

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY



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SENT VIA ELECTRONIC MAIL

City of Durango City Council - citycouncil@durangogov.org

Durango Mayor Sweetie Marbury - SweetieMarbury@DurangoGov.org

Re: Durango's Proposed Camping Ban

Dear Mayor Marbury and Durango City Councilors,

On behalf of the National Law Center on Homelessness and Poverty and the American Civil Liberties Union of Colorado, we write to express our concern with the proposed amendments to the City code governing camping and sheltering in public space. The proposed policy will not achieve the stated goals of, "promoting responsible land use planning while addressing matters that affect life, health, property and public peace within the City."¹ Instead, this proposal is a doomed-to-fail policy attempt to manage homelessness through policing and evictions from cars and encampments, rather than solving homelessness through housing and adequate places where people can live until housing is available. We urge the City to pursue real solutions to homelessness that will sustainably end outdoor camping and its associated risks.

BACKGROUND

On August 24, 2018, we submitted a letter expressing our concern about the closure of the city's only sanctioned homeless encampment and our opposition to enforcement of Durango's camping ban² against unhoused residents who have

¹ Memo to Durango City Council regarding proposed amendments, drafted by City Attorney Dirk Nelson and signed by City Manager Ronald LeBlanc (hereinafter "Nelson Memo"), *available at* https://publicaccess.durangogov.org/OnBaseAgendaOnline/Documents/ViewDocument/City_Council_Study_Session_4636_Agenda_Packet_11_13_2018_4_00_00_PM.pdf?meetingId=4636&documentType=AgendaPacket&itemId=0&publishId=0&isSection=false.

² See Durango Code of Ordinances (DCO) § 17-57(e) ("It shall be unlawful for any person to knowingly lodge in or camp upon any public way, public park, public place, or public building.").

nowhere else to go. In that letter, we highlighted Durango’s lack of housing, shelter, and lawful encampment options for unhoused residents, and we advised that application of the City’s camping ban to that population is unconstitutional and cruel.³

Only weeks later, the Ninth Circuit ruled in *Martin v. City of Boise* that it violates the Cruel and Unusual Punishment clause of the Eighth Amendment to punish unhoused people for resting in public when they are involuntarily in public space.⁴ In reaching its decision, the court affirmed the rationale of *Jones v. City of Los Angeles*,⁵ which the U.S. Department of Justice endorsed in its statement of interest brief in *Martin* and which developed from analyses of Supreme Court precedent: punishing homeless people for acts they are forced to perform in public effectively and unconstitutionally punishes them for being homeless.⁶

In light of our letter and the *Martin* decision, Durango placed a moratorium on overnight enforcement of its camping ban and took the opportunity to revisit its policies related to homeless camping. On November 13, 2018, City Attorney Dirk Nelson proposed changes to the City ordinance banning camping in city limits. Under the proposed new ordinance, “camping” and “sheltering” are broadly defined to include simply sleeping, even without any cover, as well as other activities of daily living for unhoused people, including keeping one’s possessions nearby where one is sleeping.⁷ Both camping and sheltering are prohibited throughout the city except for “City Owned Open Space and Trails,” where sheltering is allowed in designated areas “from the hours of sunset to sunrise” and with the “written action of the City Manager or other designated official if adequate overnight sheltering is not otherwise available in or near the City.”⁸ The proposal also suggests adopting code provisions that prohibit camping, sheltering or sleeping in larger vehicles in any City right of way or in other city public property, such as city parking lots. No “designated areas” for sheltering are identified in the proposal, nor is there any system for making reasonable accommodations for unhoused persons with disabilities who cannot comply with the proposal’s broad, overly rigid restrictions on when and where an unhoused person may lawfully shelter and rest.

³ Letter from NLCHP & ACLU to Durango City Council, Aug. 24, 2018, available at <https://aclu-co.org/wp-content/uploads/2018/11/2018-08-24-Durango-ACLU-camping-ban.pdf>.

⁴ See, e.g. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

⁵ See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (holding that “the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter”), vacated after settlement, 505 F.3d 1006.

⁶ *Bell v. Boise*, et. al., 1:09-cv-540-REB, Statement of Interest of the United States (Aug. 6, 2015), available at <https://www.justice.gov/crt/file/761211/download>.

⁷ Nelson Memo, pp. 2-3.

