

May 19, 2020

Mayor Chuck Bennett
City Council
555 Liberty St. SE, Room 220
Salem, OR 97301

RE: Promoting the Fundamental Human Rights of Unsheltered with Mental Illness

Dear Mayor Bennett and the Salem City Council:

I am writing to you today with respect to the Salem City Council's troubling passage of the "Ordinance Relating to Conduct on Sidewalks," No. 6-20. Disability Rights Oregon opposed a similar ordinance late last year, because of the detrimental impact to persons with disabilities, particularly unsheltered individuals with serious mental illness. We continue to object to the City Council's misguided approach in imposing prohibitions on both camping and sitting and lying in public that disproportionately affect Salem's most vulnerable citizens in the midst of a public health crisis.

Disability Rights Oregon offered public comments in November in opposition to the ordinance prohibiting sitting or lying on public sidewalks, as well as its anti-camping provisions. Despite that ardent display of opposition from community advocates and organizations like Disability Rights Oregon, the City of Salem has capitalized on the current public health emergency, which precluded oral public testimony, to pass the prohibition on sitting and lying in public.

Under the shadow of Governor Brown's declared state of emergency and issuance of the "Stay Home, Save Lives" order, the Salem City Council passed an ordinance that marginalizes the unsheltered, and further imposed an emergency resolution that threatens their health and safety. Despite the ordinance's purported promise "to ensure that the restrictions in this ordinance are not enforced until the opening of additional daytime space that is protected from the elements and includes access to toilets," the City already shirked that commitment with a no "public gathering" emergency resolution that effectively enacted the sit-lie ordinance immediately. As Councilor Anderson observed during the emergency meeting on March 17th, the resolution "kind of has the practical effect of enacting the sit-lie ordinance."

Not only does the emergency resolution clearly enact the sit-lie prohibition, it does so under threat of criminal prosecution for trespass. In so doing, the resolution criminalizes the unavoidable conduct of being unsheltered with a serious mental illness, which threatens once

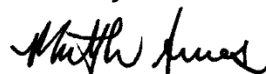
again to increase institutionalization of the mentally ill. The emergency resolution—just like previous versions of the sit-lie ordinance—violates constitutional protections against cruel and unusual punishment by prohibiting conduct that is the “unavoidable consequence of being homeless.”¹

Shortly after issuing the “Stay Home, Save Lives” order, Governor Brown made clear, “It is never acceptable to stigmatize or criminalize people experiencing homelessness.” She warned that local officials using her emergency order as an “enforcement mechanism against Oregon’s unsheltered population” do not follow the intent of the order. Notwithstanding the Governor’s guidance, the Salem City Council used its own emergency powers to begin enforcement of a sit-lie prohibition that openly stigmatizes and criminalizes the unsheltered.

The combination of measures that the City Council has undertaken has the practical effect of concentrating the unsheltered into unimproved areas of two parks with inadequate bathrooms and handwashing stations, putting their lives at risk once again. Those unimproved areas also are not accessible to many unsheltered persons with limited mobility due to physical disability. Instead of marshaling city resources to provide safe shelter that ensures adequate social distancing and sanitation accessible at all times to persons with disabilities vulnerable to the COVID-19 virus, the City took advantage of the pandemic to conduct another homeless sweep of the downtown area. In doing so, it also broke its promise to open additional safe and sanitary day shelter space, before targeting the unsheltered with its stigmatizing prohibition on sitting and lying on sidewalks.

Considering the potentially deadly ramifications of proscribing activities that are the unavoidable consequence of being homeless and the failure to address the immediate need for safe and sanitary shelter, the City has stepped up its unconstitutional attacks on the basic human rights of the unsheltered. We urge the City Council to set a new course in how it serves its most vulnerable citizens and repeal the city’s prohibitions on camping and sitting and lying in public. If you have questions or wish to discuss this further, please contact me at (503) 243-2081, extension 219, or via email at mserres@droregon.org.

Sincerely,



Matthew Serres
Staff Attorney
Disability Rights Oregon

Enclosure: DRO Public Comment Letter (Nov. 2019)

¹ See *Martin v. City of Boise*, 920 F3d 584, 617-18 (9th Cir 2019) (holding that it is unconstitutional under the Eighth Amendment as “cruel and unusual punishment” for the state to criminalize conduct that is an “unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets”).



Via mail and email to cityrecorder@cityofsalem.net

November 25, 2019

City Recorder
555 Liberty Street SE, Room 205
Salem, OR 97301

RE: Regulating the Use of Sidewalks and Public Spaces

Dear City Councilors,

I am writing to you today with respect to the proposed “Ordinance Relating to Conduct on Sidewalks.” I am a managing attorney with Disability Rights Oregon and have reviewed the most current draft of the proposed ordinance. Disability Rights Oregon condemns the ordinance as detrimental to persons with disabilities, particularly unsheltered individuals with serious mental illness at risk of institutionalization.

