IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

716 WEST FOURTH AVENUE, LLC

Appellant,

v.

LEGISLATIVE COUNCIL,

Appellee.

Appeal Case No. 3AN-16-10821CI

BRIEF OF APPELLEE LEGISLATIVE COUNCIL

Appeal of Legislative Council's Decision dated November 21, 2016
on Contract Claim Appeal of 716 West Fourth Avenue, LLC
dated October 31, 2016

Filed in the Superior Court of the
State of Alaska, Third Judicial
District, this 6th day of
October, 2017.

By: _____
Clerk of Court

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AUTHORITIES PRINCIPALLY RELIED UPON

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 No money shall be withdrawn from the treasury except in accordance with appropriations made by law.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.

JURISDICTIONAL STATEMENT

Appellee adopts Appellant's ("716") statement of jurisdiction, except that this Court has appellate jurisdiction under AS 44.62.570, rather than AS 36.30.620.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Legislative Council properly conclude that the Legislative Affairs Agency ("LAA") terminated the Lease pursuant to the non-appropriation clause of the Lease and the Legislature's constitutional authority when the undisputed record established that LAA exercised that right in a letter dated July 18, 2016, less than three weeks after a non-appropriation by the Legislature?[1]

2. Did the Legislative Council properly conclude that 716's estoppel claim failed when the undisputed record established that LAA paid all amounts owed for its tenancy under the Lease up through the date when LAA exited the building?

3. Did the Legislative Council properly conclude that 716's estoppel claim failed because the public interest would be significantly prejudiced by payment of more than $37 million to a private developer when there would be no corresponding benefit to the public?

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[1] The Legislative Council is a standing committee of 14 members of the Alaska Legislature that "exercise[s] control and direction over all legislative space" and holds public hearings, among other duties. AS 24.20.060(2), (5). Its members are the President of the Alaska Senate, six Senators appointed by the President, the Speaker of the Alaska House of Representatives, and six House members appointed by the Speaker. AS 24.20.020. "The Legislative Affairs Agency is the vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature." Alaska State Legislature, Legislative Affairs Agency (2015), http://akleg.gov/legaffairs.php. LAA's Executive Director, Pam Varni, is responsible for the activities of LAA consistent with the law and rule. *Id.*

4. Did the Legislative Council properly conclude that 716's estoppel claim failed to establish 716's damages as required and failed to provide accurate and complete supporting data?

5. Did the Legislative Council properly conclude that 716 failed to establish it had reasonably relied on LAA's statements regarding the validity of the procurement process when the undisputed record established that 716 performed an independent analysis of the procurement process and its validity?

I. STATEMENT OF THE CASE

This case arises from LAA's tenancy in a building (the "Building") for less than two years as the Legislative Information Office for Anchorage. After the Legislature decided not to appropriate funds to continue that tenancy, which resulted in the termination of the lease agreement at issue (the "Lease"), 716 initiated a "Contract Claim" demanding payment of $37,016,021 for all amounts it purportedly incurred as lessor for improvements to the Building.[2]

Like virtually all lease agreements entered into by the State and its agencies, the Lease contained a "non-appropriation clause," which recognized that the availability of funds to pay for LAA's obligations under the Lease – and the viability of the Lease itself – was contingent upon the Legislature's appropriation of funds for the Lease each year. Sections 1.2 and 43 of the Lease state as follows:

[2] *See* [R. 1–19]. The Legislative Council objects to 716's incorporation-by-reference of its 31-page Motion for Hearing *De Novo* (or the 13 pages of factual "background") in that motion, since it violates Alaska R. App. P. 212(c)(1)(G), 212(c)(8), and 212(c)(4).

§ 1.2 AS 36.30.083(a) COST SAVINGS:

. . . .

Under AS 36.30.083(a), Legislative Council has approved the extension of this Lease as legally required. In addition to any other right of the Lessee under this Lease to terminate the Lease, *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*, or will be amended by mutual agreement of the Parties. *To terminate under this section, the Lessee shall provide not less than 90 days advance written notice of the termination to the Lessor.*[3]

§ 43 AUTHORIZATION; CERTIFICATION:

. . . .

Funds are available in an appropriation to pay for the Lessee's monetary obligations under the Lease through June 30, 2015. The availability of funds to pay for the Lessee's monetary obligations under the Lease after June 30, 2015, is contingent upon appropriation of funds for the particular fiscal year involved. In addition to any other right of the Lessee under this Lease to terminate the Lease, *if, in the judgment of the Legislative Affairs Agency Executive Director, sufficient funds are not appropriated by the Legislature, the Lease will be terminated by the Lessee or amended. To terminate under this section, the Lessee shall provide written notice of the termination to the Lessor. 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.*[4]

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[3] [R. 424] (emphases added). A complete copy of the Lease is located at [R. 421–448].
[4] [R. 435–436] (emphasis added).

These Lease clauses effectuate the substance of the Alaska Constitutional provision regarding legislative appropriation.

716 admits that it was fully aware of the non-appropriation clause.[5] 716 further concedes that LAA was permitted to terminate the Lease as a result of non-appropriation.[6]

Just a few short months after LAA moved into the Building in early 2015, Legislators were already publicly questioning whether LAA should exit the Building early due to the State's fiscal crisis.[7] Under the Lease, the monthly rent had increased nearly five-fold from $56,863.05 to $281,638.[8] In early April 2015, public reports confirmed that the Alaska Senate Finance Committee had passed a budget amendment to remove future funding for the Building.[9] Later that month, the Legislative Council met to address the State's "enormous financial problems [and] budget reductions" and any recommendations the Council should make regarding the Lease.[10] During that April 2015 meeting, the Legislative Council considered the possibility of purchasing the Building, if an appropriate price could be reached, but the Chair stated "[i]f the Council does not agree with the purchase price and if the owners have not been willing to negotiate then we really must consider use of the non-appropriation clause in the lease contract for the

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[5] [R. 980]; *see also* [R. 738–739]; Opening Brief of Appellant ("716 Br.") at 9.
[6] [R. 997] ("716 does not dispute that the Lease contained appropriations clauses that allowed the Legislature to terminate the Lease if funds could not be appropriated."). 716 disputes that the termination was done properly here.
[7] [R. 739]; [R. 902–904].
[8] [R. 27–28].
[9] [R. 905–907]. This amendment did not make it into the final FY 2016 budget.
[10] [R. 910].

2017 budget year[.]"[11] The Legislative Council then voted to direct the Chair to prepare a report concerning a possible purchase of the Building or, failing that, the possible use of other space for LAA—which would necessarily entail non-appropriation of the Lease.[12]

After several months of investigation and negotiations, the Chair prepared that report and proposed several alternatives to the Legislative Council on November 24, 2015, including non-appropriation of the Lease.[13] Under this scenario, the Legislature would exercise "[n]on appropriation of the lease with 716 W. 4th Avenue and enter into a State lease with the Department of Administration for the Atwood Building."[14] On December 19, 2015, the Legislative Council discussed the proposals at length, ultimately voting unanimously to advise the Legislature not to appropriate funds for the Lease if certain conditions were not met in the next 45 days.[15]

After the 45-day window had come and gone, and the specified conditions had not been met, the Legislative Council met on February 11, 2016 to discuss the FY 2017 budget. During that meeting, LAA's Executive Director, Pam Varni, submitted a budget request to cover the obligations of LAA under the Lease in the proposed FY 2017 Legislative Council budget as a component of LAA's normal annual budget request and approval process.[16] The Legislative Council did not accept this request and instead voted unanimously to amend the budget to remove the appropriation for the Lease, consistent

[11] [R. 910–911].
[12] [R. 911–913].
[13] [R. 915–920].
[14] [R. 920].
[15] [R. 810–811].
[16] [R. 939]; [R. 946].

with Section 43 of the Lease and the December 19 vote.[17] On February 26, 2016, the House Finance Budget Subcommittee accepted the Legislative Council's recommendation to amend the budget to account for non-appropriation of the Lease.[18] The FY 2017 operating budget, as ultimately passed into law on June 28, 2016, effectuated this non-appropriation and appropriated just $844,900 for the Lease in the upcoming year—which would only cover three months of rental payments.[19]

In light of the Legislature's non-appropriation, Ms. Varni provided 716 with written notice on July 18, 2016 that sufficient funds had not been appropriated by the Legislature to cover the annual Lease payments and expense obligations for FY 2017 and that LAA was terminating the Lease under Sections 1.2 and 43 of the Lease.[20]

Consistent with Ms. Varni's letter, LAA vacated the Building on October 16, 2016.[21] It is undisputed that LAA paid all amounts owed for its tenancy up through October 16, 2016.[22] In other words, LAA paid for the benefits it received under the Lease. Because LAA vacated the Building, it is likewise undisputed that the public would

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[17] [R. 940–941].
[18] [R. 952]; [R. 954].
[19] [R. 959]; [R. 961–62]; *see also* 716 Br. at 6 n.21.
[20] [R. 962]. Because of the 90-day notice provision, Ms. Varni noted that LAA would vacate the Building on or about October 16, 2016. *See id.*
[21] [R. 994].
[22] [R. 749–750]; [R. 749] ("LAA has paid in full for that tenancy under the terms of the Lease."); [R. 731–732]; [R. 999] (". . . LAA went on to pay for rent for the first half of October, as well as provide reimbursement for real property taxes and assessments due under the Lease."); [R. 1001] ("The Decision's conclusion that 716 is entitled to zero damages under a quantum meruit theory (because LAA paid rent for the periods of time it occupied the building) does not render damages per se unavailable to 716. In this context, as in *Earthmovers*, it merely means that the legally appropriate measure of damages is the amount sustained in reliance on LAA's representations.").

receive no benefit in terms of additional services (or compensation for services previously provided) if additional payments were made to 716, including the $37 million demanded here.[23]

716 filed its Contract Claim roughly a week after the FY 2017 budget went into effect, including the non-appropriation.[24] The Procurement Officer denied 716's claim on October 6, 2016, on multiple grounds, including due to the non-appropriation.[25] 716 appealed that decision to the Legislative Council on October 31, 2016.[26] The Legislative Council adopted the decision of the Procurement Officer as the final decision without a hearing.[27] This appeal followed.

