

CITY OF LYNDEN

PLANNING DEPARTMENT

Heidi Gudde, Planning Director
(360) 354 - 5532



Planning Department Memorandum

To: Council Committees – Camping Ordinance

From: Dave Timmer

Date: November 1, 2021

Re: Public Lands Camping Ordinance

As Cities grapple with homelessness issues, many municipalities in Washington have established ordinances that prohibit “camping” on public property (parks, rights of ways, other public lands). These ordinances can be a very simple “Camping on public property prohibited” – eg. Westport 6.24.010 which is a two-sentence prohibition of placing a tent, trailer, or other structure on public property. Other Cities (Moses Lake 9.18, Everett 8.56, Vancouver 8.22) use a basic ordinance template with subtle variations, most notably, in time and location that the prohibition is applicable.

In 2018, a Federal Court case (*Martin v. City of Boise*) ruled it unconstitutional for Boise to enforce ordinances that prohibit camping in public places if there is no other option for homeless individuals. Essentially, if there is no public shelter space available, the city cannot criminalize homelessness. Since that ruling, many cities have had to reexamine their related ordinances. Others, like Moses Lake, have worked to establish new shelter space in their city, so that they could legally enforce their ban on camping in public places.

Cities have very different realities in managing this issue. At this time, Lynden has a very limited population of those who are experiencing homelessness, and no ordinance in place that would lay out prohibitions for camping on all or certain public places. It is a topic, though, that should be proactively discussed.

The Planning Dept has put together a packet of resources meant to initiate discussion on this matter. These include:

- Three examples of ordinances from representative cities in Washington (Westport, Moses Lake, and Vancouver). The Westport ordinance would likely not pass legal challenge. The Moses Lake and Vancouver ordinance follow a similar template and have recently been revised in light of the *Martin v Boise* case. Moses Lake prohibits all camping on public property. Vancouver accommodates camping at certain times and places.

- Two articles that are helpful at explaining the court case and its implications.

Finally, City legal counsel is currently working on a memo that explains the current state of the law on this matter and what the City's options are. This counsel memo will be made available to you when it is ready.

Examples of City Ordinance (Washington State)

Westport, not recently revised

Chapter 6.24 CAMPING ON PUBLIC PROPERTY

Sections:

6.24.010 Camping on public property prohibited.

6.24.010 Camping on public property prohibited.

It is unlawful for any person to park any motor vehicle or trailer or place a tent or any other structure or material on public property for the purpose of sleeping therein or thereon or maintaining the same as a temporary or permanent residence.

A person who violates or fails to comply with the provisions of this chapter or who counsels, aids or abets such a violation is guilty of a misdemeanor. (Ord. 991, 1995)

The Westport Municipal Code is current through Ordinance 1658, passed September 16, 2021.

Moses Lake, updated October 2020

Chapter 9.18

CAMPING

9.18.010 Findings:

People camping on public property and on public rights-of-way create a public health and safety hazard due to the lack of proper electrical and/or sanitary facilities for these people. People without proper sanitary facilities have openly urinated, defecated, and littered on public property on the public rights-of-way. Use of public property for camping purposes or storage of personal property interferes with the rights of others to use the areas for which they were intended. (Ord. 2921, 4/9/19)

9.18.020 Purpose:

It is the purpose of this chapter to prevent harm to the health or safety of the public and to promote the public health, safety and general welfare by making public streets and other areas readily accessible to the public and to prevent use of public property for camping purposes or storage of personal property which interferes with the rights of others to use the areas for which they were intended. (Ord. 2921, 4/9/19)

9.18.030 Definitions:

The following definitions are applicable in this chapter unless the context otherwise requires:

“Camp” or “camping” means to pitch, create, use, or occupy camp facilities and/or to use camp paraphernalia.

“Camp facilities” include, but are not limited to, tents, huts, temporary shelters made of any material, or vehicles.

“Camp paraphernalia” includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, blankets, mattresses, hammocks, or non-City designated cooking facilities and similar equipment.

“City” means the City of Moses Lake.

“Park” means the same as defined in Section [12.36.020](#).

“Store” means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.

“Street” means any highway, lane, road, street, right-of-way, boulevard, alley, and every way or place in the City of Moses Lake that is publicly owned or maintained for public vehicular travel.

