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## PORTLAND CITY COUNCIL- 09/11/13- OCCUPY LEGAL LIAISON MARK J HOFHEINS JR

## POINTS OF DISCUSSION/REGARDING SIDEWALK CLEANUP

AUDITOR 09/11/13 PM12:00

- 1) I, Mark J Hofheins Jr., come before the council on the 11<sup>th</sup> Anniversary of September 11<sup>th</sup> as i remember it well, being a trajic day for the U.S., as well as a trajic day for my transistion into adulthood with it being my 18<sup>th</sup> birthday;
- 2) I implore the council acknowledge that, Occupy Portland, as a group that are active in the community, are actually cleaning up the city, free of pay minght I add, and possibly the Council should concider employing a few of the Occupiers and work to better both the city and the people who are out there and are willing to display cooperation with the health and safety standards of the city;
- 3) I, and Occupy Portland also implore the Council to acknowledge that Homelessness is not to be criminalized, that Occupy Portland is more fearful of being brutalized and assaulted by the Portland Police Beareau than we are gang members and violent offenders being released from the Justice Center, less than 700 feet away from or current home on and around Terry Shrunk Plaza, due to constant unwarranted police harassment and assult, during hours when public officials are unreachable to address the issue;
- 4) I, Implore the council to acknowledge, that tents are required to protect our health and safety and are "our home and safety device" during inclimate weather, and again without them is inhuman treatment by the council and the police if we are unable to use them at times when absolutely necessary to save our own safety, health, and life during dangerous times and inclimate weather;
- 5) We as human being deserve to be treated with dignity and not like common criminals, It is thus unconstitutional to stop a homeless person from using means to protect themselves;
- 6) I ask the council if they have had reasonable time to review the U.S. Supreme Court, which originated from the Ninth Circuit Court of Appeals, the Ninth Circuit Court of Appeals, as well as the 09/27/00 Multnomah County Court Judge Stephen Gallagher ruling on the overturning of the " Camping Ordinance", ruling it unconstitutional?;
- 7) Camping ban overturned
- 8) Landmark decision by Multnomah County Judge Stephen Gallagher overturns Portland's nineteen-year-old anti-camping ordinance
- 9) Portland, Oregon
- 10) October 2000
- 11) By Remona Cowles
- 12) Homeless people in Portland, Oregon have finally received much needed relief. For nineteen years Portland's Anti-Camping Ordinance made it criminal to sleep outdoors—in public, on private property, or in vehicles. The ordinance was ruled unconstitutional on September 27 by

Multnomah County Judge Stephen Gallagher, who felt it was cruel and unusual punishment.

- 13) Judge Gallagher found the ordinance to be in violation of the United States Constitution because those without homes are punished for the status of being homeless. The ordinance was also found to be in violation of equal protection and the fundamental right to travel by denying homeless people the opportunity to possess their belongings with them while traveling throughout the city.
- 14) The case was brought by the State of Oregon against Norman Wickes, Sr. and his son, Norman Wickes, Jr., who had been living in their vehicle, parked nightly at various locations in Portland to sleep. Portland police had, over a short period of time, given the Wickes over forty citations for camping in their vehicle. Interestingly, it would have been legal for the Wickes to sleep in their truck had they had a home to live in. This disparity is one of the issues that made Judge Gallagher's ruling possible.
- 15) Judge Gallagher spoke eloquently and thoughtfully on behalf of homeless people. Demonstrating a keen knowledge of the issues faced by homeless people in their daily struggle to survive, Judge Gallagher offered a point by point explanation for his ruling.
- 16) In response to the question whether enforcement of the ordinance constitutes cruel and unusual punishment, and is therefore unconstitutional under the Oregon and United States Constitutions, Judge Gallagher wrote, "The court finds it impossible to separate the fact of being homeless from the necessary 'acts' that go with it, such as sleeping. The act of sleeping or eating in a shelter away from the elements cannot be considered intentional, avoidable conduct. This conduct is ordinary activity required to sustain life. Due to the fact that they are homeless, persons seek out shelter to perform these daily routines. Yet the City considers this location to be a campsite if the homeless person maintains any bedding. The homeless are being punished for behavior indistinguishable from the mere fact that they are homeless. Therefore, those without homes are being punished for the status of being homeless...This court does not accept the notion that the life decisions of an individual, albeit seemingly voluntary decisions, necessarily deprive that person of the status of being homeless."
- 17) Judge Gallagher also found that the ordinance burdens homeless people's fundamental right to travel. "The homeless carry their belongings with them or store them in a location to which they have access. Those belongings necessarily include the tools required to participate in the basic necessities of life<bedding for sleeping and a stove for food preparation. If a homeless person is traveling through our city, or traveling within our city looking for work and a permanent place to reside, he is not allowed to remain in his vehicle or lean-to without being in violation of the ordinance. By denying defendants the ability to partake in simple necessities of life, the ordinance restricts their freedom of movement. Homeless choosing to travel through our city are not allowed to stop without being in violation. Those homeless who are trying to make a life in the city are in constant violation."

