

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA COMMERCIAL FISHERMEN’S)
MEMORIAL IN JUNEAU,)
)
Plaintiff,)
)
v.) Case No. 1JU-14-487 CI
)
CITY AND BOROUGH OF JUNEAU,)
)
Defendant.)
_____)

**MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Under Alaska Rule of Civil Procedure 65, the plaintiff has moved for a temporary restraining order (TRO) and a preliminary injunction (PI) enjoining 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 State of Alaska

Department of Natural Resources (DNR) transferring the submerged lands in Gastineau Channel to the City for the construction of Dock 16B in Gastineau Channel.

The plaintiff has moved that the TRO be issued before the process associated with the plaintiff's complaint continues, to prevent irreparable harm to the plaintiff, who would be negatively, seriously, and permanently affected by the City that will:

1) enter into agreements to construct Dock 16B in Gastineau Channel when the City does not have legal authority from DNR to build Dock 16B on the submerged lands in Gastineau Channel, and

2) pay millions of dollars related to any agreement to construct Dock 16B in Gastineau Channel.

The plaintiff has asked that the TRO be effective for thirty days from the date of its issuance, unless extended by the court or by consent of the parties, or until the court can hear and decide on the application for a Preliminary Injunction, whichever date occurs earlier. See Civil Rule 65(b). In addition, the plaintiff has moved that the subsequent PI be effective until there is a final decision from DNR transferring the submerged lands in Gastineau Channel to the City.

II. FACTS AND BACKGROUND

A. The Memorial

The Alaska Commercial Fishermen's Memorial (Memorial) sponsors the annual Blessing of the Fleet (Blessing) every year. The Blessing takes place offshore of the

Memorial in Gastineau Chanel on the Juneau waterfront. The Memorial also sponsors an annual Dedication of Names in conjunction with the Blessing. Names are engraved on the Memorial each year, and those names are read and blessed each year in a non-denominational ceremony during the Blessing.

The Blessing of the Fleet and Dedication of Names has been conducted at, and in front of, the Memorial since the early 1990s. Among the reasons that the Memorial is located where it is along the Juneau, Alaska waterfront is because there is open, unobstructed access from the Memorial to the waters Gastineau Channel. There is nothing on the submerged lands in front of the memorial that has impeded that open access. Open, unobstructed access from the Memorial to Gastineau Channel is also essential to the annual Blessing of the Fleet so that fishing boats can safely parade by the Memorial for the annual Blessing of the Fleet.

The submerged lands in Gastineau Channel seaward of the Memorial belong to the state. The submerged lands in front of the Memorial in Gastineau Channel cannot be used for any purpose, especially to construct any obstruction in front of the Memorial until DNR transfers those submerged lands to a person or entity to construct an obstruction. The submerged lands in front of the Memorial do not belong to the City and the City cannot construct Dock 16B on the submerged lands in Gastineau Channel until those submerged lands are finally transferred from DNR to the City.

B. The City's Dock 16B

The City wants to build and construct a massive cruise ship dock in Gastineau Channel, which is called Dock 16B. Exhibit 1. A large portion of Dock 16B will be in front of the Memorial. Exhibit 2.

The City applied to DNR for ownership of the submerged lands in Gastineau Channel in order to construct Dock 16B. Without ownership of the submerged lands in Gastineau Channel, and without a final decision from DNR transferring the ownership of the submerged lands in Gastineau Channel to the City, the City cannot construct Dock 16B on those submerged lands.

DNR issued a Preliminary Decision transferring the submerged lands in Gastineau Channel to the City in 2013, but the law required DNR to solicit public comments on its Preliminary Decision. In November 2013, City port officials indicated that they were surprised that DNR needed to have a public comment period on DNR's Preliminary Decision transferring ownership of the submerged lands in order to transfer 18 acres of submerged lands in Gastineau Channel for the City to legally construct Dock 16B. Exhibit 3.

That expression of surprise by the City was after DNR issued a Preliminary Decision approving the transfer of submerged lands to the City. The City Assembly expressed concerns that the City port officials were planning to proceed with Dock

16B's construction in spite of the fact that the City did not own the submerged lands in Gastineau Channel on which Dock 16B would be built. Exhibit 3.

