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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

REPLY BRIEF OF APPELLANT

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I. STANDARD OF REVIEW

The Legislative Council takes a mistaken, if creative, approach to the standard of review that applies in this appeal. The Legislative Council argues that the governing standard of review is not determined by the nature of 716's claims or by the nature and extent of the process that led to the Legislative Council's decision below. Instead, the Legislative Council argues that the "reasonable basis" standard of review should apply to this appeal based on a question of law that it raised as an affirmative defense – whether the Legislature properly exercised its non-appropriation's power.[1] The Legislative Council's "standard of review" argument is incorrect.

This is an administrative appeal of a claim arising out of the relationship between a private contractor ("716") and a state agency (the Legislative Affairs Agency, or "LAA") and involving a complex commercial real estate development agreement and plan. These topics were so clearly outside of the scope of the agency's expertise that the LAA sought professional assistance from the Alaska Housing Finance Corporation ("AHFC") and Navigant, a private consultant (and numerous sub-consultants). It is settled law that little or no deference is given to an agency's interpretations of legal relationships or non-technical statutory interpretation.[2] The LAA and the Legislative

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[1] *See* Appellee's Brief at 8.

[2] *See, e.g., Titus v. State, Dept. of Admin. Div. of Motor Vehicles*, 305 P.3d 1271, 1276-77 (Alaska 2013) ("We review questions of law involving agency expertise under the reasonable basis test and where no expertise is involved under the substitution of judgment test. Questions of law where no expertise is involved encompass questions such as 'statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and

Council have expertise in enacting legislation and other normal legislative functions; they have no special expertise in negotiating complex lease and real estate development agreements or in construing the obligations that arise from those agreements.

Because no agency expertise is involved here, the superior court is required to apply the "substitution of judgment" standard on review,[3] not the "reasonable basis" standard that the Legislative Council urges. Under this 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."[4]

II. MATERIAL FACTS RELATING TO THE LAA'S DECISION TO ABANDON THE BUILDING AND TERMINATE THE LEASE ARE DISPUTED – AND THE DISPUTE HAS NEVER BEEN ADDRESSED OR RESOLVED.

The LAA and the Legislative Council advance a post-hoc rationale for the decision to abandon the LIO building. They claim that the building was abandoned because the Legislature decided not to appropriate funds for the Lease. But the material facts that support this purported rationale are and always have been disputed, and the rationale itself is undermined and conflicts with facts that are undisputed. This dispute of

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experience.'"); *Northern Alaska Environmental Center v. State, Dept. of Natural Resources*, 2 P.3d 629, 633-34 (Alaska 2000) (applying the substitution of judgment standard where the agency had interpreted non-technical statutory terms); *Heller v. State, Dept. of Revenue*, 314 P.3d 69, 73 (Alaska 2013) (applying the substitution of judgment standard where the agency has interpreted one of its own governing statutes and noting the court applies "independent review" under those circumstances).

[3] *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 299 (Alaska 2014) (citing *Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011)).

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

facts survives, even as this appeal proceeds, because the LAA and the Legislative Council refused to afford a hearing at which the evidence could be heard, weighed, and evaluated, and the factual disputes resolved in the normal fashion. By foreclosing a hearing, the agencies unfairly limited the evidence that bears on their undeniably self-serving claim as to the reason why the building was abandoned and the Lease terminated.

A. 716 DISPUTES, AND DOES NOT CONCEDE, THAT THE LEASE WAS TERMINATED PURSUANT TO THE NON-APPROPRIATIONS CLAUSE.

The Legislative Council argues that the "undisputed record" shows that the LAA terminated the Lease solely pursuant to exercise of the non-appropriations clause in the Lease.[5] This assertion is at the core of the Legislative Council's position in this case. This assertion also is undeniably and demonstrably incorrect. There remains an unresolved factual dispute – documented in 716's contract claim and in its subsequent appeals – about the actual reason and basis for the LAA's decision to terminate the Lease. The dispute over this fact issue is most clearly evidenced by (and the Legislative Council's current position is most clearly undermined by) an unambiguous statement by the LAA's own counsel. The statement of counsel was the first explanation the LAA offered as to its reason for vacating the LIO building, and was made before the LAA had reason to create an alternate explanation. In the statement of its counsel, the LAA explained that it would have "no choice but to vacate the property and to secure alternate premises in due course," *not* because the Legislature decided not to appropriate funds for the Lease, but only because of the superior court's ruling in the ABI lawsuit. That ruling,

