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MEMORANDUM

To: Kurt Triplett, City Manager

From: Darcey Eilers, City Attorney
Bob Sterbank, Foster Garvey

Date: October 11, 2024

Subject: **Evaluation of the Current Legal Climate Related to Homelessness**

RECOMMENDATION:

Staff recommends that the City Council reviews the analysis below, which discusses recent and anticipated developments in the law related to municipal authority to address homelessness. This information is provided as background for Council policy conversations and direction related to the City's response to homelessness.

EXECUTIVE SUMMARY

- There have been recent court decisions that have had the general effect of restoring local government authority and ability to enforce generally applicable ordinances prohibiting camping on public property.
- In *City of Grants Pass v. Johnson*, the United States Supreme Court rejected the 9th Circuit Court of Appeals' Eighth Amendment analysis of *Martin v. Boise*, which previously required local governments to ensure the availability of shelter before taking action to remove homeless encampments or otherwise enforce prohibitions against public camping.
- In *Potter v. Lacey*, the Washington Supreme Court held that there is no intra-state "right to travel" that would guarantee an individual's right to camp and live for free in an RV or camper on public property or rights-of-way.
- Additional litigation is actively occurring or anticipated to occur based on different alleged constitutional violations; several cases are already pending in Washington State courts.
- Legislation is expected to be introduced during the 2025 Washington legislative session that would significantly limit local governments' ability to address issues related to homelessness.

BACKGROUND:

On June 4, 2024, the City Council adopted Resolution R-5631, declaring the City's commitment to addressing homelessness through a person-centered approach and authorizing the City Manager to develop a homelessness continuum of care action plan for new policies, programs, and services that prevent and respond to unsheltered homelessness in Kirkland.

DISCUSSION/ANALYSIS:

The memorandum covers recent decisions from the United States and Washington Supreme Courts, federal district courts in Washington and California, and Washington appellate and

superior courts, as well as pending and anticipated new cases. This memorandum also briefly summarizes local laws relating to issues of homelessness, recent legislative and enforcement actions by Washington State and cities, and state legislation related to homelessness that is anticipated to be introduced in the 2025 legislative session.

United States Supreme Court Decision in *City of Grants Pass v. Johnson*

For years, the cities in Washington State have been restricted in enforcement efforts against those camping on public property. This was because of a Ninth Circuit case, *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), which held that municipalities may not impose criminal sanctions against people experiencing homelessness for camping on public property without offering adequate, alternative, and available shelter.

Martin was based on a United States Supreme Court case, *Robinson v. California*, 370 U.S. 660 (1962), which held that Cruel and Unusual Punishments Clause barred California from enforcing a law that made the "status" of narcotic addiction a criminal offense. The Eighth Amendment's texts states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Analogizing to *Robinson* and subsequent cases, the *Martin* court held 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." *Martin*, 920 F.3d at 616-17. This was because, the *Martin* court held, even if sitting, lying, and sleeping are defined as acts or conduct, they are essentially "involuntary and inseparable from status" because human beings are "biologically compelled" to engage in those acts. *Id*. And, 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." *Id*.

Then, the Ninth Circuit extended the reasoning in *Martin* in *Grants Pass v. Johnson*, 72 F.4th 868, 890 (9th Cir. 2023). Like many cities, Grants Pass had adopted an ordinance banning sleeping on public sidewalks, streets, or alleyways, or camping on city property or parking overnight in city parks. Camping was defined as "occupying a campsite," with "campsite" further defined as any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire, is placed. Initial violations of the ordinance could trigger fines, but multiple violations could result in jail time. Persons found to violate the ordinances multiple times could also be barred from all City property. If later found on City property after receiving an exclusion order, those individuals could be subject to criminal prosecution for trespass.

The Ninth Circuit determined that, as in *Martin*, the Grants Pass anti-camping ordinance violated the Eighth Amendment's ban on "cruel and unusual punishment" because there was insufficient shelter space. The Ninth Circuit determined that levying fines on someone through civil infractions for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry, who very likely does not have enough money to obtain shelter, is excessive punishment. This case was then appealed to the United States Supreme Court.