- 18) In response to the City's argument that homeless people camping pose health and safety dangers, Judge Gallagher argued, "Although protecting the health and safety of the citizens of this city may very well be compelling, there are less restrictive means to address the problem. The Wickes found themselves living out of their car due to their inability to find adequate and affordable housing. Rather than slapping a homeless person with a citation for maintaining life in a public place, the city could first explore avenues of providing sufficient housing for all individuals. Adequate services should also be in place to help individuals find housing and jobs...There are a great number of alternatives regarding housing, job training, mental health services, etc., that should be put in place to both minimize the effect of homelessness, and eliminate homelessness altogether, before our city resorts to arresting individuals for sleeping and eating in the only locations available to them."
- 19) Judge Gallagher concluded, "Individuals without a home must carry what belongings are necessary to survive, such as bedding and food, with them at all times, or store them in a place to which they have access. The place where these belongings are kept is by law deemed to be a campsite. Every time a homeless person remains at that location, he is in violation...Those without homes are impermissibly punished for the status of being homeless. Performing such life sustaining acts as sleeping with bedding is a necessary action for someone without a home. This act of sleeping is not conduct that can be separated from the fact of the individual's status of being homeless. Portland's anti-camping ordinance punishes the status of being homeless."
- 20) Understandably, Mr. Wickes Sr. responded to Judge Gallagher's ruling with elation. "It was absolutely necessary to get that mean-spirited law overturned. Don't stereotype those who are homeless. I wanted to do it the right way. I choose not to commit crimes to resolve my situation. I hung on. A lot of people get worn out-I was on the verge of being worn out, but I endured and prayed. My son and I-we have moxy. I would suggest Mayor Vera Katz be homeless for two or three months to see what it feels like to not be able to bathe when you need to, change your clothes, go to the restroom, or any of the normal things that everybody takes for granted. Being homeless is not a crime, and it's demeaning to the police who are forced to spend time they could use to fight real crime to roust homeless people. Mayor Vera Katz needs to leave it alone and accept the defeat. This country was founded by people who camped and now we're too good for that. Judge Gallagher made the right decision."
- 21) With the help of Northwest Pilot Projects, JOIN, and the generosity of Durham Construction Co., Mr. Wickes, Sr. and his son are now housed. Wickes, Jr. is now attending school, where he is studying computer technology in a special program that will be followed by a new job in the local computer industry. Expressing his relief, Mr. Wickes commented, "You know what I did last night? I took a bubble bath-just because I could. It felt great!"
- 22) Mayor Vera Katz responded with frustration to Judge Gallagher's ruling, promising to use other violations to continue the City's efforts to keep homeless people off the streets. Some of the violations often used to keep homeless people on the move are trespassing, loitering, and public nuisance. An increase in these kinds of

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violations could be expected if Mayor Katz's strategy is put into effect. Mayor Katz hopes that the District Attorney will appeal the decision, and that the ordinance can continue to be enforced until the case is heard again—a process that may take as long as a year.

- 23) The decision of some homeless people to remain living outdoors, when examined more closely, is not a decision to be homeless, but rather a decision to stop head-butting the brick wall of barriers to obtaining a home in a housing market that has no mercy. This ruling may mean the dissolution of some of those barriers. Social service workers who help homeless people find housing are hoping this will mean that their clients' criminal records will be cleared of anti-camping violations—ironically, one of the many barriers to obtaining housing for their clients.

24) For the full article and related information, go to:  
<http://www.streetroot.org/archives/2000/10/gallagherruling.html>

25)



IN THE CIRCUIT COURT FOR THE STATE OF OREGON

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FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON

Plaintiff

*Submitted by  
MARK HOFHEINS  
9/11/13*

V.

