



# CENTRAL EASTSIDE INDUSTRIAL COUNCIL

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May 22, 2015

Mayor Charlie Hales  
City of Portland  
1221 SW 4<sup>th</sup> Ave., Room 340  
Portland, OR 97204

Re: *Relocation of Right To Dream Too Homeless Camp*

Dear Mayor Hales and Council Members:

We are writing you as a coalition of property owners in the Central Eastside to ask you to re-visit your efforts regarding homeless tent camps in the City of Portland.

The recent news regarding the City's intent to relocate Right To Dream Too (R2D2) caused us to revisit the initial zoning code analysis for such a use provided by the Bureau of Development Services (BDS) through a 2013 Zoning Confirmation Letter (2013 ZCL). As you may recall, that letter, which was never finally adopted by Council, concluded that a homeless tent camp is a Community Service Use, not a mass shelter or short term housing, and therefore permitted outright in at least 14 different zones throughout the City.

We understand that the City intends to again rely on the 2013 interpretation to relocate R2D2 to an ODOT-owned property at the intersection of SE 3<sup>rd</sup> and SE Harrison in the Central Eastside Industrial District.

We also understand that you will use your executive power to permit multiple tent camps as a response to homelessness in the City, without a public process, even if that action undermines the legitimacy of the Portland City Code.

We are asking you to lead. Take this issue that has been so divisive and use it to bring the community together towards a common objective. The solution calls for advanced citizenship from our community and legitimate leadership from our Council. Our City has been built by intense regulatory scrutiny of the urban environment, rigorous design review, and a commitment to the well-designed pedestrian environment and streetscape. All of these things have been accomplished through valid planning processes where the experts, the public, the planners and the community have come together, debated the regulations, the goals and the vision and arrived at a collective plan for our City. We are all investors in that vision.

This debate should be no different; particularly in this case where a tent camp will become a recognized and allowed use in over 14 zones in the City. This decision could lead to 10, 20, 30 or more tent camps throughout the City. We have attached a map showing all of the zones where tent camps would be a

permitted use under your action. (Exhibit 1). These tent camps will not be regulated for size, appearance, membership, behavior, distance from other camps, use or any other measure. This executive action will have long term City-wide impacts that have not been fully vetted by the Council or shared with your constituents. This issue is far too important for all of us to simply act and hope for the best result.

If the City would like to include tent camps as a new use in one of the City's existing use categories or create a new use category it should, and it must, initiate a text amendment to the code through the same procedure that every other applicant must use to request an amendment to the code when their desired use is not listed. This is the Portland process; out in the open, with a fair public debate of the issues and a full understanding of the costs and benefits of a variety of policy choices.

We are asking you to lead deliberately and thoughtfully so we can be assured that our great shared investments in this City are at least considered as you adopt regulations to address homeless tent camps.

The balance of this letter addresses our current legal concerns over the City's executive action.

## I. Substantive Objections

Tent camping is a prohibited use on public and private property under the current Portland City Code.

Portland City Code (PCC) Section 14A.50.020 unequivocally prohibits tent camps on public property. That section provides:

### A. As used in this Section:

1. "To camp" means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.
2. "Campsite" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

*B. It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.*

C. The violation of this Section is punishable, upon conviction, by a fine of not more than \$100 or by imprisonment for a period not to exceed 30 days or both. (Emphasis added)."

The 2013 ZCL refers to the proposed use as "a temporary rest area with tents for overnight shelter" and as a "rest area/tent camp." (ZCL, p. 3). The descriptions of the use on pages 3 and 7 of the ZCL clearly fit within the definition of "to camp" and "campsite" quoted above.

Thus, the use is regulated by PCC 14A.50.020. The next question is whether the use is “specifically authorized” by the Code. The ZCL confirms it is not:

“...the use category descriptions in the zoning code provide enough descriptions and examples to guide me in determining the appropriate use category for the proposed rest area *even though the words ‘rest area’ and ‘campsite’ do not appear in the code.*” (ZCL, p. 4).

The ZCL continues that the code does not “enumerate it [the campsite] specifically.” (ZCL, p. 5). Thus, even by the ZCL’s own admission, tent camps are not specifically authorized by the code. With no specific authorization, the use is prohibited.

