

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

CITY OF PORTLAND,

Plaintiff

Case Nos. 0405-45747
 0407-49303
 0407-48939
 0405-46416
 and others

vs.

ERIC GLEN BURRAGE,

Defendant.

OPINION AND ORDER

1 Multiple Defendants,¹ charged with violations of a “Drug Free Zone Variance” pursuant to
2 Portland City Code 14B.20.060 D,² challenge the constitutionality of the latest version of the
3 underlying “Drug-Free Zone Ordinance” [hereinafter “the Ordinance”]. Most were excluded from
4 a zone for 90 days based on “arrest with probable cause” for a drug-related offense listed in the
5 Ordinance. Some have been excluded for one year following conviction for an enumerated drug
6 offense occurring with a designated zone but not within a residence.³

¹ As has become routine when a large number of cases involve identical or overlapping issues, the court has assigned multiple cases to track together for a single resolution of those common issues as a matter of administrative convenience, even though the resolution is not binding on other trial judges.

² The Ordinance was effective November 1, 2002. It was revised presumably to respond to several court opinions finding its predecessors invalid in various respects. The most recent revision, effective November 26, 2003, expressly in response to my conclusions in *State v. Ingram, et al*, Mult. Co. No. 0303-42469, adjusted the standard of review by a hearings officer on an appeal from an exclusion. The charges here are for violating a variance rather than for trespass, as authorized by PCC 14B.20.030 E, presumably to avoid the trespass prerequisite of a demand to leave – as recognized by *State v. Collins*, 179 Or App 384 (2002). That hurdle to trespass prosecutions was removed by 2003 Or Laws ch 444 §1. That law added “To enter premises that are open to the public after being lawfully directed not to enter the premises” to the definition of “Enter or remain unlawfully” in ORS 624.205 – the definition operative in the trespass statutes, including ORS 164.245 (Trespass II) construed by *Collins*. As noted below, the choice of charges does not affect the availability of a defense based on the invalidity of the underlying exclusion.

³ PCC 14B.20.030 B.

1 The Ordinance in its presently operative form provides:

3 **PCC 14B.20.030 A. Civil Exclusion** A person is subject to exclusion for a period of
5 ninety (90) days from any public right of way and park within a drug-free zone
7 designated in Code Chapter 14B.20 if that person has been arrested based upon probable
9 cause to believe that the person has committed any of the following offenses within that
11 drug-free zone, unless the offense was committed entirely within a private residence:

[a list of state drug-related crimes follows]⁴

13 **B.** A one (1) year exclusion from any public right of way and park within a drug-free
15 zone shall take effect upon the date of conviction for any of the offenses enumerated
17 in Subsection A of this Section if that offense was committed within that drug-free
19 zone.

21 **C.** Except as allowed under 14B.20.060, a person excluded from a drug-free zone
23 under authority of this Section may not enter that drug-free zone except to:

1. Attend a meeting with an attorney;
2. Attend a scheduled initial interview with a social service provider;
3. Comply with court-or corrections-ordered obligations;
4. Contact criminal justice personnel at a criminal justice facility;
5. Attend any administrative or judicial hearing relating to an appeal of:
 - a. the person’s notice of exclusion; or
 - b. the denial, revocation, or amendment of the person’s variance;
6. Travel through that drug-free zone on a Tri-Met vehicle; or
7. Travel through that drug-free zone on the I-5, I-84 or I-405 freeways within its boundaries.

25 **D.** While in a drug-free zone, a person who is otherwise excluded may travel only
27 directly to and from the obligations enumerated in 1. - 7. of Subsection C.

E. If an excluded person is in the drug-free zone from which that person is excluded,
in violation of the exclusion during the exclusion period, that person is subject to
arrest for criminal trespass in the second degree pursuant to ORS 164.245.

29 In addition to the *exceptions* accomplished by PCC 14B.20.030 C, PCC 14B.30.060 B directs
30 the police,⁵ on application, to grant *variances* for direct travel to and from a residence within the

⁴ “1. Attempt to unlawfully possess a controlled substance, in violation of ORS 161.405; 2. Criminal solicitation to unlawfully possess a controlled substance in violation of ORS 161.435; 3. Criminal conspiracy to unlawfully possess a controlled substance in violation of ORS 161.450; 4. Unlawful possession of a controlled substance, in violation of ORS 475.992, other than possession of less than one ounce of marijuana under ORS 475.992 (4)(f); 5. Criminal conspiracy to unlawfully deliver a controlled substance in violation of ORS 161.450; 6. Unlawful delivery of a controlled substance, in violation of ORS 475.992; 7. Attempt to unlawfully deliver an imitation controlled substance, in violation of ORS 161.405; 8. Criminal conspiracy to unlawfully deliver an imitation controlled substance in violation of ORS 161.450; or 9. Unlawful delivery of an imitation controlled substance, in violation of ORS 475.991.”

⁵ The ordinance authorizes the “Chief of Police and/or designees” to issue exclusions (PCC 14B.20.040, .050) and to grant variances (PCC 14B.20.060 B).

1 zone, an essential need provider, places of employment, social service providers, and educational
2 facilities. The subsection also affords the police discretion to grant a variance to “an excluded
3 person who presents a plausible need to engage in any non-criminal activity that is not associated
4 with the behavior supporting the person’s exclusion.”

5 An excluded person may file an appeal within 10 business days if excluded for 90 days
6 (based on an arrest) or within five business days if excluded for one year (based on a conviction).
7 PCC 14B.20.060 A. A 90 day notice does not take effect during any appeal, but “[i]f no appeal is
8 taken” the exclusion takes effect “on the eighth calendar day following the issuance of the notice of
9 exclusion.” PCC 14B.020.060 A(6). The Portland Police Bureau, however, by policy has
10 determined not to enforce exclusions until the fifteenth day following exclusion.⁶

11 ***Contentions of the Defendants:*** Defendants contend that the Ordinance is unconstitutional,
12 invoking Article I, section 8 of the Oregon Constitution (Oregon’s free speech and press provision),
13 Article I, section 20 (Oregon’s equal privileges and immunities provision) and the Fourteenth
14 Amendment to the United States Constitution. They argue that it impermissibly restricts
15 fundamental constitutional rights to travel and to association, that the Ordinance unconstitutionally
16 fails to provide adequate notice to those excluded based on a conviction, and as to all Defendants
17 offends those procedural protections associated with criminal proceedings – appointed counsel, jury
18 trial, and proof beyond a reasonable doubt. Defendants further contend that the Ordinance is
19 preempted by ORS 430.325, which generally forbids local vagrancy laws. Defendants assert that
20 the Ordinance is in fact applied in a manner that is impermissibly disparate based on race, that

⁶ This policy decision is evidenced by the following language on the form by which excluded persons are notified of the fact of their exclusion and its extent: “Your exclusion will take effect at 12:0-1 a.m. on the 15th day following receipt of this notice.”

1 selection of the predominantly African-American Beech Drug Free Zone was unconstitutionally
2 arbitrary or discriminatory, and that the Ordinance in its application is additionally arbitrary and
3 capricious because officers issuing exclusions have unbridled discretion and delete even “automatic”
4 variances.

5 Defendants further contend that the Ordinance offends notions of First Amendment
6 overbreadth because it sweeps beyond the conduct of concern and reaches “clearly protected
7 activities,” with no express exception for such First Amendment activities such as attending rallies,
8 collecting signatures, enjoying performances, attending religious services or activities, or attending
9 community meetings – particularly where the excluded person would first have to apply for a
10 discretionary “general variance” and then have to carry and present on demand any resulting
11 variance.

12 With respect to their various constitutional challenges, Defendants assert that because the
13 Ordinance infringes fundamental rights, constitutional law requires a “strict scrutiny” test, which in
14 turn imposes on the State the burden to establish that the Ordinance is “narrowly tailored” to serve
15 a “compelling” governmental interest. While they concede that the quality of life and public safety
16 objectives of the Ordinance are compelling, the Defendants argue that the Ordinance is not
17 sufficiently “narrowly tailored” because it reaches innocent activity within prohibited zones and
18 subjects excluded persons to criminal conviction and punishment regardless of the legality of their
19 conduct in the zone, because the Ordinance is not limited to persons with a pattern of illegal activity
20 in the zone or otherwise shown likely to reoffend in the affected zone, and because the City could
21 pursue the Ordinance’s purposes instead through added policing, organized neighborhood watches,
22 counseling services for drug offenders, or tougher sentences for those convicted of drug offenses.

1 With respect to their procedural arguments, Defendants assail the gap between the eight days
2 before an exclusion becomes effective and the ten days in which to file a notice of appeal – an act
3 that would typically entail presence in a drug free zone to file the appeal. They also challenge the
4 failure to provide Defendants excluded on the basis of a conviction with notice at the time of the
5 conviction.

6 Finally, Defendants contend that the Ordinance is in purpose and effect a measure to exclude
7 persons by reason of their status as drug users and as such constitutes a local law imposing penalties
8 for “vagrancy or other behavior that includes . . . using controlled substances in public, being . . . a
9 drug-dependent person, or being found in specified places under the influence of . . . controlled
10 substances” in violation of ORS 430.325.

11 *Contentions of the City and the State:* The City and the State contend that the Ordinance
12 has been repeatedly narrowed to respond to various court decisions, that it serves compelling safety
13 and other legitimate interests of citizens within the affected zones, that it need satisfy only a “rational
14 basis test” as it does not affect “fundamental” constitutional rights, that it is rationally related to its
15 compelling purpose, and that it does not offend ORS 430.325.

16 As to procedural due process, the City and the State assert that the Ordinance affords
17 excluded persons adequate pre-exclusion hearing rights, and that the notice afforded at the inception
18 of an exclusion addresses further exclusion based on a conviction and therefore satisfies any notice
19 requirement as to that exclusion.

20 With respect to state (Article I, section 20 of the Oregon Constitution) and federal (the
21 Fourteenth Amendment to the United States Constitution, section 1) equal protection, the City and
22 the State argue that membership in the class of persons subject to DFZ exclusion is volitional in the

1 sense that a person has control of whether she or he is within that class, and is therefore beyond
2 protections afforded to classes based on personal characteristics. In any event, the City and the State
3 submit, the Ordinance is carefully balanced and would satisfy even a strict scrutiny test.

