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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

716 WEST FOURTH AVENUE, LLC, Appellant, v. LEGISLATIVE COUNCIL, Appellee.	CASE NO. 3AN-16-10821CI Appeal of Legislative Council's Decision dated November 21, 2016 on Contract Claim Appeal of 716 West Fourth Avenue, LLC, dated October 31, 2016

OPENING BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to AS 36.30.620 and the Alaska Legislative Procurement Procedures, Section 480. The Procurement Officer's decision was issued on July 8, 2016[1] and adopted without modification as the final decision of the Legislative Council on November 21, 2016.[2] 716 timely filed a notice of appeal on December 20, 2016.[3]

ISSUES PRESENTED

1. Did the Legislative Council abuse its discretion in making findings of fact that are not supported by the evidence?

(a) Did the Legislative Council err in failing to address any of the evidence of representations by the agents and representatives of the Legislative Council as to the validity of the procurement process, and 716's reasonable reliance on those representations?

(b) Did the Legislative Council err in finding that the Legislature had exhausted its appropriation for the LIO building when it terminated the Lease on October 16, 2016?

(c) Did the Legislative Council err in finding that the negotiations between the LAA and 716 regarding payment for the first year of the Lease undermined 716's estoppel claim?

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[1] Administrative Record ("AR") 000730-000751.

[2] AR 001024.

[3] Dkt. 1.

(d) Did the Legislative Council err in finding that 716 did not reasonably rely on the LAA's affirmations that the lease procurement process was valid because 716 had conducted its own analysis of that issue?

(e) Did the Legislative Council err in finding that negotiations between 716 and the LAA that occurred after the Lease was executed and related to a potential sale of the LIO building affected the validity of the procurement process?

2. Did the Legislative Council err in concluding that 716 did not prove three of the four factors necessary to establish an estoppel claim when the evidence demonstrated that:

(a) 716 reasonably relied on the LAA's assertions regarding the validity of the procurement process and the Lease;

(b) 716 was prejudiced by its reliance and suffered damages as a result;

(c) the public interest will not be harmed by making 716 whole.

3. Did the Legislative Council err in finding that the LAA relied on the non-appropriations clause of the Lease and the Appropriations Clause of the Alaska Constitution in abandoning its commitments and representations to 716?

4. Did the Legislative Council err in finding that the LAA properly terminated the Lease pursuant to the non-appropriations clause?

STATEMENT OF THE CASE

Appellant 716 West Fourth Avenue, LLC ("716") appeals the Legislative Council's final decision ("Decision") denying its contract claim, originally lodged with the

Legislative Affairs Agency ("LAA") Procurement Officer in July 2016.[4] The principal facts that this appeal relies upon are set forth fully in 716's Motion for Hearing De Novo.[5] In order to conserve judicial resources and avoid repetition, the facts are not recited again in detail here. 716 incorporates the briefing on its Motion for Hearing De Novo by reference and relevant portions of the factual history of this matter are addressed in the substantive sections that follow.[6]

STANDARD OF REVIEW

When the superior court acts as an intermediate court of appeal in an administrative matter, it will independently review the merits of the agency decision.[7] The superior court reviews the administrative agency's findings of fact to determine if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8]

The superior court applies a different standard of review to questions of law

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[4] AR 000001-000023 (716 Contract Claim).

[5] Case Mot. 1. The facts set out in the motion briefing were established by the sworn statements and materials that were submitted with 716's claim, first lodged with the LAA, and then with 716's appeal to the Legislative Council. *See* AR 000974-001023 (716 Appeal of Procurement Officer's Decision).

[6] As explained in 716's Motion for Hearing De Novo, because no hearing was held by the Procurement Officer or by the Legislative Council in connection with 716's claim, the record in this matter has not been fully developed and 716 has not had a full or fair opportunity to present all of the evidence that supports its claim. 716 respectfully renews its request for an opportunity to conduct the discovery necessary and present evidence to fully support its claim.

[7] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 298-99 (Alaska 2014) (quoting *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624, 630 (Alaska 2011)).

[8] *White v. State, Dep't of Nat. Res.*, 984 P.2d 1122, 1125 (Alaska 1999) (citing *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992)).

depending on the subject of review. The reasonable basis standard applies to questions of law involving "agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions."[9] When applying the reasonable basis test, the court will "seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if [it] may not agree with the agency's ultimate determination."[10] Where no agency expertise is involved, the superior court will apply the substitution of judgment standard.[11] Under the substitution of judgment standard, the superior court may "substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law."[12]

In the present case, the Decision of the Legislative Council, sitting in its capacity as the first layer of appellate review of the actions of the agency, is subject to the substitution of judgment standard of review because the issues addressed in the Decision are not within the Legislative Council's or the LAA's areas of expertise. Additionally, the Decision is not entitled to a deferential standard of review because the proceedings below violated due process and the Alaska Administrative Procedures Act.[13]

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[9] *Id.* (citing *Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

[10] *Id.* (citing *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

[11] *Id.* (citing *Marathon Oil Co.*, 254 P.3d at 1082).

[12] *Id.* (citing *Tesoro Alaska Petroleum*, 746 P.2d at 903).

[13] 716 incorporates by reference its briefing on the lack of due process from its Motion for Hearing De Novo (Case Mot. 1) and Reply in Support of Hearing De Novo. In short, no hearing was held on 716's claim to the LAA or its appeal to the Legislative Council and the decision maker was not impartial.

The Legislative Council is a "permanent interim committee and service agency of the legislature,"[14] created pursuant to Article II, Section 11 of the Alaska Constitution. The LAA is "the vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature."[15] Additionally, the LAA, through its Division of Administrative Services, manages procurement and facilities for the Legislature.[16] The agency's "expertise," to the extent it claims any, lies only in the administration of the LAA's affairs on behalf of the Legislative Council and the Legislature. Neither the Legislative Council nor the LAA has any technical or subject matter expertise in commercial real estate leasing, acquisition or complex transactions for new development. The LAA effectively conceded its lack of expertise when it refused to make the procurement issue a matter of legislative prerogative or non-justiciability.[17]

ARGUMENT

The Legislative Council's Decision denying 716's claim improperly rewrites the facts and misapplies the governing law. The record plainly reflects that the LAA did not abandon the lease in reliance on the non-appropriations clause of the Lease[18] or the Appropriations Clause of the Alaska Constitution.[19] The decision to abandon the LIO

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[14] AS 24.20.010.

[15] AS 24.20.061; *and see* http://akleg.gov/legaffairs.php (last visited August 1, 2017).

[16] *Id.*

[17] AR 000036 (Order On Motion for Summary Judgment Re: Lease is Not an Extension, noting the LAA's failure to defend its processes as non-justiciable).

[18] AR 000424 (Section 1.2 of the Lease); AR 000436-000437 (Section 43 of the Lease).

[19] Alaska Constitution art. IX, § 13.

building was made on or before May 16, 2016,[20] and predated any decision by the Legislature regarding 2016 appropriations.[21] Rather, the LAA decided to walk away from its commitments and representations to 716 because the Superior Court found that the LAA's lease procurement process was flawed.[22]

As a result, 716 filed its contract claim on July 8, 2016, seeking relief under the doctrine of estoppel. As explained below, the LAA Procurement Officer's conclusion that 716 is not entitled to an estoppel remedy is based on an erroneous view of both the facts and the applicable law.

I. MATERIAL FACTUAL ERRORS UNDERMINE THE LEGISLATIVE COUNCIL'S DECISION

716 supplemented the record with evidence that conflicted with and undermined the Procurement Officer's Decision, and rebutted the factual claims it was based on. But on appeal, the Legislative Council adopted the Decision in full and without comment.[23] The Decision's legal conclusions are flawed because they (1) are based on findings of fact that are not supported by, and in some instances, contradict, undisputed evidence in the record, (2) are based on evidence that is irrelevant to 716's estoppel claim, and (3) ignore evidence

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[20] AR 000036 (May 16, 2016, Letter from LAA re: Lease with 716).

[21] AR 000959-000962 (CCS HB 256 passed by House and the Senate on May 31, 2016, and signed by Governor Walker on June 28, 2016).

[22] AR 000062. The LAA made the decision to abandon the building after 716 had spent $8,900,000 of its own equity capital and borrowed an additional $28,600,000 from EverBank, secured by a deed of trust on the LIO building, an assignment of the Lease, and guarantees signed by each of the individual members of 716.

[23] AR 001024.

in the record, without comment or even acknowledgement, on which 716 relied to establish its claim.

716 maintains that a de novo hearing is warranted to cure these errors, receive all relevant evidence, exclude irrelevant evidence, and render proper determinations of what evidence is most credible and persuasive on those issues where the evidence is in dispute. None of these routine adjudicative steps has yet been engaged in this matter.

A. THE DECISION ERRED IN ITS FINDINGS ABOUT THE SUBSTANCE OF THE LEASE NEGOTIATIONS AND 716'S MOTIVATION IN NEGOTIATING TO SECURE THE FIRST YEAR OF RENT ON THE LEASE.

The Decision recounts negotiations between the LAA and 716 over rent payment appropriations by the Legislature for the first year of the Lease.[24] But the Decision's recitation of those negotiations, as well as its characterization of 716's motivation for engaging in them, is unsupported by the evidence and incorrect. As a result, the legal conclusions that the Decision draws from those facts likewise are incorrect.

