

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, and  
LEGISLATIVE AFFAIRS AGENCY

Defendants.

**COPY**  
Original Received

OCT 03 2015

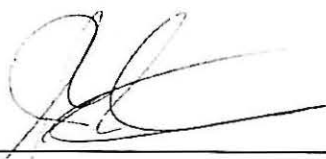
Clerk of the Trial Courts

Case No. 3AN-15-05969CI

**MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, Alaska Building, Inc., moves for a preliminary injunction prohibiting Defendant 716 West Fourth Avenue LLC (716 LLC), from disbursing any funds received pursuant to that certain contract, dated September 19, 2013, by and between defendant Legislative Affairs Agency (LAA) and defendant 716 LLC, titled "Extension of Lease and Lease Amendment No. 3" (LIO Lease) except for required debt service and the necessary direct operating costs of 716 LLC pertaining to the LIO Lease.

Dated October 6, 2015.

  
James B. Gottstein, ABA # 7811100  
Attorney for Plaintiff

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**MEMORANDUM IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, Alaska Building, Inc., has moved for a preliminary injunction prohibiting Defendant 716 West Fourth Avenue LLC (716 LLC), from disbursing any funds received pursuant to that certain contract, dated September 19, 2013, by and between defendant Legislative Affairs Agency (LAA) and defendant 716 LLC, titled "Extension of Lease and Lease Amendment No. 3 (LIO Lease)," except for required debt service and the necessary direct operating costs of 716 LLC pertaining to the LIO Lease (Motion).

**A. Overview**

The LIO Lease was putatively entered into under AS 36.30.083(a), but it neither extends a real property lease nor is it at least 10 percent below market rental value as required under AS 36.30.083(a).

The reason for this Motion is to prevent 716 LLC from disbursing money it has received under the LIO Lease in violation of AS 36.30.083(a) that it should have to pay back other than to pay for necessary direct operating expenses and debt service. Most particularly, the purpose is to prohibit 716 LLC from disbursing such funds to its owners and their affiliates and thus prevent them from sucking the limited liability company dry and unable to pay anything back.

716 LLC recently failed to properly respond to requests for production regarding its financial condition and disbursements of funds received under the LIO Lease.<sup>1</sup> If 716 LLC had produced documents proving that it would be able to pay back the money, this Motion would not have been filed. Filed contemporaneously herewith is a motion to compel responses to the requests for production, but it is respectfully suggested that prohibiting funds received under the LIO Lease from disbursement to 716 LLC's owners, or otherwise for anything other than necessary direct operating expenses and debt service pending resolution of this action, should not be deferred.

### **B. Preliminary Injunction Standard**

In deciding whether to grant or deny a preliminary injunction, Alaska courts apply the "balance of hardships" test. Immediate injunctive relief is warranted when the following three factors are present: "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case." Where the harm is not irreparable, or where the other party cannot be adequately protected, then the moving party must show probable success on the merits.

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<sup>1</sup> Proper responses would have demonstrated, among other things, how much money, if any, has already been disbursed to 716 LLC's owners, Mark Pfeffer and Robert Acree and their affiliates.

*Holmes v. Wolf*, 243 P.3d 584, 589, 591, (Alaska 2010) adopting the Superior Court's Order, footnotes omitted. *See, also, Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014); and *Messerli v. Department of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989).

### **C. The Merits**

On September 19, 2013, defendant 716 West Fourth Avenue LLC (716 LLC) entered into the LIO Lease with defendant Legislative Affairs Agency (LAA) to:

(a) demolish (i) the existing Anchorage Legislative Information Office down to its steel frame and (ii) the Empress Theatre building, and

(b) lease a newly constructed office building to LAA for the Anchorage Legislative Information Office on the two lots upon which the old LIO building and the Empress Theatre had been demolished

This was purportedly authorized under AS 36.30.083(a), but AS 36.30.083(a) only allows sole source procurement of leased space to extend a real property lease 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).

The LIO Lease is not an extension because (1) the existing building was demolished down to its steel frame (2) the adjacent old Empress Theatre, most recently the Anchor Pub, was completely demolished, (3) a brand new building was constructed on the combined sites of the old Legislative Information Office Building and the Old Empress Theatre, and (4) the premises were vacated for at least 13 months during the demolition

and while the new building was constructed. This was a new construction project and lease back, not a lease extension.

