

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

ALASKA BUILDING, INC., an Alaskan corporation, Plaintiff,
vs. 716 WEST FOURTH AVENUE, LLC, and LEGISLATIVE AFFAIRS AGENCY, Defendants.

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3AN-15-05969 CI

ORDER ON MOTION FOR SUMMARY JUDGMENT RE: LEASE IS NOT AN
EXTENSION

INTRODUCTION

On September 9, 2013, the Legislative Affairs Agency (LAA) and the 716 West Fourth Avenue LLC (716) entered into an agreement to renovate and expand the existing Legislative Information Office (LIO Project). The project required a virtual “gutting” and reconstruction of the existing rental space, demolition and subsequent construction of a separate building on an adjoining lot, increasing the square footage of the leasehold from approximately 23,645 square feet to approximately 64,048 square feet¹. The agreement called for the LAA to pay for certain tenant improvements estimated to have cost in excess of \$7.5 million. The project required relocation of the tenants for several months. At the completion of this project, the LAA once again leased the office space. Construction began in December 2013 and was completed around January 9,

¹ 170% increase in square footage.

2015. The monthly rental increased from \$56,863.05 to \$281,638 and the term of the lease was extended to May 31, 2024.²

Plaintiff, Alaska Building, Inc. (ABI) has moved for partial summary judgment asking the court to declare that the lease is not a permissive non-competitive bid “extension” under AS 36.30.083(a) and to find the lease invalid as a matter of law. LAA first argues that the lease is an “extension” under AS 36.30.083(a); secondly argues that the Legislative Council developed and followed its own procurement regulations in extending the lease; and finally argues that portions of the dispute are non-justiciable.

716 supports the LAA arguments regarding the legality of the “extension” and further argues the entire dispute is non-justiciable³, requiring summary dismissal.

As more fully explained herein, this court finds that to the extent this dispute is justiciable, the lease does not qualify as an “extension” under AS 36.30.083(a) and is illegal. The court further finds that portions of the dispute are in fact not justiciable.

I. Background

The Legislative Council (Council) is an interim legislative committee created by the Alaska Constitution.⁴ It “may meet between legislative sessions ... [and] may perform duties and employ personnel as provided by the

² 395% increase in monthly rent.

³ Actually 716 first raised the issue of justiciability in its memorandum opposing this motion for partial summary judgment. LAA did not raise this issue until prompted by the court to state its position. See LAA’s Response to Court’s Request Dated February 26, 2016.

⁴ Alaska Constitution Art. II §11.

legislature.⁵ The Alaska Legislature made it a permanent interim committee⁶ recognizing the legislature's need "for full-time technical assistance in accomplishing the research, reporting, bill drafting, and examination and revision of statutes, and general administrative services essential to the development of sound legislation in the public interest." The Legislature also granted the Council certain powers including the power to:

- (1) to organize and adopt rules for the conduct of its business;...
- (4) in addition to providing the administrative services required for the operation of the legislative branch...
 - (E) to do all things necessary to carry out legislative directives and law, and the duties set out in the uniform rules of the legislature...
- (5) to exercise control and direction over all legislative space, supplies, and equipment and permanent legislative help between legislative sessions; the exercise of control over legislative space is subject to AS 36.30.080 (c) if the exercise involves the rent or lease of facilities...⁷

The Legislature further granted the Council the authority to:

adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch. The procedures must be based on the competitive principles consistent with this chapter and must be adapted to the special needs of the legislative branch as determined by the legislative council. ...The procedures must be consistent with the provisions of AS 36.30.080 (c) - (e) and 36.30.085. Notwithstanding the other provisions of this section, the legislative agencies subject to the legislative council's regulations shall comply with AS 36.30.170(b).⁸

⁵ *Id.*

⁶ AS 24.20.010 (emphasis added).

