Government Law 2015—A Brave New World

Cosponsored by the Government Law Section

Friday, October 30, 2015
9 a.m.–4:45 p.m.

6.5 General CLE credits
GOVERNMENT LAW 2015—A BRAVE NEW WORLD

SECTION PLANNERS

Eric Blaine, Crook County Counsel’s Office, Prineville
James Brewer, Fewel Brewer & Coulombe, Corvallis
Chelsea Glynn, Washington County Counsel, Hillsboro
John Huttl, City Attorney’s Office, Medford
Tamara Jones, CityCounty Insurance Services, Lake Oswego
Brena Lopez, Department of Justice, Salem
Alan Rappleyea, Washington County Counsel, Hillsboro
Benjamin Walters, Portland Office of City Attorney, Portland

OREGON STATE BAR GOVERNMENT LAW SECTION EXECUTIVE COMMITTEE

Alan Andrew Rappleyea, Chair
Benjamin Walters, Chair-Elect
John R. Huttl, Past Chair
Kathryn A. Short, Treasurer
Chelsea Glynn, Secretary
   Eric Blaine
   James K. Brewer
   Thomas A. Brooks
   Laurie E. Craghead
   Eric S. DeFreest
   Chad A. Jacobs
   Tamara E. Jones
   William K. Kabeiseman
   Alison R. Kean
   Brena Moyer Lopez
   Sean E. O’Day
   Terence L. Thatcher
   Sarah E. Hanson, Advisory Member

The materials and forms in this manual are published by the Oregon State Bar exclusively for the use of attorneys. Neither the Oregon State Bar nor the contributors make either express or implied warranties in regard to the use of the materials and/or forms. Each attorney must depend on his or her own knowledge of the law and expertise in the use or modification of these materials.

Copyright © 2015

OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935
# TABLE OF CONTENTS

| Schedule | ........................................................................................................................................ | v  |
| Faculty | ....................................................................................................................................... | vii |
| 1A. Regulation of Marijuana in Oregon—Presentation Slides | ............................................................... | 1A–i |
| Rob Bovett, *Association of Oregon Counties, Salem, Oregon* |  |
| Katherine Thomas, *League of Oregon Cities, Salem, Oregon* |  |
| 1B. Marijuana: The New World of Marijuana Legislation and Regulation—Presentation Slides | ................................................................................................................................. | 1B–i |
| Tamara Jones, *CityCounty Insurance Services, Lake Oswego, Oregon* |  |
| 1C. A Grand Experiment: Oregon’s State and Local Rules for Commercially Legalized Marijuana—Presentation Slides | ................................................................................................................................. | 1C–i |
| Ellen Osoinach, *Portland Office of City Attorney, Portland, Oregon* |  |
| 2. New Legislation Affecting Government Lawyers | ................................................................................................................................. | 1–i |
| State Representative Kenneth Helm, *Attorney at Law, Beaverton, Oregon* |  |
| 3. Discretionary Immunity—Where Pro Activity Really Matters | ..................................................................................................................................... | 3–i |
| Kirk Mylander, *CityCounty Insurance Services, Lake Oswego, Oregon* |  |
| Gerald Warren, *Law Office of Gerald Warren, Salem, Oregon* |  |
| 4. Public Records Law Update | ....................................................................................................................................... | 4–i |
| Lora Keenan, *General Counsel’s Office, Oregon Department of Justice, Salem, Oregon* |  |
| Ian Whitlock, *Port of Portland, Portland, Oregon* |  |
| 5. Right to Rest: What Does It Mean? | ....................................................................................................................................... | 5–i |
| Glenn Klein, *Eugene City Attorney’s Office, Eugene, Oregon* |  |
| David Landrum, *Portland Office of City Attorney, Portland, Oregon* |  |
| 6A. Greasy Spoon to Greasy Sewer: FOG, Public Pipes, and the OPSC—Presentation Slides | ..................................................................................................................................... | 6A–i |
| Eric Shaffner, *Portland Office of City Attorney, Portland, Oregon* |  |
| 6B. FOG Enforcement | ........................................................................................................................................ | 6B–i |
| Carl Tappert, Manager, *Rogue Valley Sewer Services, Central Point, Oregon* |  |
| 7. Lies, Damned Lies, and Video—Presentation Slides | ....................................................................................................................................... | 7–i |
| Elmer Dickens, Jr., *Washington County Counsel, Hillsboro, Oregon* |  |
SCHEDULE

8:00  Registration

8:55  Welcome

   Alan Rappleyea, Chair, Government Law Section

9:00  Marijuana: The New World of Marijuana Legislation and Regulation

   - Oregon marijuana industry basics
   - HB 3400 highlights
   - Current regulatory regime for medical and retail marijuana businesses
   - Drug-free workplace policies

   Rob Bovett, Association of Oregon Counties, Salem
   Tamara Jones, CityCounty Insurance Services, Lake Oswego
   Ellen Osoinach, Portland Office of City Attorney, Portland
   Katherine Thomas, Multnomah County Attorney’s Office, Portland

10:30 Break

10:45 New Legislation Affecting Government Lawyers

   State Representative Kenneth Helm, Attorney at Law, Beaverton

11:30 Discretionary Immunity—Where Pro Activity Really Matters

   - Saving time and money
   - Core principles
   - Decision-making and following through

   Kirk Mylander, CityCounty Insurance Services, Lake Oswego
   Gerald Warren, Law Office of Gerald Warren, Salem

12:15 Lunch

   Thank you to the Government Law Section for generously sponsoring lunch.

1:30 Public Records Law Tips and Update

   - Public records law overview
   - Public records in the news: Bring Your Own Device (BYOD), personal email, and the press
   - The 2015 legislative session: what’s new?
   - Lessons learned and tips for dealing with records requests

   Lora Keenan, General Counsel’s Office, Oregon Department of Justice, Salem
   Ian Whitlock, Port of Portland, Portland

2:15 Right to Rest: What Does It Mean?

   - Managing of homeless camping on public property
   - Municipal obligations, responsibilities, and regulation
   - Eight Amendment status vs. conduct

   Glenn Klein, Eugene City Attorney’s Office, Eugene
   David Landrum, Portland Office of City Attorney, Portland

3:00 Break
3:15  Impact of State Plumbing Specialty Code (OPSC) on Sewage Treatment of Fats, Oils, and Grease (FOG)
- Physical impact of FOG on sewers
- Regulatory and statutory authority of local jurisdictions
- Goals and framework of the OPSC
Moderator: John Huttl, City Attorney’s Office, Medford
Eric Shaffner, Portland Office of City Attorney, Portland
Carl Tappert, Manager, Rogue Valley Sewer Services, Central Point

4:00  Lies, Damned Lies, and Video—Does Video Always Tell the Truth, the Whole Truth, and Nothing but the Truth?
- Analyzing a video of an officer-involved shooting
- Limitations of video evidence
- Decision-making heuristics related to visual observations
Elmer Dickens, Jr., Washington County Counsel, Hillsboro

4:45  Adjourn/Government Law Section Annual Meeting

5:00  Hosted Social Hour
FACULTY

Rob Bovett, Association of Oregon Counties, Salem. Mr. Bovett serves as Legal Counsel for the Association of Oregon Counties (AOC), where he primarily works on policy matters relating to governance, elections, ocean issues, and drugs. He was the elected District Attorney (2009–2014) and appointed Assistant County Counsel (1992–2009) for Lincoln County, Oregon. Mr. Bovett is the author of many of Oregon’s drug laws, including those relating to meth lab control. He created numerous state and local initiatives that provide science-based solutions to problems caused by substance abuse, such as HOPE and other diversionary programs. He has authored many opinion pieces on drug policy, including those published by The Oregonian and The New York Times, has provided over 500 presentations regarding drug policy, and has appeared on numerous programs, such as Good Morning America, National Public Radio, and PBS NewsHour and Frontline.

Elmer Dickens, Jr., Washington County Counsel, Hillsboro. Mr. Dickens serves as general counsel for the Washington County Sheriff’s Office. He has experience litigating in both state and federal courts on a wide variety of law enforcement and corrections issues. He is the legal advisor and primary author responsible for updating the Oregon State Sheriff’s Association Jail Standards and regularly teaches at the Oregon Department of Public Safety Standards and Training in the Center for Policing Excellence. Mr. Dickens is a faculty member of Americans for Effective Law Enforcement, and he presents at the annual Jail and Prison Legal Issues seminar held in Las Vegas. He has also presented for the Center for Excellence in Event Reconstruction on body camera issues and for the International Municipal Lawyers Association. Mr. Dickens taught Criminal Justice and both undergraduate and graduate level Business Law at the University of Phoenix, Tigard Campus, for several years. He is admitted to practice before the United States Supreme Court.

State Representative Kenneth Helm, Attorney at Law, Beaverton.

John Huttl, City Attorney’s Office, Medford. Mr. Huttl has worked in the City of Medford legal department since 2001. Prior to that, he was in private practice for six years doing civil litigation and appeals. He is a past chair of the Oregon State Bar Government Law Section. Mr. Huttl teaches Business Law at Rogue Community College in Medford. He has spoken at numerous continuing education events, published several articles, and edited a chapter in the Oregon State Bar’s Insurance Law publication.

Tamara Jones, CityCounty Insurance Services, Lake Oswego. Ms. Jones has been the Pre-Loss Employment Attorney at CityCounty Insurance Services (CIS) since January 2013. Prior to joining CIS, she practiced employment law on behalf of public and private-sector employers. Ms. Jones is a frequent presenter on legal issues in the employment law and human resources fields, and she served as editor/author of the book Model Policies and Forms for Oregon Employers, published in association with the Associated Oregon Industries (2007–2012 editions).

Lora Keenan, General Counsel’s Office, Oregon Department of Justice, Salem. Ms. Keenan is a Senior Assistant Attorney General with the Oregon Department of Justice, where she serves as Public Records Counsel. In that role, she advises the Attorney General regarding petitions seeking to compel state agencies to disclose records. She also advises other Assistant Attorneys General and state agencies on public records matters. She speaks within and outside the Department of Justice on public records issues. Ms. Keenan was previously a Staff Attorney to the Oregon Court of Appeals, where for many years she advised the Chief Judge on legal and administrative matters. While at the Court of Appeals, she was a frequent speaker on matters of court administration and appellate procedure and practice.

Glenn Klein, Eugene City Attorney’s Office, Eugene. Mr. Klein has served as City Attorney for the City of Eugene for 20 years. For the past 6 years, he has been in-house; prior to that, he served in that capacity while an attorney in private practice specializing in environmental and municipal law.
FACULTY (Continued)

David Landrum, Portland Office of City Attorney, Portland. Mr. Landrum is a Senior Deputy City Attorney at the Portland City Attorney’s Office, where his practice consists of defending the city and its employees in state and federal court on the usual mélange of tort and constitutional issues, including police and employment cases. Beginning in late 2008, he defended Portland in Anderson, et al., v. City of Portland, et al., USDC Case No. 08-cv-147-AA, a challenge to the city’s ordinances prohibiting camping and temporary structures on nonpark public property. That case was eventually settled in mid-2012, but the issues it addressed continue to generate policy debate and refinement. Prior to joining the Portland City Attorney’s Office in 2004, Mr. Landrum served as an Assistant Attorney General in the Oregon Department of Justice Trial Division.

Kirk Mylander, CityCounty Insurance Services, Lake Oswego.

Ellen Osoinach, Portland Office of City Attorney, Portland. Ms. Osoinach is a Senior Deputy City Attorney who leads the Portland City Attorney’s Office Public Safety Workgroup, which coordinates the office’s work on operational and employment matters for the city’s police, fire, emergency management, and 9-1-1 bureaus. She serves as Chair of the Oregon State Bar Civil Rights Section. In 2015, she was appointed to the statewide Recreational Marijuana Technical Committee on Licensing, Compliance, and Enforcement.

Eric Shaffner, Portland Office of City Attorney, Portland. Mr. Shaffner is a Portland Deputy City Attorney who is primarily assigned to advise the Bureau of Environmental Services, Portland’s municipal sewer authority.

Carl Tappert, Manager, Rogue Valley Sewer Services, Central Point. Mr. Tappert was appointed Manager for Rogue Valley Sewer Services in January 2011 after serving for 12 years as the District Engineer. He is a member of the Special District Association of Oregon board and a past member of the Oregon State Board of Examiners for Engineers and Land Surveyors board. Mr. Tappert graduated from West Virginia University in 1989 with a degree in Civil Engineering and received a Masters of Business Administration from Portland State University in 2008.

Katherine Thomas, Multnomah County Attorney’s Office, Portland. Ms. Thomas recently joined Multnomah County as an Assistant County Attorney, where she will be working on issues involving land use, environmental compliance, affordable housing, and service districts. She previously served as the Assistant General Counsel for the League of Oregon Cities, where she provided general counsel support, responded to member inquiries from elected and appointed officials, and worked on legal and legislative advocacy activities.

Gerald Warren, Law Office of Gerald Warren, Salem. Prior to opening his own firm in 2009, Mr. Warren served as trial and appellate attorney for CityCounty Insurance Services. He has successfully handled hundreds of cases for public bodies in both state and federal courts and has defended Oregon cities and counties exclusively since 1992. He spent several years as an Army Judge Advocate General Office. His last duty assignment was his appointment by Governor John Kitzhaber as the Oregon National Guard’s State Judge Advocate in August 2001.

Ian Whitlock, Port of Portland, Portland. Mr. Whitlock is the Deputy General Counsel at the Port of Portland, where he provides advice on environmental compliance, government ethics, and public records. He has spent most of his legal career in the fields of environmental and government law. Mr. Whitlock has served on the Oregon Government Ethics Commission since March 2010. Mr. Whitlock entered public service in 1996 as a Senior Assistant Attorney General in the Oregon Department of Justice, advising various natural resource agencies.
Chapter 1A

Regulation of Marijuana in Oregon—Presentation Slides

Rob Bovett
Association of Oregon Counties
Salem, Oregon

Katherine Thomas
League of Oregon Cities
Salem, Oregon
Regulation of Marijuana in Oregon

Overview

- History and Legislation
- Recreational Marijuana
  - Personal Possession
  - Retail - License Types
- Medical Marijuana
- State Tax System
- Local Options
  - Tax
  - Time, Place, and Manner
  - Opt Out
  - Business Licenses
  - Early Sales
- Current Issues
History
An overview of marijuana legislation in Oregon.

A Little History

- In December of 1998, Oregonians adopted the Oregon Medical Marijuana Act. The OMMA allowed qualifying individuals and their caregivers to grow and possess specified amounts of marijuana for medical purposes.
- In 2013, the Oregon Legislature adopted HB 3460, which provided for the operation of medical marijuana dispensaries in Oregon.
- In November of 2014, the Oregon voters adopted Measure 91, which legalized recreational marijuana in Oregon.
- In 2015, the Oregon Legislature adopted a number of bills intended to modify and clarify the legal systems regulating medical and recreational marijuana in Oregon: HB 3400, HB 2041, and SB 460.
HB 3400

- HB 3400 does not replace Measure 91 or the OMMA and subsequent legislation - it changes certain portions of those acts, but leaves the majority intact.
- Different pieces of HB 3400 take effect at different times.

Recreational System
A discussion of personal possession rules and the retail license system.
Personal Possession (M91 § 6, HB 3400 § 39)

Must be 21

No possession of more than one ounce of useable marijuana in a public place

Homegrown marijuana: not to exceed 4 plants and 8 oz of useable marijuana at any given time.

Homemade marijuana products: not to exceed 16 oz in solid or concentrate form and 72 oz in liquid form at a given time.

Delivery of not more than one ounce of homegrown marijuana, not more than 16 oz of homemade marijuana solids or concentrates, and not more than 72 oz homemade marijuana liquids at a given time by a person 21 or over to another person 21 or over for noncommercial purposes.

Prohibitions on Personal Use (M91 §§ 54, 56, 57)

No use of marijuana in a public place

No homegrown marijuana in public view

No homemade marijuana extracts
Recreational restrictions do not apply to medical card holders. The Oregon Health Authority retains jurisdiction over medical dispensaries.

Recreational License Types (M91 § §19-22, HB 3400 § § 12-16)

- Recreational Producer License (Growers)
- Recreational Processor License
- Recreational Wholesale License
- Recreational Retail License

An individual or entity can hold one or more of these licenses. Licenses are issued for one year.
OLCC to Regulate Recreational Licensees

- OLCC rules due on or before January 1, 2016.
- OLCC to accept license applications on or before January 4, 2016.
- OLCC is saying that licenses will likely not be issued until late summer/early fall of 2016.

Medical Marijuana
License types and state law restrictions.
Medical Marijuana: Three License Types

- Medical Marijuana Producer (Grower)
- Medical Marijuana Processor (New!)
- Medical Marijuana Dispensary

- Regulated by Oregon Health Authority
  Not OLCC.

Medical Marijuana Grow Sites
(HB 3400 §§ 34, 82, 88f)

- Redefined marijuana seeds as agricultural seed.
- State law does not restrict medical marijuana grows to any particular zone, but local governments can, except EFU zone.
- If located in a residential zone: up to 12 plants.
  - Except, if the residential grow was registered with OHA prior to January 1, 2015: up to 24 plants.
- If located in a zone other than a residential zone: up to 48 plants.
  - Except, if the non-residential grow was registered with OHA prior to January 1, 2015: up to 96 plants.
Medical Marijuana Processors  
(HB 3400 § 85)

- New category of medical marijuana facility.
- Must register with the Oregon Health Authority.
- If a Medical Marijuana Processor produces extracts, the Processor may not be located in a residential zone.

Medical Marijuana Dispensaries  
(HB 3400 § 86)

- May not be located in a residential zone.
- May not co-locate with a grow site.
- Must be located at least 1000 feet from another medical marijuana dispensary.
- Must be located at least 1000 feet from public, private, and parochial elementary and secondary schools.
  - If a school locates within 1000 feet of a pre-existing medical dispensary, the dispensary is not required to move.
State Tax System
An overview of the state tax system, local preemption, and distribution of revenues.

Tax – HB 3400 and HB 2041

- The state will impose a 17% sales tax on retail recreational marijuana sales.
- Preempts local governments from taxing recreational, except for up to 3% through a voter referral.
  - Does preemption include medical marijuana? More on that in a moment...
### Local Government Revenue Sharing

- **Before July 1, 2017**
  - Revenue dedicated to local governments will be distributed proportionally by population

- **After July 1, 2017**
  - 50% of revenue dedicated to local governments will be distributed proportionally based on the number of producer, processor and wholesaler licenses in the jurisdiction
  - 50% of revenue dedicated to local governments will be distributed proportionally based on the number of retail licenses in the jurisdiction

Local governments that prohibit recreational or medical marijuana facilities from locating within their jurisdiction are not eligible to receive any state marijuana tax revenues.
Local Options
An overview of local regulatory options, including taxation, regulations, opt outs and early sales.

Local Taxes (HB 3400 § 34a)

- Local governments can adopt up to a 3% local sales tax on retail recreational marijuana sales.
- Local taxes must be approved by the voters in the jurisdiction (city or county) at the next statewide general election (November 2016).
- Local governments may not adopt or enact any other type of tax or fee on the production, processing, or sale of recreational marijuana. (More to come on tax of medical marijuana)
Local Regulations – Time, Place and Manner
(HB 3400 §§ 33, 89)

- Local governments may adopt reasonable regulations related to the operation of licensed recreational producers, processors, wholesalers, and retailers.
  - Local governments may not require recreational retailers to locate more than 1000 feet from other recreational retailers → maximum buffer of 1000 feet between retailers
- Local governments may adopt reasonable regulations related to the operation of medical marijuana grow sites, processing sites, and dispensaries
- Reasonable regulations include restrictions on the manner of operation, hours, location, and the public's access

Local Regulations – LUCS
(HB 3400 § 34)

- Before issuing a license to any recreational marijuana facility, OLCC will ask the local government for a Land Use Compatibility Statement (LUCS), demonstrating that the facility is allowed as a permitted or conditionally permitted use in the applicable zone. OLCC will not issue the requested license if the LUCS shows that the facility is a prohibited use in the zone.
- A local government must respond to a request for a LUCS within 21 days of receipt of the request (if the use is permitted) or final local government approval (if the use is conditionally permitted).
- OLCC will begin accepting applications on January 4, 2016. LUCS requests could follow shortly thereafter.
Local Opt Out
(HB 3400 §§ 133-136)

- Local governments may adopt ordinances prohibiting medical marijuana processing sites and dispensaries and any recreational marijuana facilities.
  - Silent on medical grows
- Ordinances can be by council or commission if
  - 55% or more in the county voted no on Measure 91, and
  - Ordinance adopted before December 2015
- Otherwise, the ordinances must be approved by the voters at the next statewide general election (November 2016).
- A yes vote would not prohibit the possession of marijuana for personal use in the jurisdiction

Local Opt Out

- A local government that prohibits any type of marijuana facility may not impose a local tax and is not eligible to collect state shared marijuana revenues.
- Once the council or commission adopts an ordinance prohibiting any or all marijuana facilities, the local government must provide the ordinance to the OHA and OLCC.
- OHA and OLCC will stop issuing licenses and registrations for marijuana facilities in the local government’s jurisdiction until the date of the next statewide general election.
Local Opt Out - Grandfathering

- Only two types of marijuana facilities may continue to operate in the local government’s jurisdiction if the voters approve a prohibition.
  
  - **Medical Marijuana Dispensaries**:
    - A dispensary is grandfathered if:
      - The dispensary is registered with OHA on or before the date the local government ordinance is adopted and the dispensary has successfully completed a local government land use application process; OR
      - The dispensary was registered or had applied to be registered with OHA on or before July 1, 2015, and the dispensary has successfully completed a local government land use application process.
  
  - **Medical Marijuana Processors**
    - A medical processor is grandfathered if:
      - The processor is registered with OHA on or before the date the local government ordinance is adopted and the processor has successfully completed a local government land use application process; OR
      - The processor was registered with OHA on or before July 1, 2015, the processor was processing marijuana on or before July 1, 2015, and the processor has successfully completed a local government land use application process.

Early Sales - SB 460

- From October 1, 2015, through December 31, 2016, medical marijuana dispensaries can sell limited amounts of recreational marijuana to individuals who are 21 and over.
  
  - Sales are limited to leaves, buds, and non-flowering plants.
  
  - Sales are limited to one-quarter ounce of leaves and/or bud per person per day.
  
  - Local governments may adopt ordinances prohibiting sales of recreational marijuana by medical marijuana dispensaries - no voter referral required.
  
  - Beginning January 4, 2016, a state sales tax of 25% will be imposed on recreational marijuana sales by medical marijuana dispensaries.
    - Local tax? More on that in a minute...
Current Issues
An overview of unresolved, emerging issues. Areas of potential litigation and risk.

There is still a lot of uncertainty...

- OLCC Rulemaking
- OHA Rulemaking
- Pending Litigation - Cave Junction I and II
- Future Litigation
- 2016 Legislative Session
- Federal Law
Common Issues to Consider: Tax

- Can my local government put a ban and a tax on the November 2016 ballot?
- Can my local government collect the 3% tax before the November 2016 election?
- Can my local government tax medical marijuana?
- Can my local government continue to impose a tax that it adopted prior to passage of HB 3400?

Common Issues to Consider: Opt Out

- Can my local government recriminalize marijuana?
- Can my local government ban medical marijuana grow sites?
- What is the difference between the grandfathering provisions in sections 133 and 134 of HB 3400 and sections 135 and 136 of HB 3400?
- If my local government opts out, what is the process for opting back in?
- If my local government opts back in, is it eligible for state shared tax revenues? Local tax?
- Can my local government impose an effective ban using its business license ordinance?
  - If it does, is it eligible for state tax revenue?
Common Issues to Consider: Early Sales

- Is there a time limit on when my local government can ban early sales?
- If my local government waits to ban early sales, do dispensaries already engaging in those sales get grandfathered in?
- Can my local government tax early sales?
- If my local government opts out of early sales, are we still eligible for state tax revenues?

Common Issues to Consider: Time, Place & Manner

Existing State Restrictions
- Local Registration
- Location & Buffers
  - Buffers
  - Odor and Noise
- Background Checks
- Security
- Signs
- Transportation
- Inspection/Enforcement
  - More...
Chapter 1B

Marijuana: The New World of Marijuana Legislation and Regulation—Presentation Slides

Tamara Jones
CityCounty Insurance Services
Lake Oswego, Oregon
I’m guessing you heard about . . .

. . . Cyd Mauerer, a former (fired) morning TV news anchor from Eugene (http://askmeaboutmarijuana.com)
What hasn’t changed

- “Marijuana use” **still isn’t a protected class** under Oregon law.
- Employers **still don’t have to accommodate** medical marijuana users in the workplace.
- Employers **can still choose whether to be truly “zero tolerant” or “no impairment”** when it comes to employee drug use (sort of).

What has changed?

Oregon’s Indoor Clean Air Act (ICAA), also known as the Smoke-free Workplace Law

- Effective January 1, 2016
- Law was **not changed** to include marijuana use (focus remains on tobacco use).
- No “inhalant delivery systems” (in addition to cigarettes, pipes, etc.)
What has changed?

Oregon’s Indoor Clean Air Act (ICAA) / the Smoke-free Workplace Law

- Inhalant delivery systems are “devices that can be used to deliver nicotine, cannabinoids and other substances, in the form of a vapor or aerosol. These include e-cigarettes, vape pens, e-hookah and other devices.”

What has CIS seen?

- No terminations of “regular” employees for marijuana use or failure of drug test.
- Members who still haven’t made it clear to employees how recreational marijuana use is viewed by the organization.
- Employers who needed to be educated about the real scope of their drug use and abuse policy (i.e., it’s not as “zero tolerance” as they thought).
It’s time to play . . .

Fact and Fiction!

Drug Free Workplace Act

Fact . . . and . . . Fiction!

- Applies to employers who receive federal grants (all), contracts (some)
- Prohibits marijuana possession in the workplace or during work-related activities

- Not all local governments are subject to the DFWA
- The DFWA does not address whether employers can or should fire employees for off-duty use of any drug
### Drug Free Workplace Act

**Fact ... or ... Fiction?**

- The DFWA requires me to fire employees who use drugs.
- The employer has some discretion to decide.
- The DFWA requires me to drug test employees.
- The DFWA neither requires nor authorizes drug testing.

### Drug Free Workplace Act

**Fact ... or ... Fiction?**

- The DFWA requires me to fire employees who lawfully use marijuana while off-duty or outside of work.
- The employer gets to decide.
- The DFWA requires me to drug test employees.
- The DFWA neither requires nor authorizes drug testing.
### Drug Free Workplace Act

**Fact . . . or . . . Fiction?**

- If my organization tolerates employee off duty use of marijuana, we will lose our federal funding.
- Nothing in the DFWA governs the use of marijuana outside of the covered workplace.
- The DFWA “coexist[s] with state and local law.”

---

### Ask yourself . . .

Is this municipal manager in a good position to assess whether his/her municipality should be truly “zero tolerant” towards off-duty marijuana use?
Actual Quote

“I drink so much at night sometimes, I’d swear I’m still impaired when I come to work.”

got skepticism?

THANK YOU FOR LISTENING!

Tamara E. Jones
Pre-Loss Attorney
503-763-3845
tjones@cisoregon.org
Chapter 1C
A Grand Experiment: Oregon’s State and Local Rules for Commercially Legalized Marijuana—Presentation Slides

ELLEN OSOINACH
Portland Office of City Attorney
Portland, Oregon
A Grand Experiment

Oregon’s State and Local Rules
for Commercially Legalized Marijuana

Presented By: Ellen Osoinach
Senior Deputy City Attorney
City of Portland

“"It’s the dream of every retiree—sleep in and smoke a bowl.""

Deb Greene, 65-year-old retiree, and the first person to purchase pot in the Seattle area.
“Kids are going to be bombarded with pot—they’re already getting the message that it’s acceptable.”

Kevin Sabet, Director of the University of Florida Drug Policy Institute

Overarching Challenge for Regulators

Reconciling the lack of federal regulatory resources and State/local experience in marijuana with a voter-imposed mandate to regulate the budding businesses that grow, sell, and manufacture it.
Equitable Distribution of Opportunity

Licensing Types and Application Requirements

- “protecting small businesses” “providing economic opportunity” and “not over-regulating”
- Residency Requirements
- Outside investment
- Who must apply?
- What are the different license types?
Ensuring the Safety and Quality of the State’s Marijuana Supply

Challenges

- Oregon does not oversee the production, processing and packaging of alcohol -- but they must for marijuana.
- Oregon does not have to determine what constitutes a safe alcoholic product -- it merely distributes bottles once they are produced.
- Unlike alcohol, health officials know little about the risks of marijuana, which makes it hard to determine what potency is appropriate in a pot brownie versus a joint smoked by a cancer patient, for example.
What Constitutes a Serving Size?

- OHA Rules
- Lab Testing

Informing and Protecting Consumers

- OLCC and OHA rules for labeling, testing, and advertising
Limiting Availability to Minors

- The “Cole” memorandum
- OLCC rules on advertising
- Place and age restrictions
“Caterers should be aware there cannot be bartenders and budtenders.”

Mark Pettinger of the Oregon Liquor Control Commission commenting on a recent request for advice about serving pot at a wedding.

Anticipating Effects of the Green Rush
Protecting Third Parties

- Insurance Requirements
- Labor Laws

Home Delivery

- OLCC rules
- Public Safety concerns
Availability of Suitable Sites

- Agriculture
- Warehouse
- Saturation

Enforcement
Regulatory Authority of Local Governments

- Density
- Land Use review
- Operating Hours
- Permitting Processes
- Enforcement
- Business models (smoking lounges? green districts?)

Intersection of Civil and Criminal Law

- OLCC enforcement resources
- Local law enforcement
Managing Public Expectations

- Approach of the Portland Police Bureau
  - Open communication
  - Public consumption is prohibited but is not a high enforcement priority
  - “Discuss with your neighbors” complaints regarding smoke smells
Links to State Administrative Rules and Local Regulations:

**OREGON HEALTH AUTHORITY**


**OREGON LIQUOR CONTROL COMMISSION**


**LOCAL REGULATIONS**

- City of Salem Medical Marijuana Regulations City Code Chapter 31 [http://www.cityofsalem.net/CityCouncil/BoardsAndCommissions/MMJ%20Dispensary%20Subcommittee/Medical%20Marijuana%20Facilities%20Regulations%20Ordinance%202017-14.pdf](http://www.cityofsalem.net/CityCouncil/BoardsAndCommissions/MMJ%20Dispensary%20Subcommittee/Medical%20Marijuana%20Facilities%20Regulations%20Ordinance%202017-14.pdf)
- City of Beaverton Medical Marijuana Regulations City Code Chapter 7.02 [http://www.beavertonoregon.gov/DocumentCenter/View/8972](http://www.beavertonoregon.gov/DocumentCenter/View/8972)
- City of Madras Medical Marijuana Regulations City Code 4-29 [http://ci.madras.or.us/files/8614/3042/0269/4-29_OrdinanceNumber870-RegulationsForOperationOfMedicalMarijuanaDispensaries.pdf](http://ci.madras.or.us/files/8614/3042/0269/4-29_OrdinanceNumber870-RegulationsForOperationOfMedicalMarijuanaDispensaries.pdf)
Chapter 2

New Legislation Affecting Government Lawyers

STATE REPRESENTATIVE KENNETH HELM
Attorney at Law
Beaverton, Oregon
<table>
<thead>
<tr>
<th>Bill #</th>
<th>Relating to</th>
<th>Summary</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>HB 2250</td>
<td>Electronic capture of fingerprint background checks</td>
<td>In 2012, the Legislative Assembly enacted House Bill 4091, establishing a work group to consider the statewide system of criminal background checks and to evaluate potential improvements in timeliness, cost and reduction of duplication. Three measures related to criminal records checks for licensure and employment purposes grew out of the work group process, and were enacted in the 2013 session: House Bill 3330 required the Oregon State Police to adopt electronic fingerprint capture technology; House Bill 3331 directed the Oregon State Police to establish a voluntary, centralized criminal records check registry; and House Bill 3168 required the Department of Administrative Services (DAS) to adopt rules to establish statewide criteria for agencies and other entities to conduct criminal background checks for purposes other than criminal justice. House Bill 2250 continues the process of moving rulemaking related to background and criminal records checks to DAS. The measure provides uniform rules for agencies to make fitness determinations, and makes numerous related conforming changes in statute. The measure also allows the Oregon State Police to delegate the processing of fitness determinations for a variety of agencies to the Department of Human Services.</td>
<td>July 27, 2015</td>
</tr>
<tr>
<td><strong>City of Damascus Bills: HB 3084, HB 3085, HB 3086</strong></td>
<td></td>
<td>In November 2013, 63 percent of Damascus residents which cast a ballot voted to disincorporate. However, Damascus officials interpreted state law to mean that a successful vote to disincorporate required a majority of all registered voters in Damascus, so the 2013 measure ultimately failed. In 2014, the Legislative Assembly adopted House Bill 4029 which allowed property owners on the edge of Damascus to leave the city if they lived within a half mile of another city if Damascus failed to pass a comprehensive land use plan. However, the Oregon Court of Appeals ruled the law unconstitutional in City of Damascus v. Hank Brown staying all de-annexations from the city. The ruling stated the following: “The legislature’s decision to delegate that legislative authority to certain landowners, without any expression of policy to guide their decision, is an unconstitutional delegation in its purest form because it is a delegation of the legislature’s power to make the law -- a law that alters the location of the city’s boundary.”</td>
<td></td>
</tr>
<tr>
<td>HB 3084</td>
<td>City of Damascus</td>
<td>Modifies the process for resolving requests to withdraw a tract from within the city boundaries of Damascus. The Act requires the governing body to determine whether a tract qualifies for withdrawal from the city and whether withdrawal of tract would cause undue hardship on city operations.</td>
<td>June 25, 2015</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>----------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 3085</td>
<td>City of Damascus</td>
<td>Refers question to disincorporate City of Damascus to voters, for their approval or rejection, at the next primary election. If passed, the City of Damascus would cease to exist 60 days after the election. The measure would require the city to satisfy all outstanding legal debts and obligations and expend all remaining moneys as provided by law and to convey all real property and tangible and intangible personal property to Clackamas County no sooner than the 30th day after the election.</td>
<td>Refers to voters</td>
</tr>
<tr>
<td>HB 3086</td>
<td>City of Damascus</td>
<td>Specifies the process for the City of Damascus to distribute all excess moneys to each city taxpayer, after all outstanding legal debts and obligations have been satisfied if voters decide to disincorporate Damascus. The measure specifies public notification requirements of city’s obligation to satisfy debts and obligations and to encourage creditors to present claims to city to ensure timely payment. The measure requires that money in city road fund and state shared funds be transferred to Clackamas County for purpose of maintaining roads and other purposes within boundaries of former city and that city transfer $3 million to Clackamas County for employment-related and other current service expenses in budget of city on date of disincorporation.</td>
<td>July 1, 2015</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 3557</td>
<td>Public records exemption for home care workers, operators of child care facilities, exempt family child care providers and operators of adult foster homes</td>
<td>There are two categories of public records that are exempt from disclosure pursuant to a public records request: One category may be released upon a showing that the public interest requires disclosure (ORS 192.501), such as information about active litigation, trade secrets, investigative reports in criminal proceedings and electors’ residential addresses; the other category of records that are exempt from disclosure are those that require a particularized showing in order to warrant being made public (ORS 192.502), such as: advisory communications where the public interest outweighs the interest in frank discussions; medical or other similar personal information where the public interest is clear and convincing and does not constitute an unreasonable invasion of privacy; and the private addresses, phone numbers, and dates of birth of public employees and volunteers, where the public interest is shown by clear and convincing evidence. House Bill 3557 applies the clear and convincing public interest standard when determining whether a public body is required to disclose personal information about home care workers, operators of child care facilities, exempt family child care providers, operators of adult foster homes, public employees and volunteers. In addition, the measure requires that a public body, in receipt of a request, forward it to the affected individual for whom information is requested, including requiring the requestor to provide the names of individuals seeking the information. In addition, the measure allows a public body to recover associated costs with fulfilling a public records request from the requestor and provides the public body with immunity from civil and criminal liability for harm caused by release of personal information based on a determination that the standard was met for release.</td>
<td>July 28, 2015</td>
</tr>
<tr>
<td>SB 491</td>
<td>Pay equity on public contracts</td>
<td>The Public Contracting Code is intended to provide predictability, equal treatment for all, reliability, integrity and clarity in public procurements and construction contracts. Statutes provide the requirements a bidder must meet in order to be determined responsible, making them eligible to enter into a public contract. Senate Bill 491 requires contractors on any public construction contract or procurement for goods and services to comply with the pay equity statute (ORS 652.220), and that a failure to comply is a breach entitling the contracting agency to terminate the contract for cause. In addition, the bill prohibits contractors on any public contract or procurement from retaliating against employees who discuss compensation and benefits with one another. Specific to procurements for goods or services or construction contracts with the State of Oregon that exceed $500,000, contractors employing 50 or more full-time workers who bid must possess a certificate showing participation in a pay equity training program administered by the Department of Administrative Services.</td>
<td>June 16, 2015</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>SB 534</td>
<td>Agreements between cities and airports</td>
<td>Oregon’s airport network consists of 97 public-use airports, including 15 privately owned public-use airports. Rural airports are defined as those serving a city with a population of 75,000 or fewer residents. Some of these rural airports have the potential to provide economic development and job growth opportunities, but lack the funds to cover infrastructure upgrades necessary to attract investment by business and industry. The Legislative Assembly has considered legislation to address this issue in the past, including “Through the Fence” (Senate Bill 680, 2005) and tax increment financing (Senate Bill 807, 2007), but neither measure was enacted. Senate Bill 534 specifies that a city and airport may enter into agreements for provision by the city of water and sewer services to the airport without first annexing the land on which the airport is situated.</td>
<td>July 27, 2015</td>
</tr>
<tr>
<td>HB 2444</td>
<td>Agricultural mediation services</td>
<td>Presently, Oregon’s Farm Mediation program provides professional mediators for agricultural and rural disputes. The goal of the program is to provide a lower-cost and faster alternative to the court system to resolve agricultural disputes. The program was established initially during the farm credit crisis of the 1980s to help resolve foreclosure disputes between farmers and banks. The program was certified by the United States Department of Agriculture as a foreclosure mediation service. Eventually, the Oregon Department of Agriculture discontinued using the program to mediate foreclosures. In the 1990s, the mediation program began to focus its work on other types of agricultural disputes. In 1997, the Oregon Legislative Assembly passed legislation (House Bill 3737) which broadened the types of work the program could do from foreclosure to “other disputes directly related to department activities and agricultural issues under the jurisdiction of the department.” House Bill 2444 authorizes the Department of Agriculture to coordinate agricultural mediation services for disputes directly related to the activities of the department and agricultural issues under the jurisdiction of the department. The measure also removes language regarding foreclosure mediations as well as removes a price cap for mediation services.</td>
<td>June 2, 2015</td>
</tr>
<tr>
<td>HB 2653</td>
<td>Beekeeping in residential areas</td>
<td>Beekeeping and the establishment of apiaries in residential areas of the state has become increasingly popular. Presently, there are no established rules or standards for keeping bees in residential zones. House Bill 2653 directs the Oregon State University Extension Service, along with the Oregon Department of Agriculture, to create and disseminate best practices for beekeeping in residential areas. The measure also allows local governments to adopt ordinances relating to beekeeping consistent with best practices and to charge reasonable fees for registering hives in those areas.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 3188</td>
<td>Predator Damage Control Districts</td>
<td>In some parts of the country, predator damage control districts have been established by government entities to address farmer and rancher concerns for economic losses resulting from predation. House Bill 3188 authorizes county commissioners to form a predator damage control district (District) when petitioned by a minimum of 50 percent of the eligible petitioners who cumulatively own more than 50 percent of eligible land within the District. The Act authorizes the District to charge landowners a fee for the actual cost to the county of preventing, reducing and mitigating damage from predatory animals.</td>
<td>October 5, 2015</td>
</tr>
<tr>
<td>HB 2643</td>
<td>Designation of enterprise zones</td>
<td>Enterprise zones exempt qualifying businesses within a specified boundary from local property taxes on new investments in order to incentivize such investments as a focal point within the zone. Enterprise zones may be sponsored by municipal or tribal governments. The Oregon Business Development Department (OBDD) reports that there are currently 66 enterprise zones in Oregon, 53 in rural areas and 13 in urban areas. In addition to standard enterprise zones, there are additional designations, including long-term rural enterprise zones, reservation zones and electronic commerce zones. The number of enterprise zones is currently limited by statute. House Bill 2643 authorizes sponsors, including cities, counties, ports or tribal governments, to self-designate an enterprise zone, electronic commerce zone, electronic commerce city or reservation enterprise zone. Such zones, or boundary changes to existing zones, would be approved upon determination by OBDD that statutory requirements are met. The measure repeals the statutory limitation on the number of enterprise zones that may exist at any given time in Oregon.</td>
<td>October 5, 2015</td>
</tr>
<tr>
<td>HB 2734</td>
<td>Land banks for brownfields remediation</td>
<td>The term “brownfield” is defined by ORS 285A.185 as real property where expansion or redevelopment is complicated by actual or perceived contamination. This contamination needs to be cleaned before the property can be reused for business, job creation, housing and other community needs. The Oregon Business Development Department reports that there are approximately 13,500 brownfields in Oregon, of which only 35 percent have been assessed or addressed. Approximately 54 percent of brownfields are located in economically distressed counties, and 76 percent are located within an urban growth boundary, making these properties good candidates for redevelopment if the environmental issues can be remediated. House Bill 2734 authorizes local governments to organize land banks to take ownership of brownfields within the community. These land banks would be immune from legal liability for legacy contaminations or for damages of any spill or release of oil or hazardous material under certain conditions.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>--------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>SB 85</td>
<td>Local government financing for private seismic improvements</td>
<td>Many private building owners in Oregon are interested in upgrading for earthquake preparedness, but the cost of doing so is prohibitive, even for those who are relatively well-to-do. The Portland area, in particular, has a high proportion of “unreinforced masonry” buildings of certain historic character that may be particularly susceptible to damage. Public funds are limited and other emergency preparedness considerations, such as energy and transportation infrastructure, are prioritized ahead of private structures, while local governments and communities seek to exercise their creativity and resourcefulness. Senate Bill 85 authorizes local jurisdictions to develop financial programs and arrangements, within certain parameters, to assist qualifying private property owners with making seismic improvements.</td>
<td>May 4, 2015</td>
</tr>
<tr>
<td>HB 2002</td>
<td>Profiling by law enforcement</td>
<td>Currently, there are no statewide policies regarding profiling by law enforcement, nor is there a central agency where a citizen can file a profiling complaint. Cities, counties and local law enforcement agencies may have their own policies, and those policies can be different from each other. House Bill 2002 defines profiling and requires law enforcement agencies to develop written policies prohibiting profiling by January 1, 2016. Law enforcement agencies are required to set up a process for receiving complaints and must investigate complaints of profiling. The measure also creates a 10-member Law Enforcement Profiling Work Group charged with reporting to the Legislative Assembly by December 1, 2015. Additionally, the measure creates the Law Enforcement Contacts Policy and Data Review Committee to collect and review complaints of profiling.</td>
<td>July 13, 2015</td>
</tr>
<tr>
<td>HB 2356</td>
<td>Invasion of privacy</td>
<td>The crime of invasion of personal privacy prohibits the nonconsensual recording or viewing of another person when that person is in a private place and nude. Currently, the offense is a Class A misdemeanor. House Bill 2356 increases penalties for recidivists and for those who make recordings of others. Knowingly recording another person in a state of nudity without consent when that person has an expectation of privacy is reclassified as invasion of personal privacy in the first degree and becomes a Class C felony, with a crime category of 6 on the felony sentencing guidelines. Sex offender registration would be discretionary if the court finds it appropriate for public safety. Invasion of personal privacy in the first degree would also apply to those who, at the time of the offense, have a previous conviction for invasion of privacy, private indecency, public indecency or a sex crime. Invasion of personal privacy in the second degree applies to nonconsensual viewing of another and remains a Class A misdemeanor.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>---------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 2571</td>
<td>Body cameras</td>
<td>House Bill 2571 requires law enforcement agencies to establish policies and procedures for the use of cameras worn by officers. The measure establishes minimum requirements for retention of recordings and provides a public records exemption for recordings unless the public interest requires disclosure and the request is reasonably tailored for the public interest and identifies the approximate date and time. Prior to release, the faces of individuals in the video must be blurred. Body cameras are small digital recording devices worn upon the body of a person. Law enforcement may choose to use these cameras to record police interactions with 133 members of the public. Prior to enactment of House Bill 2571, there were no authorizations, prohibitions or guidelines from the state on the use of body cameras or retention and release of video captured by body cameras.</td>
<td>June 25, 2015</td>
</tr>
<tr>
<td>HB 2596</td>
<td>Invasion of personal privacy</td>
<td>House Bill 2596 extends the crime of Invasion of Personal Privacy in the Second Degree (ORS 163.700) to prohibit the nonconsensual recording of a person’s intimate area, regardless of whether that person is nude or in a private place, if the person recorded has a reasonable expectation of privacy concerning the intimate area. Invasion of Personal Privacy is a Class A misdemeanor. Traditionally, invasion of personal privacy was applied to recording another person in a state of nudity without consent and in a place where there is a reasonable expectation of privacy. Because of advances in technology, it is possible to record the intimate areas of another without their consent, but while in a public place. For example, a person may use a cell phone to surreptitiously take a photograph up the skirt of another person who is unaware of the photograph. The photo may then be digitally shared. Such behavior was not captured by ORS 163.700 prior to enactment of House Bill 2596.</td>
<td>June 10, 2015</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>----------------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 2704</td>
<td>Recording of Law Enforcement</td>
<td>House Bill 2704 creates a new exemption to ORS 165.540, which requires a person to specifically inform parties of a recording that is being made, unless exempted. The exemption in HB 2704 applies to a person who openly, and in plain view of the participants in the conversation, records a law enforcement officer while the officer is performing his or her official duties in a place where person recording is lawfully present. The measure makes clear that the exemption does not authorize a person to engage in conduct constituting criminal trespass. Under ORS 165.540, a person who obtains, or attempts to obtain, the whole or part of a conversation by means of any device must “specifically inform” the parties of the recording. Failure to do so constitutes a Class A misdemeanor. ORS 165.540 provides specific exemptions to this rule. Examples include: 1) public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies, and sporting or other services; 2) regularly scheduled classes or similar educational activities in public or private institutions; and 3) law enforcement officers operating vehicle-mounted cameras.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 2776</td>
<td>Emergency protective order</td>
<td>House Bill 2776 creates an avenue for a peace officer to apply for an emergency protective order in response to domestic disturbances. The officer must obtain the victim’s consent to apply for the order. Upon granting of the victim’s consent, the officer is permitted to unilaterally approach the court to make a showing that probable cause exists that: 1) the officer has responded to an incident of domestic disturbance and the circumstances for mandatory arrest exist; 2) a person is in immediate danger of abuse by a family or household member; and 3) an emergency protective order is necessary to prevent a person from suffering the occurrence or recurrence of abuse. Should the judge make such a finding, the court will enter an order prohibiting contact between the individuals. The order is not effective unless it is properly served upon the person restricted from contact. An emergency protective order expires on the seventh judicial business day following the day of its entry into the Law Enforcement Data System. Violation of the order constitutes contempt of court punishable by up to six months in jail. Oregon allows victims to apply for a restraining order against their abusers through the Family Abuse Prevention Act (FAPA). When a petitioner requests relief from the court in the form of a FAPA restraining order, the circuit court holds an ex parte hearing either in person or by telephone. To grant the request for a FAPA order, the court must find: 1) the petitioner has been the victim of abuse by the respondent within 180 days preceding the hearing; 2) there is an imminent danger of further abuse to the petitioner; and 3) the respondent represents a credible threat to the physical safety of the petitioner or the petitioner’s child. Upon granting of the order, the respondent is prohibited from any and all contact with the petitioner. The court may fashion additional remedies for the protection of the petitioner. Prior to the enactment of HB 2776, there was no avenue for a law enforcement officer to apply for a temporary restraining order on behalf of the victim.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>--------</td>
<td>----------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>HB 2936</td>
<td>Sobering facilities</td>
<td>Law enforcement personnel are permitted to take any person who is intoxicated or under the influence of a controlled substance in a public place, either to the person’s home or to a treatment facility. Treatment facilities for this purpose are defined as those that meet certain minimum standards for diagnosis and evaluation, medical care, detoxification, social services or rehabilitation services for alcoholics and drug-dependent persons. These facilities are immune from civil or criminal liability so long as they act in good faith with probable cause and without malice. Many small jurisdictions do not have qualifying treatment facilities, leaving acutely intoxicated persons with few safe alternatives to detoxify. House Bill 2936 extends similar civil and criminal immunity to less-comprehensive sobering facilities as provided treatment facilities. The measure establishes criteria that sobering facilities must meet to receive immunity, including affiliation with approved providers to refer individuals for appropriate treatment and develop best 136 practices. The measure also limits the number of sobering facilities that may register after January 1, 2016 and protects the confidentiality of records of persons who are admitted.</td>
<td>July 20, 2015</td>
</tr>
<tr>
<td>HB 3347</td>
<td>Civil commitment</td>
<td>House Bill 3347 revises the definition of “person with a mental illness” for purposes of civil commitment to reflect current case law interpretation of when a person is unable to provide for basic personal needs. ORS 426.130 authorizes a court to civilly commit a person with mental illness under certain circumstances. The statutes authorize commitment of individuals in two circumstances: (1) the person is a danger to themselves or others; or (2) the person is unable to provide for their basic needs. There are constitutional limitations on when a person can be civilly committed. Under current Oregon law, “the state must establish by clear and convincing evidence that the individual, due to a mental disorder, is unable to obtain some commodity (e.g., food and water) or service (e.g., life-saving medical care) without which he cannot sustain life.” State v. Jayne, 174 Or App 74 (2001). “The statute does not express a standard by which the imminence of the threat to life is to be measured. A speculative threat . . . is not itself sufficient.” Id. However, “the state need not postpone action until the individual is on the brink of death. The goal of the commitment statute is safe survival, not merely the avoidance of immediate death.” State v. D.P., 208 Or App 453, 461 (2006). There must be a “likelihood that the person probably would not survive in the near future because the person is unable to provide for basic personal needs.” State v. Cori Aron, 176 Or App 342 (2001).</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Summary</td>
<td>Effective Date</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>-------------------------------------------------------------------------</td>
<td>----------------</td>
<td></td>
</tr>
<tr>
<td>HB 3399</td>
<td>House Bill 3399 allows any party to a proceeding conducted in open court of a Justice court or a Municipal court to arrange for recording of those proceedings. If the 138 parties and the court agree, the recording may be used during the proceedings or may be agreed to as an official record of the proceedings. Additionally, a Justice or Municipal court judge to be members of the Oregon Judicial College, Justice of the Peace and Municipal court judges to be members of the Oregon State Bar or to complete a course on courts of special jurisdiction offered by the National Judicial College, Justice of the Peace courts are created by county or municipal commissioners. Justices of the Peace are not required to be attorneys and the qualifications for municipal court judges are determined by the charter of the city.Oregon’s Evidence Code recognizes several relationships in which communications are kept confidential and are generally not admissible in court. These include communications between spouses, doctors and patients, counselors and clients, lawyers and clients, and clergymen and penitent. House Bill 3476 creates a new communication privilege for confidential communications between a victim of a sexual assault, domestic violence or stalking, and victim advocates or providers of advocacy service. Victim services programs include non-profit, community-based providers and several programs found on higher education campuses, such as student affairs offices, health centers and women’s centers.</td>
<td>January 1, 2016</td>
<td></td>
</tr>
<tr>
<td>HB 3476</td>
<td>Oregon’s Evidence Code recognizes several relationships in which communications are kept confidential and are generally not admissible in court. These include communications between spouses, doctors and patients, counselors and clients, lawyers and clients, and clergymen and penitent. House Bill 3476 creates a new communication privilege for confidential communications between a victim of a sexual assault, domestic violence or stalking, and victim advocates or providers of advocacy service. Victim services programs include non-profit, community-based providers and several programs found on higher education campuses, such as student affairs offices, health centers and women’s centers.</td>
<td>June 4, 2015</td>
<td></td>
</tr>
<tr>
<td>SB 173</td>
<td>Oregon law allows a peace officer to examine any firearm possessed by a person while they are in or on a public building. The purpose of such inspection is to determine whether or not the firearm is loaded. Under current law, a refusal of such inspection constitutes an arrestable offense. Senate Bill 173 allows people with a valid concealed handgun license to present their license, rather than their firearm, upon a peace officer’s request for inspection and removes language stating that refusal to present the firearm for inspection constitutes reason to believe the person has committed a crime.</td>
<td>January 1, 2016</td>
<td></td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>---------</td>
<td>----------------</td>
</tr>
<tr>
<td>SB 188</td>
<td>Unlawful dissemination of an intimate image</td>
<td>Individuals may choose to share an intimate image, such as a photograph, of themselves with another person. In some cases, a person may discover that an image shared confidentially with another has been posted to the internet. Some websites may charge a fee to remove an image, even if the person in the image did not authorize its distribution. Further, the Federal Communications Decency Act immunizes website managers from liability when other people post content on their website. Additionally, the First Amendment and the Oregon Constitution provide protection for speech, even when unpopular or potentially injurious. Because of these restrictions, individuals have had little recourse when they find their intimate images shared in a public space without their permission. Senate Bill 188 creates the crime of unlawful dissemination of an intimate image. The measure prohibits disclosure of an intimate image to a website without permission, with the specific intent to harass, humiliate or injure another. Unlawful dissemination of an intimate image is a Class A misdemeanor for a first violation and a Class C felony for each subsequent violation.</td>
<td>June 11, 2015</td>
</tr>
<tr>
<td>SB 341</td>
<td>Agri-tourism</td>
<td>The State of Oregon has a robust and growing agri-tourism industry, which includes farm visits, vineyards, pumpkin patches, corn mazes and a broad range of other activities. While many farms welcome the public onto the land and host events, some farms encountered issues with obtaining insurance to cover events due to limited protections from lawsuits arising from farm-related activities. Senate Bill 341 gives liability protection to agri-tourism providers against injury to or death of a participant arising out of the inherent risks of agri-tourism if the agritourism provider posts certain notices and has not acted negligently. Additionally, the measure defines relevant terms and includes the exact warning language that must be posted.</td>
<td>June 22, 2015</td>
</tr>
<tr>
<td>SB 343</td>
<td>Tribal police officers</td>
<td>In 2011, the Legislative Assembly passed Senate Bill 412, which provides tribal law enforcement officers in Oregon the same arrest and police powers as other state, local, and special police officers. Senate Bill 412 included a sunset provision taking effect on June 30, 2015. In the years since the bill was enacted, several tribes and law enforcement jurisdictions have advocated for the removal of the sunset and permanent adoption of the tribal law enforcement powers. Senate Bill 343 repeals the sunset provision contained in Senate Bill 412.</td>
<td>May 26, 2015</td>
</tr>
<tr>
<td>SB 377</td>
<td>Theft of an intimate image</td>
<td>Oregon statute forbids the use of a computer to commit theft, including theft of proprietary information. The statute was not clear, however, that theft of a digital intimate image would qualify as a computer crime. Senate Bill 377 clarifies that theft of an intimate image is a computer crime, making it a Class C felony. The measure also provides a technical fix to the order of conditions of probation.</td>
<td>June 10, 2015</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>-------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>SB 525</td>
<td>Prohibition against possession of firearm or ammunition</td>
<td>The federal Violence Against Women Act (VAWA) has prohibited the possession of firearms or ammunition by certain adjudicated domestic violence offenders. However, it has been difficult to implement the federal law in Oregon because there are a limited number of federal law enforcement officers in the state, and local law enforcement officers are not authorized to enforce federal law. As a result, it is local law enforcement that interact with domestic abusers and victims and need the tools to protect victims. Senate Bill 525 establishes state firearm prohibitions modeled after the current federal prohibitions found in the VAWA. By incorporating these prohibitions into Oregon’s statutes, they will be enforceable at the state level, and will provide the protection for domestic victims. The measure provides that an individual, who is the subject of a restraining order protecting intimate partner or child of intimate partner, may not possess a firearm or ammunition. The prohibition applies if person has been convicted of misdemeanor involving domestic violence that has use or attempted use of physical force or use or threatened use of a deadly weapon as element of offense and defendant was family member of victim at time of offense. Additionally, the measure states that if a person is convicted of a qualifying misdemeanor and the victim was a family member at the time of the offense, they may not possess a firearm or ammunition.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>Bill #</td>
<td>Relating to</td>
<td>Summary</td>
<td>Effective Date</td>
</tr>
<tr>
<td>-------</td>
<td>-------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>SB 941</td>
<td>Private transfers of firearms</td>
<td>Oregon mandates that all firearm transfers at both gun shows and gun dealers be completed with a criminal background check. Such checks for private individuals, however, are permissive. ORS 166.436 provides that, prior to transferring a firearm, a transferor may request, by telephone, that the Department of State Police conduct a criminal background check on the recipient. Should a transferor elect to utilize this procedure, he or she is then immune from civil liability for any use of the firearm from the time of the transfer, unless the transferor knows, or reasonably should have known, that the recipient is likely to commit an unlawful act with the firearm. Currently, eight jurisdictions require a background check to be conducted prior to any firearms transfer, including those between private citizens and at gun shows. This is known colloquially as a “universal background check.” These states are California, Colorado, Connecticut, Delaware, New York, Rhode Island, Washington, D.C. and Washington State. Of these states, some have additional restrictions such as handgun purchase permits, waiting periods, assault weapons bans and magazine capacity restrictions. Washington State is the most recent addition to the list, with Initiative 594 taking effect on December 4, 2014. Senate Bill 941, named the “Oregon Firearms Safety Act,” expands on Oregon’s current background check requirement by establishing universal background checks for firearm transfers. The Oregon Firearms Safety Act requires all private transferors of firearms to appear at gun dealer with the person to whom the firearm is being transferred and firearm and request criminal background check before transfer. The measure specifies exceptions for background check for transfers between family members, law enforcement, inherited firearms and certain temporary transfers. A violation of background check law constitutes a Class A misdemeanor for first offense and Class B felony for second and subsequent offenses.</td>
<td>May 11, 2015</td>
</tr>
<tr>
<td>HB 2830</td>
<td>Remand of local land use decision</td>
<td>Modifies time period for local government to take action on application for permit, limited land use decision or zone change after remand based on final order of Land Use Board of Appeals.</td>
<td>January 1, 2016</td>
</tr>
<tr>
<td>HB 2831</td>
<td>Use of property line adjustments in resource zones</td>
<td>Modifies authority to use property line adjustments in resource zones.</td>
<td>January 1, 2016</td>
</tr>
</tbody>
</table>
Chapter 3
Discretionary Immunity—Where Pro Activity Really Matters

