

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: May 30, 2023
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Legal Analysis of the Proposed Unsafe Camping Ordinance

On April 13, 2023, San Diego City Council's Land Use and Housing Committee considered a proposed ordinance amending the San Diego Municipal Code (Municipal Code or SDMC) to address unsafe camping and abatement of encampments on public property (Proposed Ordinance). The Proposed Ordinance would generally prohibit camping and maintaining an encampment on public property in the City of San Diego, but the prohibition would not be enforced when there is no available shelter. The Proposed Ordinance would also authorize the City to enforce a prohibition on camping even if shelter is not available in specified locations or when the activity poses an immediate threat or unreasonable risk of harm to any natural person or to public health and safety. The Land Use and Housing Committee forwarded the Proposed Ordinance to Council without a recommendation and requested the Office of the City Attorney prepare a legal analysis of the Proposed Ordinance and address legal questions raised during the meeting.

ANALYSIS

I. QUESTIONS ABOUT THE EXISTING STATE OF THE LAW

A. Does the City Currently Allow Camping on Public Property?

No, camping is not permitted on City-owned property outside of authorized campgrounds. There are several existing laws that prohibit illegal lodging, camping, and similar activities on public

property.¹ For example, California Penal Code section 647(e) makes it a misdemeanor for a person to “lodge[] in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.” Municipal Code section 63.0102(b)(12) prohibits camping in public parks, plazas, and public beaches. The Municipal Code also bans encroachment, which generally prohibits a person from building, placing, allowing, or maintaining any vegetation or object on a public street, alley, sidewalk, or other public right-of-way or public property without permission. SDMC § 54.0110. The Proposed Ordinance would repeal and replace Municipal Code section 63.0102(b)(12), but the other referenced laws would remain in effect.

B. How do Settlement Agreements in Prior Lawsuits Affect the City’s Enforcement of Illegal Lodging and Encroachment Laws?

This Office issued a Memorandum describing existing court-monitored settlement agreements that control how the City responds to homelessness. *See* City Att’y MS 2022-6 (June 3, 2022), attached. The following briefly summarizes the City’s obligations in each agreement:

- The 2007 *Spencer* settlement generally prohibits enforcement of illegal lodging (Penal Code section 647(e)) between the hours of 9:00 p.m. and 5:30 a.m., but San Diego Police Department (SDPD) may enforce illegal lodging if responding to a complaint in the Downtown area and there is a shelter bed available.
- The 2011 *Isaiah* settlement establishes an abatement process that applies when the City cleans up encampments. The City must provide notice at least 72 hours before abatement.² Items at an encampment must be sorted and documented. Certain items must be impounded. The City agreed not to abate encampments between the hours of 9:00 p.m. and 5:30 a.m.
- The 2019 *Arundel* settlement requires SDPD to use progressive enforcement³ when enforcing Municipal Code section 54.0110 prohibiting encroachment in the right-of-way.

¹ Unauthorized activity on private property would generally constitute a trespass enforceable by the property owner. The Proposed Ordinance does not address any activity on private property.

² When storage space is available at the Sherman Heights storage facility, the City may reduce the notice period to three hours.

³ Progressive enforcement generally refers to an enforcement model where officers offer services and education on the law before issuing citations or making custodial arrests.

C. What Does the Court Ruling in *Martin v. City of Boise* Require?

The ruling in the federal case of *Martin v. City of Boise* expanded the Eighth Amendment’s protections against cruel and unusual punishment⁴ to unsheltered individuals, stating:

“[S]o long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],” the jurisdiction cannot prosecute homeless individuals for “involuntarily sitting, lying, and sleeping in public.” That is, as 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.

Martin, 920 F.3d at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

While cities may not generally prohibit unsheltered individuals from sleeping outside on public property when they cannot obtain shelter, the *Martin* decision does not prevent governments from regulating other behavior, such as blocking the sidewalk or prohibiting erection of certain structures. *Id.* at 617 n.8. Additionally, the *Martin* decision does not prevent governments from prohibiting camping “at particular times or in particular locations.” *Id.* The court recognized that such an ordinance may be constitutionally permissible, but that “will depend . . . on whether it punishes a person for lacking the means to live out the ‘universal and unavoidable consequences of being human’ in the way the ordinance prescribes.” *Id.* (quoting *Jones*, 444 F.3d at 1136).

