



CITY OF TOPEKA

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MEMORANDUM

To: Governing Body
From: Amanda L. Stanley, City Attorney
Re: Possible Camping Ordinance Amendments and the Legal Landscape
Date: August 22, 2023

I was asked by Interim City Manager Nienstedt to prepare possible options for amending the City's current Camping Ordinance for the Governing Body's consideration. As the Governing Body looks for innovative options to address the growing unsheltered crisis, I thought it also important to give some background on how the City arrived at its current ordinance and a summary of the current legal landscape regarding vagrancy laws nationally.

At the September 3, 2018 Governing Body meeting, action was taken to create a special Governing Body committee to consider similar underlying issues associated with the camping ordinance and the traffic pedestrian safety ordinance. The committee was tasked with addressing "the issue of homelessness and the displacement of persons as well as poverty."

The result of over a year of work was the passage of the current Camping Ordinance approved December 3, 2019 which can be found in TMC 9.45.340 et seq. At the time of passage, this ordinance was viewed as a limited, partial ban on camping that represented a balanced restriction to protect certain sensitive areas and infrastructure while continuing to meet the needs of the unsheltered in our community. Attached to the Novus item are several attachments demonstrating the legislative history.

As the City was undergoing this process, a case was working its way through the federal court system out of the 9th Circuit, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). In *Martin v. Boise*, homeless persons brought a §1983 claim challenging the city's ordinance as a violation of the Eighth Amendment which prohibits cruel and unusual punishment. The 9th Circuit held in the case that the Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter. The City of Boise petitioned for a writ of certiorari to the Supreme Court asking for the decision to be overturned. On December 16, 2019, approximately two weeks after the City of Topeka passed its amended camping ordinance, the Supreme Court denied the City of Boise's petition for review leaving the 9th Circuit's decision in place. *City of Boise, Idaho v. Martin*, 140 S. Ct. 674, 205 L. Ed. 2d 438 (2019). This denial was a disappointment to cities who were hoping the Supreme Court would step in and prevent this expansion of the Eighth amendment or, at a minimum, provide more clarity. Litigation was seen across the country citing to *Martin v. Boise*.

Cities across the nation have spent the last four years testing the limits of the law in regard to homelessness and so have Homeless Advocacy groups. Nationwide we have seen lawsuits trying to expand constitutional protections to a wider array of conduct around homelessness and cities likewise trying to narrow the rights. *Martin v. Boise* only dealt with criminalization of camping not code enforcement, zoning, public health laws etc. The law has not been static. In other jurisdictions, simply attempting to clean the streets and remove debris have led to claims of Fourth amendment violations for allegedly unreasonably considering property abandoned or collecting property without notice. See *Proctor v District of Columbia*, no. 18-cv-701 (D.D.C Nov 27, 2018) and *Sullivan v. City of Berkley*, no. 17-06051 (N.D. Cal. Jan. 19, 2018). Other suits have been even broader arguing city cleanup activities violated the First, Fourth, Eighth, and Fourteenth Amendments. In these cases, individuals allege the encampments were an expression of free speech to call attention to the crisis of affordable housing, that the city's policies were cruel and unusual punishment when there were not sufficient shelter beds, that denying people the right to a safe place to sleep, rest and recuperate violates the Fourteenth Amendment right to travel, and that removing tents, tarps, blankets, clothing, and other property may be creating an unlawful state-created danger for the homeless. See IMLA May-June 2021 / vol. 62 No. 3 /35.

One of the most recent cases to be decided is *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) which was decided by the 9th Circuit as recently as July 5, 2023. In this case, individuals experiencing homelessness brought a putative class action against the city challenging the constitutionality of city ordinances which precluded use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within city's limits. The ordinances result in civil fines up to several hundred dollars per violation and persons found to violate the ordinance multiple times could be barred from all city property. If a homeless person was found on city property after receiving an exclusion order, the individual was subject to criminal prosecution for trespass. See *Johnson*, at 875. Grants Pass did not have adequate shelter beds compared to the number of homeless individuals.

In *Johnson v. Grants Pass*, the Ninth Circuit held that the Grants Pass utilization of a civil enforcement mechanism first before proceeding to a criminal enforcement mechanism did not allow the City to evade the Eighth Amendment.

“the anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances’ Eighth Amendment infirmity.” *Johnson*, at 890.

Additionally the Ninth Circuit held “the district court correctly concluded the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from ‘taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available’ by banning bedding, sleeping bag, or other material used for bedding purposes. *Johnson*, at 891. The court did not go so far as to find that the banning of “fire, stove, and structure prohibitions deprive homeless persons

of sleep or ‘the most rudimentary precautions’ against the elements.” *Johnson* at 868, 895 (9th Cir. 2023).

The litigation in other jurisdictions has created a body of caselaw under the Fourth and Fourteenth amendments governing standards for removal of encampments. The Fourteenth Amendment requires both pre- and post-deprivation notice and the Fourth Amendment guards against “unreasonable” search and seizures. When adopting the City’s Administrative Procedures governing the cleanup of public lands under the City Manager’s caretaker power, this caselaw heavily influenced the drafting of the policy to ensure the City remains in constitutional compliance while also having necessary rules in place to protect the health and safety of our community. The City’s administrative policy provides advance notice of the cleanup, allows opportunity for property to be removed in advance, provides storage for particular types of property such as medications when it is clear there was likely no intent to abandon the property, and provides for post-clean up notice on where this type of property can be retrieved. Individuals have the right to be homeless; however, individuals do not have the right to build permeant structures and convert public land to private land.

One of the common arguments when discussing stricter camping ordinances is that *Martin v. Boise* is not binding precedent in Kansas. While Kansas is in the 10th Circuit and the 9th Circuit is not binding precedent, it is considered persuasive precedent. Additionally, in a relevant 10th Circuit case decided before *Martin v. Boise*, there is a specific statement that the only reason the ordinance at issue did not violate the Eighth amendment was because the camping ordinance did not criminalize involuntary behavior because an individual could not be charged with a violation of the camping ordinance when there were no open beds in a shelter. *Cochran v. City of Wichita*, No. 18-1132-JWB, 2018 WL 4637237, at *7 (D. Kan. Sept. 26, 2018), *aff’d*, 771 F. App’x 466 (10th Cir. 2019). When caselaw like this is combined with *Martin v. Boise*, it is highly probable the argument in *Martin v. Boise* is likely to prevail in the 10th Circuit.

Everything is a balancing act. The ordinances included in the agenda are examples that try to strike a balance between the City’s current camping ordinance and a complete ban in a constitutionally compliant manner.

The Legal Department has only reviewed these ordinance from a constitutionality perspective and not a broader public policy perspective. Hopefully they will serve as a helpful starting point for Governing Body and public discussion.

Attachments:

Unlawful Camping (neighborhoods)
Unlawful Camping (10 day limit)
Camping-Article III, Chapter 9.45 TMC

cc: