

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

RIO GRANDE FOUNDATION,

Plaintiff,

v.

D-202-CV-2020-02111

CITY OF ALBUQUERQUE,

Defendant.

**MEMORANDUM OPINION AND ORDER
DENYING PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION AND
GRANTING DEFENDANT'S MOTION TO DISMISS**

THIS MATTER comes before the Court on Plaintiff's Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction with Brief in Support filed on March 18, 2020, and Defendant's Motion to Dismiss filed on April 3, 2020. On March 23, 2020, the Court issued an Order Denying Petition for Temporary Restraining Order. In its order denying Plaintiff's petition for a temporary restraining order, the Court indicated that it would address Plaintiff's request for a preliminary injunction after Defendant filed a response and Plaintiff filed a reply pursuant to the Rules of Civil Procedure. The Court having received Plaintiff's briefing packet and request for hearing, finds that Plaintiff's Petition for Preliminary Injunction is ready for a decision. The Court having received Defendant's briefing packet and request for hearing, finds that Defendants Motion to Dismiss is also ready for a decision. Plaintiff's petition for a preliminary injunction is **DENIED**. Defendant's motion to Dismiss is **GRANTED**.

BACKGROUND

On March 11, 2020, the New Mexico Department of Health (“NMDOH”) confirmed four (4) cases of individuals infected with COVID-19, a novel coronavirus, in New Mexico. The same day, Governor Michelle Lujan Grisham issued Executive Order 2020-004 declaring a public health emergency under the Public Health Emergency Response Act, NMSA 1978, Sections 12-10A-1 to -19 (2003 as amended through 2015) [**Def’s Resp. in Opp’n to Pl’s Pet. for T.R.O. & Prelim. Inj. Ex. A**]. The following day, on March 12, 2020, the NMDOH issued a public health emergency order prohibiting mass gatherings of one hundred (100) or more individuals [**Def’s Resp. Ex. B**]. On March 13, 2020, the Governor issued Executive Order 2020-005 closing all public schools until April 6, 2020 [**Def’s Resp. Ex. C**]. On March 19, 2020, the NMDOH issued an amended public health emergency order prohibiting mass gatherings of ten (10) or more individuals; limiting food service establishments to providing take-out service and home delivery; closing shopping malls, recreational facilities, health clubs, athletic facilities, and theaters; directing businesses not providing “essential services” to “limit operations to the greatest extent possible and minimize employee contact;” and restricting hotels to fifty (50) percent occupancy [**Def’s Resp. Ex. D**]. On March 23, 2020, the NMDOH issued a public health emergency order prohibiting mass gatherings of five (5) or more individuals and closing all nonessential businesses [**Def’s Resp. Ex. E**].

On the local level, the City of Albuquerque (“the City”) began to review its ordinances pertaining to its “civil emergency powers” and the “Office of Emergency Preparedness.” The City’s ordinance regarding civil emergency powers was first adopted in 1968. *See* Albuquerque, N.M., Code of Ordinances §§ 2-9-1-1 to -6 (1968). The ordinance regarding the Office of Emergency Preparedness was first adopted in 1975. *See* Albuquerque, N.M., Code of

Ordinances §§ 2-9-2-2 to -2 (1975). On March 13, 2020, the Albuquerque City Council published an agenda for its March 16, 2020, meeting [Def's Resp. Ex. F]. Item fourteen (14) of the agenda was entitled: "Updating 'Civil Emergency Powers,' Sections 2-9-1-1 Through 2-9-1-7, Of the Revised Ordinances Of Albuquerque, And 'Office Of Emergency Preparedness,' Section 2-9-2-1 Through 2-9-2-2 (Davis)." [Def's Resp. Ex. F, p. 3] The draft agenda also contained the following notice:

Special Procedures for March 16, 2020 City Council Meeting

Attendance: In response to the Governor's declaration of a Public Health Emergency and ban on large public gatherings, the City Council meeting on Monday, March 13th will be limited to in-person attendance by the City Councilors, critical Council and Administrative Staff, and credentialed members of the press.

Viewing: Members of the public will have the ability to view the meeting through GOVTV on Comcast Channel 16, or to stream live on the GOVTV website at: <https://www.cabq.gov/culturalservices/govtv>, or the Council Legislative Information Portal at: <https://cabq.legistar.com/Calendar.aspx>, or on YouTube at <https://youtu.be/WR5JNaTh0Yc>. The GOVTV live stream can be accessed at these addresses from most smartphones, tablets or computers.