D. What Does *Martin*’s Requirement for Available Shelter Mean?

The *Martin* court did not elaborate on what it meant by “sleeping space . . . practically available in any shelter” but the following guidance can be extrapolated from the decision and subsequent case law. *Martin*, 920 F.3d at 618.

- The available shelter requirement 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.” *Id.* at 618 n.8.

⁴ The Eighth Amendment to the United States Constitution prohibits the government from punishing an involuntary act or condition if it is the unavoidable consequence of the person’s status. *Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) (citing *Robinson v. California*, 370 U.S. 660 (1962) (finding a statute that criminalized the status of narcotic addiction unconstitutional)). The *Martin* decision is relatively recent and there is a split in the Circuit courts on this issue. As a split exists, the United States Supreme Court may be asked in the future to resolve the conflict. This Office will keep Council informed of any changes in the law.

- Shelter that requires enrollment in a religion-based recovery program as a condition to accessing the shelter is not available to individuals unwilling to enroll in the program. *Id.* at 605-07.
- Shelter must be more than an asphalt tarmac with large umbrellas for shade that does not include a roof, walls, water, or electricity. *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648 (E.D. Cal. July 8, 2021).

To comply with *Martin's* shelter requirement, this Office recommends the City offer shelter that an individual can actually accept based on individualized needs. For example, the City should not conclude that an unsheltered woman who cannot physically access a top bunk has been offered available shelter if the only shelter beds available at the time are top bunk beds or in a men-only shelter.

II. QUESTIONS ABOUT THE PROPOSED CHANGES TO THE LAW

A. What Does the Proposed Ordinance Change from Existing Law?

The Proposed Ordinance would generally make the following changes to the Municipal Code:

- Add definitions of park and open space and incorporate the new definitions in the regulations on activities in City parks;
- Correct the Parks and Recreation Department name, make the language gender neutral, and clarify prohibited activities in parks;
- Relocate the prohibition on camping in public property to a new Division and add definitions of camp, camp paraphernalia, and encampment to describe prohibited activities;
- Add protections for waterways;
- Consistent with the *Spencer* settlement, make the general prohibition on camping in public property enforceable only between the hours of 5:30 a.m. and 9:00 p.m., and when there are shelter beds available;
- Prohibit camping, even if shelter is not available, in specific locations, including within two blocks of schools and shelters, and in all parks, open space, trolley platforms, and transit hubs; and
- Establish a process for cleaning up encampments, based on the *Isaiah* settlement's process.

The Proposed Ordinance is consistent with the *Martin* decision and the existing settlement agreements.

B. Is it Legally Permissible for the Proposed Ordinance to Prohibit Camping in Certain Locations when Shelter is Not Available?

The Proposed Ordinance is defensible so long as it does not unduly infringe upon the constitutional rights of unsheltered individuals for the status of being homeless and does not prohibit camping in a manner that results in unsheltered individuals having no alternative place to go. As amended by the Land Use and Housing Committee, the Proposed Ordinance would prohibit camping regardless of available shelter within two blocks of shelters and schools, and in all parks, open space, trolley platforms, and transit hubs. As the courts have not established a test to evaluate the times or locations where camping may be prohibited when shelter is not available, Council should weigh the constitutional rights of unsheltered individuals against the City's need to protect public health and safety in these specific locations.

If challenged, a court will assess whether the Proposed Ordinance's prohibition on camping in specific locations addresses an articulated public health or safety concern related to unlawful camping activity in those locations. For example, the Staff Report for the Land Use and Housing Committee provided evidence about the risk of wildfire in the region's open space, that encampment fires increase those risks, and that wildfires endanger the lives of unsheltered individuals camping in open space, as well as the general public.

In its deliberations, Council should ensure that there are facts in the record supporting its decision to prohibit camping in each impacted location.⁵ These facts should substantiate Council's determination that its actions are for the purpose of protecting the public's health and safety. Additionally, Council should consider whether the collective result of the specific locations included in the Proposed Ordinance result in unsheltered individuals having no place to go.

