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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAUSALITO/MARIN COUNTY CHAPTER
OF THE CALIFORNIA HOMELESS UNION,
16 on behalf of itself and those it represents;
ROBBIE POWELSON; SHERI I. RILEY;
17 ARTHUR BRUCE; MELANIE MUASOU;
SUNNY JEAN YOW; NAOMI
18 MONTEMAYOR; MARK JEFF; MIKE
NORTH; JACKIE CUTLER and MICHAEL
19 ARNOLD on behalf of themselves and
similarly situated homeless persons,

20
21 Plaintiffs,

22 v.

23 CITY OF SAUSALITO; MAYOR JILL
JAMES HOFFMAN; POLICE CHIEF JOHN
24 ROHRBACHER; CITY MANAGER
MARCIA RAINES; DEPT. OF PUBLIC
25 WORKS SUPERVISOR KENT BASSO,
26 individually and in their respective official
capacities,

27
28 Defendants.

Case No. 3:21-cv-01143-EMC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO MODIFY
PRELIMINARY INJUNCTION**

Date: April 29, 2021
Time: 1:30 p.m.
Courtroom:

Action Filed: February 16, 2021
Trial Date: T.B.D.
Judge: Hon. Edward M. Chen

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1 **I. INTRODUCTION**

2 On March 1, 2021, the Court issued a preliminary injunction, enjoining Sausalito from (1)
3 enforcing its prohibition on daytime camping, and (2) closing and/or clearing the encampment of
4 homeless persons at Dunphy Park. Sausalito now asks the Court to modify or dissolve part (2) of
5 the injunction and allow the City to move the encampment from Dunphy Park to Marinship Park.

6 The Court stated that it would consider this modification if Sausalito could “demonstrate
7 there are not toxic risks at the proposed encampment site at Marinship Park and that the move can
8 be safely accomplished.” Dkt. No. 3 (Order, p. 15). As detailed herein, Sausalito can make both
9 showings based on new facts and changed circumstances.

10 First, a qualified expert conducted air and soil testing at Marinship Park during boat
11 disposal operations at the adjacent boat yard. Deignan Declaration ¶ 3, Ex. 1 (expert report). The
12 testing evaluated the accumulation of regulated metals in the soil over time, and the presence of
13 airborne fibers, lead, and regulated metals during active disposal operations. Laboratory results
14 showed that all toxic materials were either not detectable or present at ordinary ambient levels.
15 *Ibid.* None of the samples came close to exceeding applicable regulatory limits. *Ibid.*

16 Second, Sausalito can accomplish the move to Marinship safely, given additional planning
17 and preparation it has undertaken, and improving Covid-19 conditions in Marin County. Sausalito
18 has partnered with Urban Alchemy, a homeless services provider, to develop a safe relocation plan
19 and facilitate the move. Rohrbacher Decl. ¶¶ 9–11. Sausalito has also provided for improvements
20 to Marinship Park, including deep-cleaning, repairing, and repainting the restrooms; supplying
21 portable toilets, handwashing stations, a dumpster, and personal protective equipment; regularly
22 servicing and stocking the facilities; and installing social distancing markers for tents. McGowan
23 Decl. ¶¶ 4–7, Ex. 3 (Operations and Maintenance Plan.) Additionally, Sausalito is working with
24 Marin County to bring vaccines directly to the Dunphy Park encampment by the end of April, and
25 offer them free of charge to all residents who wish to be vaccinated. Rohrbacher Decl. ¶ 8, Ex. 9.
26 Meanwhile, the overall Covid-19 situation continues to improve in Marin County, with reduced
27 case rates, reduced positivity rates, and increased vaccinations. RJN, Exs. 12-14. As a result of
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1 these improvements, the State recently moved Marin County from the “red” tier to the less
2 restrictive “orange” tier. *Id.*, Ex. 13 (Press Release).