The City knows how to enumerate such an exception specifically and has done it in the past 7 years. The City Council adopted an exception to the anti-camping ordinance in 2008. PCC 14A.55.010(C), “Access to Public Property for Parade Event,” states:

C. Camping overnight, to reserve a space in the public right-of-way along side the parade route, may be allowed as set forth in administrative rule. *Overnight camping under this section is a limited exception to Portland City Code 14A.50.020 and 14A.50.030.* (Emphasis added)

There is no similar code exception authorizing the proposed tent camp on the east side. Further, Title 14 does not have the same interpretive guidance as Title 33. Instead it sets the bar high; the use must be specifically listed to be allowed. It is not. Therefore, the campsite is prohibited by PCC 14A.50.020.

PCC 29.50.050 regulates “illegal residential occupancy,” including occupancy of tents. The code section reads as follows:

When a property has an illegal residential occupancy, *including but not limited to occupancy of tents*, campers, motor homes, recreational vehicles, or other structures or spaces not intended for permanent residential use or occupancy of spaces constructed or converted without permit, *the use shall be abated* or the structure brought into compliance with the present regulations for a building of the same occupancy. (Emphasis added).

As detailed above, the erection of tents for overnight shelter is illegal. There are no zoning code provisions that would authorize this use, and it is clearly prohibited on the City-owned site by PCC 14A.50.020. Therefore, PCC 29.50.050 would require the immediate abatement of the use.<sup>1</sup>

The City confirmed this legal position in a pleading that the City Attorney’s office filed with the United States District Court for the District of Oregon in 2009. The case was brought against the City and individual officers for its removal of camps that are a prohibited use under PCC 14A.50.020. In that pleading, the City stated that tent camps are a prohibited use on public property. The City did not recognize any exception to that prohibition which would protect a homeless tent encampment against removal through City enforcement. In a

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<sup>1</sup> The City also has a binding administrative rule for removal of tent camps on public property. The administrative rule is further evidence that the City Code prohibits tent camps on public property. Until this law is changed, the use is prohibited.

separate pleading, the City defended the police officer's right to qualified immunity from suit based on the legal legitimacy of the prohibition against camping under PCC 14A.50.020:

"In the instance where Officer Hurley cited Mr. Anderson for violation of PCC 14A.50.020, that ordinance provided:

**14A.50.020 Camping Prohibited on Public Property and Public Rights of Way.**

A. As used in this Section:

1. "To camp" means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.
2. "Campsite" means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

B. It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.

C. The violation of this Section is punishable, upon conviction, by a fine of not more than \$100 or by imprisonment for a period not to exceed 30 days or both.

In all three renditions of the facts of Anderson's citation by Officer Hurley, (*Complaint ¶¶8-11; Police Report* (Exhibit 1); *Hurley Affidavit at ¶¶1-6*), Anderson had placed sleeping matter on public property near his dogs and the van in which he alleges he lived. Thus, similar to the facts in *Grossman*, Officer Hurley had probable cause to cite Mr. Anderson, and it was objectively reasonable for Officer Hurley to rely on the constitutionality of the ordinance prohibiting camping on public property. ***The ordinance had been duly promulgated by the City Council, and was not so obviously unconstitutional as to require a reasonable officer to refuse to enforce it. Therefore, Officer Hurley is entitled to qualified immunity to the claims brought against him individually in plaintiffs' Complaint.*** Officer Hurley should be dismissed with prejudice as a defendant in this action." (Emphasis added).

We understand that the zoning code relative to camping is the same today as it was in 2009. If the City would like to change its legal position, then it must do so by changing the code.

The results of this implied interpretation with no certainty, no limitations, no regulations and no standards will very likely have unintended results that will be difficult to control or reverse. Once the City decides these camps are a Community Service Use they will be allowed on public or private property on at least 14 different zones in the City. There is no limitation in the Community Service Use category for how many, how far apart, maximum

occupancy or the like. It is simply unregulated with neighbors, property owners, businesses left to deal with whatever the consequences.

Under today's code, the use is illegal. Normally when a use goes from an illegal status to a legal status it comes with some thoughtful public discussion on how to regulate it; how to make it successful; how to mitigate its impacts. The City's current path contains none of these safeguards because the City skipped the required process. Until the City follows the right process, the City is jeopardizing legitimate enforcement and degrading the trust of the rest of the community.

