IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

Ten Tips for Lawyer Well-Being in the Age of Coronavirus

MAY
JUN
2021
VOL.62
NO.03



OFFICERS
President
Tyrone E. Cooper
City Attorney
Beaumont, Texas

President Elect
Barbara Adams
General Counsel
Illinois Local Government Lawyers Association

Immediate Past President
Patrick Baker
City Attorney
Charlotte, North Carolina

Treasurer
Rose Humway-Warmuth
City Solicitor
Wheeling, West Virginia

General Counsel and Executive Director
Charles W. Thompson, Jr.
IMLA Rockville, Maryland

BOARD OF DIRECTORS
Christopher Balch
City Attorney
Brookhaven, Georgia

Shauna Billingsley
City Attorney
Franklin, Tennessee

Lori Grigg Bluhm
City Attorney
Troy, Michigan

Alan Bojorquez
Borjorquez Law Firm PLLC
Austin, Texas

Beth Anne Childs
City Attorney
Owassa, Oklahoma

Jeffrey Dana
City Solicitor
Providence, Rhode Island

Arthur Gutekunst
Sr. Assistant Corporation Counsel
White Plains, New York

Douglas Haney
Corporation Counsel
Carmel, Indiana

Nina R. Hickson
City Attorney
Atlanta, Georgia

Joy Hulton
Regional Solicitor
York Region, Ontario, Canada

Wynetta Massey
City Attorney
Colorado Springs, Colorado

Marcel S. Pratt
City Solicitor
Philadelphia, Pennsylvania

Gregory Priamos
County Counsel
Riverside County, California

Kelly Jean Long Pridgen
General Counsel
Association County Commissioners of Georgia
Atlanta, Georgia

Tracy Reeve
City Attorney
Portland, Oregon

Jennie Granahan Tarr
Chief Assistant County Attorney
Hillsborough County, Florida

Nancy Thompson
City Counselor
Columbia, Missouri

Randall Van Vleck
General Counsel
New Mexico Municipal League
Santa Fe, New Mexico

Byron Werry
City Solicitor
Regina, Saskatchewan

Susana Alcala Wood
City Attorney
Sacramento, California

CONTENTS

MAY / JUNE 2021

TEN TIPS FOR LAWYER WELL-BEING IN THE AGE OF CORONAVIRUS

By: Chris Ritter, Director, Texas Lawyers Assistance Program, Austin, Texas

While undoubtedly rewarding, the legal profession is often filled with extraordinary demands that compromise personal time and intrude on family relationships. There are techniques and resources to help reduce stress, fight anxiety and regain control.

PAGE 6

FIRST AMENDMENT PROTECTION OF PROFANITY AND OTHER OFFENSIVE PARAPHERNALIA DISPLAYED IN THE PUBLIC'S VIEW

By: Sherri Russell, City Attorney, Lake Jackson, Texas

The 2020 presidential election merely revealed the accelerating trend towards public expression employing language that hitherto would have been considered profane. The ruckus is not new, and however inappropriate and discomfiting, mere profanity cannot be the object of municipal regulation.

PAGE 12

AVOIDING A COLLISION WHEN CODE ENFORCEMENT AND FAIR HOUSING INTERSECT

By: Patricia (Trish) Link, Assistant City Attorney, Austin, Texas

Rigorous enforcement of local codes can easily run afoul of federal laws enacted to protect the disabled, and can undermine efforts by unrelated adults to cohabit in lieu of entering nursing facilities.

PAGE 18

DEPARTMENTS

PAGE12, 6, ILLUSTRATIONS BY TRUJILLODESIGN

24 PETS
Pet-Friendly Government Subsidized Housing: Good for Taxpayers and Pets
By: IMLA, Rockville, Maryland and Best Friends Animal Society, Kanab, Utah
Programs which encourage pet ownership and conserve public funds.