In late June 2024, the United States Supreme Court issued its decision in *City of Grants Pass v. Johnson*, 144 S.Ct. 2202 (June 28, 2024), rejecting the 9th Circuit's *Martin*-based approach. The Supreme Court's decision reversed the judicial limitations previously imposed by the Ninth Circuit that required any city attempting to enforce a ban on public camping to first ensure the availability of sufficient shelter beds. Analyzing the text of the Eighth Amendment, the Court noted that while other constitutional amendments focus on *what* may be criminalized and the process by which a government may seek convictions, the Eighth Amendment concerns the "method or kind of

punishment," not whether certain acts should be punished. 144 S.Ct. at 2015. The Court noted that the combination of civil fines and possible jail time punishments in the Grants Pass ordinance were not "cruel" because they were not designed to inflict "terror, pain, or disgrace"; they were also not "unusual" because similar punishments have been and remain a usual and common mode for punishing offenses. *Id*. at 2216. The Court also determined that the Grants Pass anti-camping ordinance did not penalize status but instead punished conduct. *Id*. at 2218.

The Supreme Court's *Grants Pass* decision does not mandate any action by local governments. Instead, it enables cities to exercise their more typical legal discretion to enforce anti-camping or anti-sleeping ordinances. Issuance of citations, trespass letters, or arrests for violations of local laws may now be used as a tool to address camping in where there is a threat to public health or safety, or when other solutions are not working. In Kirkland, these enforcement mechanisms will be used as an additional tool when appropriate while continuing to apply a human-centered approach to addressing homelessness.

Washington Supreme Court: *Potter v. City of Lacey*

Shortly after the United States Supreme Court's decision in *Grants Pass*, Seattle-area homeless advocates publicly announced that multiple additional lawsuits and causes of action were "teed up" and ready for filing. National homeless activists made similar statements, identifying additional potential causes of action, including potential violations of a claimed state constitutional "right to travel"; the '"right to privacy" (applied to people sleeping in tents, and requiring a warrant); and "necessity and justification" defenses in criminal trials.

Some of these claims were already pending in Washington State. In one case, *Potter v. City of Lacey,* __ Wn.2d __, 550 P.3d 1037 (July 3, 2024), the Washington Supreme Court issued its ruling only a week after *Grants Pass*, rejecting the claimed existence of an intrastate "right to travel" under the Washington State Constitution.

The *Potter* case was based upon a City of Lacey ordinance that prohibits parking on City streets or in public parking lots (including City Hall) for more than 4 hours, except for loading/unloading or with a permit. Permits could be obtained by City residents for guests for up to 48 hours; non-residents could obtain permits for only 12 hours and had to provide information regarding the vehicle and any occupants. Potter sued Lacey, raising both federal as well as state constitutional claims, after the City ordered Potter off the Lacey City Hall parking lot, where he had been living full-time in a 23-foot travel trailer without a permit. The federal district court largely dismissed Potter's case, and Potter appealed. The Ninth Circuit then certified a question under Washington law to the Washington Supreme Court, asking it to determine whether Washington law recognized a state constitutional right to intra-state travel that would guarantee Potter the right to live in his RV for free on City property.

The Washington Supreme Court unanimously rejected Potter's claim. The Court determined that Potter had presented no authority for a Washington state constitutional "right to travel" that would allow him to park and reside in his trailer in the specific place and manner he claimed (that is, in the Lacey City Hall parking lot). In fact, federal authority (non-binding in this state law case) holds the opposite: there is no federal constitutional right to intrastate travel that protects the right to remain in a particular place, in a particular manner, in a vehicle.

Helpful to Washington cities, the Washington Supreme Court also explained that binding Washington law establishes cities' constitutional authority under Art. XI, § 11 of the Washington Constitution to adopt parking laws of general applicability, and the Court has "consistently upheld" local "laws that limit driving and parking, against intrastate travel challenges."