Kirk Mylander
CityCounty Insurance Services
Lake Oswego, Oregon

Gerald Warren
Law Office of Gerald Warren
Salem, Oregon

Contents

Presentation Slides .............................................. 3–1
Discretionary Immunity Oregon Case Law Summaries .... 3–15
Chapter 3—Discretionary Immunity—Where Pro Activity Really Matters

Discretionary Immunity

KIRK MYLANDER: CIS GENERAL COUNSEL
(503) 763-3812 | kmylander@cisoregon.org

LAW OFFICE OF GERALD L. WARREN

Discretionary Immunity

GERALD L. WARREN, ATTORNEY AT LAW
Exclusively Representing Oregon Cities and Counties since 1992
Oregon Tort Claims Act

Discretionary Immunity

Oregon Tort Claims Act Provides:

Discretionary Immunity: ORS 30.265(3)(c)

“...based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.”
Discretionary Immunity

Discretionary Immunity:

Elected Official Can’t Be Sued For Voting the Wrong Way

- Stoplight vs. Guard Rail
- Can also apply to lower decision makers

One of the more succinct formulations of the distinction between immune and non-immune actions under the doctrine of discretionary immunity is this:

1. Discretionary immunity applies to a choice
2. Among alternative public policies (not day to day actions)
3. By persons with the authority to make such policies decisions.

Applies when you exercise discretion to set policy (which path to take)

Exercise Discretion to Set Policy

- Decisions at the policy level of government, such as the design, location, and installation of traffic signals, or the make up of programs such as tree and sidewalk maintenance, are typically immune from liability.
  - *Morris v Oregon State Transportation Comm.*, 38 Or App 331 (1979)
  - *Gallison v City of Portland*, 37 Or App 135 (1978)
Discretionary Immunity

Does NOT apply when:

- Choosing to not follow policy
- Failing to implement established maintenance/inspection program

Discretionary immunity did not apply when city was negligent in implementation of traffic sign program. (Design of program would have been covered).

- Tozer v. City of Eugene, 115 Or App 464 (1992)

Does NOT apply when you fail to go down the selected path
**Discretionary Immunity**

**How to prove it applies:**

1. Final decision at governing body level
2. Decision sets plan/program carried out by staff
3. Evidence that competing alternatives were investigated and considered
   - Staff Recommendations / Reports
   - Public Testimony
   - Experts or Consultants

**Example:**

Chapter 3—Discretionary Immunity—Where Pro Activity Really Matters


- Duty to provide safe environment at waste transfer station
- Immunity applied to choice of design and safety measures
- Didn’t choose the safest design
- Documented proof that safety was considered

1. “Considered various design options”
2. “Evaluated... effectiveness, safety and risks”
3. Evaluated “relative costs and benefits of constructing the station with and without” various safety options
4. Evaluated ongoing maintenance costs imposed by different designs
5. Evidence County sought “safest, least expensive, and easiest to use” design

- Plaintiffs: County “considered” safety measures, then chose none due to cost
- Plaintiff: County owed duty of care to public, then County chose not to exercise care
- “This is not a case in which the decision-makers simply disregarded their duty to protect the public.”

“Even if flawed, they exercised their discretion and chose to protect the public in a particular way.”

“Plaintiffs wish to argue that the county should have done something more, or something different, but that argument is the kind of second-guessing that is defeated by immunity under ORS 30.265(3)(c).”
Discretionary Immunity

Whether or not to protect the public by taking preventative measures, if legally required, is not discretionary.

BUT

*The government’s choice of how to design/fulfill that requirement can be discretionary.*

---

Discretionary Immunity

- Discretionary immunity applied when injured party alleged that public body took too long to decide which method to implement to protect public from injury.

  *Miller v. Grants Pass Irrigation District, 297 Or 312 (1984)*

  - Boat went over dam; duty to warn not discretionary but how to warn is discretionary
Discretionary Immunity

- **Turner v. State of Oregon, Depoe Bay and Lincoln County**
  - Motorcycle runs into car as car turns left onto Hwy 101
  - Sightlines
  - Diag Parking
  - Fail to Warn
Discretionary Immunity

City of Depoe Bay Facts on Discretionary Immunity

- Problem Identified
- Transportation plan
- Local Businesses
### Discretionary Immunity

**Lincoln County Facts on Discretionary Immunity**

- Safety Audit by Engineer
- Roadmaster Consideration
- Transportation Plan

### Discretionary Immunity

- **Turner v. State of Oregon, Depoe Bay and Lincoln County**
  

  State’s petition for review allowed July 30, 2015

  Oral Argument set for January 14, 2016
Discretionary Immunity

- **Top Six Tips:**

1. City must prove it is entitled to immunity
   - Best proof: records showing policy and a weighing of social, political, economic, safety factors
   - Contemporaneous records are more persuasive than those created after claim is filed against city

Discretionary Immunity

- **Top Six Tips**

2. Not all decisions by Council or Mayor are immune from liability
   - Weighing factors to make policy decisions
   - Not day to day duties, or following a policy

3. Decisions by lower level employees can be immune
   - Authority delegated as in Garrison
Discretionary Immunity

- **Top Six Tips**

4. If in doubt, have the policy or plan reviewed, debated, and voted by council

5. Even if discretionary immunity does not protect the city, the documentation will help demonstrate city was not negligent

-- Your work will still be put to good use!

---

Questions?
## Discretionary Immunity
### Oregon Case Law Summaries
(Date Sorted)

Assistant Attorneys General John Clinton Geil, Jessica McKie, and Gerald L. Warren, Esq.

Rev. 10/22/2015

<table>
<thead>
<tr>
<th>Category: Gray Cases: White</th>
<th>Citation</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smith v. Cooper</td>
<td>J. Denecke</td>
<td>256 Or 485 1970</td>
<td>Granted. State highway officials and employees were immune from suit based on their alleged negligence in planning, establishing, and maintaining a highway where an accident occurred because they were performing discretionary functions.</td>
</tr>
<tr>
<td>Weaver v. Lane County</td>
<td>J. Thornton</td>
<td>10 Or App 281 1972</td>
<td>Granted. A county employee in charge of a county road system was engaged in discretionary functions and was immune from suit for common-law negligence.</td>
</tr>
<tr>
<td>Lanning v. State Highway Commission</td>
<td>J. Langtry</td>
<td>15 Or App 310 1973</td>
<td>Denied. No discretionary immunity under ORS 30.265 where state allowed debris to accumulate next to bridge piers and cause flooding of land (held to be ministerial act). Note: the court also held that a negligence action was proper even though inverse condemnation action was also available.</td>
</tr>
<tr>
<td>Daugherty v. Oregon State Highway Commission</td>
<td>J. McAllister</td>
<td>270 Or 144 1974</td>
<td>Denied, as to the definition of maintenance. Court found no evidence to support the allegation that state employees had absolute knowledge of the existence of ice and the time to correct the problem. Court also held that road maintenance is non-discretionary and is ministerial.</td>
</tr>
<tr>
<td>Turrini v. Gulick</td>
<td>J. Thornton</td>
<td>16 Or App 167 1974</td>
<td>Granted. Public officers and employees are generally immune from liability for alleged negligence in planning and designing of highways. This immunity extends to the placement of warning signs in the vicinity of allegedly hazardous highway intersections.</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>Hulen v. City of Hermiston</td>
<td>30 Or A pp 1141</td>
<td>1977</td>
<td>Denied. The evidence did not show that the alleged negligent action taken by police were based on general policy decision or were an isolated incident of negligence. The latter assumption foreclosing the possibility of discretionary immunity.</td>
</tr>
<tr>
<td>Jones v. Chehalem Park &amp; Recreation District</td>
<td>28 Or A pp 711</td>
<td>1977</td>
<td>Granted in part. The design and construction of a sidewalk and the stationing of guards deals with wholly discretionary matters. However, the failure to maintain in a reasonable manner existing traffic direction signs is considered maintenance and therefore ministerial and thus not within the scope of discretionary immunity.</td>
</tr>
<tr>
<td>Pickett v. Washington County</td>
<td>31 Or A pp 1263</td>
<td>1977</td>
<td>Granted. In a personal injury action, the court held that caseworkers and shelter care parents made delicate and complex judgments and such decisions were discretionary.</td>
</tr>
<tr>
<td>Comley v. State Board of Higher Education</td>
<td>35 Or A pp 465</td>
<td>1978</td>
<td>Granted in part. Discretionary immunity is available as a matter of law where it is shown that the authority to make the challenged decision had been expressly delegated by a co-equal branch of government. Otherwise, the challenged decision is analyzed by using the factors enumerated under the 1978 Oregon Supreme Court case <em>McBride v. Magnusson</em>, infra.</td>
</tr>
<tr>
<td>Gallison v. City of Portland</td>
<td>37 Or A pp, 145</td>
<td>1978</td>
<td>Granted. The rule that planning and designing of roads is a discretionary act includes not only actual design of a street but also the placement and location of the signs and signals.</td>
</tr>
<tr>
<td>Mayse v. Coos County</td>
<td>35 Or A pp 779</td>
<td>1978</td>
<td>Granted. A boulder that projected over shoulder of the county road that plaintiff alleged was negligently maintained was really a claim against road design and was immune. Also, failure to post warning signs was immune.</td>
</tr>
<tr>
<td>Moody v. Lane County</td>
<td>36 Or A pp 231</td>
<td>1978</td>
<td>Remanded for further factual findings. If the county delayed in implementing authorized changes in traffic control at an intersection because of an administrative or legislative determination of priorities with respect to allocation of personnel, materials, and funds, the county's conduct was a discretionary act.</td>
</tr>
</tbody>
</table>
### Chapter 3—Discretionary Immunity—Where Pro Activity Really Matters

<table>
<thead>
<tr>
<th>Category: Gray Cases: White</th>
<th>Citation</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murphy v. City of Portland J. Johnson</td>
<td>36 Or A pp 745</td>
<td>1978</td>
<td>Denied. Summary judgment should not have been allowed because there was no information from the evidence presented to show that the &quot;standard procedure&quot; taken by the defendants originated from decisions of the nature that have been held to be discretionary, or was rather simply common practice engaged on by county employees. Man was mistakenly arrested in his home.</td>
</tr>
<tr>
<td>Robert Randall Co. v. City of Milwaukie J. Buttlar</td>
<td>32 Or A pp 631</td>
<td>1978</td>
<td>Granted. City decision to hold up processing of pending building permit applications in order to establish a Design Review Committee was discretionary.</td>
</tr>
<tr>
<td>Brennen v. City of Eugene J. Howell</td>
<td>285 Or 401</td>
<td>1979</td>
<td>Denied. Negligent City taxicab licensing decisions related to proof of insurance not immune.</td>
</tr>
<tr>
<td>Dizick v. Umpqua Community College J. Denecke</td>
<td>287 Or 303</td>
<td>1979</td>
<td>Denied. Defendant's representations about certain material and equipment and its availability was not a discretionary act</td>
</tr>
<tr>
<td>Hamilton v. State of Oregon J. Campbell</td>
<td>42 Or A pp 821</td>
<td>1979</td>
<td>Denied in part. The planning, design and construction of highways are all discretionary functions, the negligent performance of which neither the State nor a city is liable for. However, where genuine issues of material fact remained as to the City's failure to inspect the sewer, entry of summary judgment was improper</td>
</tr>
<tr>
<td>Morris v. Oregon Department of Trans. Comm. J. Lee</td>
<td>38 Or A pp 331</td>
<td>1979</td>
<td>Granted. Operation or application of traffic signal constitutes exercise of discretionary function for which ODOT was immune.</td>
</tr>
<tr>
<td>Hall v. State of Oregon J. Denecke</td>
<td>290 Or 19</td>
<td>1980</td>
<td>Denied. There is no suggestion in the tort claims act that where a public body's potential tort liability is based on negligence the plaintiff's proof is to be evaluated by a stricter standard than in negligence cases generally. There is no requirement that plaintiff defined a reasonable time in which a public entity must act to avoid being negligent. Issue of whether ODOT maintenance crews swept sand from the highway in a reasonable period of time is an issue for a jury. The state is not required to establish that other highway sweeping tasks were more urgent.</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-------------</td>
<td>------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Stevenson v. State of Oregon ODOT J. Denecke</td>
<td>290 Or 3</td>
<td>1980</td>
<td>Denied. Wrongful death arising out of collision at state highway and avenue intersection. Malfunctioning [double green?] traffic signal not covered under discretionary immunity as was not a policy decision not to fix.</td>
</tr>
<tr>
<td>Bradford v. Davis J. Linde</td>
<td>290 Or 855</td>
<td>1981</td>
<td>Denied in part. This case reversed and remanded for further proceedings. <em>Bradford v. Davis</em>, 46 Or App 213, 611 P2d 326 (1980). When tortious conduct by a named officer, employee, or agent in the performance or nonperformance of his duties involved, the question under ORS 30.265(3)(c) is not the discretionary nature of the overall function of the public body but the degree of discretion allowed the individual defendant whose immunity is at issue. The question of immunity is has the defendant been delegated responsibility for a policy judgment and exercised such responsibility in the act or omission alleged.</td>
</tr>
<tr>
<td>Saracco v. Multnomah County J. Buttler</td>
<td>50 Or A pp 145</td>
<td>1981</td>
<td>Denied. The negligent performance by county employees in failing to inspect, maintain, and repair the bridge was not a policy act for which immunity was available. The decision to use studs instead of a grid is a design choice that is protected by discretionary immunity, but there is no discretionary immunity for not maintaining the studs once they were installed.</td>
</tr>
<tr>
<td>Brasel v. Children's Services Div. J. Roberts</td>
<td>56 Or A pp 559</td>
<td>1982</td>
<td>Denied. The trial court erred in granting immunity to the Division during the pleading stage because more facts were needed to determine whether the Division's application of child care center certification standards involved discretion.</td>
</tr>
<tr>
<td>Miller v. Grants Pass Irrigation District J. Linde</td>
<td>297 Or 312</td>
<td>1984</td>
<td>Denied in part. Boat swept over Savage Rapids Dam on the Rogue River. No immunity? Remanded for further facts. Failure to regulate vs. failure to warn. If there is a legal duty to protect the public by warning of a danger or by taking preventive measures, or both, the choice of means may be discretionary, but the decision as to whether or not to do so at all is not discretionary.</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>Pendergrass v. ODOT</td>
<td>74 Or App 209</td>
<td>1985</td>
<td>Discretionary immunity denied. Wrongful death arising out of a motor vehicle accident caused by an epileptic who was issued a driver’s license. Court found that ODOT/MVD policy and rules with respect to issuance of driver’s license were only implementing specific mandatory statutory duties and therefore were non-discretionary functions.</td>
</tr>
<tr>
<td>Ramsey v. City of Salem Judge Richardson</td>
<td>76 Or App 29</td>
<td>1985</td>
<td>Granted. The City's failure to repair the sidewalk was based on a general policy plan that was entitled to discretionary immunity.</td>
</tr>
<tr>
<td>Donaca v. Curry County J. Linde</td>
<td>303 Or 30</td>
<td>1987</td>
<td>Denied. There is a duty by county to keep grass cut in a right of way at an intersection where a motorcyclist on county road hit a car entering the county road from a private roadway. Note that supreme court focused on “duty” and discussed Fazzolari which was decided the same day. It doesn’t even discuss the discretionary immunity issue, although this case was later cited in the Little v. Wimmer case. It notes that the lower court wrongfully dismissed the case on a theory of “no-duty” and a failure to state a claim basis, and said there can be situations where a case could be dismissed.</td>
</tr>
<tr>
<td>Little v. Wimmer J. Jones</td>
<td>303 Or 580</td>
<td>1987</td>
<td>Denied. Two-auto collision on state highway 99E and New Era Road. State sued for hazardous and negligent highway design, construction, and maintenance, including failure to warn. Dismissal due to discretionary immunity reversed by Oregon Supreme Court. The Supreme Court pointed out that “[the] burden is on the state to establish its immunity. *** [E]vidence of how the design was made is necessary.” [at 588]. And, “If it is a continuing non-decision which is in issue, then clearly the state has not met its burden to establish its immunity. In the absence of evidence that the decision was made as a policy judgment, by a person or body with governmental discretion, the decision is not immune from liability.”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category: Gray</th>
<th>Citation</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Praggastis v. Clackamas County J. Jones</td>
<td>305 Or 419</td>
<td>1988</td>
<td>Granted. Employees who follow the explicit orders of their superiors who have themselves exercised discretionary authority in making such decisions will not be answerable for performing their duties. Docket clerk following presiding judge orders.</td>
</tr>
<tr>
<td>Tennyson v. Children's Services Division J. Carson</td>
<td>308 Or 80</td>
<td>1989</td>
<td>Granted. Because the defendants were acting under a statutory mandate, their decisions were entitled to discretionary immunity to the extent the statute dictated their actions. The court affirmed the determination that the employees were entitled to absolute immunity to the parents' § 1983 claims for the employees' action in testifying in juvenile court, but held that the employees were entitled only to qualified immunity for their other acts. The CSD and employees were entitled to absolute immunity from the OTCA claims for their discretionary acts. The court remanded for a determination of the discretionary acts.</td>
</tr>
<tr>
<td>Egner v. City of Portland J. Deits</td>
<td>103 Or App 623</td>
<td>1990</td>
<td>Granted in part. Even if a city's decision to remove a crosswalk was protected by discretionary immunity, triable issues of fact existed as to whether removal was performed in a negligent manner.</td>
</tr>
<tr>
<td>Lowrimore v. Dimmitt and County of Marion J. Peterson</td>
<td>310 Or 291</td>
<td>1990</td>
<td>Denied. A deputy sheriff's decision to continue a pursuit through populated areas at a high rate of speed was not a discretionary decision under the OTCA because that decision did not involve policy choices.</td>
</tr>
<tr>
<td>Pritchard v. City of Portland J. Unis</td>
<td>310 Or 235</td>
<td>1990</td>
<td>Denied. Although city ordinances imposed concomitant responsibilities and liability on abutting property owners for stop signs obscured by foliage, the city was not exempt from liability for its own negligent failure to maintain a sign's visibility.</td>
</tr>
<tr>
<td>Dee v. Pomeroy J. Warren</td>
<td>109 Or App 114</td>
<td>1991</td>
<td>Denied, as to a showing of the officer's actions. A police officer's decision to pursue a car and the manner in which he does so is not discretionary because the officer is immune under ORS 30.265(3)(c).</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>Zavalas v. State of Oregon</td>
<td>106 Or A pp 444</td>
<td>1991</td>
<td>Denied. A parole officer was not acting under the instruction of a judge when the officer failed to both report a violation and arrest a probationer. The state therefore had no discretionary immunity when the probationer caused an accident resulting in death and injury. A question of material fact existed as to the foreseeability of the accident, causation, and the reasonableness of the officer's actions.</td>
</tr>
<tr>
<td>Fielding v. Heiderich</td>
<td>113 Or A pp 280</td>
<td>1992</td>
<td>Granted. The school district had discretionary immunity because the decision to establish traffic patrols under ORS 336.460(1) was discretionary.</td>
</tr>
<tr>
<td>Mosley v. Portland School District</td>
<td>315 Or 85</td>
<td>1992</td>
<td>Granted. Student stabbed with knife in fight with another student. Oregon Supreme Court held the district’s decision on number and allocation of security personnel was protected policy decision under discretionary immunity.</td>
</tr>
<tr>
<td>Tozer v. City of Eugene</td>
<td>115 Or A pp 464</td>
<td>1992</td>
<td>Denied. Even if a city was immune from claims based on the development of a traffic sign program, any negligence in implementation of the program or in performance of particular maintenance activities would not be sheltered by discretionary immunity.</td>
</tr>
<tr>
<td>Bakr v. Elliot and City of Eugene</td>
<td>125 Or A pp 1</td>
<td>1993</td>
<td>Granted. City was immune from tort liability for its policy decision to implement a &quot;crisis management&quot; tree maintenance program. Where the City acted in accordance with that plan, it was not liable when a falling tree limb killed the decedent.</td>
</tr>
<tr>
<td>Buchler v. State</td>
<td>316 Or 499</td>
<td>1993</td>
<td>Supreme Court overruled 104 Or A pp 547 (denying discretionary immunity because decision not to pursue escaping prisoner was routine) because state was custodian of the prisoner, a duty to control the prisoner from harming individuals would have existed if it was shown that the state knew or should have known that the prisoner was likely to cause bodily injury to others if not controlled. However, the court held that the resultant injuries were not legally foreseeable results of the prisoner's escape. The Supreme Court decision did not address discretionary immunity, focusing instead on foreseeability.</td>
</tr>
<tr>
<td>Hawkins v. City of LaGrande</td>
<td>315 Or 57</td>
<td>1993</td>
<td>Denied. City discharged untreated sewage onto land causing death of livestock and crops. Oregon Supreme Court held on the tort claim that there was no discretionary immunity as this was a choice made</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>between two courses of action, not a policy decision.</td>
</tr>
<tr>
<td>Jones-Clark v. Severe, J. Edmonds</td>
<td>118 Or App 270</td>
<td>1993</td>
<td>Denied. Probation officer’s duties do not constitute policy judgment within meaning of ORS 30.265(3)(c) and defendants offer no evidence that probation officer was delegated policy judgment responsibility.</td>
</tr>
<tr>
<td>Demaray v. Department of Envtl. Quality J. Leeson</td>
<td>127 Or App 494</td>
<td>1994</td>
<td>Denied. A decision to discharge a mid-level employee is not a decision involving the making of policy and thus does not result in the protection of discretionary immunity.</td>
</tr>
<tr>
<td>Hall v. Dotter J. Riggs</td>
<td>129 Or App 486</td>
<td>1994</td>
<td>Denied. Pedestrian crossing road where state highway (TV Highway) and county road intersected struck by car. Even though the Manual on Uniform Traffic Control Devices didn’t require it the State had installed two pedestrian crossing warning signs. The State raised a limited discretionary immunity defense saying that it was solely following the Manual warrants and therefore had no discretion, much like the judicial clerk in Praggatis v. Clackamas County, 305 Or 419 (1988) (where a judge’s clerk was only following the judge’s instructions and therefore was absolutely immune under judicial immunity). However, the Court of Appeals pointed out that the pedestrian warning signs were installed at the suggestion of a traffic engineer and not because of the Manual, and therefore found there was no discretionary immunity. See concurring opinion by J. Deits which says the adoption of the Manual is covered by discretionary immunity and there could be discretionary immunity for the State employees carrying out the Manual design - if there were undisputed facts demonstrating that the design was done according to the Manual.</td>
</tr>
<tr>
<td>Day v. City of Canby J. Leeson</td>
<td>143 Or App 341</td>
<td>1996</td>
<td>Granted. Judgment was improperly entered against the City in an injured person's action for injuries caused by a runaway horse (that bolted due to a firecracker following a parade) because the City's decision about the design of the staging area and the public's safety</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>was a classic policy choice that was entitled to discretionary immunity</td>
</tr>
<tr>
<td>Penland v. Redwood Sanitary Sewer Serv. Dist J. Gillette</td>
<td>327 Or 1</td>
<td>1998</td>
<td>Denied. A district sewage treatment service was not entitled to immunity under the OTCA in property owners' action seeking injunctive relief from a nuisance because the OTCA conferred immunity only from liability for damages, not injunction.</td>
</tr>
<tr>
<td>Mark v. State Dept of Fish and Wildlife J. Warren</td>
<td>158 Or App 355</td>
<td>1999</td>
<td>Granted as to immunity for damages, reversed as to nuisance claim injunction in response to Penland. Agency had discretion about how to regulate public nudity.</td>
</tr>
<tr>
<td>Piper v. Scott J. Landau</td>
<td>164 Or App 1</td>
<td>1999</td>
<td>Granted. Open range area case. Defendant State was not liable for failing to warn drivers because the policy of not posting signs was a discretionary decision.</td>
</tr>
<tr>
<td>Hutcheson v. City of Keizer J. Haselton</td>
<td>169 Or App 510</td>
<td>2000</td>
<td>Denied. City immunity was properly denied where official's review of subdivision plans was not discretionary, however, an evidence instruction was improper where the allegedly &quot;less satisfactory&quot; evidence was not reasonably appropriate and was not harmless.</td>
</tr>
</tbody>
</table>
### Chapter 3—Discretionary Immunity—Where Pro Activity Really Matters

<table>
<thead>
<tr>
<th>Category: Gray</th>
<th>Citation</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases: White</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| **McComb v. Tamlyn and State of Oregon ODOT** | 173 Or App 6 | 2001 | Denied. Plaintiff, riding her bicycle in a crosswalk with a “walk” signal, was hit by car turning right at a green traffic light at the northwest entrance to Clackamas Town Center. State claimed discretionary immunity applied since the crosswalk design complied with the Manual on Uniform Traffic Control Devices (the “Manual”). Case discusses the lead *Stevenson* case. The Court of Appeals held that wasn’t enough to establish discretionary immunity since the Manual only “provided some of the tools for engineers to use in exercising their engineering judgment…” and since there was conflicting expert testimony as to whether the design complied with the Manual. The case involved whether there should have been additional warnings of the crosswalk/traffic signal conflict, such as warning signs or better signalization.  

Note: The case opinion noted that budgetary considerations were not raised by the State as a basis for discretionary immunity. |
<p>| <strong>Canell v. State of Oregon</strong> | 185 Or App 174 | 2002 | Denied. OSP <em>pro se</em> claim for lost eyeglasses. State conceded that it did not meet the grounds for discretionary immunity granted by trial court. Routine decisions that every employee must make, even when they require judgment, do not qualify for discretionary immunity. |
| <strong>Garrison v. Deschutes County</strong> | 334 Or 264 | 2002 | Granted. Selection of final design for solid waste transfer station held immune. Safety design resulted from discretionary policy judgment by individuals delegated authority to make that judgment. Immunity found despite allegation of failure to warn. |
| <strong>Ramirez v. Haw. T&amp;S Enters.</strong> | 179 Or App 416 | 2002 | Granted. City policy called for sidewalk inspections every two years. A decision by the city council to divert city employees from sidewalk inspection to flood-related duties was an exercise of discretion and such action qualified for discretionary immunity. Sets out three-part test: (1) Discretionary immunity requires choice or exercise of judgment; (2) must involve matter of public policy (as opposed to the routine day-to-day activities of officials); (3) and must be choice of person who has direct or delegated authority to make such decisions. |</p>
<table>
<thead>
<tr>
<th>Category: Gray Cases: White</th>
<th>Citation</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sande v. City of Portland</td>
<td>185 Or App 262</td>
<td>2002</td>
<td>Denied. City failed to say in briefs that warning to neighbors not to report robbery was a choice or decision. Therefore no immunity.</td>
</tr>
<tr>
<td>Vokoun v. City of Lake Oswego</td>
<td>335 Or 19</td>
<td>2002</td>
<td>Denied. Landslide involving house near Tryon Creek and storm drain outfall maintenance. Inverse condemnation and negligence claims. No immunity for budget decision not to do anything about erosion problem. Decision to fill erosion hole with asphalt debris was a routine day-to-day decision by maintenance employees.</td>
</tr>
<tr>
<td>Weatherford v. County of Klamath</td>
<td>201 Or App 601</td>
<td>2005</td>
<td>Denied. Immunity will be granted if the fact-finder decides sergeant spread ice melt at the jail was because of county’s general policy on spreading ice melt in parking lots and not just the sergeant’s own “judgment call.”</td>
</tr>
<tr>
<td>Clifford v. City of Clatskanie</td>
<td>204 Or App 566</td>
<td>2006</td>
<td>Denied. IIED. Suicide by teen falsely accused of making 911 anonymous call that other teens were drinking and partying.</td>
</tr>
<tr>
<td>Hughes v. Wilson and Wasco County Public Works Dept.</td>
<td>345 Or 491</td>
<td>2008</td>
<td>Denied. Motorist pulled out of private driveway and hit motorcycle. The county hadn’t trimmed foliage which interfered with the line of sight.</td>
</tr>
<tr>
<td>John v. City of Gresham</td>
<td>214 Or App 305</td>
<td>2008</td>
<td>Denied. Child injured crossing painted crosswalk. Motorist sued Gresham and Multnomah County saying merely painted crosswalk gave false sense of security. Trial court granted discretionary immunity for design of crosswalk but Court of Appeals reversed saying that “on the record before us we cannot determine that either defendant is subject to discretionary immunity as a matter of law....” Also said (citing McComb v. Tamlyn) that while overall design of a government project may entail decisions that may implicate discretionary immunity, many other decisions in the planning and design of highways require the exercise of some technical discretion but not necessarily governmental policy choices.</td>
</tr>
<tr>
<td>Category: Gray Cases: White</td>
<td>Citation</td>
<td>Year</td>
<td>Notes</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>Timberlake (Estate of Lyon) v. Washington County</td>
<td>228 Or App 607</td>
<td>2009</td>
<td>Granted. Traffic accident death. Held county entitled to discretionary immunity for budget decision not to remove foliage.</td>
</tr>
<tr>
<td>Smith v. Bend Metropolitan Park and Recreation District</td>
<td>247 Or App 187</td>
<td>2011</td>
<td>Denied (said it is a jury question as to whether design decision was delegated to manager by public board). Trial court granted summary judgment based on discretionary immunity where plaintiff tripped over splash pad at public pool. Appellate court reversed and remanded in part (see reference in opinion to the causation issue and the Garrison case) as there was evidence that a jury could find construction design and placement decision was done by project manager and did not require the exercise of discretion within meaning of ORS 30.265(3).</td>
</tr>
<tr>
<td>Westfall v. State, ex rel. Oregon Dept. of Corrections</td>
<td>247 Or App 384</td>
<td>2011</td>
<td>Decisions of DOC employees implementing DOC sentencing policies in the computing of prison sentence were not insulated by the immunity from tort liability provided for acts or decisions that constitute a choice among alternative public policies by persons to whom responsibility for such policies has been delegated. NOTE: Reversed by Oregon Supreme Court (at 355 Or 144 (2014)).</td>
</tr>
<tr>
<td>Jenkins v. Portland Housing Authority</td>
<td>260 Or App 26</td>
<td>2013</td>
<td>Slip and fall action by tenant in a public housing project involving leaky washing machine. Claim was found to be a tort claim, not a contract action under the ORLTA, and therefore subject to discretionary immunity. Note: There was very little substantive discussion of DI in this case. Plaintiff failed to raise an argument in the trial court that the function was “ministerial” and therefore not subject to DI. The appellate court found that this argument was not preserved and therefore didn’t consider it on appeal.</td>
</tr>
<tr>
<td>Westfall v. State</td>
<td>355 Or 144</td>
<td>2014</td>
<td>Reversing the Oregon Court of Appeals (and upholding the trial court) the Supreme Court found that an improper sentence calculation allegation against the DOC was subject to discretionary immunity, as it was done according to a DOC policy directing how a prison term analyst should calculate prison terms. The Supreme Court said that discretionary immunity protects not only the public officials who made the policy decision but also protects the employees or agents who effectuate or implement that choice in particular cases.</td>
</tr>
</tbody>
</table>
Chapter 4
Public Records Law Update

Lora Keenan
General Counsel’s Office, Oregon Department of Justice
Salem, Oregon

Ian Whitlock
Port of Portland
Portland, Oregon

Contents

1. Essential Records Retention Law ......................................................... 4–1
2. Essential Public Records Disclosure Law ............................................ 4–1
3. Recent Legal Developments ............................................................... 4–2
   a. Statutory Amendments .............................................................. 4–2
   b. Recent Court Decisions ............................................................. 4–6
4. Hints for Responding to Public Records Requests ............................ 4–10

Letter from Multnomah County DA Re Appeal of Denial of Right to Inspect/Fee Reduction (Port of Portland) .................................................. 4–13

Letter from Oregon AFSCME to Port of Portland Regarding 2015 Public Records Law
Changes .................................................................................................. 4–15

Letter from Multnomah County DA re Petition of Lee van der Voo for Disclosure of Documents
Concerning an Internal Investigation ..................................................... 4–17

Excerpted Pleadings from International Longshore and Warehouse Union v. Port of Portland,
Oregon Court of Appeals Case No. A157602 ........................................ 4–21
   Appellant’s Opening Brief and Excerpt of Record, January 28, 2015 ........ 4–21
   Respondent Port of Portland’s Answering Brief, April 17, 2015 ................ 4–55
Chapter 4—Public Records Law Update

Oregon enacted the Public Records Law (PRL) in 1973. The law reflects the legislature’s policy choice that the public is entitled to know how the public’s business is conducted. The PRL advances this policy by requiring public bodies to retain records and by granting the public a broad right to examine public records.

1. ESSENTIAL RECORDS RETENTION LAW

• Public records must be retained for the period specified in the applicable retention schedule.

• “Public records” for retention purposes are records prepared, owned, used, or retained by a state agency or political subdivision; that relate to an activity, transaction, or function of the entity; and that are necessary to satisfy the fiscal, legal, administrative, or historical needs of the entity. (This definition is narrower than the definition of “public records” for access purposes.)

• The State Archivist sets records retention schedules. Retention schedules are based on the nature of the information, not its format. Retention schedules establish both a minimum and a maximum retention period. In other words, entities are expected to destroy records that have reached their retention period.

• Retention can generally be accomplished by keeping paper or digital copies of information. Digital retention must be consistent with requirements of the State Archivist.

• Knowingly destroying public records without authorization is a class A misdemeanor. Knowingly destroying public records of the Oregon State Lottery is a class C felony.

• A public record that has been requested under the Public Records Law, or demanded through other legal process (such as a subpoena or discovery request), or that is relevant to pending litigation, cannot be destroyed even if it could otherwise have been destroyed under the applicable retention requirements.

2. ESSENTIAL PUBLIC RECORDS DISCLOSURE LAW

“Every person has a right to inspect any public record of a public body of this state, except as otherwise expressly provided by ORS 192.501 to 192.505.” ORS 192.420(1) (emphasis added).

• Access is favored. This law is primarily a disclosure law, not a confidentiality law.

• “Public records” for access purposes are ANY records that relate to the public’s business and are prepared, owned, used, or retained by a public body. Records subject to disclosure include computer database information, emails, text messages, IMs, and sound recordings.
• The identity or motive of the person making a public records request generally has no bearing on whether the person is entitled to the records. The requester’s identity or motive may be considered when deciding whether the public interest requires disclosure of an otherwise exempt record or whether to waive or reduce fees.

• Public bodies must justify reliance on exemptions. Exemptions are construed narrowly and generally do not prohibit disclosure.

• Public bodies must make available a written procedure for making public records requests; must respond promptly to requests; must make nonexempt records available for inspection or copying; and must impose only those fees that are reasonably calculated to cover actual costs of complying with requests.

• Public bodies may require requesters to comply with rules for records requests and may deny requests for failure to comply with those rules; may consult with counsel before responding to a request; and may waive or reduce fees if a request primarily serves the public interest.

3. RECENT LEGAL DEVELOPMENTS

a. Statutory amendments

Notes: (1) The following legislative amendments are not reflected in the 2014 version of the Oregon Attorney General’s Public Records Manual. (2) If a record is conditionally exempt from disclosure, it may be withheld only if the pertinent public interest test is met. All exemptions set out in ORS 192.501 are conditional; records may be withheld unless the public interest requires disclosure in the particular interest. For exemptions set out in ORS 192.502 and indicated below as conditional, see the provision for the pertinent public interest test.

The 2014 Legislative Assembly enacted the following amendments that affect public records disclosure.

HB 4093; Or Laws 2014, ch 64 (eff 03/13/2014): Amends ORS 192.501(33) to conditionally exempt from disclosure written agreements relating to the conservation of greater sage grouse entered into under ORS 541.423.

HB 4086; Or Laws 2014, ch 37 (eff 01/01/2015): Amends ORS 192.501 to conditionally exempt from disclosure personally identifiable information collected as part of an electronic fare collection system of a mass transit system.

