

The [il-]Legalization of Homelessness

by Rick Bowers

June 29, 2021

Let me begin by presenting my “get-out-of-jail-free” card. I am not an attorney. However, somehow I pulled off getting an “A” in my one obligatory business law class by writing common sense answers to test questions. Later in life (as a mediator in the Los Angeles and Ventura County court systems) I learned common sense doesn’t necessarily live in the same time zone as the law.... Those are my credentials. My advice? Take everything I say here with a grain of salt.

Note — within boxes such as this one I provide concrete examples or go into more detail or perhaps wander off into random musings. Feel free to skip over these if you’re interested in only the highlights. If you really want to go down a rabbit hole check out the footnotes.

The Big Picture (a.k.a. a brief history of the “stick” approach to end homelessness)

I think my overall point in writing this section is to vividly show that local governments have tried over the years to end homelessness by creating “anti-homeless[ness]” laws. This hasn’t worked for two reasons. First, the laws/ordinances are mostly stupid and never would work anyway (unless the goal is to spend lots of money and house all the homeless in jails). And two, eventually the Courts let the local government jurisdictions know the laws are unconstitutional. Here are some examples.

Vagrancy Laws

Unfortunately, when our country was founded we borrowed, from across the Atlantic, the idea of punishing vagrancy.¹ Whoops. It took a little over a couple of hundred years to decide phrases such as “no visible means of support” were a little broad.

For example, in 1972 the Supreme Court ruled a vagrancy law was unconstitutional in *Papachristou v. City of Jacksonville* because the “The Jacksonville vagrancy ordinance, under which petitioners were convicted, is void for vagueness, in that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ it encourages arbitrary and erratic arrests and convictions, it makes criminal activities that, by modern standards, are normally innocent, and it places almost unfettered discretion in the hands of the police.”²

Well, that didn’t work... let’s make hanging out illegal!

¹ See O’Brassill-Kulfan, K. (2019). Vagrants and vagabonds: Poverty and mobility in the early American republic.

² See <https://supreme.justia.com/cases/federal/us/405/156/#156>.

Loitering

“Loitering laws, which make it an offense for an individual to be in a public place for no apparent reason, have been attacked on the grounds of both vagueness and overbreadth, and have generally been determined to be unconstitutional.”³ But that doesn’t keep jurisdictions from trying....

A Portland anti-loitering law was declared unconstitutional in 1972 in *City of Portland v. White*.⁴ The Court of Appeals of Oregon said it agreed with the lower court’s analysis that the statute at issue had three elements: “(1) the defendant loitered or prowled; (2) such loitering or prowling was at a time, or in a place or in a manner not usual for law-abiding persons; and (3) such loitering created justifiable alarm for persons or property in the vicinity.” The Court of Appeals found all three elements unconstitutionally vague. Strike one, strike two, strike three — you’re out!

Not to worry... let’s make panhandling illegal!

Panhandling

“Panhandling is a form of solicitation or begging derived from the impression created by someone holding out his hand to beg or using a container to collect money.”⁵ The following is therefore clearly panhandling....



Salvation Army Bell Ringer⁶

Ok, we’ll make being aggressive illegal... that will fix it! Aggressive solicitation is “a term defined broadly to include behavior like asking for a donation twice, in pairs, or after sunset – on the basis that it can make passersby feel physically threatened or vulnerable to mugging.”⁷ So no Bell Ringers after sunset....

³ See <https://www.mtsu.edu/first-amendment/article/1213/loitering-laws>

⁴ See <https://law.justia.com/cases/oregon/court-of-appeals/1972/495-p-2d-778-2.html>

⁵ See <https://www.mtsu.edu/first-amendment/article/1215/panhandling-laws>

⁶ Photograph by Ben Schuman — usage rights — [Attribution-ShareAlike 2.0 Generic \(CC BY-SA 2.0\)](https://creativecommons.org/licenses/by-sa/2.0/). Downloaded from <https://www.flickr.com/photos/schuminweb/10163953713>.

⁷ See <https://theconversation.com/most-panhandling-laws-are-unconstitutional-since-theres-no-freedom-from-speech-92498>.