III. QUESTIONS ABOUT ENFORCEMENT

A. Can the City Enforce Existing Laws to Address Public Health and Safety Concerns Resulting from Unauthorized Camping?

SDPD may enforce existing laws against unsheltered individuals in compliance with the settlement agreements and the *Martin v. City of Boise* decision discussed in Section I of this Memorandum. In addition, the Municipal Code includes several prohibitions sometimes associated with camping that SDPD may enforce, including prohibitions against encroachment,

⁵ Other jurisdictions have relied on *Martin* to ban camping in specific locations when shelter is not available, although this Office has not identified any jurisdiction that has banned camping in a broad area of the city. For example, the City of Spokane banned camping underneath any railroad viaduct and within three blocks of any congregate shelter regardless of available shelter. Spokane Municipal Code section 12.02.1010. The City of Riverside banned camping in the Wildland Urban Interface, which is the area where houses meet or intermingle with undeveloped wildland vegetation. Riverside Municipal Code section 9.04.610. The City of Santee banned camping in a manner that threatens to discharge pollutants or waste in the San Diego River corridor. Santee Municipal Code section 7.20.100.

setting fires, littering, damaging park property, and camping. *See* SDMC §§ 54.0110, 63.0102(b)(5), 63.0102(b)(6), 63.0102(b)(12).

B. How Can the Proposed Ordinance be Enforced?

The Proposed Ordinance may be enforced as outlined in Municipal Code section 12.0201, which allows for infraction or misdemeanor citations or custodial misdemeanor arrests when allowed by law. *Martin* generally prohibits enforcement of an ordinance banning camping if it criminalizes conduct that is “involuntary and inseparable from [the] status” of being homeless. *Id.* at 617. But the court stated its holding was narrow and did not “dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.” *Id.* (quoting *Jones*, 444 F.3d at 1138). *Martin* suggests that the City may adopt and enforce a camping ban in specific locations when there is no shelter available. *Martin* also suggests the City may enforce camping prohibitions when an individual has the means to obtain shelter or was offered available shelter.

This Office recommends SDPD adopt procedures to ensure enforcement is consistent with *Martin* and the requirements of the Proposed Ordinance and that could assist in gathering evidence necessary for successful prosecution. Examples of possible procedures could include one or more of the following:

- Adopting a training bulletin, which could establish a progressive enforcement model;
- Including training for new SDPD recruits and refresher trainings for existing personnel;
- Developing a list of questions for use when contacting unsheltered individuals that could include questions about the type of shelter the individual needs (e.g., does the individual have a pet, can the individual access a top bunk);
- Creating a process for determining whether shelter is available⁶, including identifying in a police report the name of the person who made the offer of shelter, the type of shelter offered, and how that shelter reasonably meets the needs of the individual;
- Establishing guidance on the use of discretion when determining if the camping activity poses an immediate threat or unreasonable risk of harm to a person or to the public’s health or safety under section 63.0404(b) of the Proposed Ordinance; or
- Developing specific information that should be included in police reports.

⁶ This Office understands that SDPD already has a process for determining the number of available shelter beds on a daily basis.

This Office is available to assist with developing procedures for enforcement of the Proposed Ordinance.

C. What are Potential Challenges to Prosecuting Violations of the Proposed Ordinance?

In all criminal matters, prosecutors⁷ have an ethical duty to issue charges only when the charges are supported by legally sufficient evidence and the prosecutor has a reasonable expectation of obtaining a conviction. *See* City Att’y MS 2021-19 (Oct. 18, 2021); Cal. Prof. Rules of Conduct, Rule 3.8. Prosecutors must be able to prove each element of the offense beyond a reasonable doubt.

For charges based on the Proposed Ordinance,⁸ a prosecutor may have to overcome a necessity defense (i.e., that the defendant engaged in the camping activity out of legal necessity). *In re Eichorn*, 69 Cal. App. 4th 382 (1998). The defendant would need to demonstrate that no adequate legal alternatives to unlawful camping existed when the cited offense occurred, and that the defendant did not substantially contribute to the emergency that resulted in the defendant’s need to camp in violation of the Proposed Ordinance.⁹ To rebut this argument, the prosecutor would have to demonstrate there was shelter space available or a legal place to camp.¹⁰

Additionally, when the Proposed Ordinance is enforced in locations or at times when shelter is available, the prosecutor must be able to prove that shelter space was reasonably available for the defendant at the time the defendant was cited for a violation of the Proposed Ordinance. Proof that shelter is available can be established by, for instance, testimony from the witness who checked bed availability when the cited offense occurred.¹¹ In this example, the officer’s report should identify the shelter and shelter employee who confirmed the bed was available so the shelter employee could testify to the availability of shelter for the defendant at the jury trial.

