

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT, AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiff

vs.

716 WEST FOURTH AVENUE LLC, *et al.*

Defendants.

COPY
Original Received
FEB 23 2016

Clerk of the Trial Courts

Case No. 3AN-15-05969CI

**REPLY TO:
LEGISLATIVE AFFAIRS AGENCY'S AND
716 LLC'S OPPOSITIONS TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT (NOT EXTENSION)**

**A. The Contract Does Not Extend a Real Property Lease Within the
Meaning of AS 36.30.083(a)**

The question presented by Alaska Building, Inc.'s Motion for Partial Summary Judgment (Not Extension) is whether the lease entered into by the Legislative Affairs Agency (LAA) and 716 West Fourth Avenue LLC (716 LLC) for the new Anchorage Legislative Information Office (Lease) "extends" a real property lease within the meaning of AS 36.30.083(a). AS 36.30.083(a) provides as pertinent:

[T]he legislative council . . . may extend a real property lease that is entered into under this chapter for up to 10 years if a minimum cost savings of at least 10 percent below the market rental value of the real property at the time of the extension would be achieved on the rent due under the lease.

(emphasis added).

There is no dispute that the Lease provided for the demolition of the existing building down to its steel frame and foundation, demolition of the adjoining building, and construction of an otherwise new building, while the Anchorage Legislative Information Office moved out for over a year. As the Legislative Affairs Agency put it, the Lease . . .

provided for demolishing the former restaurant/bar known as the Anchor Bar, aside from its east wall, and remodeling, renovating, and expanding the existing LIO so that it now covered both lots on the combined site from the old LIO building and the Anchor Bar. It provides for site demolition of the existing structures and nearby sidewalk, excavation and backfill on top of the existing foundation, abandonment of existing water services and installation of a new water service to connect to the main, installation of new sanitary sewer service, and construction of the current structure based on new plumbing, heating, fuel system, ventilation, electrical, and insulation designs. The Alaska State Legislature vacated the premises for over 13 months during the demolition and reconstruction process.

Pages 6-7 of the Legislative Affairs Agency's opposition. Alaska Building, Inc., also draws the Court's attention to the photographs contained in its June 12, 2015, Memorandum and supporting affidavit, as well as in its July 7, 2015, reply to the Legislative Affairs Agency's June 29, 2015, opposition. It is apparent the Lease was a contract to construct and lease back the building.

Section B.1. of the Legislative Affairs Agency's February 3, 2016, opposition argues AS 36.30.083(a) does not preclude substantial modifications, stating, "It is entirely unclear how much change [Alaska Building, Inc.] deems to be 'too much' " to qualify as an extension. For better or worse, this Court is not being asked to draw the exact boundaries of how much is too much because this case does not present a close question.

In its opposition at page 12, 716 LLC argues that AS 36.30.083(a) "does not restrict in any way the degree to which the terms may change from the original lease," and at 13

that the Lease complies with AS 36.30.083(a) because 716 LLC and the Legislative Affairs Agency say the Lease is an extension. The former reads completely out of the statute the requirement that an agreement "extend a real property lease," and the latter ignores that it is the effect of an instrument that controls, not how it is characterized by the parties.¹

Section B.2. of the Legislative Affairs Agency's February 3, 2016, opposition argues that the Lease is not a new contract, but that is beside the point; the question is whether it "extends" a lease within the meaning of AS 36.30.083(a). At page 13 the Legislative Affairs Agency argues that it is the intent of the parties that controls whether a lease is an extension or not. However, the question here is not whether the parties intended it to be an extension, but compliance with AS 36.30.083(a).

Just last August, in *DeVilbiss v. Matanuska-Susitna Borough*, 356 P.3d 290, 295 (Alaska 2015), the Supreme Court had occasion to summarize Alaska jurisprudence on statutory interpretation

Determining the plain meaning of the statute is not the whole inquiry; we also look to the legislative purpose and the intent of the statute. We have adopted a sliding scale approach to statutory interpretation, under which "[t]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be." "We apply this sliding scale approach even if a statute is facially unambiguous."

(footnotes omitted). In that case, the Supreme Court found the plain meaning of the statute was confirmed by the legislative history.

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¹ *Department of Revenue v. Baxter*, 486 P.2d 360, 364 (Alaska 1971).

Here, the plain meaning of the statute excludes the Lease. Demolishing two buildings² and constructing a new one in its place while the tenant vacates for over a year is simply not an extension under the plain meaning of AS 36.30.083(a).