In addition, the cost is well over the market rental value of the real property. As set forth in the Affidavit of Larry Norene filed contemporaneously herewith, 90% of the market rental value is \$108,593 per month. This is the maximum allowed by AS 36.30.083(a). However, the LIO Lease carries rent in the amount of \$281,638, which is \$173,045 more per month than allowed under AS 36.30.083(a).

#### **D. The State is Faced With Irreparable Harm**

By all appearances, 716 LLC is a single asset limited liability company, consisting of the building whose sole tenant is the Legislative Affairs Agency under the LIO Lease. Attached hereto as Exhibit 1, is an e-mail from Mark Pfeffer to Tim Lowe, who appraised the LIO Lease and Michael Buller and "Doc" Crouse of the Alaska Housing Finance Corporation (AHFC) indicating that the debt service on the loans alone was going to be \$192,059 per month. This alone is \$83,466 more than allowed under AS 36.30.083(a).

However, the lease payments are \$281,638 per month,<sup>2</sup> leaving \$89,579 above the projected debt service. Only the necessary, direct operating expenses for the building should be paid from this. In particular, none of this money should be paid to Mr. Acree or Mr. Pfeffer, or any of their affiliates, during the pendency of this action. 716 LLC is

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<sup>2</sup> Exhibit 1 shows the monthly rent as \$247,756, but by the next day, when the lease was signed, the monthly rent had increased to the \$281,638. See, Exhibit 1, Page 3, to June 12, 2015, Affidavit in Support of Motion for Partial Summary Judgment (Not Extension).



unlikely to be able to pay back rent money it has received in excess of that allowed by law<sup>3</sup> and rent payments should simply not be disbursed for anything other than the necessary direct operating expenses and debt service pending final determination of this action.

716 LLC has steadfastly refused to provide discovery related to whether it will be able to pay back the money. Filed contemporaneously herewith is a motion to compel discovery with respect to such information. This issue of 716 LLC's inability to pay back the money it receives in excess of what is allowed by law was raised as early as June 12, 2015, at page 2 of Alaska Building, Inc.'s, Motion for Partial Summary Judgment (Not Extension) as the reason why that motion should be decided promptly. This Court's Civil Rule 56(f) extension of the time to oppose the motion for partial summary judgment until the end of January, 2016, should not be the occasion to harm the State in this way.

#### **E. 716 LLC Is Adequately Protected**

The requested preliminary injunction merely sequesters the enjoined funds. If it is determined that the LIO Lease complies with the law and 716 LLC is allowed to keep all of the rent payments under the LIO Lease it will still have all of the money. It is adequately protected.

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<sup>3</sup> It is possible that the limited liability shield could be pierced to reach Messrs. Acree and Pfeffer, but this is not certain and there is no reason to impose this additional burden, with uncertain prospects.

**F. While Needing Only To Raise Serious And Substantial Questions  
Going To The Merits Of The Case, Alaska Building Inc., Has Shown  
Probable Success On The Merits**

Since 716 LLC is adequately protected, Alaska Building, Inc., only need raise serious and substantial questions going to the merits. It is respectfully suggested that it has not only met that standard, but also probable success on the merits.

**G. No Security Should Be Required Under Civil Rule 65(c)**

Civil Rule 65(c) provides that no security is required of the State. This action is essentially brought on behalf of the State and therefore no security should be required in any event. Alaska Building, Inc., is not in a position to provide security for a preliminary injunction.

**H. Conclusion**

For the foregoing reasons, plaintiff Alaska Building, Inc., respectfully requests the Court to grant its Motion for Preliminary Injunction.

Dated October 6, 2015.



James B. Gottstein, ABA # 7811100  
Attorney for Plaintiff

**From:** Mark Pfeffer [<mailto:MPfeffer@PfefferDevelopment.com>]  
**Sent:** Wednesday, September 18, 2013 11:50 AM  
**To:** Timothy Lowe; Mike Buller; Doc Crouse  
**Subject:** Final Budget/Lease calc per Tim's request

All,

Per Tim's request I revised what I sent yesterday to reflect Cost changes in the appropriate categories. So for example instead of taking hard construction costs and burdening it with fees, contingency, finance etc. and then adding it to the hard cost line item I instead have added hard construction cost to that line item and then spread the other markups to the respective line items.

