



March 17, 2021

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Via email

Dear Mayor Franklin, Deputy Mayor Harper, and Council Members:

I write on behalf of the National Homelessness Law Center (“Law Center”) regarding Council Bill # 2102-06, Everett’s proposed ordinance prohibiting certain conduct within designated rights of way (“Proposed Ordinance”). The Proposed Ordinance would “prohibit sitting, lying, and the distribution of goods within a designated area.” Specifically, a person would find themselves in violation of the Proposed Ordinance if they “sit or lie down upon, or place a blanket, sleeping bag, back pack, chair, mattress, couch, stool, or any similar equipment, item, or furniture upon” in any public sidewalk or right of way within the designated area. Violations of the proposed ordinance would constitute a criminal misdemeanor and subject a person to a \$500 fine. We are concerned that the Proposed Ordinance disproportionately targets people experiencing homelessness and criminalizes involuntary homelessness. **We urge you to vote against and reconsider the Proposed Ordinance.** We also share the good news that federal COVID funding can enable Everett to address its homeless camping problem in its entirety through reimbursement for hotel stays through September, so there are no fiscal constraints to solving this issue in a much more productive way.

The Law Center is the nation’s only legal advocacy organization dedicated solely to ending and preventing homelessness. In 2017, we published *Tent City, USA: The Growth of America’s Homeless Encampments, and How Communities are Responding* (“Tent City Report”), collecting data on 187 cities’ policy responses to encampments, along with best practices, model policies, and case studies from across the country. The Tent City Report is available at https://nlchp.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf. Additionally, since 1991, the Law Center has documented the dramatic increase in laws nationwide that punish homeless people for performing harmless, life-sustaining activities in public places, as well as the negative consequences of those discriminatory measures. The Law Center’s 2019 Report addressing this issue, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (“Housing Not

Handcuffs Report”), is available at <https://www.nlchp.org/documents/Housing-Not-Handcuffs>. The Law Center’s reports demonstrate that laws like the Proposed Ordinance do not address the underlying causes of homelessness, and instead injure homeless persons’ rights and waste taxpayer resources.

In *Martin v. Boise*, the 9th Circuit ruled that punishing a person experiencing homelessness for sitting, sleeping, or lying on public property in the absence of adequate alternatives constitutes cruel and unusual punishment under the Eighth Amendment. *Martin v. City of Boise*, No. 15-35845, Opinion (2018). The Proposed Ordinance directly conflicts with *Martin* by making it a misdemeanor to sit or lie in the designated area regardless of whether there are any accommodations available.

The Proposed Ordinance also violates the Excessive Fines Clause of the Eighth Amendment. A fine violates the Excessive Fines Clause if it is determined to be punitive and excessive. *See United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998). The \$500 fine for violating the Proposed Ordinance is clearly punitive. A fine is considered excessive if it is “grossly disproportionate to the gravity of the offense.” *United States v. Bajakajian*, 524 U.S. at 324. In *Grants Pass*, a person experiencing homelessness found in violation of the camping ordinance would be fined \$295, which would frequently increase to \$537.50 due to collection fees. The *Grants Pass* court found that this fine was clearly disproportionate to the gravity of the offense.

Here, the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry. Plaintiffs do not have enough money to obtain shelter, so they likely cannot pay these fines. . . . Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter \$295 (\$537.60 after collection fees are inevitably assessed) is grossly disproportionate to the “gravity of the offense.” Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

See Blake v. City of Grants Pass, Case No. 1:18-cv-01823-CL, Opinion and Order, 22-23 (2020).

Similarly, the punishment in the Proposed Ordinance is disproportionate to the gravity of the offense. The Proposed Ordinance goes even further by making the offense punishable up to a misdemeanor. Any punishment imposed for this conduct for either an infraction or misdemeanor would be excessive, let alone a fine of \$500 that even exceeds the fine found unconstitutionally excessive in *Grants Pass*.

Because people experiencing homelessness are not on the street by choice but because they lack choices, punishment serves no constructive purpose. Whether punished through civil fines or immediate incarceration, homeless persons usually cannot pay fines, and because they often miss notices to appear in court due to a lack of permanent address, those fines frequently turn into a bench warrant and a criminal arrest. As stated by the Department of Justice in the context of its argument regarding an anti-camping ordinance in *Bell v. Boise*:

Criminalizing public sleeping in cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness...Issuing citations for public sleeping forces individuals into the criminal justice system and creates additional obstacles to overcoming homelessness. Criminal records can create

barriers to employment and participation in permanent, supportive housing programs. Convictions under these municipal ordinances can also lead to lengthy jail sentences based on the ordinance violation itself, or the inability to pay fines and fees associated with the ordinance violation...Finally, pursuing charges against individuals for sleeping in public imposes further burdens on scarce public defender, judicial, and carceral resources. Thus, criminalizing homelessness is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities.