II. STANDARD OF REVIEW

The Procurement Officer's decision, which the Legislative Council adopted, made a number of factual findings based on the undisputed factual record. This Court "review[s] questions of fact for substantial evidence, which is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[28] The Court "need only determine whether such evidence exists, and do[es] not choose between competing

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[23] [R. 1001] (". . . LAA received—and paid for—the benefit of 22.5 months tenancy in the Building."); *see also* [R. 995] (noting that LAA had "the use of the facility for more than a year" before moving out). 716 does not dispute this, but asserts that the public interest would be prejudiced in some abstract way if LAA is permitted to exercise its rights under the non-appropriation clause. *See* 716 Br. at 35–36.

[24] [R. 1–19].

[25] *See* [R. 730–751].

[26] *See* [R. 974–1006].

[27] *See* [R. 1024].

[28] *McGlinchy v. State, Dep't of Nat. Res.*, 354 P.3d 1025, 1029 (Alaska 2015) (quoting *Grimmett v. Univ. of Alaska*, 303 P.3d 482, 487 (Alaska 2013)).

inferences."[29] Moreover, the Court "do[es] not evaluate the strength of the evidence, but merely note[s] its presence."[30]

But a key question in this case—whether and when the Legislature can decline to make further appropriations for a contract pursuant to the Legislature's power under the Appropriations Clause of the Alaska Constitution and the terms of the contract[31]—is a question of law. For questions of law, there are two potential standards of review for the Court to apply. "We apply the reasonable basis standard to questions of law involving agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions. We also review an agency's application of law to facts under the reasonable basis standard."[32] Alternatively, "[q]uestions of law that do not involve agency expertise are reviewed under the substitution of judgment standard."[33]

Here, questions of law concerning legislative appropriations involve "agency" expertise and the determination of fundamental policies that are unique to the Legislative branch.[34] Appropriation is a function specifically reserved by the Alaska Constitution to

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[29] *Id.* (quoting *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992)).
[30] *Grimmet*, 303 P.3d at 487 (quoting *Handley*, 838 P.2d at 1233).
[31] *See* 716 Br. at 36.
[32] *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 535 (Alaska 2015) (internal quotation marks and citation omitted).
[33] *McGlinchy*, 354 P.3d at 1029.
[34] As noted above, LAA "is the vehicle for execution of Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature." LAA, http://akleg.gov/legaffairs.php. LAA's expertise in managing the Legislature's budget to meet LAA's contract obligations is relevant here in that the LAA Executive Director's determination that appropriated funds had been exhausted factored into the Procurement Officer's (and Legislative Council's) decision to deny 716's Contract Claim based on non-appropriation.

the Legislature. Because appropriation "implicate[s] . . . the determination of fundamental policies within the scope of the agency's statutory function,"[35] this Court should apply the reasonable basis standard of review to questions of law involving non-appropriation, which were a central feature of the Procurement Officer's decision as adopted by the Legislative Council. Likewise, the agency's application of law to facts regarding non-appropriation is subject to the reasonable basis approach. "The [reasonable] basis approach merely determines whether the agency's determination is supported by the facts and is reasonably based in law."[36]

Conversely, "the substitution of judgment standard is appropriate 'where the case concerns "statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience."'" [37] There is no statutory interpretation at issue in this appeal with regard to non-appropriation. Nor is there any issue requiring an analysis of legal relationships about which the Court has specialized knowledge and experience. As a result, the substitution of judgment standard is inapplicable to this Court's review of non-appropriation issues. The sole question of law reviewable under the substitution of judgment standard is whether estoppel applies.[38]

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[35] *White v. State, Dep't of Nat. Res.*, 984 P.2d 1122, 1125 (Alaska 1999) (quoting *Hammer v. City of Fairbanks*, 953 P.2d 500, 504 (Alaska 1998)).
[36] *Id.* (internal quotation marks and citation omitted).
[37] *McGlinchy*, 354 P.3d at 1029 (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).
[38] *State, Div. of Ins. v. Schnell*, 8 P.3d 351, 355 (Alaska 2000); *Bartley v. State, Dep't of Admin.*, 110 P.3d 1254, 1263 (Alaska 2005) ("On the estoppel issues, deference is due only to the agency's findings of fact.").

III. ARGUMENT

The Legislative Council correctly denied 716's Contract Claim for five key reasons. First, following the Legislature's non-appropriation of funds for the Lease, LAA terminated the Lease pursuant to Sections 1.2 and 43 of the Lease and paid all amounts owed for its tenancy. Second, even if 716 could show that estoppel was warranted here, which it cannot, based on the proper measure of damages for an estoppel claim, 716 could only recover based on the benefits it provided to LAA—i.e., the rental payments under the Lease for LAA's tenancy. Since LAA undisputedly already paid those amounts, 716's claim fails. Third, no estoppel is warranted here because paying a private contractor an *additional* $37 million above what 716 was entitled to receive—and did receive—under the Lease would significantly prejudice the public interest when there is no corresponding benefit to the public. Fourth, 716 failed to establish its damages during the administrative proceeding, as required. Fifth, 716 failed to show reasonable reliance on any statements made by LAA. These are each independent grounds for denial of 716's claim.

716's heated rhetoric and outlandish accusations are meant to distract the Court from the weakness of 716's legal claim. 716 knew from the outset that the Legislature could decide at any time to non-appropriate the Lease, and that 716 would then be required to find a replacement tenant. This was a risk that 716 assumed. Fundamentally, 716 is asking this Court to transform the parties' bargain and relieve 716 of the risks that it voluntarily incurred so that 716 can try to collect $37 million more than what it was

entitled to receive under the Lease. 716 cannot misuse the estoppel doctrine to make LAA the guarantor of risks that 716 voluntarily assumed.

A. The Legislature's Non-Appropriation Resulted in the Termination of the Lease and Requires Denial of 716's Estoppel Claim.

1. The Legislature Properly Non-Appropriated Further Payments for the Lease.

As described above, it is undisputed that the Legislature exercised its constitutional right to non-appropriate the Lease following roughly a year of debate, discussion, and successive votes by the Legislative Council and other committees. Given the State's financial difficulties, the Legislature concluded that the Lease was too expensive and that taxpayers' funds would be better spent elsewhere. It is likewise undisputed that LAA's Executive Director provided written notice to 716 that LAA was terminating the Lease pursuant to the non-appropriation clause, and that LAA would exit the Building by October 16, 2016 (which LAA did).[39] In an effort to avoid these inescapable and dispositive facts, 716 argues that the Legislature's non-appropriation is irrelevant because the Legislature or LAA had some improper motive for terminating the Lease or even that "LAA had terminated for other reasons" at an earlier point in time (and unrelated to the non-appropriation).[40] These manufactured arguments fail as a matter of logic and law.

716's primary argument is that the Legislature's non-appropriation authority is not absolute, and therefore the Court should second-guess the propriety of the Legislature's

[39] [R. 962]; [R. 994] ("[T]he Legislature only vacated this month, on October 16.").
[40] *See* 716 Br. at 38.

non-appropriation decision because 716 suspects that the Legislature had an improper motive.[41] In particular, 716 insists that the Legislature's non-appropriation authority must be balanced against other legal rights, including 716's desire to be paid $37 million more than it was entitled to receive under the Lease.[42] This is wrong for at least three reasons.

