

# Business group takes issue of sidewalk authority to Salem

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The Portland Business Alliance has brought forth a bill to the Oregon Legislature that for all intents and purposes is a shot over the bow of the city's sidewalks — and everyone who uses them.

House Bill 2963, under the general sponsorship of the House Judiciary Committee, would prohibit the state from preempting a city's authority to control or regulate the use of its sidewalks. This is significant because Portland's efforts to control people's use of public sidewalks have largely been tempered by state statute — reinforced by the state's constitution that says that cities can't preempt state law. That was the case in 2005 and again in 2009, when the city's ordinance was ruled unconstitutional by appellate and circuit courts.

This bill, however, would say that city rules trump state laws on the singular issue of sidewalk use.

"The intention is to clarify the city's authority to regulate a city's sidewalk activity," said PBA spokeswoman Megan Doern. Doern insisted that's where it begins and ends at this point, and she denied that any plans or efforts are underway by the PBA to change the city's existing sidewalk management ordinance at this time. Doern said there was confusion on sidewalk law following mixed decisions by two courts in 2009.

"Right now we're working on the first step," Doern said. "Because of what happened in 2009, us and Eugene and a few other cities from across the state want to clarify state law, so that's why we're working with other chambers around the state on this piece of legislation. It's something that other cities are grappling with."

For more than a decade, Portland's downtown sidewalks have been the battleground between the PBA, who say panhandlers and loitering youths are a deterrent to patrons, and homeless advocates who have fought for equal space in the downtown corridor.

In its early years, the battle focused on police enforcement procedures because of the high proportion of homeless people being told to move or receiving citations. Over the years, the ordinance has been modified and procedures massaged as court cases surfaced. One circuit court judge ruled that the 2003 version was "unconstitutionally vague and overbroad." In 2005, an appellate judge declared it was unconstitutional because it conflicted with the state law regarding disorderly conduct. That state law prohibits obstructing traffic on a sidewalk, but only when there is "intent to cause public

inconvenience, annoyance, etc." The conflict was that the city's ordinance went further, prohibiting obstruction regardless of any intention, so state law prevailed. In 2009, Multnomah County Circuit Court Judge Stephen Bushong came to the same conclusion that it was unconstitutional on these grounds.

The current ordinance came into being two years ago and crafted a compromise that people can sit or lie on the sidewalk, at least 8 to 10 feet away from buildings on the curb, with a cleared walking area for pedestrians. It is enforced from 9 a.m. to 7 p.m. daily.

Becky Straus, legislative director with the American Civil Liberties Union of Oregon, says the ACLU's concerns are two-fold.

"It seems that the Portland Business Alliance is asking the Legislature to overrule Oregon case law that says that the Portland ordinance — or at least a prior version of the Portland ordinance — is preempted by state law," Straus said. "The state statute on disorderly conduct talks about when it is lawful and when it is unlawful to obstruct traffic, including on a sidewalk. That statute is carefully crafted so as not to criminalize people who are engaging in protected free expression activity. The safeguards in the state law are crucial but the PBA is saying that, when it comes to how people use their city sidewalks, that protection isn't needed. We disagree."

Straus calls this the first step in a longer campaign to revisit the flawed sit-lie ordinance in Portland.

"The ACLU has had concerns about these ordinances from the beginning," she said. "By their very nature they are set up to target certain people in certain places in our city and that kind of disparate enforcement is questionable, at best. We cannot support a proposal where the ultimate goal is to further erode the ability of people in Portland to engage in innocent, protected activity."

Monica Goracke, an attorney specializing in homeless issues with the Oregon Law Center, says that removing the "intent" requirement of state law "could mean that many more people could be prosecuted for violating the city's sidewalk ordinance, even unintentionally."

Goracke also notes that while Oregon's state constitution provides strong protections for free speech, broadening the city's street ordinance could have an impact on panhandling.

"If a new, broader sidewalk management law was enacted, it is possible that speech asking for money could be regulated more aggressively than it is now," Goracke said.

"The issues around use of the sidewalks have been actively debated in Portland for a long time now," Goracke said. "Many people

and groups have spent a lot of time and energy working to find compromise, not just once but through multiple rounds of discussions through the years. We don't condone intentionally bad behavior, but the city already has tools to deal with that. My concern about a more punitive approach, which I think this bill represents, is that it will have a disproportionate impact on people who use the sidewalks because they have nowhere else to go. More citations and fines for these individuals would be counter-productive to the goal of ending homelessness."

Mike Boyer, crime prevention program coordinator with the Office of Neighborhood Involvement, works as a liaison between downtown businesses, neighborhood associations and the police. He says the number of complaints about groups on sidewalks intimidating pedestrians has gone up steadily in the past year.

"In my position I get regular concerns from business communities about the sidewalk management plan having a negative affect toward their business," said Mike Boyer, crime prevention program coordinator with the Office of Neighborhood Involvement. But he emphasized that the focus wasn't on the homeless, but rather the behavior of summer travelers and youths who spend their day on the sidewalk, where businesses say they harass customers by aggressively panhandling. Boyer said this is a group that is unresponsive to outreach work, and while their aggressive behavior is illegal, they are low-level violations that take up police resources, Boyer said.