It always was 716's understanding that, for the Lease to be binding, the Legislature was required to appropriate the first year's rent pursuant to AS 36.30.080(c)(1).[25] However, when the LAA signed the Lease, the Legislature was out of session and, as a result, the first year's lease payment could not be appropriated until the spring of 2014. Accordingly, 716 understood that, *for that limited period of time*, it bore the risk that the Legislature could elect not to appropriate funds for the first year of the Lease, thereby invalidating the Lease. This resulted in a period of several months during which 716 was

[24] AR 001033-001034 (Final Decision, dated October 6, 2016).

[25] AR 001012 (McClintock Aff. ¶ 15); AR 001015 (Steiner Aff. ¶ 4).

required by the LAA to begin work at a substantial cost, without any guarantee that the Legislature would ultimately appropriate funds for the first year of the Lease as required by statute.[26] 716 accepted that risk. But only that risk.

To mitigate this risk, the parties negotiated a reimbursement clause that would have provided 716 less than full repayment of its anticipated out of pocket expenses, but at least a partial remedy, had the Legislature chosen during that first year not to appropriate funds in support of the Lease.[27] But the risk that needed to be mitigated was limited because the first year's rent, once appropriated, constituted a commitment on the part of the Legislature to sanction the terms of the lease and proceed with the project.[28] Had the appropriation not been made for the first year's rent, and had the Lease thereby been rendered ineffective before full performance by 716, the extent of 716's damages would have been drastically smaller. Most of the construction work never would have been completed and most of the expenses never would have been incurred. The Decision's effort to conflate 716's acceptance of a limited risk for a limited period of time with acceptance of a much broader risk that the LAA would abandon the building *after* the building was completed, after tens of millions of dollars had been expended, and after the LAA had accepted the construction, occupied the building, and commenced payment of rent lacks any factual basis in the record. It also defies logic and common sense.

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[26] AR 001012 (McClintock Aff. ¶ 15).

[27] AR 001015 (Steiner Aff. ¶ 4).

[28] AR 001012 (McClintock Aff. ¶ 15); AR 001015 (Steiner Aff. ¶ 4).

716's explanation of the significance of the first-year's rent and its relationship to the non-appropriation clause is consistent with the evidence in the record – evidence that was ignored in the Decision. The Legislative Council's meeting minutes from December 19, 2015, corroborate 716's understanding of the limited risk that 716 assumed in connection with appropriation of the first year's rent.[29] At that meeting, 716 Principal Mark Pfeffer was asked to speak to the history of the Lease as well as to his understanding of the non-appropriations clause.[30] Mr. Pfeffer explained that he was aware of the clause and its inclusion in many if not all government leases, but that there was an understanding among the investment and business community that it rarely, if ever, is used due to the impact its use would have on future contracting with the State and the economics of most complex real estate transactions, which would be seriously impaired if government leases had to be viewed and negotiated as one-year agreements.[31]

The Legislative Council's own records further corroborate Mr. Pfeffer's statement that non-appropriation clauses are seldom utilized due to the negative policy implications of the State abdicating its contractual responsibilities to a private party.[32] Indeed, the only known instance of the use of the non-appropriations clause by the State of Alaska resulted in the State paying the lessor for its damages.[33] The outcome of that case was discussed

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[29] *See* AR 001047-001106.

[30] AR 001059 (December 19, 2015 Legislative Council Meeting Transcript).

[31] *Id.*; *see also* AR 001276-001279.

[32] *See* File No. 661-87-02841987 WL 121076 (Alaska A.G. Mar. 24, 1987).

[33] *Id.*

by the Legislative Council as the one previous example of the LAA's invocation of the non-appropriations clause.[34] The Legislative Council appears to have been made aware by LAA Counsel Doug Gardner that, although that case settled, the LAA could be held liable for the rent remaining due on the Lease if the LAA were to terminate under the non-appropriations clause.[35]

B. THE DECISION ERRED IN CONCLUDING THAT 716 WAS ON NOTICE OF DEFECTS IN THE PROCUREMENT PROCESS AS A RESULT OF THE ADJOINING PROPERTY OWNER'S CLAIM OVER DAMAGE TO THE COMMON WALL.

The Decision wrongly concludes that 716's estoppel claim was weakened by threats by local attorney James Gottstein, who was not a party to the Lease, to sue 716 over alleged damage to the common wall that his property shares with the LIO building.[36] As a matter of law, fact, and logic, a third party's threats to sue or his general opinion on the Lease cannot provide legally meaningful "notice" that would be relevant to 716's estoppel claim.[37] The Decision cites no legal authority for this remarkable proposition. Further, the Decision is mistaken in its recounting of the pertinent facts.

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[34] AR 001101 (December 19, 2015, Legislative Council Meeting Transcript).

[35] *Id.* ("Senator Micciche was right, the Legislature did pay what he believes was the very last year of the lease, we paid out the last piece of the lease in some settlement. He said it is a case worth noting and the answer is there are risks involved if the Legislature non-appropriates; there are also ways to protect the Legislature.").

[36] AR 001031-001032 (Final Decision).

[37] Unquestionably, the contract is the vehicle for such notice; otherwise, no contract could be enforced in the face of third party interference.

Mr. Gottstein first approached 716 about concerns he had with the common wall on or about October 10, 2013.[38] His contact was a result of a request on behalf of 716 to address a gas meter that served Mr. Gottstein's property but was installed on 716's property.[39] Discussions with representatives and lawyers for 716 continued for some time regarding the scope of access Mr. Gottstein was willing to allow to correct what in fact was Mr. Gottstein's problem in the first place, the indemnity obligations 716 would owe him, and the status of the wall between his building and the construction work to be done on the 716 property.[40] It was not until a meeting on Monday, October 28, 2013, with Donald W. McClintock, outside counsel for 716, that Mr. Gottstein first suggested that the lease was illegal, and attempted to use the threat of litigation of that claim as leverage for his other claims.[41] An Indemnity Agreement with Mr. Gottstein was signed on October 30, 2013, and Mr. Gottstein took no action to pursue any claims involving the validity of the Lease until he filed his Complaint in Superior Court a year and a half later, on March 31, 2015, after 716's project was completed and the LAA had taken occupancy of the building.[42]

The Decision mistakenly asserts that discussions about the validity of the Lease were held three weeks after the Lease was signed, in early October 2013. But even under the Decision's incorrect timeline, 716 had already closed on its purchase at substantial

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[38] AR 001008-001009 (McClintock Aff. ¶ 6).

[39] *Id.*

[40] AR 001009 (McClintock Aff ¶ ¶ 6-8).

[41] AR 01009-01010 (McClintock Aff. ¶ ¶ 7-8).

[42] AR 01009-01010 (McClintock Aff. ¶ ¶ 8-9).

expense of the Anchor Pub property, as required by the Lease, at the time the supposed discussions occurred.[43] Further, at the time of Mr. Gottstein's alleged "notice," 716 was already contractually committed to the LAA for a very tight construction schedule under the Lease with the risk of substantial liquidated damages for delay.[44] At no time did the LAA ever approach 716 to caution that it had second thoughts about the propriety of the procurement process for the Lease and as detailed later, when asked by 716's lenders, the LAA repeatedly reaffirmed the validity of the Lease. The LAA remained steadfast in requiring that 716 continue to perform its Lease obligations on time.

C. THE DECISION MISSTATES THE FACTS SURROUNDING THE POTENTIAL PURCHASE OF THE BUILDING ON THREE POINTS CRITICAL TO THE DECISION'S CONCLUSION.

The Decision misstates the facts surrounding the Legislature's potential purchase of the building in late 2015 and early 2016 on at least three points that are critical to the Decision's conclusion that the public interest would be significantly prejudiced by the application of the estoppel doctrine to the LAA.

First, the Decision fails to acknowledge substantial evidence in the record related to the purchase negotiations that took place between 716 and the LAA prior to December 2015. In August of 2013, prior to signing the Lease, the Legislative Council reaffirmed its earlier decision to move forward with the Lease and passed a new motion requiring the chairman to negotiate a purchase of the building after the Lease was signed.[45] In the spring

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[43] AR 000450-000512 (Anchor Pub Settlement Statement); AR 01007 (McClintock Aff. ¶ 3).

[44] AR 001008 (McClintock Aff. ¶ 5).

[45] AR 000241-000242 (Legislative Council Minutes of August 23, 2013).

of 2014, prior to occupancy, the LAA requested, and 716 provided, a proposal for the sale of the building that LAA and AHFC signed.[46] The Chairman presented the agreement to the Legislative Counsel, but it was never acted on.

In the fall of 2015, after occupancy, the LAA again requested that 716 craft another written proposal for the sale of the building. Frustrated with the LAA's misrepresentations of its position to the Legislative Council, 716 agreed, on the condition that its actual proposal be acted upon; specifically, that the proposal be put before the Legislative Council as written, in motion form. The LAA agreed in writing to that condition on October 22, 2015.[47] Without any further communication on this issue, on November 25, 2015, LAA unilaterally and without notice, and in direct conflict with the terms that were agreed to on October 22, released a report entitled "Anchorage Legislative Offices Cost Comparison" which concluded that it would be much less expensive to move to the Atwood building than to continue the current lease or purchase the 716 property.[48] The report was prepared internally by the LAA without AHFC or, to 716's knowledge, consultation with anyone with any expertise.

The report was circulated by Senator Stevens' office in advance of a December 4, 2015, Legislative Council meeting, at which LAA Executive Director Pam Varni was expected to walk the council through the report's findings. On December 3, 2015, the day

[46] AR 000514-000517 (Memorandum of Understanding dated February 2014).

[47] AR 001395-001396 (Letter from LAA Counsel to McClintock, October 22, 2015).

[48] AR 001397-001401 ("Anchorage Legislative Cost Comparison").

before the meeting, after reviewing the report, Michael Buller, the lead AHFC official involved in the project sent Director Varni an email stating:

> Pam I've left messages on both your cell and work phones. I will not attend the Leg Council meeting tomorrow. Unfortunately I cannot support the analysis of the options presented in your report to the Council and a public discussion at this time will only embarrass everyone involved.[49]

Attached to the email were notes from Tim Lowe, the appraiser hired by AHFC who had originally appraised the 716 property on behalf of the LAA prior to the execution of the Lease, explaining the many inaccuracies and errors in the LAA's report.[50]

Despite being on notice that the staff report not only was flawed, but was so misleading as to be "embarrassing," Director Varni presented it, without any disclosure of its known errors and inaccuracies, at the December 4, 2015, Legislative Council Meeting.[51] When Senator Kevin Meyers posed a question regarding what advice AHFC had provided, and noted that "we don't hear much about Alaska Housing," Director Varni did not inform the Legislative Council that AHFC was aware of the LAA's report and disagreed with both the numbers and the analysis that it contained.[52] On December 19, 2015, at yet another Legislative Council meeting, Director Varni was asked again about AHFC's opinion and she again evaded the question and did not reveal the existence of a report that conflicted with the analysis she had presented. The decision to leave Council members in the dark

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[49] AR 001510-001513 (Varni-Buller emails).

[50] *Id.*

[51] AR 001402-001509 (Transcript of December 4, 2015 Legislative Council Meeting).

[52] AR 001458-001459.

about the views of their project manager, AHFC, is unfathomable. It also was highly misleading. Only in response to a request from State Representative Herron more than a month *after* Director Varni presented her own report to the Legislative Council did she disclose to the Legislative Council the email and report from Mr. Buller.[53] None of this history or its significance is acknowledged in the Decision.

Second, the Decision goes on to misrepresent the contents of the motion passed by the Legislative Council on December 19, 2015, framing it as one that recommended "the non-appropriation of funds for rent in the upcoming fiscal year unless 716 was able to present a more cost-competitive option within 45 days that could garner adequate support."[54] This is a misleading description of the motion. Indeed, the full motion provided:

> Legislative Council advises the Legislature not to appropriate for the 716 W Fourth Avenue lease pending the outcome of the currently pending litigation or unless negotiations between counsel for the Legislature and a State entity within the next 45 days results in a competitive cost on a per square foot of usable space basis.[55]

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[53] AR 001514-001516 (Varni-Herron email); *see also* AR 001047-001106 (December 19, 2015, Legislative Council Meeting Minutes). Director Varni's misrepresentations by omission continued throughout the December 19, 2015, Legislative Council meeting where the LAA's analysis and cost comparison was discussed at length. Given multiple opportunities to provide the information she had been provided by Mr. Buller, Director Varni remained silent, choosing to withhold information relevant to Council members' questions.

[54] AR 001033 (Final Decision).

[55] AR 001105 (Transcript of Legislative Council December 19, 2015, meeting).

The Decision incorrectly states that this motion put the onus on 716 to "present a more cost-competitive option within 45 days."[56] It goes on to state that 716 "attempted to do so."[57] These unquestionably are misstatements. 716 never was obligated or asked to come up with a "cost-competitive option" in order to compete with its own property and leasehold, nor did it provide such an option. What 716 did submit, in January of 2016, was a request to Senator Stevens that an independent third party analysis be conducted regarding the cost competitiveness of the various options the Legislature was reviewing for LIO office spaces.[58] Senator Stevens declined at that time to undertake such an analysis, citing an unwillingness to spend the funds.[59]

The 45-day timeline established by the December 19, 2015, motion expired on February 2, 2016. At that time, the Department of Revenue submitted its analysis, which concluded that the purchase of the 716 property ***was*** cost-competitive compared to relocating to the Atwood Building.[60] The LAA did not accept the Department of Revenue's analysis and instead chose to hire a third party, Navigant, to conduct further analysis (a month after initially refusing to do so). Navigant concluded that a purchase of the 716 property ***was*** cost-competitive at a price point of $35.6 million.[61] The LAA refused

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[56] AR 001033.

[57] *Id.*

[58] AR 001515 (Letter McClintock to Carlsen dated January 21, 2016).

[59] *Id.*

[60] AR 001521 (Analysis of Anchorage LIO Options).

[61] AR 000665-000711 (Navigant Analyses).

to accept Navigant's analysis and hired yet another third-party consultant to conduct a fourth review of the Legislature's options.[62]

Finally, the Decision ignores the DOR analysis and focuses on and grossly mischaracterizes the Navigant economic analysis in a variety of ways. If the record establishes anything, it establishes that the LAA purposely disregarded the conclusions of its selected experts, misdirected information to the Legislative Council and was dedicated to seeking multiple opinions until it found one that said what it wanted.[63]

II. 716 PROFFERED EVIDENCE TO SUPPORT EACH ELEMENT OF ITS ESTOPPEL CLAIM

In *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation*,[64] the Court addressed "what remedy is appropriate for a contractor who is awarded a public contract which turns out to violate a statute or regulation."[65] Specifically, the Court addressed the application of the doctrine of estoppel where a government contract was

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[62] 716 has never been provided a copy of this report, which the LAA ultimately relied on. The LAA has indicated, however, that the analysis was based on an appraisal of the 716 building as a vacant office space in downtown Anchorage, without taking into account its lease value. If this was the approach taken in the analysis, it was improper and resulted in producing an artificially low value for the property. The value 716 relied on for its cash investment, and which its lenders relied on in providing financing, was based on the LAA's commitments in the lease. The full scope of the Decision's misrepresentation on these points is best captured by the "summary of considerations" discussed by the Legislative Council in determining whether to purchase the LIO building. The summary was circulated among legislators by Senator Stevens' office, and includes a point-by-point analysis of the purchase that is directly at odds with the Decision's version of events. AR 001539 (Summary of Considerations for the Potential Purchase of the Anchorage LIO).

[63] The Decision also fails to even acknowledge that the Legislative Council voted to purchase the building for $32.5 million on March 31, 2016, indicating that it did in fact find purchase of the 716 property to be "cost competitive." AR 001525-001536 (March 31, 2016 Legislative Council Meeting Minutes).

[64] 765 P.2d 1360 (Alaska 1988).

[65] *Id.* at 1364.

cancelled based on a determination that the contract violated a statute. After reviewing federal and state law precedent, the Court concluded that the appropriate remedy is the doctrine of estoppel and that four factors should be addressed in that analysis: (1) the assertion of a position by conduct or word, (2) reasonable reliance on that assertion, (3) resulting prejudice, and (4) potential prejudice to the public interest. 716 has established each of the four elements necessary to prevail under the doctrine of estoppel: (1) the LAA asserted that the procurement processes and the Lease were valid, (2) 716 reasonably relied on the LAA's assertions and invested 37 million dollars in debt and equity to meet its obligations under the Lease, (3) 716 was damaged by its reliance on LAA's assertions when the LAA abandoned the Lease as a result of the Superior Court's holding that the procurement process did not fall under AS 36.30.083 and thus the Lease was "invalid," and (4) the public interest will not be prejudiced by application of the doctrine of estoppel under these circumstances.

The Decision makes several overarching errors in concluding that 716's estoppel claim fails. First, the Decision appears to conflate the LAA with the Legislative body. 716's estoppel claim was lodged against the LAA as an administrative agency, and appealed to the Legislative Council. The Legislature as a corporate body is not a party to the claim. The LAA is the party to the Lease, the entity who set up the procurement process, and then ultimately terminated the Lease. The Claim seeks review of the actions by the LAA and the injuries they caused to 716. The Legislative Council is both an actor in the facts as well as the body with jurisdiction to hear the appeal of the Decision.

Second, the Decision confuses what is at issue by asserting that 716's claim fails because LAA paid for the period it occupied the building. At issue is whether the LAA has a legal obligation to make 716 whole after it induced 716 to invest significant amounts of debt and equity in the project through its certified procurement process and the resulting Lease, and then abandoned the Lease after the Superior Court concluded that the procurement process was invalid. Whether the Legislature paid for the short time it occupied the building does not impact the analysis, because there is no question that the LAA abandoned the Lease prior to its expiration.

Third, the Decision's conclusion that the non-appropriations clause of the Lease nullifies 716's estoppel claim is misplaced. When the Superior Court found that the procurement process was flawed it concluded that the Lease was invalid. Thus, the Legislative Council could not rely on the non-appropriations clause of the Lease to avoid 716's estoppel claim – a claim that lies in equity, not under the invalid contract.

A. LAA Asserted The Lease Was Valid And In Effect.

The preliminary requirement of any estoppel claim is for the moving party to demonstrate that the party to be estopped has asserted a position by word or conduct.[66] In *Earthmovers*, the Court concluded that this requirement was met simply by the Department of Transportation's execution of the award.[67] Here, the record clearly establishes that the LAA and the Legislative Council asserted multiple times and in multiple ways that the

[66] *Ogar v. City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

[67] 765 P.2d 1360 (Alaska 1988).

Lease was (1) valid, (2) in effect, and (3) in compliance with applicable law. The Decision does not deny that 716 has satisfied this element.

