



Agenda Bill

City Council Regular Meeting - 25 Sep 2023

Department

City Manager, Legal

Staff Contact

Adolfo Bailon, City Manager, Garmon Newsom II, City Attorney

Agenda Placement

Consent Agenda

Agenda Bill Title

Adoption of Ordinance No. 818, Unlawful Public Camping

Summary

This ordinance was previously presented to the council. The council had several questions related to the proposed ordinance.

Martin v. City of Boise

The Ninth Circuit Court of Appeals held in *Martin v. City of Boise* concerning the Eighth Amendment claim of cruel and unusual punishment, "'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.'"

"Our holding is a narrow one. Like the *Jones* panel, 'we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.'"

"We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' That is, 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."

Distance

Bellevue prioritizes using shelters in Bellevue "when possible." No *Martin v. Boise*-related decisions stated the distance that a shelter had to be from where the person was found or where the shelter had to be located.

Exemptions

Nothing was explicitly on-point concerning exemptions, but the 9th Cir. explained that its holding "does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it . . ." Several district courts repeatedly quoted *Martin* and noted that its narrow holding did not "dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place."

Related to this is somewhat direct language from the United States Supreme Court - "Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Lindsey v. Normet* (no obligation to provide adequate housing). *Deshaney v Winnebago County Dept of Social Services*. The Supreme Court further explained, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom," quoting *Lindsey v. Normet*.

Several courts noted, *Martin* does not establish a constitutional right to occupy public property indefinitely at the Plaintiffs' option. For example, a "Santa Barbara ordinance applies in only one area of the City. This geographic limitation may ultimately mean the ban does not violate the Eighth Amendment; it may simply scatter unhoused people from downtown Santa Barbara to residential areas without adequate shelter." A district court stated that the "Ninth Circuit also explained that its holding 'does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it . . .'"

Shelter

Bellevue's code does not use the phrase "reasonable shelter." Bellevue Municipal Code 10.06.110 states, "'Available overnight shelter' means a public or private shelter, with available overnight space, open to individuals experiencing homelessness, at no charge. If the person is unable to utilize an available overnight shelter due to voluntary actions such as intoxication, drug use, unruly or assaultive behavior, or violation of shelter rules, the overnight shelter space shall still be considered available for the purposes of this section."

"Shelter," as explained in *Warren v. City of Chico*, "seems to contemplate shelter will offer individuals a place to sleep 'indoors.'" According to HUD, "An emergency shelter is a temporary shelter for people who cannot live in their previous residence due to a crisis, such as a natural or man-made disaster, domestic violence, or homelessness." *Coal. on Homelessness v City & Cnty. of San Francisco*.

One court noted that plaintiffs had "not shown that removal of the portable toilet is constitutionally cognizable under the Eighth Amendment."

Other courts noted that *Martin* "seems to contemplate shelter will offer individuals a place to sleep "indoors."

Clearing or Sweeps

As explained in *Sacramento Homelessness Union v. Cnty of Sacramento*, "sweeps ... imply instantaneous removal of individuals and encampments without any notification and outside legal response." Another court explained that *Martin* prohibits a ban on all camping, not the proper designation of permissible areas."

Litigation

There have been 82 cases that cited or referenced the *Martin v. City of Boise* decision. Of the 82 cases, 59 were from district courts, and 9 were from the 9th Circuit Court of Appeals. Please keep in mind that frequently, a variety of claims are made in one action or appeal. As a result, some court decisions may allow a party to prevail on a specific issue and lose on another in the same litigation. Additionally, few of the cases were trials, so they were not final judgments.

Of the 82 cases mentioned above, approximately 53 of them were Boise-Eighth Amendment related. The other cases ranged from state law (typically in California), prisoner 1983 claim, Fourth Amendment, Fourteenth Amendment, standing, and class action claims. Of the Eighth Amendment claims, please note that these numbers are a gross simplification of some of the rulings. Frequently, both parties moved for relief and received split rulings where one party won on a specific request but lost on a related request. For example, in *Martin v. Boise*, dissenting Judge Owens, concurred in part and dissented in part.

Sixteen (16) rulings primarily favored the plaintiff(s). Two other favorable rulings were vacated (made of no effect or canceled). More specifically, 5 Preliminary Injunctions (PI) were granted, or a Stay of a PI was denied. Four (4) Defendant(s) Motions to Dismiss were denied. Two (2) plaintiff(s)' Temporary Restraining Orders (TRO) were granted. Two (2) rulings of an Eighth Amendment violation were affirmed (*Johnson v. Grants Pass* decisions). Two (2) plaintiff(s)' Motion for Summary Judgment were granted. One (1) Motion to amend the complaint was granted. Parenthetically, please note that several decisions against the plaintiff(s) granted the plaintiff leave to submit an amended complaint.