Bell v. Boise, et al., 1:09-cv-540-REB, Statement of Interest of the United States (Aug. 6, 2015).

Instead, Everett can rely on funding from the Federal Emergency Management Agency to transition all people experiencing homelessness into individual hotel rooms for the duration of the COVID-19 crisis. FEMA has recently approved waivers of both its 30 day renewal and 25% match requirements, offering 100% reimbursement funding for the duration of the pandemic. See <https://nlihc.org/resource/fema-changes-policy-approve-non-congregate-shelter-reimbursement-duration-emergency>, <https://nlihc.org/resource/new-executive-order-addresses-urgent-health-and-housing-needs-people-experiencing>. **This means communities have no fiscal constraint to stop them from offering non-congregate shelter to people experiencing homelessness for the duration of the crisis.**

According to the CDC, COVID-19 primarily spreads from person-to-person, between people within six feet of each other, and from droplets that are expelled when a person infected with COVID-19 coughs or sneezes. Recent reports indicate that homeless individuals infected by COVID-19 would be twice as likely to be hospitalized, two to four times as likely to require critical care, and two to three times as likely to die of COVID-19 than the general population. See https://endhomelessness.org/wp-content/uploads/2020/03/COVID-paper_clean-636pm.pdf. To prevent contracting and transmitting COVID-19, people are encouraged to wash their hands properly and frequently, avoid close contact with others, and to stay home if they are feeling sick.

For people experiencing homelessness, options for following CDC personal health recommendations are extremely limited since there are too few private housing and shelter options available, even as the pandemic persists worldwide. Congregate shelters are not necessarily equipped to truly safeguard against the spread of the virus. This is because congregate shelter settings do not allow for the recommended social distancing, air circulation, and sanitation necessary to stem the spread of the virus. In San Francisco, 144 residents in a single shelter were tested and five were found positive for COVID-19. Less than one week later, 92 of those residents tested positive for COVID-19, along with 10 shelter staff workers. See Colette Auerswald et al., *For the Good of Us All: Addressing the Needs of Our Unhoused Neighbors During the COVID-19 Pandemic* (2020), <https://publichealth.berkeley.edu/wp-content/uploads/2020/04/For-the-Good-of-Us-All-Report.pdf>.

On March 31, 2020, FEMA first issued a press release recognizing non-congregate sheltering as an important tool to combat COVID-19. See <https://www.fema.gov/news-release/20200722/coronavirus-covid-19-pandemic-non-congregate-sheltering>. Here, FEMA provided a non-exhaustive list of examples of appropriate instances to rely on non-congregate sheltering. **FEMA will reimburse for non-congregate sheltering like hotels and motels beyond just these instances.** While FEMA indicated a path for state-wide approval of non-congregate shelter, Everett can request additional reimbursement at the guidance of local public health declarations because providing non-congregate shelter and individual housing for all people experiencing homelessness is necessary to reduce the spread of COVID-19.

On February 3, 2021, FEMA issued a press release which expanded its previously issued support for communities using non-congregate housing to combat COVID-19. Now, FEMA will offer 100% reimbursement for “all work eligible under FEMA’s existing COVID-19 policies, including increasing medical capacity, non-congregate sheltering, and emergency feeding distribution.” Once FEMA approves a reimbursement request, it will fund the activity retroactively from January 2020 to September 30, 2021. This is a perfect opportunity to apply to take advantage of FEMA’s expanded reimbursement policy so as to open funds to individually house all people experiencing homelessness for the duration of the pandemic at no local cost.

By definition, people experiencing homelessness are at an increased risk of contracting COVID-19 or experiencing worse COVID-19 outcomes because they are less able to self-isolate. Transitioning people into individual housing units, such as the many vacant hotel rooms now available, is the best practice and would ensure they would be able to effectively socially distance themselves and have access to adequate sanitation, as well as be easily accessible to health care and other service providers. **As noted above, FEMA is now providing 100% reimbursement for communities providing non-congregate shelter.** Communities are recommended to coordinate with local partners and “continue activities that protect people experiencing homelessness, including supporting continuity of homeless services, healthcare, behavioral health services, food pantries, and linkages to permanent housing.” The guidelines also specify that any individual experiencing homelessness who is diagnosed with COVID-19 should be provided with isolation housing so they can recover and not infect others.