The ordinance disproportionately impacts unsheltered homeless individuals who have a serious mental illness. Those individuals are most likely to sit, lie, or sleep on the streets. The 2019 Point in Time (PIT) Count conservatively calculates approximately one thousand homeless individuals in Marion County. PIT data also shows that 31% of the homeless are considered “chronically homeless” and disabled.¹ In 2018, statistics from across the state indicated 29% of the homeless population self-identified as having a serious mental illness,² and those individuals are far more likely to be living in unsheltered locations.³ The City of Salem does not currently have the capacity to shelter its homeless population, even with planned

¹ Oregon Housing and Community Services, “2019 Point in Time Dashboard” (2019). Available at <https://public.tableau.com/profile/oregon.housing.and.community.services#!/#!%2Fvizhome%2F2019Point-in-TimeDashboard%2FStory1> (last accessed on November 22, 2019).

² Oregon Housing and Community Resources, “Oregon Statewide Shelter Study,” p 16 (2019). Available at <https://www.oregon.gov/ohcs/ISD/RA/Oregon-Statewide-Shelter-Study.pdf> (last accessed November 22, 2019).

³ Oregon Housing and Community Services, “2017 Point-in-Time Estimates of Homelessness in Oregon,” available at <https://www.oregon.gov/ohcs/ISD/RA/2017-Point-in-Time-Estimates-Homelessness-Oregon.pdf> (last accessed on October 3, 2019).

expansions in services. Because sleeping space is not available for all of the homeless, the prohibited conduct becomes “involuntary” and “inseparable” from the status of being an unsheltered homeless person.⁴ In other words, it is an “unavoidable consequence of being homeless.”⁵ As a result, the ordinance would have a disproportionate impact on a substantial population of unsheltered individuals with serious mental illness in the Salem area.

The ordinance criminalizes the unavoidable conduct that accompanies being unsheltered with a serious mental illness and would lead to increased arrests and institutionalization of the mentally ill. City officials claim that, because the ordinance only results in an “exclusion order,” it does not impose criminal sanctions. All roads lead to Rome—exclusion orders are just one more step in the inevitable process of arrest and incarceration. As large swaths of the city become unavailable due to exclusion, unsheltered individuals with mental illness would experience criminal prosecution for trespass. It is also likely that police would succumb to selective enforcement that targets the unsheltered and mentally ill. With no other sanctuary, unsheltered individuals with disabilities would have no choice but to violate the exclusion order and face jail time.

As a consequence of the ordinance, the criminalization of homeless individuals with serious mental illness also violates constitutional protections against cruel and unusual punishment. This year, the 9th Circuit Court of Appeals held that “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’”⁶ Criminalizing such behavior is inconsistent with the Eighth Amendment when “no sleeping space is practically available in any shelter.”⁷ With only 460 beds available in Marion County⁸ and a population of nearly a thousand homeless individuals,⁹ the City of Salem is a jurisdiction that falls strictly within the 9th

⁴ See *Martin v. City of Boise*, 920 F3d 584, 617 (9th Cir 2019) (quoting *Jones v. City of Los Angeles*, 444 F3d 1118, 1136 (9th Cir 2006)).

⁵ See *id.* at 617-18 (holding that it is unconstitutional under the Eighth Amendment as “cruel and unusual punishment” for the state to criminalize conduct that is an “unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets”)

⁶ *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F3d 1118, 1136 (9th Cir 2006)).

⁷ *Id.* at 618.

⁸ “Oregon Statewide Shelter Study” at Appendix E, p 52 (2019).

⁹ *Supra* note 1.

Circuit’s prohibition against criminal prosecution for sitting and lying in public. Make no mistake—the proposed city ordinance would inevitably lead to the attempted prosecution of unsheltered individuals for criminal trespass.

Any fines associated with violations of the ordinance or issued as a result of prosecution for trespass would have a negative impact on homeless individuals suffering from serious mental illness. The November 18 work session made it apparent that the city is contemplating fines of up to \$250 for repeat violations under the ordinance.¹⁰ Homeless individuals with serious mental illness lack the resources or capacity to pay those fines. Nonpayment would lead to additional fees, debts, and collections imposed upon those who cannot afford to pay, and may also lead to contempt of court proceedings and jail time.¹¹ The ordinances impact on the credit and criminal history of homeless individuals creates additional barriers to their transition off the streets.

