Council Study Session

November 6, 2023

Agenda Item	Balancing Homelessness Services with Public Space Regulations for a More Livable City	
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Item Type	Requested by Council ☐ Update ☐ Request for Direction ☐ Presentation ☒	

SUMMARY

Over the past two decades, the legal landscape surrounding homelessness and transient populations in Oregon has evolved significantly. The City of Ashland has not been immune to these changes and has experienced a substantial impact. Ashland's ordinances and law enforcement practices have continuously adapted to cope with the growing influx of homeless individuals. However, recent federal and state laws have imposed additional requirements on cities, necessitating specific adjustments to Ashland's longstanding laws and approach to camping and public space occupation.

Over the last year and a half, the city has diligently worked to establish alternative shelter spaces for homeless individuals. As a result, the city is now at a crucial juncture, poised to revise its prohibited camping ordinance. This revision aims to effectively guide homeless individuals toward using the newly established shelter spaces while ensuring legal compliance and addressing the broader issue of homelessness in our community.

This study session aims to provide the Council with an overview of recent case law and pertinent legislative developments. In light of these updates, the legal department will present a series of proposed modifications to our existing ordinances. These changes are designed to strike a balance between recognizing the unique challenges faced by the homeless population and safeguarding the integrity of our public spaces.

Furthermore, this study session will introduce the concept of an 'Ashland Livability Team,' inspired by successful models in cities such as Medford and others. The primary objective of this proposed team is to approach the issue of homelessness through a multifaceted strategy that combines enforcement measures with proactive outreach efforts. The overarching goal is to enhance livability in our community while simultaneously providing homeless individuals with opportunities to transition toward stable and independent living.

POLICIES, PLANS & GOALS SUPPORTED

Current city priorities encompass upholding effective code enforcement, promoting equity of access, and strong supportive city services, and broadening social and economic opportunities for every member of our community.

BACKGROUND AND ADDITIONAL INFORMATION

Civil rights lawsuits filed in federal courts have contested the legality of camping prohibitions, resulting in restrictions on the conventional enforcement of these measures. These legal challenges have invoked the 8th Amendment, which safeguards individuals against cruel and unusual punishment. In a series of rulings, the courts have maintained that it is essentially impermissible to penalize individuals for engaging in basic life activities, such as sleeping, lying, or sitting, particularly when they are involuntarily homeless and lack alternative locations to conduct these essential daily functions. You can find an in-depth explanation of the developing

case law in this field on homelessness, provided by the League of Oregon Cities. Oregon's legislature has anticipated the need for comprehensive protections for homeless individuals on public property. This has led to the passage of laws such as HB 3115 and HB 3124, which went into effect in July, 2023.

The proposed camping ordinance aims to provide a concise approach the city's capacity and necessity to regulate camping on public property in a way that differentiates between addressing behavior rather than the status of individuals who are involuntarily homeless. Prohibited Camping and Prohibited Occupancy are updated versions of ordinances previously employed by our city, as well as by most municipalities throughout the state. What sets Ashland apart is its distinctive prohibition on camping or occupying a specific public area with the intent of excluding others from its use, rather than establishing a temporary campsite for the purpose of "maintaining a temporary place to live," which is typically the norm in ordinances of other Oregon cities. This shift in approach signifies a departure from prohibiting individuals from living in public spaces and, instead, places emphasis on addressing the issue of individuals establishing residency or asserting a sense of ownership over public property. The definition of occupancy also establishes the times in which people are prohibited from exclusively using public spaces for camping, lying or sitting and the length of time for such use during the permitted times.

The changes to the prohibited camping ordinance concentrate on clarifying definitions for phrases that have either been utilized or left ambiguous by federal courts, as well as in HB 3115 and HB 3124. For instance, the term "involuntarily homeless" in the proposed ordinance aligns precisely with the courts' established definition of the term. In contrast, HB 3115 and HB 3124 employ terms like "established camping site" and "apparent value or utility" to respectively specify the duration a campsite must remain in place and what belongings can or cannot be left at that campsite. These clear definitions provide a community standard that aligns with language in relevant case law and that will allow for equal, fair, and compassionate enforcement.

The remaining adjustments to these ordinances are crafted to align with established "time, place, and manner" regulations commonly applied in constitutional analyses of government laws. These ordinances are designed to prevent individuals from camping on streets, parks, or other unsuitable areas. Defendants are given the option to cease their occupation of the site, or they may face citation and penalties. The restrictions related to the "time" and duration for camping, lying, or sitting, as previously explained, are specified within the definition of "occupy or occupancy."

In terms of location or "place" restrictions, certain areas are designated as inherently prohibited for any form of camping. These areas are typically identified as sensitive areas to ensure public safety, well-being, and the preservation of public spaces, such as parks and buildings. There are amendments to the ordinance that address unique challenges posed by camping in cars or RVs on public streets.

Additionally, there are considered changes to the City's Persistent Violation ordinance to not only correct the boundaries of the existing Enhanced Law Enforcement Area ("ELEA") but to create ELEAs for other areas that are especially sensitive or prone to increased unlawful activity and then becoming an attraction for more such activity. Legal is also evaluating if there are avenues to address drug use in public without running afoul with Measure 110 preemption issues.

