



DATE: July 14, 2023
TO: Alicia Hughes-Skandijs, Chair LHED Committee
FROM: Sherri Layne and Robert Palmer, CBJ Law Department
SUBJECT: Ord. 2023-18: Landslide and Avalanche maps and regulations

On June 26, 2023, the Lands, Housing, and Economic Development (LHED) Committee posed legal questions about potential changes to the avalanche and/or landslide maps and associated Title 49 regulations.

City and Borough of Juneau as a Regulator

In 2020, the City & Borough of Juneau (CBJ) contracted with Tetra Tech to update the landslide and avalanche maps. The CBJ currently regulates development in landslide and avalanche areas in CBJC 49.70.300 based on 1987 landslide and avalanche area maps. The CBJ also regulates hillside developments, which occasionally overlap with the landslide and avalanche regulations. CBJC 49.70.200-270. While the LHED Committee considers the various policy options, the following is a primer on the basic questions of government liability related to regulating landslides and avalanches risks (i.e. Title 49).

(1) CBJ cannot be liable for money damages for failure to protect private property

owners/occupants from hazards on private property: The CBJ—as a regulator—is immune from tort liability for failure to inspect, discover, or abate a hazard to health or safety on private property. A.S. 9.65.070(d)(1). Thus, a private property owner cannot successfully sue the CBJ for money damages for adopting the Tetra Tech maps or failing to adopt the maps under a theory that the CBJ knew of potential hazards but failed to discover or abate the hazards on the private property. While the government has an interest to keep residents informed about risks, it does not have a legal duty to do so, nor does it have liability for actually holding public meetings or providing information about those risks.

(2) CBJ cannot be liable for money damages for publishing the Tetra Tech maps for legislative policy discussions.

Similar to the above provision, the CBJ—as a regulator—is immune from tort liability for performing or the failure to perform a discretionary function. A.S. 9.65.070(d)(2). Thus, a private property owner cannot successfully sue the CBJ for money damages for publishing the Tetra Tech maps for legislative policy discussions.

(3) CBJ cannot be liable for money damages for approving a development permit in a landslide or avalanche area.

The CBJ—as a regulator—is immune from tort liability for approving a development permit. A.S. 9.65.070(d)(3). Thus, a private property owner cannot successfully sue the CBJ for money damages for approving a building permit, a variance, conditional use permit, or rezoning in a landslide or avalanche area.

(4) Regulatory “takings.” The regulatory takings analysis is more complex and usually arises due to an alleged substantial decrease in private property value or a substantial increase in costs to develop. As the CBJ considers whether to adopt the Tetra Tech maps and keep the associated development regulations, CBJC 49.70.300, the CBJ should explain why it is choosing one policy option instead of another (i.e. no action, just adopt the Tetra Tech maps for informational purposes, amend CBJC 49.70.300, or repeal CBJC 49.70.300).

- **100% Deprivation of property value.** If the CBJ has landslide or avalanche regulations (based on hazard areas defined on maps) that deprive the property owner of all economic valuable use of private property, then the CBJ could be liable for taking that private property, but it depends on the facts.
- **Diminished property value.** If the CBJ has landslide or avalanche regulations (based on hazard areas defined on maps) that deprive the property owner of some economic valuable use of the property, a case-specific analysis is necessary based on the following factors:
 - (1) character of the government [CBJ] action;
 - (2) economic impact of CBJ action;
 - (3) the private property owner’s economic expectations; and
 - (4) legitimacy of the CBJ’s interest.

(5) Tetra Tech limitations. The Tetra Tech maps include boundary line limitations,¹ and require parcel specific mitigation analysis:

The level of assessment prepared for this project is suitable for determining whether land areas could be affected by [avalanches or landslides]. A more detailed site-specific investigation and evaluation would be required to determine appropriate mitigations for specific properties.

While the maps have some limitations, the limitations do not prevent the CBJ from adopting them for informational purposes or making them a basis for some development regulations.

In summary, Alaska law provides immunity to the CBJ for most regulatory claims. However, to avert a takings claim, the Assembly should consider the limitations of the Tetra Tech maps and explain why it is choosing one policy option over the others.

¹ Downtown Juneau Landslide and Avalanche Hazard Assessment, Tetra Tech, at 20 (PDF 41) (April 27, 2022) (1.5.2 Landslide Limitations) and at 39 (PDF 59) (2.5.2 Avalanche Limitations).