

## **DAYTONA BEACH CITY OFFICIALS USE “SAFE ZONE” TO COMPLY WITH FEDERAL CASE LAW, SO POLICE CAN ENFORCE ANTI-CAMPING LAWS WITH THE HOMELESS ON PUBLIC LAND**

NOTE: THIS IS A LAYMAN’S OVERVIEW OF HOW DAYTONA BEACH CITY OFFICIALS ARE FOLLOWING LEGAL ADVICE FROM THE CITY ATTORNEY TO COMPLY WITH FEDERAL CASE LAW FOUND IN POTTINGER V. MIAMI AND JOEL V. ORLANDO. NOTHING IN THE TEXT SHOULD BE CONSIDERED LEGAL ADVICE.

In August of 2016, the City of Daytona Beach became the first municipality in Volusia County to formerly announce its intention of following federal case law, with the creation a homeless camping area known as a “safe zone.” This was done with the advice of the city attorney in an effort to comply with federal case law that has motivated other municipalities around the nation to create homeless safe zones or shelters for single adults. “The city has established a Pottinger-complaint ‘safe zone’ area,” said city spokesperson Susan Cerbone in an August 12, 2016 news release. The term “Pottinger-compliant” is in reference to federal case law found in Pottinger v. Miami.

Homeless camping “safe zones” have been set up by various municipalities in Florida since 1992, as a result of the settlement agreement reached in famous homeless lawsuit of Pottinger v. Miami. The courts approved the settlement agreement. Safe zones have been set up around the nation in states like California and Hawaii because of other court decisions such as Jones v. Los Angeles.

Pottinger v. Miami is more connected to Florida because it comes out of this area’s federal court area. Most significantly, the Pottinger decision stood up to an appeal in the Eleventh Judicial Circuit, as did the Joel v. Orlando case which followed the Pottinger rationale. Florida is in the U.S. Eleventh Circuit Court of Appeals, and so decisions from that court are controlling here.

According to the federal case law researched by the city attorney, police cannot enforce anti-camping laws with the homeless on public land, unless the officer can offer the homeless camper immediate access to available space at a safe zone or shelter. Under this case law, without the creation of at least a “safe zone,” then police would not be able to stop homeless tent cities from appearing all over on public parks and beaches.

“Only if there is space at an available shelter and the homeless person refuses the offer may the police arrest that person. (Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla.1992),” the city attorney said in his August 13, 2016 memo to the city commission.

Weapons, drugs and alcohol are prohibited in homeless safe zones, where only basic camping needs are permitted.

Pottinger v. Miami case law deals primarily with single adult homeless issues. Typically, municipal officials around the country find more public sympathy for homeless families with children, and find private donations for assistance programs to help them, along with public funding.

**VOLUSIA COUNTY HAS NEVER HAD A PERMANENT HOMELESS SHELTER FOR SINGLE ADULTS DESIGNED TO MEET FEDERAL CASE LAW STANDARDS UNDER POTTINGER V. MIAMI**

Here in Volusia County, there has never been a permanent 24-hour homeless shelter for single adults designed to meet federal case law specifications. Years ago there was federal funding available to create shelter like this, but not in 2016. In Florida, shelters like this for single adults, has typically been constructed with county and city funding, with some help with private donations.

In his memo to the city commission in August, the city attorney explained his research of federal case law concerning homeless shelter and safe zone requirements:

“The term ‘available shelter’ is defined as a shelter for a period of at least 24 hours with a bed or mat at least three inches thick, at no cost to the homeless person,” the city attorney wrote in his August 13, 2016 memo.

“As indicted in a prior email from the Legal Department (attached), courts applying Pottinger would likely require that the area be:

- Free of charge with no requirements to do anything in particular, i.e., attend church, participate in counseling, etc.,

- Reasonably accessible to the particular person, i.e., a shelter that cannot accept handicapped persons is not available to a handicapped homeless person,

- Reasonable in terms of location, i.e., a place 50 miles away probably would not be reasonable,

- Environmentally suitable, i.e., a briar patch would not be reasonable, and

- The person has to be able to get to it, i.e., a reasonable walk or transportation provided,” wrote the city attorney.

**WITH THE CHANGING NATIONAL POLITICAL ENVIRONMENT THE FUTURE OF FEDERAL FUNDING FOR HOMELESS PROGRAMS LIKE “HOUSING FIRST” IS UNCERTAIN. HOWEVER, “HOUSING FIRST” PROGRAMS STILL NEED A SAFE ZONE OR SHELTER SO POLICE CAN ENFORCE ANTI-CAMPING LAWS WITH HOMELESS IN PUBLIC AREAS.**

The city attorney's August 13, 2016 memo to the city commission did not talk about "housing first" programs for the homeless. Some people have suggested creating a "housing first" and "rapid re-housing" federal homeless program for Volusia County. Of course, this would depend on the availability of federal funds for these programs.

Other areas that do have "housing first" federally funded programs show that is not a substitute for having a homeless safe zone or shelter. "Housing first" programs in other areas still have a safe zone or shelter, so police can enforce anti-camping laws with the homeless in public parks.

