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# Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

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## THE SUM OF THE PARTS: MUNICIPALITIES TAKE AIM AT GHOST GUNS

GUN CONTROL ACT OF 1968•MAGAZINE SIZE LIMITS BACKGROUND CHECKS•MAYOR AND CITY COUNCIL OF BALTIMORE V. POLYMER80 LLC LIMITATIONS ON MAGAZINE SIZE•SECOND AMENDMENT•UNDETECTABLE FIREARMS ACT OF 1988•ASSAULT WEAPONS BANS•PROTECTION OF LAWFUL COMMERCE IN ARMS ACT•CITY OF CINCINNATI V. BERETTA USA, INC.•STRICT SCRUTINY PEOPLE OF CALIFORNIA V. POLYMER80 LLC•RED FLAG LAWS•FEDERAL FIREARMS ACT OF 1938 HELLER V. DISTRICT OF COLUMBIA•ATF FINAL RULE•CONDITIONS ON CONCEALED OR OPEN CARRY•MCDONALD V. CITY OF CHICAGO•STATE PREEMPTION•NEW YORK PISTOL AND RIFLE ASSOCIATION V. BRUEN•GUN SHOW LOOPHOLE POLYMER80 V. SISOLAK

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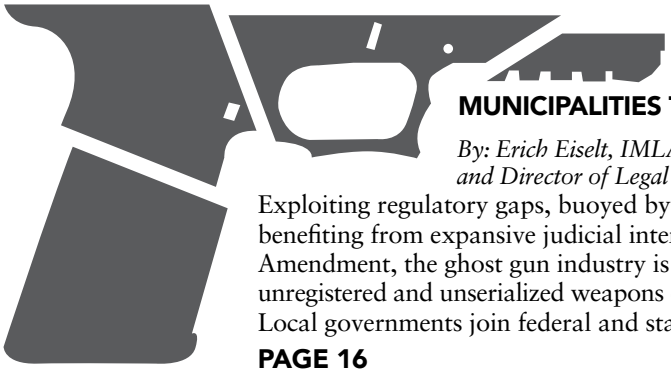
# CONTENTS

MARCH / APRIL 2023

**HOMELESSNESS IN THE BIG CITY: A CASE STUDY IN FINDING LEGAL AND PRACTICAL SOLUTIONS FOR A COMMUNITY**
*By: Marc Smith, Deputy City Attorney, City of Colorado Springs, Colorado*
After an unsuccessful effort to stop panhandling on city streets, Colorado Springs focused on a much more holistic approach to dealing with the city's homeless population, educating law enforcement, allocating social workers, and providing adequate beds to serve the unhoused. Those efforts are making a difference.
**PAGE 6**

**THE FOLLOW-THROUGH MATTERS: CONTRACTS WITH GOVERNMENTAL ENTITIES MUST BE "PROPERLY EXECUTED" NOW TO WAIVE IMMUNITY LATER**
*By: Riley Zoch, Class of 2024, Baylor University School of Law*
Governmental waiver of immunity when contracting is not as straightforward as it may seem. A number of perquisites apply, and care must be taken to ensure, or avoid, execution that will bind the locality. The author—IMLA's $5,000 Local Government Law Scholarship winner for 2023—explains.
**PAGE 11**



**THE SUM OF THE PARTS: MUNICIPALITIES TAKE AIM AT GHOST GUNS**
*By: Erich Eiselt, IMLA Assistant General Counsel and Director of Legal Advocacy, Rockville, Maryland*
Exploiting regulatory gaps, buoyed by pro-firearm politicians, and benefiting from expansive judicial interpretations of the Second Amendment, the ghost gun industry is placing thousands of unregistered and unserialized weapons on America's streets. Local governments join federal and state efforts to fight back.
**PAGE 16**

## DEPARTMENTS

**20 NEW LAWYERS**
**Balancing Work and Personal Life… Right**
*By: Todd Sheeran, City Attorney, Herriman, Utah, and Blake Pennington, Assistant City Attorney, Fayetteville, Arkansas*
Challenges to being a public servant-and-spouse-and-parent-and more.

