

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.

Case No. 3AN-15-05969CI

**OPPOSITION TO DEFENDANT LEGISLATIVE AFFAIRS
AGENCY'S MOTION FOR SUMMARY JUDGMENT UNDER THE
LACHES DOCTRINE**

Plaintiff, Alaska Building, Inc., opposes Defendant Legislative Affairs Agency's
Motion For Summary Judgment Under The Laches Doctrine (Laches Motion).

A. Alaska Laches Law

The Supreme Court has articulated the general standard for laches as follow:

Whether laches bars a suit is a question properly addressed to the trial court's discretion; we will not overturn its decision unless our review of the record leaves us with a definite and firm conviction that a mistake has been committed. To mount a laches defense, "the defendant must show, (1) that the plaintiff has unreasonably delayed in bringing the action, and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant."

Laverty v. Alaska R.R. Corp., 13 P.3d 725, 729 (Alaska 2000), footnotes omitted. "The superior court has 'broad discretion to sustain or deny a defense based on laches.' "

LAW OFFICES OF
JAMES B. GOTTSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7686
FACSIMILE
(907) 274-9493

Offshore Systems-Kenai v. State, Dept. of Transp. and Public Facilities, 282 P.3d 348, 354 (Alaska 2012).

Whether or not laches is even available as a defense depends upon whether the underlying relief requested is legal or equitable. *Laverty*, 13 P.3d at 730. ("laches is an equitable defense against equitable causes of action, but not a legal defense against actions at law.").

In *Laverty*, the Supreme Court discussed this in the context of a claim for declaratory relief as follows:

Courts in other jurisdictions have described the declaratory judgment as a *sui generis* form of relief, arising neither at law nor at equity. We have similarly described the Declaratory Judgment Act as adding "another remedy to existing legal and equitable remedies." These characterizations cause a problem when the affirmative defense of laches is raised against a claim for declaratory relief, since laches is an equitable defense against equitable causes of action, but not a legal defense against actions at law. Courts often resolve this problem by looking to the circumstances surrounding the claim and applying laches if the claim would have arisen in equity before declaratory judgment was available.

Here, *Laverty* sought a declaration and a parallel injunction, which might lead courts in some jurisdictions to treat the declaration as equitable relief, subject to laches. In Alaska, however, the issue is complicated by the broad right of standing that our law confers on citizen-taxpayers. Unlike many jurisdictions, Alaska permits citizen-taxpayer standing when a case raises issues of "public significance" and the person bringing the case is an "appropriate" party to raise the issue. Our law thus recognizes that declaratory relief is often the simplest and most effective form of judgment in cases involving significant public interest brought pursuant to citizen-taxpayer standing.

13 P.3d at 730, footnotes omitted.

B. Analysis

(1) The Delay Was Not Unreasonable or Unconscionable

As set forth above, the Supreme Court has historically held one of the requirements to assert the laches defense is that the delay be unreasonable. Most recently, in *State, Dept. of Commerce and Economic Development, Div. of Insurance*, 8 P.3d 351, 358 (Alaska 2000), the Supreme Court held the delay has to be for an unconscionable period.

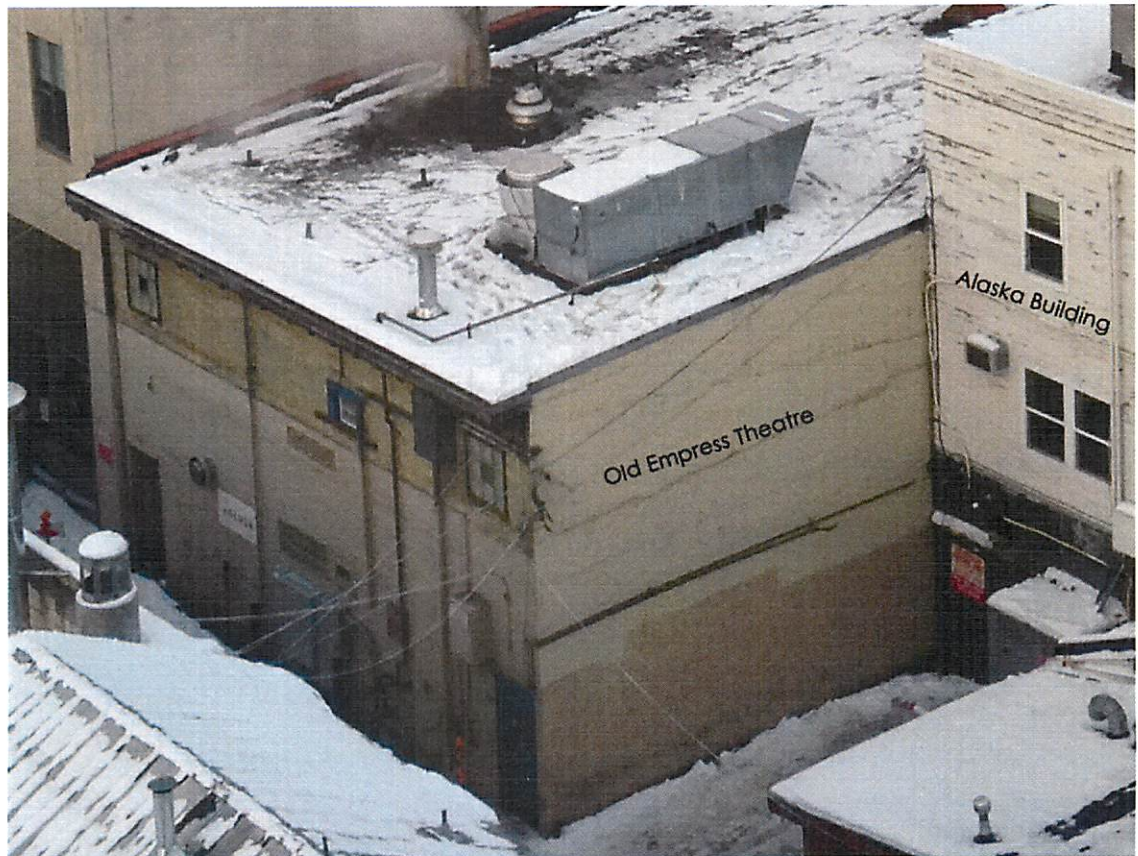
The delay here was neither. Alaska Building, Inc., did not file suit to try and stop the construction because of its valid concern of retaliatory damage to the Alaska Building if an attempt to stop the project was unsuccessful. See, highlighted portions of the deposition transcript of Alaska Building, Inc.'s president. Exhibit 1, pages 10 (Transcript page 140), 11-12 (141-142), 14 (144), 15 (145).

