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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

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14 KATHERINE CODY; PATRICIA
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19 ALEXANDER RICHARD WILSON;
20 TAMARA ROBINSON; PHILIP
21 WILLIAM LEWIS; and ALBANY
22 HOUSING ADVOCATES, a California
23 non-profit public benefit corporation,

24 Plaintiffs,

25 v.

21 CITY OF ALBANY; ALBANY
22 POLICE DEPARTMENT; and MIKE
23 MCQUISTON, in his official capacity as
24 Chief of Police,

25 Defendants.

Case No. C 13-05270 CRB

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS' EX
PARTE MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

Date: November 18, 2013
Time: 2:00 P.M.
Courtroom: 6 (17th Floor)

Action Filed: November 13, 2013

Judge: Honorable Charles R.
Breyer

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1 **I. BACKGROUND**

2 The declaration of City of Albany Police Chief Mike McQuiston, filed
3 concurrently with this brief, provides background on the Albany Bulb/Waterfront
4 Park (the Bulb). Notably, the declaration explains the City’s numerous health and
5 safety concerns with respect to persons living at the Bulb.

6 Other regulating agencies also have raised health and safety concerns with
7 respect the Bulb encampments. The Alameda County Department of Environmental
8 Health, as the local enforcement agency for solid waste, routinely inspects active and
9 closed landfills for conformance with the California Public Resources Code and
10 California Code of Regulations. In 2010, the Department issued a letter to the City
11 outlining four concerns with respect to the Bulb: (1) “Homeless encampments were
12 observed in several areas of the closed landfill”; (2) “Garbage is being generated by
13 the homeless”; (3) Evidence of burning and/or having campfires observed”; (4) Issue
14 of how area around the homeless encampments is being maintained, where trash and
15 human wastes are being disposed of, etc.” (Bond Decl. ¶ 2, Exh. A.) After
16 explaining its concerns, the Department concluded: “At this time, this Agency is
17 informing your City, as the responsible owner of the subject property, of the potential
18 for health and fire hazards as are evident by these observations and findings. As the
19 owner, it is highly recommended that your City correct these areas of concern before
20 any untoward emergencies occur.” (*Id.*)

21 In March 2013, the San Francisco Bay Region of the California Regional
22 Water Quality Control (“Water Board”) Board expressed similar concerns and
23 underscored its opposition to the Bulb encampments. The Water Board staff stated:

24 “With respect to the homeless encampments and landfill
25 ‘mining,’ Water Board staff are concerned about both activities, which
26 pose a threat to human health and environmental quality. We do not
27 support the current use of the Bulb as an encampment and we will not
28 support any legalization of the situation. The unsanitary conditions
associated with unmanaged human wastes pose health and water quality
concerns, and the mining has created some obvious safety hazards.
These issues are the responsibility of the property owners, the City of
Albany and East Bay Regional Park District (the Park District), who
have attempted to address the issue. Unfortunately, those efforts were

1 met with strong, vocal resistance by groups and individuals advocating
 2 for preserving the current ‘wildness’ of the site, as well as for the rights
 3 of the homeless to reside on the property. Recently, the Park District
 4 erected signs warning of the hazardous conditions at the site and along
 5 the shoreline; unfortunately, these signs were promptly covered with
 6 graffiti or removed.

7 Given this unfortunate situation, Water Board staff will attempt to
 8 uphold our mission of protecting water quality at the site to the best of
 9 our ability; however, we must defer to the City of Albany and the Parks
 10 District for direct supervision of the site and protection of public
 11 safety.”

12 (Bond Decl. ¶ 3, Exh. B.)

13 In May 2013, the City’s Homeless Task Force presented a report to the City
 14 Council, which included a number of policy options for addressing the homelessness
 15 at the Bulb and elsewhere. (City’s RJN Exh. A, May 6, 2013 staff report, at
 16 attachment 2].) After considering the options, along with pros and cons for each
 17 option, the City Council unanimously supported the option that contemplated
 18 enforcement of the City’s no camping ordinance in conjunction with hiring an
 19 outreach and engagement team to provide services and housing for homeless
 20 individuals in the City. (*Id.* at attachment 2, Option 1B; Plaintiff’s RJN, Exhs. 5.)
 21 The City Council directed staff to begin enforcing the no camping ordinance in
 22 October of 2013. (Plaintiff’s RJN, Exhs. 5.) The City Council also directed the
 23 Mayor and City Manager to meet with East Bay Regional Park District and State
 24 Parks to being a process to transfer the Bulb to the McLaughlin Eastshore State Park.
 25 (*Id.*)

26 On September 3, 2013, after receiving further public input, the City Council
 27 reaffirmed its adopted policy for addressing homelessness in the City. Plaintiffs’
 28 counsel wrote a letter to the City requesting that the City “agree to postpone
 enforcement of [its no-camping] ordinance until such a time that there is a well-
 developed plan to transition the residents of the Bulb to suitable housing.” (City’s
 RJN, Exh. B [Sept. 24 letter from plaintiffs].) Plaintiffs expressed fear that the no
 camping ordinance would be enforced at the Bulb without alternative “shelter beds,”
 “transitional housing,” or “supported living arrangements” for homeless individuals

1 who desired such arrangements and without a plan for personal belongings found at
 2 the Bulb. (*Id.* at pp. 2-3.) The City has, in fact, delayed enforcement well beyond
 3 October 1, 2013.

4 Moreover, it is undisputed that the City has fashioned a well-developed
 5 transition plan (albeit not the plan of Plaintiffs' choosing). In mid-October,
 6 Plaintiffs' counsel remarked, in a letter to the City regarding the Bulb transition plan:
 7 "We appreciate that the City appears to be putting considerable thought into how to
 8 transition the current Bulb residents off the Bulb, and how to provide them support in
 9 finding housing that meets their needs. We also appreciate that the City is willing to
 10 commit significant funds to the project." As explained below, the City's transition
 11 plan considers and protects the rights of people at the Bulb and their property.

12 **II. CITY'S BULB TRANSITION PLAN WAS TAILORED TO ADDRESS**
 13 **CONCERNS LIKE THOSE PLAINTIFFS INITIALLY RAISED**

14 **A. The City's Bulb Transition Plan Does Not Criminalize The Status**
 15 **Of Homeless Persons**

16 The City's transition plan does not criminalize individuals. The City's
 17 transition plan calls for a mobile transition center. (City's RJN, Exh. C [10/21 staff
 18 report] at p. 3; Plaintiffs' RJN, Exh. 17.) The transition center will provide
 19 assistance to homeless individuals transitioning from the Bulb. (*Id.*) The City has
 20 contracted with local nonprofit service providers to help connect people with human
 21 and health services, food, clothing, housing and other transitional support to meet
 22 their needs. Operation Dignity will manage the transition center while Berkeley
 23 Food and Housing Project (BFPH) continues to provide support services and housing
 24 placement. (*Id.*)

25 The City's plan provides for transitional shelter on City owned property at the
 26 waterfront near the Bulb. (City's RJN, Exh. C [10/21 staff report] at p. 3; Plaintiffs'
 27 RJN, Exh. 17.) Importantly, "[t]he temporary shelter is intended to ensure those
 28 relocating from the Bulb have an alternative sheltered location. Despite Plaintiffs'

1 unsupported assertions to the contrary (Plaintiffs' Motion, p. 4), the City does not
2 intend to cite or arrest individuals who have no alternative to camping at the Bulb.

