

1 Cyndy Day-Wilson (State Bar No. 135045)
City Attorney
2 cday-wilson@ci.eureka.ca.gov
CITY OF EUREKA
3 OFFICE OF THE CITY ATTORNEY
531 K Street, Room 200
4 Eureka, CA 95501
Telephone: (707) 441-4147
5 Facsimile: (707) 441-4148

6 Attorney for CITY OF EUREKA,
EUREKA POLICE DEPARTMENT and
7 ANDREW MILLS, in his official capacity
as Chief of Police
8

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

11
12 STACY COBINE, NANETTE DEAN,
CHRISTINA RUBLE, LLOYD
13 PARKER, GERRIANNE SCHULZE,
SARAH HOOD, AARON KANGAS,
14 LYNETTE VERA, AUBREY SHORT,
MARIE ANNTONETTE KINDER, and
15 JOHN TRAVIS,

16 Plaintiffs,

17 v.

18 CITY OF EUREKA, EUREKA
POLICE DEPARTMENT, and
19 ANDREW MILLS in his official
capacity as Chief of Police,

20 Defendants.
21

Case No. 16-cv-02239-JSW

**DEFENDANTS' APPENDIX OF
DECLARATIONS AND EXHIBITS
IN OPPOSITION TO PLAINTIFFS'
EX PARTE MOTION FOR
TEMPORARY RESTRAINING
ORDER**

Date: April 29, 2016
Time: 2:00 p.m.
Crtrm.: 5

The Hon. Jeffrey S. White

22 Defendants CITY OF EUREKA, EUREKA POLICE DEPARTMENT, and
23 ANDREW MILLS in his official capacity as Chief of Police (collective "City of
24 Eureka") hereby submit this Appendix of Declarations and Exhibits in Opposition to
25 Plaintiff's *Ex Parte* Motion for Temporary Restraining Order.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: April 27, 2016

CITY OF EUREKA
OFFICE OF THE CITY ATTORNEY

By: /s/ Cyndy Day-Wilson
Cyndy Day-Wilson, City Attorney

Attorney for Defendants, CITY OF EUREKA,
EUREKA POLICE DEPARTMENT, and
ANDREW MILLS in his official capacity as
Chief of Police

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF DECLARATIONS AND EXHIBITS

1. Declaration of Chief Andrew Mills.....4

Exhibit A – Department Order Re: Camping.....8

Exhibit B – Notice to Vacate – Sept. 2015 12

Exhibit C – Flyer re: Service..... 14

Exhibit D – Policy re: Property Procedures 17

Exhibit E – Notice to Vacate..... 24

2. Declaration of Miles Slattery 26

Exhibit F – Email re: Allocation Request 31

Exhibit G – ESHA Map..... 36

3. Declaration of Cyndy Day-Wilson..... 44

Exhibit H – Opinion in City of Eureka v. Carr 50

Exhibit I – Homeless Policy Paper..... 61

Exhibit J – Open Space Maintenance Plan..... 89

Exhibit K - Resolution 2016-05 99

DECLARATION OF ANDREW MILLS

I, Andrew Mills, declare as follows:

1. I am the Chief of Police of the City of Eureka. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Since my arrival in Eureka, the Eureka Police Department (EPD), has been tasked under my direction with enforcing ALL laws within the City including Section 93.02 of the Eureka Municipal Code.

3. EPD officers have been instructed to use judgement in enforcement and offer services as frequently as possible, taking into consideration opportunity to sleep, housing availability and needs of the individual.

4. In May of 2015, I issued a Department Order regarding camping within the City. A true and correct copy of this Order is attached hereto as *Exhibit "A"*.

5. This Department Order was modeled after a Department Order issued by the San Diego Police Department in conjunction with the ACLU after that department was sued by the ACLU regarding its enforcement of San Diego's camping ordinance.

6. Since my arrival in Eureka, EPD has been enforcing the camping ordinance including the area behind the Bayshore Mall known as Palco Marsh. My officers have continually spoken with the transients who are illegally camping there and informed them that they cannot stay and that they need to find housing. Additionally, my officers have consistently offered resources for housing to each and every person. Approximately 80 persons have obtained housing due to EPD officers efforts and the Department of Health and Human Services.

7. In September of 2015, EPD officers gave notice to the transients in the Palco Marsh that they had to vacate the area. A true and correct copy of the notice

1 is attached hereto as *Exhibit "B"*. I personally supervised this effort. I personally
2 informed transients of the need to have them seek resources for housing.

3 8. I personally met with a group of homeless persons living in the marsh
4 and explained to them they could not remain there and needed to find housing.

5 9. I personally supervised a multi-agency sweep of the marsh to arrest
6 those with warrants, weapons and stolen property. As a result 27 persons were
7 arrested and firearms were seized. In all over the past two years more than 18
8 illegally possessed firearms have been seized.

9 10. As a result of EPD analysis of the crime, including a shot fired at two
10 large Chevron fuel tanks behind the mall, and several violent crimes, I made the
11 decision to shrink the footprint of the homeless camps into a smaller space. The
12 illegal lodgers were directed to move and shrink into a more manageable location.

13 11. The relocation took place by closing the southern half of the Marsh
14 area. The footprint was reduced by about 50%. Then the southern half of what was
15 left was reduced by an additional several hundred yards. Finally the northern half of
16 the illegal camps was reduced by several hundred yards. There has been no sense of
17 finality, residency or permanency.

18 12. Beginning in September 2015, as a result of the City Council's passage
19 of the Open Space Maintenance Plan and the impending plans to begin construction
20 of the trail in the Palco Marsh area, the EPD began relocating people out area by
21 area.

22 13. The goal of the relocation was to continually reduce the footprint of the
23 homeless encampments in this area until they were all removed by late spring/early
24 summer in coordination with the construction of the trail.

25 14. During this time period, EPD's Homeless Liaison Pamlyn Milsap and
26 several POP officers have contacted each and every transient in the Palco Marsh and
27 offered services. Each was given a flyer letting them know where services were
28

1 available and informing them that camping was illegal in that area. A true and
2 correct copy is attached hereto as *Exhibit "C"*.

3 15. Numerous people were successfully housed as a result of this effort.

4 16. EPD organized and began a services fair to bring services to the people
5 desiring them.

6 17. Moreover, it has been and continues to be the policy of the EPD to
7 write and obtain search warrants for tents located in the Palco Marsh area, absent a
8 Fourth Amendment waiver or parole status. *Exhibit "D"*.

9 18. In August 2015, EPD received approval from the City Council to apply
10 for funding from Humboldt County from Measure Z funds (County tax measure) to
11 implement an annual homeless prevention program. The cost of the program was
12 \$483,000. The program elements consisted of two full-time equivalent police officer
13 positions working with the Department of Health and Human Services (DHHS)
14 Mobile Intervention Support Team (MIST).

15 19. The purpose of the program is for the police department to work with
16 DHHS in identifying homeless individuals for housing services and to fund housing
17 services. The City Council approved the proposal and EPD personnel has been part
18 of the MIST team since the fall of 2015.

19 20. On March 15, 2015, the Council directed that a hard date be set for
20 everyone to vacate the Palco Marsh area. A true and correct copy of the Notice to
21 Vacate which was served on the individuals illegally camping in Palco Marsh is
22 attached as *Exhibit "E"*.

23 21. On March 18, 2015, I along with several EPD officers notified each
24 and every individual camping in the Palco Marsh that they had to be out no later
25 than May 2, 2016.

26 22. Since the service of the notices, EPD officers have returned to the Palco
27 Marsh every day to reinforce the deadline for vacation and to offer up services.
28

EXHIBIT “A”



THE CITY OF EUREKA
EUREKA POLICE DEPARTMENT

DEPARTMENT ORDER

2015-01 Homeless Enforcement

May 12, 2015

CITYWIDE ILLEGAL LODGING ENFORCEMENT

I. BACKGROUND

Eureka Municipal Code 93.02 EMC prohibits unlawful camping and Penal Code 647 (e) prohibits lodging in any building, structure, vehicle or place public or private without the permission of the owner or lawful possessor. The City of Eureka's enforcement strategy is complaint driven.

Violations of illegal camping and lodging frequently includes individuals who suffer from a wide range of health problems including contagious diseases, mental illness and substance abuse or a combination of all of the above. Some may also be involved in other criminal behaviors including disorderly conduct offences and more serious crimes such as theft and drug dealing. These behaviors affect the illegal lodger and citizens who live, work or recreate in these communities.

The police response is three fold:

1. To prevent crime on and by the homeless populations;
2. To assist those who cannot assist themselves; and,
3. To enforce the law.

During enforcement actions for illegal lodging the police must remember that part of the police role is to provide education on the whereabouts of social services including housing and to inform them they are breaking the law. When reasonable the homeless should be given handouts such as the directory of social services available to them. Documentation of these contacts and the fact that there was a referral can be accomplished through the CAD system.

In addition to enforcing the law, police also assist those who cannot assist themselves by putting them in contact with appropriate medical, social psychiatric and other services when possible. Additionally, the police have a responsibility to physically take a person into custody when they display an imminent threat either to themselves or others pursuant to W&I 5150.

II. ILLEGAL LODGING AND CAMPING ENFORCMENT GUIDELINES

The following guidelines are to be followed with respect to illegal lodging enforcement.

1. Other than when extenuating circumstances are present, officers should primarily enforce at locations where the City has received complaints.
2. Officers shall not, in the ordinary course of duty, issue citations between the hours of 2100 and 0600 hours for illegal camping.
3. Prior to enforcement action, the officer should first consider the following through a records check:
 - a. The presences of additional crimes;
 - b. Criminal history for illegal lodging;
 - c. Warrants;
 - d. Efforts made by the individual to seek shelter;
 - e. Documented warnings; and
 - f. Verification of citizen complaints.
4. Officers should consider custodial arrests for 647(e) when the individual has either been repeatedly cited within a short period of time (30 days) or where an individual refuses to leave the area after being cited by an officer or the person poses a threat to the community.

III. ILLEGAL LODGING PROCEDURES

When taking enforcement action an officer must document the two elements of illegal lodging, lodging and without permission. These items may be helpful and a picture or video of these items are best and help with prosecution:

Lodging

1. What kind of place or structure. i.e. tent, cardboard, tree, siding, etc
2. Type and frequency of complaints
3. Presence of bedding
4. Personal belongings. i.e. dogs, food, clothes, shopping carts
5. Prior Contacts and warnings
6. Admissions of guilt

Without Permission

1. Statement by owner, occupant or manager of property (a trespass letter is fine)
2. Name and owner of property.

It is important to document the disposition of any personal property taken from those arrested.

EXHIBIT “B”

NOTICE TO VACATE

IT IS A VIOLATION OF LAW TO CAMP ON PUBLIC OR PRIVATE PROPERTY WITHIN THE CITY OF EUREKA. IT IS ALSO A VIOLATION OF LAW TO ENCROACH OR OBSTRUCT ANY PUBLIC RIGHT OF WAY.

ALL PERSONAL PROPERTY MUST BE REMOVED. ANY PROPERTY REMAINING AFTER **MAY 2, 2016** WILL BE REMOVED BY THE CITY OF EUREKA. ANY PROPERTY THAT IS DEEMED TO BE A HEALTH AND SAFETY HAZARD SHALL BE REMOVED **IMMEDIATELY AND DISCARDED**. ANY PROPERTY THAT IS DEEMED ABANDONED WILL BE **IMMEDIATELY DISCARDED**.

THIS NOTICE APPLIES TO ALL PERSONAL PROPERTY THAT IS DEEMED TO HAVE BEEN RELOCATED TO ANOTHER AREA WITHIN THE CITY OF EUREKA OR PUBLIC RIGHT OF WAY IN RESPONSE TO THIS NOTICE.

ANY PROPERTY THAT IS REMOVED MAY BE RECLAIMED BY CALLING **(707) 441- 4060** AND SCHEDULING A DATE AND TIME FOR PICK-UP OR AT THE LARGE CONEX BOX LOCATED IN THE NORTH PARKING LOT OF THE BAYSHORE MALL. ANY PROPERTY THAT IS NOT RECLAIMED WITHIN NINETY (90) DAYS OF REMOVAL WILL BE DISPOSED OF.

ANY PERSON(S) FAILING TO COMPLY WITH THIS NOTICE TO VACATE WILL BE IN VIOLATION OF STATE LAW INCLUDING THE CALIFORNIA PENAL CODE, CALIFORNIA STREETS AND HIGHWAYS CODE AND THE EUREKA MUNICIPAL CODE AND **WILL BE PROSECUTED**.

POSTED MARCH ____, 2016

EXHIBIT “C”

private property without permission is illegal and I can be cited or arrested. I acknowledge that I have been given a list of local resources that can help me with finding food, shelter and clothing among others things.