⁷ Prosecutors with the San Diego City Attorney’s Office have jurisdiction to prosecute for all offenses against the ordinances of the City and for offenses of state law constituting misdemeanors occurring within the City limits. San Diego Charter §§ 40, 40.1.

⁸ In most cases a first violation of the Municipal Code is handled as an infraction and sent to Kearny Mesa court. Violations of state law, such as the California Penal Code, are misdemeanors and are handled in San Diego Superior Court. Municipal Code violations can be enforced criminally as misdemeanors, infractions, or enforced administratively. Cal. Gov’t Code §§ 36900, 53069.4; SDMC § 12.0201.

⁹ In *Eichorn*, the court held that the defendant was “entitled to raise a necessity defense to charges he violated the camping ordinance,” because he offered “substantial if not uncontradicted evidence that defendant slept in the civic center because his alternatives were inadequate and economic forces were primarily to blame for his predicament.” *Id.* at 390-91.

¹⁰ The ability to sleep in another prohibited location or during daytime hours would not overcome the necessity defense. The court found trespassing or being forced to leave the city were inadequate alternatives, stating the city could not “‘solve’ its social problems by foisting them onto nearby localities; an individual who has no reasonable alternative to sleeping in a public place in [the city] need not travel in search of streets and other public places where he can catch his 40 winks.” *Id.* at 390 n.4.

¹¹ “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see Kirby v. United States*, 174 U.S. 47 (1899); *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

CONCLUSION

This Memorandum is intended to assist Council in its review of the Proposed Ordinance and provide background about the current state of the law. As explained above, the constitutional rights of unsheltered individuals must be balanced against the City's obligation to protect the public's health and safety. The City's ability to enforce is contingent upon compliance with the *Martin* decision and the existing settlement agreements. Furthermore, referrals for prosecution should include proof that shelter was available and refused, if required. The Presiding Judge of the San Diego Superior Court should be informed of the Proposed Ordinance, if adopted, so the courts are prepared to handle a potential increase in cases. This Office meets regularly with the Court and will keep it apprised of developments. In addition, Council may wish to require periodic updates on implementation. It is difficult to predict how the Proposed Ordinance, if approved, will impact existing City resources. This Office may require additional staff if SDPD referrals increase. This Office is available should you have any questions.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Heather M. Ferbert

Heather M. Ferbert
Senior Chief Deputy City Attorney

HMF:sc
Doc. No. 3319910
MS-2023-4

Attachment: MS-2022-6

cc: Charles Modica, Independent Budget Analyst

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: June 3, 2022
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Homelessness Lawsuits Summary

Attached for your use is a summary outlining pending and settled litigation that affect the City's response to homelessness. It describes the existing settlements and pending litigation in *Bloom v. City of San Diego*, as well as recent case law from the Ninth Circuit Court of Appeals. The summary may be made available to the public. We are available to provide more detailed information on these cases, including copies of the settlement agreements and hope these materials are helpful to you.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Heather M. Ferbert

Heather M. Ferbert
Chief Deputy City Attorney

HMF:sc
MS-2022-6
Doc. No.: 2997898
Attachment: Homelessness Lawsuits

cc: Charles Modica, Independent Budget Analyst

Homelessness Lawsuits – Summary [05/31/2022]

I. Spencer Settlement

1. The 2007 *Spencer* settlement concerns the City's enforcement of an illegal lodging law (Cal. Penal Code § 647(e), formerly 647(j)).
2. The lawsuit claimed the City violated the rights of homeless individuals by enforcing illegal lodging due to the involuntariness of homelessness and the necessary human acts of sitting down, lying down, and sleeping.
3. City-wide settlement resulted in the City agreeing not to enforce illegal lodging between 9:00 p.m. and 5:30 a.m. city-wide.
4. In 2010, the settlement was modified to allow enforcement in downtown area between 9:00 p.m. and 5:30 a.m. **IF:**
 - a. SDPD responds to a complaint;
 - b. SDPD confirms there is a bed available within the downtown area;
 - c. SDPD offers the bed to that person; and
 - d. The person refuses to accept the bed.
5. The U.S. District Court has continuing jurisdiction over the case.

