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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA COMMERCIAL FISHERMEN'S MEMORIAL IN JUNEAU,	)
	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY AND BOROUGH OF JUNEAU,	)
	)
Defendant.	)

FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU BY: GLB ON: <u>2-6-14</u>
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Case No. 1JU-14-487 CI

**ORDER DENYING MEMORIAL'S REQUEST FOR A TEMPORARY RESTRAINING ORDER**

Plaintiff Alaska Commercial Fishermen's Memorial in Juneau ("Memorial") seeks expedited consideration of its motion for temporary restraining order and preliminary injunction. Memorial moves to enjoin the City and Borough of Juneau ("City") from:

1) entering into any agreement to construct Dock 16B in Gastineau Channel, and 2) paying any money related to any agreement to construct Dock 16B in Gastineau Channel unless and until there is a final decision from the State of Alaska Department of Natural Resources ("DNR") on whether to transfer the submerged lands in Gastineau Channel to the City for the construction of Dock 16B in Gastineau Channel. Memorial requests that the court initially enter a temporary restraining order that last either 30 days or until the court can hear and decide its request for a preliminary injunction.

The motion for expedited consideration is DENIED because Memorial did not present facts adequate to justify expedited consideration. The request for a temporary restraining order is DENIED because Memorial has not shown it is facing immediate and irreparable injury,

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loss, or damage before the City can be heard in opposition. Finally, the court will hold a hearing on the request for a preliminary injunction on February 24, 2014 at 3:30 p.m.

**A. Background**

Memorial is an Alaska nonprofit corporation that sponsors the annual Blessing of the Fleet and the Dedication of Names that occurs on the first Monday in May. Memorial states that the memorial site was chosen because it has unobstructed access to Gastineau Channel which allows the fishing boats to safely parade by during the annual Blessing of the Fleet. The City wants to construct a cruise ship dock in Gastineau Channel. The dock is called Dock 16B and would be located in front of the memorial site on the Juneau waterfront.

The City applied to the DNR for the submerged lands in Gastineau Channel to build Dock 16B. The DNR issued a final decision transferring the submerged lands in Gastineau Channel to the City on January 2, 2014. Memorial appealed the final decision transferring the land to the City on January 14, 2014. At Memorial's request, the DNR stayed the transfer of land to the City pending the outcome of Memorial's appeal. Thus, the City does not have title to the submerged lands in Gastineau Channel.

Memorial claims the City approved an ordinance allowing construction of Dock 16B on January 27, 2014, even though the City was informed the final decision was stayed earlier that day.

Memorial filed a complaint for injunction and temporary restraining order against the City on January 28, 2014. The complaint states that if Dock 16B is constructed "it would destroy forever the historic manner in which the annual Blessing of the Fleet has been

conducted.” Memorial states in its complaint that the City cannot legally construct Dock 16B because the City does not possess the submerged lands in Gastineau Channel.

On January 29, 2014, Memorial filed two motions: 1) a motion for temporary restraining order and preliminary injunction, and 2) a motion for expedited consideration of the motion for temporary restraining order and preliminary injunction. The City has time remaining to answer the complaint and file an opposition to the motion for temporary restraining order and preliminary injunction.

## **B. Discussion**

Memorial argues that the court must issue a temporary restraining order and preliminary injunction to enjoin the City from: 1) entering into any agreement to construct Dock 16B in Gastineau Channel, and 2) paying any money related to any agreement to construct Dock 16B in Gastineau Channel unless and until there is a final decision from the DNR transferring the submerged lands in Gastineau Channel to the City for the construction of Dock 16B.

### **i. The Temporary Restraining Order**

Memorial asks the court to issue a temporary restraining order under Civil Rule 65(b) before the City has an opportunity to be heard. Memorial asks that the temporary restraining order last either 30 days or until the court can hear and decide Memorial’s application for a preliminary injunction.

Civil Rule 65(b) requires that one seeking a temporary restraining order give his adversary advance written or oral notice of his application except where specified

circumstances exist which make notice impossible.<sup>1</sup> Civil Rule 65(b) lays out the notice exception:

[a] temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.<sup>2</sup>

The City has been served with the complaint and the motion for temporary restraining order and preliminary injunction, but Memorial appears to be asking the court to issue a temporary restraining order before the City has an opportunity to respond. To succeed, Memorial initially needs to show that “it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to [Memorial] before the [City] can be heard in opposition.”<sup>3</sup>

Memorial states that it will be irreparably injured if the City begins the process of financing or constructing Dock 16B because the Blessing of the Fleet will not occur.

Memorial states that the Blessing will not occur because Dock 16B poses a significant and material danger to the public’s safety if the dock gets constructed.<sup>4</sup> Memorial also states that Dock 16B will not allow commercial fishermen to pass in front of the memorial site to get blessed, that Dock 16B poses navigational hazards to boats that will participate in the Blessing, that Dock 16B makes it impossible to have a boat parade for the Blessing, and that Dock 16B

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<sup>1</sup> *Knaebel v. Heiner*, 645 P.2d 201, 205-06 (Alaska 1982).

<sup>2</sup> Alaska R. Civ. P. 65(b).

<sup>3</sup> See Alaska R. Civ. P. 65(b).

