



# Local Government Strategies for Addressing Homelessness: Avoid Litigation and Do Some Good

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**LOCAL GOVERNMENT STRATEGIES FOR ADDRESSING  
HOMELESSNESS: AVOID LITIGATION AND DO SOME GOOD**

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## I. Introduction

Homelessness is an issue we hear about and see nearly everywhere we turn these days. A quick Internet search yielded over two and a half million news articles on homelessness...published within the past year! Most of us have seen the statistics by now, yet somehow the numbers are still staggering: On a single night last year, 565,708 people in the United States were experiencing homelessness—meaning they were sleeping outside or in an emergency shelter or transitional housing program.<sup>1</sup> The convergence of a housing shortage, high building costs, and the recent economic recession, among other factors, has left California with the largest homeless population of any state in the country.<sup>2</sup> 21 percent of the nation's homeless (115,738 people) live in California. Our state has over one-third of the nation's chronically homeless individuals (29,278 people) and the highest rate of unsheltered homeless people at 64 percent.<sup>3</sup>

Cities seem to be spending more on homelessness; but the homeless population appears to be growing, changing, and causing more negative impacts on local communities. The fact that cities lack the capacity to solve the problem alone has done little to temper expectations that they do *something* about it. More than ever before, city attorneys are called on to advise their municipal clients on adequate and appropriate steps to address homelessness and its related social issues. Understanding the constitutional limits on enforcement is necessary,<sup>4</sup> but more is required for municipal attorneys as they attempt to guide city officials and staff.

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<sup>1</sup> U.S. Dept. of Housing and Urban Development (HUD), *2015 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS*, p. 7.

<sup>2</sup> See, California Legislative Analyst's Office (LAO), *CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES* (Mar. 17, 2015).

<sup>3</sup> HUD, *2015 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS*, p. 12.

<sup>4</sup> Yiben Shen, *REGULATING THE USE AND OCCUPANCY OF OPEN SPACE AND OTHER PUBLIC PROPERTY AND PROTECTING CONSTITUTIONAL RIGHTS* (Paper and Presentation from League of California Cities City Attorneys' Spring Conference 2016); Marco A. Martinez & Christine Dietrick, *ENFORCEMENT OF AGGRESSIVE PANHANDLING AND LOCAL CAMPING AND SLEEPING ORDINANCES* (Paper and Presentation from League of California Cities Annual Conference 2013).

Cities that have achieved the greatest degree of success in the courts and “the court of public opinion”<sup>5</sup> have generally adopted comprehensive strategies aimed at reducing homelessness, and mitigating the adverse secondary effects of homelessness, in a manner that improves the conditions faced by homeless people. This paper draws on experiences of cities and other government entities that have made measurable progress toward their goals in addressing homelessness while avoiding (or succeeding in) litigation. It is intended to give city attorneys a variety of tools to shepherd their clients through the process of responding to homelessness in their cities; adopting an effective short and long term strategy; and tracking the results of these efforts.

## II.

### **Laying the Groundwork: Preparing to Address Homelessness in Your City**

#### **A. Taking stock of the problem**

To solve a problem, we must first understand it. Understanding the facts about the local homeless problem helps cities develop an effective strategy, and establishing a baseline is important for measuring the effectiveness of the strategy after it has been implemented (see, *infra*, Section IV.A). In many cases where a city’s homeless policies and enforcement strategies come under legal attack, the court begins its analysis by discussing the nature and magnitude of the city’s homeless problem and the impediments to addressing it.<sup>6</sup> Thus, in addition to providing useful information to policy-makers, capturing facts about the homeless problem also helps cities defend their difficult policy decisions on homelessness against legal challenges.

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<sup>5</sup> See, e.g., Western Cities Magazine, *ONTARIO PROVIDES HOMELESS WITH CONTINUUM OF SERVICES* (March 2014).

<sup>6</sup> See, e.g., *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th Cir. 2012); *Kincaid v. City of Fresno*, 2006 WL 3542732, (E.D. Cal. Dec. 08, 2006); *Joyce v. City & County of San Francisco*, 846 F.Supp. 843, 846 (N.D. Cal. 1994).