As recently as 2016 “Albuquerque outlaws all panhandling that occurs within three feet of a potential donor, unless the donor has agreed to donate. Fort Lauderdale prohibits soliciting for alms on its beaches. And the City of San Antonio has even considered penalizing those who give to beggars. New York City bans soliciting donations on its subways, as well as aggressive begging.”⁸

What’s the current state of affairs? “No panhandling bans have made it to the Supreme Court. But in recent years, all lower courts’ ruling on this issue have found that laws imposing restrictions on sidewalk and roadside solicitation are unconstitutional.”⁷ Problematic behaviors can be directly addressed (e.g. trespassing, assault, blocking a sidewalk) but panhandling, a form of asking for a donation, is protected speech.

Astoria was very careful in crafting its Unlawful Transfer ordinance. The specific behavior being discouraged was essentially disrupting traffic (and the associated safety issues) by panhandling. In City Council discussions, panhandling is clearly seen as a protected activity (meaning Constitutional), however, there were a few locations in town where traffic was disrupted by drivers making donations. The City adopted ordinance 6.390 *Unlawful Transfer on vehicular portion of the right-of-way* to prohibit this activity. Chief Spalding said from his perspective it applies to everyone — including “fill the boot” fundraisers by firemen. But the ordinance has not been “tested” in court. “In 2015, the 1st U.S. Circuit Court of Appeals in *Cutting v. City of Portland* struck down Portland, Maine’s ordinance that prohibiting panhandling while standing on median strips because it was not narrowly tailored and banned too much expressive activity.”⁸

Ok, jurisdictions have been told they cannot prohibit having no visible means of support, cannot prohibit “hanging out,” and cannot prohibit asking for money... how can we get rid of these rascals?⁹ I know! Let’s make sure they can’t sit or lie down!

Sit-Lie Ordinances

As with many homelessness related ordinances, there can be legitimacy in the intention (e.g. keeping sidewalks free from obstruction for mobility-impaired persons). As the saying goes, the devil is in the details.

Portland enacted its version in 2007. The ordinance prohibited among other things “a person from sitting or lying down on a ‘chair, stool or any other object placed upon a public sidewalk.’”¹⁰ I hope there was an exception for spectators at 4th of July parades.... According

⁸ See Lauriello, A. D. (2016). Panhandling regulation after 'Reed v. Town of Gilbert'. Columbia Law Review, 116(4), 1105-1142. Retrieved from <https://columbialawreview.org/content/panhandling-regulation-after-reed-v-town-of-gilbert/>.

⁹ You think this is not the goal (getting the homeless out of sight)? Watch this video: <https://youtu.be/nR7lt7sfNDQ?t=353>. “Cash” — the gentleman in the video — complies with all of the requests. I’m left with the overall sense that Cash’s behavior is not the problem (from the city’s perspective); Cash himself is the problem; he’s not one of the “normal people” referenced in the video who are allowed to use the park.

¹⁰ See <https://www.aclu-or.org/en/portlands-2006-sitlie-ordinance-process-abandoned-11th-hour>

to the City of Portland's *Homelessness Toolkit*, "In 2009 the United States District Court ruled that the City's 'sit-lie' ordinance was unconstitutional."¹¹ In truth, for fear of losing the lawsuit (and a potentially large jury award), the City reached an agreement with the plaintiffs to settle the lawsuit.¹²

How much money was spent defending an apparently unconstitutional law? At the City Council meeting ratifying the settlement agreement Moses Wrosen asked "What this is about is the city cutting a \$40,000 check today to the plaintiffs who they offended. So the city has spent 40,000 more dollars on the, quote-unquote, homeless issue, and that's not including your own legal fees. This has been a four-year battle. How much did your legal department spend losing this case? Do you have any idea?" There wasn't a definitive answer (except for Mayor Adams responding "They [city attorneys] get paid a salary, so they're always working."¹³ I guess that means in government accounting it was free...?

These sit-lie ordinances are widespread.

For example, the City of Orlando ordinance Sec. 43.88 says in part "*Prohibition*. It is unlawful for any person, after having been notified by a law enforcement officer of the prohibition in this section, to sit or lie down upon a public sidewalk or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, in the Downtown Core District."¹⁴ I particularly enjoy the apparently dark humor in allowing the law enforcement officer the ability to "selectively enforce" the law. No possibility of discrimination there...!

As will be shown below, the State of Oregon's current leadership is trying to make sure these local ordinances are "objectively reasonable."

Exclusion Zones

This approach to making cities "safe" is by keeping out the consistent trouble-makers. For example by making repeat offenders of local ordinances stay out of downtown... or parks. And again, the devil is in the details. For example, it's common for the social service agencies to be in an exclusion zone (so an exception is made for traveling to/from a support agency). Ditto for workplaces. Ditto for shelters. Police end up spending significant time trying to determine whether an individual is excluded or legitimately in a zone.

