IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

STEPHEN BOWER, Plaintiff, v. CITY AND BOROUGH OF JUNEAU, Defendant.	)	Filed in the Trial Courts STATE OF ALASKA, FIRST DISTRICT AT JUNEAU APR 28 2025 By RP Clerk Case No. 1JU-25-00593CI

ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

The Mendenhall River flows from the Mendenhall Lake, at the toe of the Mendenhall Glacier, to the ocean nearby. The river valley is heavily inhabited. Both parties agree that in recent years the valley has flooded at great cost to local residents.

Mr. Bower lives in a home along the banks of the river. To protect his neighborhood from flooding, the City and Borough of Juneau (CBJ) has decided to build a line of flood barriers out of large, sand-filled, heavy-duty wire mesh containers called HESCO barriers along the waterfront. The line of barriers will run at the water's edge through private lots including Mr. Bower's; the CBJ intends to remove the barriers once a more permanent flood control solution is identified. The CBJ created a "local improvement district" under CBJ ordinances to pay for the barriers by assessing the cost to all the homeowners in the affected neighborhood, including those who do not live next to the water.

Mr. Bower has asked the Court to issue a preliminary injunction pursuant to Civil Rule 65 to bar the CBJ from placing these barriers on his property. He

argued that the CBJ failed to comply with its own ordinances when it formed the local improvement district, the CBJ would likely commit an unconstitutional taking by using the property for speculative benefit without providing sufficient compensation, and the CBJ has not complied with the Rivers & Harbors Act of 1899, the Clean Water Act, the National Environmental Policy Act, or the Magnuson-Stevens Fishery Conservation and Management Act.

The CBJ opposed the motion. They argued that installation of HESCO barriers is an exercise of police power, not a compensable taking, and they formed the local improvement district consistent with local ordinances. They contended that they have been working closely with federal agencies that are often responsible for permitting projects like this one and that they have all determined that no federal permits are necessary. And even if those permits were required, the CBJ said that this Court has no jurisdiction to hear federal permitting disputes.

The Court will not wait for Mr. Bower to file a reply because the CBJ stated that barriers are to be installed this week. For the reasons stated in this order the Court finds that Mr. Bower did not meet the burden required to secure a preliminary injunction an denies the motion.

II. LAW AND ANALYSIS

a. General Discussion

The Court has the authority to grant preliminary injunctions in the early stages of a civil case to prohibit a party from taking certain actions until the matter is fully litigated. Civ. R. 65.

The Court should grant a preliminary injunction to preserve the status quo if the plaintiff faces the danger of "irreparable harm" if the Court denies the injunction and the defendant can be adequately protected from harm if the Court grants it. *State v. Galvin*, 491 P.3d 325, 332 (Alaska 2021). The plaintiff is not

required to show that success is likely: he only needs to raise "serious and substantial questions" about the merits of the case. 491 P.3d at 333. In other words, the plaintiff's case must not be frivolous or obviously meritless. *Id.* This is "balance of hardships" standard.

If the Court cannot grant an injunction under the balance of hardships standard, the plaintiff can still secure an injunction if they establish a "clear showing of probable success on the merits." *Id.* Courts must be cautious about granting injunctions under this standard. "A ruling on the merits in an action for preliminary relief would be premature, since it would usually be based on an incomplete record" without sufficient time for full consideration. *A.J. Industries, Inc. v. Alaska Public Service Comm'n*, 470 P.2d 537, 540 (Alaska 1970). And an early ruling on the merits risks the possibility that the court will have to rule twice, and possibly inconsistently. *Id.* Accordingly, courts should only issue injunctions if the likelihood of success is *clear, id.*, and should avoid any categorical rulings that do not leave room for additional law or facts to change the outcome in the future.

b. The "balance of hardships" standard does not favor Mr. Bower

Mr. Bower provided little information about what impact the flood barriers would have on his property or on his use of it, so the degree of harm is hard to assess at this stage. Nor did he establish that any harm would be "irreparable"—if he wins, the CBJ would likely have to remove the barriers and might have to compensate him for the use of his land. It is not clear that there would be any other harm left to correct if this happened.

Mr. Bower also argued that this project would cause irreparable harm to the "aquatic denizens" of the Mendenhall River. But he did not describe how construction on lots next to the river would likely harm any animal life in the

water. He speculated that this harm could happen if construction equipment needs to enter the water, but that is not sufficient to meet his burden.

On the CBJ's end, by contrast, the potential for irreparable harm is enormous.

