Regulation of Public Property in a Rise of Homelessness

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Local ordinances prohibiting camping on public property and sleeping on city streets and sidewalks were once commonplace. But in 2018, the Ninth Circuit Court of Appeals raised a red flag that began to affect the enforcement of these ordinances everywhere. In the City of Boise, Idaho, homeless individuals challenged the City's ordinances criminalizing, among other things, unauthorized sleeping in public spaces, and camping on streets, sidewalks, parks, and in public spaces. The court sided with the plaintiffs and struck down the challenged code provisions. In that case, *Martin v. Boise*, the Ninth Circuit held that the Eighth Amendment precludes a local government's enforcement of ordinances criminalizing sitting, sleeping, or lying outside in public places against homeless individuals who have no practical access to alternative shelter.

After an initial flurry of enforcement moratoria that followed the *Martin v. Boise* decision, governments began rethinking their policies, and many began updating their ordinances in ways that seemed to fit the narrow Ninth Circuit holding. Two years after the *Martin v. Boise* decision, however, the U.S. District Court for the District of Oregon struck down one government's response. In *Blake v. City of Grants Pass*, a class of individuals asserted that the city unlawfully punished people based on their status of being homeless. Grants Pass had enacted laws and policies prohibiting unpermitted camping on public property, including a ban on sleeping on streets and sidewalks. Individuals found in violation of those laws could be excluded from the property and would be fined with mandatory civil penalty amounts. If the civil penalties remained unpaid, additional collection fees would be applied, followed by collection efforts, all of which, the court found, made it more difficult for the individuals cited to ever secure housing, which might ultimately lead to further violations of the same prohibited conduct.

The opinion in *Blake v. City of Grants Pass* built on the *Martin v. Boise* decision, and the court there held that the Eighth Amendment prohibits the enforcement of anti-camping and anti-sleeping

ordinances against individuals who have no practical access to alternative shelter, regardless of whether the violations are designated as criminal or civil matters. The court also found the civil penalties Grants Pass enacted were punitive; and, as punitive fines, they were found to be in further violation of the Eighth Amendment as grossly disproportionate to the gravity of the offense. Finally, the court also held that the city's framework for exclusions from public property violated procedural due process rights.

The decisions in *Blake v. City of Grants Pass* and *Martin v. Boise* are binding on local governments in Oregon; under those case precedents, governments may not enact local laws that prohibit individuals from sitting, lying, sleeping, or camping on public property when the individuals have no alternative shelter available. Some jurisdictions have interpreted these cases as preventing them from regulating camping and sleeping on public property entirely. Such an interpretation, however, is not consistent with the courts' language in those cases. The courts in both cases note that cities may still implement reasonable time, place, and manner restrictions on the regulated activities. For example, in *Martin v. City of Boise*, the court stated: "[Cities] are not required to allow persons to sit, lie, or sleep on public property at any time and any place." And in *Blake v. City of Grants Pass*, the court provided more detail, writing:

"The City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belongings packed up. The City may also implement an anti-camping ordinance that is more specific than the one in place now. For example, the City may ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep. The City may also consider limiting the amount of bedding type materials allowed per individual in public places."

In short, the courts reminded cities that they could still adopt local laws regulating public property in a manner that is consistent with the Constitution and in compliance with these case holdings.

Local jurisdictions have continued to revise their ordinances and policies regulating the type of conduct examined in these cases. In the legislative session following the *Blake v. City of Grants Pass* decision, the Oregon State Legislature enacted House Bill 3115 (2021), in part to guide local governments in the update of their codes in response to these two case precedents.

Substance of House Bill 3115

House Bill 3115—which relates to the regulation of public property with respect to persons experiencing homelessness—is essentially a codification of the courts' guidance in *Martin v. Boise* and *Blake v. City of Grants Pass*. The regulations affected by the new law are those that concern the conduct of "sitting, lying, sleeping, or keeping warm and dry outdoors on public property." Under the new law, by July 1, 2023, certain local laws regulating this type of conduct must be objectively reasonable as to the time, place, and manner of the restrictions, in regard to persons experiencing homelessness.

"Public property" in the bill is defined to mean: "public lands, premises and buildings," including "any building used in connection with the transaction of public business" and "any lands, premises or buildings owned or leased by this state or any political subdivision therein." Because special districts are political subdivisions of the state, property within the jurisdiction of a special district is included in this definition. While the *definition* of public property includes that of special districts, the law requires only that *city or county* laws regulating the specified conduct (sitting, lying, sleeping, etc.) must be "objectively reasonable as to time, place, and manner with regards to persons experiencing homelessness."

Even though the statutory language refers specifically to cities and counties—and not to special districts or other units of local government—special districts should not take a laxer approach in the regulation of their property. The requirement to regulate conduct on public property in a manner that is objectively reasonable as to time, place, and manner is already an existing requirement of the First Amendment, and, as such, applies to special districts and all forms of state and local governments equally as it does to cities and counties. One incremental effect of House Bill 3115 is that it requires cities and counties to specifically take into account the objective reasonableness of their laws in regard to the effect of those laws on persons experiencing homelessness. With this new law, the Legislature has essentially added "effect on homelessness" as a factor to be considered by a court when determining the objective reasonableness of a local ordinance. However, given the holdings in *Blake v. City of Grants Pass* and *Martin v. Boise*, all units of local government (not just cities and counties) should consider that factor when regulating conduct on publicly owned lands.