The 2015 Legislative Assembly enacted the following amendments that affect public records disclosure.

HB 2208 (eff 06/10/2015): Amends ORS 192.501 to conditionally exempt from disclosure the name, home address, and home telephone number of a civil code
enforcement officer in specified records, if the officer requests that the information be kept confidential. (This provision is similar to ORS 192.501(31), which applies to public safety officers.) The provision defines “civil code enforcement officer” as public body employees who enforce laws or ordinances relating to land use, zoning, use of rights-of-way, solid waste, hazardous waste, sewage treatment or disposal, or the state building code.

**HB 2571 (eff 06/25/2015):** Amends ORS 192.501 to conditionally exempt from disclosure audio or video recordings from cameras worn upon police officers to record interactions with members of the public while on duty. Requests for disclosure of these recordings must identify the approximate date and time of the incident, and must be reasonably tailored to include only that material for which the public interest requires disclosure. Notwithstanding that the public interest requires disclosure in a particular instance, a recording in a sealed court record or that a court has ordered not to be disclosed may not be disclosed. A video recording disclosed under this provision must be edited to render the faces of all persons unidentifiable.

**HB 3037, § 4 (eff 04/10/2015):** Affects how public bodies must apply ORS 192.502(4), the “confidential submissions” conditional exemption. If a public body is disclosing records that were submitted to the public body in confidence and that were not otherwise required by law to be submitted (i.e., the first two conditions of the “confidential submissions” are met, but one or more of the remaining conditions are not), the public body must redact the following information: residential address; residential and personal cellular telephone number; personal email address; Social Security and employer-issued identification number; and emergency contact information.

**HB 3037 (eff 04/10/2015) / HB 3557 (eff 07/28/2015):** Adds new provision to PRL; amends and affects application of ORS 192.502(3).

►Imposes requirements on disclosure of personal information

(1) through a new provision, on public bodies (except OJD and ODOT) receiving public records requests seeking

- residential address;
- residential or personal cellular telephone number;
- personal email address;
- Social Security or employer-issued identification number; or
- emergency contact information

of

- a home care worker (ORS 410.600);
- an operator of a child care facility (ORS 329A.250);
• an exempt family child care provider (ORS 329A.430); or
• an operator of an adult foster home (ORS 443.705)

and

(2) through an amendment to ORS 192.502(3), on public bodies receiving public records requests seeking

• residential address;
• residential, personal cellular, or “other” telephone number;
• personal email address;
• driver license, employer-issued identification card, or Social Security number;
• emergency contact information; or
• date of birth

of

• a public employee; or
• a volunteer

if the information is contained in the personnel records of the employer or recipient of the volunteer services.

► A public records request for the personal information listed above must include

• the name(s) of the individuals for whom the information is sought;
• a statement describing the personal information being sought; and
• a statement explaining, by clear and convincing evidence, the public interest requires disclosure in the particular instance.

► A public body receiving such a public records request must

• forward a copy of the request and supporting materials to the individual(s) whose information is being sought (or to any representatives of each class of person whose information is being sought; the public body has sole discretion to determine the classes of persons and the representatives);
• not disclose information responsive to the request for at least seven days after that forwarding;
• consider all information submitted; and
• disclose only if the public body determines that the requester has demonstrated by clear and convincing evidence that the public interest requires disclosure in the particular instance.

A public body may recover the costs of complying with those steps without regard to whether it ultimately discloses the records.
A public body that determines that the public interest requires disclosure in the particular instance is immune from civil or criminal liability associated with the disclosure.

**Note:** 2015 HB 3037 / 3557 do not expressly apply to names of persons. This is distinct from other exemptions that expressly apply to names. ORS 192.501(7) (conditionally exempting names and signatures of employees who sign union cards or petitions); ORS 192.502(28) (exempting names and other personal information of public utility customers); ORS 192.502(35) (exempting SAIF Corporation employer account records, including “employee names”). Legislative history supports the conclusion that the procedures outlined above would not apply to a public records request for a list of names of persons within either group. (Pertinent legislative history to that effect includes statements of Representative Val Hoyle, HB 3557’s sponsor; statements of public employees who testified in favor of HB 3037; and statements of SEIU Political Director Melissa Unger, who testified in favor of HB 3037.)

**SB 253 (eff 06/11/2015):** A mends 192.502 to exempt from disclosure personally identifiable information and contact information of veterans, active duty or reserve members of U.S. Armed Forces, National Guard, or other specified reserve component that was obtained by the Department of Veterans’ Affairs in the course of performing its duties and functions. Exempt information includes (but is not limited to) name, residential and employment address, date of birth, driver license number, telephone number, email address, Social Security number, marital status, dependents, character of discharge from military service, military rating or rank, that a person is a veteran or has provided military service, information relating to an application for or receipt of federal or state benefits, information relating to the basis for receipt of federal or state benefits, and information relating to a home loan or grant application, including but not limited to financial information provided in connection with the application.

**SB 386 (eff 1/1/2016):** Removes sunset clause from ORS 192.501(30), which conditionally exempts from disclosure certain information about persons engaged in, or providing goods or services for, medical research at OHSU conducted with animals other than rodents.

**SB 966 (eff 7/6/15):** Requires DAS to develop and administer (or contract with a private entity to develop and administer) a training program covering Oregon government ethics laws, restrictions on political activity that apply to public officials and public employees, Oregon public records and public meetings law, and the operation and management of boards, commissions, and other small entities of the executive department. All new board and commission members, and all new administrators or directors of a board, commission, or other small entity must attend the training within six months of beginning service.
The 2015 Legislative Assembly also amended or enacted confidentiality provisions outside the PRL; records covered by such provisions may be exempt from disclosure under ORS 192.502(9) (exempting from disclosure records the disclosure of which is prohibited, restricted, or otherwise made confidential or privileged under Oregon law). Affected provisions and entities are as follows:

- ORS 705.137 - DCBS (HB 2350, § 1)
- ORS 706.720 – DCB (HB 2350, § 12)
- ORS 706.723 – DCBS (HB 2350, § 13)
- New provision – school districts (HB 2715)
- New provision – post-secondary education institutions (HB 2832)
- ORS 430.399 – general; records of person at drug / alcohol treatment facility or sobering facility (HB 2936)
- ORS 179.505 – general (health care services providers to inmates) (HB 2948)
- New provision (to be added to ORS 192.553 to 192.581, governing protected health information) – general (health care providers, “state health plan” as defined in ORS 192.556(12) (HB 2948)
- New provision (to be added to ORS 40.225 to 40.295 – general (domestic violence, sexual assault, or stalking certified advocates or qualified victim services providers) (HB 3476)
- New provision (to be added to ORS 646.605 to 646.652) – general (operators of internet sites or services, mobile application used primarily by or designed and marketed to K – 12 students) (SB 187)

b. Recent court decisions

**American Civil Liberties Union v. City of Eugene, 271 Or App 276 (2015).**

The ACLU sought records from the City of Eugene (city) relating to the Civilian Review Board’s (CRB) review of an internal investigation of police misconduct. The city declined to release the records, relying on ORS 181.854(3) (generally prohibiting a public body from disclosing information about a personnel investigation if the investigation does not result in discipline) and ORS 192.502(9) (state “catch-all” exemption). The ACLU filed suit, and the circuit court determined that the city was not required to release the records. On appeal, the Court of Appeals affirmed.

Both at trial and on appeal, the parties stipulated that the records were exempt from disclosure under ORS 181.854(3). The parties primarily disputed whether an exception to that exemption applied, namely, whether the public interest required disclosure. The parties also disputed which party bore the burden of establishing an exception to the exemption.

As to the burden issue, the circuit court concluded that the city bore the burden to establish that the personnel exception applied. Once that showing had been made, the burden shifted to the ACLU to establish that the public interest exception applied. (In
reaching this conclusion, the court implicitly rejected the ACLU’s argument that a public body’s burden to sustain its action under the PRL means that the public body must establish both that an exemption applies and that any exceptions to the exemption do not apply. The ACLU challenged that conclusion on appeal, but the Court of Appeals did not address it. The Court of Appeals did not reach that issue in light of the circuit court’s statement that, even if the burden remained on the city to establish that the exception applied, the circuit court would have concluded that the evidence supported nondisclosure of the records. 271 Or App at 285.

As to the public interest issue, the Court of Appeals relied on cases applying the public interest test in ORS 192.501. The court stated that test as follows: “[T]o determine whether the public interest requires disclosure, a court must balance the public’s interest in disclosure against the public’s interest in nondisclosure, with the presumption in favor of disclosure.” 271 Or App at 287. The Court of Appeals determined that sufficient evidence supported the circuit court’s findings that the following competing public interests existed: “the public’s interest in ensuring that police officers are using appropriate force in their interactions with the public and the public interest in having a police force that can effectively review its own actions and provide discipline and training for its officers.” 271 Or App at 288-90. The Court of Appeals further determined that the evidence also supported the circuit court’s finding “that the CRB was created to balance those interests— to allow for oversight of police misconduct while maintaining confidentiality of the police’s internal investigation of complaints against its officers.” 271 Or App at 288, 290. The Court of Appeals concluded that those findings supported the circuit court’s conclusion that the public interest did not require disclosure.

This opinion does not resolve whether the public body or the requester has the burden to establish that an exception to an exemption requires disclosure. The safer course is for a public body to assume that it bears the burden to establish both that an exemption applies and that any exception to that exemption does not require disclosure.

As to applying the public interest test, the court’s description of the public interest in disclosure appears to be consistent with previous cases. That interest includes the public’s interest in information about the manner in which public business is conducted and the right of the public to monitor what public officials are doing on the job. 271 Or App at 288. Here, the court concluded that the public interest ensuring that police officers are using appropriate force in their interactions with the public was a valid public interest supporting disclosure. The court rejected the ACLU’s argument that, as a matter of law, the existence of that interest required disclosure. 271 Or App at 286, 290.

The court also considered what it characterized as a “competing” public interest in nondisclosure. The court did not expressly analyze what kind of public interest in nondisclosure would be sufficient to outweigh public interest in disclosure. The court
did express that there is a valid public interest in having a police force that can effectively review its own actions and provide discipline and training.

The court also considered other factors. It emphasized that the CRB existed to balance the public interests in disclosure and nondisclosure—to assure both appropriate use of force and internal review, discipline, and training. The court also noted that, by creating an exemption, the legislature expressed a policy decision that the particular records generally be kept confidential. 271 Or App at 290-91. Finally, the court emphasized that the public interest exception allows release of those records only when “the public interest requires disclosure.” 271 Or App at 291 (emphasis added). And the court noted that the circuit court had reviewed the records in chambers. In light of the competing interests in disclosure and those other factors, the Court of Appeals approved the circuit court’s conclusion, which it characterized as follows:

“[T]he public interest did not require disclosure of the records so that the public could see the normally confidential material considered by the CRB and could, in essence, come to their own conclusions about the propriety of the police chief’s handling of the matter and the CRB’s review of the [arrest of a particular member of the public].”

271 Or at 291.

Public bodies should review American Civil Liberties Union carefully when engaging in public interest balancing, considering both the public’s interest in disclosure and the public’s interest in nondisclosure. In addition, the existence of any mechanism that already exists to balance those interests, such as the CRB in American Civil Liberties Union, should be considered; if such a mechanism exists, it would appear to weigh against disclosure.


Guard Publishing (the Register-Guard) sought disclosure of an energy-purchase contract between the Eugene Water and Electric Board (EWEB) and Seneca Sustainable Energy, LLC (Seneca). EWEB denied the records request; after the Lane County District Attorney ordered EWEB to disclose the contract, EWEB filed suit to establish that the contract, in its entirety, was exempt from disclosure. Among other exemptions, EWEB relied on ORS 192.502(26), which exempts from disclosure certain “[s]ensitive business, commercial or financial information” furnished to or developed by a public body who, like EWEB, is engaged in the business of providing electricity, if “disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers.” The circuit court ruled that the contract, in its entirety, was exempt from disclosure pursuant to ORS 192.502(26). On appeal, the Court of Appeals reversed.
The Court of Appeals concluded that ORS 192.502(26) shields only that 
"information" within a contract that satisfies the requirements of the exemption, but it 
does not shield other material in the contract that is reasonably severable from the 
exempt material. Because the summary judgment record in that case did not include 
enough specificity about the contents of the contract to determine whether all of the 
information within it was exempt from disclosure under ORS 192.502(26), the court 
reversed the grant of summary judgment in favor of EWEB and Seneca.

Although ORS 192.502(26) directly applies only to a small number of contracts, the court’s reasoning in Brown may be instructive in other contexts.

First, the court strongly suggested that an entire document will not be 
categorically exempt from disclosure unless an exemption specifically states that the 
entire document is exempt. 267 Or App at 563-65. On the other hand, the court 
suggested that exemptions that are phrased in terms of particular types of information 
do not make categories of documents exempt from disclosure. And, when an 
exemption makes only a particular type of information exempt from disclosure, a 
public body must consider what types of information is exempt, separate the exempt 
from the nonexempt material, and disclose the nonexempt information. 267 Or App 
at 565; ORS 192.505; Public Law Manual at 116-17.

The court did not reject the possibility that an entire document might be exempt 
under the “information”-type of exemption. However, the affidavits submitted by the 
parties in Brown did not establish that the contracts contained only exempt 
information. Accordingly, the court concluded that summary judgment could not be 
granted on the theory that the entire contract was exempt from disclosure. The court 
left open the possibility that the entire contract might be exempt from disclosure 
under ORS 192.502(26) if, after review of more specific affidavits describing the 
picular content of the contracts were submitted or in-chambers review of the 
contract, the circuit court concluded that all the information in the contracts was 
exempt from disclosure. However, the court was not willing to accept an argument 
that essentially said, as the court put it, “Trust us, it’s exempt.”

Second, ORS 192.502(26) bears similarity to the trade secrets exemption in ORS 
192.501(2). Accordingly, when applying the trade secret exemption, public bodies 
should carefully consider whether it could establish that an entire document is exempt 
from disclosure under that exemption. If not, the public body must identify the 
exempt material; redact it; and disclose the remainder.


This case involved Clackamas River Water (CRW), a domestic water supply 
district, and a current and former board member (Holloway and Mitchell, 
respectively). Mitchell sought records from CRW on several occasions. In 
picular, Mitchell sought emails sent or received through the CRW email system. 
When his requests went unfilled, he petitioned the Clackamas County DA for a public
records order. After being contacted by the DA’s office, CRW sent the DA six discs. CRW asserted that the discs contained all the requested emails but stated that it had not reviewed the discs for exempt material. The DA ordered CRW to determine which emails were exempt and to disclose the remainder to CRW. Ultimately, CRW provided Mitchell with 24 discs containing emails, and Mitchell shared them with Holloway.

Subsequently, CRW attempted to secure the return of the discs. In particular, CRW was concerned that the disc contained personal information about its employees. Mitchell did not return the discs, and CRW filed suit to seek to compel defendants Mitchell and Holloway to return the discs so that CRW could determine what information was exempt from disclosure. The circuit court dismissed the complaint but entered an injunction prohibiting defendants from disseminating the records. Defendants appealed. The Court of Appeals concluded that the case should have been dismissed, but on a different basis than the one the circuit court relied on. The Court of Appeals also concluded that the injunction was improper and reversed it.

Public bodies should be aware of this case because it discusses a public body’s obligations in connection with material that is exempt from disclosure under the PRL. The Court of Appeals reiterated that the PRL does not (generally) prohibit the disclosure of exempt information; instead it gives public bodies the option to withhold exempt information. 261 Or App at 618. Once CRW released the discs to Mitchell, “CRW manifested an intention to refrain from exercising its opinion to withhold.” 261 Or App at 618. The court rejected the idea that an public body “that has released possibly exempt documents can have second thoughts and recall them for a do-over.” 261 Or App at 618.

In addition, the court rejected two of CRW’s other arguments. (1) That the disclosure of the 18 discs that had not been sent to the DA were disclosed outside of the public records request process. The court focused on the fact that the disclosure occurred after the DA’s order. It is possible that any release of documents after a request for public records would likely be subject to the same analysis. (2) That the employee who released the discs was acting outside of the scope of his authority. The court focused on the facts that the person who released the records was the acting general manager of CRW and that CRW did not dispute that releasing public records was among his duties. Note that the PRL does not address which employees of public bodies may release public records; it is by no means certain that a court would conclude that a release of public records could be recalled if the releasing employee’s job duties did not clearly include releasing public records.

4. HINTS FOR RESPONDING TO PUBLIC RECORDS REQUESTS

A. It is a good practice to designate one person to coordinate responses to public records requests. This ensures consistent and, generally, more timely responses.
B. On receiving a records request, review the request to see if it is ambiguous, overly broad, or misdirected. If so, contact the requester for clarification. Also clarify whether the requester merely wants to inspect the records or actually wants copies of the records. A brief conversation with a requester can save considerable time and expense in responding to records requests. Document your communications with the requester. If you have clarified or narrowed the request, confirm in writing with the requester.

C. After determining exactly which records are being requested, estimate the steps you will need to take, the time each step will take, and the expense required to respond.

1. If it will take more than 72 hours to fully respond, consider giving the requester an estimate of how much time you anticipate needing. Doing so avoids the confusion or hostility that may arise when a requester is not contacted by a public body for an extended period of time, and may forestall the expense of a premature public records petition.

   The PRL gives public bodies a “reasonable” time to respond to records requests, despite any deadlines that a requester might attempt to impose. Nonetheless, it is a good practice to communicate with the requester about unanticipated delays; again, this can avoid a premature public records petition.

2. Notify the requester in advance of fulfilling the request if you expect to charge for the “actual costs” of making the records available. (Remember that advance notice is mandatory if the cost of responding to the request will exceed $25.) For particularly expensive requests, consider requiring reimbursement in advance of working on a request.

   At this stage, you may receive a request for a fee waiver or reduction. Consider whether the requester satisfies the statutory requirements for a fee waiver or reduction and whether the public body will waive or substantially reduce its charges for making the records available.

D. Consider whether any exemptions apply to the requested records and whether the public body might want to disclose the record despite the availability of an exemption. If any “conditional” exemptions apply, remember to consider whether the public interest in disclosure outweighs the interest in nondisclosure.

   A public body may delay the release of records to consult with legal counsel about exemptions or relevant other provisions of the law.

E. Coordinate fulfillment of the request.

   If no exemptions apply to the requested records, coordinate release of the records to the requester in as timely a manner as possible.
If one or more exemptions apply to the requested record, and the public body plans to claim the exemption(s), review the record to determine whether the entire record or only specific portions of the record are exempt. If only portions of the record are exempt, delete or obscure the exempt portions and disclose the remaining portions of the record. Cite the specific exemption(s) on which you relied in redacting information.

When denying a public records request, cite the specific exemption(s) on which you rely.
7/10/2013

Robert Remar
Rachel Lev
Leonard Carder, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

Re: Appeal of denial of right to inspect/fee reduction (Port of Portland).

Dear Mr. Remar and Ms Lev:

I am in receipt and have reviewed your 7/1/2013 appeal of denial of your public records petition. I apologize for not corresponding in a timelier manner but I only received your material yesterday to review. At this point we are not making a decision as to your appeal because we do not have jurisdiction to decide if we have the authority to reduce the fee, or order disclosure, because there has not been an actual written denial of your request by the Port of Portland.

The Port of Portland has assured our office that they will continue to work with you on your request. Ms. Pearman told me that she may be willing to lower the upfront cost for the processing of the request by allowing your client to make installment payments for work to be performed. Another option to lower costs would be to limit the scope of the request. I know in the past our office has suggested this option to petitioners to reduce perceived excessive fees.

If we do have to make a ruling on a future appeal an important consideration will be if a fee reduction is in the public interest. As you know ORS 192.440(5) allows a waiver or reduction of fees “if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.”

A matter or action is in the public interest “when it affects the community or society as a whole, in contrast to a concern or interest of a private individual entity. Attorney General’s Public Records Manual, 2011, p. 18. The greatest or most important utility of the matter or action must accrue to the community or society as a whole. The Attorney General’s Public Records Manual, p. 19 points out that “a mere allegation that the public body has treated the individual oppressively, absent a broader public interest, does not satisfy the public interest standard.”

If the parties are unable to come to a suitable agreement we would be glad to consider another appeal to decide the substantive issues. If you have further questions, please do not hesitate to call me. My desk phone is (503) 988-3405.
Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

By:

Travis Sewell
Deputy District Attorney

cc: Bevetly Pearman, Esq.
Assistant General Counsel
Port of Portland
7200 NE Airport Way
Portland, OR 97208
September 18, 2015

Port of Portland
P.O. Box 3529
Portland, OR 97208

We are writing you to make sure you are aware of important changes made to the public records laws during the 2015 legislative session. These changes directly affect our members, other public employees, and all Oregon public employers. During the session, the Oregon Legislature enacted and Governor Brown signed legislation that safeguards the privacy of public employees and volunteers while also giving public employers the responsibility to ensure that those protections are applied and honored.

The first bill, HB 3037, provides that information about public employees or volunteers -- including residential addresses, telephone numbers, personal email addresses, driver license numbers, employer-issued identification card numbers, and emergency contact information -- is exempt from disclosure under the Public Records Law (ORS 192.410 to 192.505).

The second bill, HB 3557 imposes strict requirements on any party seeking private information about public employees including requiring the requesting party to identify the workers by name for whom it seeks information, state why the information is being sought and make a showing of clear and convincing evidence that the release of personal information sought is in the public interest. Therefore, a blanket request for a list of names and other information of all employees, or groups of employees, will not satisfy the statutory standard and must be rejected by the public employer. This bill also provides that the public employer receiving the request for information contact the representative/collective bargaining agent of any employee(s) who is the subject of the request in order to provide them an opportunity to explain why the information should not be disclosed.

Thank you for your attention to the recent changes in the law which better protect the privacy and safety of all public employees. Please let me know if you have any questions and I would be happy to have someone on our legal team get back to you.

Sincerely,

Ken Allen
Executive Director
Oregon AFSCME Council 75

cc: Local President
     Council Representative
June 26, 2015

Lee van der Voo, Reporter
InvestigateWest
909 N. Beech St., Ste 209B
Portland, Oregon 97227

Beverly Pearman, Esq.
Assistant General Counsel
Port of Portland
7200 NE Airport Way
Portland, Oregon 97208

Re: Petition of Lee van der Voo of InvestigateWest for the disclosure of documents concerning an internal investigation of an alleged sexual assault by a Port of Portland employee.

Dear Ms. van der Voo and Ms. Pearman:

BACKGROUND

This appeal arises out of a February 2015 public records request submitted to the Port seeking the disclosure of documents relating to an alleged sexual assault during an out-of-state training event where both parties, the “accused” and the “victim,” were Port employees. During the pendency of Ms. van der Voo’s original petition the Port agreed to provide many of the documents requested, rendering much of her appeal moot. To the extent that Ms. van der Voo’s petition sought unredacted documents to include identifying details about the victim or other private matters, this office denied the petition in Public Records Opinion 15-12 dated June 8, 2015. Ms. van der Voo filed a second petition on June 16, 2015 after the Port reversed course and refused to provide the documents it had previously agreed to provide.

In response the Port asserts that as it prepared to produce the records sought, counsel for the accused submitted a public records request for all materials about to be provided to the media and then indicated, on June 16, 2015, that the accused would speak with Port investigators. As a result, the Port reopened their previously suspended investigation and declined to produce the documents they had previously agreed to produce.

According to the Port, an interview with the accused is currently scheduled for next week, and arbitration relating to the imposition of discipline on the accused is scheduled for July 7 and July 8, 2015.

This office has reviewed the Port’s investigation file including emails, meeting notes, interview notes, a copy of at least one document submitted to law enforcement in Texas, and memoranda of phone communication between the Port and outside counsel.
The factual background of the underlying petition has not changed except as mentioned above and the parties may refer to this office’s previous opinion for a more thorough summary.

**DISCUSSION**

In addition to the same objections that the Port raised in response to Ms. van der Voo’s last appeal it asserts the Personnel Investigatory Exemption under ORS 192.501(12) and, as to a single document, the Criminal Investigatory Exemption under ORS 192.501(3). On these same facts this office previously held that some documents at issue were protected by attorney-client privilege and that other documents, or portions thereof, fell within the personal privacy exemption. ORS 192.502(9) and 192.502(2) respectively. We do not at this time see cause to revisit those determinations. The additional developments since the last petition affect only the exemption claimed under 192.501(12).

A. **Personnel Investigatory Exemption - ORS 192.501(12)**

ORS 192.501(12) is a conditional exemption that protects from disclosure “a personnel discipline action, or materials or documents supporting that action.” This office has consistently held that, because the agency cannot say whether discipline will be imposed until the investigation is concluded, an ongoing investigation is covered by 192.501(12). See, *In re petition of Schmidt for The Oregonian*, MCDA PRO 14-26 (2014), *In re petition of Damewood for Willamette Week*, MCDA PRO 13-15 (2013). In this instance, in addition to the ongoing investigation, discipline for insubordination has already been imposed on the accused as a result of this investigation. ORS 192.501(12) thus applies to the records sought by petitioner.

The second step in analyzing a conditional exemption is assessment of whether the public interest requires disclosure in a particular instance. With respect to open investigations, we have recognized that “[g]enerally, unless the public interest at the time of the request requires disclosure, the investigation process should be completed before the release of information is ordered.” *Damewood*, PRO 13-15, at 5. Accordingly, each request for records must be evaluated independently, at the time it is made.

At the time that Ms. van der Voo made her initial request, the Port agreed that, “the public interest in disclosure weighs in favor of releasing all interview notes and related background information contained in the investigation file.” *Response to May 21, 2015 Petition* at 2. The Port now states that it was willing to disclose those materials because it did not know when, or if, the accused would choose to cooperate and the investigation reactivated. Since the accused has agreed to be interviewed, and that interview is scheduled for June 29, 2015, the Port now believes it should not have to disclose any investigative materials until such time as the investigation is complete.

Certainly the Port may not indefinitely leave open an investigation in an attempt to thwart the purposes underlying the Oregon Public Records Law. However, we agree with the Port that the very recent (June 16, 2015) agreement of the accused to provide a statement to Port investigators changes the public interest analysis from that discussed in our previous order in this matter. The Attorney General has recognized that, “in determining whether the public interest at the time of the request requires disclosure, one relevant factor is the extent to which the disciplinary proceedings might be adversely affected by public disclosure while the matter is
pending.” Attorney General’s Public Records Manual, p.52 (2014). Allowing a suspect to review other witness statements prior to his own interview would permit him to adjust his story to match that of others and thereby limit potential inconsistencies that are key to demonstrating the truth or falsity of a statement.

In the Port’s own assessment the public interest does require disclosure of these records, but we agree that it does not require their immediate disclosure. Consistent with our decisions in similar circumstances it is proper for the Port to complete its investigation prior to disclosing any records. See, Schmidt, MCDA PRO 14-26 (2014).

B. Criminal Investigatory Exemption - ORS 192.501(3)

The Port asserts the Criminal Investigatory exemption as to a single document prepared by the victim for the use of the investigating detective in the case. The deputy district attorney investigating the underlying sexual assault allegation in Tarrant County, Texas has informed this office that she does not believe that disclosure of the Port’s records would impair her investigation, which is ongoing. Given the position of the assigned prosecutor, this exemption is not a basis to withhold records. To be clear, this document is still presently covered by the exemption under ORS 192.501(12).

ORDER

Accordingly, it is ordered that the petition is denied with leave for the petitioner to resubmit upon completion of the Port’s investigation.

Very truly yours,

Rod Underhill

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

15-17
EXCERPTED PLEADINGS FROM *INTERNATIONAL LONGSHORE AND WAREHOUSE UNION V. PORT OF PORTLAND, OREGON COURT OF APPEALS CASE NO. A157602*

IN THE COURT OF APPEALS OF THE STATE OF OREGON

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, Plaintiff-Appellant, v. PORT OF PORTLAND, Defendant-Respondent.

CA No. A157602

APPELLANT’S OPENING BRIEF AND EXCERPT OF RECORD

A appeal from the Judgment of the Circuit Court for Multnomah County; Honorable John A. Wittmayer

Michael J. Morris (OSB 772839) Bennett, Hartman, Morris & Kaplan, LLP 210 SW Morrison St., Suite 500 Portland, OR 97204-3149 Telephone: 503-227-4600 Email: morrism@bennetthartman.com

Amy Edwards (OSB 012492) Reilley D. Keating (OSB 073762) Stoel Rives LLP 900 SW Fifth Avenue, Suite 2600 Portland, OR 97204 Telephone: 503-224-3380 Email: aedwards@stoel.com Email: rdkeating@stoel.com

Robert S. Remar (pro hac vice) Lindsay R. Nicholas (pro hac vice) Leonard Carder, LLP 1188 Franklin Street, Suite 201 San Francisco, CA 94109 Telephone: 415-771-6400 Facsimile: 415-771-7010 Email: rremar@leonardcarder.com Email: lnicholas@leonardcarder.com

Attorneys for Defendant-Respondent

Attorneys for Plaintiff-Appellant

January 2015
## INDEX OF CONTENTS

### I. STATEMENT OF THE CASE .................................................................1
   A. Nature of the Action and Relief Sought ........................................1
   B. Nature of the Judgment Sought to be Reviewed ..........................1
   C. Statutory Basis of Appellate Jurisdiction ..................................1
   D. Date of Entry of Judgment and Appeal ......................................2
   E. Questions Presented on Appeal ..................................................2
   F. Concise Summary of Argument ...............................................3
   G. Summary of Material Facts ......................................................5
      1. Identification of parties ......................................................5
      2. Defendant withheld, for 13 months before suit, public records
         requested by plaintiff .......................................................5
      3. ILWU’s appeal to the District Attorney ..............................11
      4. The circuit court proceedings .............................................12

### II. ASSIGNMENT OF ERROR NO. 1 ..................................................16
   In its Order, entered December 3, 2013, and later repeated in its General
   Judgment, entered August 13, 2014, the trial court erred in dismissing with
   prejudice, under ORCP 21 A, plaintiff’s claims for production of requested
   public records based on a finding of fact outside the Complaint and disputed in
   the record evidence. .................................................................16
      A. Preservation of Error ......................................................16
      B. Standard of Review .......................................................16
      C. Argument ........................................................................17

### III. ASSIGNMENT OF ERROR NO. 2 ..................................................19
   In its Order entered December 3, 2013, and later repeated in its General
   Judgment, entered August 13, 2014, the trial court erred in dismissing with
   prejudice, under ORCP 21 A, plaintiff’s claims for production of requested
   public records based on the erroneous legal assumption that a public body must
   formally issue a “denial” of a public records request to invoke court jurisdiction
   under the PRL .................................................................19
      A. Preservation of Error ......................................................20
B. **Standard of Review** .................................................................20

C. **Argument** .................................................................................21

1. The Public Records Law mandates the prompt disclosure of non-exempt public records, subject only to “reasonable” fees.21

2. The trial court applied an incorrect legal principle in ruling that the Public Records Law requires a “denial” of the records request as it actually provides for suit whenever public records have been “improperly withheld.” ............................................22

**IV. CONCLUSION** .............................................................................28

**APPENDIX (EXCERPTS FROM ORS 192.410-192.505)** .........................APP-1
## INDEX OF AUTHORITIES

### Cases:

**Brown v. Guard Publishing Co.**

**Davis v. Walker**

**Guard Pub. Co. v. Lane Cnty. Sch. Dist. No. 4J**
- 310 Or 32, 791 P2d 854 (1990) .............................................. 21

**In Defense of Animals v. Oregon Health Sciences Univ.**

**Jones v. General Motors Corp.**
- 325 Or 404, 939 P2d 608 (1997) .......................................................... 17, 21

**Kluge v. Or. State Bar**
- 172 Or App 452, 19 P3d 938 (2001) .............................................. 21, 22

**LH Morris Electric v. Hyundai Semiconductor**
- 203 Or App 54, 63, 125 P3d 1 (2005) .............................................. 17, 18

**Oregonian Publishing Co. v. Portland Sch. Dist. No. 1j**
- 144 Or App 180, 925 P2d 591 (1996) .................. 16, 20

**Schaff v. Ray's Land & Sea Food Co., Inc.**
- 334 Or 94, 45 P 3d 936 (2002) ......................................................... 18

**Schiele v. Montes**
- 231 Or App 43, 218 P3d 141 (2009) ......................................................... 17

**Turner v. Reed**
- 22 Or App 177, 538 P2d 373 (1975) ......................................................... 17, 20

**Welker v. TSPC**
- 332 Or 306, 27 P3d 1038 (2001) ......................................................... 17

### Statutes:

**ORS 19.205(1)** ................................................................. 1

**ORS 19.255(l)** ................................................................. 2

**ORS 192.410(2)** ................................................................. 5

**ORS 192.410(3)** ................................................................. 5

**ORS 19.415** ................................................................. 17, 20
ORS 192.420(1) ........................................................................................................21
ORS 192.440(2) ...................................................................................................5, 27
ORS 192.440(4)(a) .................................................................................................4, 7
ORS 192.440(5) ...................................................................................................8, 27
ORS 192.460(1) .................................................................................................22, 23
ORS 192.490(1) ...................................................................................................3, 22, 23, 26, 28
ORS 28.010 ..............................................................................................................26

**Rules**

ORAP 5.40(8)(a) ........................................................................................................... 17, 20
ORCP 21A ............................................................................................................. 2, 3, 13
ORCP 47C ............................................................................................................... 18

**Other Authorities**

Webster’s Third New International Dictionary (unabridged ed. 2002) ........ 24, 28
APPELLANT’S OPENING BRIEF

I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is an action by International Longshore and Warehouse Union (‘ILWU’) to compel defendant Port of Portland (‘Port’) to comply with the Oregon Public Records Law, ORS 192.410 to 192.505 (‘Public Records Law’ or ‘PRL’). The Complaint seeks injunctive relief to compel defendant to produce records in response to ILWU’s public records requests and to enjoin defendant from continuing its violations of the PRL, declaratory relief regarding ILWU’s rights and defendant’s obligations under it, nominal damages, attorneys fees and costs of suit.

B. Nature of the Judgment Sought to be Reviewed

The trial court granted, by Order dated November 22, 2013, and entered on December 3, 2013, defendant’s motion to dismiss the Complaint to the extent it seeks injunctive and declaratory relief to compel access to the requested, non-exempt, public records. The trial court then reaffirmed its ruling as the basis for a General Judgment, entered on August 13, 2014. Both rulings were made under ORCP 21A, governing motions to dismiss.

C. Statutory Basis of Appellate Jurisdiction

The basis for appellate jurisdiction is ORS 19.205(1).
D. Date of Entry of Judgment and Appeal

The Judgment was entered on August 13, 2014. Plaintiff filed a timely notice of appeal on August 25, 2014. This appeal is timely because fewer than 30 days elapsed between entry of the Judgment and filing of the notice of appeal. ORS 19.255(l).

E. Questions Presented on Appeal

1. Whether the trial court, in its Order, entered December 3, 2013, and later repeated in its General Judgment, entered August 13, 2014, erred in dismissing with prejudice, under ORCP 21A, plaintiff’s claims that seek declaratory and injunctive relief compelling production of requested public records based on a finding of fact – that “there has been no denial of plaintiff’s record requests” – which is disputed in the record evidence.

2. Whether, in its Order, entered December 3, 2013, and later repeated in its General Judgment, entered August 13, 2014, the trial court erred in dismissing with prejudice, under ORCP 21A, plaintiff's claims that seek declaratory and injunctive relief compelling production of requested public records based on the erroneous conclusion of law that a public body’s written or formal “denial,” rather than mere “improper withholding,” of requested public records is a prerequisite to such relief.
F. Concise Summary of Argument

This appeal challenges, as contrary to law, the trial court’s dismissal with prejudice under ORCP 21A of the portions of the Complaint that seek injunctive and declaratory relief for access to requested, non-exempt public records withheld by the Port. See December 3, 2013 Order, ER-38-39, and August 13, 2014 General Judgment, ER-42-43. Dismissal was based on the finding that “there has been no denial of the plaintiff’s record requests,” ER-38-39, which, in turn, rests on the implied legal conclusion that “denial” is a prerequisite to such claims and relief. The trial court erred in two respects.

Under the first assignment of error, the trial court improperly made a finding of purported fact – that the Port had not actually “denied” Plaintiff’s records requests -- outside the confines of the Complaint and based on disputed evidence. This is explicitly disallowed for motions to dismiss under ORCP 21A as well as for summary judgment procedures.

The second assignment of error is that the PRL does not require a public entity’s formal “denial” of a request for records as a prerequisite for the plaintiff to obtain equitable relief for access to non-exempt records. A valid claim for injunctive or declaratory relief to inspect requested public records arises whenever a public entity has “improperly withheld” the requested records, regardless of whether it has issued a formal “denial.” See ORS 192.490(1) (the circuit court
“has jurisdiction to enjoin the public body from withholding the records and to order the production of any records improperly withheld from the person seeking disclosure.”) (emphasis added). The same is true when a public entity actually agrees to allow inspection but conditions it on advanced payment of quoted fees, challenged as “unreasonable” under the Public Records Law. See In Defense of Animals v. Oregon Health Sciences Univ., 199 Or App 160, 169, 112 P 3d 336, 344 (2005); Davis v. Walker, 108 Or App 128, 814 P 2d 547 (1991).

Here, the Complaint alleges, and the Port’s own evidence presented to the trial court shows, that the Port withheld requested, non-exempt records unless and until plaintiff paid in advance nearly $200,000 in quoted fees, which plaintiff challenged as excessive and “unreasonable” under the statute. See ORS 192.440(4)(a) (the fees must be “reasonably calculated to reimburse * * * the public body’s actual cost of making public records available”). This makes out a valid claim as a matter of law.

ILWU is entitled to reinstatement of its Complaint, in its entirety, including the requested remedies compelling the Port to produce non-exempt public records responsive to ILWU’s requests, prohibiting any further such unlawful conduct, and declaratory relief regarding plaintiff’s rights and the Port’s obligations under the PRL within the confines of this dispute.
G. Summary of Material Facts

1. Identification of parties

Plaintiff ILWU is, and at all times mentioned herein, was an unincorporated association commonly known as a labor union. ILWU is a “person” competent to submit a records request as the term is defined by the Oregon Public Records Law, ORS 192.410(2). Complaint, ¶ 1.

Defendant Port of Portland is, and at all times mentioned herein, was a port district in the State of Oregon. The Port is a political subdivision of the State of Oregon and a municipal corporation under Oregon law. The Port is a “public body,” as the term is defined by the Oregon Public Records Law, ORS § 192.410(3). Answer, ¶ 2.

2. Defendant withheld, for 13 months before suit, public records requested by plaintiff

On June 11, 2012, ILWU submitted public records requests to the Port requesting eleven categories of records. Complaint, ¶ 5; see Declaration of Beverly Pearman in support of Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment (hereinafter “Pearman Decl.”), Ex. 1. Under ORS 192.440(2), the Port was required to “respond as soon as practicable and without unreasonable delay.”
The Port did not respond to ILWU until August 16, 2012, providing a “cost estimate” of “approximately $200,000.00” for “staff time for identification and location of responsive documents.” Complaint, ¶ 6; Pearman Decl., Ex. 5, ER-1-3. The Port’s letter stated that the $200,000 estimate only covered fees for a “first phase” and did not include “second phase” legal fees for counsel to review the records for potentially withholding from disclosure under the Public Record Law’s exemption provisions. Complaint, ¶ 7; Pearman Decl., Ex. 5, ER-1-3. The Port demanded ILWU pay the $200,000 before the Port would begin searching for or identifying responsive records. Complaint, ¶ 8; Pearman Decl., Ex. 5, ER-1-3. In addition, the Port stated that it would not produce any responsive records to ILWU until it determined and ILWU also paid the “substantial” “second phase” fees. Complaint, ¶ 8; Pearman Decl., Ex. 5, ER-1-3. The Port did not provide in its letter any estimate as to when the records would be produced, nor any timeline or details about the “substantial” “second phase” of review and advanced costs. Complaint, ¶¶ 8-9; see Pearman Decl., Ex. 5, ER-1-3.

By letter, dated August 30, 2012, ILWU asked the Port to explain how the $200,000 estimate was “reasonably calculated” to reimburse the Port for “actual
costs” for making the records available as restricted under ORS 192.440(4)(a).\(^1\) Complaint, ¶ 10; Pearman Decl., Ex. 8, ER-4-5. The August 30, 2012 letter also requested a time estimate for review and production of the requested documents. Complaint, ¶ 10; Pearman Decl., Ex. 8, ER-4-5.

The Port responded on September 14, 2012, but only provided a partial explanation for its fee estimate. Complaint, ¶ 11; Pearman Decl., Ex. 9, ER-6-12. The Port’s letter gave conflicting estimates of hours required to locate the records – stating 1,015 hours but documenting more than 1,597 hours – without an explanation, and listed hourly rates, most in excess of $100. Complaint, ¶ 11; Pearman Decl., Ex. 9, ER-6-12. Under this estimate of 1,597 hours, it would take a Port employee about ten and a half months, working full time, just to locate the records!\(^2\) The Port’s letter did not provide any estimate for the number of pages or files involved or what portion of the documents were available electronically, as requested by ILWU, to avoid copying costs. Complaint, ¶ 11; Pearman Decl., Ex. 9, ER-6-12.

---

\(^1\) ORS 192.440(4)(a) provides that fees must be “reasonably calculated to reimburse * * * the public body’s actual cost of making public records available.”

\(^2\) Assuming a port employee can work 35 billable hours during a 40 hour weekly schedule, it would take 45.5 weeks (i.e., ten and a half months) to complete the 1,597 hour job estimated by the Port.
By letter dated September 25, 2012, ILWU requested a waiver or significant reduction of the roughly $200,000 fees for the “public interest” or “public benefit” pursuant to ORS 192.440(5). Complaint, ¶¶ 13-14; Pearman Decl., Ex. 10, ER-13-14. ILWU’s request stated: “Making these records available primarily benefits the general public as the records relate to the effective and efficient management and operation of a major port serving the public and impacting commerce.” Complaint, ¶ 14; Pearman Decl., Ex. 10, ER-13-14. The Port did not respond to ILWU’s September 25, 2012 fee waiver or reduction request.

By letter dated September 26, 2012, ILWU made additional public records requests to the Port. Complaint, ¶ 15; Pearman Decl., Ex. 20.

At the end of October, the Port notified ILWU’s attorney that the Port was working with an outside vendor to perform electronic searches and later sent proposed search terms for ILWU’s June and September records requests. Complaint, ¶ 17; Pearman Decl., Ex. 12. ILWU agreed to consider the proposed search terms. Complaint, ¶ 17; Pearman Decl., Ex. 12.

On November 8, 2012, ILWU wrote to the Port further protesting the unreasonable fees demanded by the Port, the Port’s incomplete and “phased” fee

ORS 192.440(5) provides: “The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.”
estimates, the Port’s failure to timely respond to ILWU’s requests for a waiver or reduction of fees, and the Port’s failure to produce any records up to that time, even easily ascertainable records, responsive to ILWU’s June 2012 requests.

Complaint, ¶ 18; Pearman Decl., Ex. 13, ER-15-17.

By letter of November 16, 2012, the Port finally responded and denied ILWU’s September 25, 2012, request for a public interest fee waiver or reduction. Complaint, ¶ 19; Pearman Decl., Ex. 14, ER-18-26. The Port asserted that “ILWU does not qualify as a public interest entity, such as a newspaper or public watchdog organization” and that in light of “the ongoing disputes between [ILWU] and the Port, it appears quite likely that [ILWU’s] requests are driven by litigation[.]” Pearman Decl., Ex. 14, ER-18-26.

In late November – more than five months after ILWU’s June 2012 records requests – the Port produced some partially redacted documents responsive to some of ILWU’s requests. See Complaint, ¶ 20; Pearman Decl., Exs. 14-16. The Port charged ILWU $3,318.98 for this small production at hourly rates ranging from approximately $80.00 to $400.00 per hour for all but 1.5 hours of time allegedly spent in compiling and producing the records. Complaint, ¶ 20; Pearman Decl., Exs. 14-16. In a showing of good faith, ILWU paid $3,318.98 for the records despite the Port’s continued insistence that ILWU pay approximately $200,000 and an additional unknown amount for “second phase” review costs in
order to receive the remaining responsive records. Complaint, ¶ 21; see Pearman Decl., Ex. 16, 18, ER-27-30.

On December 31, 2012, ILWU sent the Port a third set of public records requests. Complaint, ¶ 22; Pearman Decl., Ex. 22.

On February 21, 2013, ILWU agreed to the Port’s proposed electronic search terms with respect to ILWU’s June and September records requests, providing suggestions and qualifications to narrow the focus of the search. Complaint, ¶ 24; Pearman Decl., Ex. 18, ER-27-30. ILWU also reiterated its objections that the Port’s fees were “unreasonable, unfounded, and not reasonably calculated to compensate the Port for actual costs of making the records available.” Complaint, ¶¶ 24-27; Pearman Decl., Ex. 18, ER-27-30. ILWU’s February 21, 2013 letter further advised that “[u]nder the circumstances, a failure to waive or significantly reduce the fees currently suggested by the Port would be tantamount to withholding records and a violation of [ILWU’s] rights under the law, which would prompt [ILWU] to pursue available legal remedies and actions.” Complaint, ¶ 27; Pearman Decl., Ex. 18, ER-27-30.

By letter of March 8, 2013, the Port again denied ILWU’s request for a public interest fee waiver or reduction and stated that it would not conduct any electronic searches for records until “cost issues” were resolved. Complaint, ¶ 28; Pearman Decl., Ex. 19. At that time, the quoted fees still remained at about
$200,000 for the record-search part of the “first phase,” with unstated additional amounts for other production costs, and unknown legal fees for the “second phase” of Port internal review before allowing inspection by ILWU.

On March 15, 2013 – more than nine months after ILWU made its initial June 2012 public records requests – the Port provided a “revised cost estimate.” Complaint, ¶ 29; Pearman Decl., Ex. 24, ER-31-35. The Port’s revised estimates required that ILWU pay $49,447.94 before responsive records would be produced: $37,434.15 for the June 2012 requests; $8,541.96 for the September 2012 requests; and $3,471.83 for the December 2012 requests. Complaint, ¶ 30; Pearman Decl., Ex. 24, ER-31-35. The Port did not explain how it had recalculated the “first phase” costs from approximately $200,000 to approximately $50,000. The revised estimates left open additional, unstated costs for copying and delivery of records, and the Port advised that the estimates may increase. Nothing further was said about the additional costs for the “second phase” of review the Port required before access to records. Pearman Decl., Ex. 24, ER-31-35; see Complaint, ¶ 31.

3. **ILWU’s appeal to the District Attorney**

Due to the Port’s refusal over a thirteen month period to produce responsive records, on July 1, 2013, ILWU submitted a petition for review to the Multnomah County District Attorney pursuant to ORS 192.450-460. Complaint, ¶¶ 33-34; Pearman Decl., Exs. 25, 26. In this petition, ILWU explained that the Port had
denied ILWU the right to access public records in violation of the PRL through its violation of the procedural requirements of the Law, the assessment of unreasonable fees, its refusal to grant a fee waiver or reduction, among other things. Complaint, ¶ 35; Pearman Decl., Exs. 25, 26.