Regarding “manner” regulation, this ordinance anticipates situations where individuals experiencing involuntary homelessness may not find available shelter spaces within the city limits. In such cases, the city may enter into contracts with organizations across the region that offer accessible shelter, easily reachable via local public transit, and designed and operated to safeguard involuntarily homeless individuals and other vulnerable populations for up to 72 hours at a single location. Oregon's new laws also establish specific responsibilities for the city in managing property left behind by both homeless individuals and others who may have left their belongings due to lack of alternatives. In these instances, the ordinance sets reasonable limits on what the city is required to store and the quantity thereof.

FISCAL IMPACTS

None

SUGGESTED NEXT STEPS

Suggest any modifications to the proposed ordinances and ask to have them noticed to schedule a first read.

REFERENCES & ATTACHMENTS

Proposed ORDINANCE RELATING TO PROHIBITED CAMPING AND PROHIBITED OCCUPANCY; AMENDING AMC CHAPTER 10.46.020 AND AMC 10.46.030

ORDINANCE NO. _____

AN ORDINANCE RELATING TO PROHIBITED CAMPING AND PROHIBITED OCCUPANCY; AMENDING AMC CHAPTER 10.46.020 AND AMC 10.46.030

Annotated to show deletions and additions to the Ashland Municipal Code sections being modified. Deletions are **~~bold lined through~~**, and additions are **bold underlined.**

WHEREAS, the City of Ashland must balance and prioritize several interests: recognition of the essential human dignity of everyone in the City of Ashland; the need to have safe and orderly conditions in City rights-of-way for the safety and benefit of everyone in Ashland; the right of everyone in Ashland to have shelter and safety; and respect for public spaces and public property in service to the entire community.

It is in the public interest to regulate public streets and dedicated rights of way in a way that could allow all to use the roads and sidewalks as they are intended and in the way that they remain safe and accessible. Similarly, it is in the public interest to regulate park spaces, playgrounds, and other public areas protected by the nature of their cultural and historic character and their importance to the businesses and community that relies upon and enjoys their preservation.

The City acknowledges that living on its streets is often a last resort for individuals. For many of these persons the lack access to shelter is involuntary due to unforeseen circumstances beyond a person's control that occurs when a person lacks viable options to obtain housing due to factors such as economic hardship, loss of social network, health or disability, or having exhausted available options for temporary or permanent housing assistance.

This chapter is intended to regulate the use of public rights-of-way and City property to protect and preserve the above described public places for their designed and intended purposes, while providing alternative space and shelter to rest and sleep for personswho lack access to suitable temporary shelter due to either financial inability or the unavailability of free, viable options.

While recent federal case law is unclear as to whether the city can differentiate between those who voluntarily choose to live homeless from those who are homeless involuntarily, this chapter and the City's enforcement efforts are primarily intended to minimizing public health and safety concerns related to survival camping in public areas, taking into account the resources and opportunities available to those experiencing involuntary homelessness.

Those persons who are involuntarily homeless should feel secure that they will not be penalized for their condition. The objective of this ordinance is to differentiate between those who genuinely lack alternatives and use public spaces out of necessity, and those who have access to suitable alternative spaces and shelter but instead willfully exploit public

spaces for personal gain or advantage, to the detriment of the general public that includes the involuntarily homeless population.

THE PEOPLE OF THE CITY OF ASHLAND DO ORDAIN AS FOLLOWS:

SECTION 10.46. Ashland Municipal Code Chapter 10.46 is hereby amended as follows:

Section 10.46.010. Definitions.

A. **"Apparent value or utility" in reference to personal property means property that is essential in practicality and significance to the owner's daily life and well-being, and includes but is not limited to, clothing, bedding, personal hygiene items, identification documents, and any tools or resources necessary for survival and meeting basic needs, maintaining dignity, and facilitating self-care. This definition does not include such property as non-functional or broken items, excessive or redundant items, hazardous or dangerous materials, items with limited or no personal value.**

B. "To camp" means to set up or to remain in or at a campsite.

C. "Campsite" means any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove, fire, or cooking apparatus, other than in a designated picnic area, is placed, established, maintained, or occupied, so as to exclude the use of public property by the general public, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

D. "Established camping site" means a campsite that has been in its current location for at least 72 hours. In the absence of evidence regarding the age of a campsite, a camping site is presumed established.

E. "Designated space or shelter" those areas as depicted in Exhibit A attached to the ordinance codified in this section, and includes adequate shelter that is readily accessible by local public transit, and that is designed and reasonably operated for the purpose of protecting involuntarily homeless persons and other at-risk populations for up to 72 hours in one location.

G. "Involuntarily homeless" means a person who lacks access to suitable temporary shelter due to either financial inability or the unavailability of free, viable options.

H. "Occupy" or "Occupancy" means to maintain physical control over a publicly owned area of 50 square feet or greater by a person or person's private property, wherein the primary effect is to exclude the use of the public property by the general public for more than two (2) hours during daytime hours between 8:00 AM and 8:00 P.M.

SECTION 10.46.020 . Camping Prohibited

A. **Except as otherwise provided herein,** no person shall camp in or upon any sidewalk, street, alley, lane, public right-of-way, business-front, park, playground, **Enhanced Law Enforcement Area(s) defined in AMC 10.120.010,** or any other publicly owned property or under any bridge or viaduct.

