



## AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

18 Low Avenue  
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www.ACLU-NH.org

DEVON CHAFFEE  
EXECUTIVE DIRECTOR

June 10, 2016

VIA EMAIL

Lebanon City Council  
City of Lebanon  
51 North Park Street  
Lebanon, NH 03766

RE: Proposed Ordinance #2016-03 Concerning Camping and Overnight Parking on City Property

Dear Mayor Tuttle and the Honorable Members of the Lebanon City Council:

I write on behalf of the American Civil Liberties Union of New Hampshire (ACLU-NH) concerning the City Council's consideration of Proposed Ordinance #2016-03 addressing camping, overnight parking, and sleeping on city property. This Proposed Ordinance would, in part, ban a person from sleeping in a park or other city-owned property either overnight or for any two-hour period from dusk to dawn. I understand that, on June 15, the Council will conduct a public hearing and may take action on this Proposed Ordinance. As explained below, this Proposed Ordinance raises serious constitutional concerns and is bad policy, as it would evict homeless people from all city property (and effectively from Lebanon)—an action that would have a devastating impact on the City's least fortunate. Accordingly, the ACLU-NH asks that the Council reject the Proposed Ordinance or, at the very least, table it so the City can fully examine these serious constitutional concerns.

The United States Department of Justice (DOJ) has correctly concluded that efforts by municipalities to make it a crime for homeless people to sleep in public places unconstitutionally punish these individuals for being homeless when there is insufficient shelter space within the municipality.<sup>i</sup> Indeed, courts have struck down as unconstitutional ordinances similar to Proposed Ordinance because they essentially bar the status of being homeless by prohibiting otherwise innocent actions that are integral and unavoidable aspects of that homeless status.<sup>ii</sup>

Based on this court precedent and the DOJ's guidance, we believe that the Proposed Ordinance is unconstitutional because it would impermissibly punish those who are homeless in the City, especially where there are few resources in Lebanon to fully meet the needs of the local homeless population. The most recent New Hampshire DHHS point-in-time survey of the homeless indicates that there were 107 homeless individuals in Grafton County in 2014<sup>iii</sup>, but only 67 temporary beds dedicated to the homeless.<sup>iv</sup> As far as we are aware, there are no shelter or beds of any type dedicated to the homeless in Lebanon itself. The closest shelter, Upper Valley Haven's Hixon House Adult Shelter located across the border in Vermont, has only 26 available beds, which is clearly inadequate to deal with the need in both Grafton County and Winsor County, Vermont. It has come to our attention that this shelter is regularly at maximum capacity.

But even if there was some space available at this shelter, fifteen to twenty homeless individuals regularly occupy the vacant lot adjacent to the Hannaford off Route 12A at any given time. This encampment alone exceeds any available capacity at Upper Valley Haven. Individuals at the camp have informed us that they would rather stay at the shelter but are prevented from doing so because the lack of capacity at the shelter has resulted in a waiting list. Lebanon City Manager Paula Maville has even explained that "the social services that some of these people need are outside the bounds of what the city is capable of providing."<sup>v</sup> The court in *Jones* reasoned that an ordinance substantially identical the one proposed by the City was unconstitutional precisely because the city there was unable to provide adequate resources to its homeless population. The situation here is no different. As the DOJ has made clear, "where there is insufficient shelter space to accommodate the homeless population: the conduct of sleeping in a public place is



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indistinguishable from the status of homelessness.”<sup>vi</sup> Here, given these facts, the Proposed Ordinance likely is unconstitutional.

Even setting aside these serious constitutional concerns, the City Council should reject the Proposed Ordinance because it is bad policy that fails to address the underlying causes of homelessness, especially where the Ordinance does not seem to address any public complaints concerning the homeless population. As City Manager Maville explained to the press, “she hasn’t heard any direct complaints from the public about people camping near Hannaford, but she has heard ‘talk’ in the community.”<sup>vii</sup>

And even to the extent there has been a complaint to which the Lebanon Police Department has responded, the far more tailored approach would be to address those specific complaints individually rather than to, in sweeping fashion, evict all members of the homeless population, including those who are peaceful and law-abiding. As Chief Mello stated in his May 25, 2016 memorandum to the City Council, the Department “investigated a recent complaint from Hannaford’s regarding individuals living across the road on City Property where they have been loitering in and around the store, littering on the property and bathing in their bathrooms”—all of which concern use of private, nor public, property. Here, the more targeted approach would be to enforce criminal trespass and loitering laws against these individuals with respect to their use of private property, rather than enacting an overbroad ordinance that evicts people from city property who are committing no crime, not improperly using Hannaford’s, and not causing a public safety concern. See RSA 635:2 (criminal trespass statute); RSA 644:6 (criminal loitering statute).