<sup>4</sup> Memorial never discusses why Dock 16B will pose a significant danger. Instead, Memorial refers the court to the reasons “stated by the Memorial in its comments to DNR.”

will forever end the open unobstructed waters from the memorial site to Gastineau Channel which was the primary reason for the location.

The court does not agree that Memorial has shown that it will be irreparably injured if the court does not grant the temporary restraining order. Memorial argues that it will suffer irreparable injury if Dock 16B is constructed. However, Memorial admits in its own motion that it has delayed the transfer of title of the submerged lands from DNR to the City.

Moreover, Memorial also admits that the City cannot begin construction on Dock 16B without title to the submerged lands. Thus, Memorial is not faced with suffering immediate and irreparable injury because the City does not have title to the submerged lands and construction of Dock 16B remains uncertain.<sup>5</sup>

The court will not grant the temporary restraining order because Memorial has not shown that immediate and irreparable injury, loss, or damage will result to Memorial before the City can be heard in opposition.

**ii. Preliminary Injunction**

Memorial is also asking for a preliminary injunction to enjoin the City from entering into any agreement to construct Dock 16B in Gastineau Channel, and paying any money related to any agreement to construct Dock 16B unless there is a final decision from DNR transferring the submerged lands in Gastineau Channel to the City. Memorial states that it must show probable success on the merits before it can obtain preliminary injunctive relief.

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<sup>5</sup> The court will not consider Memorial's claim that it is a public interest litigant because Memorial failed to provide any discussion on whether it meets the required criteria to be deemed a public interest litigant.

There are two tests for determining whether the court can grant a request for a preliminary injunction: the “balance of hardships” test and the “probable success on the merits” test.

In determining whether to grant a preliminary injunction, a court will apply the balance of hardships test if three criteria are met:

- (1) the plaintiff must be faced with irreparable harm;
- (2) the opposing party must be adequately protected; and
- (3) the plaintiff must raise “serious” and substantial questions going to the merits of the case; that is, the issues raised cannot be “frivolous or obviously without merit.”<sup>6</sup>

“The balance of hardships is determined by weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction.”<sup>7</sup> If the balance of hardships tips decidedly toward the plaintiff, then the preliminary injunction will be granted.<sup>8</sup>

If a court determines that any of the three criteria are not met, however, a court will only grant a preliminary injunction if a party can show probable success on the merits.<sup>9</sup> This is a

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<sup>6</sup> See *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1272 (Alaska 1992) (internal citations and quotations omitted); see also *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (internal quotation marks and citations omitted) (stating “[i]f the plaintiff faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.”).

<sup>7</sup> *A.J. Industries, Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970).

<sup>8</sup> See *A.J. Industries, Inc.*, 470 P.2d at 540 (citing *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966)).

<sup>9</sup> See *id.* at 540 (stating “the rule requiring a clear showing of probable success applies in situations where the party asking for relief does not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued . . .”).

heightened standard over the balance of hardships approach.

Memorial states that it must meet the higher threshold probable success on the merits test. However, Memorial argues that it will suffer “irreparable harm” and claims that “serious and substantial questions” exist as to the legality of the City moving forward to construct Dock 16B.<sup>10</sup> This argument appears to be mixing the criteria for the “balance of hardships” test with the “probable success on the merits” test.

Moreover, Memorial did not provide any discussion on whether the City is “adequately protected” which could be determinative of which test Memorial should be advancing to obtain injunctive relief. If Memorial claims that the City is not adequately protected, then the question of whether the court can grant the preliminary injunction hinges on the “probable success on the merits” test. Conversely, if Memorial is claiming the City is adequately protected, then the question of whether the court can grant the preliminary injunction hinges on the “balance of hardships” test. Essentially, Memorial has not provided enough analysis in its motion to allow the court to properly decide whether to grant injunctive relief under either test.

### **C. Conclusion**

Memorial’s motion for expedited consideration is DENIED because Memorial did not present facts adequate to justify expedited consideration. Memorial’s request for a temporary restraining order is DENIED because Memorial has not shown it is facing immediate and irreparable injury, loss, or damage before the City can be heard in opposition. Finally, the

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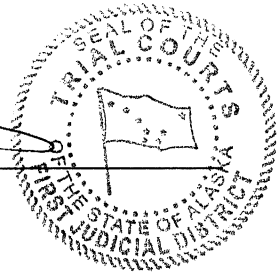
<sup>10</sup> Memorial states that the City is violating the law without identifying exactly what law the City is breaking.

court will hold a hearing on the request for a preliminary injunction on February 24, 2014 at 3:30 p.m.

Entered at Juneau, Alaska this 4<sup>th</sup> day of February, 2014.



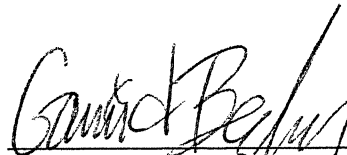
Louis J. Menendez  
Superior Court Judge



**CERTIFICATION OF SERVICE**

I certify that I served the following parties on the 5<sup>TH</sup> day of February, 2014.

Bruce Weyhrauch	Christopher Orman
<input checked="" type="checkbox"/> Via U.S. Mail	<input checked="" type="checkbox"/> Via U.S. Mail



Gavin L. Berkey  
Judicial Assistant to Judge Menendez