“Vehicle” means the same as defined in RCW [46.04.670](#), which is hereby adopted as now enacted or hereafter amended. (Ord. 2921, 4/9/19)

9.18.040 Unlawful Camping:

A. At any time, it shall be unlawful for any person to camp, occupy camp facilities for purposes of habitation, or use camp paraphernalia in the following areas, except as otherwise provided by ordinance or as permitted pursuant to Section [9.18.070](#):

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or other publicly owned or maintained area, improved or unimproved.

B. At any time, it shall be unlawful for any person to occupy a vehicle for the purpose of camping while that vehicle is parked in the following areas, except as otherwise provided by ordinance or as permitted pursuant to Section [9.18.070](#):

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or other publicly owned or maintained area, improved or unimproved. (Ord. 2959, 10/27/20; Ord. 2921, 4/9/19)

9.18.050 Unlawful Storage of Personal Property in Public Places:

At any time, it shall be unlawful for any person to store personal property, including camp facilities (other than vehicles) and camp paraphernalia, in the following areas, except as otherwise provided by ordinance or as permitted pursuant to Section [9.18.070](#):

- A. Any park;

B. Any street; or

C. Any publicly owned or maintained parking lot or publicly owned or maintained area, improved or unimproved. (Ord. 2959, 10/27/20; Ord. 2921, 4/9/19)

9.18.060 Penalty for Violations:

Any person violating any of the provisions of this chapter shall be deemed to have committed a civil infraction and shall be subject to the following penalties as set forth in Chapter [1.08](#):

First violation within a twelve (12) month period	C-21 penalty
Second and subsequent violation within a twelve (12) month period	C-18 penalty

Each and every day, or portion thereof, that the violation continues shall constitute a separate violation. (Ord. 2927, 5/14/19)

9.18.070 Permit:

A. The City Manager, or his/her designee, is authorized to permit persons to camp, occupy camp facilities, use camp paraphernalia, or store personal property in parks, streets, or any publicly owned parking lot or publicly owned area, improved or unimproved, in the City of Moses Lake.

B. Upon receipt of an application for any permit under this chapter, the City Manager, or his/her designee, shall send a copy of the application to the City departments of police, parks, public works, community development, and fire. Each of these departments shall inspect the application and each such department shall report to the City Manager, or his/her designee, within ten (10) working days after the filing of the application. Such reports shall mention any problems which the proposed activity is expected to pose for the public. It shall make any necessary recommendations for protecting the public peace, health, safety, life, property, and welfare in the event a permit is, or was, issued.

C. The City Manager, or his/her designee, is authorized to promulgate other rules and regulations regarding the implementation and enforcement of this chapter.

D. The City Manager, or his/her designee, may approve a permit as provided under this section when, from a consideration of the application, reports from other City departments, and from such other information as may otherwise be obtained, he or she finds that:

1. Adequate sanitary facilities are provided and accessible at or near the proposed camp site;
2. Adequate trash receptacles and trash collection are provided; and
3. The camping activity will not unreasonably disturb or interfere with the safety, peace, comfort and repose of private property owners.

E. No permit shall be issued for a period of time in excess of fourteen (14) calendar days in any one (1) calendar year.

F. The City Manager, or his/her designee, is authorized to revoke a permit that has been issued if he or she finds lack of compliance with any requirement of subsection D of this section, or of any rule or regulation promulgated under subsection C of this section, or of any ordinance or statute.

G. Any person who is denied a permit, or had his/her permit revoked, may appeal the denial/revocation to a hearings examiner appointed by the City Manager, or his/her designee. Notice of appeal must be in writing, and filed with the City Clerk within seven (7) working days from the date of the denial. (Ord. 2921, 4/9/19)

9.18.080 Public Duty Created:

A. It is expressly the purpose of this chapter to provide for and promote the health, safety and welfare of the general public and not to create or otherwise establish or designate any particular class or group of persons or individual who will or should be especially protected or benefited by the terms of this chapter.