4 With respect to the rationality of the selection of the Beech Drug Free Zone, the City and the
5 State assert that the selection was data-driven and responsive to community requests. Disputing the
6 implications of the data concerning over-representation of African Americans among those subject
7 to exclusion, the City and the State contend that the absence of baseline data showing the proportion
8 of African Americans involved in prohibited drug activities in the relevant zone deprives
9 Defendants' data of sufficient significance to demonstrate unlawful racial disparity.

10 ***Analysis:***

11 ***The interests at stake:*** At the outset, it is important to note the consequences of the various
12 levels of importance to which the Defendants' interests might be assigned. At one extreme, they
13 might be so "fundamental" as to be essentially beyond governmental restriction altogether. *E.g.*,
14 *Palko v. State of Connecticut*, 302 U.S. 319, 326-27 (1937) [freedom of thought and speech are
15 inviolate because "neither liberty nor justice would exist if they were sacrificed"]. Slightly less
16 protection is afforded to those "fundamental rights" that require a demonstration of carefully tailored
17 measures in service of compelling state interests. *E.g.*, *Reno v. Flores*, 507 US 292, 301-302 (1993).
18 Below the "strict scrutiny" level is a category of interests recognized by many courts as requiring an
19 intermediate level of justification (and permitting an intermediate level of judicial scrutiny) that
20 upholds a law if it "is designed to further a substantial governmental interest and does not land very
21 wide of any reasonable mark in making its classifications." *Eisenbud v. Suffolk County*, 841 F2d 42,
22 46 (2d Cir1988); *see also Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and*

1 *Recreation Dist.*, 185 Or App 729, 740 (2003). All interests deemed unworthy of strict or
2 “intermediate” scrutiny are subject to the least intrusive review, the “rational basis” test, which
3 declares that “legislation is presumed to be valid and will be sustained if the classification drawn by
4 the statute is rationally related to a legitimate state interest.” *Lawrence v. Texas*, 539 US 558, 123
5 SCt 2472, 2484 (2003), and authorities cited.

6 In addition to the variation in judicial scrutiny that follows from an assignment of a level of
7 importance to interests burdened by legislation, the assignment may affect whether an infringement
8 constitutes “punishment” so as to prevent a subsequent prosecution for the same underlying conduct
9 for purposes of former or double jeopardy (*see State v. Lhasawa*, 334 Or 543, 561 (2002)
10 [prostitution-free zone exclusion not preclusive of subsequent prosecution for conduct underlying
11 the exclusion]; *State v. James*, 159 Or App 502, 512-18 (1999), *review denied* 335 Or 180, (2003)
12 [likewise for drug free zone exclusion]), and it may also affect “what process is due” in any hearing
13 at which infringement of the interest is at stake (*e.g.*, *Mathews v. Eldridge*, 424 US 319, 334-335
14 (1976); *Logsdon v. SAIF Corp.*, 181 Or App 317, 321-323 (2002)), including whether and to what
15 extent criminal procedure rights attach to the deprivation or infringement (*Brown v. Multnomah*
16 *County Dist Court*, 280 Or 95, (1977); *State v. James, supra*, 59 Or App 502, 513-16).

17 The parties agree, as do I, that the interests the City seeks to advance by its Ordinance are
18 compelling. Public drug activity and its associated unlawful, dangerous, violent, and often debasing
19 social concomitants profoundly degrade the quality of life and commerce in affected residential and
20 commercial communities, and the City’s findings provide substantial support for the tactics

1 underlying the Ordinance and the Program.⁷ From the unique perspective of the law, it does not
2 matter that the City’s problems with some of the targets of the Ordinance may have to do with their
3 “undesirability” based on their appearance and status as poor, homeless, mentally ill, unemployed,
4 or simply unconventional in dress and behavior, only incidentally connected with illegal drug
5 activity. Merchants, diners, and shoppers have always⁸ preferred that their business and pleasure
6 activities not be challenged by the unpleasant prominence of human failure or suffering. It is also
7 true that the poor, homeless, mentally ill, and unemployed persons lawfully within the affected zones
8 are themselves often burdened by some of the behaviors the City is trying to eliminate. That the
9 understandable *concern* of the City extends to behaviors and attributes that cannot lawfully be the
10 basis of exclusion (*e.g.*, ORS 430.325; *Portland v. James, supra*, 251 Or 8) does not matter because
11 many of the targets have given the City a legitimate basis of exclusion: at least apparent violations
12 of the law.⁹

⁷ This evidence does not, however, demonstrate that revising the strategy to base exclusions on an initial criminal charge, pretrial release conditions, and probation conditions following a *conviction* would not work as well, at least with cooperation among the various criminal justice agencies involved in law enforcement, pretrial release, prosecution and post-conviction supervision. Such a response would be far more consistent with ordered liberty than the approach of the Ordinance. The City’s response to this alternative at argument was that such cooperation had not been accomplished in spite of years of effort, and that the resource-deprived criminal justice system had well demonstrated its failure at achieving the objectives of the Ordinance. I have no basis on which to conclude, however, that the City’s choice has relieved court dockets – I suspect we have ample “violation of variance” cases to replace any missing drug cases.

⁸ The efforts of urban society to banish the “undesirable” among us have persisted since before the Elizabethan Poor Law (43 Eliz I Cap. 2 (1601)). See *Papachristou v. City of Jacksonville*, 405 US 156 (1972), and authorities cited. Though the City and the State properly insist that those subjected to exclusion in this latest chapter are those arrested for drug activity, no one could plausibly posit equivalent expenditures of resources by law enforcement and the courts, or such valiant efforts of the City to reach the furthest limits of constitutional law, were the targets dressed and otherwise presented as prosperous professionals discretely buying and selling powder cocaine.

⁹ The City and the State contend that this reasoning “misses the point” because the Ordinance is intended to protect the community from the collateral effects of drug trafficking rather than from “undesirable people.” I am not persuaded. From the view of political reality, the option of exclusion is viable because it excludes people whose behaviors and apparent attributes are “undesirable” as compared with those associated with healthy commerce and society in the affected areas. And the “collateral consequences” – within the reality of how a community sets priorities – are hardly limited to used needles on the street; they clearly overlap the hallmarks of undesirability to include debris, poor hygiene, human waste, aberrant behavior, and sleeping on sidewalks. This is not to say that avoiding these hallmarks is an illegitimate social objective – of course, it is – but only that in the difficult interplay between legitimate regulation and individual liberties, it is overwhelmingly unpersuasive to suggest that this Ordinance is only about illegal activity in drugs

1 It is important to note that the objectives of the criminal law are every bit as compelling as
2 those of the Ordinance,¹⁰ yet do not justify dispensing with the substantial inconveniences of the
3 substantive and procedural protections we afford those accused of crime. That the interests of the
4 City are strong and reasonable does not end the analysis; the interests of excluded persons must also
5 be quantified.

6 Although there is precedent for accepting the characterization of the impact of exclusion on
7 affected persons as minimal, limited in duration and subject to multiple exceptions (*State v. James*,
8 *supra*, 59 Or App at 510-11; *State v. Lhasawa*, *supra*, 334 Or at 551-552 (2002)), the interests at
9 stake are at least foundational of social intercourse. Banishment or shunning from the campfire, the
10 fief, or one’s community of family, friends, or social associates is no small matter. And at least the
11 Central City Drug Free Zone incorporates centers of city and federal (but not county) government,
12 of public fora for free speech and assembly activities, of commercial and social service providers.

13 The impact of the Ordinance is certainly far less drastic than deportation (*Compare, e.g., State v.*
14 *James, supra, and State v. Lhasawa supra, with Lyons v. Pearce*, 66 Or App 777, 787-788 (1984)
15 [Newman, J., discussing deportation], *and State v. Jacobs*, 71 Or App 560 (1984) [probation
16 condition of total exclusion from county excessive]). But for some, particularly those whose
17 perspective is diminished by incapacity, exclusion “may be as close to the heart of the individual as
18 the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of
19 values.” *Kent v. Dulles*, 357 US 116, 125-27 (1947) [addressing foreign, interstate and intrastate
20 travel].

merely because that is the touchstone of its mechanism.

¹⁰ I argue below that they are ultimately the same objectives.

1 Three major problems undermine the persuasiveness of the attempt to minimize the impact
2 of exclusion. First, the ordinance provides:

3 The purpose of the variance is to allow only travel *to and from*
4 locations within a drug-free zone according to the terms of the
5 variance.

6 PCC 14B.20.060 B [*emphasis added*]

7 Similarly, the “automatic” exceptions only allow the excluded person “to travel *only directly*
8 *to and from*” the objects of those exceptions. The upshot is that even if allowed to reside in a home
9 maintained in a dwelling unit within a zone from which the person is excluded, or to attend
10 treatment, employment, or pursue other objectives by “variance,” the excluded person is subject to
11 arrest and prosecution for a misdemeanor (and to pretrial incarceration) solely for engaging in social
12 association with friends, co-workers, or family. Chatting with a neighbor on the sidewalk,
13 accompanying a friend or family member for a walk, a cup of coffee or a meal, a few moments in
14 a park, even reading a newspaper or magazine in public, are all activities that would subject an
15 excluded person to arrest, conviction, and a jail sentence. The Ordinance has no language that would
16 allow an excluded person to partake of entirely lawful community life in that person’s neighborhood
17 if the person’s home is within the zone of exclusion.