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[5] Appellee's Brief at 1.

of course, had nothing at all to do with the non-appropriations clause, but rather found only that the LAA's procurement process did not comply with the procurement code. Thus, the LAA stated that it would vacate the building only because the Court found that the procurement process that the LAA had employed was flawed.[6]

Only later did the LAA arrive at a new and different explanation for termination of the Lease, one based on the non-appropriations clause. This irreconcilable conflict in the LAA's own statements – independent from the other substantial evidence that bears on this issue – creates a genuine dispute about a fact that not only is material, but goes to the heart of the basis for the defense asserted by the LAA to 716's claim. That dispute warranted normal legal process – a hearing and an opportunity to have a determination made based on the facts, and not simply on the self-serving assertions of an agency that had ample political and public relations reasons for wanting to concoct an alternate explanation for its actions.

The LAA's appropriations argument is an artful sleight of hand, offered to avoid 716's estoppel claim. As "evidence" to support the argument, the LAA and the Legislative Council have cobbled together news accounts and unsworn statements made at Legislative Council meetings – statements and materials that would have grave difficulty surviving the standards and scrutiny of normal legal proceedings and cross-examination. There is an Alice-in-Wonderland quality to the Legislative Council's argument on appeal, that not only are news accounts and unsworn statements more

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

probative than written statements made on behalf of the LAA by its own counsel, but that the news stories and unsworn statements are so probative that they render all other evidence irrelevant and magically render the "facts" undisputed.

Because the LAA and the Legislative Council deprived 716 of a hearing, no impartial decision-maker ever has had an opportunity to hear and weigh the evidence, nor did 716 have an opportunity cross-examine and test the evidence to determine whether the LAA's appropriations defense can withstand scrutiny. This Court should be cautious about accepting the Legislative Council's conclusory and self-serving claim that the material facts are undisputed; even the limited record developed in this case makes clear that that assertion is incorrect.

B. THE LEGISLATIVE COUNCIL MISREPRESENTS 716'S BRIEFING.

The Legislative Council misrepresents 716's briefing on appeal, asserting that 716 "concedes that LAA was permitted to terminate the Lease as a result of non-appropriation."[7] This claim is wrong, and the citation the Legislative Council provides to support it is only 716's acknowledgment that the Lease ***could have*** been terminated "if funds ***could not be*** appropriated."[8] This is not a concession at all, and 716's position has been clear from the outset that funds were available to be appropriated, and the absence of an appropriation was not at all the reason why the building was abandoned and the Lease was terminated.[9]

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7 Appellee's Brief at 4.

8 R. 997 (emphasis added).

9 Opening Brief of Appellant at 46-48.

C. 716 HAS NOT ASKED THE COURT TO SECOND GUESS THE LEGISLATURE.

The Legislative Council builds a straw man over several pages of briefing about the sanctity of legislative decision-making, and then proceeds to knock down its own creation.[10] 716 has not asked the Court to look behind the veil at the wisdom of the legislators' solutions to the State's fiscal crisis. 716 only has asked the Court to review the record and find that (based on the LAA's own documents and other evidence) there are facts in dispute that are material to resolution of the issue of whether the building was abandoned and the Lease was terminated for the reasons that the Legislative Council now claims.[11]

716's request is not "second-guessing," as the Legislative Council asserts; it is the requisite due process for a contractor who has been damaged by the State's conduct. Indeed, the Legislative Council proves too much in its brief – none of the cases cited in the brief supports the Legislative Council's position that the Legislature has unfettered power to act as it wishes even to the detriment of private parties contracting with the State.[12] The principles and case law cited by the Legislative Council do not protect it from the basic purpose of 716's estoppel claim, which is to constrain improper conduct

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[10] Appellee's Brief at 11, 13-15.

