CITY COUNCIL

Business Meeting Agenda

Tuesday May 23, 2023, 6:00 PM
City Hall, 420 Sixth Ave

1. Call to Order/ Roll Call/Pledge of Allegiance

2. Agenda Adjustments

   Adjustments to the agenda are limited to a change in the order of business to accommodate visitors making presentations or citizens who are attending for the purpose of a single agenda item. Adjustments in the form of additions to the agenda are discouraged because the general public has had no prior notice of their consideration, and therefore interested persons will not have an opportunity to participate. Adjustments in the form of deletions from the agenda may be accomplished here so long as there is disclosure of the reason for the deletion and an indication as to when or if the item will be placed on a future agenda.

3. Announcements, Correspondence, Awards and Proclamations

4. Public Input – Limited to 5 minutes or less per speaker per Mayor's discretion

5. Public Hearing
   1. Second Reading of an Ordinance adopting proposed text amendments to Title 17 of the Gold Hill Municipal Code as recommended by the Gold Hill Planning Commission.

6. Consent Agenda

7. Action Items

8. Reports from Councilors

9. City Manager Report

   1. Water System Update
   2. Fuels Reduction Grant Update
   3. House Bill 3115 and 3124 - Homelessness in Public Spaces Legislation

10. Adjournment

Note: This agenda and the entire agenda packet, including staff reports, referenced documents, resolutions and ordinances are available at the Gold Hill City Hall in advance of each meeting 420 6th Avenue (P.O. Box 308), Gold Hill, OR 97525. Information can also be viewed at www.cityofgoldhill.com

Council Communication

Agenda Item	Public Hearing and Ordinance Adopting Development Code Text Amendments to Title 17 of the Gold Hill Municipal Code		
From	Adam Hanks	Interim City Manager	
Contact	Adam.hanks@cityofgoldhill.com	**Date**	May 23, 2023

SUMMARY

Before Council is an ordinance that facilitates the adoption of development code text amendments to Title 17 of the Gold Hill Municipal Code, commonly referred to as the Gold Hill Land Use Code. The Gold Hill Planning Commission, consistent with state and local requirements, held a public hearing on May 3, 2023, and formally recommended the amendments reflected in the attached Exhibit A, being the draft of Title 17 revisions. Council The draft document and Planning Commission recommendation are a culmination of many months of Commission meetings and workshops reviewing existing code, relevant sample codes from other municipalities and staff suggestions.

PREVIOUS COUNCIL ACTION

Council approved first reading of this ordinance and adopted the Staff Findings and Orders for the legislative application at its May 16, 2023 Council meeting.

BACKGROUND AND ADDITIONAL INFORMATION

A staff report that includes required findings of fact and conclusions of law and applicable criteria has been prepared for the Council public hearing by the City's contract Associate Planner James Schireman of the Rogue Valley Council of Governments, who has been instrumental in providing support, guidance and professional expertise to the Planning Commission for the majority of this project.

FISCAL IMPACTS

This project was funded by DLCD with a maximum reimbursable cap of $25,000. Staff continues to work with DLCD grant staff to ensure all required grant deliverables will be submitted prior to the grant completion deadline of May 31.

STAFF RECOMMENDATION

Staff recommends approval of second reading of the ordinance for final adoption of the revisions to Title 17 of the Gold Hill Municipal Code as recommended by the Gold Hill Planning Commission and supported by the associated findings and conclusions.

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adam.hanks@cityofgoldhill.com O cityofgoldhill.com

ACTIONS, OPTIONS & POTENTIAL MOTIONS

1) I move to approve second reading of Ordinance 23-R-5 titled "An Ordinance adopting development code revisions to Title 17 of the Gold Hill Municipal Code as presented and recommended by the Gold Hill Planning Commission."

