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5/3/2024 4:49:34 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. GREG SAKALL CASE NO. C20234363

DATE: May 02, 2024

ALLISON BRADFORD,
MICHAEL CARLSON, and
ADRIAN WURR
Plaintiff,

vs.

CITY OF TUCSON
Defendant

UNDER ADVISEMENT RULING

IN CHAMBERS UNDER ADVISEMENT RULING RE: TRIAL

This matter came before the Court for a bench trial on March 19, 21, and 22, 2024.

Before trial, the parties stipulated to consolidate the hearing on Application for Preliminary Injunction with the trial on the merits, and the Court had so ordered consistent with Rule 65(a)(2)(A), Ariz. R. Civ. P. *See* October 20, 2023 Minute Entry.

In closing arguments at trial, Plaintiffs Allison Bradford, Michael Carlson, and Adrian Wurr (collectively "Plaintiffs") argued that the conditions in the section of the Navajo Wash at issue ("the Navajo Wash" or "the wash") constitute a private and/or public nuisance for which Defendant City of Tucson ("the City") is liable, and that the Court should issue an injunction that (a) prohibits camping in tents or other structures in the Navajo Wash, and (b) requires the City to keep the Navajo Wash free of drug paraphernalia and feces. The City argued that it was immune from suit, that Plaintiffs do not have standing to bring their nuisance claims, that the conditions in the Navajo Wash do not constitute a public nuisance, and that even if there is a nuisance, the City is not liable as it has taken reasonable steps to abate and has not consented to the activity.

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At the conclusion of trial, the Court took the matter under advisement. For the reasons set forth below, the Court DENIES the Plaintiffs' Application for Preliminary Injunction, and FINDS in favor of the City.

The Court has thoughtfully considered the testimony, credibility and demeanor of the Plaintiffs, as well as the witnesses. In assessing credibility, the Court, as the trier of fact, has the right to "consider what testimony to accept, and what to reject, [it] may accept everything a witness says, or part of it, or none of it." RAJI (Civil) 4th, Preliminary 5. In exercise of its discretion, the Court has credited some of the parties' and witnesses' testimony, and rejected other parts based upon its credibility determinations. It has also considered the learned arguments of the parties' attorneys, and the admitted exhibits.

After appropriate deliberation, the Court makes the following findings and enters the following orders:

The Court adopts by reference the Stipulated Facts contained in Section II of the parties' Joint Pretrial Statement that was filed on February 28, 2024.

The section of the Navajo Wash at issue begins roughly at the northwest corner of East Hedrick Drive and Mountain Avenue, in Tucson, Arizona, and proceeds in a northwesterly direction to East Ft. Lowell Road. An exemplar image of the area follows:

The City has not declared the Navajo Wash as a public park.

A. The City Does Not Have Immunity as to Plaintiffs' Claims.

As to whether the City has immunity under A.R.S. § 12-820.01 from the Plaintiffs' requests for declaratory and injunctive relief, the Court finds that the City does not have immunity. *See Zeigler v. Kirschner,* 162 Ariz. 77, 84-85 (App. 1989) (holding that the statutory immunity provided by A.R.S. § 12-820.01 does not apply to claims for injunctive, declaratory, or equitable relief).

B. The City is Not Liable for a Private Nuisance Based on Its Use of the Navajo Wash.

The Court finds as a factual matter, that the City is not liable for a private nuisance occurring in the Navajo Wash based upon the City's use of the wash.

"Nuisance" is "a use of property or such a course of conduct, irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property in

civilized communities imposes upon what would otherwise be rightful freedom" *City of Phoenix v. Johnson*, 51 Ariz. 115, 123 (1938). It arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another, or to the public . . . [which] produc[es] . . . material annoyance, inconvenience, and discomfort." *Id.* (citation omitted). Nuisances can be "public, private, and mixed." *Id.*

As to a private nuisance, it "affects a single individual or a definite number of persons in the enjoyment of some private right which is not common to the public." *Id.* "It is strictly limited to an interference with a person's interest in the enjoyment of real property[,]" which is a "nontrespassory invasion[.]" *Armory Park Neighborhood Ass'n v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 4 (1985) (citation omitted). Owners and possessors of land may bring a claim for private nuisance. Restatement (Second) of Torts § 821(E). However, "[w]here the injury is slight, the remedy for minor inconveniences lies in an action for [monetary] damages rather than in one for an injunction." *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 183 (1972).

