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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAUSALITO/MARIN COUNTY
CHAPTER OF THE CALIFORNIA
HOMELESS UNION, et al.,

Plaintiffs,

v.

CITY OF SAUSALITO, et al.,

Defendants.

Case No. [21-cv-01143-EMC](#)

**ORDER GRANTING DEFENDANTS’
MOTION TO MODIFY PRELIMINARY
INJUNCTION**

Docket No. 27

United States District Court
Northern District of California

Previously, the Court granted Plaintiffs’ motion for a preliminary injunction. The preliminary injunction barred Defendants, and those acting in concert with them, from (1) enforcing the day camping prohibition in Resolution No. 6009 and (2) closing and/or clearing the Dunphy Park encampment. *See* Docket No. 20 (order). In its order, however, the Court expressly noted that it was not precluding Defendants from filing a motion to modify or dissolve the second part of the preliminary injunctive relief if they could, *e.g.*, show “there are no toxic risks at the proposed encampment site at Marinship Park and that the move [from Dunphy Park to Marinship Park] can be safely accomplished.” Docket No. 20 (Order at 15). The Court added that, in all likelihood, neither party had time to adequately build evidence on whether there was a danger related to the boat crushing operation near Marinship Park; furthermore, Plaintiffs did not offer most of their evidence until their reply brief, which deprived Defendants of the opportunity of offering rebuttal evidence. *See* Docket No. 20 (Order at 16 n.11).

Defendants now move to modify or partially dissolve the preliminary injunction so that the City may move the encampment from Dunphy Park to Marinship Park. The Court held a hearing

1 on the motion on April 29, 2021, and, subsequently, an evidentiary hearing on May 14, 2021.
 2 Having considered the parties' briefs, the evidence provided in support (both documentary and
 3 testimonial), and the oral argument of counsel, the Court hereby **GRANTS** Defendants' motion.

4 I. DISCUSSION

5 "A party seeking modification or dissolution of an injunction bears the burden of
 6 establishing that a significant change in facts or law warrants revision or dissolution of the
 7 injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Here, Defendants argue that
 8 there is a significant change in facts – to wit, they have conducted environmental testing of
 9 Marinship Park which reflects that people may safely camp in the area. This fact informs the
 10 preliminary injunction issues of irreparable injury and balance of hardships. *See Winter v. NRDC*,
 11 *Inc.*, 555 U.S. 7, 20 (2008) (considering as one factor in assessing a motion for preliminary
 12 injunctive relief whether the party moving for such relief would likely suffer irreparable harm in
 13 the absence of relief). It would also inform Plaintiffs showing on the merits that there is no danger
 14 (state created or otherwise) to having people camp in Marinship Park. *See Kennedy v. City of*
 15 *Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006) (recognizing a substantive due process claim
 16 where there is a "state-created danger" – *i.e.*, where a state actor "affirmatively place[s] an
 17 individual in danger' by acting with 'deliberate indifference to [a] known or obvious danger in
 18 subjecting the plaintiff to it").

19 The Court finds that Defendants have sufficiently established, in fact, there is no
 20 significant danger to people living in Marinship Park. The Court focuses on the issue of danger
 21 because Defendants have provided evidence that Marinship Park is a location that can feasibly
 22 house campers. The space available at Marinship Park is larger than that available at Dunphy
 23 Park. There appears to be no issue regarding private property encroachment at Marinship Park.
 24 The Marinship Park area, including facilities, has been improved and/or readied since the initial
 25 TRO/preliminary injunction hearing. The City has arranged for safe transportation to Marinship
 26 Park, employing resources so that each camper can be moved individually.¹ Mobile showering

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 28 ¹ Post-hearing, Defendants provided (per the Court's request) information on how many people at the Dunphy Park encampment have received the COVID-19 vaccination. It appears that the

1 will be provided at Marinship Park. Furthermore, there is no indication that the City has any plan
2 to evict campers from Marinship Park – permanently or temporarily (*e.g.*, because the park is
3 being used for an event) – once campers are moved there. It appears, for example, there will be no
4 annual wine and art festival at the site this year.