B. Nothing contained in this chapter is intended nor shall be construed to create or form the basis of any liability on the part of the City, or its officers, employees or agents, for any injury or damage resulting from any action or inaction on the part of the City related in any manner to the enforcement of this chapter by its officers, employees or agents. (Ord. 2921, 4/9/19)

Vancouver, WA updated October 2021

Chapter 8.22

CAMPING

8.22.010 Findings.

It is the purpose of this chapter to address:

- A. *Adverse Public Impacts of Camping.* People camping on public property and on public rights-of-way create a public health and safety hazard due to the lack of proper food storage, cooking, electrical and/or sanitary facilities. People without proper sanitary facilities have openly urinated, defecated, and littered on private and public property and on the public rights-of-way. Use of public property for camping purposes or storage of personal property interferes with the rights of others to use the areas for the purposes for which they were intended and creates public health and safety dangers to the city's sensitive ecological areas, including the city's water sources, through illegal dumping and improper disposal of human waste. People cooking with open flames while camping endanger the lives and property of those nearby through uncontrolled fire.
- B. *Adverse Impacts of Camping on the Poor and Infirm.* Many individuals who camp on public property do so not by choice, but due to a lack of financial means to afford adequate shelter. These individuals are also adversely mentally and physically impacted by camping. Single female camp occupants experience a disproportionately high incidence of violent crime as compared to other people. Families with children who camp as a result of a lack of adequate shelter are also disproportionately adversely impacted through risk of physical danger and impediments to childhood education.
- C. *Constitutional Limitations on Available Remedies.* The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment"; the Ninth Circuit Court of Appeals has interpreted this prohibition to forbid cities from criminalizing camping in all places, at all times, by those who lack the financial means to pay for adequate shelter unless adequate shelter is available to such person free of charge.
- D. *Supportive Campsites.* The establishment of supportive campsites creates a means of connecting individuals to services that reduce barriers to obtaining shelter and housing while providing options for lawful camping which are incidental to the receipt of such services.
- E. *Need for Themed Supportive Campsites.* The city has an important government interest in protecting the physical safety and emotional well-being of residents of campsites occupied by single occupant females, and

families with children. The establishment of themed supportive campsites as defined herein reserved for members of these groups serves that important government interest and is substantially related to accomplishing those objectives. (Ord. M-4348 § 2, 2021; Ord. M-4133 § 1, 2015; Ord. M-3323, 1997)

8.22.020 Purpose.

It is the purpose of this chapter to:

- A. Prevent harm to the health and safety of individuals who camp due to a lack of financial means to afford adequate shelter by establishing supportive campsites where adequate shelter is provided to the poor or infirm at no cost.
- B. Prevent harm to the health and safety of the public and to promote the public health, safety and general welfare by prohibiting camping within all camping impact areas at all times, except as allowed within a supportive campsite.
- C. Prevent harm to the health or safety of the public and to promote the public health, safety and general welfare by making public streets and other areas readily accessible to the public and to prevent use of public property for camping purposes or storage of personal property which interferes with the rights of others to use the areas for which they were intended. (Ord. M-4348 § 3, 2021; Ord. M-3323, 1997)

8.22.030 Definitions.

The following definitions are applicable in this chapter unless the context otherwise requires:

“Camp” or “camping” means to pitch, create, use, or occupy camp facilities for the purposes of habitation, as evidenced by the use of camp paraphernalia.

“Camp facilities” include, but are not limited to, tents, huts, temporary shelters, or vehicles.

“Camp paraphernalia” includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, blankets, mattresses, hammocks, or non-city-designated cooking facilities and similar equipment.

“Camping impact area” means the areas specified within VMC [8.22.040\(B\)](#).

“Family” means two or more “family or household members” as defined by RCW [26.52.010](#).

“Park” means the same as defined in VMC [15.04.020](#).

“Store” means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.

“Street” means any highway, lane, road, street, right-of-way, boulevard, alley, and every way or place in the city of Vancouver that is publicly owned or maintained for public vehicular travel.

“Supportive campsite” means a camp facility for which a permit has been sought and obtained from the Vancouver city manager, or their designee, pursuant to VMC [8.22.070\(B\)](#), and/or a city-sponsored supportive campsite established under VMC [8.22.070\(F\)](#).

“Supportive campsite operator” means a person, firm, corporation, or municipal corporation with a valid supportive campsite operator permit issued pursuant to VMC [8.22.070](#) or, in the case of a city-sponsored supportive campsite, an approved camp facility operator as designated by the city manager or their designee.

“Themed supportive campsite” means a supportive campsite with spaces reserved for either (1) a single occupant identifying as female; or (2) a family with one or more children under 18 years of age at the time of admission to the supportive campsite.

“Vehicle” means the same as defined in RCW [46.04.670](#), as adopted by Ordinance [M-3276](#). (Ord. M-4348 § 4, 2021; Ord. M-4133 § 1, 2015; Ord. M-3323, 1997)

8.22.040 Unlawful camping.

A. *Supportive Campsites.* Camping shall be allowed at all times within supportive campsites by those residing therein. Residence in a supportive campsite shall be at the approval of the supportive campsite operator.