18
19 Second, requiring an excluded person to apply for permission to partake of any of the wide
20 variety of lawful activities for which variances “shall” be allowed upon application, and to apply for
21 discretionary permission to engage in unlisted lawful activities such as political activity, worship,
22 weddings, funerals or celebrations, even if applications are likely of success, is a far cry from the
23 liberty enjoyed by other citizens. In the abstract, requiring any citizen to apply for permission to
24 engage in the most obviously lawful and significant of social activities evinces supervision, control,
25 and repression antithetical to any free society. It is a restriction of liberty that we generally reserve

1 for persons convicted of crime, or charged offenders subject to release pending trial for a serious
2 crime (or, on less serious charges, after a demonstrated history of failures to appear). At least as
3 applied to some persons with social or behavioral characteristics that may contribute to the City's
4 desire to exclude them, the practical ability to understand, process, and successfully assert a right to
5 apply for a variance is so unlikely as to account for the low numbers of such applications¹¹ on the
6 one hand, and to suggest on the other that the scheme exists primarily to satisfy judicial sensitivities
7 to individual liberties rather than to mitigate the hardships of exclusion. If the social services needed
8 by an excluded person have to do with illiteracy or paranoia, for example, it is at least predictable
9 that the mitigation of exclusion available in theory will not occur in practice.

10 It may well be true that at least for the vast majority of persons affected by the Ordinance,
11 what is at stake is not the right to migrate, to establish a new residence from out of state, to petition
12 their government, to engage in protected political activities, or even to attend religious activities.
13 But, even for persons with no relatives, weddings, funerals, or political activities in the zone of
14 exclusion, the importance of the remaining interests nonetheless profound in a free society:

15 Walkers and strollers and wanderers may be going to or
16 coming from a burglary. Loafers or loiterers may be 'casing' a place
17 for a holdup. Letting one's wife support him is an intra-family matter,
18 and normally of no concern to the police. Yet it may, of course, be the
19 setting for numerous crimes.

20 The difficulty is that these activities are historically part of the
21 amenities of life as we have known them. They are not mentioned in
22 the Constitution or in the Bill of Rights. These unwritten amenities
23 have been in part responsible for giving our people the feeling of
24 independence and self-confidence, the feeling of creativity. These
25 amenities have dignified the right of dissent and have honored the
26 right to be nonconformists and the right to defy submissiveness. They
27 have encouraged lives of high spirits rather than hushed, suffocating
silence. They are embedded in Walt Whitman's writings, especially

¹¹ State's exhibit 13.

1 in his ‘Song of the Open Road.’ They are reflected too, in the spirit
2 of Vachel Lindsay’s ‘I Want to Go Wandering,’ and by Henry D.
3 Thoreau.

5 *Papachristou v. City of Jacksonville*, 405 US 156, 164 (1972)

7 Similarly, “The interest of freedom of movement on the streets and the attendant interests of
8 privacy and human dignity deserve the most careful constitutional protection.” *City of Portland v.*
9 *James*, 251 Or 8, 15 (1968). Oregon’s recognition of the importance of a person’s freedom of
10 movement is sufficient to preclude undue restriction even as a condition of probation for a person
11 convicted of a crime. *See State v. Hitesman*, 113 Or App 356, *rev denied* 314 Or 574 (1992); *State*
12 *v. Ferre*, 84 Or App 459, 462 (1987); *State v. Jacobs*, 71 Or App 560 (1984); *State v. Martin*, 282
13 Or 583 (1978).

14 Third, the Ordinance requires that

15 The variance must be carried on the person while in a drug-free zone
16 in order to be effective and must be presented to a police officer upon
17 request.

PCC 14B.20.060 B

19
20 Once excluded, the subject can be arrested and convicted merely for being in the zone of
21 exclusion without producing an applicable variance – at least in the absence of a narrowing
22 construction of the Ordinance. Excluded persons become subject to arrest, search incident to arrest,
23 incarceration and conviction for the crime of trespass (ORS 624.205) or “violation of a drug free
24 zone variance” (PCC 14B.20.060 D) even if what they are doing in the zone is otherwise both
25 entirely innocent and in no way connected with the problems the City is seeking to address with the
26 Ordinance, and even if what they are doing is strictly within the scope of an automatic or any other
27 variance.

28 Having to present papers to a police officer on pain of arrest, custody, and prosecution for

1 a crime is hardly the hallmark of a free society. The City and the State would have us relegate
2 persons previously arrested on probable cause to the status of those unfortunate people whose
3 homeland is occupied by a foreign army.

4 The City argued at length that requiring documents on pain of criminal liability is common
5 in our modern world – citing industrial regulation, personal driving privileges, and similar statutory
6 schemes. But it is a critical distinction that all of those schemes exist because a business or an
7 individual seeks to undertake an activity that is not itself inherent in a free society, but involves some
8 *additional* burden, risk, or substantial object of understandable regulation. Whether it be waste
9 disposal, environmental impact, or just propelling a ton of automotive machinery across a public
10 road at substantial speeds, the object of the regulatory behavior entails justification for regulation
11 that does not apply to the social intercourse burdened by the Ordinance. In other words, in the
12 examples urged by the City, the burden relates to the legitimate public interest in regulation. To the
13 extent that the Ordinance by the device of exclusion burdens conduct well beyond the target “open
14 air drug market” behaviors, it burdens liberty interests with no such relationship. We require people
15 to have licenses before driving, and subject them to criminal liability if they drive without a license
16 or while the license is suspended. We do not subject them to exclusions from social intercourse in
17 order to ensure competent and lawful driving.

18 Finally, although the initial impact of exclusion on physical liberty is not inherently¹² as great
19 as with most criminal laws, that the purpose and effect of exclusion are to facilitate later
20 incarceration is certainly relevant. *Cf. Brown v. Multnomah County Dist. Court, supra*, 280 Or at
21 105-06.

¹² I have no evidence in this record whether persons arrested for drug crimes are generally cited and released where they are encountered.

1 At least in the abstract, then, the interests impacted by exclusion go quite directly to the
2 liberty of free citizens to participate in their community, and as such are worthy of substantial
3 protection. It does not follow, however, that they are of a character or degree to preclude
4 infringement altogether, or to require the Ordinance to pass the highest level of judicial scrutiny, or
5 to require invalidation of the Ordinance simply because there are less onerous devices by which the
6 City could pursue its objectives.

7 The City has abandoned its previous suggestion that the impact on the interests of excluded
8 persons is “mere inconvenience,” but strives along with the State to minimize the significance of that
9 impact with three approaches: First, it mines precedent for authority restricting as severely as
10 possible the breadth of the elements of liberty invoked by the Defendants.¹³ Second, it construes the
11 Ordinance as narrowly as possible to avoid conflict with liberty interests of the Defendants – and
12 urges me to continue that process as necessary to uphold the Ordinance against constitutional
13 challenge. Third, it presents a sanitized description of how the Ordinance works in practice.

14 To restrict the scope and importance of any federal constitutional “right to travel” implicated
15 by the Ordinance, the City and the State rely primarily on the relatively recent¹⁴ United States
16 Supreme Court opinions in *Washington v. Glucksberg*, 521 US 702 (1997), and *Saenz v. Roe*, 526
17 US 489 (1999). As to *Glucksberg*, the City and the State emphasize that a “right to travel” was

¹³ I cannot escape the irony that Portland is uniquely sensitive to the threats that national “anti-terrorism” measures pose to individual liberty but at the same time extraordinarily anxious to exploit the outer limits of lawful regulation to uphold a police officer’s decision to banish people suspected of drug activity on pain of criminal conviction based only on exclusion and presence..

¹⁴ Oregon courts generally do not delegate to the United States Supreme Court the task of narrowing constitutional rights previously recognized by our appellate courts under parallel federal and state constitutional provisions. *See State v. Moore*, 334 Or 328 (2002)[confrontation rights]. On the other hand, Oregon courts have only recognized the “fundamental” nature of intrastate travel in such contexts as discrimination based on place of residence. *See, e.g., Josephine County School Dist. No. 7 v. Oregon School Activities Ass’n*, 15 Or App 185, 196-197 (1973).

1 notably absent from the Supreme Court’s enumeration of rights entitled “heightened protection”
2 under a strict scrutiny substantive due process analysis: marriage, procreation, child rearing, marital
3 privacy, contraception, bodily integrity, and abortion. 526 US at 719-20. As to *Saenz*, the City and
4 the State emphasize the limited components of any “right to travel” enunciated by the Court – to
5 enter and to leave another state, to be treated as a welcome visitor when temporarily present in
6 another state, and the right to migrate to a new state of residence and receive the same treatment as
7 other residents – and *Saenz*’s failure to identify substantive due process as a basis for the first of
8 these three. 526 US at 500-01.

9 From this foundation, the City and the State argue that the Ordinance offends none of the
10 “right to travel” interests identified by the United States Supreme Court because it does not turn on
11 residency, cannot be found to deter migration, and otherwise offends no interest attributed to
12 “substantive due process” by that Court. The City and State concede that significant liberty interests
13 are at stake even in the limited exclusions occasioned by the Ordinance, but stress that this liberty
14 is not a “fundamental” right protected by “strict scrutiny” analysis, citing federal appellate courts
15 applying less rigorous standards to resolve intrastate travel challenges.

16 With respect to freedom of association, the City and the State contend that the United States
17 Supreme Court has limited this right to familial and intimate association on the one hand and
18 political association on the other, and contends that “the Court did not intend . . . to cover
19 relationships that homeless persons make with one another on the street,” citing *Roberts v. United*
20 *States Jaycees*, 468 US 609 (1984). And, the City and the State urge, even substantial associational
21 interests are subject to time, place and manner restrictions.

22 With respect to rulings by Judge Baldwin in *Blechsmidt v. Shatzer*, Mult. Co. No. 0108-

1 08565, and the Ohio cases he found persuasive (*Johnson v. City of Cincinnati*, 119 F Supp 2d 735
2 (SD Ohio 2000), *affirmed* 310 F3d 484 (6th Cir 2002), *cert. denied* 539 U.S. 915, 123 SCt 2276, 156
3 LEd 2d 130 (2003)), the City and the State emphasize that the Ordinance allows a longer period for
4 appeal and is more narrowly tailored than the ordinance before Judge Baldwin because the Ordinance
5 now supports an exclusion only from the zone in which an excluded person is arrested for a drug
6 crime,¹⁵ and because it allows immediate access to the zone of exclusion for several specified
7 purposes. The City and the State also submit that all of these courts were in error in finding a
8 fundamental right under the United States Constitution to *intrastate* travel, that Judge Baldwin
9 further erred in finding that Oregon recognizes a substantive due process right to intrastate travel,
10 and in any event that the Ordinance infringes no fundamental “right to travel.”