One area where House Bill 3115 may apply differently to special districts than it does to cities and counties is that the bill creates an affirmative defense for persons who are cited as violating a noncompliant city or county law. The bill also provides a right of action for non-monetary (injunctive or declaratory) relief for challenges to a city or county law under the statute and allows attorneys' fees to the prevailing plaintiffs. Because these specific mechanisms for challenging local ordinances are created by statute, they may be available only for a challenge to city and county ordinances. Even if they are not available to a plaintiff challenging a special district regulation, however, special districts remain obligated to enact only those regulations that are consistent with existing law.

Authority of special districts to regulate conduct on public property

A special district is formed under either a specific or general statute authorizing its organization. As creatures of statute, all special district authority must be grounded in statutory law, and the same principal acts and general statutes that provide for their formation also determine what local laws a district has the authority to enact.

There is no general authority of a special district to enact regulations concerning conduct on public property within the district's jurisdiction. Under ORS 198.530, special districts must follow a certain process to adopt local ordinances and regulations, which process applies only where a district's governing body is already authorized through its principal act to enact local ordinances and regulations. Thus, special districts do not appear to have specific authority to regulate sitting, sleeping, lying, or camping on public property. Most districts, however, have broad regulatory authority that likely encompasses the regulations of those specific activities.

The following are **three examples** of different types of special districts whose principal statutes would likely authorize the district's governing body to enact ordinances and regulations concerning sitting, sleeping, lying, or camping on public property within its jurisdiction.

1. Port districts have the authority to "make, modify or abolish regulations to provide for the policing, control, regulation and management of property owned, operated, maintained or controlled by the port" and to appoint peace officers to enforce the same. ORS 777.190.

2. Sanitary districts have the authority to "[d]o any act necessary or proper to the complete exercise and effect of any of its powers or for the purposes for which it was formed." ORS 450.075(14). Sanitary districts specifically have the authority to enact local laws and ordinances regulating the cleanliness of roads and streets of the district and for all other sanitary purposes not in conflict with the laws of this state. ORS 450.075(15); 450.810(1).

3. Library districts have the authority to "do and perform any and all acts necessary and proper to the complete exercise and effect of any of its powers or the purposes for which it was formed." ORS 357.261(8).

While the principal acts of other types of special districts do not necessarily provide for the same authorization as these three examples, special districts often have broad authority to take actions necessary to exercise other powers, such as in the example of a library district. Thus, a district that has authority to acquire property such as land, premises, and buildings, would likely have the authority to regulate the same property—if not an implied obligation to protect the property from waste or misuse. Unfortunately, there simply is no clear guidance on how this authority would extend to regulating specific conduct like sitting, lying, sleeping, or camping on the public property. Each district should review its specific statutory authorities prior to enacting regulations governing this conduct.

Effect of House Bill 3115 (2021) on special districts

As enacted, we view the bill to have the following impacts (or non-impacts) on special districts:

A. Special districts regulating this type of conduct are not required by statute to specifically consider the effect of their regulations on persons experiencing homelessness – but they should still consider those effects. Even though House Bill 3115 does not expressly require special districts to consider homelessness as a factor when enacting public property regulations, special districts are bound by the First Amendment to the U.S. Constitution, which mandates that governments regulating conduct on public property do so in a manner that is reasonable in time, place, and manner. The courts have indicated that they will consider the effect on homeless individuals when scrutinizing time, place, and manner restrictions; special districts should also take into consideration these effects.

B. Persons cited under any authorized special district law as violating regulations concerning this type of conduct do not necessarily have the affirmative defense provided under this bill. The affirmative defense House Bill 3115 establishes expressly refers to challenges to city and county laws. Special districts regulating this type of conduct should, however, continue to consider procedural due process requirements in their enforcement of their regulations against individuals.

C. Reasonable attorneys' fees are not necessarily available to a prevailing plaintiff in a challenge to a special district ordinance regulating this type of conduct. The availability of attorneys' fees will depend on the specific cause of action that the challenge is brought under, as the new law does not provide for a cause of action for challenging a special district regulation.

Conclusion

In sum, House Bill 3115 simply codifies the existing constitutional requirements that already apply to special districts, and, against cities and counties alleged to be in violation (but not against special districts), allows a right of action, along with attorneys' fees for prevailing plaintiffs.

This law does not provide any new authority for a city or county to regulate this type of conduct, and it does not provide any new authority for a special district to regulate this type of conduct. The extent to which a special district can regulate these activities will depend on the type of special district and the statute under which it is formed. In all cases, however, any regulations adopted must be reasonable in terms of time, place, and manner, and they will likely be subject to the same scrutiny the courts gave in *Blake v. City of Grants Pass* and *Martin v. Boise* when considering the impact of local regulations on persons experiencing homelessness. Special districts interested in managing the use of their public spaces should contact their legal counsel for guidance. Cable Huston attorneys are also available to assist in advising districts on this matter.

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