IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CITY OF LINCOLN, NEBRASKA, Plaintiff, v. ELEVATING ASSETS, LLC and MADSEN BOWLING & BILLIARD CENTER CO., Defendants.	)	Case No. CI 20-2706 **ORDER**

This case is before the Court on the Plaintiff City of Lincoln, Nebraska's Amended Motion for Temporary Injunction and the Defendant Madsen Bowling & Billiard Center Co.'s Amended Motion to Dismiss. On August 5, 2020, the Court heard argument and received evidence. Christopher Connolly and Timothy Sieh appeared for the Plaintiff City of Lincoln, Nebraska ("City"). J.L. Spray and Jacob Garbison appeared for the Defendant Madsen Bowling & Billiard Center Co. ("Madsen Bowling"). Being fully advised on the premises, the Court concludes that the City has an adequate remedy at law. Thus, the Court overrules the City's Amended Motion for Temporary Injunction, sustains Madsen Bowling's Amended Motion to Dismiss, and dismisses the First Amended Complaint. The Court does not decide, however, whether the Directed Health Measures 2020-07 (the "DHM") is valid, either generally or as applied to Madsen Bowling.

BACKGROUND

On August 3, 2020, the City filed a Complaint asking for a temporary and permanent injunction requiring Madsen Bowling to close because of violations of the DHM. On August 5, the City filed a First Amended Complaint, which is now the operative pleading.

The City alleges that it is currently under a declaration of emergency because of the Novel Coronavirus ("COVID-19"). Am. Compl. ¶ 3. On July 19, 2020, the Director of the Lincoln-Lancaster County Health Department (the "Health Director") issued the DHM, which generally prescribes certain measures to reduce the spread of COVID-19. *Id.* at ¶ 6 & Ex. 2. At the hearing on August 5, 2020, the City argued that the "Health Department, of course, is the City." The Court will accept that characterization for the purposes of the pending motions only.

The City alleges that Madsen Bowling has negligently, recklessly, or intentionally failed to comply with the DHM. Am. Compl. ¶ 7. Specifically, Madsen Bowling is allowing its employees to work without face coverings, is not requiring patrons to wear face coverings, and is not maintaining social distancing between patrons and groups of patrons. *Id.*

The City alleges that it has tried to educate Madsen Bowling about the DHM. *Id.* at ¶ 8. Yet the violations are continuing and threaten public health *Id.* at ¶¶ 8, 9. The City believes that closing Madsen Bowling would protect the health, safety, and welfare of the City's residents. See *id.* at ¶ 10.

The City claims that, under its ordinances, the Health Director can order the closure of, or restrict access to, a business. *Id.* at ¶ 5. Yet the First Amended Complaint asks the Court to do this for the City. That is, the City asks the Court to order Madsen Bowling to comply with the DHM, to close Madsen Bowling until the Health Director decides it can reopen, and to allow the City to enforce the temporary injunction (with the costs of such enforcement to be paid by Madsen Bowling).

On August 4, 2020, the City moved for a temporary injunction. On August 5, the City filed an Amended Motion for Temporary Injunction which the Court considered at the August 5 hearing. The Amended Motion for Temporary Injunction asks the Court to order Madsen

Bowling to close until this case is over and order that the City can enforce the temporary injunction (again, with the costs of such enforcement to be paid by Madsen Bowling).

On August 4, 2020, Madsen Bowling moved to dismiss the Complaint because the City had not alleged a great or irreparable injury under Neb. Rev. Stat. § 25-1063 (Reissue 2016). On August 5, Madsen Bowling filed an Amended Motion to Dismiss which also alleges that the City failed to state a claim for relief and failed to join a necessary party under Neb. Ct. R. Pldg. § 6-1112(b)(6), (7).

At the August 5 hearing, the Court sustained the City's motion to dismiss Madsen Bowling's landlord (Elevating Assets, LLC) from the lawsuit. The Court also sustained the City's motion to file the First Amended Complaint and thereafter considered Madsen Bowling's Amended Motion to Dismiss as it applies to the First Amended Complaint.

Both parties offered evidence and the Court took several evidentiary objections under advisement. The Court sustains Madsen Bowling's objections to paragraph 17 of Exhibit 5 and to Exhibit 12. Otherwise, the Court overrules the objections and receives the exhibits.

