

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

HONORABLE SCOTT A. BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

FREDDY BROWN, et al.

STEPHEN W TULLY

v.

CITY OF PHOENIX

AARON D ARNSON

BENJAMIN L RUNDALL
MICHAEL G BAILEY
ILAN WURMAN
JUSTIN SCOTT PIERCE
TRISH STUHAN
STEPHEN B COLEMAN
TIMOTHY SANDEFUR
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

1. Plaintiffs' *Verified Complaint for Declaratory Judgment, Special Action, and Injunctive Relief*;
2. Defendant City of Phoenix's *Answer to Verified Complaint for Declaratory Judgment, Special Action, and Injunctive Relief*;
3. The arguments and evidence received at the October 27, 2022 combined Oral Argument on Defendant's *Motion to Dismiss* and Evidentiary Hearing on Plaintiffs' *Application for Injunctive Relief*;
4. The arguments received at the December 15, 2022 follow-up Oral Argument;
5. The March 27, 2023 *Preliminary Injunction*;
6. The parties' respective motions for summary judgment and related briefing;

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

7. The arguments and evidence received at the July 10, 2023 trial;
8. The parties' respective proposed findings of fact and conclusions of law; and
9. Other relevant portions of the record in this case.

I. FACTUAL BACKGROUND

Plaintiffs brought the present action asking the Court to declare that Defendant City of Phoenix has created, maintained, and/or failed to abate a public nuisance in a neighborhood in Phoenix informally referred to as the "Zone." Plaintiffs are property owners, residents, and/or business owners in the Zone. Plaintiffs base their action on allegations, many of which are undisputed, that there is a substantial portion of homeless individuals that have moved into the area and set up semi-permanent tent encampments on the public sidewalks, public grounds, and public rights of way. Plaintiffs allege, *inter alia*, that the City refuses to enforce criminal and quality-of-life laws prohibiting loitering, disturbing the peace, drunken and disorderly conduct, drug use, domestic violence, and obstruction of streets, sidewalks, and other public grounds inside the Zone.

The City argues in response that it has discretion regarding how it enforces its policies and which policies to adopt and that such issues are therefore not appropriate for judicial review. The City also argues that it has discretion regarding how to allocate resources. The City therefore argues that its discretion on how to address the situation in the Zone precludes Plaintiffs from seeking relief from the Court.

The Court issued its *Preliminary Injunction* on March 27, 2023, after an evidentiary hearing and multiple oral arguments. The Court found in the Preliminary Injunction that the City had created and/or was maintaining a public nuisance in the Zone and ordered, *inter alia*, that the City must abate the nuisance and be prepared to demonstrate its efforts and successes at the July 10, 2023 trial. At trial, the City argued that it has already taken steps to clean out the Zone and that it will continue to do so even in the absence of a court mandate. The City asked the Court to vacate the *Preliminary Injunction* and dismiss the case.¹

Having considered the filings and the evidence, including the sworn testimony, exhibits, and demeanor of the witnesses, **THE COURT MAKES THE FOLLOWING FINDINGS:**

¹ The Court adopts the findings and analysis from its March 27, 2023 *Preliminary Injunction*. But for the sake of brevity, the Court will not restate all previous findings and analysis herein. The Court will only include those portions of the *Preliminary Injunction* that are necessary for this Ruling.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

1. Plaintiffs are property owners, residents, and/or business owners who live, work, or own businesses or property in an area of Phoenix informally referred to as the “Zone,” which encompasses an area roughly between 7th and 15th Avenues and between Van Buren and Grant Streets.
2. The homeless population in Phoenix is largely concentrated in the Zone.
3. The City controls the rights of way in the Zone, including the streets, alleys, avenues, and sidewalks.
4. Located within the Zone is the Human Services Campus (“HSC”), which occupies 13 acres with seven buildings. Approximately 15 different providers, non-profit organizations, and government agencies provide various services at the HSC to homeless individuals. The HSC began operation in 2005 and has operated continuously since that time.
5. Prior to 2018, there was some limited homelessness in the area but there were no tents or semi-permanent encampments. Residents generally considered the area safe despite the existence of the Human Services Campus and its clients.

The City Stopped Enforcing Criminal and Quality-of-Life Laws in the Zone:

6. The City changed its enforcement policies in the 2018-2019 timeframe. The City intentionally stopped – or at least materially decreased – enforcement of criminal, health, and other quality of life statutes and ordinances in the Zone. The City’s decision was based in part on the Ninth Circuit Court of Appeals’ ruling in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), which held, *inter alia*, that municipalities could not enforce public camping laws against homeless individuals who do not have access to adequate temporary shelter, whether because they do not have the means to pay for it or because it is not available to them for free. The *Martin* decision was originally issued in 2018 and was reissued in 2019 as modified.
7. The City erroneously applied the *Martin* case; interpreting its narrow holding as precluding the enforcement of public camping laws whenever the homeless population in Phoenix exceeded the number of available shelter beds. Notably, the City also stopped or greatly decreased enforcement of other health, quality of life, and even criminal laws and ordinances in the Zone.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

8. There are a substantial number of individuals that have migrated into the Zone and are living on the street as a result of the City's change in policy. These individuals have set up semi-permanent tent encampments on the public sidewalks, public grounds, and public rights of way, making the Zone the largest "homeless encampment" in the State of Arizona. Free meals and other services are provided to individuals in the Zone by providers at the HSC.
9. City representatives from the Office of Homeless Solutions testified that it is the City's strategy to keep homeless individuals in the Zone who commit crimes out of the criminal justice system, reasoning that the City "would prefer any human being not to become justice involved." Thus, if a homeless individual is confronted for an alleged crime, the City's strategy is to pursue services for the individual instead of a conviction. The Court did not receive evidence that the City's strategy extends to individuals in the Zone who are not homeless or individuals who are not occupying the Zone.
10. The City previously limited the discretion of police officers working in the Zone to enforce applicable laws and ordinances. Police officers working in the Zone informed Plaintiffs that "the Zone is off-limits to enforcement." Police officers specifically advised Plaintiffs that if they wanted the police to enforce the laws, they needed to go to their policymakers and tell them to let the police enforce laws in the Zone. It appears that the City may have reversed that policy since the issuance of the *Preliminary Injunction*, as discussed below.
11. Emergency calls to the City previously resulted in delayed response times and often did not resolve the issues. Plaintiffs often called the police 2-3 times every day. It typically took 30-40 minutes for an officer to arrive to investigate. Even after the officers arrived – if the offender was still present – the officers did not usually remove the individual from the area. Officers would instead ask the homeless person to leave private property but would not remove that person from public easements or sidewalks just steps away from the private property, even if the person was intoxicated or high on drugs.

