



October 16, 2020

VIA ELECTRONIC SUBMISSION

TO: Oakland City Council
Life Enrichment Committee
1 Frank H. Ogawa Plaza
Oakland, CA 94612

Re: Bay Area Legal Aid's Comments to Oakland's Proposed "Homeless Encampment Management Policy"

Dear Honorable Councilmembers:

On behalf of Bay Area Legal Aid ("BayLegal"), we write in response to the City of Oakland's request for public comments on the City Administrator's Proposed Homeless Encampment Policy ("Proposed Policy"), submitted on September 11, 2020.

BayLegal opposes the Proposed Policy for the reasons outlined below, particularly because its implementation would result in: (1) unconstitutional seizures of personal property and due process violations; (2) increased criminalization of homelessness through greater policing, which would disproportionately harm communities of color; and (3) uprooting unhoused individuals from their community supports and burdening their ability to access essential services, especially during a pandemic.

We urge the City Council to reject the Proposed Policy or, in the alternative, delay action until it has had the opportunity to ensure that the policy does not violate the constitutional rights of unhoused individuals in encampments, does not result in increased criminalization of homelessness or over-policing of people experiencing homelessness, has received input from the Homelessness Advisory Commission and other relevant stakeholders, and does not disrupt unhoused individuals' access to critical supports and services.

BayLegal is a regional non-profit organization that provides free civil legal services to eligible low-income and indigent clients in seven Bay Area counties, including Alameda, Contra Costa, Marin, Napa, Santa Clara, San Francisco, and San Mateo. Our mission is to provide meaningful access to the civil justice system through legal assistance to low-income individuals regardless of location, language, or disability. Our Oakland office assists clients in areas including consumer rights, health access, economic justice (access to state and federal public benefits), domestic violence prevention, and housing and homelessness prevention through direct services, policy advocacy, and impact litigation. Many of our clients are individuals and families who are experiencing homelessness or housing insecurity, have limited English proficiency, limited

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Bay Area Legal Aid serves Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, and Santa Clara counties

literacy capacity, survivors of trauma and domestic violence, and people with disabilities. The Proposed Policy will negatively impact the lives of our clients.

Implementation of the Proposed Policy would result in unconstitutional seizures of personal property and denial of due process.

If adopted and implemented, the Proposed Policy would limit an encampment's footprint to a 12 ft by 12 ft area per person. It is unclear from the Proposed Policy what actions the City would take towards a person and personal property if the individual's property exceeds this footprint, or what due process would be afforded the person whose property is seized, raising serious Fourth and Fourteenth Amendment concerns. The property and due process rights of individuals in homeless encampments are protected under the U.S. and California Constitutions, and cities that violate those rights have been found liable by federal courts.¹

Oakland's Proposed Policy looks similar to Los Angeles's prohibition on storage of "bulky items," which is currently being litigated in the Central District Court of California.² In *Garcia v. City of Los Angeles*, a federal district court granted a preliminary injunction on April 13, 2020, rejecting the City's arguments about refusing to store bulky items, stating "[t]hat a large number of items are stored in public places by homeless residents is undisputed, but the City does not sufficiently address how this fact renders seizures pursuant to the Bulky Item Provision constitutional."³ On September 23, 2020, the City of Los Angeles was held in contempt of court for violating the injunction when the City continued to post notices that bulky items would not be stored by the City.⁴ Oakland's prohibition on storing items exceeding one square yard of property for unhoused persons is similar to Los Angeles's Bulky Item provision, and therefore appears unconstitutional. For these reasons, the City should reject the Proposed Policy.

Implementation of the Proposed Policy would unnecessarily increase policing and unlawfully punish unsheltered people when they have nowhere else to go.

While we appreciate that a stated goal in the policy is not to criminalize poverty or the status of being homeless, we fear that implementation of the Proposed Policy risks violating the 9th Circuit's ruling in *Martin v. City of Boise* ("*Martin*").⁵ Even before the COVID-19 pandemic, Oakland lacked sufficient shelter for individuals experiencing unsheltered homelessness.⁶ This

¹ See *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1023 (9th Cir. 2012) (the city violated plaintiffs' Fourth and Fourteenth Amendment rights by seizing and destroying unabandoned property temporarily left on the sidewalk while plaintiffs attended to necessary tasks); *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1093, 1103 (E.D. Cal. 2012) (the government violates procedural due process when it provides insufficient prior notice of taking, fails to safeguard seized property and/or insufficient guidelines and process for retrieving seized property of homeless individuals in encampments).