By letter dated July 10, 2013, the Multnomah County District Attorney’s office responded to ILWU’s petition: “At this point we are not making a decision as to your appeal because we do not have jurisdiction to decide if we have the authority to reduce the fee, or order disclosure, because there has been no actual written denial of your request by the Port of Portland.” Complaint, ¶ 36; Pearman Decl., Ex. 27, ER-36-37.

4. The circuit court proceedings

On July 25, 2013, ILWU filed the instant Complaint against the Port in the Circuit Court for the County of Multnomah. ILWU asserts six claims alleging the Port violated various provisions and requirements of the Public Records Law in its handling of ILWU’s requests and deprived ILWU its right to access public records responsive to ILWU’s requests. See generally Complaint. In addition to declaratory relief, nominal damages, and attorney fees and costs, the Complaint seeks injunctive relief in the form of an order or orders (1) “compelling the Port to produce non-exempt records requested by ILWU;” (2) “compelling the Port to waive or substantially reduce the fees” it had demanded; and (3) “enjoining the
Port from continuing or repeating [its] unlawful activities.” Id. at pp. 23-24. With respect to production fees, the Complaint seeks an order to compel the Port to waive or significantly reduce its fee demands both (1) as a remedy for the Port’s wrongful denial of ILWU’s “public benefit” fee waiver requests, see id. at ¶ 70-76 (Fourth Claim); and (2) as a remedy for the Port’s violations of other Public Records Law requirements and the Port’s allegedly bad faith, discriminatory, and retaliatory treatment of ILWU’s record requests, see id. at ¶¶ 47, 54, 67, 81, 88 (First, Second, Third, Fifth, and Sixth Claims).

On September 20, 2013, the Port filed its motion to dismiss parts of the Complaint under ORCP 21A and a companion motion for partial summary judgment. In its motion to dismiss, the Port argued that the court lacked subject matter jurisdiction over those portions of the Complaint seeking an order to compel the Port to produce responsive records because no formal “denial” of the requests had ever issued and plaintiff could have reviewed the requested records at any time by simply paying the quoted costs (i.e., about $200,000 during a nine month period, and then $49,447.94, plus additional costs of unstated amounts). See Motion to Dismiss, pp. 12-17. In support of its motion, the Port submitted

---

4 The Port’s summary judgment motion sought a ruling that ILWU was not entitled to a fee waiver or reduction. The trial court denied this on grounds that the matter turned on disputed record evidence. See December 3, 2013 Order, ER-38-39. This ruling is not challenged by either party in this appeal.
declarations and multiple documents. See id.; Pearman Decl.; Declaration of Reilley Keating. In opposing the motion to dismiss, ILWU argued that the Port’s de facto withholding of the requested records for over a year, with release of the records conditioned upon payment of unlawful and excessive fees, along with other deficiencies in the Port’s handling of the records request, sufficiently made out a valid claim under the PRL and supported the Complaint’s prayer for equitable relief to access the requested records. Memorandum in Opposition, pp. 14-18.

By Order, dated November 22, 2013, and entered December 3, 2013, the trial court granted the Port’s motion to dismiss the targeted parts of the Complaint, stating: “Defendant’s Motion to Dismiss is granted and, to the extent plaintiff's claims seek declaratory and injunctive relief compelling defendant to produce public records, they are dismissed with prejudice because there has been no denial of plaintiff’s record requests.” ER-38-39. The trial court inserted in handwriting the phrase, “because there has been no denial of plaintiff’s record requests.” Id.

Thereafter, the parties conducted discovery and prepared for trial, which had been set for August 18, 2014. To resolve later disputes over discovery and trial preparation, the parties filed a Joint Motion with the trial court, requesting clarification as to the remaining issues left for trial in light of the court’s Order, entered on December 3, 2013, on the motion to dismiss parts of the Complaint.
The trial court’s adjudication of the Joint Motion resulted in the General Judgment, entered on August 13, 2014, which succinctly describes the procedural and substantive disposition of the case, and is, therefore, quoted in full:

This matter came before the Court on the Joint Motion, filed June 30, 2014, by Plaintiff International Longshore and Warehouse Union ("ILWU") and Defendant Port of Portland ("Port") for an order specifying the issues that remain for trial in light of the Order, filed November 22, 2013 and entered December 3, 2013 (hereinafter, "Order"), granting Defendant's motion to dismiss and denying its motion for partial summary judgment. At the July 16, 2014 hearing on the Joint Motion, the Court informed the parties that its November 22, 2013 Order was intended to dismiss all claims in the Complaint per ORCP 21 A, with the claims for declaratory and injunctive relief compelling defendant to produce public records being dismissed with prejudice and the remaining claims being dismissed without prejudice, with leave to replead the claims dismissed without prejudice.

Also at the July 16, 2014 hearing, the Court granted plaintiff 10 days, or until July 28, 2014, to file an amended pleading that would not include or address any of the claims that were dismissed with prejudice and would not assert any new claims that were not previously alleged in the original complaint. Plaintiff chose not to file an amended complaint in order to take an appeal. The Court, having considered the written submissions and the pleadings of record in the case,

HEREBY ORDERS AND ADJUDGES that:

1. Plaintiff’s Complaint is dismissed in its entirety, with all claims being dismissed with prejudice; and

2. None of the parties shall recover costs or attorney fees incurred herein.


II. ASSIGNMENT OF ERROR NO. 1

In its Order, entered December 3, 2013, and later repeated in its General Judgment, entered August 13, 2014, the trial court erred in dismissing with prejudice, under ORCP 21 A, plaintiff’s claims for production of requested public records based on a finding of fact outside the Complaint and disputed in the record evidence.

A. Preservation of Error

Defendant moved to dismiss plaintiff’s claims for injunctive and declaratory relief compelling defendant to produce public records. Plaintiff opposed defendant’s motion to dismiss. The matter was fully briefed and argued before the trial court.

B. Standard of Review

17

591, 593-94 (1996); see also Turner v. Reed, 22 Or App 177, 189 n 10, 538 P2d 373, 379 n 10 (1975).

Alternatively, pursuant to ORS 19.415 and ORAP 5.40(8)(a), plaintiff requests de novo review of the trial court’s factual finding that “there has been no denial of plaintiff’s record requests.” December 3, 2013 Order, ER-38-39. The Court should grant de novo review because this incorrect factual finding served as the basis upon which the trial court dismissed plaintiff's claims for production of requested public records. Thus, a determination of the facts in plaintiff's favor would likely provide a basis for reversing or modifying the trial court's ruling.

The Court of Appeals reviews a summary judgment record in the light most favorable to the non-moving party in order to determine whether the moving party was entitled to judgment as a matter of law. Jones v. General Motors Corp., 325 Or 404, 939 P2d 608 (1997).

C. Argument

Although the trial court made its rulings under ORCP 21 A, “it is well settled that ‘a motion is controlled by its substance, not its caption.’” Schiele v. Montes, 231 Or App 43, 47, 218 P3d 141, 143 (2009) (quoting Welker v. TSPC, 332 Or 306, 312, 27 P3d 1038 (2001)). When a party or the court relies on evidence outside the pleadings to support a motion to dismiss, the motion should be treated as a motion for summary judgment on appeal. Id. at 47-48 (citing LH

Here, the Port presented evidence outside the pleadings in support of its motion to dismiss. More importantly, the trial court relied on disputed evidence to find that “there has been no denial of plaintiff’s record requests.” December 3, 2013 Order, ER-38-39. This finding, however, flies in the face of the extensive allegations in the Complaint and even the Port’s own evidence.

It matters not whether the trial court’s finding, that “there has been no denial of plaintiff’s record requests,” has support from a preponderance of the record evidence, which it does not. The mere existence of disputed evidence or disputed inferences to be drawn from the evidence as to material issues precludes dismissal or summary judgment. ORCP 47C; Schaff v. Ray’s Land & Sea Food Co., Inc., 334 Or 94, 98-99, 45 P 3d 936 (2002) (“Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. There is no genuine issue as to any material fact if, ‘based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror court return a verdict for the adverse party * * *’

Here, the Port characterized its willingness to produce the requested records, subject only to specified fees to be paid in advance, as constituting the “granting”
of plaintiff’s record request or, stated conversely as in the motion and trial court ruling, the absence of a “denial” of the request. Plaintiff ILWU argued that the Complaint allegations (and even the Port’s own evidence it had presented with its motion) manifest a “denial” because, among other things, the quoted fees were “unreasonable” within the meaning of the PRL and the Port’s “withholding” of the requested records for thirteen months before suit was filed constituted a de facto if not actual “denial” and deprivation of public record rights. Despite ruling under ORCP 21 A, the trial court chose the Port’s characterizations and inferences of fact over those of plaintiff in finding “there has been no denial of plaintiff’s record requests.” December 3, 2013 Order, ER-38-39. This is manifest error as a matter of law.

III. ASSIGNMENT OF ERROR NO. 2

In its Order entered December 3, 2013, and later repeated in its General Judgment, entered August 13, 2014, the trial court erred in dismissing with prejudice, under ORCP 21 A, plaintiff’s claims for production of requested public records based on the erroneous legal assumption that a public body must formally issue a “denial” of a public records request to invoke court jurisdiction under the PRL.
A. Preservation of Error

Defendant moved to dismiss plaintiff’s claims for injunctive and declaratory relief compelling defendant to produce public records. Plaintiff opposed defendant’s motion to dismiss. The matter was fully briefed and argued before the trial court.

B. Standard of Review


Alternatively, pursuant to ORS 19.415 and ORAP 5.40(8)(a), plaintiff requests de novo review of the trial court’s factual finding that “there has been no denial of plaintiff’s record requests.” December 3, 2013 Order, ER-38-39. De novo review is proper because the trial court concluded it was without jurisdiction by applying an erroneous legal assumption to the facts, improperly concluding that there was no “denial” of a public records request.
The Court of Appeals reviews the summary judgment record in the light most favorable to the non-moving party in order to determine whether the moving party was entitled to judgment as a matter of law. Jones v. General Motors Corp., 325 Or 404, 939 P2d 608 (1997).

C. Argument

1. The Public Records Law mandates the prompt disclosure of non-exempt public records, subject only to “reasonable” fees.

“The guiding principle in Oregon is to protect the public’s right to inspect public records.” In Defense of Animals, 199 Or App at 168 (quoting Kluge v. Or. State Bar, 172 Or App 452, 455, 19 P3d 938 (2001)). To protect this right, Oregon has maintained a “strong and enduring policy that public records and governmental activities be open to the public,” which has been codified as Oregon’s Public Records Law. See ORS 192.410-192.505. The Public Records Law declares: “Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided.” ORS 192.420(1). “Exemptions from disclosure are to be narrowly construed” as “disclosure is the rule.” Guard Pub. Co. v. Lane Cnty. Sch. Dist. No. 4J, 310 Or 32, 37, 791 P2d 854, 857 (1990). “When a public body withholds public records from disclosure, that body carries
the burden of sustaining that action upon judicial review. ORS 192.490(1)." In Defense of Animals, 199 Or App at 343 (quoting Kluge, 172 Or App at 455).

2. The trial court applied an incorrect legal principle in ruling that the Public Records Law requires a “denial” of the records request as it actually provides for suit whenever public records have been “improperly withheld.”

In its motion to dismiss the Port argued that suit to compel access or production of requested public records may proceed only upon the public agency’s “denial” of the requested records, which it argued is absent here. In particular, it relied on ORS 192.460(1), which states that suit may be brought where a person is “denied the right to inspect or receive a copy of a public record,” finding special meaning in the word, “denied.” The trial court adopted this reasoning in dismissing plaintiff’s claims for access to requested public records on the grounds that “there has been no denial of plaintiff’s record requests.” See December 3, 2013 Order, ER-38-39. The trial court evidently was also adopting the legal opinion of the Multnomah County District Attorney’s office when it found no jurisdiction to rule on the matter “because there has been no actual written denial of [ILWU’s] request by the Port of Portland.” See Complaint, ¶ 36; Pearman Decl., Ex. 27, ER-36-37.
The trial court’s ruling misconstrues the meaning of ORS 192.460(1) and overlooks more pertinent provisions of the PRL. The plain terms of ORS 192.460(1) concern the “denial” of the “right to inspect or receive a copy of a public record.” It does not require, as a condition to compel records, a finding of a formal “denial” of the records request itself; rather, ORS 192.460(1) authorizes suit to compel access to records when a person is “denied” the legal “right to inspect” public records as defined throughout the various provisions of the PRL.

Further, ORS 192.490(1) more precisely and dispositively specifies that the circuit court has jurisdiction “to enjoin the public body from withholding records and to order the production of any records improperly withheld.” ORS 192.490(1) (emphasis added). It is the “withholding” of requested records, not any formal or informal “denial,” that supports a claim and order for production under ORS 192.490(1). And it is the “improper withholding” of requested, non-exempt, public records that constitutes a “denial” of the legal “right to inspect” under the PRL, and not, as the Port argues, the other way around.

Surely the Port may not lawfully block court action to enforce public access of its public records through the facile device of simply not bothering to send out a written “denial” of the request. To conclude otherwise would effectively enable a public body to “exempt itself from its responsibilities under the Inspection of Public Records law by adopting a policy that seeks to deprive citizens of their
rights under the law to inspect public records,” which the courts disallow. See In Defense of Animals, 199 Or App at 168.

Webster’s Dictionary defines “withheld” to mean: “1: to hold back: keep from action * * * 2: to desist or refrain from granting, giving, or allowing: keep in one’s possession or control: keep back * * *.” Webster’s Third Int’l Dictionary 2627 (unabridged ed. 2002); see Brown v. Guard Publishing Co., 267 Or App 552, at slip op. *9, ___ P 3d ___, 2014 WL 7181406 (Dec. 17, 2014) (applying Webster’s Dictionary definition of terms used in the Public Records Law). Under this definition, records can be “withheld” simply through inaction or the action of keeping in one’s possession or control, without any affirmative declaration of “denial.”

In circumstances similar to the instant case, at least two appellate decisions specifically do not require a public entity’s actual “denial” of the records request as a prerequisite to ordering production. In Davis v Walker, 108 Or App 128, 814 P 2d 547 (1991), Plaintiff had sought an injunction ordering the Portland Police Bureau to disclose its public records, to provide her an opportunity to inspect and copy the original records, and to prohibit charging fees in excess of the actual cost for copying the records. The court observed that the “Bureau [had] notified plaintiff that the records would be disclosed, but only according to [its] procedure* * * [and a] copying fee, payable in advance, plus an unspecified amount for
editing out any other information exempted by statute.” Id. at 131. Rather than follow the procedures and pay fees considered to be exorbitant, plaintiff sued for injunctive relief under the PRL to secure access to the records. The Bureau’s offer to disclose the records on specified conditions did not prevent the court from ruling that it had “improperly withheld” the requested records under the PRL, finding along the way the quoted fees to be “unreasonable.” Id. at 133.

Likewise, in In Defense of Animals, 199 Or App 160 (2005), the public entity had produced some requested records and offered to release others, including daily logs concerning the health and treatment of animals kept at defendant’s primate research facility. However, a dispute arose over the amount of fees plaintiff was required to pay in advance to inspect the daily logs and whether plaintiff was entitled to a waiver or reduction of the fees. Id. at 162-66 (“OHSU notified plaintiff that the fee for inspecting the redacted daily logs would be approximately $151,250.”). Despite defendant’s willingness to allow inspection of the redacted daily logs, provided its stated fees were paid in advance, plaintiff filed suit for injunctive relief to compel access to the logs and for declaratory relief that the quoted fees were “unreasonable” and that denial of plaintiff’s request for waiver or reduction of the fees was unlawful under the PRL. Id.

The defendant’s stated willingness to release the requested logs, once its quoted fees were paid, did not deter the appellate court from ruling that plaintiff
could proceed on the claim for access to the daily logs because the quoted fees were ruled to be “unreasonable.” While the trial court had held that it lacked jurisdiction under the PRL to rule on the “reasonableness” of the fees set by a public entity, which effectively blocked plaintiff’s access to the daily logs, the appellate court had no trouble finding a jurisdictional basis “because it is integral to the issue of access, or denial of access, to public records for inspection or copying.” Id. at 180-83. In other words, the agency’s offer to disclose records, when subject to an unreasonable fee or other unlawful condition, constitutes unlawful “denial” or “withholding” to warrant injunctive and declaratory relief under the PRL. In so ruling, the In Defense of Animals Court implicitly adopted the plaintiff’s argument that “under ORS 192.490(1), the trial court has jurisdiction to enjoin a public body from ‘withholding records,’ without any limitation on the underlying basis for the withholding and that the court's review authority therefore extends to situations in which the amount of the fee, by its unreasonableness, ‘establishes a barrier’ to access to the records.” Id. at 180, 182-83. 5

5 The In Defense of Animals Court alternatively found jurisdiction to consider the “reasonableness” of stated fees under more general statutes:

Under ORS 28.010, a court has the power to “declare rights, status, and other legal relations.” Thus, even assuming that the authority of the Attorney General and the district attorney does not extend to review of the
In the instant appeal, the Complaint alleges in great detail the Port’s “unreasonable” and “bad faith” fee demands - initially about $200,000 and after nine months, arbitrarily reduced down to a still excessive fee of $49,477.94 -- which as in Davis and In Defense of Animals “establishes a barrier” to access of the requested public records despite the Port’s stated offer to produce after receipt of payment. Relatedly, the Complaint also challenges the Port’s refusal to grant plaintiff a fee waiver or reduction, requested under ORS 192.440(5). The Complaint further alleges, and the evidence shows, that the Port failed on numerous occasions to “respond as soon as practicable and without unreasonable delay” to Plaintiff’s public records request as mandated by ORS 192.440(2). These various deficiencies, each alone or together, can as a matter of law constitute “barriers” to access of public records to warrant the equitable relief of production of requested public records. See Davis, 108 Or App 128, and In Defense of Animals, 199 Or App 160.

Finally, the allegations in the Complaint and as supported by the Port’s own evidence clearly establish that the Port has “wrongly withheld” the records requested by plaintiff, and even continuing through this litigation. This is more reasonableness of a public body’s fees, the authority of the circuit court is not so limited.

Id. at 183. ILWU asserts the same alternative grounds here.
than sufficient to state a valid claim for injunctive and declaratory relief under ORS 192.490(1) for access to the non-exempt records requested by plaintiff.\(^6\)

For the above reasons, the trial court erred as a matter of law in dismissing the Complaint for failure to state valid claims for injunctive and declaratory relief to obtain access to requested public records based on the erroneous legal assumption that there must be a written or formal “denial” by the public body to invoke court jurisdiction.

**IV. CONCLUSION**

For the above reasons, the trial court erred in granting defendant’s motion to dismiss and entering the General Judgment dismissing plaintiff’s claims with prejudice.

Respectfully submitted this 28th day of January, 2015.

\(^6\) The allegations in the Complaint also make out a claim for “denial” of requested records as the word is defined in Webster’s Dictionary - “refusal to grant, assent to, or sanction.” Whether explicitly stated or not, the Port has failed and refused to satisfy plaintiff’s request and desire for public records, as alleged in the Complaint.
IN THE COURT OF APPEALS OF THE STATE OF OREGON

THE INTERNATIONAL
LONGSHORE & WAREHOUSE
UNION, a California unincorporated
association,

Plaintiff-Appellant,

v.

PORT OF PORTLAND, an Oregon
municipal corporation,

Defendant-Respondent.

Court of Appeals
No. A157602

Multnomah County Circuit Court
No. 1307-10780

RESPONDENT PORT OF PORTLAND’S ANSWERING BRIEF

Names and Addresses of Counsel on Following Page

April 2015
Chapter 4—Public Records Law Update

AMY EDWARDS, OSB 012492
REILLEY D. KEATING, OSB
073762
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380
aedwards@stoel.com
rdkeating@stoel.com

MICHAEL J. MORRIS, OSB 772839
BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
210 SW Morrison Street, Suite 500
Portland, OR 97204
(503) 227-4600
morrism@bennetthartman.com

Attorneys for Respondent
Port of Portland

ROBERT REMAR (to be admitted
pro hac vice)
LINDSAY NICHOLAS (to be
admitted pro hac vice)
LEONARD CARDER, LLP
1188 Franklin Street, #201
San Francisco, CA 97109
(415) 771-6100
rremar@leonardcarder.com
lnicholas@leonardcarder.com

Attorneys for Appellant
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>iii</td>
</tr>
<tr>
<td>I. STATEMENT OF THE CASE</td>
<td>1</td>
</tr>
<tr>
<td>A. Nature of the Case and Relief Sought</td>
<td>1</td>
</tr>
<tr>
<td>B. Nature of the Judgment</td>
<td>1</td>
</tr>
<tr>
<td>C. Statutory Basis for Appellate Jurisdiction</td>
<td>1</td>
</tr>
<tr>
<td>D. Timeliness of Appeal</td>
<td>1</td>
</tr>
<tr>
<td>E. Questions Presented on Appeal</td>
<td>2</td>
</tr>
<tr>
<td>F. Summary of Argument</td>
<td>2</td>
</tr>
<tr>
<td>G. Summary of Material Facts</td>
<td>4</td>
</tr>
<tr>
<td>1. The June 2012 Requests</td>
<td>5</td>
</tr>
<tr>
<td>2. The September and December Requests</td>
<td>9</td>
</tr>
<tr>
<td>3. ILWU’s Appeal to the District Attorney</td>
<td>11</td>
</tr>
<tr>
<td>4. ILWU Files This Lawsuit</td>
<td>12</td>
</tr>
<tr>
<td>II. RESPONSE TO FIRST ASSIGNMENT OF ERROR</td>
<td>14</td>
</tr>
<tr>
<td>A. Preservation of Error</td>
<td>14</td>
</tr>
<tr>
<td>B. Standard of Review</td>
<td>15</td>
</tr>
<tr>
<td>C. Argument</td>
<td>17</td>
</tr>
<tr>
<td>1. The Trial Court Was Entitled to Consider Matters Outside the Pleadings in Ruling on the Port’s Motion to Dismiss for Lack of Subject Matter Jurisdiction</td>
<td>17</td>
</tr>
<tr>
<td>2. The Trial Court Did Not Err in Determining That There Was No Denial of ILWU’s Public Records Requests</td>
<td>19</td>
</tr>
<tr>
<td>III. RESPONSE TO SECOND ASSIGNMENT OF ERROR</td>
<td>22</td>
</tr>
<tr>
<td>A. Preservation of Error</td>
<td>22</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS
(continued)

B. Standard of Review ................................................................. 22
C. Argument .................................................................................. 23
   1. The PRL Does Not Recognize a “De Facto” Denial as a
      Basis for Judicial Review .................................................. 23
      a. The Plain Text of ORS 192.460 and 192.490
         Requires a Denial of the Right to Inspect or
         Receive Public Records .............................................. 23
      b. The Context of the Statutes Confirms That Judicial
         Review Is Not Available Based on a “De Facto”
         Denial ........................................................................... 26
      c. Davis and In Defense of Animals Are Readily
         Distinguishable and Do Not Support ILWU’s
         Position ........................................................................... 27
   2. Even if Judicial Review Is Available Based on a “De
      Facto” Denial, the Trial Court Properly Dismissed
      ILWU’s Claims Seeking to Compel the Port to Produce
      Responsive Non-Exempt Public Records ....................... 29
IV. CONCLUSION ................................................................................. 30
# TABLE OF AUTHORITIES

## Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Ailes v. Portland Meadows, Inc.</em></td>
<td>14</td>
</tr>
<tr>
<td>312 Or 376, 823 P2d 956 (1991)</td>
<td></td>
</tr>
<tr>
<td><em>Beck v. City of Portland</em></td>
<td>18</td>
</tr>
<tr>
<td>202 Or App 360, 122 P3d 131 (2005)</td>
<td></td>
</tr>
<tr>
<td><em>Bend Publishing Co. v. Haner</em></td>
<td>30</td>
</tr>
<tr>
<td>118 Or 105, 244 P 868 (1926)</td>
<td></td>
</tr>
<tr>
<td><em>Black v. Arizala</em></td>
<td>18</td>
</tr>
<tr>
<td>337 Or 250, 95 P3d 1109 (2004)</td>
<td></td>
</tr>
<tr>
<td><em>City of Portland v. Anderson</em></td>
<td>16</td>
</tr>
<tr>
<td>163 Or App 550, 988 P2d 402 (1999)</td>
<td></td>
</tr>
<tr>
<td><em>Davis v. Walker</em></td>
<td>27, 28, 29</td>
</tr>
<tr>
<td>108 Or App 128, 814 P2d 547 (1991)</td>
<td></td>
</tr>
<tr>
<td><em>Harnisch v. College of Legal Arts, Inc.</em></td>
<td>19, 30</td>
</tr>
<tr>
<td>243 Or App 16, 259 P3d 67 (2011)</td>
<td></td>
</tr>
<tr>
<td><em>Hayes Oyster Co. v. Dulcich</em></td>
<td>17, 19, 30</td>
</tr>
<tr>
<td>170 Or App 219, 12 P3d 507 (2000)</td>
<td></td>
</tr>
<tr>
<td><em>In Defense of Animals v. Oregon Health Sciences Univ.</em></td>
<td>16, 27, 28, 29</td>
</tr>
<tr>
<td><em>Ingram v. Allen</em></td>
<td>15</td>
</tr>
<tr>
<td>273 Or 890, 544 P2d 167 (1975)</td>
<td></td>
</tr>
<tr>
<td><em>Kluge v. Oregon State Bar</em></td>
<td>16</td>
</tr>
<tr>
<td>172 Or App 452, 19 P3d 938 (2001)</td>
<td></td>
</tr>
<tr>
<td><em>Kohring v. Ballard</em></td>
<td>24</td>
</tr>
<tr>
<td>355 Or 297, 325 P3d 717 (2014) (en banc)</td>
<td></td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

(continued)

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>State ex rel. KOIN-TV v. Olsen, 300 Or 392, 711 P2d 966 (1985)</td>
<td>30</td>
</tr>
<tr>
<td>L.H. Morris Elec., Inc. v. Hyundai Semiconductor Am., Inc., 203 Or App 54, 125 P3d 87 (2005)</td>
<td>15</td>
</tr>
<tr>
<td>MacEwan v. Holm, 226 Or 27, 359 P2d 413 (1961)</td>
<td>30</td>
</tr>
<tr>
<td>Morse Bros., Inc. v. Oregon Dept. of Econ. Dev., 103 Or App 619, 798 P2d 719 (1990)</td>
<td>25</td>
</tr>
<tr>
<td>State v. Jones, No. 100170FE, 2015 WL 1573372 (Or App Apr. 8, 2015)</td>
<td>22</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

(continued)

<table>
<thead>
<tr>
<th>Authority</th>
<th>Page</th>
</tr>
</thead>
</table>
| State v. Spainhower,  
251 Or App 25, 283 P3d 361 (2012) | 23 |
| State v. Worth,  
231 Or App 69, 218 P3d 166 (2009), rev den, 347 Or 718 (2010) | 17 |
| State v. Wyatt,  
331 Or 335, 15 P3d 22 (2000) | 14, 15 |
| Steenson v. Robinson,  
236 Or 414, 385 P2d 738 (1964) | 21 |
| Stelts v. State,  
299 Or 252, 701 P2d 1047 (1985) | 17, 23 |
| Turner v. Reed,  
22 Or App 177, 538 P2d 373 (1975) | 16 |

## Statutes

- Oregon Public Records Law, ORS 192.410, et seq. ......................... 1
- ORS 19.415 ................................................. 17, 23
- ORS 19.415(3)(b) ............................................. 17, 23
- ORS 28.010 ................................................... 29, 30
- ORS 192.410(2) ............................................... 4
- ORS 192.410(3) ............................................... 4
- ORS 192.430 ............................................... 4
- ORS 192.440 ............................................... 4
- ORS 192.440(4) ............................................... 4
- ORS 192.440(4)(c) ............................................. 6, 10, 11
- ORS 192.450 ................................................. passim
### Table of Authorities (continued)

<table>
<thead>
<tr>
<th>Authority</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ORS 192.450(1)</td>
<td>24</td>
</tr>
<tr>
<td>ORS 192.450(2)</td>
<td>24</td>
</tr>
<tr>
<td>ORS 192.460</td>
<td>passim</td>
</tr>
<tr>
<td>ORS 192.460(1)</td>
<td>23, 24</td>
</tr>
<tr>
<td>ORS 192.460(1)(a)</td>
<td>24</td>
</tr>
<tr>
<td>ORS 192.460(1)(b)</td>
<td>24</td>
</tr>
<tr>
<td>ORS 192.465(1)</td>
<td>26</td>
</tr>
<tr>
<td>ORS 192.470</td>
<td>25</td>
</tr>
<tr>
<td>ORS 192.480</td>
<td>25</td>
</tr>
<tr>
<td>ORS 192.490</td>
<td>23, 26</td>
</tr>
<tr>
<td>ORS 192.490(1)</td>
<td>15, 25, 26</td>
</tr>
<tr>
<td>ORS 192.490(3)</td>
<td>28</td>
</tr>
<tr>
<td>ORS 192.502(2)</td>
<td>28</td>
</tr>
<tr>
<td>ORS 778.005, <em>et seq.</em></td>
<td>4</td>
</tr>
</tbody>
</table>

### Rules

<table>
<thead>
<tr>
<th>Authority</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ORAP 5.40(8)</td>
<td>23</td>
</tr>
<tr>
<td>ORAP 5.40(8)(b)</td>
<td>17</td>
</tr>
<tr>
<td>ORAP 5.40(8)(c)</td>
<td>17</td>
</tr>
<tr>
<td>ORAP 5.45(1)</td>
<td>14</td>
</tr>
<tr>
<td>ORCP 21 A</td>
<td>passim</td>
</tr>
</tbody>
</table>
## TABLE OF AUTHORITIES

(continued)

<table>
<thead>
<tr>
<th>Constitutional Provisions</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Or Const, Art VII (amended), § 3</td>
<td>17, 23</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Authorities</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposed SB 41 (2011)</td>
<td>26, 27</td>
</tr>
</tbody>
</table>

---
I. STATEMENT OF THE CASE

A. Nature of the Case and Relief Sought

Appellant the International Longshore & Warehouse Union (“ILWU”) brought this action against Respondent the Port of Portland (the “Port”) alleging six claims for relief for alleged violations of the Oregon Public Records Law, ORS 192.410, et seq. (“PRL”). In each claim for relief, ILWU sought declaratory and injunctive relief compelling the Port to produce requested non-exempt public records. ILWU also sought other forms of relief, including an order declaring that the Port’s assessment of fees was unreasonable and that the Port’s refusal to waive or reduce fees was unsupported by facts or law.

B. Nature of the Judgment

By Order dated November 22, 2013 (“Dismissal Order”), the trial court granted the Port’s motion to dismiss ILWU’s Complaint pursuant to ORCP 21 A, dismissing with prejudice for lack of subject matter jurisdiction all six claims to the extent they sought declaratory and injunctive relief compelling the Port to produce public records. ER 38; Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment (“Port’s Motion”); Tr. 33:10-20. As reflected in the General Judgment entered on August 13, 2014, to which ILWU did not object as to form, the trial court granted ILWU leave to replead the remaining claims. ER 42-43. ILWU chose not to file an amended complaint and allowed all claims to be dismissed with prejudice. Id.; see also SER 45-46.

C. Statutory Basis for Appellate Jurisdiction

Accepted.

D. Timeliness of Appeal

Accepted.
E. Questions Presented on Appeal

1. Was the trial court entitled to consider and determine disputed facts outside the pleadings in deciding whether to dismiss ILWU’s claims seeking to compel the Port to produce public records for lack of subject matter jurisdiction, and if so, did the court correctly determine that there had been no denial of ILWU’s public records requests?

2. Under the PRL, does a court have jurisdiction to compel a public body to produce responsive, non-exempt public records based on a “de facto” denial or “improper withholding” of those records where the public body has not actually denied a public records request?

F. Summary of Argument

This public records action arises out of ILWU’s efforts to obtain an order compelling the Port to produce non-exempt records responsive to a series of public records requests when the Port never denied ILWU’s right to inspect the records. In its complaint, ILWU sought various forms of relief, including declaratory and injunctive relief to compel the Port to produce records, a declaration that the Port’s assessment of fees was unreasonable, and an order requiring the Port to reduce or waive its fees. The Port moved to dismiss for lack of subject matter jurisdiction a narrow subset of the relief sought by ILWU—the claims for declaratory and injunctive relief to compel production of records—on the grounds that the Port never denied ILWU’s records requests. The trial court determined that it lacked jurisdiction to issue the requested relief because there was no denial of ILWU’s requests and dismissed those claims with prejudice.

---

1 The Port also moved for summary judgment on ILWU’s claims seeking a reduction or waiver of fees on the grounds that the Port’s denial of ILWU’s fee waiver request was reasonable and within the Port’s sound discretion. The trial court’s denial of that motion is not challenged on appeal.
The trial court subsequently gave ILWU an opportunity to replead its remaining claims, including ILWU’s claims concerning the reasonableness of the Port’s estimated fees (which the Port had not moved to dismiss and expected to be resolved at trial). ILWU, however, elected to not file an amended pleading or have its claims concerning the reasonableness of the Port’s estimated fees resolved at trial, and stipulated to the entry of General Judgment dismissing all of its claims with prejudice in order to file this appeal.

ILWU’s first assignment of error fails on preservation grounds. The assignment contends that the trial court erred by considering evidence outside the pleadings, but ILWU never objected to the admission of such evidence and submitted its own declarations opposing the Port’s brief. Even if it was preserved, the assignment of error should be rejected because the trial court is expressly permitted by ORCP 21 A to consider materials outside the pleading in ruling on a motion to dismiss for lack of subject matter jurisdiction. Further, the trial court’s ruling that there was no denial of ILWU’s public records requests is supported by undisputed evidence in the record, and ILWU elected to not have a trial on its claims relating to the reasonableness of the Port’s estimated fees.

ILWU’s second assignment of error also fails on preservation grounds because ILWU did not ask the trial court to decide whether a “de facto” denial is sufficient to confer jurisdiction, and the court did not decide that issue. Alternatively, the assignment fails because the plain text and context of the PRL establishes that a circuit court has jurisdiction to issue an order compelling a public body to produce public records only if the requester is denied the opportunity to inspect the records. Judicial review is not permitted under ORS 192.450, 192.460 or 192.490 if that right has not been denied, and neither the statutes nor any Oregon case provides for judicial review based on a “de facto” denial. In all events, as explained above, the trial court properly concluded that there was no denial.
The judgment entered by the trial court should be affirmed.

G. **Summary of Material Facts**

The Port is a port district in the State of Oregon organized and functioning in accordance with ORS 778.005, *et seq.* Answer ¶ 2. ILWU is a labor union and claims it has approximately 45,000 members, including members who work and live in Oregon. Compl. ¶ 1. ILWU is a “person” as defined by ORS 192.410(2) and the Port is a “public body” as defined by ORS 192.410(3).

As a public body, the Port is obligated to comply with the PRL. The Port has established an administrative policy that sets forth the Port’s protocol for responding to records requests and outlines the costs that the requester will be charged (the “Policy”), which applies to all public records requests that the Port receives. SER 1-2. In relevant part, the Policy provides that records that require “more than a nominal amount of staff time for identification and location” and “substantial attorney time for segregation of exempt from nonexempt material” “will be provided for inspection or copying at the Port’s actual cost” for staff or attorney time, as appropriate, “in addition to any copying and delivery charges.” *Id.*

It also states that such charges “may be waived or reduced by the Records Program Manager if the waiver or reduction would be in the public interest because making the record available primarily benefits the general public.” SER 2. Finally, it states: “If it appears that the cost of providing copies will be substantial, the Port may estimate the costs in advance and require the person making the request to pre-pay the estimated costs. If the actual costs are less than the pre-payment, the Port will refund excess.” *Id.* This policy is fully consistent with ORS 192.430 and 192.440(4).
1. **The June 2012 Requests**

The facts concerning ILWU’s requests for public records and the Port’s responses to those requests are set forth in letters and emails exchanged between the parties and their counsel and that were made part of the record below without any objection from ILWU. *See Answer, Exs. 1-20; Declaration of Beverly Pearman in Support of Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment (“Pearman Dec.”), Exs. 3-27; see also Declaration of Kristin Donovan in Support of Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment (“Donovan Dec.”) ¶¶ 2-4.*

On June 11, 2012, ILWU sent to the Port five letters containing a total of 11 separate requests for public records (collectively the “June Requests”). *SER 4-13; see also Donovan Dec. ¶ 2.* In each of the letters, ILWU agreed “to pay for all reasonable administrative, production and copying costs as may be required under” the PRL, and that it would “arrange for payment in advance of production.” *SER 5, 7, 9, 10-11, 13.* The requests were extremely broad in scope, many of them asking for “any and all documents” between the Port and third parties, often without any limitations as to time. *See SER 4-13.*

The current cost estimate for identifying, reviewing and producing records to these 11 requests is $37,434.15, not $200,000. *ER 33.* That estimate is just that—an estimate of costs based on the breadth of the requests. Although the Port required prepayment of a portion of that estimate as permitted by the PRL and the Policy, ILWU would only pay the actual costs incurred in making those records available. The Port would refund any overpayment. *ER 33; SER 2.*

On June 18, 2012, the Port responded to each of the requests and informed ILWU that the Port was “in the process of evaluating each request regarding the quantity of ‘documents’ requested; the Port’s cost to search for the requested ‘documents’; estimates of the time required to make the requisite searches of [the
Port’s] records; and estimates of the cost for legal review of those documents which may be exempt from disclosure under” the PRL. Pearman Dec., Ex. 4. The Port also asked whether ILWU would narrow certain exceedingly broad requests, such as by identifying certain custodians’ files to search. *Id.* Further, the Port provided ILWU with a copy of the Policy. *Id.* at Ex. 4 and ¶ 3.

Six weeks passed without any substantive response from ILWU. Despite the lack of any response to its questions for clarification, the Port proceeded with making efforts to respond to the requests by identifying and contacting about 40 potential custodians of responsive documents and locating 195 boxes stored off-site that might contain responsive documents. Pearman Dec., Exs. 5, 6. ILWU finally emailed the Port on August 1, 2012, but then only to ask for an update on production of the responsive records, ignoring all of the Port’s questions. Pearman Dec., Ex. 7. That day, the Port again asked whether ILWU would narrow the broad requests, but ILWU refused to do so. *Id.*, Ex. 6.

By letter dated August 16, 2012, the Port provided to ILWU an estimate of the costs to identify potentially responsive documents and explained in detail all of the efforts that the Port had undertaken to determine that estimate. ER 1-3. Given the breadth of the requests and the number of custodians whose records needed to be searched, the Port estimated that such costs would be approximately $200,000, and it again invited ILWU to narrow its requests to reduce costs. *Id.* Because the searches would require more than a nominal amount of staff time for identification and location, the Port notified ILWU, consistent with the Policy, that it was charging the union the Port’s actual cost, in addition to any copying and delivery charges. ER 1-2; SER 1-2. The Port also advised ILWU that it could not estimate the cost to conduct a legal review of the records until it knew the actual volume of responsive materials. ER 2. Pursuant to ORS 192.440(4)(c), the Port asked ILWU to confirm that it wanted the Port to proceed with making the public records available. ER 3. The Port also advised ILWU that, consistent with its Policy, it
was requiring prepayment of the estimated charges and that it would refund any overpayment if actual costs were less than the prepaid amount. ER 2-3.

ILWU responded two weeks later and acknowledged that it would pay “reasonable administrative, production, copying costs” but complained that the Port’s letter “fail[ed] to explain or justify” the Port’s estimated costs. ER 4-5. ILWU ignored the Port’s request for confirmation that the Port should proceed with the public records search. See id.

By letter dated September 14, 2012, the Port responded to each of ILWU’s questions, again explaining all of the steps it had taken to determine the location of responsive documents and the basis for the Port’s cost estimate. ER 6-8. The Port also attached a schedule of the estimated hours and hourly burden rates for each employee who responded as potentially possessing responsive documents. ER 9-12. The Port reiterated that it could not commence the search until it received prepayment from ILWU to cover the initial search costs. ER 8. Further, it advised ILWU that it could reduce the original cost estimate by $75,000 if ILWU did not want the Port to review the 195 boxes stored off-site, which contained records from a former stevedore that may (or may not) include responsive records. ER 6.

On September 25, 2012, ILWU sent the Port a letter again complaining about the cost estimate but failing to narrow any of its requests. ER 13-14. Instead, ILWU requested that the Port waive or significantly reduce the fees associated with the public records request. ER 13. It also asked for more information regarding the 195 off-site boxes, claiming that such information was necessary to its consideration of whether to narrow its request regarding that item. ER 14. The Port responded two days later by enclosing an index of those boxes and providing an explanation of the records contained therein. Pearman Dec., Ex. 11.
More than a month passed with no communication from ILWU concerning the June Requests.\(^2\) On October 31, 2012, the Port’s outside counsel (Beverly Pearman) conferred with ILWU’s counsel (Rachel Lev) regarding possible methods for searching the Port’s files for potentially responsive documents. Pearman Dec. ¶ 13. As Ms. Pearman explained to Ms. Lev, the Port anticipated that using an outside vendor to conduct electronic searches of the records would be more cost-effective and efficient than in-house manual searches. *Id.; see also id.*, Ex. 12. Accordingly, on November 1, 2012, Ms. Pearman sent a list of search terms that the Port proposed to use for electronic searches of its records to identify potentially responsive documents.\(^3\) *Id.* One week later, ILWU sent a letter to Ms. Pearman again complaining about the $200,000 cost estimate and asking for additional information regarding the use of the outside vendor. *Id.*, Ex. 13. By this point, ILWU still had not (1) responded as to whether it wanted to review the 195 off-site boxes; (2) confirmed that it wanted the Port to proceed with making the public records available; (3) responded to the Port’s questions for clarification regarding of the September Requests; (4) made any advance payment to the Port for its search for records or proposed an alternative payment schedule; or (5) agreed to narrow any of its overly broad, expansive requests.

On November 16, 2012, Ms. Pearman sent ILWU a letter outlining the Port’s diligent efforts to work with ILWU while being met only with resistance. ER 18-26. Ms. Pearman further advised ILWU that the Port was denying ILWU’s request for a fee waiver or reduction on the grounds that the request was not in the public interest. ER 19. Notwithstanding ILWU’s lack of cooperation, the letter

\(^2\) On September 26, 2012, ILWU sent a second set of public records requests to the Port (the “September Requests”), which is discussed below. SER 14-15.

\(^3\) The proposed list of search terms included terms for one of the two September Requests.
included additional responses to a number of the June Requests and enclosed a disk that contained documents responsive to three of the requests. See ER 20-23. Finally, because ILWU still had not responded to the Port’s multiple inquiries regarding the review of the 195 off-site boxes, Ms. Pearman notified ILWU that the Port was making those boxes available for ILWU’s review, thereby reducing the cost estimate by $75,000, and asked the union to contact her to make arrangements to conduct the review. ER 23. On November 26 and 28, 2012, the Port produced additional documents responsive to two additional June Requests. Pearman Dec., Exs. 15, 16.

By early January 2013, the Port still had not received any response to its request for clarification of a number of ILWU’s requests, nor had it received any response to the Port’s list of search terms for the electronic records. See SER 18-19. In fact, it was not until February 21, 2013, that ILWU finally responded to the proposed list of search terms, approving the terms with certain conditions. ER 27-30. Even by then, ILWU still had not responded to (1) the Port’s inquiries for clarification or narrowing of certain requests; (2) the Port’s requests for confirmation that the Port should proceed with making the public records available; or (3) the Port’s offer to make the 195 off-site boxes available to ILWU for inspection. Rather, ILWU continued to complain about the fee estimates, asked for a complete fee estimate addressing all phases of production, and again requested a waiver or reduction of the Port’s fees associated with producing the requested documents without providing any justification as to why such a waiver would be in the public interest. See id. The Port again declined to waive the fees on the grounds that such a request was not in the public interest. Pearman Dec., Ex. 19.

2. The September and December Requests

On September 26, 2012, ILWU sent two additional public records requests to the Port, the September Requests. SER 14-15. As with the June Requests,
ILWU agreed “to pay for all reasonable administrative, production and copying costs as may be required under the” PRL, and stated that it would “arrange for payment in advance of production.” *Id.* On October 3, 2012, the Port produced to ILWU copies of documents responsive to the first of the two September Requests at no charge because they were “readily available.” *Pearman Dec.*, Ex. 21. The Port also asked several clarifying questions about the second request, which had no time limit and potentially could have sought documents dating back to 1984. *Id.* The Port advised ILWU that, once it clarified the request, the Port would be able to provide an estimate of costs to search the documents, time required to make searches of the Port’s records, and the cost for legal review of the documents. *Id.* ILWU did not respond to the Port’s inquiries until more than two months later—on December 12—when it indicated that the second September Request sought documents only for the past two years. *Answer*, Ex. 10. The Port provided ILWU with a cost estimate on January 9, 2013 and asked for payment in that amount in advance of production. SER 18-19. ILWU did not remit payment. *Pearman Dec.* ¶ 26.

On December 31, 2012, ILWU sent the Port another letter with six additional public records requests (the “December Requests”). SER 16-17. By letter dated January 9, 2013, the Port acknowledged receipt of the December Requests and advised ILWU that it was working on the requests. SER 18-19. On February 1, 2013, the Port notified ILWU that the process to identify documents responsive to the December Requests would incur far more than a nominal amount of staff time and provided a cost estimate to identify and locate responsive records in accordance with the PRL and the Policy. *Pearman Dec.*, Ex. 23. The Port indicated that it would provide an estimate of the costs for legal review once the actual volume of materials was known. *Id.* Pursuant to ORS 192.440(4)(c), it asked ILWU to confirm that it wanted the Port to proceed with locating the responsive documents and asked for prepayment of the estimated
cost in accordance with its Policy. *Id.* ILWU never provided such confirmation nor did it remit prepayment. Pearman Dec. ¶ 26.

On March 15, 2013, after having finally received ILWU’s consent to the proposed terms for the electronic searches, the Port was able to generate revised cost estimates for the June, September and December Requests, which it provided to ILWU. ER 31-35. The total cost estimate for responding to the June Requests was $37,424.15, which was significantly lower than the original estimate because the searches could be done electronically using the agreed-upon search terms rather than manually.4 ER 33. The Port offered to produce responsive documents upon receipt of advance payment in the amount of $15,455.70 for the June Requests, $4,091.14 for the September Requests, and $3,471.83 for the December Requests. ER 31-32. The Port further explained that it would revise the cost estimates once the electronic searches were done. *Id.* Once it knew the amount of potentially responsive data, it could provide a better estimate of costs for legal review and production. See *id.* ILWU failed to respond to the Port’s offer and did not make any prepayments. Pearman Dec. ¶ 25; see also *id.* ¶ 26.