NORMAN D. WICKS, SR. and

NORMAN D. WICKS, JR.

Defendants

Case No. Z711742 &amp; Z711743

OPINION AND ORDER GRANTING DEFENDENTS' MOTION

TO HOLD PORTLAND'S CAMPNG BAN UNCONSTITUTIONAL

## INTRODUCTION

This case came before the Court on June 14, 2000. Defendants, Norman D. Wicks, Sr. and Norman D. Wicks, Jr. were cited for violation of the City's anti-camping ordinance, Portland City Code, Title 14, 14.08.150, on February 10, 2000. Defendants argue that enforcement of the ordinance against the homeless constitutes cruel and unusual punishment, violates the equal protection clause of the 14<sup>th</sup> Amendment, and impedes their right to travel.

## FACTS

A resident in a NE Portland neighborhood called the police to complain about a vehicle that had been parked on a public street, in various locations, on and off for a number of days. The police arrived at the location and contacted defendants, who were located in the camper portion of their vehicle. Defendants had bedding, a stove and cooking utensils in the camper. The police did not inquire as to how long the defendants had been parked at that location. Defendants testified that they had been conducting business during the day and had been parked in that location only for an hour or so. Defendants do admit to parking in various locations in that area each evening and then leaving in the mornings to run their computer parts recycling business.

Defendants had maintained a place to live until sometime in 1995, when they were evicted from their home by a new owner. Norman Wicks, Sr. receives Supplemental Security Income each month due to a disability, having been diagnosed as suffering from Post Traumatic Stress Disorder (PTSD). Norman Wicks, Jr. earn money running the computer business out of his truck. The two have been unable to obtain permanent housing and have been living out of their truck off an on since 1995. Defendants have had difficulty in locating permanent housing due to substantial costs involved in moving into a new residence, especially given their low income, and difficult locating Section 8 housing due to Mr. Wicks, Sr.'s past felony conviction.

Expert testimony was offered regarding the general shortage of beds available to the homeless and the weather conditions at that time in February.

## APPLICATION OF THE ORDINANCE

PCC 14.08.250 provides:

A. As used in this Section:

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1. "to camp" means to set up, or to remain in or at, a campsite.
  2. "campsite" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire, is placed, established, or maintained, whether or not such place incorporates use of any tent, lean-to, shack, or any other structure or any vehicle or part thereof.
- A. It is unlawful for any person to camp in or upon any sidewalk, street, alley, lane, public right of way or any other place to which the general public has access, or under any bridge or viaduct, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.
  - B. The violation of this Section is punishable, upon conviction, by a fine of not more than \$100 or by imprisonment for a period not to exceed 30 days or both.

The ordinance has been interpreted to include the added requirement that the defendant has "exhibited" a 'purpose of maintaining a temporary place to live.'" City of Portland v. Johnson, 59 Or App 647, 651 P2d 1384 rev den 294 Or 492 (1983). This requirement is said to "modify and limit the definition of 'campsite' and 'camping.'" Id.

Despite common understanding of what constitutes a campsite, nevertheless under the ordinance Defendants' truck is a campsite by definition. This is so because defendants store all of their belongings in the truck and they have nowhere else to reside. The fact that defendants are homeless necessitates that they carry their property with them at all times, including that needed to conduct essential daily living requirements. This includes bedding materials and utensils to prepare meals. Anytime defendants remain in their vehicle, they are located in a campsite. If they have nowhere else to reside, they are necessarily in violation of the city.

#### ENFORCEMENT OF THE ORDINANCE CONSTITUTES

#### CRUEL AND UNUSUAL PUNISHMENT

The ordinance is unconstitutional as applied to the homeless under both Article I Section 16 of the Oregon Constitution and 8<sup>th</sup> Amendment of the United States Constitution.

A state may not punish a person merely for status. Robinson v Sate of California, 370 U.S. 660 (1962). In *Robinson*, the state of California made it a criminal offense to be addicted to narcotics. The Court held that it was cruel and unusual punishment in violation of the Fourteenth Amendment to punish a person based on his/her status as a narcotic addict. Id. Defendants argue that Portland's ordinance similarly punishes the status of being homeless. The City argues that being homeless is a condition, not a status. The City also contends that "'homelessness' is not a status like age and gender." Brief of Amicus – City of Portland at 15. One must not confuse immutable characteristics such as age and gender, which may be considered a suspect classification, with status, which the Supreme Court has held to include such circumstances as drug addiction.