B. *Camping Impact Areas.* Except to the extent expressly allowed pursuant to subsection [A](#) of this section, it shall be unlawful to camp at any time within a camping impact area. The following locations are camping impact areas:

1. Within 1,000 feet of the nearest point of any supportive campsite;
2. Upon any land used to operate a public water station, wastewater or stormwater facility;
3. Within 200 feet of the nearest edge of the Columbia River, Vancouver Lake, Burton Channel, Peterson Channel, Fisher’s Creek, or Burnt Bridge Creek.

C. *Daytime Camping Prohibited.* Except as otherwise provided within this chapter, during the hours of 6:30 a.m. to 9:30 p.m., it shall be unlawful for any person to camp, occupy camp facilities for purposes of

habitation, or use camp paraphernalia in the following areas, except as otherwise provided by ordinance or as permitted pursuant to VMC [8.22.070](#):

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or other publicly owned or maintained area, improved or unimproved.

D. *Daytime Camping in Vehicles Prohibited.* Except as otherwise provided within this chapter, during the hours of 6:30 a.m. to 9:30 p.m., it shall be unlawful for any person to occupy a vehicle for the purpose of camping while that vehicle is parked in the following areas, except as otherwise provided by ordinance or as permitted pursuant to VMC [8.22.070](#):

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or other publicly owned or maintained area, improved or unimproved. (Ord. M-4348 § 5, 2021; Ord. M-4133 § 1, 2015; Ord. M-3323, 1997)

8.22.050 Unlawful storage of personal property in public places.

Except as otherwise provided within this chapter, during the hours of 6:30 a.m. to 9:30 p.m., it shall be unlawful for any person to store personal property, including camp facilities (other than vehicles) and camp paraphernalia, in the following areas, except as otherwise provided by ordinance or as permitted pursuant to VMC [8.22.070](#):

1. Any park;
2. Any street; or
3. Any publicly owned or maintained parking lot or publicly owned or maintained area, improved or unimproved. (Ord. M-4348 § 6, 2021; Ord. M-4133 § 1, 2015; Ord. M-3323, 1997)

8.22.060 Penalty for violations.

Violation of any of the provisions of this chapter is a misdemeanor. Any person violating any of the provisions of this chapter shall, upon conviction of such violation, be punished by a fine of not more than one thousand

dollars or by imprisonment not to exceed ninety days, or by both such fine and imprisonment. (Ord. M-3323, 1997)

8.22.070 Permit.

A. *Authority of the City Manager.* The city manager is authorized to:

1. Promulgate procedures and policies necessary for the acceptance of applications, investigation, issuance, denial, and revocation of all camping permits of the types specified in this chapter and the establishment of city-sponsored supportive campsites;
2. Issue, deny, and revoke camping permits in furtherance of the purposes of this chapter;
3. Delegate any or all functions under this chapter; and
4. Request the assistance of other city departments to investigate, administer, and enforce the provisions of this chapter.

B. *Types of Camping Permits.* The following types of camping permits are established and may be issued by the city manager, or their designee, pursuant to procedures and policies promulgated under this chapter:

1. *Nighttime Employment Camping Permit.* The city manager, or their designee, is authorized to permit persons who present satisfactory evidence of nighttime employment to camp, occupy camp facilities, use camp paraphernalia, or store personal property in parks, streets, or any publicly owned parking lot or publicly owned area, improved or unimproved, in the city of Vancouver, except within camping impact areas as prohibited by VMC [8.22.040\(B\)](#).
2. *Supportive Campsite Operator Permit.* The city manager, or their designee, is authorized to issue a supportive campsite operator permit to a person, firm, corporation, or municipal corporation upon receipt of satisfactory evidence that the applicant possesses suitable qualifications to operate a supportive campsite in compliance with the provisions of this chapter. The duration of a supportive campsite operator permit shall be for an initial period of not more than one year. A supportive campsite operator permit may be renewed no more than twice by the city manager for a period not to exceed one year each. The request for an extension shall be processed in the same manner as an initial supportive campsite operator permit application.
 - a. Upon receipt of an application for a supportive campsite operator permit under this chapter, the city manager, or their designee, shall provide notice to all owners and residents of record of property, as shown on the most recent property tax assessment roll; located within 1,200 feet of the proposed supportive campsite and shall send a copy of the application to the city departments of police, parks, public works, community development, and fire. Each of these departments shall

inspect the application and each such department shall report to the city manager, or their designee, any problems which the proposed activity is expected to pose for the public. Such reports shall make any necessary recommendations for protecting the public peace, health, safety, life, property, and welfare in the event a permit is, or was, issued.

