



September 9, 2024

TO: Honorable Mayor and Councilmembers

Re: Public Comment Opposing Agenda Item 37 Encampment Policy Resolution to Promote Healthy and Safe Neighborhoods and Related First Reading of Ordinance Amending Chapter 14.48 of the Berkeley Municipal Code

Dear Honorable Mayor and Councilmembers,

The East Bay Community Law Center (EBCLC) and the undersigned organizations strongly urge you to reject item 37, the proposed resolution to change the City’s encampment management policy and amend Chapter 14.48 of the Berkeley Municipal Code. If approved, the City will have moved forward with a resolution that undermines the City’s stated commitment to best practices and to housing first principles without taking any steps to actually resolve the homelessness crisis. Instead, this resolution would effectively criminalize individuals for being unhoused; place unhoused residents at increased risk and subject them to loss of community; disproportionately target Black and disabled residents; silence the voices of Berkeley residents and limit public accountability of government officials; and expose the City to legal and financial liability.

While this resolution may be tempting to pass in the name of political expediency and to appease the voices of District 1 business owners, the long-term implications are inconsistent with the values the City of Berkeley claims to espouse and does nothing to resolve the number of unhoused residents in Berkeley, who this council also represents.

Of further note, this ordinance was placed on today’s agenda without undergoing the normal committee process. As such, there has not been a meaningful opportunity for council or residents

to review this ordinance and make proposed amendments to the resolution. As currently written, this resolution appears to have been written targeting two specific encampments at 8th and Harrison and 2nd and Page, both in District 1, without providing any solutions to the residents living there, which in itself is problematic. However, while the authors purport that they are proposing six “specific” exceptions whereby the City can close encampments without first offering shelter, these exceptions are actually so broad that it would subject any individual encamped alone or in community to the risk of being forced to relocate under threat of citation or arrest and grants the City Manager power without any checks to hold that office accountable to Berkeley residents.

We strongly urge council to reject this resolution tonight. Such significant change to City policy should not pass without a more thorough review of its content and its implications and should undergo significant, thoughtful, and unrushed revisions. We address our concerns in more detail as follows:

I. The Proposed Resolution Would Not Meaningfully Contribute To Resolving The Underlying Issues Contributing to Homelessness

Simply put, sweeps do not work. Almost 90% of the residents at 8th and Harrison are chronically unhoused.¹ Many residents have been targeted in past encampment closures and enforcement actions and yet they remain unhoused. At least one resident has thrice agreed to participate in shelter programs and has failed to secure stable permanent housing. The City Manager’s office reported earlier this year that since September 2021, the Homeless Response Team has performed 106 encampment operations, including closures, and that 26% of these interventions have occurred in the Gilman District.² Sweeps or encampment operations do not resolve the underlying issues causing individuals to remain unhoused. It only shuffles the problem to another street or location in the city.

As the resolution is drafted, two District One encampments will be prioritized for permanent closure, but the resolution proposes no alternative location for those residents to go and is intentionally written to absolve the City of any responsibility to designate an alternate location, either a sanctioned place to sleep and park outside, or through offers of shelter or housing. If displaced, these residents do not suddenly acquire housing. We have evidence that is not the case in that many of these same individuals have previously been displaced after being subject to sweeps and closures and still remain unhoused.

Where will these individuals go? The likely impact is that unhoused residents would relocate to other locations in the city but remain unsheltered, giving rise to new complaints from new

¹ Peter Radu, *Pilot Approach to Prioritizing Residents of the Harrison Street Encampments in Berkeley* (July 20, 2023) (Letter to Alameda County Continuum of Care attached to this agenda report on page 1071).

² Dee Williams-Ridley, *Eighth St and Harrison St Encampment Efforts* (February 20, 2024 (letter to Mayor and Council attached to this agenda report at page 1041).

businesses or residents inconvenienced by the reminder that many Berkeley residents lack a place to live and the implications of that reality.

