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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
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2 **KURT HILL; RICHARD NEWTON;**
3 **and SANTA FE ASSOCIATION OF**
4 **REALTORS, a New Mexico non-profit**
5 **corporation,**



Mark Reynolds

6 Plaintiffs-Appellees,

7 v.

No. A-1-CA-42062

8 **CITY OF SANTA FE,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**
11 **Bryan Biedscheid, District Court Judge**

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17 for Appellees

18 Erin K. McSherry, City Attorney
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20 Santa Fe, NM

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24 for Appellant

1 **MEMORANDUM OPINION**

2 **DUFFY, Judge.**

3 {1} This appeal arises from proceedings in which the district court barred
4 enforcement of an ordinance enacted by the City of Santa Fe that imposes “a three
5 percent (3%) excise tax” on home sales exceeding one million dollars. Santa Fe,
6 N.M., Code of Ordinances ch. 18, art. 18, § 18-18-18.6(A) (2023). Plaintiffs Kurt
7 Hill and Richard Newton, in their individual capacities as realtors and owners of
8 property located in Santa Fe, and as members of Plaintiff Santa Fe Association of
9 Realtors, Inc. (SFAR), filed a declaratory judgment action against Santa Fe seeking
10 a declaration that the ordinance is unlawful and unenforceable. Santa Fe argued
11 below, and continues to argue on appeal, that Plaintiffs lack standing to bring a
12 declaratory judgment action because they have not established an injury in fact.
13 Having reviewed the record and considered the parties’ arguments on appeal, we
14 agree with Santa Fe. The district court having concluded otherwise, we reverse.

15 **BACKGROUND**

16 {2} In an effort to address a shortage of affordable housing, Santa Fe enacted a
17 three percent “excise tax” on the transfer of residential real properties valued at more
18 than one million dollars. The tax would be paid by the buyer and would be due and
19 payable at the time of transfer. The ordinance was to take effect on or about May 28,

1 2024, approximately six months after voters approved the tax and the vote was
2 certified.

3 {3} Plaintiffs filed a pre-enforcement action seeking a declaratory judgment that
4 the ordinance is invalid and unenforceable. Plaintiffs argued that the ordinance
5 violated NMSA 1978, Section 3-18-2 (1980), which limits a municipality’s taxing
6 power in two ways that are relevant to Plaintiffs’ case: (1) by prohibiting
7 municipalities from imposing an ad valorem tax on property, and (2) by allowing an
8 excise tax only on “services” and “products.” *See* § 3-18-2(B), (D). Plaintiffs and
9 Santa Fe both moved for summary judgment—Plaintiffs on the merits of their claim
10 that the ordinance was unlawful, and Santa Fe on grounds that Plaintiffs lacked
11 standing to bring a declaratory judgment action.

12 {4} In response to Santa Fe’s motion for summary judgment, Plaintiffs Newton
13 and Hill argued that they had standing (1) as individuals who own residential
14 property in Santa Fe valued at more than one million dollars; and (2) as realtors “who
15 handle[] transactions involving residential real properties in Santa Fe worth more
16 than \$1,000,000.” Plaintiff SFAR, a nonprofit corporation formed to represent the
17 interests of realtors and owners of real estate in Santa Fe, asserted standing on behalf
18 of Plaintiffs Hill and Newton, as well as other members similarly situated.

19 {5} Following a hearing, the district court denied Santa Fe’s motion for summary
20 judgment. The district court rejected Plaintiffs’ assertion that they had standing

1 based on their status as homeowners of properties valued at over one million dollars.¹
2 The court concluded that because the tax applies to buyers, not sellers, Plaintiffs
3 would not be required to pay the tax, and Plaintiffs had not indicated that their
4 properties were currently on the market. However, the district court agreed that
5 Plaintiffs had standing based on their status as realtors. The court concluded that
6 Plaintiffs “would be harmed by an unlawful tax that imposes penalties for its
7 violation and that burdens real property conveyances.” The district court likewise
8 concluded that Plaintiff SFAR had standing “because of the imminent effect the tax
9 will have on its members’ livelihoods and the stated purposes for which it was
10 formed.” Of significance to the present appeal, the district court found:

11 It is not a hypothetical scenario that realtors sell houses for a living. The
12 number of homes they sell, and the price of the homes they sell
13 determines the compensation of the realtor. Here, where homes sold for
14 over a million dollars are taxed at 3% for the amount over the initial
15 one million, *there is an actual risk that homebuyers will be deterred*
16 *from purchasing homes subject to the tax, which would impact the*
17 *realtor’s livelihood.*

18 {6} After concluding that Plaintiffs had standing, the district court ultimately
19 granted summary judgment in favor of Plaintiffs on the merits and entered a
20 permanent injunction enjoining the ordinance from taking effect. Santa Fe appeals.