3 In addition to the temporary shelter being provided by the City, City staff will
4 continue its efforts to identify alternative shelter in nearby locations. (City's RJN,
5 Exh. C [10/21 staff report] at p. 3; Plaintiffs' RJN, Exh. 17.) The City is also
6 working with BFHP to identify locations for a limited number of rental units to
7 support homeless individuals that may have income from employment or public
8 assistance to contribute to a monthly rental. (*Id.*) It is anticipated that the City
9 would subsidize 40% of the rental unit, and a grant would subsidize another 30% of
10 the rental. (*Id.*)

11 **B. The City Will Not Seize Or Destroy Personal Property Found At**
12 **Bulb Encampments Without Ample Notice To Potential Owners**

13 The evidentiary record does not support Plaintiffs' assertion that the City's
14 transition plan will result in summary seizure or destruction of the personal
15 belongings of individuals camping at the Bulb (Plaintiffs' Motion, pp. 9-10). In
16 September 2013, the City adopted a comprehensive set of administrative procedures
17 for removal of temporary shelters, personal property, and refuse on public property.
18 (Plaintiffs' RJN, Exh. 18.)

19 Approximately fourteen days prior to undertaking a clean-up, the City makes
20 reasonable efforts to provide informal notice to inhabitants of encampments such as
21 the Bulb through face-to-face communications and distribution of informational
22 flyers. (Plaintiffs' RJN, Exh. 18, p. 3.) Then, at least seven days prior to
23 undertaking a clean-up, the City will seek to provide written notice of the intended
24 clean-up by posting or distributing written notice reasonably calculated to provide
25 effective notice to any inhabitants of adjacent temporary shelters or campsites. (*Id.*)
26 The City will photograph the area where clean-up is to occur to document site
27 conditions before and after the clean-up. (*Id.*)

28 The City will take reasonable precautions to prevent disposal or destruction of

1 any items which appear to be the personal property of any individual. (Plaintiffs'
 2 RJN, Exh. 18, p. 4.) The City will not assume that property which is temporarily
 3 unattended has been discarded or abandoned. (*Id.*) Reasonable doubt about whether
 4 an item constitutes trash or debris, as opposed to personal property, is resolved in
 5 favor of treating the item as personal property. (*Id.*) The City's administrative
 6 procedures also include Guidelines for Property Identification. (*Id.*)

7 Personal property that is collected will be recorded using a standard Property
 8 Receipt and Release Form. After the removal of all personal property, the City will
 9 post written notice of property retrieval. (*Id.*) Personal property will be stored at no
 10 charge to the owner for at least 120 days, during which time the property will be
 11 available to be reclaimed by the owner. Only after the expiration of 120 days, may
 12 property be donated, sold or discarded by the City. (*Id.*)

13 **C. Structures At The Bulb Will Be Afforded The Same Due Process**
 14 **Under The City's Building Code As Structures Throughout The**
 15 **City**

16 Structures at the Bulb will be afforded the same process as similar structures
 17 elsewhere in the City. The City Building Official will inspect buildings and
 18 structures illegally erected on public property and follow the City's process for
 19 abating these conditions. (Plaintiffs' RJN, Exh. 18, p. 4.) The Albany Municipal
 20 Code, Chapter 12-5, sets forth the main process to abate unsafe structures. (City's
 21 RJN, Exh. D.) If an inspection shows a structure to be unsafe, the building official
 22 must post a "notice to repair" on the property and send the notice to all owners of
 23 record shown on the title report. (*Id.* at § 12-5.2(a).) The building official must also
 24 send a "notice to vacate" to each unit if the structure is unfit for human occupancy.
 25 (*Id.* at § 12-5.2 (b).) If the deficiencies are not corrected, a noticed hearing before
 26 the City Council is held to show cause why the structure should not be declared a
 27 public nuisance, the nuisance be abated, and the costs be charged to the owner(s).
 28 (*Id.* at §§ 12-5.3, 12-5.4.) If the owner does not commence abatement within 15 days

1 of the Council's order to abate, the building official may demolish or repair the
 2 building. (*Id.* at § 12-5.5(a).) The owner may dispute the itemized "statement of
 3 expenses" in a noticed hearing, and has five days to submit payment until the
 4 expenses constitute a lien on the property. (*Id.* at §§ 12-5.5(b), (c), 12-5.6(a), (b).)

5 **III. THE IRREPARABLE HARMS AND HARDSHIPS ALLEGED IN**
 6 **PLAINTIFFS' MOVING PAPERS FLOW FROM SUPPOSITION AND**
 7 **MISINFORMATION; NOT FROM THE CITY'S TRANSITION PLAN**

8 Plaintiffs' balancing of hardships and analysis of irreparable harm are fatally
 9 defective because, as demonstrated above, each discussion is based on inaccurate
 10 speculation regarding the City's Bulb transition plan and an inaccurate portrayal of
 11 the conditions at the Bulb.

12 Plaintiffs must demonstrate that irreparable injury is likely in the absence of a
 13 temporary restraining order. *Winter v. Natural Resources Defense Council, Inc.*, 555
 14 U.S. 7, 22, 129 S.Ct. 365, 375 (2008). An injunction may not be granted based on a
 15 mere "possibility" of irreparable harm, even if plaintiffs demonstrate a strong
 16 likelihood of success on the merits (which plaintiffs here have not). *Winter v.*
 17 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 375.

18 As explained above, plaintiffs' moving papers ignore significant health and
 19 safety risks at the Bulb documented by the City and others. Furthermore, Plaintiffs
 20 speculation regarding implementation of the City's transition plan is not consistent
 21 with the factual record: the City will not cite or arrest Bulb campers who lack
 22 alternative shelter; property will not be seized without notice; and Bulb encampments
 23 will not be summarily destroyed.

24 **IV. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS**

25 **A. Plaintiffs Fail To Show A Likelihood Of Success On Their Eighth**
 26 **Amendment Claim.**

27 The Eighth Amendment prohibits a city from punishing a homeless person
 28 when that person has no other option but to live on public property. In *Jones v. City*

1 of *Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), vacated by settlement, 505 F.3d 1006
 2 (9th Cir. 2007) (*Jones*), the court held “only that . . . the Eighth Amendment
 3 prohibits [a city] from punishing involuntary sitting, lying, or sleeping on public
 4 sidewalks that is an *unavoidable consequence of being human and homeless without*
 5 *shelter* in [that city].” *Id.* at p. 1138 (italics added). “We do not hold that the Eighth
 6 Amendment . . . prevents the state from criminalizing conduct that is not an
 7 unavoidable consequence of being homeless” *Id.* at p. 1137.

8 Plaintiffs have not shown on the undeveloped record that the City would be
 9 punishing them for conduct that is an unavoidable consequence of being homeless.
 10 As explained above, the Bulb transition plan offers specific alternatives, including
 11 making available temporary shelter to transition the homeless people at the Bulb to
 12 more permanent living arrangements and assisting individuals in identifying more
 13 permanent housing. The City will also offer a host of support services for homeless
 14 individuals. If the temporary shelters become fully occupied, and persons at the Bulb
 15 are not able to gain access to other shelters, the City will not issue citations to them.
 16 Only those persons living at the Bulb who refuse to accept available shelter are
 17 eligible to be cited for violating the City’s anti-camping ordinance. *Jones* expressly
 18 stated that “we are not called upon to decide the constitutionality of punishment
 19 when there are beds available for the homeless in shelters.” *Jones*, 444 F.3d at 1138.
 20 Thus, under the actual circumstances here, and not the imagined scenario conjured
 21 by plaintiffs, plaintiffs cannot show that the City of Albany, by issuing citations,
 22 would be punishing persons for conduct that is an unavoidable consequence of being
 23 homeless.