"In September 2007, Mayor Tom Potter chose not to renew Portland's Drug and Prostitution Exclusion Zone ordinances.

¹¹ See <https://www.portlandoregon.gov/toolkit/article/563496> and <https://casetext.com/case/anderson-v-city-of-portland#summary>

¹² "The claim has been investigated by Risk Management Services. The investigation indicates there is risk the City may be found liable. Therefore, in order to avoid the risk of an adverse jury award, we feel it is prudent to compromise the lawsuit at this time." See <https://efiles.portlandoregon.gov/Record/5107559/>.

¹³ See <https://efiles.portlandoregon.gov/Record/5568393/File/Document/>

¹⁴ See https://library.municode.com/fl/orlando/codes/code_of_ordinances?nodeId=TITIICICO_CH43MIOF_S43.88SILYSI_DOCODIPR

He said his decision was based on two factors: a belief that the exclusion zones were ineffective at deterring crime, and the results of a data analysis that showed police were discriminating against African Americans in terms of enforcing the exclusions.

Potter's decision follows years of lobbying by the ACLU of Oregon against the exclusion zones, which had been in existence for 15 years.

Exclusion zones allowed law enforcement officers to bar a person, with some exceptions, from entering an exclusion zone area for 90 days. The ACLU of Oregon opposed these civil exclusion orders because they did not have sufficient due process protections before individuals are denied the right to travel and associate freely. **In particular, Portland enforced exclusion orders against people who were never prosecuted or who were found not guilty of the underlying crime that was the original reason the police gave for issuing the exclusion order** [emphasis added].¹⁵

By comparison, the **exclusion criteria** for Astoria's Property Watch Program includes "Is reasonably suspected of violating any Oregon Revised Statute (ORS) or Astoria City Code (ACC)."¹⁶ This is the same shaky ground that the ACLU opposed in Portland (see above).

So if the pesky Oregon Law Center and the American Civil Liberties Union keep representing clients and therefore keep taking away our tools (that are unconstitutional), what's a city to do?

"YOU Are Not Wanted" Signage

These come in different forms... sometimes called hostile architecture.¹⁷ Creative ideas include slanted public benches, intentionally rocky open space, fencing, removing benches....

The City of Astoria removed the bench in front of the library.



With bench



Bench removed

¹⁵ See <https://www.aclu-or.org/en/legislation/portland-exclusion-zones>.

¹⁶ See https://www.astoria.or.us/Property_Watch_Program.aspx.

¹⁷ See <https://interestingengineering.com/15-examples-of-anti-homeless-hostile-architecture-that-you-probably-never-noticed-before>.

The City of Astoria removed the picnic tables in Heritage Square “Concrete Park” (old Safeway). Heritage Square was given park status per city code 5.926 (which means park related codes like no-smoking apply). It’s also a hangout location for the unsheltered.



Heritage Square park with picnic tables.



Heritage Square park with picnic tables & people.



Heritage Square today without tables/people....



Heritage Square today without tables/people....

Driving around Portland recently I noticed huge boulders under a freeway. The reason? See the Willamette Week’s article *Oregon Officials Deter Portland Homeless Campers With a Million Dollars’ Worth of Boulders*¹⁸

Martin v. City of Boise

This is a landmark case that finally says “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 [emphasis added].”¹⁹

The 9th Circuit Court of Appeals Opinion was filed September, 4 2018. The City of Boise petitioned the U.S. Supreme Court to review the case — on December 16, 2019 the Supreme Court denied the petition. The Opinion included “the panel held that the Cruel and Unusual Punishments Clause of the Eighth Amendment precluded the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to

¹⁸ See <https://www.wweek.com/news/city/2019/06/19/oregon-officials-deter-portland-homeless-campers-with-a-million-dollars-worth-of-boulders/>.

¹⁹ See <https://www.lexisnexis.com/community/casebrief/p/casebrief-martin-v-city-of-boise>.

alternative shelter. The panel held that, 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.”²⁰

Ok... we can't criminalize being indigent, let's fine 'em! That'll fix it! Like it really makes sense to impose financial penalties to solve being indigent....

You may be thinking “Who would actually try fining the indigent for sleeping outdoors?”
The answer —both the Oregon cities of Grants Pass and Astoria.

