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 AT IDAHO FALLS
 BONNEVILLE COUNTY
 HONORABLE JON J. SHINDURLING
 DATE 4-30-2007
 TIME 9:45 a.m.
 DEPUTY CLERK [Signature]

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TETON**

WILLIAM A. ROBINSON; BROWER
 FAMILY TRUST, Dennis Brower, Trustee;
 MILO BAHR and MYRTLE BAHR, husband
 and wife; KERRY BUXTON and KATHY
 BUXTON, husband and wife; GEORGE
 BATES and SUSAN BATES, husband and
 wife; STEVEN FOSTER and RENAE
 FOSTER, husband and wife; JAYDELL
 BUXTON and JUDY BUXTON, husband and
 wife; FERRELL BUXTON and JEANNE
 BUXTON, husband and wife; WILLIAM A.
 MOULTON and CHERYL MOULTON,
 husband and wife; LUCRA INVESTMENTS,
 INC., a Louisiana corporation; LAND
 SOURCE HOLDINGS, LLC, an Arizona
 limited liability company,

Plaintiffs,

v.

BOARD OF TETON COUNTY
 COMMISSIONERS,

Defendant.

Case No. CV-07-102

OPINION AND DECISION ON
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION

**I.
 BACKGROUND**

The Teton County Board of Commissioners ("Board") met at their regularly scheduled meeting at 8:00 a.m. Monday morning March 26, 2007, during the local schools' spring break, and dealt with typical issues. However, at 9:15 a.m., the Commission Chairman, Larry Young, called a newly-added agenda item, "Proposed Emergency Measures," for consideration. Commissioner Alice Stevenson's moved that the Board find impending peril to the public health,

safety, and welfare in the form of fourteen separate findings relating to the workload of the Planning and Zoning Commission. Against the advice of the Board's attorney, the motion passed: two for, Commissioner Mark Trupp against. As part of that motion, a public hearing was set at 6:30 p.m. that night, pursuant to Idaho Code ("I.C.") § 67-6523's abbreviated notice. That night, after some hours of public comment, the Board began deliberations. After adding some language to allow Conditional Use Permits and removing a required time frame for considering applications, the Board voted and passed Emergency Moratorium Resolution No. 032707 ("Moratorium"), again two for, one against. (Pls.' First Am. Compl., *passim*). The Moratorium prohibits the filing or accepting of any application requesting approval of a zone change, subdivision, planned unit development, etc., for the duration of the period, or 182 days (Pls.' Ex. 9).

Plaintiffs filed their Complaint for Injunctive and Declarative Relief on March 30, 2007. They amended their initial complaint on April 2, 2007, with their First Amended Complaint.¹ Plaintiffs filed a Petition for TRO/Preliminary Injunction on April 6, 2007. The Court heard some argument on April 10, 2007 and scheduled another hearing on April 20, 2007. Argument was heard on April 20, 2007 and the Court took the matter under advisement, with an opinion to be ordered 7 to 10 working days from the date of the hearing.

After considering the Court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the Court renders the following opinion.

II. PRELIMINARY INJUNCTION STANDARD

An injunction should only issue where irreparable injury is actually threatened. *O'Boskey v. First Fed. Sav. & Loan Ass'n of Boise*, 112 Idaho 1002, 1007, 739 P.2d 301, 306

¹ The filing of Plaintiffs' Second Amended Complaint is not in conformance with I.R.C.P. 15(a). That rule allows a party to amend a pleading *once* before a responsive pleading is served, not twice. Therefore, the Second Amended Complaint is procedurally defective and ignored.

(1987) (citing *Cazier v. Economy Cash Stores, Inc.*, 71 Idaho 178, 187, 228 P.2d 436, 441 (1951)). Though a party may have ceased the conduct which gave rise to the desire for a preliminary injunction, the district court's power to grant that relief "survives discontinuance of the illegal conduct." *Id.* (citation omitted).

Idaho Rule of Civil Procedure ("I.R.C.P.") 65(e) sets the parameters for granting a preliminary injunction, in part:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

I.R.C.P. 65(e)(1). Generally, the decision to grant or deny a preliminary injunction rests within the discretion of the trial court. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997) (citing *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984)). The party seeking an injunction has the burden of proving a right thereto. *Harris*, 106 Idaho at 518, 681 P.2d at 993.