In fact, 716 LLC threatened to cut off the gas to the Alaska Building during negotiations over moving the gas service. See, deposition transcript pages Exhibit 1, pages 4 (87), 5 (97), 7-8 (99-100), and Exhibit 2.

716 LLC also threatened to demolish a substantial portion of the shared wall that was used by the Alaska Building. Exhibit 3. Three distinct portions of the wall must be described to understand this. The North 50 feet was a true party wall, subject to formal, recorded, party wall obligations, which supported the 2nd floor and roof of that portion of the Alaska Building. The middle segment, runs south from the end of the formal party wall to the South end of the Alaska Building. The Alaska Building uses this segment as its outer wall, with the second and third floors built inside of it. The following picture shows the posts and beams of the first floor supporting the 3rd and 4th floors using this wall.



The third section of the wall extended beyond the South wall of the Alaska Building as shown in the following picture.



LAW OFFICES OF
JAMES B. GOTTSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7686
FACSIMILE
(907) 274-9493

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Alaska Building, Inc., had agreed to 716 LLC removing this latter, most southern section of the wall, extending beyond the South wall of the Alaska Building, but not the true Party Wall portion, or the middle section, as depicted in the first picture, yet as set forth in Exhibit 3, 716 LLC threatened to remove the middle section, which is the outer wall for that portion of the Alaska Building.

So, Alaska Building, Inc., was justifiably concerned that trying to stop the project would result in substantial, even catastrophic, damage to the Alaska Building. Under such circumstances, the delay was neither unreasonable nor unconscionable.

In addition, the extremely short time frame between the announcement of the project, on or around October 2, 2013, and the anticipated commencement of demolition of the Old Empress Theatre on November 15, 2013, made suing to stop it not feasible.

In *City and Borough of Juneau v. Breck*, 706 P.2d 313 (Alaska 1985), the principle case relied upon by the Legislative Affairs Agency, and 716 LLC in its Joinder, the Supreme Court held that laches applied because the signing of the contract and commencement of work should have galvanized the plaintiff into action in finding the delay unreasonable. It is respectfully suggested, however, that the fundamental standard is whether the delay was reasonable or unconscionable and the foregoing circumstances demonstrate that it was not. To allow a laches defense to be asserted when the party established so short a time frame that mounting a legal challenge to stop it was infeasible turns the concept of unreasonable delay on its head. Similarly the prospect of retaliatory damage to the Alaska Building makes the delay not unreasonable nor unconscionable.

(2) Neither the Legislative Affairs Agency Nor 716 LLC Will Suffer Under Harm or Prejudice.

The other prerequisite for the laches defense is undue harm or prejudice. It is respectfully suggested neither 716 LLC, nor the Legislative Affairs Agency will suffer undue harm or prejudice.

As set forth in Alaska Building, Inc.'s Opposition To 716's Motion For Ruling Of Law Precluding ABI's Claims For Qui Tam And Punitive Damages, 716 LLC knew that the LIO Lease was illegal and secretly worked with the chair of the Legislative Council to put pressure on the key Legislative Affairs Agency staff to accept the illegal agreement. Under these circumstances, 716 LLC would not be suffering undue harm or prejudice. Moreover, if, as 716 LLC asserts, the rental rate under the LIO Lease is more than 10% below market, then it would be more than made whole by being allowed to lease at market if the Legislative Affairs Agency leaves. The argument of harm by 716 is an admission that the lease rate is not at least 10% below market as required by AS 36.30.083(a).

With respect to the Legislative Affairs Agency, if it is paid back the excess rent 716 LLC has received, which 716 LLC has at least implicitly represented to this Court it is capable of doing,¹ then the Legislative Affairs Agency suffers no prejudice. There are other potential remedies that make the Legislative Affairs Agency whole, such as applying all funds paid by the Legislative Affairs Agency to a proper rental rate under AS

¹ In its Opposition to the Motion for Preliminary Injunction, which is attached as Exhibit A to its Joinder, at page 14, 716 LLC states, "ABI's sole claim of irreparable harm is the unsubstantiated, speculative claim that because 716 is limited liability corporation it will be unable to pay 'pay back rent money it has received in excess of that allowed by law.' "

36.30.083(a), towards future rent, including the \$7.5 million for "tenant improvements."

In other words, the excess rent paid by the Legislative Affairs Agency could be a credit for future rent. The issue of the interplay between a declaratory judgment and potential remedies is more fully addressed in the next section, but the point here is that declaring the LIO Lease illegal, null and void does not necessarily result in a monetary loss by the Legislative Affairs Agency.

Moreover, even the claimed harm in invalidating the lease is dwarfed by the harm from continuing the lease. As set forth in the Affidavit of Larry Norene filed in support of Alaska Building, Inc.'s Motion for Preliminary Injunction, the Legislative Affairs Agency is being charged \$2,076,537 more per year than allowed under AS 36.30.083(a). Over the approximately 8½ years remaining on the lease, declaring the lease illegal, null and void will result in a savings of over \$17 million for the balance of the term.² In other words, the Legislative Affairs Agency actually suffers harm if laches is applied.

In sum, neither the Legislative Affairs Agency nor 716 LLC will suffer undue harm or prejudice.

(3) Laches Is Not Available for the Declaratory Judgment Claim that the LIO Lease is Illegal

In *Laverty*, the Supreme Court agreed that laches could be applied to the request for injunctive relief, but not to the claim for declaratory relief without a showing that there

² There is no other proper evidence of market rent in this case so far. If either 716 LLC or the Legislative Affairs Agency presents an affidavit as to market rent, then there will create a factual dispute that should be resolved by an evidentiary hearing on market rent.

was also undue prejudice with respect to that relief. *Breck* is to the same effect. In *Laverty*, the Supreme Court cited Alaska's declaratory judgment statute, AS 22.10.020(g),³ which provides:

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

(Emphasis added.)

The declaratory relief requested here is a:

Judgment declaring the September 19, 2013, agreement between 716 West Fourth Avenue LLC and the Legislative Affairs Agency pertaining to the Anchorage Legislative Information Office building illegal, null and void.