The evidence shows that Patricia Lopez, referred to as the "Interim Health Director" in the DHM, is a consultant or independent contractor hired by the Mayor. In June 2019, the Mayor signed an executive order that approved a Consultant Agreement between the City and Lopez. Ex. 9. The Consultant Agreement stated that Lopez was to provide "professional assistance by serving as the interim director of the City of Lincoln Health Department [sic]." *Id.* The contract's term ended on December 31, 2019. The Mayor later approved a Consultant Agreement Extension which extended the term until December 31, 2020, or until the hiring of a "permanent director." Ex. 10.

Although a statute requires the Mayor to appoint a Health Director with the approval of the board of health, city council, and county board, see Neb. Rev. Stat. § 71-1630(4) (Reissue 2018), the evidence does not show whether these bodies approved Lopez' appointment. The statute also states that the Health Director shall be a member of the City's unclassified service, but Lopez is paid $14,000 each month "in a temporary capacity" without any of the benefits to which "permanent City employees are entitled." Exs. 9, 10. Further, while the statute says that the Mayor may terminate the Health Director's employment only with the majority vote of the city council, county board, and board of health, Lopez' contract says that the City can terminate her employment for any reason on 30 days written notice. Ex. 10.

The Court repeats, however, that it does not decide today whether the DHM is valid. Instead, accepting the City's allegations that the DHM is enforceable as true, the Court concludes that the City is not entitled to injunctive relief because it has an adequate remedy at law.

ANALYSIS

Under Neb. Rev. Stat. § 25-1063 (Reissue 2016), a court may issue a temporary injunction if it appears by the complaint that the plaintiff is entitled to the relief demanded and such relief includes restraining some act which, if committed during the litigation, would produce great or irreparable injury to the plaintiff. A permanent injunction should only be granted if the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *County of Cedar v. Thelen*, 305 Neb. 351, 940 N.W.2d 521 (2020). Injunctions are extraordinary remedies. See *id.*

Here, the Court focuses on the requirement that the party seeking a permanent injunction not have an adequate remedy at law. An adequate remedy at law is a remedy that is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the

remedy in equity. *Thelen, supra.* Section 25-1063 does not expressly require a plaintiff to show that the remedy at law is inadequate in order to get a temporary injunction. But § 25-1063 does require that the plaintiff appear to be entitled to the relief demanded. The relief demanded by the City is a permanent injunction, which would require the City to show that the remedy at law is inadequate.

In its Complaint, the City alleges that the Health Director has the power to close businesses under L.M.C. 8.18.140, which is part of the Communicable Disease Act of 2007. See L.M.C. tit. 8, ch. 18. For the purposes of the pending motions (and the pending motions only) the Court will accept that allegation as true. Section 8.18.140 provides:

a. In addition to the Health Director, the Lincoln Police Department and/or the Lancaster County Sheriff's Department shall enforce any and all orders issued by the Health Director pursuant to this chapter.
b. The Health Director may order the closure of, or restrict access to any business, office, healthcare facility, school or government agency or department for the purpose of controlling the spread of disease or for any activity related to controlling the spread of disease.
c. . . .
d. The Health Director may adopt any other control measures which are consistent with applicable guidelines of a public sector partner, emergency management agency, and other applicable laws and regulations.

The Court notes that, under L.M.C. § 8.18.130, any individual subject to an order of the Health Director can request a hearing to contest the order's validity. The Health Director must conduct an evidentiary hearing within three days of the individual's request and, within one day of the hearing, make a final determination. The individual can then appeal the Health Director's decision to this Court as provided by law.

Thus, under the ordinances, the Health Director has the power to order Madsen Bowling to close. And such order shall be enforced by the city and county law enforcement agencies. Given the Health Director's powers, the Court is unsure why it is being asked to order the closure.

The Court acknowledges that irreparable harm to public rights, property, or welfare is presumed from the violation of a municipal ordinance. The Nebraska Supreme Court so held in *State ex rel. City of Alma v. Furnas County Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). There, a city adopted several ordinances for the permitting process of livestock facilities after learning that the defendants planned to build hog sheds. The defendants started construction notwithstanding the ordinances but stopped after the city sued them. The district court ultimately enjoined the defendants from resuming construction unless they complied with the ordinances.