B. 716 Reasonably Relied On The LAA's Assertion.

The decision ignores the record evidence to reach the flawed conclusion that 716 did not reasonably rely on the LAA's representations regarding the validity of the procurement process and the Lease. Instead, the Decision dismissively concludes that 716 did not reasonably rely on the LAA's assertions because (1) it was represented by counsel and participated in the lease negotiations, and (2) a third-party (James Gottstein) expressed criticism of the procurement process. This conclusion is wrong.

The Lease was executed in September 2013, only after 716 obtained written assurance from the LAA that the Lease complied with the Legislative Procurement Procedures. This included clear and unambiguous findings made by the Procurement Officer[68] and Director Varni[69] confirming the Lease was in compliance with the procurement rules. These findings were prepared by the LAA's counsel and certified by its Director and Procurement Officer. 716 had no role in preparing the findings. The findings were included as attachments to the Lease specifically to provide assurance to the parties that the contract was properly entered into.

In addition, prior to closing on financing for the project, 716 obtained from LAA a Subordination and Non-Disturbance Agreement ("SNDA") for its lender, EverBank,

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[68] AR 000713-000721 (Exhibit C to the Lease: Procurement Officer's Findings Under Legislative Procurement Procedure 040(d)).

[69] AR 000723 (Exhibit D to the Lease, Director Varni's AS 36.30.083(b) Report).

acknowledging that the Lease was in effect, 716 had completed all required work under the Lease, and that the LAA was prepared to be in possession of the premises as scheduled under the Lease.[70] The SNDA signed by LAA acknowledged that LAA understood that EverBank would rely on the SNDA to provide funding secured by the property.[71] Subsequently 716 signed its note and other financial commitments to EverBank for $28.6 Million.[72]

Finally, in late December 2014, the LAA took occupancy of the building and on January 1, 2015, commenced payment of the new lease amounts, which were by then appropriated by the full legislature in the FY 2015 budget,[73] acts which constituted further assurance that the lease was valid and in force.

In addition to the assertions by the LAA regarding the validity of the Lease, the full Legislative Council voted to proceed with the Lease multiple times throughout the procurement process,[74] and ultimately, the Legislature appropriated the first year's rent as

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[70] AR 000552-000559.

[71] *Id.*

[72] AR 000561 (Balloon Promissory note); AR 000568 (Assignment of Rents and Leases) through AR 000628 (other loan documents).

[73] AR 000630 (CCS HB 266 (SLA 2014)).

[74] AR 000153 (Minutes of Legislative Council, May 13, 2013 (the chair was authorized to explore the lease extension under the full remodel option); AR 00116 (Minutes of Legislative Council June 7, 2013 (the chair was granted authority to proceed with entering into the Lease); AR 000241-242 (Minutes of Legislative Council August 23, 2013 (after three months of due diligence by AHFC, the LAA staff and consultants, the Legislative Council authorized the chair to enter into the Lease and to try to buy the building).

required by AS 36.30.080(c)(1),[75] which the governor signed into effect.

The Decision fails entirely to acknowledge or address any of the above statements and actions by the LAA, the Legislative Council, and the full Legislature that support 716's reasonable reliance on the validity of the Lease. Instead, the Decision first concludes that 716 did not rely on the representations of the LAA and the Legislative Council regarding the validity of the procurement process because 716's in-house counsel, John Steiner, separately prepared a procurement analysis during the course of the Lease negotiations in 2013, and engaged in correspondence with 716 and the LAA regarding his analysis.[76] The Decision's interpretation of this history is incorrect. Steiner's analysis was provided after the Legislative Council's motion to proceed, but prior to final approval of the lease, and contrary to the Decision's conclusion, neither Pfeffer Development's In-House Counsel, John Steiner, nor 716's outside counsel, Donald W. McClintock, doubted the LAA's ability to enter a valid lease.[77] Nor was the LAA's conclusion that the Lease complied with AS 36.30.083 the sole basis for 716's reliance on the LAA. AS 36.30.083 was not the only, nor even the primary, matter of concern for 716 during the lease negotiations.[78] Rather, as described above, 716 reasonably relied on the long series of actions taken by the LAA, the Legislative Council, and the Legislature that were unambiguously intended to assure 716 that the Lease was valid. There was no reason for 716 to doubt or question the LAA's

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[75] AR 000630 (CCS HB 266 (SLA 2014)).

[76] AR 000745 (Final Decision).

[77] AR 001007-12 (McClintock Aff. ¶¶ 9-10, 12); AR 001014-001017 (Steiner Aff. ¶¶ 6-8).

[78] AR 001007-001012 (McClintock Aff. ¶¶ 14-15); AR 001014-001017 (Steiner Aff. ¶ 2).

conclusions about its compliance with its own Procurement Code.

716 had no reason to believe the LAA would not fulfill its obligations and defend the Lease before May of 2016, when the agency suddenly shifted its position and litigation strategy in the ABI Lawsuit, and when specifically asked by the court concerning the justiciability of the matter elected not to advance the sound legal argument and defense that its internal legislative processes were non-justiciable.[79] The LAA's decision not to advance this argument allowed the Superior Court to review what should have been a non-justiciable controversy – the validity of the Legislature's internal processes – which then resulted in an avoidable adverse judicial decision that the LAA now claims required it to abandon the Lease.[80] If that contention is true at all, it only is true because the LAA made tactical decisions, for political reasons personal to individual legislators, that made it true.

To further bolster its conclusion that 716 did not reasonably rely on the assertions of the LAA regarding the validity of the Lease, the Decision cites two cases for the

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[79] *Id.*

[80] The LAA's failure to defend its processes was material to the court's decision, which noted: "[d]espite 716's argument that the entire dispute is nonjusticiable, it would seem particularly inappropriate to fail to rule on the main issue in this dispute out of deference to a branch of government which is not asking for deference. It is this key fact that distinguishes this case from *Abood* or *Malone*." AR 000036. The court ultimately concluded, "[b]ecause the legislature is not requesting such deference here, this court can review the lease's legality without concern that it is not showing due respect for an equal branch of government." AR 000036-000037. The Agency's refusal to ask for deference when it became politically expedient for it not to do so is in contrast to previous positions they took in the litigation. As early as June 29, 2015, the LAA argued, "Plaintiff also fails to address the Agency's adherence to the Alaska Procurement Procedures as provided by AS 36.30.020. Consistent with those procedures, the Procurement Officer made a written determination that material modifications were appropriate as part of the Lease Extension for a host of fact-specific reasons." AR 001269.

proposition that an estoppel claim is unavailable to 716 because "a person dealing with a government agency is bound to take notice of the legal limits of the agency's power and those of its agents."[81] As discussed in detail in 716's appeal to the Legislative Counsel, these cases are inapposite. Neither *Municipality of Anchorage v. Schneider*[82] nor *Property Owners Association v. City of Ketchikan*[83] supports the Decision's conclusion that the involvement of 716's counsel or the business acumen of its principals somehow limits the availability of an estoppel claim against the LAA.

In *Municipality of Anchorage*, the Alaska Supreme Court first recognized the policy consideration that a governmental entity "acts for the good of its citizens rather than a narrow proprietary interest. Thus, the argument goes, it would be unjust to the public to enforce estoppel against a municipality."[84] However, the Court then went on to explain that it did not believe a general rule denying estoppel would be proper, and concluded that such policy concerns could "be adequately served within the doctrine of estoppel."[85]

In *Property Owners Association v. City of Ketchikan*, the property owners relied on a statement made by Ketchikan's Finance Director regarding what he believed an interest rate would be in the future.[86] But there was no question under the law that the city would

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[81] *See Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Alaska 1984); *Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567 (Alaska 1989).

[82] 685 P.2d 94 (Alaska 1984)

[83] 781 P.2d 567 (Alaska 1989).

[84] *Schneider*, 685 P.2d at 97.

[85] *Id.*

[86] *Property Owners Ass'n*, 781 P.2d at 573.

set rates and repayment schedules for assessments after the final assessment roll was completed, and by the time that occurred the Ketchikan Municipal Code contained no limitation on interest rates.[87] Because the Finance Director's statements were made prior to the final assessment, the Court held they could not bind the city on an estoppel theory. The Court did note that the property owners alleging estoppel were sophisticated businessman, making their reliance on a clearly speculative statement by a city official especially unsympathetic. However, and far more relevant to 716's claim, the Court made clear that Property Owners Association was "not analogous to *City of Kenai v. Filler*,[88] a case ignored by the Decision, where the city accepted the benefits of a contract and then sought to be released from the contract for its failure to comply with its own ordinances.[89]

Ultimately, as a practical matter, the concept that parties interacting with the government are required to understand the legal limits of the government's power is especially inapplicable under these circumstances. The LAA and the Legislative Council have the power under their own rules to expand or contract their authority by amending those rules. As noted above, the focus of the Lease negotiations was not the satisfaction of AS 36.30.083, but the Legislative Council's own procedures to ensure the Lease was valid. The Legislative Council amended its procurement rules to address this Lease amendment well in advance of the Lease execution. These internal processes were ultimately

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[87] *Id.* at 574.

[88] 566 P.2d 670, 676 (Alaska 1977).

[89] *Id.*

sanctioned and certified by the Legislative Council.[90] To say that 716 could not rely on the party that controlled the contracting process because it was sophisticated and represented by counsel is a position that is impractical, specious, and without legal support.