The video recording of this and all past meetings of the City Council will also remain available for viewing at any time on the City's website. Council Staff is available to help members of the public access pre-recorded Council meetings on-line at any time during normal business hours. Please call 768-3100 for assistance.

Members of the public can also follow the meeting proceedings through the City Council's social media platforms. Twitter: @abqcitycouncil and Instagram: @abqcitycouncil.

Public Comment: The agenda for the meeting will be posted on the City Council website by 5PM today, Friday, March 13 <https://cabq.legistar.com/Calendar.aspx>.

The Council will take general public comment and comment on the meeting's specific agenda items in written form via email, fax, or hand delivery through 4:45 PM on Monday March 16th. Web Form submission for public comment can be found at: <https://www.cabq.gov/council/find-your>

[councilor/comments-march-16-council-meeting](#). **Hard copies can be faxed to 505-768-3227 or delivered to the City Council office on the 9th Floor of the City/County Government Building at One Civic Plaza. These comments will be distributed to all Councilors for review.**

At the meeting, the Council passed Ordinance F/S O-20-4 (“the Ordinance”) by a vote of six (6) to three (3). [**Def’s Resp. Ex. G, p. 9**]. The Ordinance amended existing Sections 2-9-1-1, -3, -4 (now Section 2-9-1-5), -5 (now Section 2-9-1-6), -6 (now Section 2-9-1-7), 2-9-2-1, and -2 of the Code or Ordinances [**Def’s Resp. Ex. G**].¹ The Ordinance also included a new Section 2-9-1-4 entitled, “Mayoral Proclamation of Public Health Emergency; Emergency Orders,” and a new Section 2-9-1-8 entitled “Non Limitation or Interference with Other Authority.” [**Def’s Resp. Ex. G**] Of relevance to this action, no change was made to existing Section 2-9-1-3(F), which allows the Mayor to “[o]rder the discontinuance of selling, distributing, dispensing or giving away of any firearms or ammunition of any character whatsoever, or in the alternative, order the closing of all establishments or portions thereof where arms and/or ammunition are kept for sale or distribution.” [**Def’s Resp. Ex. G, p. 3**]

On March 18, 2020, Albuquerque Mayor Tim Keller declared a local state of emergency due to COVID-19 [**Def’s Resp. Ex. H**]. The emergency declaration did not invoke Section 2-9-1-3(F) relating to firearms [**Def’s Resp. Ex. H**].

On March 18, 2020, Plaintiff filed an Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction. On March 23, 2020, the Court issued an Order Denying Petition for Temporary Restraining Order. The Court found that Plaintiff’s petition failed to point the Court to any provision in the Ordinance that allegedly infringes on the Plaintiff’s right to bear arms. The Court also found that Plaintiff’s petition failed to show that

¹ Exhibit G does not contain underline or strikethrough indicating the changes by the Council. The Court compared the previous versions of the relevant sections of the Code of Ordinances available at <https://codelibrary.amlegal.com/codes/albuquerque/latest/overview> to Exhibit G.

Plaintiff is imminently threatened with injury or facing a real risk of future injury as a result of Defendant's actions. The Court deferred a decision on Plaintiff's petition for a preliminary injunction pending full briefing under the Rules of Civil Procedure.

DISCUSSION

A. Plaintiff's Petition for a Preliminary Injunction.

To obtain a preliminary injunction, a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.

LaBalbo v. Hymes, 1993-NMCA-010, ¶ 11, 115 N.M. 314, 850 P.2d 1017. The Court, having considered the pleadings and being fully advised finds that Plaintiff has failed to make the necessary showing to obtain a preliminary injunction.

1. Plaintiff fails to demonstrate that it will suffer irreparable injury unless the injunction is granted.

Plaintiff argues that if an injunction is not issued “[the] citizens of Albuquerque will be deprived of their due and owing constitutionally protected unfringed Second Amendment rights, and . . . their due and owing right to Due Process protected by the OMA.” [PI's Pet. for T.R.O. & Prelim. Inj. 3] The Court finds, as it did in its order denying Plaintiff's petition for a temporary restraining order, that Plaintiff's petition fails to show that Plaintiff is imminently threatened with injury or facing a real risk of future injury as a result of Defendant's actions.

“An irreparable injury for which there is no adequate remedy at law is one which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard.” *Orion Tech. Res., LLC v. Los Alamos Nat'l Sec., LLC*, 2012-NMCA-097, ¶ 31, 287 P.3d 967. “The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm. It is not enough that the party seeking injunctive relief merely claim

irreparable harm; he must come forth with evidence of the irreparability of his harm or inadequacy of any remedy.” *State ex rel. State Highway and Transp. Dep’t of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128 (internal quotation marks and citation omitted).