Also, I.R.C.P. 65(c) requires that the applicant for a preliminary injunction post a security bond, in an amount determined by the Court, to cover "such costs and damages... as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Thus, an enjoined party is protected from harm to some extent should it be subjected to wrongful action.

III. INJUNCTION ANALYSIS

Whether a preliminary injunction may be granted under I.R.C.P. 65(e)(1) is a two-part inquiry into: 1) whether plaintiff appears to be entitled to the relief demanded; and, 2) whether that relief consists in restraining the commission or continuance of the acts complained of. The Court finds in the affirmative on both inquiries.

1. Entitlement to Relief Demanded

The Idaho Supreme Court, contemplating I.R.C.P. 65(e)(1), required a “substantial likelihood of success” to find that a plaintiff is entitled to the relief demanded. *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984); see *First Nat’l Bank & Trust Co. v. Fed. Reserve Bank*, 495 F.Supp. 154 (W.D. Mich. 1980). Thus, if it appears by the complaint that a plaintiff’s claim has a substantial likelihood of succeeding, the first part of the I.R.C.P. 65(e)(1) would be satisfied.

Standing

In order to have a substantial likelihood of success, Plaintiffs must first have standing to bring the present claim. The injury claimed by a plaintiff may not be of a general nature:

It is not enough that the party is a concerned citizen who seeks to ensure that a governmental entity abides by the law. *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002). To have standing, a litigant must allege or demonstrate an injury in fact... *Id.* A citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction. *Id.*

Ameritel Inns, Inc. v. Greater Boise Auditorium Dist., 141 Idaho 849, 852, 119 P.3d 624, 627 (2005); see *Bopp v. City of Sandpoint*, 110 Idaho 488, 716 P.2d 1260 (1986). The ownership of land within an affected area “does not relieve a complainant of the necessity of demonstrating a ‘distinct palpable injury’ traceable to the challenged governmental conduct.” *Student Loan Fund of Idaho, Inc. v. Payette County*, 125 Idaho 824, 828, 875 P.2d 236, 240 (Ct. App. 1994). However, the distinct palpable injury need not be a past, completed harm—it may be futuristic: “standing may be predicated not only upon a past injury but also upon a threatened harm.” *Id.*, 125 Idaho at 827, 875 P.2d at 239 (citing *Harris*, 106 Idaho at 516, 681 P.2d at 991; and *Idaho Branch, Inc. of the Associated Gen.*

Contractors of America, Inc. v. Nampa Highway Dist. No. 1, 123 Idaho 237, 240, 846 P.2d 239, 242 (Ct. App. 1993)).

Plaintiffs, at least some of them, have alleged enough of a threatened distinct palpable injury to establish standing. Plaintiffs claim that the Moratorium will reduce the value of raw land for development purposes. (Pls.' Compl. ¶ 5). Dennis Brower, trustee of the Brower Family Trust (a named plaintiff), swore by affidavit that the Trust cannot perform its contract with a buyer with the Moratorium in effect, thus losing the time value of its money for six months. (Brower Aff., *passim*.)² While these claimed injuries have yet to be proven and are futuristic, they are threatened harms of distinct palpable injuries. There is no indication in the pleadings that Plaintiffs intend the current action as a vindication of all Teton County taxpayers' rights, but rather for specific, individualized relief. Furthermore, the Court acknowledges the fact that individuals and entities may suffer harm or lose business opportunities because of planning and zoning decisions without giving rise to a right to recover in court. However, there is a clear distinction between incidental harm caused by a legally-imposed P&Z ordinance and injury caused by an illegally-imposed one.

Substance and Likelihood of Success

Under the Idaho Administrative Procedures Act ("IAPA"), "a person aggrieved by a planning and zoning decision may seek judicial review of that decision." *CRAPSS v. Bonner County*, 138 Idaho 585, 587, 67 P.3d 64, 66 (2003); I.C. § 67-6521(2). Under that act, a "Board's zoning decision may be overturned only where it... (c) was made upon unlawful procedure" I.C. § 67-5279(3). Furthermore, the Commissioners' "factual determinations are

² The Affidavit of Garry and Verna Lerwill, husband and Wife; Stacy and Brenda Lerwill, husband and wife is ignored by the Court. These individuals have been listed as parties to the action, but have not been properly added per Idaho Rules of Civil Procedure. The affidavit will be formally disregarded by a subsequent court order.

binding... 'so long as the determinations are supported by substantial competent evidence.' Substantial and competent evidence is less than a preponderance of evidence, but more than a mere scintilla. Substantial and competent evidence need not be uncontradicted...." *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, _____, 148 P.3d 1247, 1263 (2006) (citations omitted) (quoting *Fischer v. City of Ketchum*, 141 Idaho 349, 351, 109 P.3d 1091, 1094 (2005)).