**24 LISTSERV**
**Oh No! Another Election!**
*By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina*
Upholding the fine points of local ballot box protocol.

**26 AMICUS**
**What would a Changed "Undue Hardship" Test Under Title VII Mean for Local Governments?**
*By: Amanda Karras, IMLA Executive Director and General Counsel*
An upcoming SCOTUS ruling may may require greater religious accommodation.

**36 INSIDE CANADA**
**Implied Contracts, Injurious Affection, Unowned Property, and More**
*By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario*
Recent cases of interest.

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# Homelessness in the Big City: A Case Study in Finding Legal and Practical Solutions for a Community

MARC SMITH,
*Deputy City Attorney, City of Colorado Springs, Colorado*



## INTRODUCTION

It was the winter of 2012 and things were not going well with the homeless situation in Colorado Springs, Colorado. It had been estimated in June 2008 that there were over 500 "homeless camps" on the City's public lands, and it was clear that this number had not decreased by 2012.[1] Citizen complaints were rife regarding camping and panhandling, and elected officials felt the need to do something.

On November 20, 2012, the City Council took a drastic step and enacted an anti-solicitation ordinance targeting the downtown area.[2] While the City had for many years utilized an "aggressive solicitation" ordinance targeting solicitation near businesses and automatic teller machines,[3] this was something different. Instead, this ordinance would restrict *all solicitation* within a geographic area known as a "downtown no solicitation zone." The stated purpose of the ordinance was "to preserve and protect the beauty and economic viability of the downtown area. All solicitation in the Downtown No Solicitation Zone is disturbing and disruptive to residents and businesses and impacts social harmony and economic viability of the City as a whole."[4] The Downtown No Solicitation Zone consisted of a twelve-block area in the heart of the commercial area of downtown Colorado Springs.[5]

Predictably, the ordinance was quickly challenged by attorneys from the American Civil Liberties Union ("ACLU").[6] In an action to enjoin enforcement of the ordinance, the ACLU argued that the complete ban on solicitation violated the First Amendment of the U.S. Constitution.[7] The U.S. District Court for the District of Colorado found that the plaintiffs met all four elements for a preliminary injunction,[8] stating:

> [O]ne, that they will suffer immediate and irreparable injury unless the injunction issues; two, that the threatened injury outweighs whatever damage the injunction will cause to the other party; three, that the injunction if issued will not be adverse to the public's interest; and, four, that the plaintiff has a substantial likelihood of success on the merits.[9]

The court noted that the Supreme Court has many times determined that solicitation is protected speech under the First Amendment.[10] For this type of restriction to be valid, the ordinance must be narrowly tailored to serve a significant governmental interest, be content neutral, and must leave open ample alternative channels of communication.[11]

The parties stipulated that promotion of safety for people in the public rights-of-way, free flow of traffic, and protection of businesses were "significant, important governmental interests." However, there was a lack of testimony that these interests were being addressed by the legislation.[12] Instead, the court referenced testimony that "residents and visitors explain[ed] that they felt uncomfortable about the presence of many homeless people, people who may appear bedraggled or mentally ill . . . regardless of whether these people are actually engaging in solicitation."[13] The court did, however, find that the City had a significant governmental interest in protecting businesses within the Downtown No Solicitation Zone.[14] The court then determined that the ordinance was not narrowly tailored but instead "reaches a broad range of protected speech that does not present the harms, intrusion on the convenience and comfort of pedestrians that the ordinance seeks to prevent."[15] In light of these findings, the court enjoined the City from enforcing the ordinance.[16] The City entered into a stipulation with the plaintiffs, including a monetary settlement[17] and ultimately repealed the ordinance.[18]