As a preliminary matter, the Mayor’s emergency declaration did not invoke Section 2-9-1-3(F). Therefore, Plaintiff has not suffered an actual injury. Plaintiff also fails to demonstrate “an affirmative prospect of injury.” *See City of Sunland Park*, 2000-NMCA-044, ¶ 19. Plaintiff does not allege that the Mayor is considering or will invoke Section 2-9-1-3(F) in response to COVID-19. *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 24, 144 N.M. 471, 188 P.3d 1222 (explaining that Plaintiffs could not demonstrate that the triggering event for the application of an ordinance was imminent or likely). Even if Plaintiff could show that the Mayor intends to invoke Section 2-9-1-3(F), Plaintiff fails to show how it would be affected by such an action. Plaintiff does not allege that it, or any of its members are in the business of buying, selling, or transferring firearms.

2. The threatened injury to Plaintiff does not outweigh the damage the injunction might cause the City and its residents.

Plaintiff asserts that the balance of hardship in this case weighs in its favor because “[t]here is no hardship in prohibiting the Mayor from implementing a law that should be declared null and void” [PI’s Pet. 3-4] The Court finds that the threatened injury to Plaintiff does not outweigh the damage the injunction could cause the City and its residents.

The injunctive relief Plaintiff requests is not limited to Section 2-9-1-3(F) relating to firearms. Instead, Plaintiff requests that the Court issue an injunction “prohibiting the Mayor from taking *any* emergency action under the Ordinance adopted by the City Council” [PI’s Pet 2, 7 (emphasis added)] In asking this Court to enjoin the City from taking any action under

the Ordinance, Plaintiff is asking the Court to enjoin provisions of the Ordinance unrelated to firearms that may be used to combat the spread of COVID-19. The City represents that “[t]he rapid spread of COVID-19 threatens to overwhelm the City’s public health infrastructure if left unchecked” and that “the City needs the ability to enforce social distancing measures and free up economic resources to battle the disease and its secondary impacts.” [Def’s Resp. 9] According to the City, “Enjoining [it] from taking these actions could very well cost lives.” [Def’s Resp. 9] Therefore, in light of the lack of a threatened injury to Plaintiff and the potential damage an injunction could cause the City’s efforts to combat the spread of COVID-19, the Court finds that the balance of hardship weighs in the City’s favor.

3. Issuance of a preliminary injunction will be adverse to the public’s interest.

Plaintiff argues that the issuance of a preliminary injunction will not be adverse to the public interest because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” [Pl’s Pet. 4 (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013))]. While the Court agrees with this general statement, it is premised upon a likely violation of constitutional rights. *See id.* at 1146 (“Hobby Lobby and Mardel have established a likely violation of RFRA.”). As explained earlier, Plaintiff has failed to demonstrate it is threatened with an actual injury. Furthermore, for the reasons set forth above, an injunction will be adverse to the public’s interest. As argued by Defendant, “The public has an interest in having a local government that can respond appropriately to a public health emergency such as the COVID-19 pandemic.” [Def’s Resp. 10]

4. There is not a substantial likelihood Plaintiff will prevail on the merits.

As will be discussed below in the context of Defendant’s motion to dismiss, Plaintiff lacks standing under both the Open Meetings Act (“OMA”), NMSA 1978, Sections 10-15-1 to -4

(1974 as amended through 2013), and the Declaratory Judgment Act (“DJA”), NMSA 1978, Sections 44-6-1 to -15 (1975). Therefore, Plaintiff is unlikely to prevail on the merits in this matter.

B. Defendant’s Motion to Dismiss.

“A motion to dismiss tests the legal sufficiency of a plaintiff’s complaint, and should be granted only when it appears that the plaintiff is not entitled to recover under any facts provable under the complaint.” *Glaser v. LeBus*, 2012-NMSC-012, ¶ 8, 276 P.3d 959 (internal quotation marks and citation omitted). “When considering a motion to dismiss under Rule 12(b)(6), the well pleaded facts alleged in the complaint are taken as true.” *State ex rel. Risk Mgt. Div. v. Gathman-Matotan Architects & Planners*, 1982-NMCA-130, ¶ 7, 98 N.M. 790, 653 P.2d 166.