Second Amended Complaint, page 3. The Second Amended Complaint also asks for, "Such other further and additional relief as the Court find just." *Id.* Normally, this is just a *pro forma* prayer for relief, but it takes on real meaning here in light of the provision in AS 22.10.020(g) for further proceedings following the grant of a declaratory judgment.

A declaration that the LIO Lease is illegal occasions no undue harm or prejudice to the Legislative Affairs Agency or 716 LLC. Perhaps a declaratory judgment that the LIO Lease is null and void is akin to injunctive relief, but not one that just declares the lease illegal, i.e., a violation of AS 36.30.083(a).

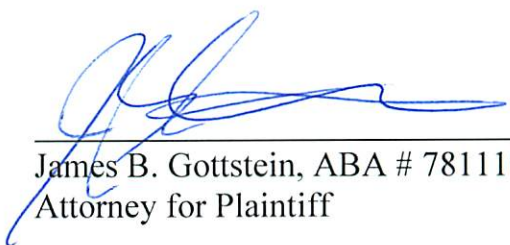
³ 13 P.3d at 729.

If the Court issues a declaratory judgment that the LIO Lease is illegal, i.e., a violation of AS 36.30.083(a), proceedings for "further necessary or proper relief . . . after reasonable notice and hearing," can be held to determine exactly what further or proper relief should be fashioned.

C. Conclusion

For the foregoing reasons Defendant Legislative Affairs Agency's Motion For Summary Judgment Under The Laches Doctrine should be **DENIED**.

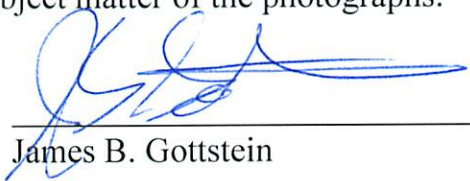
Dated November 5, 2015.


James B. Gottstein, ABA # 7811100
Attorney for Plaintiff

VERIFICATION


James B. Gottstein, being first duly sworn, deposes and states that to the best of my knowledge and belief, (1) all of the factual statements contained herein are true, (2) all of the exhibits hereto are true and correct copies, and (3) the two photographs were produced in discovery and accurately depict the subject matter of the photographs.

Dated November 5, 2015.


James B. Gottstein

SUBSCRIBED AND SWORN TO before me this 5th day of November, 2015.





Notary Public in and for Alaska
My Commission Expires: 04/10/2017

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 November 5, 2015.



Jim Gottstein

LAW OFFICES OF
JAMES B. GOTTSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7686
FACSIMILE
(907) 274-9493

*Opposition to LAA's
Laches Motion*

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In the Matter Of:

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC

JAMES GOTTSTEIN - VOL. II

October 23, 2015

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STENOGRAPHIC COURT REPORTERS
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1 ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
JAMES GOTTSTEIN - VOL. II on 10/23/2015

2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

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4 ALASKA BUILDING, INC., an
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AGENCY,

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Defendants.

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Case No. 3AN-15-05969 CI

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DEPOSITION OF JAMES B. GOTTSTEIN

13

VOLUME II

14

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Pages 59 - 147, inclusive

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Friday, October 23, 2015
9:00 A.M.

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Taken by Counsel for
Defendant 716 West Fourth Avenue LLC
at

21

ASHBURN & MASON
1227 West 9th Avenue, Suite 200
Anchorage, Alaska

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25

CERTIFIED
TRANSCRIPT

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC
JAMES GOTTSTEIN - VOL. II on 10/23/2015 A-P-P-E-A-R-A-N-C-E-S

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For Plaintiff:

3

James B. Gottstein
LAW OFFICES OF JAMES B. GOTTSTEIN
406 G Street, Suite 206
Anchorage, Alaska 99501
907/274-7686

6

For Defendant 716 West Fourth Avenue LLC:

8

Jeffrey W. Robinson
ASHBURN & MASON
1227 West 9th Avenue, Suite 200
Anchorage, Alaska 99501
907/276-4331

10

11

For Defendant Legislative Affairs Agency:

12

Kevin M. Cuddy
STOEL RIVES
510 L Street, Suite 500
Anchorage, Alaska 99501
907/277-1900

15

Court Reporter:

17

Gary Brooking, RPR
PACIFIC RIM REPORTING
711 M Street, Suite 4
Anchorage, Alaska 99501

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1 was, I think, a meeting early in the month, maybe
2 the 2nd or 3rd, and then I can't remember when there
3 was the situation with moving the gas line.

4 Q. Right.

5 A. And Bob O'Neill just said he was just going
6 to disconnect my gas line, because we hadn't yet
7 reached an agreement on it.

8 Q. I'm going to get there. I'm asking you
9 between the 11th and the 25th, the dates of these
10 e-mails, you had some communication with entities
11 involved in the project, correct?

12 A. For sure with Mr. McClintock. You know,
13 I'd have to -- you know, it's not unlikely, but I
14 don't have any specific recollections of the
15 timeframe. If you -- you know, of contacts in that
16 timeframe.

17 Q. Fair to say that, on the 25th, you
18 expressed two principal concerns to Mr. McClintock.
19 The first was the integrity of the Alaska Building,
20 right? And this is at the bottom of page 1 of your
21 e-mail. Correct?

22 A. Uh-huh.

23 Q. And the second was that you not bear any
24 costs if something were to go wrong, right? Those
25 were the two concerns that you expressed as of

1 A. Yeah. But I didn't send it.

2 Q. Sure. I'm just asking you if you copied
3 it -- if you had sent it, if you had gone forth and
4 sent the letter, you intended --

5 A. You know, it speaks for itself, but as --
6 the media is listed as a CC.

7 Q. Okay. On the 30th of October, while you're
8 e-mailing Mr. McClintock, threatening to launch the
9 grenade, and drafting letters to the Attorney
10 General that you never sent, you actually entered
11 into an indemnity agreement regarding relocation of
12 the gas line and gas meter, correct?

13 A. I don't recall what day. Was it the same
14 day?

15 Q. Yeah. I'm going to provide you with
16 Exhibit F.

17 A. Yeah. One of the things that was going on
18 was Pfeffer had said they were just going to cut off
19 the gas to my building.

20 (Exhibit F marked.)

