



## **Strategies for Addressing Homelessness: Policies and Enforcement Issues**

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# **STRATEGIES FOR ADDRESSING HOMELESSNESS; POLICY SOLUTIONS AND ENFORCEMENT**

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## Homelessness in California

California has seen an alarming spike in homelessness over the past decade. On any given night in California, more than 134,000 people experience homelessness— 22% of the entire nation’s homeless population. Leading causes of homelessness are lack of affordable housing, poverty, lack of affordable health care, domestic violence, mental illness and addiction. To address this burgeoning issue, local governments are developing comprehensive responses that leverage public safety, health and human services, housing, transportation, code enforcement, and animal control resources to aid those who are experiencing homelessness.

## Practical Considerations in the Wake of *Martin v. City of Boise*

The 9th Circuit Court of Appeals issued a unanimous decision September 2018 in *Martin v. City of Boise*,<sup>i</sup> finding that the City of Boise's prohibition against sleeping in public violates the Eighth Amendment’s prohibition on cruel and unusual punishment when the homeless individuals have no access to alternative shelter. The Court held that the Eighth Amendment prohibits ordinance enforcement if such ordinances criminalize homeless individuals for sleeping outside when they have

no access to alternative shelter. This decision greatly impacted the enforcement of similar state laws, such as California Penal Code section 647(e) prohibiting illegal lodging, which was at issue in *Orange County Catholic Worker v. Orange County* prior to the settlement of that matter in October 2018.

Notably, the *Martin* Court reaffirmed the reasoning in an earlier-decided case, *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, which held that the city's enforcement of local camping ordinances violated the Eighth Amendment by imposing criminal penalties for sitting, sleeping, or lying outside on public property when homeless individuals could not otherwise obtain shelter. The *Martin* decision confirms that cities cannot enforce camping/lodging prohibitions if their local homeless population faces inadequate shelter space. Based on *Martin*, it appears that the city enforcing the ordinance must have shelter space available within its own jurisdiction; additional shelter space elsewhere, even if nearby, does not augment the options.

The City of Boise filed a Petition for a Writ of Certiorari on August 22, 2019. The question presented by the Writ is: Does the enforcement of generally applicable laws regulating public camping and sleeping constitute "cruel and unusual punishment" prohibited by the Eighth Amendment of the Constitution?

The Writ argues that:

- The *Martin* decision vastly expands the “sparingly applied” limits imposed by the Eighth Amendment’s Cruel and Unusual Punishment clause.
- The Court has never before declared a law unenforceable on the ground that the Eighth Amendment exempts from regulation purportedly “involuntary” acts, but actually declined to do so more than 50 years ago.
- The *Martin* decision creates a conflict among the lower courts, where at least three other circuit courts have rejected the Ninth Circuit’s reasoning.

Beyond the legal ramifications of the decision, the Petition identifies various logistical ramifications of the *Martin* decision:

- The *Martin* decision’s creation of a de facto constitutional right to live on sidewalks and in parks will cripple the ability of more than 1,600 municipalities in the Ninth Circuit to maintain the health and safety of their communities.
- Public encampments have spawned crime and violence, incubated disease, and created environmental hazards that threaten the lives and well-being both of those living on the streets and the public at large.

- The expansive rationale adopted by the Ninth Circuit imperils other laws regulating public health and safety including laws prohibiting public defecation and urination.
- Encampments provide a captive and concentrated market for drug dealers and gangs who prey on the vulnerable.

Although the *Martin* decision imposes significant constraints on dealing with homeless encampments, it does not leave municipalities without recourse. Thus, while municipalities are restricted in enforcing existing laws prohibiting camping on public property, or requiring homeless individuals to leave the jurisdiction, municipalities can continue to apply generally applicable laws to homeless persons, such as litter laws and laws regarding use of private property, provided that those laws do not specifically criminalize acts necessary to live. Additionally, municipalities may conduct cleanups of encampments on public property, provided they provide advance notice before seizing and disposing of personal property, and do not arrest any persons or issue criminal citations.