This is confirmed by the legislative history cited by Alaska Building, Inc., in its June 12, 2015, Memorandum in support of the Motion (Memo) , attached as Exhibit 1 thereto. This legislative history is that AS 36.30.083(a) "will avoid the costs and disruption of moving state offices and large numbers of state employees," and take economic advantage of the fact that all of the costs of building leased space is paid for over the initial term of the lease.³ The letter transmitting the bill states:

In the past, DOA leases consisted of a constant rental rate throughout the life of the lease. This was unduly costly for the state, since initial construction and tenant improvements (TI) of office buildings are generally financed and amortized only over the initial lease period, not the optional renewal periods. The state was effectively paying multiple times for one-time costs.⁴

There is no question that AS 36.30.083(a) was enacted in its current form to take advantage of landlords having paid for their construction costs before leases are extended and therefore able to offer lower rents. This was the reason for allowing deviation from the competitive bidding process normally required. The legislative history thus confirms the plain meaning of the statute that demolishing the existing and adjacent buildings to construct a new office building while the tenant has to move out for over a year is not an

² The old Anchorage Legislative Information Office down to its foundation and steel frame.

³ Exhibit 1 to Memo, page 4.

⁴ Exhibit 1, to Memo, page 1.

extension. Neither the Legislative Affairs Agency nor 716 LLC addressed this legislative history.

Instead they argue the Legislative Council was authorized to ignore the requirements of AS 36.30.083(a).

B. The Legislative Council Did Not Have Authority to Violate AS 36.30.083(a)

Both LAA and 716 LLC spend a considerable part of their oppositions arguing that the Legislative Council was not bound by AS 36.30.083(a) because it complied with its (just amended) procurement rules. However, the Legislative Council was required to comply with the statute as well as its own procurement rules. Alaska Const. Art. II, §11, cited by 716 at page 6 of its opposition for the proposition that the Legislative Council has independent constitutional authority, provides that the Legislative Council may only perform duties as provided by the Legislature. Both the Legislative Affairs Agency and 716 LLC cite AS 36.30.020 for the proposition that the Legislative Council had the authority to enter into the Lease, but AS 36.30.020 explicitly requires the procedures adopted by the Legislative Council to be "based on the competitive principles consistent" with AS 36.30. And, of course, AS 36.30.083(a), allowing deviation from the competitive bidding process is explicitly applicable to the Legislative Council. Moreover, the actions of the Legislative Council approving the negotiation of the Lease required the Lease to

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comply with AS 36.30.083(a)⁵ and the Lease itself states in numerous places that it was entered into under the authority of AS 36.30.083(a).

C. The Court Can and Should Decide Now Whether the Lease Extends a Real Property Lease

At page 2 of its opposition, the Legislative Affairs Agency asks this Court to decide the Motion as soon as practicable:

The pendency of this litigation and [Alaska Building, Inc.'s] ongoing challenges to the validity of these procurement procedures have created uncertainty concerning the application of AS 36.30.083(a) for this lease, which has the potential to impact budgeting and other decisions that will be made during the session. LAA respectfully requests that the Court provide a ruling on the potentially dispositive legal issue of the proper interpretation of AS 36.30.083(a) as soon as practicable.

(footnote omitted).

In contrast, 716 LLC argues that this Court should delay consideration of the Motion until after trial because this Court left open the possibility 716 LLC can prove undue prejudice under the *laches* doctrine at trial. 716 LLC misreads this Court's decision on the Legislative Affairs Agency's *Laches* Motion. The Conclusion of this Court's Order Denying Summary Judgment Re: *Laches*, includes the following:

ABI's only acknowledged request is for a declaratory ruling on the legality of the lease for failure to follow procurement procedures mandated by Alaska law. Summary dismissal of this litigation by the court's invoking its equitable powers and utilizing the defense of *laches* would result in a complete avoidance of a ruling on the legality of the LAA/716 lease-- hardly an

⁵ Specifically, as set forth in Exhibit B to 716 LLC's opposition, page 3, the action taken by the Legislative Council was, "The motion allowing the chairman to negotiate all the terms and conditions necessary to extend Lease 2004-024411-0 pursuant to AS 36.30.083(a) passed with no objections." (emphasis added).

equitable result to any involved party, but most especially to the citizen taxpayer.

716 LLC moved for reconsideration of this Order and in the Court's Order Denying Motion for Reconsideration Re: Laches, this Court made even clearer that, "The court does not find that the defense of laches applies to the request for a declaratory judgment" and "[T]he court still finds that the request for declaratory relief in and of itself does not give rise to a laches defense."

Alaska Building, Inc.'s Motion for Partial Summary Judgment (Not Extension) requests a judgment declaring the Lease does not comply with AS 36.30.083(a) in that it does not extend a real property lease. This is precisely the relief for which this Court has held *laches* is unavailable. If this Court grants the instant motion for partial summary judgment for an order declaring the Lease illegal for noncompliance with AS 36.30.083(a), under this Court's laches decision the defendants may attempt to prove prejudice in support of their laches defense at trial as to the remedy that the Lease is also null and void as a result. Alaska Building, Inc., also believes that under AS 22.10.020(g) this Court should set a hearing for further necessary or proper relief, which would include such possible remedies as (a) 716 LLC paying back funds received in excess of that allowed by AS 36.30.083(a), and (b) reformation of the Lease.

