



October 28, 2011

Via US Mail, Fax and Email

Ashley Swearengin, Mayor
Fresno City Hall
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Fresno, CA 93721-3600
Fax: 559-621-7990
mayor@fresno.gov

Re: Compliance with Settlement Agreement in *Kincaid v. City of Fresno* Concerning
Destruction of Homeless People's Property

Dear Mayor Swearengin:

I am writing on behalf of the American Civil Liberties Union of Northern California and as class counsel in *Kincaid v. City of Fresno*, No. 06-CV-1445-OWW (E.D. Cal.). It has come to our attention that the City of Fresno, apparently with the assistance of Caltrans and the CHP, has posted "Notices of Trespass and Cleanup" in several areas where homeless people are living, and has begun taking actions to enforce these notices. As you likely know, such operations are covered by the 2008 settlement agreement in the *Kincaid* case, and we are concerned at reports of violations of that agreement. Specifically, we have been informed that workers are taking and immediately destroying personal property that, although unattended, appears not to have been abandoned. We are therefore writing to remind you of your obligations under the *Kincaid* settlement agreement and to ask that you ensure that workers follow the rules set forth in that agreement.¹

The *Kincaid* agreement requires Fresno to follow detailed procedures when it contemplates removing items of personal property that may belong to homeless people; Caltrans is also required to abide by the constitutional rules set forth in Judge Wanger's original injunction. Specifically, § 3.1.2 of the settlement states that the

City of Fresno Defendants and all agents and employees of the City of Fresno will, for a period of not less than 5 years from the day this settlement is approved by the Court, comply with the provisions of Fresno Administrative Order No. 6-23.

¹ The full agreement, along with a copy of Fresno Administrative Order No. 6-23, is available on the ACLU-NC website at http://www.aclunc.org/cases/closed_cases/asset_upload_file890_8469.pdf

In turn, the provisions of Administrative Order No. 6-23 (which is incorporated into the agreement) mandate that workers cannot destroy items that may be a homeless persons' property unless it is clear beyond a reasonable doubt that the items have been abandoned:

the City of Fresno shall not destroy any materials of apparent value which appears to be the personal property of any individual. Personal property may include clothing, shoes, jackets, tents, sleeping bags, bed rolls, back packs, duffel bags, bicycles, tools, watches, jewelry, audio and video equipment, medications, toiletries, eyeglasses, purses, handbags, personal papers, equipment, photographs, books and baby strollers. [T]he fact that property is unattended does not necessarily mean that it has been discarded. Reasonable doubt about whether property is "trash or debris" or valuable property should be resolved in favor of the conclusion that the property is valuable and has not been discarded.²

In other words, only property that has clearly been abandoned by its owner may be destroyed; the rest must be stored for retrieval by its owner under the settlement agreement and under California Civil Code § 2080 *et seq.*

And, as the settlement suggests, workers who are trying to determine whether or not an item is has been abandoned should be mindful that items such as tents, clothing, and personal effects will rarely constitute abandoned property. As Judge Wanger held when he ordered the City to stop seizing and destroying property belonging to homeless people,

in California, as under the common law, an item is the property of its owner unless the owner intentionally and voluntarily abandons it because "she simply no longer desires to possess the thing being abandoned." 1 Cal.Jur.3d Lost and Escheated Property, Sec. 2; *See Katsaris v. United States* 684 F.2d 758, 761-62 (11th Cir.1982). Here, the evidence demonstrates that Plaintiffs did not intend to abandon their tents, carts, clothing, bicycles, personal effects, memorabilia, and other property that they need to survive, and no reasonable official could believe this to be the case. Nor can the City treat property as abandoned and trash just because the owner has not removed it in the time the government has allotted. *A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir.1998).³

Thus, workers should be storing all usable items that they encounter when they are enforcing cleanup notices unless it is clear beyond a reasonable doubt that the owner of that property has decided that he or she no longer wishes to possess that item.

² Fresno Administrative Order No. 6-23 § I(A)(3)-(4)

³ *Kincaid v. City of Fresno*, 2006 WL 3542732 (E.D. Cal. Dec. 8, 2006), Statement of Decision and Findings Re: Plaintiffs' Application for A Preliminary Injunction, Conclusion of Law #13.

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The *Kincaid* settlement agreement has been in effect for well over three years, and we are pleased that we have received only scattered reports of violations, most of which we were able to resolve amicably with the City. This shows us that City workers are willing and able to follow the provisions of that agreement, including Administrative Order No. No. 6-23 (which, of course, was drafted by the City). We therefore hope that this reminder of the settlement's terms will ensure that they continue to do so.

If you have any questions or concerns please feel free to contact me at mrisher@aclunc.org or 415.293.6373.

Sincerely,

A handwritten signature in black ink, appearing to read "Mr. MTR", written in a cursive style.

Michael T. Risher
Staff Attorney

cc: Mark Scott, City Manager, City of Fresno
Malcolm Dougherty, Director, Caltrans
Ronald W. Beals, Chief Counsel, Caltrans