

Charter Amendment 29 Makes it Harder to Clear Encampments and Damages “Good Government” Principles

“Desperate times call for desperate measures,” said Hippocrates. That’s the rationale for amending Seattle’s Charter to address homelessness. Charter Amendment 29 is born from widespread frustration, aggravation and despair at City Hall’s failure to solve the homelessness crisis, despite many years and much spending. Recently it has become an even more urgent crisis, as parks, playgrounds, and sidewalks have become homeless encampments, preventing the rest of the public from using these spaces while campers face increased risk of Covid infection.

Hippocrates also prescribed medicine’s core principle, “First, do no harm.” CA 29 is harmful because it makes it harder to clear encampments, and because amending the Charter in this way violates important “good government” principles and sets a dangerous precedent. That is why nothing like it has been done in the 152 years since Seattle’s first charter in 1869.

CA 29 makes it harder to clear encampments because it requires a complex evaluation of each camper’s needs, “balancing” the “possible harm¹ [to the individual] caused by closing [the] encampment” against the public’s “strong interest in keeping public spaces clear.”² None of this is necessary to clear an encampment under current law. Nonprofit agencies supporting CA 29 acknowledge it will make it harder to clear encampments, noting CA 29 “moves away from removing encampments in favor of providing what people experiencing chronic homelessness need to be stably housed.”³

The current barriers to clearing encampments are not legal, but political. CA 29 will create new legal barriers that will make the political barriers more difficult to overcome. Rather than “making City Hall clear encampments” as some supporters argue, CA 29’s “balancing test” can

¹ Not “likely” or “probable” harm.

² 29A, Section 2. Third. It is the City’s policy to make available emergency and permanent housing to those living unsheltered so that the City may take actions to ensure that parks, playgrounds, sports fields, public spaces and sidewalks and streets (“public spaces”) remain open and clear of unauthorized encampments. The City shall develop policies and procedures to address those individuals who remain in public spaces, balancing the City’s strong interest in keeping public spaces clear of encampments and the possible harm to individuals caused by closing encampments. The housing and services provided shall acknowledge and be tailored to individual needs and cultural differences and be appropriately person-centered. The City shall prioritize matching willing individuals to housing based on their specific needs and situation and, as appropriate, to accommodate disabling conditions and family type in housing. The City, or its designee, shall appropriately utilize pathways to permanent housing and prioritize individuals or family needs in order to limit emergency housing stays to no longer than necessary. While there is no right to camp in any particular public space, it is City policy to avoid, as much as possible, dispersing people, except to safe and secure housing, unless remaining in place poses particular problems related to public health or safety or interferes with the use of the public spaces by others. In those circumstances where the City does not close an encampment, the City may still require individuals to shift their belongings and any structures to ensure safety, accessibility and to accommodate use of public spaces.

³ <https://www.seattletimes.com/seattle-news/politics/campaign-to-put-homeless-policy-in-seattles-charter-adds-sunset-clause-new-language-on-encampments/> April 22, 2021

be used as a shield to explain why an encampment is not cleared. And even if City Hall were more willing to clear encampments, CA 29's legal barriers will stand in the way.

Just as CA 29 is not necessary to clear encampments, amending the Charter is not necessary to provide more housing, services and funding for the homeless. Seattle has never shied away from public and philanthropic investments in helping the homeless. We are indeed "Compassionate Seattle." That is a good thing. Virtually everything that CA 29 seeks to achieve can be done without amending the Charter.

Making it Harder to Clear Encampments

Creating a legal right to a "balancing test" for each camper will necessarily slow efforts to clear encampments from parks and public spaces. Clearing will be slowed further by inevitable legal challenges to whether the new balancing test was properly performed or reached the right result in a particular case.