² *Garcia v. City of Los Angeles*, Case No. 2:2019cv06182 (C.D. Cal filed July 18, 2019).

³ *Id.*

⁴ *Id.*

⁵ See generally, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), cert. denied 589 U.S. 19-247 (Dec. 16, 2019).

⁶ In 2019, Oakland reported 3,210 unsheltered individuals within its jurisdiction, with only 1,757 shelter beds throughout Alameda County. Compare EveryOne Counts! 2019 Homeless Count and Survey, at 10, available at https://everyonehome.org/wp-content/uploads/2019/12/2019HIRDReport_Oakland_2019-Final.pdf with Dep't of Hous. & Urban Dev., Housing Inventory Count for Oakland, Berkeley / Alameda County COC, available at https://files.hudexchange.info/reports/published/CoC_HIC_CoC_CA-502-2019_CA_2019.pdf. See also, Informational Report and Recommendation on Encampment Management Policy and Program, from Joe DeVries, Assistant to the City

problem has been exacerbated by this economic downturn. Some economists estimate that homelessness will increase by an additional 20% during the current economic crisis.⁷ Instead of attempting to minimize the effects of this ongoing humanitarian crisis, the City's Proposed Policy will actually increase the suffering of those hardest hit by this crisis by attempting to ban people from simply existing in a substantial portion of the City, despite the fact that people may have nowhere else safe to go. As stated by the 9th Circuit, "[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."⁸

Additionally, the Proposed Policy would lead to greater involvement of the Oakland Police Department ("OPD") in the targeted policing of unhoused individuals.⁹ BayLegal opposes OPD's role in implementing and enforcing the Proposed Policy and also opposes OPD having any seat on the Encampment Management Team ("EMT") tasked with the implementation and enforcement of this Proposed Policy. Because EMT does not handle criminal matters and any law enforcement response is "separate and distinct from EMT action,"¹⁰ OPD's presence on the EMT is unnecessary and counterproductive.

Along with OPD's involvement in the EMT, the inclusion of a list of crimes in the policy serves to perpetuate harmful stereotypes that falsely equate homelessness and poverty with criminality.¹¹ The crimes listed in the Proposed Policy exist irrespective of one's status as sheltered or unsheltered, or housed or homeless; their inclusion in this document is unnecessary.¹² Homelessness in Oakland is mostly associated with economic forces – such as job loss, eviction or foreclosure, and rent increases – as well as mental health issues. Solutions must address those underlying factors rather than focusing on perpetuating false and harmful stereotypes.¹³

Administrator, April 22, 2019, at page 7. "The total number of shelter/ Transitional/Cabin beds in Oakland are insufficient to serve the total unsheltered population of Oakland. In addition to the shortage of beds, barriers such as not accepting pets, lack of storage, and location are some of the challenges individuals cite as reasons for not accepting shelter referrals."

⁷ Peter Hartlaub. San Francisco Chronicle. "Economist: Homelessness could spike 20% in California as jobless struggle during pandemic." available at <https://www.sfchronicle.com/bayarea/article/Economist-Homelessness-could-rise-20-in-15273847.php>

⁸ *Martin*, *supra* 920 F.3d at 617.

⁹ Closing an encampment "requires additional outreach, can lead to a confrontational situation operation, and requires follow-up enforcement by OPD." Informational Report and Recommendation on Encampment Management Policy and Program, from Joe DeVries, Assistant to the City Administrator, April 22, 2019, at page 3.

¹⁰ Encampment Management Policy, "Encampment Actions or Behaviors Warranting a Law Enforcement Response" at page 8.

¹¹ *Id.*, at 3, 8.

¹² In fact, listing violent crimes such as murder, homicide, and assault in the Proposed Policy creates a perception that such crimes are prevalent in encampments while ignoring the reality that unhoused people are actually less likely than housed people to perpetuate violent crimes and more likely to be victims of violent crime. Washington Department of Commerce, "Homeless Myths and Facts," <http://www.commerce.wa.gov/wp-content/uploads/2016/12/hau-chg-mythsfacts-12-8-2016.pdf>; Speigman, R. & Rex S. Green, "Homeless and Non-Homeless Arrestees: Distinctions in Prevalence and in Sociodemographic, Drug Use, and Arrest Characteristics Across DUF Sites, Final Report," p. 4 (1999), <https://www.ncjrs.gov/pdffiles1/nij/grants/193805.pdf>.