The *Martin* Court also makes clear that its opinion does not apply to “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 does the decision completely prohibit cities from banning sitting, lying, or sleeping outside at particular times or in particular locations. The Court further indicated that prohibitions on the obstruction of public rights-of-way or the erection of structures likely will remain permissible. And finally, an ordinance’s valid enforcement will ultimately depend on whether that law criminalizes an individual for not having the means to “live out” the “universal and unavoidable consequences of being human.” So the *Martin* decision still gives municipalities important tools in regulating these particularly problematic areas.

## **Creating Solutions to Homelessness**

Municipalities have a host of tools to overcome challenges to the siting and construction of emergency shelters and homeless support centers. For example:

- **Emergency Shelter as of Right:** SB 2 requires local governments as part of their Housing Element to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit.
- **Intergovernmental Immunity:** Cities and counties are mutually exempt from each other’s zoning regulations

relative to property that one such entity may own within the territory of the other.<sup>ii</sup>

- Shelter Crisis Declaration: Govt. Code 8698: suspends certain regulations that could delay a shelter project.
- Public Contract Code Section 22050: Provides for expedited public contracting procurement in the event of an emergency, such as a shelter crisis.
- Prevailing Wage Exemptions: Labor Code 1720(c)(4): applies to projects for construction, expansion or rehabilitation of not-for-profit facilities to provide emergency shelter and services for the homeless where more than half the costs are from private sources, excluding real property that is transferred or leased.

Municipalities relying on various forms of federal and state grant funding must be vigilant to ensure they comply with all funding deadlines and expenditure and reporting constraints.

## **Addressing Public Health and Safety Issues Related to Homelessness**

Homelessness presents municipalities with a variety of challenging social and public health, safety and welfare issues. Many of these issues require complex, long-term strategies with no simple or straightforward solutions.



However, certain public nuisances that result from the effects of homelessness, such as encampments and the use of vehicles as living quarters, may demand more immediate attention by city officials. Local public officials can enhance their long range likelihood of success by following certain procedures in addressing homelessness-related nuisances.

### **Homeless Encampments on Public Property**

Homeless encampments of various sizes have become common in many cities. These encampments can deprive the public of the use of certain city sidewalks, parks, or recreational areas. These encampments may also pose serious public health and safety threats as a result of accumulations of trash, illegal drug use, inadequate sanitation, and the presence of rodents and vermin. At the same time, homeless encampments may contain an individual's only belongings, including medicine and personal mementos. In dealing with homeless encampments, therefore, city officials must be sensitive to the constitutional rights of homeless individuals.

In *Lavan v. City of Los Angeles*<sup>iii</sup>, the Ninth Circuit Court of Appeals upheld an injunction that prevented the City of Los Angeles from seizing and destroying homeless property left unattended on public property. The

injunction did not apply if there was an objectively reasonable belief that the property was truly abandoned or the property posed an immediate public health and safety threat or was evidence of a crime or contraband. While the Court did not find a constitutional right to leave personal property on public property, the Court did conclude that the Fourth and Fourteenth Amendments of the U.S. Constitution protect a homeless individual's right to keep his or her unattended but unabandoned property. In the Court's view, the seizure and *immediate* destruction of homeless property was not reasonable.

Based on *Lavan*, cities should proceed cautiously in dealing with homeless encampments on public property. Initially, the enforcement team should confirm that public property is involved. Homeless encampments on private property raise a separate set of issues, as discussed below.