And why not follow the right process? The City could initiate a legislative change to the zoning code, proposing tent camps as a new use or new use category. The Bureau of Planning and Sustainability would evaluate the nature of the use, impose appropriate standards and procedures and submit that report to the Planning Commission for its recommendation and the City Council for its review and approval. The resulting decision and policy choices will be deliberate, well considered and the result of Portland's long hailed public planning process. Failure to use this process is a violation of the zoning code itself.

**The proposed tent camp is a prohibited use in the Zoning Code under PCC 33.700.070(C).and cannot reasonably be classified as a "Community Service" use under PCC 33.920.420.**

To circumvent the prohibition against camping detailed above, the 2013 ZCL attempts to fit this previously prohibited use into another use category using the interpretive rules of PCC 33.700.070. Each of those rules is addressed below. None support the ZCL's conclusions. The result of the City's 2013 ZCL analysis is that tent camps would be permitted on both private and public property without land use review.

First, under 33.700.070.A, "literal readings of the code language will be used. Regulations are no more or less strict than as stated." Camping is not listed as an allowed, limited or conditional use. A literal reading of the code therefore does not include the use. Further, allowing the use where it is otherwise not allowed is much less strict than the code requires in violation of Subsection A.

Second, under Subsection B "where the language is ambiguous or unclear, the Director of BDS may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments." The language of the code is not unclear. It does not list camping as a permitted, conditional or limited use. If that was unclear, the Director of BDS had an option. He could initiate a Type III procedure to clarify that camping is permitted in the City. He chose not to initiate that procedure. Subsection B gives the City no relief.

The City therefore turns to its last option. Subsection C states "proposals for uses, development, or land divisions where the Code is silent or where the rules of this section do not provide a basis for concluding that the proposal is allowed are prohibited. The Planning Director may initiate an amendment to Title 33 to add a new use category, or make other amendments, as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments."

The ZCL confirms that the code is silent. It does not list camping as an allowed use. It is therefore prohibited. The ZCL then concludes that while the code is silent on an express

camping allowance, there is some loose basis to find that camping is a Community Service Use. To follow this winding path, the ZCL looks to the characteristics and examples under Community Services.

#### PCC 33.920.420 Community Services

A. Characteristics. Community Services are uses of a public, nonprofit, or charitable nature generally providing a local service to people of the community. Generally, they provide the service on the site or have employees at the site on a regular basis. The service is ongoing, not just for special events. Community centers or facilities that have membership provisions are open to the general public to join at any time, (for instance, any senior citizen could join a senior center). The use may provide mass shelter or short term housing where tenancy may be arranged for periods of less than one month when operated by a public or non-profit agency. The use may also provide special counseling, education, or training of a public, nonprofit or charitable nature. (Emphasis added).

A homeless campsite is not described here. Instead, the characteristics section refers to mass shelters or short term housing as a Community Service Use. But the ZCL goes to great effort to conclude that the campsite is not a mass shelter or short term housing. The ZCL states that the tent camp is not a mass shelter because “multiple temporary tents on the site are not like a single open sleeping area or multiple sleeping areas separated by non-permanent partitions” characteristic of a mass shelter. (ZCL, p. 7).

This section of the ZCL analysis shows the contrived nature of the opinion. The ZCL defines the tents as temporary or non-permanent. They are therefore “multiple sleeping areas separated by non-permanent partitions.” But such a classification would make the tent camp a mass shelter. If it is a mass shelter in the EX zone (as contemplated in the 2013 ZCL) it is subject to conditional use review and other development standards that it cannot satisfy. Thus, the ZCL claims it is not a mass shelter.

The City can either use the characteristic statement to conclude that it is a mass shelter subject to standards or conditional use review or it is not in the characteristic statement and is therefore once again prohibited.

The same is true for the short term housing interpretation. There the ZCL states that it is not short term housing because it has no building, the tents are not individual sleeping rooms and individuals do not have to make a reservation or be referred to the site. (ZCL, p. 8). Thus, the ZCL concludes that many of the key required characteristics and standards for short term housing cannot be met by this kind of tent use so it is subject to no review at all. A use is not classified by what standards or descriptions it cannot meet. If it cannot meet the description, and it is not specifically listed as an allowed use, it is prohibited. That is the conclusion required by PCC 33.700.070.C.