3 Finally, the City has developed additional evidence, not available at the preliminary
4 injunction stage, further demonstrating that Marinship Park is a better location for the
5 encampment compared to Dunphy Park. The Dunphy Park encampment has continued to grow
6 and expand, and now includes approximately 44 tents and 44 residents, the majority of whom are
7 non-local. Rohrbacher Decl. ¶¶ 4, 6, Ex. 7 (comparison photographs). Due to the small size of the
8 Dunphy Park camping area (approximately 30,000 square feet), tents are packed closely together,
9 exacerbating Covid-19 risks. McGowan Decl. ¶ 9, Ex. 5. By contrast, Marinship Park offers
10 approximately twice as much space (60,000 square feet) and can better accommodate the growing
11 encampment. McGowan Decl. ¶ 10, Ex. 6. Additionally, the Dunphy Park encampment now
12 encroaches significantly onto adjoining private property, whose owner has asked for the
13 encampment to be removed. Rohrbacher Decl. ¶ 7. Sausalito has adopted a new Operations and
14 Maintenance Plan for Marinship Park, which will ensure that the facilities there are improved,
15 regularly serviced, and made safe for the residents. McGowan Decl. ¶ 6, Ex. 3.

16 For these reasons, all preliminary injunction factors—irreparable injury, balance of harms,
17 likelihood of success on the merits, and public interest—now tip in Sausalito’s favor as to the
18 proposed relocation. The Court should therefore modify or partially dissolve the preliminary
19 injunction to allow the relocation to go forward.

20 **II. FACTUAL BACKGROUND**

21 **A. The Dunphy Park Encampment And City Council Resolution**

22 The factual background relating to the Dunphy Park encampment and City Council
23 Resolution No. 6009, is detailed in Defendants’ Opposition to Plaintiff’s Motion for Temporary
24 Restraining Order (Dkt. No 3) and in the Court’s Order Granting Plaintiffs’ Motion for a
25 Temporary Restraining Order and Preliminary Injunction (“Order”) (Dkt. No. 20). For the sake of
26 brevity, it is not repeated here.

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1 **B. The Court’s Preliminary Injunction**

2 On March 1, the Court issued its preliminary injunction, enjoining the City from (1)
3 enforcing the day camping prohibition in Resolution No. 6009, and (2) closing and/or clearing the
4 Dunphy Park encampment. Order, p. 16. This motion seeks to modify or dissolve only part (2) of
5 the injunction.

6 As to part (2), the Court concluded that the balance of harms weighed in favor of enjoining
7 the move to Marinship Park because the adjacent boat disposal operation raises concerns about
8 toxics and environmental safety. Order, pp. 9–10. The Court noted, however, that Plaintiffs’
9 evidence of such risks was “concededly thin,” and that Defendants had not submitted counter-
10 evidence. *Id.*, p 9. The Court did not rule on Plaintiffs’ assertion that relocation itself would pose
11 Covid-19-related harms. *Id.*, p. 10, n.9. It found that the evidence on this point was “minimal,”
12 and that “there could well be ways to have a move safely done (e.g., particularly if there were City
13 assistance).” *Ibid.*

14 As to likelihood of success on the merits, the Court found that Plaintiff’s showing on the
15 proposed relocation was “not as strong” as for the day camping ban. Order, p. 14. But the Court
16 expressed concern that the City had not taken concrete steps to ensure that the environment at
17 Marinship is safe from the boat disposal operation, had not properly equipped and cleaned the
18 Marinship Park bathrooms, and had not taken actions to ensure the health and safety of the
19 campers while they are in Dunphy Park. *Ibid.*

20 Given Plaintiffs’ weaker showing on part (2), the Court invited Defendants to file a motion
21 to modify or dissolve that specific preliminary injunctive relief if “they demonstrate there are not
22 toxic risks at the proposed encampment site at Marinship Park and that the move can be safely
23 accomplished.” Order, p. 15.

24 The Order also noted that the urgency of obtaining a preliminary injunction, coupled with
25 the fact that Plaintiffs “did not offer most of their evidence until they filed their reply brief,”
26 deprived Defendants of the opportunity of offering rebuttal evidence. Order, p. 16, n. 11.
27 Accordingly, the Court noted that it would take these circumstances into account should
28 Defendants file a motion to modify the preliminary injunction. *Ibid.*

1 **C. New Facts and Changed Circumstances**

2 New facts and changed circumstances relevant to the preliminary injunction have arisen
3 since the hearing on February 23.

