

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Ste 206
Anchorage, AK 99501
Tel: 274-7686

Attorney for Respondent
Alaska Building, Inc.

FILED
SEP 14 2015
APPELLATE COURTS
OF THE
STATE OF ALASKA

IN THE SUPREME COURT FOR THE STATE OF ALASKA

716 WEST FOURTH AVENUE LLC,

Petitioner,

vs.

ALASKA BUILDING, INC., an Alaska
corporation,

Respondent.

Supreme Court No. S16062

Trial Court No. 3AN-15-05969CI

Case No. 3AN-15-05969CI

**ALASKA BUILDING, INC.'S
RESPONSE TO PETITION FOR REVIEW**

A. Introduction

While it is unclear the reasons why interlocutory review should be granted under Appellate Rule 402(b) asserted by Petitioner are sufficient to warrant deviation from the final judgment rule, Respondent Alaska Building, Inc., has no objection to such review, provided (1) the Superior Court proceedings are not stayed, or (2) a sufficient bond is posted. The reason this is important is the Petitioner, 716 West Fourth Avenue LLC (716 LLC), appears to be a single asset limited liability company and is unlikely to be able to

pay back what has been estimated to be over \$177,000 per month more than allowed under AS 36.30.083(a).¹

Substantively, if citizen-taxpayer standing does not exist in this case, it is hard to see where it would ever exist. And, in fact, the Petitioner essentially asserts this Court should overrule its seminal case on citizen-taxpayer standing, *Trustees for Alaska v. State, Dep't of Natural Res.*,² arguing that *Law Project for Psychiatric Rights v. Alaska (PsychRights)*,³ *Keller v. French*,⁴ and *Kleven v. Yukon-Koyukuk School District*⁵ have so" reined in"⁶ what it calls the "expansive rule"⁷ and "outdated standard"⁸ of *Trustees for Alaska* that it is time for this Court to recognize the *Trustees for Alaska* criteria are no longer controlling.

Contrary to Petitioner's assertion that *Trustees for Alaska* is no longer controlling, it is respectfully suggested *PsychRights*, *Keller*, & *Kleven* instead hold that citizen-taxpayer standing cannot be used to enforce private rights as opposed to rectifying wrongs to the public as is the case here.

¹ See, page 3 of Plaintiff's Opposition to Legislative Affairs Agency's Motion for Stay of proceedings, dated June 8, 2015.

² 736 P.2d 324, 329-330 (Alaska 1987).

³ 239 P.3d 1252 (Alaska 2010).

⁴ 205P.3d 299, 304-305 (Alaska 2009).

⁵ 853 P.2d 518 (Alaska 1993).

⁶ Petition, page 7.

⁷ Petition, page 7.

⁸ Petition, footnote 26.

B. Background

On September 19, 2013, Petitioner entered into a sole source agreement with the Legislative Affairs Agency (LAA) to:

- (a) demolish (i) the existing Anchorage Legislative Information Office down to its steel frame and foundation and (ii) the entire 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 old Empress Theatre had been demolished
- (LIO Lease).

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 would be achieved on the rent due under the lease.

The LIO Lease is not an extension because (1) the existing building was demolished down to its steel frame and foundation, (2) the adjacent old Empress Theatre, most recently the Anchor Pub, was completely demolished, (3) a new building was constructed on the combined sites, and (4) the premises were vacated for over a year during the demolition and while the new building was constructed. This constitutes a contract to construct an office building and lease it, not a lease extension.

In addition, the cost is more than twice the market rental value. Comparing apples to apples, the LIO Lease rate is about \$7.15 per square foot per month, while the market rate is about \$3.00. Ten percent below market rate is about \$2.70/square foot per month,

which works out to \$104,310 per month instead of the real rate specified in the LIO Lease of \$281,638. This is \$177,328 per month more than allowed under AS 36.30.083(a). Over the life of the LIO Lease this is over \$21 million more than allowed under AS 36.30.083(a).⁹

The old Empress Theatre and the Alaska Building shared a wall (Party Wall) and the demolition of the old Empress Theatre and construction of the new Anchorage Legislative Information Office Building caused substantial damage to the Alaska Building.