### II. Setting the Stage

Despite this inauspicious beginning in its response to the homelessness issues facing

the City, Colorado Springs has subsequently made substantial progress in its efforts to address its residents' and visitors' concerns while also providing necessary services to individuals who are experiencing homelessness. But first, some background: According to the U.S. Census Bureau, Colorado Springs' estimated population as of July 1, 2021 was 483,956 residents.[19] This was an increase of over 4,000 residents from the year before, and more than 67,500 residents greater than the 2010 population of 416,427.[20] With this increase in population, there had been extreme pressure on housing stock and affordability.[21] It was estimated that Colorado Springs had a housing shortage of 12,135 units.[22]

The United States Interagency Council on Homelessness, a council comprised of members of 19 wide-ranging federal agencies[23] has found that when housing costs are more affordable and housing opportunities are more readily available, there is a lower likelihood of households becoming homeless, and households who do become homeless can exit homelessness more quickly and with greater likelihood of sustaining that housing long-term.[24] Simply put, in Colorado Springs the population had boomed, housing demand increased, and prices rose substantially—and all these factors continue to escalate year after year and put sustained pressure on issues related to persons experiencing homelessness.

While these factors might lead to the conclusion that the local situation is trending in the wrong direction, the numbers suggest the opposite is true. In 2012, it was estimated in the City's Point in Time ("PIT") count that there were 257 chronically homeless people in the City.[25] That number rose to a high of 387 in 2016.[26] By 2021, following massive efforts by the City and the non-profit community which will be discussed below, the number of chronically homeless people in Colorado Springs was down to 182—the lowest PIT count number since 2011.[27]

**III. Legal Landscape**

The legal landscape surrounding issues related to people experiencing homelessness in Colorado has evolved significantly since the U.S. Supreme Court issued its 2015 opinion in *Reed v. Town of Gilbert*.[28] While localities across the nation, including Colorado Springs, immediately saw impacts to their land use and sign codes because of *Reed*, the impact of that decision went far beyond signs.[29] *Reed* stands for the proposition that any content-based restriction will be reviewed by the courts under a strict scrutiny analysis.[30] This means any content-based restriction must "'require[] the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'"[31]

Following that Supreme Court decision, a Colorado-specific panhandling case was decided based on the principles set forth in *Reed*.[32] In *Browne v. City of Grand Junction*, the U.S. District Court for Colorado struck down Grand Junction's anti-panhandling and solicitation ordinances, finding that they were "over-inclusive because they prohibit speech that poses no threat to public safety."[33] Grand Junction's ordinances were similar to Colorado Springs' in that they restricted panhandling and solicitation in specific areas at specific times.[34] In terms of legislation regarding panhandling and solicitation, the trend in Colorado following the cases in both Colorado Springs and Grand Junction suggest a high level of scrutiny by the federal courts.

While the *Browne* case certainly caused impacts across Colorado, a Ninth Circuit case from Boise, Idaho also had a profound impact on legal efforts in Colorado Springs regarding persons experiencing homelessness. In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals held that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[35] The court, quoting a vacated opinion in an earlier Ninth Circuit case stated:

> [W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place . . .
> [w]e hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'[36]

While Colorado is in the Tenth Circuit, *Boise* raised the attention of the City of Colorado Springs and helped bring to the forefront a more holistic approach to solving legal issues associated with people experiencing homelessness.

**IV. A Services-Based Model**

An important step to ensuring that a city can adopt and enforce ordinances that contribute to the reduction of homelessness is to create a services-based model within a community. As *Martin v. Boise* illustrated, in a city with a large population of people experiencing homelessness it is necessary

*Continued on page 8*



**Marc Smith** has been with the Office of the City Attorney in Colorado Springs, Colorado since 2004. After beginning with the City as an intern between his second and third years of law school, he is now a Deputy City Attorney and oversees corporate, legislative and utilities legal affairs.
In his 18 years with the office, Marc has represented nearly all City operational departments and was Legislative Counsel to the City Council. In 2022 he was designated an IMLA Local Government Fellow. Marc is a graduate of the University of Colorado at Colorado Springs, has a Master of Sports Administration degree from Ohio University, and earned a Juris Doctorate from the University of Mississippi School of Law, better known as Ole Miss.