[11] 716 acknowledges the Court's prior ruling, and respectfully asserts that this factual dispute well warrants a hearing so the facts can be fully developed to aid in the proper determination of 716's claim.

[12] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378 (Alaska 2001) (holding that the governor has authority to "strike or reduce" "a sum of money dedicated to a particular purpose," but the governor does not have authority to "distort the legislative intent, and in effect create legislation inconsistent with that enacted ... by the careful striking of words, phrases, clauses or sentences."); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) (explaining purpose of appropriations clause of federal Constitution)

by a state agency, such as that of the LAA here. To the contrary, when a private party is damaged by improper action by the government, it must be permitted to seek and obtain damages "'where justice and right require it.'"[13]

Here, "justice and right" require the application of equitable estoppel against the Legislative Council. The cases in which equitable estoppel has been granted against a government entity demonstrate the rationale and purpose of equitable estoppel: to "'prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so.'"[14] These cases involve direct, purposeful affirmative statements and/or conduct by parties that reasonably induced another party to act or refrain from acting in a certain way to its detriment,[15] exactly the circumstances that are present here.

III. THE STATE RECEIVED BENEFITS FOR WHICH 716 WAS NOT COMPENSATED.

A common thread throughout the Legislative Council's brief is that it paid for "all" benefits it received, and thus 716 did not suffer any damages when the Legislative

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[13] *Feduniak v. California Coastal Comm'n*, 148 Cal. App. 4th 1346, 1359-60, 56 Cal. Rptr. 3d 591, 610 (2007) (quoting *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 493, 91 Cal. Rptr. 23, 476 P.2d 423 (1970))("The government is not immune from the doctrine [of equitable estoppel], and it may be applied " 'where justice and right require it.'"); *see also ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1113 (D.C. Cir. 1988) (approving the doctrines of unjust enrichment and of equitable lien as a matter of federal common law, and holding that these doctrines are available to private parties seeking equitable relief against the government).

[14] *Feduniak*, 148 Cal. App. 4th 1346 at 1371 (quoting *Skulnick v. Roberts Express, Inc.*, 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992)) (discussing collected cases).

[15] *Id.*

Council abandoned the building and its contractual obligations.[16] Had the Legislature merely contracted with 716 for a month-to-month lease of an existing office space, the Legislative Council's argument might have some merit. But the contractual relationship between the Legislature and 716 was not that of a simple, month-to-month landlord and tenant. Rather, as explained in 716's Motion for a Hearing De Novo,[17] 716's contractual obligations required that it purchase additional property adjacent to the existing LIO building and complete a series of substantial renovations and new construction, at a cost in excess of $37 million.[18] The renovations and construction were required and directed by the Legislative Council and they would not have been undertaken by 716 for any other reason.

Because of the complexity of the process, the Legislative Council designated the design and construction team AHFC to serve as its representative, review the plans and process for the renovations, check the design-build contractor's bid proposal, and retain multiple third-party experts to research, study, and validate the proposed extension costs and terms.[19] An independent real estate appraiser was also hired to complete a full review and validation of the proposed lease extension terms on behalf of the Legislative

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16 Appellee's Brief at 6-7, 10, 27-29.

17 *See* Motion for Hearing De Novo at 2-12.

18 R. 000016.

19 R. 000159-170 (Minutes of June 7, 2013, Legislative Council Meeting authorizing AHFC to act as Legislative Council's representative); R. 000171-173 (Agenda for June 7, 2013 Legislative Council Meeting).

Council.[20] Thus, the benefits to the State greatly exceeded a simple calculation of rent owed and paid. The greatest benefit to the State – the financing, design, and construction of a building specifically to fit the State's long-term needs for decades – is ignored completely by the Legislative Council.