I also understand that criminal behavior such as violence, theft, possession of illegal weapons and drug trafficking will cause immediate and permanent removal from this area.

My desire is to diligently seek housing or return to my city of origin if not from Eureka.

By signing below I acknowledge and agree. This is not permission to trespass.

Signed:

Refused

- North Coast Veterans Resource Center (707) 442-4522
- Detox (707) 445-3869
- Serenity Inn (707) 442-4815
- Open Door Clinic (707) 443-4666
- Redwood Community Action Agency (707) 445-0881
- Food for People (707) 445-3166
- Eureka Rescue Mission 110 2nd Street, Admissions at 4:30 PM
- St Vincent De Paul Dining (707) 445-9588 35 W. 3rd Street
- North Coast Resource Center 35 W 3rd. Walk-in
- Multiple Assistance Center 2nd and Y by Target

- Betty Chinn Day Center and C Street walk-in
- HOPE Center 720 V Street
- Crossroads Treatment Center (707) 443-0514
- Humboldt Recovery 443-0514
- Arcata House/Arcata Shelter (707) 822-411th Arcata
- Sequoia Humane Society (707) 442-1782 607 Ave

EXHIBIT “D”



Eureka Police Department
Policy Manual

Property Procedures

804.1 PURPOSE AND SCOPE

This policy provides for the proper collection, storage, and security of evidence and other property. Additionally, this policy provides for the protection of the chain of evidence and those persons authorized to remove and/or destroy property.

804.2 DEFINITIONS

Property - Includes all items of evidence, items taken for safekeeping and found property.

Evidence - Includes items taken or recovered in the course of an investigation that may be used in the prosecution of a case. This includes photographs and latent fingerprints.

Safekeeping - Includes the following types of property:

- Property obtained by the Department for safekeeping such as a firearm
- Personal property of an arrestee not taken as evidence
- Property taken for safekeeping under authority of a law (e.g., Welfare and Institutions Code § 5150 (mentally ill persons))

Found Property - Includes property found by an employee or citizen that has no apparent evidentiary value and where the owner cannot be readily identified or contacted.

804.3 PROPERTY HANDLING

Any employee who first comes into possession of any property, shall retain such property in his/her possession until it is properly tagged and placed in the designated property locker or storage room along with the property form. Care shall be taken to maintain the chain of custody for all evidence.

Where ownership can be established as to found property with no apparent evidentiary value, such property may be released to the owner without the need for booking. The property form must be completed to document the release of property not booked and the owner shall sign the form acknowledging receipt of the item(s).

804.3.1 PROPERTY BOOKING PROCEDURE

All property must be booked prior to the employee going off-duty unless otherwise approved by a supervisor. Employees booking property shall observe the following guidelines:

- (a) Complete the property form describing each item of property separately, listing all serial numbers, owner's name, finder's name, and other identifying information or markings
- (b) The officer shall mark each item of evidence with initials and date;
- (c) The evidence envelope or bag in which the property is stored shall have the case number, item number, date, reporting officer/employee, classification or charge written on the packaging.
- (d) Place the case number in the upper right hand corner of the bag

Eureka Police Department

Policy Manual

Property Procedures

- (e) The original property form shall be submitted with the case report. A copy shall be placed with the property in the temporary property locker or with the property if property is stored somewhere other than a property locker
- (f) When the property is too large to be placed in a locker, the item may be retained in the supply room. Submit the completed property record into a numbered locker indicating the location of the property
- (g) Property bearing serial numbers or owner applied numbers shall be checked through CLETS. Serialized property or property marked with an OAN shall be entered into CLETS.

804.3.2 NARCOTICS AND DANGEROUS DRUGS

All narcotics and dangerous drugs shall be booked separately using a separate property record. Paraphernalia as defined by Health & Safety Code § 11364 shall also be booked separately.

The officer seizing the narcotics and dangerous drugs shall place them in the evidence locker accompanied by two copies of the form for the Records Section and Detectives. The remaining copy will be detached and submitted with the case report.

804.3.3 EXPLOSIVES

Explosives that are known or suspected to be armed or live, other than fixed ammunition, should not be retained in the police facility. All fireworks, railroad flares, or fuses that are considered safe will be transported to the Fire Department on a regular basis by a Property Coordinator.

Officers who encounter an explosive device shall immediately notify their immediate supervisor and/or Watch Commander. The Bomb Squad will be called to handle situations involving explosive devices and all such devices will be released to them for disposal.

804.3.4 EXCEPTIONAL HANDLING

Certain property items require a separate process. The following items shall be processed in the described manner:

- (a) Latent fingerprints are to be placed in the latent print envelope which is completed by the employee collecting the prints and shall be submitted directly to the I.D. Technician and shall be placed in the evidence locker and kept separate from other items that are submitted under the same case number.
- (b) "Elimination Fingerprints" shall be placed directly in the latent fingerprint envelope and submitted directly to the I.D. Technician and placed in the evidence locker.
- (c) Bodily fluids such as blood or semen stains shall be air dried prior to booking
- (d) License plates found not to be stolen or connected with a known crime shall be returned directly to the Department of Motor Vehicles or booked and placed in the evidence locker for processing by the Property Coordinator.
- (e) All bicycles and bicycle frames require a property record. Property tags will be securely attached to each bicycle or bicycle frame. The property may be released directly to the Property Coordinator, or placed in the bicycle storage area until a Property Coordinator can log the property
- (f) All cash shall be counted in the presence of a supervisor and the envelope initialed by the booking officer and the supervisor. The Watch Commander shall be contacted for cash in excess of \$1,000 for special handling procedures

Eureka Police Department

Policy Manual

Property Procedures

City property, unless connected to a known criminal case, should be released directly to the appropriate City department. No formal booking is required. In cases where no responsible person can be located, the property should be booked for safekeeping in the normal manner.

804.4 PACKAGING OF PROPERTY

Certain items require special consideration and shall be booked separately as follows:

- (a) Narcotics and dangerous drugs
- (b) Firearms (ensure they are unloaded and booked separately from ammunition)
- (c) Property with more than one known owner
- (d) Paraphernalia as described in Health & Safety Code § 11364 and Business and Profession Code § 4140
- (e) Fireworks
- (f) Contraband

804.4.1 PACKAGING CONTAINER

Employees shall package all property, except narcotics and dangerous drugs in a suitable container available for its size. Knife boxes should be used to package knives, and syringe tubes should be used to package syringes and needles.

A property tag shall be securely attached to the outside of all items or group of items packaged together.

804.4.2 PACKAGING NARCOTICS

The officer seizing narcotics and dangerous drugs shall retain such property in their possession until it is properly weighed, packaged, tagged, and placed in the evidence locker, accompanied by two copies of the property record. Prior to packaging and if the quantity allows, a presumptive test should be made on all suspected narcotics. If conducted, the results of this test shall be included in the officer's report.

Narcotics and dangerous drugs shall be packaged in an envelope of appropriate size available in the report room. The booking officer shall cover the envelope seal with cellophane tape and initial and date the seal. Narcotics and dangerous drugs shall not be packaged with other property.

804.5 RECORDING OF PROPERTY

The Property Coordinator receiving custody of evidence or property shall record his/her signature, the date and time the property was received and where the property will be stored on the property control card.

A property number shall be obtained for each item or group of items. This number shall be recorded on property tag and the property control card.

Any changes in the location of property held by the Eureka Police Department shall be noted on the Property Control Card.

804.6 PROPERTY CONTROL

Each time the Property Coordinator receives property or releases property to another person, he/she shall enter this information on the property control card. Officers desiring

Eureka Police Department

Policy Manual

Property Procedures

property for court shall contact the Property Coordinator at least one day prior to the court day and provide a photocopy of the court subpoena.

804.6.1 RESPONSIBILITY OF OTHER PERSONNEL

Every time property is released or received, an appropriate entry on the Property Control Card shall be completed to maintain the chain of possession. No property or evidence being held for a judicial determination is to be released without first receiving written authorization from a supervisor or detective.

Request for analysis for items other than narcotics or drugs shall be completed on the appropriate forms and submitted to the Property Coordinator. This request may be filled out any time after booking of the property or evidence.

804.6.2 TRANSFER OF EVIDENCE TO CRIME LABORATORY

The transporting employee will check the evidence out of property, indicating the date and time on the property control card and the request for laboratory analysis.

The Property Coordinator releasing the evidence must complete the required information on the property control card and the evidence. The lab forms will be transported with the property to the examining laboratory. Upon delivering the item involved, the officer will record the delivery time on both copies, and indicate the locker in which the item was placed or the employee to whom it was delivered. The original copy of the lab form will remain with the evidence and the copy will be returned to the Records Section for filing with the case.

804.6.3 STATUS OF PROPERTY

Each person receiving property will make the appropriate entry to document the chain of evidence. Temporary release of property to officers for investigative purposes, or for court, shall be noted on the property control card, stating the date, time and to whom released.

The Property Coordinator shall obtain the signature of the person to whom property is released, and the reason for release. Any employee receiving property shall be responsible for such property until it is properly returned to property or properly released to another authorized person or entity.

The return of the property should be recorded on the property control card, indicating date, time, and the person who returned the property.

804.6.4 AUTHORITY TO RELEASE PROPERTY

The Criminal Investigation Section shall authorize the disposition or release of all evidence and property being held for a judicial determination.

804.6.5 RELEASE OF PROPERTY

All reasonable attempts shall be made to identify the rightful owner of found property or evidence not needed for an investigation.

Release of property shall be made upon determination of ownership. With the exception of firearms and other property specifically regulated by statute, found property and property held for safekeeping shall be held for a minimum of 90 days. During such period, property personnel shall attempt to contact the rightful owner by telephone and/or mail when sufficient identifying information is available. Property not held for any other purpose and not claimed within 90 days after notification (or receipt, if notification is not feasible) may be auctioned to the highest bidder at a properly published public auction. If such property

Eureka Police Department

Policy Manual

Property Procedures

is not sold at auction or otherwise lawfully claimed, it may thereafter be destroyed (Civil Code § 2080.6). The final disposition of all such property shall be fully documented in related reports.

A Property Coordinator shall release the property upon proper identification being presented by the owner. A signature of the person receiving the property shall be recorded on the original property form. After release of all property entered on the property control card, the card shall be forwarded to the Records Section for filing with the case. If some items of property have not been released the property card will remain with the Property Section. Upon release, the proper entry shall be documented in the Property Log.

804.6.6 DISPUTED CLAIMS TO PROPERTY

Occasionally more than one party may claim an interest in property being held by the Department, and the legal rights of the parties cannot be clearly established. Such property shall not be released until one party has obtained a valid court order or other undisputed right to the involved property.

All parties should be advised that their claims are civil and in extreme situations, legal counsel for the Department may wish to file an interpleader to resolve the disputed claim (Code of Civil Procedure § 386(b)).

804.6.7 CONTROL OF NARCOTICS & DANGEROUS DRUGS

The Property Coordinator will be responsible for the storage, control, and destruction of all narcotics and dangerous drugs coming into the custody of this department, including paraphernalia as described in Health & Safety Code § 11364.

804.7 DISPOSITION OF PROPERTY

All property not held for evidence in a pending criminal investigation or proceeding, and held for six months or longer where the owner has not been located or fails to claim the property, may be disposed of in compliance with existing laws upon receipt of proper authorization for disposal. The Property Coordinator shall request a disposition or status on all property which has been held in excess of 120 days, and for which no disposition has been received from a supervisor or detective.

804.7.1 EXCEPTIONAL DISPOSITIONS

The following types of property shall be destroyed or disposed of in the manner, and at the time prescribed by law, unless a different disposition is ordered by a court of competent jurisdiction:

- Weapons declared by law to be nuisances (Penal Code §§ 12028, 12029, 12251)
- Animals, birds, and related equipment that have been ordered forfeited by the court (Penal Code § 599a)
- Counterfeiting equipment (Penal Code § 480)
- Gaming devices (Penal Code § 335a)
- Obscene matter ordered to be destroyed by the court (Penal Code § 312)
- Altered vehicles or component parts (Vehicle Code § 10751)
- Narcotics (Health & Safety Code § 11474, etc.)
- Unclaimed, stolen or embezzled property (Penal Code § 1411)
- Destructive devices (Penal Code § 12307)

Eureka Police Department

Policy Manual

Property Procedures

804.7.2 UNCLAIMED MONEY

If found or seized money is no longer required as evidence and remains unclaimed after three years, the Department shall cause a notice to be published each week for a period of two consecutive weeks in a local newspaper of general circulation (Government Code § 50050). Such notice shall state the amount of money, the fund in which it is held and that the money will become the property of the agency on a designated date not less than 45 days and not more than 60 days after the first publication (Government Code § 50051).

Any individual item with a value of less than fifteen dollars (\$15.00), or any amount if the depositor/owner's name is unknown, which remains unclaimed for a year or by order of the court, may be transferred to the general fund without the necessity of public notice (Government Code § 50055).