¹This aspect of the district court’s standing determination is not at issue on appeal as Plaintiffs did not cross-appeal the ruling and have not argued the matter in their answer brief.

1 **DISCUSSION**

2 {7} “The determination of whether a party has standing to sue is a question of law,
3 which we review de novo.” *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 5, 130
4 N.M. 368, 24 P.3d 803. As well, our review of the district court’s grant of summary
5 judgment is also de novo. *See Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 7,
6 148 N.M. 713, 242 P.3d 280.

7 **I. Traditional Standing**

8 {8} New Mexico’s Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15
9 (1975), “grants jurisdiction to the district courts to determine questions of the
10 construction or validity of local laws and municipal ordinances.” *Am. Fed’n of State,*
11 *Cnty., & Mun. Emps. (AFSCME) v. Bd. of Cnty. Comm’rs of Bernalillo Cnty.*, 2016-
12 NMSC-017, ¶ 11, 373 P.3d 989. “[C]ourts in New Mexico have jurisdiction to
13 adjudicate and declare rights and legal relations only in cases of actual
14 controversy . . . [which] exists only where a plaintiff satisfies justiciability
15 requirements.” *Id.* ¶ 15. Based on the “actual controversy” requirement, our
16 Supreme Court has determined that standing “is a jurisdictional prerequisite” to a
17 declaratory judgment action. *Id.* ¶ 31.

18 {9} “To acquire standing, a plaintiff must demonstrate the existence of (1) an
19 injury in fact, (2) a causal relationship between the injury and the challenged
20 conduct, and (3) a likelihood that the injury will be redressed by a favorable

1 decision.” *Forest Guardians*, 2001-NMCA-028, ¶ 16 (internal quotation marks and
2 citation omitted). In this case, the parties focus only on the first element—whether
3 Plaintiffs have suffered an injury in fact. “[T]he requirement of proving an injury in
4 fact has been liberally construed by [New Mexico] courts.” *Id.* ¶ 24. To establish an
5 injury in fact, New Mexico courts require litigants to “allege that they are directly
6 injured as a result of the action they seek to challenge in court.” *N.M. Right to*
7 *Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841.
8 “[T]his requirement is met even when the extent of the alleged injury is slight.” *Id.*
9 {10} Santa Fe argues that the district court erred in concluding Plaintiffs had
10 standing to challenge the ordinance because (1) the court relied on evidence not in
11 the record to make its determination that Plaintiffs had standing and (2) Plaintiffs
12 did not meet their burden to show that they were imminently threatened with injury.
13 We discuss these issues together, as both require us to examine the summary
14 judgment record for evidence of an injury in fact. Based on our review, we agree
15 with Santa Fe that Plaintiffs did not present evidence to establish the threat of a direct
16 injury required for standing.

17 {11} Santa Fe’s motion for summary judgment argued that “Plaintiffs fail the test
18 for standing” because “Plaintiffs have only alleged a hypothetical injury.” Santa Fe
19 asserted three undisputed material facts, stating that each of the Plaintiffs “[have]
20 offered no evidence that [they have] paid any taxes under the [o]rdinance.” In their

1 response to Santa Fe’s motion for summary judgment, Plaintiffs admitted to these
2 facts, but correctly argued that “payment of a tax under the [o]rdinance is not
3 necessary to confer standing to challenge the [o]rdinance.” *See AFSCME*, 2016-
4 NMSC-017, ¶ 31 (establishing that pre-enforcement challenges “involve the
5 possibility of wholly prospective future injury, not a prayer for relief from damages
6 already sustained” (internal quotation marks and citation omitted)); *see also Am. Civ.*
7 *Liberties Union of N.M. (ACLU) v. City of Albuquerque*, 2008-NMSC-045, ¶ 11,
8 144 N.M. 471, 188 P.3d 1222 (stating that “a litigant need not suffer the actual
9 effects of the challenged action or statute . . . to meet the injury in fact requirement.
10 Rather, the litigant need only show that [they are] imminently threatened with
11 injury” (internal quotation marks and citations omitted)).