11 The City and the State emphasize that the exclusion process starts with an arrest for a drug
12 related crime based on probable cause, and minimizes the consequences of exclusion due to the
13 automatic exception of some purposes from the effect of the exclusion order, the availability of
14 “automatic” and nondiscretionary “plausible need” variances for many other innocent activities, and
15 the availability of discretionary exclusions for all other innocent purposes. In particular, the City and
16 the State respond to Defendants’ assertions of such core freedoms as the right to petition, to collect
17 signatures, to picket, or to worship by noting the availability of “plausible need” variances – and by
18 demonstrating the issuance of such a variance *for purposes of participating in a protest against the*
19 *Ordinance – organized by the person excluded.*

20 The Ordinance has indeed been the repeated subject of critical refinement, expressly in

¹⁵ “A person is subject to exclusion . . . from . . . a drug-free zone . . . if that person has been arrested based upon probable cause to believe that the person has committed any of the following offenses within *that* drug-free zone . . .” PCC 14B.20.030 B [*emphasis added*].

1 recognition of procedural rights and in an attempt to reduce unnecessary or unlawful restrictions on
2 the rights of excluded persons to engage in lawful participation with respect to employment,
3 treatment, residence, and even travel along some major routes of public transportation. Largely by
4 emphasizing the geographical limitations of any exclusion, its repeated refinements of the Ordinance
5 in response to adverse judicial rulings, and the automatic and “plausible need” variances, the City
6 and the State attempt to minimize the constitutional significance of any exclusion. Yet the
7 Ordinance still allows the fact of an arrest on probable cause by an officer to accomplish the
8 exclusion of an individual from entirely innocent activities in a center of social and political life, and
9 to the requirement of carrying and presenting papers upon demand, all on pain of criminal liability.
10 This consequence still profoundly challenges the notion of a society premised upon individual
11 liberty, and emulates instead totalitarian approaches to social control.

12 Another aspect of the impact of the Ordinance on liberty interests is how it plays out on the
13 streets with respect to persons who have not been excluded, accordingly have no variance to present
14 (automatic or otherwise), and who may to an officer resemble someone who might just be subject
15 to such an exclusion. The City assures me that officers only approach citizens to demand papers if
16 the officer has “reasonable suspicion” that they are present in violation of an outstanding exclusion
17 order. The City further insists that the requirement of carrying papers serves important interests of
18 administrative convenience, particularly in allowing a rapid determination that a person is within the
19 scope of an existing variance.

20 Several factors combine to cause me to pause before accepting this benign analysis. First,
21 the City asserts that the Portland Police Bureau has in place an effective means by which to postpone
22 the enforcement of an exclusion order for 15 days to accommodate an excluded person’s interest in

1 perfecting an appeal that would further postpone the effectiveness of an exclusion order. If the City
2 can keep track of the existence and effective dates of potentially multiple and overlapping exclusion
3 orders whose impact may be suspended by an appeal without the assistance of the suspected
4 excluded person (except, perhaps, for identification of the person – which does not depend on the
5 exclusion order form with variances), I do not understand the critical need for the piece of paper in
6 the hands of the person who is subject of an inquiry unless it is to extend the scope of the power to
7 arrest well beyond the claimed objectives.

8 Second, the notion that officers in general avoid contacting people without “reasonable
9 suspicion” ignores a critical chapter in the development of American law. Long gone are the days
10 that anyone thought that exclusionary rules actually deterred unlawful police behavior. Oregon long
11 ago abandoned reliance on that function as a justification or interpretative consideration for
12 exclusionary rules.¹⁶ More recently, by statute, Oregon abandoned inadmissibility of evidence as
13 a consequence of police illegality except as required by constitutional law, privileges, or rules against
14 hearsay. ORS 136.432. Modern police work *properly and aggressively* employs use of “mere
15 conversation,”¹⁷ “inventory searches,”¹⁸ and all other devices short of the distant threshold of civil
16 liability and the only occasionally relevant concern for actual suppression of evidence at an expected
17 trial. After all, if the City has given up on the criminal justice system, ultimate suppression of

¹⁶ See *State v. Spencer*, 305 Or 59, 75 (1988); *State v. Kosta*, 304 Or 549, 553 (1987), and authorities cited.

¹⁷ *State v. Amaya*, 336 Or 616, 626-27 (2004), and authorities cited.

¹⁸ In spite of occasional attempts to discourage the term “inventory search” on grounds an inventory is not a search (*e.g.*, *State v. Haney*, 195 Or App 273, 280 (2004)), a simple WestLaw™ or Lexis™ search will confirm the futility of insisting upon the fiction that an inventory is not a “search” simply because the theory of this means of avoiding constitutional restrictions on searches invokes some administrative function for discovering and listing the contents of an automobile or a suspect’s clothing. Practicing attorneys and trial judges well know that inventories are “searches” - they frequently reveal evidence upon which convictions depend, and I have not seen, at least in the last 20 years, an appellate opinion upholding suppression of evidence on the basis that the inventory that produced it was accomplished by pretext.

1 evidence at a trial is of no concern. And, given such a trial, since even a mistaken suspicion is
2 enough to support a conviction based on the resulting discovery of contraband,¹⁹ and because the
3 lack of reasonable suspicion will not provide a defense if the encounter yields evidence of the crime
4 of violation of a variance or any other crime whose proof does not depend on evidence seized at the
5 time of arrest,²⁰ I take no comfort in the suggestion that officers will not be approaching people and
6 asking for papers absent reasonable suspicion.

7 After all, while the City presents the simple picture of drug dealers arrested and excluded on
8 probable cause who are then subject to challenge and arrest for returning only if an officer has
9 reasonable suspicion that they have unlawfully returned, the implications of exclusion are more
10 daunting. Without the Ordinance, the City must approach “open air drug markets” by developing
11 probable cause for arrest for illegal drug activity, and by prosecuting and achieving a conviction and
12 a sentence that will somehow prevent the defendant’s return to drug dealing. As the City argues, the
13 criminal justice system has “failed” because pretrial release and post conviction probation or
14 incarceration are in practice unreliable means by which to prevent the defendant’s return and
15 continued contribution to the spectacle of open air drug markets. With the Ordinance, after an initial
16 arrest the exclusion allows repeated arrests (many of the Defendants have multiple “violation of
17 variance” charges pending) without the burden of developing probable cause that the excluded
18 person has committed any new crime other than return to the zone. Persons who are in fact, merely
19 believed to be, or even mistakenly believed to be present in violation of such an exclusion are subject

¹⁹ *State v. Lawton*, 194 Or App 190 (2004).

²⁰ It is only some evidence obtained as a result of police illegality that is subject to suppression; in the typical violation of variance scenario, the State is free to prove exclusion and unlawful presence in a zone without relying on any “fruit” of an arrest that is made without probable cause. In other words, even if the arrest is unlawful, the excluded person can be convicted – there is unlikely to be any evidence whose admissibility might motivate reference to such standards as reasonable suspicion.

1 to detention, arrest, and search incident to arrest and inventory search *all without any basis to believe*
2 *that they have again actually committed any crime*, although these new occasions to search – often
3 unlawful but for the device of the new “crime” of presence in a zone of exclusion – may
4 conveniently yield evidence of a new crime. The Ordinance thus creates an opportunity to arrest,
5 search, and “deport” people from zones by the simple device of making it a crime to be back in a
6 zone after a prior arrest and exclusion. Unless the police who administer this program have and use
7 a sophisticated database to keep track of multiple serial 90 day and one year exclusions for multiple
8 people (and the impact of any appeals on the effectiveness of any exclusion), the risk is substantial
9 that police will often entertain and act on a mistaken but good faith belief that a given person is
10 subject to arrest on sight. There is, after all, no disincentive but rather a potential reward in the
11 discovery of contraband: *See State v. Lawton*, 194 Or App 190 (2004).

12 And, since the whole enterprise is premised on the failures of the criminal justice system, I
13 must assume that it is not the ultimate conviction and presumably ineffective sentence that the City
14 seeks, but the ability to arrest and physically to remove people from zones through police force quite
15 unlike that aimed at an adjudication and judicial disposition. Indeed, the only reason the Ordinance
16 ultimately seems to work is the cooperation that convinced the Sheriff to adjust matrix procedures
17 to hold frequent violators longer than others at the request of police.²¹

18 In practice, then, the Ordinance amounts to an elaborate scheme to accomplish detention,
19 arrest, exclusion, and search of its targets while avoiding judicial oversight and the inconvenience
20 of older restrictions on search and seizure occasioned by exclusionary rules first fashioned to protect
21 the liberties of citizens. Having previously undermined restrictions on searches through the device

²¹ See the Affidavit of Jeffrey Meyers, Exhibit 32 to the State’s Memorandum, in *State v. Ingram*, Mult. Co. No. 0303-42469.

1 of “inventories,” the City now seeks to evade the protections of criminal procedure rights that might
2 precede the availability of probation conditions through the device of making presence rather than
3 drug dealing criminal.

4 Third, the administrative utility of a copy of an exclusion order is seriously undermined by
5 the City’s enthusiasm for eschewing any authority on the part of issuing officers to strike or diminish
6 any of the “automatic” variances. If variances really are automatic – in the sense that they exist
7 without request by the excluded person or action by the issuing officer, then the utility of the paper
8 in question is nil; the officer who next encounters the excluded person must assume all “automatic
9 variances” are in place and is properly concerned only with the subject’s identity, location, and
10 purpose – none of which are established by the paper whose absence the Ordinance purports to make
11 criminal *even if the subject is otherwise within the scope of an automatic or any other variance.*²²

12 Fourth, the City and the State both responded to defense examples of “adjustments” by
13 officers who have issued exclusion notices to what the parties have been treating as “automatic”
14 variances. Although both promise to dismiss any charges dependent upon an exclusion form on
15 which the issuing officer has purported to delete or strike variances (but not those based on exclusion
16 forms on which the officer has inserted details), the disconnect among the Ordinance, the City, and
17 the practice of police on the streets seriously challenges the representation that people are approached
18 for papers only on “reasonable suspicion.” The Ordinance surely declares no such restriction on
19 police investigation or enforcement of exclusions, and it is hard to understand why the City should
20 expect officers well trained in “mere conversation” to alter their tactics for purposes of the
21 Ordinance.