3. **ILWU’s Appeal to the District Attorney**

On July 1, 2013, ILWU submitted to the Multnomah County District Attorney a petition to review the purported denial of ILWU’s right to inspect or receive copies of the requested records and the denial of ILWU’s request for a fee waiver or reduction (the “DA Petition”). Pearman Dec., Exs. 25, 26. Much like the complaint in this case, the DA Petition complained that the Port’s estimated costs and demands for advance payment were unreasonable, that the Port

---

4 The cost estimate for responding to the December Requests was reduced to $3,471.83. ER 32. The estimate for the September Requests using the electronic search terms was $8,541.96. ER 34. Ultimately, consistent with the Policy, ILWU would be obligated to pay only the Port’s actual costs and would have been refunded any overpayments and invoiced for any unpaid balance.
improperly denied ILWU’s fee waiver request, and that the Port discriminated and retaliated against ILWU because of ongoing litigation between the parties. *Id.* It asked the District Attorney to order the Port to produce the requested records and to waive or substantially reduce the fees associated with the public records requests. *Id.*

The District Attorney declined to make a decision on ILWU’s appeal, concluding that it did not have jurisdiction to consider the petition because the Port had not denied any of ILWU’s requests. ER 36-37. Specifically, the District Attorney stated: “[W]e do not have jurisdiction to decide if we have authority to reduce the fee, or order disclosure, because there has not been an actual written denial of your request by the Port of Portland.” ER 36. The District Attorney urged ILWU to communicate with the Port and attempt to reach an agreement regarding the up-front costs and potentially limiting the scope of the requests to reduce overall costs. *Id.*

4. **ILWU Files This Lawsuit.**

Instead of attempting to reach such an agreement with the Port, ILWU filed the present action, asserting its six claims for relief. Pursuant to ORCP 21 A, the Port moved to dismiss for lack of subject matter jurisdiction all six claims to the extent they sought declaratory and injunctive relief compelling the Port to produce responsive records because the Port had not denied ILWU the right to inspect or receive copies of responsive records. The Port also moved for summary judgment on all claims to the extent they sought an order compelling the Port to waive or significantly reduce its fees associated with ILWU’s public records requests. The Port did not file a motion concerning ILWU’s challenges to the reasonableness of the Port’s estimated fees, acknowledging that the trial court has jurisdiction to resolve that question. *See* Tr. 17:9-17.

The Port’s Motion was supported by two declarations, which attached numerous exhibits documenting the exchanges between the parties concerning the
requests. See Pearman Dec.; see also Declaration of Reilley Keating in Support of Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment (“Keating Dec.”). ILWU did not object to (or move to strike) either declaration or any of the exhibits attached thereto, and in fact submitted its own declarations in opposition to the Port’s Motion. See Declaration of Robert Remar in Support of Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss and Motion for Partial Summary Judgment; Donovan Dec. ILWU also did not raise any such objections during oral argument on the Port’s Motion or otherwise argue that the trial court could not consider extraneous materials in ruling on that motion.

In granting the Port’s Motion to dismiss the claims seeking declaratory and injunctive relief compelling the Port to produce the records, the court stated: “I think I have no jurisdiction because there is certainly no reason for me to conclude that there was a denial, let alone a de facto denial, if in fact a de facto denial would be a sufficient denial, which I don’t conclude at all. But I don’t determine that there’s a basis to conclude there was a denial or a de facto denial.” Tr. at 33:10-20. The court subsequently entered the Dismissal Order, dismissing with prejudice ILWU’s claims seeking declaratory and injunctive relief compelling the Port to produce public records “because there has been no denial of plaintiff’s record requests.” ER 38.

The parties thereafter engaged in discovery, and a dispute arose concerning the scope of the remaining issues in the case. The parties jointly submitted a motion seeking clarification of those issues. See SER 24-44. At the hearing on that motion, the trial court explained that its Dismissal Order was intended to dismiss all claims in the Complaint, with the claims for declaratory and injunctive relief compelling the Port to produce public records being dismissed with prejudice and the remaining claims being dismissed without prejudice. See ER 40-41; Tr. 36:10-38:2, 45:1-7. ILWU’s counsel asserted no objections to the trial court’s explanation and stated: “Your Honor, Plaintiff would, you know, agree with your
assessment and request that we be able to file a First Amended Complaint, and we would be willing to do that in a very expedited matter [sic].” Tr. 40:3-6. ILWU was given 10 days, or until July 28, 2014, to file an amended complaint to replead the claims dismissed without prejudice. ER 40-41.

ILWU did not file an amended complaint. Instead, on July 31, 2014, it filed a “Notice Not to File an Amended Complaint in Order to Take an Appeal,” stating that ILWU “decided not to file a First Amended Complaint pursuant to the court’s dismissal of the original complaint at the July 16, 2014 hearing, in order to appeal the Court’s July 16, 2014 ruling (written Order still pending), as well as the related Order, filed November 22, 2013 and entered December 3, 2013.” SER 45-46.

On that same day, counsel for the Port submitted to the trial court a proposed General Judgment, to which ILWU did not object as to form. ER 42-43. As stated in the General Judgment, ILWU’s Complaint was “dismissed in its entirety, with all claims being dismissed with prejudice.” ER 43.

II. RESPONSE TO FIRST ASSIGNMENT OF ERROR

ILWU failed to preserve the issue raised in its first assignment of error. To the extent preserved, this assignment should be rejected because the trial court properly considered and determined disputed facts outside the pleading in dismissing ILWU’s claims seeking to compel the Port to produce public records for lack of subject matter jurisdiction.

A. Preservation of Error

ORAP 5.45(1) provides that “[n]o matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court * * *. See also State v. Wyatt, 331 Or 335, 341, 15 P3d 22 (2000) (citing Ailes v. Portland Meadows, Inc., 312 Or 376, 380, 823 P2d 956 (1991)). In order to preserve an argument for judicial review, “a party must provide the trial court with an explanation of his or her objection that is specific enough to ensure that the court
can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is warranted.” *Wyatt*, 331 Or at 343; *McDowell v. Allied Bldg. Prods. Corp.*, 235 Or App 12, 24, 230 P3d 552 (2010) (where plaintiff failed to raise alternative appellant contention before the trial court, plaintiff failed to preserve issue for appellate review).

Although ILWU opposed the Port’s Motion, it did not object to the trial court’s consideration of the declarations and exhibits filed in support of that motion. Nor did ILWU argue that the trial court should have limited its consideration only to the pleadings. Even more, ILWU filed its own declarations with attached exhibits in opposing the Port’s Motion. ILWU therefore did not preserve for appellate review the issue of whether the trial court was permitted to review matters outside the pleadings in resolving the Port’s ORCP 21 A motion, and if there were an error, ILWU invited it. See *L.H. Morris Elec., Inc. v. Hyundai Semiconductor Am., Inc.*, 203 Or App 54, 62, 125 P3d 87 (2005) (noting plaintiffs’ failure to object to trial court’s consideration of affidavits and exhibits filed in support of motion to dismiss and plaintiffs’ submission of own affidavits in response to motion); *Ingram v. Allen*, 273 Or 890, 893, 544 P2d 167 (1975) (“If the court’s ruling was in error, the plaintiff’s acquiescence invited the error and plaintiff cannot complain on appeal.”).

**B. Standard of Review**

Even if preserved, ILWU misstates the standard of review for its assigned error. In asserting that this assignment is subject to *de novo* review, ILWU relies on the general standard that applies to the review of public records proceedings. See App Br at 16; see also ORS 192.490(1). In each of the cited cases, the public

---

5 As explained below, because the Port’s Motion was to dismiss for lack of subject matter jurisdiction, the trial court was entitled to consider extraneous materials.
body claimed an exemption applied and withheld records on that basis. See In
Defense of Animals v. Oregon Health Sciences Univ., 199 Or App 160, 169, 112
P3d 336 (2004); Turner v. Reed, 22 Or App 177, 189 n 10, 538 P2d 373 (1975).
However, a case involving public records is not automatically subject to de novo
review; instead, an appellate court should consider the underlying basis for which
the case is on appeal. See Kluge v. Oregon State Bar, 172 Or App 452, 457, 19
P3d 938 (2001) (applying summary judgment standard of review in public records
disclosure case and noting that although “[g]enerally, we review public records
proceedings de novo on the record * * *[,] we do not ignore the fact that this case
is on appeal from a summary judgment”); City of Portland v. Anderson, 163 Or
App 550, 552, 988 P2d 402 (1999) (applying summary judgment standard of
review in public records disclosure case).

Although not clearly articulated, ILWU’s first assignment of error appears to
raise two separate questions: (1) whether the trial court erred in considering
materials outside the pleadings in resolving the Port’s ORCP 21 A motion to
dismiss for lack of subject matter jurisdiction; and (2) whether the trial court
correctly resolved those facts in granting the Port’s Motion. Both questions are
reviewed for abuse of discretion.

As explained more fully below, ORCP 21 A expressly provides that, on a
motion to dismiss for lack of subject matter jurisdiction, parties may present
evidence outside the pleadings to the court, and “the court may determine the
existence or nonexistence of the facts supporting such defense or may defer such
determination until further discovery or until trial on the merits.” ORCP 21 A.
Therefore, “the court’s decision to determine facts at the motion-to-dismiss stage,
rather than deferring such determination until a trial where the parties would have
an opportunity to present all their evidence, is subject to review for abuse of
14, 333 P3d 1102 (2014). “In reviewing for an abuse of discretion, ‘we consider
whether the decision was within a range of legally correct choices and whether it produced a permissible, legally correct outcome.”” *Id.* (quoting *State v. Worth*, 231 Or App 69, 74, 218 P3d 166 (2009), rev den, 347 Or 718 (2010)).

Likewise, the trial court’s resolution of the jurisdictional facts should be reviewed for abuse of discretion, and the trial court’s finding will not be disturbed unless “the court can affirmatively say there is no evidence to support them.” *See Stelts v. State*, 299 Or 252, 255, 701 P2d 1047 (1985); *see also* Or Const, Art VII (amended), § 3.

The Court also should decline to apply *de novo* review pursuant to ORS 19.415. First, ILWU does not specify the provision under ORS 19.415 to which ILWU claims it is entitled to *de novo* review. Assuming ILWU intends to request *de novo* review pursuant to ORS 19.415(3)(b), ILWU has not “identifi[ed] with particularity the factual findings that [ILWU] seeks to have the court find anew on the record,” as required by ORAP 5.40(8)(b). As explained in ORAP 5.40(8)(c), the Court should “exercise its discretion to try the cause anew on the record *** only in exceptional cases.” This is not such a case.

C. **Argument**

1. **The Trial Court Was Entitled to Consider Matters Outside the Pleadings in Ruling on the Port’s Motion to Dismiss for Lack of Subject Matter Jurisdiction.**

The Port sought to dismiss on jurisdictional grounds each of ILWU’s claims to the extent they sought a particular form of relief—declaratory or injunctive relief compelling the Port to produce public records. Most of the exhibits attached to the declarations submitted in support of the Port’s Motion also were attached to

---

the Port’s Answer, and therefore such evidence was not actually outside the pleadings.

Even so, the trial court is expressly permitted by ORCP 21 A to consider evidence outside the pleadings in deciding whether it has jurisdiction to compel the Port to produce the records. ORCP 21 A states, in relevant part:

“If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits.”

Oregon courts routinely have held that “a court may consider evidence beyond the allegations in the pleadings to determine whether it has subject matter jurisdiction of a case.” Beck v. City of Portland, 202 Or App 360, 365, 122 P3d 131 (2005); Black v. Arizala, 337 Or 250, 265-66, 95 P3d 1109 (2004); Krohn v. Hood River School Dist., 250 Or App 8, 10 n 3, 279 P3d 295 (2012); Munson, 264 Or App at 695. When considering whether to dismiss a claim for lack of subject matter jurisdiction, “the trial court may decide disputed jurisdictional facts based on evidence submitted by the parties, but the court may not, at that stage, decide disputed facts that go to the merits of the underlying claim because to do so would deprive a party of its entitlement to a trial ‘on disputed questions of material fact.’” Munson, 264 Or App at 695 (quoting Black, 337 Or at 265).

Here, the trial court did not abuse its discretion to the extent it considered evidence outside the pleadings in ruling on the Port’s jurisdictional motion. The court’s decision to consider that evidence and to make the factual determination that ILWU’s records requests were not denied also did not interfere with ILWU’s
right to a trial on disputed questions of material fact—namely, whether the Port’s assessment of fees was reasonable. As explained further below, the Port did not move to dismiss ILWU’s claims to the extent they concerned the reasonableness of the Port’s estimated fees, and that issue would have been resolved at trial had ILWU chosen to replead those claims. In any event, ILWU does not argue in its Opening Brief that it was deprived of a trial on disputed questions of material fact, and it cannot remedy that deficiency now. See Hayes Oyster Co. v. Dulcich, 170 Or App 219, 237 n 20, 12 P3d 507 (2000); Powell v. State ex rel. Oregon Dept. of Land Conservation and Develop., 238 Or App 678, 690 n 5, 243 P3d 798 (2010); Beall Transport Equip. Co. v. So. Pac. Transp., 186 Or App 696, 700 n 2, 64 P3d 1193 (“[I]t is not this court’s function to speculate as to what a party’s argument might be. Nor is it our proper function to make or develop a party’s argument when that party has not endeavored to do so itself.”), on recons, 187 Or App 472 (2003); Harnisch v. College of Legal Arts, Inc., 243 Or App 16, 25, 259 P3d 67 (2011) (“[W]e do not make or develop a party’s argument when that party has not endeavored to do so itself***.”).

2. The Trial Court Did Not Err in Determining That There Was No Denial of ILWU’s Public Records Requests.

The trial court’s decision that there was no denial of ILWU’s public records requests also was amply supported by undisputed evidence in the record. The record below was replete with correspondence exchanged by the Port and ILWU that demonstrates that the Port did not deny ILWU the right to inspect public records. During oral argument on the Port’s Motion, ILWU’s counsel admitted that the Port never refused to produce responsive records:

THE COURT: They’ve [the Port] never told you they won’t give you the records, have they?
MR. RUSSELL: They’ve – that’s right.
Tr. 7:9-11.

The record also contained communications from the Port stating that it was processing ILWU’s requests, would produce responsive documents upon receipt of advance payment of the Port’s estimated expenses, offering to allow ILWU to inspect boxes of records that potentially contained responsive documents, and proposing search terms for electronic searches for documents. See Answer, Exs. 2, 4, 8, 11, 16, 18, 19; Pearman Dec., Exs. 4-6, 9, 11, 12, 14, 17, 19, 21, 23, 24. The Port also produced documents responsive to some of ILWU’s requests. See Answer, Exs. 7, 12, 13; Pearman Dec., Exs. 15, 16. ILWU does not dispute the authenticity, accuracy or admissibility of any of those communications, and thus there is no factual dispute as to their contents. Moreover, ILWU does not dispute that the Port is entitled to require advance payment of its reasonable estimated fees and costs before producing any documents. See, e.g., Keating Dec., Exs. 1-3 (establishing that public body may require prepayment of fees before taking action on public records request).

Instead, ILWU argues that there was a “de facto” denial because the Port’s “quoted fees were ‘unreasonable’ within the meaning of the PRL.” App Br at 19. But, as explained below, the plain text and context of the PRL demonstrate that a court does not have jurisdiction to compel production of public records based on a “de facto” denial of a public records request.

Moreover, the reasonableness of the Port’s estimated fees would have been resolved at trial had ILWU chosen to file an amended complaint and proceed to trial. In its complaint, ILWU asserted specific claims concerning the reasonableness of the Port’s fees. For example, ILWU sought “an order declaring defendant’s assessment of fees to be unreasonable, not calculated to compensate [Port] for its actual costs, and unsupported by facts or law.” See Compl., Prayer for Relief ¶ 1. The complaint also sought an order declaring the Port’s “refusal to
waive or reduce unreasonable fees to be unsupported by facts or law” and compelling the Port to waive or substantially reduce those fees. Id. ¶¶ 4, 7. The Port did not move to dismiss those claims for lack of subject matter jurisdiction, and agreed that the court had jurisdiction to resolve those issues. Tr. at 17:12-21. Following the trial court’s ruling on the Port’s Motion, the parties also agreed that the reasonableness of the Port’s calculation of estimated fees was one of the issues to be tried. See SER 24-35, 36-44.

ILWU, however, elected to not proceed with a trial on the reasonableness of the Port’s estimated fees and instead requested entry of judgment dismissing its remaining claims with prejudice to file this appeal, including its claims that the Port’s estimated fees were not reasonably calculated to compensate the Port for its actual costs. Had ILWU filed its amended complaint and had the parties proceeded to trial on the issue of the reasonableness of the estimated fees, ILWU potentially could have obtained a judgment ordering the Port to reduce those fees, which would have removed the alleged “barrier to access” the requested records.7 Instead, by allowing those claims to be dismissed with prejudice, ILWU deprived the trial court of the opportunity to resolve that question, and ILWU cannot complain about it now. See, e.g., Steenson v. Robinson, 236 Or 414, 416-17, 385 P2d 738 (1964) (stating general rule that “a party may not appeal from a judgment which he voluntarily requested” and holding that appeal must be dismissed where trial court’s decision did not preclude recovery on plaintiff’s claim).

Finally, even if the Port’s estimated fees were determined to be unreasonable, the trial court still reasonably could have concluded that the Port had

---

7 Of course, the Port contends that its estimated fees, which were adjusted as the Port attempted to reduce costs, were reasonably calculated to reimburse it for its actual costs given the scope and breadth of ILWU’s requests.
III. RESPONSE TO SECOND ASSIGNMENT OF ERROR

ILWU failed to preserve its second assignment of error. To the extent the error was preserved and the trial court concluded that it had jurisdiction to compel the Port to produce public records only if there was a "denial" of ILWU's public records request, that conclusion is correct and supported by the plain text and context of the PRL.

A. Preservation of Error

ILWU failed to preserve this error. As this Court recently confirmed in State v. Jones, No. 100170FE, 2015 WL 1573372 at *2 (Or App Apr. 8, 2015), an assigned error is not preserved if the party assigning error did not "request an explanation from the trial court" for the decision being challenged on appeal. Here, the trial court expressly stated that it was not deciding whether a "de facto" denial is sufficient to confer jurisdiction on a court to compel a public body to produce records under the PRL. See Tr. 33:14-18. Yet that is precisely what ILWU challenges on appeal. ILWU should have asked the trial court to make a determination of this legal issue and explain its reasoning, but it did not do so. Consistent with Jones, this issue was not preserved.

B. Standard of Review

Even if preserved, ILWU again misconstrues the standard of review for its second assignment of error. Although not clearly explained, ILWU's assigned error appears to present two questions: (1) whether the PRL requires a "denial" of a public records request for a court to have jurisdiction to compel a public body to produce responsive records, or whether a "de facto" denial is sufficient; and (2) whether the trial court correctly determined that there was no "denial" or "de facto" denial of ILWU's requests. The first question concerns the court's
interpretation of the PRL, and therefore is reviewable for legal error. *State v. Spainhower*, 251 Or App 25, 27, 283 P3d 361 (2012). The second question challenges the court’s factual determination that there was no denial or “de facto” denial, which is reviewed for abuse of discretion. See *Stelts*, 299 Or at 255; Or Const, Art VII (amended), § 3.

The Court should decline to apply *de novo* review to the trial court’s factual findings pursuant to ORS 19.415 and ORAP 5.40(8) for the same reasons discussed above in connection with ILWU’s first assignment of error. See discussion *supra* Section II.B. ILWU has not satisfied the requirements of ORS 19.415(3)(b), and this is not the type of exceptional case that warrants such review.

C. *Argument*

1. **The PRL Does Not Recognize a “De Facto” Denial as a Basis for Judicial Review.**

A circuit court’s jurisdiction to review a denial of a right to inspect the public records of a public body (other than a state agency) is governed by ORS 192.460 and ORS 192.490. The plain text and context of those statutes confirm that there must be a denial of a request to inspect public records before a court has jurisdiction to compel a public body to produce responsive records. See *Portland Gen. Elec. v. Bureau of Labor and Indus.*, 317 Or 606, 610, 859 P2d 1143 (1993) (in construing a relevant statute, a court first examines the statute’s text and context); *State v. Gaines*, 346 Or 160, 164, 206 P3d 1042 (2009) (same).

   a. **The Plain Text of ORS 192.460 and 192.490 Requires a Denial of the Right to Inspect or Receive Public Records.**

ORS 192.460(1) provides that “ORS 192.450 applies to the case of a person denied the right to inspect or to receive a copy of any public record of a public body other than a state agency” with certain exceptions. Reading ORS 192.460 together with ORS 192.450, “any person denied the right to inspect or to receive a
copy of any public record of a state agency may petition” the district attorney in the county in which the public body is located to review the public record and determine if it may be withheld from public inspection. ORS 192.450(1) (emphasis added); ORS 192.460(1)(a). If the district attorney denies the petition, then the person seeking disclosure may institute a proceeding in the circuit court for the county in which the public body is located. ORS 192.450(2); ORS 192.460(1)(b).

Webster’s Dictionary defines “deny” (the present tense of “denied”) to mean: “3 a : to turn down or give a negative answer to * * * b : to refuse to grant.” *Webster’s Third New Int’l Dictionary* 603 (2002); *Kohring v. Ballard*, 355 Or 297, 304, 325 P3d 717 (2014) (en banc) (relying on Webster’s in interpreting statute).8 Therefore, a suit may be maintained under ORS 192.460 in the circuit court if (1) the public body denied (or turned down or refused to grant) the requester the right to inspect or receive copies of public records; and (2) the district attorney denied the requester’s petition to review that denial. Conversely, if the public body has not refused the requester the right to inspect or receive copies of public records and if the district attorney has not denied the requester’s petition, judicial review is not available. ILWU’s argument that ORS 192.460(1) does not require a finding of a “formal ‘denial’” of the records request but only the denial of the “legal ‘right to inspect’” records is a distinction without meaning. See App Br at 23. In either case, a denial is required.

It is undisputed—and even admitted by ILWU’s counsel—that the Port has never stated that it would not produce responsive public records. See Tr. 7:9-11. Since the Port has never refused to produce responsive records, it has not denied

---

8 Similarly, “denial” is defined as “1 : refusal to grant, assent to, or sanction : rejection of something requested, claimed, or felt to be due.” *Webster’s Third New Int’l Dictionary* at 602.
ILWU the right to inspect the records, and judicial review is not available under ORS 192.460.\(^9\)

Jurisdiction also is not conferred on the circuit court by ORS 192.490(1). ILWU argues that that statute authorizes a circuit court to order a public body to produce records “improperly withheld.” See App Br at 23. But ILWU ignores the prefatory phrase of ORS 192.490(1), which states that it applies only to “any suit filed under ORS 192.450, 192.460, 192.470 or 192.480.”\(^10\) Thus, as relevant here, ORS 192.490 confers jurisdiction on a circuit court to compel a public body to produce records only in an action maintained under ORS 192.460. If the court

\(^9\) Moreover, the Multnomah County District Attorney did not deny ILWU’s petition for review. Rather, the District Attorney expressly declined to decide ILWU’s appeal on the grounds that it did not have jurisdiction since the Port had not denied ILWU the right to inspect or receive copies of public records. See ER 36. See Morse Bros., Inc. v. Oregon Dept. of Econ. Dev., 103 Or App 619, 621, 798 P2d 719 (1990) (requester failed to satisfy prerequisites for circuit court review when requester filed petition for review before agency acted on public records request and where Attorney General denied petition on basis that it was premature).

\(^10\) The full text of ORS 192.490(1) is as follows:

“In any suit filed under ORS 192.450 [Petition to review denial of right to inspect state public record], 192.460 [Procedure to review denial of right to inspect other public records], 192.470 [Petition form] or 192.480 [Procedure to review denial by elected official of right to inspect public records], the court has jurisdiction to enjoin the public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action. The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.”
does not have jurisdiction to consider an action under ORS 192.460, as is the case here, it does not have jurisdiction to consider it under ORS 192.490(1).

Because, as ILWU concedes, the Port has not refused to produce responsive documents, ILWU’s argument that a court has jurisdiction to compel a public body to produce public records rests entirely on its claim that a “de facto denial” or “improper withholding” of requested records is sufficient and that the trial court erred in concluding otherwise. See App Br at 23, 28. But as discussed above, the plain text of the PRL does not support this “de facto” denial theory.


Other provisions of the PRL confirm that judicial review does not exist under ORS 192.460 or 192.490 based on a “de facto” denial of a public records request. For example, ORS 192.465(1) provides that the failure of the Attorney General or district attorney to grant or deny a petition to require disclosure within seven days “shall be treated as an order denying the petition for the purpose of determining whether a person may institute proceedings for injunctive or declaratory relief under ORS 192.450 or 192.460.” (Emphasis added.) The Oregon legislature could have enacted a similar provision applicable to public bodies, but it has not done so.

In fact, in 2011, the Oregon legislature considered proposed legislation that would have amended the PRL to, inter alia, require the public body to take certain actions within 10 days of receipt of a public records request. Keating Dec., Ex. 4 (Proposed SB 41, §§ 4, 7, 14 (2011)). It further proposed that a public body’s failure to provide a sufficient response within the prescribed time periods “shall be deemed a denial of the request and the requester may petition for review of the denial as provided in ORS 192.450 or 192.460.” Proposed SB 41, § 16. The bill was debated in committees, amendments were proposed, and ultimately, it was returned to the Senate President’s desk for referral to the Rules Committee and
remained in committee upon adjournment of the 2011 legislative session. If the PRL allowed for “de facto” denials, such a revision would not be necessary.
Moreover, the fact that the bill was proposed and did not pass indicates that the law currently in effect does not allow for jurisdiction to be conferred based on a “de facto” denial.

c. **Davis and In Defense of Animals Are Readily Distinguishable and Do Not Support ILWU’s Position.**

ILWU relies on two decisions from this Court to support its argument that a court has jurisdiction to compel a public body to produce public records absent an actual “denial” of a records request: *Davis v. Walker*, 108 Or App 128, 814 P2d 547 (1991), and *In Defense of Animals*, 199 Or App 160. Both cases, however, concerned the reasonableness of fees being charged by the public bodies; neither decision addressed whether a circuit court has jurisdiction to compel a public body to produce public records based on a “de facto” denial arising from alleged unreasonable fees. ILWU’s reliance on them is misplaced.

In *Davis*, the plaintiff appealed “an order of the trial court denying her request for injunctive relief” against the Portland Police Bureau in an action in which she had sought “an injunction ordering them to disclose public records, to provide her an opportunity to inspect and copy the original records and to prohibit them from charging fees in excess of the actual cost for copying the record.” 108 Or App at 130. As relevant here, the plaintiff assigned error to the trial court’s findings that (1) the fees were reasonable and necessary to reimburse defendant for its actual cost in making records available; and (2) the Bureau sufficiently complied with the PRL and plaintiff was not entitled to attorney fees. *Id.* at 131, 133.

On the first issue, this Court held that the Bureau had not “carried its burden to show that the fees are reasonably calculated to reimburse it for its actual costs.” *Id.* at 133 (emphasis omitted). On the second issue, this Court held that attorney
fees should have been awarded because the Bureau did not comply with the PRL by (1) failing to produce responsive records within seven days after the district attorney ordered disclosure as required by ORS 192.490(3); and (2) improperly refusing to disclose records on the grounds that they were exempt under ORS 192.502(2). *Id.* at 133-34. There are no similar issues presented here. At no point did the *Davis* court rule that the defendant had “improperly withheld” public records by charging unreasonable fees or that the Police Bureau constructively denied a records request, as argued by ILWU here. *See* App Br at 25.

*In Defense of Animals* also does not support ILWU’s position. There, this Court held that a circuit court has jurisdiction to review the reasonableness of a public body’s estimated costs of responding to a request. *See* 199 Or App at 182-83; *see also id.* at 167 (noting that the trial court determined that it “lacked subject matter jurisdiction over the fee issue” and that even if it had jurisdiction, OHSU complied with the law, which were rulings challenged on appeal (emphasis added)). It did not, however, hold that a circuit court has jurisdiction to compel a public body to produce public records when it had not denied such a request.\(^\text{11}\) Nor did it hold that a public body constructively, or “de facto,” denies the right to inspect public records by giving a fee estimate that the requester alleges is unreasonable. The court also did not compel OHSU to produce records; rather, it determined that, based on the evidence presented below, the fees assessed by

---

\(^{11}\) Moreover, in *In Defense of Animals*, OHSU refused to allow the plaintiff to inspect records on the grounds that the documents contained information subject to exemptions and therefore required redaction, and the court considered the applicability of the exemptions claimed. *See* 199 Or App at 166, 179. Here, in contrast, the evidence established that, to date, the Port has (1) not asserted that exemptions apply to any of the public records requested by ILWU; (2) agreed to produce the records at issue upon receipt of advance payment; and (3) offered to allow ILWU to conduct its own inspection of the 195 off-site boxes to reduce costs. ER 18, 31.
OHSU were not reasonable and remanded for further proceedings “pertaining to that issue.” *Id.* at 186.

Accordingly, neither *Davis* nor *In Defense of Animals* supports a finding that a court has jurisdiction to compel a public body to produce records based on a “de facto” denial.

2. **Even if Judicial Review Is Available Based on a “De Facto” Denial, the Trial Court Properly Dismissed ILWU’s Claims Seeking to Compel the Port to Produce Responsive Non-Exempt Public Records.**

As previously explained, the evidence was undisputed that the Port (1) never told ILWU that it would not produce public records; and (2) affirmed that it would produce documents responsive to ILWU’s remaining requests upon ILWU’s advance payment of the Port’s estimated costs, which ILWU does not dispute the Port may require. *See* discussion *supra* at Section II.C.2.

Given the evidence in the record, the trial court did not abuse its discretion in determining that ILWU was not denied the right to inspect public records, notwithstanding ILWU’s allegations that the Port’s estimated fees were unreasonable. Even if reviewed *de novo*, the trial court’s decision should be affirmed. Moreover, ILWU waived its ability to have the reasonableness of the Port’s estimated fees resolved because it elected to not file an amended complaint and instead allowed its claims concerning that issue to be dismissed with prejudice.\(^{12}\)

---

\(^{12}\) In footnote 5 of its Opening Brief, ILWU states that the *In Defense of Animals* court “alternatively found jurisdiction to consider the ‘reasonableness’ of stated fees” under ORS 28.010, and that “ILWU asserts the same alternative grounds here.” It is unclear whether ILWU is contending that this Court should find jurisdiction to compel the Port to produce records under ORS 28.010. If that is what ILWU is arguing, then the Court should decline to do so for several reasons. First, none of ILWU’s assignments of error concerns ORS 28.010, and ILWU has made no attempt to explain how judicial review would be available under that statute. This Court should not make ILWU’s argument for it, *Beall* (continued . . .)
IV. CONCLUSION

For the foregoing reasons, the Port respectfully requests that this Court affirm the judgment of the trial court.

DATED: April 17, 2015.

STOEL RIVES LLP

/s/ Reilley D. Keating
AMY EDWARDS, OSB 012492
REILLEY D. KEATING, OSB 073762
Attorneys for Respondent Port of Portland

(...) continued

*Transport*, 186 Or App at 700-01 n 2; *Harnisch*, 243 Or App at 25, and ILWU cannot remedy this failure by attempting to develop the argument in its reply brief, *Hayes Oyster*, 170 Or App at 237 n 20; *Powell*, 238 Or App at 690 n 5. Second, judicial review of a denial of the right to inspect public records is governed exclusively by the PRL since the right to inspect or copy public records is created solely by statute and did not exist at common law. *See Bend Publishing Co. v. Haner*, 118 Or 105, 107, 244 P 868 (1926) (stating that “[a]t common law no person is entitled to inspect records” (internal quotation marks and citation omitted)); *MacEwan v. Holm*, 226 Or 27, 359 P2d 413, 417 (1961); *State ex rel. KOIN-TV v. Olsen*, 300 Or 392, 711 P2d 966 (1985); *see also SAIF v. Anderson*, 124 Or App 651, 654, 863 P2d 509 (1993) (in determining “the exclusivity of an administrative remedy that has been provided for statutory violation,” “[t]he threshold determination” is whether the claim predates the statute or derives therefrom”), *rev’d on other grounds*, 321 Or 139 (1995).
Chapter 5

Right to Rest: What Does It Mean?

GLENN KLEIN
Eugene City Attorney’s Office
Eugene, Oregon

DAVID LANDRUM
Portland Office of City Attorney
Portland, Oregon

Contents

List of Cases Showing the Evolution of Constitutional Law with Respect to Municipal Regulation and Management of Homeless Camping on the West Coast ........................................... 5–1
Opinion and Order in O’Callaghan v. City of Portland, et al. ............................................. 5–3
Opinion Ruling on the Criminal Defendant’s Motion to Dismiss in State v. Barrett ............ 5–19
U.S. DOJ’s Statement of Interest in Bell v. City of Boise ..................................................... 5–39
Memorandum Decision and Order in Martin and Anderson v. City of Boise ....................... 5–57
Links to Selected News Articles Discussing Homeless Camps ........................................ 5–77
“Ending Homelessness for People Living in Encampments” ............................................. 5–79
List of Cases Showing the Evolution of Constitutional Law with Respect to Municipal Regulation and Management of Homeless Camping on the West Coast

a. Jones v. City of Los Angeles; 505 444 F3d 1118 (9th Cir. 2006) (incl. dissent by Judge Rhymer); dismissed as moot and vacated, 505 F3d 1006 (9th Cir. 2007)


e. Lavan v. City of Los Angeles, 693 F3d 1022 (9th Cir. 2012)

f. Bell, et al, v. City of Boise, 709 F3d 890 (i9th Cir. 2013) (District Court grant of Summary Judgment to Defendant reversed & remanded)


h. Desertrain, et al, v. City of Los Angeles, et al; 754 F3d 1147 (9th Cir. 2014) (car camping)

i. Bell, et al, v. City of Boise, 2104 WL 3547224 (D.Idaho 2014) (District Court ruling on Defense Motion to Strike & Dismiss, granted in part and denied in part)

j. City of Des Moines v. Webster, 861 N.W.2d 878 (Iowa Court of Appeals 2014) (City appealed trial court denial of cert and upholding ruling for homeless individuals/defendants; Court of Appeals reversed & remanded)

k. State v. Tegland, 269 Or.App. 1 (2015) (Police Officers did not violate state constitution or Fourth Amendment by lifting the tarp on criminal defendant’s makeshift shelter erected on public property, and observing defendant smoking methamphetamine)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL O'CALLAGHAN

v.

CITY OF PORTLAND; MULTNOMAH COUNTY SHERIFF; VIESTSI DE COMMUNITY COURT; CITY OF PORTLAND HEARINGS OFFICER GREGORY FRANK; DIRECTOR KURT NELSON, CITY PARKS; MARK PALMITER, PORTLAND POLICE OFFICER JOHN DOE

Defendants.

MICHAEL O'CALLAGHAN
P.O. Box 3321
Portland, OR 97208
(503) 960-3787

Plaintiff, Pro Se

JAMES H. VAN DYKE

1 - OPINION AND ORDER
Chapter 5—Right to Rest: What Does It Mean?

Brown, J.

This matter comes before the Court on Defendant Multnomah County Sheriff’s Motion (#101) to Dismiss Plaintiff’s Second Amended Complaint Pursuant to FRCP 12(b)(1) and (6) and Plaintiff’s Motion (#108) to Vacate Sentence and Judgment.

For the reasons that follow, the Court GRANTS Defendant’s Motion and DENIES Plaintiff’s Motion.

BACKGROUND

On February 3, 2012, Plaintiff Michael O’Callaghan filed a pro se Complaint pursuant to 42 U.S.C. § 1983 against the City of Portland, the Multnomah County Sheriff, Westside Community Court,
Judge Evans, Judge Blank, Gregory Frank, Kurt Nelson, Portland Police Officer Palmitem, and three John Doe Portland police officers. Plaintiff's Complaint consisted of a lengthy narration of numerous contacts that Plaintiff had with Portland police officers and various legal proceedings from May 2009 through December 2011. Plaintiff did not identify the specific state or federal laws or provisions of the United States Constitution that Defendants allegedly violated.

On June 12, 2012, Defendant Multnomah County Sheriff filed a Motion to Dismiss Plaintiff's claims against him.

On January 16, 2013, the Court issued an Opinion and Order granting Multnomah County Sheriff's Motion to Dismiss on the grounds that (1) to the extent that Plaintiff sought to allege state-law claims against the Multnomah County Sheriff, Plaintiff failed to allege that he provided timely notice as required by the Oregon Tort Claims Act (OTCA); (2) to the extent that Plaintiff alleged state-law claims against the Multnomah County Sheriff, the proper Defendant would have been Multnomah County; and (3) Plaintiff failed in his Complaint to set out any factual allegations specifically related to the Multnomah County Sheriff. The Court granted Plaintiff leave to file an amended complaint to cure the deficiencies as to his claims against the Multnomah County Sheriff.

On February 6, 2013, Plaintiff filed a Motion to Amend,
which was a narrative of assorted allegations against "parks employees," unnamed Multnomah County Sheriff's deputies, Portland City Parks Director Kurt Nelson, and "PPB Palmier." Plaintiff asserted (1) various Notices of Compliance allegedly issued to Plaintiff constituted bills of attainder; (2) Plaintiff was deprived of property in violation of his right to due process; and (3) the Westside Community Court "is nothing more than a free slave system for the Portland business alliance to clean up downtown & the Pearl [and] it preys on the homeless for livability crimes with no authority of law, in secret."

On February 27, 2013, the Court construed Plaintiff's Motion to Amend as Plaintiff's Amended Complaint.

On March 13, 2013, the Multnomah County Sheriff filed a Motion to Dismiss Plaintiff's claims against him on the grounds that Plaintiff failed to provide him with Tort Claim Notice within 180 days of Plaintiff's alleged injury and Plaintiff fails to allege specific facts that state a claim against him.

On July 11, 2013, the Court issued an Opinion and Order in which it granted the Multnomah County Sheriff's Motion to Dismiss. The Court noted it had previously advised Plaintiff as to the notice requirement of the OTCA, but Plaintiff again failed to allege that he provided the Multnomah County Sheriff with notice as required under the OTCA. The Court, therefore, dismissed Plaintiff's state-law claims against the Multnomah
County Sheriff without leave to replead. The Court also noted Plaintiff's Amended Complaint did not contain any factual allegations specifically related to acts of the Multnomah County Sheriff with respect to Plaintiff's claims for violation of his rights under the Fourth and Fifth Amendments and/or § 1981. Plaintiff, however, alleged in his Response to the Multnomah County Sheriff's Motion to Dismiss that on February 7, 2011, unnamed Deputy Sheriffs "directed a work crew to destroy the plaintiffs' home and all its contents" and jailed Plaintiff without due process in violation of his rights under the Fourth and Fifth Amendments to the United States Constitution and possibly in violation of 42 U.S.C. § 1981. Nevertheless, Plaintiff did not set out with particularity in his Amended Complaint that such acts were directed or conducted by Multnomah County Sheriff's Deputies. The Court, therefore, permitted Plaintiff to file a Second Amended Complaint on the grounds that Plaintiff is proceeding pro se and might be able to state a claim with the direction provided by the Court in its July 11, 2013, Opinion and Order. The Court, however, noted in the Order that it was permitting Plaintiff to file a Second Amended Complaint for the sole purpose of amending his allegations and claims against Multnomah County for violation of his rights under the Fourth and Fifth Amendments and/or § 1981 arising from the alleged actions by Multnomah County Sheriff's Deputies on February 2, 2011. Plaintiff is not permitted to add further claims, facts, or allegations to his Second Amended Complaint against Multnomah County Sheriff.
beyond those enumerated above. If Plaintiff adds additional claims or allegations against Multnomah County in his Second Amended Complaint, those claims and allegations will be stricken and the Court will not consider them.

Emphasis in original.

On July 23, 2013, Plaintiff filed a Second Amended Complaint in which he alleges, among other things, that the Multnomah County Sheriff violated his rights under the Fourth and Fifth Amendments to the United States Constitution.

On August 12, 2013, the Multnomah County Sheriff filed a Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to FRCP 12(b)(1) and (6). The Court took the Sheriff's Motion under advisement on September 16, 2013.

On October 21, 2013, Plaintiff filed a Motion to Vacate Sentence and Judgment.

MULTNOMAH COUNTY SHERIFF'S MOTION (#101) TO DISMISS

The Multnomah County Sheriff moves to dismiss Plaintiff's claims against him on the ground that Plaintiff fails to state a claim.

I. Standards

Although the Multnomah County Sheriff titles his Motion as one to dismiss pursuant to Rule 12(b)(1) and (6), he does not make any argument related to this Court's jurisdiction nor does such a legal argument appear to apply to the claims alleged against the Sheriff. Accordingly, the Court addresses only the Sheriff's allegation that Plaintiff has failed to state a claim against him.

6 - OPINION AND ORDER
To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” [Bell Atlantic v. Twombly, 550 U.S. 554,] 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. at 556. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. at 557, 127 S. Ct. 1955 (brackets omitted).

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). See also Bell Atlantic, 550 U.S. at 555-56. The court must accept as true the allegations in the complaint and construe them in favor of the plaintiff. Din v. Kerry, 718 F.3d 856, 859 (9th Cir. 2013).

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012)(citation omitted). A court, however, "may consider a writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)(citation omitted).

A pro se plaintiff's complaint "must be held to less stringent standards than formal pleadings drafted by lawyers."
Erickson v. Pardus, 551 U.S. 89, 94 (2007). Thus, the Court has an "obligation [when] the petitioner is pro se . . . to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." Akhtar v. Mesa, 698 F.3d at 1212 (quotation omitted). "Before dismissing a pro se complaint the . . . court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." Id. (quotation omitted). "A district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Id. (quotation omitted).

II. Discussion

Plaintiff alleges in his Second Amended Complaint that on February 3, 2011, Portland Police Officer Palmiter and Portland Parks Ranger Supervisor Kurt Nelson came to the place that Plaintiff was living/camping and gave him a Notice of an illegal campground. The Notice provided:

It is the policy of the City of Portland to provide 24-hour notice before removing shelters erected at illegal campgrounds. All other illegal campgrounds will be subject to immediate cleaning and removal.

Shelter is available in Portland through several nonprofit service agencies. For more information about shelter and other services, contact Transition Projects, 435 NW Glisan, telephone 823-4934.
Second Am. Compl., Ex. 1 at 1. Plaintiff alleges Officer Palmiter and a Multnomah County Sheriff's Deputy came to Plaintiff's "sidewalk site" on February 7, 2011, and "directed the work crew to destroy [Plaintiff's] home and personal property contained therewithin. The property was taken to an unknown and unretrievable location." Second Am. Compl. at 1-2. Plaintiff alleges the Sheriff's Deputy did not "present [Plaintiff] with a chargeable instrument . . . [or] a search warrant." Plaintiff alleges the removal of his property and the failure to provide him with a search warrant or "chargeable instrument" violated his rights under the Fourth and Fifth Amendments to the United States Constitution.

The Fourth Amendment prohibits only those searches and seizures that are "unreasonable." The Fifth Amendment, applied to the states through the Fourteenth Amendment, provides "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of laws." Due process requires notice and the opportunity to be heard. United States v. Shanholtzer, 492 F. App'x 799, 801 (9th Cir. 2012)(citation omitted).

Oregon Revised Statute § 203.077 requires all municipalities and counties to develop policies for removal of homeless camps or
camping on public property, including parks. Oregon Revised Statute § 203.079(1) requires policies adopted by municipalities and counties for the removal of those camping on public property to comply with the requirements of due process by providing the following:

(a) Prior to removing homeless individuals from an established camping site, law enforcement officials shall post a notice, written in English and Spanish, 24 hours in advance.

* * *

(d) All unclaimed personal property shall be given to law enforcement officials whether 24-hour notice is required or not. The property shall be stored for a minimum of 30 days during which it will be reasonably available to any individual claiming ownership. Any personal property that remains unclaimed for 30 days may be disposed of. For purposes of this paragraph, “personal property” means any item that is reasonably recognizable as belonging to a person and that has apparent utility. Items that have no apparent utility or are in an insanitary condition may be immediately discarded upon removal of the homeless individuals from the camping site. Weapons, drug paraphernalia and items that appear to be either stolen or evidence of a crime shall be given to law enforcement officials.

As noted, Plaintiff alleges in his Second Amended Complaint that he was provided with Notice of an illegal campground more than 24 hours before authorities removed his property from the public property on which he was illegally camping. The Notice attached to Plaintiff's Second Amended Complaint complies with the requirements of Oregon Revised Statute § 203.079: It advised Plaintiff that he was camping illegally on public property,
informed him about the availability of shelter and other services, and advised how to retrieve his property that was removed by officials. The Notice also meets the due-process notice requirement of the Fourteenth Amendment. In addition, provision of the notice more than 24 hours in advance of the removal of Plaintiff's property satisfies the reasonableness requirement of the Fourth Amendment. Finally, the storage of Plaintiff's removed property for 30 days and a process for Plaintiff to reclaim his removed property meet the requirements of due process.

Plaintiff does not allege he attempted to call the telephone number provided on the Notice to reclaim his property or that he called and was in some way barred from reclaiming his property. In addition, Plaintiff does not point to, nor could this Court find, any case in which a court held seizure and removal of property from an illegal campsite after 24-hour advance notice and an opportunity to reclaim the property violated a plaintiff's rights under the Fourth or Fifth Amendments. See, e.g., Todd v. City of Portland, No. 3:12-CV-2239-JE, 2013 WL 1562965, at *3 (D. Or. Mar. 20, 2013) ("Plaintiff's allegation that the 'Parks Department left an eviction type notice' at his camp in Forest Park is insufficient to assert constitutional violations by the City of Portland."). Cf. Lavan v. City of Los Angeles, 693 F.3d 1022, 1032-33 (9th Cir. 2012) (municipality's seizure and
immediate destruction of homeless persons' unowned property on public sidewalks without prior notice and without the opportunity for them to retrieve their property violated Fourth and Fourteenth Amendments).

The Court concludes on this record that Plaintiff has not stated a claim against the Multnomah County Sheriff for violation of his rights under the Fourth or Fifth Amendment, and, therefore, the Court grants the Multnomah County Sheriff's Motion to Dismiss Plaintiff's claims against him.

PLAINTIFF'S MOTION (#108) TO VACATE SENTENCE AND JUDGMENT

In his Motion to Vacate Sentence and Judgment Plaintiff alleges:

On 2-10-11 the plaintiff was arraigned [sic] in the Multnomah County Court for Criminal Mischief II. At the time arrainment [sic] [Plaintiff] requested a trial by jury in writing. That was denied by the court.

* * *

On October 3, 2013, the State of Oregon issued its opinion in State v. Benoit CC 111051946 CV 5060858 affirming the right to a jury trial on a criminal charge.

2 Although Defendants' response to Plaintiff's Motion is not due until November 7, 2013, the Court may address jurisdiction sua sponte "[w]hen ever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3). See also O'Neal v. Price, 531 F.3d 1146, 1154 (9th Cir. 2008)(court may dismiss sua sponte matters over which it does not have jurisdiction).
Thus the plaintiff prays in light of this decision that this court vacate the sentence and judgment in case # 110140807.

Plaintiff’s claim is barred by the Rooker-Feldman Doctrine. Under the Rooker-Feldman Doctrine, federal district courts lack jurisdiction over cases in which a plaintiff seeks review of state-court judgments. AmerisourceBergen Corp. v. Roden, 495 F.3d 1143, 1153 (9th Cir. 2007) (citing Henrichs v. Valley View Dev., 474 F.3d 609, 613 (9th Cir. 2007)). The doctrine bars a federal court's direct review of issues actually decided by state courts as well as "claim[s] that 'amount[] to nothing more than an impermissible collateral attack on prior state court decisions'" and are "inextricably intertwined with the forbidden appeal." Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit, 453 F.3d 1160, 1166 (9th Cir. 2006) (quoting Branson v. Nott, 62 F.3d 287, 291 (9th Cir. 1995), and citing Noel v. Hall, 341 F.3d 1148, 1157 (9th Cir. 2003)).