The U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office) has published a useful framework for law enforcement agencies to better grasp the specific homelessness problem within its jurisdiction.<sup>7</sup> The COPS Office framework, which is relevant not only to law enforcement agencies but also to cities as a whole, recommends examination of several different aspects of the local homelessness problem to design more effective response strategies. A city's answers to the following questions will, in large part, determine its response to its homelessness problem:

## **1. The homeless population**

### *a. The people*

- How many homeless people live in the city? How many are unsheltered?
- What is known about them? How long have they been homeless? Where did they live before? What are their genders, ages, races or ethnicities?<sup>8</sup> How many of them have chronic health issues, substance abuse problems, or mental illness?
- What is known about the victimization of unsheltered and/or chronically homeless in the city?
- Do the homeless know about and utilize existing community social services, such as soup kitchens, drop-in centers, shelters, job training, clinics, and substance abuse treatment?

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<sup>7</sup> COPS Office, *HOMELESS ENCAMPMENTS: PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 56*, pp. 13-19 (2010).

<sup>8</sup> Under AB1733, as of July 1, 2015, a homeless person, child or youth, as defined by the McKinney-Vento Homeless Assistance Act (42 U.S.C. Section. 11301, et seq.) born in the State of California can get a free certified birth certificate from the county of their birth. And as of January 1, 2016, a homeless person, child or youth will be able to get a free new or replacement California photo identification card from the Department of Motor Vehicles.

### *b. Locations, migratory patterns, and encampment attributes*

- Are there seasonal patterns to the unsheltered homeless populations and homeless encampments in the city? Are there more people in encampments in the summer or winter?
- Where are homeless populations gathered? How accessible or remote are these locations?
- Who owns or has jurisdiction over encampment areas for landscaping, maintenance, and policing? Are the sites publicly or privately owned? Is the area subject to jurisdiction of state or federal regulatory agencies?
- Why are groups of homeless people gathering at certain locations? Are they close to food and water sources or transportation? Are they concealed? Do they have shelter from weather?
- How elaborate are the encampments in the city? Are there shelters, cooking facilities, bathing facilities, potable and non-potable water, or security features?
- Are there health and safety concerns, such as unsafe fire situations, threats to water quality, or poor waste management?
- What are the allowable land uses under municipal code and other regulations applicable to the encampment area?
- Who else uses the area around the encampment? Do homeless people and other users conflict over the use of this area?

## **2. The stakeholders and public attitudes toward homelessness**

- Who are the key stakeholders?<sup>9</sup> (The wide array of agencies and individuals may include social services agencies, religious and charitable organizations serving the transient population, sheltered and unsheltered homeless people, residents living close to or affected

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<sup>9</sup> See, *supra*, Section II.A regarding collaboration.

by homeless encampments, businesses, the community as a whole, media, county officials, state officials, and federal officials.)

- How many citizen complaints do you receive related to transients? What, precisely, is the nature of those complaints? Who is making the complaints?

### **3. City's current response to homelessness and the demand on city resources**

- How has homelessness (particularly unsheltered homelessness) been handled in the city in the past? How is it handled now? Is the current response adequate and appropriate?
- What local laws and policies currently regulate adverse secondary effects of homelessness? Are these laws adequate and constitutional?
- What is being done in the city to address chronic homelessness? Does the city have a long range plan to reduce or end chronic homelessness?
- How frequent are city staff and police officers' contacts with chronically homeless people? What are the outcomes of these contacts?
- Does the city have any formal or informal arrangements with shelters and social services agencies regarding referrals and transportation of chronically homeless people?
- What efforts have been made by local social services providers to address chronic and/or unsheltered homelessness? Have such efforts been successful?
- How many incidents involving disputes over public space does the city handle?
- How much time and money does the city spend dealing with problems associated with homelessness? (homelessness related nuisances, calls for service from encampment areas or nearby business owners and residents, etc.)