21 BY MR. ROBINSON:

22 Q. So we're on Exhibit F. Page 2, is that
23 your signature Mr. Gottstein, on page 2?

24 A. Yes. It's an electronic signature.

25 Q. And the date, please?

1 A. October 30th, 2013.

2 Q. Were you provided also with the certificate
3 of insurance, certificate of liability insurance?

4 And we're on page 4 here.

5 A. Yeah, it looks like it. Yeah, I believe
6 so.

7 Q. And you were the certificate holder,
8 correct, or the Alaska Building was the certificate
9 holder, correct?

10 A. Do you want to point me to where Alaska
11 Building is referenced?

12 Q. Sure. On the first page of the
13 certificate, the bottom left corner.

14 A. Oh, okay.

15 Q. In fact, on the 29th, did you, throughout
16 this process, inform your tenants what was happening
17 with respect to construction efforts?

18 A. I tried to keep them informed.

19 Q. Did you specifically share with them, and
20 if so, when, that the lease was illegal and
21 construction shouldn't go forward?

22 A. I don't recall.

23 Q. Did you hold a meeting at any point with
24 any of your tenants saying that you reviewed the
25 statute, you understood that the lease was illegal,

1 and therefore they could have liability ultimately
2 if the lease was -- was there a meeting generally
3 with your tenants to discuss what you had uncovered
4 after reading the statute?

5 A. I never had a meeting with the tenants. I
6 would issue memos, and I met, talked to different
7 tenants at different times.

8 MR. ROBINSON: I'm going to mark as
9 Exhibit G, Mr. Gottstein...

10 (Exhibit G marked.)

11 BY MR. ROBINSON:

12 Q. Do you recall writing this memo,
13 Mr. Gottstein?

14 A. Yes.

15 Q. And the date?

16 A. Yes.

17 Q. What's the date?

18 A. It says October 29th, 2013.

19 Q. Okay. And you had previously written your
20 tenants a memo on October 10th, 2013?

21 A. Yes. Yeah, I assume so.

22 Q. What was the nature of this memo? I'm
23 referring to one and two on page 1.

24 A. Well, the big concern was the threat to
25 just turn off gas to the Alaska Building in the

1 middle of winter.

2 Q. So you wanted the developer to provide
3 written assurances that any costs or damages caused
4 to Alaska Building and its tenants would be
5 reimbursed by the project, correct?

6 A. Yeah.

7 Q. And that the project wouldn't irreparably
8 damage the building, right?

9 A. Yes.

10 Q. And this one specifically dealt with the
11 "gas meter removal" issue, right? And that's
12 reflected in the last paragraph?

13 A. Well, the document speaks for itself.

14 Q. Would you agree with me that you received
15 those assurances when you entered into the indemnity
16 agreement on the 30th?

17 A. No.

18 Q. And that was your signature on the
19 10/30 document?

20 A. Well, yeah. This was specifically about
21 moving the gas -- the gas line. It had nothing to
22 do with the larger issues.

23 Q. Right. But to be clear, you've never
24 raised an issue that there was somehow negligence or
25 whatever in the removal of the gas line?

1 A. Well, there were problems that resulted
2 from it. I mean, my -- the boiler went off a couple
3 times, and the rooftop units had some problems.

4 Q. As part of this lawsuit, that claim has
5 never been raised, right?

6 A. No.

7 Q. Would you agree with me that 716, or the
8 developer, was making good faith efforts to discuss
9 the construction project with you and the other
10 neighbors of the building?

11 A. I wouldn't necessarily characterize it as
12 good faith.

13 Q. What would you characterize it as?

14 A. Public relations.

15 Q. Willing to meet with people who possibly
16 could be affected by the construction, right?

17 A. Yeah. I mean, they would, you know, invite
18 people and give them pizza. So, yeah, they had
19 meetings with people to -- as part of their public
20 relations effort.

21 MR. ROBINSON: I'm going to just provide an
22 example of that. And I think we cut -- are we at H, I
23 and J there?

24 THE WITNESS: I have got G.

25 THE REPORTER: I, J and K.

1 versions of this letter. Is that right?

2 A. Yes.

3 Q. Do you see those on the screen?

4 A. I see another one dated October 31st, 2013.

5 Q. And what was the time on that?

6 A. 11:00 a.m.
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JAMES GOTTSTEIN - VOL. II on 10/23/2015

7 Q. Okay. And you testified earlier today that
8 you were thinking about, quote, unquote, launching
9 the grenade and seeking an injunction to stop the
10 project unless you received adequate assurances that
11 the Alaska Building would not be damaged. Is that
12 right?

13 A. Yes.

14 Q. And did you receive those assurances on or
15 about October 30th?

16 A. No, I wouldn't say that they were
17 satisfactory, but that's what I could -- could get.
18 And then ultimately I decided not to file the
19 injunction, because I felt there was too much risk
20 of not being successful, and having retaliatory
21 damage to the Alaska Building, especially after
22 Mr. McClintock pointed out that I probably wouldn't
23 be able to post the bond.

24 Q. Did you take any further steps after you
25 had been drafting these letters to the Attorney

1 General on or about October 30th? Did you take any
2 steps after that date to continue in that direction
3 with another letter for the research, anything at
4 all between, say, October 31st and March of 2015?

5 A. Well, I didn't take any, you know, steps to
6 advise, you know, people, I mean, the Attorney
7 General anyway. I don't know what further
8 research -- I may have done more research.
9 Certainly, I did -- you know, probably at least
10 relooked at it before I filed the lawsuit.

11 Q. Okay. You dropped this idea of sending a
12 letter to the Attorney General basically at the same
13 time that you received the license to enter
14 indemnity and insurance agreement. Is that right?

15 A. No. I mean, basically, I dropped it. I
16 mean, which -- if you're talking -- the gas piping
17 one was -- I mean, that was just kind of coincidence
18 that it was the same time. But I -- I dropped
19 pursuing that because of the concern over the
20 retaliatory damage to the Alaska Building, so which
21 ultimate- -- go ahead.

22 Q. Well, did anyone threaten you,
23 Mr. Gottstein?

24 A. No.

25 Q. Did Mr. McClintock suggest to you that you

1 may be subject to some sort of retaliatory damage

2 if --

3 A. No.

4 Q. -- you didn't sign on?

5 A. No. But -- no. But I -- I certainly

6 thought it was a real concern. I mean, we had to

7 really press for measures to protect the Alaska
8 Building. And -- no. And it was not entirely
9 successful, both in terms of not getting what was
10 asked for and also in terms of damage resulting to
11 Alaska Building.