Mr. Bower derisively asserted that the only potential harm would be that "many of [the CBJ's] politicians may not get re-elected if the barriers are not erected." But as Mr. Bower conceded, glacial outburst floods have occurred in this area for a decade and a half, they continue to occur, and his neighborhood has flooded twice in the last two years. Another flood in the near future may not be certain but it seems very likely.

He contended that the possibility of another flood is not a "guarantee" of harm—and that in any event the people whose homes might be damaged are not parties to the case so their potential injuries are irrelevant. But the CBJ has an interest in protecting its constituents—including Mr. Bower and neighbors—so the potential for damage to other private property is relevant whether the owners are parties to the case or not.

The balance of hardships standard strongly favors the CBJ and does not support an injunction.

c. Mr. Bower has not established probable likelihood of success on the merits for any of the arguments he raised.

Mr. Bower conceded that likely would not be able to establish irreparable harm so he focused on the argument that his claims are likely to succeed. He contended that the CBJ did not comply with its own ordinances when it created a local improvement district without the express consent of a majority of the affected property owners. He argued that the CBJ's use of his property would constitute a taking, that taking is unnecessary, and the CBJ is unlikely to provide reasonable compensation for it. And he asserted that the CBJ's plan would

violate a host of federal laws—the Rivers and Harbors Act (RHA), the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Magnuson-Stevens Fishery Conservation and Management Act (FCMA).

It is not clear that Mr. Bower is likely to succeed on any of his claims. The law does not require affirmative consent to the creation of a local improvement district. It is not clear that the CBJ's use of Mr. Bower's land would constitute a taking at all, let alone an invalid one, and Court cannot award damages or restitution through a preliminary injunction. Mr. Bower does not appear to have standing to raise a challenge under the RHA or the FCMA in any court, and this Court does not appear have jurisdiction to hear a direct challenge under either of those laws or under the CWA or NEPA. Even if the Court could consider those laws indirectly (to evaluate whether a taking was valid, for example), Mr. Bower is not likely to be able to show that the CBJ violated any of those laws. And even if Mr. Bower could prove he was likely to succeed, the cost to the public of an error at this preliminary stage is so high that the Court would not grant an injunction anyway.

i. Municipal ordinances

Mr. Bower alleged that the CBJ did not follow the correct procedure for the creation of a local improvement district. Citing a CBJ website, he claimed that a local improvement district plan must be "signed by a majority of the property owners in the proposed area." This did not happen, he said. He argued that the CBJ assumed it had consent of a majority of homeowners simply because most homeowners did not protest. According to Mr. Bower, this violated the CBJ's ordinances and the Rules of Professional Conduct.

Mr. Bower has misinterpreted the law governing the formation of local improvement districts.

The interpretive problems begin with Mr. Bower's reliance on the Rules of Professional Conduct. These regulate lawyers, not municipal governments, so they have nothing to do with this case.

The problems continue with Mr. Bower's reliance on a CBJ website. He did not actually provide the link to the website when he quoted from it, but presumably he was referring to the CBJ's Local Improvement District Process page.[1] This page has no legal value, and anyway the language Mr. Bower cited refers to *owner-initiated* petitions to create local improvement districts. *Id.*, see also AS 29.46.010(a)(1) (permitting property owners to request a local improvement district if the owners of the majority of properties agree). The *government* initiated this flood control project so different provisions apply.

The state permits municipal governments to create special assessment districts and make local improvements and to set the procedures for doing so by ordinance. AS 29.46.020(a). The CBJ has adopted such laws here. Ordinance 15.10.030 states that if the assembly intends to make a local improvement at the expense of the owners who will be benefitted, it must prepare a written proposal, set a hearing on the proposal, and invite public comment by publishing notice. The assembly must publish notice "at least 30 days prior to the date set for the hearing" in a newspaper of general circulation that contains all the information required by law. Ordinance 15.10.040. If property owners who will pay fifty percent or more of the assessment object in writing that the improvement is not necessary, the improvement cannot proceed unless (1) the assembly overrides the owners' veto by a vote of eight members or (2) the assembly persuades enough owners to withdraw their objections. Ordinance 15.10.060.

[1] https://juneau.org/engineering-public-works/lid-process, last accessed Apr. 24, 2025.

The CBJ is not required to seek affirmative consent from anyone to create a local improvement district or levy a special assessment. These ordinances (and equivalent provisions in state law, see AS 29.46.050(b)) permit local governments to proceed in the absence of sufficient protest. That is what happened here even in Mr. Bower's version of events so the CBJ's actions were lawful.[2]

ii. The Takings Clause

Mr. Bower argued that the CBJ would take his property if it erects flood barriers on it. He contended that this taking would be unnecessary and the CBJ probably will not provide reasonable compensation for the taking.