**Homelessness** *cont'd from page 7*

to provide services, including shelter beds, to ensure that any ordinances that a city adopts can withstand challenge. One of the most impactful steps the City of Colorado Springs took was to hire a "Homelessness Prevention and Response Coordinator."

In 2017, the City hired a social worker whose sole job is to coordinate and provide services for the homeless population, in concert with the City's Police and Fire Departments, Community Development Division, and many local entities that specialize in homeless-related issues.[37] The Homeless Prevention and Response Coordinator developed the 2019 Colorado Springs Homeless Initiative to guide the City's efforts in reducing homelessness in the community.[38] In addition to coordination with other departments of the City, the Community Development Division, in which the Homeless Prevention and Response Coordinator is located, is tasked with obtaining and administering federal Emergency Solutions Grant ("ESG") funding and Community Development Block Grant ("CDBG") funding to help provide housing and services to people experiencing homelessness.[39]

The City has further expanded the services and programs to ameliorate homeless issues substantially over the years. In addition to the Homelessness Prevention and Response Coordinator position, the City's Police Department established a Homeless Outreach Team ("HOT Team") that focuses on issues related to people experiencing homelessness.[40] The HOT Team consists of six officers[41] tasked with making direct contact with people experiencing homelessness and directing them to services to assist them with resources to address financial, substance abuse, and sheltering issues. Part of these duties includes helping people find shelter beds in the case of winter weather.[42] These efforts have undoubtedly saved countless lives.

In addition to the HOT Team, the Police Department has also established the Downtown Area Response Team ("DART"). Consisting of 14 officers,[43] DART is tasked with enforcing ordinances in the downtown area that, in addition to its general policing efforts, specifically address issues related to homelessness. The Colorado Springs Fire Department has created a Homeless Outreach Program through its Community and Public Health Division that provides access to services during medical calls with individuals experiencing homelessness.[44] Finally, the City created a Homeless Outreach Court docket in its Municipal Court for homeless individuals who have been cited with municipal ordinance violations.[45] The Municipal Court focuses on referring individuals to local services to facilitate positive outcomes for those seeking help.

The City's Homeless Prevention and Response Coordinator and the Community Development Division Director also coordinates with the Pikes Peak Continuum of Care ("PPCoC"). The PPCoC consists of government officials and non-profit service providers,[46] operating under a three-year strategic plan and coordinating on homeless issues throughout the City and El Paso County.[47] The stated mission of the PPCoC is "to end homelessness in the Pikes Peak Region."[48] PPCoC also administers the local Homeless Management Information System ("HMIS"). HMIS is required by the U.S. Department of Housing and Urban Development ("HUD") to obtain federal funding.[49] All of these efforts are necessary to generate an effective community response to provide services to individuals experiencing homelessness.

**V. The Necessity of Shelter Beds**

The single most important element for cities wishing to enforce their public camping prohibitions is the availability of shelter beds. As illustrated in *Martin v. Boise*, under the Eight Amendment courts are wary of allowing enforcement of municipal ordinances targeting camping on public grounds without the availability of alternative shelter arrangements.[50] To further illustrate this point in Colorado, the City and County of Denver had an urban camping ban declared unconstitutional by a county court judge, citing the *Martin* case. However, this was overturned by the district court following acknowledgement that the defendant in the case had, in fact, been offered a shelter bed and refused prior to being cited under the prohibition on camping in public places.[51] A petition for a *writ of certiorari* was denied by the Colorado Supreme Court,[52] leading to the conclusion that the availability of shelter beds can protect a city's enforcement of restrictions on public camping in Colorado.