CA 29 declares that, "[I]t is City policy to avoid, as much as possible, dispersing people, except to safe and secure housing, unless remaining in place poses particular problems related to public health or safety or interferes with the use of the public spaces by others." If an encampment is not closed, campers may be "require[d] to shift their belongings and any structures to ensure safety, accessibility and to accommodate use of public spaces." In effect this also creates a balancing test; Is a sidewalk wide enough to accommodate both an encampment and pedestrians? Can part of a park be encamped, leaving "enough" for public use? Nothing like this is required to clear an encampment under current law.

There is a common misperception that a 2019 federal court decision (Martin vs. Boise⁴) bars clearing an encampment unless there is shelter available for the displaced. On the contrary, the court said:

[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place... Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible... So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures.

Conforming to Martin, other cities are making it easier to clear encampments while Seattle would be making it harder. This will mean more encampments in Seattle as campers are displaced from those cities. It also will undermine the new King County Regional Homelessness Authority by reducing the incentive for suburban cities to address the needs of their homeless.

CA 29 also creates new barriers to enforcing existing laws protecting public spaces by invalidating "all preexisting ordinances and rules in conflict" with it.⁵ Because CA 29 doesn't

⁴ Martin vs. Boise (920 F.3d 584)

⁵ 29A. Section 5. This Article IX ...shall supersede all preexisting ordinances and rules in conflict herewith.

define “encampment”, it is impossible to know just what the effect will be. For example, blocking traffic by pitching a tent in the middle of 5th Ave. downtown would violate current law and lead to immediate removal. Is this preexisting law invalidated unless CA 29’s “balancing” process is done first? Is an illegally parked RV an “encampment”, invalidating parking regulations absent “balancing?” Is someone sitting on a downtown sidewalk in the middle of the day with a backpack and sleeping bag “encamped?” Does it matter if the sleeping bag is unrolled? The courts will tell us.

Damaging “Good Government”

CA 29 is harmful because it violates important “good government” principles about the purpose of a charter. Breaking these norms will set a damaging precedent for the body politic. Like a constitution, a charter is a foundational document defining the structure, powers and responsibilities of city government. CA 29 has nothing to with any of these. At its core CA 29 is the stuff of legislation aimed at adopting policies and the programs intended to achieve them.

Normally you would expect CA 29 to take the form of an initiative rather than a charter amendment. By law, however, an initiative cannot budget money and it can be amended by City Hall two years after passage. A charter amendment can budget and it cannot be changed except by the voters.

CA 29 is the first charter amendment ever to allocate a specific percentage of the City’s budget to a specific purpose. It puts 12% of the City’s General Fund (i.e., money that can be spent on most city functions) in a “lock box” until 2028 to be spent only on “human services.” This lack of flexibility and accountability is “bad government,” because budgets should weigh all the competing needs at a moment in time and then allocate limited funds based on judgments about priorities. Priorities and strategies to implement policy change over time. Elected officials make annual budget decisions, can adjust funding and strategies in real time as needed and can be held accountable for their decisions. CA 29 eliminates all of this for 12% of the General Fund.

Ironically, recent events demonstrate the importance of the budget flexibility that CA 29 abandons. Proponents estimate the 12% “lockbox” would increase funding for human services (not just for the homeless) by \$18 million. The American Rescue Plan Act (Covid relief) sends Seattle \$12 million specifically for housing assistance for the homeless and another \$239 million in General Fund support which, among other things, could be used for homeless services. It is unnecessary to lock up 12% by amending the Charter.⁶

Budgeting by charter sets a dangerous precedent because advocates for libraries, parks, fire, police, infrastructure and all the other services relying on the General Fund will see the opportunity and the threat. For example, libraries have seen a steady erosion of the General Fund percentage of their budget as the City increasingly relies on passing special levies (where voters increase their taxes) specifically to fund libraries while reallocating General Funds to other purposes. Library lovers will see the opportunity to “lock up” their General Fund share

⁶ CA 29 increases human services funding without any proposed new revenue source. It simply takes the money from competing General Fund services. Another example of “bad government.”

and the threat posed by others locking up theirs before the libraries do. In fact, this is happening in CA 29 where only park General Funds are protected against any reduction resulting from CA 29's lockbox, while libraries would be unprotected.