2) I move to approve second reading of Ordinance 23-R-5 titled "An Ordinance adopting development code revisions to Title 17 of the Gold Hill Municipal Code as presented and recommended by the Gold Hill Planning Commission, with the following amendments…_____"

REFERENCES & ATTACHMENTS

1) Staff Report and Findings for Title 17 Text Amendments
2) Draft Ordinance adopting Revisions to Title 17 of the Gold Hill Municipal Code
3) Planning Commission recommended revisions to Title 17 of the Gold Hill Municipal Code (Copy available at City Hall and in Council Chambers at meeting)

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CITY OF GOLD HILL
DEVELOPMENT CODE TEXT AMENDMENT
EXTENSIVE TITLE 17 REVISIONS

APPLICANT: City of Gold Hill

APPLICATION: The proposal is an ordinance amending numerous sections within Titles 17, zoning, of the City of Gold Hill Municipal Code. These proposed amendments focus on the standards regarding development within the urban growth boundary in the City of Gold Hill as required by both the State and Department of Land Conservation and Development (DLCD).

STAFF RECOMMENDATION: Approval

I. BACKGROUND:

The City of Gold Hill Zoning Code guides development within Gold Hill, based on the adopted Comprehensive Plan. Zoning codes regulate what can and can't be done on a particular piece of property – they influence where we live, where we work and how we get around. Zoning can be used to help attract new businesses, encourage the construction of new housing and protect natural resources. Because zoning codes have a significant impact on how we build and shape our community, they are an important tool in fostering equitable and sustainable growth.

Ultimately, a zoning code reflects the conditions of the time it was written, promoting certain past ideas of our needs, desires and values. In order to preserve the vitality and efficiency of such a document, the City of Gold Hill pursued a technical grant funded by the Department of Land Conservation and Development with the intent to perform a comprehensive update of the municipal code. Overall, the goals for the code update were to:

1. Modernize our zoning code to reflect our community's current and future needs, values, and aspirations.
2. Address modern day issues identified by Staff and the Planning Commission;
3. Align with State and Federal Laws; and,
4. Provide a user-friendly document through organization, clear and simplified language, and the use of tables and graphics;

The project first began in early 2022, but a large portion of the review regarding title 17 didn't begin until August of 2022, when Associate Land Use Planner James Schireman took lead on the project. Since then, staff met with the Gold Hill Planning Commission in a public workshop setting one to two times a month to review concepts and research, identify regulatory intent, and revise potential draft language.

With the changes incorporated into the document shown in exhibit A, staff finds that these proposed changes will enable the City of Gold Hill to more efficiently regulate development within the city, afford new economic & residential opportunities, and ultimately preserve the character of Gold Hill. The primary themes of the proposed changes are listed below.

II. Proposed Title 17 Changes:

Accessory Dwelling Units (ADU's)

On recommendation from both staff and DLCD, the planning commission decided to implement further flexibility when it came to regulating accessory dwelling units within the city of Gold Hill. The maximum size for ADU's was increased from 600 square feet to 900, so long as the ADU is no larger than 75% of the primary dwelling's square footage. The commission approved even greater flexibility regarding ADU's built within structures, such as above garages or within daylight basements. These types of ADU's are allowed to go above the 900 Sq. Ft maximum so long as they are confined to the existing footprint of the building.

Parking

In response to a set of state mandated parking regulations largely seeking to reduce the amount of parking mandated by cities, the Planning Commission listened to staff presentations, analyzed regulatory language, and deliberated options for maintaining compliance while also factoring in the local context of Gold Hill. Ultimately, the commission viewed the option offered in OAR 660-012-0420 of removing all parking minimums city-wide as the best option for the city of Gold Hill. This necessary code reform not only ensures that the City of Gold Hill remains compliant with DLCD regulations, but also differentiates the community as one of the first small cities to remove parking minimums citywide. Staff anticipate that removing this provision will ensure future development to be compact, affordable, and most importantly, feasible.

Downtown Revitalization

In scoping and discussing the code review project, commissioners expressed a desire to implement a wider array of tools to assist in revitalizing Gold Hill's downtown. Staff identified a need for the downtown to consolidate both tourist and resident oriented goods and services, and proposed a more concise set of allowed uses within the zone. The revisions focused on allowing activities such as restaurants, commercial retail, and medical offices to occur within the downtown, while keeping less appropriate uses such as automotive repair and self-storage to occur in other zones such as the General Commercial and Light Industrial districts. Previously, the C-1 zone also sought to meet this need for surrounding residential areas, but as the commission and staff narrowed the purpose of the downtown, the need for a C-1 zone was largely eliminated and therefore struck from the code. Later on in the year, staff anticipates the commission will hold a workshop to reexamine the zoning map of Gold Hill and accordingly update it to comply with the new code revisions. Staff anticipate the Downtown zone will be expanded to encompass the commercial and service-oriented land uses along 4th avenue.