The City can also look to the list of example uses under the Community Service Use.

**C. Examples.** Examples include libraries, museums, senior centers, community

centers, publicly owned swimming pools, youth club facilities, hospices, ambulance stations, drug and alcohol centers, social service facilities, mass shelters or short term housing when operated by a public or non-profit agency, vocational training for the physically or mentally disabled, crematoriums, columbariums, mausoleums, soup kitchens, park-and-ride facilities for mass transit, and surplus food distribution centers.

Tent camp is not listed amongst the examples. Mass Shelters and Short Term Housing are listed. But the ZCL determines that the tents are neither of those uses.

On this point, it is useful to consider the purpose statement for the code chapter that regulates short term housing and mass shelters:

### **33.285.010 Purpose**

This chapter provides regulations for Community Service uses that provide short term housing or mass shelter. These regulations recognize that it is in the public interest to provide short term housing and shelter to people who would otherwise not receive it, and to ensure that standards of public health and safety are maintained. The regulations are intended to reduce conflicts between these and other uses. These regulations recognize that short-term housing and mass shelters have differing impacts, and encourages providers to locate in existing structures and work with neighbors. These regulations also focus on the land use impacts of these uses.

In adopting PCC 33.285, the City recognized that it is in the public interest to provide short term shelter, but that in doing so the City must “encourage providers to locate in existing structures” and “ensure that standards of public health and safety are maintained.” The City also properly concluded that such uses must be regulated to “reduce conflicts between these and other uses” and to “focus on the land use impacts of these uses.” The City has acknowledged the need to classify and regulate short term housing and mass shelters to maintain health and safety and minimize impacts, but now fails to take similar action for a tent camp or camps that would shelter an unlimited number of people outside of a building.

The City has carefully regulated mass shelters, including the number of beds allowed both onsite *and* within 1,300 feet of the shelter, the types of uses that are allowed outside of the building and those that are required inside of the building, the minimum number of toilets, and has required certification by the Portland Office of Neighborhood Involvement to confirm that the shelter meets the operational standards established by the City of Portland and Multnomah County for mass shelter programs. However, under the interpretation advanced by BDS, anyone wishing to avoid the City’s regulation of mass shelters can simply establish an outdoor shelter, call it a tent camp, and place it anywhere a Community Service use is allowed with a willing property owner.

The City therefore has no further interpretive allowances under the code. Tent camps were intended to be prohibited uses, they are not listed as permitted, conditional or limited uses and the Community Service Use offers no refuge. The code therefore requires the City to deny the use or amend the code and add a new use category.

Finally, while the City addressed only the EXd zone in the 2013 ZCL case, there are many more zones that contain the same code language relied on by the City in 2013. For example,

the EG1, EG2, EX, CN1, CN2, CO1, CO2, CM, CS, CG and CX all allow community service uses outright with no land use review. The IG1, IG2, IH all allow community service uses of less than 3,000 square feet of floor area without review. And the RX zone allows community service uses up to 20% of the site's net building area as a permitted use. Therefore, if the 2013 ZCL is relied on by Council, this interpretation can be used to site the same types of "Community Service" tent camp facilities without building permits or design review on *any private or public property in any of these 15 zones throughout the City.*

**Even if the camp was an allowed use and was not prohibited by any other code sections, establishing the camp requires a building permit under PCC 33.700.005 before the camp could move to the eastside.**

PCC 33.700.005 is not mentioned in the 2013 ZCL. It states:

All new development, changes to existing development, and changes in the type or number of uses requires a building permit." (Emphasis added).

Moving the tent camp to the ODOT lot would change the type and number of uses on the site, thereby requiring a building permit.

Changing from a vacant lot, a parking lot or other use to tent camps is a change in the type of use. There can be no confusion on that point. A change in the type of use requires a building permit.

**PCC 33.296.030(B) prohibits both camping and Community Service Uses as temporary uses.**

It is not yet clear whether the ODOT tent camp will be temporary in nature. It seems from the meeting and media accounts of the plan that the tent camp will be permanent and the City intends to replicate it 20 times over at least on other parcels throughout the City.

