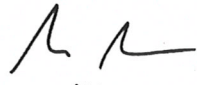


January 31, 2022

MEMO TO: AH-14(1) File

F R O M: Gabe Johnson, Chair 
Affordable Housing Committee

SUBJECT: **TRANSMITTAL OF DOCUMENT RELATING TO RIGHT TO SHELTER** (AH-14(1))

The attached document pertains to Item 14(1) on the Committee's agenda.

ah:ltr:014(1)afile01:ans

Attachment

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COUNTY COUNCIL

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AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai‘i

September 21, 2021

VIA ELECTRONIC MAIL

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**Re: Maui County sweeps of people experiencing houselessness at
Pu‘uhonua o Kanaha**

Dear Mayor Victorino, Acting Police Chief Rickard, Director Tsuhako, Mr. Fretz,
and Corporation Counsel Lutey,

Letter re: Maui County sweeps of people experiencing houselessness at Pu‘uhonua o Kanaha
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The ACLU of Hawai‘i Foundation (“ACLU of Hawai‘i”) has learned that the County of Maui (“County”) has started, and is continuing, sweeps to forcibly evict people and their belongings from Pu‘uhonua o Kanaha—a houseless encampment on Amala Place near Kanahā Beach Park. We understand that the County has already blocked access to the public park and public bathrooms and water located nearby and has been forcing people to leave the area on threat of criminal prosecution. We have also learned that, so far, the Maui Police Department arrested at least one person observing the County-led blockade, even though she committed no apparent crime.¹ We write to express our concerns about the ongoing sweep, especially considering the public health dangers it presents in spreading COVID-19, as well as the County’s broader, unconstitutional practices regarding houselessness, which needlessly involve police and thus also needlessly fuel the criminalization of houselessness and poverty. ***We demand that the County immediately cease the sweep, and cease sweeps of houseless encampments at all locations County-wide.***

About 53 people currently experiencing houselessness on Maui reside in the Pu‘uhonua o Kanaha, which is located on Amala Place near Kanahā Beach Park. They are among the hundreds of people on Maui who live unsheltered each night.² For reasons largely out of their control, they must rely on public property, such as parks like Kanahā Beach Park, to sleep, rest, sit, and conduct other life-sustaining activities. While the County has promised it is “making emergency shelter resources and services available for each individual . . . as well as services to suit their situation,”³ it appears to be reneging on that promise. Currently, capacity at shelters in Maui is woefully scarce: *as of this writing, the County has shelter vacancy for only 9 people County-wide.*⁴ Worse, the County has already closed the

¹ See <https://www.facebook.com/jennahia/videos/3041934019396433/> (video depicting Maui Police Department officers arresting observer).

² See Ka Mana O Na Helu, *We Count Because Everyone Matters: Bridging the Gap Homeless Point-in-Time Count January 26, 2020* (May 2020), at 38
https://www.btghawaii.org/media/uploads/2020_btg_pit_count_report_final_-_5.6.20.pdf.

³ Maui County press release, *Amala Place clean-up to begin this month* (Sep. 1, 2021), <https://www.mauicounty.gov/CivicAlerts.aspx?AID=11143>.

⁴ State of Hawaii Homeless Initiative, *Daily Emergency Shelter Vacancy* (updated Sep. 21, 2021), <https://homelessness.hawaii.gov/daily-emergency-shelter-vacancy>. Even with the few shelter vacancies that exist, restrictions on who may enter—for example, some shelters are designated only for people with mental illnesses or veterans—make these shelters practically unavailable. The County’s current shelter system simply cannot viably house 53—let alone 400+—people, particularly considering the public health precautions that the COVID-19 pandemic requires.

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park road and public-use facilities, and seized and destroyed personal property (using bulldozers and garbage trucks), even though the County has not provided practical, alternative shelter or housing options, or other services, as the Mayor had promised in a public press statement.⁵

The County’s ongoing sweep at Pu‘uhonua o Kanaha violates both the U.S. and Hawai‘i constitutions in at least the following ways:

First, the ongoing sweep violates the Eighth Amendment of the United States Constitution and article I, section 12 of the Hawai‘i Constitution to be free from cruel and unusual punishment by subjecting houseless people to criminal punishment and penalties when there is a lack of adequate, lawful, and safe places for them simply to exist. As the Ninth Circuit Court of Appeals recently held, “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’”⁶ The forced removal and criminalization of houseless individuals who are simply existing in public when no viable alternative shelter is available to them is unconstitutional.

Second, removal of unsheltered people and their personal property without providing adequate notice or an opportunity to be heard violates procedural due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution and article I, section 5 of the Hawai‘i Constitution.⁷ Here, residents were not given adequate notice—in fact, they were given false information—when they were forced to either surrender their belongings and place of shelter or face arrest, even though

⁵ See Maui County press release, *Amala Place clean-up to begin this month* (Sep. 1, 2021), <https://www.mauicounty.gov/CivicAlerts.aspx?AID=11143> (“Once the unsheltered residents have settled into new accommodations, we will start the clean-up . . .”).

⁶ *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019).