The Rooker-Feldman Doctrine applies even when the challenge to the state-court decision involves federal constitutional issues, including those anchored in federally-protected rights to due process and equal protection. Bates v. Jones, 131 F.3d 843, 856 (9th Cir. 1997) (citing Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986)).

Rooker-Feldman is a jurisdictional doctrine rather than a res judicata doctrine. Elwood v. Drescher, 456 F.3d 943, 948.
Chapter 5—Right to Rest: What Does It Mean?

612.0x792.0

[183x754]

Chapter 5—Right to Rest: What Does It Mean?

[0x0] Chapter 5—Right to Rest: What Does It Mean?

[36x32]

Government Law 2015—A Brave New World

[556x32] 5–16

[60x726]

(9th Cir. 2006). In Robinson v. Ariyoshi the court explained:

[T]he res judicata requirement of full and fair opportunity to litigate and the Feldman 'inextricably intertwined' barrier are two sides of the same coin. Under the rubric of either 'jurisdiction' or 'res judicata,' the crux of the question is whether there has already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible 'appeal' from the state court decision. If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so 'inextricably intertwined' that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

753 F.2d 1468, 1472 (9th Cir. 1985), vacated on other grounds by 477 U.S. 902 (1986).

Plaintiff requests this Court to review and to reverse the decision of the Multnomah County Circuit Court, and, therefore, the Rooker-Feldman Doctrine applies. Thus, the Court lacks subject-matter jurisdiction over Plaintiff's request to vacate his state judgment and sentence. Accordingly, the Court denies Plaintiff's Motion to Vacate Sentence and Judgment.

CONCLUSION

For these reasons, the Court GRANTS Defendant Multnomah County Sheriff's Motion (#101) to Dismiss Plaintiff's Second

14 - OPINION AND ORDER

Government Law 2015—A Brave New World 5–16
Amended Complaint Pursuant to FRCP 12(b)(1) and (6), **Dismisses** Plaintiff's claims against the Multnomah County Sheriff without leave to amend, and **Denies** Plaintiff's Motion (#108) to Vacate Sentence and Judgment.

This matter will proceed only as to Plaintiff's claims against Defendants City of Portland, Kurt Nelson, Gregory Frank, and Mark Palminter.

**It is so ordered.**

DATED this 29th day of October, 2013.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge
IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

) Case Nos. 14CR10631
) 14CR14443
) 14CR16019
) 14CR17841
) 14CR20088
) 14CR24192
) 14CR20918
) 14CR20285
) 14CR20924
) 14CR32814
) 15CR00103
) 14VI04508
)

STATE OF OREGON,

Plaintiff,

v.

ALEXANDRA CHANEL BARRETT,

Defendant.

INTRODUCTION

Defendant was arrested on multiple occasions and charged with several offenses, including unlawful camping in the City of Portland (City) in violation of Portland City Code (PCC) 14A.50.020 (the Ordinance).\(^1\) Defendant has filed a demurrer/motion to dismiss the charges, contending that the Ordinance, as applied to defendant, violates Article I, section 16, of the Oregon Constitution; the Eighth Amendment to the United States Constitution; and the Fourteenth Amendment’s Equal Protection Clause.

\(^1\) The Ordinance provides that it is “unlawful for any person to camp in or upon public property or public right of way” unless otherwise authorized by law. PCC 14A.50.020B. “To camp” means “to set up, or remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.” PCC 14A.50.20A(1). A “campsite” is defined as “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 the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.” PCC 14A.50.020A(2). A violation of the Ordinance is punishable by a fine of not more than $100, imprisonment of not more than 30 days, or both. PCC 14A.50.020C.
Defendant contends that the Ordinance violates the constitutional prohibitions against cruel and unusual punishment because it punishes her for the status of being homeless. According to defendant, such punishment violates Article I, section 16, of the Oregon Constitution and the Eighth Amendment under Robinson v. California, 370 U.S. 660 (1962), and Powell v. Texas, 392 U.S. 514 (1968). Defendant contends that strict scrutiny applies to her Equal Protection challenge because the Ordinance violates defendant’s fundamental rights to travel and assemble. Finally, defendant contends that the Ordinance is unconstitutionally vague and overbroad.

For the reasons explained in this opinion, the court concludes as follows: (1) applying the Ordinance to defendant does not violate the prohibitions on cruel and unusual punishment in Article I, section 16, of the Oregon Constitution and in the Eighth Amendment; (2) the Ordinance does not violate the Equal Protection Clause because it is rationally related to legitimate governmental interests; (3) strict scrutiny does not apply because the Ordinance does not infringe upon defendant’s fundamental rights to travel or assemble; and (4) the Ordinance is not unconstitutionally vague or overbroad. Accordingly, defendant’s demurrer/motion to dismiss is DENIED.

FACTS

The parties stipulated to facts relating to defendant’s arrests for purposes of this motion. The stipulated facts are set forth in defendant’s reply memorandum at pp. 2-5. The charges at issue stem from defendant’s arrests on the following dates: May 23, 2014; June 20, 2014; July 24, 2014; August 7, 2014; August 19, 2014; August 20, 2014; August 22, 2014; September 9, 2014; October 9, 2014; December 12, 2014; and December 28, 2014.2 Many of the arrests were

---

2 The stipulated facts include facts relating to citations on December 12, 2014 that are at issue in case nos. 14VI04508 and 15CR00103, and an arrest on December 28, 2014 that is at issue in case no. 14CR32814. Those
for camping in Chapman Square in downtown Portland. The State does not dispute that
defendant was homeless at the time of these arrests.

**DISCUSSION AND ANALYSIS**

*Cruel and Unusual Punishment—Eighth Amendment and Article I, section 16*

Defendant contends that the Ordinance violates the prohibition on cruel and unusual
punishment in Article I, section 16, of the Oregon Constitution and the Eighth Amendment.
Defendant does not present separate arguments under the state and federal constitutions, relying
instead on the Supreme Court’s decisions in *Robinson* and *Powell* in support of her arguments
under both constitutional provisions.

In *Robinson*, the Supreme Court reversed a conviction for violating a California statute
that made it a crime for a person to be addicted to the use of narcotics. The Court observed that
the statute did not punish the use of narcotics, the purchase, sale or possession of narcotics, or
any antisocial or disorderly behavior resulting from the use of narcotics. Nor did the law purport
to provide or require medical treatment. Rather, the statute made the "status" of narcotic
addiction a criminal offense, for which the offender may be prosecuted at any time before he
reforms. As a result, under this law, a person could be continuously guilty of an offense, whether
or not he had ever used or possessed any narcotics in California, and whether or not he had been
guilty of any other criminal conduct in the state. The Court noted that narcotic addiction was "an
illness which may be contracted innocently or involuntarily," and held that "a state law which
imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic
drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual

cases have not been joined with the present cases, but the parties stipulated that the court’s ruling on defendant’s
demurrer should apply to those cases as well.
In *Powell*, the successor case to *Robinson*, the Supreme Court affirmed a conviction for being intoxicated in public. Justice Marshall's plurality opinion explained that *Robinson* did not apply because defendant Powell

"was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The 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. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper.'"


"*Robinson* so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."

_id_. at 553. The plurality also rejected the dissent's interpretation of *Robinson* as precluding the imposition of criminal penalties upon a person for being in a condition he is powerless to change. Rather,

"the entire thrust of *Robinson*’s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some _actus reus_. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’ or ‘occasioned by a compulsion.’"

_id_. at 553.

Justice White concurred in the judgment. In his view, if it could not be a crime to have an "irresistible compulsion to use narcotics" in *Robinson*, then an addict’s use of narcotics would
also be beyond the reach of the criminal law. Id. at 548-49 (White, J., concurring in the result).

It followed, according to Justice White, that the statute under which Powell was convicted should not be applied to a chronic alcoholic who has a compulsion to drink and nowhere but a public place in which to do so. "As applied to [such alcoholics] 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. However, Justice White did not believe that Powell’s conviction violated the Constitution because Powell made no showing that he was unable to stay off the streets on the night he was arrested. Id. at 552-53.

The Powell dissent opined that a criminal penalty could not be imposed on a person suffering the disease of chronic alcoholism for a condition— being in a state of intoxication in public— which is characteristic of his disease. Id. at 559 (Fortas, J., dissenting). Contrary to the plurality, the dissent read Robinson to mean that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." Id. at 567. Although the statute in Powell differed from the statute in Robinson by covering more than mere status (being intoxicated and being found in a public place while in that condition), the dissent nevertheless found the same constitutional defect present as in both cases because the defendant was accused of being "in a condition which he had no capacity to change or avoid." Id. at 567-68.

In Ingraham v. Wright, 430 US 651 (1977), the Supreme Court explained how Robinson fits within the Court’s analysis of the Cruel and Unusual Punishment Clause. Ingraham involved the use of corporal punishment in public schools. The Court first noted that the Eighth Amendment’s proscription against cruel and unusual punishment "confirms that it was designed to protect those convicted of crimes." Id. at 664. In other words, "the primary purpose of [the clause] has always been considered, and properly so, to be directed at the method or kind of
punishment imposed for the violation of criminal statutes." Id. at 667 (quoting Powell, 392 US at 531-32 (Marshall, J., plurality). The Court concluded that its Eighth Amendment cases

"recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways. First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."

Id. at 667 (citations omitted). The Court stated that the third limitation— the limitation recognized in Robinson— was "to be applied sparingly." Id.

Oregon appellate courts have addressed Robinson and the substantive limits the Eighth Amendment imposes on "what can be made criminal and punished as such" in only a few reported cases. In State v. Caughey, 89 Or App 605 (1988), the trial court imposed an enhanced sentence based on its finding that defendant suffered from a severe personality disorder that gave him a propensity toward criminal conduct, making him a dangerous offender within the meaning of Oregon’s dangerous offender statute, ORS 161.725. On appeal, defendant argued that imposition of an enhanced sentence "punishes the ‘status’ of suffering a severe personality disorder and thereby violates the prohibition against cruel and unusual punishment contained in Article I, section 16, and the Eighth Amendment." Id. at 607, citing Robinson, 370 US 660.

The Court of Appeals disagreed, concluding that the statute "does not punish a person for having a severe personality disorder." Id. at 607. The court explained that the statute "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. Thus, the court concluded, the Oregon legislature "could properly determine that, because he is less likely to be rehabilitated during incarceration so that he can be safely released into society, increased incarceration time is necessary for the protection of the public." Id.
In State v. James, 3 Or App 539 (1970), the Court of Appeals rejected defendant’s contention that his 10-year prison sentence for unlawful possession of heroin constituted cruel and unusual punishment under Robinson. The court concluded: “Robinson is not controlling here, because the crime of which defendant stands convicted is not the ‘status crime’ of being a narcotics addict, but the crime of unlawful possession of heroin.” Id. at 540.

No reported Oregon appellate decision addresses whether the Ordinance, or any analogous camping ordinance, violates the substantive limits the Eighth Amendment places on what is punishable as a crime.3

The California Supreme Court addressed the facial validity of the City of Santa Ana’s anti-camping ordinance in Tobe v. City of Santa Ana, 892 P2d 1145 (Cal 1995).4 In that case, the court held that the anti-camping ordinance was facially valid, but declined to decide whether and how it might be unconstitutionally applied.5 The court would not assume that the ordinance would be enforced “against persons who have no alternative to ‘camping’ or placing camp paraphernalia on public property.” Id. at 1155, n. 8. The state assured the court that “a necessity defense might be available to ‘truly homeless’ persons and that prosecutorial discretion would be exercised.” Id.

After Tobe, the California Court of Appeals held in In re Eichorn, 69 Cal App 4th 382, 81 Cal Rptr 2d 535 (1998), that a defendant charged with violating the City of Santa Ana’s anti-

---

3 Defendant cites Judge Gallagher’s opinion in State v. Wicks, Multnomah County Circuit Court Case Nos. Z711742 and Z711743 (Sept. 27, 2000). Judge Gallagher’s opinion is not binding on this court. With respect, this court disagrees with and declines to follow that opinion.

4 Santa Ana’s ordinance stated that it was “unlawful for any person to camp, occupy camp facilities or use camp paraphernalia” in any street, public parking lot, or public area, improved or unimproved. Tobe, 892 P2d at 1150 (quoting the ordinance).

5 The California Supreme Court noted the distinction between a “status” that cannot be punished under the Eighth Amendment and a “condition” that causes conduct that is punishable. 892 P2d at 1166. The court reversed the California Court of Appeals’ ruling that the ordinance was unconstitutional on its face because “it is far from clear that none [of the defendants] had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.” Id. at 1167.
camping ordinance is entitled to raise a “necessity” defense where there was evidence that defendant camped in public “because his alternatives were inadequate and economic forces were primarily to blame for his predicament.” 69 Cal App 4th at 390. The court concluded that the ordinance, as applied, did not violate the Eighth Amendment under Robinson because the defendant could raise a necessity defense. Id. at 391.6

Several conclusions follow from the above survey of pertinent case law. The Ordinance, on its face, does not impermissibly punish someone for their homeless status. For a statue or ordinance to be facially unconstitutional, “it must be unconstitutional in all circumstances, i.e., there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster.” State v. Sutherland, 329 Or 359, 365 (1999). See also State v. Christian, 354 Or 22, 40 (2013) (stating that court’s analysis of a facial challenge to an ordinance “is limited to whether the ordinance is capable of constitutional application in any circumstance”).

Here, the Ordinance punishments conduct—camping on public property— not the status of being homeless. On its face, it can be applied in a constitutional manner. For example, the Ordinance prohibits people who are not homeless from camping on public property. Thus, it does not, on its face, impermissibly punish individuals based on their homeless status.

Whether the Ordinance, as applied, impermissibly criminalizes conduct that is the unavoidable consequence of being involuntarily homeless is a more difficult question. A majority of the Supreme Court has never adopted the views of the Powell dissenters or Justice White’s concurrence. Instead, the Court subsequently noted that the Eighth Amendment’s limitation on punishing “status” is “to be applied sparingly.” Ingraham, 430 US at 667. The

6 The “necessity” defense under California law is virtually identical to the “choice of evils” defense available under Oregon law in some cases. See Eichorn, 69 Cal App 4th at 389 (listing elements of California’s “necessity” defense); ORS 161.200; State v. O’Neill, 256 Or App 537, 540-41 (2013) (listing elements of Oregon’s “choice of evils” defense).
appellate courts in Oregon and other courts have generally applied Robinson sparingly, declining to extend it to preclude states or local governments from criminalizing conduct that is derivative of status.

Defendant cites one reported appellate decision, *Jones v. City of Los Angeles*, 444 F3d 1118 (9th Cir 2006), vacated 505 F3d 1006 (2007), in support of her position. That opinion, by a divided panel, was subsequently vacated by the Ninth Circuit. Thus, the panel opinion has no precedential value. *United States v. Joelson*, 7 F3d 174, 178 n 1 (9th Cir 1993) (stating that a vacated panel opinion “has no precedential value” but may be considered for its persuasiveness). Moreover, as the dissent in *Jones* points out, the vacated majority opinion was contrary to prior Ninth Circuit precedent. *Jones*, 444 F3d at 1145 (Rymer, J., dissenting), citing *United States v. Ayala*, 35 F3d 423 (9th Cir 1994); *United States v. Kidder*, 869 F2d 1328 (9th Cir 1989); and *United States v. Ritter*, 752 F2d 435 (9th Cir 1985). And as the dissent further noted, “[n]either the Supreme Court nor any other circuit court of appeals has ever held that conduct derivative of a status may not be criminalized.” *Jones*, 444 F3d at 1139 (Rymer, J., dissenting).

The federal district court opinions on this issue have generally held that similar municipal camping ordinances do not violate the Eighth Amendment. See, e.g., *Ashbaucher v. City of Arcata*, 2010 US Dist LEXIS 126627, *41 (ND Cal 2010) (holding that Eighth Amendment “does not prohibit ordinances that criminalize conduct such as sleeping or camping outside even though such conduct is beyond each Plaintiff’s control because they are homeless”); *Lehr v. City of Sacramento*, 624 F Supp 2d 1218 (ED Cal 2009) (holding that Sacramento’s anti-camping ordinance does not impermissibly punish homeless status); *Joyce v. City & County of San Francisco*, 846 F Supp 843 (ND Cal 1994) (holding that, even if homelessness is a status, criminalizing acts of sitting, lying or sleeping on public streets does not violate the Eighth Amendment).
Chapter 5—Right to Rest: What Does It Mean?

A mendment). But see Pottinger v. City of Miami, 810 F Supp 1551 (SD Fla 1992) (holding that arresting homeless individuals for harmless, involuntary conduct may violate the Eighth Amendment).\(^7\)

Both parties cited a civil case, Anderson v. City of Portland, 2009 US Dist LEXIS 67519 (D Or 2009), that presented a similar constitutional challenge to the Ordinance. The plaintiffs in Anderson brought a civil rights action under 42 USC § 1983, alleging that the Ordinance as applied to the homeless plaintiffs violated the Eighth Amendment. The court denied the City’s motion to dismiss, concluding that

“plaintiffs adequately state a claim under the Eighth Amendment, in that they allege that the City’s enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property. Given that plaintiffs bring an as-applied challenge, precisely when, where and how the City enforces the anti-camping and temporary structure ordinances requires development of the facts.”

2009 US Dist LEXIS 67519 at *20. In a later proceeding in the same case, the court denied plaintiffs’ motion for summary judgment, concluding:

“Given the legitimate governmental interests of safety and sanitation cited by defendants and the differing interpretations that result from the summary of citations and the manner of their enforcement, plaintiffs do not establish, as a matter of law, that defendants’ enforcement actions criminalize status as opposed to conduct in violation of the Eighth Amendment.”


This court agrees with the Anderson court’s observation that development of the facts regarding enforcement of the Ordinance as to defendant would be helpful in analyzing

\(^7\) Defendant cites two other district court opinions in support of the proposition that the Eighth Amendment forbids criminalizing conduct derivative of status, Goldman v. Knecht, 295 F Supp 897 (D Colo 1969); and Wheeler v. Goodman, 306 F Supp 58 (WD NC 1969), vacated on other grounds by 401 US 987 (1971). In both cases, the courts struck down laws that expressly criminalized the status of being a “vagrant” while recognizing that the statutes would have been constitutional if they had instead criminalized conduct. Goldman, 295 F Supp at 908; Wheeler, 306 F Supp at 64.
defendant’s as-applied Eighth Amendment challenge. Even assuming, without deciding, that the Eighth Amendment prevents the City from criminalizing derivative conduct that is an unavoidable consequence of a defendant’s involuntary homeless status, dismissing the charges against this defendant is not required. If defendant presents evidence that her homelessness was involuntary and that camping in a public place was an unavoidable consequence of that status, she would be entitled to have the jury consider a “choice of evils” defense to the charges.\(^8\)

Because that defense is potentially available, this court concludes, as the California Court of Appeals concluded in Eichorn, that the Ordinance, as applied, does not unconstitutionally punish defendant for her homeless status in violation of the constitutional proscriptions against cruel and unusual punishment.

**Equal Protection and the Fundamental Rights to Travel and Assemble—14th Amendment**

Defendant contends that the Ordinance impermissibly infringes upon her fundamental right to travel, and is therefore subject to strict scrutiny under the Equal Protection Clause.

Although not expressly listed in the Constitution, “a right of interstate travel undoubtedly exists.” State v. Berringer, 234 Or App 665, 671 (2010). A law that infringes on the right to travel “must be supported by a compelling justification.” In re Marriage of Fedorov, 228 Or App 50, 66 (2009), citing Shapiro v. Thompson, 394 US 618, 634 (1969). As the Court of Appeals has noted, the constitutional source of the right to travel “has never been identified definitively” and its contours “are as vague as its source.” Berringer, 234 Or App at 672. Nevertheless, the Court of Appeals has held that “the right to travel intrastate is a right protected from discriminatory

---

\(^8\) Under Oregon law, the “choice of evils” defense applies when there is evidence that: (1) defendant’s conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the threatened injury was greater than the potential injury of her illegal actions. State v. O’Neill, 256 Or App at 541; ORS 161.200.
regulation to the same extent” as the right to travel interstate. Josephine Co. Sch. Dist. v. OSAA, 15 Or App 185, 196 (1973).

Generally, courts have held that laws imposing residence requirements (or otherwise distinguishing between residents and nonresidents) impermissibly discriminate against nonresidents in violation of their right to travel. See Berringer, 234 Or App at 672-73 (summarizing cases). However, the right to travel does not “endow citizens with a ‘right to live or stay where one will.’” Tobe, 892 P2d at 1165. Moreover, the recognition of a constitutionally-protected right to travel “does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right.” Id.

Here, as in Tobe, the Ordinance on its face does not impermissibly discriminate between residents and nonresidents. Nor does it discriminate between homeless and non-homeless individuals. The Ordinance has no impact on the right to travel except insofar as individuals, homeless or otherwise, might be discouraged from traveling to the City because camping in public places within the City is prohibited. That is not enough to show that the Ordinance impermissibly infringes upon the right to travel. For the reasons articulated by the California Supreme Court in Tobe, this court concludes that the Ordinance does not infringe upon defendant’s fundamental right to travel.

Defendant further contends that strict scrutiny applies because the Ordinance violates her fundamental right to freedom of assembly. The Oregon Supreme Court recently held in State v. Babson, 355 Or 383 (2014), that a Legislative Administration Committee guideline prohibiting overnight use of the steps of the state capitol building did not violate anyone’s constitutional right to freedom of assembly. The court explained that the guideline’s restriction on overnight use of the capitol steps “is not, by its terms, directed at assembling, instructing representatives, or
applying for the redress of grievances. Nor does the text of the guideline expressly or obviously include those rights as an element or proscribed means of causing a targeted harm.” Id. at 430.

The same is true here: the Ordinance is directed at camping in public places, not assembling, and it does not include assembling as an element or proscribed means of causing the targeted harm— camping. Under Babson, the Ordinance does not violate defendant’s right to freedom of assembly.

Because strict scrutiny does not apply, the Ordinance will satisfy the Equal Protection Clause as long as it is rationally related to a legitimate governmental interest. Defendant does not contend that the Ordinance violates the Equal Protection Clause under the rational basis test. Because the Ordinance is rationally related to the City’s legitimate interests in protecting and preserving public health, safety and welfare, it does not violate the Equal Protection Clause.

Vagueness and Overbreadth

Defendant contends that the Ordinance is unconstitutionally vague and overbroad. In City of Portland v. Johnson, 59 Or App 647 (1982), the Court of Appeals held that an earlier version of the City’s anti-camping ordinance was not unconstitutionally vague or overbroad. With respect to the overbreadth challenge, the court noted that, although the ordinance’s “definition of ‘campsite’ is indeed very broad, we must construe the definition in light of the entire ordinance in order to effectuate the intent of the City Council.” Id. at 650. The version of the ordinance in effect at that time included a statement of purpose— prohibiting campsites established “for the purpose of maintain a temporary place to live” (Id.)— that is now part of the definition of “campsite” in the current version of the ordinance.

The Court of Appeals read that statement of purpose into the definition of “campsite” and concluded that the ordinance, so construed, was “not intended to prohibit the type of activities
that defendant contends are now prohibited by the ordinance, such as picnicking on a blanket in a park, waiting in line for tickets while wrapped on a blanket or watching the Rose Festival parade from a cot or blanket.” Id. The court further concluded that the ordinance was not unconstitutionally overbroad because the court “cannot find a ‘constitutionally protected ground’ that is invaded by this ordinance, despite defendant’s imaginative attempts to identify rights that it may impinge upon.” Id.

Defendant contends that Johnson is not controlling here because the Oregon Supreme Court’s decision in State v. Ausmus, 336 Or 493 (2003) changed the law. In Ausmus, the court held that one subsection of the disorderly conduct statute was unconstitutionally overbroad because the statute on its face prohibited “congregating with others in a manner that does not cause harm.” Id. at 507. The Supreme Court later clarified that, in general, Oregon courts “will not consider a facial challenge to a statute on overbreadth grounds if the statute’s application to protected speech is not traceable to the statute’s express terms.” State v. Illig-Renn, 341 Or 228, 236 (2006). The court further explained that “courts may invalidate a statute for facial overbreadth only if the statute proscribes a substantial amount of protected conduct in relation to its legitimate sweep.” Id. at 238.

Here, defendant contends that the Ordinance “proscribes a substantial amount of protected conduct”—specifically, defendant’s rights to assemble, travel and associate. However, the Court of Appeals in Johnson rejected that argument, concluding that Portland’s anti-camping ordinance did not infringe upon any constitutionally-protected conduct. The Ordinance on its face prohibits camping, not assembling, traveling or association. Any infringement on constitutionally-protected conduct resulting from the application of the Ordinance would not be traceable to its express terms. Ausmus and Illig-Renn did not change the law in any way that
overrules or undermines Johnson. Under Johnson (which is binding on this court), the Ordinance is not unconstitutionally overbroad.

With respect to defendant’s contention that the Ordinance is unconstitutionally vague, the Court of Appeals in Johnson concluded otherwise. The court held that Portland’s anti-camping ordinance was not unconstitutionally vague because it was “sufficiently specific that it does not leave the determination of the law to the ‘uncontrolled discretion’ of judges and juries, or invite ‘standardless and unequal application of penal laws, contrary to article I, section 20 of the Oregon Constitution.’” Johnson, 59 Or App at 651 (citations and internal quotes omitted).

Defendant contends, despite the court’s holding in Johnson, that the Ordinance is unconstitutionally vague under current law because it prohibits setting up or remaining in a campsite “for the purpose of establishing or maintaining a temporary place to live” without defining what is meant by “a temporary place to live.”

A law may be unconstitutionally vague “if it gives the police, the prosecutor, or the court, uncontrolled or unbridled discretion to punish defendants or to decide what is prohibited, or fails to inform persons subject to it of what conduct on their part will render them liable.” State v. Rogers, 352 Or 510, 527 (2012), citing Illig-Renn, 341 Or at 238-42. A criminal statute “need not define an offense with such precision that a person in every case can determine in advance that specific conduct will be within the statute’s reach.” Illig-Renn, 341 Or at 239, quoting State v. Graves, 299 Or 189, 195 (1985). Only a “reasonable degree of certainty” is required. Id. The “fair warning” requirement is satisfied if the challenged law would “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.” Illig-Renn, 341 Or at 241, quoting Grayned v. City of Rockford, 408 US 104, 108 (1972)
In addition, a law may be unconstitutionally vague “if it either contains no identifiable standard, or employs a standard that relies on the shifting and subjective judgments of the persons who are charged with enforcing it.” Illig-Renn, 341 Or at 240, citing Kolender v. Lawson, 461 US 352, 358 (1983), and City of Chicago v. Morales, 527 US 41, 62 (1999). A statute is not unconstitutionally vague if, by its terms, it “leaves nothing to the ad hoc judgment of the individual police officer, judge, or jury but instead, invokes ascertainable standards from an outside source, i.e., the substantive laws of this state.” Illig-Renn, 341 Or at 240. The fact that police officers have discretion in deciding whether or not to arrest someone for violating the law does not make a law unconstitutionally vague if the statute itself is not the source of that discretion. Illig-Renn, 341 Or at 239, n 5.

As noted above, the Court of Appeals held in Johnson that Portland’s anti-camping ordinance is not unconstitutionally vague. That conclusion is binding on this court. Defendant’s only arguments for reaching a contrary result in this case are (1) the Ordinance is unconstitutionally vague under the subsequent Supreme Court decision in Morales; and (2) Multnomah County’s recent decision to suspend enforcing the Ordinance to ensure the accuracy of a “homeless street count” demonstrates unconstitutional “haphazard, standardless administration of the law.”

The Supreme Court’s decision in Morales does not undermine the Court of Appeals’ decision in Johnson. Portland’s anti-camping ordinance is different from the Chicago “Gang Congregation Ordinance” found to be unconstitutionally vague in Morales. Chicago’s ordinance applied to people who the police believed to be “criminal street gang members” who loitered in any public place for no apparent purpose. Morales, 527 US at 47 (listing the predicates of an offense under Chicago’s ordinance). The Supreme Court noted that Chicago’s ordinance
“contains no mens rea requirement, and infringes on constitutionally protected rights.” Id. at 55. The Court explained that “the vagueness that dooms [Chicago’s] ordinance is not the product of uncertainty about the normal meaning of ‘loitering,’ but rather about what loitering is covered by the ordinance and what is not.” Id. at 57. In short, Chicago had “enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.” Id. at 64.

The Ordinance here— unlike Chicago’s ordinance— contains a mens rea requirement. Setting up or remaining in a campsite violates the Ordinance only if a person engages in that conduct “for the purpose” of establishing or maintaining a temporary place to live. This refers to the person’s intent. Making a criminal violation hinge on a person’s intent invokes ascertainable standards from substantive criminal laws. See ORS 161.085(7) (defining “intentionally” or “with intent” for purposes of the criminal code). That is permissible under Illig-Renn, 341 Or at 240.

Unlike Chicago’s ordinance, Portland’s ordinance does not infringe upon any constitutionally-protected rights, as explained above, and it prohibits remaining in a specific public place (a campsite) only for a specific purpose— the purpose of establishing or maintaining a temporary place to live. The Ordinance does not suffer from the same uncertainty that doomed Chicago’s ordinance in Morales. There is no uncertainty about what camping is covered by the Ordinance and what camping is not— all camping is covered. It is true that police officers have discretion in determining whether to arrest someone who violates the Ordinance. But that is permissible under Illig-Renn, 341 Or at 239, n 5, because the Ordinance itself is not the source of the police’s discretion.
The Court of Appeals' conclusion in Johnson that the Ordinance is not unconstitutionally vague is binding on this court. Subsequent Oregon and United States Supreme Court decisions have not overruled or undermined Johnson. A person of ordinary intelligence would know from the plain meaning of the words used in the Ordinance that camping in public is prohibited by the Ordinance.

The fact that elected officials can temporarily suspend enforcement of the Ordinance to get an accurate count of homeless people living in Portland does not make the Ordinance unconstitutionally vague or overbroad. Under Johnson, Illig-Renn, and the cases cited in those opinions, the Ordinance is not unconstitutionally overbroad or vague.

CONCLUSION

Homelessness is a serious problem in Portland and other communities across the nation. Every day, homeless men, women, and children struggle to find food, shelter, clothing, a safe place to sleep. For many people, these basic human needs—many would call them basic human rights—are not being met. The underlying causes of homelessness—poverty, mental illness, drug and alcohol addiction, among others—are often left unaddressed as public policymakers attempt to deal with limited resources, increasing demands for public services, and constituents concerned about “livability” and the effect homelessness has on local businesses, property values, and our community.

The City’s anti-camping ordinance is not the solution to this complex problem. Arresting people who are struggling to survive in the streets just because they have no place else to go is not the answer. We must do better than that. But determining the best ways to address this difficult problem is the job of public policymakers, not the courts. This court's only role is to
decide whether the City’s anti-camping ordinance violates defendant’s constitutional rights in any of the ways she contends.

For the reasons stated in this opinion, based on the record developed at this stage of the proceedings, the court concludes that the Ordinance, as applied to defendant, does not violate Article I, section 16, of the Oregon Constitution, nor does it violate the Eighth Amendment or the Equal Protection Clause of the Fourteenth Amendment. The court further concludes that the Ordinance is not unconstitutionally vague or overbroad. Accordingly, defendant’s demurrer/motion to dismiss is DENIED.

Dated: 2/5/2015 08:30 AM

_____________________________
Stephen K. Bushong
Circuit Court Judge
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JANET F. BELL, et al.,
Plaintiffs,
v.
CITY OF BOISE, et al.,
Defendants.

Civil Action No. 1:09-cv-540-REB
Hon.

STATEMENT OF INTEREST
OF THE UNITED STATES
STATEMENT OF INTEREST OF THE UNITED STATES

On any given night in the United States, half a million people are likely to be experiencing homelessness.1 Homeless individuals are a diverse population, including children, families, veterans, and the elderly. The causes of homelessness are also varied. In recent years, some people who were affected by the economic downturn and foreclosure crisis have become homeless.2 Some homeless individuals have serious and persistent physical or behavioral health conditions that neither they nor the communities in which they live have sufficient services to accommodate. As a result, these individuals are unable to obtain permanent housing.3 Other individuals are homeless because of circumstances beyond their control; they are victims of domestic violence and trafficking, or youth who are separated from their families.4 These individuals must find space in a public shelter or sleep on the street.

For many homeless people, finding a safe and legal place to sleep can be difficult or even impossible. In many cities, shelters are unable to accommodate all who are homeless.5 In 2014, 42% of homeless individuals slept in unsheltered, public locations—under bridges, in cars, in parks, on the sidewalk, or in abandoned buildings.6

---


2 See generally id. Nationally, 11% of all homeless adults are veterans. Id. at 40.


4 There are approximately 45,205 unaccompanied homeless children in the United States. 2014 AHAR at 1. “Unaccompanied children and youth” is defined in the AHAR as a person under the age of 25 who is not a member of a family or a multi-child household. Id. at 32.

5 Id.

6 Id. at 14. In 2014 there were roughly 153,000 unsheltered homeless individuals nationwide on any given night. Id.
In this case, Plaintiffs are homeless individuals who were convicted of violating certain city ordinances that prohibit camping and sleeping in public outdoor places. They claim that the City of Boise and the Boise Police Department’s (“BPD”) enforcement of these ordinances against homeless individuals violates their constitutional rights because there is inadequate shelter space available in Boise to accommodate the city’s homeless population. Plaintiffs argue that criminalizing public sleeping in a city without adequate shelter space constitutes criminalizing homelessness itself, in violation of the Eighth Amendment.

The parties disagree about the appropriate framework for analyzing Plaintiffs’ claims. Plaintiffs encourage the court to follow Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (vacated after settlement, 505 F.3d 1006 (9th Cir. 2007)), which held that enforcement of anti-camping ordinances may violate the Eighth Amendment on nights where there is inadequate shelter space available to accommodate all who are homeless in Boise.

---

7 See Revised Second Am. Compl. at 4-5, ECF No. 171. Plaintiffs in this case challenge the application of two Boise Municipal Code ordinances. The first ordinance, Boise City Code § 9-10-02, prohibits “us[ing] any of the streets, sidewalks, parks or public places as a camping place at any time, or to cause or permit any vehicle to remain in any of said places to the detriment of public travel or convenience.” The ordinance defines “camp” or “camping” to mean “the use of public property as a temporary or permanent place of lodging, sleeping, or as a sojourn.” The second ordinance, § 6-01-05(A), prohibits “disorderly conduct,” which includes “[o]ccupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without the permission of the owner or person entitled to possession or in control thereof.”

8 Plaintiffs allege that BPD’s enforcement practices are unconstitutional because: 1) there is insufficient shelter space available to accommodate all who are homeless in Boise, Pls. M em. in Supp. of Pls. M ot. for Summ. J. (“P l. M em.”), ECF No. 243-2, at 16-18; 2) there are restrictions on certain shelter beds that some homeless individuals are unable to meet, thereby preventing them from obtaining shelter space even when beds may be unoccupied, id. at 20; and 3) the BPD continues to enforce the anti-camping and disorderly conduct ordinances when shelters are full and against those who do not qualify for the beds, either because BPD officers are insufficiently trained or they are unaware when shelters are full because of unreliable reporting from the shelters, Id. at 20-21. Defendants, on the other hand, contend that there has never been a time when a homeless individual was turned away from a shelter due to lack of space, and even if that were to occur, the BPD would not enforce the ordinances under such circumstances.Defs. Resp. in Opp’n to Pl. M ot. for Summ. J. (“Defs. Resp.”), ECF No. 257, at 7-10. The parties dispute whether individuals are being turned away from shelters for lack of space or inaccessibility to persons with disabilities. The parties also dispute whether the beds available in the Boise Rescue Mission, which is affiliated with a religious institution, should be counted in the total number of available beds for homeless individuals, as use of those beds may subject them to unwanted proselytizing. Pls. M em. at 13-14. The United States takes no position on any of these disputes.
shelter space available for all of a city's homeless individuals. Pls. Mem. at 5. Defendants, on the other hand, assert that Plaintiffs' reliance on Jones is “heavily misplaced, factually unsupported, and immaterial to this case.”Defs. Resp. at 7.

Because the summary judgment briefing in this case makes clear that there is a significant dispute between the parties on the applicability of Jones and conflicting lower court case law in this area, the United States files this Statement of Interest to make clear that the Jones framework is the appropriate legal framework for analyzing Plaintiffs’ Eighth Amendment claims. Under the Jones framework, the Court should consider whether conforming one's conduct to the ordinance is possible for people who are homeless. If sufficient shelter space is unavailable because a) there are inadequate beds for the entire population, or b) there are restrictions on those beds that disqualify certain groups of homeless individuals (e.g., because of disability access or exceeding maximum stay requirements), then it would be impossible for some homeless individuals to comply with these ordinances. As set forth below, in those circumstances enforcement of the ordinances amounts to the criminalization of homelessness, in violation of the Eighth Amendment.

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (“Section 14141”), the United States enforces the rights of individuals to be free from unconstitutional and abusive policing. The United States has used its

---

9 The full text of 28 U.S.C. § 517 is as follows: “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

STATEMENT OF INTEREST OF THE UNITED STATES - pg. 4
authority under Section 14141 to investigate numerous jurisdictions for unconstitutional police practices.\(^{10}\)

The United States also has a broad interest in ensuring that justice is applied fairly, regardless of wealth or status. In 2010, Attorney General Eric Holder launched the Office for Access to Justice ("ATJ") at the Department of Justice to address the access-to-justice crisis in the criminal and civil justice systems. ATJ’s mission is to help the justice system deliver outcomes that are fair and accessible to all.\(^{11}\) ATJ works with other federal agencies on a range of programs and policies affecting low-income and vulnerable people—including agencies that work to prevent and end homelessness.

The United States also has an interest in breaking the cycle of poverty and criminalization. Numerous federal initiatives are tasked with reducing the criminalization of homelessness and promoting alternatives to incarceration that are more cost-effective, efficient, and fair. For example, the United States Interagency Council on Homelessness ("USICH"), composed of nineteen cabinet secretaries and agency heads, coordinates federal efforts to end homelessness. USICH was established through the Stewart B. McKinney Homeless Assistance Act in 1987 and was most recently reauthorized in 2009 with the passage of the Homeless Emergency Assistance and Rapid Transition to Housing Act. 42 U.S.C. § 11311 et seq.

In 2010, USICH and ATJ, with support from the Department of Housing and Urban Development ("HUD"), held a summit entitled Searching for Balance: Civic Engagement in


**STATEMENT OF INTEREST OF THE UNITED STATES**
Communities Responding to Homelessness on the development of constructive alternatives to the criminalization of homelessness. A related report, Searching Out Solutions: Constructive Alternatives to Criminalization, explores themes raised at the summit.\textsuperscript{12} HUD also produced a guide, Reducing Homeless Populations’ Involvement in the Criminal Justice System, intended to raise awareness among law enforcement and service providers about available resources to serve homeless people, and those at risk of homelessness, who are involved in the criminal justice system.\textsuperscript{13}

**DISCUSSION**

The “Cruel and Unusual Punishments” Clause of the Eighth Amendment “imposes substantive limits on what can be made criminal and punished as such.” Ingraham v. Wright, 430 U.S. 651, 667-68 (1977). Pursuant to that clause, the Supreme Court has held that laws that criminalize an individual’s status, rather than specific conduct, are unconstitutional. Robinson v. California, 370 U.S. 660 (1962). In Robinson, the Court considered a state statute criminalizing not only the possession or use of narcotics, but also addiction. Noting that the statute made an addicted person “continuously guilty of this offense, whether or not he had ever used or possessed any narcotics within the State”—and further that addiction is a status “which may be contracted innocently or involuntarily,” given that “a person may even be a narcotics addict from the moment of his birth”—the Court found that the statute impermissibly criminalized the status of addiction and constituted cruel and unusual punishment. Id. at 666-67 & n.9.


Six years after Robinson, the Court addressed whether certain acts also may not be subject to punishment under the Eighth Amendment if they are unavoidable consequences of one’s status. In Powell v. Texas, 392 U.S. 514 (1968), the Court considered the constitutionality of a statute that criminalized public intoxication. A four-member plurality interpreted Robinson to prohibit only the criminalization of status and noted that the statute under consideration in Powell criminalized conduct—being intoxicated in public—rather than the status of alcohol addiction. The plurality declined to extend Robinson, citing concerns about federalism and a reluctance to create a “constitutional doctrine of criminal responsibility.” Id. at 534 (plurality opinion). Moreover, the plurality found that there was insufficient evidence to definitively say Mr. Powell was incapable of avoiding public intoxication. Id. at 521-25. The dissenting justices, on the other hand, found that the Eighth Amendment protects against criminalization of conduct that individuals are powerless to avoid, and that due to his alcoholism, Mr. Powell was powerless to avoid public drunkenness. Id. at 567 (dissenting opinion). The dissenters, therefore, would have reversed Mr. Powell’s conviction. Id. at 569-70.

Justice White provided the decisive fifth vote to uphold Mr. Powell’s conviction. Instead of joining the plurality opinion, in a separate concurrence he set forth a different interpretation of Robinson. Justice White did not rest his decision on the status-versus-conduct distinction raised by the plurality. Instead, Justice White considered the voluntariness, or volitional nature, of the conduct in question. See Powell, 392 U.S. at 548-51 (White, J., concurring in the judgment). Under this analysis, if sufficient evidence is presented showing that the prohibited conduct was involuntary due to one’s condition, criminalization of that conduct would be impermissible under the Eighth Amendment. Id. at 551.

STATEMENT OF INTEREST OF THE UNITED STATES - pg. 7
Notably for the present case, Justice White specifically contemplated the circumstances of individuals who are homeless. He explained that, “[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking.” Id. Justice White believed some alcoholics who are homeless could show that “resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.” Id. For these individuals, the 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. Ultimately, Justice White sided with the plurality because Mr. Powell did not present evidence to show that he was incapable of avoiding public places while intoxicated. Id. at 552. However, Justice White’s concurrence articulated the narrowest grounds for the decision; accordingly, it is the only controlling precedent from Powell. See Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that the narrowest position controls when no rationale garners the votes of a majority of the Court).

Robinson and Powell have resulted in a division among courts on how to analyze claims regarding enforcement of anti-camping ordinances against homeless individuals. Because Powell did not produce a majority opinion on whether the Eighth Amendment prohibits only the criminalization of status or also the criminalization of involuntary conduct, it does not provide a binding test for how courts should analyze these issues. Some courts have adopted the plurality’s strict interpretation of Robinson, opining that the Eighth Amendment limits only the criminalization of status, not of conduct. See, e.g., Lehr v. City of Sacramento, 624 F. Supp. 2d. 1218 (E.D. Cal. 2009) (finding the Eighth Amendment inapplicable where a statute criminalizes conduct and not status). Others have considered the voluntariness of the conduct, and whether
the conduct is inextricably linked to one’s status, such that punishing the conduct is indistinguishable from punishing the status. See, e.g., Jones, 444 F.3d 1118 (finding anti-camping ordinance violated Eighth Amendment because it criminalized sleeping in public when homeless individuals had no other choice but to sleep in public, and therefore criminalized the status of homelessness itself); Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev’d on other grounds, 61 F.3d 442 (5th Cir. 1995) (same); Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) (same). Finally, some courts have avoided the debate altogether by deciding a case on factual grounds. See, e.g., Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (not deciding the legal issue of whether the Eighth Amendment reaches conduct that is inextricably linked to status because Orlando proved the voluntary nature of public sleeping by “present[ing] unrefuted evidence” that the city’s large homeless shelter “has never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee”); Allen v. City of Sacramento, 234 Cal. App. 4th 41, 59 (2015) (upholding an anti-camping ordinance because the plaintiffs failed to “allege why [they] had no shelter”).

The differing interpretations of Robinson and Powell have caused drastically different results for both individuals and the criminal justice system. In the mid-1990s, the United States twice filed briefs in appellate cases to help clarify the Eighth Amendment analysis for claims brought by individuals who were convicted of violating anti-camping ordinances. See Brief for the United States as Amicus Curiae, Joyce v. City and County of San Francisco, No. 95-16940 (9th Cir. Mar. 29, 1996); Brief for the United States as Amicus Curiae, Tobe v. City of Santa Ana, No. S03850 (Cal. June 9, 1994). In those briefs, the United States took the position— as it does here— that criminalizing sleeping in public when no shelter is available violates the Eighth Amendment.
Amendment by criminalizing status. In the twenty years since the United States last weighed in on this issue, courts’ analyses of these statutes have remained divergent.

Consistent with the position taken in its previous filings, the United States now urges this Court to adopt the reasoning of Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006). Although the Ninth Circuit ultimately vacated its opinion in Jones—pursuant to a settlement agreement between the parties, 505 F.3d 1006 (9th Cir. 2007), not for any substantive reason—its logic remains instructive and persuasive.

The Jones court considered the enforcement of a Los Angeles ordinance prohibiting sitting, lying, or sleeping in public. There, like here, the court was asked to consider a statute that, on its face, criminalized conduct rather than status. Importantly, the plaintiffs in Jones presented evidence suggesting that there was an inadequate number of shelter beds available for homeless individuals, so many individuals had no choice but to sleep in public in violation of the city’s ordinance. See Jones, 444 F.3d at 1137.

The Jones court found enforcement of the ordinance to be unconstitutional as applied to the plaintiffs because of inadequate shelter space. The court based its decision on its conclusion that, “[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.” Id. at 1136. Because sleeping is unavoidable, the court then considered whether the plaintiffs had a choice to sleep somewhere other than in public, concluding that they did not: “for homeless individuals in [Los Angeles’] Skid Row who have no access to private spaces, these acts can only be done in public.” Id. at 1136. As a result, the court found that sleeping in public is “involuntary and inseparable from” an individual’s status or condition of being homeless when no shelter space is available. Id. at 1132. The court
concluded that, under those circumstances, “by criminalizing sitting, lying, and sleeping, the City [of Los Angeles] is in fact criminalizing [Plaintiffs’] status as homeless individuals.”  Id. at 1137.

Defendants assert that reliance on Jones would be “misplaced, factually unsupported, and immaterial to this case.”  Def. Rep. at 7. In advocating against the applicability of Jones, Defendants rely on a conduct-versus-status distinction that does not withstand close scrutiny.  Id. (stating that the Boise ordinances “avoid criminalizing status by making conduct an element of the crime”). However, Defendants’ position is unpersuasive because the Eighth Amendment analysis is not limited to a reading of the plain language of the statute in question. Rather, the practical implications of enforcing the statute’s language are equally important. Those implications are clear where there is insufficient shelter space to accommodate the homeless population: the conduct of sleeping in a public place is indistinguishable from the status of homelessness.

Supreme Court precedent suggests as much. As the Jones court correctly noted, Powell is best read as providing support for Plaintiffs’ argument against the criminalization of involuntary sleeping in public, not as posing a barrier to that position. Indeed, five members of the Powell Court (Justice White and the four dissenting Justices) believed that punishing truly involuntary or unavoidable conduct resulting from status would violate the Eighth Amendment; only four Justices would have held otherwise. Jones, 444 F.3d at 1135.