5 With respect to Plaintiffs’ claim of environmental danger, the Court finds that Defendants’
6 expert, Mr. Deignan, is qualified and credible. Mr. Deignan conducted environmental testing,
7 including both air sampling and soil sampling. The Court focuses on air sampling because
8 Plaintiffs’ main concern has been the quality of the air in Marinship Park due to the nearby boat
9 crushing operation. Plaintiffs have expressed concern about fiberglass dust being released into the
10 air because boats can be made from (at least in part) fiberglass.

11 Mr. Deignan conducted his testing on a day (March 11, 2021) when three boats were
12 destroyed or otherwise disposed of, one of which was fiberglass.² Mr. Deignan was informed by
13 the RBRA and/or US ACE that this was an appropriate representation of work at the site, and
14 there is no evidence to the contrary. The fact that, on a different day, three fiberglass boats were
15 scheduled for destruction does not, in and of itself, mean that the demolition that took place on
16 March 11 was not representative. Mr. Deignan set up air samplers at two locations in Marinship
17 Park: one sampling site was next to the fence line between the boat crushing operation and the
18 lawn area of Marinship Park (with the air samplers facing west); the other sampling site was near
19 the rest rooms at the tennis courts (with the air samplers facing east). The prevailing winds on
20 March 11 were Northeasterly which would have transported air from the boat crushing operation
21 toward the air samplers in Marinship Park. (The typical prevailing winds are Westerly or
22 Northwesterly.)

23 The results of the testing showed that the area was safe – *e.g.*, “PCM fiber air samples . . .
24 at the fence line and rest rooms were reported as <0.001 fibers per cc, which is well below

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26 number is relatively small. *See* Docket No. 46 (Rohrbacher Decl. ¶ 9) (testifying that 3 people
27 have been fully vaccinated and 8 partially vaccinated). The Court assumes that vaccinations will
28 continue to be offered at Marinship Park.

² The fiberglass boat took about two hours to destroy. A fourth boat was also made of fiberglass
and was scheduled for demolition on March 11 but, ultimately, was not destroyed that day.

1 Cal/OSHA permissible exposure limits (PEL) for fiberglass of 1.0 fiber/cc.” Deignan Rpt. ¶ II.
2 Notably, the test results from the air samplers in the two sampling sites were consistent.

3 Plaintiffs’ expert, Ms. Ray, was critical of Mr. Deignan’s testing. Although there are
4 questions as to whether Ms. Ray is qualified to express all of her opinions, the Court nevertheless
5 took them into account – *i.e.*, it did not reject any of her opinions on the basis that she was not
6 qualified to opine on the subject matter. Defendants have largely addressed Ms. Ray’s criticisms.

7 For example:

- 8 • Ms. Ray asserted that PCM testing was inadequate and TEM testing should have
9 been done instead. In response, Mr. Deignan conducted TEM testing (on the
10 remaining portions of the air samples he collected on March 11) and the results
11 were not materially different.
- 12 • Ms. Ray maintained that the humidity on March 11 likely resulted in dust
13 suppression. But the source on which she relied did not deal with fiberglass dust
14 specifically. Moreover, the timeanddate.com website on which she relied showed
15 that the average humidity for March 2021 is 64%, which is similar to the humidity
16 on March 11. *See*
17 <https://www.timeanddate.com/weather/@5393605/historic?month=3&year=2021>;
18 *see also*
19 <https://www.timeanddate.com/weather/@5393605/historic?month=2&year=2021>
20 (indicating average humidity of 68% for February 2021);
21 <https://www.timeanddate.com/weather/@5393605/historic?month=4&year=2021>
22 (indicating average humidity of 66% for April). In other words, even if there were
23 dust suppression on March 11 because of humidity, there would typically be dust
24 suppression at Marinship Park because of similar humidity conditions. In any
25 event, the study Ms. Ray cites showed that particulate concentration would be
26 affected by, *e.g.*, several fold with a 20% change in humidity – nothing close to a
27 thousand fold which is the difference between that found by Mr. Deignan and
28 OSHA’s PEL.

