

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

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ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiff

vs.

716 WEST FOURTH AVENUE LLC, and
LEGISLATIVE AFFAIRS AGENCY

Defendants.

Case No. 3AN-15-05969CI

**ALASKA BUILDING, INC., RESPONSE TO 716 WEST FOURTH
AVENUE MOTION FOR RECONSIDERATION OF THE COURT'S
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT RE:
"NOT EXTENSION"**

Defendant 716 West Fourth Avenue LLC (716) has moved for reconsideration¹ of this Court's March 24, 2016, final appealable declaratory judgment, titled Order on Motion for Summary Judgment Re: Lease Is Not an Extension (Declaratory Judgment) and this Court has requested responses. Alaska Building, Inc., is pleased to do so. 716 asserts two reasons for granting reconsideration: (1) that it was denied due process because the Declaratory Judgment did not allow it to further present a factual basis to support a *laches* defense, and (2) that this Court erred in finding it had jurisdiction to decide whether the

¹ 716 does not identify in which way(s) this Court has overlooked, misapplied, failed to consider or misconceived a directly controlling principle, or misconceived a material question as required by Civil Rule 77(k)(2).

LIO Lease complied with AS 36.30.083(a) because it was approved by the Legislature and therefore a nonjusticiable political issue. Neither assertion is well taken.

A. This Court Correctly Held the Laches Defense Unavailable for the Declaratory Judgment

In accordance with *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 730 (Alaska 2000), this Court held *laches* was not available against Alaska Building, Inc.'s request for declaratory judgment. Order Denying Motion for Reconsideration Re: Laches, p. 4 ("The court does not find that the defense of laches applies to the request for a declaratory judgment."). The Declaratory Judgment explicitly issued only a declaratory judgment, stating in footnote 45 that, "Declaratory judgment is the only remaining relief requested in ABI's Second Amended Complaint." Thus, 716's argument that it is a violation of Due Process because it has not been allowed to present its *laches* defense is fallacious. It is no violation of Due Process to disallow evidence on an unavailable defense.

Alaska Building, Inc., requested a hearing on further necessary or proper relief pursuant to AS 22.10.020(g) should declaratory judgment be granted.² Alaska Building, Inc., contemplated such further relief would include recovery of payments under the LIO Lease should it be declared illegal. However, this Court declined Alaska Building, Inc.'s invitation for such a hearing. Should this Court decide to reverse itself and conduct a hearing on such further necessary or proper relief, then the question would arise as to

² Page 9 of February 23, 2016, Reply to: Legislative Affairs Agency's and 716 LLC's Oppositions to Plaintiffs' Motion for Partial Summary Judgment (Not Extension). *See*, also, page 9 of November 5, 2015, Opposition to Defendant Legislative Affairs Agency's Motion for Summary Judgment Under the Laches Doctrine.

whether a *laches* defense applies to such further relief. If so, the defendants would be allowed to put on evidence attempting to prove undue harm or prejudice, and Alaska Building, Inc., allowed to introduce evidence on unclean hands.

There is a pretty comprehensive analysis of such further necessary or proper relief when a public contract has been judicially determined illegal in the Appendix to *Earthmovers of Fairbanks, Inc. v. State, Dept. of Transp.*, 765 P.2d 1360 (Alaska 1988), cited by 716 at footnote 3. Under this analysis, in light of 716 not only being charged with knowing the requirements of AS 36.30.083(a), but also actually knowing the LIO Lease did not comply, there is a good chance all of the money paid under the illegal lease should be returned.³ At most, 716 would be entitled to retain fair market rent. Contrary to the suggestion of 716 in footnote 3, *estoppel* would not be available to 716.

However, since the Declaratory Judgment foreclosed any remedy in this action beyond declaratory relief there is no prejudice to 716 that would make the *laches* defense available. There has been no denial of Due Process by holding *laches* unavailable.