Restatement (Second) of Torts § 822 provides for the elements of a cause of action for a private nuisance as follows:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
> (a) intentional and unreasonable, or
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Restatement (Second) of Torts § 822. "'Legal cause' is that cause-effect relation between act and omission and consequence that is necessary in law before liability for the consequence can be imposed upon the actor." *Id.*, cmt. e. Legal cause is also known as

proximate cause. *Barrett v. Harris*, 207 Ariz. 374, 378, ¶ 11 (App. 2004). Proximate cause is a question of fact for the factfinder. *Robertson v. Sixpence Inns of America, Inc.*, 163 Ariz. 539, 546 (1990).

As to the private nuisance claim, the Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that the City's landowner use of the Navajo Wash is the legal cause of their alleged injuries. Plaintiffs' claimed injuries arise from third parties—namely, those individuals camping in the wash as well as the urine, feces, drug paraphernalia, occasional fires, shopping carts, and refuse or waste which arises from those camping. Plaintiffs presented numerous photographs that were admitted into evidence; some images from those admitted exhibits follow:

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The substantial weight of the evidence supports the Court's finding that those conditions exist regularly in the Navajo Wash when camping is present. However, Plaintiffs do not allege that the City's employees are themselves camping in the wash or creating the conditions in the wash listed above. As such, if the City is liable for the actions of those camping in the wash, it is based upon the City either setting in motion the nuisance or upon one of the Restatement provisions discussed below.

C. The City is Not Liable for a Public Nuisance Based on Its Use of the Navajo Wash.

The Court finds as a factual matter, that the City is not liable for a public nuisance occurring in the Navajo Wash based upon the City's use of the wash.

As to a public nuisance, it "is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public." *Armory Park*, 148 Ariz. at 4 (citations omitted). "[C]onduct which unreasonably and significantly interferes with the public health, safety,

peace, comfort or convenience is a public nuisance within the concept of tort law. . . .” *Id.*, at 10. *See also* Restatement (Second) of Torts § 821(B). Furthermore, “it must affect a considerable number of persons or an entire community or neighborhood.” *City of Phoenix*, 51 Ariz. at 124.

Restatement (Second) of Torts § 821B provides for the elements of a cause of action for a public nuisance as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>> (c) whether 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. A plaintiff must also provide causation. *Armory Park*, 148 Ariz. at 7.

1. Plaintiffs Adrian Wurr and Michael Carlson Have Standing to Bring a Public Nuisance Claim; Plaintiff Allison Bradford Does Not.

As to standing, the Court finds that Plaintiffs are not public officials and do not have standing to sue under Restatement (Second) of Torts § 821(C)(2)(b), and do not have standing to sue as a representative of the general public, as a citizen in a citizen’s action, or as a member of class in a class action. Restatement (Second) of Torts § 821(C)(2)(c).

Nonetheless, a private individual has standing to bring a tort claim for public nuisance if the individual’s “harm [is] different in kind or quality from that suffered by

the public in common." *Armory Park*, 148 Ariz. at 5 (citations omitted). An injury to a private individual's "use and enjoyment of their real property" is "a damage special in nature and different in kind from that experienced by the residents of the city in general" and allow that individual to bring a lawsuit to enjoin a public nuisance. *Id. See also* Restatement (Second) of Torts § 821(C)(2)(a); *City of Phoenix*, 51 Ariz. at 123-24.

The Court finds Plaintiff Adrian Wurr has standing to bring a public nuisance claim related to the Navajo Wash. His property is in close proximity to the Navajo Wash; it is across Hedrick Drive to the south of the wash. His front window looks out over the wash. He's smelled the smoke from the fires. He's been assaulted by an individual that he identified as a camper in the wash. The general rule is that "[t]he owner of property adjacent to or abutting upon a public park [or common area] has a special interest therein, distinct from and in addition to that of the general public, which will enable him to maintain a suit to enjoin the misuse of the park [or public area]." 60 A.L.R. 770. Also, Mr. Wurr is involved with the Hedrick Acres Neighborhood Association as Secretary of the association, and also with Tucson Clean & Beautiful as its lead regarding ongoing efforts in the wash. He engages in clean up in the wash so the more refuse that is left behind by encampments, the more effort he needs to put into the cleanup. Because of those efforts, the actions of third parties in the Navajo Wash have caused him a damage that is special in nature and different in kind from that experienced by the City's residents in general.