The City Transports Homeless Individuals Into the Zone:

12. The City maintains a policy of transporting homeless individuals into the Zone from other areas of the City. Phoenix police officers provide "courtesy rides" for homeless individuals from throughout Phoenix to the Human Services Campus in the Zone. City officials testified that the transportation to the Zone is for the purpose of assisting the homeless to obtain services from the Campus; not to encourage them to camp in the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

area. But the City simply drops the homeless off in the area and thus the City's courtesy rides to the Zone inevitably result in more homeless individuals residing on the streets of the Zone. The Court received testimony that some of the City's community partners, such as Community Bridges, also transport individuals into the Zone to obtain services at the HSC. The Court finds no fault with these courtesy rides – which are an entirely reasonable method to get someone in crisis the help they need – but the City has an obligation to ensure that their transport of multiple individuals with mental health or substance abuse issues to a particular area does not result in cumulative harm to the area.

Individuals Occupying the Zone and Homeless In General:

13. Both parties agree that unregulated camping is not healthy or safe for the homeless individuals living in the encampment or for the area in which the encampment exists. There is rampant victimization in homeless encampments such as the Zone.
14. The Court found in the *Preliminary Injunction* that some of the individuals occupying the Zone were “service resistant,” meaning that they refuse to accept services when offered and will instead opt to live on the street in the Zone. The City has used outreach providers to attempt to get people into services. But a portion of the homeless in the Zone have been resistant to going into shelters because they have accumulated a large number of possessions on the street or because they are prohibited from taking contraband into the shelter, for example: drugs and weapons. Although unthinkable for the general public, there are many individuals in the Zone that choose to live in a tent on the sidewalks or in the street, with three meals each day provided by the Human Services Campus and the ability to engage in antisocial behavior and drug use.
15. The City's outreach efforts since the issuance of the *Preliminary Injunction* have supported the Court's earlier findings. About 70% of the individuals in the Zone accepted services when offered, which in turn means that about 30% have resisted the services. But even the 70% number can be misleading because the City is unable to determine how many individuals accepted a free hotel room for the night and then returned to the Zone the next day.
16. The City previously conducted a study of homeless individuals in downtown Phoenix, which focused upon the reasons why homeless individuals were not in shelters. The City published the study in April of 2022 along with recommendations to the City Manager. Notably, only about 14% of the subjects stated that the lack of shelter beds is what kept them out of shelters. By contrast, nearly 20% stated that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

they chose not to go to shelters because they did not want to follow the shelters' curfew and related rules. Other reasons given were: (1) large amounts of accumulated personal belongings; (2) desire to live with their pets; (3) desire to live together with their partners; and (4) criminal backgrounds and addiction. The City's study further confirms the finding that a sizable percentage of the individuals in the Zone are service resistant and voluntarily choose to live on the street without rules and restrictions.

17. Closely related to Finding No. 16, the Court has not received credible evidence that every individual in the Zone lacks access to adequate temporary shelter, whether because they do not have sufficient means to pay for it or because it is unavailable to them for free.² Conceivably, a large portion of the homeless in the Zone legitimately lack access to shelter. But in the absence of credible evidence, the Court will not infer that each individual in the Zone that engages in the conduct detailed below lacks realistic access to adequate temporary shelter. For example, a service resistant individual could not be said to lack access to adequate temporary shelter if he or she is refusing the service. In other cases, individuals may have the means to pay for adequate temporary shelter because they receive government benefits or a disability pension. City representatives admitted at trial that the determination of whether a homeless individual in the Zone is involuntarily homeless is based entirely on self-reporting from the individual. If an individual inside the Zone tells a City representative that he is in the Zone because he has no access to shelter and no money, the City conducts no follow-up. The City simply assumes the truth of the statement and offers services to the individual. This does not mean that the individual is actually involuntarily homeless.
18. Plaintiffs offered at trial the opinion testimony of their expert witness, Dr. Judge Glock. Dr. Glock referred to the individuals in the Zone – and homeless individuals generally – as either “sheltered homeless” or “unsheltered homeless.”³
19. Sheltered homeless generally live in shelters and largely consist of single parents with children. Sheltered homeless are usually homeless for short periods of time and are less likely to have substance abuse or mental health issues.

² See *Johnson v. City of Grants Pass*, 72 F.4th 868, 878 n.2 (9th Cir. 2023).

³ “Judge” is Dr. Glock’s first name. Dr. Glock serves as Director of Research and a senior fellow at the Manhattan Institute, as well as serving on the Mayor of Dallas’ taskforce on homelessness. The Court found Dr. Glock’s opinion testimony to be both credible and compelling.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

20. Unsheltered homeless generally live on the street and are typically single adults. About 75% of unsheltered homeless have mental health issues or substance abuse as a factor in their status. Only about 25% to 45% of the unsheltered homeless would agree to go into shelters. Large numbers of the unsheltered homeless avoid shelters because, again, they do not wish to comply with the shelters' rules, such as no drugs, no weapons, curfews, etc. The lack of shelter beds is not determinative as to why these individuals sleep on the street. The unsheltered homeless population is more mobile and oftentimes comes from outside of the city, particularly when meals and services are offered, such as those offered at the HSC.
21. The City's expert witness, Dr. Sheila Harris, repeatedly stressed the importance of "Permanent Supportive Housing" (a/k/a "Housing First") in combatting homelessness in general. But a housing first model does not provide much assistance to those with mental health or substance abuse issues. Dr. Glock testified that there is no credible evidence that a housing first model improves outcomes for most homeless individuals. Reduced housing rents would likely help some of the homeless leave the street. But availability of lower income housing only affects the sheltered homeless. It generally does not affect the unsheltered homeless, who will often leave affordable housing after moving in.⁴

⁴ Dr. Harris has extensive experience in the area of homelessness reduction and the development of affordable housing. She is the former Director of the HSC and continues to serve as a consultant with the City. The Court found Dr. Harris to be sincere but her testimony appeared heavily slanted toward the provision of increased services and benefits to individuals occupying the Zone while showing little concern for the City's constituent business and property owners or for the time it would take to implement her strategies. Dr. Harris downplayed the importance of enforcement in addressing the chaotic situation in the Zone, arguing that law enforcement's role should be to provide assistance to individuals occupying the Zone by helping them understand the laws that they are violating, thereby helping to end homelessness. Dr. Harris further disagreed with Dr. Glock's opinion that the City should follow the model used by Colorado cities to reduce homeless encampments. Dr. Harris believed the Colorado plan relied too heavily on enforcement. According to Dr. Harris, the City of Phoenix's plan, which she helped create, uses less enforcement and instead looks to an individual's wants and needs. She testified that the City of Phoenix's plan is the more expensive method but that it is better for the individual in the Zone because an individual that is told to move from his tent in the street is "just going to end up homeless somewhere else," or words to that effect. Although the Court agrees that all individuals, homeless or not, deserve to be treated with dignity, the Court does not believe that Dr. Harris' unusually soft approach to addressing the dangerous and chaotic conditions in the Zone would be effective. *See, e.g.* Finding Nos. 25-28. Indeed, the evidence suggests that this softer approach – absent of any meaningful enforcement – is what has created the intolerable conditions that currently exist in the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

22. A municipality's policy choices play a role in public encampments. Enforcement tends to decrease encampments and other related crime. When a city enforces camping bans, the largest portion of the individuals in the encampment return to live with friends or family. Others move into transitional housing. And the remainder simply pick up and move to a city that has more permissive laws and does not enforce camping bans.
23. Service resistance can be as high as 60%-80% when anti-camping and other quality of life laws are not enforced by a city. In such cases, homeless individuals choose to live on the street without rules or restrictions. Even sheltered homeless individuals leave the shelters and move to the street when a city does not enforce camping bans.
24. The evidence establishes that a municipality that is more welcoming to homeless encampments is going to see more homeless encampments.