The bottom line number is still the same.

NOTE that the file name now has today's date on it.

That work for you Tim?

**Mark Pfeffer**

**PFEFFER DEVELOPMENT, LLC**  
425 G Street, Suite 210 | Anchorage, Alaska 99501  
p 907 646 4644 | f 907.646.4655 |

**Cell Phone 907 317 5030**

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**Anchorage LIO Building****Development Budget  
September 18, 2013****64,048**

Gross SF

**Development Budget**

Existing Property & Property Acquisition	\$ 7,890,000	Note 1
Soft Costs	\$ 515,000	Note 2
Construction & A/E Services	\$ 30,169,055	Note 3
Interim Office Space	\$ 1,000,000	Note 4
Contingency	\$ 771,722	Note 5
Construction Loan Interest	\$ 1,133,388	Note 6
Loan Fee	\$ 622,368	Note 7
Construction Management	\$ 905,433	Note 8
Development Fee	\$ 1,509,055	Note 9
<b>Total</b>	<b>\$ 44,516,021</b>	Note 10

Note 1 Stipulated value for 716 W 4th + Acquisition cost of 712 W 4th

Note 2 Legal, Title, Appraisal, Geotech, Survey, Taxes, Insurance Environmental

Note 3 Stipulate Sum Proposal from Criterion Construction Date August 27th 2013 Inclusive of A/E Fees with final design adjustments incorporated

Note 4 Loss of rent during construction + Cost to construct Interim Improvements,

Note 5 2.56% of Construction

Note 6 Subtotal project cost of \$39.628m (less existing building value) @ 5.0% for 1 year x 65% average draw down.

Note 7 1.5% of subtotal of cost

Note 8 3% of stipulated sum amount

Note 9 5% of stipulated sum amount

Note 10 Total Cost

DRAFT

9/18/2013 11:32 AM

L27

LAA\_001300

**Lease Rate Calculation**

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Total Cost	\$ 44,516,021
Tenant TI Contribution @ \$120/GSF	<u>\$ 7,500,000</u>
Net Lessor Cost	\$ 37,016,021
25% Owner Equity Contribution	<u>\$ 9,254,005</u>
<b>Net Loan Amount</b>	<b>\$ 27,762,016</b>
AIDEA Loan amount	\$ 20,000,000
\$20.0m at 5.68%, 25 year amortization	\$ 124,976
\$7,762,016 at 6.375%, 15 year amortization	\$ 67,083
Total Debt Service	\$ 192,059
Debt Service Coverage	1.29
Lease Payment NNN	\$ 247,756
Return on Owners Equity	7.22%

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**AFFIDAVIT OF LARRY NORENE**

THIRD JUDICIAL DISTRICT )  
 )ss  
STATE OF ALASKA )

LARRY NORENE, being first sworn under oath hereby deposes and states as follows:

1. I am a retired real estate appraiser and Alaska commercial real estate broker very familiar with the Anchorage commercial real estate market, including the core downtown area.

2. I have reviewed the so-called "Extension of Lease and Lease Amendment No. 3," dated September 19, 2013, by and between, 716 West Fourth Avenue LLC and the Alaska Legislative Affairs agency pertaining to the Legislative Affair Agency leasing 716 W. 4th Avenue, Anchorage, Alaska, for its Anchorage Legislative Information Office (LIO Lease).

3. I have also reviewed the Rental Value Appraisal Report, Anchorage Legislative Information Office, Prepared for Alaska Housing Finance Corporation, as of June 1, 2014, by Timothy R. Lowe pertaining to the LIO Lease (Lowe Appraisal) and offer my opinion of the maximum fair market rent as of that date.

4. This estimate is based on the high end of a possible range, using market comparison, using full floor net rentable area in accordance with the market, and using full service lease comparisons which require an adjustment to reflect the subject net net lease.

5. At that time, it is my opinion that the maximum rent attainable would be \$2.00/square foot/month for the basement, and \$3.25/square foot/month for the upper floors for a full service lease, as follows:

<b>Market Rates</b>	<b>Square Feet</b>	<b>Monthly per sq/ft</b>	<b>Monthly</b>	<b>Annual</b>	<b>Over Lease Term</b>
Basement	9,806	\$ 2.00	\$ 19,612	\$ 235,344	\$ 2,353,440
Upper Floors	45,194	\$ 3.25	\$ 146,881	\$ 1,762,566	\$17,625,660
Market Rent Totals			\$ 166,493	\$ 1,997,910	\$19,979,100

6. The LIO Lease is for a completely net lease, and deducting the operating costs as estimated in the Lowe Appraisal, estimated at \$10/square feet/year, the fair market rent for completely net lease is \$1,447,910/year, or \$120,659/month.