716 now faces losses beyond the investment recited in its initial claim, which can be substantiated further by testimony and documentary evidence if a hearing ever is granted in this matter. The lender for the project has proceeded with foreclosure on the building and the impact to the credit of the principals is substantial. Restitution may not fully cover all of the losses that resulted from the State's termination of the lease. But the State should bear the cost and consequence of a procurement process that it solely controlled and its decision to abandon the Lease and its commitments to 716.

The Legislative Council's reliance on *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation* to support its position on this issue is unavailing. In *Earthmovers*, 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" and concluded that the doctrine of estoppel is the appropriate remedy after reviewing federal and state law precedent.[21] After determining that equitable estoppel applied against the State, the Court discussed what remedy was appropriate under the circumstances:

> The public interest is implicated in this case in two ways. The primary purpose of AS 35.15.050 is to protect the public purse. The statute has been

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[20] R. 000261-374 (Rental Value Appraisal Report prepared for AHFC by Waronzof Associates).

[21] 765 P.2d 1360, 1364 (Alaska 1988).

> said to have a secondary purpose, viz., to accord public contractors a certain amount of fair play. The supreme court has recognized that treating contractors honestly and fairly serves the public interest. The court then must balance these two policies to reach a fair result. This is not a case like *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. If the court adopts the remedy of quantum meruit, as other state courts have utilized, EM would recover nothing, since it conferred no benefit on the state. Under these circumstances, it would be fair to both the public and to EM to reimburse EM for its actual out of pocket expenditures made in reasonable reliance on the April 27 award. This result comports with the reasonable expectations of the parties as reflected in a stipulation entered into after the Supreme Court decision.[22]

The Legislative Council argues, based on this passage, that because LAA already paid 716 the monthly lease payments for the period it occupied the building, 716 is not entitled to any additional damages under the theory of *quantum meruit*.[23]

The flaw in this argument is that, as explained above, the State received benefits above and far beyond the short period that it occupied the building. It is undeniable that the financing, design and construction of a building specifically to fit the State's needs for decades was a benefit, and 716 primarily seeks compensation for costs it incurred to provide that benefit. The Court in *Earthmovers* expressly recognized this type of damages as appropriate by distinguishing *Filler* – a case where a public entity accepted the benefits of work performed and then tried to avoid paying for them. In that situation, as here, "justice require[s] that the contract be enforced."[24]

IV. THE PUBLIC INTEREST DEMANDS A GOVERNMENT THAT ADHERES TO ITS CONTRACTUAL OBLIGATIONS.

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22 *Id.* at 1371.

23 Brief of Appellee at 31.

24 *Earthmovers*, 765 P.2d at 1371.

Despite the Legislative Council's efforts to shield its conduct in this matter from review, the basic premise of *Earthmovers* remains relevant if not controlling, namely that "treating contractors honestly and fairly serves the public interest."[25] As 716 argued in its initial claim, the Alaska Supreme Court has recognized the importance of government honoring its commitments, noting in *City of Kenai v. Filler* that, "where a public entity accepted the benefits of work performed and then tried to avoid paying for them . . . justice require[s] that the contract be enforced."[26] The circumstances of this case mirror those in *City of Kenai*. 716 fully performed its end of the bargain, the Legislature took occupancy, and justice requires that the contract expectancies be honored.

The Legislative Council argues that the public interest begins and ends with the State's pocketbook,[27] and it is oddly dismissive of the public's interest in honest, reliable, and trustworthy government. The Legislative Council likewise is dismissive of a substantial record of concerns that the banking, bond underwriting, and legal communities have about the financial consequences of the State abandoning its promises and representations,[28] suggesting that there is "no evidence" that those concerns have materialized.[29] Yet.

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

26 *Id.* at 1370-71 (citing *City of Kenai v. Filler*, 566 P.2d 670 (Alaska 1977)).