In short, while the ACLU-NH appreciates that homelessness is a serious and difficult issue faced by many communities, the reality is that fining and evicting individuals who lack even the most basic means is a poor use of police resources and only serves to further burden and marginalize the most vulnerable citizens in our community. That is why the Valley News urged the Council to reject the proposal as “the lure of an alleged solution that is no solution at all.”<sup>viii</sup>

Finally, recent press reports suggest that, if the Proposed Ordinance is enacted, the Lebanon Police Department may plan on selectively enforcing it against only those who the Department believes are “homeless by choice.”<sup>ix</sup> Setting aside the impracticability of making such a determination, this approach would create serious additional constitutional concerns, as such a policy would vest the Department with the unfettered discretion to engage in arbitrary and discriminatory decision making as to who it cites/evicts and who it does not. See *Montenegro v. N.H. DMV*, 166 N.H. 215, 221 (2014) (striking down DMV policy that “encouraged arbitrary and discriminatory enforcement”). The Council should be aware that, if the Ordinance is enacted and is deemed constitutional, it applies to all homeless people on City property, even the City’s neediest who are law abiding and causing no public safety concern. The Proposed Ordinance cannot be enforced selectively.

Thank you for your time and consideration. If you have any questions, do not hesitate to contact me.

Regards,

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cc: Chief Richard R. Mello, Chief of Police ([Richard.Mello@lebcity.com](mailto:Richard.Mello@lebcity.com))  
Deputy Chief Phillip J. Roberts, Deputy Chief of Police ([Phillip.Roberts@lebcity.com](mailto:Phillip.Roberts@lebcity.com))  
Paula Manville, Acting City Manager ([paula.maville@lebcity.com](mailto:paula.maville@lebcity.com))



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<sup>i</sup> <https://www.justice.gov/opa/file/643766/download>; <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>

<sup>ii</sup> See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (vacated after settlement, 505 F.3d 1006 (9th Cir. 2007)); see also *Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084, at \*6 (N.D. Cal. May 2, 2016) (holding that the city would be enjoined from clearing a homeless encampment if it did not provide adequate shelter for all of the encampment’s residents); *State v. Adams*, 91 So.3d 724, 754-55 (Ala. Crim. App. 2010) (holding that the arrest of a homeless sex offender for not providing an actual address was unconstitutional because the only shelters that take sex offenders were always full, thus the law punished “involuntary conduct that was inseparable from his status of homeless”).

<sup>iii</sup> <http://www.dhhs.nh.gov/dcbcs/bhhs/documents/pointintime2014.pdf>.

<sup>iv</sup> <http://www.nhceh.org/wp-content/uploads/reports/2014-report.pdf>, 21.

<sup>v</sup> Tim Camera to, *Public Hearing Date for Proposed Homeless Ordinance set in Lebanon*, VALLEY NEWS (June 2, 2016), available at <http://www.vnews.com/Lebanon-City-Council-to-Take-Up-Homeless-Ordinance-2543011>.

<sup>vi</sup> Statement of Interest at 11.

<sup>vii</sup> Jordan Cuddemi, *Proposed Ordinance Could Force Homeless from Site*, VALLEY NEWS (May 14, 2016), available at <http://www.vnews.com/Homeless-Population-Sets-Up-Behind-Hannafords-West-Lebanon-NH-2079030>.

<sup>viii</sup> Editorial: Homeless in Lebanon, VALLEY NEWS, (June 7, 2016), available at <http://www.vnews.com/homeless-in-lebanon-2668509>.

<sup>ix</sup> Meghan Pierce, *Lebanon City Council to Discuss Camping Ban on City Property*, UNION LEADER (June 2, 2016), available at <http://www.unionleader.com/apps/pbcs.dll/article?AID=/20160603/NEWS0606/160609747>