B. **The prohibition on camping may be temporarily suspended under the following conditions:**

   a. **A camping exemption due to an emergency in accordance with AMC 2.62;**

   b. The offender is Involuntarily Homeless and a Designated Space or Shelter is unavailable.

C. Camping is strictly prohibited under any circumstance that includes existence of a fire or gas stove, or when the campsite exceeds 100 square feet (10 feet by 10 feet), or when located:

   i. On Sidewalks,

   ii. Lithia Park and parks with playgrounds,

   iii. The Enhanced Law Enforcement Area(s) defined in AMC 10.120.010

   iv. Within 250 feet of a preschool, kindergarten, elementary or secondary school, or a childcare center licensed, certified or authorized under ORS 329a.250-329a.460, ORS 418.205 to 418.970: OAR 419-410-0010 to OAR 419-490--0170,

   v. Within 250 feet of a Designated Space or Shelter;

   vi. Within 250 feet of freeway entrance or exits;

   vii. Within 150 feet of other campsites;

viii. **Within 100 feet of any river or steam; and**

ix. **Attached to any fence, trees, building, or vehicle.**

D. **Involuntarily Homeless persons who use vehicles for shelter in a lawful parking space in the following circumstances:**

a. **The vehicle must be operational and must be moved at least 1000 feet from its original location every 24 hours.**

b. **The parking space cannot be within a 100' radius of any residence.**

c. **No building or erecting of any structures connecting or attaching to vehicles is permitted, including tents that are not designed and manufactured to be attached to a vehicle.**

d. **Persons may not accumulate, discard or leave behind garbage, debris, unsanitary hazardous materials, or other items of no apparent utility in public rights-of-way, on City Property, or on any adjacent public or private property.**

e. **All animals must be under the keeper's control or otherwise leashed or crated at all times.**

f. **Dumping of gray water (i.e. wastewater from baths, sinks, and the like) or black water (i.e. sewage) into any facilities or places not intended for gray water or black water disposal is prohibited. This includes but is not limited to storm drains, which are not intended for disposal of gray water or black water.**

E. **Except as provided herein, the City will remove established campsites and unclaimed property having Apparent Value or Utility from a campsite as provided by ORS 195.505.**

a. **The following campsites are subject to immediate removal:**

i. **Campsites that are not established;**

ii. **Site contamination by hazardous materials, fire hazards, a public health emergency or other immediate danger to human life or safety;**

iii. **The occurrence or presence of evidence of criminal activity or violation of the Ashland Municipal Code (excluding this offense)**

b. **Property held having no apparent value or utility, unless hazardous, will be held for fourteen (14) days upon the demand of owner, and processed as follows:**

i. **The owner may appeal the determination in accordance with AMC 2.30, seeking to have the determination rescinded and the property returned. The appeal notice shall specify the relief sought and the reason for said relief.**

ii. **The Hearing Officer shall uphold the determination if, upon de novo review, the preponderance of the evidence establishes that the property does not meet the definition of having apparent value or utility according to AMC 10.46.010(A).**

F. **The City Manager has the authority to establish additional administrative rules regarding time, place, and manner regulations as deemed necessary to address particular situations arising from conditions affecting Involuntarily Homeless individuals, and that are intended to safeguard the safety, health, and welfare of both the general public and those who are Involuntarily Homeless.**

~~**B. Any person who violates any provision of this Chapter is subject to Section 1.08.020 of the Ashland Municipal Code. Any violation of this section is a Class IV Violation. (Ord. 3137, amended, 2017; Ord. 3026, amended, 08/03/2010; Ord. 2972, amended, 11/04/2008)**~~

SECTION 10.46.030. ~~Sleeping on Benches.~~ Prohibited Occupancy.

A. Subject to AMC 10.46.020 or authorized permit, no person shall occupy a public area or street furniture during the time as provide in definitions of "Occupancy" defined under AMC 10.46.010 H.

B. Any person who violates any provision of this Chapter is subject to Section 1.08.020 of the Ashland Municipal Code. Any violation of this section is a Class IV Violation. (Ord.

~~**SECTION 10.46.040. Removal of Campsite**~~

A. ~~Prior to removing the campsite, the City shall post a notice, 24- hours in advance. All posted notices shall be in English and Spanish. A City enforcement officer shall not issue a~~

~~citation for violation of Chapter 10.46 if the citation would be issued within 200 feet of the notice (identified above) and within two hours before or after the notice was posted.~~

~~B. At the time that a 24-hour notice is posted, the City shall inform a local agency that delivers social services to homeless individuals where the notice has been posted.~~

~~C. The local agency may arrange for outreach workers to visit the campsite where a notice has been posted to assess the need for social service assistance in arranging shelter and other assistance.~~

~~D. All personal property shall be given to the police department whether 24-hour notice is required or not. The property shall be stored for a minimum of 60 days during which it will be reasonably available to any individual claiming ownership. Any personal property that remains unclaimed for 60 days may be disposed of consistent with state law and AMC 2.44 for disposition of found, lost, unclaimed or abandoned property, as applicable. For purposes of this paragraph, "personal property" means any item that is reasonably recognizable as belonging to a person and that has apparent utility. Items that have no apparent value or utility or are in an unsanitary or putrescent condition may be immediately discarded. Weapons, drug paraphernalia and items that appear to be either stolen or evidence of a crime shall be given to the police department.~~

~~E. The 24-hour notice required under subsection D of this section shall not apply:~~

~~1. When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring.~~

~~2. In the event of an exceptional emergency such as possible site contamination by hazardous materials or when there is immediate danger to human life or safety. (Ord. 2972, amended, 11/04/2008)~~

SECTION 10.46.050. Removal of Campsite

A Violation of this section is punishable by an AMC Class IV fine. In lieu of a fine the may be converted the eight hours community service.