27 Appellee's Brief at 32.

28 R. 1276-1277.

29 Appellee's Brief at 31 n.111.

The Legislative Council's tone-deafness is notable, as it must be aware that the State's credit worthiness *has* suffered, at least in part as a result of the Legislature's conduct.[30] The consequences of lowered bond ratings and higher interest rates (resulting from establishing the State as an unreliable contracting partner and obligor) ultimately will dwarf the amount that the Legislative Council claims it will have "saved" (by abandoning the LIO building and terminating the lease). Moreover, no opportunity has been afforded to present additional evidence of the adverse financial impact in the financial and bond markets resulting from the Legislative Council's actions. This is another instance of the State first foreclosing an opportunity to present evidence, and then complaining about the supposed lack of evidence.

The Legislative Council urges this Court to ignore its conduct entirely in discerning the public interest. This is not the analysis that is required under the doctrine of equitable estoppel. As the Ninth Circuit has recognized in the context of an estoppel claim against a federal agency, "to say to [] appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."[31]

V. THE LEGISLATIVE COUNCIL IMPROPERLY ATTEMPTS TO BOLSTER THE RECORD AND RAISE NEW ARGUMENTS ON APPEAL.

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[30] *See* Annie Zak, *Moody's downgrades Alaska's credit rating again*, Alaska Dispatch News, (July 14, 2017), https://www.adn.com/business-economy/2017/07/14/moodys-downgrades-alaskas-credit-rating-again/; Annie Zak, *Alaska credit rating downgraded for 2nd time in a week* (July 18, 2017), https://www.adn.com/business-economy/2017/07/18/s-second-downgrade-in-one-week/; Rachel Waldholz, *Moody's downgrades Alaska credit rating; fourth downgrade this year* (July 26, 2016), https://www.alaskapublic.org/2016/07/26/moodys-downgrades-alaska-credit-rating-fourth-downgrade-this-year/.

[31] *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

The Legislative Council has supplemented the record with emails made public during the ABI lawsuit.[32] Based on these e-mails, the Council has also proffered a new argument—that 716 did not rely on the LAA's procurement process in entering the Lease. As a preliminary matter, the Legislative Council's interpretation of the email it cites is incorrect and necessarily is the product of reviewing one email in isolation. In doing so, it has ignored other undisputed evidence in the record discussed below.

Second, the assertion that 716 did not rely on the governmental entity that controlled and certified the procurement process is beyond reason and common sense. The record is undisputed that certifications were made by the LAA not only to 716, but also to its lenders, that the procurement process was proper.[33]

Finally, the Legislative Council seeks to base this argument on evidence that was never considered by the procurement officer. And could not have provided a basis for his decision. Such argument is wholly improper on appeal.

The LAA twists John Steiner's affidavit to argue: "That is, 716 was seeking to persuade LAA that there were no procurement statute obstacles with the transaction—not the other way around."[34] But the LAA takes Mr. Steiner's comment wholly out of context—a context that is established in the record without dispute. As explained in Donald McClintock's affidavit:

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[32] R. 001577-1581.

[33] R. 000551-559 (Subordination Non-Disturbance and Attornment Agreement for Everbank dated December 22, 2014); 000632-636 (Estoppel Certificate dated August 20, 2015); 000713-721 (Procurement Officer's Findings dated September 16, 2013); 000722-23 (Pamela Varni letter certifying compliance with AS 36.30.083(b) dated September 19, 2013).

[34] Appellee's Brief at 45.

13. The Procurement Officer also asserted in the Decision that discussions about the procurement process among me, Doug Gardner, and John Steiner meant that 716 could not have reasonably relied upon the procurement process that the LAA adopted.

14. John Steiner and I were brought into the process either about the same time or after the Legislative Council had already had its June 7, 2013, meeting authorizing the parties to begin the process under Procurement Rule .040. At that time, I was not familiar with the LAA's procurement process and looked to Doug Gardner for guidance on how to document the deal.

