

Homelessness and Urban Camping: Ordinances After *Martin v. City of Boise*

Lack of affordable housing, unemployment, substance abuse, and drug addiction run rampant across the nation. People flock to city council meetings and pepper social media with concerns about homeless populations. Residents want to enjoy public spaces and feel safe using parks. Residents want to help the poor. Often the homeless have no place to go.

Balancing the competing interests is a struggle for municipalities attempting to adopt comprehensive plans to address homelessness. It is also a task fraught with evolving legal considerations.

Courts have long recognized that *conduct* may be regulated, but not the *status or condition* of being homeless.

Ordinances typically focus on activities engaged in by homeless persons, such as camping or storing belongings on public property (urban camping), being



inebriated, bathing, or urinating in public and aggressive panhandling. These ordinances may be adopted alone or in combination with programs to increase

shelter space and improve social services. However, the laws are being aggressively challenged, creating a patchwork of cases and risks for municipalities.

The Ninth Circuit Court of Appeals (which includes Arizona) recently struck down Boise's urban camping ordinance in *Martin v. City of Boise*. Boise had adopted camping and disorderly conduct ordinances, similar to those in Arizona. There were three shelters in Boise, all run by private, nonprofit organizations. One shelter frequently

had to turn away people due to lack of space. The remaining two, both operated

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The New Arizona Limited Liability Company Act

The Arizona legislature recently revised the laws governing limited liability companies in Arizona. Drafted by a committee of the State Bar of Arizona in which the author participated, the law is based on provisions that have been uniformly adopted in many states, but retains many of the provisions of existing Arizona law. The new law is effective for companies formed after August 31, 2019, and is effective for existing companies a year later.

Under both existing and the new law, a limited liability company is treated very much like a partnership, and the operating

agreement established by the members will govern the actions of the company, its members, and managers. The new law provides rules to govern if there is no operating agreement, or for situations not covered by the operating agreement. With a few exceptions, the provisions of the operating agreement will govern, even if they are contrary to the provisions that would otherwise be applicable. The new law does not affect any provisions relating to taxation of limited liability companies. Members and managers of limited liability companies remain insulated from liability for the debts of the company or of the other members solely because they are members or managers.

It will not be necessary to change the provisions of any existing operating agreement to comply with the new law, because those provisions will remain in force. Now is a good opportunity, however, for members of existing companies to review their operating agreements, to ensure that the agreements still reflect the members'

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NEW FACES



Melissa S. San Angelo (Tucson Office)

Melissa's litigation practice includes general civil matters, employment law, insurance defense and the defense of liability claims against health care facilities and providers. She has experience representing clients in employment matters, including wage and hour, discrimination, wrongful termination, and harassment claims.

She has handled various insurance defense matters, including wrongful death and personal injury cases.

Before joining Gust Rosenfeld, Melissa clerked for the Honorable Sarah R. Simmons and the Honorable Richard E. Gordon of the Superior Court of Arizona, Pima County. She also spent four and a half years in private practice in Southern California.



John C. (Jack) Shafer, III (Phoenix Office)

Jack focuses his practice in the areas of public finance and tax. With ten years of experience working as an Assistant City Attorney for three large Phoenix-area cities, he has broad experience in municipal finance, including bonds, taxes, city regulatory licensing, procurement, budgets, and franchise law. He represents colleges and

universities, special districts, cities, towns and other units of local government in Arizona municipal finance and tax matters.

Jack also has experience in drafting contracts, legislation, city

codes and ordinances. He is a member of an ad hoc team formed to represent the interests of all 91 Arizona municipalities in revising an intergovernmental agreement with the Arizona Department of Revenue (ADOR). He also is a prior member of the ADOR State and Local Uniformity Group committee.

In addition to his municipal attorney experience, Jack worked for Ernst & Young as a Tax Consultant in its State and Local Tax Group, and as Tax Counsel for the ADOR.