B. The court shall consider in mitigation of any punishment imposed upon a person convicted of prohibited camping whether or not the person immediately removed the campsite upon being cited. For purpose of this section, removal of the campsite shall include all litter, including but not limited to bottles, cans, garbage, rubbish and items of no apparent utility, deposited by the

person in and around the campsite. All litter in and around the campsite shall be presumed to be deposited by the person convicted of prohibited camping. Such presumption shall be rebuttable, however. **If an offender, who has been cited for a violation of this Section, can show meaningful engagement with a referred service provider or a similar one before the hearing, the judge may exercise discretion to reduce or waive the fine.** (Ord. 3026, amended, 08/03/2010; Ord. 2972, amended, 11/04/2008)

SECTION 10.46.050. Application outside City

Pursuant to ORS 226.010, this chapter applies to acts committed on park property owned by the City that is located outside the City. (Ord. 2972, amended, 11/04/2008)

SECTION 3. Codification. Provisions of this Ordinance shall be incorporated in the City Code, and the word "ordinance" may be changed to "code", "article", "section", or another word, and the sections of this Ordinance may be renumbered or re-lettered, provided however, that any Whereas clauses and boilerplate provisions (*i.e.*, Sections [No(s.)] need not be codified, and the City Recorder is authorized to correct any cross-references and any typographical errors.

The foregoing ordinance was first read by title only in accordance with Article X, Section 2(C) of the City Charter on the _____day of _____, 2023, and duly PASSED and ADOPTED this ____ day of _____, 2023.

ATTEST:

_____
Alissa Kolodzinski, City Recorder

SIGNED and APPROVED this _____ day of _____, 2023.

_____
Tonya Graham, Mayor

GUIDE

League of Oregon Cities

Guide to Persons Experiencing Homelessness in Public Spaces

JUNE 2022

Updated October 2022

Guide to Persons Experiencing Homelessness in Public Spaces

Cities possess a significant amount of property – from parks, greenways, sidewalks, and public buildings to both the developed and undeveloped rights of way – sizable portions of a city belong to the city itself, and are held in trust for particular public purposes or use by residents. Historically cities have regulated their various property holdings in a way that prohibits persons from camping, sleeping, sitting or lying on the property. The historic regulation and management of a city's public spaces must be reimagined in light of recent federal court decisions and the Oregon Legislature's enactment of HB 3115, both of which direct cities to consider their local regulations within the context of available local shelter services for those persons experiencing homelessness.

As the homelessness crisis intensifies, and the legal parameters around how a city manages its public property contract, cities need guidance on how they can regulate their property in a way that respects each of its community members, complies with all legal principles, and protects its public investments. A collective of municipal attorneys from across the state of Oregon convened a work group to create this guide, which is intended to do two things: (1) explain the legal principles involved in regulating public property in light of recent court decisions and statutory enactments; and (2) provide a checklist of issues/questions cities should review before enacting or amending any ordinances that may impact how their public property is managed.

Legal Principles Involved in Regulating Public Property

Two key federal court opinions, *Martin v. Boise* and *Blake v. Grants Pass*, have significantly impacted the traditional manner in which cities regulate their public property. In addition to these two pivotal cases, the Oregon Legislature enacted HB 3115 during the 2021 legislative session as an attempt to clarify, expand, and codify some of the key holdings within the court decisions. An additional piece of legislation, HB 3124, also impacts the manner in which cities regulate public property in relation to its use by persons experiencing homelessness. And, as the homelessness crisis intensifies, more legal decisions that directly impact how a city regulates its public property when it is being used by persons experiencing homelessness are expected. Some of these pending cases will seek to expand, limit, or clarify the decisions reached in *Martin* and *Blake*; other pending cases seek to explain how the well-established legal principle known as State Created Danger applies to actions taken, or not taken, by cities as they relate to persons experiencing homelessness.

A. The Eighth Amendment to the U.S. Constitution

The Eighth Amendment to the U.S. Constitution states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. In 1962, the U.S. Supreme Court, in *Robinson v. California*, established the principle that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." 370 U.S. 660 (1962).

B. Martin v. Boise

In 2018, the U.S. 9th Circuit Court of Appeals, in *Martin v. Boise*, interpreted the Supreme Court's decision in *Robinson* to mean that the Eighth Amendment to the U.S. Constitution "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter … because sitting, lying, and sleeping are … universal and unavoidable consequences of being human." The court declared that a governmental entity cannot "criminalize conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping." 902 F3d 1031, 1048 (2018).