As Mr. Bower points out, the Alaska Constitution says "Private property shall not be taken or damaged for public use without just compensation." AK Const., Art. 1 § 18. This applies to both permanent and temporary takings. *Waiste v. State*, 10 P.3d 1141 (Alaska 2000). A taking must be necessary for a public use or purpose in a manner compatible with the greatest public good and the least private injury. *Hillstrand v. City of Homer*, 218 P.3d 685, 690 (Alaska 2009) (citing AS 09.55.430(7) and AS 09.55.460(b)). If a taking is necessary, the government must reasonably compensate the landowner unless an exception like the necessity doctrine applies. *Brewer v. State*, 341 P.3d 1107, 1114 (Alaska 2014).

It is not clear whether Mr. Bower will be able to establish that a taking occurred here. "Not every acquisition of a private property interest by the state

---

[2] Mr. Bower also stated that the CBJ failed to conduct informal polling, a process described on the CBJ's website. The website is not a legal authority, and the ordinances in Title 15, Chapter 10 of the CBJ's laws do not contain any reference to an "informal polling" requirement. Ditto Title 29, Chapter 46 of the Alaska Statutes, which fill in any gaps in the ordinances. See AS 29.46.020 ("To the extent that a municipality does not prescribe a procedure for special assessments as permitted by this section, the municipality shall comply with the special assessment procedures set out in AS 29.46030-29.46.100."). Assuming the CBJ's website accurately describes its typical practice, departure from that practice is within the CBJ's discretion because the law does not require it.

constitutes a taking[.]" *Waiste v. State*, 10 P.3d 1141, 1155 (Alaska 2000) (quoting *Hughes v. State*, 838 P.2d 1018, 1037 (Ore. 1992). The government can acquire private property through "the taxing power, the police power, or the power to purchase property," among other methods, and "when the government acquires such an interest through a power other than its taking power, just compensation is not constitutionally required." *Id.* Whether a state action constitutes a compensable taking or a non-compensable exercise of the state's police power is not always clear, and depends on a wide range of facts. In *Brewer*, for example, the Supreme Court explained that the state is not required to pay compensation if the use of private property is "necessary to prevent an impending or imminent public disaster from fire, flood, disease, or riot," though it may be required to pay if the danger is not sufficiently imminent. 341 P.3d at 1115-16.

It is not clear as a matter of fact or law which party is most likely to prevail on that question. No one disputes that the river has flooded in this area multiple times since 2011, including both of the last two summers. It will certainly flood again. But how likely is it that it will flood this summer? That likely depends on a host of factors the parties may not even be aware of yet. And if the river is likely to flood in the next few months, is that sufficiently "imminent" to categorize the CBJ's use as a non-compensable exercise of police power rather than a taking? The parties have not addressed that legal question yet.

Assuming it is a taking, Mr. Bower probably will not be able to establish that the taking would be unnecessary. Courts are required to defer to elected officials when they balance private harm against public good and determine that a taking is necessary: a court may only set aside that decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Hillstrand v. City of Homer*, 218 P.3d 685, 686-690 (Alaska 2009). Given the frequency of flooding in this area, Mr. Bower is not likely to be able to establish

that the CBJ's decision to build flood barriers on private property is arbitrary or capricious or that the CBJ abused its discretion.

The final question—what level of compensation would be reasonable for a taking, if Mr. Bower can establish that a compensable taking occurred—is outside the scope of this motion. The court grants preliminary injunctions to prohibit or require certain acts while a case is pending, not to award damages or compensation. AS 09.40.230; Civ. R. 65.

iii. This Court has no jurisdiction over the other federal violations raised by Mr. Bower and he has no standing to raise most of them.

Mr. Bower argued that the CBJ's plan would violate the Rivers and Harbors Act, the Magnuson-Stevens Fishery Management and Conservation Act, the National Environmental Policy Act, and the Clean Water Act.

The first two laws are well beyond the reach of this Court *or* the plaintiff. The Department of Justice "shall conduct the legal proceedings necessary to enforce" the RHA, and must "vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials" designated in that Act. 33 U.S.C. § 413. Similarly, the FCMA must be enforced by the Secretary of Commerce and the cabinet secretary responsible for the Coast Guard. 16 U.S.C. § 1861(a). Federal courts have "exclusive jurisdiction over any case or controversy" arising under the FCMA. 16 U.S.C. § 1861(d). In other words, the RHA and the FCMA must be enforced by the federal government in federal court. It does not appear that either law creates a private cause of action that can be filed in state court—so Mr. Bower cannot bring a case and this Court cannot hear one.

