Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-010439

01/16/2023

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. Defendant City of Phoenix's *Motion to Dismiss*;
2. Plaintiffs' *Response to Defendant's Motion to Dismiss*;
3. Defendant City of Phoenix's *Reply in Support of its Motion to Dismiss*;
4. Plaintiffs' *Verified Complaint for Declaratory Judgment, Special Action, and Injunctive Relief*;
5. The FTR recording of the October 27, 2022 combined Oral Argument on the *Motion to Dismiss* and Evidentiary Hearing on Plaintiffs' *Application for Injunctive Relief*; and

6. The arguments received at the December 15, 2022 follow-up Oral Argument.[1]

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 quality-of-life ordinances 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.

Defendant City of Phoenix moves to dismiss Plaintiffs' *Complaint* for multiple reasons. First, the City argues that Plaintiffs' claim for declaratory relief is improperly plead. Second, the City argues that it has discretion regarding how it enforces its policies and which policies to adopt and such issues are therefore not appropriate for judicial review. Third, the City argues that it has discretion regarding how to allocate resources. And finally, the City argues that it does not have a constitutional duty to protect Plaintiffs' property.

As a general policy matter, "motions to dismiss for failure to state a claim are not favored under Arizona law." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983). When considering a motion to dismiss under Rule 12(b)(6), the Court will look only to the pleading itself and consider the well-pleaded factual allegations contained therein. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The Court must assume the truth of the well-pleaded factual allegations and indulge all reasonable inferences therefrom, "but mere conclusory statements are insufficient." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012) (*quoting Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 (1998). "Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law []plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *Id.*

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[1] The Court notes that the procedural posture of the case differs somewhat from most cases at this stage in the litigation. The undersigned Judge assumed responsibility for this case after the previous two Judges voluntarily recused based upon past professional relationships with one or more parties or counsel in the case. The parties already participated in oral argument on the *Motion to Dismiss* and a separate evidentiary hearing on the *Application for Preliminary Injunction*. Although the Court has already received admissible evidence, the Court will rule on the *Motion to Dismiss* according to the standard applicable to such motions – without citation to evidence received at the evidentiary hearing and relying solely on the *Complaint* and briefing on the *Motion*. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). The Court will subsequently issue a separate ruling on the *Application for Preliminary Injunction* that relies upon the evidence received.

SUPERIOR COURT OF ARIZONA
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FINDINGS OF FACT

The Court assumes the truth of the following well-pleaded factual allegations for purposes of the *Motion to Dismiss*. *Coleman*, 230 Ariz. at 356.

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. There is a substantial number of individuals that have migrated into the Zone since 2019 that 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;

3. The City has failed and/or refused to enforce criminal, health, and/or quality-of-life statutes and ordinances prohibiting loitering, disturbing the peace, drunken and disorderly conduct, drug use, public camping, domestic violence, and obstruction of streets, sidewalks, and other public grounds inside the Zone;

4. The City's creation, maintenance and/or failure to address the issues in the Zone have resulted in profoundly negative consequences for residents, property owners and business owners and their employees in the Zone, including:

   a. a dramatic increase in violent crime;
   b. a dramatic increase in public drug use, including the use of needles and smoking of dangerous drugs such as fentanyl and methamphetamine directly adjacent to Plaintiffs' businesses;
   c. a dramatic increase in property crime, including break-ins and vandalism;
   d. frequent trespass on Plaintiffs' properties during and after business hours;
   e. intoxicated individuals sleeping right up against and/or on the patios of Plaintiffs' properties and businesses;
   f. risk of violent crime to Plaintiffs and their employees while on their property or at their businesses;
   g. routine public urination and defecation on and near Plaintiffs' properties and buildings, which Plaintiffs are forced to clean up;
   h. a proliferation of trash and human excrement on the streets, sidewalks, and Plaintiffs' properties, creating an ongoing biohazard;

i. prostitution, frequent public nudity and lude acts in plain view directly adjacent to Plaintiffs' businesses and properties;
j. an increase in fire hazards, including homeless encampments catching fire;
k. tents and encampments blocking the rights of way to and from Plaintiffs' properties and businesses;
l. a measurable diminishment of business traffic and of property values; and
m. deaths of homeless individuals on the streets of the neighborhood.