Under this case law with Pottinger, police cannot enforce anti-camping laws with the homeless on public land, unless they can offer the homeless camper immediate available space at a safe zone or shelter 24-hours a day. Housing First has an application process with limited space. "Housing First" or "Rapid Re-Housing" programs do not accept any homeless person 24-hours a day, every day of the year, therefore do not meet the standards under Pottinger v. Miami, without the addition of either a safe zone or shelter. Even the current federal "best practices" which focus on Housing First recognize and endorse the need for a 24/7 emergency shelter.

### **WHY HOMELESS SERVICES PROVIDED BY SOME CHURCHES CAN ONLY BE PART OF THE SOLUTION**

Federal case law says the homeless shelter used by police to enforce anti-camping laws with the homeless in public parks, cannot have religious requirements. "The shelter cannot impose religious constraints, or mental health or other treatment requirements," wrote the city attorney when describing his federal case law research.

A number of churches provide homeless services like food and temporary overnight shelter. Some people have claimed that churches are enough to serve the homeless. However, churches are often located near residential areas, and typically don't meet city zoning requirements to serve as homeless shelters. Well-intended church volunteers are not always trained to deal with serious issues that can sometimes occur with the homeless, such as intoxication, alcoholism, drug addiction, and mental illness.

**QUESTION: TO MEET FEDERAL CASE LAW REQUIREMENTS SO POLICE CAN ENFORCE ANTI-CAMPING LAWS WITH THE HOMELESS IN PUBLIC PARKS, SHOULD VOLUSIA COUNTY HAVE ONE CENTRALLY LOCATED SHELTER OR SAFE ZONE NEAR THE JAIL?**

**PINELLAS COUNTY HAS BEEN SUGGESTED AS A POSSIBLE MODEL FOR VOLUSIA TO FOLLOW: HOW PINELLAS COUNTY HAS A HOMELESS SHELTER THAT CAN BE USED BY ALL MUNICIPAL POLICE DEPARTMENTS IN THAT COUNTY, TO ENFORCE ANTI-CAMPING LAWS WITH HOMELESS ON PUBLIC LAND**

Pinellas County in Florida has one centrally located homeless shelter on unincorporated land to meet the needs of federal case law for a safe zone. Instead of all cities in Pinellas County creating their own safe zones or shelters, the Safe Harbor shelter there serves the needs of

municipalities throughout that county. As a result, police in municipalities throughout Pinellas in various cities tell homeless campers on public land that they have the choice of either going to the Safe Harbor shelter, or being arrested for violating camping laws in public parks and taken to jail.

Available space at the safe zone or shelter remains a key factor with Pottinger case law. Police can only enforce anti-camping laws with the homeless in public areas with available space at the shelter or safe zone. If the shelter or safe zone becomes full, enforcing anti-camping laws in public areas has to be put on hold, until additional shelter or safe zone space is provided.

### **DAYTONA BEACH CITY ATTORNEY EXPRESSES LIABILITY CONCERN WITH HOMELESS SAFE ZONE USE, CREATING MOTIVATION TO UPGRADE FACILITIES OR CREATE SHELTER**

It's likely that Daytona Beach city officials will be motivated to upgrade the facilities at the "safe zone." While the city attorney has advised the creation of a "safe zone," he warns of the liability to the city that comes with it. "A secondary issue arises as to the City's liability to persons within the arrest-free zone. In general terms under State negligence law, liability may arise to persons invited on property when there is a known dangerous condition on the property and the property owner fails to correct or warn of such condition, unless the danger is open and obvious," City Attorney Robert Jagger advised the city commission in a August 13, 2016 memo.

"In addition, when a police officer or any other person creates a foreseeable zone of risk, Florida law will generally recognize a duty to either to lessen the risk or see that sufficient precautions are taken to protect others from the harm the risk poses. (Kaisner v. Kolb, 543 So.2d 732, 734 (Fla.1989)). Liability may thus arise when a police officer brings a dangerous suspect into a hospital and fails to provide adequate protection for hospital staff (Sams v. Oelrich, 717 So.2d 1044, 1047 (1st DCA 1998)), or where an officer undertakes care and supervision of another and fails to exercise reasonable care (Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009)). As these cases indicate, the outcome of any litigation concerning establishment of an arrest-free zone will be fact specific," Jagger advised.

### **COPY OF CITY OF DAYTONA BEACH NEWS RELEASE ANNOUNCING THE CREATION OF A HOMELESS CAMPING AREA CALLED A "SAFE ZONE" IN AN EFFORT TO COMPLY WITH FEDERAL CASE LAW LIKE 1992 POTTINGER V. MIAMI**

, Fla. (August 12, 2016) – Today is the final day the city of Daytona Beach will pay for motel rooms for the remaining participants from the Salvation Army's Bridge Bed program. The city has spent \$24,900 to house this population of 70 people since they were released from the Salvation Army's program on August 1. Official check out time is 1 p.m. on August 12, 2016.