⁷ See, e.g., *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012) (“Because homeless persons’ unabandoned possessions are ‘property’ within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment’s due process clause if it wishes to take and destroy them.”); *Kincaid v. City of Fresno*, No. 106CV-1445 OWW SMS, 2006 WL 3542732, at *1, *37-39 (E.D. Cal. Dec. 8, 2006) (preventing City from “immediately seizing and destroying on the spot, [plaintiffs’] personal possessions, during sweeps conducted by the City . . . to remove homeless persons, encampments, and their property from private property and other locations within the City” because the City’s failure to provide “effective and adequate pre-or post-deprivation process. . . violate[d] the Fourteenth Amendment . . .”).

the County had previously promised not to sweep the encampment until after people were safely relocated. That the County is doing so despite our knowledge that residents filed petitions for contested cases that have yet to be resolved is especially troubling.

Third, in unreasonably seizing and destroying houseless individuals’ personal property with the use of dump trucks and bulldozers, the County violates the Fourth Amendment to the U.S. Constitution and article I, section 7 of the Hawai‘i Constitution.⁸ Notably, on September 2, 2021, the Ninth Circuit issued a published opinion in *Garcia v. City of Los Angeles*, which reaffirmed “well-established principles” regarding how the Fourth Amendment applies to government seizures of property stored in public areas and held that Los Angeles could not constitutionally “summarily destroy[] homeless individuals’ publicly stored personal property.”⁹ That the County is moving forward despite this pronouncement is unacceptable.

Finally, by deliberately choosing to evict and scatter the residents currently residing at Pu‘uhonua o Kanaha—and thereby affirmatively placing them in further danger of contracting COVID-19¹⁰—the County also violates substantive due process rights guaranteed by the federal Fourteenth Amendment and article I, section 5 of the Hawai‘i Constitution.¹¹

Apart from the constitutional concerns, conducting this sweep now, as COVID-19 case numbers in Hawai‘i are among the highest they have been, is particularly unconscionable. It directly contravenes the public health guidance of the Centers for Disease Control and Prevention (“CDC”) which advises against clearing

⁸ See, e.g., *Kincaid v. City of Fresno*, No. 106CV-1445 OWW SMS, 2006 WL 3542732, at *1, *35-37 (E.D. Cal. Dec. 8, 2006) (granting preliminary injunction on Fourth Amendment grounds based on City’s “policy and practice of seizure and destruction” of plaintiffs’ personal property “[e]ven when homeless people inform[ed] City workers that they ha[d]been granted permission to keep their belonging where they are . . .”).

⁹ *Garcia v. City of Los Angeles*, No. 20-55522, 2021 WL 3923396, at *4 (9th Cir. Sept. 2, 2021).

¹⁰ The government has a duty to act “when the state affirmatively places the plaintiff in danger by acting with ‘deliberate indifference’ to a ‘known or obvious danger.’” *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir 1996).

¹¹ See, e.g., *Kennedy v. City of Ridgefield*, 439 F. 3d 1055, 1061-65 (9th Cir. 2006) (recognizing claim under substantive due process where state or local officials place a person in a situation of known danger with deliberate indifference to their personal and physical safety).

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encampments unless individual housing units are available.¹² Sweeps increase the likelihood that these individuals—who are already at risk of contracting severe illness from COVID-19—will be exposed to and contract the disease. Clearing encampments also puts other lives at risk by increasing transmission of the virus among a vulnerable population staying in shelters, particularly when the County’s shelters are at or near full capacity even under non-pandemic circumstances.

Finally, while we understand that the Kanahā Pond Wildlife Sanctuary and Wailuku-Kahului areas are important public lands, sweeping public areas of and forcibly evicting people who have no other place to rest is inhumane. The houseless people living at the encampment have no other choice: there simply is not enough space and safety in Maui’s homeless shelters to meet the needs of the residents of Pu‘uhonua o Kanahā, especially in light of the pandemic.

The ACLU of Hawai‘i demands that the County immediately stop forcibly removing people from Pu‘uhonua o Kanaha, and not conduct any other sweeps, evictions, or other enforcement actions against people who are houseless. Such a moratorium must exist *at least* until the COVID-19 pandemic passes, but should extend beyond that point as well. The County must consider other alternatives—alternatives that are safer, sounder, lawful, and humane—over the police-led, punishment-heavy approach that the County is employing, which further criminalizes houselessness. Such alternatives are many, and include housing people in vacant hotels, and designating safe places for houseless people to reside. We hope that the County will agree to work with us to reach a resolution that will both respect the constitutional rights of people experiencing houselessness and also accommodate the County’s legitimate public health and public lands interests.

Thank you for your attention to this matter. If you have questions or comments, please contact Wookie Kim at 808-522-5905 or wkim@acluhawaii.org.

Sincerely yours,



Wookie Kim
Legal Director

¹² Contrary to the County’s public statements, the CDC guidelines remain in effect. The guidelines were updated in July 2021, but the relevant language about not disturbing encampments during the pandemic has not changed. See CDC, *Interim Guidance on People Experiencing Unsheltered Homelessness* (July 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html#facility-encampments>.