B. The Lease's Non-Compliance With AS 36.30.083(a) Is Justiciable

Citing AS 36.30.080(c)(1), 716 raises for the first time on reconsideration⁴ that by making the appropriation for the first year's rent, the Legislature approved the LIO Lease. In making this argument 716 also asserts for the first time that AS 36.30.850(b)(5) renders AS 36.30.083 a nullity. This cannot be so.

³ See, footnote 6 of *Earthmovers* Appendix.

⁴ This is grounds alone for denying the Motion for reconsideration, *Katz v. Murphy*, 165 P.3d 649, 661-662 (Alaska 2007), however Alaska Building, Inc., will address the merits.

(1) The First Year's Rent Appropriation Did Not Constitute Legislative Approval

First, by its very terms AS 36.30.080(c)(1) does not apply to lease extensions under AS 36.30.083(a). This Court made the distinction between leases, lease renewals, and lease extensions, and the separate statutes pertaining to each in its Declaratory Judgment.

716 argues that the Legislative Council complied with the notice provision of AS 36.30.080(c) and therefore the appropriation of the first year's rent constitutes approval of the LIO Lease. This is fallacious. AS 36.30.083 provides for a separate and different notice than AS 36.30.080(c). Neither AS 36.30.080, nor AS 36.30.083 provide that an appropriation of the first year's rent of an extension under AS 36.30.083(a) constitutes approval.

In footnote 17, 716 cites to AS 36.30.850(b)(5) for the proposition that the procurement code does not apply to AS 36.30.083 because AS 36.30.083 is not listed as an exception to the exception. Or, rather, that AS 36.30.080 "is the operative procurement requirement," because AS 36.30.083 is not listed in AS 36.30.850(b)(5). AS 36.30.850(b)(5) provides in pertinent part:

(b) This chapter applies to every expenditure of state money by the state, acting through an agency, under a contract, except that this chapter does not apply to . . .

(5) acquisitions or disposals of real property or interest in real property, except as provided in AS 36.30.080 and 36.30.085;

Assuming *arguendo* that a lease extension is an acquisition of an interest in land,⁵ then 716's argument is that AS 36.30.083 is not part of AS 36.30. This makes no sense.

Looking at the history of AS 36.30.850(b)(5), one sees that it was enacted in 1986 SLA Ch. 106, and only included AS 36.30.080. In 1994 SLA Ch. 75, §3, the authority of the Legislative Council to exercise control over legislative space to lease or lease-purchase or lease-financing was curtailed in AS 24.20.060(5) and made subject to AS 36.30.080(c). Section 7, added AS 36.30.085 pertaining to lease-purchases, and Section 8 amended AS 36.30.850(b)(5) to add AS 36.30.085. However, when AS 36.30.083 was first added through 1996 SLA Ch. 137, § 11, a corresponding amendment to AS 36.30.850(b)(5) was not made, nor was AS 36.30.850(b)(5) amended when AS 36.30.083 was repealed and reenacted to its current provisions through 2004 SLA Ch. 89, §11.⁶

716's analysis means that AS 36.30.083 is read completely out of the statutes because the corresponding amendment to AS 36.30.850(b)(5) was not made. This is an incorrect way to interpret statutes in Alaska:

When construing a statute, this court "presume[s] that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous." "[A]ll sections of an act are to be construed together so that all have meaning and no section conflicts with another." If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a

⁵ If it is not, then the AS 36.30.850(b)(5) exception to the exception does not apply.

⁶ As originally enacted in 1996, AS 36.30.083 made lease extensions subject to procedures adopted under AS 36.30.020, but this was deleted when AS 36.30.083(a) was repealed and reenacted in 2004 SLA Ch. 89, §11.

conflict, the specific section will control over the general." "[I]f two statutes conflict, then the later in time controls over the earlier."

Nelson v. Municipality of Anchorage, 267 P.3d 636, 642 (Alaska 2011), footnotes omitted.