1. Plaintiff lacks standing to bring a claim under the Open Meetings Act.

Count I of Plaintiff’s Complaint alleges that the Albuquerque City Council violated the OMA by failing to provide proper notice for its March 16, 2020, meeting and failing to conduct the meeting in accordance with the Act [**Compl. ¶ 7**]. Defendant argues that Plaintiff lacks standing to bring its OMA claim because Plaintiff failed to give the City written notice of the alleged violation. The Court agrees.

Under the Open Meetings Act, “All meetings of any public body . . . shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” § 10-15-1(A). “No . . . ordinance . . . shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978.” § 10-15-3(A). The OMA is enforced by the attorney general or the district attorney in the county of jurisdiction. § 10-15-3(B). “However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts, *provided that the individual*

first provides written notice of the claimed violation to the public body and that the public body has denied or not acted on the claim within fifteen days of receiving it.” § 10-15-3(B) (emphasis added). This requirement gives the public body an opportunity to cure an alleged violation of the OMA. *See id.*

Plaintiff’s complaint fails to allege that Plaintiff provided written notice of the claimed violation to the City. In fact, Plaintiff’s response to Defendant’s motion to dismiss states: “[W]hile the OMA . . . may require notice be given that a citizen believes that their government has violated the [OMA], neither the First, nor the Fourteenth Amendments to the United States Constitution require that the citizen must give notice before taking action to prevent the loss of those constitutional freedoms.” [Pl’s Consol. Reply in Supp. of Pet. for T.R.O. & Resp. to Mot. to Dismiss 14] Plaintiff’s statement amounts to a tacit admission that Plaintiff has not provided notice to the City as required under Section 10-15-3(B). The Court finds that Plaintiff has failed to provide the City with written notice of the claimed OMA violation. Thus, Plaintiff has not satisfied the statutory requirement for bringing an OMA action.

2. Plaintiff lacks standing to bring a claim under the Declaratory Judgment Act.

Defendant moves to dismiss Count II of Plaintiff’s Complaint on the grounds that Plaintiff lacks standing. Count II alleges that the Ordinance violates the right to bear arms under the New Mexico Constitution. *See* N.M. Const. art. II, § 6 (“No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.”). Defendant argues that Plaintiff has not suffered an injury in fact because the Ordinance did not amend Section 2-9-1-3(F) regarding firearms. Defendant also

argues that Plaintiff has failed to demonstrate associational standing. The Court finds that Plaintiff lacks standing under the DJA.

Defendant's argument that because Plaintiff is challenging a decades old law, Plaintiff has not suffered any direct harm is unavailing. The DJA clearly allows any person whose rights are affected by a municipal ordinance to "have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." § 44-6-4. Therefore, the fact that Section 2-9-1-3(F) was not amended by the Ordinance does not preclude Plaintiff from challenging Section 2-9-1-3(F).

However, the Court agrees that Plaintiff has failed to establish associational standing to show the existence of an actual controversy under the DJA. Under the DJA, "In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." NMSA 1978, § 44-6-2 (1975). "In the absence of any actual case or controversy, it is improper to issue a declaratory judgment." *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 17, 149 N.M. 42, 243 P.3d 746. "An actual controversy is not present unless the issue raised by the litigant is ripe for judicial determination and the litigant has standing." *AFSCME v. Bd. of Cty. Comm'rs of Bernalillo Cty.*, 2016-NMSC-017, ¶ 17, 373 P.3d 989 (internal citations omitted).

An organization's standing to sue is premised on the standing of its individual members. Thus, an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

ACLU of N.M., 2008-NMSC-045, ¶ 30 (internal quotation marks and citation omitted).

According to Plaintiff's Complaint, "Plaintiff Rio Grande Foundation is a Domestic Nonprofit Corporation operating in New Mexico providing information to New Mexico's citizens, many of its members are citizens of Albuquerque, New Mexico that are directly affected by the governmental policy actions taken by the government officials comprising the City of Albuquerque." [Compl. ¶ 1]. This is the sole paragraph of the complaint addressing Plaintiff's standing. This paragraph addresses at most the first prong of *ACLU of N.M.*, albeit in a conclusory fashion. As such, Plaintiff's complaint is insufficient to establish organizational standing.

CONCLUSION

For the foregoing reasons Plaintiff's Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction is **DENIED**. Defendant's Motion to Dismiss is **GRANTED**. Defendant's request for attorney's fees and costs is **DENIED**.

IT IS SO ORDERED.


NANCY J. FRANCHINI
DISTRICT COURT JUDGE