5. Prior to 2019, there was some limited homelessness in the area but there were no tents or semi-permanent encampments;

6. The City intentionally stopped enforcing criminal, health, and other quality of life statutes and ordinances in the Zone in 2019, after the Ninth Circuit Court of Appeals issued its first of two rulings stating that municipalities may not, *inter alia*, enforce public camping laws when there are insufficient shelter beds available for the homeless population;[2]

7. The situation inside the Zone has gotten progressively worse, not better, since 2019 and has become dire since November of 2021;

8. Plaintiffs have suffered identifiable harm resulting from the situation inside the Zone and the City's failure to act, as identified above;

9. Plaintiffs have attempted to work with the City to resolve the issues identified above, including the creation and submission to the City of a cost-effective plan to build outdoor shelter space on acceptable areas of City property;

10. 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;

11. Plaintiffs have identified large areas of vacant city land where such outdoor camping spaces could be erected;

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[2] *See 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. 2022).

12. The City had not responded to any of Plaintiffs' proposals at the time of filing of the *Complaint*;

13. The City confirmed at the oral argument that 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 that individuals have illegally constructed in the Zone also do not presently 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 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.

CONCLUSIONS OF LAW

Count I.

The City moves for dismissal of Count I, arguing: (1) Plaintiffs have not properly supported their nuisance claim and have instead based their nuisance claim on criminal and health statutes that do not provide a private cause of action; and (2) Plaintiffs improperly pleaded their nuisance claim as a claim for declaratory judgment.

THE COURT FINDS that Plaintiffs have properly supported their declaratory judgment action based upon a public nuisance claim. To support a 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 of Phoenix for its maintenance of and failure to repair faulty sewer system next to resident's property). Regarding the second and third elements, Plaintiffs have alleged sufficient facts in the *Complaint* to show that the City created and/or is maintaining the alleged nuisance in the Zone and that the harm is special in nature to Plaintiffs as residents and property owners in the Zone. *See* Findings of Fact Nos. 1-8, 12-13, *supra*.

Plaintiffs can 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. Plaintiffs' *Complaint* cited numerous Arizona criminal and health statutes and ordinances that prohibit the conduct occurring inside the Zone and that label such conduct a "public nuisance." Contrary to the City's arguments, Plaintiffs were entitled to support their public nuisance claim by relying upon these statutes, regardless of whether the statutes individually provide for a private right of action.

Plaintiffs may additionally 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 facts detailed in the *Complaint* and taken as true for purposes of the City's *Motion*, that Plaintiffs have sufficiently alleged "unreasonable interference." *See* Findings of Fact Nos. 1-4, 7-8, *supra.*

THE COURT FURTHER FINDS that the manner by which Plaintiffs plead Count I does not mandate dismissal. "Arizona follows a notice pleading standard." *Coleman*, 230 Ariz. at 356. The Arizona Rules of Civil Procedure merely require Plaintiffs to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Ariz.R.Civ.P 8(a)(2). Count I and its supporting paragraphs satisfy the standard of Rule 8(a).

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).

Regardless of whether Plaintiffs chose to style Count I as a declaratory action based upon a public nuisance, or alternatively as a public nuisance action seeking declaratory relief, it is clear to the Court and to the parties that Plaintiffs brought an action asking the Court to declare the existence of a public nuisance and further, seeking an order requiring the City to abate the nuisance. Count I therefore satisfies Arizona's notice pleading standards and the requirements of Rule 8; regardless of how it was styled. *See also* Rule 1, Ariz.R.Civ.P. (courts must construe,

administer, and employ the Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding.").