As to Plaintiff Michael Carlson, the Court finds that while the issues are closer than that of Mr. Wurr, Mr. Carlson does have standing to bring a public nuisance claim related to the Navajo Wash. Mr. Carlson has suffered damage to his business' property near Ft. Lowell and Park from individual(s) that camp in the wash, and he has had missing property. Furthermore, he has had encounters with two individuals (a couple) in the Navajo Wash when he went to find some missing property, and a camper who came to his business demanding tin foil. Mr. Carlson can't see Navajo Wash from his business

property. He uses the area near the wash about once a year to park and make a phone call or do paperwork. The actions of third parties in the Navajo Wash have caused Mr. Carlson damage that is special in nature and different in kind from that experienced by the City's residents in general.

On the other hand, the Court finds Plaintiff Allison Bradford does not have standing to bring a public nuisance claim related to the Navajo Wash. There was no credible evidence that she uses the wash. Her sole injuries relate to two trespasses upon her property in 2023 and increased traffic in the alley by her home by individuals she believes to be unsheltered homeless. There was, however, no credible evidence that the trespasses which she has suffered were caused by those individuals who camp in the Navajo Wash. Ms. Bradford cannot see the wash from her house. She has not used the City's encampment reporting protocol. Similar to other citizens, she sees activity and clean up in the wash when she drives by. As such, she has failed to prove by a preponderance of the evidence that she has suffered a damage that is special in nature and different in kind from that experienced by the City's residents in general.

2. The City's Use of Navajo Wash Has Not Caused the Public Nuisance in Navajo Park.

As to the public nuisance claim, the Court finds the general public has a right to use and enjoy the Navajo Wash. The actions of third parties who have camped in the wash, as described above, significantly interfere with the public health, safety, peace, comfort, and convenience. The Court also finds that the actions of third parties in the Navajo Wash affect a considerable number of persons who reside in the Hedrick Acres Neighborhood Association, as well as those who use the wash.

However, the Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that the City's landowner use of the Navajo Wash is the legal cause of any public nuisance. Again, the injuries to the public arise from third parties, not the City as landowner. Plaintiffs do not allege that the City's employees are themselves camping in

the wash or creating the conditions listed above. As such, if the City is liable under a public nuisance claim for the actions of those camping in the wash, it is based upon the City either setting in motion the nuisance or upon one of the Restatement provisions discussed below.

D. The City is Not Liable under Plaintiffs' First-Party Liability Theory that the City Set in Motion the Nuisance.

The Court finds as a factual matter, that the City does not have derivative responsibility for setting in motion a nuisance.

As to a landowner's derivative responsibility by setting a nuisance in motion, "liability will arise for a public nuisance when [the defendant]'s acts set in motion a force or chain of events resulting in the invasion." *Armory Park*, at 7 (citation omitted). In *Armory Park*, Arizona Supreme Court addressed the liability of a defendant which engaged in "a worthwhile, prais[e]worthy activity" of operating a center which provided one free meal a day to indigent persons. *Id.* at 2-8. Plaintiffs were neighbors who claimed the center created a public nuisance because it attracted "transient persons" to their neighborhood. *Id.* at 2. The defendant argued that it was not responsible "for acts committed by its patrons off the premises to the Center." *Id.* at 6-7. The Supreme Court rejected that argument and upheld the trial court's finding that there was a causal link between the defendant's acts and the plaintiff's injuries because there was testimony that the defendant's "act of offering free meals . . . 'set in motion' the forces resulting in the injuries" to the plaintiffs. *Id.* at 7.

Plaintiffs argue that the City's three-tier Encampment Protocol Process (Exhibit A), which went live on October 27, 2022, and the City employees' actions in handing out tents, tarps, backpacks, food, and water to unsheltered homeless individuals set in motion a nuisance such that the City is liable. On the other hand, the City argues that Plaintiffs have failed to prove that it has set in motion the nuisance.

Having considered the conflicting testimony and evidence on these points, the Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that the City has set in motion a nuisance arising from the Navajo Wash.