24 The facts here instead are more appropriately analyzed under *Tobe v. City of*
 25 *Santa Ana*, 9 Cal.4th 1069 (1995) (“*Tobe*”). There, the California Supreme Court
 26 considered the constitutionality of “anti-camping” ordinances which were challenged
 27 by various homeless persons and taxpayers. The California Supreme Court held that
 28 an ordinance that bans camping and storing personal possessions on public property

1 did not constitute “cruel and unusual punishment” because the ordinance proscribed
 2 specific acts, not the status of being homeless. *Id.* at 1104; see also *Robinson v.*
 3 *California*, 270 U.S. 660 (1962). Notably, “[t]he ordinance permits punishment for
 4 proscribed conduct, not punishment for status.” *Id.* at 1104. As in *Tobe*, the City’s
 5 Bulb transition plan does not criminalize homelessness, but rather proscribes specific
 6 curfew violations and camping acts. Also, as noted above, only those persons living
 7 at the Bulb who refuse to accept available shelter are eligible to be cited for violating
 8 the City’s anti-camping ordinance. Thus, the Bulb transition plan does not
 9 criminalize the homeless people at the Bulb based on their homeless status, and,
 10 accordingly does not violate the Eighth Amendment. Plaintiffs attempt to distinguish
 11 *Tobe* on the ground that it did not involve people involuntarily camping on public
 12 property. (See Plaintiffs’ Motion, p. 14, n. 9.) However, *Tobe* is precisely on point
 13 here where the City is enforcing anti-camping ordinances against specific proscribed
 14 acts occurring on the Bulb, and not based on an unavoidable consequence of being
 15 homeless, as explained above.

16 Plaintiffs contend that the City’s Bulb Transition Plan “criminalizes the status
 17 of homelessness” in violation of the Eighth Amendment because some of the Bulb
 18 homeless people will have no shelter in six months after implementation of the Bulb
 19 Transition Plan, and other homeless people will allegedly face an immediate
 20 situation where it is impossible for them to go into shelters. (*See, e.g.*, Plaintiffs’
 21 Motion at pp. 14 -16.) Plaintiffs argue that, for those who find “all bunk beds taken,”
 22 or those with disabilities, the Bulb transition plan immediately criminalizes these
 23 individuals. Plaintiffs’ position flows from unfounded assumptions and speculation.
 24 First, Plaintiffs assume that the thirty beds presently offered by the City will
 25 immediately be filled by the persons at the Bulb. Even indulging for the moment
 26 that the assumption is reasonable, Plaintiffs implicitly speculate that the City would
 27 not offer additional transitional shelter for persons at the Bulb if the need arose.
 28 Furthermore, plaintiffs make no showing that persons currently residing at the Bulb

1 will not be able to find housing other than the City's transitional shelters. Plaintiffs
2 also cite no statistics from local shelters regarding occupancy of shelter space.

3 In summary, plaintiffs fail to show that the City would violate the Eighth
4 Amendment by issuing a citation to any person who could not find housing other
5 than the City's temporary shelters (assuming that to be so), and who then refused to
6 live in the City's temporary shelters, preferring instead to remain at the Bulb.
7 Plaintiffs have not demonstrated a likelihood of success on their Eighth Amendment
8 claim.

9 **B. Plaintiffs Fail To Show A Likelihood Of Success On Their**
10 **Americans With Disabilities Act Claim.**

11 Under Title II of the Americans with Disabilities Act (ADA), "no qualified
12 individual with a disability shall, by reason of such disability, be excluded from
13 participation in or be denied the benefits of the services, programs, or activities of a
14 public entity, or be subjected to discrimination by any such entity." 42 U.S.C.
15 section 12132. The federal regulations implementing Title II require public entities
16 "to make reasonable modifications in policies, practices, or procedures when the
17 modifications are necessary to avoid discrimination on the basis of disability, unless
18 the public entity can demonstrate that making the modifications would
19 fundamentally alter the nature of the service, program, or activity." 28 C.F.R.
20 section 35.130, subd. (b)(7). The "reasonable modification" requirement in the
21 ADA mirrors the requirement in the Fair Housing Amendments Act (FHAA) that
22 public entities "make reasonable accommodations in rules, policies, practices, or
23 services, when such accommodations may be necessary to afford such person equal
24 opportunity to use and enjoy a dwelling." 42 U.S.C. section 3604(f)(3)(B). Thus,
25 "[t]he requirements for reasonable accommodation under the ADA are the same as
26 those under the FHAA." *Oconomowoc Residential Programs, Inc. v. City of*
27 *Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002). *See also McGary v. City of Portland*,
28 386 F.3d 1259, 1266 n.3 (9th Cir. 2004) (*McGary*) ("Although Title II of the ADA

1 uses the term “reasonable modification,” rather than “reasonable accommodation”
 2 [under the FHAA], these terms create identical standards.”). Accordingly, the
 3 principles in the Fair Housing Act and ADA hybrid cases discussed in the next
 4 paragraph apply with full force to the ADA reasonable accommodation claim
 5 asserted by plaintiffs here.

6 The Ninth Circuit has “recognized that the question of what constitutes a
 7 reasonable accommodation under the ADA ‘requires a fact-specific, individualized
 8 analysis of the disabled individual’s circumstances and the accommodations that
 9 might allow him to meet the program’s standards.’ [Citation.]” *McGary*, 386 F.3d at
 10 1270 (involved both FHAA and ADA claims). Under the ADA and FHAA, “only
 11 *reasonable* accommodations that do not cause undue hardship or mandate
 12 fundamental changes in a program are required.” *Giebeler v. M&B Associates*, 343
 13 F.3d 1143, 1154 (9th Cir. 2003) (italics original). “To prove that an accommodation
 14 is necessary, ‘plaintiffs must show that, but for the accommodation, they likely will
 15 be denied an equal opportunity to enjoy the housing of their choice.’ [Citation.]” *Id.*
 16 at p. 1155. “The concept of necessity requires at a minimum the showing that the
 17 desired accommodation will affirmatively enhance a disabled plaintiff’s quality of
 18 life by ameliorating the effects of the disability.” *United States v. City of Chicago*
 19 *Heights*, 161 F.Supp.2d 819, 834 (N.D.Ill. 2001).

20 Assuming only for the sake of argument in this opposition brief that the ADA
 21 even applies to the City’s transitional housing, plaintiffs here have not requested, nor
 22 do they assert they have requested, any accommodation as an alternative to the
 23 transitional housing the City provides. Instead, they simply assert that the
 24 transitional housing will not be suitable for some of them because of their
 25 disabilities. Without plaintiffs having even requested any accommodation, this Court
 26 cannot possibly determine whether a particular accommodation is reasonable or
 27 whether it would cause undue hardship to the City or mandate a fundamental change
 28 in the City’s land use and zoning policies. The Court also cannot determine whether

1 whatever desired accommodation plaintiffs might have in mind would affirmatively
 2 enhance their quality of life by ameliorating the effects of their disabilities. This is
 3 so whether plaintiffs wish to remain at the Bulb (which would not be a reasonable
 4 accommodation under any circumstances) or whether plaintiffs would like the City to
 5 provide alternative housing. Furthermore, plaintiffs overlook the fact that the City
 6 also provides information to them regarding homeless shelters in the region.