Revisions to the downtown zone's regulation also introduced a unique advantage: the ability for the zone to allow multi-unit development on the 2nd story of spaces. Allowing the downtown to potentially become a mixed-use area affords numerous advantages including economic vitality, general vibrancy, and increased safety within the area. Seeing as it's practically impossible to enter or leave Gold Hill without passing through downtown, staff hope that these land use revisions will enable it to recover and grow.

Creation of the Public Zone

While shown on the comprehensive map, the original development code lacked the standards for a public zone. Staff drafted a model zone which largely focusses on the preservation of natural spaces, yet also has the capacity to host recreational fields, and

institutional assets. In drafting this zone staff ensured the proposed regulations aligned with existing uses within the public zone such as the Gold Hill Library, Hanby Middle School, and the Gold Hill Sports Park.

Administration
Lastly, the new code improves the planning process, giving staff the tools to request exact information regarding a development, or even request and record an official interpretation when a section of the code appears conflicting or vague. The administrative improvements are not only for the benefit of staff as well, but also help to aid citizens and developers in the planning process. For example, the new allowable use tables clearly illustrate which land use is allowed in which zones, allowing citizens to quickly identify the differences and overall intent of each unique zone. In addition, adding the ability for less intensive development activities to be approved at the staff level allows the planning department to operate at reduced costs. Enabling tax payer money to serve other valuable city services, or even be set aside to fund other necessary long range projects in the future.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW and APPLICABLE CRITERIA

Section 17.84.030 Criteria for Quasi-Judicial Amendments.
A recommendation or a decision to approve, approve with conditions or to deny an application for a quasi-judicial amendment shall be based on all of the following criteria:

1. Demonstration of compliance with all applicable comprehensive plan policies and map designations. Where this criterion cannot be met, a comprehensive plan amendment shall be a prerequisite to approval.

   FINDING: Satisfied with Conditions
   Removing the standards for the C-1 zone creates a technical conflict between the development code and comprehensive plan map, despite each zone accomplishing the same goal of providing essential commercial services to nearby residents. Furthermore, such conflicts have long existed in the code due to the lack of regulations regarding the R-1-U and P zones, which will only be fully resolved once the city completes a study assessing future zoning locations within Gold Hill.

   In order to fully address this potential conflict arising out of the transition period, staff request that a planning interpretation be made to clarify this conflict and apply the standards of the downtown zone in the planned expansion area until the comprehensive planning map and zoning map can be formally amended.

   Condition of approval: The text amendments evidenced in exhibit A may be approved on the condition that upon the adoption of the new code staff make a planning interpretation clarifying that tax lots within the old C-1 zone shall now be held to the standards of the D zone until the zoning map can be formally amended.

2. Demonstration of compliance with all applicable standards and criteria of this Code, and other applicable implementing ordinances;

FINDING: Satisfied
Staff finds that the primary purpose of this code update was to eliminate conflicting and outdated language found within the development code, and that overall these proposed revisions demonstrate compliance with the standards and criteria of this Code.

3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or land use district map regarding the property which is the subject of the application; and the provisions of Section 17 .06.080, as applicable.

FINDING: Satisfied
This text amendment is a city sponsored application and proactively seeks to resolve identified deficiencies within the comprehensive plan rather correct a mistake or inconsistency discovered through a development action.

IV. RECOMMENDATION

Having found all the above criteria adequately satisfied, both City Staff and the planning commission recommend that the City Council **approve** text amendment 23-01, amending title 17, Zoning, with the text attached in Exhibit A.

Respectfully Submitted,

James Schireman
Contract Planner

City of Gold Hill

Ordinance No. 23-01

AN ORDINANCE OF THE CITY OF GOLD HILL, OREGON AMENDING TITLE 17 OF THE GOLD HILL MUNICIPAL CODE

Whereas, the City of Gold Hill Charter authorizes Council to establish and modify its local laws and rules, consistent with the home rule powers and authority, known as the Gold Hill Municipal Code via passage of ordinances.