Blake v. City of Grants Pass

This is a case that, still winding its way through the courts, added “no fines” to the “cannot criminalize” Boise decision. More accurately, this judge sees “punishment” (including fines) already existing in the Boise decision. The Summary Judgment was issued July 22, 2020 by a Federal District Court and has been appealed.²¹

The Court said “Maintaining a practice where the City allows a person to ‘sleep’ on public property, but punishes him as a ‘camper’ if he so much as uses a bundled up item of clothing as a pillow, is cruel and unusual punishment. Therefore, this Court finds that it is not enough under the Eight Amendment to simply allow sleeping in public spaces; the Eight Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.”²¹

“Grants Pass argues that Plaintiffs have alternative ‘realistically available’ shelter outside the City on federal BLM land, Josephine County land, or state rest stops. This remarkable argument not only fails under Martin, but it also sheds light on the City's attitude towards its homeless citizens. Essentially, Grants Pass argues that it should be permitted to continue to punish its homeless population because Plaintiffs have the option to just leave the City.”²¹

“The Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal.” The Court 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 shows that this language was not a limitation on when the Eighth Amendment's prohibition on cruel and unusual punishment applies.”²¹

It's important to remember that the Court did not say limitations on camping cannot be imposed; jurisdictions are free to make reasonable no-camping ordinances.

²⁰ The Opinion is archived at <https://friendsoftheunsheltered.org/legislation/#1607388201388-53d01a1e-bc67>

²¹ The Summary Judgment is archived at <https://friendsoftheunsheltered.org/legislation/>.

It's also important to remember the potential cost to cities for this litigation. In the Grants Pass case, "Plaintiffs are awarded the amount of \$300,000, for their costs and attorney fees."²² This is of course in addition to the cost and attorney fees incurred in its defense.

Based on the Boise decision, Astoria went down a similar path as Grants Pass. In 2018 Astoria City officials were confronting unwanted camping in the woods east of town and recognized the existing [No] Camping ordinance did not cover that part of Astoria. Almost simultaneously, the 9th Circuit Court of Appeals ruled in the Martin v. City of Boise case. As a result, Astoria updated its Camping Ordinance, 5.900 – 5.925, to include "Violation of this ordinance is a Class B violation as defined by ORS 153.008 and 153.012." According to ORS 153.019 the presumptive fine for a Class B violation is \$265 and ORS 153.018 sets the maximum fine at \$1,000.

An October 2018 *Hipfish* article says Mayor "Jones acknowledges the recent 9th Circuit Court ruling that arresting those sleeping outside with nowhere else to go as 'cruel and unusual punishment' applies to Astoria. Yet, he believes camping on city property needs to stay illegal, indicating that Astoria is compelled to support enough beds and services for people experiencing homelessness in this community." In a follow up personal email to my request for clarification Mayor Jones said "The court did not rule that prohibiting camping on public property is cruel and unusual punishment. The court ruled that ARRESTING someone for camping illegally, IF there is no other alternative for that person to sleep, constitutes cruel and unusual punishment."

I'm in complete agreement with Mayor Jones... as far as he goes. It is true, as Mayor Jones highlights, the Court did opine that ARRESTING individuals in the Boise case violate the constitution but the Court DID NOT authorize fines as the Mayor apparently assumes. By voting to pass the Astoria Camping Ordinance that identifies a violation as a Class B violation, Mayor Jones seems to be supportive of fines (as Councilor, he voted for the ordinance on October 15, 2018). However, United States Magistrate Judge Mark D. Clarke sees the Boise case differently than the mayor. As previously quoted, "The Eighth Amendment prohibits cruel and unusual punishment **whether the punishment is designated as civil or criminal** [emphasis added]." The Court 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 shows that this language was not a limitation on when the Eighth Amendment's prohibition on cruel and unusual punishment applies** [emphasis added]." ²¹

²² See <https://friendsoftheunsheltered.org/wp-content/uploads/2020-10-05-Blake-v.-City-of-Grants-Pass-Attorney-Fees.pdf>. I'm assuming this award would be voided in the City prevails in its appeal.