In light of these concepts and to ensure enforceability of its camping ordinances, the City of Colorado Springs currently maintains more than 750 shelter beds, and hundreds are normally left unfilled per night.[53] To facilitate the enforcement of the ordinances, in 2018 the City provided $500,000 for the expansion of low barrier shelter capacity for the Salvation Army[54] and at the "Springs Rescue Mission Campus" in the southwest portion of downtown Colorado Springs.[55] The Springs Rescue Mission Campus is within walking distance of the area that was part of the Downtown No Solicitation Zone that was the subject of the 2012 litigation.[56] The Springs Rescue Mission provides shelter beds and coordinates on-site with the Veterans Administration, the Department of Human Services and Adult Protective Services, the Pikes Peak Library District, the Pikes Peak Workforce Center, and many private non-profit service providers.[57] There is a daily posting online displaying the number of available shelter beds at the five main shelters within the City.[58] If

*Continued on page 14*

**Governmental Entities** *cont'd from page 13*

21. *Id.*
22. *Id.* at 350.
23. 602 S.W.3d 521 (Tex. 2020).
24. *Id.* at 524–25.
25. *Id.* at 525.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 525–26.
32. *Id.* at 526.
33. *Id.* at 526, 531. The Court cites 19 Tex. Admin. Code §§ 100.1033(a)-(b), .1101(b)-(c) for a Charter School's delegation of powers and duties.
34. *Id.* at 532.
35. *Id.*
36. *Id.* at 533.
37. *Id.*
38. *Id.*
39. *Id.*
40. *See* City of Port Isabel v. Meza, No. 13-19-00070-CV, 2020 Tex. App. LEXIS 5031, at *3–4, *7–8 (Tex. App.—Corpus Christi July 2, 2020, pet. denied).
41. *See id.* at *3–4, *12–13.
42. *See id.* at *8–9.
43. *Id.* at *7–8.
44. *Id.*
45. *Id.* at *12.
46. *Id.*
47. *Id.* at 12–13.
48. Richmond Printing v. Port of Hous. Auth., 996 S.W.2d 220, 224 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
49. City of Bonham v. Sw. Sanitation, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied).
50. Panhandle Const. Co. v. Spearman, 89 S.W.2d 1053, 1055 (Tex. App.—Amarillo 1935, no writ).

**Homelessness** *cont'd from page 8*

there are shelter beds available, the City will enforce its camping ordinances.

**VI. Legislative Tools**

In addition to providing numerous services, it is important to have local ordinances regulating criminal behavior that sometimes occurs during interactions with people experiencing homelessness. These quality-of-life ordinances are necessary to assist the community and the municipal government find solutions. In Colorado, municipal ordinance violations are misdemeanor offenses with penalties capped at not more than $2,500, imprisonment of not more than 189 days, probation, or a combination thereof.[59] In 2010, the City Council passed an ordinance making it "unlawful for any person to camp on any public property, except as may be specifically authorized by the appropriate governmental authority."[60] A similar ordinance is also in effect regarding camping on City parks property, including parking and camping in a house trailer or camper trailer after the parks' closing time.[61] These ordinances are enforced when low barrier shelter bed capacity is available.

One of the more significant recent ordinances adopted by Colorado Springs is titled "Camping and Waste Deposit Within Public Stream/Public Stream Riparian Zone Prohibited."[62] In 2018, following water quality sampling conducted by the U.S. Geological Survey, the Colorado Department of Public Health and the Environment's Water Quality Control Commission determined that Fountain Creek, which traverses the length of the City, contained undesirable levels of *e. coli.* In response, the City Council adopted an ordinance making it illegal to camp within a stream, streambank, or within 100 feet from the edge of a streambank.[63] Additionally, there is specific language regarding dumping of waste within the riparian zone.[64] This ordinance was drafted and adopted to address the water quality concerns brought to the City's attention by the State and after citizens and City staff witnessed individuals urinating, defecating, and bathing within the City's streams. Mayor John Suthers stated, "[t]hat is truly a health, safety and wellness measure, trying to make sure we aren't polluting our waters."[65] Another concern is frequent flash flooding that has occurred and led to injuries and deaths through drowning.[66]