12 Q. Okay. And one of those measures, if I can
13 find it, was this Exhibit F, the license to enter
14 indemnity and insurance agreement, which was signed
15 on October 30th, 2013.

16 A. No. That was just for the gas piping,
17 wasn't it?

18 Q. Okay.

19 A. On that date, yeah. That -- yeah. No,
20 that was just to move the gas service.

21 Q. It was an indemnity agreement, right?

22 A. What?

23 Q. It was an indemnity agreement?

24 A. Yeah. But it was just for the gas piping.

25 The main agreement was signed on December 6th.

1 Q. Okay. And by then you had already scrapped
2 this idea of alerting the Attorney General about any
3 concerns with the lease extension. Is that right?

4 A. Yeah. I mean, I -- he didn't bring it up,
5 but I actually e-mailed Mr. McClintock about that.

6 Q. Okay. Did you have a conversation with
7 Daniel Herz from the Alaska Dispatch News in August
8 of 2015 in connection with the hearing on the motion
9 to dismiss?

10 A. Yes.

11 Q. And --

12 A. I mean, I'm not sure of the specific date.

13 Q. Roughly in that time period?

14 A. Some -- sometime before the -- that
15 hearing.

16 Q. Okay. And in an article that Mr. Herz
17 published on August 17th, 2015, he reports that you
18 had estimated you had put the equivalent of \$40,000
19 of your own time into the case at that point.

20 A. Yes.

21 Q. Was that true?

22 A. Yes.

23 Q. And roughly how much do you have into the
24 case now if you had \$40,000 worth of time as of
25 mid-August 2015?

1 A. I don't know. I mean, I actually pulled up
2 the billing and looked at it, and I haven't done --
3 I don't know what it is now.

4 Q. In excess of 50,000?

5 A. Probably, yes. Yeah. I would be surprised
6 if it wasn't.

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JAMES GOTTSTEIN - VOL. II on 10/23/2015

7 Q. Okay. And you had indicated earlier this
8 morning that you were conflicted about whether to
9 bring a suit for the public back in October of 2013.

10 A. Well, I don't know that I said that, but it
11 was in an e-mail. And I was conflicted about even
12 entering into an agreement with 716 LLC because of
13 the lease being illegal. So in other words, I had a
14 desire to bring the claim that it was illegal back
15 then, and that was -- the conflict was that I felt
16 that was going to, you know, put the Alaska Building
17 at great risk. And that was -- that was the
18 conflict.

19 Q. Okay. And so you were prepared to put the
20 interest of the building and any potential property
21 damage it may suffer ahead of that of the public, in
22 terms of the legality or illegality of this lease?

23 A. Well, you have to put that in the context
24 of my evaluation of the prospect of being
25 unsuccessful in preventing the project from going

1 forward. And as I thought about it, I thought it
2 was going to be very difficult to actually stop the
3 project, and that would then jeopardize the Alaska
4 Building.

5 Q. Why did you think that? Why did you think
6 it would be difficult to stop the project from going
7 forward?

8 A. Basically the bond requirement.

9 Q. Anything else?

10 A. No, not really.

11 Q. Did you ever --

12 A. I mean --

13 Q. Sorry. Go ahead.

14 A. I mean, there's always litigation risk, so,
15 I mean, I have -- in the Mental Health Trust Lands
16 litigation, David Walker, co-counsel, you know, said
17 that if you have a hundred percent case, you have an
18 80 percent chance of winning. And so there's a
19 bond, and then there's just a general litigation
20 risk, which I saw as having very potentially severe
21 negative consequences.

22 Q. Did this idea about a potential injunction
23 or other lawsuit in the October 2013 timeframe, did
24 that ever go further than an idea? Did you actually
25 begin to start drafting any pleadings?

1 A. No.

2 MR. CUDDY: Okay. I have nothing further.

3 THE REPORTER: Off record?

4 MR. ROBINSON: Yes, off record. Thank you.

5 (Proceedings recessed at 11:12 a.m.)

6 (Signature reserved.)

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC
JAMES GOTTSTEIN - VOL. II on 10/23/2015

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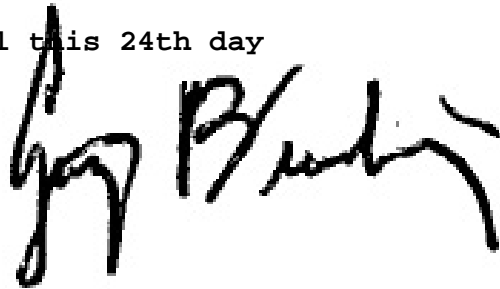
24

25

CERTIFICATE

I, GARY BROOKING, Registered Professional
Reporter and Notary Public in and for the State of
Alaska, do hereby certify that the witness in the
foregoing proceedings was duly sworn; that the
proceedings were then taken before me at the time
and place herein set forth; that the testimony
and proceedings were reported stenographically by
me and later transcribed by computer transcription;
that the foregoing is a true record of the
testimony and proceedings taken at that time;
and that I am not a party to nor have I any
interest in the outcome of the action herein
contained.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my seal this 24th day
of October, 2015.



GARY BROOKING, RPR
My Commission Expires 6/28/2016

GB4229

James B. Gottstein

From: Bob O'Neill <BOneill@PfefferDevelopment.com>
Sent: Monday, October 28, 2013 11:47 AM
To: 'James B. Gottstein'
Cc: Mark Pfeffer; Donald W McClintock
Subject: Gas Meter Removal Notification
Attachments: Gottstein Notice of Gas Meter Removal-10-28-13.pdf

Jim,
Please see attached. A copy of this letter is also being mailed to you. Don't hesitate to contact me if you have any questions.

Thanks,

Bob O'Neill, PE
Director of Project Management

PFEFFER DEVELOPMENT, LLC
Commercial Real Estate Developers
425 G Street, Suite 210 | Anchorage, Alaska 99501 p 907.646.4644 | f 907.646.4655

716 West Fourth Avenue LLC

425 G Street suite 210

Anchorage, AK 99501

James B. Gottstein

Law Offices of James B. Gottstein

406 G Street, Suite 206

Anchorage, AK 99501

RE: Notice of Removal of Enstar Gas Meter on Anchor Pub Building on November 11

Dear Jim,

The letter is to notify you that the gas meter currently serving your building is being removed from the Anchor Pub. As we have previously discussed, this meter is located on a building scheduled for demolition in Mid-November. The removal of this meter requires that you re-pipe your gas lines from the Anchor Pub to the meter located behind your building on the alley.