While the City had accepted bids to build Dock 16B at a cost of roughly \$54 million, the City Assembly expressed an interest in delaying a financing ordinance until the City had actual ownership of the submerged lands in Gastineau Channel, so that Dock 16B could be constructed. Exhibit 3. At that time, the City Assembly expressed concerns that it was too risky to finance Dock 16B if the City did not have the submerged lands in Gastineau Channel transferred to the City so it could construct Dock 16B. Exhibit 3.

In addition, the City Assembly was concerned about the financials of Dock 16B and the City's exposure of constructing Dock 16B if the City did not have the submerged lands in Gastineau Channel. Exhibit 3. The City Assembly indicated that City port officials should have disclosed the fact that DNR had not transferred the submerged lands in Gastineau channel to the City for Dock 16B construction. Exhibit 3. The City indicated at the same time that DNR would not care if the City signed a contract to construct Dock 16B that the City ultimately could not honor, because the City did not have the submerged lands in Gastineau Channel to construct Dock 16B, because that was the City's problem. Exhibit 3.

At the time all of this took place, the City did not own the submerged lands in Gastineau Channel. DNR had not transferred the submerged lands in Gastineau

Channel to the City in order for the City to legally construct Dock 16B on those submerged lands.

In November 2013, The City Assembly voted to proceed with the funding ordinance for Dock 16B, as long as the City sought written assurances from DNR that its transfer of the submerged lands in Gastineau Channel for construction of Dock 16B was imminent. Exhibit 3. DNR has still not finally transferred the submerged lands in Gastineau Channel to the City for it to construct Dock 16B.

C. DNR's Process

As part of the permitting process for the construction of Dock 16B, the City applied to DNR for the submerged lands in Gastineau Channel. DNR issued a Preliminary Decision transferring the submerged lands to the City and sought comments from the public. Exhibit 4. The plaintiff submitted public comment to DNR. Exhibit 5.

DNR issued a Final Decision transferring the submerged lands in Gastineau Channel to the City on January 2, 2014. On January 14, 2014, the plaintiff appealed that final decision. Exhibit 6. The plaintiff also sought a stay of DNR's final decision pending appeal of the Final Decision. On January 27, 2014, DNR granted a stay of its Final Decision. Exhibit 7. Thus, DNR has not transferred the submerged lands in Gastineau Channel to the City to construct Dock 16B.

D. The City Ignores the Facts and Violates the Law

The City was presented with the facts as set forth above on January 27, 2013.

The Assembly knew that DNR stayed its decision transferring submerged lands to the City to finance and construct Dock 16B. The City does not own, have title to, and has no jurisdiction over the submerged lands in Gastineau Channel. The City nevertheless ignored these facts.

On January 27, 2014, the City decided to pay more than \$55 million to pay for a bid on Dock 16B. Exhibit 8, page 2-3. The City did so in spite of the fact that the City does not have the submerged lands in Gastineau Channel, and despite the fact that the City cannot legally build Dock 16B without the submerged lands in Gastineau Channel.

III. ARGUMENT

The court must issue a temporary restraining order (TRO) and a preliminary injunction (PI) 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. The court's TRO and PI must be kept in place unless and until there is a final decision from DNR that transfers the submerged lands in Gastineau Channel to the City for the construction of Dock 16B.

A. Plaintiff Will Be Irreparably Injured if the City Finances or Constructs Dock 16B

The City is spending money on a project that cannot be legally constructed because the City does not have title to the Submerged lands on which the City wants to construct Dock 16B. 16B. The City's violation of law must be immediately enjoined by the court.

The Memorial will be irreparably injured if the City begins the process of paying for, or constructing, Dock 16B. The Blessing of the Fleet will never occur as it has been historically conducted if the City proceeds with Dock 16B without legal title to the submerged lands in Gastineau Channel. As stated by the Memorial in its comments to DNR, if Dock 16B is constructed, it poses a significant and material danger to the public's safety. Dock 16B will not allow commercial fishermen to pass in front of the Memorial any more to get blessed. Exhibit 5. Dock 16B poses hazards to navigation to boats that have participated in the Blessing. Dock 16B makes it impossible to have a boat parade for a Blessing. In addition, Dock 16B will forever end the open unobstructed waters from the Memorial to Gastineau Channel and will forever end the reasons that the Memorial was located where it is, with the City's approval, in the first place. Exhibit 5.