b. In evaluating whether to grant or deny an application for a supportive campsite operator permit, the city manager, or their designee, shall evaluate whether the resulting supportive campsite will be (i) equitably dispersed throughout the city in relation to other existing supportive campsites, (ii) located where the supportive campsite will avoid areas of highest economic vulnerability within surrounding residential areas in the city, (iii) afford accessibility in compliance with the Americans with Disabilities Act, (iv) be located within one-half mile of public transit, and (v) comply with all requirements of the State Environmental Policy Act.

c. The city manager, or their designee, shall review and approve rules and regulations regarding the admission to, and operation of, all supportive campsites.

C. The city manager, or their designee, may approve a permit as provided under this section when, from a consideration of the application, reports from other city departments, and from such other information as may otherwise be obtained, the city manager, or their designee, finds that:

1. Adequate sanitary facilities are provided and accessible at or near the proposed campsite;
2. Adequate trash receptacles and trash collection are provided; and
3. The camping activity will not unreasonably disturb or interfere with the safety, peace, comfort and repose of private property owners.

D. The city manager, or their designee, is authorized to revoke a permit that has been issued if the city manager, or their designee, finds lack of compliance with any requirement of subsection C of this section, or evidence that a supportive campsite operator has failed or refused to require campsite residents comply with any rule or regulation promulgated under subsection (B)(2)(c) of this section, or of any ordinance or statute.

E. Any person who is denied a permit, or had their permit revoked, may appeal the denial/revocation to a hearings examiner appointed by the city manager, or their designee. Notice of appeal must be in writing, and filed with the city clerk within seven working days from the date of the denial or revocation.

F. City staff may propose city-sponsored supportive campsites. Such proposals will be evaluated for approval by the city manager, or their designee, applying the criteria under subsections (B)(2) and (C) of this section and the availability of city resources. (Ord. M-4348 § 7, 2021; Ord. M-4133 § 1, 2015; Ord. M-3323, 1997)

8.22.080 Public duty created.

A. It is expressly the purpose of this ordinance to provide for and promote the health, safety and welfare of the general public and not to create or otherwise establish or designate any particular class or group of persons or individual who will or should be especially protected or benefited by the terms of this ordinance.

B. Nothing contained in this ordinance is intended nor shall be construed to create or form the basis of any liability on the part of the City, or its officers, employees or agents, for any injury or damage resulting from any action or inaction on the part of the City related in any manner to the enforcement of this ordinance by its officers, employees or agents. (Ord. M-4133 §1, 2015; Ord. M-4133 §1, 2015; Ord. M-3323, 1997)

The Vancouver Municipal Code is current through Ordinance M-4348, passed September 20, 2021.

Is Your Camping Ordinance Constitutional?

October 1, 2018 by [Oskar Rey](#)

Category: [Homelessness](#)



A recent Ninth Circuit Federal Court of Appeals case — *Martin v. City of Boise* — ruled that it is unconstitutional for the City of Boise to enforce ordinances prohibiting camping in public places against homeless individuals at times when no shelter space is available. Washington is part of the Ninth Circuit, so this decision applies to Washington municipalities.

Many Washington municipalities have ordinances that prohibit camping and sleeping on public property (e.g.,

camping ordinances). This blog will examine the case and provide thoughts on the status of such ordinances in light of this decision.

Martin Requires that there be Alternatives to Public Camping

Martin was a challenge by homeless individuals to Boise's enforcement of camping ordinances against homeless individuals when no shelter space is available. They argued that citing homeless individuals under such circumstances is tantamount to criminalizing homelessness. The court agreed, stating:

an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.

There was extensive discussion of Boise's attempt to show that there is sufficient shelter space for Boise's homeless population. Of the three shelters in Boise, two are operated by churches, and there was evidence that the church shelters required participation in religious activities. The court ruled that shelter space is not "available" if homeless individuals are required to participate in religious instruction in exchange for shelter. The court also noted that all the shelters had limits on how long a person can stay, and that the annual, point-in-time homeless counts suggested there were more unsheltered homeless than shelter spaces in Boise.