²² See PCC 14B.20.060 B.

1 There is yet another problem lurking in the relationship between the Ordinance and the police
2 as evidenced by the Notice of Exclusion and Variance (state’s exhibit 4) and the “Understanding
3 Exclusion Zones” notice that accompanies the Notice (state’s exhibit 5). At argument, the parties
4 treated the portion of the Notice of Exclusion that begins “**THE VARIANCES MARKED**
5 **BELOW APPLY TO YOU**” as synonymous with “automatic variances.” This is presumably why
6 the City and the State disavowed any attempt to proceed in cases in which the officer struck any of
7 these variances from the notice (or wrote “n/a” – presumably meaning “not applicable”). But the
8 Ordinance has *exceptions* from the exclusion (PCC 14B.020.030 C(1)-(7)) that are largely²³ distinct
9 from any of the “variances” listed as such on the Notice. The exceptions are listed on the box on the
10 back of the Notice of Exclusion. The Ordinance declares the availability of “General” variances
11 (presumably identical with “plausible need” variances mentioned by the City at argument and in
12 briefing), and several other categories of variance corresponding to those listed under the **APPLY**
13 **TO YOU** box on the Notice of Exclusion form. PCC 14.02.060 B.

14 Section 14B.20.050 of the Ordinance in relevant part provides:

15 A. If a person is arrested based upon probable cause to believe that the person has
16 committed any of the offenses enumerated in Subsection A. of Section 14B.20.030
17 within a drug-free zone, the Chief of Police and/or designees may exclude that person
18 from that drug-free zone. Every person excluded shall be provided a notice of
19 exclusion and variances substantially similar to Exhibit B attached to Ordinance No.
20 176950.

21 B. At the time a person is issued a notice of exclusion from a drug-free zone, the
22 Chief of Police and/or designees *shall issue* those variances described in 14B.20.060
23 B.2. through 6., and *may* do a preliminary review with the excluded person of the
24 need for an additional variance and *may issue a general variance* pursuant to the
25 process described in subsection B. of Section 14B.20.060.
26
27

²³ The “social services variance” overlaps to some extent the exception for “initial interview” with a social services provider. *Compare* PCC 14B.20.030 C(2) *with* 14B.20.060 B(5).

1 Section 14.20.060 of the Ordinance in relevant part provides:

3 B. VARIANCES. Variances shall be granted, denied, amended or revoked in
accordance with the following provisions:

5 All variances shall be in writing, *for a specific period and only to accommodate a*
6 *specific purpose, all of which shall be stated on the variance.* The purpose of the
7 variance is to allow only travel to and from locations within a drug-free zone
8 according to the terms of the variance. *The variance must be carried on the person*
9 *while in a drug-free zone in order to be effective and must be presented to a police*
10 *officer upon request.*

11 All Police Bureau Precincts shall receive and process requests for Drug-Free or
12 Prostitution Free Zone variances during regular business hours if they are otherwise
13 open to the public. This capability will be maintained at the main precinct station or
14 at a sub-station.

15
16
17 1. General Variance. The Chief of Police and/or designees may, for any
18 reason, grant an excluded person a variance from an exclusion at any time
19 during an exclusion period. Except as described in 14B.20.050 B., the Chief
20 of Police and/or designees shall grant an appropriate variance to an excluded
21 person *who presents a plausible need* to engage in any non-criminal activity
22 that is not associated with the behavior supporting the person's exclusion. A
23 variance granted under this Subsection *allows travel within the drug-free*
24 *zone only in accordance with the terms specified in the variance.*

25
26
27 2. Residential Variance. The Chief of Police and/or designees *shall grant* an
28 excluded person a residential variance from the exclusion. A residential
29 variance allows an excluded person to travel within the drug-free zone
30 directly to and from the person's residence *in accordance with the terms of*
31 *the variance.*

32
33 3. Essential Needs Variance. The Chief of Police and/or designees *shall grant*
34 an excluded person an essential needs variance from the exclusion. An
35 essential needs variance allows an excluded person to travel within the
36 drug-free zone *in accordance with the terms of the variance* to access a
37 public or private place within the drug-free zone that provides an essential
38 need *when the essential need sought by the excluded person cannot*
39 *reasonably be accessed by the excluded person without entering the drug-free*
40 *zone.*

41 4. Employment Variance

42
43 a. The Chief of Police and/or designees *shall grant* an excluded

1 person an employment variance from the exclusion. An employment
3 variance allows an excluded person to travel to, from and for work
5 within the drug-free zone *in accordance with the terms of the
7 variance* if the excluded person:

(1) is an owner, principal, agent or employee of a place of
7 lawful employment located in the drug-free zone; or

(2) is required to perform employment-related services in the
9 drug-free zone for a lawful employer.

11 5. Social Services Variance. The Chief of Police and/or designees *shall grant*
13 an excluded person a social services variance from the exclusion. A social
15 services variance allows an excluded person to travel within the drug-free
17 zone *in accordance with the terms of the variance if* the excluded person:

17 a. *is in need of social services in the drug-free zone;*

19 b. the social services are sought *for reasons relating to the health or
21 well-being* of the excluded person; and

23 c. *the social services agency has written rules and regulations
25 prohibiting the unlawful use and sale of controlled substances by
27 their clients.*

27 6. Educational Variance

29 a. The Chief of Police and/or designees *shall grant* an excluded
31 person an educational variance from the exclusion. An educational
33 variance allows an excluded person to travel within the drug-free
35 zone *in accordance with the terms of the variance:*

(1) to enroll as a student at an educational facility located
37 within the drug free zone.

(2) to attend school at an educational facility located within
39 the drug-free zone.

41 C. REVOCATION OR AMENDMENT OF VARIANCES. A variance may be
43 revoked or amended for the following reasons:

1. The excluded person provided false information in order to obtain the variance;

2. *There is probable cause to believe the person has committed any of the*

1 school, employment, or social services provider.²⁴ Although the Notice of Exclusion announces that
2 “**THE VARIANCES MARKED BELOW APPLY TO YOU**” and conveniently prints an “x” in
3 the boxes introducing each of the variances the City and the State portray as “automatic,” the
4 language of the Ordinance and the appearance of the Notice of Exclusion suggest that without “terms
5 specified” in any variance, there *is* no variance. It is easy to understand why an officer issuing the
6 notice might expect that she or he might have some role both in defining the scope of any “plausible
7 need” variance and in indicating that the excluded person did not request or receive any of those
8 listed “automatic” variances. And it is equally understandable why an officer trained concerning the
9 Ordinance would understand that if there is no indication of a residence, employment, or other basis
10 of a variance, it makes sense to cross it out or write “N/A.”

11 Although the Ordinance appears to contemplate that the terms of any such variance be
12 “specified” – meaning its application is linked to a designated location, provider, or circumstance
13 – and although the Ordinance purports to require that such variances “shall” be granted, the City and
14 the State insist that all persons automatically receive the benefit of the variances in question
15 regardless whether their terms are specified beyond the generic information printed on the Notice
16 of Exclusion. The City and State do so to minimize the infringement of liberty occasioned by an
17 exclusion, and to this end concede that any Notice of Exclusion is ineffective if the issuing officer
18 struck or indicated “N/A” by any of the variances.

19 There are, of course, substantial practical differences between the most plausible reading of

²⁴ The next theoretical step for an officer determining whether the excluded person is within an issued variance is to determine whether any associated travel is direct, whether the essential need can only be satisfied within the zone of exclusion, whether any employment is lawful and requires the excluded person to perform services within the zone of exclusion, whether the excluded person really “needs” the social services in question, whether such needs relate to the person’s health or well-being, and whether the social service provider has rules “and” regulations prohibiting use or sale of controlled substances. Even if the variance were “automatic,” therefore, its impact on liberties is substantially undermined by the prospect of such interrogation when an excluded person presents the copy of the variance.

1 the Ordinance (as requiring specificity beyond that pre-printed on the Notice) and the position of the
2 City and the State. First, under the plausible reading of the Ordinance, the variances are “automatic”
3 only to the extent that the issuing officer inquires and correctly determines the excluded person’s
4 qualifications for any of the variances and designates the correct providers or locations on the form.
5 For the 90 day (or one year) period of the exclusion, however, the variance would be in no sense
6 automatic if the excluded person experiences or desires a change of residence, essential needs
7 provider, educational activity, employment, or social services needs. The person would have to
8 apply for a new or modified variance if the change would result in a need for a different specification
9 of variance.

10 Second, given that the Notice and any variances are to be issued on the occasion of an arrest
11 by the “designee,” requiring specificity that can only be the product of a conversation between the
12 arresting officer and the excluded person raises substantial concerns for self-incrimination purposes
13 – indeed, if the arrest is based on probable cause for illegal drug activities, a *Miranda* warning may
14 well precede any discussion about variances, the person may have invoked the right to silence, and
15 the discussion could obviously touch on such issues as why the person is in the zone and what he or
16 she is up to.

17 Third, under the reading urged by the City and the State, all persons automatically have the
18 benefit of such variances even as conditions change – a quite substantial decrease in the impact of
19 exclusion on personal liberty. But under this scenario, there is no plausible role for specificity
20 beyond the printed generic language on the Notice of Exclusion, and the form is of no use to an
21 officer attempting to determine whether an excluded person is present as allowed by a variance.
22 Moreover, a variance *with* a specification is either an *increase* in the impact of exclusion upon

1 personal liberties or it has no effect because the generic exclusion is still operative – in which case
2 the form still has no utility sufficient to justify the requirement of carrying it in a zone on pain of
3 criminal liability. Because a Notice of Variance with a filled-in variance essentially tells the person
4 that the variance is limited to the specifications recorded by the issuing officer, it announces a
5 substantially greater impact on the excluded person than the City and State claim.