If the money remains unclaimed as of the date designated in the published notice, the money will become the property of this department to fund official law enforcement operations. Money representing restitution collected on behalf of victims shall either be deposited into the Restitution Fund or used for purposes of victim services.

804.8 INSPECTIONS OF THE EVIDENCE ROOM

- (a) On a regular basis, the supervisor of the evidence custodian shall make an inspection of the evidence storage facilities and practices to ensure adherence to appropriate policies and procedures.
- (b) Unannounced inspections of evidence storage areas shall be conducted annually as directed by the Chief of Police.
- (c) An annual audit of evidence held by the department shall be conducted by a Division Commander (as appointed by the Chief of Police) not routinely or directly connected with evidence control.
- (d) Whenever a change is made in personnel who have access to the evidence room, an inventory of all evidence/property shall be made by an individual(s) not associated to the property room or function to ensure that records are correct and all evidence property is accounted for.

EXHIBIT “E”

NOTICE TO VACATE

IT IS A VIOLATION OF LAW TO CAMP ON PUBLIC OR PRIVATE PROPERTY WITHIN THE CITY OF EUREKA. IT IS ALSO A VIOLATION OF LAW TO ENCROACH OR OBSTRUCT ANY PUBLIC RIGHT OF WAY.

ALL PERSONAL PROPERTY MUST BE REMOVED. ANY PROPERTY REMAINING AFTER **MAY 2, 2016** WILL BE REMOVED BY THE CITY OF EUREKA. ANY PROPERTY THAT IS DEEMED TO BE A HEALTH AND SAFETY HAZARD SHALL BE REMOVED **IMMEDIATELY AND DISCARDED**. ANY PROPERTY THAT IS DEEMED ABANDONED WILL BE **IMMEDIATELY DISCARDED**.

THIS NOTICE APPLIES TO ALL PERSONAL PROPERTY THAT IS DEEMED TO HAVE BEEN RELOCATED TO ANOTHER AREA WITHIN THE CITY OF EUREKA OR PUBLIC RIGHT OF WAY IN RESPONSE TO THIS NOTICE.

ANY PROPERTY THAT IS REMOVED MAY BE RECLAIMED BY CALLING **(707) 441- 4060** AND SCHEDULING A DATE AND TIME FOR PICK-UP OR AT THE LARGE CONEX BOX LOCATED IN THE NORTH PARKING LOT OF THE BAYSHORE MALL. ANY PROPERTY THAT IS NOT RECLAIMED WITHIN NINETY (90) DAYS OF REMOVAL WILL BE DISPOSED OF.

ANY PERSON(S) FAILING TO COMPLY WITH THIS NOTICE TO VACATE WILL BE IN VIOLATION OF STATE LAW INCLUDING THE CALIFORNIA PENAL CODE, CALIFORNIA STREETS AND HIGHWAYS CODE AND THE EUREKA MUNICIPAL CODE AND **WILL BE PROSECUTED**.

POSTED MARCH ____, 2016

DECLARATION OF MILES SLATTERY

I, Miles Slattery, declare as follows:

1. I am the Director of Parks and Recreation for the City of Eureka. I have held this position since 2013 and have been employed by the City since 2006. My duties, as Director of Parks and Recreation, include responsibility for overseeing the maintenance of City property.

2. The City is the owner of most of the property known as the Palco Marsh which is the subject of this dispute. This property is directly adjacent to Humboldt Bay, a natural bay and a multi-basin, bar-built coastal lagoon located on the rugged North Coast of California, entirely within Humboldt County. It is the largest protected body of water on the West Coast between San Francisco Bay and Puget Sound, the second largest enclosed bay in California, and the largest port between San Francisco and Coos Bay, Oregon. Palco marsh is directly adjacent to Humboldt Bay.

3. In addition to being home to more than 100 plant species, 300 invertebrate species, 100 fish species, and 200 bird species, the bay and its complex system of marshes and grasses support hundreds of thousands of migrating and local shore birds. Commercially, this second largest estuary in California houses the largest oyster production operations on the West Coast, producing more than half of all oysters farmed in California.

4. Humboldt Bay and its tidal sloughs are open to fishing year-round, and the bay is home to the Humboldt Bay National Wildlife Refuge, created in 1971 for the protection and management of wetlands and bay habitats for migratory birds. In the winter, the bay serves as a feeding and resting site for more than one hundred thousand birds. Humboldt Bay is recognized for protection by the California Bays and Estuaries Policy. The bay is a source of subsistence and sport fishing for a variety of salt-water fish, crustaceans, and mollusks. Dungeness crab are fished commercially, and oysters are commercially farmed in the bay.

1 5. The bay supports over 100 species of marine and estuarine fish,
2 including green sturgeon, coho and Chinook salmon, steelhead and coastal cutthroat
3 trout which spawn and rear in its watershed, covering an area of 223 square miles.
4 The federally endangered tidewater goby is found in the bay along with more
5 common three-spined stickleback, shiner perch and Pacific staghorn sculpin. Birds
6 found on the bay include gull species, Caspian tern, brown pelican, cormorant, surf
7 scoter, and common murre. Marine mammals are represented by harbor porpoises,
8 harbor seal, California sea lion and river otter, with Steller sea lion and gray whale
9 found immediately offshore. Leopard sharks have been reported inside the bay
10 which also provides habitat for young bat rays, feeding on clams, crabs, shrimps,
11 worms, sea cucumbers, brittle stars, various gastropods and isopods.

12 6. Unfortunately, this area is greatly compromised by a large homeless
13 population which has been illegally camping in this Environmentally Sensitive
14 Habitat for years. During this time, the City has been providing notifications for
15 those illegally camping to remove personal property in preparation for cleanup for
16 years. In addition, the City has been doing clean ups in this area since I've been with
17 the City, March 2006.

18 7. From 2006 to 2013, the City removed approximately one 40 yd
19 dumpster per month from the marsh area.

20 8. From 2013-2015, the City lessened clean ups in the area due to
21 concerns that came from lawsuits around the State. The City still did clean ups, but
22 less frequently. During that time there was a significant increase in inappropriate
23 activities, environmental damage, vermin and illegal dumping and encampment
24 remnants.

25 9. In June of 2015, Council approved cleanup of the marsh area
26 approximately every week. From July 2015 to about February 2016, the City
27 averaged approximately three to four 40 yd dumpsters removed approximately every
28 week from the area.

1 10. Since March 2016 to present, the City is still averaging at least two 40
2 yd dumpsters per week. Every clean up since prior to 2013, EPD provided
3 notification and no personal belongings have ever been discarded since I've been
4 associated with the marsh clean ups, March 2006.

5 11. Every time my staff and I have been to the Palco Marsh location, we
6 have told the individuals present that they are illegally camping. Every individual
7 residing in the location has been aware of the pending development of the
8 Waterfront Trail for at least the past year, as well as the definitive vacate date of
9 May 2nd for a couple of months.

10 12. The City has been working on the Waterfront Trail since 2005 when
11 the Waterfront Trail and Promenade recommendations were approved by City
12 Council. Ever since then, staff has been seeking funding for the trail.

13 13. In October 2013, the California Transportation Commission approved
14 an amendment and alternative to the project scope for the Waterfront Drive
15 Extension project where \$1.2 million of Eureka Non-Freeway Alternative funds was
16 reprogrammed to go towards Phase A of the Waterfront trail for construction
17 purposes.

18 14. The money associated with the trail is State funding only, as was
19 reflected in the allocation request submitted by the City on January 6, 2016 and re-
20 affirmed by Caltrans staff via email on March 14, 2016 by Athena Gliddon, Chief,
21 Caltrans Office of Capital and Finance. *Exhibit "F"*.

22 15. The City has until April 2019 to spend the \$1.2 million for Phase A of
23 the Waterfront Trail. However, the cost estimate for Phase A is about \$800,000, and
24 the City is short approximately \$300,000 in funding for Phases B and C. We have a
25 deadline to spend the funding for the Phase B and C project, funded through the
26 Active Transportation Project, of January 2019.

27 16. The Phase B and C project will take two years to complete so we must
28 go to bid for the B and C project by August 2016. In order to reprogram left over

1 funding from Phase A to the B and C project, we need to have a finalized bid. We
2 are going to bid this week for the construction so we can get the cost and then go to
3 the CTC to reprogram any remaining funds. This obviously has to be done before
4 August 2016 because we can't go to bid for Phase B and C without having adequate
5 funding.

6 17. In addition and more time sensitive, the City has significant liability
7 exposure based on the pending threat of a loss of insurance coverage to a portion of
8 the affected area. Redwood Empire Municipal Insurance Fund ("REMIF"), the
9 City's insurer, has given the City until early summer 2016 to remove the concrete
10 remnants on Parcel 4. Parcel 4 is the southern portion of the marsh area where
11 illegal encampments are. Parcel 4 has been an attractive nuisance for years and the
12 City recently lost a \$400,000 lawsuit for an injury a resident sustained while visiting
13 the property with out-of-town homeless people. Parcel 4 is a significant liability for
14 the City, especially considering the pending elimination of insurance coverage, and
15 the most blighted property along the entire North Coast. The bid for this work
16 closed April 26, 2016 and we are going to Council to award the bid on May 3, 2016.

17 18. This project involves lots of heavy equipment and machines to crush all
18 of the concrete on-site. With the amount of concrete to crush, the stockpile for the
19 crushed concrete (to be used as base for the Phase A waterfront trail) is estimated to
20 take up approximately an acre.

21 19. The only upland areas along the Phase A alignment is in the pole shed
22 property and along the RR corridor to the north. All other areas are ESHA or strictly
23 constricted by adjacent ESHA and cannot be used to stockpile the crushed concrete.
24 These upland areas are where all of the illegal encampments currently exist.
25 Furthermore, the larger equipment will need to access the property from Del Norte
26 Street. It is the only upland area wide enough to handle the equipment and not
27 disturb adjacent ESHA. Del Norte is to the north of the area where most of the
28 illegal encampments are and in order to access Parcel 4 the equipment will need to

1 traverse directly along the alignment where the majority of the illegal encampments
2 currently are. A true and correct copy of the ESHA map is attached hereto as
3 *Exhibit "G"*.

4 20. The City is permitting the entire Waterfront Trail as one project and
5 have finalized Army Corps Nationwide Permit, Regional Board Water 401 Quality
6 Certificate Permit, Harbor District General Permit and City Conditional Use Permit.
7 For Phase A, we have secured a lease agreement and permit approval for the trail
8 within the NCRA ROW. The rest of the property where the alignment is on City
9 property. The Coastal Development Permit (CDP) is going to the May 11-13
10 Coastal Commission meeting for approval. Local staff are recommending the CDP
11 for approval. The contract for the Parcel 4 work will be awarded and insurance
12 approved by the time the CDP is approved. I spoke with the contractor today, and he
13 said he will be ready to mobilize by May 11th.

14 21. The City has received many complaints related to the environmental
15 damage caused by the illegal encampments from residents, non-profits (Humboldt
16 Baykeeper) and regulatory agencies, from Department of Fish and Wildlife,
17 Humboldt County Environmental Services, Coastal Commission and the North
18 Coast Regional Water Quality Control Board. The City has recently been put on
19 notice about a potential Notice of Violation from both Department of Fish and
20 Wildlife and North Coast Regional Water Quality Control Board.

21 I declare under penalty of perjury under the laws of the United States of
22 America that the foregoing is true and correct.

23 Executed on this 27th day of April, 2016, at Eureka, California.

24
25 

26 Miles Slattery
27
28

EXHIBIT “F”

From: janelle [mailto:njjr@sbcglobal.net]
Sent: Tuesday, March 15, 2016 9:19 AM
To: Gliddon, Athena M@DOT
Cc: steven.keck@dot.ca.gov; Norma.Ortega@dot.ca.gov; Greg Sparks
Subject: Re: March 16-17 CTC meeting, Tab 84 (Ref # 2.5c.(4))

Resolution G-13-14 revised the Waterfront Drive Extension project to eliminate the roadway extension work, lower the project cost to \$2,390,000, rename the project to Eureka Waterfront Trail Phase A, and revise the funding plan. (page 1) It also reprogrammed \$1,200,000 to fully fund the Phase A construction. (page 2) (for resolution see

http://dot.ca.gov/hq/transprog/ctcliaison/resolutions/g_resolutions/G-13-14.pdf)

The CTC accepted the Mitigated Negative Declaration for the Eureka Waterfront Trail Phase A Project and approved the project for future consideration of funding. The Tab 34 Memo for the January 22, 2015 CTC meeting noted the project "is estimated to cost \$2,390,000 and is fully funded through construction with Eureka Non-Freeway Project Alternative Funds." (page 2)

(see memo at

http://www.catc.ca.gov/meetings/agenda/2015Agenda/2015_01/34_2.2c%282%29.pdf)

The CTC March 2016 meeting Tab 84 Memo does propose: "Resolved, that \$1,200,000 be allocated from Non-Budget Act Item 2660-601-3093 for the locally administered Eureka Non-Freeway Alternative Fund project in Humboldt County as described on the attached vote list."