## B. Collaboration

No single entity is solely responsible for creating the conditions that lead to homelessness and no city is equipped to address homelessness and its impacts without significant contributions from others. Cities have found that collaboration is essential. In a recent report on homeless encampments prepared for the Contra Costa County Flood Control and Water Conservation District, every agency actor interviewed attributed much of the success and failure of its homeless program to whom they collaborated with and how well the collaboration functioned.<sup>10</sup> In that study, which examined several local government entities in multiple counties, the agencies that had developed protocols that involved interagency collaboration felt that they were most effective in their interventions. All agencies studied cited collaboration as important in dealing with encampments.<sup>11</sup> Collaboration is key not only to effectively addressing homelessness, it also helps shape the public's understanding of a city's approach to homelessness issues and allows others to share ownership of the community's response. Such public understanding and shared ownership of solutions are important factors in mitigating litigation risks.

Informal collaborations through resource sharing and communication can be useful where formal collaboration proves impracticable (e.g., lack of strong regional leadership or collaborative mandates).<sup>12</sup> Informal collaborations are a good way to involve multiple departments within a city and with charitable organizations, volunteer groups, and individual community members, including advocates and homeless people. Informal collaboration can be particularly helpful as a means of educating community members who may not understand the

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<sup>10</sup> Saneta DeVuono-Powell, *HOMELESS ENCAMPMENTS IN CONTRA COSTA COUNTY: A REPORT FOR THE CONTRA COSTA COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT*, p. 17-18 (Summer 2013).

<sup>11</sup> *Id.*

<sup>12</sup> Contra Costa County's Homelessness Inter-Jurisdictional Inter-Departmental Work Group is an example of effective collaboration. It involves city and county officials, law enforcement officers, nonprofits, and homeless people.

factors that give rise to homelessness, the constitutional limitations on cities managing problems associated with chronically homeless people on the streets, or the resource constraints cities grapple with in their efforts to address vast societal problems like homelessness.

While collaboration, in principle, is widely accepted as effective, it is not always simple in practice. Obstacles to interagency collaborations include jurisdictional complexity, lack of funding and institutional capacity, lack of consistency across agencies, lack of housing and services for the homeless and at-risk populations, inadequate mental health or substance abuse services and legal constraints. AB 1403, which became effective January 1, 2016, was enacted with the express purpose of facilitating collaboration around homelessness. State law generally authorizes two or more public agencies to jointly exercise common powers. AB 1403 allows a private, nonprofit corporation that provides services to homeless persons to enter into a joint powers agreement with a public agency to provide housing and care services to persons who most frequently utilize public services. The joint powers agreement authorized by AB 1403 is intended “to encourage and ease the sharing of information between public agencies and nonprofit corporations ... necessary to identify the most costly, frequent users of publicly funded emergency services in order to provide frequent user coordinated care housing services ... to homeless persons or to prevent homelessness.”<sup>13</sup>

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<sup>13</sup> Cal. Gov’t Code, § 6538(b). Although AB 1403 became effective only a few months ago, the Community Action Partnership of Solano (CAP Solano), which was formed before AB 1403, is an example of a joint powers authority established to address homelessness. CAP Solano provides oversight and coordination of homeless and safety net services to residents in Solano County; administers funds and makes grants available to other non-profit entities for homeless services; sets policy and is intended to serve as the central oversight agency for the operation of homeless shelters, transitional housing, and homeless assistance centers.  
[http://www.capsolanojpa.org/About\\_Us.html](http://www.capsolanojpa.org/About_Us.html).

### III.

## Choosing a Strategy that Works: Common Elements of Effective Local Government Responses to Homelessness

### A. Preference for the “Housing First” model

A growing body of research is documenting the effectiveness of the Housing First approach, particularly when used in working with homeless individuals who have serious behavioral health disabilities and other impairments.<sup>14</sup> The research indicates that the approach is effective both at placing and retaining people in permanent housing and at reducing the costs associated with these individuals within the healthcare and judicial systems.<sup>15</sup> What differentiates the Housing First approach from others is its immediate and primary focus on helping individuals and families quickly access and sustain permanent housing. A central tenet of the Housing First approach is that social services to enhance individual and family well-being can be more effectively provided when people are in their own home.<sup>16</sup> Housing First programs all typically include: (i) assessment-based targeting of Housing First services; (ii) assistance locating rental housing, relationship development with private market landlords, and lease negotiation; (iii) housing assistance – ranging from security deposit and one month’s rent to provision of a long-term housing subsidy; (iv) a housing placement that is not time-limited; and (v) case management to coordinate services (time-limited or long-term) that follow a housing placement.<sup>17</sup>

Housing is scarce in many California cities.<sup>18</sup> Still, cities should ensure that no components of their homelessness strategies act as barriers to the Housing First approach. The ability to implement the Housing First

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<sup>14</sup> National Alliance to End Homelessness, *ORGANIZATIONAL CHANGE: ADOPTING A HOUSING FIRST APPROACH*, p. 2 (July 2009).