Second, in addition to concluding that 716 did not reasonably rely on the LAA and the Legislative Council because it conducted an internal analysis of the procurement process, the Decision also concludes that 716 did not reasonably rely on the validity of the procurement process because a neighboring property owner, James Gottstein, indicated that he believed the Lease was not valid.[91] As discussed in greater detail above, Mr. Gottstein's assertions about the legality of the Lease were discussed with 716 at the end of October 2013, and an Indemnity Agreement with Mr. Gottstein was signed on October 30, 2013, under which Mr. Gottstein was paid for agreed access and impacts to his property. Mr. Gottstein took no actions to pursue any claims involving the validity of the Lease until he filed his Complaint in Superior Court a year and a half later, on March 31, 2015, *after* 716's project was completed and the Legislature had taken occupancy of the building.

The Decision's conclusion that Mr. Gottstein provided 716 with "notice" that the procurement process was not valid ***prior to*** the Lease being finalized is based on a complete misconstruction of the facts. By the time Mr. Gottstein raised his concern about the

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[90] AR 000240-000242 (Minutes of Legislative Council, August 23, 2013); AR 000713-000721 (Procurement Officer's Findings under Legislative Procurement Procedure 040(d)).

[91] Mr. Gottstein's goal in the litigation was securing a $10 million payout for his property's proximity to the 716 project. He initially suggested that the lease was illegal and attempted to use the threat of litigation of that claim as leverage for his damages claim in the unrelated lawsuit. *See* AR 001320-001321 (Gottstein Deposition Transcript).

procurement process, 716 and the LAA had already obligated themselves by signing the Lease and 716 had closed on its purchase of the adjacent Anchor Pub property, as required by the Lease,[92] committing 716 to the $3,180,000 purchase price and closing costs in reliance on the executed Lease.

During this timeframe, the LAA required that 716 continue to perform its Lease obligations on schedule. At no time prior to the Superior Court's decision did the LAA indicate to 716 that it had any concerns about the validity of the Lease.

The Decision provides no authority, and 716 has not discovered any authority, for the proposition that a third party's threats to sue, or its general opinion on the Lease, can provide "notice" in any manner that would be legally relevant to 716's estoppel claim. Indeed, such a rule would turn contract law on its head, as any party could seek to be excused from performance based on the statements of an unrelated and even uninformed third party. To the contrary, concepts of privity address who has the power to influence or enforce contracts. Mr. Gottstein was a stranger to this contract with his own self-serving agenda. The Decision's conclusion on this issue is erroneous.

C. 716 Was Prejudiced By Reliance On LAA And Suffered Actual Damages

The Procurement Officer's Decision conflates the issue of prejudice with other assertions the Decision makes about damages and mitigation in this case.[93] That 716 has

[92] This occurred on or about September 24, 2013. AR 000450-000512 (Anchor Pub Settlement Statement).

[93] *See generally*, AR 001041-001045.

suffered prejudice in this matter is unassailable and is well documented in its claim,[94] as well as by subsequent events which have continued to unfold during this appeal.

716 arranged for the investment of $37 million dollars in debt and equity to renovate a building uniquely designed at the request of the LAA and the Legislative Council to meet the needs of the Legislature, which objectively has been recognized as a special use office building.[95] 716 waited until the Lease was signed to close on its acquisition of the neighboring Anchor Pub at the cost of $3,180,000.[96] An integral part of the Lease were the findings of the Procurement Officer that the procurement process met the requirements of Alaska Legislative Procurement Procedures Section 040(d)[97] and the determination by

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[94] AR 000012-000014.

[95] AR 000262. To the extent the Procurement Officer Decision questions the special use nature of the building or finds 716's claim speculative as to the high probability that any new tenant would require substantial improvements before leasing the building, the LAA's counsel previously has identified precisely the same points made and relied on by 716, and communicated those points to the Legislative Council. *See* AR 001068 ("MR. GARDNER asked if the issue was for a higher value of a building like this. He said there are a lot of public spaces, a lot of large meeting rooms in this building; was the consideration to purchase a building like this that this kind of building might be worth more to the State than it might be to a private party. In other words, a business might not want to pay as much to be in here, but the Legislature asked for improvements and, ultimately, the building is more suited for a public use than it might be for a private space." The expert brought to the Legislative Council to advise on the value of the 716 property confirmed that the building was indeed a "special purpose-type use building . . . noting it's the "cost of doing business" for state agencies with special office space needs.) AR 001068 (testimony of Shorett).

[96] AR 000450.

[97] AR 000713-000721 (Exhibit C "Procurement Officer's Findings Under Legislative Procurement Procedure 040(d)).

Director Varni that the Lease terms complied with AS 36.30.083(a),[98] which were attached as exhibits to the Lease.

The purchase of the Anchor Pub building was the first step in a process that involved the investment of debt and equity to build the LIO to the Lease's very exacting specifications and schedule and the laboriously negotiated scope of the lease. EverBank was the last of several lenders involved, and those funds were used to retire the construction debt on the project. EverBank proceeded with its loan only after it received assurances from the LAA in the form of the SNDA dated December 22, 2014, that among other matters "the obligations of Tenant thereunder are valid and binding...."[99] 716 now finds itself in a foreclosure lawsuit with EverBank, which is seeking foreclosure of the collateral property and a deficiency for the balance due, as well as personal liability of the members.[100] Counsel for EverBank wrote to counsel for the LAA on May 10, 2016, notifying them that the McKay decision violated the assurances the LAA provided to EverBank in the SNDA.[101] A week later, counsel for the LAA wrote to EverBank that "[i]n the absence of a valid lease, LAA will have no choice but to vacate the property and to secure alternate premises in due course."[102] In fact, the LAA had an array of choices before it, to renegotiate

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[98] AR 000723 (Exhibit D Varni to Fairclough letter of September 19, 2013 Lease Reporting Requirement").

[99] AR 000554 at Section 6.

[100] *EVERBANK v. 716 West Fourth Avenue, LLC, Mark E. Pfeffer, Robert B. Acree, Mount Trident, LLC*, Case No. 3AN 17-06341 CI (Third Judicial District, State of Alaska), Second Amended Complaint.

[101] AR 000653-000655 (letter from Hume to LAA dated May 10, 2016).

[102] AR 000062-000063 (Letter from Cuddy to Hume dated May 16, 2016).

the lease, to buy the building, or affirm the lease under its sole source authority. It chose to abandon it,

The actual amount of damages 716 is entitled to as a result of the LAA's actions will be determined by a judicial fact finder if its claim is allowed to proceed. And whether those damages should be measured based on a reliance standard or on a quantum meruit standard remains undecided.[103] But there can be no question that 716 has been prejudiced by the fact that the LAA asserted that the procurement process and Lease were legal and valid, followed by the Superior Court finding that it was not. The consequences flowing from the Superior Court's decision were immediate with EverBank and began before the appropriations bill was final. Beginning in June 2016, immediately after the Superior Court's decision was released, counsel for EverBank began asserting its various rights under its loan documents solely based on the McKay Order. [104] As a result, 716 lost all rents paid by the LAA as early as June of 2016 just to avoid a declaration of default based upon the McKay Order.[105] The Procurement Officer's Decision lacks a factual foundation on the reliance and damages issue and must be rejected by this Court.

Finally, the Decision rejects all evidence of damage and states: "Despite 716's certification that the supporting data for its contract claim are accurate and complete, the data are clearly lacking as to the (1) amount of money spent on the Building; (2) 716's

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[103] *See* AR 000015-000018 (716 Contract Claim).

[104] AR 000725 (Letter from Hume to McClintock dated June 14, 2016; setting forth forbearance terms accepted by borrowers).

[105] *Id.*; *see also* AR 001021 (Pfeffer affidavit para 6).

efforts to mitigate its damages; and (3) the residual value of the Building."[106] As explained in detail below, these findings are wrong in each instance and lack substantial evidence to support them. Any one element of a recoverable injury would be a basis to proceed to allow 716 to present its claim. 716 has met that burden several times over.

(1) <u>The finding of insufficient proof of the amount of money spent on the building is arbitrary.</u>

The Decision can point to no evidence in the record that the entire amount claimed was not spent on the project. To the contrary, the record includes: (i) the contractor's certification required by the LAA procurement process that the "amount requested accurately reflects those damages the State is liable to 716…";[107] (ii) the Bratslavsky cost study commissioned by the AHFC;[108] (iii) the affidavit of Michael Buller, then Deputy Executive Director of AHFC;[109] (iv) the affidavit of Mark Pfeffer;[110] (v) the cost summary presented to AHFC during the project;[111] (vi) the AHFC commissioned Waranzof appraisal, which contained its own estimates of probable cost; and (vii) the Estoppel Certificate signed by the Procurement Officer and given by the LAA to EverBank after the

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[106] AR 001045.

[107] AR 000019.

[108] AR 000378-000419.

[109] AR 000022 ("it was my position as the Legislature's tenant representative, that the financial terms of the deal, the cost of construction and internal mark-ups for development and overhead were commercially reasonable ….").

[110] AR 001020 ("The budget that was submitted for the project, with the exception of the contingency for construction and the interim relocation of the offices, was mainly based on contractual commitments and is a fair representation of 716's actual investment in the Project.").