⁸ *Id.*

DISCUSSION

Unfortunately, the current proposal misses the opportunity to pursue real policy solutions to homelessness and instead adopts a punitive and rigid policy approach cut from the same cloth as those that landed Durango in its current predicament.

Unhoused people in Durango still have nowhere to go.

As we outlined in our prior letter, the number of people living outside in Durango is increasing. Durango does not have enough accessible housing, or even temporary emergency shelter, to meet their need. Even when shelter beds are available, many unhoused people are unable to access them because of shelter rules. People with mates, pets, active addictions or who have slept in the shelter more than six weeks are barred from staying in the shelter. The obvious consequence of this imbalance is that people are forced to live outdoors and in public space. Yet, despite this stark reality, the City has repeatedly moved its unhoused residents around Durango under threat of arrest and without a clear plan. It now proposes to impose counterproductive and onerous restrictions on resting and sheltering in public while doing nothing to address the core problem: a lack of safe, stable places where unhoused people can be until housing is available to them.

The proposed camping ban will worsen Durango's homelessness crisis.

The City's approach to homelessness has been counterproductive and harmful. Punitive approaches to homelessness are expensive and waste limited public money on a losing strategy.⁹ It has caused significant human suffering, including the loss of property needed to help unhoused Durango residents survive the frigid winter months.¹⁰ And, critically, it has not reduced homelessness.¹¹ The proposed camping restrictions represent more of the same.

Enforcement of the proposed restrictions will be expensive. We and local homeless advocates have heard from unhoused people who have been cited or evicted from public space – multiple times – simply for sleeping outdoors in the wrong location or leaving a tent up during restricted hours. This practice of enforcement has not reduced these individuals' collective need for shelter, nor

⁹ See, e.g., David Chambers, *Too High a Price: What Criminalizing Homelessness Costs Colorado: Durango City Spotlight*, UNIVERSITY OF DENVER, STURM COLLEGE OF LAW, HOMELESS ADVOCACY POLICY PROJECT (hereinafter "Too High a Price"), available at <https://www.law.du.edu/documents/homeless-advocacy-policy-project/Durango-Spotlight.pdf>.

¹⁰ Letter from Community Compassion Outreach to Durango City Council, Nov. 16, 2018.

¹¹ Meghan Henry et al., *The 2017 Annual Homeless Assessment Report (AHAR) to Congress*, Dec. 2017; Tom McGhee *Homelessness rises in Colorado in 2017, but Denver's count dropped*, DENVER POST, Dec. 6, 2017.

persuaded them to better comply with the ordinance, as the human need for shelter cannot be reasonably foregone. Under the proposed ordinance, and in the absence of adequate alternatives, this pattern of ineffective enforcement will continue and, consequently, so will its expense. As stated by Boulder County Sheriff Joe Pelle regarding enforcement of Boulder’s camping ban, "Jail is an expensive solution. I can't even call it a solution. It's an expensive option. . . . I'm not sure this is a problem we're going to enforce our way out of."¹²

Enforcement of the ban will also create great harm to unhoused residents. We and local homeless advocates have spoken with multiple unhoused individuals who have described serious health problems resulting from the current camping ban and unhoused persons’ futile attempts to comply with it. We have heard from individuals who have suffered loss or damage to their critical personal possessions, including their tents which can make the difference between surviving or not this winter. Yet, rather than mitigate against those known and obvious risks, the City proposes to continue the harm by limiting the hours when persons can shelter themselves – despite the obvious fact that inclement weather can require sheltering at hours not permitted under the ordinance.

And, again, it is critical to note that the City’s proposal does not identify even one adequate place where unhoused people can lawfully shelter even during permitted hours.

The proposed camping ban is legally infirm.

The proposed camping ban raises serious legal concerns about its discriminatory impact on members of protected classes.

1. The proposed camping ban is unconstitutionally cruel as applied to unhoused people.

The proposed camping ban, as applied to unhoused Durango residents, violates a bedrock Eighth Amendment principle: it is unconstitutionally cruel to criminalize a status, like homelessness, that “may be contracted innocently or involuntarily.”¹³ The City cannot circumvent this principle by nominally criminalizing the “act” of sheltering oneself in public as a proxy for criminalizing the status of homelessness outright. Courts have repeatedly found in favor of homeless people challenging laws restricting camping and sleeping under similar circumstances.¹⁴

¹² Natinya Ruan, *Too High A Price 2: Move on to Where?*, UNIVERSITY OF DENVER, STURM COLLEGE OF LAW, HOMELESS ADVOCACY POLICY PROJECT.