The 9th Circuit clearly stated in its *Martin* opinion that its decision was intentionally narrow, and that some restrictions on sitting, lying, or sleeping outside at particular times or in particular locations, or prohibitions on obstructing the rights of way or erecting certain structures, might be permissible. But despite the narrowness of the decision, the opinion only truly answered some of the many questions cities are rightly asking. After *Martin*, municipal attorneys could advise their clients in limited ways: some things were clear, and others were pretty murky.

One of the most commonly misunderstood aspects of the *Martin* decision is the belief that a city can never prohibit a person experiencing homelessness from sitting, sleeping or lying in public places. The *Martin* decision, as noted, was deliberately limited. Cities are allowed to impose city-wide prohibitions against persons sitting, sleeping, or lying in public, provided the city has a shelter that is accessible to the person experiencing homelessness against whom the prohibition is being enforced. Even if a city lacks enough shelter space to accommodate the specific person experiencing homelessness against whom the prohibition is being enforced, it is still allowed to limit sitting, sleeping, and lying in public places through reasonable restrictions on the time, place and manner of these acts ("where, when, and how") – although what constitutes a reasonable time, place and manner restriction is often difficult to define.

A key to understanding *Martin* is recognizing that an analysis of how a city's ordinance, and its enforcement of that ordinance, can be individualized. Pretend a city has an ordinance which prohibits persons from sleeping in city parks if a person has nowhere else to sleep. A person who violates that ordinance can be cited and arrested. A law enforcement officer finds 11 persons sleeping in the park, and is able to locate and confirm that 10 of said persons have access to a shelter bed or a different location in which they can sleep. If any of those 10 persons refuses to avail themselves of the available shelter beds, the law enforcement officer is within their rights, under *Martin*, to cite and arrest the persons who refuse to leave the park. The practicality of such an individualized assessment is not to be ignored, and cities are encouraged to consider the ability to make such an assessment as they review their ordinances, polices, and procedures.

What is clear from the *Martin* decision is the following:

1. Cities cannot punish a person who is experiencing homelessness for sitting, sleeping, or lying on public property when that person has no place else to go;

2. Cities are not required to build or provide shelters for persons experiencing homelessness;

3. Cities can continue to impose the traditional sit, sleep, and lie prohibitions and regulations on persons who do have access to shelter; and

4. Cities are allowed to build or provide shelters for persons experiencing homelessness.

After *Martin*, what remains murky, and unknown is the following:

1. What other involuntary acts or human conditions, aside from sleeping, lying and sitting, are considered to be an unavoidable consequence of one's status or being?

2. Which specific time, place and manner restrictions can cities impose to regulate when, where, and how a person can sleep, lie or sit on a public property?

3. What specific prohibitions can cities impose that will bar a person who is experiencing homelessness from obstructing the right of way?

4. What specific prohibitions can cities impose that will prevent a person who is experiencing homelessness from erecting a structure, be it temporary or permanent, on public property?

The city of Boise asked the United States Supreme Court to review the 9th Circuit's decision in *Martin*. The Supreme Court declined to review the case, which means the opinion remains the law in the 9th Circuit. However, as other federal circuit courts begin considering a city's ability to enforce sitting, sleeping and camping ordinances against persons experiencing homelessness, there is a chance that the Supreme Court may review a separate but related opinion to clarify the *Martin* decision and provide clarity to the outstanding issues raised in this guide.

C. Blake v. Grants Pass

Before many of the unanswered questions in *Martin* could be clarified by the 9th Circuit or the U.S. Supreme Court, an Oregon federal district court issued an opinion, *Blake v. Grants Pass*, which provided some clarity, but also provided an additional layer of murkiness.

From the District Court's ruling in the *Blake* case we know the following:

1. Whether a city's prohibition is a civil or criminal violation is irrelevant. If the prohibition punishes an unavoidable consequence of one's status as a person experiencing homelessness, then the prohibition, regardless of its form, is unconstitutional.

2. Persons experiencing homelessness who must sleep outside are entitled to take necessary minimal measures to keep themselves warm and dry while they are sleeping.

3. A person does not have access to shelter if:

- They cannot access the shelter because of their gender, age, disability or familial status;

- Accessing the shelter requires a person to submit themselves to religious teaching or doctrine for which they themselves do not believe;

- They cannot access the shelter because the shelter has a durational limitation that has been met or exceeded; or

- Accessing the shelter is prohibited because the person seeking access is under the influence of some substance (for example alcohol or drugs) or because of their past or criminal behavior.

But much like *Martin*, the *Blake* decision left unanswered questions. The key unknown after *Blake*, is this: What constitutes a minimal measure for a person to keep themselves warm and dry—is it access to a blanket, a tent, a fire, etc.?

On September 28, 2022, the U.S. 9th Circuit Court of Appeals rendered their opinion and affirmed *Blake v. City of Grants Pass.*[1] The 9th Circuit Court of Appeals upheld the U.S. District Court's prior ruling that persons experiencing homelessness are entitled to take necessary minimal measures to keep themselves warm and dry while sleeping outside. The 9th Circuit Court of Appeals noted that the decision in this case was narrow and that "it is 'unconstitutional to [punish] simply sleeping somewhere in public if one has nowhere else to do so.'"[2]

The 9th Circuit Court of Appeals opined that cities violate the Eighth Amendment if they punish a person for the mere act of sleeping outside *or for sleeping in their vehicles at night* when there is no other place *in the city* for them to go.[3] As a result of this ruling, this decision expanded the application of *Martin v. Boise*. The opinion concluded that class actions are permissible in these types of cases and remanded the decision for the District Court to make findings on several outstanding matters in the case.