Forty (40) rulings primarily favored the defendant(s). To be clear, the governments, cities and/or counties were almost always the defendant(s). Sixteen (16) rulings that dismissed complaints or granted a defendant(s)' Motion to Dismiss or Motion for Summary Judgment were issued. Nine (9) plaintiff(s)' TROs were denied or vacated. Five (5) plaintiff(s)' PI requests were denied. Three (3) convictions or injunctions were affirmed (found to be correctly imposed). Two (2) plaintiff(s)' Motions to Amend were denied (but most rulings against the plaintiff(s) offered the plaintiff(s) an opportunity to amend the complaint). Two (2) plaintiff(s)' Motions to Dismiss were denied. One (1) plaintiff(s)' PI was dissolved. One (1) prior ruling in favor of the plaintiff(s) was reversed or remanded.

Financial impact

Given the fact that Burien and the King County Sheriff's Office have not been pursuing arrests or prosecutions for people being unhoused, there is no actual data related to the financial impact of having an anti-camping ordinance. To Burien's knowledge, no one has been arrested for camping or being unhoused. If someone were arrested, it would likely be for a different violation. Such an arrest may not result in the person being jailed unless there are outstanding warrants or other reasons that the court may find to justify holding this hypothetical person in custody.

Options

1. Adopt Ordinance No. 818.
2. Do not adopt Ordinance No. 818.

Administrative Recommendation

Adopt Ordinance No. 818.

Suggested Motion

I move to adopt Ordinance No. 818, Unlawful Public Camping.

Fiscal Impact

Unknown.

Attachments

[Draft Ordinance No. 818 - Unlawful Public Camping \(Amended\)](#)

CITY OF BURIEN, WASHINGTON

ORDINANCE NO. 818

AN ORDINANCE OF THE CITY OF BURIEN, WASHINGTON, CREATING AN ANTI-CAMPING OR ANTI-DWELLING ORDINANCE IN BURIEN, PROVIDING FOR SEVERABILITY, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, on July 17, 2023, during a regular council meeting, the council requested that the City Manager draft (or have drafted) an anti-camping ordinance for Burien;

WHEREAS, the council specifically requested that the ordinance be modeled on Bellevue ordinance 10.06.110;

WHEREAS, the language in this anti-camping ordinance complies with the *Martin v. Boise* and *Johnson v. Grants Pass* Ninth Circuit decisions in that it does not criminalize people resting, sleeping, or lying down on public property if there are no shelter beds or spaces available, rather it sets a reasonable time, and it authorizes the City Manager to set reasonable place and manner restrictions on resting, sleeping, or lying down on public property;

WHEREAS, the proposed ordinance below is the requested draft ordinance with a grace or education period before potential enforcement; and

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section One. Section 9.85.150, entitled **Unlawful Public Camping**, of the Burien Municipal Code, is created and states as follows.

A. A person is guilty of unlawful public camping if that person uses nonresidential public property, as defined in this section, as a temporary or permanent dwelling, lodging, residence, or living accommodation, at any time between 10:00 p.m. and 6:00 a.m., except at places set aside and posted for such purposes by the Burien City Manager or designee, or by permit issued by the Burien City Manager or designee.

B. For this section, “nonresidential public property” means any street, sidewalk, Burien public park, or any other open area where Burien or another governmental agency has a property interest, including easements. “Nonresidential public property” does not include apartments, houses, or other fixed residential living quarters owned or leased by Burien.

C. Indicia of camping include but are not limited to bedding, cots, sleeping bags, tents or other temporary shelters, personal belongings storage, and cooking equipment use or storage.

D. Unlawful public camping is a misdemeanor.

E. A person is not guilty of unlawful public camping if there is no available overnight shelter when the person is on public property. "Available overnight shelter" means a public or private shelter with available overnight space, open to individuals experiencing homelessness at no charge. If the person cannot utilize an available overnight shelter due to voluntary actions such as intoxication, drug use, unruly or assaultive behavior, or violation of shelter rules, the overnight shelter space shall still be considered available for this section.

F. The City Manager shall have the permit authority noted above in addition to the emergency authority provided under BMC Chapter 2.75 and any other applicable laws, orders, rules, or equivalents.

G. Given the sensitivity of this matter, the significance and impact of the unhoused, and the need to educate and inform the public, including the unhoused, this ordinance will take effect on November 1, 2023.

Section Two. Severability. Should a court of competent jurisdiction find any section, paragraph, sentence, clause, or phrase of this ordinance, or its application to any person or circumstance, unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining parts of this ordinance or its application to other persons or circumstances.

Section Three. Edits. For purposes of this ordinance, additions are underlined, and deletions are stricken with brackets around the deleted language.

Section Four. Corrections. The City Clerk and codifiers of the ordinance are authorized to make necessary corrections to this ordinance, including, but not limited to, the correction of scrivener/clerical errors, references, ordinance numbering, section/subsection numbers, and any references thereto.

Section Five. Effective Date. This ordinance shall be published in Burien's official newspaper and take effect on November 1, 2023.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON, AT A REGULAR BUSINESS MEETING THEREOF THIS 25th DAY OF SEPTEMBER, 2023.

CITY OF BURIEN

Sofia Aragon, Mayor

ATTEST/AUTHENTICATED:

Heather Dumlao, City Clerk

Approved as to form:



Garmon Newsom II, City Attorney

Filed with the City Clerk: September 13, 2023
Passed by the City Council: September 25, 2023
Ordinance No.: 818
Date of Publication: September 29, 2023