If you elect to indemnify us and our contractors, we are happy to perform the work. If you do not feel this is in your best interest you are free to retain a mechanical contractor to perform the work and restart your gas fired equipment.

The removal of the meter is scheduled for November 11.

Feel free to contact us if you have any questions. I can be reached at 907-317-1692 or by email at boneill@pfefferdevelopment.com

Thank You,



Bob O'Neill, PE

For 716 West Forth Avenue, LLC

James B. Gottstein

From: James B. Gottstein <james.b.gottstein@gottsteinlaw.com>
Sent: Tuesday, October 29, 2013 2:31 PM
To: 'Donald W. McClintock'
Cc: james.b.gottstein@gottsteinlaw.com
Subject: RE: Gas Meter Removal Notification

I have to admit to laughing out loud.

From: Donald W. McClintock [mailto:dwm@anchorlaw.com]
Sent: Tuesday, October 29, 2013 2:24 PM
To: 'James B. Gottstein'
Cc: 'Dennis Berry'
Subject: RE: Gas Meter Removal Notification

Jim,

I am running down the gas load information. And yes I recognize the document. But I am not above self criticism!

Don

Donald W. McClintock
Ashburn & Mason, P.C.
1227 W. 9th Ave. Ste. 200
Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
www.anchorlaw.com

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From: James B. Gottstein [<mailto:james.b.gottstein@gottsteinlaw.com>]
Sent: Tuesday, October 29, 2013 12:31 PM
To: Donald W. McClintock
Cc: 'Dennis Berry'; james.b.gottstein@gottsteinlaw.com
Subject: RE: Gas Meter Removal Notification

Hi Don,

The problem is that this is your client's project and one never knows what will happen when messing around with an old building like the Alaska Building. I have therefore (hopefully) attached a form of indemnification agreement. You may even recognize it.

I just talked with Dennis and he has been in communication with Enstar who said they didn't have any information on the gas loads to size the new meter. I know that your client's contractor has come in and secured

that information. Please provide it to me, and especially Dennis. I know they took pictures of the plates. I talked this morning to the person from whom I purchased the rooftop units and he had a vague recollection that the reason those lines were installed from the meter behind the Empress might have been the line serving that little building on Alaska Building, Inc.'s property was not big enough.

Dennis has very little time into the gas service relocation issue and all I want him to do is have someone look at the plan and make sure it is okay. If things go south, there might be more.

I am almost certainly going to have to go on a deposition trip to Milwaukee sometime before the 15th of November. I may have to leave keys with BBFM for access. That might be a good idea anyway.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@ GottsteinLaw.Com

From: Donald W. McClintock [<mailto:dwm@anchorlaw.com>]
Sent: Tuesday, October 29, 2013 11:33 AM
To: 'James B. Gottstein'
Cc: Dennis Berry; 'Bob O'Neill'; Rebecca A. Windt; 'Shea C. Simasko'
Subject: RE: Gas Meter Removal Notification

Jim,

This will be our first test of effective communication for the project. I think we agree with the end result. 716 W. 4th Ave, LLC is willing to pay for the work. The issue of BBFM is perhaps not a major one; we would be providing the coordination so I was not sure what role you saw them playing. Perhaps, if it is just in an oversight capacity and we have some idea of the cost involved, it is not a major issue.

The main issue was I did not want to get tripped up over indemnity agreements, which so far have been an obstacle. My solution to that was we would agree on a licensed and bonded contractor to do the work, you would be its client. Is that route satisfactory?

Our estimate is if the work is well coordinated, the time to cut the lines and patch it into the boilers would be around 4 hours, which should minimize everyone's inconvenience.

Don

Donald W. McClintock
Ashburn & Mason, P.C.
1227 W. 9th Ave. Ste. 200
Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
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From: James B. Gottstein [<mailto:james.b.gottstein@gottsteinlaw.com>]
Sent: Tuesday, October 29, 2013 9:09 AM
To: Donald W. McClintock
Cc: Dennis Berry; james.b.gottstein@gottsteinlaw.com
Subject: RE: Gas Meter Removal Notification

Hi Don,

It is hard for me to see how moving the service is anything other than your client's responsibility.

It has never been explained why my client should bear any costs caused by your client's project.

I am skeptical Enstar will allow your client to shut off the gas to my client's building in the middle of the winter.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: [James.B. Gottstein@ GottsteinLaw.Com](mailto:James.B.Gottstein@GottsteinLaw.Com)

From: Donald W. McClintock [<mailto:dwm@anchorlaw.com>]
Sent: Monday, October 28, 2013 7:56 PM
To: 'James B. Gottstein'
Cc: Rebecca A. Windt; Heidi A. Wyckoff
Subject: RE: Gas Meter Removal Notification

Jim,

The argument misses the point. Although we can dive deep into the weeds and argue about whether you have a legal right to keep your gas lines on the Anchor Pub walls, the fact remains the lines won't connect to anything in a few weeks as ENSTAR will not allow the meter to remain there while demolition is planned. One cannot gain a prescriptive easement to the alley, which you astutely pointed out was the location of the meter.

The offer stands, we will arrange for a third party licensed and bonded contractor to reconnect your line to the meter location, as approved by ENSTAR, with appropriate supply. That will require the contractor to access the building to turn off and on the boiler and gas fired equipment. We are happy to talk to BBFM about it but that will be at your cost. The contractor would be your contractor, we would just reimburse the contractor's expense—that should get us around indemnity for either you or 716 W. 4th Avenue. We will coordinate with the contractor, but if BBFM wants to make some recommendations as to who to use we would consider that.

Don

Donald W. McClintock
Ashburn & Mason, P.C.
1227 W. 9th Ave. Ste. 200
Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
www.anchorlaw.com

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From: James B. Gottstein [<mailto:james.b.gottstein@gottsteinlaw.com>]

Sent: Monday, October 28, 2013 5:58 PM

To: Donald W. McClintock

Cc: james.b.gottstein@gottsteinlaw.com

Subject: RE: Gas Meter Removal Notification

Hi Don,

There is little doubt Alaska Building, Inc., has an easement for those gas lines. See, *HP Ltd. Partnership v. Kenai River Airpark, LLC*, 270 P.3d 719 (Alaska 2012).