7 For these reasons, plaintiffs have not shown they are likely to succeed on their
 8 claim that the City of Albany has failed to make reasonable accommodations in its
 9 transitional housing for disabled persons currently living at the Bulb.

10 **C. Plaintiffs Fail To Show A Likelihood Of Success On Their**
 11 **Substantive Due Process Claim.**

12 Substantive due process prohibits “the government from depriving a person of
 13 life, liberty, or property in such a way that shocks the conscience or interferes with
 14 the rights implicit in the concept of ordered liberty.” *Corales v. Bennett*, 567 F.3d
 15 554, 568 (9th Cir. 2009) (internal citations and quotations omitted). Government
 16 violates substantive due process only when its actions “can properly be characterized
 17 as arbitrary, or conscience shocking, in a constitutional sense.” *Collins v. City of*
 18 *Harker Heights*, 503 U.S. 115, 128 (1992). Plaintiffs allege that enforcement of the
 19 City’s ordinance violates substantive due process, by knowingly subjecting Bulb
 20 residents to danger to their physical health and safety. See Motion for TRO at pp.
 21 19-20; *See also, Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (the Constitution
 22 protects a citizen’s liberty interest in one’s bodily security). To allege a violation of
 23 substantive due process for a threatened state-created danger, courts consider (1)
 24 whether the danger was affirmatively created by state action, and (2) whether the
 25 state acted with deliberate indifference to a known danger. *See Kennedy v. City of*
 26 *Ridgefield*, 439 F.3d 1055, 1062-64 (9th Cir. 2006) (*Kennedy*). Plaintiffs have not
 27 shown a likelihood of success on either factor.
 28

1 **1. The City Does Not Create Danger By Offering Temporary**
 2 **Housing To Plaintiffs.**

3 In examining whether the City affirmatively places plaintiffs in danger, the
 4 court “must examine whether [the City] left the person in a situation that was more
 5 dangerous than the one in which they found him.” *Kennedy*, 439 F.3d at 1062. The
 6 conditions at the Bulb, where plaintiffs currently reside, are deplorably unsafe and
 7 hazardous. Accordingly, plaintiffs must show that the transitional housing provided
 8 by the City places them in an even more dangerous situation. This, they fail to do.
 9 Plaintiffs offer only speculation that the City’s transitional housing could lead to
 10 illness and aggravate the conditions associated with their disabilities. They have not
 11 supplied any concrete evidence that living in the transitional housing would be more
 12 dangerous than the demonstrably dangerous conditions at the Bulb.

13 Plaintiffs further assert that “around 30 Bulb residents” will be evicted from
 14 the Bulb around the time that winter approaches. See Motion for TRO, at pp. 19-20.
 15 But plaintiffs’ contention that this places them in danger overlooks that the City
 16 provides them with shelter. To the extent plaintiffs are concerned that the City’s
 17 transitional shelters will be insufficient to house all persons living at the Bulb,
 18 plaintiffs have not shown that any in their group will be unable to find alternative
 19 shelter, nor have they shown that the City would not consider supplying additional
 20 transitional shelters. Where, as here, the City provides voluntary transitional housing
 21 for Bulb inhabitants who currently reside in dangerous conditions, plaintiffs fail to
 22 show that the City creates a situation even more dangerous than the one in which
 23 they currently live.

24 **2. The City Has Not Acted With Deliberate Indifference To A**
 25 **Known Danger.**

26 Turning to deliberate indifference, the Court “must decide the related issues of
 27 whether the danger to which the defendant exposed plaintiff ‘was known or obvious,
 28 and whether [defendant] acted with deliberate indifference to it.” *Kennedy*, 439 F.3d

1 at 1064. “[D]eliberate indifference is a stringent standard of fault, requiring proof
 2 that a municipal actor disregarded a known or obvious consequence of his actions.”
 3 *Bryan County v. Brown*, 520 U.S. 397, 410 (1997). Plaintiffs cannot show that the
 4 City’s Bulb Transition Plan treats Bulb inhabitants with deliberate indifference to a
 5 know danger. First, as noted above, plaintiffs fail to show that the City has created
 6 any danger. Second, plaintiffs fail to show that any conditions of their transitional
 7 housing pose known or obvious dangers; as noted above, plaintiffs offer only
 8 speculation. Plaintiffs fail to show that the City acts with deliberate indifference to a
 9 known danger.

10 **D. Plaintiffs Fail To Show A Likelihood Of Success On Their**
 11 **Procedural Due Process Claim**

12 A “procedural due process claim hinges on proof of two elements: (1) a
 13 protectable liberty or property interest; and (2) a denial of adequate procedural
 14 protections.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005).
 15 The City acknowledges that residents at the Bulb are entitled to procedural due
 16 process protections with respect to their possessions. The City affords those
 17 protections.

18 Plaintiffs contend that the City must grant the same due process procedural
 19 protections to the Bulb inhabitants and their “shelters” as the City would grant to any
 20 other resident whose “home” it seeks to condemn. Motion for TRO at p. 20. The
 21 City will afford the same process to structures at the Bulb as it affords to other
 22 structures under the City’s Building Code, as explained above.

23 Plaintiffs also speculate that the City will seize and destroy their personal
 24 possessions without any notice at all. Plaintiffs are wrong. First the City will
 25 provide seven days’ notice to all residents at the Bulb that their possessions will be
 26 placed in storage for a period of at least 120 days. The City’s seven-day notice
 27 procedure that it will store (not destroy) plaintiffs’ property for 120 days readily
 28 satisfies due process. *See De-Occupy Honolulu v. City and County of Honolulu*,

1 2013 U.S. Dist. Lexis 71968, *16-17 (D. Haw. 2013) (court upheld removal of
 2 personal possessions from public property where ordinance (1) provided 24 or 72-
 3 hours' written notice before items were seized; (2) provided post-seizure notice
 4 describing items removed and location of retrieval, and (3) provided for holding
 5 seized items at least 30 days before destruction.)

6 Plaintiffs fail to show that the City will violate any of their procedural due
 7 process rights because (i) the City will afford plaintiffs the same procedural rights
 8 afforded to other structures under the City's Building Code, and (ii) any personal
 9 property seized pursuant to the Bulb Transition Plan will likewise be afforded due
 10 process. As a result, plaintiffs fail to make a showing of likely success on the
 11 merits.

12 **E. Plaintiffs Fail To Show A Likelihood Of Success On Their Right To**
 13 **Privacy Claim.**

14 The California unconstitutional conditions doctrine provides that where the
 15 "receipt of a public benefit is conditioned upon the waiver of a constitutional right,
 16 the government bears a heavy burden of demonstrating the practical necessity for the
 17 limitation." *Robbins v. Superior Court*, 38 Cal.3d 199 (1985) (internal quotation
 18 marks omitted). Contrary to plaintiffs' assertion, the doctrine does not apply here.
 19 First, the City has not conditioned the receipt of a public benefit upon the waiver of
 20 anything. The City offers transitional housing to residents of the Bulb who will no
 21 longer be permitted to live there. People are prohibited from living at the Bulb
 22 because of the City's anti-camping ordinance. Thus, regardless of whether a resident
 23 of the Bulb decides to live in transitional housing, that resident may not live at the
 24 Bulb as a matter of local law. The City is not saying that a resident may live at the
 25 Bulb, but if the resident chooses to live in transitional housing, the resident then may
 26 no longer live at the Bulb. Accordingly, the City has not conditioned habitation in
 27 transitional housing upon vacating Bulb property. Plaintiffs must vacate Bulb
 28 property in any event. The unconstitutional conditions doctrine does not apply here.