The Attachment , however, identifies the project as the Eureka Waterfront Trail Phase A construction "(Funded from Eureka Non Freeway Alternative Project Funds)." It also references the CEQA-MND document, a January 22, 2015 resolution, and states "This allocation for CON to come "come from the Eureka Non-Freeway Alternative Project Funds (State Only)." (see memo at http://catc.ca.gov/meetings/agenda/2016Agenda/2016-03/84_2.5c4.pdf)

If there are other funds that is wonderful as the City needs to relocate a large group of people before construction begins. Please provide the record of any TDIF allocation request for construction of Phase A of the Eureka Waterfront Trail Project.

janelle

Janelle Egger

On Monday, March 14, 2016 4:39 PM, "Gliddon, Athena M@DOT" <athena.gliddon@dot.ca.gov> wrote:

The source of funds for the current allocation is the TDIF (fund 3093) which is a state fund and not a federal fund. This construction allocation has no federal funds.

From: janelle [<mailto:njir@sbcglobal.net>]

Sent: Monday, March 14, 2016 4:27 PM

To: Gliddon, Athena M@DOT

Cc: Keck, Steven D@DOT; Orozco, Arletha J@DOT; Anderson, Peter B@DOT

Subject: Re: March 16-17 CTC meeting, Tab 84 (Ref # 2.5c.(4))

Mr. Gliddon,

Thank you for the quick response.

The funding is from the Eureka Non Freeway Alternative Project Fund. Though the project to be funded has changed, the source of the funding for the previous project was noted to include federal funds.

If in fact the current allocation includes federal funds the Commission should receive correct information.

At this point suffice it to say that I have been informed that the source of the funding may be of importance. Is correcting an error an issue?

janelle

On Monday, March 14, 2016 2:48 PM, "Gliddon, Athena M@DOT" <athena.gliddon@dot.ca.gov> wrote:

The notation of "State Only" funding is merely to indicate that the current allocation does not include federal funds. I am unclear on what exactly the problem seems to be. Perhaps if you could elaborate on why identifying this allocation as coming from state funds is an issue, we may be able to assist you.

Athena Gliddon

Chief, Office of Capital and Finance

(916) 657-5033

From: Keck, Steven D@DOT
Sent: Monday, March 14, 2016 11:00 AM
To: Gliddon, Athena M@DOT; Orozco, Arletha J@DOT
Subject: Fwd: March 16-17 CTC meeting, Tab 84 (Ref # 2.5c.(4))

Steven Keck

Chief Budget Officer

California Department of Transportation

916.654.4556 (o)

916.804.6763 (m)

----- Original message -----

From: janelle <njir@sbcglobal.net>
Date: 03/14/2016 10:55 AM (GMT-08:00)
To: "Keck, Steven D@DOT" <steven.keck@dot.ca.gov>, "Ortega, Norma L@DOT" <norma.ortega@dot.ca.gov>
Cc: Greg Sparks <gsparks@ci.eureka.ca.gov>
Subject: March 16-17 CTC meeting, Tab 84 (Ref # 2.5c.(4))

To Steven Keck and Norma Ortega,

I am writing regarding your Mem regarding TAB 84 on the California Transportation Commission's March Agenda.

The Memo attachment states this project is funded by the Eureka Non Freeway Alternative Project Funds and that this is "State Only" funding. I believe that the attached documents indicate that this Fund includes Federal funding.

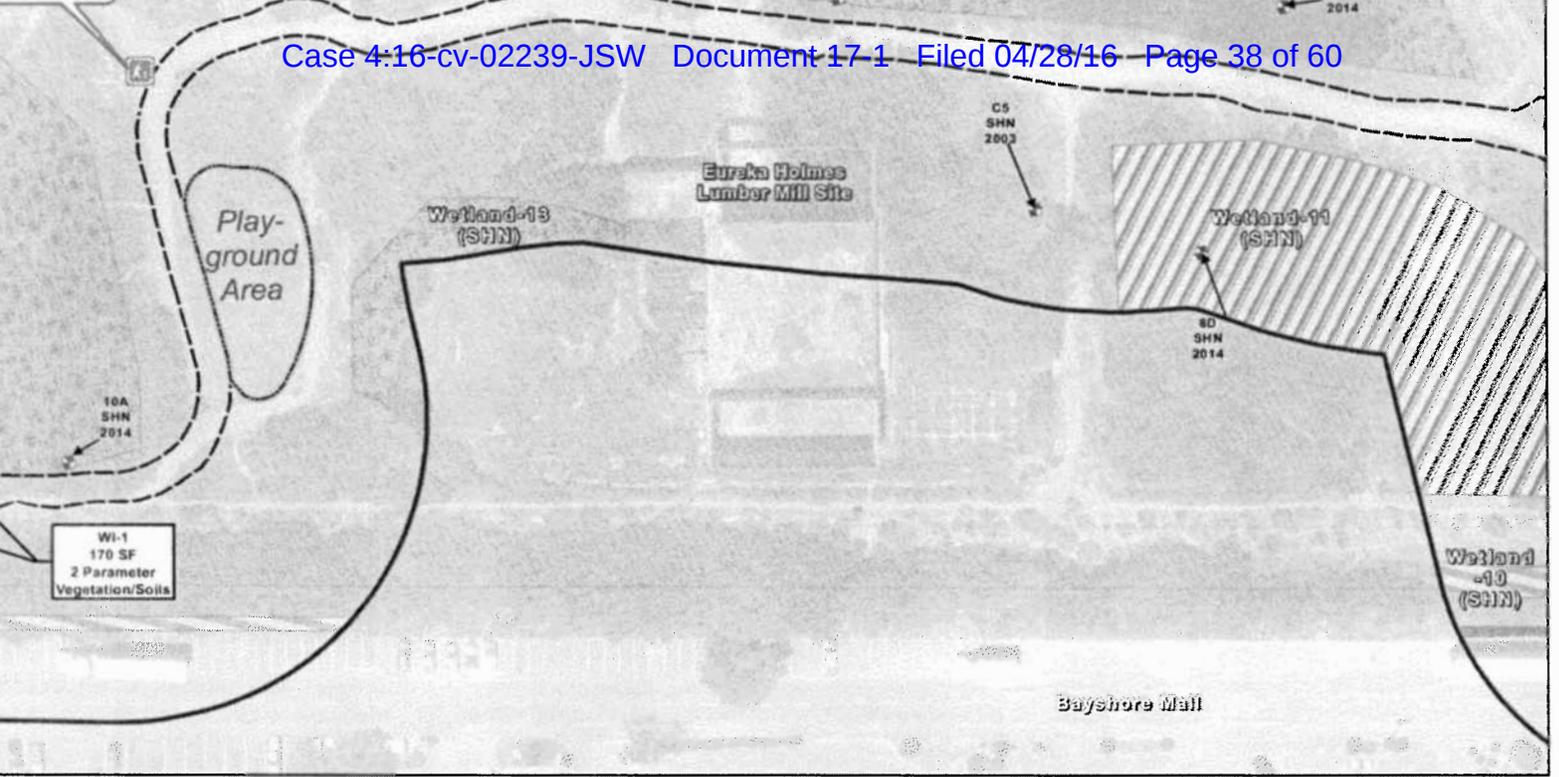
Please provide a TAB 84 Memo with a corrected attachment to the Commission and email a copy to myself and Eureka City Manager Greg Sparks.

janelle

Janelle Egger

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the sender. This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.

EXHIBIT “G”

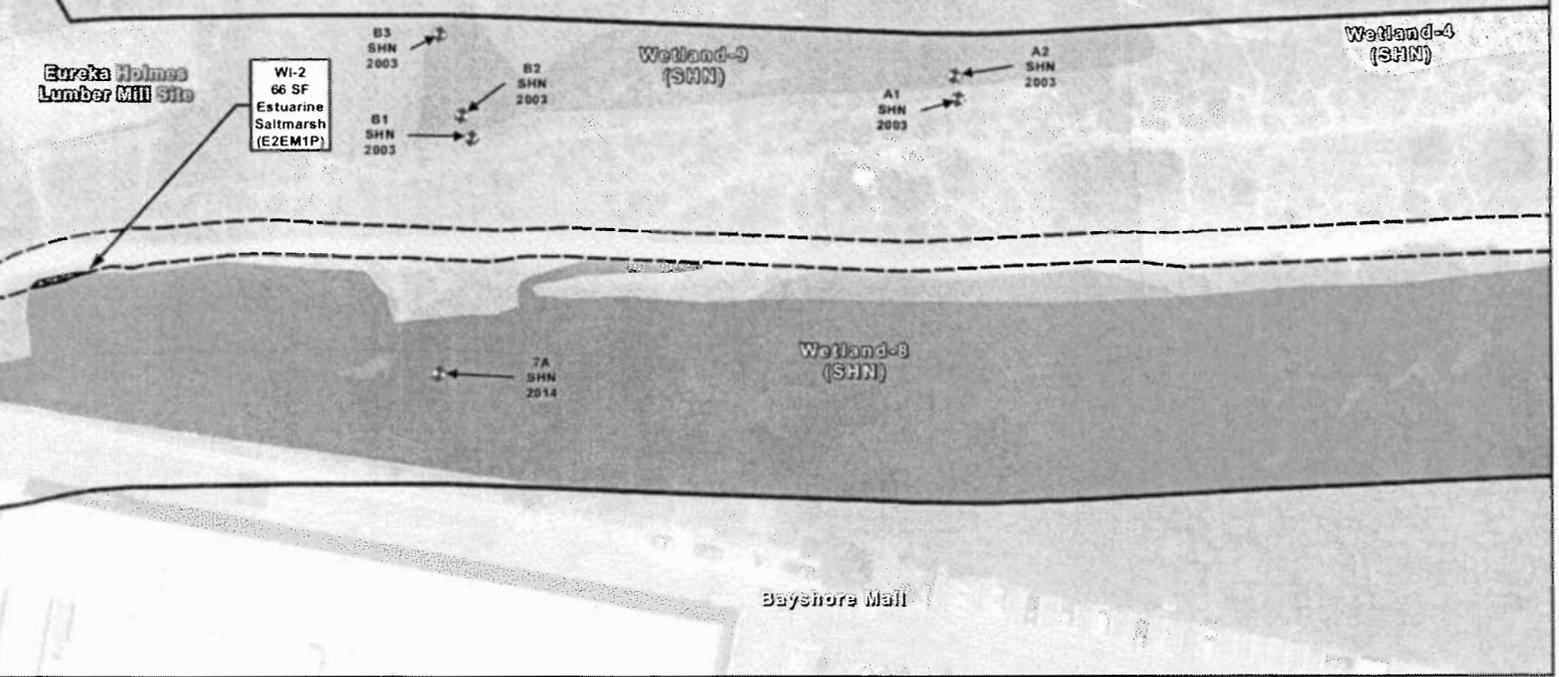


<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impacts 	<ul style="list-style-type: none"> Eureka Holmes Lumber Mill Site Historic Wiyot Community Historic Buckport Townsite Historic Eureka Dump (CA-HUM-857) 	<ul style="list-style-type: none"> ** Salix hookeriana Shrubland Alliance ** 1 Parameter, Blackch Vegetation ** 1 Parameter (Freshwater Vegetation) ** 2 Parameter Vegetation/Soils 	<ul style="list-style-type: none"> Estuarine Saltmarsh/Ditch (E2EM1P) Estuarine Channel/Ditch (E2US3) Estuarine Subtidal (E1UB3) Palustrine Emergent Ditch (PEM1C) ** Coastal Commission (CC) Jurisdiction 	<ul style="list-style-type: none"> Palustrine Emergent Wetland (PEM1C) Palustrine Forested Wetland (PFD1) Wetland Mixed (PEM1C) (PFD1) (E2EM1P) 		<p>City of Eureka Waterfront Trails Phases A, B and C</p>	<table border="1"> <tr> <td>Job Number</td> <td>8411641</td> </tr> <tr> <td>Revision</td> <td>A</td> </tr> <tr> <td>Date</td> <td>15 Jan 2016</td> </tr> </table>	Job Number	8411641	Revision	A	Date	15 Jan 2016
Job Number	8411641												
Revision	A												
Date	15 Jan 2016												

Wetland Impacts Figure 2.2

718 Third Street Eureka CA 95501 USA T 707 443 8326 F 707 444 8330 E eureka@ghd.com W www.ghd.com

This map was prepared by the contractor and is not a warranty, representation or guarantee of any kind. The contractor shall not be held responsible for any errors or omissions in this map. The contractor shall not be held responsible for any damages or liabilities resulting from the use of this map. The contractor shall not be held responsible for any damages or liabilities resulting from the use of this map.