Other Cases Pending in Washington State

Other cases involving claims arising from enforcement related to homelessness are currently pending in Washington courts. They include the following:

Kitcheon v. City of Seattle, Washington Court of Appeals, Case No. 85583-2-I.

This case is pending in the Washington State Court of Appeals, Division I, in Seattle. Oral argument was held on September 24, 2024, and the case is awaiting decision. In *Kitcheon,* the plaintiffs challenged the City of Seattle's administrative rules governing homeless encampment removals. Plaintiffs allege Seattle's rules violate two provisions of the Washington State Constitution: the right to privacy (article I, section 7) and the right against "cruel punishment" (article I, section 14), even though Seattle's administrative rules require certain protections for unhoused individuals. The trial court had granted partial summary judgment, finding the City's ordinance "partially" facially unconstitutional, and the trial court denied the City's summary judgment motion as to an "as-applied" Article I, section 14 claim, despite undisputed facts that the named plaintiffs had received and accepted offers of shelter in connection with encampment removals, accessed City-funded shelters, and then decided to leave those shelters to resume camping.

Currie v. City of Spokane, Spokane County Superior Court, Cause No. 24-2-03708-32.

This case was filed on August 1, 2024, by the ACLU of Washington on behalf of two individuals, one of whom camps in her car on city streets, and a homeless advocacy organization, Jewel Helping Hands. The complaint alleges that Spokane's anti-camping ordinance violates two provisions of the Washington Constitution: Article I, Section 14, prohibiting "cruel punishment," and Article I, Section 3, requiring due process, because the ordinance allegedly lacks standards for determining whether or when City officials will hold seized property. The City of Spokane has filed a motion to dismiss the case, which is noted for a hearing on November 1, 2024. The City's motion requests dismissal or, in the alternative to dismissal, that the superior court await the Court of Appeals' decision in *Kitcheon*.

Cole-Tindall v. City of Burien, United States District Court, Cause No. 2:24-cv-00325-RAJ; and *Burien v. King County*, Snohomish County Superior Court, Cause No. 24-2-02338-31.

These related cases involve King County Sheriff Patti Cole-Tindall's refusal to enforce the City of Burien's anti-camping ordinance. Burien's ordinance prohibits camping overnight on any nonresidential public property, except when temporary shelter services are unavailable, in which case camping may be permitted only between the hours of 7 p.m. and 6 a.m. The ordinance defines public property as including any city park, street, or sidewalk, and any other property in which Burien or other governmental agency has a property or easement interest.

The Sheriff sued Burien in federal court, alleging that the ordinance was unconstitutional because it violated *Martin v. Boise* and *Grants Pass v. Johnson*. The Sheriff's complaint argued that the Sheriff would face potential loss of her certification to work as a peace officer, which the Sheriff claimed was a property interest, and could also face potential liability, and that this gave her standing to challenge the City's ordinance. The City countersued in Snohomish County Superior Court, alleging the Sheriff had breached the County's contract with the City to provide police services and enforce the City's generally applicable anti-camping ordinance which, the City argued, was constitutional and did not violate the Eighth Amendment.

The Sheriff removed the City's breach of contract case to federal court. The City then moved to dismiss the Sheriff's constitutional challenges to the Burien ordinance, alleging that the Sheriff lacked standing to sue and that the ordinance was constitutional on its merits.

Following the U.S. Supreme Court's *Grants Pass* decision, on September 24, 2024, the federal trial court (Judge Richard Jones) granted the City's motion and dismissed the Sheriff's case. Judge Jones ruled that prevailing law in the Ninth Circuit holds that public officials do not have standing to challenge the constitutionality of a law where the only interest at stake is avoiding a potential violation of their oath of office or potential civil liability. This is particularly the case where the interest at stake is merely "abstract outrage at the enactment of an unconstitutional law" and no specific consequences to the official from enforcement were alleged.

