Memo

To: Anne Heath

From: Carrie Connelly

Date: April 4, 2023

Re: City of Coburg Implementation of HB 3115/ORS 195.530

Purpose of Memo

In the ever-evolving arena of homelessness regulations, this memo and the accompanying Code Audit seek to clarify next-steps and possible Code amendments for the City. Recognize that the foundations this memo is built upon will certainly shift in the coming months and years. As a result, evaluation of these issues is not static and not a one-time obligation. The City will need to continue its evaluations and adjustments into the future.

This memo is intended to address two recent developments. On September 29, 2022, the Federal Court of Appeals for the Ninth Circuit issued its decision in *Johnson v. Grants Pass* (formerly known as *Blake v. Grants Pass*). The *Johnson* case applies the earlier ruling made in *Martin v Boise*, 920 F.3d 584, 604 (9th Cir. 2019).

The 2021 Oregon legislature attempted to codify this constitutional law in ORS 195.530, which becomes operative on July 1, 2023. In addition, HB 3124 expanded prior statutes regarding how to disband "established" homeless campsites.

City Regulatory Background

The City of Coburg does not forbid camping City-wide on all City-owned property. However, the City does close its parks overnight, and the term "park" is defined broadly to include developed *and* natural resource areas and undeveloped parkland. I was unable to access the Parks and Recreation page on the City's website, so cannot evaluate developed and undeveloped park acreages.

In terms of parking on City streets, the City enforces parking regulations throughout the City with a limit on storing vehicles on City streets. All vehicles are cited after 72 hours in one location. The City also prohibits parking or standing for more than 5 consecutive or non-consecutive days within each calendar quarter. I'm not sure whether this latter restriction is being enforced.

The City has regulations that forbid blocking sidewalks which would be applied to a person sleeping on a sidewalk in such a way as to cause an obstruction. But the City does not prohibit individuals sitting or sleeping on a sidewalk in a way that does not cause an obstruction.

Taken together, the City's regulations would allow overnight camping on City property, apart from its "parks" (e.g., natural areas not subject to the overnight closure, and undeveloped rights-of-way). The City does not forbid sleeping on sidewalks so long as the person is not blocking vehicle or pedestrian access. In addition, the City allows camping in a vehicle on City streets for up to 72 hours.

Martin **and** ***Johnson*** **Cases**

In western states subject to the Ninth Circuit's *Martin* ruling, it is unconstitutional to punish someone for sleeping on public property if that person has nowhere else to sleep. The *Martin* Court cautioned against reading its ruling too broadly. In this regard, the court noted the following:

- Cities are not required to provide adequate shelters for homeless persons;
- Cities have not been ordered to allow homeless individuals to sit, lie, or sleep on city streets at all times and places;
- The ruling does not apply to people who have access to adequate shelter but choose not to use it;
- The ruling leaves open the possibility for an ordinance to prohibit sitting, lying or sleeping outside during particular times of the day or at particular locations; and
- It may be possible for an ordinance to prohibit the obstruction of public rights-of-way or the erection of certain structures.

In July, 2020, Judge Clarke of the United States District Court for the District of Oregon ruled in favor of the plaintiffs on their Eighth Amendment claim against the City of Grants Pass in the case *Blake v. Grants Pass*.

In summary, Judge Clarke's ruling provides that cities need to carve out exceptions where the homeless can lawfully engage in sleeping without risk of violating a camping ordinance. An exception that would likely meet Judge Clarke's opinion would be to relate the camping violation to a certain time limitation (e.g., camping in one location for more than 24 hours) instead of a complete ban on sleeping in public.

The *Blake* case added the following guidance to *Martin*:

- 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.

- Persons experiencing homelessness who must sleep outside are entitled to take necessary minimal measures to keep themselves warm and dry while they are sleeping (e.g., a city could not outlaw use of a sleeping bag in public spaces).

On September 29, 2022, the Federal Court of Appeals for the Ninth Circuit issued its decision in *Johnson v. Grants Pass* (formerly known as *Blake v. Grants Pass*). In the *Johnson* case, the Ninth Circuit had the opportunity to again evaluate the issues raised in *Martin* and determine how the Eighth Amendment might apply to how Grants Pass regulated its homeless population. The court in *Johnson* affirmed the *Martin* analysis and concluded:

> "We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go."

We do not see the *Johnson* ruling as a sea-change in the law or a drastic extension of the *Martin* case. Instead, we see *Johnson* as a rather natural and expected evolution of the *Martin* ruling. At its core, *Johnson* made three minor extensions to *Martin*:

1) Camping includes the ability to stay warm and dry through the use "rudimentary protection" such as a blanket (reflects the District Court's decision in *Blake*);
2) Punishment under the Eighth Amendment includes civil monetary penalties (e.g., civil code enforcement) in addition to criminal monetary penalties (e.g., infraction citations (reflects the District Court's decision in *Blake*); and
3) Camping on public property includes sleeping in a vehicle on public streets.

ORS 195.530 – HB 3115 (2021)

Effective July 1, 2023, ORS 195.530(2) states:

> "Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness."

Keeping warm and dry includes taking protective measures from the cold and rain, such as use of a blanket, but does not include use of fire or flame. ORS 195.530(1)(b).

While intended to codify *Martin* and *Blake*, this statute places an increased burden on cities. Under *Martin* and *Johnson*, cities could largely eliminate constitutional liability by not enforcing local regulations that violate the Eighth Amendment.