716 LLC also argues that whether the Lease complies with AS 36.30.083(a) is a nonjusticiable political matter, citing *Malone v. Meekins*, 650 P.2d 351 (Alaska 1982), and *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987). As a threshold matter, while the Legislative Affairs Agency might have standing to raise the justiciability

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issue, 716 LLC does not. As set forth above, the Legislative Affairs Agency has requested a decision on the motion as soon as practicable.

In any event, *Meekins* and *Abood* are inapposite. *Meekins* involved the House removing its Speaker and electing a new one, which the Supreme Court held was not subject to judicial review. Similarly, in *Abood*, the Supreme Court held that the Legislature did not have to follow the Open Meetings Act, AS 44.62.310, because how the Legislature operates was within its sole province so long as constitutional rights were not violated. In both cases, it was the full legislature that acted.

Here, the Legislative Council is subject to the explicit requirements of AS 36.30.083(a), negating the first *Baker v. Carr* test of "a textually demonstrable constitutional commitment of the issue to a coordinate political department," adopted by the Alaska Supreme Court in *Malone*.⁶ Alaska Building, Inc., does not doubt that the full legislature has the power to act on the Lease, but the Legislative Council does not have authority to violate AS 36.30.083(a). Even if the Legislature acts on the Lease this Court would still have authority to determine the application of AS 36.30.083(a) to the Lease, subject to possible mootness and application of the public interest exception to the mootness doctrine.⁷

As the Supreme Court cautioned in both *Malone*⁸ and *Abood*⁹, merely

⁶ 650 P.2d at 357, citing to *Baker v. Carr*, 369 U.S. 186, 210 217, 82 S.Ct. 691, 710 (US 1962).

⁷ See, *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 380 (Alaska 2007).

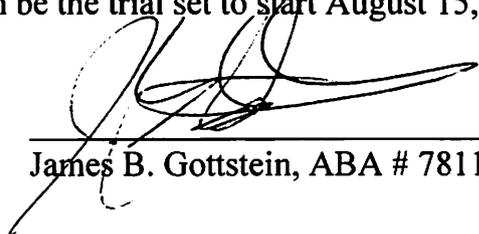
⁸ 650 P.2d at 356.

characterizing a case as political in nature does not render it immune from judicial scrutiny.¹⁰ The Legislative Affairs Agency not only has not raised the justiciability issue, but has asked for a decision as soon as practicable. Alaska Building, Inc., respectfully suggests the Legislative Affairs Agency's request be accommodated.

D. Conclusion

For the foregoing reasons it is respectfully suggested the Court should, (1) Grant plaintiff Alaska Building, Inc.'s Motion for Partial Summary Judgment (Not Extension), (2) Declare that the Lease does not comply with AS 36.30.083(a) because it does not extend a real property lease, and (3) Set a hearing for further necessary or proper relief pursuant to AS 22.10.020(g), which can be the trial set to start August 15, 2016.¹¹

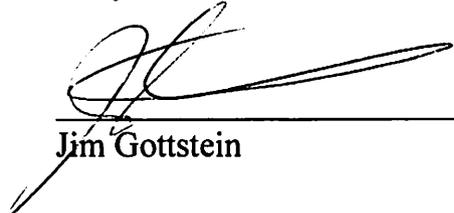
Dated February 23, 2016.


James B. Gottstein, ABA # 7811100

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he mailed a copy hereof and revised proposed order to Kevin M. Cuddy and Jeffrey W. Robinson/Eva R. Gardner,.

Dated February 23, 2016.


Jim Gottstein

⁹ 743 P.2d at 336.

¹⁰ None of the five other factors under *Baker v. Carr*, 369 U.S. 186, 210 217, 82 S.Ct. 691, 710 (US 1962) apply here.

¹¹ A revised proposed order reflecting this further hearing is being lodged herewith.

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corporation,
Plaintiff

vs.

716 WEST FOURTH AVENUE LLC,
KOONCE PFEFFER BETTIS, INC., d/b/a
KPB ARCHITECTS, PFEFFER
DEVELOPMENT, LLC, LEGISLATIVE
AFFAIRS AGENCY, and CRITERION
GENERAL, INC.,
Defendants.

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**ORDER GRANTING
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
(NOT EXTENSION)**

Upon consideration of plaintiff Alaska Building, Inc.'s motion for partial summary judgment, defendants' oppositions, and plaintiff's replies, it is **HEREBY ORDERED**

that:

1. the motion is **GRANTED**;
2. that certain contract, dated September 19, 2013, by and between defendant Legislative Affairs Agency and defendant 716 West Fourth Avenue LLC titled "Extension of Lease and Lease Amendment No. 3," is declared illegal for failure to comply with AS 36.30.083(a) in that it does not extend a real property lease; and

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3. a hearing for further necessary or proper relief pursuant to AS 22.10.020(g), shall be held August 15, 2016, beginning at 8:30 am, in Courtroom 301 of the Boney Courthouse 425 G Street, Anchorage, Alaska.

Dated _____, 2016.

Patrick J. McKay/Superior Court Judge