<sup>15</sup> *Id.*

<sup>16</sup> National Alliance to End Homelessness, *WHAT IS HOUSING FIRST?* (Nov. 9, 2006).

<sup>17</sup> *Id.*; see also, U.S. Interagency Council on Homelessness (USICH), *THE HOUSING FIRST CHECKLIST: A PRACTICAL TOOL FOR ASSESSING HOUSING FIRST IN PRACTICE*.

<sup>18</sup> See, LAO, *CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES*.

program model and the program specifics will vary from city to city depending on the homeless population and the availability of affordable housing and/or housing subsidies and services that can be provided, but cities should aim to implement or, at least, facilitate Housing First programs in their communities wherever possible.<sup>19</sup>

## **B. Frequent quality interactions and engagement with the homeless population**

Persistent, coordinated, and creative outreach efforts are vitally important to the ability to not only identify, but engage, people experiencing chronic homelessness and link them to the housing and services interventions available in the community. These efforts should seek to reach and connect with all people who are unsheltered within your community, including people living in encampments or tent cities, as well as people in institutional settings at high risk of becoming homeless, such as inmates and patients.<sup>20</sup> Many local law enforcement agencies, such as San Rafael, Concord, Fairfield, Santa Monica, and San Diego, have established units to deal specifically with homeless people.

There are varying arrangements for homeless outreach units, but all involve engaging unsheltered people outside the context of criminal arrest or citation.<sup>21</sup> In Santa Monica, for example, a specially trained unit of about six police officers (the Homeless Liaison Program) reaches out to transients and refers them to services. The HLP Team establishes contacts with short-term and long-term housing providers, job placement services, and treatment programs for mental illness and substance abuse disorders. In San Rafael a mental health outreach provider hired by the police department walks the city's downtown area daily with a sworn officer engaging the chronically homeless, assessing their needs, attempting to connect them with housing, shelter, and essential services. Other

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<sup>19</sup> For a list of state level resources, see LAO's *OVERVIEW OF STATE HOMELESSNESS PROGRAMS* (Feb. 25, 2016).

<sup>20</sup> USICH, *TEN STRATEGIES TO END CHRONIC HOMELESSNESS*.

<sup>21</sup> COPS Office, *HOMELESS ENCAMPMENTS: PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 56*, p. 33.

variations are based more on crisis intervention than patrol.<sup>22</sup> No matter the specifics, all outreach should be person-centered and emphasize building rapport and trust as a means of helping people obtain housing with appropriate services.<sup>23</sup>

### **C. Promoting alternatives to unsheltered homelessness**

Unsheltered homelessness not only leads to unhealthy and often dangerous living conditions for homeless people, it can pose environmental hazards. Unsheltered homelessness has been linked with such problems as pollution of the water supply, degradation of wetlands and wildlife habitat, fires, and damage to open space areas by abusive camping practices such as cutting down trees and leaving garbage on-site.<sup>24</sup> Urban homeless encampments have an even more immediate impact on nearby communities because of proximity. Many common elements of unsheltered homelessness, such as sleeping on the streets, panhandling, public excretion or urination, and public intoxication, are threatening or undesirable to other city residents--in some urban settings, police rate such behaviors as a bigger problem than drugs, car burglaries, public fighting, cruising, or noise.<sup>25</sup> Evidence from police case studies shows areas adjacent to homeless encampments have, apart from the "routine behaviors" of the chronically homeless, higher levels of petty and serious crime, including drug dealing and usage, disturbance, theft, prowling, burglary, fighting, vandalism, armed robbery, rape, and aggravated assault.<sup>26</sup>

#### **1. Encouraging shelter where housing is unavailable**

Permanent housing is the obvious long-term answer to homelessness (see, *supra*, Section III.A), but stopgap measures are critical here in

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<sup>22</sup> An example is the Homeless Outreach Team in San Diego, where in addition to homeless outreach efforts, police officers partner with mental health clinicians in a Psychiatric Emergency Response Team.