Also in 2018, the City extended its prohibition on extended parking of recreational vehicles in residential areas to all public rights-of-way.[67] The City Code makes illegal "[a]ny recreational vehicle parked on . . . a public right-of-way for a period of time greater than that necessary for the expeditious loading and unloading of passengers or property."[68] This ordinance was passed following an observation that many recreational vehicles were congregating on City streets just outside of residential areas in the downtown part of the City. Violation of this ordinance is not a criminal offense—instead, it results in a parking ticket with escalating fines up to, and including, potential impoundment of the recreational vehicle after multiple offenses.

Another traffic safety ordinance that the City of Colorado Springs has adopted relates to the use of medians on certain roadways in the City. Solicitation from medians was a dangerous safety concern throughout the mid-2010s in Colorado Springs. It was not uncommon to see people on medians soliciting for money at very crowded intersections with fast-moving vehicles. In 2017, the City Council passed an ordinance at the request of the City Traffic Engineer that made it unlawful to, "access, use, occupy, congregate or assemble on or about any median that has been posted with a sign pursuant to this section prohibiting such access, use or occupancy."[69] To ensure this code provision was narrowly tailored to

meet a compelling government interest, mainly traffic and pedestrian safety, the City limited the number of medians in which the restriction applies. The prohibition covers only medians that have been posted with a sign restricting access,[70] are located on any roadway with a posted speed of 30 miles per hour or greater and are classified as a freeway, expressway, parkway, principal arterial, or minor arterial, are less than four feet in diameter, and do not have a flat grade of eight percent or less.[71]

This measure has effectively limited the number of medians from which people can solicit; however, any community wishing to implement this type of ordinance must take extreme care to demonstrate specific evidence with a strong link to pedestrian safety to support the restrictions. Additionally, the regulation must be narrowly tailored based on this evidence regarding a specific type(s) of median instead of a wholesale prohibition on occupying all or most medians in the community.[72]

The final major piece of legislation that the City has adopted is known as the "Pedestrian Access Act."[73] This ordinance prohibits individuals from sitting, kneeling, reclining or lying down in the Downtown Commercial District and the Old Colorado City Commercial District between the hours of 7:00 A.M. and 10:00 P.M. and until 3:00 A.M. on Friday and Saturday nights.[74] It was adopted in 2016[75] in response to the downtown public rights-of-way being overrun by individuals sitting and lying in the path traveled by business owners, visitors, and residents. The Downtown Commercial District was recently expanded to include areas that have developed over the last few years, including the U.S. Olympic & Paralympic Museum, Colorado College's new NCAA Division I hockey arena, and a new minor league soccer stadium.[76] The sole purpose of the legislation is to allow access through public rights-of-way in highly crowded areas that contain facilities and services of high civic value. There have been increasing police calls for services related to the prohibited behaviors within the area, although the ordinance does contain affirmative defenses for medical emergencies, mobility devices, areas subject to City-issued permits, for people seated on objects intended for sitting furnished by the City, and those awaiting public transportation.[77]

**VII. The Effectiveness of a Holistic Approach**

It takes efforts on several fronts to achieve success in dealing with issues related people experiencing homelessness. Colorado Springs has enacted tough municipal ordinances to combat undesirable behaviors; however, the only way it has been able to enforce these ordinances effectively is through providing ample services and partnering with dedicated non-profit organizations committed to helping people find transitional and permanent housing. Colorado Governor Jared Polis remarked:

> I think Colorado Springs has had a more successful approach to reducing homelessness than Denver and other cities, having someone familiar with best practices . . . It has a long way to go, but it hasn't gotten any worse, and we want other cities to emulate that.[78]

**Conclusion**

Colorado Springs will never completely eliminate homelessness. But a multi-faceted approach has proven that the number of people experiencing homelessness can be successfully reduced. This is even during a time of great population increase, inflationary pricing, and high demand for any housing, let alone affordable housing. While there is still much work to be done, a commitment to these principles can lead to a successful regulatory regime, buy in from residents, and a program that helps people get off the streets permanently.