Looking back to the 2013 ZCL, it states that the "proposed use/activity ... is for a temporary rest area with tents for overnight shelter for people experiencing homelessness." (ZCL p. 3). The ZCL goes on to state that "the rest area/tent camp is expected to be at this location for up to one year..." (ZCL, p. 3). Although the ZCL and this most recent relocation, place no clear limitations on the nature or life span of the camp, the ZCL describes both the overall camp and the individual tents as "temporary in nature." (ZCL p. 7). Temporary uses are specifically regulated by PCC 33.296. The 2013 ZCL and this most recent effort at relocation fail to address how the proposed temporary use would meet the requirements of this chapter.

PCC 33.296.030(B) regulates temporary uses in the RX, C, E, and I zones. Each zone is listed in this chapter followed by an enumeration of the temporary uses that are permitted in each zone by use category. Camping is not on any of the lists in any of the zones. Community Service Uses are also not on the list of permitted temporary uses. Instead the uses include seasonal sales, carnivals and the like. If BDS had properly addressed the temporary uses provisions in 2013, it would have concluded that the use could not be authorized as a valid temporary use under PCC 33.296.

## **II. Other Significant Issues**



### **Specific Site Location**

The proposed ODOT site at the intersection of SE 3<sup>rd</sup> and SE Harrison is located between the railroad tracks and East Side Plating, among other uses. Per East Side Plating's website, East Side Plating provides, among other things, various polishing, plating, and anodizing finishes. As part of its processes, the following chemicals are on site at East Side Plating's property, adjacent to the proposed ODOT site:

Cadmium, cyanide, hydrochloric acid, sulfuric acid, zinc, nickel, copper and their various byproducts.

It is our understanding that the City of Portland has initiated a phase I environmental site assessment and that a phase 2 environmental site assessment may presently be underway on the ODOT tent camp property. We do not know what the results of those site assessments will be or whether any potential environmental concerns originate from East Side Plating's property. What is clear, however, is that the City intends to allow residential use on the site, directly on the ground, with possible pathways of exposure to these users. The results of the City of Portland's Phase I and Phase II environmental site assessments should be made public so that R2D2 and any other user can determine the risks associated with their occupancy of the site.

### **State Law Regulating Organized Camps**

The City has loosely used the term "recreational" to describe the camp. If the characteristics of the camp qualify it as an "organizational camp" with a recreational element, the camp would be regulated under ORS 446.310 and would require all of the relevant licensing and permits listed under that state statute. Because the site selection and use parameters have only recently been disclosed, it is not clear if the City believes it must comply with these regulations or whether it indeed has submitted applications to the state under these requirements.

### **ODOT Sale**

The sale of ODOT property to the City to facilitate a homeless tent camp may also create difficult precedent for ODOT. Again, how is one to distinguish between the visible characteristics of this ODOT parcel and another ODOT parcel that has not yet been sold to a local government for use as a homeless camp? Homeless campers will not likely distinguish between the ODOT sites, leaving ODOT in a difficult enforcement position relative to its non-camping sites.

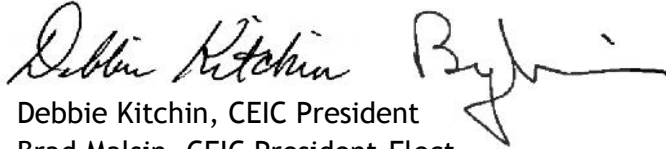
### **III. CONCLUSION**

For the reasons set forth above, the City Council should reject the purchase of this ODOT property for relocation of a tent camp. Instead, Council should direct BDS to respond to this request in the same way it would respond to any other request of a previously prohibited use; amend the Code to regulate homeless tent camps within the City. During this legislative process, experts, the general public and residents of these Portland communities can testify as to the nature of the use, where it should be located, in what zones and under what regulations, just like every other use.

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Certainty is the currency of our successful urban development. Property owners and applicants make investments in this City because we have a code that regulates uses, protects investments and provides meaningful process when one attempts to depart from the reasonable expectations of the code. This recent action and the 2013 ZCL dismantle that social contract and must be rejected for all of the reasons stated above.

Very truly yours,

Handwritten signatures of Debbie Kitchin and Brad Malsin. The signature of Debbie Kitchin is on the left and Brad Malsin's is on the right.

Debbie Kitchin, CEIC President  
Brad Malsin, CEIC President-Elect

cc : Council Members  
Tracy Reeve, City Attorney (Tracy.Reeve@portlandoregon.gov)