Assuming that the encampment is on public property, enforcement officers should take the following steps in dealing with the removal of property owned by homeless individuals:

- **Provide Advance Notice.** Give as much notice as feasible that (1) the homeless individual's property needs to be removed and (2) the city will remove and store the property if the homeless individual does not comply and remove it within the timeframe provided. The amount of notice should be based on the circumstances of the

situation. However, when conducting scheduled sweeps of homeless encampments, cities should post several written notices in the area designated for clean-up, at least 72 hours in advance. The notices should include the following information:

1. A statement of the nature and purpose of the clean-up;
2. The legal authority for the clean-up (i.e., cite to the city's anti-camping ordinance or other applicable regulations; the city attorney should be consulted *in advance* to assist in reviewing the local ordinances to ensure they are up to date and otherwise enforceable);
3. The specific location(s) where the clean-up will occur;
4. The date and time of the posted notice, as well as the date and time of the scheduled clean-up;
5. A notice that items left in the clean-up area on the date and time of the scheduled clean-up will be impounded by the city;
6. The address where individuals may claim personal belongings that are collected by the city, and a statement indicating the date on which the belongings will be deemed finally abandoned and destroyed;

7. A brief description of the process for reclaiming lost belongings (i.e., owner will be required to describe lost items to prove ownership);

8. A list of local facilities and shelters where homeless individuals may relocate for temporary shelter; and,

9. A phone number that individuals may call for more information.<sup>iv</sup>

- **Remove the Property.** The city should then document all property removed from the encampments in as much detail as possible, preferably with a written description and photographs. The inventory list must include the items collected, the date and time of location, the storage location and hours of operation, directions on how the homeless person can retrieve the seized property, and the date on which the seized property will be destroyed. The City should provide the inventory list to the homeless individual if possible. If there is a reasonable belief that certain items are actually abandoned (such as trash or discarded debris) or are a threat to public health and safety (such as bodily waste receptacles, drug paraphernalia, narcotics, alcohol, weapons, or heavily soiled mattresses), the items may be seized and destroyed right away. The city may also seize and collect evidence of a crime or other obvious illegal contraband. All other items should be collected and stored for a reasonable period of time before any destruction.<sup>v</sup>

## Homeless Encampments on Private Property

Homeless encampments on private property present similar public nuisance problems and health and safety concerns. While property owners are typically responsible for nuisance conditions on their own property, many property owners or nearby neighbors look to city officials for assistance in abating these conditions and removing unwelcome squatters. As with the removal of encampments on public property, public officials should proceed cautiously.

Following the *Martin* decision, the Northern District of California has repeatedly upheld the City of Oakland's policy that allows Oakland to "clean and clear" homeless encampments by providing a notice of trespass 72 hours in advance. Central to these decisions was that Oakland's cleanups did not involve any arrests or issuance of citations.<sup>vi</sup>

After properly identifying the owner of the subject private property, city officials should determine whether the owner has consented to the homeless encampment on the property. In a situation in which the property owner has allowed the encampment to exist or cannot be located, the city should address the situation as a standard public nuisance abatement issue. A court-approved inspection warrant under California Code of Civil Procedure<sup>vii</sup> section 1822.50 et seq. may first be necessary

to evaluate the extent of the problem and determine the appropriate remedy.

In situations in which the owner did not consent to the homeless encampment, local law enforcement may cite the squatters for misdemeanor trespass under the Penal Code.<sup>viii</sup> With regard to homeless property located on private property, city officials must determine whether to leave the clean-up to the property owner or confiscate the homeless property. If the city ultimately elects to remove property owned by homeless individuals from the private property encampment, the city should follow the same procedures for removing homeless encampments from public property, including providing advance notice and storage of the property when required by the statutes.

### Sleeping in Vehicles

Another challenging health and safety issue involving the homeless has been the use of vehicles as living quarters on city streets and other public property. For some, the idea of homeless living in a vehicle, which in some instances may be an individual's last remaining possession, might seem preferable to the homeless living on the street. This activity, however, can lead to overcrowding on public streets, unsanitary conditions, and neighborhood blight. A recent Ninth Circuit Court of Appeals decision again

involving the City of Los Angeles demonstrates the difficulties and legal obstacles that cities may face in addressing this issue.

