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MEMORANDUM

February 10, 2014

SUBJECT: Injunction security
(CSHB 47()); Work Order No. 28-LS0072\N)

TO: Representative Eric Feige
Attn: Linda Hay

FROM: Megan A. Wallace 
Legislative Counsel

This memorandum is a corrected version of the draft dated February 8, 2014, serves as a follow-up to the memorandum, dated February 1, 2013, from Dennis C. Bailey, and answers the same questions in analyzing CSHB 47().

1. *Does CSHB 47() require Alaskans to post a bond when requesting a stay or injunction?*

Yes. The bill states that "a party seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects an industrial operation shall give security" This is a requirement.

2. *Does CSHB 47() make posting a bond mandatory?*

Yes.

It should be noted, however, that despite the seemingly mandatory language in both CSHB 47() and Rule 65(c) relating to security for injunctions, the federal courts, including the Ninth Circuit, have interpreted the comparable federal rule as giving the court full discretion of the amount of security required, **if any**. See *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) ("Despite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*. In particular, the district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct.") (internal quotations omitted) (emphasis in original) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) and *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999)); see also *Language Line Servs., Inc. v. Language Servs. Associates, Inc.*, 500 F. App'x 678, 681 (9th Cir. 2012) ("LSA incorrectly argues that Federal Rule of Civil Procedure 65(c) requires the posting of a bond. Despite the mandatory language of Rule 65(c), district courts retain 'discretion as to the amount of security required, *if any*.'" (emphasis in original). While the Alaska Supreme Court has

never reached this issue, it would not be unreasonable to assume that it would reach a similar conclusion if asked to do so.

3. Does CSHB 47() set the bond amount?

No. The bill does not set a dollar figure for the bond amount. The bill allows the court to set the amount "the court considers proper."

4. Does CSHB 47() prevent plaintiffs from filing an action?

Civil Rule 65(c) already requires security in all cases involving a restraining order or preliminary injunction. Further, because CSHB 47() continues to allow the court full discretion in determining the amount of security, it is unlikely that it will prevent plaintiffs from filing an action. As a practical matter, the security would not be due at the time the complaint is filed, but would become due after a determination by the court of the amount due.

See also the analysis of the *Patrick* case in Mr. Bailey's memo.

5. Does CSHB 47() apply to the state or municipalities?

CSHB 47() does not expressly exempt the state or municipalities from posting a bond, but under AS 09.68.040(a), they would not be required to do so. AS 09.68.040(a) provides:

(a) In an action or proceeding in a court in which the state or a municipality is a party or in which the state or a municipality is interested, a bond or undertaking is not required of the state, a municipality, or an officer of the state or municipality.

Based on this section, the state or a municipality or their officers would not be required to post bond as security under HB 47.

6. Does CSHB 47() apply to Alaska Native Corporations?

Yes.

7. Would CSHB 47() apply to a dispute among neighbors where one wishes to stop another from a residential construction activity?

Probably not, but it would likely depend on the scope of the project. The definition of the term "industrial operation" in the bill includes "construction"; whether the construction is industrial construction would depend on the particular circumstances.

8. Does CSHB 47() mirror Alaska Civil Rule 65(c) by allowing the court to set an amount that it "considers proper" when determining an amount for security?

Yes. Both CSHB 47() and Rule 65(c) allow a court to set the security in an amount it deems proper. The bill, however, states that the court shall consider specific factors when determining such amount.

9. Does CSHB 47() in any way attempt to have the injunction security include compensation for lost profit?

No, not specifically, but the court could likely consider potential lost profits in determining the amount of security.

10. Would CSHB 47() create a court rule change that requires a two-thirds majority vote?

In my opinion, the revised language of CSHB 47() does not make it any more or less likely, as compared to the original version, that the legislation will be considered as changing a court rule. Civil Rule 65(c) reads, in part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The factors that are now required to be considered by the court under CSHB 47() could already be considered by the court under Rule 65(c). Ultimately, however, regardless of the factors considered, both CSHB 47() and Rule 65(c) leave the court with discretion about the amount of security to require.

Regardless of the changes in CSHB 47(), the argument could still be made that the legislation makes an indirect court rule change because it specifically mandates that the court consider "the amount of wages and benefits for employees and payment to contractors and subcontractors of the industrial operation." In addition, Rule 65(c) exempts the state and municipalities from the security requirement, whereas CSHB 47() only exempts a party from providing security where the permitting decision was made by the Department of Environmental Conservation and the Department of Natural Resources in limited circumstances. Therefore, if the state or a municipality seeks an injunction relating to an industrial operation in other cases, CSHB 47() would apply. As previously articulated, this suggests that a two-thirds vote may be required. Moreover, this legislation requires a party to give security when seeking a restraining order, preliminary injunction, *or* "order vacating or staying the operation of a permit that affects an industrial operation." Rule 65(c) only requires security in cases requesting a restraining order or preliminary injunction. There may be some limited circumstances where a party seeks an "order vacating or staying the operation of a permit that affects an industrial operation" or permanent injunction as a part of a civil action and does not seek temporary injunctive relief. Because this legislation extends the security requirement beyond cases seeking a restraining order or preliminary injunction, it may be deemed a court rule change and a two-thirds vote may be required.