Clerk of the Superior Court
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P. McKinley

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439 03/27/2023

HONORABLE SCOTT BLANEY

CLERK OF THE COURT
P. McKinley
Deputy

FREDDY BROWN, et al.

STEPHEN W TULLY

v.

CITY OF PHOENIX

AARON D ARNSON

MICHAEL G BAILEY
ILAN WURMAN
TRISH STUHAN
STEPHEN B COLEMAN
TIMOTHY SANDEFUR
JUDGE BLANEY

UNDER ADVISEMENT RULING

The Court has reviewed and considered the following:

1. Plaintiffs' *Application for Preliminary Injunction*;
2. Defendant City of Phoenix's *Opposition to Plaintiff's Application for Preliminary Injunction*;
3. Plaintiffs' *Reply in Support of Their Application for Preliminary Injunction*;
4. The Goldwater Institute's *Amicus Brief in Support of Plaintiffs and In Support of Motion for Preliminary Injunction and Motion for Expedited Hearing*;
5. 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*;
6. The arguments received at the December 15, 2022 follow-up Oral Argument;

7. Plaintiffs' *Brief*, filed pursuant to the Court's January 31, 2023 Order (filed 02/01/2023);
8. Defendant City of Phoenix's *Response in Opposition to Plaintiffs' Brief*;
9. The *Declaration of Aaron Aftergood*, dated February 6, 2023;
10. The *Declaration of Scott Hall*, dated February 13, 2023; and
11. 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 disagrees.

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

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, which occupies 13 acres with seven buildings. Approximately 15 different providers, non-profit organizations, and government agencies provide various services at the Campus to homeless individuals. The Human Services Campus 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 Resources Campus and its clients.

The City Stopped Enforcing Certain 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. The City also stopped or greatly decreased enforcement of other health, quality of life, and even criminal laws and ordinances in the Zone.

8. There are a substantial number of individuals that have migrated into the Zone and are living on the street since 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.

9. The City currently has a policy of transporting homeless individuals to 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 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.

10. The City's decision to forego enforcement of criminal, health, and other quality of life statutes and ordinances in the Zone continues to this day. City representatives from the Office of Homeless Solutions testified that it is the City's strategy to keep homeless individuals 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 arrested 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 who are not homeless.

11. The City limits the discretion of police officers working in the Zone to enforce applicable laws and ordinances. Police officers working in the Zone have informed Plaintiffs that "the Zone is off-limits to enforcement." Police officers have specifically advised Plaintiffs that if they want the police to enforce the laws, they need to go to their policymakers and tell them to let the police enforce laws in the Zone.[1]

[1] The Court did not receive a hearsay objection to this testimony. Moreover, the Court found the witness and his testimony to have been credible. The Court further notes that the City's witness, Commander Brian Freudenthal, disputed the testimony that individual officers are not permitted to enforce laws in the Zone. Commander Freudenthal is the commander with responsibility for the area encompassing the Zone and he testified that police officers have individual discretion regarding whether to arrest an offender in the Zone – they have not been told to avoid arresting offenders. But the Court notes that this testimony is directly contradicted by the City's stated policy positions. *See* Finding No. 10. The testimony is also contradicted by the statements of individual police officers working in the Zone. *See* Finding No. 11. And Commander Freudenthal's testimony that officers are permitted to enforce the laws in the Zone at their discretion is greatly undermined by the actual conditions in the Zone; appalling conditions that continue to deteriorate. *See* Finding Nos. 8, 12, 15, 17-20, 24-27, 32, & 44. Commander Freudenthal also testified that the concentration of police officers around the Zone is higher than in any other area of the City. Although relevant, this testimony does not explain

12. Emergency calls to the City result in delayed response times and often do not resolve the issues. Plaintiffs often call the police 2-3 times every day. It typically takes 30-40 minutes for an officer to arrive to investigate. Even after the officers arrive – if the offender is still present – the officers do not usually remove the individual from the area. Officers will instead ask the homeless person to leave private property but will not remove that person from public easements or sidewalks just steps away from the private property, even if the person is intoxicated or high on drugs.