Following dismissal of the Sheriff's constitutional claims, Judge Jones ruled that the City of Burien's remaining counterclaims, and its state law claims for breach of contract, lacked sufficient federal basis to support continued federal court jurisdiction. He therefore remanded the remaining claims to Snohomish County Superior Court, where they remain pending.

Since Judge Jones' dismissal, the Sheriff's public statements have indicated that she will continue to refuse to enforce the Burien anti-camping ordinance, although the basis for refusing to do so was not identified.

Additional Legal Considerations

The *Grants Pass* decision addresses only the Eighth Amendment. The Supreme Court's opinion notes that other constitutional protections continue to apply and may limit what behavior can be declared to be criminal as well as how local officials go about enforcing criminal laws. For example, the Court said, the First Amendment prohibits governments from using their criminal laws to abridge the rights to speak, worship, assemble, petition, and exercise the freedom of the press. The Equal Protection Clause of the Fourteenth Amendment prevents governments from adopting laws that invidiously discriminate between persons, and the Due Process Clauses of the Fifth and Fourteenth Amendments ensure that government officials follow fair and established procedures before taking any action against an individual that could affect their fundamental rights. The Constitution provides additional limits on prosecutorial power, such as due process requirements for fair notice and equal treatment (e.g., no selective prosecution). In addition, various defenses (insanity, diminished-capacity, and duress) continue to be available for assertion by individual criminal defendants. In addition, local governments may decline to criminalize actions such as public camping.

In relation to homelessness, other case law from federal courts in the Ninth Circuit relies on the Fourth Amendment to require certain due process requirements with respect to seizure of personal property in public spaces. These requirements remain intact, including requirements for advance notice of encampment clearing and the right to a reasonable opportunity to reclaim property that is not hazardous. *See Lavan v. City of Los Angeles*, 693 F.2d 1092 (9th Cir. 2012); *Miralle v. City of Oakland*, 2018 WL 6199929 (N.D. Cal. 2018); *Hooper v. City of Seattle*, 2017 WL 4410029 (W.D. Wa. 2017).

And, where a city has adopted policies requiring notice to encampment residents and requiring storage of property for later reclamation by homeless persons, courts have insisted that the city document training of staff on these policies to ensure that they are followed. *See, e.g.*, *Coalition on Homelessness v. City/County of San Francisco*, 2024 WL 3669475 (slip op. August 5, 2024) and 2024 WL 3956323, (slip op. August 26, 2024).

Local Laws

The City of Kirkland does not currently have generally applicable city-wide ordinances prohibiting camping and sleeping on public property with similar breadth and specificity to the ordinances at issue in *Grants Pass* or *Martin*. The City does have generally applicable laws regulating camping in parks, including KMC 11.80.140 (prohibiting camping in any city park), KMC 11.80.200 (prohibiting building fires in any city park) and KMC 11.80.250 (closing parks between the hours of 11 p.m. and dawn, and making it unlawful for any person to enter or remain in any park during closure hours). The absence of specific laws generally prohibiting camping on public property may limit the enforcement tools available to City staff when someone is sleeping in an area that is not a City park, depending on the circumstances and location, among other things.

Likewise, Kirkland does not have a permit parking scheme like the one enacted by the City of Lacey at issue in the *Potter* case, but Kirkland does have generally applicable parking laws that prohibit recreational vehicle camping on city streets. These include KMC 12.45.210 (prohibiting parking or storage of camping trailers on public streets, except for areas not including or abutting residential areas and designated by the planning director) and KMC 12.45.300 (prohibiting parking in excess of established time restrictions).

Other City and State Actions

At least two Washington cities, Lakewood and Auburn, have recently revised their anti-camping ordinances to remove *Martin v. Boise*-type requirements that shelter be available on any given night before anti-camping ordinances may be enforced. *See* Lakewood Ordinance No. 808; Auburn Ordinance No. 6950. Staff from both cities report that homeless persons engaged in camping on public property regularly refused offers of shelter and/or refused to use publicly available restroom facilities (porta-potties) placed adjacent to public camping. With the revised ordinances, City staff are seeing behavior modifications from those individuals.