4 First, Sausalito has taken concrete steps to assist the persons in the Dunphy Park
5 encampment and improve living conditions there. Because the permanent bathrooms at Dunphy
6 Park are distantly located from the site of the encampment, on or around March 8, Sausalito
7 provided portable toilets and a separate handwashing station to the Dunphy Park encampment, and
8 on March 24, provided a dumpster for the encampment. McGowan Decl. ¶ 3. On March 25,
9 Sausalito retained Urban Alchemy (a non-profit specializing in outreach to individuals
10 experiencing homelessness) to assist the Dunphy Park residents. Rohrbacher Decl. ¶ 9, Ex. 10
11 (services agreement). Urban Alchemy’s scope of work includes “endeavor[ing] to learn what each
12 of the encampment residents needs or wants to be able to return to their vessels on Richardson Bay
13 or move to the offered location at the City’s Marinship Park” and “mak[ing] suggestions to the
14 City throughout their time at the encampment on ways they can assist to improve upon the health
15 and safety of the encampment residents and the community as a whole.” *Ibid.* Since being
16 retained, Urban Alchemy has communicated at length with the individuals at the Dunphy Park
17 encampment and reported back to the City. *Id.* ¶ 10. In addition, Urban Alchemy has been
18 instrumental in removing trash and debris from the Dunphy Park encampment area to improve the
19 health and safety of the individuals residing there. *Ibid.*

20 Second, Sausalito has taken concrete steps to prepare and improve Marinship Park for the
21 encampment, and to ensure that the relocation can be accomplished safely. In early March,
22 Sausalito retained an industrial hygienist to conduct air and soil testing at Marinship during boat
23 disposal operations at the boat yard. Deignan Decl. ¶ 3, Ex. 1 (report). The testing demonstrated
24 that Marinship is environmentally safe for the encampment, with all regulated and toxic materials
25 not detectable or present at expected ambient levels. *Ibid.*

26 Sausalito has also adopted an Operations and Maintenance Plan for Marinship Park to
27 ensure that it is regularly cleaned and stocked, and that specific improvements are made to the
28 facilities. McGowan Decl. ¶ 6, Ex. 3 (Plan). As provided in the Plan, prior to relocating the

1 encampment to Marinship, Sausalito will complete a number of upgrades and maintenance items,
2 including replacing the plumbing fixtures, and supplying portable toilets, handwashing stations,
3 and a dumpster. *Id.* ¶¶ 6, 7, Ex. 3. The City will also post laminated signs in the restroom
4 providing a phone number to call if users find that supplies are running low or additional cleaning
5 is needed. *Id.* ¶ 5, Ex. 2 (new signage). Additionally, Sausalito has already completed certain
6 items in preparation for the move. Specifically, on April 5, the Department of Public Works deep-
7 cleaned the restroom facilities using a “Hotsy” pressure washer, which combines steam cleaning
8 with pressure washing detergent. McGowan Decl. ¶ 4. On April 8, Sausalito re-painted the
9 restroom facilities. *Id.* ¶ 7, Ex. 4 (documentation photos). Sausalito will also continue its routine
10 cleaning and re-stocking of the bathroom facilities at Marinship Park every weekday, except major
11 holidays. McGowan Decl. ¶ 4.

12 Meanwhile, the Dunphy Park encampment has continued to expand. The camp has now
13 increased to approximately 44 tents and 44 individuals. Rohrbacher Decl. ¶¶ 4, 6, Ex. 7
14 (comparison photographs). Only about 15 individuals claim to be displaced from boats in
15 Richardson’s Bay; the remaining 29 have relocated to Dunphy Park from outside of Sausalito
16 and/or Marin County. *Id.* ¶ 4. Approximately 34 of the 44 tents at the Dunphy Park encampment
17 are now encroaching onto private property owned by Bridgeway Marina Corp. Rohrbacher Decl.
18 ¶ 7; McGowan Decl. ¶ 8, Ex. 5 (encampment diagram). Bridgeway’s President Cameron Razavi
19 has made numerous requests to have the tents removed. Rohrbacher Decl. ¶ 7. Sausalito
20 previously received a letter from Mr. Razavi confirming that tents belonging to the Dunphy Park
21 encampment are currently encroaching onto its private property and authorizing the City to
22 remove the tents on its behalf. *Id.* ¶ 7, Ex. 8 (Razavi letter).