13. An unknown portion of the homeless population in the Zone is "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 uses "outreach providers" to attempt to get people into services. But a portion of the homeless in the Zone resist 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 some 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. Although City representatives admitted that a portion of the Zone was service resistant, the City was unable to provide the Court with an estimate of the percentage of homeless in the Zone that refuse services.

14. Closely related to Finding No. 13, 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 likely lack access to shelter. But in the absence of credible evidence, the Court will not infer that every 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. When questioned at the hearing, City representatives could not tell the Court how many of the homeless in the Zone were

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the response delays alleged by other witnesses, nor does it mitigate the negative impact of precluding officers from enforcing statutes and ordinances.

[2] *See Martin*, 920 F.3d at n.8.

already receiving government benefits that they could use toward housing, or how many were receiving a military pension or some type of regular disability payments.

Increase in Violent Crime:

15. 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. 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.

16. The City does not send sanitation workers into the Zone without security officers. City representatives testified that the City provides security officers with the sanitation crews for the safety of individuals living in the Zone, reasoning that the heavy equipment could be a danger to residents. But the Court does not find that reasoning to be credible. A sanitation worker wearing a reflective vest could provide the necessary safety precautions that are provided at any job site, such acting as a "ground guides" for heavy equipment. The Court instead finds that the City attaches security guards to sanitation crews as a necessary precaution for the protection of the sanitation workers.

17. 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. This alarming fact suggests that there is a violent, organized crime element taking root in the Zone.

Increased Public Drug Use:

18. 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.

The Zone Has Become a Biohazard:

19. 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.

20. 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.

21. 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.

22. 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.

23. The City has engaged in periodic cleaning of the Zone but has not been focused on abatement. The cleanings have therefore been limited in their effectiveness. When City workers arrive to clean the streets, they move some of the people that are encamped so that they can clean but then allow the individuals to return. Workers generally clean from the curb to the street but leave untouched everything that is staged by the homeless from the curb to the fence line. City workers do not clean any space that has tents or semi-permanent structures on them. The City stopped doing these clean-ups in January of 2022 because many of the homeless refused to cooperate, claiming that the City was violating their constitutional rights by moving their belongings for the cleanup.[3]

Property Crimes:

24. 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, 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:

25. The increase in homeless individuals and drugs, coupled with the City's decrease in enforcement, has resulted in illegal prostitution, frequent public nudity, and lude 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

[3] The Court was informed at the last hearing that the City planned to resume the cleanings.

masturbation in plain view of business owners, their employees, and family members.

Increased, Unabated Fire Hazards:

26. 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:

27. 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.

Arbitrary Enforcement:

28. The City refuses to remove the tents and the other obstructions, despite the hazards they present.

29. The City is currently applying a different standard to one of the long-time businesses in the Zone. The area immediately adjacent to 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."

30. 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 is enforcing 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:

31. 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.

32. The situation inside the Zone has gotten progressively worse, not better, since 2018 and has become dire since November of 2021.

33. The impact of the unsheltered 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.

34. 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.

The City's Mitigation Efforts:

35. 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.

36. Plaintiffs presented much of their evidence to the City on January 27, 2020, before the crises really got out of hand. Plaintiffs testified that they later presented their concerns and proposed solutions in a meeting with their City Council representative and other City officials in February of 2022; explaining the benefits of their proposed plan and pleading for assistance. But up until the filing of the present lawsuit, the City and its representatives did not materially respond to Plaintiffs' concerns.

37. 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.

38. 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 some meaningful action.

39. 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 hearing on which this Ruling is based, the City approved for the first time the construction of a "sprung structure," which will take at least nine months to construct and should provide about 200 shelter beds. City representatives testified that the City also intends to open other shelters in the future, such as a 200-bed shelter on Washington Street. But that shelter is seasonal and merely intended to serve as a "heat respite shelter" in the summer months. There is no evidence that the shelter is meant to specifically address the homeless population in the Zone. Most of the shelters that the City is considering are specialty shelters intended for specific tenants, such as domestic violence shelters, transitional housing for

working homeless men, COVID response hotels, etc., that are not intended to provide general shelter service to the 1000-plus homeless population in the Zone.

40. With few exceptions, the action items about which City representatives testified 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 – if any – that the City intends to take immediate, meaningful action to protect its constituent business owners, their employees, and residents from the lawlessness and chaos in the Zone.