This case is distinguishable from *Armory Park*. In that case, the center attracted patrons to the neighborhood, and those patrons then caused a public nuisance affecting the neighboring community. In this case, the presence of unsheltered homeless individuals camping in the wash and surrounding community predated the City's three-their protocol. Mr. Wurr testified that there was camping in wash for five years, albeit in lower numbers before the COVID pandemic. Furthermore, there is no credible evidence that the City has established the Navajo Wash as a distribution center for goods and services as the defendant had done in *Armory Park*. Rather, when confronted with individuals camping in the wash, the City reacts to those who are there and attempts to abate the effects of the campers by offering referrals to services and basic supplies to those individuals. When there are encampments, the City offers clean up services, outreach and monitoring in Tier 2 camps. Exhibit A. If the encampment(s) reach a Tier 3 status, the City removes the encampment(s). *Id*. Furthermore, the Navajo Wash is situated in an area where there are private businesses and organizations (*e.g.,* Evergreen Cemetery, QT, and CODAC) nearby which attract the unsheltered homeless community. Also, based on the testimony of Mr. Carlson, the unsheltered homeless are everywhere and in every "nook and cranny of Ward 3." *See also* Exhibit B, COT_0000557, documenting 524 cases in Ward 3. The Court also found the testimony of Justin Hamilton to be persuasive and credible that there is repopulation problem in the Navajo Wash because of its unique location, and that even if the wash were to be declared a park, there would still be usheltered homeless individuals there all day, everyday.

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This case is also distinguishable from *Brown v. City of Phoenix*, CV 2022-010439, Maricopa County Superior Court.[1] In that case involving the "Zone" in Phoenix, the Superior Court found, *inter alia*, that the City of Phoenix stopped enforcing criminal and quality-of-life laws in the Zone, transported homeless individuals into the Zone from other areas of the city, located a Human Services Campus in the Zone to provide services to homeless individuals, and would not clean up the Zone unless forced to do so. The Superior Court's finding in *Brown* that the City of Phoenix created or maintained the nuisance in the Zone (Page 18) is consistent with the law and the court's factual finding.

In contrast, there is no credible evidence in this case that the City of Tucson has not responded to complaints in the Navajo Wash. The City has responded to all but one of Mr. Wurr's and his wife's 911 calls regarding illegal activities or emergency conditions in the wash. There is no evidence or argument that the City has transported unsheltered homeless individuals to the Navajo Wash or that it designates the wash as a central hub to provide services to the unsheltered homeless. Furthermore, the City voluntarily—without a Court order—regularly cleans up the Navajo Wash. It has done so approximately 10 times between April 2023 and February 2024. Also, the City has been making even more frequent cleanups in the wash in the period leading up to the trial of this matter.

Insofar as Plaintiffs contend that the City's three-tier Encampment Protocol Process set in motion encampments in the Navajo Wash, the Court finds Plaintiffs have failed to prove that contention by a preponderance of the evidence. Dr. Glock's testimony did not supply the necessary causal link between the City's protocol and Navajo Wash specifically, and neither did any other witness. Furthermore, there is evidence that even when the City bans public, overnight camping in public parks, camping still occurs. Exhibit B.

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[1] The Ruling is in the Clerk's file in this case as Exhibit A to Plaintiffs' March 25, 2024 Notice of Lodging.

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E. The City is Not Liable Under Section 838 of the Restatement (Second) of Torts.

The Court finds as a factual matter, that the City is not liable under Restatement (Second) of Torts § 838.

As to a landowner's liability for conduct by a third party acting upon the landowner's land, Section 838 provides for landowner liability for third-party's conduct upon the landowner's land as follows:

> A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and
> (a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will involve an unreasonable risk of causing the nuisance, and
> (b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.

Restatement (Second) of Torts § 838.

As to the issue of reasonable care to prevent the nuisance from arising under Section 838(a), liability can arise when the landowner "consents to the presence of the third persons on [the] land but not to [the third persons'] engaging in the particular activity." *Id.*, cmt. g. "What is reasonable care will depend upon the circumstances. The [landowner] is not required in all cases to put a stop to the activity if it is possible to abate the nuisance without doing so." *Id.* It "is . . . not required to do more than is reasonable . . . when the nuisance can be prevented only by measures involving great effort and expense and in proportion the harm caused by the nuisance is relatively slight, the [landowner] is not liable if [it] fails to adopt the measure to prevent it." *Id.* The Restatement also provides the following illustration:

> A owns and possesses a vacant lot in the heart of a city. Over a period of weeks boys of the neighborhood trespass on the lot and play baseball there. The noise they make and the thrown and batted balls interfere with the use and enjoyment of adjoining

> land. On a number of occasions A drives the boys off of his land and has them driven off by the police. He also complains to their parents. It is found as a fact that the only other effective means A could take would be to fence his lot or to employ a watchman, either of which would involve prohibitive and disproportionate expense. A is not liable for the nuisance.

Id., ill. 7.