⁷ AS 24.20.060

⁸ AS 36.30.020

AS 36.30.080 provides that:

(c) If ... the legislative council intends to enter into or renew a lease of real property with an annual rent to the ... legislative council that is anticipated to exceed \$500,000, or with total lease payments that exceed \$2,500,000 for the full term of the lease, including any renewal options that are defined in the lease, ... the legislative council ... shall provide notice to the legislature.

The notice must include the anticipated annual lease obligation amount and the total lease payments for the full term of the lease.

"The ... legislative council ... may not enter into or renew a lease of real property

(1) requiring notice under this subsection unless the proposed lease or renewal of a lease has been approved by the legislature by law; an appropriation for the rent payable during the initial period of the lease or the initial period of lease renewal constitutes approval of the proposed lease or renewal of a lease for purposes of this paragraph;

(2) under this subsection if the total of all optional renewal periods provided for in the lease exceeds the original term of the lease exclusive of the total period of all renewal options.

(d) When the department is evaluating proposals for a lease of space, the department shall consider, in addition to lease costs, the life cycle costs, function, indoor environment, public convenience, planning, design, appearance, and location of the proposed building.

(e) When the department is considering leasing space, the department should consider whether leasing is likely to be the least costly means to provide the space.⁹

Under its authority to "adopt rules for the conduct of its business" the Council unanimously passed four motions on June 7, 2013: "1) a motion allowing the Chairman to negotiate all the terms and conditions necessary to extend the lease under AS 36.30.083(a); 2) a motion for the Legislative Council to adopt

⁹ AS 36.30.080 (c)-(e).

Amendment No.12 to the Legislative Procurement Procedure 040 to allow the Agency to materially modify an existing lease that was previously competitively procured; 3) a motion to authorize material amendments to the lease, including the addition of 712 West Fourth Ave with other terms and conditions necessary to accommodate renovations and 4) a motion of the legislative council to authorize the Alaska Housing Finance Corp to act as its representative during negotiations.”¹⁰

Pursuant to the Council’s regulations, the Legislative Affairs Agency (LAA) and 716 signed a lease in September 2013, which under the new regulations, purported to extend the April 2004 lease for LIO office space with 716. Alaska Building, Inc. argues that the lease between LAA and 716 violates AS 36.30.083(a) because it “does not extend a real property lease.”¹¹ 716 counters that this issue presents a nonjusticiable political question because the court will be reviewing the legislature’s application of its internal regulations to itself. The LAA agreed with 716 in part. In its briefing, the LAA agreed that the legislature’s findings under the Legislative Procurement Procedures are discretionary determinations and as such are nonjusticiable.¹² However, the LAA conceded that the court can review the lease’s compliance with AS 36.30.083.¹³

¹⁰ 716 LLC’s Opposition to Plaintiff’s Motion for Partial Summary Judgment (Not Extension) at 4. See also 28th Legislature (2013-2014) Committee Minutes from June 7, 2013, 716’s Opposition Exhibit B.

¹¹ Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment (Not Extension) at 1.

¹² LAA’s Response to Court’s Request Dated February 26, 2016 at 1.

¹³ *Id.* at 2.

II. Legal Standard

Summary judgement is appropriate where “there is no issue as to any material fact and the moving party is entitled to a judgement as a matter of law.”¹⁴ The non-moving party must “set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a material issues of fact exists.”¹⁵ Alaska has a lenient summary judgement standard,¹⁶ but mere allegations are insufficient and the non-moving party “must set forth specific facts showing that there is a genuine issue of material fact.”¹⁷ The court views “the facts in the light most favorable to the non-moving party and draw[s] all factual inferences in the non-moving party's favor.”¹⁸

III. Issues Presented

- A. Is this case justiciable in whole or in part?
- B. Does the lease does comply with AS.36.30.083?

IV. Analysis

A. *Justiciability*

“[T]he political question doctrine is essentially a function of the separation of powers, existing to restrain courts from inappropriate interference in the

¹⁴ Alaska R. Civ. P. 56(c).