We appreciate Everett’s plans to promote homeless services including the shelter attached to the Proposed Ordinance—but the best, most cost-effective, and permanent way to achieve that is to ensure that all who are unsheltered are able to access adequate, alternative housing. The lack of capacity to house or adequately shelter the people experiencing homelessness means these people are merely dispersed to different public spaces, and will inevitably find themselves subject to the Proposed Ordinance again. Thus, we are concerned that this type of ordinance merely provides procedures for pursuing ineffective and expensive punishment strategies, rather than constructive solutions that can actually end homelessness in Everett.

Numerous studies have shown that communities actually save money by providing housing and services to those in need, rather saddling them with fines, fees and arrest records and cycling them through expensive hospital and jail systems. *See Housing Not Handcuffs Report.* The Economic Roundtable of Homelessness in Los Angeles found that housing reduced average monthly spending by 41% per person, even after including the cost of providing housing. This savings included a 95% reduction in jail facilities and services costs. Though it may hide the costs in the law enforcement and jail budget, the Proposed Ordinance will incur significant costs for Everett and its taxpayers—without solving the problem of homelessness. If the city’s true interest is in public health, safety, and economic growth, it could make a much better investment by providing housing and services, rather than making it harder for people to exit homelessness due to criminal penalties and arrest records.

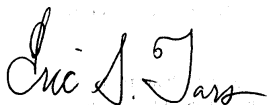
Additionally, legislation like the Proposed Ordinance run afoul of the federal government’s policies to end homelessness, and may ultimately threaten the community’s access to federal funding to provide homeless services. For several years, the U.S. Department of Housing and Urban Development has asked questions on its funding application for its \$2.5 billion Continuum of Care funding stream to reward communities that have implemented constructive solutions to homelessness and restrict funding for those that continue punishment strategies.

Finally, the Proposed Ordinance may spur litigation like the class action lawsuit in *Grants Pass* or other similarly situated municipalities, which would be an additional fiscal cost. When the city of Honolulu enforced similar camping bans, a certified class of “all homeless or formerly homeless individuals, whose property was seized and destroyed by the city and county of Honolulu officials,” filed suit against the city alleging violations of the Fourth and Fourteenth Amendments of the U.S. Constitution. *See Martin v. City and County of Honolulu*, 15-cv-00363 (D. Haw. Aug. 15, 2016). More recently, sweeps of encampments in Oakland, California have triggered litigation resulting in an order mandating the city to provide a new Notice to Vacate at least 72 hours in advance, offer shelter beds for the evicted, and provide notice and storage of any property collected. *See Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584, at *1 (N.D. Cal. Apr. 23, 2019). Based on our observations, 57% of lawsuits brought against municipalities for anti-sleeping or anti-camping ordinances between 2014 and 2017 resulted in decisions favorable to the homeless plaintiffs. *See National Law Center on Homelessness and Poverty, Housing Not Handcuffs: A Litigation Manual* (2017) available at <https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual>.

We hope you will draw on our experience and make use of the Law Center’s Encampment Best Practices and Procedures found in the appendix to the Tent City Report. Any “solution” which does not meet the actual needs of people experiencing homelessness—including where they can find a safe place to be, day and night, with their belongings—will result in those individuals needing to improvise their own solutions, and most likely, Everett will not like those solutions any more than they like the current ones. Only by providing a better alternative for these individuals that actually meets their needs will Everett stop this wasteful and harmful cycle. In 2019, Los Angeles adopted our best practices into their own official guidance, which we consider the best model to date. *See Los Angeles Homeless Services Authority, Guiding Principles and Practices for Unsheltered Homelessness* (2019), <https://www.lahsa.org/documents?id=2951-guiding-principles-and-practices-for-unsheltered-homelessness.pdf>.

In an era of record poverty, prolonged unemployment, and a shrinking stock of affordable housing, sensible and cost-effective policies are needed. The City of Everett should not continue to propose problematic encampment ordinances so that they may further criminalize homelessness. Instead, the best way to address the problem is by removing the need for people to shelter themselves in public in the first place, by providing adequate housing and services. Our reports document numerous case studies of constructive alternatives. We urge you to vote against and reconsider the Proposed Ordinance. If Everett would like, we would be happy to work with you to develop and implement solutions that work for everyone. Please feel free to contact me at etars@nlchp.org or 202-638-2535 x. 120.

Sincerely,



Eric S. Tars
Legal Director