I do appreciate Mayor Jones statement, “Astoria is compelled to support enough beds and services for people experiencing homelessness in this community.” I’m still waiting.
Countywide homeless counts during the last few years:

- 2017: 680
- 2018: 790
- 2019: 894²³
- 2020: over 1,000.²⁴

The Most Recent Laws Impacting Homelessness

Hopefully I’ve clearly made the point that courts are over many years one-by-one finding laws unconstitutional that in one way or another attempt to address homelessness by restricting rights. That certainly doesn’t mean local jurisdictions won’t continue enacting ordinances that in my humble opinion are unconstitutional (e.g. Astoria’s Camping 5.900 – 5.925 updated October 15, 2018).²⁵ It does however mean these ordinances have the potential to be used as “clubs” against people who are homeless until courts find them unconstitutional.

The good news... some State of Oregon elected leaders are encouraging us to actually solve the problems of homelessness with what might be called a “hand up” approach instead of continuing to use fines and jails. The first two state interventions are meant to increase the housing stock (including affordable housing).

Accessory Dwelling Units

In an apparent attempt to increase housing options in Oregon, HB 2001 from the 2019 Oregon Legislative session, was signed into law and became effective on August 8, 2019.²⁶ Key features of the legislation include:

- “A city with a population greater than 2,500 or a county with a population greater than 15,000 **shall allow** in areas within the urban growth boundary that are zoned for detached single-family dwellings the development of **at least one accessory dwelling unit** for each detached single-family dwelling, subject to *reasonable local regulations* relating to siting and design [emphasis added].”
- “‘*Reasonable local regulations* [see above] relating to siting and design’ does not include owner-occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking [emphasis added].”

In 2017 we purchased a house in Astoria and subsequently explored the possibility of converting the basement into an ADU to house low-income graduates of recovery

²³ See <https://friendsoftheunsheltered.org/2021/02/16/research-pit/> for the 2017-2019 sources of data.

²⁴ Vivian Matthews speaking at the Homelessness Forum #2, City of Seaside, May 13, 2021 (23 minutes, 16 seconds into the video). See <https://youtu.be/8zerK2nMXpo?t=1396>.

²⁵ See <https://friendsoftheunsheltered.org/2018/10/15/camping-ordinance/>.

²⁶ See <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HB2001>.

programs. The home is in a high-density R3 historic neighborhood. We were told existing zoning precluded this because (1) ADUs were not allowed on “half-size lots” and (2) additional off-street parking would be required.

When HB 2001 was passed I heard a city official say words to the effect of “I wish Salem would quit telling us how to run our city. We know better.”

The Astoria Planning Commission was tasked with developing proposed updates to the city’s Development Code to accommodate the requirements set forth in HB 2001. In Astoria, a resident wanting to install an ADU is caught in a “Catch-22” by the Development Code. Testimony from the December 10, 2019 meeting included [slightly edited for clarity]:

Planner Barbara Fryer: “Our code currently does not allow a manufactured home, modular home, prefabricated home that is smaller than a thousand square feet.”²⁷

City Manager Brett Estes: “...one of the things the city council has directed the planning commission to do as a part of this amendment is to determine specifically whether or not to allow manufactured or modular homes as accessory dwelling units. They've asked the planning commission to have a dialogue and there are representatives in the audience tonight who are prepared to discuss this....”²⁸

Cheryl Matson: “My name is Cheryl Matson. I'm a homeowner at 5450 old highway 30. I have no neighbors. I was looking... and still looking to put an ADU on my property. I picked up a manufactured home two years ago.... I got excited when you guys passed the law that we could put on an ADU on our property so I went out and purchased a manufactured home — 450 square feet. It comes from McMinnville and they can deliver it to my property. But it comes in on wheels. Even though it will come in on wheels and they'll place it and it'll have a deck around it and will be wrapped and will be permanent on a platform — they then considered it [apparently the Planning Dept tried to determine whether to consider this unit as a manufactured home or as a tiny home]— if it wasn't a manufactured home — it would be a tiny home and tiny homes couldn't come in on wheels. So I'm kind of in that cusp of trying to get this law passed where I could have an accessory dwelling unit. Originally it was for my father-in-law and it's now been two years and he has since passed away. But I have 13 stairs in my home and as I age up I'm hoping that this will eventually be my little mother-in-law suite....I needed to be a little bit of an income property until I get to that point. It has a little kitchenette in it. It has a bedroom on one end. It comes fully set up. I can have the same as my siding; I got bigger windows; I got upgraded it has the stud housing. I just need a seal of approval for from you guys. It is what I'm waiting for right now.”²⁹

²⁷ See <https://youtu.be/LxqJZtb0gPM?t=1086>.

²⁸ See <https://youtu.be/LxqJZtb0gPM?t=1145>.