- 1 • Ms. Ray questioned the positioning of the air samplers – *e.g.*, the air samplers
2 closer to boat crushing operation were pointed to the west, not the east, even
3 though the wind that day was Northeasterly. But the air samplers near the rest
4 rooms were pointed to the east, and the results of the two sets of samplers were
5 consistent (*i.e.*, indicating that the difference in orientation was not material).
6 Moreover, the air samplers had high volume pumps set to a range of 8 to 9 liters
7 per minute of airflow, which indicates that positioning is not as significant as it
8 might otherwise seem. Ms. Ray contended that the air pumps would still be in
9 competition with the wind but she also admitted that she could not say which of the
10 two would “win” out and further attributed “low counts” to humidity more than
11 anything else.
- 12 • Ms. Ray argued that the air samplers were also inadequately positioned because
13 they were placed at a height of 3.5’ and not (in addition) 5’ (the former being more
14 representative of a person sitting or a child standing, the latter being more
15 representative of an adult standing). But it is not clear that this difference in height
16 was material given the specific testing being done – *e.g.*, outside instead of inside,
17 with wind conditions, and with some distance between the source and the sampling
18 site(s).
- 19 • Ms. Ray asserted that there should have been more than two sampling sites, but,
20 although it may have been preferable to have multiple air monitors set up around
21 the perimeter of the source, that does not mean that such was necessary. That the
22 latter approach was taken for the Libby Asbestos Site does not mean that the same
23 approach was needed at Marinship Park, at least not without more concrete
24 evidence to establish such.

25 Finally, and most importantly, even if the Court were to credit all of Ms. Ray’s criticisms,
26 that still would not be enough to show that the conditions at Marinship Park are dangerous. Mr.
27 Deignan’s testing showed that the fibers present were one-thousandths (0.001) of the OSHA PEL
28 for fiberglass. For Plaintiffs to show that there is danger at Marinship Park because of the boat

1 crushing operation, they would have to show that the testing done by Mr. Deignan was off by a
 2 *thousandfold*. The magnitude of the difference cannot be overcome by the claimed deficiencies in
 3 testing procedure. Implicitly recognizing such, Plaintiffs argued for the first time that the Court
 4 should not use the OSHA PEL standard as the appropriate measure for safety. But Plaintiffs
 5 offered no other standard to apply (other than hypothesizing that one could be developed given the
 6 specific situation at Marinship Park); moreover, the OSHA PEL standard is a reasonable proxy
 7 given that it is a gauge for safety in the workplace environment.

8 Accordingly, the Court concludes that Plaintiffs have failed to demonstrate that Marinship
 9 Park is not a safe location for the encampment. It therefore modifies the preliminary injunction
 10 such that Defendants are able to relocate individuals from Dunphy Park to Marinship Park.³ The
 11 Court's ruling here is dependent on the City fulfilling all other conditions and safeguards
 12 described above. In addition, the Court's ruling here has no impact on the other part of the
 13 preliminary injunction related to day camping. That is, the Court continues to enjoin the day
 14 camping prohibition.

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 21 ³ In their papers in opposition to Defendants' motion, Plaintiffs argued for the first time forcing
 22 individuals to relocate to Marinship Park after already losing their boat homes and having those
 23 boat homes crushed would be traumatic, especially as this would place them near a boat-crushing
 24 operation. There are several problems with Plaintiffs' argument.

25 First, Plaintiffs never identified this as an issue during the initial preliminary injunction
 26 proceedings which makes the belated argument questionable. Second, not every person in the
 27 camp appears to claim this trauma – *i.e.*, not everyone in the camp appears to have had a boat
 28 destroyed. Third, even for those who have made the claim of trauma, it is conclusory in nature
 and the declaration of the licensed clinical social worker is similarly lacking in specifics. Fourth,
 it is not clear that this is the kind of danger that is contemplated by the case law on state-created
 danger. *See Kennedy*, 439 F.3d at 1061 & n.1 (discussing physical dangers such as private
 violence and harsh environmental conditions). Finally, while the Court does not foreclose the
 possibility that psychological trauma could be a state-created danger, the evidence of record –
 because it is conclusory in nature – is not sufficient to establish the level of danger suggested by
 the case law.

1 **II. CONCLUSION**

2 For the foregoing reasons, the motion to modify the preliminary injunction is granted.
3 Defendants, and those acting in concert with them, are enjoined from enforcing the day camping
4 prohibition in Resolution No. 6009 but they are not enjoined from moving the encampment from
5 Dunphy Park to Marinship Park.

6 This order disposes of Docket No. 27.

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8 **IT IS SO ORDERED.**

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10 Dated: May 26, 2021

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13 EDWARD M. CHEN
14 United States District Judge
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United States District Court
Northern District of California