1 Second, the unconstitutional conditions doctrine would required plaintiffs to
 2 establish that the City has infringed a constitutional right. *Parrish v. Civil Service*
 3 *Com.*, 66 Cal.2d at 270. But there are not constitutional rights, privacy or otherwise,
 4 inherent in plaintiffs occupancy of the Bulb. Plaintiffs allege violation of an
 5 associational right to live in a particular location and to choose their own living
 6 companions. *See* Motion for TRO at p. 23. The “[freedom] to associate with people
 7 of one’s choice is a necessary adjunct to privacy in the family and the home.”
 8 *People v. Katrinak*, 136 Cal.App.3d 145, 153 (1982). Plaintiffs allege an illegal
 9 burden of their right to privacy in their “dwellings” on the Bulb, based primarily on
 10 the purported sophistic choice between waiving a right to privacy by accepting the
 11 City’s temporary shelter, or risking criminal sanctions by sleeping on the City’s
 12 streets. *See* Motion for TRO at p. 22. But, as noted above, plaintiffs are not required
 13 to make such a choice. The City offers transitional housing on a voluntary basis.
 14 Bulb inhabitants are free to seek other shelters throughout the area. Plaintiffs argue
 15 that the combination of high numbers of homeless people combined with lower
 16 numbers of shelter beds show impossibility for obtaining alternative shelter.
 17 However, Plaintiffs cite no statistics regarding occupancy of local shelters and fail to
 18 show that plaintiffs would be prevented from obtaining alternative shelter should
 19 they choose not to associate with other residents in the City’s transitional housing.
 20 Further, no resident who declines to accept the City’s temporary housing will be
 21 cited if alternative housing is unavailable. Thus, Plaintiffs fail to show that the City
 22 is forcing Bulb inhabitants to associate with anyone other than of their own
 23 choosing. Rather, the City is merely moving lawfully to evict in a particular location
 24 of the City.

25 In asserting a right to associate freely, plaintiffs fail to show a reasonable
 26 expectation of privacy at illegal campsites on the public open space. Plaintiffs’
 27 claims of privacy are based on a presumption that Bulb inhabitants have exclusive
 28 permanent property rights to campsites at the Bulb. Indeed, plaintiff cites cases

1 extending the right to privacy to lawful residences. *See, e.g., Hill v. NCAA*, 7 Cal.
 2 4th 1 (1994); *CALHO v. City of Santa Monica*, 88 Cal. App. 4th 451, 459 (2001) (“In
 3 short, the right to privacy includes the right to be left alone in our homes.”).
 4 However, as held in *Zimmerman v. Bishop Estate*, 25 F.3d 784 (9th Cir. 1993), rights
 5 to privacy for squatters may be limited. *Id.* at 787-88 (squatter in a residential home
 6 did not have an objectively reasonable expectation of privacy where the squatter had
 7 no legal right to occupy the home). Instead, the City, “has no constitutional
 8 obligation to make accommodations on or in public property available to the
 9 transient homeless to facilitate their exercise of the right to travel,” *Tobe v. City of*
 10 *Santa Ana*, 9 Cal.4th 1069, 1103 (1995), citing *Lindsey v. Normet*, 405 U.S. 56, 74
 11 (1972), and there is no fundamental right to camp on public property. *Tobe*, 9
 12 Cal.4th at 1108. As a result, Plaintiffs fail to demonstrate a violation of a
 13 constitutional right to associate or to privacy.

14 **V. CONCLUSION**

15 For all of the foregoing reasons, the ex parte motion should be denied.

16 Dated: November 15, 2013

Respectfully submitted,

17 RICHARDS, WATSON & GERSHON
 18 A Professional Corporation
 19 GREGORY W. STEPANICICH
 T. PETER PIERCE
 TOUSSAINT S. BAILEY

20
 21 By: _____ /s/

22 TOUSSAINT S. BAILEY
 23 Attorneys for Defendants
 24
 25
 26
 27
 28

1 CRAIG LABADIE
2 CITY ATTORNEY
3 CITY OF ALBANY

3 RICHARDS, WATSON & GERSHON
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13 Telephone: 415.421.8484
14 Facsimile: 415.421.8486

15 Attorneys for Defendants

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 KATHERINE CODY; PATRICIA
19 MOORE; ROBERT WHARTON;
20 APRIL ANTHONY; LARRY
21 CABRERA; JOSEPH ROSE;
22 STEPHANIE RINGSTAD;
23 ALEXANDER RICHARD WILSON;
24 TAMARA ROBINSON; PHILIP
25 WILLIAM LEWIS; and ALBANY
26 HOUSING ADVOCATES, a California
27 non-profit public benefit corporation,

28 Plaintiffs,

v.

29 CITY OF ALBANY; ALBANY
30 POLICE DEPARTMENT; and MIKE
31 MCQUISTON, in his official capacity as
32 Chief of Police,

33 Defendants.

Case No. C 13-05270 CRB

**DECLARATION OF JEFF BOND IN
OPPOSITION TO PLAINTIFFS' EX
PARTE MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

Date: November 18, 2013
Time: 2:00 P.M.
Courtroom: 6 (17th Floor)
Judge: Honorable Charles R. Breyer

Action Filed: November 13, 2013

34 I hereby attest that I have on file all holographic signatures corresponding to any
35 signature indicated by a conformed signature (/s/) within this e-filed document.

36 /s/

37 By: _____
38 TOUSSAINT S. BAILEY

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

DECLARATION OF JEFF BOND

I, Jeff Bond, declare:

1. I have been employed by the City of Albany (the "City") since March 2006. My current position is Director of the Community Development Department. I have personal knowledge of the information provided below and I would testify with regard to the information if called as a witness.

2. On May 27, 2010, the City's Community Development Department received a letter from Maria A. Mendoza of the County of Alameda Department of Environmental Health, Office of Solid/Medical Waste Management regarding "Inspection Findings and Concerns regarding Albany Closed Landfill Located at the West End of Buchanan Street, Albany." A true and correct copy of the letter, which is in file of the City's Community Development Department files, is attached as **Exhibit A.**

3. On March 5, 2013, I received an email regarding "Response to your question regarding Albany Landfill" from Lindsay Whalin, an Engineering Geologist for the San Francisco Bay Region of the California Regional Water Quality Control Board. A true and correct copy of the email is attached as **Exhibit B.**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 15th day of November, 2013, at Albany, California.