Increased Violent Crime in The Zone:

25. There has been a dramatic increase in violent crime in the Zone since 2018, including assault and homicide. Police officers have responded on multiple occasions to situations involving burned or burning human bodies in the Zone, including that of a burned, deceased newborn baby found lying in the street and a deceased man found burned alive in a dumpster. Business owners and employees no longer feel safe and must travel in groups. There is a constant risk of violent crime to property owners, their family members, business owners and their employees while on their property or in their businesses. Employees of businesses in the Zone have been violently attacked and they face verbal confrontations with homeless individuals almost daily. There are also frequent fights involving anywhere from two to six homeless individuals.
26. The City does not send sanitation workers into the Zone without security officers.

Zone. *See* Finding Nos. 9-11. Contrary to Dr. Harris' approach of minimized enforcement, the evidence, including Phoenix PD tracking sheets and the testimony of Commander Freudenthal, establishes that increased enforcement is having a positive impact in the Zone. *See* Finding No. 58.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

27. Even at the time of trial, police officers were still required to accompany all medical and fire personnel on calls in the Zone because medical and fire personnel find the area too dangerous.
28. Every week there is some sort of violent criminal act committed in the Zone, including shootings. There had been multiple homicides in the Zone in the weeks leading up to trial (after issuance of the *Preliminary Injunction*), with the most recent homicide occurring the weekend before trial. Violence is an everyday theme, and there are random fist fights, yelling and screaming, and the brandishing of weapons daily.

There Is A Growing Organized Crime Element in The Zone:

29. Homeless individuals in the Zone receive threats from other homeless individuals – and even from “advocates” for the homeless – warning them not to cooperate with City officials, such as by voluntarily moving their possessions during clean-ups. Individuals occupying the Zone are forced to pay gangs or individuals to “rent” a spot for their tent or structure – with the most expensive spots located next to the roads where non-profits conduct street feeding. Homeless victims are too afraid to speak with law enforcement or testify in court. These alarming facts establish that there is a violent, organized crime element that exists in the Zone.

Increased Public Drug Use in The Zone:

30. There has been a proliferation in public drug use in the Zone since 2018. This includes use of needles and the smoking of dangerous substances, such as fentanyl and methamphetamine. Individuals in the Zone often smoke these dangerous substances by the doors and windows of Plaintiffs’ businesses and homes, resulting in the toxic smoke coming into the residence or business and forcing Plaintiffs and their employees to risk breathing it in. There are frequent overdose cases on the property of area businesses and driveways. Plaintiffs routinely find used needles on their properties, in addition to pieces of tin foil with burned residue of fentanyl pills all over the sidewalks. Business owners and property owners often find intoxicated, unconscious individuals sleeping right up against and/or on the patios of their properties and businesses.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

The Zone Has Become a Biohazard:

31. Since 2018, the Zone has evolved into a serious environmental nuisance – a biohazard – that empties into the state’s waterways. The City does not dispute this fact. There is a considerable amount of human waste, food waste, and trash dumped on the streets or around the streets. Homeless individuals defecate and urinate in the open on the streets, sidewalks, lawns, and buildings. Property and business owners are forced to clean up the human waste each day. When it rains, the soil in and around the area is so soaked with urine and human feces that the rain intensifies the smell. Business and property owners do not go outside when it rains because of the puddles full of human urine and feces. The proliferation of human excrement and half-eaten food causes an infestation of flies and other insects in the Zone.
32. As stated above, there are used needles lying everywhere in the Zone. And users leave pieces of tin foil with burned residue of fentanyl pills in them on the lawns, in the street, and on the sidewalks. The fentanyl-tainted pieces of tin foil blow around in the wind and come into contact with residents, business owners, their employees, and even their children.
33. There is a dramatic increase in trash since 2018. The City has provided some dumpsters in the Zone but they are constantly overflowing. The issue is often exacerbated when the homeless climb into the dumpsters and throw the trash onto the street. Individuals living on the street dump their trash onto the sidewalks and curbs and when the wind blows, the trash is carried all over the businesses, sidewalks, and properties.
34. When there is a discharge into the storm drains in the City of Phoenix, that discharge ends up in the rivers, washes, and retention basins of the state. The storm drains in the Zone are clogged with human excrement, rotting food, and trash. The homeless dump buckets of human waste into the storm drains. This toxic material ends up in the Rio Salado River Parkway.

Property Crimes in The Zone:

35. Residents and business owners in the Zone have seen a dramatic increase in property crimes with the influx of homeless individuals since 2018. Plaintiffs experience break-ins of their properties during and after business hours, even when the buildings are occupied. Business owners have had to install multiple locks over and over again just to offer some sort of temporary security but the homeless continue breaking in to steal anything of value. Plaintiffs also experience frequent break-ins of their vehicles,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

with one Plaintiff having found a cinderblock thrown through the window of his truck so that the thief could look for anything of value inside.

Prostitution and Public Indecency in The Zone:

36. The increase in homeless individuals and drugs, coupled with the City's decrease in enforcement, has resulted in illegal prostitution, frequent public nudity, and lewd acts in plain view directly adjacent to Plaintiffs' businesses and properties. At least several times each month, business owners and/or their employees witness sex acts right out in the open or in tents with open tent flaps and open windows. There is frequent prostitution in the evenings and sex workers walk up and down the street offering to engage in sex for money. There is a tent outside one of the Plaintiffs' properties and it is routinely used for prostitution. That particular Plaintiff has been solicited when arriving at or leaving his property. There is also frequent public masturbation in plain view of business owners, their employees, and family members.

Increased, Unabated Fire Hazards in The Zone:

37. The individuals that reside on the streets of the Zone light fires for cooking and for heat, in the open, often with nobody tending to the bonfires because the individual has passed out or walked away. At times the wind picks up and adds to the danger of the fires in the closely-packed line of tents and makeshift structures. Structure fires are not uncommon in the Zone.