¹³ *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

¹⁴ Courts have repeatedly found in favor of homeless people challenging laws restricting camping and sleeping under similar circumstances. See e.g. *Jones v. City of Los Angeles*, 444 F.3d 1118, (9th Cir. 2006), vacated pursuant to settlement agreement, 505 F.3d 1006 (9th Cir. 2007); *Johnson v.*

As noted above, the Ninth Circuit recently ruled in *Martin v. City of Boise* that it violates the Constitution to punish people for living outside when they have no options to live inside. To do so is unconstitutionally cruel because all human beings must rest and, when they lack accessible housing and shelter, they must do so in public space. In its ruling, the Ninth Circuit reasoned that people who are involuntarily in public space cannot be punished for universal and unavoidable human conduct, such as sitting, lying down, and sleeping.

The new proposed rules would explicitly make sleeping outside, with or without cover, a criminal act, unless the City Manager has authorized otherwise by “written action.” The new proposed rules do nothing to address the desperate need of unhoused people for a non-temporary place to sleep, especially through the winter. As with the temporary moratorium, any authorized sleeping in city limits would be limited to between sunset and sunrise. People who must winter outdoors in Durango need at least to be able to insulate their tent with additional tarps and blankets, which realistically requires a non-temporary place for their tent to remain set up. Under the proposed rules, however, unhoused people must take down their shelter every morning before sunrise and carry it with them until sunset. This is particularly burdensome for the many unhoused Durango residents who are elderly and/or who have disabilities. Not only are these populations more at risk from the cold winter temperatures, but many are unable to physically put up, take down, and carry their tents along with all of their personal possessions on a daily basis.

The new proposed rules also limit authorized sleeping to circumstances in which “adequate overnight shelter is not otherwise available in or near the City.” The proposed rules do not explain how the City Manager or police are to know if adequate overnight shelter is available, nor do they account for how a determination will be made as to a shelter bed’s accessibility.¹⁵ Ultimately, under these proposed rules, many unhoused people will not know if there is any location where they are allowed to sleep in the City.

Rather than crafting policies that approach homelessness with compassion, ingenuity and resources, the new proposal sets up homeless residents for continued unnecessary involvement with the criminal justice system simply because they lack permanent housing.

City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev’d in part on other grounds, 61 F.3d 442 (5th Cir. 1995); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Anderson v. City of Portland*, 2009 WL 2386056 (D. Or. July 31, 2009); *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

¹⁵ As the Ninth Circuit decision explicitly recognized, open shelter beds do not equate with adequate available shelter. See *Martin*, 902 F.3d at 1040-42. As described above, there are many circumstances in which unhoused people are unable to stay in open shelter beds, whether because of mental illness, addiction or shelter rules.

2. *The proposed camping ban likely violates Due Process*

The Due Process Clause of the Fourteenth Amendment states that “No state shall . . . deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1. The proposed camping ban raises serious Due Process concerns related to vagueness.

A criminal statute is unconstitutionally vague if it will lead to arbitrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). As the Supreme Court stated in *Papachristou*, if an ordinance provides “no standards governing the exercise of . . . discretion . . . [it] permits and encourages an arbitrary and discriminatory enforcement of the law.” *Id.*, at 170. The proposed ordinance invites arbitrary and selective enforcement by, for example, vesting sole decision making authority in the City Manager or “other designated official” to determine if “adequate overnight sheltering” is otherwise available. This raises several questions left wholly unanswered by the proposed restrictions. Is the mere presence of an open shelter bed sufficient to allow an officer to conclude “adequate overnight sheltering” is available? If a shelter bed is open but the individual who is sheltering outside cannot access the shelter because of having a mate or pet, is “adequate overnight sheltering” available or is that individual subject to citation? What if the camping individual does not stay in shelters because the tight quarters exacerbates his or her mental illness? How is the law enforcement officer to even learn of the reasons the individual is not staying in a shelter? Are officers to wake sheltering individuals in the middle of the night and question them regarding possible barriers to sleeping in a shelter? The proposed amendments do not set forth any standards for evaluating the adequacy or availability of alternative shelter, leaving the City Manager and law enforcement officials to make this determination on a daily or nightly basis while unhoused people must guess as to whether “sheltering” in the city will subject them to being ticketed.