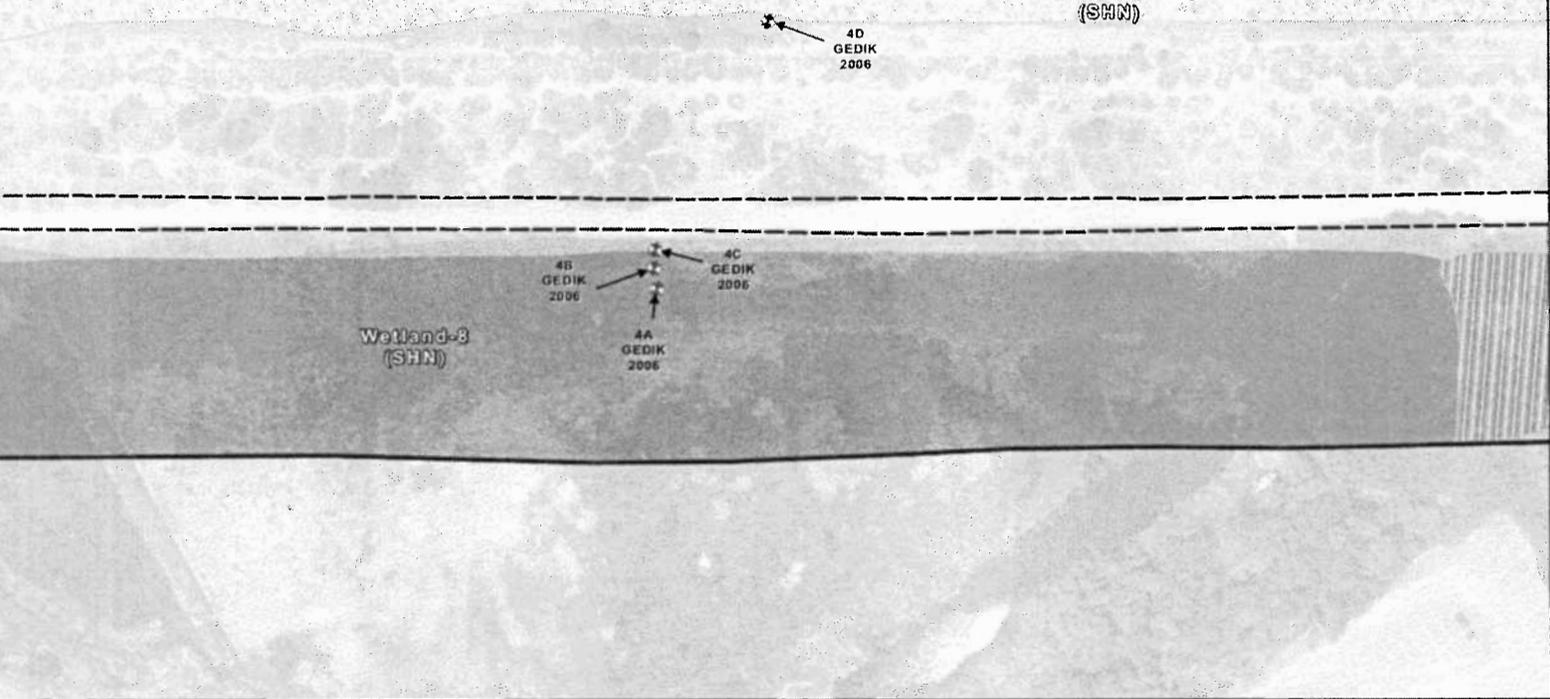


<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impacts 	<ul style="list-style-type: none"> Eureka Holmes Lumber Mill Site Historic Wiyot Community Historic Buckport Townsite Historic Eureka Dump (CA-HUM-857) 	<ul style="list-style-type: none"> ** Salix hookeriana Shrubland Alliance ** 1 Parameter Brackish Vegetation ** 1 Parameter Freshwater Vegetation ** 2 Parameter Vegetation/Soils 	<ul style="list-style-type: none"> Estuarine Saltmarsh/Ditch (E2EM1P) Estuarine Channel/Ditch (E2US3) Estuarine Subtidal (E1US3) Palustrine Emergent Ditch (PEM1C) ** Coastal Commission (CC) Jurisdiction 	<ul style="list-style-type: none"> Palustrine Emergent Wetland (PEM1C) Palustrine Forested Wetland (PFO1) Wetland Mixed (PEM1C) (PFO1)/E2EM1P 		<p>City of Eureka Waterfront Trails Phases A, B and C</p>	<p>Job Number 8411641 Revision A Date 15 Jan 2016</p>
---	---	---	--	---	--	---	---

Wetland Impacts Figure 2.3

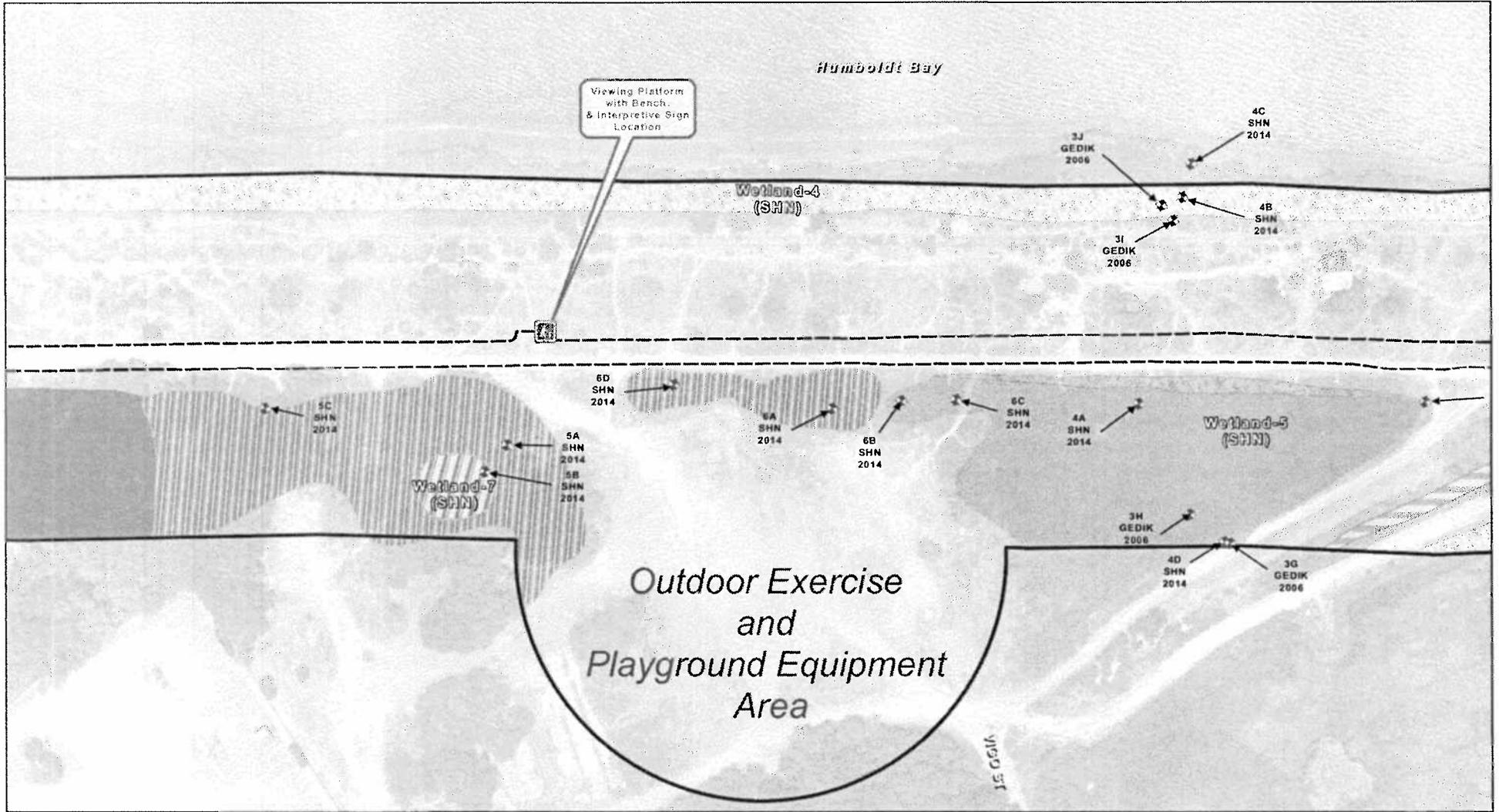
718 Third Street Eureka CA 95501 USA T 707 443 8326 F 707 444 8330 E eureka@ghd.com W www.ghd.com

GHD and its consultants are not responsible for the accuracy, reliability, completeness or timeliness of any data or information provided by third parties. GHD and its consultants are not responsible for any damage or injury to any person or property, or for any loss of profit or business, or for any other consequences, arising from the use of the information provided by GHD and its consultants.

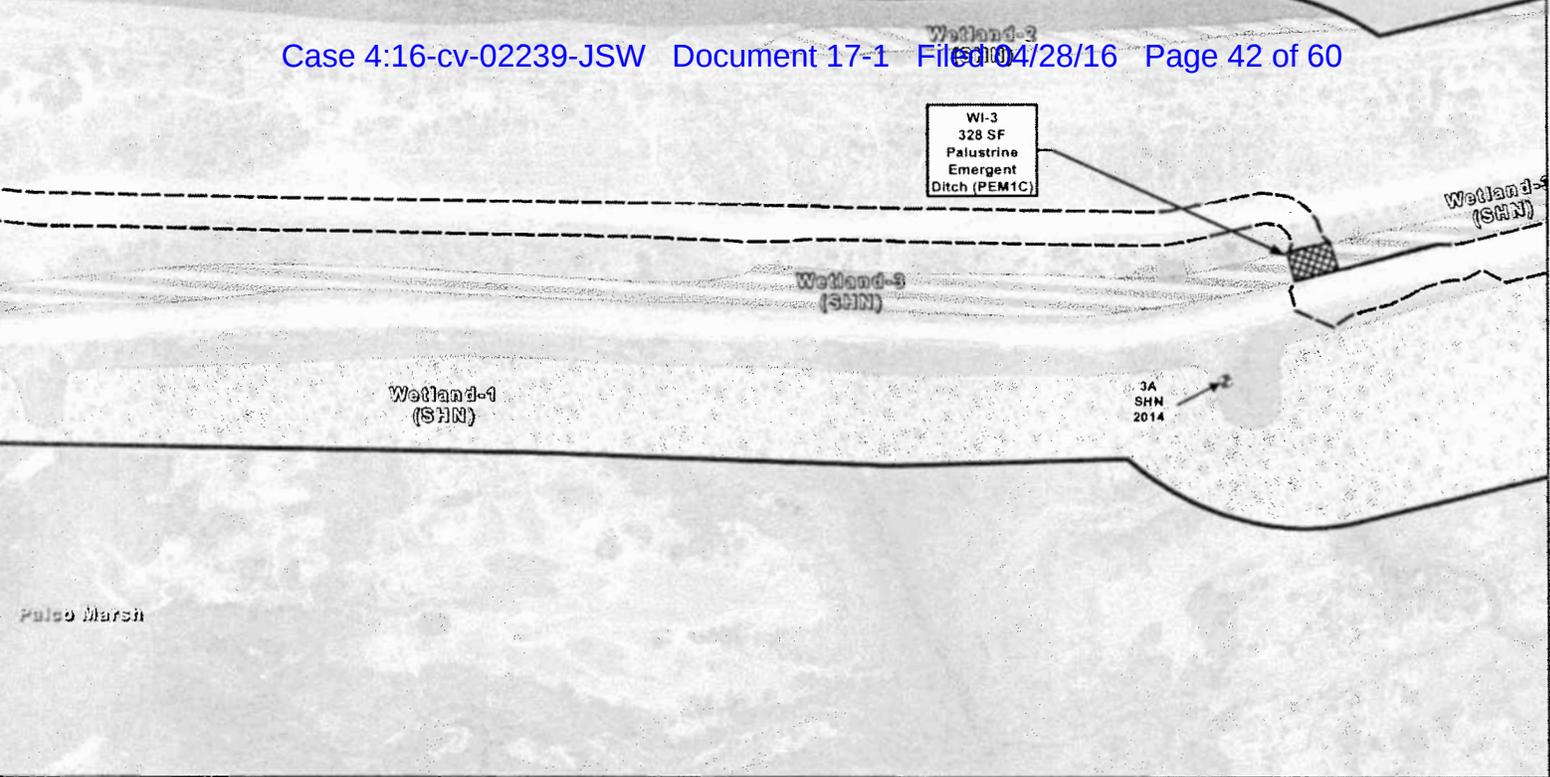


<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impacts 	<ul style="list-style-type: none"> Eureka Holmes Lumber Mill Site Historic Wiyot Community Historic Bucksport Townsite Historic Eureka Dump (CA-HUM-857) 	<ul style="list-style-type: none"> ** <i>Saxifragaria hookeriana</i> Shrubland Alliance ** 1 Parameter: Brackish Vegetation ** 1 parameter (Freshwater Vegetation) ** 2 Parameter Vegetation/Soils 	<ul style="list-style-type: none"> Estuarine Saltmarsh/Ditch (E2EM1P) Estuarine Channel/Ditch (E2US3) Estuarine Subtidal (E1UB3) Paratidial Emergent Ditch (PEM1C) ** Coastal Commission (CC) Jurisdiction 	<ul style="list-style-type: none"> Paratidial Emergent Wetland (PEM1C) Paratidial Forested Wetland (PF01) Wetland Mixed (PEM1C) (PF01)/(E2EM1P) 			<p>City of Eureka Waterfront Trails Phases A, B and C</p>	<p>Job Number 8411641 Revision A Date 15 Jan 2016</p>
--	--	--	---	--	--	--	---	---

