



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 24, 2018

SENT VIA Email

City of Durango City Council - citycouncil@durangogov.org

Durango Mayor Sweetie Marbury - SweetieMarbury@DurangoGov.org

Re: Enforcement of Durango's Camping Ban

Dear Mayor Marbury and Durango City Councilors.

We understand the City of Durango will today close its only sanctioned homeless encampment, forcing many unhoused Durango residents to sleep and live elsewhere on public property and risk enforcement of Durango's ordinance prohibiting camping. 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."). Given the City's choice to close the encampment, we write to urge the City to immediately cease enforcement of its camping ban. As Councilor Melissa Youssef candidly acknowledged: "'If there isn't a place for [unhoused people] to go, then there will be illegal camping.'"¹ It is cruel and unconstitutional to criminalize camping in public spaces when – due to City action – homeless residents have nowhere else to go.

Background – Durango targets homeless residents for cruel treatment.

Over the last several years, Durango's wealth and cost of living have increased along with its rates of poverty and its homeless population.² While it is hard to know precisely how many unhoused people there are in Durango, it is clear that – as in Colorado and the nation – the numbers are increasing.³ One strong

¹ Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018.

² Ann Butler, *No Place to Call Home*, DURANGO HERALD, July 18, 2015.

³ 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,; Associated Press, *Durango Residents Advocate for Homeless Campground*, DENVER POST, July 15, 2017.

indicator: food insecurity is on the dramatic rise. In 2003 Manna Soup Kitchen served fewer than 30,000 meals; in 2014, it served 70,000 meals.⁴

Rather than addressing the root causes of homelessness, in recent years, City leaders have made concerted efforts to push unhoused people out of public places, out of sight and mind, and to criminalize their very existence. A University of Denver report reveals the lengths to which the city of Durango has gone to banish and ostracize people experiencing homelessness.⁵ Between 2010 and 2014, Durango more than doubled the number of citations it issued under ordinances that primarily target impoverished persons.⁶ For example, Durango stepped up enforcement of Section 17-101, which prohibits urinating and defecating unless in a restroom. Given that Durango's public restrooms are closed from 6 p.m. to 9 a.m. combined with the hostility of many Durango business owners toward the homeless, enforcement of this ordinance necessarily disproportionately impacts homeless people.⁷ Many are unable to lawfully meet their most basic needs in the City for 15 hours a day. Additionally, until ACLU intervention in 2014, Durango was actively enforcing an antiquated and unconstitutional ordinance that prohibited "loitering for the purpose of begging."⁸ Even with a camping ban already in place, just last year, Durango City Council passed a sit/lie ordinance which was plainly directed against people experiencing homelessness.⁹ The ordinance makes it "unlawful for any person to sit, kneel, recline or lie down in the downtown business area upon any surface of any public right-of-way." DCO §. 7.60. While sitting on public benches remains lawful under the ordinance, in a particularly cruel twist, the City has been steadily removing public benches from the downtown area, specifically to discourage homeless people from being present downtown.¹⁰

Durango's homeless residents have nowhere to go

Shelter space in Durango is limited and, by all accounts, plainly insufficient to accommodate the City's homeless population.¹¹ Unhoused people, their advocates and service providers are in agreement that, because the City of Durango lacks

⁴ 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*").

⁵ *Id.*

⁶ *Id.*

⁷ There was nearly 60% increase number of citations issued for Section 17-101 between 2013 and 2014. *Id.* Durango's public restroom hours can be found here: <http://www.downtowndurango.org/faqs>.

⁸ Chuck Slothower, *Durango's Loitering Law Questioned by Group*, DURANGO HERALD, Nov. 11, 2014.

⁹ See ACLU Statement on Durango's Anti-Homeless 'Sit-Lie' ordinance, <https://www.aclu.org/news/aclu-statement-durangos-anti-homeless-sit-lie-ordinance>.

¹⁰ Mary Shinn, *Homeless People Motivate Businesses to Move Benches*, DURANGO HERALD, May 21, 2015.