The Clean Water Act and National Environmental Policy Act are a bit different. Unlike the RHA or the FCMA, the CWA does permit private citizens to file enforcement actions—but those lawsuits must be filed in federal court. 33

U.S.C. § 1365. The NEPA does not provide for a private right of action, *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988), but private citizens can file a lawsuit under the federal Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* The APA, too, says those lawsuits must be filed against the United States in federal court. 5 U.S.C. § 702. Mr. Bower might be able to bring a suit under the CWA or NEPA, but he cannot do so in a state court.

These limitations are probably fatal to Mr. Bower's claims under these four acts. But say an indirect challenge is permitted – that a private citizen could challenge a taking under state law on the grounds that the purpose of the taking would be illegal, which might be incompatible with the requirement that a taking be both necessary and in the public interest, for example. Even in that case, Mr. Bower cannot meet his burden. The CBJ says that all the relevant federal agencies have advised them that permits will not be required, and as the Court will explain in the next few sections, Mr. Bower has not yet established any reason to believe otherwise.

iv. The Rivers and Harbors Act

The Rivers and Harbors Act of 1899 prohibits anyone from building "any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States," or obstructing "the navigable capacity of any of the waters of the United States" without the consent of Congress and the Army Corps of Engineers (or Coast Guard, depending on the body of water). 33 U.S.C. §§ 401 and 403.

The RHA prohibits obstructing navigable waters[3] or building **over or in** such waters without authorization. Here, the plaintiff has only pointed to

[3] This term means waters that are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is a navigable

construction *next to* a waterway. He has not provided any authority that has extended the plain language of the Rivers and Harbors Act beyond the banks the water to construction on its shores, nor has he alleged that the flood barriers will actually have any impact on the course of the river or any navigation in it.

v. The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant" into the waters of the United States. 33 U.S.C. §§ 1311(a) and 1362(12)(A). This act is jointly enforced by the Environmental Protection Agency and the Army Corps of Engineers; the EPA regulates most discharges but the Corps regulates the discharge of dredged or fill material into covered waters. 33 U.S.C. § 1344. See also *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 657-61 (2023).

Mr. Bower has not pointed to any potential discharge here. He alleges that the CBJ would be constructing a flood barrier on his property. He has not alleged that flood barriers would be placed into the water—or that the placement of a removable flood barrier would constitute a discharge of dredged or fill material within the scope of Section 1344.

vi. The Magnuson-Stevens Fishery Conservation and Management Act

Congress enacted the FCMA to establish a "federal-regional partnership to manage fishery resources." *NRDC v. Daley*, 209 F.3d 747, 749 (D.C.Cir. 2000). The federal government exercises "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources,

---

water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other states or foreign countries[.]" *The Montello*, 87 U.S. 430, 436 (1874). Not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water" is navigable—"it must be generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442. Open question whether the Mendenhall River is actually a navigable river within this definition—Mr. Bower did not present any evidence that it is, but the CBJ did not present any evidence that it is not.

within the exclusive economic zone," 16 U.S.C. § 1811(a), which extends from the seaward boundary of each coastal state to a line 200 miles offshore. 16 U.S.C. § 1802(11). Waters inside the seaward boundary of a state are outside the scope of the Act, and the Act in fact expressly declares that even the seas of Southeast Alaska are for the most part state-managed. 16 U.S.C. § 1856(a)(2)(C). A freshwater river near Juneau would appear to be beyond the reach of the Act and Mr. Bower has not shown otherwise.

Additionally, the FCMA created regional fishery management councils to regulate fisheries through stock management—identifying fish stocks, determining available stock and the maximum sustainable yield of that stock, allocating that yield between different classes of fishermen, determining the impact of different fishing activities on the targeted fisheries, limiting bycatch, regulating methods of fishing, etc. 16 U.S.C. §§ 1851, 1853. The law does not on its face permit these councils to regulate all activities that could impact fish, let alone require them to do so. Mr. Bower has not pointed to any provisions of the FCMA that would suggest otherwise.

vii. The National Environmental Policy Act

Mr. Bower argued that the CBJ failed to secure a "NEPA permit" for this project. It is not clear what Mr. Bower means by "NEPA permit" because the National Environmental Policy Act is not an independent permitting authority. The law requires federal agencies to take certain steps to analyze the potential environmental impact of legislation and "major federal actions significantly affecting the quality of the human environment," which can include the issuance of federal permits under *other* statutory authorities for major projects. 42 U.S.C. § 4332.