Proponents argue that a charter amendment is necessary because City Hall won't be able to change it without voter approval, so they will carry out the law as written. But, as with budgeting, when it comes to changing a law, flexibility can be important and rigidity can be dangerous, especially when the law is as broad, complex, and vague as CA 29. Ironically, the same City Hall the proponents don't trust to make or change the law is given very wide discretion under CA 29's vague terms to use its judgment in implementing the law.⁷

The dangers of CA 29 also come from two other well-known laws; Murphy's and Unintended Consequences. Courts will sort out a definition of "encampment," what the "balancing test" and other new camper rights mean, and many other issues sure to arise in the areas touched by CA 29, including land use⁸, contracting⁹, labor¹⁰, criminal¹¹, and municipal finance¹² laws. And if we don't like those court interpretations, there will be no way to fix or change them without going back to the voters.

"Good government" dictates that a charter provision be clear, focused and as concise as possible to accomplish its purpose without unnecessarily invalidating otherwise useful laws. CA 29 is the opposite; no one knows the laws that will be invalidated if it is adopted. It is "bad government" to enact a sweeping amendment that invalidates other laws without any conception of the laws being superseded.

CA 29 backers believe it will "make" City Hall do what it requires. No one opposes more housing and services for the homeless. The difficult issue for City Hall is clearing encampments. Despite claims of supporters, CA 29 does not require clearing any encampments. Instead, it requires a complex balancing process to evaluate whether to clear an encampment. In the end, the only *product* CA 29 gives us is more *process*—one commodity we never lack in Seattle.

Everything CA 29 wants done can be done now if City Hall wants to do it. To paraphrase Shakespeare, the fault is not in our laws, but in our leaders. The usual remedy is to turn out of office those responsible and elect those who can get the job done. The proponents apparently

⁷ CA 29. Section 2. Third. The housing and services provided shall acknowledge and be tailored to individual needs and cultural differences and be appropriately person-centered.

⁸ CA 29. Section 2. Fifth. [W]aive land use code and regulation requirements as necessary to urgently site projects.

⁹ CA 29. Section 2. Sixth. The housing and services provided will acknowledge and be tailored to individual needs and cultural differences and be appropriately person centered.

¹⁰ CA 29. Section 2. Sixth. [W]orkforce standards to address safety, appropriate compensation, and working conditions that allow contractors to recruit, retain and stabilize a diverse, skilled and culturally competent workforce.

¹¹ CA 29. Section 2. Sixth. [C]onsistent with the City's public safety obligations, programs shall be implemented to divert individuals from the criminal justice system whose law violations are connected to a lack of housing, income instability, or behavioral health issues.

¹² CA 29. Section 3. There shall be placed in the Human Services Fund such moneys as may be budgeted annually for such programs including not less than 12 percent of the City's annual general fund revenues; grants, gifts and bequests for human service purposes received from the general public, businesses and philanthropy; and such other moneys as may be provided by ordinance,

don't believe that will work. Amending the Charter as a work-around is akin to amending the Constitution to address the Trump presidency.

CA 29 may be "good" or "bad" legislation on its own merits, but using the Charter to enact it will inspire others. Why bother with an initiative when you can insulate your proposal against any change not approved by the voters and in the bargain lock in a share of city funds for your cause? Someone will envision bypassing the mayor and council to lock in redefined police functions and establish a funding formula for public safety.

In sum, CA 29 is an unnecessary means to increase spending on housing and services because of massive increases in federal funds. Meanwhile, it will make it harder to clear encampments, lead to more encampments, unknowingly invalidate useful laws, waive land use laws for siting projects, establish new contracting and labor standards, create new constraints on the prosecution of crimes allegedly committed by those lacking housing, the "income unstable" or those with "behavior health disorders." And instead of accomplishing all this by ordinance or initiative, it sacrifices 152 years of important good government principles to amend the Charter, setting a damaging precedent.

Hippocrates would vote No!

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