<sup>23</sup> USICH, *TEN STRATEGIES TO END CHRONIC HOMELESSNESS*.

<sup>24</sup> COPS Office, *HOMELESS ENCAMPMENTS: PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES NO. 56*, p. 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at pp. 8-9.

California; where a typical home costs more than double the national average and the median monthly rent was nearly 50 percent more than the national average.<sup>27</sup> Housing and shelters should not be competing priorities.<sup>28</sup> As one homeless advocate put it, “[t]o focus too much on housing is like a hospital saying, ‘We need a cardiac unit.’ Yeah, of course, but you can’t sacrifice the ER to do that.”<sup>29</sup>

Homeless outreach efforts allow cities to maintain and distribute up-to-date information to their homeless populations regarding availability of shelter in their communities and nearby communities. This sort of shelter availability information is particularly important for cities seeking to enforce anti-camping ordinances. In *Tobe v. City of Santa Ana*, the California Supreme Court, in rejecting a group of homeless plaintiffs’ claim that Santa Ana had improperly enforced its no-camping ordinance, pointed to the fact that none of the plaintiffs had provided evidence that lawful shelter was unavailable on the night they were cited.<sup>30</sup>

Day resource centers, where the chronically homeless can access services, bathing facilities, and health care and food, may also be useful when permanent housing is not readily available. Providers of such facilities, however, should strongly consider connecting receipt of services to some sort of programming to transition people from homelessness. In Fontana, California, the police worked with local churches and other service providers to create TEN-4 (Transient Enrichment Network for Fontana), a processing center that provides a hot shower, clean clothes, food, and assistance finding housing, employment, or placement in a long-term substance abuse treatment program. The facility is in a strip mall in an area of the city with a long-standing homelessness problem. If someone brought to the TEN-4 facility did not enter the program, he or she was given a ride away from the area. This helped alleviate business owners’

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<sup>27</sup> CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES, p. 6.

<sup>28</sup> <https://www.usich.gov/news/using-shelter-strategically-to-end-homelessness>.

<sup>29</sup> [http://www.huffingtonpost.com/2012/02/09/californias-homeless-crisis\\_n\\_1243223.html](http://www.huffingtonpost.com/2012/02/09/californias-homeless-crisis_n_1243223.html).

<sup>30</sup> 9 Cal.4th 1069, 1087-89 (1995); see also, *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013); *Lehr v. City of Sacramento*, 624 F.Supp 2d 1218, 1226 (E.D. Cal. 2009).

concerns that the area around the center would be overrun by homeless people who were “dropped off” there. This and other similar measures helped satisfy nearby business owners, who soon became strong supporters of TEN-4.<sup>31</sup>

Cities that lack adequate shelter options and have a significant number of people who are unable to obtain shelter may wish to consider declaring a shelter crisis pursuant to California Government Code section 8698, *et seq.* Such a declaration allows a city that makes findings related to health and safety to make government owned buildings available to use as shelter. Additionally, it provides for immunity from liability for “ordinary negligence in the provision of emergency housing.”

## **2. Discouraging homeless encampments**

The formation of encampments does not represent an end to homelessness; rather encampments are an indication of a critical need to create more effective local systems for responding to unsheltered homelessness. Strategies that make encampments an official part of the homelessness response system can distract communities from focusing on connecting people to permanent housing solutions and increase costs to ensure safety, security, and well-being.<sup>32</sup> Cities that have identified sufficient shelter alternatives should take steps to transition unsheltered populations out of encampments. Cities must take great care in closing encampments, as clean-up efforts are fraught with legal challenges and can even exacerbate homelessness problems. Encampment closures will vary depending on the attributes of a particular camp and its inhabitants, but, at a minimum, a city closing an encampment should take the following steps:<sup>33</sup>

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<sup>31</sup> COPS Office, *HOMELESS ENCAMPMENTS: PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES No. 56*, p. 6.