C. Alaska Building, Inc., Has Citizen-Taxpayer Standing

The criteria for citizen-taxpayer standing established in *Trustees for Alaska* are:

First, the case in question must be one of public significance. . . . Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.¹⁰

Petitioner's argument is based on the second criterion, the appropriateness of Respondent, Alaska Building, Inc., to be a plaintiff.¹¹ Acknowledging that *PsychRights*,

⁹ Page 3 of Plaintiff's Opposition to Legislative Affairs Agency's Motion for Stay of proceedings, dated June 8, 2015.

¹⁰ 736 P.2d at 329-330, footnotes omitted.

¹¹ Petitioner also asserts the Superior Court should have made an additional separate finding of adversity. This is not true. For citizen-taxpayer standing, it is the satisfaction of the *Trustees for Alaska* criteria that establishes the requisite adversity.

Keller & Kleven only disallow citizen-taxpayer standing to plaintiffs asserting individual rights, the Petitioner argues that because there were potential landlords or developers who have not sued, Alaska Building, Inc., is an inappropriate plaintiff.¹²

In making its argument, Petitioner asserts that Alaska Building, Inc., is attempting to assert the rights of potential bidders.¹³ This is not the case. Alaska Building, Inc., is asserting the rights of taxpayers. As this Court held in *Ruckle v. Anchorage School District*,¹⁴ the procurement requirements are for the benefit of taxpayers, not potential bidders:

In *McBirney & Associates v. State*, this court explained that the purposes of the competitive public bidding system are:

to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable.

... [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.

85 P.3d at 1035, footnotes omitted.

This Court seems to have made clear that *Ruckle* would have had citizen-taxpayer standing if no suit had already been filed by a disappointed bidder.

These cases do support the proposition that citizen-taxpayers have standing to challenge the results of public bidding systems. However,

¹² Petition, page 11.

¹³ Petition, pages 11 (Alaska Building, Inc., is asserting "the individual rights of potential bidders"), and 12 (potential bidders are "the parties actually affected").

¹⁴ 85 P.3d 1030, 1034-1035 (Alaska 2004).

none of these cases involve a situation, such as the one at bar, where both the bidder and a citizen-taxpayer have filed suit on the same issue, and three of the cases hail from jurisdictions where bidders are only permitted to challenge the bid procedures of municipalities in which they are also municipal taxpayers.¹⁵

Here, the Superior Court found that no one had filed suit or was likely to,¹⁶ concluding:

In the current matter, the facts are more similar to *Ruckle* than to *Keller* or *Law Project*. The rights asserted to be violated are not individual rights but rather a citizen's right to challenge the potentially excessive state expenditures of public funds. There is no substitution of third party rights in this case.¹⁷

Alaska Building, Inc., has citizen-taxpayer standing on this basis alone.¹⁸

There is, however, an additional element establishing citizen-taxpayer standing, which is Alaska Building, Inc., is more directly affected than potential bidders because it was substantially damaged as a result of the allegedly illegal lease.¹⁹ It is respectfully suggested that this damage to Alaska Building, Inc., as a result of the allegedly illegal lease makes it "more directly affected by the challenged conduct in question," than hypothetical bidders on a no-bid lease.

¹⁵ 85 P.3d at 1035-1036, footnotes omitted.

¹⁶ Order, page 6.

¹⁷ *Id.*

¹⁸ Petitioner also cites the Superior Court's statement that the parties to the lease were more appropriate plaintiffs, but it is hard to understand how the fact that the parties to an allegedly illegal lease don't challenge the lease can be a basis for denying citizen-taxpayer standing.

¹⁹ Attachment 1 hereto is the engineer's report on this damage.

D. Alaska Building, Inc., Also Has Interest-Injury Standing.

1. The Damage To Alaska Building, Inc., Confers Interest-Injury Standing.

It is respectfully suggested that the damage suffered by Alaska Building, Inc., as a result of the allegedly illegal lease confers interest-injury standing. As stated in *Keller*:

To establish interest-injury standing plaintiffs must demonstrate that they have a "sufficient personal stake" in the outcome of the controversy and "an interest which is adversely affected by the complained-of conduct." The degree of the injury need not be great: an "identifiable trifle" is sufficient to establish standing "to fight out a question of principle."²⁰

(footnotes omitted).

Here, Alaska Building, Inc., has suffered far more than an "identifiable trifle"—\$250,000 or more²¹—and it is respectfully suggested this is sufficient to fight out the question of principle regarding whether the LIO Lease violates AS 36.30.083(a).