This opinion, in most respects, affirmed what was already known from both the *Martin* and *Blake* cases. However, the opinion failed to provide much anticipated clarification on several issues, such as what constitutes "necessary minimal measures" to keep warm or dry or what "rudimentary protections from elements" means.

The City of Grants Pass intends to file a petition for an en banc panel rehearing—a petition for the three-judge panel opinion be re-heard by a panel of twelve judges. During the pendency of the petition process, the current opinion is in effect and the outstanding questions remain unanswered by the Court.

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[1] *Johnson v. City of Grants Pass,* 50 F.4th 787 (9th Cir. 2022) [formerly *Blake v. City of Grants Pass;* class representative Blake became deceased during pendency of the appeal.]
[2] *Id.* at 813.
[3] *Id.*

Municipal attorneys are still challenged in determining the answers to such questions as the following: what types of changes should be expected, the severity of those changes, and when those changes will occur. Given the fluidity surrounding the legal issues discussed in this guide, before adopting any new policy, or revising an existing policy, that touches on the subject matter described herein, cities are strongly encouraged to speak with their legal advisor to ensure the policy is constitutional.

D. House Bill 3115

HB 3115 was enacted by the Oregon Legislature during its 2021 session. It is the product of a workgroup involving the LOC and the Oregon Law Center as well as individual cities and counties.

The bill requires that any city or county law regulating the acts of sitting, lying, sleeping or keeping warm and dry outside on public property must be "objectively reasonable" based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness. What is objectively reasonable may look different in different communities. The bill retains cities' ability to enact reasonable time, place and manner regulations, aiming to preserve the ability of cities to manage public spaces effectively for the benefit of an entire community.

HB 3115 includes a delayed implementation date of July 1, 2023, to allow local governments time to review and update ordinances and support intentional community conversations.

From a strictly legal perspective, HB 3115 did nothing more than restate the judicial decisions found in *Martin* and *Blake*, albeit a hard deadline to comply with those judicial decisions was imposed. The bill provided no further clarity to the judicial decisions, but it also imposed no new requirements or restrictions.

E. House Bill 3124

Also enacted during the 2021 legislative session, HB 3124 does two things. First, it changes and adds to existing guidance and rules for how a city is to provide notice to homeless persons that an established campsite on public property is being closed, previously codified at ORS 203.077 *et seq*., now found at ORS 195.500, *et seq*. Second, it gives instructions on how a city is to oversee and manage property it removes from an established campsite located on public property. It is important to remember that HB 3124 applies to public property; it is not applicable to private property. This means that the rules and restrictions imposed by HB 3124 are not applicable city-wide, rather they are only applicable to property classified as public.

HB 3124 does not specify, with any true certainty, what constitutes public property. There has been significant discussion within the municipal legal field as to whether rights of way constitute public property for the purpose of interpreting and implementing HB 3124. The general consensus of the attorneys involved in producing this guide is that rights of way should be considered public property for purposes of HB 3124. If an established homeless camp is located on rights of way, it should generally be treated in the same manner as an established camp

located in a city park. However, as discussed below, depending on the dangers involved with a specific location, exceptions to this general rule exist.

When a city seeks to remove an established camp site located on public property, it must do so within certain parameters. Specifically, a city is required to provide 72-hour notice of its intent to remove the established camp site. Notices of the intention to remove the established camp site must be posted at each entrance to the site. In the event of an exceptional emergency, or the presence of illegal activity other than camping at the established campsite, a city may act to remove an established camp site from public property with less than 72-hour notice. Examples of an exceptional emergency include: possible site contamination by hazardous materials, a public health emergency, or immediate danger to human life or safety.

While HB 3124 specifies that the requirements contained therein apply to established camping sites, it fails to define what constitutes an established camping site. With no clear definition of what the word established means, guidance on when the 72-hour notice provisions of HB 3124 apply is difficult to provide. The working group which developed this guide believes a cautious approach to defining the word established at the local level is prudent. To that end, the LOC recommends that if, for example, a city were to enact an ordinance which permits a person to pitch a tent between the hours of 7 p.m. and 7 a.m., that the city also then consistently and equitably enforce the removal of that tent by 7 a.m. each day, or as close as possible to 7 a.m. Failing to require the tent's removal during restricted camping hours each day, *may*, given that the word established is undefined, provide an argument that the tent is now an established camp site that triggers the requirement of HB 3124.

In the process of removing an established camp site, oftentimes city officials will also remove property owned by persons who are experiencing homelessness. When removing items from established camp sites, city officials should be aware of the following statutory requirements:

- Items with no apparent value or utility may be discarded immediately;
- Items in an unsanitary condition may be discarded immediately;
- Law enforcement officials may retain weapons, drugs, and stolen property;
- Items reasonably identified as belonging to an individual and that have apparent value or utility must be preserved for at least 30 days so that the owner can reclaim them; and
- Items removed from established camping sites in counties other than Multnomah County must be stored in a facility located in the same community as the camping site from which it was removed. Items removed from established camping sites located in Multnomah County must be stored in a facility located within six blocks of a public transit station.