This resolution is also antithetical to Berkeley's stated values and principles and its stated commitment to engage in best practices as articulated by the United States Interagency Council on Addressing Homelessness. Indeed, the agenda report identifies successes from utilizing the housing first model, which is recommended by the Interagency, referencing a reduction in homelessness in Berkeley based on numbers from the most recent point in time count. On the City's own admission, insufficient accessible housing and shelter options exist for all of Berkeley's unhoused residents. This resolution fails to address that fact by at least providing for a sanctioned encampment and safe parking lot for the residents who will remain unhoused if Berkeley cannot provide accessible shelter to all unhoused residents. It proposes NO solutions other than to scatter unhoused residents who will be required to relocate without an offer of any, let alone accessible, offers of housing or shelter, or be subject to citation or arrest. And once scattered from the prioritized locations at 8th and Harrison and 2nd and Page, based on the wording of this resolution, unhoused residents could be forced to relocate repeatedly, making it even more difficult for unhoused residents to connect with service providers and to eventually move into housing.

II. The Proposed Resolution Raises State And Federal Constitutional Concerns

The authors of this resolution acknowledge the City's obligations to comply with constitutional requirements, but ignore the reality that this resolution, as written, raises serious state and federal constitutional concerns. It is not atypical for drafters of legislation to assert that their intention is contrary to the language, or that in practice the government body will not operate in a manner that the language of the legislation allows, but if that is the case, then the legislation should be drafted to reflect the intent and practice. Without that written assurance in the legislation, even if the framers' intent is to the contrary, the language will allow officials to act in accordance with the legislation as written. This specific resolution is written in such an overly broad manner that it gives rise to serious constitutional concerns and grants permission for these violations to occur.

a. The proposed resolution is overly broad and raises California constitutional concerns

The resolution allows the City to proceed with encampment closures and enforcement of City ordinances against unhoused residents under what the authors frame as six "specific" exceptions. These "specific" exceptions amount to being unhoused and unsheltered in the City of Berkeley, as it is impossible for any resident of Berkeley to live outside and not be in violation of some city ordinance, and thus subject to enforcement action without an offer of shelter, and thus also subject to citation or arrest if they do not then voluntarily relocate to another location where they could then have to turn around and move again. For example, the definition of nuisance includes a violation of "**any** City, state, or federal ordinance, law, or regulation" or "**any other activity** declared by the City to be a public nuisance." In a recent Peace and Justice Commission meeting, Peter Radu, the Assistant to the City Manager, admitted that it is not possible to keep a sleeping bag and sleep in the permitted nine square foot allowance provided by regulations governing

temporary non-commercial objects. In prior encampment closure operation, city officials could not identify a single location in the city where someone unhoused could legally camp, even when asked by employees of East Bay Community Law Center on behalf of unhoused residents being asked to relocate off a wide median strip on Adeline Street. Under this resolution, simply camping outside in a sleeping bag is sufficient to give rise to enforcement under threat of citation or arrest without an offer of shelter.

While the US Supreme Court ruled there is no eighth amendment violation when a city enforces anti-camping ordinances, the State of California has broader constitutional protection in Article I, Section 17 of the state constitution, including prohibitions against cruel or unusual punishment and against excessive fines.

This resolution is particularly troublesome in that it fails to provide any way for an unhoused resident without shelter to avoid being subject to enforcement, and thus subject to risk of fine or arrest.

b. The proposed resolution disproportionately targets Black and disabled residents, raising additional 14th amendment concerns

EBCLC is a woman of color led and woman of color centered organization. We believe that when we invest in the vision, strategies, and solutions of women of color, we center dignity, uplift families, and advance systems-change work that transforms all communities. Disability Rights Advocates and Disability Rights Education and Defense Fund are organizations committed to ensuring equality and justice for those who identify as having a disability. The undersigned organizations are all committed to racial, economic and disability justice.

This resolution targets Berkeley's Black and/or disabled communities. Specifically, the encampment at 8th and Harrison is identified as an encampment prioritized for enforcement under this resolution. The City is aware that residents at 8th and Harrison are disproportionately Black and/or disabled, not just when compared to housed residents, but in comparison to Berkeley's unhoused population generally. Further, this resolution is written so broadly that it is ripe for selective enforcement in violation of the 14th amendment.