*Continued on page 22*



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**New Lawyers** *cont'd from page 21*

**Get a hobby.** Many members find balance in their hobbies. Whether that involves throwing pottery, sitting down to read, doing crossword puzzles, or spending time in the great outdoors, these activities "contribute to a healthy lifestyle for the long term."

**Give yourself grace.** Life will not always be a walk in the park, and it's important to set reasonable expectations for ourselves. One member acknowledges that "perfection is not attainable, and therefore it's really important that we forgive ourselves if we are trying our best but still fall short." Another member said, "I now know that there are going to be periods when personal and family commitments intercede more and other times when I have seemingly endless time and energy to devote to my work. And that's okay. Giving myself grace and having a forgiving perspective has eventually brought everything into equilibrium." ML

## Notes

1. In this article, we will quote several responses anonymously. And to ensure flow, it is safe to assume that anytime we're quoting something, it came from a member who submitted a response, without our specifying each time that it came from a member.
2. Yi-Yuan Tang, et al., *The neuroscience of mindfulness meditation*, Nature Reviews Neuroscience, April 2015 at 213-225
3. Shian-Ling Keng, et al., *Effects of mindfulness on psychological health: A review of empirical studies*, Clinical Psychology Review, Volume 31, Issue 6, 2011 at 1041-1056
4. Philippe R. Goldin, et al., *Effects of Mindfulness-Based Stress Reduction (MBSR) on Emotion Regulation in Social Anxiety Disorder*, Emotion, February 2010 at 83-91
5. Visit http://www.klauckwork.com for more information about practicing mindfulness including other tips and exercises.

**Homelessness** *cont'd from page 15*

1. *See* https://coloradosprings.gov/police-department/page/homeless-outreach-team.
2. Colorado Springs, Colo., Ordinance 12-100 (Nov. 20, 2012).
3. Code of the City of Colorado Springs 2001, as amended ("City Code") § 9.2.111.
4. Ordinance 12-100 was codified in City Code § 9.2.111.
5. City Code § 9.2.111 (B)(repealed).
6. Pikes Peak Justice & Peace Commission v. City of Colorado Springs, 12-cv-03095-MSK (U.S. Dist. Colo. 2012).
7. *Id.* at p .4.
8. Fed. R. Civ. P. 65.
9. *Pikes Peak Justice & Peace Commission, supra* note 6 at p. 10. The Court drew the elements of the preliminary injunction analysis from *Schrier v. University of Colorado,* 427 F.3d 1235 (10th Cir. 2005).
10. *Id.* at p. 13 *citing* Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); and United States v. Kokinda, 497 U.S. 720 (1990).
11. *Id.* at p. 13.
12. *Id.* at p. 14.
13. *Id.* at p. 15.
14. *Id.* at pp. 18-19.
15. *Id.* at p. 22.
16. *Id.* at p. 32.
17. As part of the overall settlement of the case the City agreed to pay $110,000 to the ACLU.
18. Colorado Springs, Colo., Ordinance 13-22 (Apr. 11, 2013).
19. United States Census Bureau, "Quick Facts", https://www.census.gov/quickfacts/coloradospringscitycolorado.
20. *Id.*
21. Breeanna Jent, *Nearly All El Paso County Renters, Half of Homeowners Concerned About Housing Affordability*, Colorado Springs Gazette (Jun. 8, 2022), https://gazette.com/premium/nearly-all-el-paso-county-renters-half-of-homeowners-concerned-about-housing-affordability-poll/article_97404cb4-e6a2-11ec-b1c8-9f36e6a9351c.html.
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