6 The State and the City, again, contend that the Ordinance affords all of the listed “variances”
7 automatically and without the necessity of any act by a police officer or other designee, or that it
8 should be so construed to achieve a sufficient accommodation of liberty interests to withstand
9 appropriate scrutiny. Even accepting this construction of the Ordinance, a substantial concern for
10 liberty remains. The State’s assertion that “residence” excludes “transient occupancy in a hotel or
11 motel” is without support in either the Ordinance itself or the Notice of Exclusion. The distinction
12 between “transient occupancy” and residential occupancy has troubled the Portland Police and the
13 legislature in the context of the scope of landlord/tenant law²⁵ for decades, in large part because for
14 many low-income persons, residency *is* occupancy in “hotels” that cater to weekly renters who have
15 no other home – and who, like the City in this context, are anxious to avoid procedural attributes
16 (such as eviction laws) they deem cumbersome. For purposes of assessing liberty interests, even
17 transient occupancy as defined by landlord/tenant law does not always negate residency. After all,
18 there are citizens for whom transient occupancy is the only residence they achieve between spells
19 of homelessness.

20 I accept the invitation of the City and of the State to construe the Ordinance to minimize its
21 infringement of liberty interests so as “automatically” to afford all excluded persons all of the

²⁵ Compare ORS 90.110(4) with ORS 90.100(44).

1 variances as well as all of the exclusions listed on the Notice of Exclusion. But it follows from my
2 analysis and from my reading of the Notices of Exclusion in evidence that a conviction cannot be
3 based on a Notice from which an officer has struck out or written “N/A” as to any variance (as
4 conceded by the City and the State at argument).

5 Moreover, because under this validating construction of the Ordinance all excluded persons
6 are entitled to the generic “automatic” variances, a defendant is not precluded from asserting as a
7 defense that his or her presence in a zone upon which “violation of a variance” is based was in fact
8 within the scope of a generic automatic variance regardless of any attempt by the issuing officer to
9 restrict the scope of the variance.²⁶ A defendant must be permitted to assert the “residential”
10 variance even if an actual residence²⁷ may be deemed “transient” under other provisions of law. And
11 a defendant is free to assert as a defense that as applied to the circumstances of that defendant, any
12 language added to an exclusion by an issuing officer liberties invalidated the exclusion due to its
13 impact on the defendant’s actual liberty interests.²⁸

14 Finally, because the validating construction largely urged by the City and the State almost
15 entirely undermines the governmental interest in producing a copy of the variance upon demand,
16 because producing papers on demand while merely being within a public center of social, political,
17 or commercial life is so fundamentally at odds with notions of a free society, and because this result

²⁶ For example, an issuing officer may have specified a location of employment that later required the defendant’s presence in a different part of the zone, or the excluded person may have changed residences within the zone since the exclusion.

²⁷ For these purposes, a residence is simply a “principal place of abode” and may include short-term occupancy of a hotel room, depending, for example, on whether the occupant has any other place of abode and intends the occupancy to constitute the occupant’s “home.”

²⁸ For example, when a designation by an issuing officer had a perceived practical adverse impact on the excluded person’s actual interests in entering a zone for purposes deemed permissible by the generic version of the “automatic” variance.

1 in no way enhances the risk of liability associated with an arrest based on probable cause that may
2 turn on the absence of proof of a variance, I construe the Ordinance as not preventing a defendant
3 from asserting as a defense and proving at trial on a trespass or violation of variance charge that the
4 defendant was actually within the scope of an applicable variance – even if the defendant failed to
5 produce his “papers.”²⁹ I note in passing that the Ordinance makes no attempt to require carrying
6 and presenting a variance to give an excluded person the benefit of an *exception* to the effect of a
7 variance articulated in 14B.20.030 Under my reading of the Ordinance, that benefit remains.

8 So accepting the construction of the Ordinance urged by the City and the State,³⁰ I will
9 proceed to assess the Defendants’ contentions under an intermediate standard of scrutiny.

10 ***The Anti-Vagrancy Law Statute:*** ORS 430.325 provides:

11 **Prohibitions on local governments as to certain crimes.** (1) A political subdivision
12 in this state shall not adopt or enforce any local law or regulation that makes any of
13 the following an offense, a violation or the subject of criminal or civil penalties or
14 sanctions of any kind:

15 (a) Public intoxication.

16 (b) Public drinking, except as to places where any consumption of alcoholic
17 beverages is generally prohibited.

18 (c) Drunk and disorderly conduct.

19 (d) Vagrancy or other behavior that includes as one of its elements either drinking
20 alcoholic beverages or *using controlled substances in public*, being an alcoholic or
21 a drug-dependent person, or being found in specified places under the influence of
22 alcohol or controlled substances.

23 (e) *Using* or being under the influence of controlled substances.

(2) Nothing in subsection (1) of this section shall affect any local law or regulation

²⁹ The Ordinance provides that “The variance must be carried on the person while in a drug-free zone in order to be effective and must be presented to a police officer upon request” (PCC 14B.20.060 B), while defining the crime in this language: “It is unlawful for any person to violate any term of any variance issued pursuant to this section” (PCC 14B.20.060 D). And trespass is available when “an excluded person is in the drug-free zone from which that person is excluded, in violation of the exclusion during the exclusion period.” PCC 14B.20.030 E. In part responding to the enthusiasm with which the City and State urge a validating construction, I read “to be effective” as meaning “to be effective to prevent an arrest when probable cause exists,” but not as trumping the excluded person’s compliance with an applicable variance.

³⁰ Although it is a close question, I believe I can read the Ordinance as *permitting* the “Chief/designee” to declare all of the variances the City and State deem “automatic” available to an excluded person regardless of specificity.

1 of any political subdivision in this state against driving while under the influence of
3 intoxicants, as defined in ORS 813.010, or other similar offenses that involve the
operation of motor vehicles.

5 [emphasis added]

7 The City and the State insist that because our appellate courts have distinguished
8 “possession” from use, and because exclusions are based on violation of statutes based on possession
9 or dealing (or behaviors otherwise not captured by ORS 430.325), Defendants’ contentions under
10 that statute have no merit.

11 The argument of the City and the State rests on *State v. Downes, supra*, 31 Or App 1183
12 (1977), which reasoned as follows:

13 The convictions arose out of one incident, witnessed by an
14 undercover officer, which consisted of another person’s injecting into
15 defendant’s arm a “controlled substance” later identified as
16 phencyclidine (PCP). Under these facts, it is contended that
17 defendant was not only guilty of using the drug, but he was also guilty
of possessing it because it was in his bloodstream.

19 The legislative scheme does not permit such a conclusion. If
20 we were to accept the State’s theory, everyone guilty of criminal use
21 of drugs under ORS 167.217, subject to a maximum term of one-year
22 imprisonment, would also be guilty of criminal activity in drugs under
23 ORS 167.207, subject to a maximum term of imprisonment of ten
24 years. Not only would there be no necessity for ORS 167.217, but the
25 apparent legislative scheme of treating illegal use as a less serious
offense than illegal possession would be thwarted.

27 Furthermore, ORS 161.015(8) defines “possess” as meaning
28 “to have physical possession or otherwise to exercise dominion or
29 control over property.” (*Emphasis added.*) Under the statutory
30 definition, the exercise of dominion or control over the property is
31 necessary. Obviously, after a drug is ingested or injected into the
32 human body, the host body can no longer exercise dominion or
33 control over it.

35 31 Or App at 1185-86

37 The City and the State apply the analysis of *PGE v. Bureau of Labor and Industries*, 317 Or

1 606 (1993), to *the Ordinance* to argue that it is not a vagrancy statute, and further argues that the
2 statute’s prohibition of local laws criminalizing being in a public place while intoxicated by or *using*
3 drugs or alcohol (which the City and the State associate with “status”) does not extend to persons
4 arrested for *possessing* or dealing drugs, citing *State v. Downes, supra*, 31 Or App 1183 (1977) [after
5 ingestion, controlled substance is not “possessed”], and distinguishes *Portland v. James*, 251 Or 8
6 (1968) [vagrancy ordinance stricken for vagueness], by arguing that the Ordinance is not subject to
7 vagueness challenges because it is based upon an arrest with probable cause for any of the listed drug
8 crimes and limited in its application to precisely described zones.

9 As I noted at argument, the argument based on *PGE v. Boli* has two flaws: first, *PGE v. Boli*
10 has been modified by recent amendment to ORS 174.020 to invite easier access to legislative intent
11 than that case allowed.³¹ Second, the statute that needed interpretation is ORS 430.325, not the
12 Ordinance. The City and the State obtained the scant legislative history of ORS 430.325 from the
13 1971 legislative assembly. That legislative history³² suggests that the purpose of the statute was to
14 promote treatment as a response to addiction rather than the mechanisms of the criminal law, and
15 to prevent local devices contrary to that objective. On the other hand, the contemporaneous approval
16 of local laws aimed at the effects of drunken and disorderly *conduct* supports the argument that ORS
17 430.325 was not intended to prevent localities from using the criminal law to respond to *behaviors*

³¹ **174.020 Legislative intent; general and particular provisions; consideration of legislative history.** (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate. [Amended by 2001 c.438 §1]

³² 1971 Or Laws ch 622, ch 743 § 221 and committee minutes.

1 other than the mere manifestation of use of intoxicants (or, as later added, narcotics). To this extent,
2 then, ORS 430.325 does not preclude the Ordinance, as it is premised on possession or delivery of
3 controlled substances sufficient to establish violation of any of the enumerated drug offenses.

4 On the other hand, although the Ordinance bases exclusions on an arrest for violation of state
5 laws criminalizing possession or delivery, accomplished or attempted, (PCC 14B.20.030 A),
6 probable cause may indeed be based entirely (or critically) on observations which under *Downes* and
7 ORS 430.325 amount only to “using” drugs. Because the resulting exclusion – even under the
8 minimizing characterization by the City and the State and my construction of the Ordinance –
9 constitutes at least a “civil” “sanction” of *some* “kind,”³³ the Ordinance cannot lawfully apply to such
10 an exclusion. The City can criminalize possessing or dealing in drugs, but the City cannot either
11 criminalize or impose civil sanctions for mere “use” in public.