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@GottsteinLaw.Com

-----Original Message-----

From: Donald W. McClintock [<mailto:dwm@anchorlaw.com>]

Sent: Monday, October 28, 2013 3:49 PM

To: 'James B. Gottstein'

Cc: Rebecca A. Windt; Dennis Berry; Rebecca A. Windt

Subject: RE: Gas Meter Removal Notification

Jim,

As noted earlier, we are not willing to enter into an indemnity agreement. We actually would request a waiver and indemnity to undertake the work for you. We would be hiring a third party contractor in any event.

Don

Donald W. McClintock
Ashburn & Mason, P.C.
1227 W. 9th Ave. Ste. 200
Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
www.anchorlaw.com

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copies. This communication is covered by the Electronic Communications Privacy Act, 18 U.S.C. 2510-2521. Your cooperation is appreciated.

-----Original Message-----

From: James B. Gottstein [mailto:james.b.gottstein@gottsteinlaw.com]
Sent: Monday, October 28, 2013 3:46 PM
To: Donald W. McClintock
Cc: Rebecca A. Windt; Dennis Berry; james.b.gottstein@gottsteinlaw.com
Subject: RE: Gas Meter Removal Notification

Hi Don,

Your client can move the service, subject to BBFM's approval of the plan, payment of BBFM's costs pertaining thereto by your client, and your client indemnifying Alaska Building, Inc.

Jim

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@ GottsteinLaw.Com

-----Original Message-----

From: Donald W. McClintock [mailto:dwm@anchorlaw.com]
Sent: Monday, October 28, 2013 3:37 PM
To: 'jg@touchngo.com'
Cc: Rebecca A. Windt
Subject: RE: Gas Meter Removal Notification

Jim,

Your point I guess is that the meter itself is in the alley, surrounded by a protective cage connected to our building. ENSTAR will not allow your meter to remain in the alley with the building slated for demolition. And your piping is pretty clearly attached to our building wall, which we want removed.

As noted before, we have been willing to assist you in relocating the piping to your own meter; but not on the terms outlined in your proposed agreement.

Don

Donald W. McClintock
Ashburn & Mason, P.C.
1227 W. 9th Ave. Ste. 200

Anchorage, AK 99501
(907) 276-4331 (voice)
(907) 277-8235 (fax)
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-----Original Message-----

From: James B. Gottstein [mailto:james.b.gottstein@gottsteinlaw.com] On Behalf Of jg@touchngo.com
Sent: Monday, October 28, 2013 3:11 PM
To: Donald W. McClintock
Cc: jg@touchngo.com
Subject: RE: Gas Meter Removal Notification

Hi Don,

I don't know if the meter is on your property or not. It certainly isn't on your building.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@GottsteinLaw.Com

-----Original Message-----

From: Donald W. McClintock [mailto:dwm@anchorlaw.com]
Sent: Monday, October 28, 2013 2:39 PM
To: James B. Gottstein
Cc: jim.gottstein@psychrights.org; Rebecca A. Windt; Dani Crosby; Matthew T. Findley
Subject: Re: Gas Meter Removal Notification

Jim

ENSTAR delivers gas to the meter which is on our building.
Don

Sent from my iPhone

> On Oct 28, 2013, at 2:26 PM, "James B. Gottstein"
<james.b.gottstein@gottsteinlaw.com> wrote:
>
> Hi Don,
>
> The picture clearly shows the gas is being delivered to my property.

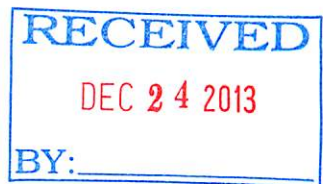
>
> James B. Gottstein
> Law Offices of James B. Gottstein
> 406 G Street, Suite 206
> Anchorage, AK 99501
> Tel: (907) 274-7686 Fax: (907) 274-9493
> e-mail: James.B. Gottstein@ GottsteinLaw.Com
>
>
> -----Original Message-----
> From: Donald W. McClintock [mailto:dwm@anchorlaw.com]
> Sent: Monday, October 28, 2013 2:09 PM
> To: 'James B. Gottstein'
> Cc: jg@touchngo.com; Dennis Berry; 'Bob O'Neill'; Rebecca A. Windt
> Subject: RE: Gas Meter Removal Notification
>
> Jim,
>
> Here is a pretty good shot of the piping running from the meter around
> the corner and then to your building. We are not shutting off your
> gas in the way you raise the question; we have asked ENSTAR to stop
> delivering gas to our property. Originally, we were going to do it
> sooner and assist in the relocation of your piping, but since we are
> not allowed onto your property we moved the date back to allow you
> time to set up your own service. This is not difficult to do, but you
> should do it sooner rather than later.
>
> Don
>
>
>
> Donald W. McClintock
> Ashburn & Mason, P.C.
> 1227 W. 9th Ave. Ste. 200
> Anchorage, AK 99501
> (907) 276-4331 (voice)
> (907) 277-8235 (fax)
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> printed copies. This communication is covered by the Electronic
> Communications Privacy Act, 18 U.S.C. 2510-2521. Your cooperation is
> appreciated.
>
>
> -----Original Message-----
> From: James B. Gottstein [mailto:james.b.gottstein@gottsteinlaw.com]

> Sent: Monday, October 28, 2013 12:42 PM
> To: Donald W. McClintock
> Cc: jg@touchngo.com; Dennis Berry
> Subject: RE: Gas Meter Removal Notification
>
> Hi Don,
>
> What makes Pfeffer think he can just turn off my gas service? I just
> looked at the meter and it is not clear to me it is on your client's
> property.
>
>
>
> James B. Gottstein
> Law Offices of James B. Gottstein
> 406 G Street, Suite 206
> Anchorage, AK 99501
> Tel: (907) 274-7686 Fax: (907) 274-9493
> e-mail: James.B. Gottstein@ GottsteinLaw.Com
>
>
> -----Original Message-----
> From: Bob O'Neill [mailto:BOneill@PfefferDevelopment.com]
> Sent: Monday, October 28, 2013 11:47 AM
> To: 'James B. Gottstein'
> Cc: Mark Pfeffer; Donald W McClintock
> Subject: Gas Meter Removal Notification
>
> Jim,
> Please see attached. A copy of this letter is also being mailed to you.
> Don't hesitate to contact me if you have any questions.
>
> Thanks,
>
> Bob O'Neill, PE
> Director of Project Management
>
> PFEFFER DEVELOPMENT, LLC
> Commercial Real Estate Developers
> 425 G Street, Suite 210 | Anchorage, Alaska 99501 p 907.646.4644 | f
> 907.646.4655
>
>
>
>
>

ASHBURN & MASON P.C.