12 {12} Plaintiffs countered that they met the injury in fact requirement because
13 “[e]ach . . . works as a realtor who handles transactions involving residential real
14 properties in Santa Fe worth more than \$1,000,000, . . . and the tax at issue *would*
15 *adversely impact their constitutional right to earn a living by interfering with those*
16 *transactions.*” In support of this argument, Plaintiffs cited to their statement of
17 additional undisputed material facts numbers fourteen and sixteen (UMFs 14 and
18 16), which state that Plaintiffs Hill and Newton are “realtor[s] who handle[] the sale
19 of residential real properties in Santa Fe worth more than \$1,000,000.” We note that
20 these facts do not assert a market impact on the basis that homebuyers will be

1 deterred from purchasing homes, nor do they identify any “adverse impact” on
2 Plaintiffs’ livelihood in general as a result of the ordinance; rather, they simply
3 identify Plaintiffs as persons involved in real estate transactions involving properties
4 that would be subject to the ordinance.

5 {13} Turning to the exhibits attached to Plaintiffs’ response, the only evidence that
6 appears to relate to Plaintiffs’ standing as realtors appears in Plaintiffs’ Exhibit 8,
7 which is a portion of Plaintiff SFAR’s responses to interrogatories.² In particular,
8 Interrogatory No. 11 asked SFAR to “[p]lease describe each individual Plaintiff’s
9 basis for standing to challenge the [o]rdinance, identifying the direct injury or
10 injuries to invoke the court’s authority to decide the merits of a case as a result of
11 the tax.” As relevant to the issue of realtor standing, Plaintiff SFAR responded that
12 Plaintiffs are

13 SFAR members who also regularly handle[] the sale of residential real
14 properties in the City of Santa Fe worth more than \$1 million, and *they*
15 *have a legal interest in their livelihood not being harmed by the adverse*
16 *impact on that market* of the unconstitutional tax imposed by the
17 ordinance at issue, *whether on the alienability and the marketability of*
18 *such properties, or the interference with the closing process.*³

²Plaintiffs UMFs 14 and 16 cite to “Ex. 1 at ¶ 11.” But Exhibit 1 to Plaintiffs’ response is one page from Plaintiff Hill’s responses to interrogatories, and it does not contain a paragraph 11.

³Plaintiffs did not offer anything further during the hearing on the motion. Plaintiffs indicated that they were “not inclined to comment beyond what is stated in the briefs”; they simply asked if the district court had any specific questions. The district court asked only whether individual standing and realtor standing were both required, or if either was a sufficient basis on its own.

1 {14} Notwithstanding Plaintiff SFAR’s suggestion that realtors’ livelihoods would
2 be “harmed by the adverse impact on th[e] market,” Plaintiffs did not offer any
3 evidence to demonstrate that an adverse market impact is “actual or imminent.” *See*
4 *Forest Guardians*, 2001-NMCA-028, ¶ 24. For example, there is no evidence
5 tending to suggest that a prospective buyer was deterred from purchasing a home
6 priced over \$1 million in Santa Fe as a result of the ordinance, or evidence tending
7 to show that homes currently valued over \$1 million will decrease in value once the
8 ordinance takes effect. Without such evidence, we have no basis to conclude that the
9 ordinance would, in fact, adversely impact the market in general or Plaintiffs’
10 livelihoods in particular, much less that homebuyers will be deterred from
11 purchasing homes subject to the tax. *See ACLU*, 2008-NMSC-045, ¶ 19 (requiring a
12 party to show “that [they are] injured or threatened with injury in a direct and
13 concrete way”); *cf. N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 14
14 (concluding that the plaintiffs, abortion service providers, had “a direct financial
15 interest in obtaining state funding to reimburse them for the costs of these services,
16 and a close relationship to the Medicaid-eligible women whose rights they seek to
17 assert in court”); *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-
18 093, ¶ 9, 144 N.M. 636, 190 P.3d 1131 (stating that the plaintiffs had standing
19 because the ordinance imposed specific additional costs on the plaintiffs’ businesses
20 that would impair the plaintiffs financial interests). While Plaintiffs suggest that the