¹¹ Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018, ("Durango does not have enough shelter space for everyone in need, and camping is banned in open spaces around town").

adequate shelters for the homeless, many homeless residents are forced to live and sleep outdoors.¹²

Until May of this year, the La Plata County Sheriff's Office had long permitted camping by homeless Durango residents on county property not far from town. Unhoused Durango residents could live and sleep without fear of the Sheriff's Office enforcing the County's camping ban.¹³ See La Plata County Code 38-1(IV)(A). La Plata County Sheriff Sean Smith recognized that the City had insufficient shelter space and that ticketing homeless people for camping when they had nowhere else to go was not only cruel, but also unconstitutional.¹⁴

At the request of the City, prompted by concerns over fire danger, the Sheriff closed the campsite during the first week of May.¹⁵ The City, to its credit, established another temporary camping area. Still, due to continued concerns regarding fires, unhoused people have been forced to move to four different encampments this year, including two campsites, a school, and barren land behind a cemetery.¹⁶

During this period of disruption, the City enacted strict rules, one of which required residents to break camp every morning and leave the site from 9 a.m. to 6 p.m.¹⁷ Residents were required to take down tents, even if they were wet, which prevented them from drying. For any human seeking stability, this requirement was counterproductive and onerous, but particularly so for the elderly and people with disabilities. The City told homeless residents to store personal belongings in garbage containers, which leaked and led to property damage. Camp manager Jacob Jost said that while the site was uninhabited during the days, property, such as

¹² Information regarding shelters provided by Rachel Bauske Frasure, the Southwest Colorado Division Director at Volunteers for America in telephone conversation with the ACLU on Aug. 25, 2018. Volunteers of America currently runs two shelters in Durango, which can accommodate a total of 70 people. Both shelters are high barrier – they do not accommodate any of Durango's many unhoused residents with active addictions, animals, or felony convictions. See also Chase Olivarius-McCallister, *Solution to Homelessness? Give Them a Place to Live*, DURANGO HERALD, July 20, 2015.

¹³ Jonathan Romeo, *Sheriff's Candidates Discuss Budget, Turnover and Homelessness Challenges*, DURANGO HERALD, Aug. 17, 2018.

¹⁴ Associated Press, *Durango Residents Advocate for Homeless Campground*, DENVER POST, July 15, 2017 ("Insufficient shelter is part of the reason constant camping is allowed north of the Tech Center, La Plata County Sheriff Sean Smith recently told Durango City Council."); Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018 ("The sheriff has said in previous interviews and at public meetings that he can't arrest people for sleeping in public places if they don't have anywhere else to go because doing so could violate their constitutional rights – essentially punishing them for being homeless").

¹⁵ Mia Rupani, *La Plata County Sheriff's Office Temporarily Relocating Homeless Camp*, DURANGO HERALD, Apr. 19, 2018.

¹⁶ Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018.

¹⁷ Mary Shinn, *Durango City Council: Homeless Camp Rules Must Be Upheld*, DURANGO HERALD, July 24, 2018.

laptops, camping gear and birth certificates, were stolen.¹⁸ The City's arbitrary rules primarily served to undermine residents' sense of safety and community.¹⁹ As Councilor Youssef candidly acknowledged: "We are intentionally creating disruptive and chaotic policies to the very population we are trying to serve."²⁰ On July 25th, some homeless residents engaged in a peaceful protest by leaving their tents up during the day. The police broke up the protest, required most residents to leave, and issued several citations for trespass, though these individuals were living on the land to which the City had sent them.²¹

When the Sheriff closed the county encampment, he did so at the request of the City and based on the City's promise that it would create a permanent space for homeless residents.²² City Manager Ron LeBlanc promised, "We will have a site ready,"²³ and the City committed to opening a permanent camp no later than June 30th.²⁴ Despite these promises, the City has now announced that as of today, the temporary camp will close and the City is abandoning any efforts to make camping space available for its unhoused residents.²⁵ In doing so, the City is not only forcing many homeless residents to sleep and live outdoors in public spaces but is also apparently planning to step up enforcement of the City's camping ban.²⁶ The City has even hired four new seasonal park rangers specifically for this purpose.²⁷ Unless the City's goal is banishment from city limits of people experiencing homelessness, enforcement of the camping ban under these circumstances is confounding. It also violates the Constitution.

Punishing camping in the absence of adequate alternatives is unconstitutional.

