

Legal Q & A

Regulating the Homeless

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The problem of homelessness is an unfortunate fact of life for many Illinois municipalities. All but the smallest communities have homeless people living within their borders. Homelessness has always been a challenging issue facing municipalities. Due to the recent turmoil in the housing market, however, that issue may become even more challenging.

Often, the attraction of the homeless is an unintended consequence of municipal development. In an attempt to lure tourism and commerce, a municipality may develop and improve an area of the city. But it is not only tourists and businesses who are attracted to these improved areas. The homeless will also converge on these high-traffic areas because their odds of survival increase around a higher number of people. This influx of homeless may deter the economic redevelopment and, consequently, decrease the amount of revenue that the municipality would otherwise receive. The unfortunate irony of this is that the municipality may need those very revenues in order to maintain programs to assist the homeless. By flocking to these popular areas, the homeless may stymie the municipality's efforts to help them.

Q: *To what extent may a municipality regulate homelessness?*

A: A municipality may not prohibit homelessness altogether, but it may regulate and license certain activities concerning the homeless. Municipalities may also prohibit certain personal behaviors committed by all people but that are more frequent among the homeless.

1. Homelessness defined: Before we can discuss regulating homelessness, we must first define it. Illinois statutes are of limited help when it comes to defining homelessness. The only statute that contains such a definition is the Illinois Election Code. That statute defines a "homeless person" as "any person who has a nontraditional residence, including but not limited to, a shelter, day shelter, park bench, street corner, or space under a bridge."¹ Not only is this statute rather vague, but it is drafted for the purpose of defining electors rather than for the regulation of homelessness.

Federal law is more helpful in finding a workable definition of homelessness. Under federal statutes, the term "homeless individual" includes:

- (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and
- (2) an individual who has a primary nighttime residence that is—

- (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
- (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or
- (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.²

With respect to regulation, there are two elements to homelessness that the municipality should consider: (i) the lack of a residence; and (ii) the degree to which that lack is voluntary. This second element is particularly important because voluntary homelessness appears to be susceptible to more regulation than involuntary homelessness.

2. A municipality may not prohibit homelessness altogether: The Eighth Amendment of the U.S. Constitution limits the scope of vagrancy ordinances. The Illinois Municipal Code explicitly states that the corporate authorities of a municipality may prevent vagrancy.³ That authority, however, does not appear to be absolute.

This was recently an issue before the federal Ninth Circuit Court of Appeals in the case of *Jones v. City of Los Angeles*.⁴ In that case, the City of Los Angeles passed an ordinance stating that "[no] person shall sit, lie or sleep in or upon any street, sidewalk or other public way."⁵ Several homeless individuals were arrested or cited for violating this ordinance. These individuals sued, arguing that this violated their Eighth Amendment rights against cruel and unusual punishment.⁶ The Court agreed and enjoined the enforcement of the ordinance.⁷ The Court concluded that the effect of the ordinance was to criminalize the status of being homeless.⁸ In reaching this conclusion, the Court concentrated on the following factors:

- Because there were more homeless people than there were available shelters, it was unavoidable that a certain number of people would be forced to live in public places.⁹
- The ordinance did not contain any time or place exemptions—the prohibition applied at all times and to places within the city.¹⁰
- Sitting, lying, or sleeping are universal and unavoidable consequences of being human. Being human, no homeless person can avoid doing them, and, being homeless, no homeless person can avoid doing them in a public place.¹¹

The Eighth Amendment prohibits the state from criminalizing certain involuntary conduct.¹² Because homelessness in Los Angeles was involuntary conduct for at least some people, the city could not criminalize the conduct that, in effect, constituted homelessness.

What this case means for municipalities is that, in order ensure constitutionality, a vagrancy ordinance should contain at least some exceptions for certain times or places. The necessary scope of these exceptions will depend on the number of people who are involuntarily homeless due to a lack of available shelter.

3. A municipality may regulate and license certain activities concerning the homeless: While a municipality cannot issue a blanket prohibition against homelessness, there are some

regulatory actions that it can take to alleviate some of the more significant problems associated with homelessness.