[111] AR 00729 (Development Budget).

project was completed and accepting the Premises as conforming to the Lease requirements.[112] As these documents demonstrate, this was an open book process where all of the proposed costs were reviewed in advance by the LAA. Additionally, the LAA acknowledged to 716's lender that the building had been completed to its satisfaction. Given these facts, and in the absence of any evidence to the contrary, it was arbitrary and incorrect to find that 716 did not adequately prove what it had spent on the project.[113]

The findings on 716's effort to mitigate and finding that the building has substantial residual value are entirely speculative and not supported by any, let alone "substantial," evidence. 716 outlined the mitigation efforts that had taken place as of October 2016 when the LAA moved out of the building in its appeal to the Legislative Council.[114] In fact, once the default occurred and the first forbearance agreement was put into place in June 2016, 716 no longer controlled the building—its lender did.[115] If granted a hearing, 716 will present substantial evidence of its further mitigation efforts, all of which, unfortunately, came to nothing because of EverBank's unwillingness to proceed.[116]

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[112] AR 000634 ("All work required to be performed by Landlord as of the date hereof with respect to the Lease and in connection with the Premises has been completed by Landlord to the satisfaction of the Tenant.")

[113] If the Legislative Council had allowed a hearing, it could have explored this issue to its satisfaction; but it cannot make a finding that the 716 did not support its damages claim on the existing record.

[114] AR 001022 (Pfeffer Aff. ¶ 8).

[115] AR 000725 (Hume June 14, 2016, forbearance letter); AR 001021 (Pfeffer Aff.).

[116] Finally, using failure to mitigate as a basis for denying damages turns the burden of proof on its head. *See Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 902-03 (Alaska 1984) (citing *West v. Whitney-Fidalgo Seafoods*, 628 P.2d 10, 18 (Alaska 1981)); *University of Alaska v.*

The Decision's conclusion that the building retains a substantial residual value is based on the assumption that "[t]he Building is a highly valuable commercial building that can be leased or sold."[117] In other words, the Decision assumes that because 716 continues to possess the building, it cannot have suffered any loss. This is incorrect and the Decision offers no facts to support this finding other than conclusory statements.

At the time it filed its claim, 716 was aware it would most certainly suffer damages in the amount of at least $9 million.[118] This figure represents 716 members' equity in the project and land, which will not be recovered either under a workout or as part of a last-minute sale, as explained in 716's claim.[119]

Today, EverBank seeks in the pending foreclosure lawsuit the entire building, the proceeds of this litigation, as well as a further deficiency judgment against 716 and its members.[120] There is no conceivable residual value to the Building under these harsh realities. As demanded in EverBank's Notice of Default to 716 dated October 26, 2016:

> In accordance with the Note, due to the occurrence of events of default described above, EverBank hereby declares the entire amount of principal and interest due under the Note immediately due and payable. In addition, Borrower must pay any Prepayment Fee owed under the Note.[121]

Chauvin, 521 P.2d 1234, 1240 (Alaska 1974) ("The duty [to mitigate] rests on the party claiming damages but the burden of proving mitigation or failure to mitigate falls on the breaching party.").

[117] AR 000750.

[118] AR 001023 (Pfeffer Aff. ¶ 10).

[119] *Id.*; AR 000015-000016.

[120] The court can take judicial notice of other pleadings filed in this jurisdiction; *see* Second Amended Complaint in *EVERBANK v. 716 West Fourth Avenue, LLC, Mark E. Pfeffer, Robert B. Acree, Mount Trident, LLC* Case No. 3AN 17-06341 CI (Third Judicial District, State of Alaska).

[121] AR 001550.

In addition, EverBank has invoked those provisions of the Note that impose an interest rate of 15 percent per annum or the maximum interest rate permitted by law following acceleration, increasing further the damages 716 may incur.[122]

The factual findings made by the Procurement Officer on this issue are not supported by any evidence, are untethered to reality, and should be rejected and reversed.

D. PUBLIC INTEREST IS NOT PREJUDICED BY 716'S RELIANCE ON LAA.

Ultimately, despite the Procurement Officer's conclusory assertions, the Legislative Council is not the decider of the public interest element of 716's estoppel claim; this court is. The Procurement Officer's Decision fails to properly weigh the damage and injury to the public interest under the *Earthmovers* decision.

The Decision posits the novel theory, not raised anywhere in 716's claim, that 716 could be awarded $37 million in damages based on its estoppel claim, yet still maintain ownership of the 716 property.[123] The Decision then spends considerable effort to knock down this strawman. Regardless of any dispute over the final amount of 716's damages, as stated in its claim, and as further discussed above, it is clear 716 will not be able to maintain ownership of the building.[124] As a result, the Decision's conclusion that 716's estoppel claim is an affront to the public interest is built on a flawed understanding of the facts, already detailed above.

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[122] *Id.*

[123] AR 001042-001043.

[124] AR 000015 (716 Contract Claim)("as a result of the State's abrogation of its lease responsibilities, 716 will lose title to the property through foreclosure.").

The Court repeatedly has recognized "that treating contractors honestly and fairly serves the public interest."[125] The Court noted in *Earthmovers* that it was necessary to balance concern for the public purse with concern for those negatively impacted by government misconduct.[126] It is significant that the Court in *Earthmovers* distinguished the facts in that case from those in *City of Kenai v. Filler*, "where a public entity accepted the benefits of work performed and then tried to avoid paying for them. On those facts, justice required that the contract be enforced."[127] The conditions present here mirror those in *City of Kenai*. 716 fully performed its end of the bargain, the Legislature took occupancy and partially performed, and justice requires that the reliance expectancies be honored through 716's estoppel claim.

To reiterate, the Lease was signed after the procurement findings were made. In reliance on the LAA's representations, 716 proceeded with design and construction; and take out financing and closed in reliance on a Lease fully approved by the Legislature under AS 36.30.080(c)(1). Several banks extended credit based on those actions—debt and equity totaling $37 million were invested, based in part on an assignment of rents from this Lease—and the LAA took possession and enjoyed the use of the facility for more than a year. These are all actions that society considers positive and that the business community considers to be a foundation to doing business with the state with confidence, as noted by

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[125] *Earthmovers*, 765 P.2d at 1370 (citing *King v. Alaska State Housing Authority*, 633 P.2d 256, 262 (Alaska 1981)).

[126] *Id.*

[127] *Id.* at 1371.

both bond counsel and the Alaska Banker's Association.[128] It will be a serious blow to the public interest if an agency of the state is permitted to cancel a lease and walk away after the other party has fully performed, based on a court ruling finding the Lease invalid because of errors by the agency in administering its own procurement process; even when the agency is an agency of the Legislature.

III. THE APPROPRIATIONS CLAUSE DOES NOT INSULATE THE LEGISLATURE'S CONDUCT FROM JUDICIAL REVIEW

The Procurement Officer's decision, adopted as the final decision of the Legislative Council, takes the position that it does not matter why the LAA decided to abandon its contractual responsibilities under the Lease because the Legislature subsequently decided not to appropriate funds to cover LAA's lease payments. The decision reasons that the LAA's actions were excused pursuant to the non-appropriation clause in the Lease and the Legislature's powers under the Appropriations Clause of the Alaska Constitution.[129] By this logic, the Legislative Council could direct its agency to abandon any contract, at any time, for any reason, so long as ***later*** the Legislature declines to make further appropriations for the contract pursuant to its power under the Appropriations Clause. This undeniably self-interested interpretation is inconsistent with the intent and purpose of the Appropriations Clause and should not be adopted by this Court.

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[128] AR 001276 (Alaska Banker's Association letter to Pete Kelly dated April 8, 2015); AR 001277 (letter Klinkner to Meyer dated April 6, 2015)

[129] Alaska Constitution art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.").

The decision to terminate the Lease and vacate the building was not made as part of a decision by the Legislature not to appropriate funds for the Lease. To the contrary, it was a decision made by the agency to terminate the Lease and vacate the building *before* the Legislature made a final decision regarding 2016 appropriations, and was based on the fact that the Superior Court found that the LAA's procurement process was flawed.[130] In finding that the procurement process was flawed, the Superior Court did not enter an order requiring the LAA to vacate the building.[131]

Only after 716 filed its contract claim with the LAA's Procurement Officer challenging the decision to abandon the Lease, did the LAA and its Procurement Officer try to re-write history and assert that its motive in terminating the lease was budgetary, and that it had relied on the non-appropriations clause to terminate the Lease.[132] This reconstruction of the facts is wholly at odds with the LAA's own statements of record. The only support cited by the Procurement Officer for the assertion that the Lease was terminated for budgetary reasons consists of discussions within the Legislature in 2015 regarding the possibility of not appropriating funds for the Lease, the Legislative budget,

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[130] *See* AR 000062-000063 (May 16, 2016, letter from LAA outside counsel to EverBank advising, that: "In the absence of a valid lease [because of the court's rulings], LAA will have no choice but to vacate the property and to secure alternate premises in due course."); AR 000959-000962 (CCS HB 256 passed by House and the Senate on May 31, 2016, and signed by Governor Walker on June 28, 2016); AR 000962-000963 (July 18, 2016, Letter from Varni notifying 716 that insufficient funds had been appropriated to fund the Lease through the end of the fiscal year).

[131] AR 000043 (Order, granting only declaratory relief).