/s/ Jeff Bond

Jeff Bond

RICHARDS | WATSON | GERSON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

EXHIBIT A

ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY
ALEX BRISCOE, Director



ENVIRONMENTAL HEALTH SERVICES
ENVIRONMENTAL PROTECTION
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
(510) 567-6700
FAX (510) 337-9335

May 27, 2010

City of Albany
1000 San Pablo Avenue
Albany, CA 94706-2295
Attn: Beth Pollard, City Manager

**SUBJECT: INSPECTION FINDINGS AND CONCERNS REGARDING ALBANY CLOSED
LANDFILL LOCATED AT THE WEST END OF BUCHANAN STREET, ALBANY**

Owner: City of Albany

The Department of Environmental Health as the Local Enforcement Agency (LEA) for solid waste routinely inspects active and closed landfills within the county for conformance with standards prescribed in Public Resources Code and Title 14 and 27, California Code of Regulations. On May 4, 2010, a routine quarterly inspection of the above noted closed landfill was performed. In general, closed landfills are evaluated for the integrity of the overburden cap of soil over solid waste, gas monitoring and control systems, drainage, erosion, security measures, etc. to prevent public contact with waste, landfill gas and leachate and to ensure that public health and safety and environment are protected. On May 4th the following concerns were noted:

1. Homeless encampments were observed in several areas of the closed landfill.
2. Garbage is being generated by the homeless.
3. Evidence of burning and/or having campfires observed.
4. Issue of how the area around the homeless encampments is being maintained, where trash and human wastes are being disposed of, etc.

At this time, this Agency is informing your City, as the responsible owner of the subject property, of the potential for health and fire hazards as evident by these observations and findings. As the owner, it is highly recommended that your City correct these areas of concern before any untoward emergencies occur.

If there are any questions, please contact me at (510) 567-6730 or you may email at maria.mendoza@acgov.org.

Sincerely,

Maria A. Mendoza, Senior REHS
Alameda County Department of Environmental Health
Office of Solid/Medical Waste Management

Cc: Ariu Levi, Director, Alameda County DEH
Alex Briscoe, Director, Health Care Services Agency
Ron Browder, Chief, Alameda County DEH, Environmental Protection Division
Jorge Goitia, Acting Supervisor, ALCO DEH, Office of Solid/Medical Waste Mgmt.
Ann Chaney, Community Development Director
File

EXHIBIT B

From: [Whalin, Lindsay@Waterboards](mailto:Whalin.Lindsay@Waterboards)
To: [Rochelle Nason](mailto:Rochelle.Nason)
Cc: [Jeff Bond](mailto:Jeff.Bond); [Chris Barton \(cbarton@ebparks.org\)](mailto:Chris.Barton@ebparks.org)
Subject: Response to your question regarding Albany Landfill
Date: Tuesday, March 05, 2013 2:59:35 PM

Rochelle,

I've looked into the issue of toxic leachate at the Albany Landfill, and here's what I've found. Analyses of the toxicity of leachate inside the former landfill indicated that leachate would be acutely toxic to fish due to the presence of unionized ammonia (a toxic form of nitrogen). Despite this condition, the potential for significant water quality impacts from a release of unionized ammonia to the Bay from Albany Landfill is considered minimal, for the following reasons:

1. The toxicity tests do not represent actual site conditions: Studies of the toxic effects of chemicals on fish (fish "bioassays") are performed by placing a number of fish in a water sample for a specified period of time and measuring the percentage that survive. Typically these tests are performed in samples of water that fish would be exposed to, such as samples collected from the Bay adjacent to the Landfill. However, the tests performed on the Albany Landfill used leachate, and therefore do not represent actual site conditions because fish do not live inside landfills and are not exposed to undiluted leachate. If leachate were released to the Bay, it would be mixed into a much larger volume of Bay water and the concentrations of toxins would be significantly reduced.
2. The likelihood of health effects from unionized ammonia is small: If consumed in high enough concentrations, ammonia can be toxic to wildlife, as well as to humans. However, large releases of leachate from this site are unlikely given the hydrogeology, and there is no reason to expect people will drink the leachate. However, if you do observe the presence of exposed, standing liquids in the "mined" areas of the landfill, please let us know. We definitely would want to inspect the situation.
3. Minor releases of unionized ammonia, though not desirable, are not a major water quality concern: Nitrogen changes form quickly in the environment, and unionized ammonia is expected to be transformed to non-toxic forms of nitrogen.

With respect to the homeless encampments and landfill "mining," Water Board staff are concerned about both activities, which pose a threat to human health and environmental quality. We do not support the current use of the Bulb as an encampment and we will not support any legalization of the situation. The unsanitary conditions associated with unmanaged human wastes pose health and water quality concerns, and the mining has created some obvious safety hazards. These issues are the responsibility of the property owners, the City of Albany and East Bay Regional Park District (the Park District), who have attempted to address the issue. Unfortunately, those efforts were met with strong, vocal resistance by groups and individuals advocating for preserving the current "wildness" of the site, as well as for the rights of the homeless to reside on the property. Recently, the Park District erected signs warning of the hazardous conditions at the site and along the shoreline; unfortunately, these signs were promptly covered with graffiti or removed.

Given this unfortunate situation, Water Board staff will attempt to uphold our mission of protecting water quality at the site to the best of our ability; however, we must defer to the City of Albany and the Parks District for direct supervision of the site and protection of public safety.

Please let me know how I can support your efforts for change at the bulb, and when you plan to visit the site. I think it would be informative for both of us to tour the site together.

Best,

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Lindsay Whalin, MS, PG
Engineering Geologist
San Francisco Bay Water Board
(510) 622-2363
1515 Clay St., Ste. 1400
Oakland, Ca 94612

From: Rochelle Nason [mailto:rnason@rochellenason.net]
Sent: Thursday, February 21, 2013 11:47 AM
To: Whalin, Lindsay@Waterboards
Cc: Jeff Bond (jbond@albanyca.org)
Subject: RE: Albany Landfill Document

Thanks very much Lindsay, I look forward to hearing from you next week, take care,

Rochelle Nason

From: Whalin, Lindsay@Waterboards [mailto:Lindsay.Whalin@waterboards.ca.gov]
Sent: Thursday, February 21, 2013 11:44 AM
To: Rochelle Nason
Cc: Jeff Bond (jbond@albanyca.org)
Subject: RE: Albany Landfill Document

Rochelle,
These are important questions. I'll take a look at these, dig up some data, and respond ASAP. I expect it will be next week as I need to prepare for a major inspection today that I'm undertaking tomorrow.

Best,

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oO..Oo

Lindsay Whalin, MS, PG
Engineering Geologist
San Francisco Bay Water Board
(510) 622-2363
1515 Clay St., Ste. 1400
Oakland, Ca 94612

From: Rochelle Nason [mailto:rnason@rochellenason.net]
Sent: Wednesday, February 20, 2013 11:22 AM
To: Whalin, Lindsay@Waterboards
Cc: Jeff Bond (jbond@albanyca.org)
Subject: FW: Albany Landfill Document

Many thanks Lindsay! Please note that I am looping Jeff Bond in on this e-mail.

I have a couple of questions about this; please note that I have attached all the documents I have that relate to this matter for your convenience.

The 1997 Streamborn Report has been understood by many to indicate that the water within the landfill is not toxic.

However, the 1999 WDR described the water as 'acutely toxic' and containing high levels of metals.

Which is correct – is the water (1) toxic, but contained safely within the landfill, as the WDR seems to indicate, or (2) is the water nontoxic, and therefore not a threat to people or the Bay if released ?

The context of these question is the activity of the residents of the homeless encampment that lives on the Bulb – they 'mine' the landfill for buried metal, particularly along the north side of the Neck. So I am trying to find out if there cause for concern if the miners encounter and/or release leachate into the Bay.

Also, the residents of the homeless encampment are interested in pursuing legal status for their occupancy. So my second question is: would the presence of the leachate and/or the lack of sanitary facilities be of concern to the RWQCB if the City's plan for the Bulb shifted from open space to human habitation ?