Cities are encouraged to discuss with legal counsel the extent to which these or similar requirements may apply to any camp site, "established" or not, because of due process protections.

F. Motor Vehicles and Recreational Vehicles

Cities need to be both thoughtful and intentional in how they define and regulate sitting, sleeping, lying, and camping on public property. Is sleeping in a motor vehicle or a recreational vehicle (RV) that is located on public property considered sitting, lying, sleeping, or camping on public property under the city's ordinances and policies? This guide will not delve into the manner in which cities can or should regulate what is commonly referred to as car or RV camping; however, cities do need to be aware that they should consider how their ordinances and policies relate to car and RV camping, and any legal consequences that might arise if such regulations are combined with ordinances regulating sitting, lying, sleeping, or camping on public property. Motor and recreational vehicles, their location on public property, their maintenance on public property, and how they are used on or removed from public property are heavily regulated by various state and local laws, and how those laws interact with a city's ordinance regulating sitting, lying, sleeping, or camping on public property is an important consideration of this process. Further, the Court of Appeals opinion in *Blake v. City of Grants Pass* has potential implications in determining how cities can regulate motor vehicles.

G. State Created Danger

In 1989, the U.S. Supreme Court, in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, interpreted the Fourteenth Amendment to the U.S. Constitution to impose a duty upon the government to act when the government itself has created dangerous conditions – this interpretation created the legal principle known as State Created Danger. 489 U.S. 189 (1989). The 9th Circuit has interpreted the State Created Danger doctrine to mean that a governmental entity has a duty to act when the government actor "affirmatively places the plaintiff in danger by acting with 'deliberate indifference' to a 'known or obvious danger.'" *LA Alliance for Human Rights v. City of Los Angeles*, 2021 WL 1546235.

The State Created Danger principle has three elements. First, the government's own actions must have created or exposed a person to an actual, particularized danger that the person would not have otherwise faced. Second, the danger must have been one that is known or obvious. Third, the government must act with deliberate indifference to the danger. *Id*. Deliberate indifference requires proof of three elements:

> "(1) there was an objectively substantial risk of harm; (2) the [state] was subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed; and (3) the [state] either actually drew that inference or a reasonable official would have been compelled to draw that inference." *Id*.

Municipal attorneys are closely reviewing the State Created Danger principle as it relates to the use of public spaces by persons experiencing homelessness for three reasons. First, many cities are choosing to respond to the homeless crisis, the legal decisions of *Martin* and *Blake*, and HB 3115, by creating managed homeless camps where unhoused persons can find shelter and

services that may open the door to many State Created Danger based claims of wrongdoing (*e.g.* failure to protect from violence, overdoses, etc. within the government sanctioned camp). Second, in California, at least one federal district court has recently ruled that cities have a duty to act to protect homeless persons from the dangers they face by living on the streets, with the court's opinion resting squarely on the State Created Danger principle. Third, when imposing reasonable time, place, and manner restrictions to regulate the sitting, sleeping or lying of persons on public rights of way, cities should consider whether their restrictions, and the enforcement of those restrictions, trigger issues under the State Created Danger principle. Fourth, when removing persons and their belongings from public rights of way, cities should be mindful of whether the removal will implicate the State Created Danger principle.

In creating managed camps for persons experiencing homelessness, cities should strive to create camps that would not reasonably expose a person living in the camp to a known or obvious danger they would not have otherwise faced. And if there is a danger to living in the camp, a city should not act with deliberate indifference to any known danger in allowing persons to live in the camp.

And while the California opinion referenced above has subsequently been overturned by the 9th Circuit Court of Appeals, at least one federal district court in California has held that a city "acted with deliberate indifference to individuals experiencing homelessness" when the city allowed homeless persons to "reside near overpasses, underpasses, and ramps despite the inherent dangers – such as pollutants and contaminant." *LA Alliance for Human Rights v. City of Los Angeles,* 2022 WL 2615741. The court essentially found a State Create Danger situation when a city allowed persons experiencing homelessness to live near interstates – a living situation it "knew" to be dangerous.

Before a city official enforces a reasonable time, place, and manner restriction which regulates the sitting, sleeping and lying of persons on public property, the official should review the enforcement action they are about to take in in light of the State Created Danger principle. For example, if a city has a restriction that allows persons to pitch a tent on public property between the hours of 7 p.m. and 7 a.m., a city official requiring the person who pitched the tent to remove it at 7:01 a.m. should be mindful of all environmental conditions present at the time their enforcement order is made. The same thoughtful analysis should be undertaken when a city removes a person and their belongings from the public rights of way.

How Cities Proceed

The law surrounding the use of public spaces by persons experiencing homelessness is newly emerging, complex, and ripe for additional change. In an effort to simplify, as much as possible, the complexity of this legal conundrum, below is an explanation of what municipal attorneys know cities must do, must not do, and may potentially do.

A. What Cities Must Do

In light of the court decisions discussed herein, and the recent House bills enacted by the Oregon Legislature, cities must do the following:

1. Review all ordinances and policies with your legal advisor to determine which ordinances and policies, if any, are impacted by the court decisions or recently enacted statutes.

2. Review your city's response to the homelessness crisis with your legal advisor to ensure the chosen response is consistent with all court decisions and statutory enactments.