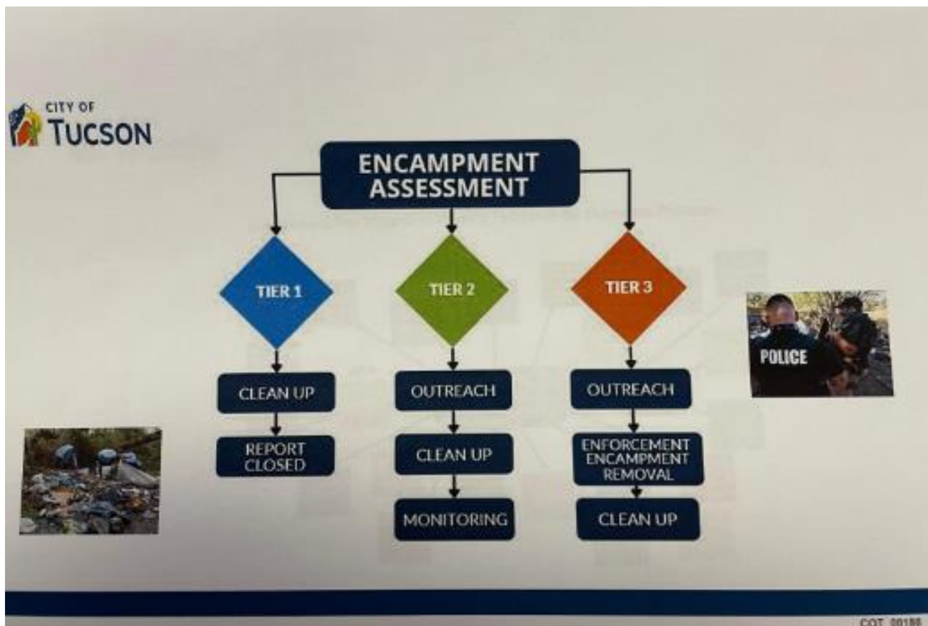
As to the issue of consent under Section 838(b), comment f provides that the landowner must consent not only as to the third-party's presence on the land but also to the third-party's activities that invade the public's or plaintiff's rights. Specifically, it provides as follows:

> The consent required to make a possessor of land subject to liability for an activity conducted on the land by third persons may be manifested by specific words or by other conduct. **Failure to stop an activity is not alone sufficient to warrant a finding of consent. There must be knowledge of the facts plus some manifestation of acquiescence or approval in respect to the persons in question.** Mere acquiescence is not sufficient when unconnected with other circumstances that tend to make the acquiescence indicate consent. **Moreover, it is not enough that the possessor has merely consented that others act upon his land in some way. It must be shown that he consented to the activity involving the invasion.**

Id., cmt. f (emphasis added).

The Court finds that the City consents to camping in the Navajo Wash. By comparison, the City does not consent to encampments near schools and in the right-of-ways and sidewalks. In those situations, the City orders immediate removal. However, as to Navajo Wash, the City does not consent to urine, feces, drug paraphernalia, occasional fires, shopping carts, and refuse or waste which arise from those camping there. Furthermore, the Court finds that the City's actions in response to activities in the Navajo Wash by campers are reasonable. The law, as explained in the Restatement, does

not require that the City ban camping in the Navajo Wash if the City can abate the nuisance(s) associated with the camping. The Court finds that the City has engaged in reasonable efforts to abate the nuisance caused by public camping generally and more specifically in the Navajo Wash. Those ongoing efforts, including continual modification of the three-tier protocol discussed previously (*see* also image below), were well-documented at trial by the City's witnesses.



Those modifications are based upon regular input at weekly taskforce meetings organized to gain input from various departments within the City, as well as Pima County and the Tucson Pima Coalition to End Homelessness.