II. Isaiah Settlement

1. The 2011 *Isaiah* settlement concerns the City's waste abatement procedures when homeless personal property is involved.
2. The lawsuit claimed the City violated the rights of homeless individuals by: (1) failing to provide adequate prior notice before abatements; and (2) using inadequate procedures for determining which property was waste (disposed immediately) and which is not (stored by the City for 90 days).
3. City-wide settlement includes three main features:
 - a. One-time settlement payment (which has been completed);
 - b. One-year pilot program to house storage bins in the downtown area where homeless individuals could store their personal belongings; and
 - c. Updated City abatement procedures when homeless personal property is involved, including the 72-hour noticing requirement and a detailed property sorting procedure.

4. In 2014, the *Isaiah* settlement was amended to approve separate abatement procedures for Downtown Partnership (Clean & Safe).
5. In 2018, the *Isaiah* settlement was amended to allow a three-hour abatement noticing period when storage space is available at the Sherman Heights storage facility. The City also agreed not to abate between 9:00 p.m. and 5:30 a.m.
6. In 2020, the *Isaiah* settlement was temporarily amended to allow a three-hour noticing period when any storage facility in the downtown area is not full, including storage at City shelters. The amendment expires when the local state of emergency related to Covid-19 terminates.
7. The U.S. District Court has continuing jurisdiction over the case.

III. Arundel Settlement

1. The 2019 *Arundel* settlement concerns enforcement of the City's encroachment ordinance (SDMC § 54.0110). This ordinance generally prohibits storing any object on public property.
2. Similar to *Spencer*, this lawsuit claimed the City violated the rights of homeless individuals when enforcing that law because homeless individuals have no place to put their belongings.
3. The City-wide settlement resulted in the City opening an additional storage facility on Lea Street for individuals to store their personal belongings. The City also agreed to adopt a written procedure for a progressive enforcement model.
4. The U.S. District Court has continuing jurisdiction over the case for an initial period of five years.

IV. Pending Litigation - Bloom

1. Disability Rights California (DRC) and other groups represent eleven homeless individuals, some with disabilities, who live in their RVs and vehicles, and who have sued the City over the City's Oversized Vehicle Ordinance (SDMC § 86.0139(a)) and the Vehicle Habitation Ordinance (SDMC § 83.0137(f)).
2. Plaintiffs allege these ordinances violate the constitutional rights of individuals and the Americans with Disabilities Act. Constitutional issues alleged include the 8th Amendment, right to travel, and equal protection. The litigation is ongoing.
3. The Oversized Vehicle Ordinance (SDMC § 86.0139(a)) prohibits parking of oversized vehicles, non-motorized vehicles, or recreational vehicles on street, park road, or parking lot between 2:00 - 6:00 a.m. and is enforced as a parking citation.
4. The Vehicle Habitation Ordinance (SDMC § 86.0137(f)) prohibits using a vehicle for habitation between the hours of 9:00 p.m. and 6:00 a.m. and prohibits using a vehicle for

habitation all the time within 500 feet of a residence or a school. The Ordinance is subject to progressive enforcement.

V. Martin v. City of Boise, 920 F. 3d 584 (9th Cir. 2018)

1. The City is also subject to federal and state law, including the United States Court of Appeals for the Ninth Circuit's decision in *Martin v. City of Boise*. The court ruled that cities cannot enforce ordinances that impose criminal sanctions against homeless individuals for sleeping outdoors on public property if there is no alternative shelter available to them.
2. The ruling focuses on the availability of "practically available" shelter.

VI. City Programs

1. The City and San Diego Housing Commission operate and administer multiple programs to provide shelter, safe parking lots, personal storage space, and other services to unsheltered individuals and families.
2. More information is available here: <https://www.sdhc.org/homelessness-solutions/city-homeless-shelters-services/>