Thanks for your attention ! Best wishes,

Rochelle Nason
963 Ventura Avenue
Albany, California 94707
(510)524-7278 (landline)
(510)542-1789 (mobile)

rnason@rochellenason.net

From: Whalin, Lindsay@Waterboards [<mailto:Lindsay.Whalin@waterboards.ca.gov>]
Sent: Tuesday, February 19, 2013 1:20 PM
To: Rochelle Nason
Subject: FW: Albany Landfill Document

I believe I found the letter you were looking for. I apologize it took so long, I had to figure out how to use a new module in our electronic file storage database.

Best,

@..@
(----)
()--()
oO..Oo

Lindsay Whalin, MS, PG
Engineering Geologist
San Francisco Bay Water Board
(510) 622-2363
1515 Clay St., Ste. 1400
Oakland, Ca 94612

From: Whalin, Lindsay@Waterboards
Sent: Monday, February 11, 2013 12:42 PM
To: 'rnason@rochellenason.net'
Subject: Albany Landfill Document

Ms. Nason,

I have looked through our electronic files, but have not located the document you requested. It is possible a copy was not saved in our records since the Water Board was not the addressee. I apologize that I wasn't more helpful.

Please feel free to contact me if you would like me to join you on your inspection of the bulb. I'd certainly appreciate being made aware of potential threats to water quality.

Best,

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(----)
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oO..Oo

Lindsay Whalin, MS, PG
Engineering Geologist
San Francisco Bay Water Board
(510) 622-2363
1515 Clay St., Ste. 1400
Oakland, Ca 94612

1 CRAIG LABADIE
2 CITY ATTORNEY
3 CITY OF ALBANY

3 RICHARDS, WATSON & GERSHON
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5 GREGORY W. STEPANICICH (Bar No. 78317)
6 gstepanicich@rwglaw.com
7 T. PETER PIERCE (Bar No. 160408)
8 ppierce@rwglaw.com
9 TOUSSAINT S. BAILEY (Bar No. 245641)
10 tbailey@rwglaw.com
11 44 Montgomery Street, Suite 3800
12 San Francisco, California 94104-4811
13 Telephone: 415.421.8484
14 Facsimile: 415.421.8486

15 Attorneys for Defendants

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

18 KATHERINE CODY; PATRICIA
19 MOORE; ROBERT WHARTON;
20 APRIL ANTHONY; LARRY
21 CABRERA; JOSEPH ROSE;
22 STEPHANIE RINGSTAD;
23 ALEXANDER RICHARD WILSON;
24 TAMARA ROBINSON; PHILIP
25 WILLIAM LEWIS; and ALBANY
26 HOUSING ADVOCATES, a California
27 non-profit public benefit corporation,

28 Plaintiffs,

v.

29 CITY OF ALBANY; ALBANY
30 POLICE DEPARTMENT; and MIKE
31 MCQUISTON, in his official capacity as
32 Chief of Police,

33 Defendants.

Case No. C 13-05270 CRB

**DECLARATION OF MIKE
McQUISTON IN OPPOSITION TO
PLAINTIFFS' EX PARTE MOTION
FOR TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION**

Date: November 18, 2013
Time: 2:00 P.M.
Courtroom: 6 (17th Floor)
Judge: Honorable Charles R. Breyer

Action Filed: November 13, 2013

34 I hereby attest that I have on file all holographic signatures corresponding to any
35 signatures indicated by a conformed signature (/s/) within this e-filed document.

36 /s/
37 By: _____
38 TOUSSAINT S. BAILEY

DECLARATION OF MIKE McQUISTON

I, Mike McQuiston, declare:

1. I have been employed by the City of Albany (the "City") as a police officer since December 1988. My current position is Chief of Police. I have served as Chief of Police for the City since July 1, 2006. I have personal knowledge of the information provided below and I would testify with regard to the information if called as a witness.

2. From July 1, 2006 to the present, I have been the City staff person primarily responsible for enforcement of Albany Municipal Code §8-4 regulating the use of City parks, recreation, open space, waterfront and Albany Hill areas within the City of Albany (Exhibit 1). Contained within the provisions of Albany Municipal Code §8-4 are prohibitions on alcoholic beverages, fires, fireworks, overnight camping, littering, storage of personal property and construction of buildings in these recreational areas. My role with respect to enforcement of the ordinance, specifically the prohibition of overnight camping and the night-time curfew, is to maintain oversight and management of police operations. With regard to enforcement, it is my intent to implement police department policies and procedures that fulfill City goals and objectives in a compassionate, ethical and effective manner.

3. Current conditions at the Albany Bulb/Waterfront Park are unsafe and unhealthy for both those who make camp there and those who utilize the park for recreation. Community concerns about conditions and safety on the Bulb have been expressed directly to the police department and publicly to the members of City Council. The public space there has become increasingly off limits and unavailable to the public as well as members of City staff charged with responsibility for maintaining and protecting the property and its visitors. The inaccessibility is caused by the unpredictable and sometimes openly hostile behavior of persons camped there. The Albany Police have investigated or received reports of violent crimes

IRW RICHARDS | WATSON | GERSHON
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1 occurring in and among the camps at the Bulb as well as the more publicly accessible
2 areas. There have been several disturbing cases reported to police within the last
3 twelve months.

4 4. A female park visitor walking her dog on the Bulb, whose dog was
5 attacked by two dogs from a homeless camp, was told to “get the fuck out of here.”
6 While departing the area she was chased by a female suspect holding what she
7 believed was a knife, who shouted “I have a knife and will stab you and your dog.”
8 When police responded and detained the suspect, she was found to be in possession
9 of a 7” screwdriver. The suspect was placed under private person’s arrest for assault
10 with a deadly weapon (APD# 12-2027).

11 5. We’ve investigated a report of a violent sexual assault involving forced
12 oral copulation, sodomy and theft after the male suspect and female victim smoked
13 methamphetamine together (APD #13-0462).

14 6. A homeless African-American couple was effectively run off the Bulb
15 following a disturbance involving racial/hate crime connotations after they attempted
16 to set up camp on the Bulb. After staying one night they told officers they did not
17 feel safe after being racially harassed and threatened by multiple persons, one of
18 whom held a brick in hand while a dog attacked and bit the victim on his arm (APD
19 #13-1349).

20 7. Albany police responded to a reported stabbing wherein the suspect (a
21 Bulb camper) had pulled a knife on another and sliced him in the face, causing a
22 severe laceration to upper and lower lips (APD# 13-0513).

23 8. I have also received a confidential report of a camper who lives in an
24 isolated area where he can “beat his girlfriend in peace.” This victim was reported to
25 me to have two black eyes which were being disguised behind makeup. (APD
26 #130812041).

27
28

1 9. In another case a different female victim was beaten, resulting in two
2 black eyes and cuts under her eye and on her forehead by another male camper
3 (APD# 13-1777).

4 10. Unsafe conditions in the park are exacerbated by ominous “beware of
5 dog” signs and aggressive, uncontrolled dogs that limit the freedom of movement of
6 park users and City staff on the paths and trails of the Bulb.

7 11. One recent report made to police by a park user documents his
8 experience of having his dog chased by four of the campers’ dogs and the
9 indifference displayed when he confronted the person responsible for the attacking
10 dogs: “They come back and they think they own the place. They don’t. I can’t go
11 here with my kids. I can’t go over there. That’s forbidden. It’s infuriating.” (APD#
12 13-1771).