From the court's standpoint, it is not a simple question of whether an ordinance prohibiting camping on public property is constitutional. Rather, enforcement of such an ordinance is cruel and unusual punishment under the Eighth Amendment if a homeless person has no alternative to living and sleeping outside:

As long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

In other words, camping ordinances are not inherently unconstitutional, but a municipality can be in violation of the Eighth Amendment if the person cited had no meaningful alternative to sleeping outside.

Additional Information on the Scope of Martin

In footnote 8, the *Martin* court set forth some limits on the scope of its decision:

1. It does not cover individuals who do have access to adequate temporary shelter but choose not to use it.
2. Even when shelter is unavailable, an ordinance may prohibit sitting, lying, or sleeping outside at certain times or in certain locations.
3. An ordinance may prohibit obstruction of rights-of-way or the erection of certain types of structures.
4. Whether such ordinances are consistent with the Eighth Amendment will depend on "whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human...'"

What Should Cities Do in Response to Martin?

Martin raises both legal and policy issues for a municipality to consider:

- If a municipality is enforcing camping ordinances, it should obtain review by its legal counsel in light of the *Martin* case and suspend enforcement until that process is complete.
- Many camping ordinances predate the rise of the homelessness population in this region. As a policy matter, a municipality may want to review its camping ordinances to determine whether they are in keeping with current legislative priorities.
- A municipality should decide, as a matter of policy, if it wants to create a system that tracks the number of available shelter beds and the number of homeless individuals in its jurisdiction. Being able to show that shelter beds are available will require ongoing efforts and may be logistically difficult since the number of homeless individuals and the number of shelter beds in a jurisdiction will fluctuate over time. Municipalities will need to coordinate with other entities to the extent shelters in the area are operated by third-party agencies or nonprofits. If a municipality opts not to track this information, then it will be vulnerable to a legal challenge if it enforces ordinances that prohibit camping or sleeping in public.
- A municipality can consider limiting the applicability of camping ordinances to certain times of day or certain types of properties. Under *Martin*, the questions will be whether there is shelter space available or whether there are places in the jurisdiction where a homeless individual can sleep or camp without violating camping ordinances.

Questions? Comments?

If you have comments about this blog post, please comment below or email me at orey@mrsc.org. If you have questions about this or other local government issues, please use our [Ask MRSC form](#) or call us at (206) 625-1300 or (800) 933-6772.

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About Oskar Rey

Oskar Rey has practiced municipal law since 1995 and served as Assistant City Attorney for the City of Kirkland from 2005 to 2016, where he worked on a wide range of municipal topics, including land use, public records, and public works. Oskar is a life-long resident of Washington and graduated from the University of Washington School of Law in 1992.

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Camping Ordinance Criminalized Homeless Status

 nrpa.org/parks-recreation-magazine/2019/july/camping-ordinance-criminalized-homeless-status/

July 8, 2019, Department, by James C. Kozlowski, J.D., Ph.D.

Law Review



On May 7, 2019, Denver voters overwhelmingly rejected a “Right to Survive” referendum, which would have effectively repealed the city’s existing anti-camping ordinance in public parks and spaces. This vote came in the wake of the federal appeals court “City of Boise” opinion described herein. In this case, federal appeals court for the 9th Circuit held unconstitutional any such camping ordinance, which effectively criminalizes the mere status of being homeless. In an apparent response to this federal court opinion, several cities in the West have reportedly ceased enforcing their anti-camping laws. (Search terms: Denver, homeless, camping – See: "[Denver Voters Deny Homeless the 'Right to Survive.'](#)" [Here's What That Means.](#)" and "[What is Denver Initiative 300: Right to survive.](#)")

The growing concern among public park administrators is that any such legislated “Right to Survive” or “Right to Shelter” policy would override existing urban camping ordinances and could also effectively nullify existing park curfew regulations. Without directly addressing the

lack of available shelters and affordable housing for the homeless, public parks could become low-cost de facto open-air homeless shelters with increased trash and sanitation burdens threatening the environmental integrity of park resources.

While rejecting a camping ordinance that could effectively criminalize the mere status of being homeless, the federal appeals court in the “City of Boise” opinion described below did not issue an absolute ban on such local laws. On the contrary, the federal appeals court found “an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations,” as well as “an ordinance barring the obstruction of public rights of way or the erection of certain structures...might well be constitutionally permissible.”