¹⁵ *Christensen v. Alaska Sales and Service, Inc.* 335 P.3d 514, 517 (Alaska 2014).

¹⁶ *Estate of Milos v. Quality Asphalt Paving, Inc.*, 145 P.3d 533, 537 (Alaska 2006).

¹⁷ *Kelly v. Municipality of Anchorage*, 270 P. 3d 801, 803 (Alaska 2012) (internal citations omitted).

¹⁸ *Kalenga v. Jadon, Inc.*, 305 P.3d 346, 349 (Alaska 2013).

business of the other branches of Government, and deriving in large part from prudential concerns about the respect [the judiciary] owe[s] the political departments.”¹⁹ It is difficult to “defin[e] the contours of the doctrine of justiciability” because it is “not a legal concept with a fixed content or susceptible of scientific verification.”²⁰ Nonjusticiable political questions nevertheless share common characteristics:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²¹

The Alaska Supreme Court has examined the boundaries of judicial authority to review laws regulating the legislature’s own actions. In *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, (Alaska 1987), the League of Women Voters of Alaska and others (the League) brought suit against certain members of the legislature for holding closed meetings, which the League alleged violated Alaska’s Open Meeting Act (AS 44.62.310) and the legislature’s Uniform Rule 22. The court held that “out of respect owed to a coordinate branch

¹⁹ *Nixon v. United States*, 506 U.S. 224, 252-53 (1993).

²⁰ *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 336 (Alaska 1987)(internal citations omitted).

²¹ *Baker v. Carr* 369 U.S. 186, 217 (1962).

of state government, we must defer to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature.”²² It further found, that “it is the legislature’s prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative.”²³ Unless the legislature’s action are infringing upon a constitutional right or impacting a person not in the legislature, courts are reluctant to interfere because “it is not the function of the judiciary to require that the legislature follow its own rules.”²⁴

In another similar case, *Malone v. Meekins*, 650 P.2d 351 (Alaska 1982), the former Speaker of the House of Representatives, Representative Duncan, appealed from a lower court decision in which he brought suit against various members of the legislature alleging that they had illegally and unconstitutionally replaced him as Speaker of the House. As part of his complaint, he alleged that another Representative had violated AS 24.10.020, which allows the majority leader to preside only if the elected officer “resigns, becomes incapacitated, or dies,” by calling to order a meeting in which the House voted to replace Representative Duncan. Because none of the contingencies provided for in AS 24.10.020 were present when the other Representative called to order the meeting, Representative Duncan urged the court to find that the Representative had usurped power. The Alaska Supreme Court declined to address whether AS 24.10.020 vested the power to convene meetings solely in Representative Duncan as Speaker because even if he was correct:

²² *Abood*, 743 P.2d at 337.

²³ *Id.* at 338.

²⁴ *Id.*

it would still be improper for a court to declare the June 16th election of Representative Hayes to the Speakership invalid.

Such a declaration would, in our view, be an unwarranted intrusion into the business of the House. To be sure, the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature. But a statute such as AS 24.10.020 relates solely to the internal organization of the legislature, a subject which has been committed by our constitution to each house. Insofar as compliance with such a statute is concerned, we believe that a proper recognition of the respective roles of the legislature and the judiciary requires that the latter not intervene.²⁵

The court recognizes that the political question doctrine seemingly may leave a plaintiff such as ABI without a remedy. But the doctrine simply affirms that in some limited cases, the constitutional requirement of separation of powers shifts the ultimate resolution of certain disputes from the courts back to the governmental branch involved in the dispute- whether it be through further discussion with their colleagues or ultimately the citizens who placed them in their position.

716 argues that the present suit is almost identical to *Abood* and *Malone*. It argues that the Legislative Council, a constitutionally created entity, adopted internal procurement procedures pursuant to its statutorily granted authority to do so.²⁶ The Council then followed its own regulations (as amended) and made the

²⁵ 650 P.2d at 356.

