy indefinitely any public space of their choosing”).

allow a city to ban overnight camping on public property citywide, even though camping would still be allowed during the day, because most people sleep at night.<sup>11</sup>

*Can the City adopt an anti-camping ordinance?* Yes, and code enforcement staff is currently developing one. This ordinance will need to be crafted in a way that complies with the legal parameters discussed above. Specifically, an anti-camping ordinance should not enforce criminal penalties on individuals if there is no other shelter reasonably available to them. Certain areas of the City could be completely closed off to camping, but at least some portion of public property will need to remain available for overnight sleeping if there are not enough shelter beds to accommodate the City's homeless population on any given night. The ordinance should also include a clear description of what counts as camping and other prohibited activities in order to avoid the vagueness issues discussed in Section 4 below.

## 2. Cities Must Respect the Property Rights of Homeless People

Cities must respect the personal property of homeless people and cannot dispose of it without following legally required procedures. Specifically, cities generally cannot seize and dispose of a homeless person's unabandoned personal property without (a) giving prior notice and (b) providing a reasonable opportunity for the person to be heard and to re-obtain their property.<sup>12</sup> The city will also have to store the property until it is claimed or the time for claiming it expires, with some exceptions.<sup>13</sup> Many agencies have a practice of storing property for 90 days.<sup>14</sup> This applies regardless of the size of the object and it applies to animals that belong to a homeless person.<sup>15</sup>

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<sup>11</sup> *Wills v. City of Monterey*, 617 F. Supp. 3d 1107, 1120–21 (N.D. Cal. 2022) (“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 outside 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.”).

<sup>12</sup> *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012); *Kincaid v. City of Fresno*, No. 106CV-1445 OWW SMS, 2006 WL 3542732, at \*37 (E.D. Cal. Dec. 8, 2006) (“The City's seizure of homeless people's personal property without probable cause and the immediate and permanent destruction of such property without a method to reclaim or to assert the owner's right, title, and interest to recover such personal property violates the Fourth Amendment to the United States Constitution and Art. I, § 13 of the California Constitution.”). Guidance about an effective notice, storage, and hearing process is given in *Kincaid* at \*38 (paragraph 22). See also *Sullivan v. City of Berkeley*, 383 F. Supp. 3d 976 (N.D. Cal. 2019), in which the court found that Berkeley's policy regarding practices of collection, storage, and disposal of unattended property at homeless encampments was reasonable and not constitutionally deficient.

<sup>13</sup> For example, in *Janosko v. City of Oakland*, No. 3:23-CV-00035-WHO, 2023 WL 3029256, at \*3 (N.D. Cal. Apr. 19, 2023), the court found that it was reasonable for the city to refuse to store “tiny homes” and other makeshift structures due to the unsafe and decaying nature of the materials,” and to refuse to move and store “a 20 to 40 foot long shipping container given the City's inability to search and sort through the contents to assess whether any are hazardous or unsafe.”

<sup>14</sup> This is based on Civil Code § 2080.2.

<sup>15</sup> *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1119 (9th Cir. 2021) (striking down provision in Los Angeles ordinance that provided for destruction without notice or hearing of items that were too large to fit into a 60-

There is an exception to this general rule when the person's property is creating an imminent threat to the health and safety of the public. In this circumstance, the property could be seized or moved without prior notice.<sup>16</sup> The city can also dispose of trash and abandoned property immediately, without notice. However, the city cannot "treat property as abandoned and trash just because the owner has not removed it in the time the [city] has allotted."<sup>17</sup>

### **3. Cities Must Follow State Law Requirements When Closing or Limiting Access to Public Property**

Since public property is, by its nature, open to the public, cities must follow special procedures to close or limit access to public property that are not required for owners of private property. Private property owners can simply ask a person to leave their property, and if they do not then they are trespassing and can be arrested, regardless of whether there is any sign or fence. This is not the case with property that is open to the public.<sup>18</sup>

Instead, if the city wants someone to leave public property and the person is not engaged in any other kind of illegal conduct, then the city must take action, through an ordinance or resolution, to close that property to the public at large. Examples include establishing hours for public parks and buildings, or completely closing off certain areas of public property to the public or closing it during certain hours.

Cities that own large areas of open space also face additional challenges. It is often impractical or undesirable to place fences around these areas, which makes it difficult to prevent trespassing and to enforce full or time-limited closures.

Finally, enforcement can become complicated when other public agencies own or control property within the City. For example, it is likely that the City lacks authority to clear homeless encampments within the right-of-way of a state highway,<sup>19</sup> although the City could attempt to partner with Caltrans and the County sheriff to address this issue.

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gallon trash can); *Recchia v. City of Los Angeles Dep't of Animal Servs.*, 889 F.3d 553 (9th Cir. 2018) (applying Fourth Amendment analysis where city seized and euthanized birds in possession of homeless person).

<sup>16</sup> *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 308, 562 P.2d 1302, 1311 (1977).

<sup>17</sup> *Kincaid v. City of Fresno*, No. 106CV-1445 OWW SMS, 2006 WL 3542732, at \*37 (E.D. Cal. Dec. 8, 2006), citing *A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir.1998).

<sup>18</sup> See Penal Code § 602(o) (Trespassing includes "[r]efusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another *and not open to the general public...*").

<sup>19</sup> *Where Do We Go Berkeley v. California Dep't of Transportation*, 32 F.4th 852, 855 (9th Cir. 2022) ("California law provides Caltrans with "full possession and control" of state highways and property acquired for state highway purposes."); see Streets and Highways Code § 90.