The ordinance unfairly stigmatizes homeless individuals with mental illness. It states that “persons who sit or lie down on public sidewalks * * * threaten the safety and welfare of all pedestrians.” It asserts, with no basis in fact, that their acts of sitting or lying on sidewalks have the greatest impact on pedestrians “who are elderly, young children, or who have physical and mental disabilities.” In fact, individuals with physical or mental disabilities are more likely than other individuals to sit or lie on the sidewalks. The ordinance’s greatest impact on them is negative, not positive. Depicting the unavoidable conduct of some persons with disabilities as a threat to the safety and welfare of the elderly and children ultimately leads to negative attitudes and public disapprobation toward persons with disabilities.

The effects of the ordinance threaten the health and safety of unsheltered individuals with serious mental illness. The broad definition of a “campsite”—an assemblage of any materials that form an upper covering or enclosure on one side—captures even the most basic attempt at protection from the elements. As a result, unsheltered individuals have no way to stay dry and little protection against potentially lethal winter cold.

¹⁰ Additional fees would be imposed at the time of filing an appeal of an exclusion order or denial of a variance. See Proposed SRC 95.860(c) (2019).

¹¹ See ORS 161.685 (stating that potential consequences of nonpayment of fines, restitution or costs include debt collection, contempt of court, and issuance of a warrant of arrest).

Denying access to such minimal shelter places individuals' health and safety at risk. It is also likely to lead to an increase in emergency room visits and other negative impacts on our healthcare system. More importantly, it calls into question the city's commitment to basic human rights, as the survival of some of its most vulnerable citizens would be jeopardized.

The exclusion orders resulting from the ordinance would be so extensive that they would deny homeless individuals with serious mental illness access to essential mental health and social services. Some examples of essential services found within the exclusion zones include the Homeless Outreach & Advocacy Project's (HOAP) Day Center¹² and the Health, Outreach, Shelter, Transitions program.¹³ Because the exclusion orders would deny access to the east side entry points of the Center St., Marion St., and Union St. bridges, homeless individuals would also be unable to access most services on the west side of the river, including the Northwest Human Services' homeless program clinic.¹⁴ Absent a variance, homeless individuals would have to decide whether to access essential services and to risk criminal prosecution for trespass.

The variance process is impractical, especially as it pertains to homeless individuals with serious mental illness. First, since the Chief of Police, or a designee, must review each and every application for a variance, heavy administrative burdens and costs would result and detract from other more important law enforcement priorities. Second, because homeless individuals with serious mental illness likely cannot navigate the complicated written variance request guidelines, innumerable unnecessary arrests for violations of an exclusion order would result. Third, the "clear and convincing evidence" standard of proof for variances is an unreasonable evidentiary burden to place on homeless individuals with serious mental illness, because they are more likely to struggle in explaining where they are going, why they are going there, and how it is the "shortest direct route."¹⁵ Fourth, the variance process puts homeless individuals at high risk of discrimination and institutionalization. The ordinance allows a police officer to request variance documentation for any

¹² <http://www.northwesthumanservices.org/HOAP.html>

¹³ <http://www.northwesthumanservices.org/HOST.html>

¹⁴ <http://www.northwesthumanservices.org/West-Salem---Total-Health-Community-Clinics.html>

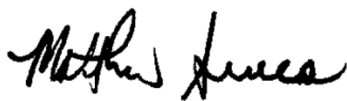
¹⁵ See Proposed SRC 95.840(a)-(c).

reason, which may lead to disproportionate police interaction with, and targeting of, homeless individuals based on their appearance or, especially in individuals with mental illness, their mannerisms. It may also lead to pretextual stops and fishing expeditions for other violations or outstanding warrants that would overwhelm jail rosters. Finally, even if a variance has been granted, violations would still occur simply because the ordinance requires individuals with no shelter and nowhere to keep their belongings to carry the variance documentation with them within the exclusion zones. All of the above expectations make the variance process an unreasonable burden not only for homeless individuals suffering mental illness, but also for law enforcement.

Disability Rights Oregon strongly objects to the proposed ordinance because of the negative impact it would have on homeless individuals with serious mental illness. The City of Salem should no longer pursue the proposed ordinance, because it disproportionately impacts unsheltered mentally ill individuals, criminalizes the mentally ill, creates barriers to successful transition off the streets, feeds the stigma of mental illness, threatens the health, safety, and survival of vulnerable persons with disabilities, and poses an undue administrative and financial burden.

If you would like to discuss these comments further, please contact me at (503) 243-2081, extension 219, or via email at mserres@droregon.org. Thank you for your consideration.

Respectfully,

A handwritten signature in black ink that reads "Matthew Serres". The signature is written in a cursive, flowing style.

Matthew Serres
Managing Attorney