²⁶ AS 36.30.020.

written findings necessary to utilize the exemption amendment. 716 contends that these actions all fall within the legislature's constitutionally mandated prerogative to regulate itself.²⁷

The LAA agrees that there are portions of this lease extension issue that are nonjudiciable because they "lack ... judicially discoverable and manageable standards for resolving [the issue]."²⁸ Specifically, the LAA argues that the Procurement Officer's written findings under Procurement Procedure 040 are nonjudiciable discretionary policy decisions. Beyond these determinations, the LAA allowed that the court could rule on whether the lease is in fact an extension under AS 36.30.083.²⁹

Based upon the pleadings and case law cited above, the court agrees with LAA position as stated herein. Despite 716's argument that the entire dispute is nonjusticiable, it would seem particularly inappropriate to fail to rule on the main issue in this dispute out of deference to a branch of government which is not asking for deference. It is this key fact that distinguishes this case from *Abood* or *Malone*. In both those cases, legislators raised the political question doctrine defense which prompted the Court in both cases to defer to the legislature. Because the legislature is not requesting such deference here, this court can review the lease's legality without concern that it is not showing due respect for

²⁷ ABI briefly raises the issue that 716 may not be allowed to raise a nonjusticiable political question defense. Though often the party raising the defense of a "textually demonstrable constitutional commitment of the issue to a coordinate political department" (*Baker v. Carr*, 369 U.S. 186, 217 (1962)), belongs to one of the three branches of government, (see e.g. *Nixon v. U.S.*, 506 U.S.224 (1993)), a party does not have to belong to the government to raise this defense. See e.g. *Corrie v. Caterpillar, Inc.*, 503 F. 3d 974 (9th Cir. 2007).

²⁸ LAA's Response to Court's Request Dated February 26, 2016; *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁹ *Id.* at 2.

an equal branch of government. However, out of due respect for the legislature, the court will not look behind the legislative curtain and will only consider whether the lease is a valid extension under AS 36.30.083(a).³⁰

B. The lease does not comply with AS.36.30.

LAA and 716 argue that to extend a real property lease under AS 36.30.083(a) they are only required to demonstrate a 10% savings and it does not matter whether the contract sought to be extended is substantively modified. AS 36.30.083(a) reads:

Notwithstanding any other provision of this chapter ... the 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.³¹

Thus the first requirement of this section is that the instrument in question is in fact a lease extension. Certainly, one of the provisions of the 2013 document extended the time LAA had the right to remain in the leased premises. But the

³⁰As a separate and likely also another nonjusticiable matter, the court does not agree that that the Legislative Council's promulgated procurement regulations, and the amendments thereto specifically promulgated to accommodate the lease at issue, comport with the state's procurement code. The Legislative Council has the authority to enact regulations to "...govern the procurement of supplies, services, professional services..." (AS 36.30.020). This provision is limited, however, by the mandate that these rules "be based on the competitive principles consistent with the legislative chapter of the state procurement code." In this court's opinion, altering the requirements of the procurement code to exempt certain legislative leases from the bidding process does not conform to the chapter's "competitive principles." (Id.). This finding is only included to permit review and prevent the need for remand and further expensive litigation if a reviewing court finds this issue is justiciable. But the believes this is not a justiciable issue under *Abood* and *Malone*, *supra*.

³¹Emphasis added.

court does not accept the argument that the contract is only an extension simply because that is what 716 and LAA named it in the document.