As 36.30.083 is both more specific and later in time. It controls. It has its own specific notice requirement, which unlike AS 36.30.080(c)(1) does not provide that appropriation of the first year's rent constitutes approval. This Court should not graft it into the statute.

(2) Whether the Lease Complies with AS 36.30.083 is Justiciable

716 and the Legislative Affairs Agency both argue that the procurement decision by the Legislative Council under its Procurement Procedures is not justiciable, but the Legislative Affairs Agency's position is that whether the lease complies with AS 36.30.083(a) is justiciable. Alaska Building, Inc., did not claim the lease violated the Legislative Council's procurement procedures; its position is simply that the Legislative Council was required to comply with AS 36.30.083(a), regardless of its procedures. This Court agreed with the Legislative Affairs Agency that whether the Legislative Council complied with its procedures was nonjusticiable. Alaska Building, Inc., did not agree, but did not claim a violation of the Legislative Council's procedures, relying instead on the LIO Lease violating AS 36.30.083(a), which is controlling.⁷ In any event, whether the LIO Lease complies with AS 36.30.083(a) is justiciable.

Malone v. Meekins, 650 P.2d 351 (Alaska 1982), and *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987) do not support a claim of non-justiciability.

⁷ It might be worth noting that AS 36.30.020 does not authorize the Legislative Council to adopt procedures pertaining to AS 36.30.083(a).

In both cases, the question was the Legislature's procedures. In *Malone*, the House voted to replace its Speaker. The Alaska Supreme Court held that so long as no constitutional provision was violated the issue was non-justiciable. In *Abood* the Alaska Supreme Court held it was up to the Legislature to decide if meetings of members to discuss and attempt to obtain agreement on the budget had to be open to the public under Alaska's Open Meetings Act, AS 44.62.310. The Alaska Supreme Court held it is the Legislature's prerogative to make, interpret and enforce its own procedural rules.

This case is far different. Leasing space has nothing to do with the Legislature's procedures. None of the U.S. Supreme Court *Baker v. Carr*⁸ elements that must be "prominent on the surface," adopted by the Alaska Supreme Court in *Malone*, favor nonjusticiability. These elements are:


1. Textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. A lack of judicially discoverable and manageable standards for resolving it;
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. An unusual need for unquestioning adherence to a political decision already made;
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

⁸ 369 U.S. 186, 217, 82 S.Ct. 691, 710 (US 1962).

In order: (1) the Judicial Council's only authority under the Alaska Constitution is that granted to it by the Legislature, Alaska Const. Art. II, §11, (2) this Court had no trouble resolving whether the LIO Lease "extends a real property lease" under AS 36.30.083(a); (3) no initial policy determination by the Court was required—the Legislature had already made that initial policy determination, (4) the Legislature did not ask the Court to refrain from ruling on whether the lease complied with AS 36.30.083(a), (5) there is no need, let alone an unusual need, for unquestioning adherence to a political decision already made—this was a procurement decision, not a political decision, and (6) there is not the potentiality of the type of embarrassment from multifarious pronouncements held applicable by the U.S. Supreme Court.⁹

In *Baker v. Carr* the United States Supreme Court held that election redistricting did not rise to the level of a non-justiciable political question. If redistricting for elections does not rise to the level of being a non-justiciable political issue certainly neither does whether the LIO Lease complies with Alaska's procurement code.

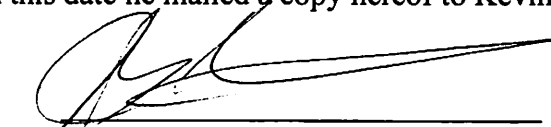
Dated April 11, 2016.


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CERTIFICATE OF SERVICE

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

Dated April 11, 2016.


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⁹ The risk the U.S. Supreme Court referred to was "embarrassment of our government abroad, or grave disturbance at home." 369 U.S. at 226.