[132] AR 000962 (July 18, 2016 Letter from Varni to 716).

and newspaper articles.[133] By the time the budget matter was considered by the Legislature the termination was a fait accompli because the LAA had terminated for other reasons. Each of these citations is most generously characterized as a *post hoc* rationalization. None was asserted by the Legislature or communicated contemporaneously to 716 by the LAA at the time the decision to terminate the Lease was made. The Procurement Officer and the Legislative Council abused their discretion by relying on them here, and by completely ignoring the substantial evidence that undermines that conclusion. The facts on this issue that should have been weighed and deemed most relevant, most persuasive, and most probative of the LAA's reasons for abandoning the Lease are the Legislature's contemporaneous statements and the direct communications between the parties and their counsel.[134] This troubling example of the Procurement Officer ignoring evidence and re-writing facts to support a self-serving result, was rendered even more prejudicial by the decision to deny a hearing on 716's claim and, thereby, cut off the presentation of

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[133] AR 000732 (Decision citing Legislative Council Meeting Minutes at n.6 and Associated Press article at n.7), AR 000739-000740 (Decision citing news articles, Legislative Council Meeting Minutes and Legislative budget).

[134] To the extent that there are any questions about why the LAA decided to terminate the Lease, 716 should be permitted to conduct discovery into this issue. Certainly, there should not be any concern about conducting discovery of the administrative officials who exercised the clause—in fact it was the LAA Executive Director Pamela Varni who asserted that she was exercising the termination right. To insulate administrative officials from judicial scrutiny is a degree of deference that is not mandated when the Legislature acts in an administrative capacity and not a legislative capacity. And the same question can also be brought to bear against the legislative officer—in this case Senator Stevens who acted not only in a legislative capacity but also as the Procurement Officer. Unless the rule is that separation of powers forbids the courts from any inquiry into the administrative acts of the Legislature, then 716 should be allowed some opportunity for redress that is meaningful; the most basic of which is the right to undertake some discovery to develop a record on its claim. To date, 716 has been denied the opportunity to develop the record on this issue.

additional evidence that would have further undermined the Procurement Officer's conclusion.

The Appropriations Clause confers certain power on the Legislature. But, like all constitutional grants of power and rights, the authority extended by the Appropriations Clause is not limitless, and does not operate in a legal vacuum. Just as an at-will employee can be terminated, but cannot be fired for an improper purpose or for a reason that violates public policy,[135] the Legislature may exercise its Appropriations Clause power, but it cannot employ it for an improper purpose or for a reason that violates public policy. For example, if the Legislature decided not to appropriate funds for a lease because the building ownership changed and the building now was owned by a minority community member, it could not credibly be argued that the Legislature's invidiously discriminatory motive is shielded from judicial scrutiny simply because the decision was camouflaged as within the Legislature's authority under the Appropriations Clause.

By the same logic, the Court should not permit the Legislature to abandon the commitments of its agency under the guise of an exercise of its power under the Appropriations Clause when the decision to terminate the Lease was made for different reasons, at an earlier point in time, prompted by very different and far less laudatory motives. The Appropriations Clause is intended to shield the public from harm. It is not

[135] *Zajac v. FedEx Exp. Anca Station*, 68 F. App'x 95 (9th Cir. 2003) (Under Alaska law, at-will employee can only bring claim against employer for breach of contract if he claims that his termination violated covenant of good faith and fair dealing or otherwise violated public policy.)

intended to shield legislators from personal embarrassment or political accountability, nor is it intended to serve as a sword by which the Legislature can shift financial responsibility for its agency's actions, decisions, and errors in administering its own procurement process onto third-parties who acted in reasonable reliance on the agency's representations and promises.

Article II, sections 13 and 15 of the Alaska Constitution govern the balance of power between the legislative and executive branches of Alaska's government.[136] Together these clauses govern the Legislature's and the Governor's "joint responsibility ... to determine the State's spending priorities on an annual basis."[137] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers."[138] While the Appropriations Clause provides the Legislature with broad power to ensure that public funds are expended for the common good according to the best judgment of the Legislature,[139] it reasonably cannot be interpreted to provide the Legislature with an absolute right or power to breach contractual commitments of its agency and void the agency's representations for non-budgetary and politically self-serving

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[136] *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016).

[137] *Id.*

[138] *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994) (citing *Arco Alaska*, 824 P.2d 708, 710 (1992)).

[139] *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir. 2000) (quoting *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428, 110 S. Ct. 2465 (1990)).

reasons. Rather, like other parts in the Constitution, the Appropriations Clause is subject to being balanced against other legal rights and remedies.

This is not a novel or ground-breaking notion. Constitutional protections are rarely absolute. For example, the First Amendment protection of free speech, despite its unambiguous wording ("Congress shall make no law . . ."), is not absolute and must give way to other constitutional requirements such as the rights to a fair trial and due process.[140] The Free Exercise Clause of the Constitution gives way to other laws, such as controlled substance laws which prohibit the use of certain drugs, even when used for sacramental purposes.[141] And the Second Amendment right to bear arms is not absolute and may be limited by other laws such as requirements for background checks, permits, or training.[142] Just as these constitutional protections must, at times, be balanced against competing legal and constitutional interests, so must the power of the Legislature under the Appropriations Clause be balanced against other rights and policies. Otherwise, the Legislature is given the ultimate "get out of jail free" card, and can exercise the Appropriations Clause to violate other laws and protections with impunity.

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[140] *See, e.g., Watkins v. United States*, 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957) (balancing First Amendment rights against due process); *Barenblatt v. United States*, 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959) (balancing first amendment rights against due process); *Hawk v. Cardoza*, 575 F.2d 732 (9th Cir. 1978) (balancing counsel's First Amendment rights against due process and Sixth Amendment rights of client).

[141] *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned by legislative action by Religious Freedom Restoration Act of 1993 ("RFRA"), P.L. 103-141, 107 Stat. 1488, 42 U.S.C. § 2000bb (Nov. 16, 1993).

[142] *D.C. v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2786, 171 L. Ed. 2d 637 (2008) (recognizing that Second Amendment right to bear arms is not unlimited).

The Court must carefully assess the actual reasons that the LAA abandoned its Lease commitment to 716, and not simply accept the LAA's after-the-fact excuse that the Legislature chose not to appropriate further funds for the Lease because of budgetary restrictions.[143]

If, as the LAA contends, it can breach the Lease because of flaws in its own procurement process and then walk away without any consequences by invoking the Appropriations Clause after the fact, then there is nothing to stop it from using the Appropriations Clause as a subterfuge at virtually any time, and for even more nefarious and self-serving purposes.

If the Court looks carefully at the facts of this case, it is abundantly clear that the LAA did not abandon the Lease because it did not have money to pay the agreed upon rent (it did have the money, but opted to use it for other things), or because there was anything defective in the building or services provided by 716 (the State certified that the contractually agreed improvement requirements had been met), or for any similar proper purpose or reason consistent with the public interest. Rather, the Legislature vacated the building and stopped paying rent because legislators on the Legislative Council, relied on

[143] The *de novo* hearing 716 has requested is aimed at ensuring that the Court has the benefit of all available and relevant evidence in evaluating the basis for the LAA's decision to terminate the Lease and vacate the building, and in striking the balance that is required in weighing the legal and constitutional interests presented. But even if the Court does not look beyond the current administrative record, there is evidence that some legislators believed the McKay Order was a basis for abandoning the Lease. *See* AR 001533 (minutes of March 31, 2016 Leg. Council meeting: Representative Kito "He said that, to him, the motion says the Legislature does not appropriate according to Council's motion in December," referring to the part of the motion that said "or the lawsuit resulted in a declaration that the lease was invalid.").

misrepresentations by LAA staff and the Chair and weighed their personal political fortunes as being more important than the state honoring its representations and commitments after the Superior Court found the procurement process to have been flawed. Such a self-interested, improper use of the Appropriations Clause must be balanced by this Court against 716's due process and estoppel-based rights.

IV. THE LAA'S AFTER-THE-FACT EXERCISE OF THE NON-APPROPRIATION CLAUSE TO TERMINATE THE LEASE BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

As discussed above, the LAA should not be permitted to abandon its commitments under the guise of the non-appropriations clause when the decision to terminate the Lease was made for different reasons, at an earlier point in time. However, even if the Court did condone this behavior, the LAA did not properly exercise the non-appropriation clause in the Lease in two respects. First, the actions of the LAA staff and the Procurement Officer violated the covenant of good faith and fair dealing, and second, the decision by Pam Varni to invoke the clause was improper because appropriated funds had not been exhausted.

A. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

"The covenant of good faith and fair dealing is implied in every contract in order to effectuate the reasonable expectations of the parties to the agreement, not to alter those expectations."[144] To satisfy the implied covenant, "[a] party must act in subjective good faith, meaning that it cannot act to deprive the other party of the explicit benefits of the

[144] *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997).

contract, and in objective good faith, which consists of acting in a manner that a reasonable person would regard as fair."[145]

Extensive evidence establishes that the LAA failed to meet its obligations under Sections 1.2 and 43 of the Lease in good faith. Section 43 of the Lease provides:

> The Executive Director will include a budget request to cover the obligations of Lessee in the proposed budget as presented to the Legislative Council for each lease year as a component of Lessee's normal annual budget request and approval process.[146]

The implied covenant operates to require that this request be made in good faith, subjectively and objectively. This was a bargained-for term of the parties' amended lease agreement, specifically required by 716 as a change to the original Section 43 for the express purpose to avoid placing the decision to request or not request funds in the hands of a single person, the Executive Director, and to reinforce the LAA's commitment to try—diligently and honestly—to appropriate rent funds in order to give 716 the degree of security necessary to justify its investment of tens of millions of dollars into the property.

Substantial evidence demonstrates that the LAA's request for funds was not made in good faith. While Varni did go on to make a "recommendation" that the funds be appropriated, it was only nominally a recommendation.[147] Evidence shows that Varni

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[145] *Casey v. Semco Energy, Inc.*, 92 P.3d 379,384 (Alaska 2004).