²⁹ See <https://youtu.be/LxqJZtb0gPM?t=1542>.

Essentially the existing code required an “on-site, stick built” structure costing significantly more than the same dwelling built off-site. Remember rates of homelessness are strongly associated with housing prices.

Single Family Dwelling Zones

I want to make two interconnected points. First, housing prices are related to the rate of homelessness.

“Economists John Quigley and Steven Raphael were among the first to demonstrate that housing affordability—rather than personal circumstances—is the key to predicting the relative severity of homelessness across the United States. They estimated that a 10.0 percent increase in rent leads to a 13.6 percent increase in the rate of homelessness. Consistent with Quigley and Raphael’s findings, our analysis indicates that median rents across U.S. states explains 43 percent of the variance in rates of homelessness in 2017.”³⁰

My second point is single-family homes, with a larger square footage and land footprint than multi-family homes, cost more.

In 2020 a median priced single-family home in Oregon was valued at \$377,275 while a condo was \$302,959.³¹

I’m guessing rents are analogous; apartments are less expensive to rent than single-family homes. I think it’s pretty easy to argue that encouraging the development of multi-family homes will encourage the creation of affordable homes. That’s exactly the direction the State of Oregon and other jurisdictions³² are headed (but NOT Clatsop County cities).

According to the legislative summary of House Bill 2001 from the 2019 Oregon State Legislature’s regular session “Requires cities with population greater than 10,000... to allow duplexes in lands zoned for single-family dwellings within urban growth boundary.... Requires cities and counties to amend their comprehensive plan and land use regulations to conform with requirements or to directly apply model ordinance developed by commission.... Requires local governments to support density expectations with findings when updating regulations to accommodate housing need.... Prohibits conditioning approval of accessory dwelling unit within urban growth boundary on off-street parking availability or owner occupancy.”³³

House Bill 2001 was signed into law and became effective August 8, 2019.

The situation of single-family zones within Clatsop County cities, the county with the highest rate of homelessness in the state (see footnote 23 on page 8), is interesting....

³⁰ ECONorthwest (March 2019). *Homelessness in Oregon: A review of trends, causes, and policy options*.

³¹ See <https://www.fool.com/the-ascent/research/average-house-price-state/>.

³² Interesting Berkely, CA is eliminating single-family zoning because of it’s “racist legacy.” See <https://sf.streetsblog.org/2021/02/24/berkeleys-move-towards-eliminating-single-family-zoning/>.

³³ See <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/HB2001>.

Astoria, Cannon Beach, Gearhart, Seaside, and Warrenton all have populations less than 10,000 so are not subject to HB 2001 that forces larger cities to eliminate exclusive single-family dwelling zones. All these Clatsop County cities have chosen to keep their low density single-family zones free from (arguably more affordable) duplexes. In the county with the highest rate of homelessness in the state of Oregon all of the major cities persist in keeping more affordable housing options out of more exclusive single-family zones.

Oregon State Legislature — 81st Regular Session — 2021

There have been several bills related to homelessness put forth in this legislative session. Four have been enacted — signed by Governor Brown. My general takeaway — the Oregon legislature is tiring of the state being a national leader in homelessness³⁴ and tiring of the general inaction in local jurisdictions. By enacting these bills the legislature is encouraging further action by cities and counties.

HB 2006 — Emergency Shelter Siting, “Camping” in Parking Lots, Grants

From the bill’s summary: “Requires local governments to allow siting of qualifying emergency shelters by qualifying entities notwithstanding land use laws and regulations. Sunsets requirement July 1, 2022.”³⁵ My focus here is the shelter aspect of the bill, however, there are provisions such as “Any political subdivision **may allow** any public or private entity to allow overnight camping by homeless individuals living in vehicles on the property of the entity [emphasis added].” The bill was signed into law and became effect May 12, 2021.