Black's Law Dictionary 523 (5th Ed. 1979) defines an "extension" generally as "an increase in length of time." As it relates to leases, it defines an extension as "a prolongation of the previous leasehold estate...*the same lease* continues in force during additional period upon performance of stipulated act."³² Likewise Garner's Dictionary of Legal Usage 346 (3rd Ed. 2011) defines "extension" as a legal contract that "continues *the same contract* for a specified period..."³³ Other jurisdictions have contemplated the meaning of a lease extension when differentiating between an extension and a lease renewal.³⁴ For example, the Minnesota Supreme Court has said that "[t]he legal distinction between an extension and a renewal of a lease is that an *extension merely continues the original lease*, while a renewal requires a new lease."³⁵ When considering the difference between an option to extend a contract and an agreement to negotiate a contract extension, a Florida court found that negotiating to extend a contract created "new and successive contracts. [Exercising an option to extend] merely operated to extend the duration of the agreement for specified periods under the same terms and conditions, all of which...had been subject of the initial bidding procedure."³⁶ The common theme throughout these definitions and explanations is that a lease extension only alters the time period of the contract while the remainder of the contract remains in full effect. The court finds the plain meaning

³² Emphasis added.

³³ Emphasis added

³⁴ See e.g. *Med-Care Associates, Inc. v. Noot*, 329 N.W. 2d 549, (Minn. 1983).

³⁵ *Id.* at 551 (emphasis added).

³⁶ *City of Lakeland, Fla. V. Union Oil Co. of Cal.*, 352 F. Supp. 758 (M. D. Florida 1973).

of AS 36.30.083(a) is to exempt an extension of the length of a lease (without substantive modification to the terms of the lease) from the competitive bidding requirement. As the parties argued before the court, AS 36.30.083(a) does not specifically prohibit substantive modification. The court agrees but further notes that AS 36.30.083(a) does not *permit* substantive modification either, except for rental amount to meet the cost savings requirement. This statutory silence actually supports the court's finding that an extension of a lease does not contemplate substantive modification of the terms.

As additional support for its findings, the court first notes that the legislature separated new leases and lease renewals from lease extensions.³⁷ By creating separate statutes to govern these different contractual principles, the legislature recognized the differences among these contracts and chose differing statutory approaches, requiring new leases and renewals to be subject to competitive bidding, and exempting only extensions with a 10% savings over market rate. The court assumes that the legislature did this purposefully and was mindful of not muddling the two statutes by conflating a lease extension with either a new lease or a lease renewal.

AS 36.30.083(a) permits a lease extension and, impliedly, the ability to modify the monthly rental payment to 90% of market value established "by a real estate broker's opinion of the rental value or by an appraisal the rental value". The lease between the LAA and 716 does not fit within the definitions of "extension" as articulated above because the 2013 lease is undoubtedly a different lease instrument from the 2004 contract. Significantly, the subject

³⁷ Compare AS 36.30.080 (Leases/Renewals) with AS 36.30.083 (Lease Extensions Authorized).

property of the 2013 lease is vastly different from the 2004 lease subject property. As the LAA states, the 2013 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.³⁸

The fact that the previous LIO absorbed the next door building significantly increasing the square footage of the building and the extensiveness of the new construction and reconstruction persuade this court that the 2013 lease's subject property is different from the subject property in the 2004 lease. Other factors that influence the court's decision include that the 2013 lease provides substantially altered rights and obligations for the parties³⁹ along with a 395% price increase.⁴⁰

³⁸ Legislative Affairs Agency Opposition at 6-7. The court finds no genuine issue of material fact.

³⁹ See e.g. Section 3 Extension of Lease and Lease Amendment No. 3.

⁴⁰ *Id.* at Section 1.1(c).

The court similarly does not agree that the contracting parties' interpretation of an "extension" falls within the meaning the legislature intended when it passed AS 36.30.083(a). Legislative history indicates that the primary impetus for enacting the revised version of this statute was to save money by reduced rent and make it easier for agencies to remain in their current building and avoid the costs of moving and re-procurement, especially since initial construction costs are usually amortized over the building's first years. As the then Chief Procurement Officer stated during one committee hearing:

...(T)he upfront construction and tenant improvement costs are generally financed and amortized over the initial firm term of the lease. The lessor is afforded an opportunity to bid a different price during the option periods of a lease. Generally, there is a dramatic decrease in prices after the initial firm period is over.⁴¹

.....

