

August 26, 2021

Geoff Spalding, Chief of Police
City of Astoria
1095 Duane St.
Astoria, OR 97103

RE: **City Council Work Session — Police Community Survey**

Dear Chief Spalding:

I enjoyed your Police Community Survey presentation at the recent City Council work session. I especially enjoyed the general agreement that the lack of safety, related to homelessness, perceived by the housed is just that — perception more than reality. And speaking of perceptions, I have a somewhat different perspective of the Boise and Grants Pass court cases I would like to share... not so much mine... primarily a Federal Magistrate Judge as expressed in his opinion. In and of itself, these different perceptions may seem like a small matter, however, to me it's emblematic of Astoria's (and in many jurisdictions, society's) slow progress to actually solving homelessness. I'll explain what I mean in the second half of this letter.

Different Perspectives

During the meeting you said "... Boise was criminalizing homelessness because certain individuals were being incarcerated for the involuntary act of sleeping and so **they're [the court is] saying you can't criminalize it.** When I say incarcerated I mean in some cases they're taken to jail and then released [emphasis added]."¹ And then in the Grant's Pass case "**they took it a step further and said that any fine of a homeless individual can be determined as again cruel and unusual punishment....** you can't criminalize the involuntary act of sleeping and therefore if you don't have a shelter or somewhere they can go then you cannot take enforcement action."

However, United States Magistrate Judge Mark D. Clarke seems to have a different perspective when he opined "The Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal." The Federal Judge explained "Violations of the Boise ordinances analyzed in Martin were misdemeanors, 920 F.3d at 603, so the Ninth Circuit at times used the word 'criminal' in its analysis. However, **a careful reading of Martin [v. City of Boise] shows that this language was not a limitation on when the Eighth Amendment's prohibition on cruel and unusual punishment applies** [emphasis added]."² From my non-attorney's understanding, this Federal judge, writing in 2020, did not say he was taking Boise "a step further," he said a careful reading of the U.S. Court of Appeals for the Ninth Circuit ruling in the Boise case already made this point back in 2018.

Indeed, this judicial reasoning goes back to another Ninth Circuit Court of Appeals case, *Jones v. City of Los Angeles*, when in 2006 Judge Wardlaw wrote for the majority, "**The Eighth Amendment prohibits the City from punishing** involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."³ He didn't say criminalizing; he said punishing. In 2015 the United States Department of Justice filed a *Statement of Interest of the United States* specifically requesting the judicial reasoning from the 2006 Jones v. City of Los Angeles case be used in the Boise case.

¹ Slightly edited for clarity... see <https://youtu.be/do2ALQmiSC8?t=1450>.

² Blake v. City of Grants Pass, Opinion and Order — see <https://friendsoftheunsheltered.org/wp-content/uploads/2020-07-22-Blake-v.-City-of-Grants-Pass-Summary-Judgment.pdf>.

³ See <https://friendsoftheunsheltered.org/wp-content/uploads/Jones-v.-City-of-Los-Angeles-444-F.pdf>.

So what's the big deal?

The short answer... I'm simply tired of jurisdictions trying to use policing (and the courts) to solve homelessness! I'm guessing we are in general agreement on this! Homelessness is not "up front" a police issue... homelessness is a mental health issue, a housing availability/pricing (land-use planning) issue, an educational issue (a long soap-box story)... Homelessness is a symptom of many societal issues. Our country has a long history of trying to solve homelessness through policing: e.g. vagrancy laws, loitering laws, panhandling laws, sit-lie laws, exclusion zones.... One by one the majority of these overly broad laws have been struck down for various constitutional issues. But in this multiple decades' long process we're avoiding substantively addressing the real societal issues. Instead, we just seem to slowly march down the street of policing thinking we'll eventually find our way out of homelessness. The Boise (and subsequent Grants Pass) decision is just one more example of this. The Ninth Circuit issued its opinion in 2018. The particular case was on the criminal side of the code. So apparently the Grants Pass and Astoria city attorneys said in effect, "Don't worry, let's make it a civil infraction!" Like that really solves anything! Meanwhile time marches on and in 2020 a Federal District Court judge says "No, read the Boise decision carefully...." He didn't say "I'm taking Boise a step further and applying it to civil enforcement." He said it was already in the Boise decision. How much time and effort is going into the appeal of the Grants Pass case that could be used to address the underlying systemic issues. It drives me nuts.

In conclusion

I would enjoy the Grants Pass decision be phrased something like "The federal judge ruled the Martin v. City of Boise 2018 opinion, with a careful reading, already applied to both the civil as well as the criminal side of the law."

And furthermore...

Has anyone noticed that the leadership of the State of Oregon seems to be tiring of the limited action by cities / counties toward actually solving homelessness? I'm reading the tea leaves in this way because Oregon is one of the top states in the absolute number of homeless and the state is enacting laws that trump local ordinances on homelessness / housing issues.

- 2017's SB 1051 required ADU development in certain areas.
- 2019's HB 2001 limited exclusive single-family zoning in many cities; extended ADU provisions.
- 2020's HB 2006 trumps local zoning for shelters.
- 2020's HB 3115 sitting, lying, sleeping ordinances must be "objectively reasonable."⁴
- 2020's HB 3124 extends written notice for removal of campsites.

On the other hand, perhaps the intent of local jurisdictions is to let the state handle this NIMBY issue....

Sincerely,



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⁴ I believe it's general knowledge that HB 3115 was put in place as a precautionary measure in case (1) the Boise decision is overturned — although the U.S. Supreme Court denied review in 2019 — or (2) the Grants Pass case is overturned on appeal.