On appeal, the defendants argued that the city had not shown any actual or substantial injury because the defendants had stopped construction. The Nebraska Supreme Court disagreed that such a showing was even necessary:

> [A] municipality or public entity which shows a violation of a valid statute or ordinance need not show irreparable harm in order to obtain a permanent injunction to prevent further violations. In such cases, irreparable harm to the public is presumed to result from actions which by statute or ordinance have been declared unlawful. As articulated by the Wisconsin Supreme Court, *"the express basis for such holdings is that the fact that the activity has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public."*
> *Furnas County Farms, supra*, 266 Neb. at 578, 667 N.W.2d at 528, quoting *Joint Sch. Dist. v. Wisc. Rapids Educ. Assoc.*, 234 N.W.2d 289 (Wisc. 1975) (emphasis added, citations omitted).

But here, unlike in *Furnas County Farms*, the Court's focus is the adequacy of the City's legal remedies and not irreparable harm. One commentator has equated irreparable harm with an inadequate remedy at law. See John P. Lenich, Nebraska Civil Procedure § 18:2 (2020), citing *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). But when *Furnas County Farms* referred to "irreparable harm" it was clearly referring to actual harm to the public. The adequacy of legal remedies was not contested in *Furnas County Farms* because the permitting ordinances apparently did not provide any penalties or enforcement mechanisms.

The Court also acknowledges caselaw which allows the government to enjoin repeated unlawful acts notwithstanding criminal penalties for those acts. The Nebraska Supreme Court recently revisited this rule in *County of Cedar v. Thelen*, 305 Neb. 351, 940 N.W.2d 521 (2020). There, a landowner repeatedly put his fence line within the county's public road right-of way. He was charged and convicted of obstructing a public road, which was a Class V misdemeanor and punishable by a small fine. The landowner said that he would nevertheless continue to put his fence in the right-of-way because the fine was "cheap pasture rent." *Id.* at 356, 940 N.W.2d at 526. The county sued the landowner and the district court permanently enjoined the landowner from encroaching on the right-of-way.

The landowner argued that prosecuting him for a misdemeanor was an adequate remedy at law. The justices agreed that courts generally should not exercise their equity power to enforce the criminal law. But there is an exception for continuous or repeated violations of a penal statute:

> [T]he rule that equity will not interfere to enforce criminal law, which ordinarily provides an adequate remedy at law, does not have the force of denying such a remedy in the prevention of public wrongs arising out of either continuous or repeated violations of a penalty statute which harmfully affect the interests of the public. There is a well-

> recognized exception to the general rule that enforcement of criminal laws provides an adequate remedy, namely, that where a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, at the instance of properly constituted authorities, afford relief by injunction in order to protect the public welfare. *Thelen, supra*, 305 Neb. at 359, 940 N.W.2d at 527–28.

The *Thelen* court reasoned that an injunction was necessary because the landowner admitted that he would continue encroaching on the right-of-way despite being fined.

Here, another ordinance provides that any person who violates the Communicable Disease Act of 2007 is subject to a fine of up to $500 and imprisonment of up to six months. See L.M.C. § 8.18.170; see also Neb. Rev. Stat. § 71-506 (Reissue 2018). But the remedy at issue in this case is the Health Director's power to order a business to close under § 8.18.140, not a possible criminal prosecution under § 8.18.170. And while § 8.18.170 also says that the City Attorney can file an injunction action "[i]n addition to any penalty," the Health Director's enforcement powers under § 8.18.140 are not a "penalty." Further, whether a remedy at law is adequate is a question for the Court to decide.

Section 8.18.140 differs in a key respect from the criminal penalties in *Thelen* and the cases cited therein. See, e.g., *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991) (permanent injunction affirmed where a business simply paid the fines for its illegal coin-operated booths in which patrons viewed pornography). This ordinance does not merely allow the Health Director to levy a fine which a business owner can shrug off as a cost of doing business. Rather, § 8.18.140 allows the Health Director to order a business to close and such order shall be enforced by law enforcement. Closing a business is exactly what the City wants the Court to do here, of course, except the Court's order (unlike the Health Director's order) could only be enforced through contempt proceedings.

In sum, the City asks the Court to order Madsen Bowling to close because the Health Director has the power to order Madsen Bowling to close. But the ordinances give the City a much more effective remedy: The Health Director himself or herself can order Madsen Bowling to close and such order shall be enforced by law enforcement. The City therefore has an adequate remedy at law and is not entitled to a temporary or permanent injunction.

IT IS THEREFORE ORDERED that the Court **OVERRULES** the City's Motion for Temporary Injunction and **SUSTAINS** Madsen Bowling's Amended Motion to Dismiss. The First Amended Complaint is **DISMISSED**.

DATED this 6 day of August, 2020.

BY THE COURT:

John A. Colborn
District Court Judge