23 **III. LEGAL STANDARD**

24 This Court has inherent authority, and “wide discretion,” to modify a preliminary
25 injunction based on changed circumstances or new facts. *A&M Records, Inc. v. Napster, Inc.*, 284
26 F.3d 1091, 1098 (9th Cir. 2002) (citing *System Federation No. 91 v. Wright*, 364 U.S. 642, 647–48
27 (1961), and *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir. 1963)); *see also*
28 Order, at 15:28 to 16:1.

1 **IV. ARGUMENT**

2 The Ninth Circuit in *Martin* clarified in its holding that cities may lawfully regulate the
3 location of outdoor sleeping sites for persons with no options for sleeping indoors. *Martin v. City*
4 *of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (“we in no way dictate to the City that it must provide
5 sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the street . . .
6 at any time and at any place”).

7 While the Court enjoined the City from relocating the encampment to Marinship Park
8 based on the balancing of the evidence presented at that time, it noted that “Plaintiffs’ showing is
9 less robust” and their “showing of endangerment is not as strong as compared to [the day camping
10 prohibition].” Order, p. 15. The Court therefore stated that evidence demonstrating that there are
11 no toxic risks at the proposed encampment site at Marinship Park and that the move can be safely
12 accomplished “could alter the balance of hardships and ameliorate the risk of irreparable injury to
13 Plaintiffs.” Order, pp. 15–16.

14 As detailed below, new information and changed circumstances now show that both
15 potential risks are adequately addressed. Furthermore, the City has developed additional evidence
16 demonstrating that Marinship Park is a superior location for the encampment compared to Dunphy
17 Park. Accordingly, the preliminary injunction factors—including irreparable injury, balance of
18 harms, likelihood of success on the merits, and public interest—now weigh in the City’s favor.
19 *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The Court should therefore
20 modify or dissolve the preliminary injunction to allow the City to relocate the encampment to
21 Marinship Park.

22 **A. Marinship Park Is Environmentally Safe**

23 New evidence developed since the preliminary injunction hearing demonstrates that
24 environmental conditions at Marinship Park are safe for the proposed encampment. The City
25 retained a qualified industrial hygienist, Monte Deignan & Associates (“Deignan”), to evaluate
26 whether boat disposal operations at the U.S. Army Corps of Engineers (“USACE”) facility result
27 in environmental contamination at Marinship Park. Deignan Declaration ¶ 3, Ex. 1 (“Deignan
28 Report”).

1 On March 11, 2021, Deignan inspected the USACE facility in advance of the planned
2 disposal of three boats. Deignan Report, p. 1, figs. 2–3. The boats contained the following
3 potentially hazardous materials: lead, copper, zinc, fiberglass, and arsenic. *Ibid.* Deignan
4 confirmed that oils, fuels, paints, and lead-acid batteries were removed intact using hand tools
5 prior to demolition work (*id.*, p. 6), thereby confirming that these potential sources of
6 contamination are not a risk to Marinship Park. Deignan collected a soil sample from the
7 Marinship Park lawn area to determine whether airborne contaminants had been deposited and
8 accumulated over time. *Id.*, p. 1, figs. 1 & 4. During active boat disposal operations, Deignan
9 collected air samples from two locations within Marinship Park, including along the property line
10 immediately adjacent to the USACE facility to provide a maximally conservative analysis. *Id.*, p.
11 2, fig. 4. No visible dust or emissions from the USACE facility were noted during boat demolition
12 work. *Id.*, p. 3.