In determining the constitutionality of an existing or proposed anti-camping ordinance, the issue, however, would be whether a law or regulation “punishes a person for lacking the means to live out the universal and unavoidable consequences of being human.” Accordingly, in considering the constitutionality of an anti-camping ordinance, a federal court would necessarily examine what viable alternatives existed, if any, to satisfy the basic human need for shelter by homeless individuals who might otherwise have no other option but to resort to “camping” in public parks and places.

Sleeping Ban in Public Places

In the case of *Martin v. City of Boise*, 902 F.3d 1031, 2018 U.S. App. LEXIS 25032 (9th Cir. 4/1/2019), the issue before the United States Court of Appeals for the 9th Circuit was “whether the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to.”

The plaintiffs were six current or former residents of the city of Boise (“the City”) who are homeless or have recently been homeless. These homeless individuals had lived in or around Boise since 2007. Between 2007 and 2009, each plaintiff alleged he or she was cited by Boise police for violating one or both of two city ordinances: the “Camping Ordinance” and the “Disorderly Conduct Ordinance.” With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, one plaintiff was sentenced to one additional day in jail.

The Camping Ordinance, Boise City Code § 9-10-02, made it a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time.” The Camping Ordinance defined “camping” as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.”

The Disorderly Conduct Ordinance, Boise City Code § 6-01-05, prohibited “occupying, lodging, or sleeping in any building, structure, or public place, whether public or private without the permission of the owner or person entitled to possession or in control thereof.”

Homeless Population Shelter

Boise has had a significant and increasing homeless population. According to a January 2014 count taken by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County where Boise is the county seat; 46 of the reported homeless were “unsheltered,” or living in places unsuited for human habitation, such as parks or sidewalks. In 2016, reported data indicated there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered. This reported data likely underestimated the number of homeless since the count reflected a one-night point in time. Moreover, many homeless individuals may have access to temporary housing on a given night. In addition, weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

In the city of Boise, three homeless shelters run by private, nonprofit organizations were the only shelters in Ada County offering emergency shelter services. One shelter, (“Sanctuary”) operated by a religious organization, did not impose any religious requirements on its residents and was open to men, women and children of all faiths. Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter.

In 2010, Sanctuary reached full capacity in the men’s area “at least half of every month,” and the women’s area reached capacity “almost every night of the week.” In 2014, the shelter reported that it was full for men, women or both on 38 percent of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9 p.m. each night, it allots any remaining beds to those who added their names to the shelter’s waiting list.

The other two shelters in Boise were both operated by the Boise Rescue Mission (“BRM”), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission (“River of Life”), is open exclusively to men; the other, the City Light Home for Women and Children (“City Light”), shelters women and children only.

BRM’s facilities provide two primary “programs” for the homeless: the Emergency Services Program and the New Life Discipleship Program. The Emergency Services Program provides temporary shelter, food and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message. The Discipleship Program is an “intensive, Christ-based residential recovery program” of which “religious study is the very essence.”

Police Shelter Protocol

The plaintiffs filed suit in the United States District Court for the District of Idaho in October of 2009, alleging that their previous citations, under the Camping Ordinance and the Disorderly Conduct Ordinance, violated the U.S. Constitution Cruel and Unusual Punishment Clause of the Eighth Amendment. Under federal civil rights law, the plaintiffs sought damages for those alleged violations and a court order precluding any future enforcement of the ordinances by the city of Boise.

After the litigation began, the Boise Police Department promulgated a new “Special Order,” effective as of January 1, 2010. The Special Order prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had “an available overnight space.” City police implemented the Special Order through a two-step procedure known as the “Shelter Protocol.”

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11 p.m. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full.

The Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order’s mandate that “[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter” (Boise City Code §§ 6-01-05, 9-10-02).

Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40 percent of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full. If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

Credible Enforcement Threat

In July 2011, the federal district court granted summary judgment to the City, holding the Special Order and Shelter Protocol referenced in the amendment ordinances effectively “permitted camping or sleeping in a public place when no shelter space was available.” As a result, the federal district court found that the plaintiffs’ claims were “moot” because there was no longer a “credible threat” of future prosecution under the challenged ordinances:

If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs...[T]here is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity...[T]here has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families.

On appeal, the federal appeals court held the district court had erred in finding the plaintiffs’ claims were moot because “the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police.” Accordingly, the

federal appeals court found: “The City had not met its ‘heavy burden’ of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — could not reasonably be expected to recur.”