¹³ ASR, Alameda County Homeless Count & Survey Comprehensive Report, pp. 28-29 (2019), <https://www.fremont.gov/DocumentCenter/View/41808/Alameda-Homeless-Survey-2019>.

There is overwhelming evidence that “criminalization and locking people up are costly and harmful responses that fail to fix the crisis.”¹⁴ Including OPD in the EMT comes with a significant financial cost, and those dollars are better used providing shelter and services to the unhoused and those on the verge of homelessness.¹⁵ Further, OPD’s involvement will only further exacerbate the homelessness crisis in Oakland,¹⁶ since simply citing unhoused people for low-level offenses often leads to a cascade of unfortunate events¹⁷ which ultimately makes it harder for people to secure housing and jobs.¹⁸ Involving law enforcement in any policy related to the livelihoods of unhoused persons is bad public policy for a city that genuinely wishes to abate homelessness in any meaningful way.

Moreover, by further stigmatizing people experiencing homelessness with references to criminality, the Proposed Policy actually reinforces the very attitudes that have led to an increase in violent attacks against unhoused individuals¹⁹ without offering them any measure of protection. Current police practices are ineffective in protecting homeless residents and often put them at even greater risk of police-initiated violence. We are in the midst of a national reckoning regarding police violence and systemic racism with calls for reform, defunding rather than expanding law enforcement, and offering community policing alternatives, including in Oakland. As demonstrated by the fatal shooting of Joshua Pawlik, Oakland’s unhoused residents are confronted with excessive and violent contact with police.²⁰ Any policy that fails to include assurances that unhoused individuals will receive protection from over-policing is inadequate.

Implementation of an Encampment Management Policy should await, and include involvement from, the Homeless Advisory Commission.

Currently, the City of Oakland is in the process of establishing the Homeless Advisory Commission (“Commission”), which is set to launch next month.²¹ The Commission should have

¹⁴ Levin, Sam, “‘They’ve turned their backs on us’: California’s homeless crisis grows in numbers and violence,” The Guardian (Dec. 27, 2019) (quoting Eve Garrow, homelessness policy analyst with the American Civil Liberties Union of Southern California), <https://www.theguardian.com/society/2019/dec/26/theyve-turned-their-backs-on-us-californias-homeless-crisis-grows-in-numbers-and-violence>

¹⁵ According to the Informational Report and Recommendation on Encampment Management Policy and Program, from Joe DeVries, Assistant to the City Administrator, April 22, 2019, at page 12, the fiscal impact of having the OPD involved with the EMT is between \$1 and \$1.5 million annually, depending on whether 1 or 1.5 crews are operating. In addition, “OPD has two FTE Officers committed to the EMT and the current fully burdened cost for the two positions is \$391,105. The FY19-20 cost is estimated at \$438,983. The FY20-21 cost is estimated at \$479,710. Additionally, OPD will provide officer support through Overtime as needed during larger operations or to cover two OPW crews. Approximately \$96,000 in CDBG funds has also been provided for OPD to assist with EMT efforts.” This adds up to at least \$2 million dollars in funding going to OPD involvement in the EMT annually.

¹⁶ Woolington, Rebecca & Melissa Lewis, “Portland homeless accounted for majority of police arrests in 2017, analysis finds,” The Oregonian (June 30, 2019), https://www.oregonlive.com/portland/2018/06/portland_homeless_accounted_fo.html.

¹⁷ Involvement in the EMT simply gives law enforcement additional opportunities to issue “quality-of-life” citations for offenses falling outside of the purview of *Martin* and to execute bench warrants issued when unhoused individuals are unable to pay the resulting fines or appear in court, all of which simply continues the cycle of homelessness without improving the collective quality of life.

¹⁸ Bailey, Madeline, et. Al., “No Access to Justice: Breaking the Cycle of Homelessness and Jail,” Vera Institute of Justice Evidence Brief, pp. 7-10 (Aug. 2020), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf>; see also Woolington, Rebecca & Melissa Lewis, “Portland homeless accounted for majority of police arrests in 2017, analysis finds,” The Oregonian (June 30, 2019), https://www.oregonlive.com/portland/2018/06/portland_homeless_accounted_fo.html.