Tenant improvements and upfront construction [to prepare a new office for agency needs] are generally substantial for a large-size lease. There are also telephone relocations and CAT-5 cables are expensive...
Furthermore, the disruption of a relocation is difficult to quantify.⁴²

In agreeing to setting the incentive rate at 10% below market value, then Representative Rokeberg stated that it would "allow the department to move

⁴¹ *Background and History of HB 545 – State Real Property Lease Extensions: Hearing Before the House Labor and Commerce Standing Committee*, April 16, 2004, at p.8. (Statement of Mr. Vern Jones, Chief Procurement Officer, Division of General Services, Department of Administration); Exhibit 1 to Plaintiff's Memorandum in Support of Motion For Partial Summary Judgment.

⁴² *Id.* at p.11.

forward with a sole source type contract and ... avoid the appearance of any noncompetitive type of acquisition or continuation of lease."⁴³

The legislative history indicates that permitting sole-source contracting when there was a 10% savings was intended as both a cost saving measure and for agency convenience. Here, the legislature paid \$7,500,000.00 for additional tenant improvements and disrupted the legislature by relocating for over a year while the existing building was essentially demolished to its structural framing, rebuilt and new construction was completed on newly acquired premises. Thus none of the legislature's stated purposes for exempting a lease extension from the competitive bid process was realized from this lease "extension." The court does not find that the legislative history supports the positions of LAA and 716.

Finally, plain common sense -a principle which jurisprudence should not require to be checked at the courtroom door- mandates a finding that a contract to lease over 2.5 times more newly constructed space for just under 5 times the current rent with an introductory payment of \$7.5 million⁴⁴ for leasehold improvements is not a simple lease extension. A court finding that this leasing scheme could be sole-sourced would eviscerate the competitive principles of the state procurement code. The court finds this lease invalid as it does not comply with AS 38.30.083 (a).

⁴³Background and History of HB 545 – State Real Property Lease Extensions: Hearing Before the House Labor and Commerce Standing Committee, April 16, 2004, at p. 25.

⁴⁴The court notes that this amount is significantly more than the LAA paid for rent in toto for 9 years under the 2004 lease.

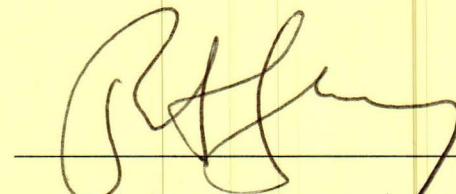
V. Conclusion

Though 716 initially invoked the political question doctrine, the LAA agreed that the court can decide whether the lease is an extension under AS 36.30.083. After reviewing various definitions and interpretations of a lease extension, the plain meaning of the words of the statute, the legislative history and intent, this court finds that this contract is not an agreement to extend a lease but rather a wholly new lease instrument altogether and should have been competitively bid. Summary judgment is GRANTED in favor of plaintiff ABI that the lease is not an extension under AS 38.30.083 (a).

The court further enters, as the final appealable order⁴⁵, a declaratory judgment that the lease is invalid based on the lease's non-compliance with AS 38.30.083(a). Because the court finds the lease invalid, all further proceedings are vacated as it is not necessary to decide whether the lease rate is 10% below the current market rate.⁴⁶

3/24/16

DATE



Hon. Patrick J. McKay

Judge of the Superior Court

I certify that on 3/24/16 a copy
of the following was mailed/ faxed/ hand-delivered
to each of the following at their addresses of mailed
record. James Gottstein
Jeffrey Robinson / Kevin Cudly
Administrative Assistant KC

⁴⁵ Declaratory judgment is the only remaining relief requested in ABI's Second Amended Complaint dated August 25, 2015.

⁴⁶ This ruling renders current pending motions MOOT.