2. The *Qui Tam* Claim Confers Standing.

Alaska Building, Inc., claims 10% of any savings to the State as a result of the court declaring the LIO Lease illegal (*Qui Tam* Claim).²² At oral argument, after agreeing that the *Qui Tam* Claim seeks a new judicially created cause of action, counsel offered to address why Alaska Building, Inc., believed it was warranted. The Superior declined to hear these reasons and in footnote 15 of its Order, after stating the *Qui Tam* Claim, "is not an issue presently before the court," held it "does not find enough credence in the claim to grant interest-injury standing."

²⁰ 205P.3d at 304-305, footnotes omitted:

²¹ Attachment 1.

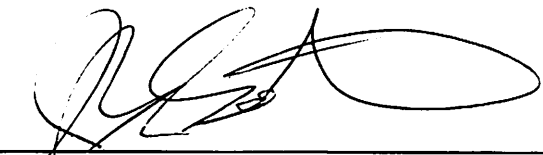
²² The interest-injury sought to be vindicated is the State's, through the *qui tam* mechanism.

It is respectfully suggested this was improper. The Superior Court and, perhaps this Court, may ultimately decide that the *Qui Tam* Claim will not be allowed, but denying standing because the Court does not find credence in the claim is putting the cart before the horse. The proper procedure is for the Superior Court to entertain a motion to dismiss the *Qui Tam* Claim and then make a decision on the merits, rather than deny standing. Alaska Building, Inc., believes it has citizen-taxpayer standing and this Court need not reach the issue of *qui tam* interest-injury standing, but Alaska Building respectfully suggests it also has interest-injury standing to bring the *Qui Tam* Claim on behalf of the State.

E. Conclusion

For the foregoing reasons Respondent, Alaska Building, Inc., requests this Court either (1) Affirm the Superior Court's Order granting citizen-taxpayer standing to Alaska Building, Inc., on the current briefing, or (2) Deny the Petition for Review.

Dated September 14, 2015.



James B. Gottstein, ABA # 7811100

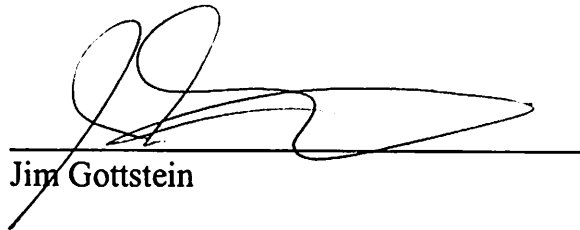
INDEX OF ATTACHMENTS

Attachment 1,	July 22, 2015, Engineer's Report Re: Damages to Alaska Building from Legislative Information Office Construction
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CERTIFICATE OF TYPEFACE & SERVICE

The undersigned hereby certifies that (1) the foregoing document is in 13 point Times New Roman typeface and (2) a copy hereof was mailed to Kevin M. Cuddy, Jeffrey W. Robinson/Eva R. Gardner, Blake Call, Mark Scheer, Daniel T. Quinn, and Cynthia L. Ducey.

Dated September 14, 2015.



Jim Gottstein

July 22, 2015

Jim Gottstein
Alaska Building
406 G Street, Suite 206
Anchorage, AK 99501

Re: Damages to Alaska Building from Legislative Information Office Construction

Dear Mr. Gottstein:

The Alaska Building has suffered significant damage due to the demolition of the old Empress Theater and the construction of the Legislative Information Office. The damages are due to movement of the common wall between the two structures and the undermining of the foundations that has occurred due to the expansion of the Empress basement.



Figure 1 Separation at west wall of stair

The Alaska Building is actually a combination of several structures built at different times going back to the development of the Anchorage Town Site in 1916. The part of the building on Fourth Avenue was a two story building and the south part of the building on the alley was originally one story and the second and third floors were added later. There is a basement under the southeast part of the building.

There is a concrete wall between the Alaska Building and the old Empress Theater building to the west that is connected to both buildings. There are no known drawings of either building.

At some point in the past the basement of the old Empress Theater building had been extended to the alley to the south. That basement extension was below the footing for the common wall. A new foundation wall had been created as part of that work.

Recently the Old Empress Theater building was demolished, the entire basement deepened and a new multi-story building built as part of the significant remodel of the Legislative Information Office. The deeper basement was below the footing

for the common wall and the foundation wall that had been added when the Empress Theater basement had been extended. A shoring wall of driven H pile and wood lagging was installed to retain the soil under the common wall during the basement excavation.