First, properly understood, "non-appropriation" is not an affirmative action by the Legislature; it is an absence of action. Each fiscal year, starting from a clean slate, the Legislature must make countless choices as to what appropriations to make to fund the State's activities. Some of these activities have been ongoing for many years and are routinely funded from year to year, but it requires affirmative conduct by the Legislature to include them in the final budget. Non-appropriation, on the other hand, requires no action whatsoever. If the Legislature's decisions as to what *not* to fund through appropriations were somehow actionable, or subject to judicial review, then a nearly infinite number of potential claimants could allege that their pet cause was not funded by the Legislature due to some purportedly improper reason. 716 cites no authority from any jurisdiction in support of its apparently unprecedented position, instead relying on far-flung hypotheticals and strained analogies. Non-appropriation is not actionable.[43]

Second, even if non-appropriation could be equated to affirmative spending choices, none of the spending power's limitations even arguably applies here. It is true

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[41] *See id.* at 39–42.
[42] *See id.* at 41.
[43] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378 (Alaska 2001) (recognizing that "legislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs)").

that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds," and a Legislature therefore could not condition an appropriation upon an unconstitutional infringement of another's rights.[44] But no constitutional provisions or rights are at issue here.[45] This is a monetary claim on an estoppel theory—that is all.[46] Further, there is no alleged conditional grant of funds, and 716 does not allege (nor could it) that the Legislature attempted to use non-appropriation to accomplish some unconstitutional end. 716 has no constitutional right to collect $37 million more than what it was owed under the Lease, and any limitation relating to "other constitutional provisions" is clearly inapplicable here even if this were a "spending power" case (which it is not).

Third, 716's novel argument that the Court should second-guess the Legislature's non-appropriation decision because one or more Legislators purportedly had "politically

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[44] *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Indeed, the preposterous hypothetical suggested by 716 concerning invidiously discriminatory state action is exactly the type of conduct that is beyond the spending power's limits. *Compare* 716 Br. at 39, *with Dole*, 483 U.S. at 210–11 ("[A] grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress' broad spending power."). That limitation has no relevance to this case.

[45] 716 makes a passing reference to an alleged infringement of 716's due process rights, *see* 716 Br. at 43, but this appears to relate to 716's claim that the absence of an evidentiary hearing deprived 716 of procedural due process (despite the absence of factual disputes on dispositive legal issues). 716's Contract Claim makes no reference to any constitutional rights. In *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006), Governor Murkowski exercised his line item veto of an appropriation that would have benefited certain citizens. The citizens sued and the Alaska Supreme Court affirmed a summary judgment ruling in the State's favor because, in part, the claimants had made no viable claim that a constitutional right was violated when the appropriation was vetoed. *See id.* 716 has likewise made no claim—viable or otherwise—that any constitutional right was violated by the non-appropriation.

[46] [R. 9–15].

self-serving" motivations is at odds with the Appropriations Clause's intent and purpose.[47] The Appropriations Clause is "a standard section providing that money shall not be withdrawn from the treasury except in accordance with appropriations made by law."[48] As the U.S. Supreme Court explained, the Framers included the Appropriations Clause in the federal Constitution

> to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes [are] raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation[.][49]

The Legislature's "power to decide how and when any money should be applied" for public purposes is a power entrusted exclusively to the legislative branch.[50] The Appropriations Clause's "fundamental and comprehensive purpose" "is to assure that

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[47] 716 Br. at 40–41. 716 asserts that the Legislative Council's interpretation "is inconsistent with the intent and purpose of the Appropriations Clause," but assiduously avoids addressing the intent and purpose of the clause. *See id.* at 36.

[48] 2 *Proceedings of Alaska Constitutional Convention* 1111 (Dec. 19, 1955).

[49] *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427 (1990) ("*OPM*") (quoting 2 *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

[50] *See Alaska Legislative Council*, 21 P.3d at 371 ("[The Alaska Constitution] gives the legislature the power to legislate and appropriate. . . . The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.").

public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good . . . ."[51]

The plain meaning and purpose of the Appropriations Clause is to entrust the Legislature with the core responsibility of making these difficult judgments and deciding how and when public funds should be expended—or, as in this case, not expended. Whether viewed as a question of separation of powers or the political question doctrine, 716 has offered no valid reason why the Judiciary should second-guess the Legislature's decision not to expend millions of public dollars on a Lease when less expensive office space was readily available. The Court should decline 716's dangerous invitation.[52]

716's argument also proceeds from a false premise: that LAA "breached" its contractual responsibilities and did so prior to the Legislature's non-appropriation.[53] Both parts of the premise are wrong. First, LAA exercised its contractual rights under Sections

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[51] *OPM*, 496 U.S. at 427–28.

[52] Tellingly, 716 offers no standard by which the Court should evaluate the propriety of the non-appropriation decision – presumably, this is because no standard exists. Even if the Court were to apply the "public purpose" standard that attaches to affirmative appropriations of funds (rather than non-appropriations), 716 has not come close to satisfying that exceedingly deferential standard. *See, e.g., Weber v. Kenai Peninsula Borough*, 990 P.2d 611, 615 (Alaska 1999) (noting that the finding of a "public purpose" will not be overturned unless the decision is "arbitrary or without any reasonable basis in fact or is so unreasonable as to transgress the limitations of our constitution such that it is plainly foolhardy or without any discernible benefit"). The record establishes that the Legislative Council was informed by outside experts that there were cost savings associated with exiting the Building for other office space. *See, e.g.*, [R. 687]. The decision by the Legislature to non-appropriate was clearly not arbitrary or without any reasonable basis in fact.

[53] 716 Br. at 38 ("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."), 42 (asserting that LAA claims it can "breach" the Lease and then invoke the Appropriations Clause after the fact).

1.2 and 43 of the Lease to terminate the agreement following the non-appropriation. This is not a breach of the Lease; it is the application of a bargained-for provision in the contract. Second, LAA did not terminate the Lease until July 18, 2016, when Ms. Varni provided the requisite notice that LAA was exercising its rights under Sections 1.2 and 43 of the Lease.[54] It is undisputed that 716 continued to pay all rent owed and continued to perform under the Lease up until it vacated the Building on October 16, 2016.[55] 716 claims that LAA "abandoned" the Lease after the Superior Court issued a decision in March 2016, but the undisputed facts are otherwise. As 716 recognizes, "the Superior Court did not enter an order requiring the LAA to vacate the building."[56] And, in point of fact, LAA did not vacate the Building in March 2016 or any time in the six months thereafter. Rather, it was only after the Legislature had non-appropriated the Lease and Ms. Varni had provided the requisite 90-day notice that LAA vacated the Building. 716's suspicion that LAA had "decided" to vacate the Building at some point prior to the non-appropriation—but had not actually vacated or taken any action whatsoever under the Lease—is irrelevant. 716's speculation on LAA's thought process does not change the undisputed fact that LAA neither terminated the Lease nor failed to satisfy any obligation under the Lease up through the date that the Lease was terminated on October 16, 2016.

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[54] [R. 962].

[55] [R. 744] ("LAA fully performed its obligations under the Lease by paying rent and other expenses up through the date that the tenancy concluded pursuant to the non-appropriation power."); [R. 749] ("Both 716 and LAA fully performed their respective obligations under the Lease."); [R. 1018] (affidavit of 716's property manager confirming that LAA made payments for rent in July, August, and September, and for 16 days in October 2016, plus real estate taxes and an assessment).

[56] 716 Br. at 37.

The Legislature's non-appropriation—and LAA's resulting termination of the Lease—is fatal to 716's estoppel claim for at least two reasons. First, it establishes that 716 was not prejudiced by LAA's assertions regarding the validity of the procurement process. The "prejudice" that 716 complains about here is LAA's termination of the Lease, but that termination occurred pursuant to the Lease's terms and as a direct result of the Legislature's non-appropriation—not the Superior Court's decision (which occurred more than six months earlier and which, as 716 correctly notes, did not require LAA to vacate the Building). Second, as addressed more fully below, the non-appropriation and LAA's termination pursuant to Sections 1.2 and 43 of the Lease ended the parties' contractual obligations to one another. 716 cannot use the estoppel doctrine to obtain more than what the Lease provides.

2. LAA's Exercise of Its Non-Appropriation Rights did not Violate the Implied Covenant of Good Faith and Fair Dealing.

716 admits, as it must, that LAA complied with its obligations under Sections 1.2 and 43 of the Lease when Ms. Varni included a budget request in February 2016 to cover the obligations of the Lease in the proposed budget for FY 2017.[57] Despite this, 716 claims that LAA only made the budget request "nominally" and that this somehow

[57] 716 Br. at 44 ("Varni did go on to make a 'recommendation' that the funds be appropriated"); [R. 936–951] (budget request by Ms. Varni).

violated the implied covenant of good faith and fair dealing.[58] 716's argument ignores the facts and misapplies the law.

The undisputed facts confirm that the Legislative Council had *already voted* in December 2015 to recommend the non-appropriation for the Lease unless certain conditions were met (they were not), and that this vote occurred long before the normal annual budget request and approval process took place in February 2016.[59] By the time that Ms. Varni had an opportunity to present her annual budget request, the Legislative Council's earlier recommendation was essentially already in place.[60] In fact, early in that meeting one Legislator "asked if the budget request reflected the removal of the lease costs for the Anchorage LIO in FY 2017, noting that in December 2015, Legislative Council recommended the removal of that appropriation if certain conditions were not met, which they were not."[61] Because the Legislative Council had already voted to recommend non-appropriating the Lease before Ms. Varni's request could even be presented, 716's complaint about Ms. Varni's diligence rings hollow. Ms. Varni could not undo the Legislative Council's previous vote, and the implied covenant did not obligate her to do so.