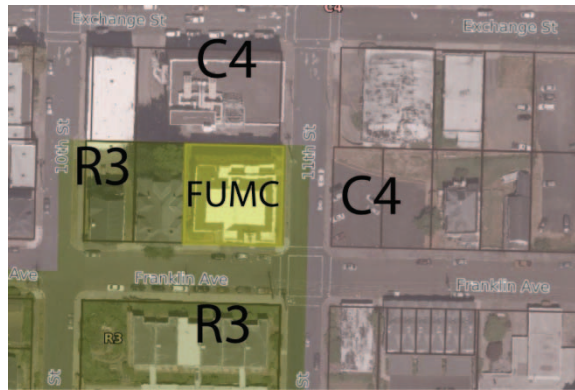
From my perspective, this is an example of the State overriding NIMBY objections to shelters as well as encouraging local jurisdictions to update zoning laws. Clatsop County has no year-round “HUD qualifying” low-barrier shelters and we have the highest rate of homelessness in the state. At least in Astoria, siting of shelters is not considered in the Development Code and there is virtually no relevant guidance (in support of shelters) from the Comprehensive Plan.

Due to [legitimate] neighbor complaints, the City of Astoria required the Astoria Warming Center (operating in the basement of the First United Method Church) to obtain a Conditional Use Permit. The public hearing was held July 27, 2017. Quoting from Community Development Director Kevin Cronin’s staff report “Homeless are residents too just like homeowners and renters, but do not currently have permanent shelter. The Comprehensive Plan does not articulate a hierarchy of housing status. For example, homeowners are not elevated above renters or homeless for that matter and should be evaluated equally. Conversely, the compatibility goals [CP.220.6 & CP.220.14] are applicable to this proposal and short term impacts and a long term location need to be addressed. **In total, when reviewing the Housing policies cumulatively, it is decidedly in favor of protecting the needs of existing neighbors over non-residential uses and**

³⁴ See <https://www.security.org/resources/homeless-statistics/>.

³⁵ See the Oregon State Legislature’s information on HB2006 at <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2006>.

incompatible uses [emphasis added].”³⁶ This is a finding relevant to placing the only low-barrier shelter in the county, open 90 days per year, in a building in a high-density residential R3 zone that is bordered on two sides by a commercial C4 zone. Let me be clear — the building to the north and the church parking lot to the east of the church building are in a commercial zone. See the map below:



First United Methodist Church (FUMC).

The Astoria Planning Commission (APC) did approve the temporary Conditional Use Permit for the Astoria Warming Center (to be renewed yearly). Given the lack of guidance from the Development Code, Commissioner Moore instigated a process for the APC to make recommendations to the City Council to update the city code regarding shelters. However, at this time the Comprehensive Plan, the City’s guiding vision, still does not address the homeless or very low-income affordable housing. After many work-sessions President Moore suggested tabling the Development Code updates until the Comprehensive Plan is updated. See my letter to the Council on this issue here:

<https://friendsoftheunsheltered.org/2019/07/15/astoria-city-council-re-comprehensive-plan/>. While I still believe updating the Comprehensive Plan first is the correct approach, so far I have been waiting two years for action. In the meantime, due to our inaction (and inaction by other Oregon cities), the State legislature enacted HB2006, trumping local zoning.

The following is an example of the “delaying” NIMBY tactic. In written testimony for the HB 2006 Gwenn Wysling, the Executive Director of Bethlehem Inn (homeless shelter in Bend, Oregon) writes, “Bethlehem Inn is ready to expand our operations to open a shelter in a neighboring community that currently has **NO** shelter beds. We have received conditional use approval and currently approved again at the appeal level from one individual, absentee business owner that does not even reside in Oregon. If this individual elects to continue this opposition through the systems in place, it would go to Oregon Land Use Board of Appeals (LUBA). While our case is strong, the current siting system and this potential delay tactic could end up taking years to ultimately approve.”³⁷

³⁶ See PDF page 51 in https://www.astoria.or.us/assets/dept_3/agendas/72517_APC_packet.pdf.

³⁷ See <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/25089>.

A little over a year ago we investigated purchasing a residential property in Astoria that was in the middle of a stalled renovation. Utilities were not connected, some work had been done. County records indicate the house is almost 5,000 square feet and six bedrooms — in a tour we saw eight bedrooms. We understood that in its history it had been a boarding house. Our thought was to make a low-ball offer and re-create it as an eight bedroom clean & sober boarding house. Checking with City Hall we were told for that use we would need twelve off-street parking spaces (or potentially get a variance). Does anyone know of a house in Astoria with twelve off-street parking spaces? We couldn't figure out a way to make a low offer contingent on the long process of getting a variance so gave up. An out-of-towner purchased it for approximately what we were able to pay — for the use of...?

My summary / take-away is the Oregon legislature has taken a “shot across the bow” for local jurisdictions to get in action to provide incentives and code amendments for all levels of housing, including shelters.