Blocking of Rights of Way in The Zone:

38. Rights of way in the Zone are blocked. Wall-to-wall tents and encampments line the sides of the streets. The tents and makeshift structures block the entire sidewalk and portions of the street with buckets of human excrement spilling over into the streets. In most areas the tents extend five to eight feet into the street, blocking traffic, including emergency vehicles. Property and business owners find it impossible to park. Safety is also an issue because the openings to the tents are in the street, and anyone can emerge from the tent into the street, without warning and while intoxicated. Other individuals in the Zone do not have tents. Instead, they use tarps that are supported by chains located in the easements, further blocking the rights of way.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

The City Has Engaged In Arbitrary Enforcement:

39. The City previously refused to remove the tents and the other obstructions, despite the hazards they presented.
40. The City applied a different standard to one of the long-time businesses in the Zone. The area immediately adjacent to Plaintiff Phoenix Kitchen's building – the right of way between the building and the street – was previously lined with tents and other makeshift structures from the homeless. The City moved the homeless encampment off of the right of way so that necessary gas line work could be completed. The contractor doing the gas line work constructed a temporary fence after the encampments were removed from the right of way. While the fence was in place, Phoenix Kitchens installed some artistic sculptures on the right of way to discourage the homeless from returning to the right of way with their encampments after completion of the work. The City contacted Phoenix Kitchens and told the business that it would need to obtain a revocable use permit to encroach on the right-of-way. Phoenix Kitchens promptly filed an application for the revocable use permit. But the City denied the application for a permit and ordered Phoenix Kitchens to remove the unauthorized sculptures within thirty days. The City relied on Phoenix City Code Section 31-9(B), which makes it “unlawful for any person to temporarily or permanently place, construct, maintain, or install a minor encroachment in the public right-of-way.”
41. The irony is not lost on the Court. There is no evidence before the Court that the City has sought to enforce Section 31-9(B) by ordering the removal of any tents, structures, or obstructions encroaching in the right of ways in the Zone, despite the obvious health and safety hazards presented by the structures, as detailed above. But the City attempted to enforce the encroachment prohibition against one of the businesses that filed this lawsuit, despite no showing whatsoever that the artistic sculptures create the health and safety issues created by the encampments.

Continued Deterioration of the Environment in the Zone:

42. Plaintiffs have experienced a dramatic decrease in customers and foot traffic to their businesses and a decrease in the value of their properties that corresponds to the increase in homeless encampments in the Zone.
43. The situation inside the Zone has gotten progressively worse, not better, since 2018 and has become dire since November of 2021.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

44. The impact of the homeless population in the Zone far exceeds the impact faced by any other Phoenix neighborhood. Plaintiffs have suffered identifiable harm since 2018 resulting from the situation inside the Zone.
45. Plaintiffs testified that the State of Arizona manages to keep its areas of responsibility near the Zone – such as the State Cemetery – clean and free of homeless encampments. Plaintiffs testified that they observe consistent enforcement of quality of life laws from the state police on state land.

Plaintiffs’ Attempts To Work With The City And The City’s Response:

46. Notably, the Human Services Campus has been providing services at its current location since 2005, but the dramatic increase in homeless individuals, violence, drugs, biohazard, and the corresponding deterioration of the neighborhood did not begin until 2018.
47. Plaintiffs attempted to work with the City to resolve the issues identified above before filing the present lawsuit, including the creation and submission to the City of a seemingly cost-effective plan to build outdoor shelter space on acceptable areas of City property.
48. Plaintiffs presented much of their evidence to the City on January 27, 2020, before the crises really got out of hand. Plaintiffs testified at the October 27, 2022 hearing that they also raised their concerns and presented proposed solutions in a February 2022 meeting with then-Councilwoman Yassamin Ansari – their representative on the Phoenix City Council – along with other City officials. At the meeting, Plaintiff’s described the alarming conditions in the Zone and their concerns that it would get worse. Plaintiffs also highlighted the benefits of their proposed plan. But despite their pleas for assistance, the City and its representatives did not materially respond to Plaintiffs’ concerns until the filing of this lawsuit was imminent.
49. Plaintiffs also identified for the City several other cities, including Denver, Santa Rosa, and Los Angeles, where structured outdoor camping spaces have been created on city lots without creating public nuisances. Plaintiffs identified for City representatives large areas of vacant City land where such outdoor camping spaces could be erected.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

50. Although the City identified many of the issues detailed above in 2020, it was not until the filing of this lawsuit was imminent that the City began to take meaningful action.
51. For example, the City created the Office of Homeless Solutions to address the City's homelessness problem just one month before this lawsuit was filed. On October 26, 2022, after the filing of the lawsuit and less than 24 hours before the *Preliminary Injunction* hearing, the City approved for the first time the construction of a "sprung structure," which would take at least nine months to construct. Plans for the sprung structure were scrapped after the hearing on the *Preliminary Injunction* because the intended location was not suitable.
52. With few exceptions, the action items about which City representatives testified at the hearing on Plaintiffs' *Application for Preliminary Injunction* centered around the creation of more bureaucracy, additional staff positions, and obtaining additional funding for programs to vaguely address homelessness in general. The Court received very little evidence that the City intended to take immediate, meaningful action to protect its constituent business owners, their employees, and residents from the lawlessness and chaos in the Zone.
53. Structured campgrounds on vacant City lots would be an effective solution to the issues in the Zone. Plaintiffs repeatedly proposed the creation of structured campgrounds. Such City-controlled facilities could provide bathrooms and hygiene areas. They could also provide security. These campgrounds have already been successfully employed by other cities to address the homeless issue by providing temporary shelter. And finally, structured campgrounds would solve the City's concerns about the application of the *Martin* case because the additional shelter beds would provide an alternative to sleeping on the street. Thus, structured campgrounds would eliminate any legal prohibition on the enforcement of anti-public camping laws.
54. City leaders initially declined to consider the creation of controlled, outdoor camping spaces on vacant City property because they preferred to provide facilities with air conditioning and heat to homeless individuals. But the City has begun the process of creating a structured campground since the issuance of the *Preliminary Injunction*. The City anticipates that the campground will be fully operational this month.
55. The plan for the structured campground that the City has now adopted was created by Plaintiffs and submitted to City representatives two years ago.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

56. City witnesses agreed that a structured campground with security and a code of conduct would be safer for the individuals occupying the Zone than their current situation living on the street. The Court also agrees.
57. The population of homeless individuals around the HSC has increased since the issuance of the *Preliminary Injunction*. Many individuals occupying the Zone have switched from tents to semi-permanent structures made of wood, with solar panels, generators, grills, refrigerators, and other amenities.

The City Will Not Clean Up The Zone Unless Forced To Do So.