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[58] *See* 716 Br. at 43–44 (reciting the standard, but failing to explain—or to provide any supporting legal authority demonstrating—how 716 failed to satisfy either the subjective or objective prong of the implied covenant).
[59] *Compare* [R. 810–811] (Dec. 19, 2015 vote), *with* [R. 936–951] (Feb. 11, 2016 meeting to address annual budget process).
[60] *See* 716 Br. at 16 (conceding that the 45-day window expired on Feb. 2—nine days before the budget presentation meeting).
[61] [R. 939].

716 devotes much of its brief to reckless accusations that LAA made misrepresentations to the Legislative Council or even "sabotaged" the funding request for the Lease.[62] The facts are otherwise. Facing a multi-billion dollar deficit, LAA, the Legislative Council, and the Legislature all looked for available cost savings. The Lease was an obvious candidate because of its high price and the availability of lower-cost alternatives elsewhere.[63] Based on one analysis, the average annual cost of the Lease was $4,032,000 while moving to other space over the same period would have an average annual cost of $664,776.[64] Even accounting for certain tenant improvements or differences in square footage, LAA stood to save considerably—even tens of millions of dollars—by terminating the Lease early and moving elsewhere. 716 complains that an AHFC official and an appraiser disagreed with certain parts of the analysis, especially as it related to the potential purchase of the Building, and that this information should have been shared with the Legislative Council earlier. But others' disagreement and opinions (particularly the appraiser's "preliminary and tentative" opinions) obviously do not establish that the earlier analysis was incorrect or, more importantly, that LAA would not save millions by leaving the Building for other office space. Whether or not the option to

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[62] *See* 716 Br. at 12–17, 44–45.

[63] *See, e.g.*, [R. 687]; [R. 755–757]; [R. 774] ("[Peter Shorett, Executive V.P. of Kidder Matthews Real Estate Appraisal] said that at the end of the day it is clearly a lower cost to move to the Atwood Building than to stay at 716 W. 4th Avenue under the current lease."); [R. 905]; [R. 907]; [R. 915].

[64] [R. 1397]; [R. 1401]. 716 asserts, without any citation to the record, that the report containing this figure was prepared internally by LAA and without consultation with Alaska Housing Finance Corporation (AHFC) or anyone else with expertise. No citation to the record is offered because 716's assertion is unsupportable and false.

purchase the Building may ultimately have been somewhat less (or more) expensive on a per-square-foot basis than was referenced in the analysis, there is no dispute that LAA could save the public money by exiting the Building and moving to different office space.[65] This is further confirmed by the Navigant report, which found that the present value differential between continuing to lease the Building and relocating to certain State-owned property would yield a savings of more than $30 million.[66] Given these undisputed facts, the Legislative Council's vote to recommend non-appropriation was clearly reasonable.

The implied covenant's purpose "is to effectuate the reasonable expectations of the parties, not to alter or add terms to the contract, and it will not create a duty where one does not exist."[67] The parties' reasonable expectations, as set forth in Sections 1.2 and 43 of the Lease, were that LAA may and could terminate the Lease without penalty if

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[65] It is worth noting that 716's principal, Mark Pfeffer, testified at great length during the December 19, 2015 Legislative Council meeting that preceded the vote to recommend non-appropriation (pending certain steps). *See* [R. 765–767] (Mr. Pfeffer commenting on the scenarios and the potential purchase of the Building); [R. 759–768] (Mr. Pfeffer's testimony).

[66] [R. 687] (finding that the present value of costs over 20 years for those two options was $61.8 million and $24.2 million, respectively—a difference of $37.6 million). It is undisputed that, as found by the Legislative Council, negotiations between counsel for the Legislature and a State entity did not result in a competitive cost on a per square foot of usable space basis, and that overall cost savings could be achieved through the move. 716 accuses Ms. Varni of failing to respond to "Senator Meyers" [sic] when he asked about advice provided by AHFC, *see* 716 Br. at 14, but 716 disingenuously fails to mention that Senator Meyer asked his question of Juli Lucky, a staffer for Rep. Mike Hawker, and that the question related to the existing Lease and its value when it was entered into—not AHFC's views about how to analyze the potential purchase of the Building [R. 1458—1459].

[67] *Alaska Fur Gallery, Inc. v. Tok Hwang*, 394 P.3d 511, 516 (Alaska 2017) (internal quotation marks and citation omitted).

the Legislature decided not to appropriate sufficient funds for the Lease. That is exactly what happened. Ms. Varni did exactly what she was supposed to do in presenting the budget request to the Legislative Council as part of LAA's normal annual budget request and approval process, and the Legislative Council did exactly what it was entitled to do in recommending non-appropriation when the undisputed information it had received from Navigant and others demonstrated that moving to other office space would save the public money. 716 cannot add terms to the Lease or manufacture alleged duties that would somehow require LAA's Executive Director to persuade the Legislative Council to fund the Lease when less expensive alternatives were readily available. Further, in a closely analogous case involving non-appropriation, another court found that the implied covenant simply had no application because "in times of fiscal crisis the [state agency] has an obligation to communicate to the legislature appropriate ways to reduce state spending."[68] If the implied covenant could be used to circumvent—and impose liability for the exercise of—the Legislature's constitutional authority to non-appropriate, then that authority will be improperly undermined. Notably, 716 does not cite any authority in support of its argument. Misapplying the implied covenant here, as 716 proposes, would frustrate the parties' expectations and create a new and unworkable duty out of thin air.

[68] *KHK Assocs. v. Dep't of Human Servs.*, 632 A.2d 138, 141 (Me. 1993) (finding that the implied duty of good faith and fair dealing should not be imposed in connection with decisions about non-appropriation).

3. LAA Properly Terminated the Lease.

Under Section 1.2 of the Lease, the timeline for termination is governed by "the date appropriated funds are exhausted" and a 90-day notice period. CCS HB 256 only appropriated $844,900 for rent in FY 2017 for the Lease. It is undisputed that this appropriated amount was not sufficient to pay for LAA's monetary obligations for the Lease for the upcoming fiscal year, which triggered LAA's right to terminate the Lease pursuant to Sections 1.2 and 43 of the Lease. 716 argues, however, that LAA did not terminate the Lease as of the date that the appropriated funds were exhausted because 716 was ultimately paid more than the $844,900 that was appropriated for rent. This argument ignores the text of the provision, misstates the facts, and omits the basic practicalities of the appropriations process.

716 correctly notes that Section 1.2 states that the Lease will be terminated "as of the date appropriated funds are exhausted," but fails to consider the remainder of the provision: "To terminate under this section, the Lessee shall provide not less than 90 days advance written notice of the termination to the Lessor."[69] Here, the Legislature appropriated enough for exactly 90 days of rent. Because the mandatory written notice was not provided until July 18, however, it was at least arguable that LAA would not have satisfied the written notice requirement if it exited the Building in late September and failed to provide the full 90 days' advance written notice.[70] Rather than risk a dispute

[69] [R. 424].

[70] Insofar as 716 complains that it was overpaid, the remedy would be reimbursement to LAA—not payment of $37 million of public funds to this private contractor.

with 716 regarding whether Section 1.2 had been properly exercised if less than 90 days' written notice was provided, or whether certain real estate taxes and assessments were owed for the partial year, LAA elected to pay for the remaining amounts arguably owed through October 16, 2016. These amounts were not included in the Legislature's initial appropriation for FY 2016. Because LAA received benefits under the Lease up through October 16, however, it determined that paying for these benefits was warranted and that it would obtain an additional supplemental appropriation to cover these amounts.[71] These types of supplemental appropriations are entirely standard and essential for the State's government to operate. When unanticipated expenses arise, LAA and other agencies necessarily resort to supplemental appropriations to address certain expenses, which is what was done here.

The Legislature appropriated a total of $1,074,900 for 2016 Lease payments through an initial and then later supplemental appropriation.[72] 716 states that it received $1,227,817.32 in total payments from the Legislature since July 1, 2016.[73] 716 uses the difference between the total payments it received since July 1, 2016 and the CCS HB 256 appropriation to suggest that the Legislature was somehow able to pay 716 more than it appropriated directly for the Lease. But, critically, 716 does not identify where the funds

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[71] The supplemental appropriation is contained in HB 57, CH1 SSSLA 17, § 5, page 80, line 32. Alaska Legislature, 2017 Second Special Session, http://www.legis.state.ak.us/PDF/30/Bills/HB0057Z.PDF. The Court may take judicial notice of this appropriations bill. The amount of this supplemental appropriation was $230,000.

[72] *See* [R. 961] (CCS HB 256's initial appropriation for $844,900); *supra* note 71 (HB 57's supplemental appropriation for $230,000).