<sup>32</sup> USICH, *ENDING HOMELESSNESS FOR PEOPLE LIVING IN ENCAMPMENTS: ADVANCING THE DIALOGUE*, p. 2 (Aug. 2015).

<sup>33</sup> COPS Office, *HOMELESS ENCAMPMENTS: PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES No. 56*, pp. 30-31.

- 1) Visit the encampment to determine (i) how many people live there and if they have any special needs; (ii) if there are any environmental hazards that need to be handled by trained personnel; and (iii) the proper deployment of police officers and other staff to adequately carry out the plan;
- 2) Determine which agencies have jurisdiction over the encampment area. If there is more than one, as is often the case in park or wilderness areas where state or federal agencies may have jurisdiction, consider entering a Memorandum of Understanding (MOU) or similar agreement that specifies which agency will be responsible for law enforcement, safety, and environmental protection, and who will do what while the response is being implemented;
- 3) Find out who owns the property in question. The laws pertaining to legality of encampments vary depending on whether the land is privately or publicly owned;
- 4) Establish a procedure for removal of personal property and people from transient encampments. Such procedure should address how staff will distinguish personal property from trash; how hazardous or otherwise dangerous material at the camp site will be handled; and how personal property will be stored, how long it will be stored, and how it can be retrieved by its owner (erring on the side of retaining personal property rather than disposing of it as trash and providing a minimum storage period of ninety days are advisable);
- 5) Meet with representatives from homeless advocacy groups to advise them of your plan and why you are doing it. Data collected during the scanning phase of your project will be useful here. Consider inviting these groups to come along on your subsequent contacts with transients at the encampment;
- 6) Identify available shelter for all the transients (and their pets) *before* you begin to remove them from the encampment. This is



an important step to avoid legal challenges on the basis of the unconstitutionality of punishing someone for carrying out an “act of life” – sleeping<sup>34</sup>;

- 7) Provide all transients with a written notice advising them (i) they are violating the law by camping in the prohibited area; (ii) they are subject to further law enforcement if they remain in the area; (iii) of the location of the alternate shelter arranged specifically for them; and (iv) by which date they must vacate the area (the amount of notice will vary depending how established the encampment is and the needs of the inhabitants);
- 8) Before the final vacation date, return to the encampment, issue warnings to those still there, and redistribute alternative shelter information. Tell them the date by which they must vacate and that they will be subject to arrest and seizure of property if they do not leave by then;
- 9) On the final vacation date, transport any remaining camp inhabitants from the camp and store their belongings. If at all possible, inhabitants should be transported to alternative shelter rather than arrested and taken to jail. Coordinate with other agencies or government departments in removing their property. Be careful about potential constitutional violations regarding searches and seizures of property;
- 10) Determine which departments and individuals will be responsible for ensuring the encampment is not rebuilt. Ask other affected entities to contribute resources for regular patrols of the camp area and ensure your city has the capacity to immediately clean up an area if it begins to reestablish itself;
- 11) Discourage reestablishment of the encampment by cutting back excess foliage that hides the encampment area. Post signage in the former encampment indicating that camping is not

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<sup>34</sup> See, *infra*, Section III.D.

permitted in the area. Encourage private property owners to secure vacant lots and buildings, enlisting the assistance of code enforcement officers as necessary.

#### **D. Law enforcement narrowly-tailored to specific, avoidable harms**

Although solving homelessness is a laudable goal,<sup>35</sup> cities experiencing housing and shelter shortages are forced to deal with more immediate negative secondary effects while they work in their communities to solve the root causes of homelessness. In addressing secondary effects related to homelessness, cities must avoid punishing homeless people for attributes or activities that are natural consequences of being homeless, so called “acts of living.” Criminal enforcement is an arrow in a city’s quiver that should be used sparingly to curb dangerous or violent conduct that does not flow directly from homelessness and cannot be addressed through the means discussed above.<sup>36</sup>

Cities have been vulnerable to constitutional attacks in cases where their enforcement targeted “act of living” crimes. In *Pottinger v. City of Miami*, for example, the court held that “arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual punishment.”<sup>37</sup> Significantly, however, the same court expressly stated that it was not prohibiting the city from regulating other conduct that might be actually harmful to the homeless population or others.<sup>38</sup> When undertaking enforcement actions that affect homeless people, cities must specifically delineate the harms at which the

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<sup>35</sup> Indeed, many cities have adopted “Ten Year Plans” as part of a federal government initiative to eliminate chronic homelessness. For more on the federal initiative, see USICH, *OPENING DOORS: FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS* (as amended in 2015).

