

# The State of New Hampshire

HILLSBOROUGH COUNTY

SUPERIOR COURT

DENNIS HIGGINS and FREEMAN TOTH

v.

CITY OF MANCHESTER

Docket No.: 216-2023-CV-31

## ORDER

The plaintiffs, Dennis Higgins and Freeman Toth, filed suit against the defendant, the City of Manchester, for declaratory judgment and preliminary and permanent injunctive relief to prevent the City's planned eviction of the encampment of unhoused people located at Pine and Manchester streets. On January 13, 2023, the plaintiffs filed a request for a temporary restraining order. The Court held a hearing on the same day. At the conclusion of the hearing, the City agreed to temporarily hold off with the removal of the encampment until end of business on Tuesday, January 17, 2023, so that the Court could have additional time to consider the issues presented. The Court has reviewed the legal issues and considered the arguments made by both sides, including the supplemental submissions filed by both sides today. For the following reasons, the Court DENIES the plaintiffs' request for a temporary restraining order.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dep't of Env't Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." Id. "An

injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law.” Id. “Also, a party seeking an injunction must show that it would likely succeed on the merits.” Id. “It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity.” Id.

Approximately 50 people reside at the encampment. The encampment is on public sidewalks. On January 8, 2023 the City issued a notice ordering people residing at the encampment to vacate the premises before 12:00 a.m. on Tuesday, January 17, 2023. The City had indicated it plans to remove people and property from the encampment on January 17, 2023. (As noted above, the City agreed to temporarily postpone the removal for a brief period to allow the Court an opportunity to consider the issues presented.)

Manchester City Ordinance § 130.13 (A) deems unlawful the use of public space for camping without prior written permission. The ordinance goes on to provide, “[t]he Manchester Police shall enforce this camping section only when the individual is on public property and there is an available overnight shelter.” Manchester, N.H. § 130.13 (B) (2021).

The plaintiffs contend that the City cannot enforce its ordinance because there is insufficient overnight shelter available for the individuals residing at the encampment. The plaintiffs rely heavily on Martin v. City of Boise which held that a local ordinance violates the Eighth Amendment if it “imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.” 920 F.3d 584, 604 (9th Cir. 2019). The plaintiffs argue that the

City's removal of people from the encampment without appropriate and available overnight shelter violates the Eighth Amendment under the reasoning of Martin. While the Court is very sympathetic to the plight of the people living at the camp, the Court finds that this situation is distinguishable from Martin. Considering the grave risks to public health and safety posed by the ongoing presence of the encampment on public sidewalks in downtown Manchester and the availability of safe alternatives for the people living in the encampment, a temporary restraining order is not justified.

The City credibly contends that the continuance of the encampment presents a serious public health hazard. The City cites at least one death and overdoses that have occurred at the encampment and an incident where a man set a tent on fire. According to the City, in the past few months, there have been approximately 380 calls for service to the Manchester Police Department in connection with the encampment. These calls have included alleged assaults and drug use. As the weather has become colder, individuals within the encampment have reportedly been lighting fires in the vicinity of the tents. There are no accessible public bathrooms in close proximity and there are issues with needles associated with illegal drug use and trash associated with the encampment. The photographs included in the City's submission document fire sprinkler connections being blocked by the encampment. Not surprisingly, this activity has had a significant impact on neighbors, including residents and local businesses and a child care center which had been located nearby has purportedly closed.

If there were no safe alternatives available, the Court would agree that forced removal of the encampment would likely violate the State and federal constitutional rights of the people residing in the encampment. The City offers individuals overnight

shelter at the Cashin Senior Activity Center. On the evening of January 12, 2023, the City contends that 31 beds were available at the Cashin Center and 3 beds for men at Families in Transition. The Cashin Center operates as a shelter from 7 p.m. to 6 a.m. Unhoused individuals are not permitted at the Cashin Center outside of those hours. The City also offers a warming center at the 1269 Café at 456 Union Street during the day, as well as rides to that location. In total, the City proffers that individuals can avail themselves of up to 21 hours of shelter between the two locations each day. The City has further represented that it is actively working to improve sheltering options for people. The City has also offered to store the belongings of the people residing in the encampment at a safe and secure location.

The Court believes that the City should continue to work to provide better shelter options for the people residing at the encampment. The Court is very concerned that 21 out of 24 hours still leaves unhoused people with potentially 3 hours or more of time when they do not have shelter. In winter months in New Hampshire, this potentially exposes people to real health risks. The Court hopes the City continues to make a real effort to identify a way on an expedited basis to close the gap so there are options for people to remain warm 24 hours per day.

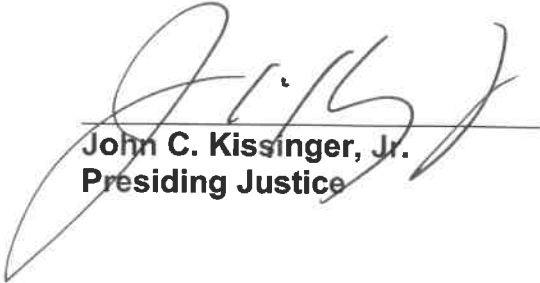
The State administrative regulations cited by plaintiffs (He-M 314.02 and He-M 1007.02) are helpful in setting out the components that a shelter should have. A warm bed, access to shower facilities, basic food, first aid and a place where people are not excluded for any part of the day during the bad weather months are all things that, in the Court's view, should be available for all people. It appears that the City is working very hard to provide those things. But the Court finds, at least at this preliminary stage of the

case, that the City is not obligated to meet all of those standards immediately in order to satisfy both the ordinance requirement of overnight shelter and the Eighth Amendment. Critical to the Court's analysis of these issues is that the alternative, allowing the encampment to remain on city sidewalks indefinitely, endangers the health and safety of the people living in the encampment, police, fire, and emergency personnel, and others in the neighborhood. It is certainly possible that the people living in the encampment will try to find other locations in the city on public property to set up camps. The more that can be done to provide better shelter and long term housing options for unhoused people will reduce the likelihood that people will find themselves living in such conditions. Nevertheless, although the alternative shelter options offered by the City could be improved, in the present circumstances they are adequate.

The Court finds that the plaintiffs have failed to show a likelihood of success on the merits to justify the extraordinary relief of a temporary injunction in this case. The plaintiffs' request for a temporary restraining order is DENIED.

**SO ORDERED.**

1/17/2023  
Date

  
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John C. Kissinger, Jr.  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 01/17/2023