Count II.

The City additionally moves for dismissal of Count II of the *Complaint*. Count II alleges that the City violated, and continues to violate, Plaintiffs' rights under Article 2, Section 4 of the Arizona Constitution. More specifically, Plaintiffs seek an order declaring that the City's actions in maintaining a large homeless encampment on City-controlled public lands adjacent to Plaintiffs' property, businesses and homes, while refusing to provide sufficient police protection or to enforce numerous laws in existence for the protection of persons and property, deprives Plaintiffs of liberty and property without due process of law. This is a novel argument.

Article 2, Section 4 of the Arizona Constitution provides that no person may be deprived of life, liberty, or property "without due process of law." Arizona's Due Process Clause also "protects against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose." *Coleman*, 230 Ariz. at 362.

The City argues that existing law does not recognize a constitutionally protected liberty or property interest in "the protection of the laws," citing to established standards under the U.S. Constitution. The City cites in its *Motion* to Arizona cases in which courts have applied federal standards when interpreting Arizona's Constitution. But this again is a novel issue for which neither party has cited legal authority that is *directly* on point.

Arizona state courts may interpret the Arizona Constitution differently from interpretations of similar provisions in the U.S. Constitution. *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984) (recognizing that federal decisions interpreting the U.S. Constitution have great weight in interpreting the Arizona Constitution, but "the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law, … therefore, we cannot and should not follow federal precedent blindly."); *see also* Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505 (2012) ("Even protections of individual rights in state constitutions that are similar or identical to provisions in the Federal Constitution may be interpreted more broadly (though not more narrowly)."). And in carrying out that interpretation, the Court notes that "[t]he framers of our [Arizona] Constitution understood that one of the basic responsibilities of government is to protect private property interests." *Bailey v. Myers*, 206 Ariz. 224, 227 (App. 2003).

Plaintiffs have alleged, supported by well-pleaded facts, that the City created the circumstances that necessitate "the protection of the laws." *See* Findings of Fact Nos. 1-8, 12-13, *supra*. Plaintiffs argue that the City's failure to provide that protection after creating and

maintaining those circumstances deprives them of liberty and/or property without due process of law. This is a material distinction from the City's interpretation of Plaintiffs' argument; i.e. that Plaintiffs simply believe they are entitled to enforcement of the laws. Moreover, Plaintiffs have provided sufficient allegations – when taken as true – that the City's actions regarding the maintenance and enforcement of laws in the Zone are "arbitrary" and/or "irrational," and thus the claim must survive a Rule 12(b)(6) challenge.

THE COURT THEREFORE FINDS, after considering the well-pleaded facts in the *Complaint* and the procedural posture of the case, the Court is unable to determine as a matter of law that "plaintiffs would not be entitled to relief [on their Due Process Claim] under any interpretation of the facts susceptible of proof." *Coleman*, 230 Ariz. at 356.[3] It is unclear whether Plaintiffs can ultimately prevail on their novel constitutional claim, but dismissal of Count II would be inappropriate at this stage in the litigation. Although novel, Plaintiffs are entitled to advance their constitutional argument.

Count III.

Plaintiffs allege in Count III of the *Complaint* that the City's actions violate Article 2, Section 13 of the Arizona Constitution, which provides: "[n]o law shall be enacted granting to any citizen ... privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

The City moves for dismissal of Plaintiffs' claim based largely upon the same arguments it advanced against Plaintiffs' Due Process claim. The City correctly cites the *Coleman* case for the proposition that the Arizona Supreme Court has in the past "construed the state Privileges and Immunities Clause as applying the same standard as applies to equal protection claims under the U.S. Constitution." *Motion* at pg. 10 (citing *Coleman*, 230 Ariz. at 361.). But the Court