[73] *See* 716 Br. at 47–48 (citing [R. 1018]).

it received came from. Instead, 716 just assumes that some other funds were available from the FY 2017 budget and could have been used to pay the rent following October 16, 2016.[74] 716's assumption is incorrect. Tracking the Legislature's payments for the Lease, step by step and year by year, confirms that the Legislature paid exactly what was appropriated and no more.

716's math makes two critical errors. First, 716 fails to recognize that the real estate tax payments the Legislature made in 2016 were appropriated in 2015 for FY 2016, as is standard practice under Section 25.160 of the Alaska Administrative Manual ("AAM").[75] These tax payments were not appropriated in FY 2017, as 716 suggests. Second, 716 fails to account for various attendant expenditures beyond straight rent to 716— such as utility, property management, and security service costs—for which the Legislature made a supplemental appropriation to cover its initially unanticipated stay through October 16, 2016. If one omits the tax payments (which were appropriated in 2015), 716 is asserting that it was paid $1,005,204 after July 1, 2016.[76] This is within $70,000 of LAA's initial and supplemental appropriations, with the difference being

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[74] *See id.* at 48.

[75] AAM 25 - Budgets, Fiscal Year Obligations, http://doa.alaska.gov/dof/manuals/aam/resource/25.pdf (noting that, for "fixed price" contracts where the service is not severable as to fiscal year, the funds can be encumbered for one fiscal year and paid the following year). These tax payments amounted to more than $220,000. *See* [R. 1018].

[76] [R. 1018].

comprised of the non-rent operating costs related to the Lease.[77] This confirms that the Legislature only spent in 2016 what was appropriated specifically for the Lease. Beyond the appropriations in CCS HB 256 and HB 57, there were no additional funds available to pay any rent, or otherwise, for the Lease. The appropriation—including the supplemental appropriation—was therefore exhausted on October 16, 2016.[78] Ms. Varni's judgment that sufficient funds would not be appropriated for the Lease beyond October 16, 2016, as was necessary to terminate the Lease under Sections 1.2 and 43, is entitled to significant deference under the "substantial evidence" standard of review based on the presence of evidence to support that judgment.

716 briefly references an earlier non-appropriation case—the *Behrends* case—claiming it has "much similarity" to this dispute, and suggests that LAA could be held liable for the remaining rent due on the Lease based on that ruling.[79] 716 is mistaken. In fact, the *Behrends* case illustrates clearly why non-appropriation was exercised properly here.

Behrends involved the LAA's lease with B.M. Behrends Company for office space 30 years ago. The lease was subject to annual appropriation. The annual rental for

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[77] By way of comparison, LAA's budget request for the Lease in early 2016 sought $4,032,000, but only $3,380,000 was for straight rent—the remaining $652,000 was for these operating expenses. [R. 946].

[78] On July 18, 2016, Ms. Varni notified 716 that there were insufficient funds to pay for the full year of the Lease. This was undeniably true. Absent a supplemental appropriation, the funds would have run out in advance of October 16, 2016. In order to avoid further disputes with 716, LAA was able to obtain the supplemental appropriation to cover the remaining expenses through October 16, 2016. But no additional funds were appropriated or available thereafter.

[79] *See* 716 Br. at 48 & n.162; *id.* at 9–10.

this office space was $321,240.[80] During the relevant year, the Legislature made an appropriation of more than $20 million to the Legislative Council for assorted operating expenditures, including a lump-sum appropriation of roughly $2.4 million for "office space rental." There was legislative history, however, showing an intention to withhold availability of funds beyond a certain amount for the Behrends lease (i.e., non-appropriating the lease). The Attorney General's office found this legislative history immaterial because "[t]hat intention was not carried out in the language of the appropriations act itself and does not have the effect of law."[81] In particular, the Attorney General's office found persuasive that the appropriation act itself was silent about whether the lump-sum appropriation was only available for specific purposes, notwithstanding language contained in a conference committee report indicating legislative intent to fund (or not fund) a specific contract.[82] "In the Behrends case, the lump-sum appropriation for the Legislative Council was available for expenditure for the Behrends lease."[83]

The appropriations act at issue here is starkly different from the one described in *Behrends*. CCS HB 256 did not simply contain a lump-sum appropriation for "office space rental." Rather, the appropriations confirmed *twice* explicitly that only certain funds would be available for the Lease. First, it identified an amount for "Legislature

[80] The facts are taken from the Attorney General's opinion that addressed the legal effect of the Legislature's attempted non-appropriation of the lease. *See* 1987 WL 121076, at *1 (Alaska A.G. Mar. 24, 1987).
[81] *Id.* at *6.
[82] *See id.* at *3.
[83] *Id.* at *5.

State Facilities Rent—Other than Anchorage 716 W. 4th Ave."[84] Second, it identified the only amounts that could be expended for the Lease: "Legislature State Facilities Rent—Anchorage 716 W. 4th Ave."[85] While the legislative history, as described above, makes it abundantly clear that the Legislature intended to non-appropriate the Lease, the text of the appropriations act itself has the effect of law and leaves no doubt that non-appropriation was properly effected here.

B. LAA Paid for all Benefits it Received Under the Lease, and 716 Cannot Receive More Than *Quantum Meruit* Damages for Its Estoppel Claim.

It is undisputed that LAA paid for all of the benefits it received from 716, regardless of whether the Lease was invalidated.[86] 716 was entitled to rent and associated expenses up through October 16, 2016, when the Legislature vacated the Building, and that is exactly what LAA paid. This is undisputed and requires dismissal of 716's estoppel claim. 716 cannot obtain more through its estoppel theory than that to which it was entitled under the contract, or otherwise. Even assuming 716's estoppel claim had merit, which it does not, the most that it could seek here would be payment for the benefits it provided to LAA. Since LAA already paid those amounts, 716's estoppel claim fails as a matter of law.

The Alaska Supreme Court has addressed the appropriate remedy for estoppel claims like this, and that remedy is the reasonable value of benefits received by the

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[84] [R. 960]. This is found at lines 22–25.
[85] [R. 961]. The supplemental appropriation referenced *supra* at note 71 contains identical language: "Legislature State Facilities Rent—Anchorage 716 W. 4th Ave."
[86] *See supra* note 22 and accompanying text.

defendant. In *Native Village of Stevens v. Alaska Management & Planning*, a contract was found to be unenforceable because it violated federal and state procurement regulations involving competitive bidding.[87] Despite the unenforceability, the plaintiff was found to be entitled to a *quantum meruit* recovery for the benefits the defendant received: "'[I]t is equally clear that the Government bargained for, and received the benefit of YPC's services . . . . For this reason we hold the plaintiff is entitled to a *quantum meruit* recovery for the reasonable value of the services received by defendant.'"[88] The Alaska Supreme Court therefore remanded the case for a retrial of damages based on a *quantum meruit* theory.[89] The reasonable value of the services received by LAA here was for the use of the Building up through October 16, 2016, as measured by the agreed-upon rent that LAA undisputedly paid.

Alaska's *quantum meruit* approach is well within the mainstream of estoppel jurisprudence. If a claimant has been paid the reasonable value of the services received by the government, then no additional recovery is permitted.[90] This means the "value of

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[87] 757 P.2d 32, 42 (Alaska 1988).

[88] *Id.* at 43 (brackets in original) (quoting *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 560 (Ct. Cl. 1978)). *Yosemite Park* is an estoppel case.

[89] *See id.*

[90] *See, e.g., Lee v. United States*, 130 Fed. Cl. 243, 260 (2017) (noting that *quantum meruit* recovery is permissible when a contractor provides goods or services to the government in good faith under an express contract, but that contract is later rescinded for invalidity). "Since plaintiffs have not alleged that they were not paid the full contract rate during these periods as well, they cannot sustain a plausible claim for additional payment under a *quantum meruit* theory." *Id.*; *see also United Pac. Ins. Co. v. United States*, 68 Fed. Cl. 152, 159 (2005) (noting that "when contracts are voided for illegality *and the contractor has not been fully paid pursuant to the contract*, the contractor may be entitled to relief under an implied in fact contract theory"; it is undisputed that 716 was

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the conforming goods or services received by the government prior to the rescission of the contract for invalidity."[91] "The plaintiff may not, however, recover in quantum meruit [in an estoppel case] an amount in excess of the contract price even though the contract is void."[92] Accordingly, 716's estoppel claim cannot exceed the rental payments that were due—and paid—under the Lease up through October 16, 2016.

716 offers no legal argument as to the dispositive legal issue of the proper measurement of estoppel damages, and instead simply asserts that it has been prejudiced and that it is entitled to a damages award.[93] The only two authorities 716 mentions are clearly inapposite. In *City of Kenai v. Filler*, an architect prepared a design plan at the city manager's request, but the city manager lacked appropriate authority to make the request.[94] The city sought to avoid paying the architect for the benefits he provided to the city with certain updated architectural plans. The Alaska Supreme Court affirmed a finding that the city council had accepted the benefits of the updated plans and had

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(. . . continued)
fully paid pursuant to the Lease) (emphasis added)); *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1334 (Fed. Cir. 2006) ("Because it is undisputed that the government paid [the claimants] the full amount required by the contract for the construction performed, *Amdahl* does not help [the claimant]."); *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325–26 (Fed. Cir. 2007).