41. Structured campgrounds on vacant City lots would be an effective solution to the issues in the Zone. Plaintiffs have 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. The City admits that it is possible to get all the unsheltered people in the Zone into a structured campground if the City made the structured campground its priority. The City further admits that temporary, cheaper, emergency shelters would solve the issue of homelessness for some people, even if it does not solve the issue for everybody. 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.

42. City leaders are **not** considering the creation of controlled, outdoor camping spaces on vacant City property because they would prefer to provide air conditioning and heat to homeless shelters, and they do not believe they can provide air conditioning and heat to the tents in a controlled camping space. But the Court notes that the privately-owned tents and makeshift shelters that individuals have illegally constructed in the Zone also do not have air conditioning or heat and are largely in disrepair, providing little in the way of shelter to those residing in them. The individuals start bonfires to cook and keep warm. Moreover, many of the individuals in the Zone have no tent or shelter whatsoever; they instead sleep right up against Plaintiffs' buildings, on Plaintiffs' patios, and on sidewalks or lawns.

43. Conditions have continued to worsen in the Zone, even after the creation of the Office of Homeless Solutions.

44. 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.

II. LEGAL ANALYSIS

An applicant for injunctive relief must show: **(1)** a strong likelihood of succeeding on the merits; **(2)** the possibility of irreparable injury not remediable by damages if relief is withheld; **(3)** a balance of the equities in its favor; and **(4)** that public policy favors granting the relief. *See, e.g., IB Property Holdings, LLC v. Rancho Del Mar Apartments, Ltd. Partnership*, 228 Ariz. 61, 64-65, 263 P.3d 69, 72-73 (App. 2011); *Smith v. Arizona Citizens Commission*, 212 Ariz. 407, 410-411, 132 P.3d 1187, 1190-91 (2006). This test is flexible based on specific facts and circumstances and is a sliding scale. *Id*. The Court will address each of these factors.

1. Strong likelihood of succeeding on the merits.

Declaratory Judgment.

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 any governmental agency and that is not maintained in a sanitary condition." The statute could not be more applicable to the Zone, nor could the following Findings detailed above: Finding Nos. 19-23.

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. 15-22, 25-27, above), indecent (*see* Finding No. 25), offensive to the senses (*see* Findings Nos. 15-22, 25-27) 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. 15-22, 24-27.

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. 27.

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. 19-23.

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. 19-23.

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. 22.

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.

To support a private cause of action for public nuisance at common law, 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 of Phoenix for its maintenance of and failure to repair faulty sewer system next to resident's property).

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, 15, 17-27, 43, 44. Most notably, the City transports 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 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.[4]

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, 4, 5, 8, 31-34.

Plaintiffs may also 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, 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, that Plaintiffs have sufficiently established "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." *See* Finding Nos. 8, 12, 15-22, 24-27, 43.

Mandamus Relief.

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

[4] The Court's reference to a "siren song" refers to the mythical Greek creatures called "sirens" from Homer's *Odyssey* who, with alluring voices and music, would temp sailors to sail closer to the rocks where their ships would ultimately become shipwrecked.

(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.[5]

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.

But even if Plaintiffs were unable to cite to a statute or ordinance that required the City to act, Plaintiffs may still be entitled to mandamus relief if they can establish that 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

[5] 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.

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 *Veach 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 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. *See* Finding Nos. 28-30. 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. 28-30. 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 does not enforce criminal statutes against the homeless in the Zone, instead seeking to provide services to homeless offenders. *See* Finding Nos. 10. 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. And finally, although the City imbeds security guards with its sanitation crews to protect the City employees from the violence in the Zone, the City does not provide dedicated security guards to any of the businesses or property owners in the Zone to protect them from the same violence. *See* Finding Nos. 16.

THE COURT THEREFORE FINDS that the City has abused its discretion through the arbitrary application of the law and provision of taxpayer funded security in the Zone.

THE COURT FINDS Plaintiffs have established a strong likelihood of success on the merits of their declaratory action and request for mandamus relief.

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 a strong likelihood of success on the merits of their declaratory and mandamus actions. *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).