[146] AR 000437 (Lease Amendment dated September 19, 2013).

[147] AR 001234 (Minutes of February 11, 2016 meeting) ("Chair Stevens said that there will be an amendment offered at this meeting to zero out the appropriation; however, members need to understand that Ms. Varni, under the contract, can do nothing more than present the budget with the full appropriation figure.")

successfully undermined the effort for Lease appropriations or a purchase of the 716 property by providing information to the Legislative Council that she knew to be incorrect, incomplete, and misleading.[148] In fact, the analysis submitted by Director Varni to the Legislative Council in December of 2015 was so one-sided and inaccurate that Michael Buller, an AHFC official, refused to endorse it or attend the Legislative Council meeting at which Director Varni presented it.[149] Mr. Buller stated in his e-mail to Director Varni: "At this time I recommend that you encourage Sen. Stevens to table the discussion on the report. Tell the Council you have recently found guidelines that if followed will give them a clearer picture of the options[.]"[150]

Director Varni later confirmed that Senator Stevens was also aware of Mr. Buller's criticisms at the time she presented the misleading report at the December 4, 2015 Legislative Council meeting, meaning that both Senator Stevens and Director Varni knew the report was flawed and failed to alert the Legislative Council to its serious shortcomings.[151] These facts tells a story of sabotage—Director Varni, with the assistance of others in the LAA and Senator Stevens and his staff, deliberately acted to undermine the Agency's request to appropriate funds for the Lease and set the stage for the subsequent decision not to appropriate funds.

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[148] *Supra* at 12-17.

[149] AR 001514 (Varni-Herron emails).

[150] *Id.*

[151] AR 001560 (Elwood Brehmer, Analysis Finds Buying Anchorage LIO Close to Moving Costs, March 24, 2016); AR 001458-001459 (December 4, 2015, Legislative Council Meeting Transcript).

B. EXECUTIVE DIRECTOR VARNI DID NOT TERMINATE THE LEASE WHEN APPROPRIATIONS HAD BEEN EXHAUSTED.

Varni's termination letter of July 18, 2016, asserted the right to terminate "because the funds appropriated by the Legislature are not sufficient, in my judgment, to cover the annual Lease payments and expenses."[152] Section 1.2 of the Lease allows for termination

> if, in the judgment of the Legislative Affairs Agency Executive Director, sufficient funds are not appropriated in an amount adequate to pay the then annual lease payments and expenses, the Lease will be terminated by the Lessee as of the date appropriated funds are exhausted…[.][153]

The issue of whether appropriated funds were exhausted should be read in light of a 1987 Alaska Attorney General's opinion.[154] The opinion was issued when the Legislature attempted to terminate a lease based on a "subject to annual appropriation" clause.[155] The opinion addressed the question of whether "funds were appropriated . . . from which the lease rental amount could have been paid" following the LAA termination of a lease pursuant to the annual appropriations clause.[156] In rejecting the argument that the agency should look at the committee reports for statements of legislative intent, the opinion unequivocally provided:

> The specific allocations of appropriation items are not binding. Operating expenditures may be made through the shifting of amounts between allocations subject only to administrative constraints requiring approvals. To the extent that the existence of an appropriation providing a funding source

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[152] AR 001257 (letter Varni to Pfeffer and Acree dated July 18, 2016).

[153] AR 000424 (Lease) (Emphasis added).

[154] Robert L. Stewart 1987 WL 121076 (Alaska A.G. Mar. 24, 1987).

[155] *Id.* at 1.

[156] *Id.*

> for an expenditure is concerned, specific allocations do not have a determinative legal affect.[157]

Thus, despite the legislative intent to not appropriate for the lease in that matter, the opinion found that "funds were appropriated to the Legislative Council from which the lease rental amount could have been paid."[158]

In this case, the Procurement Officer relies on the fact that "sufficient funds were not appropriated by the Legislature to pay for LAA's monetary obligations under the Lease for the period of July 1, 2016 through June 30, 2017," citing to CCS HB 256. [159] CCS HB 256 appropriated 844,900 for "Legislature State Facilities Rent—Anchorage 716 W. 4th Ave." as an allocation item under its Legislative Operating Budget of $21,396,800, as well as a separate Legislative Council budget of $25,333,800.[160] But the LAA actually expended a total of $1,227,817.32 in lease expenditures on the 716 Lease in fiscal year 2017.[161]

Although the Procurement Officer states in a conclusory manner that insufficient funds were appropriated, no explanation is provided and there is no record of how Executive Varni made the determination that lease funds had been exhausted. In this case, there is no dispute over whether the funds from other line items in the appropriation were

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[157] *Id.* at 2.

[158] *Id.* at 1.

[159] AR 000743 (Procurement Officer's Decision dated October 6, 2016).

[160] AR 001254 (CCS HB 256 (SLA 2016)).

[161] AR 001018 (Affidavit of Shea Niebuhr). Of that total, base rent payments (as opposed to additional rent for insurance and taxes) equaled $990,275.

used to meet Lease obligations—that is a matter of simple math since $1,227,817.32 was expended but according to the LAA only $844,900 was appropriated that could be used to pay rent. 716 is entitled to explore whether the LAA met its obligations and the arbitrary decision by Varni as to what funds could be used to pay the Lease obligations.[162] It cannot be disputed that some funds came from other parts of the appropriation or perhaps other appropriations. As an administrative decision, Director Varni's decision should be subject to some judicial inquiry and a hearing should have been allowed to explore whether other funds remained available to pay the rent on the termination date.[163]

V. AGENCY BIAS ARGUMENTS

The application of the Alaska Legislative Procurement Procedures in this matter resulted in 716's appeal to the Legislative Council being lodged with the same individual who authored the underlying decision on 716's contract claim because the Chair of the Legislative Council was both the Procurement Officer for the contract at issue and was required to hear appeals under Section 360 of the Alaska Legislative Procurement

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[162] The case bears much similarity to the *Behrend*s case as acknowledged by the current Legislative Council. In *Behrends*, the opinion addressed the LAA's lease with the B.M. Behrends Company. Robert L. Stewart 1987 WL 121076 (Alaska A.G. Mar. 24, 1987) at 1. The decision was discussed by the Legislative Council as the one previous example of the Legislature's invocation of the non-appropriations clause. The Legislative Council appears to have been made aware by LAA Counsel Doug Gardner that, although the *Behrends* case was settled, the State could very well be liable for the rent remaining due on the Lease if the Legislature were to terminate under the non-appropriations clause. AR 001101; *see* note 35, *supra.*

[163] Section 30 of SB 138 appropriated $5.5 million to the Legislative Council. Within this Section, there is language earmarking $1.5 million for video surveillance upgrades. The balance, $4.5 million is "for renovation of, repair of, technology improvements to, and other necessary projects related to legislative buildings and facilities." SB 138 is available here: https://www.omb.alaska.gov/ombfiles/17_budget/PDFs/SB0138_With_Vetoes%20_6-28-16_New.pdf.

Procedures. The impact of this is magnified because the Legislative Council is the same body of decision makers who:

(1) initiated and conducted the procurement process;

(2) were involved in negotiations that led to the contract dispute at issue here;

(3) made the decision to move forward and award the procurement;

(4) certified the validity of the procurement process;

(5) certified the procurement contract terms as being fulfilled;

(6) abdicated their duty to defend their own procurement against judicial scrutiny;

(7) engaged in discussions that resulted in the Council's recommendation to the Legislature to not appropriate funds for the Lease;

(8) provided the Procurement Officer rendering the initial decision on 716's contract claim; and

(9) then adopted their own denial as a final decision while "wearing the hat" of the Legislative Council.[164]

These are the precise actions 716 alleges support its estoppel claim.

The Legislative Council simply cannot be viewed as an impartial decision maker in this matter given its previous involvement in the dispute set forth on appeal. Moreover,

[164] Pursuant to Section 450 of the Alaska Legislative Procurement Procedures the Legislative Council Chairman can appoint a hearing officer to remove the Legislative Council from the hearing itself. However, pursuant to Section 460 of the Alaska Legislative Procurement Procedures, the hearing officer would only make a recommendation to the Legislative Council. Thus, on remand to the Legislative Council under the Legislative Procurement Procedures, 716 simply will not receive an impartial tribunal (either in fact or appearance) to hear and decide its appeal.

the Alaska Supreme Court's admonition that such proceedings "not only be conducted fairly, but also give the appearance of complete fairness" cannot be satisfied in light of the Legislative Council's adoption of a decision that does not so much weigh the evidence in favor of the LAA, but goes so far as to not even acknowledge the evidence put forth by 716.[165] Thus, it is imperative that this court review the Decision and the record with fresh and critical eyes.

CONCLUSION

For the foregoing reasons, the Decision should be reversed and remanded with directions to the Legislative Council to enter a damage award in favor of 716 in such amount as is established by 716's damages evidence. Alternatively, 716 should be granted a hearing de novo on its estoppel claim.

DATED this 7th day of August, 2017.

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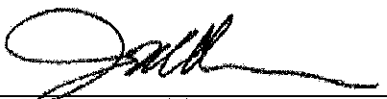
By 

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[165] AR 1024 (November 21, 2016 Decision on Appeal of Procurement Officer's Decision).

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 7th day of August, 2017, a true and correct copy of the foregoing is being delivered via electronic mail to:

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