The city has worked diligently to place as many people as possible into alternative housing arrangements and programs. To date, 26 of the 59 remaining clients will be placed this afternoon. Case managers identified individuals for the various placement programs. The city has contracted with Allen Chapel AME Church, 580 George W. Engram Blvd. in

Daytona Beach, to operate a housing facility at 310 Kingston Avenue. Allen Chapel is a certified Community Housing Development Organization (CHDO) and because the two-story structure previously served as a community housing location for the indigent, it's a grandfathered use. This location will shelter 17 individuals. Pastor Nathan Mugala has agreed to coordinate additional social services to continue the clients' ongoing rehabilitation and treatment.

Five individuals will be transported and sheltered at the Ormond Beach Alliance Church, 55 North Nova Road in Ormond Beach. For the past six years, Pastor Doug Hautz has successfully housed many homeless people and provides counseling and access to services to identify and place people in permanent housing.

The Salvation Army will provide services to four homeless people who are veterans.

Two people staying at the hotel have made arrangements to remain at the motel at their expense.

The city has established a Pottinger-complaint "safe zone" area for remaining individuals. This "safe zone" is located on city-owned property on the southwest corner of Bellevue Extension and Clyde Morris Blvd. The "safe zone" provides homeless people an area where they can eat, sleep and congregate undisturbed during the evening hours. The city has provided a water source and has placed porta-potties on the premises. The city may identify additional "safe zone" sites to rotate the location from time to time.

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Susan Cerbone  
Communications Manager  
City of Daytona Beach

## **COPY OF DAYTONA BEACH CITY ATTORNEY'S MEMO TO POLICE AND CITY COMMISSION ON AUGUST 13, 2016**

Subject: Pottinger Arrest-Free Zones  
City Commissioners,

As you are aware the City has set up an arrest-free zone for homeless persons on a City lot at Clyde Morris Road and the Bellevue Extension, as envisioned under the Pottinger case. The question has been raised by a City Commissioner as to the legal requirements in establishing such an area.

A quick review of Pottinger may be helpful to put this issue in context. In 1988 the ACLU filed a suit against the City of Miami on behalf of all homeless persons living in the City. In 1992, the Federal trial court found that, "the City had a policy and practice of arresting homeless individuals for the purpose of driving them from public areas" which violated the Constitution. The court ordered the parties to agree on two public areas or "safe zones" where homeless persons could remain without being arrested. The parties were directed to consider proximity to feeding programs, health clinics, and other services. Until the safe zones were

established the court enjoined the City from arresting homeless persons in a portion of Bicentennial Park and in an area under the I-395 overpass. The City appealed to the Eleventh Circuit.

In 1998, while on appeal the parties agreed to settlement. The settlement was amended with approval of the Court in 2014. The core requirement of the current Consent Decree is that Miami police must offer a homeless person the chance to go to an available shelter instead of arrest for certain “life sustaining conduct misdemeanors.” The term “available shelter” is defined as a shelter for a period of at least 24 hours with a bed or mat at least three inches thick, at no cost to the homeless person, within the territorial boundaries of the City or within one mile thereof. The shelter cannot impose religious constraints, or mental health or other treatment requirements. Only if there is space at an available shelter and the homeless person refuses the offer may the police arrest that person. (*Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D.Fla.1992)).

In a later case decided by the Eleventh Circuit, the court upheld an Orlando ordinance prohibiting camping on public property. The court refused to follow *Pottinger* but acknowledged, “unrefuted evidence that the Coalition, a large homeless shelter, has never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee.” (*Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000)).

Other than the Joel case, there has been little guidance from the courts as to *Pottinger* requirements for an acceptable alternative place to sleep where a homeless person will not be subject to arrest. As indicted in a prior email from the Legal Department (attached), courts applying *Pottinger* would likely require that the area be:

- Free of charge with no requirements to do anything in particular, i.e., attend church, participate in counseling, etc.,
- Reasonably accessible to the particular person, i.e., a shelter that cannot accept handicapped persons is not available to a handicapped homeless person,
- Reasonable in terms of location, i.e., a place 50 miles away probably would not be reasonable,
- Environmentally suitable, i.e., a briar patch would not be reasonable, and
- The person has to be able to get to it, i.e., a reasonable walk or transportation provided.

A secondary issue arises as to the City’s liability to persons within the arrest-free zone. In general terms under State negligence law, liability may arise to persons invited on property when there is a known dangerous condition on the property and the property owner fails to correct or warn of such condition, unless the danger is open and obvious.

In addition, when a police officer or any other person creates a foreseeable zone of risk, Florida law will generally recognize a duty to either to lessen the risk or see that sufficient precautions are taken to protect others from the harm the risk poses. (*Kaisner v. Kolb*, 543 So.2d 732, 734 (Fla.1989)). Liability may thus arise when a police officer brings a dangerous suspect into a hospital and fails to provide adequate protection for hospital staff (*Sams v. Oelrich*, 717 So.2d 1044, 1047 (1st DCA 1998)), or where an officer undertakes care and supervision of another and fails to exercise reasonable care (*Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009)). As these cases indicate, the outcome of any litigation concerning establishment of an arrest-free zone will be fact specific.

Please let me know if you have any questions.

Robert Jagger  
City Attorney  
City of Daytona Beach