Wetland Impacts Figure 2.4



<p>Paper Size 11" x 17" (ANSI B)</p> <p>Map Projection: Lambert Conformal Conic Horizontal Datum: North American 1983 Grid: NAD 1983 StatePlane California FIPS 9401 Feet</p>	<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impacts 	<ul style="list-style-type: none"> Eureka Homes Lumber Mill Site Historic Wiynt Community Historic Buckport Townsite Historic Eureka Dump (CA-HUM-857) ** <i>Salix hookeriana</i> Shrubland Alliance ** 1 Parameter: Brackish Vegetation ** 1 Parameter: Freshwater Vegetation ** 2 Parameter: Vegetation/Soils Eureka Saltmarsh/Ditch (E2EM1P) Eureka Channel/Ditch (E2US3) Eureka Subtidal (E1UB3) Palustrine Emergent Ditch (PEM1C) Palustrine Emergent Wetland (PEM1C) Palustrine Forested Wetland (PFD1) Wetland Mixed (PEM1C) (PFD1)(E2EM1P) ** Coastal Commission (CC) Jurisdiction 		<p>City of Eureka Waterfront Trails Phases A, B and C</p> <p>Job Number 8411641 Revision A Date 15 Jan 2016</p> <p>Wetland Impacts Figure 2.5</p>
---	---	--	--	--

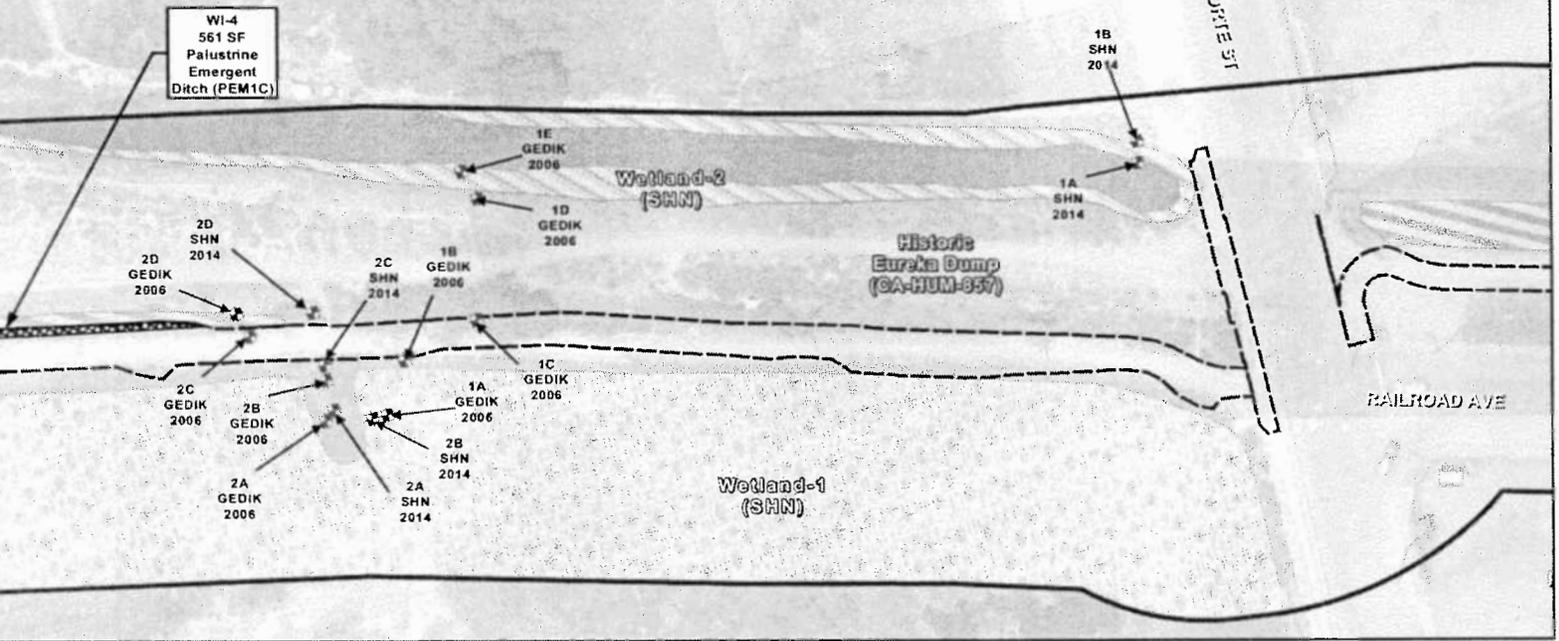


<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impact 	<ul style="list-style-type: none"> Eureka Homes Lumber Mill Site Historic Wiyot Community Historic Bucksport Townsite Historic Eureka Dump (CA-HUM-857) 	<ul style="list-style-type: none"> ** Salix hookeriana Shrubland Alliance ** 1 Parameter Brackish Vegetation ** 1 parameter (Freshwater) Vegetation ** 2 Parameter Vegetation/Soils 	<ul style="list-style-type: none"> Estuarine Saltmarsh/Ditch (E2EM1P) Estuarine Channel/Ditch (EZUS3) Estuarine Subtidal (ETUB3) Palustrine Emergent Ditch (PEM1C) ** Coastal Commission (CC) Jurisdiction 	<ul style="list-style-type: none"> Palustrine Emergent Wetland (PEM1C) Palustrine Forested Wetland (PFO1) Wetland Mixed (PEM1C) (PFO1)/E2EM1P 		<p>City of Eureka Waterfront Trails Phases A, B and C</p>	<p>Job Number 8411641 Revision A Date 15 Jan 2016</p>
--	---	---	--	---	--	---	---

Wetland Impacts Figure 2.6

© 2016 GHD. All rights reserved. No part of this document may be reproduced or transmitted in any form or by any means electronic or mechanical, including photocopying and recording, or by any information storage and retrieval system, without the prior written permission of GHD. The information contained herein is confidential and intended solely for the use of the individual user. It is not to be disseminated outside the organization.

Equipment Area



<ul style="list-style-type: none"> Sample Point Wetland Study Boundary Trail Footprint Wetland Impacts Temporary Construction Impacts 	<ul style="list-style-type: none"> Eureka Homes Lumber Mill Site Historic Wiyot Community Historic Buckport Townsite Historic Eureka Dump (CA-HUM-857) 	<ul style="list-style-type: none"> ** Salix hookeriana Shrubland Alliance ** 1 Parameter, Brackish Vegetation ** 1-parameter (Freshwater Vegetation) ** 2 Parameter Vegetation/Soils 	<ul style="list-style-type: none"> Estuarine Saltmarsh/Ditch (E2EM1P) Estuarine Channel/Ditch (E2US3) Estuarine Subtidal (E1UE3) Palustrine Emergent Ditch (PEM1C) ** Coastal Commission (CC) Jurisdiction 	<ul style="list-style-type: none"> Palustrine Emergent Wetland (PEM1C) Palustrine Forested Wetland (PFD1) Wetland Mixed (PEM1C) (PFD1) (E2EM1P) 			<p>City of Eureka Waterfront Trails Phases A, B and C</p>	<p>Job Number 8411641 Revision A Date 15 Jan 2016</p>
--	--	--	---	--	--	--	---	---

Wetland Impacts Figure 2.7

718 Third Street Eureka CA 95501 USA T 707 443 8326 F 707 444 8330 E eureka@ghd.com W www.ghd.com

GHD and its consultants are not responsible for any inaccuracies or omissions in this report or any other documents prepared by GHD or its consultants, and shall not be held liable for any such inaccuracies or omissions.

DECLARATION OF CYNDY DAY-WILSON

I, Cyndy Day-Wilson, declare as follows:

1. I am the City Attorney for the City of Eureka and have been so employed since November of 2011. Pursuant to Section 608 of the City Charter, I am the Chief legal Advisor and Chief Prosecutor of the City. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Since November of 2011, I have been tasked by the City Council with the prosecution of violations of the Eureka Municipal Code ("EMC"). EMC § 10.99 provides that any violation of the EMC is a misdemeanor which brings with it imprisonment of up to 6 months and/or a fine of \$1000. The camping ordinance applies to ALL areas of the City including the Palco Marsh.

3. During my tenure as City Attorney, the City has had a policy of zero tolerance for violation of the camping ordinance. Since 2011, my office has prosecuted hundreds of violations of the City's camping ordinance. This statute has been upheld as constitutional. See *Exhibit "H"*.

4. In 2013, the City undertook a clean-up of the Palco Marsh. This clean-up included the removal of illegal campers from the area. Each and every camper in the area was given a 10 day Notice to Vacate prior to the City's clean-up efforts.

5. During the 2013 clean-up effort, all camps were removed and all illegal campers were told to vacate the area. Numerous citations were issued to those that were illegally camping and they were prosecuted by my office.

6. After the 2013 clean-up, the City continued its efforts to keep the Palco Marsh area clean and to stop the illegal camping. However, many returned to the area and continued to camp. From 2013 to 2015, the City issued numerous citations for violation of EMC Section 93.02.

7. In 2014, the City engaged Focus Strategies to study the issue of

1 homelessness and to recommend strategies to address this multi-faceted issue.
2 Focus Strategies, as a result of that study, issued a Homeless Policy Paper that
3 addressed recommendations to solve homelessness rather than attempt to manage
4 the problem. *Exhibit "I"*.

5 8. The Policy Paper, in order to achieve that goal, made the following
6 recommendations:

7 9. Short-Term: City and County partnership to develop a Behavioral
8 Health and Law Enforcement Team to conduct outreach to chronically homeless
9 people living outdoors. Once identified, these individuals should be prioritized for
10 available permanent supportive housing. Status – Accomplished.

11 10. Medium Term: Formalize a Homeless Outreach Team with a “Housing
12 First” Focus. Mental Health Services Act funds could be utilized to provide housing
13 for homeless people with mental illness and who are high users of emergency
14 services. Status – This has been initiated.

15 11. Longer-Term: Review and analyze how fund are currently being
16 invested, what outcomes are being accomplished, and how outcomes could be
17 improved by changing existing programs and investments. Determine how
18 additional permanent housing and rapid re-housing capacity is needed to completely
19 end homelessness. Status – On-going, with the primary step taken to contract with
20 Focus Strategies for a comprehensive implementation plan for rapid-rehousing.”

21 12. IN view of the recommendations made by the Homeless Policy Paper,
22 the City Staff recommended the adoption of the Open Space Property Maintenance
23 Plan by the City Council: “Staff recognizes that the implementation of rapid re-
24 housing is a longer term solution to ending homelessness and that allowing
25 unfettered illegal camping along the waterfront is detrimental to the community’s
26 safety, leads to continued environmental degradation, and negatively impacts our
27 tourism economy. To that end, the implementation of the Open Space Property
28 Maintenance Plan should be accomplished in a manner that focuses enforcement

1 efforts on encampments utilizing building materials, such as pallets, bricks, cement
2 blocks, roofing materials, and other products that are incompatible with the city's
3 camping ordinance. The overall goal is to gradually reduce the footprint of illegal
4 encampment throughout the city, while working through the MIST team and other
5 service providers to assist individuals in finding permanent housing."