   If your city chooses to exclude persons experiencing homelessness from certain areas of the city for violating a local or state law, the person must be provided the right to appeal that expulsion order, and the order must be stayed while the appeal is pending.

3. If your city choses to remove a homeless person's established camp site, the city must provide at least 72-hour notice of its intent to remove the site, with notices being posted at entry point into the camp site.

4. If a city obtains possession of items reasonably identified as belonging to an individual and that item has apparent value or utility, the city must preserve that item for at least 30 days so that the owner can reclaim the property, and store that property in a location that complies with state law.

B. What Cities Must Not Do

When the decisions rendered by the federal district court of Oregon and the 9th Circuit Court of Appeals are read together, particularly in conjunction with Oregon statutes, cities must not do the following:

1. Cities cannot punish a person who is experiencing homelessness for sitting, sleeping, or lying on public property when that person has no place else to go within the city's jurisdiction .

2. Cities cannot prohibit persons experiencing homelessness from taking necessary minimal measures to keep themselves warm and dry when they must sleep outside.

3. Cities cannot presume that a person experiencing homelessness has access to shelter if the available shelter options are:

   - Not accessible because of their gender, age, or familial status;

   - Ones which requires a person to submit themselves to religious teaching or doctrine for which they themselves do not believe;

   - Not accessible because the shelter has a durational limitation that has been met or exceeded; or

   - Ones which prohibit the person from entering the shelter because the person is under the influence of some substance (for example alcohol or drugs) or because of their past or criminal behavior.

C. What Cities May Potentially Do

As previously noted, the recent court decisions lack clarity in many key respects. This lack of clarity, while frustrating, also provides cities some leeway to address the homelessness crisis, specifically with how the crisis impacts the management of public property.

1. Cities may impose reasonable time, place and manner restrictions on where persons, including those persons experiencing homelessness, may sit, sleep, or lie. Any such regulation imposed by a city should be carefully vetted with the city's legal advisor.

2. Cities may prohibit persons, including those persons experiencing homelessness, from blocking rights of way. Any such regulation should be carefully reviewed by the city's legal advisor to ensure the regulation is reasonable and narrowly tailored.

3. Cities may prohibit persons, including those persons experiencing homelessness, from erecting either temporary or permanent structures on public property. Given that cities are required, by *Blake*, to allow persons experiencing homelessness to take reasonable precautions to remain warm and dry when sleeping outside, any such provisions regulating the erection of structures, particularly temporary structures, should be carefully reviewed by a legal advisor to ensure the regulation complies with all relevant court decisions and Oregon statutes.

4. If a city chooses to remove a camp site, when the camp site is removed, cities may discard items with no apparent value or utility, may discard items that are in an unsanitary condition, and may allow law enforcement officials to retain weapons, drugs, and stolen property.

5. Cities may create managed camps where person experiencing homelessness can find safe shelter and access to needed resources. In creating a managed camp, cities should work closely with their legal advisor to ensure that in creating the camp they are not inadvertently positioning themselves for a State Created Danger allegation.

D. What Cities Should Practically Consider

While this guide has focused exclusively on what the law permits and prohibits, cities are also encouraged to consider the practicality of some of the actions they may wish to take. Prior to imposing restrictions, cities should work with all impacted staff and community members to identify if the suggested restrictions are practical to implement. Before requiring any tent pitched in the public right of way to be removed by 8 a.m., cities should ask themselves if they have the ability to practically enforce such a restriction – does the city have resources to ensure all tents are removed from public property every morning 365 days a year? If a city intends to remove property from a camp site, cities should practically ask themselves if they can store said property in accordance with the requirements of HB 3124. Both questions are one of only dozens of practical questions cities need to be discussing when reviewing and adopting policies that touch on topics covered by this guide.

Conclusion

Regulating public property, as it relates to persons experiencing homelessness, in light of recent court decisions and legislative actions, is nuanced and complicated. It is difficult for cities to know which regulations are permissible and which are problematic. This guide is an attempt to answer some of the most common legal issues raised by *Martin*, *Blake/Johnson*, HB 3115, HB 3124, and the State Created Danger doctrine – it does not contain every answer to every question a city may have, nor does it provide guidance on what is in each community's best interest. Ultimately, how a city chooses to regulate its public property, particularly in relation to persons experiencing homelessness, is a decision each city must make on its own. A city's decision should be made not just on the legal principles at play, but on its own community's needs, and be done in coordination with all relevant partners. As with any major decision, cities are advised to consult with experts on this topic, as well as best practice models, while considering the potential range of public and private resources available for local communities. Cities will have greater success in crafting ordinances which are not only legally acceptable, but are accepted by their communities, if the process for creating such ordinances is an inclusive process that involves advocates and people experiencing homelessness.

Additional Resources

The League of Oregon Cities (LOC), in preparing this guide, has obtained copies of ordinances and policies that may be useful to cities as they consider their own next steps. Additionally, several municipal advisors who participated in the development of this guide have expressed a willingness to share their own experiences in regulating public rights of way, particularly as it relates to persons experiencing homelessness, with Oregon local government officials. If you believe these additional resources may be of use to you or your city, please feel free to contact a member of the LOC's Legal Research Department.

Recognition and Appreciation

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