Status was clarified in Powell v State of Texas, 392 U.S. 514 (1968). In *Powell*, the defendant was convicted of being in violation of a statute making it a crime to be intoxicated in a public place. The defendant argued that he was being punished for his status of being a chronic alcoholic, claiming this was impermissible under *Robinson*. The Court upheld the statute stating that the defendant was convicted for his status as an alcoholic, but rather for this conduct after drinking – being in public. The Court found "[t]he State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." Id. At 532.

The court is influenced by Justice White's concurrence, where he discussed that his opinion may have been different had the defendant been homeless. "The facts remain that some chronic alcoholics must drink and must drink somewhere. Although many chronic alcoholics have homes, many others do not. . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk." Id. At 551.

In Oregon, it is held that dangerous offender statute permissibly enhanced the sentence of the defendant who had been diagnosed with a severe personality disorder. State v. Caughey, 89 Or App 605 (1988). The court held the defendant was not being punished for his status of having a personality disorder, but rather "[i]t merely reflects the legislative recognition that a person who has a severe personality disorder that causes him to commit dangerous crimes is less amenable to rehabilitation." Id. At 607.

In the light of both Oregon and federal law, the court must determine if PCC 14.08.250 is punishing defendants for their

status of being homeless, or for their conduct, distinguishable from the fact that they are homeless.

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The court finds it is impossible to separate the fact of being homeless from the necessary 'acts; that go with it, such as sleeping. The act of sleeping or eating in a shelter away from the elements, cannot be considered intentional, avoidable conduct. This conduct is ordinary activity required to sustain life. Due to the fact that they are homeless, persons seek out shelter to perform these daily routines. Yet the City considers this location to be a campsite if the homeless person maintains any bedding. The homeless are being punished for behavior indistinguishable from the mere fact that they are homeless. Therefore, those without homes are being punished for the status of being homeless.

There is a distinction between those homeless who have a place to maintain their possessions, such as a vehicle or a lean-to, and those homeless less fortunate who carry their bedding materials with them and choose a different spot to sleep on any given night. The court does not believe those particular homeless individuals could be found in violation of this ordinance due to the added requirement of "exhibiting a "purpose of maintaining a temporary place to live."

The set of circumstances before us can distinguish from *Powell* and *Caughey*. In *Powell*, the defendant was not punished for being a chronic alcoholic, but rather for choosing to place himself in public setting after becoming intoxicated. In *Caughey*, the defendant was found to be dangerous and less amenable to rehabilitation. Here, defendants were merely found to be in possession of bedding material in an area where they intend to sleep – a basic requirement of sustaining life.

The City argues that status is something one has not control over. After discussing *Pottinger*, the City footnotes the proposition that homelessness may derive from voluntary acts, suggesting that the person has put himself in the position of being homeless and therefor cannot claim it to be a status. This court does not accept the notion that the life decisions of an individual, albeit seemingly voluntary decisions, necessarily deprive that person of that status of being homeless.

Consider *Robinson*, where it was held that a person may not be punished for the status of being a drug addict. Although the Court in *Robinson* did discuss possible circumstances when drug addiction could be involuntary, such as a newborn addicted from the time of birth and a patient using medically prescribed narcotics, *Id.* At 667 n.9, it is clear that many addicts become addicted to narcotics by making voluntary decisions at the beginning of the addiction. The fact *Robinson* once chose to pick up a needle did not foreclose him for attacking a statute unfairly punishing him for the arguably inevitable result down the road – that he is now an addict.

#### ENFORCEMENT OF THE ORDINANCE VIOLATES EQUAL PROTECTION AND IMPEDES THE HOMELESS' CONSTITUTIONAL RIGHT TO TRAVEL

Equal protection requires that those individuals similarly situated are treated alike. City of Cleburne v Cleburne Living Center, 473 U.S. 432, 439 (1985). The rational basis test is applied when considering laws under equal protection analysis. However, when a suspect class is involved, or there is an infringement of fundamental right, strict scrutiny is the proper test to be applied. *Id.* At 440.