The Court assumes Mr. Bower meant that the CBJ failed to secure NEPA-compliant permits under the other permitting authorities he described (the RHA,

CWA, and FCMA). But as noted in previous sections, Mr. Bower is not likely to be able to show that permits would be required under those federal laws – and if there is no need to secure a federal permit, there is no federal action for which an environmental impact statement would be needed.

Even if a federal permit was required, it is not clear that Mr. Bower could establish that the issuance of a permit would constitute a "major federal action" that would "significantly affect[] the quality of the human environment." Environmental impact statements are not required for non-major actions or actions that may be major but do not have a significant impact on the quality of the environment. See, e.g., *Sierra Club v. Hassell*, where the court concluded that rebuilding a large bridge did not meet this standard because replacing a bridge would not measurably change the environment in any way. 636 F.2d 1095 (5th Cir. 1981). See also *Rucker v. Willis*, where the Fourth Circuit concluded that an Army Corps of Engineers permit for a 1,000-foot-long fishing pier, a dredged boat basin, and a marina did not constitute a "major federal action" for which NEPA would require an impact analysis because the project had minimal, primarily local impacts. 484 F.2d 158 (4th Cir. 1973). Mr. Bower has not offered an explanation how the installation of flood barriers on private lots next to a relatively short stretch of shoreline would likely affect the quality of the human environment, nor has he established how a federal permit for a project at this scale would constitute a "major" action.

viii. An injunction would imperil the public interest

Even if Mr. Bower was likely to succeed on the merit of any of his claims, the Court would not grant an injunction. In *State v. Galvin* the Supreme Court explained that a judge can deny a preliminary injunction even after finding that the moving party is likely to succeed on the merits if the injunction would imperil the public interest. 491 P.3d at 339. And Civil Rule 65(c) prohibits the

court from issuing an injunction unless the applicant posts a bond that would be sufficient to cover any costs and damages suffered as a result of an injunction that should not have been issued.

The early appearance of probable success is not the same as success. The cost of a mistake could be millions of dollars in unnecessary damages to private property, or even lives lost. The public has a right to expect that an emergency flood control project would not be stopped by something as tenuous as a judge's preliminary assessment of a case—particularly when the damage, if any is proven, can be fixed at a later date. This is all the more true when the person asking for an injunction would not be able to cover the costs his error imposed on the public if he turned out to be wrong.

III. CONCLUSION & ORDER

Mr. Bower asked the Court to issue a preliminary injunction barring the CBJ from building temporary flood barriers on his property. He argued that he will suffer more harm if the CBJ builds the barriers than the CBJ will if he does not. He also argued that the CBJ did not comply with its own ordinances when it authorized this project, the CBJ would likely commit an unconstitutional taking by using his property without sufficient cause and without providing sufficient compensation, and the CBJ has not complied with a host of relevant permitting authorities.

Mr. Bower did not meet his burden under Civil Rule 65 to justify a preliminary injunction. He did not establish that he is likely to suffer any harm that cannot be repaired, while the undisputed facts show that the potential harm to the CBJ is considerable. And Mr. Bower did not show a clear likelihood of success.

The undisputed facts show that the CBJ complied with the relevant ordinances when it authorized the project—at least with respect to those

ordinances that have been raised with the Court so far. Mr. Bower has raised a colorable argument with respect to his takings claim, but the CBJ raised a colorable defense: it is not clear which party is likely to prevail on the question whether the barriers constitute a compensable taking or a non-compensable exercise of police power. Mr. Bower does not appear to have standing to file a private action under the RHA or the FCMA, and this Court does not appear to have jurisdiction over enforcement actions under those acts or under the CWA or NEPA. Even if the Court does have jurisdiction to analyze these statutes indirectly as part of the takings claim, it is far from clear that Mr. Bower would be able to show that the CBJ was required to secure permits under any of those federal laws. And even if Mr. Bower was likely to succeed, the Court would deny the preliminary injunction as against the public interest.

Mr. Bower's motion for a preliminary injunction is denied. As noted earlier in this order, this decision is based on the Court's preliminary assessment of the case based on the factual allegations and legal authority raised at this early stage of litigation. See discussion of *A.J. Industries, Inc., supra*. This order should not be read as a final ruling on the merits of any of the claims Mr. Bower filed in his complaint, or on any of the defenses or counterclaims the CBJ may file in its answer.

IT IS SO ORDERED.

Dated April 28, 2025

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

Daniel E. Doty
Superior Court Judge

Certification
Copies Distributed
Date 4/28/25
To S. Perkins
E. Wright bye-mail
By BP