28 INTERNATIONAL
Spain as the "State of the Autonomies"
By: Celia Guillot Rabanal, Head of the Administrative and Legal Support Office, Barcelona Provincial Council
An interview and history lesson from a new ALEL colleague.

30 AMICUS
Fighting Preemption of Public Health Measures
By: Amanda Karras, IMLA Deputy General Counsel and Director of Legal Advocacy
The continuing battle for municipal authority over local health issues.

34 HOMELESSNESS
Campgrounds on Main Street: The Persistence of Transience
By: Erich Eiselt, IMLA Assistant General Counsel
The complexities in municipal response to sidewalk dwellers.

36 INSIDE CANADA
COVID Rules, Heritage Buildings, Nameless Complainers, and More
By: Monica Ciriello, Ontario 2015
Recent cases of interest.

STAFF

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Erich R. Eiselt

EDITORIAL STAFF
Deanna Shahnami

ART DIRECTION AND PRODUCTION
Trujillo Design

MARKETING
Caroline Storer

Views appearing in Municipal Lawyer are those of the author. Publication of articles in this magazine does not reflect a direct or implied endorsement of an author's views. © Copyright 2021 by the International Municipal Lawyers Association (IMLA). All rights reserved. IMLA is a non-profit professional association of municipal lawyers from across the United States and Canada. It offers its members continuing legal education courses, research services, litigation assistance on amicus briefs and an information-sharing network in the field of municipal law. Municipal Lawyer is IMLA's membership magazine. It is published bi-monthly. Views expressed by authors and contributors are not necessarily the views of IMLA. For membership information contact: IMLA, 51 Monroe Street, Suite 404, Rockville, Maryland 20850, phone: (202) 466-5424, or e-mail: info@imla.org. Contributions of articles are welcome. Municipal Lawyer reserves the right to refuse or edit manuscripts submitted for publication.

HOMELESSNESS

BY: ERICH EISELT,
IMLA Assistant General Counsel

Campgrounds on Main Street: The Persistence of Transience

On April 20, 2021, federal Judge David Carter of the Central District of California ordered that the City and County of Los Angeles provide housing and related assistance for all homeless persons in the 50-square block area known for decades as known as "Skid Row" by October 18. According to the Los Angeles Homeless Services Authority, that number now exceeds 4,600 people.[1]

Judge Carter's sweeping decision in *LA Alliance for Human Rights v. City of Los Angeles*, cv. 20-02291 (C.D. Cal. Apr. 20, 2021) defines Los Angeles's homeless problem as disproportionately affecting people of color, reflecting decades of discriminatory employment and housing policies and repeated instances of underperformance by authorities despite the continued influx of billions of dollars:

> Here in Los Angeles, how did racism become embedded in the policies and structures of our new city? What if there was a conscious effort, a deliberate intent, a cowardice of inaction? Through redlining, containment, eminent domain, exclusionary zoning, and gentrification—designed to segregate and disenfranchise communities of color—the City and County of Los Angeles created a legacy of entrenched structural racism. . . . While Black people comprise only eight percent of Los Angeles's population, they make up 42% of its homeless population. The current inaction on the part of the City and County of Los Angeles has allowed the harms of their racist legacy to continue unabated, leaving Black people—and especially Black women—effectively abandoned on the streets.

The 110-page opinion found a broad range of actionable wrongs in the plaintiffs' motion for injunctive relief, ranging from denial of Due Process and Fifth Amendment associational rights, state-created danger and deliberate indifference, as well as ADA violations:

> To satisfy the ADA, public sidewalks must have at least 36 inches of passable sidewalk, and the City and County are responsible for ensuring that this requirement is met. 36 C.F.R. § 1191, app. D. § 403.5.1 (2014); Willits v. City of Los Angeles, 925 F. Supp. 2d 1089, 1093 (C.D. Cal. 2013). Hundreds of city sidewalks, not only in Skid Row but across the City and County of Los Angeles, fail to meet the minimum requirements of the ADA due to the creation of homeless encampments. Again, it must be emphasized that these encampments— and the resulting ADA violations— are the outcome of decades of active policy choices and deliberate indifference on the part of the City and County.