12 As in *State v. Ingram*, because this much of Defendants’ challenge is facial, I cannot
13 determine which (if any) of the Defendants were excluded based on probable cause to which mere
14 “use” was critical. A defendant whose exclusion was critically based on “use” would by virtue of
15 ORS 430.325 have a defense at trial on the charge of trespass or violation of a variance even if that
16 defendant failed to exploit the opportunity for appeal – or even if the defendant had appealed
17 unsuccessfully.³⁴

18 Because I cannot resolve the issues before me on statutory grounds, it is necessary to proceed
19 to the constitutional issues. *E.g.*, *State v. Perry*, 336 Or 49, 52 (2003).

20 ***Fundamental Rights and Criminal Procedure Rights:*** Critically relying on the narrow

³³ I trust that no one would seriously contend that because of the laudatory purposes of exclusion, it doesn’t fit within the category of “sanctions of any kind.”

³⁴ See *State v. Riddell*, 172 Or App 675 (2001).

1 reading of the Ordinance urged by the City and the State, and because of my reading of appellate
2 pronouncements in related areas, I cannot sustain the Defendants’ facial challenges urging that the
3 Ordinance unconstitutionally abrogates fundamental rights, that it is unconstitutionally prohibitive
4 of innocent or protected conduct, or that it is so intrusive of liberty as to trigger the procedural rights
5 guaranteed to persons accused of a crime.

6 Although they involved a significantly different context – whether an exclusion constituted
7 former jeopardy so as to preclude prosecution under Article I, §12, for the criminal behavior upon
8 which the exclusion was based – the following appellate pronouncements compel me to recognize
9 that the Ordinance does not invoke the highest level of scrutiny:

11 To be sure, exclusion from a portion of the City can be burdensome, depending on
12 the excluded person’s individual circumstances. However, if affected individuals are
13 entitled to a variance because they live or work in an exclusion zone and may, at the
14 discretion of designated officials and agencies, obtain additional variances for
15 reasons of health, welfare, or well-being, PCC § 14.150.160(2)(b), then the burdens
16 that accompany exclusion are considerably less than they might be. Although
17 defendant takes great pains to point out that the granting of variances is in part
18 discretionary, we cannot assume that city officials will deny legitimate requests for
19 variances, particularly when the individual who makes the request can show that an
exclusion is particularly burdensome.

21 *State v. Lhasawa*, 334 Or 543, 555 (2002) [“prostitution-free” zone]

23 We do not believe that the sanctions are excessive in relation to their remedial
24 purpose. That purpose, as noted, is to improve citizens’ quality of life in areas that
25 have become notorious for criminal drug activity. The sanctions involve short-term
26 exclusion of people who the police have probable cause to believe are involved in
27 criminal drug activities in those areas. People excluded from the areas under these
ordinances may receive variances to enter the areas for legitimate purposes.

29 *State v. James*, 159 Or App 502, 513 (1999)

31 At least in light of such appellate assessments, I agree with the City and the State that the
32 interests here at stake do not trigger the highest level of scrutiny, and do not permit or require the
33

1 court to invalidate the Ordinance simply because there may well be less onerous devices for seeking
2 the City's objectives or because in application the Ordinance effectively prohibits otherwise innocent
3 conduct in a zone. I further agree that notwithstanding the distinction in issues presented in the
4 foregoing former jeopardy cases, I cannot find the Ordinance unconstitutional on the theory that it
5 unnecessarily burdens substantive constitutional rights. Even as to First Amendment rights to speech
6 and assembly, Defendants' facial attack must fail; the effect of the Ordinance on such rights is far
7 more remote than that of regulatory schemes and criminal laws readily upheld against such
8 arguments. *E.g., City of Portland v. Ayers*, 93 Or App 731, 735 (1988), and authorities cited.

9 This is not to say that I accept the argument that the Ordinance is as easily distanced from
10 the criminal law as suggested.

11 The City and the State dispute my insistence that criminal law seeks the same objectives as
12 the Ordinance, pointing to the absence of any attempt to rehabilitate offenders. At least in the
13 context of former jeopardy – where the issue is whether a scheme such as that involved here is
14 sufficiently aligned with *traditional purposes of criminal punishment* to preclude a subsequent
15 prosecution for the underlying criminal behavior – there is authority for the position urged by the
16 City and the State:

17 The City's stated goals for deterring criminal drug activities in the designated
18 zones are civil, not criminal; the City found that the drug activities
19 contributed to the degradation of the designated areas and had a negative
20 effect on the quality of life for the residents, businesses, and visitors.
21 Concerns about property values and citizens' quality of life in a specific
22 geographical area are essentially civil in nature. Defendant also argues that
23 the sanction is retributive because it is directly tied to the commission of
24 criminal offenses. We are not convinced. The ordinances, as well as the
25 City's findings on the need for the ordinances, demonstrate a concern for the
26 quality of life in the designated zones in general and not a desire to seek
27 retribution against individuals who commit crimes. The fact that excluded
individuals may obtain variances to carry out legitimate business in the

1 designated zones supports our conclusion that, although the ordinances are
2 intended to deter drug crime, their overriding purpose is to achieve legitimate
3 civil goals.

4
5 *State v. James, supra*, 159 Or App at 512 (1999)

6
7 With respect, any view that quality of life is not the concern of criminal law is profoundly
8 mistaken at least as to modern criminal law, and dubious even with respect to “traditional” views
9 of the purposes of criminal law. Although it may well be that for former jeopardy purposes, the
10 device of punishment or “retribution” may distinguish the criminal law from civil remedies, it surely
11 does not follow that the *purposes* of deterrence or promoting quality of life in affected
12 neighborhoods or avoiding the collateral consequences of illegal activity in drugs distinguish
13 criminal law from civil remedies. Reasonable minds may differ on the success or even the rationality
14 of the “drug war” waged through the mechanisms of criminal justice, but it strains credulity to
15 suggest that the objectives of that pursuit – or of the criminal law in most of its applications – do not
16 include precisely those here urged in support of the Ordinance: public safety and the quality of life
17 (and commerce) threatened by the collateral consequences associated with the relevant criminal
18 behaviors. I’ve heard morality asserted as the justification for some laws, and even the relatively
19 bizarre and woefully misguided notion that *courts* should not be in the business of reducing
20 recidivism but should only punish. But I’ve not heard it suggested that responding to moral
21 objection is the sole objective of legislative decisions criminalizing vice, domestic violence, theft,
22 or driving under the influence of intoxicants.

23 Suggesting that punishment for its own sake is the only purpose of criminal law or, worse,
24 that deterrence, rehabilitation, and incapacitation are not within its intended mechanisms, is in any
25 event flatly contrary to Oregon law. Since the 1971 Criminal Code (largely based on the 1962 Model

1 Penal Code), statutory law has declared that the purposes of the criminal law are to “insure the
2 public safety by preventing the commission of offenses through the deterrent influence of the
3 sentences authorized, the correction and rehabilitation of those convicted, and their confinement
4 when required in the interests of public protection.” ORS 161.025(1)(a). Since 1996, our
5 constitution has provided that “Laws for the punishment of crime shall be founded on these
6 principles: protection of society, personal responsibility, accountability for one’s actions and
7 reformation.” Oregon Constitution, Article I, Section 15. As to the *traditional* purposes of Oregon
8 law, the same provision of our constitution provided from 1859 through 1996 “Laws for the
9 punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.”

10 Although deterrence, reformation, and incapacitation are among the devices of the criminal
11 law, it does not follow that any application of the law that does not include one of those devices is
12 therefore distinct from the criminal law. Surely, an application of the law is no less “criminal” when
13 it results in incapacitation for life because rehabilitation of a dangerous offender is too uncertain or
14 unlikely to fulfill the sentencing objective of public safety. Nor does the circumstance that any
15 given application of criminal law may serve less than all of the potential social purposes of criminal
16 law establish that the law is not “criminal.” Unavoidably, the Ordinance and the criminal law are
17 not conveniently mutually exclusive in terms of their objectives or their means – indeed, the device
18 of exclusion is in some real sense both an application of deterrence and of incapacitation.³⁵

19 The trouble with the current attempts to articulate the differences between criminal and civil

³⁵ “Even if defendant were correct that exclusion serves as a deterrent, that fact is of little value to our analysis. Deterrence is a legitimate remedial purpose and its presence is perfectly compatible with a conclusion that a proceeding and sanction is civil. *See Hudson*, 522 U.S. at 105, 118 S.Ct. 488 (stating that deterrence may serve both civil and criminal goals). The same can be said of defendant’s contention that exclusion under the ordinance serves to incapacitate persons from committing further crimes. Incapacitation, in that sense, is a remedial goal.” *State v. Lhasawa*, 334 Or. 543, 560 (2002).

1 processes is that Oregon has long eschewed purely punitive purposes of the criminal law, and
2 increasingly recognizes that the highest purposes of the criminal law are “remedial” – even when
3 furthered by the traditionally criminal mechanism of incarceration for purposes of incapacitation.
4 A more persuasive approach to the distinction between criminal and civil *remedies* would focus on
5 the use of methods historically characteristic of criminal law – jail, prison, or other punishment –
6 and, perhaps, the opprobrium associated with the target behavior or the official response.³⁶

7 That the line between civil and criminal law approaches to public safety, quality of life, and
8 social health is nowhere near as clear as the City and State contend does not mean that the
9 Defendants are correct in asserting that the Ordinance is unconstitutional for want of the full panoply
10 of procedural protections associated with criminal justice.

11 Whatever the approach for purposes of former jeopardy (or *ex post facto*) analyses, the
12 analysis that seems most appropriate here is to assess the impact on core liberties, and then to
13 determine whether such an impact can be exacted without affording the highest of procedural
14 protections.³⁷ This is, of course, the approach that determines “what process is due,” an approach
15 that begins with *Mathews v. Eldridge, supra*, 424 US at 333-335 (1976):

17 The fundamental requirement of due process is the opportunity to be
18 heard “at a meaningful time and in a meaningful manner.”* * * *
19 [citations omitted]
* * * *

³⁶ For former jeopardy purposes, the relevant “stigma” seems to be that implied by the sanction, not that associated with the behavior punished. *See, e.g., State v. Selness*, 334 Or 515, 534-535 (2002).