15. Initially, it had been my hope that we could use a commercial form of agreement to document the lease and the related development work that was required. Mr. Gardner made it clear that we would have to use the standard legislative format, which is what we actually used.[35]

Read in this light both the Steiner e-mail and his affidavit reflected the belief that counsel for 716 understood that the LAA had the authority under its own procurement rules, subsection .040 and AS 36.30.083(c)(1), to proceed on a sole source procurement basis. The LAA told 716, however, that it had control over the proper process to follow, and that its intent was to follow AS 36.30.083 and that the parties needed to proceed under those rules.[36] 716 acceded to the LAA's position despite the commercial risk that under AS 36.30.083, 716 would not know what the rent would be for the deal until well into the project, a concern that proved to be true—the rent was only fixed in September 2013 when the Lease was signed. 716 never agreed to proceed knowing that there was a risk that in fact the LAA did not properly implement their procurement under AS

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35 R. 001011-1012 (Affidavit of Donald McClintock at ¶¶ 13-15).

36 *Id.*

36.30.083.[37] To the contrary, the discussions and correspondence that occurred between the parties regarding the LAA's procurement process demonstrate that 716 sought assurances that the LAA was conducting the process properly.

The LAA's arguments on these points are advocacy, but not fact. Reading John Steiner's affidavit and e-mail in context makes clear that what Mr. Steiner said in his affidavit was in fact true: "There was every reason to rely on the authority of the legislature to apply its own rules as it believed appropriate and ultimately no basis for 716 to be concerned that the lease might be declared invalid."[38] An opportunity for a hearing would allow both sides to better establish a factual record—a record that at this point is devoid of any statement by LAA's staff counsel who engineered the procurement that is contrary to these affidavits of record.

VI. 716 HAS SUFFERED DAMAGES

The procurement guidelines required that 716 file its claim before its damages could be fully assessed and documented. The decision of the lender, for example, occurred months after the claim had to be filed, and the damages accruing as a result of the foreclosure could not have been known or calculated at the time of filing. As a result, the damages sought in 716's initial claim necessarily were preliminary. The Legislative Council ignores this unavoidable constraint, resulting solely from the claim process that it

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37 *See* R. at 001015-1016 (Affidavit of John Steiner at ¶¶ 6-8)

38 R. 001015-1016 (Affidavit of John Steiner at ¶ 6).

adopted and with which 716 had to comply. And, instead, it complains that 716's damages claim is insufficient[39] and that 716 failed to mitigate its damages.[40]

First, failure to mitigate damages is an affirmative defense and 716 was under no obligation to provide proof of its mitigation efforts along with its claim. It can – and will – present substantial evidence of its mitigation efforts if it is ever afforded a hearing and if evidence is presented by the LAA in support of a defense of failure to mitigate.

Second, while the Legislative Council attacks the quality of the evidence 716 submitted to support its damages claim, it does not point to or cite *any* contrary evidence in the record. This is not surprising because none exists. 716's damages claim is not based on numbers that it made up or pulled out of thin air. It is based on the value of the project that was calculated by the AHFC and certified by the Legislative Council.[41] With no contrary evidence, it is more than sufficiently established.

Third, the Legislative Council's argument about the quality of 716's damages evidence only underscores the need for a hearing on the claim.[42] With the passage of time since the filing of the initial claim, 716 is now able to provide more precise calculations to substantiate its damages claim, and requests an opportunity to present this evidence.

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39 Appellee's Brief at 10, 37-41.

40 R. 000749-750 (Procurement Officer's Decision finding that 716 provided no evidence of any attempt to mitigate its damages); Appellees Brief at 41.

41 The record contains, among other things, (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..." (R. 000019); (ii) the Bratslavsky cost study commissioned by the AHFC (R. 000378-000419.); (iii) the affidavit of Michael Buller, then Deputy Executive Director of AHFC (R. 000022); (iv) the affidavit of Mark Pfeffer (R. 001020); and (v) the cost summary presented to AHFC during the project (R. 000729).