7. Then, taking 90% of that as being the maximum allowed under AS 36.30.083(a), the maximum allowable lease rate would be \$1,303,119 per year or \$108,593 per month.

8. Thus, the LIO Lease charges \$2,076,537 per year over what is allowed under AS 36.30.083(a), or \$2,076,537 per month over what is allowed under AS 36.30.083(a).

9. Putting all of these and over the lease term figures in a matrix is as follows:

Market Rates	Square Feet	Monthly per sq/ft	Monthly	Annual	Over Lease Term
Basement	9,806	\$ 2.00	\$ 19,612	\$ 235,344	\$ 2,353,440
Upper Floors	45,194	\$ 3.25	\$ 146,881	\$ 1,762,566	\$17,625,660
Market Rent Totals			\$ 166,493	\$ 1,997,910	\$19,979,100
Deduct Operating Expenses for Triple Net			\$ (45,833)	\$ (550,000)	\$ (5,500,000)
Adjusted for Triple Net Lease			\$ 120,659	\$ 1,447,910	\$14,479,100
90% of Market Allowed By 36.30.083(a)			\$ 108,593	\$ 1,303,119	\$13,031,190
LIO Lease			\$ 281,638	\$ 3,379,656	\$33,796,560
<b>Amount Over AS 36.30.083(a) Allowable</b>			<b>\$ 173,045</b>	<b>\$ 2,076,537</b>	<b>\$20,765,370</b>

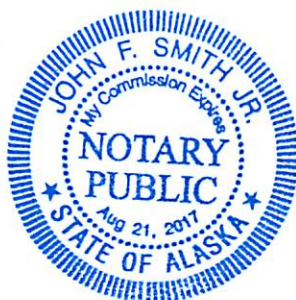
FURTHER YOUR AFFIANT SAYETH NAUGHT.

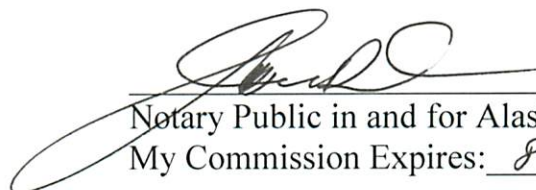
DATED this 2 day of Oct., 2015.

  
Larry Norene

SUBSCRIBED AND SWORN TO before me this 2 day of OCTOBER

2015.



  
Notary Public in and for Alaska  
My Commission Expires: 8-21-17



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**ORDER GRANTING  
MOTION FOR PRELIMINARY INJUNCTION**

Upon motion by Plaintiff, Alaska Building, Inc., for a preliminary injunction prohibiting Defendant 716 West Fourth Avenue LLC (716 LLC), from disbursing any funds received pursuant to that certain contract, dated September 19, 2013, by and between defendant Legislative Affairs Agency (LAA) and defendant 716 LLC, titled "Extension of Lease and Lease Amendment No. 3" (LIO Lease) except for required debt service and the necessary direct operating costs of 716 LLC pertaining to the LIO Lease, and consideration of opposition thereto, it is hereby **ORDERED** that the Motion is **GRANTED**.

**IT IS FURTHER ORDERED:**

1. Defendant 716 West Fourth Avenue LLC is prohibited from disbursing any funds received under the LIO Lease except for necessary direct operating expenses and required debt service, consisting of required interest and principle

payments on the existing loan or loans securing the building at 716 West Fourth Avenue in Anchorage, Alaska.

2. Defendant 716 West Fourth Avenue LLC is specifically prohibited from disbursing any funds received under the LIO Lease to its managers or members, including Mark Pfeffer, Robert Acree, Mount Trident, LLC, or any person or entity in which Mark Pfeffer, Robert Acree, or Mount Trident, LLC, or any combination thereof, have an ownership or beneficial interest.

Dated \_\_\_\_\_, 2015.

\_\_\_\_\_  
PATRICK J. McKAY,  
SUPERIOR COURT JUDGE