³⁷ Were I writing on a clean slate, I might well conclude that the impact here is enough – even with all the limitations and protections articulated by the City and the State – to require the highest of procedural protections – and that the legitimate purposes of social control could be accomplished by coordinated efforts of police, pretrial release, prosecution and correctional supervision efforts. But the slate is hardly blank. Some might argue that the City seeks by its position on the Ordinance to continue the transformation of the role of the judiciary from that of defending inconvenient liberty to legitimizing the sacrifice of liberty to practicality, but my role as a trial judge is to bow to the weight of authority.

1 More precisely, our prior decisions indicate that identification of the
2 specific dictates of due process generally requires consideration of
3 three distinct factors: First, the private interest that will be affected by
4 the official action; second, the risk of an erroneous deprivation of
5 such interest through the procedures used, and the probable value, if
6 any, of additional or substitute procedural safeguards; and finally, the
7 Government’s interest, including the function involved and the fiscal
8 and administrative burdens that the additional or substitute procedural
9 requirement would entail.

11 In view of the narrowing construction urged by the City and the State, the alteration
12 accomplished by the City’s response to *State v. Ingram* (so that an appeal from an exclusion is
13 successful if the hearing officer is not persuaded that the excluded person actually committed a drug
14 crime), and the availability in any prosecution for violation of a variance of a defense based on the
15 invalidity of the underlying exclusion or the applicability in fact of a variance, I am persuaded that
16 the Ordinance does not require criminal procedure rights as to the exclusion itself – jury trial,
17 appointed counsel, or proof beyond a reasonable doubt. Those rights apply, of course, should the
18 excluded person be prosecuted for the crime³⁸ of violation of a variance (or trespass). Upon such
19 a prosecution, the defendant is unquestionably entitled to the rights of any defendant facing a
20 criminal prosecution.

21 The remaining procedural issues address notice of a suspension based upon a conviction and
22 the disconnect between the 10 days in which to file an appeal and the eight day delay before the
23 effectiveness of an exclusion order.

24 Because a one year-exclusion based upon a drug crime within a zone does not depend upon
25 the fact of a former exclusion,³⁹ the Ordinance in no manner requires that a person subject to the one-

³⁸ Some of these rights are diminished or avoided when the State chooses to pursue a prosecution as a “violation” carrying at most a financial penalty. *See* ORS 161.566.

³⁹ *See* PCC 14B.20.030 B.

1 year exclusion be provided with notice of that exclusion. Because the exclusion attaches only in the
2 event that the drug crime were committed in a zone but not in a residence, the conviction does not
3 establish all prerequisites to an exclusion, and the function of notice is hardly *de minimis* to the
4 extent that it relates to an excluded person’s interest in appeal. In view of the intermediate level of
5 scrutiny and the additional foundational role of notice in providing an excluded person with notice
6 of the prohibited behavior (presence in a zone without variance or exception), I conclude that the
7 Ordinance cannot constitutionally preclude the defense in a trial for trespass or violation of a
8 variance that a person subject to a one-year exclusion did not have actual notice of the exclusion
9 following a conviction.

10 With respect to the eight day suspension to accommodate a 10 day period of appeal, the
11 Notice of Exclusion recites that the exclusion will not take effect until 15 days after the exclusion.
12 The utility of notice would be enhanced and the consequences of a shorter period of suspension than
13 for filing an appeal would be mitigated by a notice (given with the Notice of Exclusion) that
14 expressly authorized appeals to be filed by mail.⁴⁰ I take the City at its word that it will bring the
15 Ordinance into compliance with the Notice, and cannot invalidate the Ordinance based on a
16 discrepancy whose impact is negated by the cited provision in the Notice of Exclusion. Of course,
17 this conclusion does not preclude a defense asserted by any defendant who contends the discrepancy
18 had some actual role in preventing an appeal.

19 ***Equal Treatment, Disparate Impact and Selection of the Beech DFZ:*** The City and the
20 State are clearly correct with respect to equal protection/equal treatment arguments not based on race

⁴⁰ The ordinance is silent as to notices of appeal filed by mail (PCC 22.10.030; 14B.20.060), the “**Understanding Exclusion Zones**” attachment (state’s Memorandum, Exhibit 5) apparently served with the Notice of Exclusion implies that the excluded person is expected to pick up an “appeal form” at the Portland Police Bureau “at the address and times listed above.”

1 – members of a group that can describe itself as disfavored do not prevail on such arguments if their
2 membership in the group is essentially volitional. *See, e.g., Hale v. Port of Portland*, 308 Or 508,
3 524-26 (1989); *Withers v. State*, 163 Or App 298, 306-07 (1999), and *authorities cited*.⁴¹ And apart
4 from issues of racially disparate governmental action, the City has clearly demonstrated a sufficiently
5 rational basis for designating the Beech Drug Free Zone (and for enacting the Ordinance in general)
6 given my limiting interpretation of the Ordinance even if the Defendants were somehow members
7 of a “true class.” *See, e.g., Cox ex rel. Cox v. State*, 191 OrApp. 1, 4 (2003), and *authorities cited*.

8 The Defendants’ efforts to establish unlawful racial disparity are hampered by the prevailing
9 notion that some racial animus must be evident. *See, e.g., Washington v. Davis* 426 US 229, 239
10 (1976), and *authorities cited*; *City of Portland v. Ayers, supra*, 93 Or App 731, 734 (1988).
11 Whatever the theoretical potential for statistical disparity to support an inference of racial animus,
12 I must agree with the City and the State on two points fatal to Defendants’ present challenges based
13 on racial disparity. First, without a baseline addressing the proportion of African Americans in fact
14 engaged in illegal drug activities, I can draw no sufficient inference in Defendants’ behavior from
15 the disproportion of African Americans charged with Ordinance violations as compared with other
16 ethnic groups. Absent that baseline, I have no basis upon which to isolate the impact of the
17 Ordinance on the disparity. Second, the record is persuasive that selection of the Beech Drug Free
18 Zone was *not* based on any intent to burden African Americans, but was at least in substantial part
19 responsive to demands from the Beech neighborhood itself for designation as a drug free zone.

20 To the substantial extent that Article I, section 20, and federal equal protection notions may

⁴¹ The obverse does not follow -- *i.e.*, even if Defendants could contend that their membership in the class of persons excluded from drug free zones (or charged with violation of a variance) is not “voluntary,” they would not thereby establish entitlement to analysis as a “true class.” *See Ag West Supply v. Hall*, 126 Or App. 475, 479-80 (1994).

1 provide a basis for a challenge to governmental actions related to criminal law that are not based on
2 discrimination against a “true” or “protected” class, but are arbitrary or without a rational basis (*see*,
3 *e.g.*, *In re Conduct of Gatti*, 330 Or 517, 534 (2000), *and authorities cited*), the City has
4 demonstrated an evidence-based process for designating drug free zones that clearly satisfies the
5 constitutional threshold.

6 ***Conclusion***

7 With a substantially narrowed reading to sustain its validity, the Ordinance withstands the
8 facial attacks launched by the Defendants, and I reject as unpersuasive Defendants’ attempts to
9 demonstrate unlawfully racially disparity in either the selection of any zone or its impact as applied
10 to African Americans.⁴² To achieve validity of the Ordinance, I construe it as follows:

- 11 1. All excluded persons are entitled both to the exceptions from the operation of an
12 exclusion listed in PCC 14B.20.030 C and to the variances listed in PCC 14B.20.060
13 B(2)-(6) regardless of any language added to the Notice of Exclusion by the issuing
14 officer;
- 15 2. Any exclusion accompanied by a Notice of Exclusion form on which the issuing
16 officer struck any listed variance or indicated that any variance was not applicable is
17 void;
- 18 3. Any excluded person charged with trespass or “violation of a variance” based on an
19 exclusion has a defense if the person can establish that by reason of language added
20 to the Notice of Exclusion by the issuing officer the person in fact suffered restriction

⁴² This does not preclude any individualized attempt to demonstrate that a particular example of enforcement was unlawful due to unlawful discrimination.

1 of activities within a zone to which that person was entitled by virtue of the
2 exceptions or the variances generically described by PCC 14B.20.00 B(2)-(6);

3 4. Any excluded person charged with trespass or “violation of a variance” based on an
4 exclusion has a defense if the person can establish that the person’s presence in the
5 zone was within the scope of the generic residential variance (PCC 14B.20.060 B(2))
6 even if the person’s actual “residence” may be deemed “transient” under other
7 provisions of law;

8 5. An excluded person charged with trespass or “violation of a variance” based on an
9 exclusion has a defense if the person can establish that at the time the person is
10 charged with being unlawfully in a zone the person was within the scope of an
11 exception or variance, whether or not the person carried or presented written
12 evidence of an exception or variance,

13 6. Any excluded person charged with trespass or “violation of a variance” based on an
14 exclusion has a defense if the person can establish that the probable cause upon
15 which the exclusion was based critically consisted of mere “use” or effects of use of
16 controlled substances rather than possession or delivery of controlled substances,
17 whether or not the person pursued an appeal from the exclusion;

18 7. Any excluded person charged with trespass or “violation of a variance” based on an
19 exclusion following a conviction for a drug crime in a zone has a defense if the
20 person can establish that the person did not receive actual notice of that exclusion.

21 The demurrer is in all other respects OVERRULED.

22 Based on representations of counsel at the hearing on this matter, I assume that the City or

1 the State will seek appellate review of this decision or the City will bring its Ordinance and related
2 forms into compliance with this opinion.⁴³

3

4 April 20, 2005

/s/ Michael H. Marcus
Michael H. Marcus, Judge

⁴³ Of course, my assumption is not intended to discourage pursuit of alternatives to the Ordinance less in conflict with liberty interests – see note 7, *supra*.