3. *The proposed camping ban will have a discriminatory impact on persons with disabilities.*

Title II of the Americans with Disabilities Act (“ADA”) prohibits public entities from discriminating against disabled individuals on the basis of their disability. The proposed sheltering rules adversely and substantially affect individuals with disabilities as compared with non-disabled individuals. Facially neutral ordinances may illegally discriminate against persons with disabilities when, as here, there is a causal connection between the facially neutral policy and the discriminatory effect.¹⁶

Durango’s proposed camping ban will predictably result in discrimination against unhoused people with disabilities, who are often poor and homeless as a direct result of their disabilities. Persons with disabilities have fewer options for

¹⁶ *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565 (2d Cir. 2003)

accessible and medically appropriate housing and emergency shelter, and they are less physically and mentally able to comply with the proposal's strict requirements, including the requirement to physically break down tents and physically remove one's personal property each morning. Yet, even though the new proposal excessively burdens homeless persons with disabilities as compared with non-disabled homeless persons, the proposal provides no accommodation of any sort to persons with disabilities.

Because homeless people with disabilities in Durango are less able to comply with the proposed camping restriction, and are thus at greater risk of liability, enforcement of the ordinance raises serious questions about the City's compliance with the Americans with Disabilities Act.¹⁷

Durango has an opportunity to pursue real solutions to homelessness.

Residents of Durango want real solutions to homelessness, and your community is well positioned to achieve them if it commits to meaningful, sensible, and humane policy reform. The National Law Center on Homelessness & Poverty ("Law Center") has issued numerous reports on policies that prevent homelessness for people at risk¹⁸ and sustainably end homelessness for people experiencing it.¹⁹ The Law Center also has developed a range of model policies that communities can adopt to constructively address homelessness,²⁰ along with case studies of communities that have implemented them successfully.²¹

Authorizing areas where unhoused people can sleep overnight is legally necessary step in the right direction, but it does not go far enough to address the problem facing Durango. All people need safe, accessible, legal places to be, both at night and during the day, and a place to securely store belongings. Without such stability, unhoused people are less able to escape homelessness²² – perpetuating the very problem plaguing Durango now.

¹⁷ See e.g. *Bloom v. San Diego*, Case No. 17-cv-02324-AJB-NLS (S.D. Cal. 2018) (Court denied City's motion to dismiss Plaintiffs' ADA claims alleging that the City of San Diego discriminates against homeless persons with disabilities by ticketing and impounding the vehicles they live in despite having no housing or medically appropriate shelter available to them.)

¹⁸ National Law Center on Homelessness & Poverty, *Protect Tenants, Prevent Homelessness* (2018).

¹⁹ National Law Center on Homelessness & Poverty, *Tent City USA* (2018); See also National Law Center on Homelessness & Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness* (2016).

²⁰ See Housing Not Handcuffs Campaign Model Policies, available at <http://housingnothandcuffs.org/policy-solutions/>.

²¹ National Law Center on Homelessness & Poverty, *Tent City USA*.

²² See Tai Dunson-Strane and Sarah Soakai, *The Effects of City Sweeps and Sit-Lie Policies on Honolulu's Houseless*, Univ. of Hawai'i at Manoa, Dep't of Urban and Regional Planning 12, 19 (June 2015).

Authorized encampments and other alternatives to traditional housing, such as the successful tiny home village operating in Denver²³, are important interim solutions to homelessness until permanent housing is available. The Law Center has issued guiding principles, based on best practices around the country, that can assist Durango develop effective solutions for where unhoused people can be until housing is available.²⁴ Key to success is a peer driven system of governance that has been shown to improve the neighborly relationship between housed and homeless people.²⁵

Housing is the solution to homelessness, and it is ultimately cheaper and more effective than any other policy approach. Numerous studies have shown that permanent supportive housing saves public resources, improves communities by reducing street homelessness, and improves the health and well-being of homeless people.²⁶

CONCLUSION

Durango deserves real solutions that will end outdoor camping and its associated risks to life, health, and public space. The City should abandon its proposed camping rules that do nothing to address the root causes of homelessness while putting the City at risk of legal liability.

Sincerely,

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²³ <https://www.denverpost.com/2018/07/27/tiny-home-homeless-thriving-denver-rino-neighborhood/>

²⁴ See Section 3 of Tent City USA from the National Law Center on Homeless & Poverty.

²⁵ See *City of Seattle Permitted Encampment Evaluation* (July 2017).

²⁶ See for example, <https://endhomelessness.org/resource/permanent-supportive-housing-cost-study-map/>.

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