ORS 195.530 goes a step further, requiring regulations to be reasonable as judged by the statutory criteria. This changes the legal process used for filing a lawsuit from an "as

applied" challenge, as in *Martin* and *Johnson*, to a "facial" challenge. The City must be proactive to ensure that its adopted regulations meet the statutory criteria. A plaintiff in an ORS 195.530 lawsuit need only show that they are "homeless" and subject to "unreasonable" regulations – enforcement of the regulations does not appear to be a necessary element for a lawsuit under ORS 195.530.

What is objectively reasonable under ORS 195.530 may look different in different communities. The statute 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. Fortuitously, ORS 195.530 incorporates the first two holdings in *Johnson* (points #1 and #2, above).

Martin, *Johnson* and ORS 195.530 all concern regulating "public property." While routinely referenced in association with public parks, the law does not only target park regulations. If the City has other suitable public areas where a person may sleep without punishment, the law does not forbid the closure of public parks from camping.

Under the current law, we can also conclude:

> 1) The Eighth Amendment does not limit the City's ability to evict homeless individuals from particular public places, *if* there are other places for the individuals to go;
> 2) Cities can prohibit sleeping in public parks *if* it also does not prohibit sleeping on other public lands;
> 3) Cities are not prohibited from clearing out a specific homeless encampment because the Eighth Amendment does not establish a constitutional right to occupy public property indefinitely (but see ORS 195.505 procedures for clearing out "established campgrounds"; and
> 4) The Eighth Amendment does not create a right for homeless to occupy any public space of their choosing.

As to parking regulations, the Ninth Circuit cases do not go so far as to require the City to allow the establishment of a permanent vehicle camp within the public right-of-way. While *Martin* and *Johnson* do not speak directly to the contours of vehicle camping allowances, it would be hard to read the cases as forbidding a 72-hour parking regulation.

ORS 195.505 – HB 3124 (2021)

ORS 195.505 requires the City to provide 72 hours' notice before removing homeless individuals from an "established campsite." ORS 195.505 also requires the City to store any unclaimed personal property from the "established campsite" for at least 30 days, unless the personal property is unsanitary or valueless. The City can immediately remove an "established campsite" if it poses a threat to health or safety. Unfortunately, the legislature did not define the term "established campsite."

Absent clarification from the courts, our advice has been that homeless individuals' tents or other camping materials do not become an "established campsite" if the camping is done in accordance with reasonable time/manner/place regulations. For example, if a city has a regulation that permits camping on public property between the hours of 7:00 PM and 7:00 AM and the city consistently enforces that regulation, a campsite in compliance with that regulation does not become an "established campsite" under ORS 915.505. However, if that city did not enforce its regulation, but instead tolerated campsites to remain on public property beyond the permitted times, then it is likely that those campsites became "established campsites" under the statute and the city must comply with ORS 195.505.

Next Steps

Obligations Imposed on Coburg by State and Federal Law

Under the case law described above, as well as ORS 195.530, there are two basic obligations on cities.

1. The City is obligated to cease imposing sanctions for camping, sleeping on public property when no alternative shelter is available. Coburg has no City-wide camping ban, so no Code provision absolutely must be repealed by July 1, 2023.
2. The City is obligated to examine any existing Code provisions regulating sitting, lying, sleeping, or keeping warm and dry outdoors on public property open to public to ensure that they are "objectively reasonable" in relation to those experiencing homelessness.
    a. We recommend amending or repealing Ordinance No. A-246, Section 23(4), which sets a 5 cumulative day parking limit on motor homes used to transport or house the operator or operator's family members.
    b. If needed to ensure sufficient public areas for unhoused to sleep, amend the definition of the term "park" in Ordinance Nos. A-171, Section 2(1) to include only developed parkland.
    c. If the City does not allow camping on other public property or if there is no other public property suited for camping, either repeal Ordinance Nos. A-171, Section 15(2), which forbids any person from using a tent, vehicle, camper, or trailer as shelter for housing or sleeping in any park area, except with a permit between 10 p.m. and 7 a.m., or add an exception for unhoused individuals.
    d. Consider repealing any City-imposed minor curfew, and instead rely solely on state law, ORS 419C.680.
    e. If not yet in place, adopt a policy complying with ORS 197.500 and 197.505 governing the "removal of homeless individuals from camping sites on public property."

Other than these few regulations, the City's current Code appears to comply with ORS 195.530. Regardless, based upon *Johnson* and ORS 195.530, and depending upon changes in the homeless population, ongoing work entails:

1) Know the amount of public space "open" for camping. This does not necessarily need to be a parcel-by-parcel inventory, but there needs to be an accepted mechanism within the City's enforcement staff as to where enforcement measures will not be undertaken to satisfy the federal 8th Amendment.

2) Evaluate the character of that public space available for camping–parks are generally maintained while undeveloped rights-of-way and natural areas are not maintained. For example, if the only unregulated properties available for camping become sodden or full of blackberry brambles, the City's inventory of suitable camping locations would be impacted and its regulations may no longer be "reasonable" under ORS 195.530.

3) The population of homeless (#s) will impact the reasonableness of regulations and can play into the *Johnson* and ORS 195.530 analysis. As a result, the City should have procedures: a) to estimate its homeless population; and 2) monitor whether the City's inventory of "available" public spaces is sufficient for the corresponding homeless population. If "full," regulations and enforcement may need to be adjusted to open up additional City public property.