The State of Washington reportedly has achieved more success in both clearing encampments and getting encampment residents into shelter, but apparently was able to do so by relaxing typical shelter requirements prohibiting active drug use while in the shelter, and requiring gender segregation (i.e., limiting shelter residents to male-only, or female-only). *See, e.g.*, https://www.seattletimes.com/seattle-news/homeless/wa-found-a-better-way-to-remove-homeless-encampments-will-it-stick/. This program has attracted some controversy because, in addition to the rule relaxation, it offers shelters only to encampment residents, rather than on a need-based approach typical of federally-funded shelter programs.

Possible Legislation Impacting Issues Related to Homelessness

In addition to court decisions, the legislative landscape can also impact issues related to homelessness. Multiple bills related to homelessness were introduced last session, and many are expected back in 2025. AWC staff has identified the following bills:

- Vehicle residences (in response to *Long v. Seattle*):
    - HB 2359 (advocates bill). Among other things, creates additional responsibilities and procedures regarding the impounding of a vehicle used as a home and requires state and local governments to ensure vehicle residences are impounded as a last resort, to pay storage charges for impounded vehicle residences, and to pay the registered tow truck operator the remaining costs if a court reduces impound or storage fees.
    - SB 5730 (Sen. Fortunato, incl. 2002 stakeholder group recommendations). Among other things, this bill would eliminate the existing homestead exemption for a vehicle used as a home if it was illegally parked; creates new procedures for towing from public property;

changes court procedures for reclaiming impounded vehicles; and requires the Department of Licensing to reimburse towing operators.

- Hostile architecture – SB 6231. Prohibits cities/counties from installing or constructing buildings or structures intended to prevent persons experiencing homelessness from sitting or lying down in a public space at street level, although design elements intended to prevent skateboarding, rollerblading or entry of vehicles are acceptable.

- Homeless shelter policies. These likely bills are still being developed but are expected to include a provision for shelter providers and others to challenge local emergency housing and shelter siting decisions or policies. Previous proposed versions have provided for Commerce to assume a quasi-judicial role over city land use decisions.

- Washington State version of Oregon's response to anti-camping type local ordinances (O.R.S. Stat. §195.530(2)). In 2022, the Oregon Legislature adopted legislation requiring Oregon cities to adopt a policy "to ensure the most humane treatment for removal of homeless individuals from camping sites on public property." While the new Oregon law prohibits sleeping on public sidewalks, streets, or alleyways at any time, and regulates occupying a campsite, storing camping materials and removal of person/property from campsites, it also requires a city police department to store removed property for a minimum of 30 days, limits penalties for violation to $50 fine plus any "alternative penalties intended to address the reason(s) for the violation, but *not* including imprisonment." Under the Oregon Model: "Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." The law also authorizes lawsuits challenging such municipal laws regulating sitting, lying, sleeping, or keeping warm and dry outdoors on public property.

- Homeless Bill of Rights. This bill is still being developed but is expected to prohibit housing status discrimination, prohibit harassment by law enforcement/agents, create rights in public spaces to survive, and prohibit civil or criminal penalties for sleeping or camping in public spaces, among other things.

Key Takeaways

Grants Pass and *Potter v. Lacey* indicate cities have more flexibility in addressing impacts of homelessness. Both the federal and state Supreme Courts indicate receptivity to exercise of municipal police powers and need for creative legislative approached. However, *Grants Pass* and *Potter v. Lacey* are not the end of the story. Litigation is ongoing and more is expected, which could impose additional obstacles to municipal encampment removals. These ongoing and future efforts are likely to be made in state court, with state constitutional challenges likely, rather than focusing on federal constitutional claims.

NEXT STEPS

Staff will keep Council apprised of any new case law impacting issues related to homelessness.