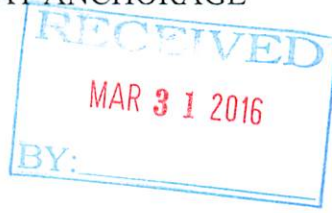


IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

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



Case No.: 3AN-15-05969 CI

**MOTION FOR RECONSIDERATION OF THE COURT’S ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT RE: “NOT EXTENSION”**

Under Civil Rule 77(k)(1)(i) and (iii),¹ Defendant 716 West Fourth Avenue LLC (“716”) respectfully moves the Court to reconsider its March 24, 2016 Order granting final relief. The Order raises serious due process and jurisdictional concerns that require resolution.

First, the Order deprives 716 of its due process right to be heard on the issue decided and present a defense.² Entering a final order invalidating the *lease*, based solely on a record addressing the *procurement process*, exceeds the scope of the issues presented to the Court to date. Moreover, deciding the case on its merits, without allowing 716 to be heard on its laches defense, violates 716’s right to make a defense and conflicts with the Court’s prior ruling.

Second, the Order overlooks that the Legislature approved the lease extension under statutes that specifically commit approval of leases to that branch of government. When ruling that it had jurisdiction to review the Lease Extension’s compliance with AS 36.30.083(a), the Court failed to consider AS 36.30.020’s mandate that leases be analyzed in light of AS 36.30.080(c)-(e). The Legislature’s actual appropriation of rent under these statutes served as a

¹ Civil Rule 77(k)(1)(i) and (iii) (a party may seek reconsideration if “[t]he court has overlooked, misapplied or failed to consider a statute, decision or principle directly controlling” or “misconceived a material question in the case[.]”).

² 716 raised this argument in its Opposition to ABI’s Motion, but the Court did not address it in the recent Order. *See* 716’s Opp. to Pl.’s Mot. for Partial S.J. (Not Extension) at 16-17.

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legislative act of law, and is an independent basis for the validity of the Lease Extension. Additionally, the Legislature's approval of the lease renders any question over its validity a nonjusticiable political question outside the Court's subject matter jurisdiction.

I. Due process requires further proceedings before a final order.

Significant due process issues arise from the Court's entry of a final order. The Court's ruling "that the lease is invalid" resolves an issue that was beyond the scope of the question before it. The issue presented to the Court was whether the lease was in compliance with the procurement laws. The Court's finding that the *procurement process* was flawed does not automatically invalidate the lease, which was entered into with apparent authority and which engendered tens of millions of dollars of reliance by both 716 and LAA. This is a complex and factual issue that requires further development of the record as a matter of due process.³

In addition, the Court's decision to enter final relief on the merits now, before 716 has had an opportunity to present evidence on its laches defense, fundamentally infringes 716's right to due process.⁴ It was also in conflict with the Court's prior ruling, which expressly reserved the laches defense for trial.⁵

The Court's January Laches Order held that "[u]nder the unique findings in this

³ It bears noting that even a final judgment in this action does not end the relationship between 716 and the LAA. *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation*, 765 P.2d 1360 (Alaska 1988), confirms that in the event of nonperformance, 716 will have an estoppel claim based on its reliance on the State's assurances regarding the Lease Extension's legality.

⁴ *Smithart v. State*, 988 P.2d 583, 586 (Alaska 1999) ("[A] defendant's right to present a defense is a fundamental element of due process."); *cf.* Alaska Const. Art. 1 § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.").

⁵ Laches bars a suit if the defendant shows (1) that the plaintiff unreasonably delayed in bringing the action, and (2) the unreasonable delay has caused undue harm or prejudice to the defendant. *See City & Borough of Juneau v. Breck*, 706 P.2d 313, 315 (Alaska 1985). When raising the defense of laches, prejudice is measured where "money or valuable services will be wasted as a result of the unreasonable delay[.]" *See Bibo v. Jeffrey's Restaurant*, 770 P.2d 290, 293 (Alaska 1989).

litigation, the court does find that the defense of laches is available to this lawsuit.”⁶ The Court also found that ABI’s financial gains, combined with the seventeen months ABI waited to file suit, constituted “unreasonable” delay.⁷⁸ However, the Court went on to hold that it would be premature to rule on the defense, as the final criterion—prejudice—involved genuine issues of material fact.⁹ The Court expressly stated that “[t]his decision is not to be construed as a finding that the defense of laches is unavailable to the defendants at trial.”¹⁰

Laches acts as a defense to suit, separate and apart from the merits of the plaintiff’s underlying claims.¹¹ Entering final relief against 716, before hearing its defense, violates 716’s due process right to establish the prejudice it suffered from ABI’s unreasonable delay.

II. The Court lacks subject-matter jurisdiction to invalidate the lease.

This Court acknowledged the Legislative Council’s authority under AS 36.30.020 to adapt its procurement procedures to meet the special needs of the legislative branch as determined by the Legislative Council¹² and concluded that the procurement findings made by

⁶ See Laches Order, Jan. 7, 2016, at 4.