6 13. The City Council Agenda Summary for the October 20, 2015 council
7 meeting further noted: "Camping in violation of city ordinances on waterfront
8 property within the Coastal Zone has become an increasingly more difficult issue for
9 city departments to resolve and control. Despite recent cleanup efforts, sanitation
10 issues, hazardous waste and criminal activity within the area has become a major
11 concern to the community at large, and or state and federal regulatory agencies. The
12 City of Eureka has the responsibility to maintain public property in a safe manner.
13 The waterfront is a major economic driver within the community as a tourism asset
14 for visitor services. Future plans for trail development represent a major investment
15 of public funds. "

16 14. The plan provided the followings steps of implementation: "The goal
17 of this implementation plan is to provide for Incremental Enforcement of the illegal
18 encampments within the City of Eureka open space along Humboldt Bay. This
19 effort is focused on reducing the size and number of encampments in both the short
20 and long term. Incremental Enforcement allows the Eureka Police Department and
21 the Park and Recreation Department to focus on problem areas from a safety and
22 environmental standpoint and of problem campers, specifically those with
23 significant criminal histories and active warrants. This level of enforcement
24 provides an appropriate timeline and means for homeless individuals and families to
25 seek both temporary and permanent housing options."

26 15. The plan provided that the following steps would be taken to initiate
27 implementation of the Eureka Open Space Property Maintenance Plan: (1) Illegal
28 camping will be strictly enforced behind the Bayshore Mall, due to safety concerns

1 from the dilapidated concrete structures in the area and a recent history of violence
2 among those in the area. Camping to the north of this area and south of Del Norte
3 Street will not be aggressively enforced, but will be addressed as necessary; (2) The
4 City will begin the process of removing all wood pallets, building materials, and
5 plumbing fixtures that have been constructed on city property; (3) Large tarps fixed
6 to trees and building materials are not allowed on city owned property; and (4) The
7 City will continue to provide cleanups of the open space area and will also remove
8 invasive vegetation through cutting and approved chemical treatment.”

9 16. The City Council adopted the Eureka Open Space Property
10 Maintenance Plan on October 20, 2015. See Exhibit "J". The City of Eureka, in
11 order to support and implement Phase I of the plan has committed a budget of
12 \$250,000 from its Housing Successor funds towards ending homelessness. These
13 funds can be utilized as one-time money for matching fund to implement a 30/60
14 plan proposed as part of Phase I of the plan.

15 17. On January 5, 2016, City staff provided the City Council with a report
16 regarding the adoption of a Shelter Crisis pursuant to Government Code Section
17 8698, et. seq. within the City. As a result of that report, staff was directed to bring a
18 Resolution back to council at the January 19, 2016 meeting declaring a shelter crisis
19 within the City.

20 18. At the January 19, 2016 meeting the City Council was presented with
21 an Agenda Summary and a proposed Resolution declaring a shelter crisis. The City
22 Council adopted a modified Resolution declaring the existence of a shelter crisis
23 within the City on January 19, 2016.

24 19. The Resolution did not identify any City facilities as part of the Shelter
25 Crisis and specifically excluded those areas 100' from ESHA – Environmentally
26 Sensitive Habitat Areas – from the shelter crisis declaration. The Resolution also
27 encouraged the community to step forward and provide shelter either on private
28 property or through a negotiated agreement with the City. See *Exhibit "J"*.

1 20. The City Council met in closed session on May 15 and as a result set a
2 hard deadline of May 2, 2016 for all campers to vacate the Palco Marsh area. In
3 addition, the City Council directed staff to issue a Request for Proposals (RFP) for
4 individuals or entities to bring forth proposals for the operation of homeless shelters
5 within the City on private or public property.

6 21. The RFP was issued by the City on March 25, 2016 and responses were
7 due on April 22, 2016. The City has received only one response to its RFP to date.

8 22. On April 5, 2016, the City Council was presented with a Resolution to
9 rescind the Declaration of a Shelter Crisis of January 19 so that two facilities could
10 be added to the Shelter Crisis Declaration. The City Council adopted the modified
11 Resolution which increased the number of available beds in Eureka to 130, more
12 than enough to house the remaining 113 individuals residing in the Palco March.

13 23. The City of Eureka has been battling a problem with homeless
14 individuals squatting on public land in environmentally sensitive habitats for more
15 than a decade. This residency results in the depositing of trash and human waste
16 material in protected lands which drain directly into the bay and which create
17 significant problems affecting public health and the environment.

18 24. Based on the current sanitation conditions of the Palco Marsh, two
19 complaints have been filed with the Environmental Protection Agency. Moreover, I
20 am informed and believe that a Notice of Violation ("NOV") is pending from the
21 Department of Fish and Wildlife.

22 25. In addition, the Palco Marsh area is much more than a homeless
23 encampment and is a location which has results in numerous arrests for possession
24 and sale of narcotics, prostitution, and firearms violations. A recent sweep of the
25 area resulted in the removal of 17 firearms and countless hypodermic needles from
26 the Palco Marsh area. Residents have threatened state and local officials with
27 violence with guns and the area has become known in the City as "The Devil's
28 Playground."

1 26. Moreover, the City is currently involved in a project which would
2 establish a path through the Palco Marsh area for the public good. The City has
3 received an estimated total of \$5.3 million in grant money to fund the project. The
4 City is currently in jeopardy of losing this grant money if the homeless problem in
5 the Palco Marsh area is not resolved within the next 90 days. In addition, the City
6 has entered into contracts to begin the construction of the trial project. Delay could
7 put the City at risk of breach of contract.

8 27. The City has made arrangements to store the personal property of all
9 affected individuals and to care for any animals who are presented in the Palco
10 Marsh area.

11 28. An order enjoining the enforcement of a municipal statute designed to
12 protect Environmentally Sensitive Habitat – as well as protect the public health and
13 welfare of the local community – is a drastic action which should be taken with
14 caution.

15 29. Finally, in the event that this Court concludes that a temporary
16 restraining order should issue, defendants request that it be for a limited duration
17 only so as to allow the parties an opportunity to present further briefing on this
18 issue. Given the magnitude of the problem, the seriousness of the potential damage
19 to the area, and the potential for lost grant monies in the millions of dollars, the
20 enforcement of the statute is simply too important to be stayed indefinitely.

21 I declare under penalty of perjury under the laws of the United States of
22 America that the foregoing is true and correct.

23 Executed on this 27th day of April, 2016, at Eureka, California.

24
25 
26 Cyndy Day-Wilson

EXHIBIT “H”

Deaf Wilson
#3

Ches
FILED

APR - 3 2015

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

RECEIVED
APR 07 2015
CITY ATTORNEY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT
APPELLATE DIVISION

CITY OF EUREKA,
Plaintiff & Respondent,
vs.
DANE M. CARR,
Defendant & Appellant.

CASE NOS:
CR1201892 CR1204002
CR1205681 CR1300508
CR1300711 CR1300712
CR1300808 CR1301065
CR1301457

OPINION

**APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF CALIFORNIA, LIMITED CRIMINAL, COUNTY OF HUMBOLDT**

Defendant and Appellant Dane Carr timely noticed this appeal after his convictions for nine separate violations of the Eureka Municipal Code's "camping ordinance," hereinafter EMC §93.02. Appellant had challenged the ordinance in the court below by way of demurrer in CR1201892. The demurrer was denied by written ruling filed October 19 2012. As the parties acknowledge denial of a demurrer raising solely legal issues, as here, is subject to *de novo* review.

///

1 The constitutional challenge to EMC § 93.02 travels very well trod ground. *See, Allen v.*
2 *City of Sacramento* (2015) 243 Cal.App.4th 41, [183 Cal. Rptr. 3d 654]. Like challenges
3 throughout the state to similar ordinances, Appellant asserts that §93.20 is unconstitutional in
4 violation of Due Process Clause of the 14th Amendment as it is overbroad and vague, and that it
5 violates the prohibition of cruel and unusual punishment.

6 Protections against vagueness are based on due process. To satisfy the constitutional
7 requirement of due process of law, a penal statute must (1) be sufficiently definite to provide
8 adequate notice of the conduct proscribed, and (2) provide sufficiently definite guidelines for the
9 police in order to prevent arbitrary and discriminatory enforcement *Tobe v. City of Santa Ana*
10 (1995)9 Cal.4th 1069, 1106-1107. However, no more than a reasonable degree of certainty is
11 required. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 [60 Cal. Rptr. 2d 277, 929
12 P.2d 596]. Thus, a statute is not void for uncertainty if any reasonable and practical construction
13 can be given to its language. (*Tobe, supra*, 9 Cal.4th at p. 1107.) And “[o]ften the requisite
14 standards of certainty can be fleshed out from otherwise vague statutory language by reference to
15 any of the following sources: (1) long established or commonly accepted usage; (2) usage at
16 common law; (3) judicial interpretations of the statutory language or of similar language; [and]
17 (4) legislative history or purpose. [Citation.]” *Ewing v. City of Carmel-By-The-Sea* (1991) 234
18 Cal.App.3d 1579, 1594 [286 Cal. Rptr. 382]; see *Samples v. Brown, supra*, 146 Cal.App.4th at
19 pp. 802–804.

20 “The analysis begins with ‘the strong presumption that legislative enactments ‘must be
21 upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.]
22 A statute should be sufficiently certain so that a person may know what is prohibited thereby and
23 what may be done without violating its provisions, but it cannot be held void for uncertainty if
24 any reasonable and practical construction can be given to its language.” (*Walker v. Superior*
25 *Court, supra*, 47 Cal.3d at p. 143.)” (*Tobe, supra*, 9 Cal.4th at p. 1107)

1 As noted by the trial court below, the ordinance in question is within the police power of
2 the City of Eureka as authorized by Penal Code 647c. Appellant does not challenge the City's
3 authority to promulgate such an ordinance, (Which would be incorporated into Appellant's
4 overbreadth argument) rather the constitutionality of the ordinance as promulgated. EMC §93.02
5 reads as follows:

6 **§ 93.02 CAMPING PERMITTED ONLY IN SPECIFICALLY DESIGNATED**
7 **AREAS.**

- 8 (A) Except as provided herein, no person shall camp in any public or private space or public or private
9 street, except in areas specifically designated for such use. *CAMP* shall mean residing in or using
10 a public or private space for living accommodation purposes, such as sleeping activities, or
11 making preparations to sleep (including laying down of bedding for the purpose of sleeping), or
12 storing personal belongings, (including but not limited to clothing, sleeping bags, bedrolls,
13 blankets, sheets, luggage, backpacks, kitchen utensils, cookware, and similar material), or making
14 any fire or using any tents, regularly cooking meals, or living in a parked vehicle. These activities
15 constitute camping when it reasonably appears, in light of all of the circumstances, that a person is
16 using a public space as a living accommodation regardless of his/her intent or the nature of any
17 other activities in which he/she might also be engaging. *PRIVATE* shall mean affecting or
18 belonging to private individuals, as distinct from the public generally. All police officers are
19 hereby charged with the enforcement of the camping provisions of this chapter.
- 20 (B) For the purposes of this section
 - 21 (1) *PUBLIC SPACE*. Shall include the following areas:
 - 22 a. Any public park or public beach.
 - 23 b. Any public parking lot or public area improved or unimproved.
 - 24 (2) *PUBLIC STREET*. Shall include any public street or public sidewalk including the public
25 benches.
 - 26 (3) *PRIVATE SPACE*. Shall include the following areas:
 - 27 a. Any private park or private beach.
 - 28 b. Any private parking lot or private area improved or unimproved.
 - 29 (4) *PRIVATE STREET*. Shall include any private street or alley including private benches.
- 30 (C) Camping on private property shall be lawful if the owner of the private property is present at all
31 times that the camping is occurring and if the camping is occurring accessory to a permitted
32 residential use on property which is zoned for a residential purpose only. However,
33 notwithstanding this exemption, if the camping is creating or maintaining a nuisance, as defined in
34 the Eureka Municipal Code, it shall be unlawful.

35 ///

1 The ordinance here is very similar to the one approved in *People v. Scott* (1993) 20
 2 Cal.App.4th Supp. 5. Likewise it is substantially similar to the current definition of camping set
 3 forth in Code of Federal Regulations 36 C.F.R. §7.96(i)(1).¹ No doubt the ordinance was drafted
 4 with those examples in mind. While EMC §93.02 does not contain a specific temporal element,
 5 the term “living accommodation purposes” indicates to a reasonable person something more than
 6 a nap on a bench or a picnic in the park. Could the ordinance be interpreted to prohibit those
 7 activities? Yes, but such an interpretation would be unreasonable. The Supreme Court in *Tobe*
 8 rejected the piecemeal reading of the subject ordinance there, admonishing that the ordinance be
 9 read in context. Apparently the Appellant there had advanced a similar argument as here, that
 10 innocent uses of property could be penalized. However, the court stated : “it is clear that leaving
 11 a towel on a beach, an umbrella in the public library, or a student backpack in a school, or using
 12 picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.” The
 13 same can be said here. Read in context, EMC § 93.02 is not unconstitutionally vague.