Panhandling is one of the biggest problems associated with homelessness. Aggressive panhandlers are a nuisance in many cases, and an influx of panhandlers to a specific location may suppress tourism and commerce in that part of the city. Municipalities do have the statutory authority to prevent begging.¹³ That statutory authority, however, is limited. Panhandling itself is protected by the First Amendment and, thus, cannot be completely prohibited.¹⁴ But municipalities may prohibit aggressive panhandling,¹⁵ and they may limit the time and manner in which panhandling activities take place.¹⁶ They may even require all people to obtain licenses or permits to panhandle.¹⁷

Homeless shelters are another potential problem for municipalities. An ill-placed shelter can have a detrimental affect on the surrounding neighborhood. These effects can include increased loitering and congestion, increased crime, and decreased property values. Municipalities, however, have at least some power to alleviate these negative effects; they can use their zoning powers to regulate all homeless shelters, even if those shelters are operated by a religious institution.¹⁸

4. A municipality may prohibit certain behaviors committed by all people but that are more frequent among the homeless: Municipalities have the power to prohibit certain conduct—even if the prohibition would disproportionately affect the homeless. For example, a municipality may prohibit public urination under the disorderly conduct statute,¹⁹ and they may prohibit the blocking of public sidewalks.²⁰ This prohibition would apply to all members of the public, but would likely affect the homeless to a greater degree due to a variety of factors.

5. Other regulatory limitations: There are a variety of other constitutional limitations upon municipalities regulating the homeless. For example, we found a federal Circuit Court case out of the Second Circuit that determined, under the First Amendment, municipalities cannot disperse service-resistant homeless people who were invited to sleep outside on church property.²¹ We also found a case out of the Sixth Circuit that held that, under the Fifth and Fourteenth Amendments, a city cannot confiscate and not return personal property of the homeless without due process.²² Furthermore, please be aware of the limitations imposed upon units of local government in regards to regulating and zoning religious entities under the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA)²³ and the Illinois Religious Freedom Restoration Act.²⁴

While the issue of homelessness can impact a municipality, it is important to take care in regulating this issue. As a result of the various constitutional intricacies involved, we recommend that you consult with your municipal attorney if and when your municipality considers any regulation to control or regulate a local homeless population.

This monthly column examines issues of general concern to municipal officers. It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney. As

always, when confronted with a legal question, contact your municipal attorney as certain unique circumstances may alter any conclusions reached herein.

¹ 10 ILCS 5/1-3

² Stewart B. McKinney Homeless Assistance Act of 1987 § 103(a), 42 U.S.C. § 11302(a) (2000).

³ See 65 ILCS 5/11-5-4

⁴ See generally, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006); vacated as moot because of a settlement between the parties, and remanded, 505 F.3d 1006 (9th Cir. 2007); See also, *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934).

⁵ L.A., Cal., Mun. Code § 41.18(d) (2005).

⁶ See *Jones*, 444 F.3d at 1120.

⁷ See *id.* at 1138.

⁸ See *id.* at 1136.

⁹ See *id.* at 1132-33.

¹⁰ See *id.* at 1123.

¹¹ See *id.* at 1132.

¹² See *id.* at 1137; see also, *Robinson v. California*, 370 U.S. 660 (1962) (holding that it is unconstitutional to criminalize alcoholism); *Powell v. Texas*, 392 U.S. 514 (1968) (holding that it is unconstitutional to criminalize drug addiction).

¹³ See *supra*, note 3.

¹⁴ See *supra*, note 8.

¹⁵ See 80 Illinois Municipal Review 21, No. 3 (March 2001); *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

¹⁶ See *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999).

¹⁷ See *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997); cert. den. 522 U.S. 931 (1997).

¹⁸ See *First Assembly of God of Naples, Florida, Inc. v. Collier County*, 20 F.3d 419 (11th Cir. 1994); cert. den. 513 U.S. 1080 (1995).

¹⁹ See 720 ILCS 5/26-1; *People v. Duncan*, 259 Ill. App. 3d 308 (4th Dist. 1994).

²⁰ See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

²¹ See *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002); Injunction granted, 2004 U.S. Dist. LEXIS 22185 (S.D.N.Y. Oct. 28, 2004); affirmed by, 177 Fed. Appx. 198 (2d Cir. 2006); cert. denied, 127 S. Ct. 387, 166 L. Ed. 2d 271 (2006).

²² See *Cash v. Hamilton County Dep't of Adult Prob.*, 388 F.3d 539 (6th Cir. 2004); rehearing denied, 2005 U.S. App. LEXIS 3840 (6th Cir. Feb. 25, 2005); cert. denied, 546 U.S. 927 (2005).

²³ 42 U.S.C. §§ 2000cc, et seq.

²⁴ 775 ILCS 35/1 et seq.