Jesi L. Wolnik (Phoenix Office)

Jesi practices in the areas of real estate transactions and litigation, commercial litigation, professional liability, arbitration/mediation, and probate.

With more than 15 years experience as a licensed real estate broker, Jesi handles a variety of professional liability issues for real estate professionals, including assistance during audits or investigations by the Arizona Department of Real Estate.

Jesi has extensive experience resolving real property, quiet title, easement and access disputes, as well as boundary issues. She also advises clients in agreements for sale and commercial and development transactions.

Jesi teaches statewide courses for the Arizona Association of REALTORS®, as well as having served on the association's legal hotline.

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by a Christian nonprofit, limited stays to 17 nights for men and 30 nights for women and children, unless the individuals joined a discipleship program. There was a 30-day ban against re-admittance, with winter exceptions.

The plaintiffs challenged Boise's ordinances under the Eighth Amendment, which prohibits cruel and unusual punishment, and sought damages under 42 U.S.C. § 1983. In response, the Boise Police enacted a special order that prohibited enforcement on any night where no shelter had space available. The shelters were to notify police if they reached capacity. The religious-based shelters never reported reaching full capacity.

The Court examined the core Eighth Amendment issue, holding that the Amendment prohibits the imposition

of criminal penalties for camping on public property for homeless individuals who cannot obtain shelter. The Court reasoned that sitting, lying, and sleeping are universal and unavoidable consequences of being human and are inseparable from status. "[A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."

Not deterred by the police order to prohibit enforcement where no shelter space was available, the Court found that the city could not coerce an individual to attend religion-based programs by the threat of prosecution. Moreover, by the time an individual discovered there was no shelter space available at one facility, it may be too late to seek shelter at other

facilities.

It is not entirely clear what the future holds after *Martin v. City of Boise*. More homeless shelters are needed. Difficult questions include who bears the cost of shelters, where they are best located, and how to operate them. Community stakeholders need to examine funding options for shelters and more generally affordable housing needs. One thing is evident: It is time to reexamine urban camping ordinances.

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Trish concentrates her practice on public law, civil litigation, employment law and alternative dispute resolution.

New European Union Regulations Require Review of How Arizona Businesses Collect and Maintain Data

Over the past few months, you've probably received several notices from companies that store data about you—such as Facebook, Instagram, Google, and Apple—to explain how their privacy practices are changing. These changes are due in large part to the European Union's General Data Privacy Regulation (GDPR) which became effective on May 25, 2018. The GDPR provides additional rights to consumers, giving them increased control over their data. Even though your company operates in Arizona, you may have new obligations under GDPR if you have data of persons who reside in the European Union (EU) or process data there.

Below are some useful tips to determine whether your privacy policy or practices need revision.

1. **Conduct a data audit.** Determine what customer data you maintain electronically and on paper. If you do business in the EU or do business with persons in the EU, GDPR applies. An example of data you may maintain includes mailing lists with addresses and stored credit card numbers.
2. **Review your website privacy policy.** The GDPR requires that businesses that operate in the EU or who do business with persons who reside in the EU provide notice in a privacy policy regarding collection and maintenance of data and third-party sharing of data. Provide notice of changes to your privacy policy to all consumers. Many international companies have simply raised the bar for all consumers with privacy practices and notices to meet the requirements of the GDPR.
3. **Obtain affirmative consent of consumers before collecting personal data.** The GDPR requires, and it is a good privacy

practice to obtain, the consent of consumers when collecting data from them. The GDPR considers the IP address and tracking cookies to be personal data requiring affirmative consent. Provide consumers with clear notice of how the data you collect will be used and obtain unambiguous consent. The GDPR also requires parental consent to collect or process personal data of children under 16 and additional consent should be obtained from a parent. If you maintain data of consumers in the EU, you should consider sending an email to obtain consent to ongoing maintenance of their data.