HB 3115 — Local Sitting, Lying, Sleeping Ordinances Must be Objectively Reasonable

While HB2006 seeks to increase the number of shelter beds, this bill seeks to avoid further punishment of those who are unable to “get a traditional roof” over their heads. For relevant background information see Sit-Lie Ordinances on page 3, Martin v. City of Boise on page 6, and Blake v. City of Grants Pass on page 7. The bill’s summary includes “Provides that local law regulating sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness.”³⁸

There are a few things that stand out in this bill. First, it has support from the League of Oregon Cities. In choosing between “carrot and stick” solutions to solving homelessness, historically cities seem to actively support “stick” approaches. However, not in this case.

Ariel Nelson, League of Oregon Cities, writes “HB 3115 confirms cities’ obligation to manage public spaces for the benefit of entire community while protecting the safety and dignity of people experiencing homelessness. Thank you for your consideration, we urge your support for HB 3115.”³⁹

And homeless advocates support the bill.

For example, Jimmy Jones, Executive Director of Mid-Willamette Valley Community Action Agency writes “A society is judged, at day’s end, by how it treats its weakest and most vulnerable members, those without power, those who are often despised or tormented or neglected. But a good society, a just society, acts to ensure that those that cannot protect themselves are protected. It took us thirty years of bad public policy for the homeless

³⁸ See <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3115>.

³⁹ See <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/27877>.

problem to grow into what it has become today. It will take another thirty years of smart public policy to get us out. House Bill 3115 is a good start.”⁴⁰

Second... the less hopeful side of me recognizes the bill requires cities to be “objectively reasonable” in local ordinances. I suspect objectively reasonable in Grants Pass is drastically different than Gresham.

Finally, I appreciate the affirmative defense aspect of the bill. According to the bill’s summary, “Creates affirmative defense to charge of violating such local law that law is not objectively reasonable. Creates cause of action for person experiencing homelessness to challenge objective reasonableness of such local law. Authorizes court to award attorney fees to prevailing plaintiff in such suit in certain circumstances.”³⁸

Affirmative Defense: “...part of an answer to a charge or complaint in which a defendant takes the offense and responds to the allegations with his/her own charges, which are called “affirmative defenses.” These defenses can contain allegations, take the initiative against statements of facts contrary to those stated in the original complaint against them, and include various defenses based on legal principles.”⁴¹ For example, an affirmative defense may take the form of agreeing that I slept overnight at a particular public location, but the local ordinance is not objectively reasonable because....

The bill was signed into law on June 23, 2021.⁴²

HB 3124 — Increases Posted Notice “No Camping” Time

According to the legislative summary “Increases time that written notice must be posted before removal of homeless individuals from established camping site.... Requires written notice to state how individuals may claim personal property removed from camping site. Requires that unclaimed personal property be stored in orderly fashion.... Provides that local law that is more specific or provides greater protections to homeless individuals subject to removal from established camping site preempts contrary provisions of section....”⁴³

The bill was signed into law June 23, 2021.

HB 3026 — Waive Fee for Identification Cards for Homeless

According to the legislative summary “Directs Department of Transportation to waive fee for issuing, renewing or replacing identification card if person who is issued card is experiencing homelessness. Becomes operative January 1, 2022.”⁴⁴

The bill was signed into law June 11, 2021.

⁴⁰ See <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/28062>.

⁴¹ The People's Law Dictionary by Gerald and Kathleen Hill Publisher Fine Communications. See <https://dictionary.law.com/Default.aspx?selected=2363>.

⁴² See <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3115>.

⁴³ See <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3124>.

⁴⁴ See <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3026>.

Unpassed Legislation

The 2021 Legislative Session was scheduled from January 19th to June 27th. Two bills relating to homelessness were winding their way through the process when the session ended (so were not passed). HB 2544 – Authorizes... two-year grants to organizations that provide services to unaccompanied homeless... and HB 3004 – ...additional weights [i.e. homeless students]... to distribute State School Fund moneys.

Conclusion

My overall “take-away” with recent State legislation is local jurisdictions would do well to aggressively and proactively address housing shortages (including shelters, transitional, and affordable) for two reasons. First, it’s the right thing to do. And second, if we do not take action now, the State will take action — in ways we may not enjoy. For example, HB 2006, signed into law during this legislative season, “trumps” local zoning for shelters. If we already had shelters in place (supported by proactive Comprehensive Plans and Development Codes) we would have adequate shelters sited where we prefer.