The decision also found joint responsibility by the City and County under California's Welfare and Institutions Code:

> Simply put, under the aegis of local, state, and federal initiatives, the City and County together have become jointly responsible for fulfilling the mandate of § 17000, at least as it pertains to confronting the crisis of homelessness. Therefore, the Court finds that the most reasonable interpretation of § 17000—the interpretation most in step with modern partnerships and funding arrangements between the City and County—is that it applies not only to counties alone, but to cities and counties when they undertake a joint venture directed to the goals of § 17000, such as a coordinated effort to alleviate homelessness in their jurisdictions.

Judge Carter imposed a rigorous schedule of remedial measures, placing an immediate hold on $1 billion of municipal funds. The City and County must provide "shelter or housing" to all unaccompanied women and children living in Skid Row within 90 days; to all families within 120 days and to the general

Skid Row population within 180 days. He also required creation of a report detailing "all land potentially available within each district for housing and sheltering the homeless" and ordered "the cessation of sales, transfers by lease or covenant" of more than 14,000 properties he understands to be owned by the City and County.

The City and County rapidly filed for interlocutory relief to the Ninth Circuit; their requests for stay pending appeal have been largely denied. IMLA is evaluating its amicus support in the proceedings.

The Skid Row order appears to be the most aggressive judicial response yet in a lengthening sequence of legal battles between municipalities and displaced individuals and advocates. More will ensue. According to the National Alliance to End Homelessness, in 2019, some 570,000 Americans were estimated to be without adequate shelter,[2] based on HUD's "point in time" counts conducted across the country annually each January.[3] The problem is most concentrated in large and coastal states. California itself accounts for more than one-quarter of the nation's homeless (151,000 persons), with New York (92,000), Florida (28,000), Texas (26,000), and Washington (22,000) rounding out the top five jurisdictions.[4] The racial imbalances noted by Judge Carter are borne out in the national statistics: fully 40% (more than 225,000) of the total homeless population is Black, with another 124,000 being Hispanic/LatinX.[5]

Large cities may dominate the headlines but seemingly no jurisdiction is immune from the problem or its resulting litigation. IMLA members will recall the seminal decision arising in Boise, whose ordinances criminalized sleeping outside on public property. The Ninth Circuit found that such policies violated the Eighth Amendment; the sanctions were unenforceable as cruel and unusual unless the city could offer shelter for any person so cited. The availability of "shelter" was not merely a function of the number of vacant beds, because the city's policies also limited an individual's shelter use to a certain number of consecutive nights. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2017).

Numerous homeless cases seeking Eighth Amendment relief have subsequently cited *City of Boise*. Others have aimed far more broadly: one such example is *Phillips v. City of Cincinnati*, 479 F.Supp. 3d 611 (S.D. Oh. 2020). Beginning in 2018, Cincinnati and surrounding Hamilton County began to enforce ordinances making encampments illegal, closing site after site and repeatedly forcing settlements to relocate. Joseph Phillips, a Cincinnati resident who had been without shelter for ten years and was threatened with arrest for living outdoors, sued on behalf of himself and similarly situated residents, naming the City and its Mayor. Plaintiffs moved for injunction against further resettlement activity, as well as compensatory damages for property lost and destroyed as the City executed cleanup activities. Their prayer for relief sought a declaration that the City's policy governing "police interaction with homeless encampments" (so-called "Policy 12.111") violated the First, Fourth, Eighth, and Fourteenth Amendments. Seven of its eleven counts were adequately pled to survive motions to dismiss:

Free speech: "Here, Plaintiffs have provided enough facts to go forward on their claim that the Cincinnati homeless encampments were an expression of free speech to call attention to the crisis of the shortage of affordable housing shortage in Cincinnati, and that the Permanent Injunction unlawfully restricts that expression."