[91] *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986); *United Pac. Ins. Co.*, 464 F.3d at 1333 (citing *Amdahl*).

[92] *Capital Bridge Co. v. Cty. of Saunders*, 83 N.W.2d 18, 23 (Neb. 1957).

[93] *See* 716 Br. at 30, 50. Oddly, 716 states that "whether those damages should be measured based on a reliance standard or on a quantum meruit standard remains undecided," but fails even to attempt to address the issue. *Id.* at 30. 716 merely states that the Procurement Officer's decision failed to properly weigh the damages under the *Earthmovers* decision. *See id.* at 34.

[94] *See* 566 P.2d 670, 675-76 (Alaska 1977) (cited in 716 Br. at 35, and asserting that "[t]he conditions present here mirror those in *City of Kenai*").

ratified the contract at issue.[95] *City of Kenai* is a ratification case, not an estoppel case. In any event, *City of Kenai* held that the city should pay for the benefits it had received, but it is undisputed that LAA already paid for the benefits it received through more than $6 million in rent and associated expenses up through October 16, 2016.[96] *City of Kenai* fully supports LAA's position. If LAA had declined to pay any rent, or had insisted on a refund of the rental payments made, then *City of Kenai* might be relevant to show that LAA should pay the rent for the services it received. But that is not the case here.

Earthmovers of Fairbanks, Inc. v. State, Department of Transportation likewise does not help 716. In that case, the Department of Transportation terminated a contract and declined to make any payments under it because the contract violated a procurement statute that required the contract to be awarded to the lowest bidder.[97] Plaintiff claimed it was entitled to $287,625.54 under the contract's "termination for convenience" provision for mobilization costs, "standby costs," bidding expenses, and related overhead.[98] The court found that the awarded contract did violate the statute and then reviewed federal and state authorities for guidance on the appropriate remedy.[99] Finding that the contractor would ordinarily have been limited to a *quantum meruit* recovery (rather than relief under the "termination for convenience" provision), the court noted that the contractor would receive no payment whatsoever under *quantum meruit* because the contract was

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[95] *See id.*
[96] [R. 750].
[97] 765 P.2d 1360, 1361-62 (Alaska 1988).
[98] *See id.*
[99] *See id.* at 1364.

terminated during the mobilization phase and therefore the contractor had not yet conferred any actual benefit to the State.[100] Seeking to avoid a complete non-payment to the contractor, the court allowed the contractor to recover its actual out-of-pocket expenses during the mobilization period (a little less than $30,000).[101] The case before this Court is quite different for at least two fundamental reasons. First, LAA did not rescind the Lease; it terminated the Lease pursuant to its non-appropriation rights, and so no quasi-contractual remedies are permitted or appropriate. Second, unlike in *Earthmovers*, 716 *did* provide benefits to LAA by providing access to the Building up through October 16, 2016, and LAA *did* already pay 716 all amounts due for those benefits. The *quantum meruit* remedy is therefore available and compensates 716 for the benefits it provided to LAA.[102]

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[100] *See id.* at 1368, 1371 ("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.").

[101] *See id.* at 1371–72. The trial court found that, although the contractor was entitled to these costs, it had waived its right to collect them. The Alaska Supreme Court reversed this portion of the ruling and permitted the contractor to recover the mobilization costs. *See id.* at 1360.

[102] A third distinction recognized by *Earthmovers* is that even the *quantum meruit* remedy may be unavailable if the award at issue contravenes public policy. *See id.* at 1368 ("Similarly, where an agency has the general authority to award such a contract, but the award is technically or procedurally flawed such that it violates a statute, a contractor will be permitted quantum meruit recovery *so long as the award . . . does not manifestly contravene public policy*." (emphasis added)). 716's apparent reliance on the trial court's order undercuts its claim, because that order found that the Lease, if permitted, "would eviscerate the competitive principles of the state procurement code." [R. 42]. Accordingly, even under 716's preferred approach, no *quantum meruit* remedy would be available.

The usual *quantum meruit* measure of damages, as used by the Alaska Supreme Court in *Native Village of Stevens* and as recognized in *Earthmovers*,[103] should govern any estoppel claim here. Because LAA has undisputedly already paid for the benefits it received under the Lease, 716 is entitled to nothing more and its estoppel claim fails.

C. 716's Estoppel Claim Fails Because it Would Significantly Prejudice the Public Interest.

716 seeks $37,016,021 in public funds from LAA and the State to compensate 716 for amounts this private developer purportedly spent when renovating the Building in connection with the Lease.[104] It is undisputed that neither LAA nor the public will receive any use of, or benefit from, the Building if 716 receives more than $37 million in public funds. It is likewise undisputed that the additional $37 million sought by 716 will not compensate 716 for any benefits previously provided to LAA or the public. LAA already paid for the benefits it received from 716 prior to its October 16, 2016 exit.[105] LAA also paid for $7,500,000 in tenant improvements to the Building.[106] Payment of $37 million over and above the amounts due under the Lease, which have already been paid, would significantly prejudice the public interest.

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[103] *See, e.g.*, 765 P.2d at 1368-69 (noting that state courts may permit *quantum meruit* recovery when a contractor performs under a void contract or one that violates a statute).
[104] [R. 15–16]; [R. 18].
[105] *See supra* at pp. 6–7.
[106] [R. 16]; [R. 425].

Estoppel may only be invoked against the State and its agencies in "exceptional cases."[107] To establish its entitlement to estoppel, 716 must prove four elements: (1) LAA's assertion of a position by conduct or word; (2) 716's reasonable reliance on that assertion; (3) resulting prejudice; and (4) that the public would not be significantly prejudiced by granting the relief requested by 716.[108] Even if 716 could establish the first three elements here, it did not and cannot establish the fourth. "Often, even where reliance has been foreseeable, reasonable, and substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced."[109] Payment of $37 million in public funds to a private contractor over and above what the contractor is entitled to receive under the Lease would significantly prejudice the public interest.

The applicable test, which 716 fails to address, is straightforward: The Court should "balanc[e] 'the gravity of the injustice to the citizen if the doctrine is not applied' and 'the injury to the commonwealth if the doctrine is applied.'"[110] If the doctrine is not applied, then 716 will have been paid in full for all rent owed under the Lease for LAA's tenancy and would be expected to find a replacement tenant following LAA's exit from

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[107] *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 960 (Alaska 2004); *State v. Dupier*, 118 P.3d 1039, 1053 n.88 (Alaska 2005).
[108] *See, e.g., VECO Int'l v. APOC*, 753 P.2d 703, 709 (Alaska 1988).
[109] *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 97 (Alaska 1984); *see also, e.g., Mortvedt v. State, Dep't of Nat. Res.*, 858 P.2d 1140, 1142-43 (Alaska 1993); *Prop. Owners Ass'n v. City of Ketchikan*, 781 P.2d 567, 573 (Alaska 1989).
[110] *Municipality of Anchorage v. Stenseth*, 361 P.3d 898, 909 (Alaska 2015) (quoting *Schneider*, 685 P.2d at 97 n.6). This is the same test used by the Procurement Officer. [R. 747].

the Building (which was preceded by 90 days' written notice). 716 would also be the recipient of $7.5 million in tenant improvements—paid for by LAA—for the Building. In other words, if the doctrine is not applied, then 716 will receive *exactly what it was entitled to receive under the Lease, consistent with the parties' reasonable expectations and the Lease's terms*. While 716 asserts that it faces certain losses from actions of its lender, 716's separate arrangements and dealings with its lender and 716's failure to locate a replacement tenant are neither within LAA's control nor LAA's responsibility.

If the doctrine is applied, on the other hand, the injury to the public will be enormous. While coping with a multi-billion dollar deficit, the public will be forced to pay this private developer more than *$37 million* over and above the rent actually owed under the Lease (which has already been paid in full). The public will receive no tangible benefit from this payment of tens of millions of dollars: it will not gain access to the Building, nor will it have paid for some services previously provided.[111] The few Alaska cases granting estoppel against the government demonstrate that 716's massive claim clearly constitutes "significant prejudice" to the public. For example, in *Schneider*, the Alaska Supreme Court found it to be "[o]f primary importance" that any public injury

[111] 716 references two letters from the Alaska Bankers Association and a lawyer from a private law firm that identified potential negative consequences from a non-appropriation, including impacts to the State's credit rating. *See* 716 Br. at 35–36 & n.128 (citing [R. 1276–1277]). 716 fails to mention that these letters were sent in April 2015 after the Senate Finance Subcommittee recommended non-appropriation for the Lease. [R. 1276–1277]. That is, these letters predated the non-appropriation at issue here by *more than a year*, and the Legislature was therefore well aware of these concerns when it decided that non-appropriation was, on balance, in the public's best interest. Further, there is no evidence that these concerns have materialized.

from applying the doctrine of estoppel would be "quite limited" where an improper zoning decision would not lead to the violation of any health or safety codes, and the proposed structure would have satisfied the zoning terms that were in effect just a month earlier.[112] Likewise, in *Crum v. Stalnaker*, estoppel was permitted when the doctrine would cause "no harm to the public."[113] The *Earthmovers* Court awarded less than $30,000 in out-of-pocket costs, finding that it would be unfair to the public to require the agency to bear the remainder of the plaintiff's $258,297.67 claim.[114] In *Stenseth*, estoppel was enforced where the municipality's agents improperly entered into a settlement agreement that was $20,000 lower than their authority.[115] 716's claim is more than 1,000 times larger than the typical estoppel claim permitted by the Alaska Supreme Court. The magnitude of the claim makes this a difference in kind, not merely degree. Forcing payment of $37 million from the public coffers for a building that the public will get no future benefit from would significantly prejudice the public interest.