Boyer said the goal is not to be punitive to the homeless community, but the sentiment among business owners is that the current rules don't "allow them to do what they need to do and operate a safe business," he said.

"The rub is that the business are looking for it to revert back to the old sidewalk management plan," Boyer said.

Which one?  
"The one that did not allow for any sitting or lying on the sidewalk, period," he said.

Rep. Jennifer Williamson, D-Portland, sits on the House Judiciary Committee, sponsors of the bill, and has watched Portland cycle through numerous versions of sidewalk control laws. She says laws like sit-lie will

remain subject to a high bar of constitutionality even with this proposal to keep it local.

"I'm not generally supportive of these kinds of laws, but I do think that it is important to have it at the city council level," said Williamson, who is also a former volunteer attorney with the American Civil Liberties Union. "I'm OK with the proposal HB 2936 as it stands now, but very concerned about the constitutionality of (sit-lie) laws. Either way, the constitutionality is still a hurdle."

Commissioner Nick Fish, who heads up housing and homeless issues, and

Commissioner Amanda Fritz, who championed the advisory committee around the sidewalk management ordinance, both declined to comment on the bill.

In an interview earlier this month with Street Roots, Mayor Charlie Hales called the city's current sidewalk ordinance dysfunctional, and that business owners, shoppers and

homeless advocates are equally unhappy with the status quo. Hales suggested he was in favor of moving to a new version of the ordinance that "works better."

Dana Haynes, the mayor's communications director, said that while the PBA's bill was not on the mayor's priority list for this legislative session, "any legislation that clarifies the rules regarding preemption would be a good thing. We generally support legislation that gives us more authority to do things better, but we haven't yet landed on where we are on this bill."

Janet Byrd, executive director of Neighborhood Partnerships, said the issue of opening the door to yet another sidewalk ordinance proposal is of concern to her and the state's Housing Alliance, which she represents.

"The Housing Alliance doesn't yet have an official position on HB 2963," Byrd said. "We are concerned about any bill that would criminalize homelessness. We know that our communities are stronger when everyone has a safe decent place to call home, and when we work together to address community needs. The answer to homelessness is not to brush it aside, out of sight, but to develop housing options that meet the needs our communities face."

## Portland's sidewalk laws: In search of common ground

Since it appears a new round of sit-lie debates is coming down the pike, there's no time like the present to bone up on the city's sidewalk management history. Here are just the highlights:

**2004:** Portland's sidewalk ordinance barring sitting and lying is declared unconstitutional by Circuit Court Judge Marilyn E. Litzenberger, who called the ordinance unconstitutionally broad and vague. From June 2004 until December 2005 the ordinance is not enforced.

**2005:** A new 18-month pilot sit-lie ordinance is negotiated. During its 18-month tenure only 19 tickets were issued, eight of which were thrown out of court. Of the 11 remaining cases, only one individual was found guilty.

**2006:** The business community requests a six-month extension of the sit-lie ordinance until a new ordinance can be drafted that

will allow the police to use broader enforcement guidelines. Then-mayor Tom Potter presents City Council with the Street Access for Everyone (SAFE) Resolution, creating a workgroup to address street disorder and sidewalk nuisance problems. Twenty-four organizations spend a year developing the strategy.

**2007:** The American Civil Liberties Union of Oregon, originally part of the 24 organizations that helped develop the SAFE committee recommendations, withdraws its support of the ordinance. The ACLU says the ordinance goes too far in not allowing individuals to sit on stools or chairs, and by limiting protesters' rights. The city moves forward with enforcement. Reports from the Portland Police indicate that the vast majority of people cited under the sit-lie ordinance are people experiencing homelessness.

**2008:** Protests arise over the city's anti-

camping and sit-lie ordinances, particularly among the homeless, leading to a two-week encampment around City Hall in April. The advocacy community continues to call for its repeal because of the number of homeless people caught up in the process.

**2009:** City Council votes 4-1 to extend the sit-lie ordinance beyond its June sunset until Oct. 23, 2009. In June, Multnomah County Circuit Court Judge Stephen K. Bushong rules that Portland's sidewalk obstruction ordinance unconstitutionally exceeds the city's authority and is preempted by state law.

**2010:** The city adopts a new sidewalk management ordinance patterned after the Americans with Disabilities Act and similar legislation. The ordinance prohibits anyone from sitting, lying or keeping possessions beyond his or her immediate reach in the "pedestrian use zone" of downtown and Rose Quarter/Lloyd district sidewalks

between 7 a.m. and 9 p.m. The pedestrian zone extends from the building frontage out eight feet for sidewalks 10 feet wide or more. For sidewalks less than 10 feet wide, the zone is six feet. The ordinance leaves the two feet next to the curb open to non-pedestrian activities.

There are exceptions to the prohibitions, including people waiting for services, street musicians, and people who for medical reasons are unable to comply with the ordinance.

From the start, the vast majority of those receiving warnings and/or citations have been homeless.

**2013:** The Portland Business Alliance leads the charge to change state law to eliminate the state statute preemption that made the previous versions unconstitutional. If approved, it will likely clear the way for a new version of the sidewalk management ordinance to appear this summer.