58. To the City's credit, the Court received evidence that the City is taking steps to comply with the *Preliminary Injunction* and abate the public nuisance in the Zone. The City is conducting periodic cleanings of certain blocks – approximately once every three weeks – and does not allow tents to return to cleaned areas. But the most dramatic change seems to have come from law enforcement, who have stepped up enforcement in the Zone. Phoenix PD issued a Crime Suppression Plan for the Zone around the same time that the Court issued the *Preliminary Injunction* in this case. Since that time, there has been a decrease in violent crime and property crime in the area. Law enforcement has shown that enforcement of existing laws produces favorable results. The Zone is still dangerous – one of the more dangerous parts of Phoenix. But if permitted to do their jobs, law enforcement officers assigned to the Zone are capable of dramatically impacting crime in the area.
59. Despite the law enforcement successes, the Court has little confidence that the City will continue to abate the public nuisance and restore order to the Zone absent an order from this Court. The City failed to take any meaningful action toward addressing the conditions in the Zone until this Court issued the *Preliminary Injunction*. No tents were removed prior to the issuance of the Injunction. City witnesses admitted at trial that the reason that they are now closing the streets to additional camping is because of the existence of the *Preliminary Injunction*.
60. Moreover, City personnel appearing at trial were singularly focused on addressing and providing for the needs of homeless individuals occupying the Zone, without equal regard for the City's constituent property owners, business owners, employers and their employees. City representatives – with the lone exception of Gina Montes – do not

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

seem to understand the City's obligation to also protect and serve Phoenixians who live and work in the Zone.⁵

61. As just one example, Rachel Milne, the Director of the Office of Homeless Solutions, testified that although the unsheltered population has increased in the Zone since the *Preliminary Injunction*, the number of people in shelters has also increased "and that is a big win." The Court finds this testimony to be both remarkable and out of touch with the issues in this case. Regardless of how many individuals the City temporarily places into shelters, an increase in homeless individuals in the Zone is not a "big win." City personnel are clearly focused on an honorable goal – helping the homeless. But in their zeal to assist homeless individuals occupying the Zone, City personnel appear to be utterly indifferent to the plight of the City's constituent property owners, their families, and small business owners that are attempting to make a living.
62. In the absence of a court order, City officials will not complete the cleaning of the Zone and will not abate the public nuisance until they have attained the long-term goal of ending homelessness. Plaintiffs and other residents of the Zone cannot wait that long, if such lofty goals are actually attainable. *See* specifically Finding Nos. 14-20.

II. LEGAL ANALYSIS

Plaintiffs Have Established An Entitlement To Declaratory Relief.

A.R.S. § 12-1831 grants this Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." This case presents a justiciable controversy in that "there are adverse claims asserted upon present existing facts that have ripened for judicial review." *Planned Parenthood Center of Tucson, Inc. v. Marks*, 17 Ariz.App. 308, 310 (App. Div. 2 1972). And Plaintiffs' allegations of public nuisance provide the underlying cause of action necessary to support a declaratory action. *Ansley v. Banner Health Network*, 248 Ariz. 143, 151 (2020).

The conditions that exist in the Zone fall squarely within the statutory definitions of "public nuisance." Most notably, A.R.S. § 36-601(A)(4) declares the following to be a public nuisance dangerous to the public health: "Any place, condition or building that is controlled or operated by

⁵ Ms. Montes serves as the Deputy City Manager. The Court found her testimony credible and she appeared to recognize that while the City addresses the issue of homelessness in the Zone, the City also owes a duty to its residents, business and property owners, and taxpayers. Ms. Montes testified about the City's aggressive planning since the issuance of the *Preliminary Injunction* for the structured campground and her belief that it would be operational by September of 2023.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

any governmental agency and that is not maintained in a sanitary condition.” The statute could not be more applicable to the Zone. *See* Finding Nos. 6, 8 13, 30-34, 36-39, 43-44., above.

Other Arizona statutes also establish that the Zone is a public nuisance. For example, A.R.S. § 13-2917(A)(1) defines a public nuisance as “[A]nything ... to be injurious to health (*see* Finding Nos. 6, 8 13, 25-29, 30-34, 36-39, 43-44, above), indecent (*see* Finding No. 36), offensive to the senses (*see* Findings Nos. 31-34) or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons.” *See* Finding Nos. 6, 8 13, 25-29, 30-34, 36-39, 43-44.

A.R.S. § 13-2917(A)(2) defines public nuisance as “[A]nything ... to unlawfully obstruct the free passage or use, in the customary manner, of any ... public park, square, street or highway. *See* Finding No. 38.

A.R.S. § 36-601(A)(1) declares the following to be a public nuisance: “Any condition or place in populous areas that constitutes a breeding place for flies, rodents, mosquitoes and any other insects that are capable of carrying and transmitting disease-causing organisms to any person or persons....” *See* Finding Nos. 31-34.

A.R.S. § 36-601(A)(5) declares the following to be a public nuisance: “All sewage, human excreta ... garbage or other organic wastes deposited, stored, discharged or exposed so as to be a potential instrument or medium in the transmission of disease or between any person or persons.” *See* Finding Nos. 31-34.

A.R.S. § 36-601(A)(9) declares the following to be a public nuisance: “The pollution or contamination of any domestic waters.” *See* Finding No. 31-34.

THE COURT THEREFORE FINDS that the City is maintaining a public nuisance in the Zone, as the term “public nuisance” is defined in Arizona statutes.

Plaintiffs may also establish the existence of a public nuisance at common law. To support a common law private cause of action for public nuisance, Plaintiffs must show: (1) an unreasonable interference with a right common to the general public; (2) a causal connection between the City’s activity (and as additionally alleged here – failure to act); and (3) that the acts committed by the individuals in the Zone affect Plaintiffs’ use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by Phoenix residents generally. *Armory Park Neighborhood Association v. Episcopal Community Services In Arizona*, 148 Ariz. 1, 4-8 (1985) (citing Restatement (Second) of Torts §§ 821D & 821C); *see also City of Phoenix v. Johnson*, 51 Ariz. 115, 123 (1938) (recognizing nuisance cause of action against City

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

of Phoenix for its maintenance of and failure to repair faulty sewer system next to resident's property).

Plaintiffs may establish the first element – “unreasonable interference” – by demonstrating that the conduct of individuals inside the Zone “is proscribed by a statute, ordinance or administrative regulation.” Restatement (Second) of Torts § 821B(2)(b); *see also Armory Park Neighborhood Association*, 148 Ariz. at 9. As discussed above, the conditions in the Zone fall squarely with the statutory definitions of “public nuisance.”

In addition to the statutory definitions of public nuisance detailed above, Plaintiffs may establish the first element by demonstrating: (1) that “the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience”; or (2) “the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, as the actor knows or has reason to know, has a significant effect upon the public right.” Restatement (Second) of Torts § 821B(2)(a)&(c); *see also Armory Park Neighborhood Association*, 148 Ariz. at 7-8. The Court has little difficulty finding, based upon the Findings and analysis above, “a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.” *See* Finding Nos. 6, 8 13, 25-29, 30-34, 36-39, 43-44.

Regarding the second element, Plaintiffs have established that the City created and/or is maintaining the alleged nuisance in the Zone. *See* Finding Nos. 6, 8-12, 39, 43, 46, 48, and footnote 4. Most notably, the City and its funded partners transport homeless individuals from other parts of Phoenix into the Zone so that they can receive services from the Human Services Campus. *See* Finding No. 9. There is no evidence that the City transports these homeless individuals back out of the Zone after they meet with Campus providers and thus they are left in the Zone.

The evidence also strongly suggests that the City knowingly created and maintains the dire situation that currently exists in the Zone through its failure, and in some cases refusal, to enforce criminal and quality of life laws in the Zone. The City's refusal to meaningfully enforce statutes and ordinances in the Zone has created a classic siren song to certain individuals that are enticed at their peril by the Zone's drugs, sex, and lack of societal rules. *See* Restatement (Second) of Torts § 838.