In *Desertrain v. City of Los Angeles*, the Ninth Circuit struck down the city's ordinance, adopted in 1983 that restricts the use of vehicles as living quarters on public streets and in public parking lots. In 2010, the city increased its enforcement activities under the ordinance in response to numerous complaints about homeless people living in vehicles on public streets in the Venice area of the city. According to the complaints, these individuals were dumping trash and human waste on streets and parkways and endangering public health.

Following the issuance of several citations and multiple arrests under the ordinance, a group of homeless individuals brought an action against the City claiming that the police had violated their constitutional rights. The Ninth Circuit held that the ordinance language was unconstitutionally vague and promoted arbitrary enforcement. In the Court's view, the ordinance was broad enough to cover any person who transports personal belongings in a car, but was only applied to homeless individuals.

However, following *Desertrain*, a city's vehicle habitation prohibition should clearly define what it means to use a vehicle as a dwelling. Such a definition should establish

the quantum of evidence necessary to prove that an individual is actually using a vehicle as a dwelling. City officials should work closely with their city attorneys to craft appropriate language. In addition, enforcement officers will need to be patient in observing possible violators and gathering evidence. The mere fact that an individual is storing personal items in a car may not be sufficient. Enforcement officers should make observations over an extended period of time in order to support an allegation that an individual is using a vehicle as a dwelling as defined by the local ordinance.

## **CONCLUSION**

Dealing with nuisance conditions created by homeless encampments and the use of vehicles for dwelling purposes requires patience, vigilance, and sensitivity. Local agencies must provide reasonable notice to homeless individuals before enforcement officers confiscate homeless property and must provide homeless individuals with an opportunity to reclaim their property. Local officials must also ensure that their ordinances provide clear guidance to homeless individuals regarding what conduct is prohibited. Taking these steps may be time consuming and challenging, but they will help cities address some of the short-term problems associated with homelessness and minimize potential litigation risks.



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<sup>i</sup> *Martin v. City of Boise* (9<sup>th</sup> Cir. 2018) 902 F.3d 1031

<sup>ii</sup> *Lawler v. City of Redding* (1992) 7 Cal.App.4th 778, 783-784; 40 Ops.Cal.Atty.Gen. 243 (1962).

<sup>iii</sup> *Lavan v. City of Los Angeles* (9<sup>th</sup> Cir. 2012) 693 F.3d 1022

<sup>iv</sup> *Kincaid v. City of Fresno* (E.D. Cal., Dec. 8, 2006, 106CV-1445 OWW SMS) 2006 WL 3542732, \*38.

<sup>v</sup> No published opinion has determined what constitutes a “reasonable” period of time for storing homeless property. *Kincaid*, which was not published, held that California Civil Code section 2080.2 imposed a mandatory duty on the defendant city to hold and store impounded property for 90 days. Civil Code 2080.2 provides, “If the owner appears within 90 days, after receipt of the property by the police department or sheriff’s department, proves his ownership of the property, and pays all reasonable charges, the police department or sheriff’s department shall restore the property to him.” The application of section 2080.2 to homeless property remains a topic of debate.

<sup>vi</sup> *Le Van Hung v. Schaaf* (N.D. Cal., Apr. 23, 2019, No. 19-CV-01436-CRB) 2019 WL 1779584, at \*4;

*Miralle v. City of Oakland*, 2018 WL 6199929, at \*2 (N.D. Cal. Nov. 28, 2018) [“Martin does not establish a constitutional right to occupy public property indefinitely at Plaintiffs’ option.”]; *Shipp v. Schaaf* (N.D. Cal., Apr. 16, 2019, No. 19-CV-01709-JST) 2019 WL 1644401, at \*3.

<sup>vii</sup> Code Civ. Proc. § 1822.50 et seq.

<sup>viii</sup> Penal Code section 602(m) (prohibits individuals from “[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner’s agent, or the person in lawful possession”).