13 Laboratory testing of the soil sample for regulated metals (CAM-17) showed that all 17
14 metals were either not detectable or within the ambient range for naturally occurring metals in soil
15 based on EPA guidance. Deignan Report, p. 5, table 2. None of the samples came remotely close
16 to exceeding applicable regulatory limits. *Ibid.* This demonstrates that there has been no
17 accumulation of toxic materials from the boat disposal operations over time.

18 Laboratory testing of the air samples for fiberglass/airborne fibers, lead, and regulated
19 metals (CAM-17) likewise showed that all toxic substances were either not detectable or present at
20 ordinary background levels. Deignan Report, pp. 4–5, table 1. There was no detectable lead in the
21 air samples. *Id.*, p. 6. There were no detectable fibers in the air samples. *Ibid.* And all regulated
22 metals were either not detectable or well below applicable limits. *Ibid.* This testing demonstrates
23 that active boat disposal operations do not expose Marinship Park to toxic airborne materials.

24 Finally, weather conditions on the day of testing provided a conservative, worst case
25 scenario. The winds that day were from the east, and therefore would have carried any hazardous
26 materials to Marinship Park, which was immediately downwind of the boat disposal operations.
27 Deignan Report, pp. 1, 2, & 3. “If contaminants were released from the boat work into the air, this
28 particular day’s samples should have detected them.” *Ibid.* However, this wind pattern is also

1 uncommon. Typical prevailing winds are from the west or northwest and would carry any
2 hazardous materials away from Marinship Park and into Richardson's Bay. Deignan Report, p. 3.
3 Despite the worst case scenario for toxics risk, the sampling still showed no contamination. These
4 findings thus confirm that the boat disposal operations present no environmental risks to the
5 proposed encampment at Marinship Park.

6 **B. The Encampment Move Can Be Accomplished Safely**

7 New facts and changed circumstances also demonstrate that the encampment move can be
8 accomplished safely, notwithstanding the Covid-19 pandemic.

9 First, Sausalito is working with Marin County Health and Human Services to bring the
10 one-shot Johnson & Johnson vaccine directly to Dunphy Park and offer it to anyone who wishes to
11 be vaccinated. Rohrbacher Decl. ¶ 8, Ex. 9 (emails with County). The County's mobile
12 vaccination effort started the week of April 5, and the goal is to bring vaccines to Dunphy Park by
13 the end of the month. *Id.* Sausalito intends to submit a supplemental declaration on this point
14 before the motion hearing.

15 Second, the City has consulted with Urban Alchemy about the best methods for ensuring a
16 safe move of the individuals at Dunphy Park to Marinship Park (approximately 0.6 miles away),
17 and it will engage Urban Alchemy to assist with the move. Rohrbacher Decl. ¶ 10. Consistent
18 with guidance from Urban Alchemy and public health authorities, the City will rent multiple
19 trucks/vehicles to transfer individuals and their belongings from Dunphy Park to Marinship Park.
20 *Ibid.* Individuals will be allowed to load and unload their own belongings into the trucks/vehicles
21 unless they otherwise request assistance. *Ibid.* To minimize the risk of Covid-19 transmission,
22 only one individual/family will be assigned to each truck/vehicle per trip. *Ibid.* All individuals
23 will be offered protective face masks and appropriate personal protective equipment (PPE) during
24 the move. *Ibid.* Temperature checks and health screenings will also be performed for all
25 individuals at the encampment and those assisting with the move. *Ibid.*

26 Finally, Covid-19 conditions have improved markedly in Marin County since the
27 preliminary injunction hearing on February 23, thereby reducing potential safety risks of the
28 move. The adjusted daily case rate per 100,000 residents has dropped from 5.5 to 3.4; the case