Regarding the third element – that the harm is special in nature to Plaintiffs as residents and property owners in the Zone – Plaintiffs established that the nuisance is concentrated in the Zone where Plaintiffs work, live, and own property. *See* Finding Nos. 1, 25-28, 30-39.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

THE COURT THEREFORE FINDS that the City has created and is maintaining a public nuisance in the Zone based upon common law definitions of public nuisance.

The City's Discretion Regarding How To Abate the Nuisance Does Not Preclude Mandamus Relief Requiring Abatement.

Plaintiffs seek an order requiring the City to abate the nuisance. The City argues in response that the City has discretion in how to perform the functions that Plaintiffs ask the Court to mandate, particularly law enforcement functions, and therefore cannot be compelled to abate the nuisance. The City is only partially correct. “[A] mandamus action cannot be used to compel a government employee to perform a function in a particular way if the official is granted any discretion about how to perform it.” *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465 (App. 2007); *see also Sensing v. Harris*, 217 Ariz. 261, 263-65 (App. 2007) (law enforcement activities by police and prosecutors were discretionary and not appropriate for mandamus relief because city code did not state that they *must* act).

But while the City may exercise discretion in *how* it complies with some of the statutes, the City does not have discretion regarding *whether* it complies with those statutes. For example, A.R.S. § 13-2917(A), discussed above, declares as a public nuisance anything that is, *inter alia*, injurious to health, offensive to the senses or an obstruction to the free use of property. The statute also declares as a public nuisance anything that unlawfully obstructs the free passage or use of a street. If ordered to abate the public nuisance, a government or governmental authority must abate; the failure to do so is a class 2 misdemeanor. *Id.* at § D; *see also*, A.R.S. § 13-105(30) (including a government or governmental authority in the definition of “person” for purposes of the statute). The statute affords the City no discretion once ordered to abate the nuisance.⁶

The same is true for A.R.S. § 35-601(A)(4), which addresses public nuisance in places controlled by any governmental agency. The statute provides that a refusal to abate the nuisance may be addressed by the Court through an action for injunctive relief. § 35-601(C). The City has no discretion under the statute regarding whether to abate any such public nuisance.

⁶ It is irrelevant for purposes of this analysis that an action to enforce A.R.S. § 13-2917 must be brought by the county attorney, the attorney general, or a city attorney. Plaintiffs did not bring the current lawsuit pursuant to A.R.S. § 13-2917, which is a criminal statute. Instead, the statute becomes relevant in response to the City’s argument that it has discretion in how it addresses the situation in the Zone and therefore cannot be ordered through mandamus to abate the nuisance. But A.R.S. § 13-2917 and A.R.S. § 36-601 (discussed above) establish that the City has no discretion regarding whether to abate a public nuisance.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

THE COURT THEREFORE FINDS pursuant to the statutes discussed above that the City has no discretion regarding whether to abate the public nuisance it has created and maintained in the Zone. The City must abate the public nuisance.

But even in the absence of the statutes listed above, Plaintiffs may still be entitled to mandamus relief if the City has abused or is abusing its discretion. “The general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus. This rule, however, is qualified by the provision that if it clearly appears that the officer has acted arbitrarily and unjustly and in the abuse of discretion, the action may still be brought.” *Arizona State Highway Commission v. Superior Court*, 81 Ariz. 74, 77 (1956) (quoting *Collins v. Krucker*, 56 Ariz. 6 (1940); see also, *Yes on Prop 200*, 215 Ariz. at 465. Upon such a showing, mandamus is available to require the City to “act properly.” *Id.*; see also *Sensing*, 217 Ariz. at 263 (“We recognize that there are situations where mandamus may be used to compel an officer, board or commission to take action even though such action is discretionary[.]”) (internal quotations omitted). In such circumstances “mandamus may be used to compel a public officer to perform a discretionary act, but not to exercise that discretion in any particular manner.” *Blankenbaker v. Marks*, 231 Ariz. 575, 577 (App. 2013).

Two other cases from the Arizona Supreme Court are instructive on this point: *City of Phoenix v. Johnson*, 51 Ariz. 115 (1938) and *Veech v. City of Phoenix*, 102 Ariz. 195 (1967). Although the cases involve actions for damages and not for mandamus relief, both cases clearly demonstrate that there are limits to the City’s discretion. For example, the City conceivably has discretion in how to construct a sewer system, how to maintain the sewer system, and how to allocate funds for the maintenance and repair of the sewer system. But in *Johnson*, our Supreme Court affirmed a judgment against the City of Phoenix on a nuisance claim because the City was not maintaining a portion of the sewer system “in such a manner that it will be neither a private nor a public nuisance.” *Johnson*, 51 Ariz. at 126. Certainly the City could argue that maintenance, repair, and funding of a sewer system is at the core of discretionary decision-making, but such discretion would not permit the City to maintain a nuisance and would not shield the City’s decisions from judicial review.

In *Veech*, our Supreme Court reversed the grant of a motion to dismiss a complaint filed against the City of Phoenix based upon the City’s failure to provide sufficient fire protection to an area in the City. Much like the City’s discretion in the allocation of law enforcement to the Zone and other areas of Phoenix, the City has discretion to determine what is reasonable fire protection for each area of the City. The court in *Veech* recognized the City’s discretion but also highlighted the limits on that discretion, stating: “[a] city has discretion, governed by the extent of need and other economic considerations, to determine what is a reasonable protection for each area – but this discretion cannot be arbitrary, and must be fairly and reasonably exercised.” *Veech*, 102 Ariz. at 197. The court ultimately determined that whether the City’s provision of fire protection to that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

part of the City was “arbitrary” and “fairly and reasonably exercised” was a question of fact, not appropriate for determination on a motion to dismiss. *Id.*

Veech provides direction in the present case. The City has engaged in arbitrary enforcement of the law in the Zone. As just some examples, the City has refused to enforce laws and the City Code against the many semi-permanent structures erected by the homeless in the rights of way in the Zone, despite the health and safety risks presented by these structures. But when one of the businesses in the Zone erected artistic sculptures (which posed no health or safety risk) alongside its building to discourage individuals from placing more structures in that location, the City enforced the Code against that business. *See* Finding Nos. 39-41. Thus, according to the evidence before the Court, the City has only sought to enforce the Code against one of the Plaintiffs in this case, out of hundreds of illegal, dangerous structures in the Zone. The City also avoids enforcement of criminal statutes against the homeless in the Zone, instead seeking to provide services to homeless offenders. *See* Finding No. 9. There is no evidence before the Court that the City has used this discretion to forgo prosecution of large groups of accused persons outside the Zone or individuals in the Zone that are not homeless.

THE COURT THEREFORE FINDS that the City has abused its discretion through the arbitrary application of the law in the Zone.

Plaintiffs Are Entitled To A Permanent Injunction.

The Court entered a *Preliminary Injunction* in this case on March 27, 2023. Plaintiffs ask the Court to make the injunction permanent. The City asks the Court to dissolve the injunction.