50% of the residents of 8th and Harrison identify as Black³, while only 8% of Berkeley residents are Black. Berkeley has a long history of segregation and then of displacing its Black residents. This resolution proposes increased enforcement and allows for citations and arrests while subjecting residents to further displacement from the mere ground they live and sleep on, even if they did not individually contribute to the identified conditions resulting in enforcement. This resolution poses serious risk of an increase in the policing and incarceration of Black residents in Berkeley who have been disproportionately displaced as a direct result of the City's racist policies and practices.

³ Radu, *supra* note 1, at 1075 of this agenda report.

Further, in violation of the ADA, the City has a pattern and practice of discriminating against individuals with disabilities, including a history of failing to respond to requests for reasonable accommodation or to provide reasonable accommodation for unhoused individuals with disabilities. This resolution targets residents who are unable to access shelter for disability related reasons. The City is aware that residents of 8th and Harrison disproportionately identify as having a disabling condition.⁴ Individuals with mobility impairments may not be able to relocate in compliance with notices unless they receive accommodations, such as time and support to move belongings. Disabled individuals with developmental disabilities or disabilities that impact executive functioning are also less likely to be able to understand notices or be able to make a plan to comply. Under this resolution, because there is no location an individual can legally relocate to, disabled individuals will also be potentially subject to repeated enforcement efforts leaving them subject to citation or arrest. The resolution makes no effort to provide an accommodation process that individuals with disabilities can access or even allow time for accommodation requests to be made and processed. Further, displacement through closures and sweeps also mean disabled individuals will lose access to services they rely on for support and survival, subjecting them to state created danger when forced to relocate. This resolution poses a serious risk to unhoused residents with disabilities, further discriminating against them, as well as subjecting them to criminalization and to state created danger in violation of the 14th amendment.

III. The Proposed Resolution Limits Public Participation And Limits Public Accountability Of Government Officials

This resolution also proposes a change to City ordinance allowing the City Manager's office to promulgate regulations without first obtaining approval from council. This attempt to increase executive power at the local level, if successful, will deprive residents from being able to participate and ultimately will limit the accountability of the City Manager's office and other city agencies. Residents will be unable to provide input as to the impact, intended or not, of proposed regulations. And council will not be able to debate and improve on proposed regulations or ensure there is not an abuse of power by the City Manager's office. Even with public participation in place, there are regulations on the book that are impossible for unhoused residents to comply with. This resolution makes no attempt to place restrictions on proposed future regulations or any attempt to remedy existing regulations that make it impossible for anyone to live unhoused and unsheltered within the City and allows the City to proceed with enforcement without addressing that impossibility.

That this council would agree to limit public participation and abdicate its own role in ensuring the City remains accountable to its residents is quite disturbing and every resident should be concerned about the implications of allowing city officials to act unchecked.

⁴ Id. at 1074 of this agenda report.

IV. The Proposed Resolution Would Potentially Expose The City To Increased Legal and Financial Liability

Finally, this resolution is costly to implement and also exposes the City to future legal liability. Encampment closures are costly and unless the City addresses the underlying issues resulting in individuals being unhoused, the resolution allows for repeated encampment closures for camps of all sizes, not just those at 8th and Harrison and 2nd and Page. This resolution proposes City expenditures without requiring any results. It merely sets the City up to repeatedly expend funds on sweeps and enforcement actions by removing an obligation to provide access to accessible shelter or housing before proceeding with enforcement.

Further, such sweeps and enforcement actions are violative of state and federal constitutional law. The City is currently involved in litigation over federal constitutional claims and violations of the Americans with Disabilities Act. The City is rushing to proceed before resolution of these legal challenges. Proceeding now subjects the City to potential actions for damages by those individuals who are impacted by the City conducting enforcement actions or sweeps in an illegal manner. This resolution admits the City remains obligated to follow requirements under the constitution but makes no attempt to ensure compliance, and instead removes important checks on City agencies.

For these reasons, we strongly urge the City to reject this resolution. Please feel free to reach out if we can be of any assistance in reaching solutions that address the underlying issues leading to chronic homelessness in a manner that is legal and upholds the dignity of the City's unhoused residents. We are also happy to address any questions you may have.

Respectfully Submitted,



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