14 A related concept to vagueness is that of overbreadth. “[A] facial challenge to a law on
 15 grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and
 16 cannot have any valid application (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455
 17 U.S. 489, 494, fn. 5 [71 L.Ed.2d 362, 369, 102 S.Ct. 1186]), or a claim that the law sweeps in a
 18 substantial amount of constitutionally protected conduct.” *Tobe, supra*, 9 Cal.4th at p.1109
 19 (emphasis added). While other uses of public property might be suggested by Appellant, the
 20 only constitutionally protected activity forwarded is the right to travel. Other ordinances
 21 prohibiting camping in public places have repeatedly rejected such a ban as infringing on a
 22 protected right to travel. The United States District Court in *Joyce v. City and County of San*
 23

24 ¹ Contrast EMC § 93.02 with the far more vague ordinance found unconstitutionally vague in *Desertrain v. City of*
 25 *Los Angeles*, (9th Cir. 2014) 754 F3d 1147. The ordinance there failed to provide definition to its terms leaving
 some of them open ended and subject to substantial interpretation. In contrast here, the ordinance offers definitions
 and examples more clearly defining the prohibited activity. The ordinance here is more in line with that found
 constitutional in *Scott, supra*.

1 *Francisco* (N.D. Cal. 1994) 846 F. Supp. 843, rejected the argument that the implementation
2 Matrix Program in San Francisco infringed upon the right to travel. The program included
3 enforcement of camping and lodging in public parks.

4 Moreover, this court finds the California Supreme Court determination in *Tobe*, is
5 directly on point as to whether an ordinance such as EMC § 93.02 infringes upon a
6 constitutionally protected right to travel. The court stated:

7 “lest we be understood to imply that an as applied challenge to the ordinance might
8 succeed on the right to travel ground alone, we caution that, with few exceptions, the
9 creation or recognition of a constitutional right does not impose on a state or
10 governmental subdivision the obligation to provide its citizens with the means to enjoy
11 that right. (*Harris v. McRae* (1980) 448 U.S. 297, 317-318 [65 L.Ed.2d 784, 804-806,
12 100 S.Ct. 2671]; *Maher v. Roe* (1977) 432 U.S. 464, 471-474 [53 L.Ed.2d 484, 492-495,
97 S.Ct. 2376].) Santa Ana has no constitutional obligation to make accommodations on
or in public property available to the transient homeless to facilitate their exercise of the
right to travel. (*Lindsey v. Normet* (1972) 405 U.S. 56, 74 [31 L.Ed.2d 36, 50-51, 92
S.Ct. 862].)” *Tobe, supra*, 9 Cal.4th at p. 1103.

13 The Court also found that the ordinance in question was not discriminatory in the context
14 of the right to travel in that it was applicable to residents as well as non-residents. *Id.* The same
15 can be said of the subject ordinance here.

16 This court finds EMC § 93.02 is not constitutionally overbroad so as to sweep up
17 constitutionally protected activities within its prohibitions.

18 Next Appellant asserts that EMC §93.02 violates the Eighth Amendment prohibition
19 against cruel and unusual punishment. Again this argument has been advanced in similar cases.
20 Essentially the argument is that homelessness is a status and as such penalizing someone for an
21 involuntary condition is cruel and unusual. The Eighth Amendment prohibits the infliction of
22 cruel and unusual punishment in three ways: it limits the type of punishment that can be imposed
23 on those convicted of crimes; it proscribes punishment grossly disproportionate to the severity of
24 the crime; and it imposes substantive limits on what can be made criminal. (*Ingraham v. Wright*
25 (1977) 430 U.S. 651, 667 [51 L.Ed.2d 711, 727-728, 97 S. Ct. 1401].) The last limitation, which

1 is at issue here, is “to be applied sparingly.” (Ibid.) The Supreme Court thoroughly analyzed the
 2 concept in *Tobe* stating:

3 “As the district court observed in *Joyce v. City and County of San Francisco*, *supra*,
 4 846 F.Supp. 843, 857, the Supreme Court has not held that the Eighth Amendment prohibits
 5 punishment of acts derivative of a person's status. Indeed, the district court questioned whether
 6 “homelessness” is a status at all within the meaning of the high court's decisions. “As an
 7 analytical matter, more fundamentally, homelessness is not readily classified as a ‘status.’ Rather,
 8 as expressed for the plurality in *Powell* by Justice Marshall, there is a ‘substantial definitional
 9 distinction between a “status” ... and a “condition” ...’ 392 U.S. at 533, 88 S.Ct. at 2155. While
 10 the concept of status might elude perfect definition, certain factors assist in its determination,
 11 such as the involuntariness of the acquisition of that quality (including the presence or not of that
 12 characteristic at birth). *see Robinson*, 370 U.S. at 665-69 & [fn.] 9, 82 S.Ct. at 1420-21 & [fn.] 9,
 13 and the degree to which an individual has control over that characteristic.” (846 F.Supp. at p.
 14 857.)” *Tobe*, *supra*, 9 Cal.4th at p. 1105. In *Tobe* there were declarations to the effect that “On
 15 any given night... the number of shelter beds available was more than 2,500 less than the need.”
 16 *Supra*, at p. 1083. Thus on any given night in Orange County, for those 2,500 people their
 17 homeless condition was involuntary. *See also, Lehr v. City of Sacramento*, (E.D. Cal. 2013) 624
 18 F. Supp.2d 128 (1200 persons without shelter on any given night in Sacramento, but finding no
 19 Eighth Amendment prohibition for Sacramento’s camping ordinance as it effected homeless
 20 individuals.)²

21 Respondent asserts that Appellant’s argument here is asking the court to find whether
 22 EMC § 93.02 as applied to him violates the Eighth Amendment, but that he failed to raise the
 23 issue in the trial court and that the issue was never decided by the trial court. Obviously a facial
 24 challenge was made by way of demurrer alleging the ordinance was in violation of the Eighth
 25 Amendment. We affirm the lower court’s rationale in denying that challenge. However, the “as
 applied” argument is closely related to Appellant’s necessity defense.³ Essentially, if Appellant
 had nowhere to find lodging on the occasions in question his condition was involuntary. The
 issue was hotly contested by the parties here, and evidence was presented on both sides. The

² Appellant does not cite *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3d 1118, which offers a contrary position. *Jones* was vacated upon settlement of a Federal suit. An excellent discussion of the Eighth Amendment issue is found in *Ashbauer v. City of Arcata*, 2010 US Dist LEXIS 126627 (N.D. Cal. Aug 19, 2010). There the court was even more definitive as to the Eighth Amendment application to homelessness stating: “Because Sections 10004 and 10006 proscribe conduct, not status, Plaintiffs’ facial challenges fail to state a claim under *Robinson* and *Powell*. See *U.S. v. Ocegueda*, 564 F.2d 1363, 1366-67 (9th Cir. 1977) (federal statute prohibiting heroin users from the act of acquiring firearms did not violate *Robinson* ban on status crimes). Furthermore, Plaintiffs’ as-applied challenges fail to state a claim because under clearly established federal law, the Eighth Amendment does not prohibit ordinances that criminalize involuntary conduct such as sleeping or camping outside even though such conduct is beyond each Plaintiff’s control because they are homeless.”

³ Unlike the legal determination subject to *de novo* review in evaluating denial of the demurrer, the “as applied” analysis is a factual determination subject to the “substantial evidence” standard on review.

1 jury decided that Mr. Carr had reasonable alternatives to violating the ordinance. It is clear
2 that he chose not to avail himself of lodging at the Eureka Rescue Mission despite the ability to
3 opt out of its religious services. While certainly one could make an argument contrary to the jury
4 determination, the jury's determination is supported by substantial evidence.

5 Appellant's argument that EMC §93.02 is fatally defective based upon the lack of a
6 specified *mens rea* is also related to his Eighth Amendment argument. If one violates an
7 ordinance without a culpable mental state then the argument is that the ordinance is prohibiting a
8 condition, presumably one which Appellant could not avoid. In this case the trial court gave
9 CALCRIM 250, Union of Act and Intent: General Intent. That in combination with an instruction
10 on the necessity defense would adequately insure that the jury could not convict Mr. Carr if they
11 found his conduct in violating the statute was involuntary.

12 The court thus rejects the assertion that the failure of EMC § 93.02 to specify a *mens rea*
13 is constitutionally fatal.

14 Turning then to Appellant's assignment of error as instructional error, Appellant
15 proposed two special instructions:

16 1.

17 The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of
18 direct governmental compulsion and is violated by the enactment of laws which establish an
19 official religion whether those laws operated directly to coerce non-observing individuals or not.
[Citations omitted].

19 Moreover, this Court has noted that "[when] the power, prestige and financial support of
20 government is placed behind a particular religious belief, the indirect coercive pressure upon
21 religious minorities to conform to the prevailing officially approved religion is plain. [Citations
22 omitted].

20 And:

21 2.

21 At a minimum, reasonable minds could differ whether defendant acted to prevent a significant
22 evil. Sleep is a physiological need, not an option for humans. It is common knowledge that lack
23 of sleep produces a host of physical and mental problems (mood irritability, energy drain, and low
24 motivation, slow reaction time, inability to concentrate and process information). [Citations
25 omitted].

24 Discussions regarding the proposed jury instructions were not on the record. The Trial
25 Court placed on the record, outside the presence of the jury, the jury instructions that she would

1 be reading to the jury. The Trial Court indicated, "We'll go through them on the record here and
2 if there's any objection or any comment that you need to make on the record, this is the time to
3 do so." (RTII 400:21-23). The Trial Court indicated a number of requested instructions were
4 withdrawn, and specifically would be giving defense instruction number two. (RTII 403:23-25).

5 The defense instruction given was substantially similar to proposed defense instruction 2
6 outlined above, but was modified as follows:

7 2.
8 Sleep is a physiological need, not an option for humans. Loss of sleep produces a host of
9 physical and mental problems (mood irritability, energy drain and low motivation, slow
10 reaction time, inability to concentrate and process information).

11 Proposed defense instruction 1 outlined above, was not given as an instruction in any
12 variation. There is no mention of proposed defense instruction 1 made by the Trial Court, nor
13 either counsel at that point in the proceedings. (RTII 400-404). The Trial Court asked both
14 counsel, "Is there anything anyone wants to put on the record at this time relative to jury
15 instructions?" (RTII 404:16-17). Both counsel responded "no." (RTII 404: 18-19).

16 Respondent maintains that Appellant failed to object to the Trial Court's denial of
17 proposed defense instruction 1 and therefore has forfeited his right to challenge that instruction.
18 Appellant maintains that since the Appellant did not withdraw his request for defense instruction
19 1 any review is preserved. It may well be that the failure of Appellant to state his objection on
20 the record to the Trial Court denial of proposed defense instruction 1 is a waiver of any issue on
21 appeal. However, since the record is not clear it that regard, this Court will address the
22 substantive issued presented.

23 The Trial Court properly did not instruct the jury on proposed defense instruction 1. It is
24 within the purview of the Trial Court to determine if the statute itself passed Constitutional
25 muster, not the jury. Proposed defense instruction 1 would place a legal determination and not a
factual issue before the jury, which is not proper. Furthermore, proposed defense instruction 1

1 does not properly instruct the jury on how to consider any evidence presented and as phrase is
2 incomplete and argumentative. This Court cannot address the issue
3 in more detail, because neither counsel asked the Trial Court to state her reasons on the record
4 for denying the request to give proposed defense instruction 1.

5 The Trial Court did instruct the jury on the defense of legal necessity. (RTII 418:10-
6 419:3). Appellant presented evidence during the course of the trial and argued in his closing
7 that the religious nature of the Eureka Rescue Mission was not an "adequate legal alternative."
8 The Appellant was able to develop and present his theory of his case and the defense of legal
9 necessity. The jury deliberated in this matter, considering the facts presented at trial and the
10 instructions given by the Trial Court. The Appellant was found guilty on all charged offenses.

11 This Court finds no error in the jury instructions given by the Trial Court and the failure
12 to do so was not an abuse of discretion.

13 Based upon the foregoing, the judgment of the trial court is affirmed in its entirety.

14 DATED: APRIL 3, 2015 CHRISTOPHER G. WILSON
15 Christopher G. Wilson, J.

16 We concur:

17
18
19
20 DALE A. REINHOLTSSEN
Dale A. Reinholtsen, J.

21
22
23 JOYCE D. HINRICHS
Joyce D. Hinrichs, J.

STATE OF CALIFORNIA,) COUNTY OF HUMBOLDT) SS. AFFIDAVIT OF SERVICE BY
MAIL

I, HARLA SANTOS, say:

That I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, Eureka, California; that I served a true copy of the OPINION by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

- Hon. Marilyn B. Miles – placed in mailbox – Court Executive Office
- ✓Cyndy Day-Wilson- placed in attorney's mailbox – Court Operations Box #63
- Tracy Rain, placed in attorney's mailbox – Court Operations Box #

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 3rd day of APRIL 2015, at the City of Eureka, County of Humboldt, State of California. KERRI KEENAN, Clerk of the Court

By HARLA SANTOS
Deputy Clerk