Given the clear lack of sufficient bed space for Durango's unhoused population, enforcement of the camping ban violates the Eighth Amendment's proscription against cruel and unusual punishment. The Supreme Court has long held that laws punishing individuals based on involuntary status alone are cruel

¹⁸ Mary Shinn, *Homeless Campers Protest City Rules at Site near Greenmount Cemetery*, DURANGO HERALD, July 20, 2018.

¹⁹ Ryan Simonovich, *Homeless Residents at New Campsite with New Rules*, DURANGO HERALD, July 4, 2018.

²⁰ Mary Shinn, *Durango City Council Approves Camp for Homeless near Dog Park*, DURANGO HERALD, Apr. 4, 2018.

²¹ Mary Shinn, *Durango Homeless Camp Protest Extends to Fourth Day*, DURANGO HERALD, July 23, 2018.

²² Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018 ("Sheriff Sean Smith said he committed to closing a camp for homeless residents on county property west of town and enforcing camping bans because the city committed to opening an alternative site").

²³ Mary Shinn, *Homeless Residents Question Durango's Plan for New Camp*, DURANGO HERALD, Mar. 23, 2018.

²⁴ Mary Shinn, *City of Durango Commits to Timeline for Opening New Homeless Camp*, DURANGO HERALD, May 1, 2018.

²⁵ Mary Shinn, *Durango to Close Homeless Camp, Won't Provide New Location*, DURANGO HERALD, Aug. 18, 2018.

²⁶ Mary Shinn, *Homeless Residents May Be Allowed to Sleep near Dog Park*, DURANGO HERALD, Mar. 16, 2018 ("Councilors asked city staff to send a letter to La Plata County Sheriff Sean Smith that explains their plan to offer an alternative to camping in the woods west of Durango and to ask him to shut down the existing camp and enforce the county's ban on camping").

²⁷ Mary Shinn, *Durango City Council: Homeless Camp Rules Must Be Upheld*, DURANGO HERALD, Jul. 25 2018.

and unusual in violation of the Eighth Amendment.²⁸ Several courts have concluded that ordinances prohibiting camping violate the Eighth Amendment as an impermissible punishment based solely upon one's involuntary status as homeless.²⁹ After all, sleeping is a necessary condition of being human and sleeping outdoors is a necessary condition of being an unhoused human.

In a case filed by the National Law Center on Homelessness and Poverty, the Department of Justice (DOJ) filed a statement of interest arguing in favor of the approach taken in the cases discussed in footnote 29. The DOJ urged that criminalizing camping or sleeping outdoors violates the Eighth Amendment when there is either (1) inadequate shelter space for a city's homeless population or (2) shelter restrictions preventing certain individuals from accessing shelter.³⁰ Both of these conditions are indisputably met in Durango. Durango's camping ban, like the challenged ordinances discussed in footnote 29 serves no other purpose than to punish people experiencing homelessness merely for their involuntary, life-sustaining conduct of sleeping outdoors when no reasonable shelter space exists. Consequently, without providing adequate shelter space, Durango's enforcement of its camping ban constitutes cruel and unusual punishment.

Durango's camping ban is also unconstitutionally vague. An ordinance is unconstitutionally vague when it fails to specify a standard of conduct and, "[a]s a result, men of common intelligence must necessarily guess at its meaning."³¹ Durango's camping ban prohibits individuals from "knowingly lodg[ing] or camp[ing] upon any public way, public park, or public building." DCO § 17-57(e). Although the ordinance specifies where certain conduct is prohibited, it wholly fails to define "lodging" or "camping."³² This lack of definition leaves people experiencing homelessness in Durango guessing as to whether covering themselves with a blanket or cardboard, even in freezing weather, would subject them to a citation.

²⁸ *Robinson v. California*, 370 U.S. 660, 666 (1967) (holding that a law criminalizing narcotic addicts constituted unconstitutional punishment of individuals for nothing more than their involuntary status under the Eighth Amendment).

²⁹ 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; *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 2012) (holding that "arresting homeless individuals for the harmless acts they are forced to perform in public effectively punishes them for being homeless" in direct violation of the Eighth Amendment); *Cobine v. City of Eureka*, 2016 WL 1730084 (N.D. Cal. May 2, 2016) (enjoining the City from enforcing its camping ban until it provided plaintiffs with shelter); *Anderson v. City of Portland*, 2009 WL 2386056, *7 (D. Or. Jul. 30, 2009) (unpublished disposition) (holding that plaintiffs' Eighth Amendment claim was adequately stated because "the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property").