It should be uncontroversial that punishing conduct that is a “universal and unavoidable consequence[] of being human” violates the Eighth Amendment. See id. at 1136. It is a “foregone conclusion that human life requires certain acts, among them . . . sleeping.” Johnson, 860 F. Supp. at 350. As the Jones court noted, it is impossible for individuals to avoid “sitting, lying, and sleeping for days, weeks, or months at a time . . . as if human beings could remain in...
perpetual motion.” Jones, 444 F.3d at 1136. Once an individual becomes homeless, by virtue of this status certain life necessities (such as sleeping) that would otherwise be performed in private must now be performed in public. Pottinger, 810 F. Supp. at 1564; see also Johnson, 860 F. Supp. at 350 (“they must be in public” and “they must sleep”). Therefore, sleeping in public is precisely the type of “universal and unavoidable” conduct that is necessary for human survival for homeless individuals who lack access to shelter space. Id.

In this way, the Boise anti-camping and disorderly conduct ordinances are akin to the ordinance at issue in Robinson, at least on nights when homeless individuals are— for whatever non-volitional reason(s)— unable to secure shelter space.14 When adequate shelter space exists, individuals have a choice about whether or not to sleep in public. However, when adequate shelter space does not exist, there is no meaningful distinction between the status of being homeless and the conduct of sleeping in public. Sleeping is a life-sustaining activity— i.e., it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless. See id. at 1136-37.

Adopting the Jones court’s approach would not implicate the knotty concerns raised by the Powell plurality and cited by the district courts that depart from Jones. In Powell, the plurality was concerned with the Cruel and Unusual Punishments Clause becoming “the ultimate arbiter of the standards of criminal responsibility.” 392 U.S. at 533; see also Joyce v. City & Cnty. of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994); Lehr, 624 F. Supp. 2d at

---

14 In Powell, Justice White noted that he may have held differently on the merits if there was evidence presented that Mr. Powell was unable to avoid drinking in public; the availability of alternative venues in which Mr. Powell could drink was essential to Justice White’s concurrence in the judgment. See Powell, 392 U.S. at 553.
1231. The Justices in the *Powell* plurality declined to extend the Eighth Amendment prohibition to the punishment of involuntary conduct because they feared doing so would allow violent defendants to argue that their conduct was “compelled” by any number of “conditions.” *Powell*, 392 U.S. at 534 (expressing concern that a hypothetical murderer could claim a compulsion to kill). The plurality was reluctant to “defin[e] some sort of insanity test in constitutional terms.” Id. at 536.

But these concerns are not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely. Thus, the Court need not constitutionalize a general compulsion defense to resolve this case; it need only hold that the Eighth Amendment outlaws the punishment of unavoidable conduct that we know to be universal. Moreover, unlike the hypothetical hard cases that concerned the *Powell* plurality, the conduct at issue in the instant case is entirely innocent. Its punishment would serve no retributive purpose, or any other legitimate purpose. As the plurality in *Powell* itself noted, “the entire thrust of *Robinson*’s interpretation of the Cruel and Unusual

---

15 In *Lehr*, the district court declined to follow the Ninth Circuit’s decision in *Jones* in evaluating the plaintiffs’ Eighth Amendment as-applied claims regarding the City of Sacramento’s anti-camping ordinance. Despite evidence that the population of homeless individuals in Sacramento far outnumbered the available shelter beds, the court decided to follow the plurality opinion in *Powell* and the dissent from *Jones* because there was no precedential opinion in place, and it found the *Jones* dissent “to be the more persuasive and well-reasoned opinion.” *Lehr*, 624 F. Supp. 2d at 1231. For the reasons discussed above, the United States disagrees with *Lehr* and urges this Court to reject its analysis. The rationale in *Joyce* is equally unpersuasive. In *Joyce*, a pre-*Jones* district court decision, the court rejected the relevance of whether the City of San Francisco provided enough beds for homeless individuals. Rather than consider how and when the city enforced its state and local laws prohibiting camping and sleeping in public places, the court looked only at the language of the statute itself and concluded that it addressed only “acts” that derive from a person’s status, and not the status itself. *Joyce*, 846 F. Supp. at 857 (N.D. Cal. 1994). The *Joyce* court therefore declined to grant the plaintiffs’ motion for a preliminary injunction. However, while the plaintiffs’ appeal was pending before the Ninth Circuit, the City of San Francisco suspended, and eventually eliminated, enforcement of the challenged laws, issuing a memorandum affirming the rights of all homeless individuals. See *Joyce* v. City and Cnty. of San Francisco, No. 95-16940, 1996 WL 329317 (9th Cir. June 14, 1996).

**STATEMENT OF INTEREST OF THE UNITED STATES** - pg. 13
Punishment Clause is that criminal penalties may be inflicted only if the accused has committed
some act [or] has engaged in some behavior which society has an interest in preventing."
Powell, 392 U.S. at 533 (emphasis added).

Using this reasoning, the vital question for the Court becomes: Given the current
homeless population and available shelter space in Boise, as well as any restrictions on those
shelter beds, are homeless individuals in Boise capable of conforming the necessary life activity
of sleeping to the current law? If not, enforcing the anti-camping ordinances and criminalizing
sleeping in public violates the Eighth Amendment, because it is no different from criminalizing
homelessness itself. The Jones framework, developed from analyses of earlier cases, makes it
clear that punishing homeless people for “acts they are forced to perform in public effectively
punishes them for being homeless.” Pottinger, 810 F. Supp. 1551, 1564; see also Jones, 444
F.3d at 1136-37; Johnson, 860 F. Supp. at 350.

The realities facing homeless individuals each day support this application of the Eighth
Amendment. Homelessness across the United States remains a pervasive problem. As the Jones
court observed, “an individual may become homeless based on factors both within and beyond
his immediate control, especially in consideration of the composition of the homeless as a group:
the mentally ill, addicts, victims of domestic violence, the unemployed, and the unemployable.”
Jones, 444 F.3d at 1137. Regardless of the causes of homelessness, individuals remain homeless
involuntarily, including children, families, veterans, and individuals with physical and mental
health disabilities. Communities nationwide are suffering from a shortage of affordable housing.
And, in many jurisdictions, emergency and temporary shelter systems are already underfunded
and overcrowded. For example, the 2010 Hunger and Homelessness Survey conducted by the
U.S. Conference of Mayors found that 64% of cities reported having to turn people away from their shelters.\textsuperscript{16}

At least one of the Justices in Robinson was concerned with how criminalizing certain conditions (there, addiction to narcotics) may interfere with necessary treatment and services that could potentially improve or alleviate the condition. See Robinson, 370 U.S. at 673-75 (Douglas, J., concurring). Those concerns are equally applicable in this context. Criminalizing public sleeping in cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness. As noted by the U.S. Interagency Council on Homelessness, “rather than helping people to regain housing, obtain employment, or access needed treatment and service, criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back.”\textsuperscript{17} Issuing citations for public sleeping forces individuals into the criminal justice system and creates additional obstacles to overcoming homelessness. Criminal records can create barriers to employment and participation in permanent, supportive housing programs.\textsuperscript{18} Convictions under these municipal ordinances can also lead to lengthy jail sentences based on the ordinance violation itself, or the inability to pay fines and fees associated with the ordinance violation. Incarceration, in turn, has a profound effect on these individuals’


\textsuperscript{17} Searching out Solutions: Constructive Alternatives to Criminalization, supra note 12 at 7.

\textsuperscript{18} The Federal Interagency Reentry Council, established by Attorney General Eric Holder in January 2011, is working to coordinate efforts to remove these barriers at the federal level, so that individuals are able to move past their criminal convictions and compete for jobs, attain stable housing, support their children and families, and contribute to their communities. See Federal Interagency Reentry Council, Overview (May 2014), available at http://csgjusticecenter.org/wp-content/uploads/2014/05/FIRC_Overview.pdf.

STATEMENT OF INTEREST OF THE UNITED STATES - pg. 15
Finally, pursuing charges against individuals for sleeping in public imposes further burdens on scarce public defender, judicial, and carceral resources. Thus, criminalizing homelessness is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities.

CONCLUSION

For the reasons stated above, the Court should adopt the analysis in Jones to evaluate Boise's anti-camping and disorderly conduct ordinances as applied to Plaintiffs in this case. If the Court finds that it is impossible for homeless individuals to secure shelter space on some nights because no beds are available, no shelter meets their disability needs, or they have exceeded the maximum stay limitations, then the Court should also find that enforcement of the ordinances under those circumstances criminalizes the status of being homeless and violates the Eighth Amendment to the Constitution.

Submitted this 6th day of August, 2015.

s/ Sharon Brett
Sharon Brett
Attorney for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2015, I served the foregoing via the Court’s CM/ECF system, which will automatically provide notice to all counsel of record.

/s/ Sharon Brett
SHARON BRETT
Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 353-1091
I. Background and Summary of Decision

This case, filed in 2009, has a long procedural history that includes multiple dispositive motions, multiple amendments of the Plaintiffs’ Complaint, the withdrawal and addition of numerous attorneys representing the various parties, dismissal of several parties, and an appeal of a substantive ruling against the plaintiffs followed by a remand from the Ninth Circuit Court of Appeals. The facts and legal issues are well known to the parties and set forth in more detail in the Court’s prior Orders. See Dkts. 152, 170, 286.

Pending are Plaintiffs’ Motion for Summary Judgment (Dkt. 243) and Defendant’s Motion for Dispositive Relief (Dkt. 229), with associated motions to strike particular

1 The City’s Motion is made under Federal Rules of Civil Procedure 12(b)(1) and 56.
evidence filed by both parties (Dkts. 253, 264, 268). The case now includes two remaining Plaintiffs: Robert Martin (“Martin”) and Robert Anderson (“Anderson”). The only remaining Defendant is the City of Boise (the “City”). See Order (Dkt. 286). The remaining claims seeks prospective relief in (1) a declaration under 28 U.S.C. § 2201 that Boise City Code § 9-10-02 and §6-01-05(A) (collectively the “Ordinances”) violate the Eighth Amendment’s prohibition against cruel and unusual punishment, and (2) a permanent injunction enjoining the City of Boise from enforcing the Ordinances.3 See Amd. Compl., pp. 22-23 (Dkt. 171).

The City argues that a threshold matter precludes the case from going any further at this point – specifically, that the case should be dismissed because the Plaintiffs lack standing. The City also argues that even if the Plaintiffs have standing to pursue the remaining claim, it has nonetheless been mooted and, regardless, Plaintiffs’ claims fails on the merits. (Dkt. 229). Plaintiffs argue they have standing, the case is not moot, and they should be granted summary judgment as a matter of law based upon “undisputed”

---

2 After the hearing on these motions, several additional motions were submitted (Dkts. 283, 287, 288, 289), some of which will be resolved here, and others by separate order.

3 Plaintiffs seek a declaration that the “Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or physical disability.” Pls.’ Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2). In making this argument, Plaintiffs primarily rely on cases involving “as applied” challenges to the constitutionality of statutes. See, e.g., id., p. 7. Only nighttime enforcement of the Ordinances is at issue. See Bell v. City of Boise, 709 F.3d 890, 896 (9th Cir. 2013).

**MEMORANDUM DECISION & ORDER - 2**

Martin and Anderson allege that they face a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. See Boise City Code §§ 6-01-05(A); 9-10-02. Under applicable law, they have a right to bring such a claim only if they have suffered an injury-in-fact sufficient to provide the Plaintiffs legal standing under Article III of the federal Constitution. Any such claim made upon an alleged threatened injury (as argued by Martin and Anderson) must be “certainly impending” or there must be a “substantial risk that the harm will occur.” Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1150, n.5 (2013). The injury-in-fact must also be concrete and particularized, and actual or imminent. Bennett v. Spear, 520 U.S. 154, 167 (1997).

The Court concludes for the reasons described to follow that neither Martin nor Anderson is facing such a concrete, particularized or imminent injury, and therefore neither Martin nor Anderson has standing to bring a constitutional challenge to the Ordinances. Of central importance to that ruling is the fact that the Ordinances, by their very terms, are not to be enforced when a homeless individual “is on public property and there is no available overnight shelter.” Boise City Code §§ 6-01-05(A); 9-10-02. Thus, the Ordinances are not to be enforced when the shelters are full. Additionally, neither Plaintiff has shown that he cannot or will not stay in one or more of the available shelters, if there is space available, or that he has a disability that prevents him from accessing
shelter space. Thus, there is no actual or imminent threat that either Plaintiff will be cited for violating the Ordinances. In the absence of such a threat, Plaintiffs cannot allege a sufficient injury-in-fact to establish legal standing to bring their claims. Therefore, the Court lacks jurisdiction to consider the merits of the claim that the Ordinances violate certain constitutional protections, and the case must be dismissed.

II. Standing

A. Introduction

The City argues that neither Mr. Martin, nor Mr. Anderson is at risk of any “certainly impending” injury and therefore each lacks the requisite Article III standing to seek prospective relief.

B. Standards of Law

Federal Rule 12(b) permits dismissal of a complaint where the federal court has no jurisdiction to consider the claims raised in the complaint. Under our Constitution federal courts may only consider and decide “[c]ases” and “[c]ontroversies.” U.S. Const., Art. III, § 2. See also Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014). Martin and Anderson have the burden of proving the existence of a case or controversy sufficient to confer Article III standing, at all stages of the litigation. Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994). To do so, there must be: (1) the existence of an injury-in-fact that is concrete and particularized, and actual or imminent; and (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. Bennett v. Spear, 520 U.S. 154, 167
(1997); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). If Plaintiffs lack standing at this particular stage of the lawsuit, notwithstanding the motion practice and discovery efforts that have transpired along the way, then the Court lacks jurisdiction to consider the merits of their remaining claims.4

C. Defining the Alleged Injury


The injury Plaintiffs allege is a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. Their claims are, therefore, based upon an allegation of a future injury, which can amount to an injury-in-fact but only if the threatened injury is “certainly impending” or there is a “substantial risk that the harm will occur.”5 Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1150, n.5

4 There have been a number of additional plaintiffs, in addition to Martin and Anderson, at various times in the pendency of this case. They have been dismissed for various reasons, including reasons related to the very fact of their homeless status - i.e., that they live in a nomadic manner and transient status, and that either by choice or circumstance they have fallen out of contact with their counsel. As a result, such persons were unavailable to participate in the proceedings of the case, such as, by way of example, being available for the taking of their deposition. Whatever have been the circumstances leading to this point, the Court’s focus in the context of the City’s challenge to the standing of the two remaining Plaintiffs must be only upon those two Plaintiffs.

5 The Supreme Court has explained that its prior holdings “do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about.”

MEMORANDUM DECISION & ORDER - 5
Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending.” Id. at 1147. An injury-in-fact is sufficiently alleged where there is “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979).

Both Martin and Anderson were cited under prior versions of the Ordinances, which have since been revised. The current ordinances prohibit enforcement when “the individual is on public property and there is no available overnight shelter.” Boise City Code §§ 6-01-05(A); 9-10-02. Neither Martin nor Anderson has been cited under the revised Ordinances. Although “past wrongs are evidence bearing on whether there is a

6 Plaintiff Anderson was cited in 2007 under the camping ordinance. Jones Declr., Ex. 7 (Dkt. 244–6). Plaintiff Martin was cited in 2009 under the disorderly conduct and camping ordinances. Jones Declr., Ex. 8 (Dkt. 244–7). Mr. Martin also received a camping citation in the fall of 2012. Jones Declr., Ex. 2, p. 143 (Dkt. 259–1). The Ordinances were revised in 2014.

7 Both ordinances define the term “available overnight shelter” as “a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge.” Boise City Code §§ 6-01-05(A); 9-10-02. But, they go on to state that “[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available.” Id.

8 Other individuals have received citations since the Ordinances were revised in 2014. See, e.g., Jones Declr., Ex. 71 (Dkt. 246-20). However, as discussed earlier, the Court here is
real and immediate threat of repeated injury”, Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1081 (9th Cir. 2004) (citing O'Shea v. Littleton, 414 U.S. 488, 496 (1974)), here the Ordinances have materially changed since Plaintiffs were issued citations.

D. Robert Martin Does Not Have Standing

Martin resided in Boise when Plaintiffs filed this case in 2009, but he has been living in Post Falls or Hayden, Idaho, since November 2013. Jones Declr., Ex. 2, p. 107 (Dkt. 259-1); Martin Aff., ¶ 8 (Dkt. 258-5). His having moved from Boise does not preclude the possibility of standing to pursue the lawsuit’s remaining claims, because he made several trips to Boise in 2014 to visit his minor son and he plans to return to Boise in the future for the same purpose. Jones Declr., Ex. 2, pp. 111, 114, 181 (“I come down [to Boise] regularly to be able to see my son and everything, so I know I'll be coming back” to visit Boise). See also Martin Aff., ¶¶ 3–7 (Dkt. 258-5). During his prior return trips to Boise, Martin has stayed at the Budget Inn (with help from his attorneys), Jones Declr., Ex. 2, p. 113 (Dkt. 259-1), has also stayed with friends, id., p. 119, and, on the last four or five trips to Boise, stayed in his car, id. p. 120, 142. At no time, however, during the

considering the standing of the two remaining Plaintiffs and not other parties who may have claims similar to Plaintiffs’ claims.

9 Martin says that if his employment and financial situation does not improve he will consider moving back to Boise. Martin Aff., ¶ 9 (Dkt. 258-5). However, this is too tenuous a statement to manifest an intention to move to Boise, nor is there any suggestion beyond supposition that he would move to Boise and camp outside even when there is shelter space available.

10 Martin no longer has a vehicle.
four or five trips he has made to Boise in the last year, has he “camped outside,” id., p. 143, and he has no stated plans to do so on future trips to Boise.

Martin says he is concerned that if he comes to Boise and is unable to find shelter at a friend’s home or an emergency shelter, then he may receive a citation for violating the Ordinances. Martin Aff., ¶ 10 (Dkt. 258-5). His concern, however, is entirely speculative because he is willing (and has in the past) stayed at the homeless shelters. Martin testified that he would stay at the Sanctuary and would consider staying at the River of Life, if they would let him stay there. Hall Declr., pp.160–61 (Dkt. 230-1) (if River of Life allowed Martin to stay at that shelter, he would “for a day or two, if need be”); but see id. at p. 164 (later stating, without explanation as to why, that he might stay at the River of Life and “it’s possible [he might] not”). The directors of both the River of Life and Interfaith Sanctuary shelters have said that Martin can stay at their respective

11 There are three emergency shelters in Boise - Interfaith Sanctuary (or the “Sanctuary”), which houses both men and women, and the two shelters operated by the Boise Rescue Mission - the River of Life shelter for men and the City Lights shelter for women and children. Pls.’ St. Mat’l Facts, ¶ 10.

12 Martin also testified that whether he would stay at the Sanctuary would depend on if his ex-wife and her new husband were staying there as well, but there is no indication in the record about how often that circumstance might occur. Additionally, it would only impact Martin if the other shelter, River of Life, was full. Hall Declr., pp.160–61 (Dkt. 230-1). Plaintiffs have argued that the River of Life never reports as full because it does not turn people away. See Jones Declr., Ex. 69 (Boise Rescue Mission Wepage dated 4/17/15) (“Even in our busiest months, it’s our policy to never turn down anyone for food or shelter due to lack of space.”) (Dkt. 246-18). However, Martin’s decision to not utilize available shelter space due to his personal concerns about being near his ex-wife do not implicate constitutional concerns. The Court has considered the fact that Martin described that when going through his divorce, he was the subject of a no-contact order requiring that he stay away from his wife. There is nothing in the record, however, to suggest that there is any current no-contact order, even though Martin may choose on his own to keep his distance from his ex-wife.

MEMORANDUM DECISION & ORDER - 8
shelters in the future, if necessary. Roscoe Aff., ¶ 7 (Dkt. 239) (testimony of the Boise Rescue Mission’s CEO); Sorrels Aff., ¶ 6 (Dkt. 240) (testimony of the Sanctuary’s Executive Director that Martin is not barred from staying there). And, Martin confirmed that, in the last four years, he has not been barred from the Sanctuary because of a rule violation. Jones Declr., p. 139 (Dkt 259-1). Thus, Martin can stay at the emergency shelters.

As previously described, the Ordinances are not to be enforced against a particular individual when “the individual is on public property and there is no available overnight shelter.” Boise City Code §§ 6-01-05(A); 9-10-02. Hence, Martin’s concern that he will be cited under the Ordinances if he is unable to stay with a friend or in a shelter is not reasonable given that the Ordinances specifically provide that they shall not be enforced when there is no available overnight shelter. Moreover, evidence in the record suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity. Allen Aff., ¶ 8 (Dkt. 242); see also Bailly Aff., ¶ 7 (Dkt. 232); Hall Declr., Ex. 7, pp. 74-75; id., Ex. 5, p. 65. The record also indicates that there has not been a single night when all three shelters in Boise called in to report they

13 Martin was not certain that he was placed on a “ban list” at River of Light, but he thought he had been told sometime prior to 2010 that he should not come back to that facility because he “had a problem getting up in the morning”. Hall Declr., Ex. 1, pp. 129-30 (Dkt. 230-1). However, Martin currently is not barred from staying at either shelter. Dkts. 239, 240 (Sorrels and Roscoe Affidavits).

MEMORANDUM DECISION & ORDER - 9
were simultaneously full for men, women or families.  *Id.*; *see also* Allen Supp. Aff., ¶ 4 (Dkt. 257-5).

Martin’s counsel argues though that, even if there is room at a shelter, shelter may be nonetheless unavailable to Martin because the Boise Rescue Mission is a religious organization and Martin has religious objections to staying there. Both Ordinances state that “[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available.” Boise City Code §§ 6-01-05(A); 9-10-02. They do not address whether the Ordinances will be enforced if individuals have other reasons for not seeking shelter, such as an objection to the religious basis of the Boise Rescue Mission or a mental illness or disability that might cause issues.\(^\text{14}\)

Regardless, Martin testified that he finds nothing “objectionable” about the rules at River of Life because the rules are “pretty fair for the most part and everything.” Hall Declr., Ex. 1, pp. 130-31 (Dkt. 230-1). Instead, his primary complaint with River of Life is the rule that during “chapel” (a religious service which lasts an hour) he is not able to go outside and have a cigarette. *Id.* That rule does not, however, require that Martin attend chapel at the River of Life (which he acknowledges) and he did not attend chapel.

\(^{14}\) The Boise Police Department’s Special Order also prohibits officers from enforcing the Ordinances when a person is on public property and there is no available overnight shelter. The Special Order states that, “to qualify as ‘available’, the space must take into account sex, marital and familial status, and disabilities.” *Bell v. City of Boise*, 709 F.3d 890, 894–95 (9th Cir. 2013). “The Special Order further provides that, if an individual cannot use available space because of a disability or a shelter’s length-of-stay restrictions, the space should not be considered available.” *Id.* But, the space will be considered available if the individual cannot use the space “due to voluntary actions such as intoxication, drug use or unruly behavior.” *Id.*

**MEMORANDUM DECISION & ORDER - 10**
at the River of Life when he stayed there previously, even though he had the impression that “people”\(^\text{15}\) wanted him to attend. Jones Declr., Ex. 5, p. 124 (Dkt. 250-1). See also Hall Declr., Ex. 1, p. 129 (Dkt. 230-1) (Martin acknowledged that nobody has ever said he had to go to chapel at River of Life). Additionally, even though Martin has been diagnosed with certain mental health disorders, nothing in the record suggests that mental health issues have prevented him from accessing the shelters. See Pls.’ St. Facts\(^\text{16}\) ¶ 3 (Dkt. 248).

In short, Martin’s alleged future injury is too speculative for Article III purposes. He has not alleged that a mental disorder or other disability interferes with his ability to obtain shelter at the Sanctuary or River of Life, or that he will not stay at any of the shelters even if space is available, or that any “objection” he may have to the religious mission of the River of Life will certainly cause him not to seek shelter there if needed. Additionally, although Martin does allege that he may again be homeless on his visits to Boise, there is no allegation that moves beyond supposition built on speculation that he will then remain outdoors on public property, in violation of one or more of the Ordinances, when the shelters are not full.\(^\text{17}\)

\(^{15}\) Mr. Martin did not specify whether these “people” were other individuals seeking shelter or directors or volunteers at the shelter.

\(^{16}\) The part of this document referring to Plaintiffs’ medical records has been redacted from the public record and, at this time, is filed under seal. Accordingly, the Court has not stated more specifically what the record reflects.

\(^{17}\) “[F]or purposes of assessing the likelihood that state authorities will reinFLICT a given injury, [the Supreme Court] generally ha[s] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”
To carry standing, Martin must demonstrate “an intention to engage in a course of conduct arguably affected with a constitutional interest,” but proscribed by a statute. Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (emphasis added). Here, camping or sleeping at night in a public place is permitted, not proscribed, by the Ordinance if there is no shelter space available. Accordingly, the conduct Martin alleges he might have to engage in if he cannot stay at a friend’s house or the shelters are full — i.e., camping or sleeping in a public place — is not proscribed by the Ordinance, and there cannot be a credible threat of prosecution under these circumstances. See Babbitt, 442 U.S. at 298. See also Pennell v. City of San Jose, 485 U.S. 1, 8 (1988) (quoting Babbitt, 442 U.S. at 298) (internal quotation marks omitted) (“[A ] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.”)).

Finally, the declaratory relief requested—that the “Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or

Honig v. Doe, 484 U.S. 305, 320 (1988) (alterations added) (citing Los Angeles v. Lyons, 461 U.S. 95, 105, 106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); Murphy v. Hunt, 455 U.S. at 484 (no reason to believe that party challenging denial of pre-trial bail “will once again be in a position to demand bail”); O’Shea v. Littleton, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws)).
physical disability”—does not align with the inchoate alleged injury. See Pls.’ Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2); but compare declaratory relief requested in Rev. 2d Amd. Compl, pp. 22-23 (Dkt. 172). First, there is no evidence that shelter beds are unavailable to Martin because of a mental illness or physical disability, so the declaratory relief in that regard would not redress his particular alleged injury. Second, when there are not enough emergency shelter beds available, regardless of the reason, the Ordinances by their plain terms may not be enforced. The City’s evidence is that the Ordinances are not enforced under these circumstances. Thus, it does not matter (but also does not condone nor condemn the sad commentary that flows from the difficulties faced by Boise City, or any community, in sheltering the homeless population) whether there are fewer beds in shelters than there are homeless individuals for purposes of standing. If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs who are homeless and do not have a disability or other issue of Constitutional interest that the evidence shows prevents them from accessing the shelters.

---

18 This is a permissible consideration in assessing the merits of Plaintiffs’ claims. Part of what the Court may consider if it applies the framework from Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) vacated by 505 F.3d 1006 (9th Cir. 2007), is whether the homeless Plaintiffs have no choice but to be present in the City’s public spaces. See Order, p. 8 (Dkt. 115). Plaintiffs also discuss overcrowding at the shelters and the use of overflow mats, but that evidence and arguments relate to the merits of Plaintiffs’ claims and not Plaintiffs’ ability to demonstrate that they are threatened with injury from the alleged unconstitutional enforcement of the Ordinances at issue that is fairly traceable to the City’s conduct. To satisfy the causation requirement, plaintiffs “must show that the injury is causally linked or ‘fairly traceable’” to the City’s Ordinances, “and not the result of independent choices by a party not before the Court.” Nw. Requirements Utilities v. F.E.R.C., No. 13-70391, 2015 WL 4716753, at *5 (9th Cir. Aug. 10, 2015).
E. **Robert Anderson Does Not Have Standing**

Anderson has not been warned by law enforcement officials regarding conduct that might violate the Ordinances in the four years preceding his most recent deposition. Hall Declr., Ex. 2, p. 101 (Dkt. 230–2). At the time of his most recent deposition, Anderson had housing because he lived with his girlfriend. Hall Declr., Ex. 2, pp. 81, 84–87 (Dkt. 230–2). His most recent Declaration describes that his girlfriend moved in February of 2015, which led to Anderson living with a friend for several months before obtaining shelter at the River of Life for a night and then at the Sanctuary. (Dkt. 296–1). Unfortunately, Anderson is again homeless and relies on the shelters to provide him a place to sleep.

However, as is the case with Martin, Anderson also will seek a place at a shelter instead of sleeping outside, and he has successfully done so. Hall Declr., Ex. 2, p. 103

19 Mr. Anderson did not pay rent to his girlfriend and his only “income” was food stamps. He is not eligible for government housing assistance and has been denied a request for social security benefits. Hall Declr., Ex. 2, pp. 81, 84-87 (Dkt. 230-2).

20 This Declaration provides relevant information for the Court to assess Anderson’s standing, and standing must exist throughout every stage of litigation, which means the Court must reassess the facts relevant to standing as they change. Accordingly, the Court has considered the information provided. Plaintiffs’ Motion seeking permission to file the Declaration is granted.

21 The City’s mootness argument rests on its assertion that Plaintiffs’ claims for prospective relief is moot because Plaintiffs are no longer living unsheltered in Boise. See Def.’s Mem., p. 6 (Dkt. 229-2). Because those circumstances have changed with regard to Anderson, the Court has not considered whether this case is now moot based on Plaintiffs’ living situations.

22 Anderson reported that he slept on the streets in 2014 for three nights even though he could have accessed a shelter on those nights, because he was ashamed to return to the shelters. Hall Declr., Ex. 2, p. 70 (Dkt. 230-2). The reason for his reluctance to seek shelter for three nights does not evince an unwillingness to stay at shelters in the future (even if one assumed that

**MEMORANDUM DECISION & ORDER - 14**
(Dkt. 230–2). There is nothing to prevent Anderson from seeking shelter at the River of Life or the Sanctuary, see Dkt. 239, ¶ 7; Dkt. 240, ¶ 6, although he does not like the rules at the River of Life that constrain his ability to smoke before he goes to bed, nor does he like the River of Life’s “religious policies”. Hall Declr., Ex. 2, p. 73 (Dkt. 230–2).

Anderson was not forced to engage in prayer at the River of Life during his March 2014 stay, but says he was forced to attend chapel services. Hall Declr., Ex. 2, p. 76 (Dkt. 230–2). But his statement in that regard was clarified in that he said that to join a particular treatment program that would allow him to stay for an extended period on the upper floors of the River of Life, he was required to attend chapel and other religious services. However, he decided not to participate in that particular program. He was, nonetheless, still permitted to stay overnight on the first floor without joining the program, subject, of course, to the other rules of the shelter. Id., pp. 72–79, 111.\(^{23}\) In other words, he objected to the requirements placed on those who stay longer than 17 days and then choose to enter the program allowing access to treatment program housing in the upstairs portion of the facility. Regardless, Anderson has stayed at the River of Life recently and has stated he will do so in the future. Id. at p. 110. Additionally,

\(^{23}\) Anderson explained that he was required to attend chapel services at a stay in 2007, before the Boise Rescue Mission was “changed . . . over” to River of Life, and before this litigation commenced. Hall Declr., Ex. 2, p. 74 (Dkt. 230-2). He has stayed at the facility since that time.
although he has been diagnosed with certain mental health disorders, nothing suggests that mental health issues have prevented Anderson from utilizing the shelters. See Pls.’ St. Facts, 3 (Dkt. 248).

As with Martin, Anderson is worried he will receive a camping citation if there is no shelter space available and he has to camp or sleep in a public place. But also as with Martin, the revised Ordinances do not allow Boise City Police Officers to cite Anderson when no shelter space is available. Anderson is willing to stay at either available shelter, even if he prefers the Sanctuary and dislikes some of the policies at the River of Life. In such circumstances, Anderson’s worry that he might be cited under the Ordinances does not amount to a substantial risk of imminent harm sufficient to demonstrate the injury-in-fact required for Article III standing.

F. Conclusion on Standing Issues

That these particular Plaintiffs lack standing does not mean, for all purposes, that other putative plaintiffs also would lack standing to pursue similar claims. There may, for instance, be an individual with a mental or physical condition that has interfered with her or her ability to seek access to or stay at shelters, with such difficulties likely to continue in the future.24 Or, perhaps a homeless individual will refuse to stay at the River of Life

24 See, e.g., Jones Declr., Ex. 80 (Dkt. 247-4) (police report describing contact with an apparently homeless individual who advised that he has PTSD and cannot stay at a shelter); id., Ex. 77 (Dkt. 247-1) (list of individuals who are barred from the Interfaith Sanctuary and, if coupled with an objection to the religious practices at River of Life, may be able to demonstrate threatened injury); id., Ex. 78 (Police report noting probable cause for camping violation for homeless person who apparently suffers from a mental illness because he “said he had not tried to get into any shelters because they try to get him onto illegal drugs and steal his medicine”); id., Ex. 72 (Dkt. 246-21) (homeless individual cited when the Sanctuary was full because River

MEMORANDUM DECISION & ORDER - 16
and can support a claim that the facility requires participation in religious practices for homeless individuals to stay in temporary housing there. However, this Court cannot entertain and decide controversies on possibilities, and it is similarly inappropriate for the Court to surmise conclusively whether such circumstances would be sufficient for other persons to establish standing. The Court will not substitute the possibility that another person might have standing to make the claims raised here as a substitute for the shortcomings of the standing claimed for Martin and Anderson. Instead, the Court must do exactly what has been done in this decision - consider the evidence and the allegations of future threatened harm to determine whether such a record rises to the level required for these particular plaintiffs to establish standing in the circumstances of this case. That answer, on this record, is “no.” Because the Plaintiffs lack standing to pursue their claims, the Court lacks jurisdiction to consider the merits of those claims and this case will be DISMISSED.

G. Miscellaneous Motions

Before the hearing, Plaintiffs filed a Motion for Leave to File Supplemental Authority related to the standing issue (Dkt. 283). The City acknowledges that the Court has discretion to consider the three cases Plaintiffs brought to the Court’s attention, but asks that the Court decline to do so. (Dkt. 293). The Court concludes that it is appropriate to consider the additional case authority, and has done so. The City is not prejudiced in any substantive manner by the presentation of the supplemental authority, of Light had capacity, but individual was “barred” from the facility).
and has had the opportunity to try and distinguish these cases from the facts of the present case. \textit{See} Dkt. 293.

After the hearing, Plaintiffs filed a \textit{Motion for Leave to Identify Record Citations} made at the hearing (Dkt. 289), for the stated purpose of assisting the Court in efficiently reviewing the record. Plaintiffs filed an appendix identifying the pages of the record that support their arguments. The appendix is a useful tool to compile evidence already in the record, it does not add to the record. Accordingly, Court will grant the \textit{Motion} and has considered the appendix.

Plaintiffs also asked that the Court strike the affidavits of Jayne Sorrels and Jacob Lang, filed in support of the City’s opposition to Plaintiffs’ \textit{Motion for Summary Judgment}. \textit{See} Dkts. 257-3; 257-4. Plaintiffs argue that these affidavits contain (1) expert opinion testimony they are unqualified to provide and (2) statements for which they lack personal knowledge and foundation or constitute hearsay. (Dkt. 268-1). However, the Court did not rely on any of this evidence to find that Plaintiffs lack standing in this case, and the challenged affidavits relate primarily to issues going to the merits of this case.\textsuperscript{25} Accordingly, Plaintiffs’ \textit{Motion to Strike} (Dkt. 268) is moot.

Additionally, having considered the evidence relevant to the standing issue and having ruled in the City’s favor, the Court further finds that the City’s \textit{Motions to Strike} also are moot.

\textsuperscript{25} Although the Court has cited to Sorrels’s Affidavit, the citation was not to any evidence objected to as unqualified expert testimony.

\textbf{MEMORANDUM DECISION & ORDER - 18}
III. Order

For the reasons set forth above, IT IS HEREBY ORDERED:

(1) Defendant’s Motion for Dispositive Relief (Dkt. 229) is GRANTED;

(2) Plaintiffs’ Motion for Summary Judgment (Dkt. 243) is DENIED.

(3) Defendant’s Motions to Strike (Dkts. 254 & 263) are DENIED as MOOT.

(4) Plaintiffs’ Motion to Strike (Dkt. 268) is DENIED as MOOT.

(5) Plaintiffs Motion for Leave to File Supplemental Authority (Dkt. 283) is GRANTED.

(6) Plaintiffs’ Motion for Leave to Identify Record Citations (Dkt. 289) is GRANTED.

(7) Plaintiffs’ Motion seeking permission to file the Robert Anderson Declaration (Dkt. 296) is GRANTED.

A separate judgment will be filed contemporaneously with this Order.

DATED: September 28, 2015

[Signature]
Honorable Ronald E. Bush
U. S. M agistrate Judge
Links to Selected News Articles Discussing Homeless Camps


09/06/2015 *Los Angeles Times* article discussing the US DOJ’s discouragement of municipal governments from breaking up homeless camps: [http://touch.latimes.com/#section/-1/article/p2p-84372151/](http://touch.latimes.com/#section/-1/article/p2p-84372151/)
Chapter 5—Right to Rest: What Does It Mean?

Ending Homelessness for People Living in Encampments

Advancing the Dialogue

August 2015
Chapter 5—Right to Rest: What Does It Mean?

Background and Intent

To end homelessness for everyone, we must link people experiencing unsheltered homelessness, including people sleeping and living in encampments1, with permanent housing opportunities matched with the right level of services to ensure that those housing opportunities are stable and successful. It is only through the provision of such opportunities that we can provide lasting solutions for individuals and communities. Across the country, many communities are wrestling with how to create effective solutions and provide such housing opportunities for people experiencing unsheltered homelessness. The presence of encampments often creates heightened awareness and concerns in communities and requires different approaches than working with individual people who are unsheltered.

It is important to acknowledge that there are many reasons that some people who are unsheltered may sleep and live in encampment settings, including that such settings offer some people a greater sense of community and safety. It is also important to acknowledge that there are many reasons that other community members may have concerns regarding the presence of encampments within their communities, including concerns related to health, sanitation, and safety. Fundamentally, the solution is not prioritizing one perspective over another; the focus on the goal of ending homelessness requires that communities implement strategies that will link all people experiencing homelessness to permanent housing opportunities.

The perspectives that USICH has brought to the preparation of this document include:

- The presence of encampments in our communities is an indicator of the critical need to create more effective and efficient local systems for responding to the crisis of homelessness.

- The formation of encampments does not represent an end to homelessness, and strategies that focus on making encampments an official part of the system for responding to homelessness can serve to distract communities from focusing on what is most important—connecting people experiencing homelessness to safe, stable, permanent housing.

- Authorizing encampments as an official part of the system for responding to homelessness creates costs to ensure the safety, security, and well-being of the people living within the encampments, which can prevent funding from being directed to supporting and creating permanent housing and service options for all who are unsheltered.

- People sleeping and living in encampments are diverse and the housing and services interventions provided must address a range of needs, challenges, and goals. Some people may be experiencing chronic homelessness and need access to permanent supportive housing, intensive services, and healthcare supports; other people may need rapid re-housing interventions with less intense services; and others may need to be linked to mainstream affordable housing opportunities.

- The forced dispersal of people from encampment settings is not an appropriate solution or strategy, accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide such lasting solutions to people who have been sleeping and living in the encampment.

1 USICH recognizes that different terms are used for such settings—such as “tent cities”—but has chosen to use “encampments” in this document, while encouraging communities to use whatever language works best locally.
Chapter 5—Right to Rest: What Does It Mean?

- Providing lasting solutions and ending the homelessness of people living in encampments requires a thoughtful, coordinated, and collaborative plan and process to ensure that people can be linked to appropriate housing options and that the presence of encampments in the community can be resolved.

USICH has addressed related issues in our 2012 publication, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness*, and in the materials on our website. More recently, our work with community partners has indicated that more specific and concrete guidance is needed to help organizations implement proactive, solutions-focused approaches to end homelessness for people sleeping and living in encampments and to address community concerns. This document is intended to offer such guidance and provides a framework for the development of local strategies so that communities can create and provide lasting housing solutions for people living in encampments.

The information and ideas contained within this document have been developed by USICH based upon conversations and problem-solving discussions with advocates, housing and services providers, and government officials across the country regarding what they have learned, and are still learning, about the most effective approaches and strategies. USICH believes that there is still more to be learned and explored, and this document is not intended as a final statement on the best practices for addressing the housing and services needs of people living in encampments. Rather, the intended purpose of this document is to advance community-level discussions that will strengthen practices and strategies. We welcome dialogue and input on the perspectives and information presented here.

**Effective Strategies and Approaches**

Communities seeking to provide lasting solutions to end homelessness for people living in encampments should first develop a local action plan that engages both residents of the encampment and an array of community partners.

The action plan should include four key elements, summarized here and described in more detail below. A planning checklist can be found on pages 11 and 12 of this document.

1. **Preparation and Adequate Time for Planning and Implementation:** Action plans for creating and providing housing solutions for people living in encampments should ensure that there is adequate time for strategizing, collaboration, outreach, engagement, and the identification of meaningful housing options. Adequate time is essential to achieve the primary objective of meeting the needs of each person and assisting them to end their homelessness.

2. **Collaboration across Sectors and Systems:** Action plans should include collaboration between a cross-section of public and private agencies, neighbors, business owners, and governmental entities, based upon on where the encampment is located. The action plan should feature strong communication among a broad range of community service providers and managers of the permanent housing resources that are being utilized in order to maximize efficiency, align resources, and address system gaps.

3. **Performance of Intensive and Persistent Outreach and Engagement:** Action plans should involve agencies that have strong outreach experience and demonstrated skills in engaging vulnerable and unsheltered people. Effective outreach is essential for effectively connecting people with coordinated assessment systems, resources, and housing options.
4. **Provision of Low-Barrier Pathways to Permanent Housing**: Action plans should focus on providing people with clear, low-barrier pathways for accessing and attaining permanent housing opportunities and should not focus on relocating people to other encampment settings.

1. **Preparation and Adequate Time for Planning and Implementation**

Providing adequate time to organize stakeholders and develop an action plan will increase the likelihood of success. There are times when swift action may be required; even in such circumstances, partners should develop a shared action plan that offers guidance on how to connect individuals and families with permanent, stable housing. Stakeholders should have a clear understanding of the strategies, interagency agreements, protocols, the roles they play, how interventions will be timed, and how people living in the encampment will be alerted to the plan.

Important elements to consider when developing an action plan include:

**Shared Agreements and Decisions**

- **Determine Timing**: Having adequate time to implement a comprehensive and effective strategy is preferable, but in some instances, property owners, safety officials, or others may require or enforce a strict timeline. It is always important to articulate the timeline, so that residents can determine their options and so that partners know the timeline for connecting people to housing options. Even when there is flexibility for determining the timeline, it is still important to act with a sense of urgency and establish an aggressive timetable, as encampment communities often experience crises that can include violence, criminal victimization, and health and safety risks. An emphasis should be placed on balancing the time it will take to develop the plan, recruit necessary partners, implement effective outreach, respond to the concerns of property owners, attend to safety needs, respond to public attention, address other urgent issues that may arise, and connect people to services and housing.

Throughout the process, there should be sufficient feedback mechanisms among stakeholders to evaluate progress and, if needed, reevaluate the timeline to ensure that solutions are people-focused and that activities do not cause additional harm or trauma for people experiencing homelessness. Efforts that rush events or prematurely disperse people without connecting them to housing could cause relocation to a different encampment setting. There is also a risk that premature dispersal might threaten the partners’ ability to build trusting relationships with residents, which is vital to successful housing outcomes. Whenever possible, activities should be tracked through the Homeless Management Information System (HMIS) to allow for efficient reporting and evaluation.

- **Create Shared Purpose and Intent**: While many of the partners will have encountered or worked with people experiencing homelessness, they will likely have differing approaches and assumptions. Action plans should communicate a shared purpose for all stakeholders involved, including encampment residents, should emphasize safety for all parties involved, and should focus on access to appropriate permanent housing.

- **Develop Shared Outcomes**: Action plans should identify expected outcomes for each stage of the intervention and build consensus regarding how successful outcomes are being defined. A focus on shared goals enhances collaborative efforts and the development of coordinated
strategies, as well as focusing partners on identifying the resources and activities necessary to achieve outcomes.

- **Develop Shared Protocols/MOU**: In order to minimize confusion and miscommunication, it is important that action plans clearly delineate the who, what, when, where, and why for each identified strategy and incorporate those details into protocols agreed to among stakeholders. A list of shared protocols may then be used to inform a Memorandum of Understanding (MOU), which is useful for formalizing the ongoing, collaborative response to encampments in the future.

- **Create a Communications Plan**: Action plans should incorporate a communications strategy that informs stakeholders how to interact with the media and respond to questions from community members. One entity should take the lead role as primary media contact so that communication is consistent and prompt.

**Assess Needs and Available Resources:**

- **Identify Land Owner(s)**: One of the first steps to implementing the plan is to identify who owns the land where the people are living. Planning should consider the needs of the land owner and determine what role the land owner may need to play in the action plan. It is critical to include the land owner as soon as possible to ensure costly, harmful, and uncoordinated preemptive measures are avoided.

- **Assess Needs of People Living in the Encampment**: As soon as an encampment is identified, it is important to assess the unique needs of every individual living there and determine how much time and what resources are needed to connect individuals and families with appropriate housing and supportive services. Particular attention should be given to individuals who are highly vulnerable, people experiencing chronic homelessness, people with mental health issues, and people struggling with substance use. Additionally, specialized attention is needed for individuals who may be ineligible for some housing options, including undocumented immigrants, those with histories of involvement with the criminal justice system, and people who are subject to registration requirements as sex offenders.

- **Identify Adequate Staffing and Resources**: Based upon the projected needs, it is important to determine how existing housing and services resources can be aligned and targeted to connect people to permanent housing. This analysis of resources should also identify how gaps in resources may be filled and what staffing will be necessary to implement the plan. It is important to identify flexible funding that outreach teams can use to offer quick interim housing solutions for people who have already identified a more permanent housing option but need extra time to access that housing. For example, some people may need time to get approved for housing, need assistance gathering documentation, or need help with transportation or move-in costs.

**Next Steps**

- **Plan for Preventing Encampment from Being Recreated**: Action plans should include strategies for cleanup measures as well as how the space will be returned to its intended use. Additional security and outreach measures may be necessary to prevent future encampments from being formed at the same location.
• **Plan for Follow-up Contacts and Tracking Outcomes:** Action plans should include strategies for following up with people who have been assisted in order to track their outcomes and measure progress.

• **Standardize Future Responses:** It is important for communities to develop standardized approaches and align policies across programs and agencies, allowing for efficient and effective responses. A standardized response should include law enforcement policies and procedures, communication and coordination among outreach teams and service agencies, and agreements with housing providers to accept referrals from outreach workers and case managers. Since encampments are often transitory or cross jurisdictional boundaries, it is also helpful for neighboring cities to align local plans so that strategies are unified.

• **Integrate with the Community’s Strategic Efforts to End Homelessness:** Finally, it is important to integrate these actions with the community’s strategic efforts to end homelessness. Partners should debrief and identify lessons that can be learned from the implementation of the action plan in order to both inform future responses and improve the homelessness crisis response system as a whole.

2. **Collaboration across Sectors and Systems**

The most effective action plans involve early engagement with multiple public and private stakeholders including, but not limited to, local officials, city and county staff, Continuum of Care agencies, service providers, housing organizations, law enforcement, business leaders, strategic planning bodies, and people who have experienced homelessness. Collaborative efforts can better align available resources and more quickly connect people with housing, health care, and services.