1 district court could properly infer these harms, Plaintiffs have not pointed to
2 evidence that would support such an inference. *See Lovato v. Plateau, Inc.*, 1968-
3 NMCA-060, ¶ 5, 79 N.M. 428, 444 P.2d 613 (stating that on summary judgment “all
4 reasonable inferences from the evidence must be indulged in support of plaintiff’s
5 case. However, an inference is more than a supposition or a conjecture. It is a logical
6 deduction from facts which are proven, and guess work is not a substitute therefor.”).
7 {15} We emphasize that an evidentiary showing is necessary here because the issue
8 of standing was raised in a summary judgment motion. Once Santa Fe made a prima
9 facie showing (and Plaintiffs have not argued that Santa Fe failed to do so), it was
10 incumbent on Plaintiffs to adduce evidence demonstrating an injury in fact. *See*
11 *Romero*, 2010-NMSC-035, ¶ 10. On the record before us, however, Plaintiffs’
12 asserted injury—an adverse market impact—is unsupported. As a result, we must
13 conclude that the injury identified is merely “conjectural or hypothetical,” *Forest*
14 *Guardians*, 2001-NMCA-028, ¶ 24 (internal quotation marks and citation omitted),
15 which is insufficient to “establish the threat of direct injury required for standing.”
16 *ACLU*, 2008-NMSC-045, ¶ 29; *see also AFSCME*, 2016-NMSC-017, ¶ 32 (“An
17 injury that is merely conjectural, speculative, or hypothetical will not satisfy the
18 injury-in-fact component of standing.” (internal quotation marks and citation
19 omitted)). In the absence of a showing that individual members have standing in

1 their own right, we must also conclude that Plaintiff SFAR does not have
2 organizational standing. *See ACLU*, 2008-NMSC-045, ¶ 12.

3 {16} For all these reasons, we hold that Plaintiffs have failed to establish an injury
4 in fact under our traditional standing analysis.

5 **II. Great Public Importance Doctrine**

6 {17} Plaintiffs argued below, and continue to argue on appeal, that even if they do
7 not meet the injury in fact requirement for traditional standing, this Court may still
8 confer standing based on the great public importance of the issue presented. *See*
9 *ACLU*, 2008-NMSC-045, ¶ 33 (recognizing that New Mexico courts may “confer
10 standing and reach the merits of a case regardless of whether a plaintiff meets the
11 traditional standing requirements, based on a conclusion that the questions raised
12 involve matters of great public importance”). Issues of great public importance
13 “typically have involved clear threats to the essential nature of state government
14 guaranteed to New Mexico citizens under their Constitution—a government in
15 which the three distinct departments, legislative, executive, and judicial, remain
16 within the bounds of their constitutional powers.” *Id.* (alteration, internal quotation
17 marks, and citation omitted). Plaintiffs contend that the great public importance
18 doctrine is applicable here because this case “turns upon whether Section 3-18-2
19 permits home-rule municipalities [to] tax real property sales.”

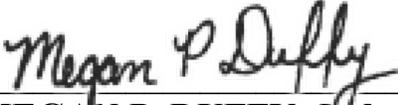
1 {18} Plaintiffs have not persuaded us that this case raises the kind of question that
2 our Supreme Court “has deemed to be of great public importance such that we would
3 elect to confer standing when it is not otherwise present.” *See id.* ¶ 34. The question
4 of whether the tax at issue is a valid excise tax under Section 3-18-2 “does not
5 implicate the integrity of state government, in terms of separation of powers, or the
6 state’s definition of itself as a sovereign.” *ACLU*, 2008-NMSC-045, ¶ 34 (internal
7 quotation marks and citation omitted). The issue raised by Plaintiffs instead concerns
8 a home-rule municipality’s exercise of its taxing authority in a manner that is,
9 according to Plaintiffs, contrary to the limited authorization granted by the
10 Legislature. The result is an allegedly unlawful tax imposed on certain specific
11 citizens who purchase property in Santa Fe. New Mexico courts have been reluctant
12 to invoke the great public importance doctrine and confer standing under similar
13 circumstances. *See Eastham v. Pub. Emps. Ret. Ass’n Bd.*, 1976-NMSC-046, ¶¶ 20-
14 24, 89 N.M. 399, 553 P.2d 679 (indicating that a citizen taxpayer suit did not rise to
15 the level of great public importance). We are not persuaded that it is necessary to do
16 so here, as there is no indication that the legality of the ordinance could not be
17 addressed in a subsequent case upon a sufficient showing of imminent injury or
18 actual enforcement of the ordinance.

19 {19} For all of these reasons, we decline to confer standing and reach the merits of
20 the case.

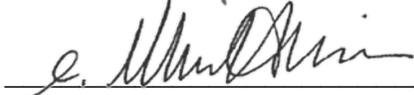
1 **CONCLUSION**

2 {20} We reverse the district court’s order denying Santa Fe’s motion for summary
3 judgment. We further vacate the district court’s order granting Plaintiffs’ motion for
4 summary judgment and dissolve the permanent injunction.

5 {21} **IT IS SO ORDERED.**

6 
7 _____
MEGAN P. DUFFY, Judge

8 **WE CONCUR:**

9 
10 _____
J. MILES HANISEE, Judge

11 
12 _____
SHAMMARA H. HENDERSON, Judge