To show entitlement to a permanent injunction, Plaintiffs must show: (1) they have suffered an irreparable injury; (2) remedies available at law, such as money damages, are inadequate to compensate for that injury; (3) considering the balance of the hardships between Plaintiffs and the City, a remedy in equity is warranted; and (4) the public interest would not be disserved by issuance of a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

1. Plaintiffs have suffered and continue to suffer irreparable injury for which remedies available at law, such as money damages are inadequate.

Plaintiffs have established that they have suffered and continue to suffer irreparable injury, not remediable by damages. For example, the violence that Plaintiffs face every day on their property, in their businesses, and while traveling to and from their property and businesses, constitutes irreparable injury for which monetary damages would not properly compensate them. *See* Finding Nos. 9-10, 25-28.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

Another example is Plaintiffs' daily exposure to biohazards in the Zone, on their property and in their businesses, such as human excrement, used needles, blowing tinfoil with fentanyl residue, and the fly and insect infestation. The Zone's toxic environment exposes Plaintiffs to irreparable injury – illness and disease – not remediable by monetary damages. *See* Finding Nos. 31-34.

Plaintiffs' repeated exposure to fentanyl and methamphetamine smoke from the homeless who smoke the dangerous drugs just outside Plaintiffs' doors and windows further exposes them to irreparable injury not remediable by monetary damages. *See* Finding Nos. 30.

THE COURT FINDS that Plaintiffs have suffered and continue to suffer irreparable injury for which remedies available at law, such as money damages are inadequate.

2. The balance of the hardships tilts heavily in Plaintiffs' favor.

The hardship Plaintiffs have faced is well documented throughout this Ruling and, for the sake of brevity, the Court will not restate each hardship yet again. *See* Finding Nos. 8, 11, 13, 25-42.

The City argues that it faces a different hardship: that any abatement it undertakes in the Zone must comply with the Ninth Circuit's decisions in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). Although this Court is not bound by rulings from a federal court of appeals, the Court will address the City's concerns. *See, e.g., Fann v. State*, 251 Ariz. 425, 432 (2021).

Martin held, *inter alia*, that a municipality could not impose criminal penalties for sitting, sleeping or lying outside on public property against homeless individuals who cannot otherwise obtain shelter. *Martin*, 920 F.3d at 616. *Grants Pass* took *Martin*'s holding further by declaring, *inter alia*, a municipality cannot enforce an anti-camping ordinance “against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.” *Grants Pass*, 72 F.4th at 896 (emphasis added). The prohibition applies when an involuntarily homeless person engages in conduct necessary to protect himself or herself from the elements when there is no shelter space available to him or her. *Id.* (directing the district court on remand to enjoin enforcement of certain ordinances against “involuntarily homeless persons” for engaging in conduct necessary to protect themselves from the elements).

The City's argument relies on a number of faulty assumptions. First, neither case precluded municipalities from enforcing prohibitions against fires, stoves, or structures that do not provide the most rudimentary precautions against the elements. Nor do the cases preclude municipalities

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

from abating a nuisance, arresting violent offenders, enforcing laws against drugs and violence, or enforcing laws against biohazards and pollution of public waters, etc.

But the most glaring misinterpretation of the *Martin* and *Grants Pass* opinions is the inference that anyone who has erected a tent or other structure in the public rights of way is intrinsically unable to otherwise obtain shelter. The Court rejects such a broad, unsupported inference. *See* Finding Nos. 14-24. The cases also do not support the inference that anyone in the Zone that is using illegal drugs, is publicly intoxicated and/or passed-out, is committing criminal acts, and/or is engaging in some type of public indecency, is involuntarily engaging in the offending conduct as an unavoidable consequence of his or her status. *See Powell v. State of Texas*, 392 U.S. 514, 535-36 (1968) (state could prosecute alcoholic defendant for the *actus reus* of being drunk in public). Again, the Court will not adopt such broad inferences without credible supporting evidence as to specific individuals.⁷

“Persons are involuntarily homeless if they do not have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free.” *Grants Pass*, 72 F.4th at 878 n.2 (internal quotations omitted). Thus, if an individual refuses a shelter bed because he does not want to part with his pet, that individual is not involuntarily homeless. If an individual refuses a shelter bed because she will not be permitted to bring all of her property into the shelter, that individual is not involuntarily homeless. If an individual refuses to go into a shelter because he wants more space than the shelter provides, that individual is not involuntarily homeless. And if an individual refuses to go into a shelter because he wants to live together with his partner, that individual is not involuntarily homeless. Individuals who make these difficult but voluntary decisions to forego temporary housing are not involuntarily

⁷ The *Martin* and *Grants Pass* decisions created an unworkable mandate based upon questionable legal analysis; analysis that is beyond the scope of this ruling. *See* generally, the extensive dissenting opinions in *Grants Pass*, 72 F.4th at 896-945. One need only look at the multitude of dangerous and dehumanizing homeless encampments and open-air drug markets in cities under the jurisdiction of the Ninth Circuit – such as the Zone in Phoenix – to see the profound impact that *Martin* and *Grants Pass* have had. The Court received evidence that after the *Martin* decision, states under the jurisdiction of the Ninth Circuit saw a 25% increase in unsheltered homeless, while states outside of the Ninth Circuit’s jurisdiction saw a 25% decrease in unsheltered homeless. The principals enunciated in *Martin* and *Grants Pass* partially tie the hands of cities that seek in good faith to address the growing homeless encampment epidemic. And the decisions also provide a convenient excuse for other city leaders that wish to do nothing while such encampments grow and fester. To the extent that a state trial court judge could have any influence on the United States Supreme Court’s decision to review a lower court ruling, this judge would respectfully urge the U.S. Supreme Court to review the *Grants Pass* ruling and, by extension, the *Martin* decision.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

homeless and are not legally entitled to set up a tent or semi-permanent structure on public land. Such individuals have realistic access to adequate temporary shelter but choose not to use it.

It is not Plaintiffs' burden in this case to affirmatively establish that each individual who has erected a tent or other structure in the Zone is service resistant or voluntarily homeless before the City must act. *See* Finding Nos. 14-24. Instead, the burden is on any party arguing that *Martin* or *Grants Pass* preclude enforcement against a particular individual to establish – based upon credible evidence – that the individual cannot otherwise obtain shelter and/or that the individual's offending conduct is an unavoidable consequence of his or her status.

But even if the City were required to demonstrate that there were more open shelter beds than homeless in Phoenix before removing an illegal tent or other obstruction from public rights of way, the City could readily mitigate that burden through the creation of structured campgrounds. Until recently, the City has been reluctant to pursue this viable, cost-effective option despite admitting its viability. City officials testified at trial that they have now adopted a plan to create structured campgrounds.

THE COURT FINDS that the balance of hardships tips sharply in Plaintiffs' favor and a remedy in equity is warranted.

3. The public interest would not be disserved by the issuance of a permanent injunction.

Applicable public policy is embodied in the various statutes cited herein. As just some examples: Any place in populous areas that constitutes a breeding place for insects and rodents that are capable of carrying and transmitting disease-causing organisms to any person is a public nuisance and must be abated. A.R.S. § 36-601(A)(1).