1 positivity rate has declined from 1.61% to 1.20%; and the health equity test positivity rate has
2 declined from 2.82% to 1.80%. See RJN, Ex. 12 (data through March 27). In response to these
3 improvements, effective March 24, the State downgraded Marin County from “red” status (tier
4 2/substantial risk) to “orange” status (tier 3/moderate risk). See RJN, Ex. 13. This move allows
5 numerous uses and facilities to expand *indoor* capacity, including retail & grocery to 100%,
6 restaurants to 50% or 200 people; museums & movie theaters to 50% or 200 people, and gyms to
7 25%. *Id.* During the same period, Marin County has made significant progress on vaccine
8 distribution, particularly among the vulnerable 65+ age group. See RJN, Ex. 14. From February
9 23 to April 6, cumulative vaccine doses administered increased from approximately 80,327 to
10 213,761. *Ibid.* Approximately 63.6% of residents over 16 years old have now been vaccinated
11 with at least one dose. *Ibid.* By the date of the motion hearing, all Marin County adults are
12 expected to be eligible for vaccination.

13 **C. New Evidence Shows That Marinship Park Is Superior To Dunphy Park**

14 Sausalito has also developed additional evidence, not available at the preliminary
15 injunction stage, which shows that Marinship Park is a better location for the encampment
16 compared to Dunphy Park. This new evidence further tips the balance of harms and likelihood of
17 success on the merits in Sausalito’s favor

18 *Tent spacing/crowding*—As detailed above, the Dunphy Park encampment has continued
19 to grow and expand, and now includes approximately 44 tents and 44 residents. Rohbacher Decl.
20 ¶¶ 4, 6, Ex. 7 (photos). The Dunphy Park encampment area is approximately 30,000 square feet,
21 and the tents are now closely packed together, exacerbating Covid-19 risks. *Ibid.*; McGowan Decl.
22 ¶ 9, Ex. 5. By contrast, Marinship Park offers approximately 60,000 square feet for the
23 encampment—nearly twice as much space—and can better and more safely accommodate the
24 growing encampment. McGowan Decl. ¶ 10, Ex. 6.

25 *Private property encroachment*—As detailed above, the Dunphy Park encampment now
26 encroaches significantly onto adjoining private property, whose owner has asked for the
27 encampment to be removed. Rohbacher Decl. ¶ 7; McGowan Decl. ¶ 8, Ex. 5.

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1 *Marinship Park improvements*—As detailed above, Sausalito has adopted a new
2 Operations and Maintenance Plan for Marinship Park, which will ensure that the facilities there
3 are improved, regularly serviced, and made safe for the residents. Specific items that have already
4 been completed or will be completed prior to relocation include deep-cleaning, repairing, and
5 repainting the restrooms; supplying portable toilets, handwashing stations, a dumpster, and
6 personal protective equipment; providing signage and a telephone number for requests; regularly
7 servicing and stocking the facilities; and installing social distancing markers for tents.

8 *Mobile showers*—The Court previously found that Sausalito had not convincingly
9 demonstrated that it was infeasible to deploy the mobile showering trailer to Dunphy Park, based
10 on the Court’s observation that there appears to be adequate parking space and a hose bib for the
11 water connection. Order, pp. 11–12. New evidence, however, shows that Dunphy Park truly is
12 not a feasible location for the mobile showering program. Rohrbacher Decl. ¶ 13, Ex. 11. Before
13 implementing the mobile showering program, the Downtown Streets Team came to Sausalito to
14 scout six potential locations for the mobile showering trailer. *Ibid.* In reviewing Dunphy Park, the
15 team determined that it was not safe to back the trailer into the parking lot and that placement of
16 the trailer there would block access for entrance and exit of parked vehicles. *Ibid.* Moreover, in
17 order to meet the demand for the number of showers currently needed, the mobile showering
18 trailer requires simultaneous access to a fresh water hook-up, a drain water connection (sanitary
19 hook-up), and a metered electrical hook-up—which is not possible at Dunphy Park. *Ibid.*
20 Although the mobile showering trailer could act as a standalone unit without these utility
21 connections, only a limited number of showers would be available and they would not be enough
22 to meet current demand. *Ibid.*

23 **V. CONCLUSION**

24 For the foregoing reasons, Sausalito respectfully requests that the Court modify or partially
25 dissolve part (2) of its preliminary injunction to allow Sausalito to move the encampment from
26 Dunphy Park to Marinship Park.

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