In *Office of Personnel Management v. Richmond*, the United States Supreme Court dealt squarely with the issue of whether a private litigant could use an estoppel

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[112] *Schneider*, 685 P.2d at 98.

[113] 936 P.2d 1254, 1258 (Alaska 1997) (holding that estoppel required Teachers' Retirement System to accept teacher's application for unused sick leave credit).

[114] *Earthmovers*, 765 P.2d at 1371.

[115] *Stenseth*, 361 P.3d at 909 (finding "little injury to the general public" due to the $20,000 error); *see also Allen v. State, Dep't of Health & Soc. Servs.*, 203 P.3d 1155, 1164 (Alaska 2009) (stating in dicta that an overpayment of food stamps to a household would likely qualify for estoppel); *Grunert v. State, Commercial Fisheries Entry Comm'n*, 735 P.2d 118, 124 (Alaska 1987) (Matthews, J., dissenting) (concluding that requiring the issuance of one more fishing license would not prejudice the public interest).

theory to obtain monetary payments from the government that were not otherwise permitted by law.[116] The claimant had received erroneous advice from a government official regarding certain eligibility requirements that must be met before certain benefits would be impacted. In reliance on that advice, the claimant took on extra work that caused his income to exceed the relevant eligibility requirements for the benefits at issue.[117] Assuming "that much equity subsists in respondent's claim," the Court found that no estoppel against the federal government was possible where the claimant sought public funds that were contrary to a statutory appropriation.[118] Relying upon the Appropriations Clause of the U.S. Constitution,[119] the Court found that "judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized."[120] After noting that "not a single case has upheld an estoppel claim against the Government for the payment of money,"[121] the Court explained that the Appropriations Clause ensured that "public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to

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[116] 496 U.S. 414 (1990).
[117] *See id.* at 417-18.
[118] *See id.* at 416, 423–24.
[119] *See id.* at 424 (citing U.S. Const. art. I, § 9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). This clause largely mirrors the corresponding clause in article IX, section 13 of the Alaska Constitution: "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."
[120] 496 U.S. at 426.
[121] *Id.* at 427.

the individual favor of Government agents or the individual pleas of litigants."[122] If government officials, through mistaken or otherwise unauthorized statements or promises, were able to obligate the Treasury to pay funds, then the control over those public funds would be transferred to those government officials instead of the legislative body.[123] This is unacceptable.

Here, the Legislature made these difficult judgments as to the common good and determined that no future appropriations should be made for the Lease. 716 asks this Court to override the Legislature's difficult judgments because risks that 716 voluntarily incurred through the Lease have come to pass. In particular, 716 accepted the risk that the Legislature may not appropriate funds for the Lease at any point. 716 also accepted the risk that it would need to locate a replacement tenant within 90 days if the Legislature exercised this non-appropriation right and LAA accordingly exited the Building. Forcing the Legislature to pay more than $37 million of public funds for the benefit of a private developer during this financial crisis would significantly prejudice the public interest and reduce funds that would otherwise be available for numerous other legislative priorities.

D. 716 Failed to Establish It Incurred $37,016,021 in Damages.

716's lead damages argument improperly reverses the burden of proof. Specifically, 716 faults the Procurement Officer's decision for failing to point to evidence in the record that $37,016,021 was not spent on the project.[124] It is not, of course, the

[122] *Id.* at 428.
[123] *See id.*
[124] *See* 716 Br. at 31.

agency's burden to prove a negative. It was 716's burden to establish the amount of its damages, with supporting documentation, but 716 failed to satisfy its burden.

716 cites to seven places in the record where it purportedly showed that it had spent $37,016,021 on the project,[125] but none actually does so.

First, 716 cites to its certification that the supporting data was accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which 716 believes the State is liable.[126] The contractor's self-serving certification is obviously not a substitute for providing supporting evidence.

Second, the Bratslavsky cost study was a "cursory review of the contractor's cost estimate" that was performed in October 2013—*before the construction was performed.*[127] It necessarily cannot establish or verify that any particular amounts were spent on the construction.

Third, Mike Buller's affidavit does not establish how much was spent on the project, but just says that "the cost of construction and the internal mark-ups for development and overhead were commercially reasonable and consistent with a reasonable range of market costs[.]"[128]

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[125] *See id.* at 31–32.
[126] [R. 19]; Alaska Legislative Procurement Procedures § 350(a) (rev. Nov. 21, 2013). A copy of the procedures can be found at https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=97814.
[127] [R. 378]; [R. 22] (noting that the report was delivered in the fall of 2013).
[128] [R. 22].

Fourth, Mr. Pfeffer's affidavit post-dates the Procurement Officer's decision and effectively concedes that 716 failed to provide this information when it was required.[129] He goes on to say that he believes the damages are "$37 million" because "[t]he budget that was submitted for the project, *with the exception of the contingency for construction and interim relocation of the offices*, was mainly based upon contractual commitments and is a fair representation of 716's actual investment in the Project."[130] This is essentially a reiteration of the uninformative contractor's certification, except that Mr. Pfeffer now states that some of the contingencies in the budget materials may have been inaccurate in some undefined way. This fails to establish what was spent on the project or to permit the agency to substantiate any of the claimed damages.

Fifth, the "cost summary" presented as a one-page spreadsheet is for a budget that was submitted on September 18, 2013—*before the construction was performed.* It does not establish or verify that any particular amounts were spent on this project.

Sixth, the Waranzof appraisal is merely an "estimate[] of probable cost" for the project, and therefore does not and cannot establish how much was actually spent on the project.[131]

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[129] [R. 1020–1021].
[130] *Id.* (emphasis added).
[131] 716 Br. at 31. Further, the Waranzof appraisal expressly confirms that no other use of its appraisal is anticipated. [R. 270]. It was not intended to show how much was spent on the project.

Finally, the Estoppel Certificate simply says that the work was performed "to the satisfaction of the Tenant."[132] It says nothing about how much was spent on the project, nor does it provide any mechanism for LAA to verify the claimed damages.

716 faults the Legislative Council for failing to provide a hearing where this evidence could have been presented,[133] but 716 is not entitled to a third bite at the apple. 716 was required to submit its damages evidence with its original contract claim. Having failed to do so, and having been directly informed of that failure, 716 inexplicably failed to present the required information during its appeal to the Legislative Council. Neither the Procurement Officer nor the Legislative Council was required to take 716 at its word that it really spent $37,016,021 on the project and should be compensated accordingly.

The agency proceeding is supposed to afford the Procurement Officer a fair opportunity to evaluate the claimed damages and ensure that the claimant is not seeking reimbursement for funds it never expended in the first place—for example, hundreds of thousands of dollars in "contingency funds" as claimed by 716. Indeed, under State law, a claimant that misrepresents its damages in connection with a contract claim like 716's forfeits all claims relating to that contract and is liable to the State for reimbursement of all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented.[134] By failing to present any evidence of the amounts it actually spent on the project, 716 deprived the Procurement Officer (and the Legislative

[132] [R. 634].
[133] *See* 716 Br. at 32.
[134] *See* AS 36.30.687(a)(1), (2).

Council and this Court) of a fair opportunity to determine what damages might have been owed and to ensure that 716 had not exaggerated its claim.

Even so, it is clear that 716's claim does overstate its damages because it fails to account for two objective facts. Leaving aside the absence of any evidence to show that 716 attempted to mitigate its damages,[135] 716's claim for every penny that it purportedly spent on the project necessarily ignores the residual value of the Building. As noted by the appraiser that 716 relies heavily upon, it is a mistake to "ignore[e] the residual value of the building at [the] end of [the] occupancy" because the appraiser estimated that the Building could be sold for tens of millions of dollars even after having been used for 10 or more years.[136] 716 ignores this residual value and attacks a straw man, claiming that the Procurement Officer's decision assumes that 716 cannot have suffered *any* monetary loss if 716 continued to possess the Building.[137] That is not what the decision says. The decision notes that the Building is a highly valuable commercial building that can be leased or sold, and that the Contract Claim seeks the full value of all work performed as though the Building had no residual value.[138] That is, 716 clearly overstated its loss by failing to account for the residual value. Further, the decision correctly notes that 716 received exactly what it bargained for because it obtained an upgraded Building in

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[135] 716 provided no such evidence to the Procurement Officer, only during the appeal to the Legislative Council. *See* 716 Br. at 32.
[136] [R. 1512] ("Waronzof appraisal contained three future value estimates (see page 103); more conservative two put year ten value at a range of from $24.6 million (generic tenants) to $34.6 million (other government tenants)."); [R. 363–367].
[137] 716 Br. at 33.
[138] [R. 750].

downtown Anchorage, with LAA as a paying tenant for a period of time, and therefore 716 was not prejudiced by LAA's termination of the Lease.[139] Even if there was some monetary loss because 716 could not ultimately sell the Building for what it had paid into it, this is not "prejudice" because 716 obtained exactly the rights and benefits it was supposed to receive under the Lease.

