



June 8, 2021

Mayor Pat Eklund, peklund@novato.org
Mayor Pro Tem Eric Lucan, elucan@novato.org
Councilmember Denise Athas, dathas@novato.org
Councilmember Amy Peele, apeele@novato.org
Councilmember Susan Wernick, swernick@novato.org

Via email

Dear Mayor Eklund, Mayor Pro Tem Lucan, and Novato City Council:

I write on behalf of the National Homelessness Law Center (“Law Center”) regarding Ordinance 1669 and 1670 (“Proposed Ordinances”), which are being voted on by the Novato City Council today on June 8, 2021. Ordinance 1669 would amend the Novato Municipal Code to ban camping or storage of property in public spaces near “critical” infrastructure. Ordinance 1670 would amend the Novato Municipal Code to ban camping near specific waterways like streams. Violations of the Proposed Ordinances would constitute a criminal misdemeanor in Novato. We are concerned that the Proposed Ordinances fall afoul of the 9th Circuit’s ruling in *Martin v. Boise* by criminalizing involuntary homelessness, and we urge you to vote against them. Instead, we encourage Novato to take advantage of the Federal Emergency Management Agency’s 100% reimbursement for placing homeless individuals in non-congregate shelter during the COVID-19 pandemic. By doing so, Novato can safely end *all* encampments in its jurisdiction by providing hotel rooms to encampment residents at *zero* cost to the local taxpayers.

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 Ordinances do not address the underlying causes of homelessness, and instead injure homeless persons’ rights and waste taxpayer resources.

The Proposed Ordinances Run Afoul of *Martin v. Boise*

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). City Manager Adam McGill acknowledged that Novato has obligations under *Martin* and as such must ensure that people experiencing homelessness must be able to lawfully sleep outside absent shelter alternatives. However, Ordinance 1669 grants Novato the discretion to designate substantial amounts of the city as “critical infrastructure,” including government buildings, hospitals, and train tracks, which would prohibit camping at or near these areas regardless of the availability of shelter.

Martin is an as applied challenge. There are numerous circumstances Novato must consider that could influence when a person might need to rest outside during certain times. For example, a person experiencing homelessness might be unable to rely on these alternatives due to other restrictions and concerns, such as the potential loss of personal property or its proximity to their place of work. Changing the face of the law does not insulate Novato from its *Martin* requirements—the relevant inquiry is whether a person experiencing homelessness has reasonable access to indoor shelter.

Additionally, a recent district court decision further clarified the *Martin* ruling. In *Blake v. City of Grants Pass*,¹ Grants Pass, OR maintained a similar ordinance that prohibited sleeping on any public sidewalks or streets, as well as camping on any public property. The City of Grants Pass argued that its anti-camping ordinances complied with *Martin* because it did not criminalize the act of sleeping, but instead prohibited sleeping in a campsite and the ordinances only imposed a civil fine, not a jail sentence. The Court found that these ordinances were unconstitutional under *Martin*, because “it is not enough under the Eighth Amendment to simply allow sleeping in public spaces; the Eighth Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.”

Because people experiencing homelessness are not on the street by choice but because they lack choices, punishment serves no constructive purpose. Even if Novato can constitutionally enforce the camping ban, restricting where unhoused people can sleep does not address any of the underlying reasons causing their homelessness. As stated by the United States Department of Justice, “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). Just like the camping ban in Boise, Novato’s Proposed Ordinances “create[] a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back.” *Id.* (quoting the U.S. Interagency Council on Homelessness). Policies that create criminal records because someone is homeless “create barriers to employment and participation in permanent, supportive housing programs.” *Id.* Additionally, convictions 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.” Finally, “pursuing charges against individuals for sleeping in public imposes further burdens on scarce defender, judicial, and carceral resources.” *Id.*

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

Providing Non-Congregate Housing is Reimbursable During the COVID Pandemic

Guidelines released by the Centers for Disease Control and Prevention (“CDC”) state “[i]f **individual housing** options are not available, 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.” See <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>. Individual housing is necessary to curb the spread of the COVID-19 pandemic and to protect against avoidable hospitalization and death among both housed and unhoused people.

While providing individual housing is necessary for the current crisis, it is also the best practice for the long term, from both a public health and fiscal policy perspective. The lack of plan or requirement to house or adequately shelter the displaced encampment residents means these people are merely dispersed to different public spaces, leading to the inevitable reappearance of outdoor encampments. Thus, we are concerned that the Proposed Ordinances merely provide procedures for pursuing ineffective and expensive punishment strategies, rather than constructive solutions that can actually end homelessness in Novato.

Fortunately, the Federal Emergency Management Agency (“FEMA”) has recently approved waivers of both its 30-day renewal and 25% match requirements, offering 100% reimbursement funding for non-congregate shelter for the duration of the pandemic. See <https://www.fema.gov/press-release/20210203/fema-statement-100-cost-share>. First, 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. Now is a perfect opportunity to apply to take advantage of FEMA’s expanded reimbursement policy to individually house all people experiencing homelessness for the duration of the pandemic at no local cost. Novato has **no** excuse not to apply or reapply for this funding so it can offer non-congregate shelter to people experiencing homelessness for the duration of the crisis. Novato can use this opportunity to develop a long-term affordable housing plan, instead of promoting legislation like the Proposed Ordinances. See also <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>.

Novato should apply or reapply for FEMA reimbursement so that it can address *all* encampments in the city by offering hotel rooms to people experiencing homelessness *for the duration of the crisis* at zero local cost. Rather than waste any more money conducting encampment sweeps and amending camping ordinances, Novato owes it to its citizens, housed and unhoused alike, to exhaust every available funding channel and use this opportunity to secure housing for people experiencing homelessness. Novato can look to states like Vermont and Connecticut when crafting its response, which have relied on FEMA reimbursement to support efforts for non-congregate housing. See <https://www.fema.gov/press-release/20210302/fema-awards-more-15-million-covid-19-non-congregate-sheltering-vermont>; <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/09-2020/Governor-Lamont-Coronavirus-Update-September-9>. Additionally, California relied on FEMA reimbursement when working to procure hotel and motel rooms to safely isolate people experiencing homelessness and reduce the risk of COVID-19 spread. See <https://www.gov.ca.gov/2020/04/03/at-newly-converted-motel-governornewsom-launches-project-roomkey-a-first-in-the-nation-initiative-to-secure-hotel-motel-rooms-to-protecthomeless-individuals-from-covid-19/>.

The Proposed Ordinances May Increase Fiscal Costs

If Novato is interested in reducing costs, 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 Ordinances will incur significant costs for Novato 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, these types of ordinances run afoul of the federal government’s policies to end homelessness, and may 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 Ordinances may spur litigation, 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).

In an era of record poverty, prolonged unemployment, and a shrinking stock of affordable housing, sensible and cost-effective policies are needed. We all share the goal of not having homeless persons sleep in our streets and parks—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. Criminalizing camping in Novato undermines Novato’s work to serve people experiencing homelessness. The Proposed Ordinances miss the most significant feature of an encampments policy—namely, where will those residing in the encampments live if not in the targeted encampments? The best solution to the problem is to remove the need for people to shelter themselves in public in the first place, by providing adequate housing and services.

We urge you to vote against the Proposed Ordinances and prioritize solutions that lead to permanent housing for people experiencing homelessness in Novato. We would be happy to work with you to develop and implement solutions that work for everyone. Please feel free to contact me at tbauman@nlchp.org.

Sincerely,

Tristia Bauman
Senior Attorney