4. **Create a data breach plan.** Unfortunately, data breaches are becoming commonplace. The GDPR requires notification of a breach within 72 hours of its discovery. A data breach plan should include all essential stakeholders including executive leadership, legal counsel, public relations staff and information technology (IT) staff. Arizona law also requires that companies notify customers of a data breach and provide credit monitoring. Plan ahead and be prepared.
5. **Train employees on data privacy expectations.** The increased privacy requirements of the GDPR provide a good opportunity to train employees on expectations regarding data privacy. Data privacy is a shared responsibility, not just the responsibility of your IT Department. Employees should be encouraged and rewarded for reporting data privacy concerns—such a report could avoid a data breach.

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Carrie practices in the area of public law.

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The Best Lawyers in America® 2019 Lists 23 Gust Rosenfeld Lawyers as Leaders in Their Field

In addition, three Gust attorneys recognized as a 2019 “Lawyer of the Year”

Gust Rosenfeld is pleased to announce that 23 of the firm’s attorneys across 21 practice areas were selected by their peers for inclusion in The Best Lawyers in America® 2019. Also, three Gust Rosenfeld attorneys were recognized by Best Lawyers® as a 2019 “Lawyer of the Year” in Phoenix.

Christina M. Noyes was named the Best Lawyers® 2019 Franchise Law “Lawyer of the Year” in Phoenix. Robert D. Haws was named the Best Lawyers® 2019 Education Law “Lawyer of the Year” in Phoenix. Susan D. Goodwin was named the Best Lawyers® 2019 Municipal Law “Lawyer of the Year” in Phoenix.

The following Gust Rosenfeld attorneys were named in The Best Lawyers in America® 2019:

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- **Mark L. Collins** (Litigation – Real Estate; Real Estate Law)
- **Peter Collins, Jr.** (Commercial Litigation, Insurance Law, Personal Injury Litigation – Plaintiffs)
- **Patrick J. Farrell** (Corporate Law)
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ET·Y·MOL·O·GY COR·NER Goblins, Trolls & Gnomes

Fall is the time for mischievous little goblins (12th century Old French “gobelin”) hiding in shady cracks and crevices, giant lumbering trolls (14th century Old Norse “troll” or “trod”) skulking under dark bridges and ghoulish gnomes (Medieval Latin “gnomus”) wandering the countryside frightening the inhabitants, demanding their due or threatening consequences. Some believe they are only mythical creatures found in the pages of dusty children’s books, but I know differently. I’m prepared to meet their demands to avoid their evil tricks. Halloween (17th century Scotland, aka All Hallows’ Eve) always brings back wonderful memories.

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*Rick, our etymologist, practices
in the areas of commercial
law and litigation.*





Gust Rosenfeld was ranked as the #1 bond counsel in Arizona by par value in the 2018 midyear rankings issued by the national newspaper The Bond Buyer. Gust Rosenfeld was also ranked #8 in the southwest region.

Barbara Rodriguez-Pashkowski was recognized among the Most Influential Women in Real Estate by AZRE Magazine.

Christina M. Noyes and **Charles W. Wirken** were recognized among the Top 100 Lawyers in Arizona for 2018 by AzBusiness magazine.

Wendy N. Weigand and **William S. Sowders** gave presentations on avoiding malpractice claims and voir dire and jury selection at the Arizona Podiatric Medical Association Summer educational program in Coronado, California.

Wendy N. Weigand created and moderated a continuing education program for the State Bar of Arizona Construction Section entitled “A Panel of Architects-Topics from Retention to Close Out and Many Things In Between.” Also, Wendy was elected secretary of the State Bar of Arizona Construction Section.

Dick Whitney was reelected President of the Phoenix Chamber Music Society to lead its 59th season. The society brings the world’s finest chamber groups to Phoenix and simultaneously has five major educational and outreach programs for middle school and high school students in the Phoenix area. For further information see PhoenixChamberMusicSociety.org

Charles W. Wirken co-chaired the American Academy of Appellate Lawyers Fall Meeting; he moderated the presentation “Social Media for Appellate Lawyers.” Also, Chas now serves on the City of Mesa’s Judicial Advisory Board for a three-year term beginning July 2018.