LAWYERS

DANI CROSBY • MATTHEW T. FINDLEY • EVA R. GARDNER • MERA MATTHEWS
DONALD W. MCCLINTOCK III • JACOB A. SONNEBORN • THOMAS V. WANG • REBECCA A. WINDT
OF COUNSEL MARK E. ASHBURN • JULIAN L. MASON III • A. WILLIAM SAUPE



December 23, 2013

Jim Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501

Re: Party Wall Agreement
Our File No.: 10708.050

Dear Jim:

I am writing in response to our conversation regarding the legal scope 716 West Fourth Avenue's ("716") obligation to preserve the "Party Wall" pursuant to that Access, Indemnity, and Insurance Agreement ("Agreement") between Alaska Building, Inc. ("Alaska Building") and 716, executed December 6, 2103. The language of the Agreement is very clear with respect to this obligation.

Pursuant to the terms of the Agreement, the "Party Wall" is a defined term for that shared portion of wall "described and pursuant to the terms of certain documents recorded at Book 3, Page 293 on January 22, 1917, at Book 5, Page 300, on August 21, 1918, and at Book 10, Page 83 on July 13, 1923, all in the Anchorage Precinct, Territory of Alaska."¹ These documents (the "Party Wall Agreement") in turn define the Party Wall as:

[T]he following described portion of the East wall of that certain building known as the "EMPRESS THEATRE" situated on Lot Two (2) in Block Forty (40), plat of the Townsite of Anchorage, in Anchorage, Alaska;

¹ Agreement at pg. 1.

Jim Gottstein

Page 2

December 23, 2013

Beginning at the North Lower corner of said wall, and thence running South Fifty (50) feet, thence vertically a distance of 25 feet to the top of the building owned by the grantee herein, thence north along the top line of said building to the North end of said wall, then vertically downward to the place of beginning

The Party Wall Agreement is included with this letter for reference.

The Agreement requires the following with respect to preservation of the Party Wall:

716 shall exercise due care consistent with its obligations under the Party Wall Agreement and common law to preserve the Party Wall during the Project. The Party Wall will remain governed by the Party Wall Agreement. *Portions of the eastern wall of the Empress Theater not shared by the Empress Theater and the Alaska Building and not included within the scope of the Party Wall Agreement may be removed during the Project in 716's discretion.*²

716 remains committed to its obligations pursuant to the Agreement and the Party Wall Agreement. That said, pursuant to both the Agreement and the Party Wall Agreement, 716's preservation obligations extend only to that portion of shared wall described in the Party Wall Agreement. Any portion of the eastern wall of the Empress Theater attached to the Party Wall but not included in the scope of the Party Wall Agreement is located entirely on 716's property and is by definition the sole property of 716.

While I understand your concerns about preservation of the Party Wall and, by extension, the Alaska Building, the legal documents are very clear with respect to the scope of shared ownership and the scope of 716's preservation obligations. If you see specific conflicting language or an alternate description in the documents, please let me know and I would be happy to discuss this with you.

² Agreement at paragraph 7, pg. 4.

ASHBURN & MASON P.C.

Jim Gottstein
Page 3
December 23, 2013

Very truly yours,

ASHBURN & MASON, P.C.

A handwritten signature in blue ink, appearing to read "Rebecca A. Windt". The signature is fluid and cursive, with the first name "Rebecca" and last name "Windt" clearly distinguishable.

Rebecca A. Windt

James B. Gottstein

From: James B. Gottstein <james.b.gottstein@gottsteinlaw.com>
Sent: Wednesday, January 15, 2014 3:18 AM
To: Rebecca A. Windt
Cc: dwm@anchorlaw.com; Eric Follett; james.b.gottstein@gottsteinlaw.com; DaveD@criteriongeneral.com; Bob O'Neill
Subject: Your Letter of December 23rd

Dear Ms. Windt:

This is to reiterate that your interpretation of the Access, Indemnity, and Insurance Agreement contained in your December 23, 2013 letter, is incorrect. Extracting, the relevant portion of the parallel construction of the italicized language you cited in Section 7 of the agreement is as follows:

Portions of the eastern wall of the Empress Theater not shared by the Empress Theater and the Alaska Building . . . may be removed during the Project in 716's discretion.

I asked Eric Follett who negotiated the agreement on my behalf, and he concurred that none of the Party Wall except portions extending south of the south end of the Alaska Building is allowed to be removed.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@ GottsteinLaw.Com

ASHBURN & MASON P.C.

LAWYERS

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DONALD W. MCCLINTOCK III • JACOB A. SONNEBORN • THOMAS V. WANG • REBECCA A. WINDT
OF COUNSEL MARK E. ASHBURN • JULIAN L. MASON III • A. WILLIAM SAUPE

January 21, 2014

Via Electronic & U.S. Mail:

Jim Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501

Re: Party Wall Agreement
Our File No.: 10708.050

Mr. Gottstein:

This letter responds to your January 15, 2014 e-mail regarding the Access, Indemnity and Insurance Agreement (the “Agreement”). The language of the Agreement is clear:

Portions of the eastern wall of the Empress Theater not shared by the Empress Theater and the Alaska Building and not included within the scope of the Party Wall Agreement may be removed during the Project in 716’s discretion.¹

Your e-mail failed to include the underlined portion of the above, which makes clear the role of the Party Wall Agreement in determining the portions of the eastern wall of the Empress Theater which may be removed during the Project.

Further, even disregarding the underlined portion of the paragraph above, the Party Wall Agreement legally defines the portion of the eastern wall of the Empress Theater which is “not shared by the Empress Theater and the Alaska Building.” Any portion of this wall

¹ Agreement at paragraph 7, pg. 4 (emphasis added).

ASHBURN & MASON^{P.C.}

Jim Gottstein
Page 2
January 21, 2014

beyond the scope of the Party Wall Agreement is located entirely on real property owned by 716 West Fourth Avenue, LLC, and is not subject to any legal rights held by the Alaska Building. While this portion of the eastern wall of the Empress Theater may be located very close to the western wall of the Alaska Building, the wall is, by definition, not shared by the properties.

Very truly yours,

ASHBURN & MASON, P.C.



Rebecca A. Windt

RAW:haw
cc: Client