Plaintiffs' claim for declaratory or injunctive relief has a substantial likelihood of success. The Board pursued an abbreviated notice of hearing of the Moratorium under I.C. §67-6523. That section reads, in pertinent part:

If a governing board finds that an **imminent peril to the public health, safety, or welfare** requires adoption of ordinances as required or authorized under this chapter, or adoption of a moratorium upon the issuance of selected classes of permits, or both, it shall state in writing its reasons for that finding. The governing board may then proceed without recommendation of a commission, upon any abbreviated notice of hearing that it finds practical, to adopt the ordinance or moratorium.

I.C. § 67-6523 (emphasis added). Normally the Court would be bound by the Board's factual finding of imminent peril to the public health, safety, or welfare; however, the facts as alleged in the Complaint show insufficient substantial and competent evidence to support the finding of imminent peril.

In the body of the Moratorium, the Board enumerated its findings as to the nature of the emergency justifying abbreviated notice and process. (Pls.' Ex. 9 at § 2.) Findings 1-4, 7, and 9-13 are all reiterations of the same idea: Teton County's planning department is overwhelmed with applications and is overworked and understaffed. Finding 5 indicates that Teton County lacks a Capital Improvements Plan. Finding 6 is that the County landfill will close about July 15, 2007 and that a transfer station is planned to be built—there is no mention of whether there will be a time without a local

garbage disposal facility, whether or not a stop-gap is available, or any other fact indicating the existence of imminent peril. Finding 8 is that Teton County does not have a Land Use Map. (*Id.*)

None of these findings appear to present substantial and competent evidence of imminent peril to public safety, health, or welfare required for emergency action; in fact, it is debatable whether they constitute even a scintilla of evidence of such peril. I.C. § 67-6523 authorizes local planning entities to circumvent statutory notice requirements in rare cases of emergency where time is of the essence. The danger of mudslide, the potential eradication of an endangered species, or the discovery of the presence of toxic waste all readily come to mind as examples of where waiting two weeks before imposing a moratorium could have disastrous consequences, thus justifying an exceptional abridgment of citizens' rights to be heard. Moratorium No. 032707 contemplates issues that are not urgent—at least not urgent enough to counterbalance the rights of Teton County's citizens.

County Commissions are unusual in our governmental framework because they exercise both executive and legislative functions. However, to diminish the threshold at which this kind of emergency action can be taken is to abrogate the public responsibility of the legislative process and to foster the governing of a county by executive fiat. Such is not the intent of the law.

Many local government agencies are overworked and understaffed, and a moratorium may very well be necessary to curb the influx of applications until a more ordered process may be instituted. However, given the facts as alleged in the Complaint as applied to a preliminary injunction analysis, the normal processes for enacting such a moratorium would probably have been sufficient; there was no basis for an emergency

proceeding. There is a substantial likelihood that the Moratorium is procedurally defective, and thus that Plaintiffs would succeed in their claim per I.C. § 67-5279(3)(c); therefore, the first part of I.R.C.P. 65(e)(1) is satisfied.

2. Relief Requested Restrains Complained-of Acts


The second part of I.R.C.P. 65(e)(1) requires that the relief requested consist in “restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.” The act complained of here was the enactment of Teton County Emergency Moratorium Resolution No. 032707. Plaintiffs pray that the Moratorium “be declared null and void.” (Pls.’ Compl. for Inj. and Decl. Relief, at 7.) Axiomatically, declaring the resolution null and void equates to a perpetual restraint of the commission of enforcing a procedurally defective act. Therefore, the second part of I.R.C.P. 65(e)(2) is also satisfied.

**IV.
CONCLUSION**

Both parts of I.R.C.P. 65(e)(1) have been met. The Court exercises its discretion to grant a preliminary injunction under the authority of that rule. An injunction will be ordered consistent with this opinion. Bond in the amount of \$5,000 will be required.

IT IS SO ORDERED.

Dated this 30 day of April, 2007.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2007, I served a true and correct copy of the foregoing OPINION AND DECISION ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Clerk of the District Court
Teton County, Idaho

by *AD in Chambers*
Deputy Clerk
of Bonanza County