Any place or condition that is controlled by any government agency and that is not maintained in a sanitary condition is a public nuisance and must be abated. A.R.S. § 36-601(A)(4).

All sewage, human excreta, garbage, or other organic waste deposited, discharged, or exposed as to potentially transmit disease to or between any person or persons is a public nuisance and must be abated. A.R.S. § 36-601(A)(5).

The pollution or contamination of any domestic waters is a public nuisance and must be abated. A.R.S. § 36-601(A)(9).

Anything that is injurious to health, indecent, offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

entire community or neighborhood is a public nuisance and must be abated. A.R.S. § 13-2917(A)(1).

Any unlawful obstruction to the free passage or use of any public park or street is a public nuisance and must be abated. A.R.S. § 13-2917(A)(2). And the Court further notes the drafters of our constitution recognized that “one of the basic responsibilities of government is to protect private property interests” such as those of Plaintiffs in this case. *Bailey v. Meyers*, 206 Ariz. 224, 227, 76 P3d 898, 901 (App. 2003).

Beyond the public policy embodied in the statutes above, the public interest counsels that the City take immediate action to protect the homeless individuals residing in squalor in the Zone from the many risks and dangers identified throughout this *Ruling*. “Immediate action” means abating the public nuisance in which they reside and developing *temporary* shelter space for those that truly need it. It does not mean leaving the public nuisance in place and allowing it to fester while the City pursues development of long-term plans of permanent supportive housing. *See* Finding No. 21 and footnote 4.

THE COURT FINDS that the public interest favors the injunctive/mandamus relief that Plaintiffs seek in this case.

Finally, although the Court is cautious about issuing *permanent* injunctive relief, **THE COURT FINDS** a strong probability that the intolerable conditions that the City allowed to develop in the Zone prior to the issuance of the *Preliminary Injunction* will almost certainly return upon the lifting of the *Preliminary Injunction* because: (1) the Human Services Campus still exists in the Zone as a draw for any individuals seeking assistance; and (2) the City is singularly focused on addressing and providing for the needs of homeless individuals occupying the Zone without equal regard for the City’s constituent property owners, business owners, employers and their employees. *See* Finding Nos. 21, 60-61, and footnote 4. For that reason, the modified order detailed below must remain in place.

THE COURT THEREFORE FINDS that Plaintiffs have established their entitlement to injunctive and mandamus relief.

THE COURT FURTHER FINDS that the City has the ability to abate the public nuisance by November 4, 2023 through, *inter alia*, enforcement of current statutes, ordinances and codes. The Court notes that by November 4, 2023, the City will have had approximately: (1) eight months to address conditions in the Zone since the date the Court issued the *Preliminary Injunction*; (2) fifteen months from the date that Plaintiffs filed this lawsuit; and (3) nearly two years from the date that Plaintiffs first sought assistance from – and presented a viable plan to – their City Council

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

representative and other City officials. The Court therefore finds little merit to any argument that a 45-day deadline does not allow sufficient time for the City to complete the clean-up.

Accordingly, good cause shown and in the Court's discretion,

IT IS THEREFORE ORDERED granting Plaintiffs' request for relief as follows:

- a. Granting Plaintiff's request for declaratory relief and declaring that the City of Phoenix has created and maintained a public nuisance in the area known as the "Zone" since as early as 2019.
- b. The City of Phoenix is prohibited from continuing to maintain a public nuisance on the public property in the Zone.
- c. The City of Phoenix shall abate the nuisance it presently maintains on the public property in the Zone, including the removal of all tents and other makeshift structures, by November 4, 2023. The Court recognizes that the City has discretion in how to comply with this Order and does not direct with specificity any of the myriad actions that would lead to compliance.
- d. The City of Phoenix shall maintain its public property in the Zone in a condition free of: (a) tents and other makeshift structures in the public rights of way; (b) biohazardous materials including human feces and urine, drug paraphernalia, and other trash; and (c) individuals committing offenses against the public order. The Court will employ a reasonableness standard to future allegations of violation of (b) and/or (c). The Court does not intend this order to create a private cause of action for every non-pervasive violation of subsection (b) and/or (c). Further, the Court will require evidence of a substantive, good faith attempt to address any future violations of this order with the City before seeking Court involvement.
- e. The portion of the *Preliminary Injunction* that enjoined the City from enforcement of Phoenix City Code Section 31-9(B) against Plaintiff Phoenix Kitchens, referring to the artistic sculptures Phoenix Kitchens installed next to its building, shall terminate on November 4, 2023.
- f. Counsel for the parties shall appear for a 30-minute in-person return hearing on **November 30, 2023 at 9:00 a.m.** Each party shall separately file a hearing memorandum of not more than three (3) pages that updates the Court on compliance with this order at least ten (10) days prior to the return hearing. *See Daley v. Earven*,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

09/20/2023

166 Ariz. 461, 463 (App.Div.2 1991) (superior court has inherent authority to enforce its judgments through subsequent orders).

- g. Plaintiffs' request for reimbursement of their reasonable attorneys' fees and costs is granted pursuant to A.R.S. § 12-348 and § 12-2030. Plaintiffs' request is also granted pursuant to the "private attorney general doctrine." *See Ansley v. Banner Health Network*, 248 Ariz. 143, 152-53 (2020). Plaintiffs' successful litigation of this action has benefitted a large number of people – all residents, business and property owners, and employees in the Zone. Plaintiffs' action required private enforcement and presented a matter of societal importance, that is, the abatement of a public nuisance and the return of law and order to the state's largest, most dangerous homeless encampment.

Although the Court previously found Plaintiffs' constitutional claims to be potentially viable, *see Ruling on Defendant's Motion to Dismiss* dated 01/16/2023 at pp. 7-9, the Court declines to address the merits of the constitutional claims herein because Plaintiffs have established their entitlement to relief based upon non-constitutional grounds. *See Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281 (2019) (Arizona courts will not reach a constitutional question when the case can be fairly decided on other, non-constitutional grounds).

IT IS FURTHER ORDERED taking no further action on Defendant's post-trial filing of its *Notice of Recent Developments*, in which the City accuses one of the Plaintiffs in this case of dumping mattresses next to a dumpster in the Zone. The final trial has already occurred in this case and the allegations in the *Notice* – even if they could be proven true – do not materially affect the Court's ruling or the issues before the Court. At most, such allegations – again, if true – would merely suggest hypocrisy. The Court declines to further expand these proceedings.

IT IS FURTHER ORDERED directing Plaintiffs to prepare and lodge a form of Judgment on or before **October 2, 2023**. Plaintiffs shall file any application for attorney's fees and statements of taxable costs by this deadline as well. Defendant shall file any objections or responses to the form of judgment or to the request for attorney's fees and costs within **twenty (20) days** thereafter.

IT IS FURTHER ORDERED the Judgment shall contain Rule 54(c) language as upon resolving attorney's fees and costs, no further matters will remain pending.