<sup>36</sup> See, USICH, *SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO CRIMINALIZATION OF HOMELESSNESS* (2012).

<sup>37</sup> *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1564-65 (S.D. Fla. 1992).

<sup>38</sup> *Id.* (The homeless “plaintiffs have not argued that the City should not be able to arrest them for public drunkenness or any type of conduct that might be harmful to themselves or others.”).

enforcement is aimed and narrowly-tailor enforcement policies to address those harms.<sup>39</sup>

#### IV.

### Showing Your Work: Tracking the Progress of Your City's Response to Homelessness

#### A. Measure the effectiveness of your city's response

Ultimately, no matter how a city chooses to address problems of homelessness, it is important for a city to “show its work” addressing homelessness to the public and, in context of litigation, to the court. Measuring homelessness strategy effectiveness is beneficial to cities for several reasons, including understanding whether the current response is achieving its intended results; driving strategy improvement; and facilitating the sharing of information on effective practice with other interested individuals and entities. Measurement should be taken before implementation of the city's homelessness strategy to determine the extent of the problem (see, *supra*, Section II.B), and after implementation to determine the strategy's effectiveness.<sup>40</sup>

In addition to measuring the number of homeless people placed in shelter or housing, cities should also track the impact their homelessness strategies have on adverse secondary effects of homelessness. Useful measures include environmental or water quality improvements; reduction of crime in and around encampments; fewer police calls for services to encampment areas; fewer police calls for service for nuisance problems caused by homeless people; fewer complaints by businesses and residents concerning homeless people or encampments; lower costs for responding

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<sup>39</sup> See, e.g., *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1157 (2014) (“The health and safety concerns cited by the City do not excuse the basic infirmity of the ordinance: It is so vague that it fails to give notice of the conduct it actually prohibits.”).

<sup>40</sup> In federal lawsuit challenging the City of Albany's homelessness strategy, tracking the city's outreach efforts and the results was integral to the city defeating a motion for injunctive relief by homeless advocates and ultimately resolving the litigation so that the city's closure of a large waterfront encampment could move forward.

to homelessness; increased use of social services; improved communication between the city and social services providers; and improved communication between the city and its homeless population.

## **B. Tell your own story**

Tracking progress is also vital to defending against legal challenges. Gathering facts about the results of the homelessness response helps a city frame public debate about the sufficiency of the response and advocate for greater community support. Moreover, in litigation concerning homelessness issues, the story a city tells about its response effort will be at least as important as the rule of law applied by the courts. Homelessness is a wicked problem.<sup>41</sup> Solutions to the problem are inherently imperfect. Consequently, cities, much like middle school students grappling with seemingly unsolvable math problems, will need to “show their work” in order to get credit for their answers to homelessness.

## **V.**

### **Conclusion**

In sum, a city preparing to address homelessness should look to gain a deep understanding of its specific problem and collaborate wherever possible. This preparation will allow the city to respond to homelessness with a preference for “Housing First” as a long-term solution while addressing immediate impacts of homelessness through strategic use of short-term shelter and carefully tailored law enforcement. A well-thought-out homelessness strategy not only allows a city to effectively respond to an important social issue, it also helps mitigate litigation risks in an area fraught with peril.

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<sup>41</sup> The term “wicked problem” was coined by Horst Rittel and Melvin Webber who argued that, unlike some problems posed in science or engineering, the societal problems that planners face are inherently ill-defined and do not have clear solutions. Rittel & Webber, *DILEMMAS IN A GENERAL THEORY OF PLANNING*, p. 160 (1973).