¹⁹ Levin, Sam, “‘They’ve turned their backs on us’: California’s homeless crisis grows in numbers and violence,” The Guardian (Dec. 27, 2019) (quoting Eve Garrow, homelessness policy analyst with the American Civil Liberties Union of Southern California), <https://www.theguardian.com/society/2019/dec/26/theyve-turned-their-backs-on-us-californias-homeless-crisis-grows-in-numbers-and-violence>

²⁰ Justice for All: The Policing of Oakland’s Unhoused Communities, A Research Report For: The Coalition for Police Accountability, by students at the University of California Berkeley, presented in December 2019.

²¹ <https://www.oaklandca.gov/news/2020/city-of-oakland-seeks-applicants-for-new-homeless-advisory-commission>

a part in informing and shaping this Proposed Policy. Any further action on this Proposed Policy should be delayed to afford the Commission and other relevant community stakeholders, including individuals with lived experience with homelessness, an opportunity to weigh in and provide critical input on the Proposed Policy. Furthermore, BayLegal urges the City to include the Commission, instead of OPD, in the EMT. Doing so aligns with the best practice of liaising with homeless encampments through outreach workers, public health professionals with training in mental health and trauma informed care, and people with lived experience of homelessness. Such action is already supported by City officials and administrators.²²

Implementation of the Proposed Policy will further disproportionately harm Black, Indigenous, and People of Color (“BIPOC”) communities.

The Proposed Policy also fails to incorporate a meaningful racial justice analysis. While it acknowledges the profound racial disparities in homelessness in Oakland, it fails to include an equity impact analysis and instead defers it to *after* adoption and implementation. We believe it is critical that such an analysis—which must include input from members of both unsheltered and sheltered BIPOC communities—be initiated prior to the adoption and implementation of any encampment management policy so as to build in concrete safeguards designed to mitigate further negative impacts on these communities.²³

As the Proposed Policy acknowledges, BIPOC are disproportionately represented among Oakland's unsheltered population. While Black people only constitute 24% of the City's overall population, 70% of Oakland's unsheltered population is Black.²⁴ For reasons already discussed above, criminal justice is one area in which racial disparities are likely to be further aggravated by this Proposed Policy. “[R]esearch has shown that Black people, who already face disproportionate risk of homelessness, are exposed to even further disproportionate levels of policing after becoming homeless.”²⁵ This may be even more likely in Oakland, where racial disparities in policing, indicative of selective law enforcement, are among the starkest, if not the starkest, in the state. When adjusted for population, OPD is 9.7 and 5.8 times more likely to cite Black and Latinx adults, respectively, for a non-traffic infraction than white adults.²⁶ Moreover,

²² See Agenda Report regarding Encampment Management, by Joe DeVries, Director of Interdepartmental Operations, July 2, 2020, at page 7, 12. In the report the City Administrator released in July, staff recommended creating a significantly expanded team of outreach workers. See also, Supplemental Report for Encampment Management Policy and Program, by Councilmember Bas, May 23, 2019, at page 5. Councilmember Bas proposed partnering with Alameda County to provide mental health and trauma experts to respond to emergency situations at encampments, as opposed to OPD.

²³ Given the importance of this issue, we also believe that a semi-annual equity review of any such plan is insufficient. Such a plan must be continuously reviewed and, at the very least, a thorough review should be conducted quarterly.

²⁴ Agenda Report regarding Encampment Management, by Joe DeVries, Director of Interdepartmental Operations, July 2, 2020, at page 10.

²⁵ Bailey, Madeline, et. Al., “No Access to Justice: Breaking the Cycle of Homelessness and Jail,” Vera Institute of Justice Evidence Brief, p. 3 (Aug. 2020), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf>.