When developing or expanding a collaborative partnership, consider engaging a broad array of stakeholders, including:

• **People Living in Encampments:** People living in encampments have a strong interest in planned efforts and outcomes, may regard the site as their home and community, and understandably expect that others will respect their privacy and personal property. Planning should assume that people are entitled to participate in decisions that will affect their lives and should seek ways to incorporate their input. Leaders in an encampment community are valuable partners and can offer information about the culture of the community and can help outreach workers and other providers connect with people and better understand their needs and goals.

• **Continuum of Care Agencies:** Agencies working with the local Continuum of Care (CoC) can provide leadership and guidance based on their expertise in implementing programs and coordinating system-level responses for people experiencing homelessness. The CoC should identify key agencies to participate within the action plan and should determine how coordination among those agencies will be managed. The U.S. Department of Housing and Urban Development (HUD) has an [online resource](#) where community leaders can find contact information for the CoC.

• **Other Social Service and Health Care Agencies:** Agencies that are not primarily focused on homelessness, but that serve people who are experiencing homelessness, such as behavioral and physical health care providers, affordable housing providers, or legal aid programs are also important partners and can offer access to data, resources, and expertise.
• **Community Outreach and Engagement Teams**: Outreach teams, case managers, and peer specialists often have relationships with people in encampments, can provide insight into the challenges and realities people are facing, and bring knowledge and experience with effective outreach and engagement strategies.

• **Law Enforcement Agencies**: Law enforcement agencies offer expertise on public safety and the protection of vulnerable individuals. Law enforcement agencies can also clarify policies that impact encampment settings and the charges that people can accrue if they are in violation of a municipal ordinance. In some communities, law enforcement personnel participate as core members of outreach teams, including helping to ensure the safety of outreach personnel. In other instances, law enforcement officials call upon outreach teams for assistance when they encounter people who are experiencing homelessness and are at-risk of arrest. Close coordination and communication between the outreach teams and law enforcement agencies is essential for assuring the safety of staff and of people experiencing homelessness.

• **Local Government Agencies and Officials**:
  1. **Elected Officials**: Elected officials are important leaders in ending homelessness and have an interest in being responsive to citizen concerns about their neighborhoods. Elected officials can take a leadership role in convening stakeholders and can help direct attention and funding toward strategies that will connect people to housing.
  2. **Planning, Parks and Recreation, and Public Works**: Encampments are often located under bridges, next to roads and highways, or on other public lands that a public entity is obligated to monitor and maintain. Staff from such agencies should have information about ownership of the land and security measures currently in place, may have useful information about the site and the people living there, and can offer expertise in sanitation and security once people have been assisted and the site is vacant.
  3. **Human or Social Services Departments**: City and county human services offices likely manage resources and programs that can address homelessness, may have housing and service contracts with a variety of providers in the community, and can recommend nonprofit organizations to help with interventions. These departments may also be able to identify funding and resources to expand outreach efforts or to support the provision of services and housing options.
  4. **Public Health and Behavioral Health Care Departments**: Public health and behavioral health care departments can both play key roles in outreach via public health nurses, doctors, and skilled clinicians. They can also provide education regarding sanitation, health and safety concerns, and available services. Such departments have critical roles to play in the provision of services to people as they access housing and other services, and after they are in permanent housing.
  5. **Business Leaders**: Businesses may be impacted by encampments, which can motivate them to support effective solutions. Business leaders can leverage their professional affiliations and relationships with the local Chamber of Commerce and other business associations to generate public support and provide resources for programs that are creating lasting solutions.
• **Philanthropic Organizations:** The involvement of private funds in planning efforts may help identify organizations with strong track records of ending homelessness. Some funders may also be interested in supporting expanded, outcomes-focused efforts to create solutions for the issue of people living in encampments within the community.

• **Faith-based Organizations:** Many faith-based organizations are interested in improving the lives of people experiencing homelessness and provide volunteer and financial support to assist the community response. While volunteer efforts, financial contributions, and in kind donations may currently focus on meeting individuals’ daily subsistence needs, such organizations may also be seeking opportunities to partner with other organizations to support permanent solutions to homelessness.

• **Advocates:** Advocates can ensure that the voices of people in encampments are being heard, can use their positions to affirm the human need for housing, and can make the case for increased investments in affordable, safe, high-quality housing and services. Advocates can also help research and articulate the impact of counterproductive ordinances that criminalize homelessness.

3. **Intensive and Persistent Outreach and Engagement**

Outreach and engagement efforts are critical components of any successful plan that addresses the needs of people living in encampments and should be implemented throughout the process. The deployment of cross-disciplinary outreach teams is an important strategy for aiding people to move into permanent housing. Cross-disciplinary teams might include outreach workers, law enforcement, U.S. Department of Veterans Affairs staff, public health, city and county staff that can connect people to benefits, peer specialists, and other trained service providers and volunteers. To ensure success, outreach and engagement teams must have the ability to refer individuals directly to permanent housing opportunities and interim options that can be immediately available.

Key outreach and engagement strategies include:

• **Identify all Members of the Encampment by Name and Implement Ongoing Outreach:** It is important that outreach teams identify every single person living at the site, including collecting necessary demographic data and other relevant information. Information about how many people are living at the site allows the coordinating team to begin to identify the scale of resources that will be needed. By learning about people’s histories through an iterative engagement process, outreach workers and case managers can better work with individuals and families to tailor interventions that will lead to the appropriate permanent housing solutions and the right services and supports.

• **Maintain a Consistent Presence in the Encampment:** Outreach workers should maintain a consistent presence at the site so that relationships of trust can be formed, allowing for clear and precise information about the plans and options available for people. This is especially important for engaging people who may not be responding to outreach or who have not accepted the options being offered by providers. Consistent and ongoing outreach and engagement efforts offer individuals multiple opportunities to connect with outreach workers on their own terms.
• **Maintain Honest and Transparent Communication**: Outreach workers and other members of the collaborative action plan should make sure that their communication with people is honest and forthcoming. It is important to be transparent about the process and timelines while at the same time making sure not to over-promise resources, options, or expected outcomes.

• **Identify Leadership from within the Encampment**: Many encampment communities have developed some type of a leadership structure. It is important to include these leaders in the process in order to better understand the needs and goals of people and to foster open and trustworthy relationships between people staying at the site and the agencies and organizations implementing the action plan.

• **Cross-train and Share Information**: Cross-training and sharing information among outreach teams increases the likelihood of success by enabling partners to develop shared responses to both crisis and non-crisis situations. It also provides insight into practices and policies of outreach teams, facilitates coordination of activities, and enhances sensitivity in working with people experiencing homelessness.

• **Link with Housing Search Services**: Outreach workers should partner with housing navigators, housing search specialists, and/or landlord liaisons to help people access appropriate housing opportunities.

4. **Provide Low-Barrier Pathways to Permanent Housing**

People experiencing unsheltered homelessness, including those who live in encampments, are not uniform in their housing and services needs. Some individuals may be experiencing chronic or long-term homelessness, while others may be encountering their first and only brief experience without housing.

Considerations for providing the range of housing solutions needed include:

• **Apply Housing First Strategies and Practices**: Implementing the proven practice of Housing First will remove unnecessary obstacles, requirements, and expectations so that people can access housing as quickly as possible. Removing as many barriers as possible will help prevent people from being “screened out” of the housing options that are available.

• **Align Activities with the Existing Homelessness Crisis Response and Coordinated Entry System**: Efforts to assist people living in encampments should not stand alone from the community’s broader efforts to respond to the crisis of homelessness and effectively reach and serve other people who are unsheltered in the community. It is also important to ensure that living in an encampment does not become the only way to access necessary housing and services. Coordinated assessment, intake, and placement strategies help assure that people are prioritized for and linked to the housing and services interventions that are most appropriate to their needs and will most efficiently end their homelessness.

• **Offer Interim Housing Opportunities and a Clear Path to Permanent Housing**: Permanent housing opportunities cannot always be immediately accessed, so it is important to be able to provide an immediate, interim housing opportunity (which could include shelter, bridge housing, or other temporary arrangements) without barriers to entry while permanent housing and appropriate supports are being secured.
• **Identifying an Adequate Supply of Housing Options**: People will need access to a variety of permanent housing options, including permanent supportive housing, rapid re-housing, and mainstream affordable housing opportunities. People will also need assistance in identifying landlords from whom they can rent units. Public housing authorities and multi-family owners can be recruited and encouraged to establish preferences for people experiencing homelessness. Communities can create risk mitigation pools of funds to help address concerns landlords may have, and service providers can work with landlords to address concerns that may arise.

• **Engage State and Federal Partners**: State and Federal partners may have information and/or resources that can increase availability and access to permanent housing, and there may be opportunities to better align Federal, state, and local funding and programs to provide the pathways into permanent housing more efficiently and effectively.

**Conclusion**

We want to thank all of the communities that have participated in conversations and written dialogue about this topic and the challenges they face in their efforts to end homelessness for people experiencing unsheltered homelessness and living in encampment communities. It is our hope and intention that this document and the framework presented will advance community-level discussions that will strengthen practices and foster strategies for addressing those challenges. We look forward to continuing to work together to broaden our understanding and share solutions and lessons learned.

For more information, or to share your experiences and perspectives on these issues, please contact the USICH Regional Coordinator who works with communities within your state. You can also learn more about related topics on the USICH website.
Planning Checklist

*Ending Homelessness for People Living in Encampments: Advancing the Dialogue*

To end homelessness for everyone, we must link people experiencing unsheltered homelessness, including people sleeping and living in encampments, with permanent housing opportunities matched with the right level of services to ensure that those housing opportunities are stable and successful. It is only through the provision of such opportunities that we can provide lasting solutions for individuals and communities. Across the country, many communities are wrestling with how to create effective solutions and provide such housing opportunities for people experiencing unsheltered homelessness. This Planning Checklist is intended as an accompaniment to *Ending Homelessness for People Living in Encampments: Advancing the Dialogue*, a framework for developing local action plans in order to aid policy-makers, government officials, and practitioners in developing a thoughtful, coordinated, and collaborative plan to ensure that people living in encampments are linked to permanent housing. More detailed information regarding each of the actions identified here is provided within the full document.

**Prepare with Adequate Time for Planning and Implementation**

When developing an action plan:

- **Determine Timing.** Articulate an action plan timeline so residents can determine their options and partners know the timeline for connecting people to housing.
- **Create Shared Purpose, Intent, and Outcomes.** Develop a common purpose and intent for all stakeholders that enhances collaborative efforts and helps partners identify resources and activities to achieve shared outcomes.
- **Develop Shared Protocols/MOU.** Create a Memorandum of Understanding that formalizes relationships among stakeholders and delineates protocols.
- **Create a Communications Plan.** Incorporate a communications strategy on how to interact with the media and respond to questions from community members.
- **Identify the Land Owner[s].** Consider the needs of the land owner and determine his/her role.
- **Assess Needs of People Living in the Encampment.** Consistently assess the needs of every person.
- **Identify Adequate Staffing and Resources.** Based on the projected need, determine how existing housing and services resources can be aligned to connect people to permanent housing.
- **Plan for Preventing Encampments from Being Recreated.** Create strategies for cleanup measures as well as how the site will be used and/or secured in the future.
- **Plan for Follow-up Contacts and Tracking Outcomes.** Include strategies for following up with people who have been assisted in order to track outcomes.
- **Standardize Future Responses.** Develop standardized approaches that incorporate law enforcement policies and agreements with housing providers.
- **Integrate with the Community’s Strategic Efforts to End Homelessness.** Identify lessons that can strengthen the community’s overall homelessness crisis response system.

---

2 USICH recognizes that different terms are used for such settings—such as “tent cities”—but has chosen to use “encampments” in this document, while encouraging communities to use whatever language works best locally.
Collaborate Across Sectors and Systems

When developing or expanding a collaborative partnership, engage stakeholders, including:

- **People Living in Encampments.** To help understand the needs and goals of residents.
- **Continuum of Care Agencies.** To provide expertise in coordinating system-level responses.
- **Other Social Service and Healthcare Agencies.** To provide access to data, resources and expertise.
- **Community Outreach and Engagement Teams.** To help develop the best engagement strategies.
- **Law Enforcement Agencies.** To coordinate outreach and ensure the safety of all.
- **Local Government Agencies and Officials.** To help coordinate government resources and action, specifically:
  - Elected Officials
  - Planning, Parks and Recreation, and Public Works
  - Human or Social Services Departments
  - Public Health and Behavioral Health Care Departments
- **Business Leaders.** To leverage professional relationships to generate support and resources.
- **Philanthropic Organizations.** To involve private funders that have interest in ending homelessness.
- **Faith-based Organizations.** To provide volunteer and financial support.
- **Advocates.** To ensure that the voices of people in encampments are heard and raise other concerns.

Perform Intensive and Persistent Outreach and Engagement

Implement outreach and engagement efforts throughout the process, including:

- **Identifying All Members of the Encampment By Name and Implement Ongoing Outreach.** Having a full understanding of the population is important to scale resources and tailor interventions.
- **Maintaining a Consistent Presence in the Encampment.** Devote adequate time and resources to ensure trusting relationships are being developed with residents.
- **Maintaining Honest and Transparent Communication.** Transparency about the process and timelines ensures trusting relationships are formed.
- **Identifying Leadership from within the Encampment.** Include such leaders in the process in order to better understand the needs and goals of people and to strengthen relationships.
- **Cross-Training and Sharing Information.** Sharing information among outreach teams increases success by enabling partners to develop shared responses to both crisis and non-crisis situations.
- **Linking with Housing Search Services.** Outreach workers should partner with housing navigators, housing search specialists, and landlord liaisons to help people access housing.

Provide Low-Barrier Pathways to Permanent Housing

To provide a range of housing solutions, consider:

- **Applying Housing First Strategies and Practices.** Remove obstacles, requirements, and expectations so that people can access housing as quickly as possible.
- **Aligning Activities with the Existing Homeless Crisis Response and Coordinated Entry System.** Coordinated entry assures people are prioritized for and provided housing and services that meet their needs.
- **Offering Interim Housing Opportunities and a Clear Path to Permanent Housing.** It is important to provide immediate, interim housing without barriers to entry while permanent housing is being secured.
- **Identifying an Adequate Supply of Housing Options.** People will need access to a variety of housing options, including permanent supportive housing, rapid re-housing, and mainstream affordable housing.
- **Engaging State and Federal Partners.** Identify opportunities to align Federal, state, and local funding and programs to provide pathways to permanent housing.
Chapter 6A

Greasy Spoon to Greasy Sewer: FOG, Public Pipes, and the OPSC—Presentation Slides

Eric Shaffner
Portland Office of City Attorney
Portland, Oregon
Overview

1) The impact of fats, oils, and grease (FOG) on the public sewer system.
2) The regulatory and statutory authority of local jurisdictions to protect their sewers.
3) The goals and framework of the Oregon Plumbing Specialty Code (OPSC).
4) The OPSC’s apparent restrictions on local jurisdictions’ ability to protect their sewers.
5) A way forward.
This is bacon:

This is your sewers on bacon:
Why doesn’t this work?

“The City of Portland by its Council has power and authority . . . to regulate, restrain and prohibit use of public sewers for any substance which may be harmful or detrimental to the sewers, to sewage disposal and treatment, or hazardous to workers, to property or to the public.” Portland City Charter § 2-105(a)(34).

AND/OR

“A city, through its council, may enact and enforce such ordinances and other provisions as may be necessary or essential for the proper policing, protection, management and control of sewers . . . beyond the city limits and constructed by the city . . .” ORS 224.140.

Meet the OPSC

“The state building code [including the OPSC] shall be applicable and uniform throughout this state and in all municipalities, and no municipality shall enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code but which provides different requirements unless authorized by the Director of the Department of Consumer and Business Services . . . The director shall encourage experimentation, innovation and cost effectiveness by municipalities in the adoption of ordinances, rules or regulations which conflict with the state building code.” ORS 455.040(1).

“No provision of this code shall be deemed to require a change in a portion of a plumbing . . . system . . . in or on an existing building or lot where such work was installed and is maintained in accordance with law in effect prior to the effective date of this code, except where such plumbing . . . is deemed by the building official to be in fact dangerous, unsafe, insanitary, or a nuisance and a menace to life, health, or property.” OPSC 101.4.2.
Chapter 6A—Greasy Spoon to Greasy Sewer: FOG, Public Pipes, and the OPSC—Presentation Slides

**Prevention vs. Penalties**

**What about this?**

“It shall be unlawful for any person to **deposit**, by any means whatsoever, into any plumbing fixture . . . which is connected to any . . . **public sewer** . . . any . . . **oils; grease;** or any other thing whatsoever that **would, or could**, cause damage to the . . . public sewer.” OPSC 306.0.

**Problems:**

1) Backward-looking, so expensive for everyone;
2) We can do that already;
3) Encourages evasion.

---

**A Way Forward**

“It is unlawful to discharge . . . directly or indirectly into the City sewer system any substance . . . that **may inhibit** . . . the performance of the City’s conveyance, collection or treatment processes and systems. Prohibited discharges also include those that create **or could create** a nuisance or a threat to human health or the environment or that: . . .

“4. Contain **solids or viscous substances** which . . . are capable of obstructing the flow of wastewater or cause other interference with the operation of the sewer system . . . .” Portland City Code § 17.34.030 B.4.

“[I]f the Director finds that industrial wastewater from a particular commercial or industrial occupancy or a class of similar occupancies **causes or may cause** . . . interference . . . to the City sewer system, . . . the Director . . . may terminate acceptance.” Portland City Code § 17.34.030 D.
A Better Way Forward

“[N]o municipality shall enact . . . any . . . regulation relating to the same matters encompassed by the [OPSC] . . . .” ORS 455.040(1).

“[M]atters generally not authorized for inclusion in a specialty code . . . include . . . matters covered by federal or state law . . . .” OAR 918-008-0000(2).

Different “matters”:

The OPSC establishes technical construction standards primarily to protect the owners, occupants, and users of buildings.

Sewer regulations primarily protect the public sewer system, and they are generally tied to NPDES mandates.

Needed:

Recognition by the state that both regulatory regimes are necessary and can coexist.
Who We Are

- Formed in 1966 to address regional sanitary sewer problems
- Original partners were City of Medford, Phoenix, Central Point and BCVSA
- Annexed White City in Mid-1970’s
- Jacksonville connected in 1980
- Eagle Point connected in 1996
- From 1998-2004 Phoenix, Central Point, Eagle Point and Jacksonville annexed into RVSS.
- Manage Shady Cove system under contract since 2011
Causes of Sewer Spills

- High Flows: 25%
- Grease: 16%
- Roots: 7%
- Blockage: 14%
- Equipment Failure: 16%
- 3rd Party: 20%
- Other: 3%
- High Flows: 25%
- Grease: 16%
- Blockage: 14%
- Roots: 7%
- Equipment Failure: 16%
- 3rd Party: 20%
- Other: 3%
RVSS Code – Prohibited Discharge

• Section 7.10.010 Prohibited Discharges
• B9 “Any fat, oils or greases, including but not limited to petroleum oil, non-biodegradable cutting oil, or products of mineral oil origin, in amounts that will cause interference or pass through.”
RVSS Code – Grease Interceptors

• Section 7.25.050 Grease Interceptors and other pretreatment
  • Grease, oil, and sand interceptors shall be provided, operated, and maintained when, in the opinion of the WRD superintendent or manager, they are necessary for the proper handling of liquid wastes containing grease in excessive amounts, or any flammable wastes, sand or other harmful substances...All interceptors shall be of a type and capacity approved by the requesting authority and shall be located as to be readily accessible for cleaning and inspection. Such interceptors shall be inspected, cleaned, and repaired regularly as needed by the owner at his expense.

RVSS Code – Right of Entry

• Section 7.30.030 Inspection and entry requirements.
  • The WRD superintendent shall have the right to enter the premises of any user to determine whether the user is complying with all requirements of this title...
40 CFR 403.5

- (b) *Specific prohibitions.* In addition, the following pollutants shall not be introduced into a POTW:
  
  - (1) Pollutants which create a fire or explosion hazard in the POTW, including, but not limited to, wastestreams with a closed cup flashpoint of less than 140 degrees Fahrenheit or 60 degrees Centigrade using the test methods specified in 40 CFR 261.21;
  
  - (2) Pollutants which will cause corrosive structural damage to the POTW, but in no case Discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such Discharges;
  
  - (3) Solid or viscous pollutants in amounts which will cause obstruction to the flow in the POTW resulting in Interference;
  
  - (4) Any pollutant, including oxygen demanding pollutants (BOD, etc.) released in a Discharge at a flow rate and/or pollutant concentration which will cause Interference with the POTW.
  
  - (5) Heat in amounts which will inhibit biological activity in the POTW resulting in Interference, but in no case heat in such quantities that the temperature at the POTW Treatment Plant exceeds 40 °C (104 °F) unless the Approval Authority, upon request of the POTW, approves alternate temperature limits.
  
  - (6) Petroleum oil, nonbiodegradable cutting oil, or products of mineral oil origin in amounts that will cause interference or pass through;
  
  - (7) Pollutants which result in the presence of toxic gases, vapors, or fumes within the POTW in a quantity that may cause acute worker health and safety problems;
  
  - (8) Any trucked or hauled pollutants, except at discharge points designated by the POTW.

Oregon Plumbing Specialty Code 2011

- 1014.0 Grease Interceptors
  
  - 1014.1 Where it is determined by the Authority Having Jurisdiction that waste pretreatment is required, an approved type of grease interceptor(s) complying with the provisions of this section shall be correctly sized and properly installed in grease waste line(s) leading from sinks and drains, such as floor drains, floor sinks and other fixtures or equipment in serving establishments where grease is introduced into the drainage or sewage system in quantities that can affect line stoppage or hinder sewage treatment or private sewage disposal. Any combination of hydromechanical, gravity grease interceptors and engineered systems shall be allowed in order to meet this code and other applicable requirements of the Authority Having Jurisdiction when space or existing physical constraints of existing buildings necessitate such installations. A grease interceptor shall not be required for individual dwelling units or for any private living quarters. Water closets, urinals, and other plumbing fixtures conveying human waste shall not drain into or through the grease interceptor.
Oregon Plumbing Specialty Code 2011

• 1014.1.1 Each fixture discharging into a grease interceptor shall be individually trapped and vented in an approved manner.

• 1014.1.2 All grease interceptors shall be maintained in efficient operating condition by periodic removal of the accumulated grease and latent material. No such collected grease shall be introduced into any drainage piping or public or private sewer. If the Authority Having Jurisdiction determines that a grease interceptor is not being properly cleaned or maintained, the Authority Having Jurisdiction shall have the authority to mandate the installation of additional equipment or devices and to mandate a maintenance program.

Oregon Plumbing Specialty Code 2011

• 1014.1.3 Food Waste Disposal Units and Dishwashers. Unless specifically required or permitted by the Authority having Jurisdiction, no food waste disposal unit or dishwasher shall be connected to or discharge into any grease interceptor. Commercial food waste disposers shall be permitted to discharge directly into the building’s drainage system.
What could possibly go wrong?

BCD Stipulated Order

• 6.6 RVSS is regulated under the National Pretreatment Program (40 CFR 403) which requires it to adopt and enforce a pretreatment program. The pretreatment program includes, among other things, a prohibition of discharge of FOG into the sewer.

• 6.7 Under the pretreatment program, RVSS has the authority to require installation of pretreatment equipment, including grease interceptors, for users it determines to be potential sources of a prohibited discharge. Once it is determined that pretreatment is necessary, any such equipment must be installed in accordance with the OPSC.
Oregon Plumbing Specialty Code - 2014

• 1014.0 Grease Interceptors
  • 1014.1 Where Required. Waste pretreatment is required in all Food Service Establishments. Waste pretreatment is also required in other establishments as determined by the building official, where grease is introduced into the drainage or sewer system. An approved type of grease interceptor(s) complying with the provisions of this section shall be correctly sized and properly installed. The following plumbing fixtures and drains shall be connected to the grease interceptor(s).

Oregon Plumbing Specialty Code - 2014

• Plumbing fixtures, garbage disposals, dishwashers, floor drains, and cooking equipment, with drain connections in food and/or beverage preparation areas of all Food Service Establishments.
  • If a garbage disposal is installed on a system using a hydromechanical grease interceptor, a solids interceptor shall be installed upstream of the inlet of the grease interceptor.
Oregon Plumbing Specialty Code - 2014

• Where space or existing physical constraints of existing buildings necessitate such installations a combination of hydromechanical, gravity grease interceptors, and professionally engineered systems shall be allowed in order to meet this code and other applicable requirements of the building official. A grease interceptor shall not be required for individual dwelling units or for private living quarters.

• Exceptions:
  • Ice wells and condensate drains are not required to drain into or through the grease interceptor(s)
  • Bathroom plumbing fixtures, including bathroom floor drains, shall not drain into or through the grease interceptor(s)
BEFORE THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES OF THE STATE OF OREGON

BUILDING CODES DIVISION

IN THE MATTERS OF:

ROGUE VALLEY SEWER SERVICES AND SHANE MACUK,

RESPONDENTS

STIPULATED ORDER

CASE NO. 2012-0164

CASE NO. 2012-0163

1.

The Building Codes Division is responsible for adopting a statewide building code. The building code provides predictability and uniformity by allowing businesses and contractors throughout the state to rely on one construction standard for construction, alteration and repair work. Included in the state wide building code is the Oregon Plumbing Specialty Code (also “OPSC”).

2.

In May 2012, the division initiated an investigation into complaints from local plumbing contractors and food establishments that Respondent Rogue Valley Sewer Services (RVSS) was enforcing standards different than the OPSC. The division’s investigation found that RVSS had in fact adopted different standards for grease interceptors and in a number of instances required individual businesses to comply with construction requirements that were different than what was required under the OPSC. The investigation also found that Respondent Shane Macuk, the appointed building official for RVSS (BO Macuk), enforced these requirements despite being required under his State of Oregon certifications as an Oregon Inspector (OIC375) and limited plumbing inspector (5369PIS) to administer and enforce the state building code. Respondents took these actions with respect to Debbie’s Diner, the Talent café, Abby’s Pizza, and others. RVSS applied its standards to all food service establishments as opposed to applying OPSC standards. It required existing restaurants buildings to retrofit to RVSS standards.

3.

The division finds RVSS’s actions constituted violations of ORS 455.040 and BO Macuk’s actions constituted violations of ORS 455.040, OAR 918-098-1470, OAR 918-098-1480, and OAR 918-695-0400(9)(b). These findings are significant because meeting additional or different RVSS construction requirements creates significant expense for owners of buildings. Meeting additional or different RVSS construction requirements creates confusion for

In the Matters of Rogue Valley Sewer Services & Shane Macuk
contractors in the service area who may be required to follow RVSS standards in one district and the statewide code in all others. The goal of the state building code is to avoid confusion and conflicting construction standards.

4.

Based on its findings, the Director is authorized under ORS 455.895 to propose civil penalties and/or actions affecting certifications against Respondents for enacting and enforcing construction requirements covering the same matters as the state building code adopted by the Director.

5.

Respondents and the Director desire to settle this matter by the entry of this Stipulated Order. Respondents understand that this Order is a public record.

6.

The Director finds, and Respondents stipulate that:

6.1 RVSS is a sanitary authority that has been delegated the enforcement of plumbing code under ORS 450.837 and 455.150, as it relates to the installation and maintenance of connections between structures and the sewer mains and the sewers of the authority.

6.2 BO Macuk is certified by the State of Oregon as an Oregon Inspector and Limited Plumbing Inspector and is the appointed building official for RVSS. BO Macuk was delegated the enforcement and administration of the Oregon Plumbing Specialty Code under ORS 450.837 and 455.150, as it relates to the installation and maintenance of connections between structures and the sewer mains and the sewers of the authority.

6.3 The Director initially adopted the Oregon Plumbing Specialty Code under 447.020 as part of the statewide building code in 1974, governing the construction, reconstruction, alteration and repair of plumbing installations. The Director has continually maintained and updated the plumbing code, including the most recent adoption in April 1, 2011, through Oregon Administrative Rule 918-750-0110.

6.4 Chapters 7 and 10 of the Oregon Plumbing Specialty Code (OPSC) contain specific references to grease trap inceptors and the handling of fats, oils and grease (FOG) in particular facilities including food service establishments, based on the pipe size and flow rate.

6.5 Under the OPSC, grease trap interceptors are not required for all food service establishments. Properly sized interceptors are required where grease is introduced into the drainage or sewage system in quantities that can affect line stopping or hinder sewage treatment or private sewage disposal. These requirements are subject to the discretion of the Authority Having Jurisdiction (AHJ).
6.6 RVSS is regulated under the National Pretreatment Program (40 CFR 403) which requires it to adopt and enforce a pretreatment program. The pretreatment program includes, among other things, a prohibition of discharge of FOG into the sewer.

6.7 Under the pretreatment program, RVSS has the authority to require installation of pretreatment equipment, including grease interceptors, for users it determines to be potential sources of a prohibited discharge. Once it is determined that pretreatment is necessary, any such equipment must be installed in accordance with the OPSC.

6.8 RVSS has adopted the Rogue Valley Sewer Services Code Title 7 and Standard Specifications for FOG facilities.

The Rogue Valley Sewer Services Code chapter 7.25.050 (Grease Interceptors and Other Pretreatment) reads “grease, oil, and sand interceptors shall be provided, operated, and maintained when, in the opinion of the WRD superintendent or manager, they are necessary for the proper handling of liquid wastes containing grease in excessive amounts...All interceptors shall be of a type and capacity approved by the requesting authority.”

6.9 RVSS has adopted standard specifications that require all food service establishments with the potential to generate FOG to have a grease trap interceptor. These establishments include, but are not limited to, all restaurants, cafes, lunch counters, cafeterias, bars and clubs, hotels, hospitals, sanitariums, commercial kitchens, and coffee kiosks.

6.10 RVSS’s Standard Specification\(^1\) requires gravity grease interceptors have a minimum total volume of 300 gallons. The OPSC provides that a properly sized gravity grease interceptors is determined by Table10-3, which provides that the minimum volume is 500 gallons.

6.11 RVSS’s Standard Specification\(^2\) requires all newly constructed facilities with “type one\(^3\) vent hoods to install a gravity grease interceptor regardless of volume of FOG entering the system. OPSC allows the use of either a gravity or hydromechanical grease trap interceptor.\(^4\) Further, the OPSC requires a grease trap interceptor only if a food service establishment meets the threshold for grease discharge.

6.12 RVSS’s Standard Specifications\(^5\) cite the 2008 OPSC, not the currently valid 2011 OPSC.

6.13 RVSS’s Standard Specifications\(^6\) require 30 inch access covers and no more than 12 inches of grade rings. The OPSC does not contain either of these requirements.\(^7\)

6.14 RVSS’s Standard Specification\(^8\) requires commercial food waste disposers and dishwashers be connected to a gravity grease interceptor. The OPSC specifically prohibits the

---

\(^1\) Rogue Valley Sewer Services, Standard Specifications (B) (2008).
\(^2\) Standard Specifications (B)(e)(1)(1).
\(^3\) Type one hoods are those utilized by food service establishments to capture grease smoke. They also contain fire suppression equipment.
\(^5\) Standard Specifications (C)(e)(1) and (B)(1) and (D)(e)(1).
\(^6\) Standard Specifications (D)(e)(ii)(1) and (2).
\(^7\) OPSC Chapter 10 Traps and Interceptors (2008 and 2011)
\(^8\) Standard Specifications (D)(e)(iv)(C).
connection of food waste disposers or dishwashers to grease interceptors unless allowed by the AHJ.

6.15 RVSS provides specific guidance documents illustrating the requirements discussed above.

6.16 On or about May 21, 2010, RVSS sent out a communication to all food service establishments (approximately 210 locations) notifying them that RVSS was going to begin random inspections to require businesses to comply with FOG prevention requirements adopted by RVSS.

6.17 RVSS found that there were 117 food service establishments that did not have grease interceptors.

6.18 Between March 2010 and May 2012, RVSS inspected 251 food service establishments according to the RVSS requirements and applied its standards retroactively, regardless of which standards were required by state law at the time of construction.

6.19 The state wide building code does not require retrofitting for existing buildings not engaged in alterations or repairs when code changes are implemented. The OPSC contained provisions prior to January 1, 2013, relating to the repair and maintenance of grease interceptors which may have required retrofits in some cases.

6.20 RVSS used the authority granted by of the National Pretreatment Program (40 CFR 403) to require installation of pretreatment systems at existing food service establishments. Once it is determined that pretreatment is necessary, any such equipment must be installed in accordance with the OPSC.

6.21 On November 03, 2010, RVSS inspected Animal House Coffee and found it was out of compliance with the RVSS ordinance because Animal House Coffee did not have a grease trap interceptor. Animal House Coffee was an existing establishment not engaged in alterations or repairs.

6.22 On January 14, 2011 Animal House Coffee received a letter from RVSS instructing them that they had 15 days to install a grease trap or face fines of $100 per day.

6.23 On January 5, 2011, RVSS sent an e-mail to representatives of Rogue Community College Table Rock Campus informing them of, not only Oregon Plumbing Code, but also RVSS Municipal Code requirements regarding grease traps.

6.24 In May of 2012, the division met with plumbing contractors in the RVSS service area. One of the contractors was hired to install grease interceptors on existing Dutch Brothers Coffee Kiosks not undergoing any alteration or repair. The owner of these kiosks was installing the grease interceptors to avoid further enforcement action by RVSS.

6.25 117 other existing restaurants were given a time frame to comply with RVSS’s directives to install or retrofit grease interceptors, or be subject to civil penalties assessed by
RVSS. Many of the existing restaurants complied with the requirements to avoid the threat of daily fines.

6. 26 The Director has not authorized any deviations from the state building code, Oregon Plumbing Specialty Code for the RVSS service area or for inspections beyond the connections.

7.

Respondents' acts and conduct constitute the following violations:

7. 1 By enacting requirements for new construction covering same the matters as the state building code adopted by the Director, but different from those requirements, without the Director's authorization, RVSS violated ORS 455.040 on a continual basis for two years.

7. 2 By enforcing requirements for new construction covering the same matters in the state building code adopted by the Director, but different from those requirements, without Director's authorization, RVSS violated ORS 455.040.

7. 3 By requiring new structures to comply with more restrictive or different standards for grease interceptors than the plumbing code allows, throughout his tenure as building official, BO Macuk violated ORS 455.040 and OAR 918-098-1480 on multiple occasions and consistently, for an extended period of time.

7. 4 By requiring new structures to comply with more restrictive or different standards for grease interceptors than the plumbing code allows, throughout his tenure as building official, BO Macuk created significant expense for property owners, confusion for contractors, and lack of clarity, uniformity or predictability in construction standards generally, thereby failing to act in the public interest while performing his duties and violating ORS 918-098-1470 on multiple occasions and consistently, for an extended period of time.

7. 5 By conducting inspections for standards different from those contained in the statewide plumbing code, BO Macuk failed to act in the public interest while performing his duties as limited plumbing inspector, thereby violating OAR 918-098-1470 on multiple occasions and consistently, for an extended period of time.

7. 6 By committing these violations, Respondents are subject to sanctions under ORS 455.895(2) and (4).
8.

Respondents and the Director agree to resolve this matter by the entry of this Stipulated Order subject to the following terms and conditions:

8.1 The Director hereby assesses a $15,000 civil penalty against RVSS, but suspends it entirely for a period of five years, and agrees to not take any immediate action except as noted below against BO Macuk, under the following terms:

8.1a Respondents agree to immediately suspend enforcement of all construction requirements covering same the matters as the state building code adopted by the Director, but different from those requirements, that it adopted without the Director’s authorization. Respondents agree to only administer and enforce the appropriate provisions of the state building code as it relates to construction of structures and the building sewer.

8.1b RVSS agrees to, within 120 days, rescind all construction requirements covering same the matters as the state building code adopted by the Director, but different from those requirements, that it adopted without the Director’s authorization.

8.1c RVSS agrees to provide proof it has complied with 8.1b within 30 days of achieving compliance with 8.1b. Proof of compliance will be provided to Andrea Simmons, Enforcement Manager, Building Codes Division.

8.1d Should RVSS adopt any new construction standard within three years of the execution of this Stipulated Order, RVSS agrees to provide the Director a copy of the standard for review prior to the RVSS Board taking action. RVSS agrees to provide the adopted standard within 30 days of its adoption.

8.1e Should RVSS elect to adopt new policies related to FOG requirements for food establishments or any other construction related policies, Respondents agree to allow the Director to review a draft of the proposed policy before its adoption.

8.1f In lieu of paying any civil penalty, RVSS agrees to allow BO Macuk to develop and provide Director approved training for other Oregon building jurisdictions and trade associations. The contents of the training will be developed with assistance of Building Codes Division (BCD) staff or other individuals appointed by the Director. The class will cover, at a minimum, the duties and responsibilities of building officials and inspectors and how they may run into enforcement issues if they enforce conflicting local construction requirements. The costs for the development and presentation of the training will be the sole responsibility of RVSS. No costs will be incurred by the Director except for BCD staff time. There will be no less than four presentations, and will include a presentation to the Oregon Building Officials Association general
conference in July, 2013 and the Oregon Building Officials Association’s school in the fall. In addition to the four presentations, a presentation will be provided to the Oregon Plumbing Board at their April, 2013 board meeting covering the contents of the course and a brief presentation on the contents related to local ordinances. All required training sessions shall be completed within 12 months of the execution of this order. BO Macuk will provide the division information including date, time, and location of each training session and a list of individuals who attended.

In the event BO Macuk is no longer employed by RVSS, the requirements of this Order remain in effect.

8.1g BO Macuk agrees to notify the Director immediately in the event RVSS or any other local municipality requires him to enforce a construction standard that is conflict with the State building code. Upon the issuance of a final order finding that BO Macuk failed to comply with this agreement, the Director will immediately suspend all of BO Macuk’s Oregon certifications issued by the Director for a period not to exceed five (5) years.

8.1h RVSS understands and acknowledges that its building official will be required to notify the Director if he/she is asked to enforce a construction standard that is conflict with the State building code. In the event RVSS obtains a BO other than BO Macuk, RVSS will require their new BO to comply with this requirement. Compliance will be verified in writing with signatures from both RVSS and the new BO, and a copy will be provided to the Director within 14 days of the new BO’s appointment.

8.2 The Director agrees that the civil penalties suspended will be waived, five (5) years after the execution of this Stipulated Order, provided RVSS complies with the terms of this Stipulated Order.

8.3 Any violations of Building Code Division’s statutes or rules by Respondents not contained within this Stipulated Order, whether committed before or after its execution, may be the basis for further enforcement action.

8.4 Respondents have read and understand the terms of this consent order, freely and voluntarily, without any force or duress, consent to the entry of this order and expressly waive all rights to hearing, appeal, or judicial review in this matter.
8.5 Respondents understand, upon signature of all parties, this Stipulated Order will be a FINAL ORDER.

8.6 This Order becomes effective the date it is signed by the Director or his designee.

IT IS SO STIPULATED THIS 27th day of February, 2013.

[Signature]
Rogue Valley Sewer Services

Shane Mapes, Building Official
Rogue Valley Sewer Services

IT IS SO ORDERED THIS 10th day of March, 2013.

[Signature]
Andrea Simmons
Director
Department Of Consumer and Business Services
State of Oregon
Chapter 7

Lies, Damned Lies, and Video—Presentation Slides

Elmer Dickens, Jr.
Washington County Counsel
Hillsboro, Oregon
LIES, DAMNED LIES AND VIDEO ……

ELMER DICKENS

LEGAL DISCLAIMER

• The following is not intended as legal advice and may not be relied upon as such.
VIEWPOINT DISCLOSURE

- General counsel for Sheriff’s Office
- Civil litigation - use of force and officer involved shootings
- 1st OIS shooting – 2000 – We need cameras!
- Officer risk of criminal prosecution vs. risk of civil litigation

OVERVIEW

- Scott v. Harris – What did the Supreme Court teach us about video?
- Analysis of officer involved shooting video from different perspectives
- What can we do about it?
SCOTT V. HARRIS

• DEPUTY TIMOTHY SCOTT V. VICTOR HARRIS
• PURSUIT AND PIT RESULTING IN HARRIS BECOMING A QUADRUPLE LEGIC
• 11TH CIRCUIT DENIED QUALIFIED IMMUNITY TO DEPUTY HARRIS
• APRIL 2007
SCOTT V. HARRIS

- DASH CAM VIDEO – TAKEN MARCH 2001
- MOTION FOR SUMMARY JUDGMENT
- NO GENUINE ISSUE OF MATERIAL FACT
- FACTUAL DISPUTES REQUIRE A JURY

SCOTT V. HARRIS

- PLAINTIFF CAN AVOID SUMMARY JUDGMENT BY ASSERTING “FACTS” THAT DISPUTE OTHER PARTY
- COURT MUST TAKE FACTS IN LIGHT MOST FAVORABLE TO NON-MOVING PARTY
- DEPUTY SCOTT ASKED FOR SUMMARY JUDGMENT – “PIT WAS JUSTIFIED”
SCOTT V. HARRIS

• HARRIS DECLARATION: I WAS DRIVING SAFELY, USING BLINKERS, NO RISK TO PUBLIC SAFETY, NO REASON FOR DEADLY FORCE (PIT)

• 11TH CIRCUIT COURT OF APPEALS AGREED – IGNORING EVIDENCE IN VIDEO

SCOTT V. HARRIS

• NORMALLY, CASE GOES TO JURY BECAUSE OF DISPUTE ABOUT WHAT HAPPENED

• IMPORTANT NEW STANDARD – COURTS DON’T ALWAYS HAVE TO TAKE FACTS IN LIGHT MOST FAVORABLE TO PLAINTIFF
**SCOTT V. HARRIS**

- “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”

**SCOTT V. HARRIS**

- **LESSON**- **OBJECTIVE EVIDENCE SUCH AS VIDEO THAT AGREES WITH YOUR OFFICER’S VERSIONS OF THE EVENTS SHOULD RESULT IN SUMMARY JUDGMENT**

  • **RESULTS NOT NECESSARILY APPLICABLE TO CASES IN THE 9TH CIRCUIT**
USING VIDEO

• “There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened.”

USING VIDEO

• DOES VIDEO NOW REPRESENT THE “OBJECTIVE TRUTH”?
• IS THERE A NEED TO HAVE AN EXPERT COME IN TO “EXPLAIN” WHAT THE VIDEO REALLY SHOWS?
• RECENT DAAUBERT MOTION.
USING VIDEO

• Should an officer be allowed to view body camera video of an officer involved use of force BEFORE writing a report?
• Are you testing officer’s recollection or trying to get most accurate report?
• Union’s starting to push – no statement until officer sees video.

OFFICER INVOLVED SHOOTING

• WILL VIDEO ALWAYS SHOW EVERYTHING THAT THE OFFICER CAN SEE?
• WE ARE GOING TO REVIEW AN OFFICER INVOLVED SHOOTING THAT WAS CAPTURED ON VIDEO.
911 CALL

- CALLER REPORTS BEING MENACED
  - WMA WITH WEAPON
  - BEHIND DORM NEAR CAMPUS FACILITIES BUILDING
  - EARLY 20'S
  - BLUE SHIRT, BLACK SHORTS
  - BROWN HAIR

CALLER HANG UP.

DEPUTY ONE BLOCK AWAY FROM FACILITIES BUILDING.
• Deputy reports that he has located suspect.

• Shots fired less than one minute later.

• Deputy tells investigators suspect:
  • Was uncooperative
  • Had a gun
  • Reached for the gun.
• INDEPENDENT WITNESS REPORTED SUSPECT HAD HIS HANDS UP WHEN HE WAS SHOT

INDEPENDENT VIDEO

• INVESTIGATORS LEARN THAT THE “INDEPENDENT” WITNESS TOOK A VIDEO WITH HIS PHONE – AND POSTED IT TO YOUTUBE SO POLICE COULDN’T COVER UP THE SHOOTING.
INDEPENDENT VIDEO

- THE AUDIO IN THE INDEPENDENT VIDEO IS SPOTTY.
INDEPENDENT VIDEO

• WHAT WILL THE MEDIA AND THE PUBLIC THINK AFTER SEEING THIS INDEPENDENT VIDEO?
• DOES THE OFFICER AND THE AGENCY HAVE A POTENTIALLY BIG PROBLEM?

DASHCAM VIDEO RELEASED

• THE MEDIA LEARNS OF A DASHCAM VIDEO AND DEMANDS ITS RELEASE.
• IT IS A NEW SYSTEM, AND THE AUDIO IS NOT VERY GOOD.
• FOCUS ON THE SUSPECT’S HANDS AND WAISTBAND....... 
• IS HIS LEFT HAND UP WHEN HE IS SHOT?

DASH CAM VIDEO
ANALYSIS

• NOW THAT YOU HAVE SEEN BOTH VIDEOS, WAS THE OFFICER JUSTIFIED IN USING DEADLY FORCE?
• BY A SHOW OF HANDS, WHO THINKS THE OFFICER MIGHT HAVE DISCIPLINARY, CRIMINAL OR CIVIL LAWSUIT ISSUES?

FRAME BY FRAME ANALYSIS

• IN THE EVENT OF AN OFFICER INVOLVED SHOOTING, WILL THERE BE A SLOW MOTION OR FRAME BY FRAME ANALYSIS?
• IS THAT FAIR, OR DOES THE VIDEO SPEAK FOR ITSELF?
SLOW MOTION

WILL THE MEDIA STORY LEAD WITH THIS FRAME FROM THE VIDEO?
AFTERMATH

• IS THERE A SERIOUS RISK NOW THAT THIS OFFICER GETS DISCIPLINED, CHARGED CRIMINALLY OR SUED?

• DOES THE FACT THAT THE SUSPECT HAD A GUN IN HIS WAISTBAND CHANGE THAT?
AFTERMATH

• IS THERE A CHANCE THAT THE OFFICER WAS TELLING THE TRUTH?
• DOES THE CAMERA SHOW EVERYTHING THE OFFICER CAN SEE?
• ANOTHER VIDEO FROM A DIFFERENT ANGLE.

PERSPECTIVES MATTER
PERSPECTIVES MATTER

• WHAT IS THE POINT OF ALL THIS?
• HOW MANY OF US HAVE SEEN A VIDEO AND IMMEDIATELY ARRIVED AT A CONCLUSION?

PERSPECTIVES MATTER

• DOES THE MEDIA SEE A VIDEO AND ARRIVE AT A CONCLUSION ABOUT THE ACTIONS OF OFFICERS?
• DO THEY ALWAYS GET IT RIGHT?
NEXT STEPS

- HUMANS ARE HARD-WIRED TO MAKE SNAP DECISIONS BASED UPON VISUAL INPUT.
- Don't judge too quickly
- ONCE WE MAKE A DECISION – IT IS HARD TO CHANGE OUR MINDS.

CONCLUSION

- Video presents one perspective of the events, but does not necessarily show the “totality of the circumstances.”
- Don’t judge too quickly.....
NEXT STEPS

• SLOW DOWN AND RECOGNIZE THAT VIDEO MAY NOT BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

SPECIAL THANKS TO YAMHILL COUNTY SHERIFF’S OFFICE
SHERIFF TIM SVENSON
SGT. BRIAN YOUNG     DEPUTY WILL LAVISH     DEPUTY ROBERT EUBANKS