2. Possibility of irreparable injury not remediable by damages if relief is withheld.

"[A] party seeking an injunction must show a possibility of irreparable injury not remediable by damages. Money damages may provide an adequate remedy at law." *IB Property Holdings,* 228 Ariz. at 65, 263 P.3d at 73 (internal citations omitted).

Plaintiffs have established that they face the very real possibility of 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, creates the possibility of irreparable injury for which monetary damages would not properly compensate them. *See* Finding Nos. 15-17.

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. 19-22.

Plaintiffs' 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. 18.

THE COURT FINDS that Plaintiffs have established a strong possibility of irreparable injury.

3. Balance of the hardships.

Arizona has identified that the critical element in analyzing the criteria for entering a preliminary injunction is the hardship to the parties. *See Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)(citing *Justice v. National Collegiate Athletic Association*, 577 F. Supp. 356, 363 (D. Ariz. 1983)). To meet this burden, the moving party may establish either **(1)** probable success on the merits and the possibility of irreparable injury; or **(2)** the presence of serious questions and the balance of hardships tip sharply in his favor. *Id*.

As discussed above, Plaintiffs have established a strong probability of success on the merits and the possibility of irreparable injury. But the Court notes that the balance of the parties' hardships also tilts heavily in Plaintiffs' favor.

The hardship Plaintiffs face is well documented throughout this Ruling and, for the sake of brevity, the Court will not restate each hardship yet again. *See* Finding Nos. 1, 8, 15-22, 24-33.

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*, 50 F.4th 787 (9th Cir. 2002). 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 for 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*, 50 F.4th at 813 (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*.

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." *Grants Pass*, 50 F.4th at 812. Nor do the cases preclude municipalities 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. 13, 14. 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.[6]

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 otherwise has "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, but they choose not to use it." *Martin*, 920 F.3d at n.8. Put another way, Plaintiffs are not required to establish that each person in the Zone is service resistant or voluntarily homeless before the City must act. *See* Finding Nos. 13, 14. 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 actually 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. *See* Finding Nos. 41, 42. But the City has refused to pursue this viable, cost-effective option despite admitting its viability. *See* Finding Nos. 41, 42.

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[6] The majority in *Grants Pass* dismissed the position of the dissent that cases such as *Powell* require an individualized showing of involuntariness. *Grants Pass*, 50 F.4th at 809-812. But the majority ultimately found that the involuntariness of the homeless status of the plaintiffs in *Grants Pass* was supported by sworn testimony and undisputed by the City. *Id*. at 811.

THE COURT FINDS that the balance of hardships tips sharply in Plaintiff's favor.

4. Public policy

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 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).

Finally, beyond the public policy embodied in the statutes above, public policy 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*. *See* Finding Nos. 15-22, 24-27, 43, 44. "Immediate action" means abating the public nuisance in which they reside and developing, as quickly as practicable, *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, affordable housing. *See* Finding Nos. 42, 43.

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

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 through, *inter alia*, enforcement of current statutes, ordinances and codes.

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

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

1. The City of Phoenix is prohibited from continuing to maintain a public nuisance on the public property in the Zone.

2. The City of Phoenix shall abate the nuisance it presently maintains on the public property in the Zone.

3. 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.

4. The City shall devise and carry out as soon as is practicable a plan that achieves compliance with this Order. 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.

5. The City is enjoined from further, arbitrary enforcement of Phoenix City Code Section 31-9(B) against Phoenix Kitchens – a named Plaintiff in this case – regarding the artistic sculptures Phoenix Kitchens installed next to its building. *See* Finding Nos. 28-30. The existing sculptures shall remain in place until the City has abated the public nuisance in the Zone or until further order of the Court.

6. The City shall be prepared to demonstrate to the Court at the July 10, 2023 Bench Trial in this matter the steps it has taken and the material results it has achieved toward compliance with this Order.

THE COURT FURTHER FINDS the Court is unable to issue a permanent injunction at this time because the parties did not agree to consolidate the hearing on the preliminary injunction with a trial on the merits. *See* Rule 65(a)(2)(A), Ariz.R.Civ.P. The Court has scheduled a trial on the merits in a separate minute entry. *See* Trial Setting Order, dated March 23, 2023.