Moreover, as a public interest litigant, the plaintiff seeks this court to enjoin the City by preventing it from paying for or entering any agreements related to the

Construction of Dock 16B on Submerged lands in Gastineau Channel that the City does not even have jurisdiction over to construct Dock 16B.

The plaintiff has raised serious and substantial questions about the legal merits of the City's actions. Thus, the plaintiff is likely to prevail on the merits of the issues presented.

B. Preliminary Injunction Standard

Under the standard for determining whether to grant the application for a preliminary injunction, the applicant must show probable success on the merits before obtaining preliminary injunctive relief, instead of simply raising “serious and substantial,” i.e. non-frivolous, legal issues.¹ Thus, the second standard requires that the applicant show (1) that the applicant will be faced with irreparable harm if a preliminary injunction is not granted; and (2) probability that the applicant will prevail on the merits of the case. Under this standard, the plaintiff is entitled to the relief requested.

C. Irreparable Harm to Plaintiff

Plaintiff will be injured irreparably if the City pays millions to construct Dock 16B on submerged lands that have not been transferred from DNR to the City. Construction of Dock 16B will result in total loss of the very purposes that the Memorial was located where it is. The plaintiff is irreparably harmed if the City pays

¹ See State v. United Cook Inlet Drift Ass'n, 815 P.2d 378, 378-379 (Alaska 1991); State v. Kluti Kaah Native Village of Copper Center, 831 P.2d 1270, 1273 (Alaska 1992).

millions to a contractor to construct Dock 16B on submerged lands that the City does not own.

The Alaska Supreme Court has defined irreparable harm this way:²

‘Irreparable injury’ includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law.

The plaintiff has no remedies at law for the forthcoming injury of the City illegally constructing Dock 16B. However, enjoining the City from spending any money on Dock 16B will insure that the submerged lands in Gastineau Channel offshore of the Memorial stay open for the Blessing of the Fleet and Dedication of Names.

D. Serious and Substantial Questions and Likelihood of Success on the Merits

There are serious and substantial questions about the legality of the City moving forward to construct a dock on the Submerged lands of Gastineau Channel with the City does not even have title or jurisdiction over those lands to construct Dock 16B.

² Kluti Kaah, 831 P.2d at 1273 n.5 (quoting Black’s Law Dictionary 786 (6th ed. 1990)).

E. TRO Necessary Pending Preliminary Injunction Hearing

Because of the urgency of the situation, and the illegal nature of the City's actions, this court should issue the TRO requested by Plaintiff, pending the next stage of the proceedings. This matter cannot wait for a preliminary injunction hearing to be held because the defendant is taking actions pursuant to its decision to appropriate funds for Dock 16 on January 27, 2014. Further damage to the legal rights of the Memorial to have open waters over the submerged lands of Gastineau Channel pending a legal, final transfer of those lands from DNR to the City, will result and must be immediately enjoined by the court.

IV. CONCLUSION

Under Alaska Rule of Civil Procedure 65, the plaintiff has moved for a temporary restraining order (TRO) and a preliminary injunction (PI) enjoining 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 in Gastineau Channel unless and until there is a final decision from DNR transferring the submerged lands in Gastineau Channel to the City for the construction of Dock 16B in Gastineau Channel.

The plaintiff has moved that the TRO be issued before the process associated with the plaintiff's complaint continues, to prevent irreparable harm to the plaintiff, who would be negatively, seriously, and permanently affected by the City that will enter into

agreements to construct Dock 16B in Gastineau Channel, and 2) pay millions of dollars related to any agreement to construct Dock 16B in Gastineau Channel.

The plaintiff has asked that the TRO be effective for thirty days from the date of its issuance, unless extended by the court or by consent of the parties, or until the court can hear and decide on the application for a Preliminary Injunction, whichever date occurs earlier. See Civil Rule 65(b). In addition, the plaintiff has moved that the subsequent PI be effective until there is a final decision from DNR transferring the submerged lands in Gastineau Channel to the City.

Dated this ____ day of January, 2014

LAW OFFICE OF BRUCE B. WEYHRAUCH, LLC

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