Rob Haws, Jennifer MacLennan, Jim Giel, Susan Segal, Carrie O’Brien, Kyle Mabe, and Shelby Exposito all spoke at the Arizona School Boards Association law conference in early September.

Christopher M. McNichol and **Kent E. Cammack** spoke at the Arizona Trustee Association Convention in August.

Jennifer N. MacLennan spoke at the Arizona School Administrator’s Principal and the Law Conference in September.

In September, **Scott A. Malm** spoke at an Arizona State Escrow Association meeting and at the Land Title Association of Arizona Annual Convention in October.

John L. Hay was one of the presenters of a program on LLCs to the Arizona Attorney General’s office in October.

Jay R. Graif presents at the National Construction Defect Conference in Fort Lauderdale, Florida, in November.

Barry M. Markson will be the Master of Ceremonies for the 2018 Maricopa County Bar Foundation Golf Tournament (The Tim Huff Pro Bono Golf Tournament) on Saturday, November 17, at the Papago Golf Course.

Updated: Judgments Renewal Statute

Like most things, judgments have a shelf life. The Arizona Legislature just enacted a law that keeps them on the shelf a little longer, but it left open a question about how to interpret the “use by” date.

Historically, an Arizona judgment expired five years after the Clerk of Court entered it unless the holder of the judgment, i.e., the judgment creditor, timely renewed it. After expiration, the judgment creditor may not collect or otherwise enforce the judgment. The judgment has, in a word, lapsed. Before it would so lapse, a judgment may be renewed by filing either a lawsuit or an affidavit to renew it. If renewed by way of affidavit—the route most judgment creditors take if they are renewing—the affidavit must be filed within the last ninety days before the judgment expires.

Effective August 3, 2018, the Legislature extended the prior five-year shelf life to ten years. While it’s clear then that judgments entered on and after August 3, 2018, will last for ten years, (with the same renewal options, the law did not expressly make the change retroactive. The question thus arises whether judgments on the books as of August 3, 2018, will automatically get the benefit of the new ten-year period, or whether those judgments still will require a renewal within the previously applicable five-year timeline from the initial filing...or possibly even some hybrid timeline that involves both 5- and 10-years.

Stay tuned as we await clarification from the Arizona Legislature or the Courts.

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wishes. The new law makes it clear that an operating agreement can be a written document, an oral agreement, or both so that all agreements among members of a company may be considered an operating agreement and thus are enforceable.

The new law sets out the duties of members and managers to each other and the company. The duty of loyalty includes the duty to act on behalf of the company only in its interests and not when having an adverse interest to the company. It specifically prohibits taking an opportunity of the company and prohibits competition with the company. Before taking action on behalf of the company, the new law requires disclosure to other members and managers of any conflicts of interest that may exist. The duty of care requires

refraining from engaging in grossly negligent or reckless conduct or willful or intentional misconduct. The operating agreement can vary or eliminate these duties, but it cannot eliminate the implied duty of good faith and fair dealing or the duty to refrain from willful or intentional misconduct.

The new law makes it clear that the members can restrict the transferability of membership interests. The creditors of a member cannot foreclose on that member's membership interest, but can only receive distributions the member would otherwise receive. Management of the company may be by the members themselves or managers appointed by the members, and the new law sets forth what the authority of each member and man-

ager is, depending on the situation, if the operating agreement does not spell it out.

If you have any questions about an existing limited liability company or wish assistance in forming or management of a company, a number of the lawyers at Gust Rosenfeld are familiar with the new law and would be happy to assist.

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John focuses his general corporate and commercial law practice on representing small- and medium-sized businesses.

John served on the State Bar of Arizona committee that drafted the new LLC legislation.

ATTORNEY PET MATCH... Christopher McNichol: Tortoise / Robert Williams: Fish / Heather Bohnke: Cats

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