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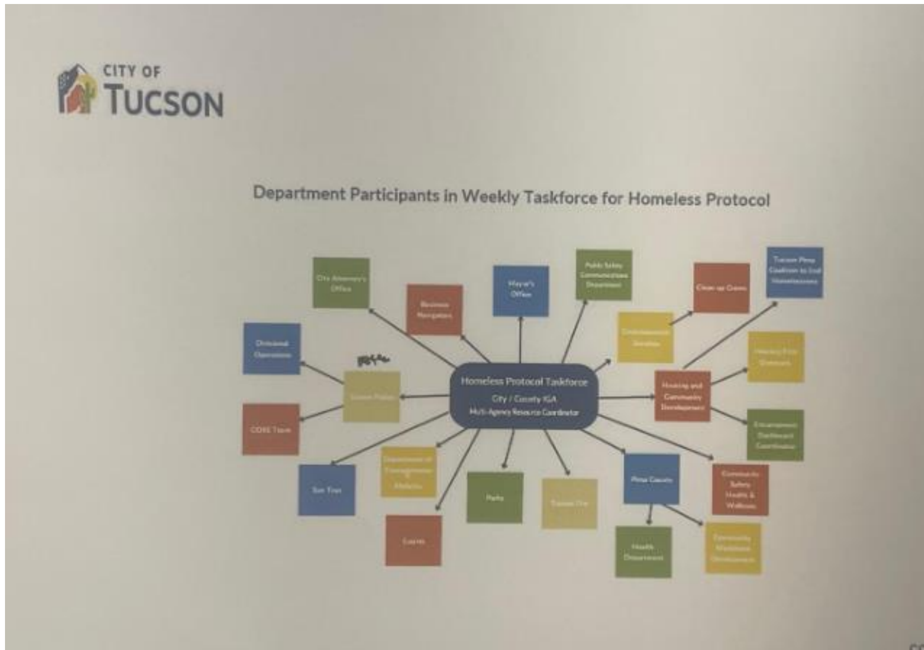

The City cleans up trash in the wash using flatbed trucks, front loaders, and garbage trucks. Police are present during cleanups as necessary. The City offers outreach and services to those in the Navajo Wash in a reasonable effort to build trust and rapport with the campers, and ultimately get them into available housing. While the timeliness of the City's response to conditions in the Navajo Wash may not be as speedy as Plaintiffs' desire, the response time is not unreasonable. A reasonable response does not require perfection which is what Plaintiffs seem to desire.

Plaintiffs' arguments rest in no small part upon a desire for a change to the City's "Housing First" policy and its three-tier Encampment Protocol Process. As a matter of public policy, many, including Dr. Glock, believe that the City should change its protocol, ban public camping, and focus on humane enforcement. He relies upon data from various cities that shows a ban on public camping results in reducing, but not eliminating, unsheltered homelessness. Others, including the City employees who testified and Thomas Litwicki, CEO of Old Pueblo Community Services, believe that the City's approach as to Housing First is in keeping with the federal government's policies and best practices from most cities. City employees testified that they believe they are

making headway on overall homelessness in the community, and the 2023 Point In Time Count Report indicates at least a plateauing of the number of unsheltered homeless in the community from 2022 to 2023. Exhibit 83, p. 10. However, the public policy question[2] is not the relevant legal question in this case. The legal question before this Court is whether the City's actions are reasonable under the circumstances in the Navajo Wash, and the Court finds that they are.

F. The City is Not Liable Under Section 839 of the Restatement (Second) of Torts.

The Court finds as a factual matter, that the City is not liable under Restatement (Second) of Torts § 839.

As to a landowner's liability for failing to abate an artificial condition on the land, Section 839 provides for landowner liability when the landowner fails to abate an artificial condition under certain circumstances and provides as follows:

> A possessor of land is subject to liability for a nuisance caused while he is in possession by an abatable artificial condition on the land, if the nuisance is otherwise actionable, and
> (a) the possessor knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved, and
> (b) he knows or should know that it exists without the consent of those affected by it, and
> (c) he has failed after a reasonable opportunity to take reasonable steps to abate the condition or to protect the affected persons against it.

Restatement (Second) of Torts § 839. Section 839 applies to both public and private nuisances. *Id.*, cmt. a. "When . . . the condition has been created by a third person, the

[2] Public camping in the Tucson community is widespread (Exhibit B, documenting 13,158 reports, and 213 active reports; 1,868 total cases with 174 active cases; 2,428 clean-ups completed). The City's city-wide policies regarding the unsheltered homeless and public camping should be debated before its elected leaders and be resolved as part of the applicable political processes.

possessor is entitled to a reasonable time to remedy it after he knows or should know of its existence and the lack of consent." *Id.*, cmt. l.

The Court finds the City is not liable under Section 839 as it has repeatedly taken reasonable steps to abate the conditions in the Navajo Wash. The Court adopts by reference its factual findings from above.

G. Conclusion

For the foregoing reasons, the Court DENIES the Plaintiffs' Application for Preliminary Injunction, and FINDS in favor of the City. The City must submit any request for taxable costs and attorneys' fees consistent with Rule 54(f)-(g), Ariz. R. Civ. P., and lodge a proposed form of judgment consistent with Rules 54(h) and 58(a), Ariz. R. Civ. P.

(ID: f1482fc9-cefb-42d8-bdee-4befee3334c9)

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