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[3] The Court agrees with Defendant's argument that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Motion* at pg. 8 (*citing Alpha, LLC v. Dartt*, 232 Ariz. 3030, 305 (App. 2013)). But here, Plaintiffs have alleged sufficient facts to survive a Rule 12(b)(6) challenge by demonstrating not only that they have real property and business interests, but that the City's failure to prevent the interference with their property rights has caused a measurable diminution in value of their property and businesses and, accordingly, that they have been deprived of those property interests without due process. *Response* at pg. 16. This case is therefore distinguishable from the *Dartt* case, wherein the plaintiff towing companies alleged that their position on the town's towing rotation list was a property right and that they had been deprived of that property right without due process when they were removed from the list. The court in *Dartt* ultimately held that the plaintiffs did not have a constitutionally protected right to remain on the lists because the list was not governed by statute, regulation or ordinance. *Id* at 307-08.

notes that the court in *Coleman* also based its decision to apply the federal standard in part on the fact that the plaintiffs "[had] not argued that another standard should apply," *Id.* at 362, thereby presumably leaving the door open in future "privileges and immunities" cases to the application of a standard different from that applied to the equal protection claims under the U.S. Constitution.

THE COURT FINDS dismissal of Count III at the Rule 12(b)(6) stage in the litigation to be inappropriate for the same reasons it found dismissal of Count II inappropriate at this stage in the litigation.

Count IV.

The City moves for dismissal of Count IV, which is Plaintiff's special-action request for mandamus ordering the City to abate the nuisance. The City argues that Count IV should be dismissed because the City has discretion in how to perform the functions that Plaintiffs ask the Court to mandate; particularly the law enforcement functions. "[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).

The City is correct that a government actor's discretion generally precludes mandamus relief. But this is not always the case, and this general rule does not compel dismissal of Plaintiffs' request for mandamus at this stage in the litigation. Plaintiffs may still be entitled to mandamus relief if they can establish that the City has abused or is abusing its discretion. *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 *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 defense of 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…," *Motion* at pg. 5, 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.*

The Court can infer from the *Complaint* that Plaintiffs are asserting the City has abused its discretion by arbitrarily deciding that property owners and business owners in the Zone are not entitled to the same enforcement of laws and corresponding protection from harm as other areas of the City. *See Coleman*, 230 Ariz. at 356 (courts must indulge all reasonable inferences from the well-pleaded facts in the complaint). It is not enough at this stage in the litigation for the City to simply argue that it has discretion in how it allocates resources and enforces laws.[4]

THE COURT THEREFORE FINDS dismissal of Count IV would be inappropriate at this stage in the litigation.

Count V.

The City moves for dismissal of Plaintiffs' request for injunctive relief in Count V, relying upon arguments it made in its *Opposition to Plaintiff's Application for Preliminary Injunction*. The Court will therefore defer ruling on Count V until it issues a ruling on Plaintiffs' *Application for Preliminary Injunction*.

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[4] Ideally, the Court would like to receive evidence regarding whether the City has stopped or dramatically limited enforcement of the health and safety laws and ordinances in other areas of the City of Phoenix since 2019 before deciding as a matter of law whether the City's exercise of its discretion has been arbitrary.

THE COURT FINDS any remaining arguments made by either party to be without merit or inappropriate at the motion to dismiss stage.

IT IS THEREFORE ORDERED, for the reasons stated above and in the Court's discretion, denying *Defendant City of Phoenix's Motion to Dismiss.*

IT IS FURTHER ORDERED denying any relief requested in the briefing on the *Motion to Dismiss* that is not granted herein.

IT IS FURTHER ORDERED the Court will set a final trial on the merits when it issues its ruling on the *Application for Preliminary Injunction.* The parties did not stipulate to combine the hearing on the *Application* with a final trial on the merits pursuant to Rule 65(a)(2), Ariz.R.Civ.P. The parties are therefore entitled to present all of their evidence – including any evidence subsequently obtained through discovery – at a final trial on the merits.