#### **4. City Ordinances Must Be Clear and Cannot Be Enforced in a Way That Targets Homeless People**

An ordinance must be sufficiently clear in its standards that it does not leave the public uncertain about what conduct it prohibits.<sup>20</sup> It does not have to be perfectly clear, but there must be at least a “reasonable degree of certainty.”<sup>21</sup> In the 2014 case of *Desertrain v. City of Los Angeles*, the court struck down an ordinance that prohibited using a vehicle “as living quarters” because it was unclear what actions would violate the ordinance – sleeping in the vehicle? During the day or only at night? Eating in the vehicle? Storing personal belongings in the vehicle? Using a vehicle to get out of the rain?<sup>22</sup> However, in 2018, in the case of *People v. Diaz*, the court found that a similar ordinance in San Diego was *not* unconstitutionally vague, even though it did not define what it meant to use a vehicle as a “living quarters” or “place of habitation.”<sup>23</sup> The take away here is that courts may differ on what exactly counts as too vague, but it is best to err on the side of clarity.

Furthermore, regardless of whether the ordinance leaves room for interpretation, cities cannot enforce otherwise neutral laws in a way that intentionally singles out homeless people for enforcement.<sup>24</sup>

#### **5. Summary**

In summary, a city may not punish someone merely for being homeless and may not punish the actions of a homeless person that are the unavoidable consequence of being homeless. Furthermore, cities must respect the personal property rights of homeless people and can only prohibit homeless people from entering onto and staying on public property based on regulations that apply to the public at large. Finally, city regulations aiming to address homelessness must clearly describe any prohibited conduct and city regulations cannot be selectively enforced in ways that intentionally target homeless people.

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<sup>20</sup> *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014).

<sup>21</sup> *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 54 (2015).

<sup>22</sup> *Desertrain*, at 1155-56.

<sup>23</sup> *People v. Diaz*, 24 Cal. App. 5th Supp. 1, 7 (Cal. App. Dep't Super. Ct. 2018) (“The reasonable and practical construction of the ordinance here is clear—it is intended to prevent people from living in their vehicles on city streets. The language of the ordinance is sufficiently clear to inform persons that they may not use their vehicles as homes on any street, as well as to inform law enforcement that a person utilizing his or her vehicle for a purpose that does not turn the vehicle into a place of residence does not violate this ordinance. While there may be circumstances where the facts are open to conflicting interpretations, that does not render the ordinance unconstitutional—it simply creates a factual issue for the court.”).

<sup>24</sup> *Ashbaucher v. City of Arcata* (N.D.Cal., Aug. 19, 2010, No. CV 08-2840 MHP (NJV)) 2010 U.S. Dist. Lexis 126627, pp. \*47–48 (complaint alleging selective enforcement of ordinances against the homeless states an equal protection claim), cited in *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 64 (2015). “Selective enforcement of laws that are neutral on their face is not a denial of equal protection “unless there is shown to be present in it an element of intentional or purposeful discrimination.” *Ashbaucher v. City of Arcata*, at \*12, citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

## **Staffing and Operational Needs, and Other Constraints on Addressing Homelessness**

### **Code Enforcement**

The Code Enforcement Division receives citizen concerns regarding homelessness impacts through the online citizen concern form. The online form allows for:

1. **Easy Tracking:** The portal allows tracking and managing of all complaints that are submitted, ensuring no concern goes unnoticed and to allow for photos to accompany the concerns.
2. **Data Analysis:** By utilizing the portal, staff extract valuable data that reveals trends, emerging issues, and common violations in different areas of the City.
3. **Efficient Routing:** Each submission through the portal is automatically directed to the appropriate department for follow-up, utilizing an algorithm. This reduces the chances of paperwork or emails being delayed if an individual is out of the office or absent due to illness, ensuring prompt attention to each matter. Concerns related to homelessness are routed to multiple City departments and divisions for a coordinated effort.
4. **Comprehensive Data Centralization:** By having all this information in one location, staff are able to track frequency, location, type and many other attributes of the data.

Depending on the concern type, level of severity, type of property (private, public, public right of way, park, etc.), and other factors, Code Enforcement division staff coordinate with homeless service providers, Police Department, private property owners, Parks and Recreation, Public Works, Airport, Solid Waste and other City departments and divisions in order to address the concern in the applicable manner.

Code Enforcement division staff then respond to the concerned resident to let them know their concern has been received and they are working to address it. When resolution is achieved, the concerned resident then receives notification of such. Because of the complexity and constraints surrounding addressing homelessness, there are some concerns that are rapidly addressed and others that take more time and coordination.

### **Police Department**

The Police Department has many challenges in addressing the homeless issue. The first of which is staffing. Most agencies today are assigning staff as homeless liaison officers. These officers become familiar with the laws addressing people experiencing homelessness and the resources available to them. As we have done here in Lompoc, the officers have a working relationship with all of the entities assisting people experiencing homelessness. This is typically a position that does not respond to calls for

service so that the officers have the time to invest in resolving some of the challenges facing our homeless population.

The Police Department has received two additional Police Officer positions in the current budget. Officers assigned to this new role will focus on Cannabis Compliance and Homelessness. The Police Department will evaluate the workload of these new positions at the end of this budget cycle to see if the Department needs to add additional staffing in future budgets. These new positions will be assigned to the Community Services section and supervised by the Sergeant assigned.

It would also make sense to provide the officers with funding to help appropriately relocate or reunite homeless individuals with their families in other cities and for other supplies as needed.

These are time-intensive contacts. Many in this population push back against services due to their clean and sober requirements. Some do not like the time requirements required of the shelters and some just choose the lifestyle. This burdens law enforcement to adapt to the subject they contact and navigate their challenges and the challenges placed on them by the law.

Respectfully submitted,



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Jeff Malawy, City Attorney

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Kevin Martin, Chief of Police



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Christie Alarcon, Community Development Director

**APPROVED FOR SUBMITTAL TO THE CITY COUNCIL:**

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Dean Albro, City Manager