In addition, the appeals court found plaintiffs had presented evidence of a “credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.” In so doing, the court further noted “the City is wholly reliant on the shelters to self-report when they are full.”

In particular, the court found undisputed evidence that the Sanctuary shelter was “full as to men on a substantial percentage of nights, perhaps as high as 50 percent.” While the BRM facility claimed it would “never turn people away due to lack of space,” the court found the BRM would, however, “refuse to shelter homeless people who exhaust the number of days allotted by the facilities.” Further, the court found that the homeless could be denied access to shelter facilities based on the time of their arrival:

BRM’s facilities may deny shelter to any individual who arrives after 5:30 p.m., and generally will deny shelter to anyone arriving after 8:00 p.m. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 p.m. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

In addition, the federal appeals court found evidence that some BRM programs required the homeless to participate in certain religious activities. According to the court, the City would violate the Establishment Clause of the First Amendment to effectively coerce a homeless individual to attend religious-based “treatment programs” to avoid prosecution under the ordinances. In this particular instance, several of the plaintiffs objected to the “overall religious atmosphere” in an available homeless shelter, including “the Christian messaging on the shelter’s intake form and the Christian iconography on the shelter walls.”

Under these circumstances, the federal appeals court found homeless individuals “may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances) or enrolling in BRM programming that is antithetical to his or her religious beliefs.”

Eighth Amendment Violation?

Under the circumstances, the issue before the federal appeals court was, therefore, whether “the Cruel and Unusual Punishments Clause of the Eighth Amendment” in the U.S. Constitution precluded “the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter.”

As cited by the court, the Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (U.S. Const., amend. VIII). Further, the court noted the Cruel and Unusual Punishment Clause

“circumscribes the criminal process in three ways”:

First, it limits the type of punishment the government may impose; second, it proscribes punishment “grossly disproportionate” to the severity of the crime; and third, it places substantive limits on what the government may criminalize.

In this particular instance, the court found the third limitation was pertinent; i.e., substantive limits on what the government may criminalize:

The entire thrust of the Cruel and Unusual Punishment is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus [guilty act]. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, involuntary...[C]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.

Accordingly, the federal appeals court acknowledged, “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.” In particular, the appeals court found: “This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.”

Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. Moreover, any conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping. As a result, just as the state may not criminalize the state of being “homeless in public places,” the state may not criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.

While the City could not criminalize the state of being homeless in public places, the federal appeals court cautioned: “Our holding is a narrow one.” Specifically, the federal appeals court would “in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets at any time and at any place.”

We hold only that so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public.

That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

As applied to the homeless plaintiffs in this case, the appeals court found the challenged ordinances “effectively punish them for something for which they may not be convicted under the Eighth Amendment — sleeping, eating and other innocent conduct.” As noted by the court, “the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding.”

As characterized by the federal appeals court, the Disorderly Conduct Ordinance, on its face, criminalized “[o]ccupying, lodging, or sleeping in any building, structure or place, whether public or private” without permission (Boise City Code § 6-01-05). Similarly, the court found the Camping Ordinance criminalized using “any of the streets, sidewalks, parks or public places as a camping place at any time” (Boise City Code § 9-10-02). Moreover, the court noted the ordinance defined “camping” broadly:

The term “camp” or “camping” shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn.

Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Further, the federal appeals court noted the Camping Ordinance was “frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of ‘camping’ were present”; i.e., “the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property.”

For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside “wrapped in a blanket with her sandals off and next to her,” for sleeping in a public restroom “with blankets,” and for sleeping in a park “on a blanket, wrapped in blankets on the ground.”

Based on this evidence, the federal appeals court found the Camping Ordinance “can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements.”

Accordingly, as applied to the facts of this case, the federal appeals court held: “a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.” In making this determination, however, the federal appeals court noted the following limitations on its holding:

Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction

with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.

So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures [might be constitutional]. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes.

The appeals court, therefore, reversed the judgment of the federal district court granting summary judgment to the City and remanded the case for further proceedings. On remand, the district court would consider whether the City’s amended ordinances would effectively preclude any future “criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”

James C. Kozlowski, J.D., Ph.D., is an *Attorney and Associate Professor in the School of Recreation, Health and Tourism at George Mason University*. [Law review articles archive](#) (1982 to present).