Cruel and unusual punishment: "Plaintiffs have provided enough facts to go forward on their claim that housing is not available for some specific unhoused people, nor for all, and, therefore, jailing people for being unhoused is cruel and unusual punishment."

Right to travel: "The Fourteenth Amendment promises citizens the virtually unfettered ability to lawfully and freely travel. Citing and arresting unhoused persons for sleeping in public spaces could violate the right to travel by denying unhoused people the necessity of a safe place to sleep, rest, and recuperate."

Substantive due process: "If the City is requiring the homeless to vacate well-lit and high-traffic public land, or go to jail, when housing is not available for some specific unhoused people, nor for all, and taking and destroying their tents, tarps, blankets, clothing, and other property, then the City may be creating an unlawful state-created danger for the homeless."

Procedural due process: "Confiscating or destroying property without fair notice could be a due process violation. Here, Plaintiffs have provided enough facts to go forward on their claim that the City has failed to provide adequate notice regarding the collection or destruction of their property."

Vagueness: "Plaintiffs have provided sufficient facts to go forward on their claim that Ohio's criminal trespass statute may be unconstitutionally vague, as applied to them by the City, for not providing adequate notice that individuals may be deprived of liberty or property interests for sheltering in a public space."

Monell: "Plaintiffs have provided sufficient facts to go forward on their claim that the City has a policy or custom of evicting and arresting unhoused persons who cannot secure shelter, and that the City's policy or custom has violated Plaintiffs' constitutional rights."

Although the majority of these claims failed, they illustrate the legal hurdles to removal of encampments. Even where camps are not relocated, legal frictions emerge. Localities attempting simply to clean streets

Continued on page 39

HOMELESSNESS, *cont'd from page 35*

and remove debris are ensnared in Fourth Amendment arguments. In *Proctor v. District of Columbia*, no. 18-cv-701 (D.D.C Nov. 27, 2018), plaintiffs alleged that the District unreasonably considered property abandoned when a resident was absent during the cleaning or left the site after the cleaning began, and that the District's signage "misleads homeless residents about how the District will treat certain unattended items." And in *Sullivan v. City of Berkeley*, no. 17-06051 (N.D. Cal. Jan. 19, 2018) the court permitted plaintiffs' Fourth Amendment claims to proceed where they alleged facts showing the city, on multiple occasions, "collect[ed] and store[d] property without notice, and in a way that [did] not allow plaintiffs to retrieve it in a usable condition (or at all)."

It is clear that housing unaffordability, driven by chronic poverty, unemployment and earnings too meager to pay skyrocketing rents, is a major cause of the homelessness crisis. Municipalities are pushing to address the problem, offering federally-funded housing vouchers, building temporary structures, rezoning to allow greater density, purchasing or leasing defunct hotels, and taking other steps to increase the number of available dwellings.[6] But adding supply will not, by itself, solve the persistent homelessness dilemma. A 2014 study concluded that fully one-quarter of homeless persons suffered from serious mental illness, with upwards of 45% being mentally unstable.[7] Add to this the significant instance of alcoholism and drug addiction among the displaced population and it becomes evident that only a multi-faceted approach, combining federal, state and local resources that address the spectrum of underlying causes, will begin to solve America's homeless problem. Until then, judicial pressure on municipal decision makers will no doubt continue. **M.**

Notes

1. 4700 - 2020 Greater Los Angeles Homeless Count—Skid Row (lahsa.org).
2. State of Homelessness: 2020 Edition - National Alliance to End Homelessness.
3. "The Point-in-Time (PIT) count is a count of sheltered and unsheltered people experiencing homelessness on a single night in January." Point-in-Time Count and Housing Inventory Count - HUD Exchange
4. State of Homelessness, *supra* note 2.
5. *Id.*
6. See for example, Seattle's multi-pronged approach: https://kingcounty.gov/depts/community-human-services/housing/services/homeless-housing.aspx.
7. Homeless Mentally Ill Facts and Figures : Mental Illness Policy Org.
8. https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/housing-shelter.