Figure 2 Separation at door frame at base of stair

The common concrete wall was monitored during the construction. A series of survey points were established on the wall. Tracking the monitoring points placed on the wall, changes in elevation are as much as 1.4", changes in north/south direction are as much as 0.60", and changes in the east/west direction are as much as 0.84". Movement of that joint wall during construction has caused some damage to the structure and the architectural finishes of the Alaska.

The separation that has occurred between the common wall and the northern part of the Alaska Building is most clearly evident in the northwest stair



Figure 3 Separation at west side of stair

as can be seen in Figures 1, 2 and 3. The large unknown is what this separation means to the structural integrity of this part of the Alaska Building, since the wall provides vertical and lateral support for it. The gaps that now exist raise significant questions as to how stable that support now is. It is not known how much bearing exists on the common wall and how much that was reduced during the construction. During a seismic event it is possible the bearing could be lost and there could be catastrophic collapse of all or parts of the Alaska Building. At the southern part of the building posts and beams provide the vertical support but the lateral support is still provided by the wall. Again the integrity of the connections to the wall at the south part of the building are unknown.



Figure 4 Gap at settled column

Where the basement foundation on the Empress Building and the Legislative Information Office undermined the Alaska Building a large void under the slab led to the sudden settlement of a major building column which was sitting on the slab. It is possible some of the void existed prior to the recent work, but most of the void was created due to the recent work. Although that void was filled with concrete the one column is still lower than it was

before the settlement as is evident in the gaps at the beam supports at the top of the wall. See Figures 4 and 5. This settlement is evident in the slopes of the floors above this column as shown in Figures 6, 7 and 8. There are new cracks evident in the slab in this area. See Figures 9 and 10.

Furthermore, the soil lost when the void was created left a section of unconsolidated soil. Settlement is continuing in this area and will require future adjustments. It is possible there are still some voids under the slab. This could be investigated with ground penetrating radar.

An additional cost for the Alaska Building would be the removal of the larger block of concrete if at some future time the site is redeveloped.



Figure 5 Buckled plywood

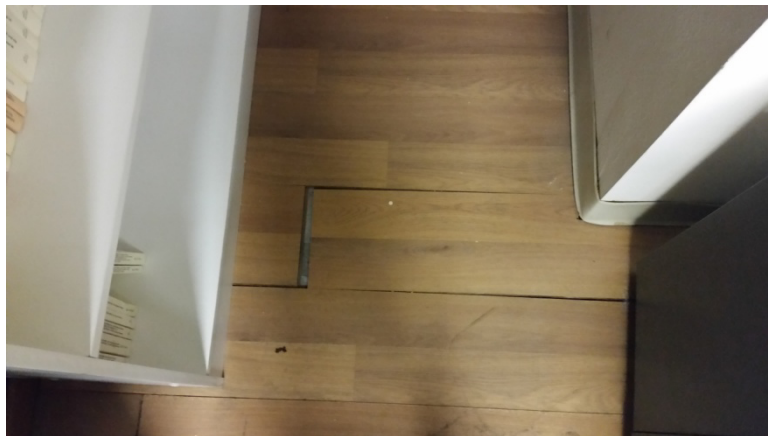


Figure 6 Shifting of floor finishes on slope floor



Figure 7 Slope in floor at door sill



Figure 8 Slope of floor at interior wall



Figure 9 Crack in slab at east side of storeroom.



Figure 10 Crack in slab in storeroom



Figure 11 Open top of common wall



Figure 12 Open top of common wall



Figure 13 Water damage to second floor ceiling

Quantifying the damages is difficult because the full impact on the structure is not known without significant demolition of the finishes of the building. However, in my opinion the costs are the following:

Movement of the common wall

Remove finishes exposing the structure	\$25,000
Reinforce structural connections	\$65,000
Replace finishes	<u>\$60,000</u>
Subtotal	\$150,000

Undermining of the foundations

Grout jack slab to level	\$10,000
Raise building structure back to original level	\$15,000
Repair finishes	\$35,000
Future settlement consideration	<u>\$15,000</u>
Subtotal	\$75,000

Weather damage

Remove finishes	\$5,000
Repairs to damaged material	\$8,000
Replace finishes	<u>\$12,000</u>
Subtotal	\$ 25,000

Total	\$250,000
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Sincerely,

BBFM Engineers, Inc.

A handwritten signature in black ink, appearing to read "Dennis L. Berry". The signature is stylized with a large, looped "D" and a prominent "B".

Dennis L. Berry, PE

Senior Principal