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.* at 9. The Court’s subsequent order denying reconsideration, dated January 22, 2016, appeared to hold that laches defense is inapplicable to a request for pure declaratory judgment. Although the Court characterized its recent decision invalidating the lease as a “declaratory judgment,” Order at 17, the ruling is widely being perceived as effectively terminating the lease. This appears to be the result contemplated in the Court’s original Laches Order, which discussed the potential fallout from such a ruling. See Laches Order at 9 (outlining two scenarios that could result from a ruling that the lease is illegal, both of which assume termination of the lease obligations).

¹¹ *Conti v. Bd. of Civil Serv. Commissioners*, 461 P.2d 617, 623-24 (Cal. 1969) (in bank) (“laches constitutes an affirmative defense which does not reach to the merits of the cause”); *Johnson v. City of Loma Linda*, 5 P.3d 874, 884 (Cal. 2000) (“The defense of laches has nothing to do with the merits of the cause against which it is asserted.”); *Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001) (affirming trial court’s bifurcation of proceedings to hear laches in advance of merits, and dismissal of claim for laches).

¹² Order at 3.

the Legislative Council were not a justiciable issue.¹³ The Court further acknowledged that the procedures “must be consistent with the provisions of AS 36.30.080(c)-(e) and AS 36.30.170(b) [sic].”¹⁴ Although the Court cited the AS 36.30.080 provisions, it failed to actually analyze or apply this statute, as it was required to do. But the Legislature’s approval of the lease extension in accord with AS 36.30.080(c) explicitly places ABI’s challenge to the validity of the lease outside of the Court’s jurisdiction, regardless of its findings under AS 36.30.083.

AS 36.30.080(c) provides that a lease may be entered into by the Legislative Council if two things happen: (i) the Legislative Council provides notice to the Legislature of any leases in which the annual rent payment exceeds \$2,500,000; and (ii) the lease is “approved by the legislature by law.” A lease is approved by the legislature “by law” if the Legislature appropriates “rent payable during the initial period of the lease.”¹⁵ Both of these requirements happened here.¹⁶ Further, the Legislature’s subsequent approval of the Lease Extension means that its validity is necessarily non-justiciable, regardless of this Court’s finding of defects in the application of AS 36.30.083 prior to that approval by the Legislature.¹⁷

The presence of a political question deprives a court of subject matter jurisdiction.¹⁸

¹³ *Id.* at 11 n.30.

¹⁴ *Id.* at 4. *See supra* n.3. (AS 36.30.020 refers to AS 36.30.085 not 170(b)).

¹⁵ AS 36.30.080(c)(1)(Emphasis added).

¹⁶ Pam Varni notified the Legislature of the Lease Extension’s statutory compliance. *See* Ex. D to the Lease Extension. First year’s rent has been appropriated and is being paid.

¹⁷ AS 36.30.850(b)(5) provides that the procurement code does not apply to “acquisitions or disposals of real property or interests in real property, except as provided in AS 36.30.080 and 36.30.085.” The point is .080 is the operative procurement requirement under this title.

¹⁸ *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007). *See also Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”) An objection to a court’s subject matter jurisdiction can be raised by any party (or the court itself *sua sponte*) at any stage of litigation, including after trial and the entry of judgment. *See Arbaugh v. Y & H Copr.*, 546 U.S. 500, 506 (2006).

This Court acknowledged the guiding principles of *Baker v. Carr*, 369 U.S. 186, 217 (1962) in performing its justiciability analysis.¹⁹ *Baker* demands a “discriminating inquiry into the precise facts and posture of the particular case” before a court may withhold its own constitutional power to resolve cases and controversies.”²⁰ This Court found that the only distinction between this case and *Abood* and *Malone* was the Legislature’s failure in the instant case to ask for deference.²¹ As expressed in *Corrie v. Caterpillar*, the Court cannot fail to apply the political doctrine because another branch of government expresses hesitancy about the case proceeding; subject-matter jurisdiction is not waivable or left to the Court’s discretion.²²

In light of the Legislature’s express approval of the Lease Extension under AS 36.30.080(c), this Court lacks subject-matter jurisdiction to find it is invalid. At a minimum, a final order cannot be entered finding the lease to be “invalid” for noncompliance with AS 36.30.083 without resolving the separate question of whether the Legislature’s subsequent act of approving the lease provides a separate basis for its validity.

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DATED: 3-30-16

By: 

Jeffrey W. Robinson
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¹⁹ See Order at 7. See also *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) (reiterating that “the inextricable presence of one or more of the [*Baker v. Carr*] factors will render the case nonjusticiable under the Article III ‘case or controversy’ requirement”) The Court recognized 716’s standing to present the question. Order at 10, n.27 (citing *Corrie*, 503 F.3d 974).

²⁰ *Baker v. Carr*, 269 U.S. at 216.

²¹ See *id.*

²² *Corrie*, 503 F.3d at 982.