42 Or, at minimum, a remand for a hearing on the damages issue.

Indeed, it is hard to fathom how the Court can engage in the kind of review and assessment of the quality of the evidence that the Legislative Council seems to invite for the first time on appeal, without holding hearing on the issue of damages.

Finally, 716's request for reliance damages is supported by the case law on this issue. In *Griffin & Griffin Exploration, LLC v. U.S.*, the Court of Federal Claims addressed the appropriate measure of damages where the United States, acting through the Bureau of Land Management, cancelled oil and gas leases issued to the plaintiffs on the grounds that the leases were improperly issued.[43] While recognizing that the government's cancellation of the plaintiffs' leases was not technically a breach of contract because one of the regulations incorporated into the terms of the leases required that "[l]eases shall be subject to cancellation if improperly issued,"[44] the Court nonetheless rejected the government's argument that plaintiffs were limited to recover on a quasi-contractual theory of damages.[45] The Court found that plaintiffs should be permitted to present evidence of expectation damages or, if they could not establish their expectation damages with reasonable certainty, they could calculate their damages based on their reliance interest.[46]

The Court went on to address the fact that any request for damages for injury to plaintiffs' interests must take into consideration the Court's holding that the cancellation

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43 *Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 167 (2014).

44 *Id.* at 176.

45 *Id.* at 177.

46 *Id.*

of the leases was not, in and of itself, a breach of contract because the cancellation of the leases was required by law.[47] Addressing this point, the Court stated:

> The cancellation clause in the leases is similar in some respects to the "termination for convenience" clauses that are included in government contracts for the procurement of goods and services. As in that analogous context, it may be inappropriate to provide an award of damages based on interference with plaintiffs' expectation interest, for which the legitimate cancellation of the lease would be the intervening cause. The Federal Acquisition Regulation provides for a form of reliance damages to contractors when the government exercises its right to terminate for convenience.[48]

While the *Griffin* Court did not ultimately decide the damages to be awarded in that matter, its analysis is instructive and consistent with other cases where courts have considered similar circumstances.[49]

VII. 716 HAS BEEN DEPRIVED OF DUE PROCESS.

The parties' briefing on appeal illustrates that there are facts at issue in this matter that are disputed and are material to resolution of the legal issues presented. 716 renews its motion for a de novo hearing, and in the alternative requests the Court remand the matter for a full and proper hearing before the Legislative Council. Alaska law requires that claimants in 716's position be afforded "an impartial decision-maker, notice and the opportunity to be heard, procedures consistent with the essentials of a fair trial, and a

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47 *Id.*

48 *Id.*

49 *See e.g., Amber Res. Co. v. United States*, 73 Fed. Cl. 738 (2006), aff'd, 538 F.3d 1358 (Fed. Cir. 2008) ("Sunk costs" that lessees expended in exploration and development of offshore oil and gas leases were recoverable as reliance damages in suit against the government for breach of the leases, such expenditures were plainly undertaken in reliance on the lease contract and were fully foreseeable.)

reviewable record."[50] That has never occurred here and, as a result, 716 is "*entitled* to a trial de novo, in whole or in part," where it has been "denied the opportunity to present [. . .] relevant material and evidence supporting [its] claim."[51]

CONCLUSION

The Legislative Council's representation of the issues and facts on appeal is disconnected from the reality of this case. 716 is not seeking to line its pockets at the expense of taxpayers – it is seeking only to recoup the substantial and unjustifiable damages it has suffered as a result of the Legislature's failure to comply with the terms of the complex lease agreement that it requested, negotiated, oversaw, and certified as compliant with its own procurement procedures. The Legislative Council's request that the Court deny 716's claim in its entirety based on an incomplete and self-serving record runs afoul of due process.

For these reasons, the Court should reverse and remand the Decision 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.

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[50] *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010) (citing *Keiner v. City of Anchorage*, 378 P.2d 406, 409–10 (Alaska 1963)).

[51] *Id.* (emphasis added).

DATED this 9th day of November, 2017.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 9th day of November, 2017, a true and correct copy of the foregoing is being delivered via electronic mail to:

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