³⁰ U.S. Dep't of Just. Statement of Interest in *Bell v. City of Boise*, available at <https://www.justice.gov/crt/file/761211/download>.

³¹ *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

³² See *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155–56 (9th Cir. 2014) (holding that a city ordinance prohibiting the use of "a vehicle as living quarters either overnight, day-by-day or otherwise" was unconstitutionally vague because the statute did not define "living quarters." Thus, "Plaintiffs [were] left guessing as to what behavior would subject them to citation and arrest by an officer.").

Thus, Durango's no-camping ordinance violates the Due Process Clause because it fails to provide clear notice of the conduct that is prohibited.

Punishing camping in the absence of adequate alternatives has a discriminatory impact on persons with disabilities.

Durango's enforcement of the camping ban particularly burdens people with disabilities, who are often poor and homeless as a direct result of their disabilities. Persons with disabilities have fewer options for accessible and medically appropriate housing and emergency shelter. Homeless people with severe mobility problems, for example, are often excluded from emergency shelters on that basis, leaving them with literally no option but to sleep and shelter themselves outside. Because disabled homeless people in Durango are less able to comply with the no-camping ordinance 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.

Moreover, people with disabilities are more vulnerable to serious harm flowing from enforcement of the no-camping ordinance. The physical and mental stresses of ongoing, fruitless searches for a lawful place to sleep and shelter oneself may worsen existing disabilities or even cause new medical conditions to arise. It is only a matter of time before Durango's enforcement of the no-camping ordinance results in serious bodily harm to one or more members of its disabled homeless population, which may violate their right to substantive due process under the Fourteenth Amendment.

Criminalization of homelessness is bad policy.

Durango's further criminalization of homelessness through increased enforcement of the camping ban not only violates the constitutional rights of impoverished people, but will be costly to taxpayers and will serve to exacerbate problems associated with homelessness and poverty. As a starting point, Colorado's jails are overcrowded and in any event should be reserved for people who pose a threat to public safety, not individuals trapped in a cycle of poverty. As the Department of Justice stated in *Bell v. Boise*, criminalizing camping unnecessarily burdens the scarce resources of the criminal justice system while doing nothing to improve public safety:

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

finances 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).

Numerous studies have shown that communities actually save money by providing housing and services to those in need, rather than saddling them with fines, fees and arrest records and cycling them through expensive hospital and jail systems.³³ The Economic Roundtable of Homelessness in Los Angeles, for instance, found that provision of housing to the unhoused reduced average monthly spending by 41% per person, even after including the cost of providing housing. This savings included a 95% reduction in costs of services and expenses solely related to incarceration. Similarly, here in Colorado, the Colorado Coalition for the Homeless reportedly found that the average unhoused person costs the taxpayer \$43,000 a year in emergency-room visits, jail costs and other expenses, while providing housing for that person would cost just \$17,000.³⁴ As County Judge Martha Minot, who runs the La Plata County behavioral health and drug courts, recently explained “even without hard numbers, it’s obvious that continuing to ignore the needs of Durango’s homeless population ‘is not cost-efficient, for anyone.’”³⁵

Ultimately, further enforcement of the camping ban will incur significant costs for the City and its taxpayers without improving public safety or addressing the causes of homelessness.

Conclusion

The City of Durango must acknowledge the real-world, inevitable effects of its closure of the homeless encampment: many of the City’s unhoused residents will have no choice but to live and sleep in public spaces. Given this reality, we urge the City to do what is constitutionally required to at least minimize the harm to unhoused people caused by the City’s choice to close the encampment: stop enforcing the camping ban. This requires instructing law enforcement officers charged with enforcing the municipal code that DCO § 17-57(e) is no longer to be enforced in any way, including by issuance of citations, warnings, or move-on orders.

³³ National Law Center on Homelessness and Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in US Cities* (2016), available at <https://www.nlchp.org/documents/Housing-Not-Handcuffs>.

³⁴ Chase Olivarius-McAllister, *Solution to Homelessness? Give Them a Place to Live*, DURANGO HERALD, July 24, 2015.

³⁵ *Id.*

Please respond to this letter by **Wednesday September 5**.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Wallace". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

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