Whereas, legal notice of public hearing occurring on May 3, 2023, was provided and convened before the Gold Hill Planning Commission to deliberate and provide a formal recommendation to City Council for the approval of comprehensive text amendments to Title 17 of the Gold Hill Municipal Code, commonly referred to as the Land Use Ordinance.

Whereas, the Council of the City of Gold Hill determined at its initial May 16, 2023 Public Hearing, based on the hearings record and the staff findings, that the Planning Commission recommended text amendments to Title 17 of the Gold Hill Municipal Code benefit current and future property owners, promote economic development, and provide appropriate controls and guidance for future development within the City of Gold Hill

THE COUNCIL OF THE CITY OF GOLD HILL ORDAINS AS FOLLOWS:

Section 1: The City Council adopts as its own, and incorporates by reference, the Title 17 text amendments as recommended by the Gold Hill Planning Commission and attached as Exhibit A

Section 2: The City Council adopts as its own, and incorporates by reference, the staff report and findings for this legislative action attached as Exhibit B.

The foregoing ordinance was first read by title only in accordance with the City Charter on the _____ day of _____, 2023 and duly **PASSED AND APPROVED** by the Council of the City of Gold Hill this _____ day of _____, 2023.

Approved:

_____
Ronald Palmer
Mayor

Attest:

_____
Darlene “Dee” Giana-Larez
City Recorder

City Manager's Report

May 23, 2023

1. Water System Update

There has been quite a bit of recent activity recently with the City's water system. Our contract operator, Michael Bollweg of Southern Oregon Water Technology LLC (SOWT) and his staff recently completed a hydrant flush of the entire distribution system. Flushing the system regularly is an important part of maintaining the distribution lines and maintaining water clarity from the treatment plant to the customer. A flyer from SOWT is attached for more info.

SOWT staff also recently completed a lead and copper sample testing process that involved the cooperation of select customers at different locations within the distribution system. This is a required and important testing protocol that ensures the water that is put through our treatment process meets or exceeds all Oregon Health Authority requirements and best practices.

Progress continues on the upgrade to the chlorination system at the Water Treatment Plant. As soon as the plan review from the Oregon Health Authority is complete, the existing tab chlorine system will be decommissioned and a new liquid system will be installed. This provides higher accuracy, ability to automate and remote access the process and assists in the required tracer study that will commence upon the completion of the equipment swap out.

Big thanks to the SOWT team for their work, mostly behind the scenes, in maintaining and improving Gold Hill's water system.

2. Fuels Reduction Grant Update

The recently awarded Oregon State Fire Marshal Fuels Reduction grant of $140,000 is now in the contract agreement stage of the process and will likely be ready for final Council review and approval in July. This will be accompanied by a recommended action plan to execute on the required deliverables outlined in the application. This includes either direct hire of a seasonal employee along with the purchase of fuel reduction equipment or contracting/partnering on a contract basis. The Grant has

some stipulations on these elements and staff will be attending a grant information meeting July 11 to learn about the extent of our execution options.

3. House Bill 3115 and 3124

All cities in Oregon are working on local ordinances to address the requirements set forth in each of these homelessness focused legislative actions passed by the Oregon Legislature in 2021. Attached is an informational guidebook published by the Oregon League of Cities that does an excellent job of explaining the complicated legal issues of the House Bills and of the federal court cases that generated the need for States to enact further legislation on the matter.

The development of a local ordinance is a high priority item that needs to be addressed as soon after the budget process as possible. I have added this topic to the Council look ahead for July and will be working in the mean time to obtain sample ordinances from similarly sized communities for staff and Council to refer to as Gold Hill specific ordinance language is developed.

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

The LOC wishes to extend its sincerest thanks to the municipal attorneys who assisted in the development of this guide. Attorneys from across Oregon came together over several months to vet legal theories, share best practices, and create this guide. These attorneys donated their time, experience, and resources – seeking nothing in return. And while a core team of attorneys was gathered to build this guide, the LOC recognizes that the team's work stands on the shoulders of every city and county attorney in Oregon who has been working, and who will continue to work, to assist their community in addressing the homelessness crisis. For those attorneys not specifically named below, please know your contributions are equally recognized and respected:

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