²⁶ Lawyers' Committee on Civil Rights of the San Francisco Bay Area, “Cited for Being in Plain Sight: How California Polices Being Black, Brown, and Unhoused in Public,” p. 12 (Sept. 2020) (hereafter “LCCR Report”). According to the report, Oakland's astounding disparity in racial policing is the highest among 15 major state and local law enforcement agencies, including the California Highway Patrol and police and sheriff departments serving the cities and counties of Los Angeles, Sacramento, and San Diego; police departments in Fresno, Long Beach, San Jose, and San Francisco; and sheriff departments in the counties of Orange, Riverside, and San Bernardino. *Id.* A Center for Social Innovation analysis suggests that poverty rates alone do not explain this overrepresentation, and a 2018 report by the Los Angeles Homeless Services Authority

in 2019, for every 1,000 Black adults, 2.1 were cited by OPD for a local infraction as a result of a non-traffic stop as compared to only 0.2 for every 1,000 White adults.²⁷ Finally, data from January 2014 through March 2019 reveal that the 82% of individuals that the Oakland Housing Authority Police Department ("OHAPD") stopped were Black adults, who were charged with infractions including "loitering" on or about Oakland Housing Authority ("OHA") Property or simply being considered a suspicious person.²⁸ The Proposed Policy would have a disparate impact on BIPOC communities, and that impact should be fully evaluated before moving forward.

Implementing the Proposed Policy will exacerbate the public health crisis and disrupt unhoused individuals' access to critical supports and services, including during the COVID-19 pandemic.

The Proposed Policy places at risk unhoused people's health outcomes by hindering their ability to connect to service providers and meet basic needs. It could also unfairly prohibit people from remaining in the areas in which they have roots and familial or social ties. Unhoused individuals need to be able to attend appointments with medical providers, social services, and legal service providers. The Proposed Policy creates large geographic areas where encampments are prohibited. The creation of these "high sensitivity" and "low sensitivity" areas will effectively force people experiencing homelessness into isolated, industrial locations with poorer air quality where they will be cut-off from their community and essential services while being exposed to increased environmental and health hazards.²⁹ The creation of these "high sensitivity areas" are designed to keep unhoused individuals out of predominantly white and affluent neighborhoods where critical supports and services are more readily available and accessible. By pushing unhoused persons into isolated areas of the City, individuals will lose contact with much needed services and community connections which are crucial for people to find and maintain stability. In this way, the Proposed Policy could have the unintended but foreseeable consequence of making it much more difficult for people to overcome homelessness while further aggravating public health impacts.

Such an action would be disastrous in normal times, and to do so during a pandemic is unconscionable and contrary to CDC guidance. The CDC recognizes that unsheltered homeless individuals are a particularly vulnerable population for COVID-19. If the City cannot provide

concluded that "the circumstances that lead Black people to disproportionately experience homelessness cannot be untangled from the impact of institutional and structural racism in education, criminal justice, housing, employment, health care, and access to opportunities." Id.

²⁷ Id., at 18.

²⁸ Id., at 20.

²⁹ A July 2, 2020, Life Enrichment Committee Agenda Report from the Director of Interdepartmental Affairs states: "The net effect of a complete prohibition on encampments in residentially zoned areas would be to push encampments onto commercial corridors, into the Downtown Metro Area, and into the City's industrial zones. Although many encampments have already chosen these areas to establish, over-concentration without proper management would be problematic. Affirmatively making this a City policy would also be problematic from a socioeconomic, geographic, and environmental equity standpoint, as it would disproportionately impact some Council Districts over others and concentrate encampments in areas of the City that are, on average, poorer, non-White, and have poorer air quality." pp. 5-6. Of course, the draft policy as written also prohibits encampments from located near businesses, which further exacerbates the concerns stated above and will foreseeably push encampments into industrial zones, poorer areas, and those with poorer air quality.

individual housing for its unsheltered population, the CDC recommends that local officials “allow people who are living unsheltered or in encampments to remain where they are. Clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.”³⁰ Given that there were insufficient shelter placements for Oakland’s unhoused population pre-pandemic³¹ and there are now even fewer indoor placements that allow for effective social distancing and sheltering-in-place,³² executing such a policy would clearly violate CDC recommendations.

For these reasons, we strongly urge the City to reject the Proposed Policy or, in the alternative, delay taking any action until the aforementioned concerns have been addressed. With the recent infusion of federal dollars to address the ongoing COVID-19 health crisis, the City should use the additional funding to meet this moment and address the needs of our unhoused neighbors.

We look forward to working together in achieving these goals. If we can be of further assistance or if you have any questions, please do not hesitate to contact us.

Respectfully submitted,

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³⁰Center for Disease Control and Prevention. Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials. (August 6, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>

³¹ *Supra*, footnote 6

³² Memorandum from Mayor Libby Schaaf regarding Updates on Oakland’s COVID-19 Homeless Response Efforts, April 16, 2020, page 3.