The right to travel has long been considered a fundamental constitutional right. Attorney General of New York v. Soto-Lopez et al., 476 U.S. 898 (1986). Oregon extends this right to include intrastate travel in addition in interstate travel. Josephine County School District No & v. Oregon School Activities Association, 15 Or. App. 185, 515 P.2d 431 (1973). It is not uncommon for the infringement on the right to travel to be an indirect impairment of the right. "Out right-to-migrate cases have principally involved . . . [an] indirect manner of burdening the right." Soto-Lopez at 903.

PCC 14.08.250 effectively restricts the homeless' right to travel. The homeless carry their belonging with them, or store them in a location to which they have access. Those belongings necessarily include tools required to participate in the basic necessities of life – bedding for sleeping and a stove for food preparation. If a homeless person is travelling through our city, or travelling within our city looking for work and a permanent place to reside, he is not allowed to remain in his vehicle or lean-to without being in violation of the ordinance. By denying defendants the ability to partake in simple necessities of life, the ordinance restricts their freedom of movement. Homeless choosing to travel through our city are not allowed to stop without being in violation. Those homeless who are trying to make a life in the city are in constant violation.

The fact that a number of homeless in our city are in the midst of traveling was recognized at the hearings regarding passage of the ordinance. "We have found in surveying those who are involved in the camping out, that the majority of them, the preponderance of them are in transit thought the City of Portland to somewhere else, or newly arrived here." Deputy Chief Gary Haines of the Portland Police Bureau, Minutes of May 28, 1981, Reel 4579, p. 830-831.



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The court has found that the ordinance burdens the homeless' fundamental right to travel. The court must now consider whether the ordinance is necessary to further compelling state interest. In *Johnson*, the court cites language from the preamble of the ordinance regarding its purpose. "The Council finds . . . [t]hat such persons [remaining at campsites], by such actions are creating unsafe and unsanitary living situation which pose a threat to the peace, health and safety of themselves and other citizens of the City." *Johnson* at 650.

Although protecting the health and safety of the citizens of this city may very well be compelling, there are less restrictive means to address the problem. The Wicks found themselves living out of their car due to their inability to find adequate and affordable housing. Rather than slapping a homeless person with a citation for maintaining life in public place, the city could first explore avenues of providing sufficient housing for all individuals. Adequate services should also be in place to help individuals find housing and jobs. Expert testimony was offered at trial regarding the insufficient number of beds available to the homeless, particularly during winter months. The safety and cleanliness of some shelters were also considered. "[E]ven where there is available space in a shelter, it may not be a viable alternative 'if as is likely, the shelter is dangerous, drug infested, crime-ridden, or especially unsanitary . . . Giving one the option of sleeping in a space where one's health and possessions are seriously endangered provides no more choice than does the option of arrest and prosecution.'" *Pottinger* at 1580.

There are a great number of alternatives regarding housing, job training, mental health services, etc. that should be put in place to both minimize the effect of homelessness, and eliminate homelessness altogether, before our City resorts to arresting individuals for sleeping and eating in the only locations available to them.

#### CONCLUSION

Individuals without a home must carry what belongings are necessary to survive, such as bedding and food, with them at all times, or store them in place to which they have access. The place where these belongings are kept is by law deemed to be a campsite. Every time a homeless person remains at that location, he is in violation. Those who carry their belongings on their person and move about day today, however, are not in violation; they have not exhibited required intent of 'maintaining a temporary place to live.'

The anti-camping city ordinance is unconstitutional as applied to homeless in violation of the 8<sup>th</sup> Amendment of the United States Constitution and Article I Section 16 of the Oregon Constitution. Those without homes impermissibly punished for the status of being homeless. Performing such life sustaining acts as sleeping with bedding is a necessary action for someone without a home. This act of sleeping is not conduct that can be separated from the individual's status of being homeless. Portland's anti-camping ordinance punishes the status of being homeless.

The ordinance also violates equal protection and the fundamental right to travel. By denying homeless the opportunity to possess their belongings with them while traveling throughout the city, they are being denied the basic necessities required for daily living. This infringes on the homeless' ability to travel freely. Restrictions on a fundamental right must be necessary to further a compelling purpose to comport with the Constitution. Although the City's purpose may very well be compelling, i.e. to protect the safety and welfare of all its citizens, there are less intrusive means available to achieve the same purpose. Therefore the ordinance violates the homeless' equal protection and constitutional right to travel.

The ordinance is hereby found unconstitutional and defendants are found to be not guilty.

Dated this 27<sup>th</sup> day of September, 2000.

Honorable Stephen L. Gallagher, Jr.