



December 5, 2023

TO: Oakland City Council

Re: Comments of Legal Aid Nonprofits and Advocacy Organizations to Oakland's Proposed "Safe Work Zone Ordinance"

Dear Honorable Councilmembers:

On behalf of East Bay Community Law Center, the Western Center of Law and Poverty, the Western Regional Advocacy Project, Legal Services for Prisoners with Children, the Anti Police-Terror Project, Love and Justice in the Streets, Punks with Lunch, and the Law Offices of Osha Neumann, we write to urge you to reject the City's proposal to enact the Safe Work Zone Ordinance, which would add Chapter 9.06 to the Oakland Municipal Code.

We wrote to the Council last year when similar legislation was proposed raising serious constitutional and equitable concerns about the proposed ordinance, and the superficial changes made to the new proposed ordinance do not allay these serious concerns.

I. The Proposed Ordinance would not meaningfully contribute to the safety of Department of Public Works personnel.

As previously stated, there is no legitimate basis for this ordinance because Public Works personnel and police already have the tools and authority to maintain worker safety during encampment sweeps and closures. For example, Department of Public Works employees already have the authority to set up perimeters around work zones and members of the public already must listen to Public Works personnel. In addition, police officers, who are required to be present during encampment sweeps and closures, already may intervene if they perceive that a crime jeopardizing worker safety is imminent. Further, it is illegal to disobey the lawful order of a police officer. Accordingly, the proposed ordinance is not only duplicative, it also threatens to further limit public scrutiny of government actions and criminalize disproportionately impacted communities. What is more, the proposed ordinance could place needless strain on Police Department resources, as officers may need to become more involved in enforcing the ordinance's vague mandates during encampment sweeps and closures.

II. The Proposed Ordinance raises serious constitutional questions.

In addition to being unnecessary, the proposed ordinance still poses a threat to individuals' rights under the First Amendment, Fourth Amendment, Eighth Amendment, and Fourteenth Amendment.

First, the proposed ordinance places no limits on the size of potential “safe work zones.” While it states that the zones must be “no larger than reasonably necessary” for workers to complete their jobs, there is no actual limit or guidance. Without sufficient guardrails to guide their discretion, Public Works employees are vested with unfettered discretion, which invites arbitrary and discriminatory enforcement.¹ Moreover, the ordinance conceivably authorizes Public Works employees to impose impenetrable “safe work zones” so large as to keep the public at such a distance they cannot not effectively observe actions of City employees and document their activities—threatening to violate the First Amendment’s guarantee to observe and record public officials performing their duties in public spaces.² While the new ordinance states that the purpose of zones must be to prevent injury and harassment, the ordinance still will lead to unlawful limitations on First Amendment Rights. The City should be aware that similar attempts to interfere with the public’s First Amendment rights have failed. For example, in 2022 the U.S. District Court for the Eastern District of California preliminarily enjoined on First Amendment and vagueness grounds a similar “buffer zone” ordinance enacted by the City of Fresno, which has since rescinded its unlawful ordinance.³

Second, the proposed ordinance increases the risk that individuals will be unlawfully deprived of property, as the City is obligated to store property that individuals wish to keep but cannot take with them. *See Miralle v. City of Oakland*. If individuals are forced to leave their belongings and exit a work zone under threat of arrest, they are less likely to have time to indicate to the City what must be stored and thus even more likely to lose their precious belongings. Cutting off residents from their belongings would lead to unsafe conditions by increasing the likelihood that life-sustaining items, such as tarps, tents, blankets, medicines, and mobility devices will be destroyed. Their exclusion from the work zone will lead inevitably to violations of their right under the Fourth Amendment to be protected from unreasonable seizure of their property.

And third, making someone’s mere presence in a work zone while they are just trying to protect their home and belongings a basis for an arrest directly criminalizes them for being homeless. This increases the likelihood that individuals’ rights under the Eighth Amendment will also be violated. *See Martin v. Boise*. Additionally, the proposed ordinance would criminalize advocates who provide vital assistance to unhoused community members during sweeps and encampment closures. Both unhoused residents and city officials rely on volunteers and observers to de-escalate situations during evictions and preventing these individuals from entering the “safe work zone” would lead to Oakland Police Department and Public Works employees taking on this role, a role that they are not trained to do, especially given the trauma of previous criminalization that many unhoused people experience. This is the worker safety issue, making sure the right people, with the right training, are doing the right jobs.

¹ *See Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012) (explaining in context of permitting that the “unbridled discretion” doctrine requires laws to include adequate standards and protect against risk that officials “will favor or disfavor speech based on its content”) (citation omitted).

² *See Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (First Amendment protects the public’s right to observe and document “matters of public interest,” including public officers “engaged in the exercise of their official duties in public places”).

³ *See Order Granting Pls.’ Mot. for a Prelim. Inj.*, ECF No. 25, *Martinez et al v. City of Fresno*, No. 1:22-cv-00307-DAB-SAB (E.D. Cal. May 24, 2022).

III. The Proposed Ordinance would disproportionately harm Black, Indigenous, and People of Color BIPOC communities as well as people with disabilities.

This proposed ordinance allows Public Works employees to exclude anyone they decide to target for any reason from the zone. The ordinance is therefore ripe for selective enforcement, in violation of the 14th Amendment's guarantee of due process. BIPOC are disproportionately represented among Oakland's unsheltered population. Black people only constitute 24% of the City's overall population, for example, but 70% of Oakland's unhoused population is Black.⁴ In Oakland, racial disparities in policing, indicative of selective law enforcement, are already among the starkest in the state. When adjusted for population, OPD is 9.7 and 5.8 times more likely to cite Black and Latinx adults, respectively, for a non-traffic infraction than white adults.⁵ The majority of encampments currently reside with poorer, BIPOC districts, and the ordinance would increase police presence in these already terrorized communities. This ordinance risks further increasing policing and incarceration of Black people.

In addition, according to Alameda County's 2022 Point-in-Time Count, 40% of unhoused residents identify as people with disabilities.⁶ Individuals with mobility impairments are disproportionately harmed by property seizure and displacement due to inability to move their belongings in time to prevent them from being seized, and will face extreme hardship if they are not allowed to access their belongings in "safe work zones." Furthermore, residents with mental health conditions will be especially harmed because they may be less able to understand that the establishment of "safe work zones" prevents them from accessing these areas, leading to further criminalization of people with disabilities and potential violations of the Americans with Disabilities Act. Again, it is important that the right people be present during these already stressful encounters to prevent further harm.

IV. The Proposed Ordinance would limit public accountability of government officials during encampment sweeps.

Public scrutiny is essential to creating greater transparency and accountability and an important deterrent to excessive use of force and property destruction. By design, the proposed ordinance limits the public's ability to observe both the Public Works officials carrying out the sweeps and the police on site. The ordinance thus provides authorities with a potent tool to shield any misconduct away from public view and then avoid liability for wrongdoing, thereby increasing the risk of escalated conflict, severe physical abuse, injury, and death.

Sweeps are not easy on anyone—those who are being evicted, and those carrying out the evictions. Unfortunately, oftentimes there are heightened emotions involved which lead to tense situations. There is also some history of perceived and actual mistreatment by the staff carrying

⁴ Joe DeVris, *Agenda Report regarding Encampment Management*, (July 2, 2020).

⁵ Lawyers' Committee on Civil Rights of the San Francisco Bay Area, "Cited for Being in Plain Sight: How California Polices Being Black, Brown, and Unhoused in Public," (Sept. 2020), https://lccrsf.org/wp-content/uploads/LCCR_CA_Infraction_report_4WEB-1.pdf.

⁶ Applied Survey Research, "2022 Alameda County Homeless Count and Survey Comprehensive Report," (2022), https://everyonehome.org/wp-content/uploads/2022/10/2022-Alameda-County-PIT-Report_9.22.22-FINAL-3.pdf.

out evictions at encampments as well as by the police. For example, the City of Oakland recently settled a lawsuit brought by a group of unhoused people that alleged that the City acted illegally during encampment closures, including by Oakland Public Works destroying and losing residents' belongings. Under the settlement, the City was required to pay unhoused residents \$250,000 and make changes to how it conducts closures and stores possessions. Under this proposed ordinance, advocates would not be able to exercise their First Amendment rights and their rights under settlements to observe the City's actions during encampment closures and its compliance with internal policies, preventing them from holding the City accountable and likely leading to more abuse.

The advocates present during these actions are also vital in assisting unhoused community members understand how to access resources, including housing. Cutting this lifeline off will be detrimental.

For these reasons, we strongly urge the City to reject the proposed ordinance. We are optimistic that the new administration will steer the City towards a different approach that does not criminalize the unhoused, and we look forward to working together in achieving the goal of making everyone in our community safer. If we can be of assistance or if you have any questions, please do not hesitate to contact us.

Respectfully submitted,



Brigitte Nicoletti



Brandon Greene

The Law Offices of Osha Neumann

Osha Neumann



Cat Brooks



Alejandra del Pinal



Meredith Wallis



Heather Freinkel



Talya Husbands-Hankin



Paul Boden