13 12. Earlier this year the City received a claim for lost wages and medical
14 expenses from the mother of a dog attack victim who had been bitten while walking
15 on the Bulb, transported to the hospital via ambulance, and had undergone a series of
16 rabies vaccinations (APD# 121230032).

17 13. On October 28, 2013, two Albany police officers on foot at the Bulb
18 were confronted by two apparently vicious dogs. Both dogs moved to attack the
19 officers, with one dog managing to get a bite on one of the officer’s arms. Both
20 officers discharged their sidearms, critically injuring one of the attacking dogs, an
21 unneutered male mixed breed (apparently pit bull/akita/mastiff) weighing
22 approximately 60lbs. The purported owner of the dog was not present. Police
23 attempted to contact him and speak to him about the incident, however he is
24 currently a wanted parolee with a “no bail” warrant issued by the California
25 Department of Corrections for a parole violation. (APD# 13-1884).

26 14. There is evidence to suggest that many of the persons currently camped at
27 or frequenting the Albany Bulb are habitual users of controlled substances,
28 specifically marijuana and methamphetamine. Albany Police Department records

1 indicate numerous narcotics related contacts and arrests of various persons associated
 2 with the Bulb camps for possession of marijuana, methamphetamine, and illicit drug
 3 paraphernalia (i.e. glass smoking pipes, hypodermic needles or syringes).

4 15. I have visited the Bulb on many occasions at various times of day in
 5 and out of police uniform and have made personal observations of conditions there.
 6 Within the last two months, I have personally observed used hypodermic syringes
 7 laying about the ground on the Bulb and surrounding land (i.e., the area commonly
 8 known as “the neck”) with needles exposed. I have seen heaps of garbage and
 9 detritus strewn about the park, often in large quantities and in one location spilling
 10 into the San Francisco Bay waters and protected wildlife wetland habitat. I have
 11 observed a large plastic bucket nearly filled with human feces left sitting in an open
 12 park area, and upon return to photograph it a few days later, discovered that the
 13 contents had been dumped on the ground and the bucket removed. I have been
 14 prevented from freely moving about the Bulb by intimidating dogs and signs warning
 15 of the presence of dogs.

16 16. In my official capacity as Chief of Police, I believe that the encampment
 17 on the Albany Bulb represents a significant threat to public health and safety, and has
 18 resulted in the loss of public access to City owned property which is maintained as
 19 regional public parkland. This is by no means the full extent of the public health and
 20 safety record concerning the encampments on the Albany Bulb but instead offers a
 21 sampling of the dangerous conditions.

22 17. The plaintiff’s Motion for Temporary Restraining Order contains
 23 significant mischaracterizations of Albany Police policy and past enforcement
 24 efforts. The Albany Police Department does not now, nor to my knowledge has it
 25 ever, adopted or employed a policy or practice of directing homeless individuals to
 26 the Albany Bulb. Albany police officers have practiced constitutional based policing
 27 for over two decades, specifically with regard to the protections of the Fourteenth
 28 Amendment to the U.S. Constitution.

1 18. The most recent erroneous assertion of such a practice is contained
 2 within the personal declaration of Tamara Robinson. Robinson asserts she was told
 3 to “go back to the landfill” when she was contacted by police while sleeping on a
 4 public sidewalk (¶ 9). Albany Police employ a practice of documenting public
 5 “Welfare Checks” such as the one described by Robinson, and have recorded in
 6 excess of 20 contacts of various nature with Robinson in the past thirty months. But
 7 no such record exists of the contact she alleges. If it were the officers’ intent to make
 8 Robinson “go back to the landfill” or face receiving “a ticket for obstructing the
 9 sidewalk” these “three Albany police officers” would not have simply turned and left
 10 Ms. Robinson. Department records would indicate that no person has received such a
 11 citation.

12 19. Amber Whitson, who has been perhaps the most vocal and visible
 13 advocate for persons currently camped on the Bulb has placed before the court a
 14 declaration that Albany police “directed homeless people out to the Bulb to live”
 15 (Whitson ¶ 15). However in an internet “blog” posting she very clearly asserts and
 16 provides anecdotal evidence that this is the practice of the City of Berkeley Police
 17 Department officers.

18 20. That this practice of directing homeless to the Albany Bulb was in fact a
 19 practice of law enforcement outside Albany is further supported by the declarations
 20 of plaintiffs Cabrera (¶ 4) and Bowen (¶ 6); Moreover the circumstances described
 21 in the declarations of Evans (¶ 3), Whitson (¶ 5), Moore (¶ 4), Wilson (¶ 4), Choate
 22 (¶ 3), Barnett (¶ 3), and Lewis (¶ 5), support my assertion that this is not the policy or
 23 practice of the Albany Police Department.

24 21. Other mischaracterizations of police enforcement are contained in the
 25 declarations of Cabrera (¶ 18-19) and Mattonen (¶ 14), specifically the assertion that
 26 on the night of October 14, 2013 officers told Cabrera and Mattonen they would be
 27 arrested. There were no threats to arrest. A scripted admonition was employed to
 28 inform persons found violating curfew on that date (both campers and others

1 discovered in the park) that future violations “may” result in citation and that repeat
2 violations “may” result in arrest.

3 22. During 1999, the City undertook a nearly year-long process to address a
4 multitude of issues on the Albany Waterfront; among these were a burgeoning
5 homeless population and a disconcerting increase in violent crime there. Following
6 adoption of Albany Municipal Code §8-4 regulating the waterfront the City
7 employed a multi-agency, multi-disciplinary phased approach to compassionately
8 remove homeless from the former landfill by offering a multitude of services and
9 transitional housing.

10 23. I was a police supervisor who was heavily involved in the police
11 planning and ordinance enforcement operations in 1999. I have personal knowledge
12 of the attentive, considerate and compassionate techniques employed by Albany
13 Police officers at that time. Citations were preceded by verbal warnings; in the few
14 instances where custodial arrests occurred, they only took place following multiple
15 incidents of citations issued in the field. Any other characterization of our conduct is
16 incorrect. It is my intention to employ a similar philosophy as we move forward
17 with enforcement in the present day.

18 24. Concerning the currently planned Code enforcement on the Albany
19 Bulb: The Albany Police do not plan to issue citations or make arrests for camping
20 or curfew violations on the Bulb when alternative shelter or housing is not available
21 to persons being cited. It is my intent to enforce in phases as persons living there are
22 transitioned to other shelter or housing options. As such, if Bulb campers or other
23 homeless persons fill the beds available in the nearby shelter or other nearby shelter
24 or housing options, police would not enforce the no camping or curfew laws. Simply
25 put, the no camping and curfew laws would not be enforced and no citations would
26 be issued, nor would arrests take place for these violations under such circumstances.
27 For this reason, our enforcement will likely be phased, in a quadrant approach,
28 opening up portions of the park currently inaccessible to the parks users due to the

1 activity of campers, as they are assisted with finding alternative shelter or housing.
2 Concurrently, new encampments and construction on the Bulb will not be permitted.

3 I declare under penalty of perjury under the laws of the United States of
4 America that the foregoing is true and correct.

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6 Executed on this 15th day of November, 2013, at Albany, California.

7

8 /s/ Mike McQuiston

9 Mike McQuiston

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