The second objective fact ignored by 716's damages claim is the fact that LAA paid more than $6 million in rent during its tenancy.[140] 716 received millions in benefits under the Lease, yet it seeks damages as though LAA never paid anything. 716's demand thus overstates its damages because it fails to account for LAA's substantial payments.

716's concession that, at the time it filed its claim, it knew only that it was likely to suffer damages of at least $9 million, proves that the Procurement Officer's decision was correct.[141] 716's claim for more than $37 million when its actual confirmable losses were only roughly $9 million shows that 716 had failed to account for the residual value of the Building and LAA's millions in payments. 716 speculates that it could face larger losses due to claims by its lender, but those losses are a function of 716's failure to find a replacement tenant despite having months to do so. This was a risk that 716 voluntarily accepted when it entered into the Lease. 716 cannot make LAA—or the State—into the guarantor of risks that 716 accepted as part and parcel of its bargain. Further, 716 has apparently taken the position that its potential recovery in this lawsuit cannot be claimed

[139] [R. 746–767].
[140] [R. 750] (noting that LAA paid $6,059,759.55 in rent during its tenancy up through October 2016, plus $7.5 million in tenant improvements).
[141] *See* 716 Br. at 33.

by its lender.[142] In other words, if 716 recovers $37 million from its lawsuit here, it expects to retain that money (less the $9 million in damages that 716 asserts it will lose under any workout or purchase scenario). 716 is not entitled to a windfall here, and it has utterly failed to establish its damages.

E. 716 Did Not Reasonably Rely on LAA's Representations Regarding the Validity of the Procurement Process.

716 did not reasonably rely on LAA's statements regarding the validity of the Lease. Contrary to 716's claims, it did not merely "participate[] in the lease negotiations."[143] Rather, 716 performed its own independent assessment and extensive legal analysis of the governing procurement procedures and satisfied itself that the Lease was valid. This independent conclusion undermines 716's claim that it relied upon LAA's statements. Further, 716 admits that it was on direct notice of the anticipated legal challenge to the Lease's validity within weeks after the Lease was signed but proceeded with construction anyway. Under these undisputed facts, 716 did not rely upon LAA's statements regarding the Lease's validity.[144]

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[142] *See Everbank v. 716 W. Fourth Ave., LLC*, Case No. 3AN-17-06341CI, Complaint ¶ 65 ("716 has asserted to EverBank that the Procurement Claim [for $37 million] is not collateral securing the obligations of 716 under the Note, Deed of Trust, Assignment and other loan documents."). The Court may take judicial notice of other pleadings filed in this jurisdiction.

[143] 716 Br. at 20.

[144] The Legislative Council acknowledges that there are potential fact disputes that could arise with respect to this portion of the Procurement Officer's decision. That is why the Legislative Council did not argue, in connection with 716's motion for a *de novo* hearing, that this issue would necessarily be resolved as a matter of law—as would the legal issues of non-appropriation, the public interest element of any estoppel claim, and LAA's payment of all amounts owed under a *quantum meruit* analysis. Nevertheless, there are

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716 performed its own independent procurement analysis—in fact, it performed two—and came to its own independent conclusion that the Lease satisfied all of the procedural requirements to be valid.[145] As 716's in-house counsel, John Steiner, confirmed again in his affidavit, "the [Procurement Officer's] Decision is correct that I stated [my] belief that the Alaska Procurement Code made the transaction exempt from all procurement rules other than AS 36.30.080, which only requires approval by the Legislature if total lease payments are to exceed $2,500,000."[146] This was consistent with his view, as communicated to 716, in the months prior to 716 entering into the Lease.[147] In fact, Mr. Steiner went further and explained that he "did not then, however, and do[es] not now, believe there was any need to comply with the below market value extension requirements of AS 36.30.083."[148] He continued: "It was my opinion that under AS 36.30.080, once the full legislature approved the Lease by appropriating the first year's payment, any other possible issue relating to procurement became legally moot."[149] According to his analysis dated July 24, 2013,

> [e]xemption from competitive procurement based on a written determination under Alaska Legislative Procurement Procedures Section 40(a) would eliminate any concern about compliance with the competitive solicitation under past

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undisputed facts here that make it appropriate to affirm the agency decision on this "reliance" ground as well, if the Court has not already affirmed on one of the other grounds listed above.

[145] [R. 736] (citing [R. 816–822]; [R. 823–824]).
[146] [R. 1014–1015] (¶ 3).
[147] [R. 814].
[148] [R. 1015] (¶ 3).
[149] [R. 1015] (¶ 4).

> practice and the Alaska Legislative Procurement Procedures. That exemption would thus, also eliminate any need to accomplish the proposed enlargement and renovation of the existing space under AS 36.30.083 in order to justify not issuing a new competitive solicitation.[150]

Notably, 716 provided its independent analysis to LAA's legal counsel "[b]ased on [LAA's counsel's] concern as to any possible procurement implications of our transaction plan for the Anchorage LIO lease amendments[.]"[151] That is, 716 was seeking to persuade LAA that there were no procurement statute obstacles with the transaction—not the other way around.

The upshot of 716's independent analysis was that (1) if the Legislature appropriated the first year's payment for the Lease, then AS 36.30.083 was irrelevant and did not need to be satisfied for the Lease to be valid, and (2) if the Procurement Officer made a written determination under Section 40(a) of the Legislative Procurement Procedures, then the rules regarding competitive procurements (including AS 36.30.083) would not apply. Accordingly, the Procurement Officer's findings and Ms. Varni's statement regarding the Lease's compliance with AS 36.30.083 were irrelevant to 716 because 716 believed the statute did not apply whatsoever.

It is frankly disingenuous for 716 to claim that it relied upon "assurances" from the Procurement Officer about the Lease's compliance with AS 36.30.083 when 716 helped craft and edit those assurances itself. 716's "errata" on this point is, generously put, an understatement. While 716 originally claimed it had "no role" in preparing the

[150] [R. 824].
[151] [R. 816].

Procurement Officer's findings, it now states that it had "no role in preparing the findings, other than to volunteer a few editorial comments to a late draft, some of which were accepted."[152] Not so. On July 26, 2013, 716's principal, Mark Pfeffer, sent draft procurement findings to the Procurement Officer in an email entitled "BACK CHANNEL" and said that if 716's proposed findings were acceptable then he would have them sent to LAA's in-house counsel, Doug Gardner.[153] That is, the direction of these proposed assurances was from 716 to LAA, not vice versa. 716's proposed findings included a statement, purportedly on behalf of the Procurement Officer, that an award of the Lease to 716 was "in the best interest" of LAA and others. It went on to say that, in response to LAA's in-house counsel's concerns that the Lease should comply with AS 36.30.083, the Lease may be entered into consistent with the State Procurement Code and the Legislative Procurement Procedures.[154] 716 thus attempted to prepare its own assurances about the Lease's compliance with the State Procurement Code. The Procurement Officer ultimately used a different form of "findings," but just four days before those findings were signed, 716's Mr. Pfeffer was invited to—and did—provide comments that were incorporated into the final version.[155] Having helped draft the

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[152] *See* Errata for Opening Brief of Appellant at 1.
[153] [R. 1577–1581].
[154] [R. 1580].
[155] *Compare* [R. 713–721] (Procurement Officer's Sep. 16, 2013 findings), *with* [R. 1567–1576] (Mr. Pfeffer's Sep. 12, 2013 comments). Mr. Pfeffer apparently did not want his edits of the findings made public, since he sent the edits to the Procurement Officer's private email address and requested that Mr. Pfeffer's version not be forwarded to others. [R. 1567].

"findings," which 716's principal said "looks fine to me,"[156] 716 cannot claim to have relied on those assurances from the Procurement Officer.

716 next points out that LAA signed a Subordination and Non-Disturbance Agreement acknowledging that the Lease was in effect,[157] but this statement merely echoed the parties' understanding at the time and post-dated 716's procurement analyses (which did not rely upon that agreement). 716 also highlights the fact that LAA took occupancy of the Building in December 2014 and began paying rent as evidence that the Lease was valid.[158] But, as 716 acknowledges, these actions post-dated the Legislature's appropriation for the first year's payments of the Lease.[159] By then, according to 716's independent assessment, the procurement procedures—or any statements by LAA regarding the Lease's validity—were irrelevant. 716 was not relying on these actions because, in 716's view (as confirmed by sworn affidavit testimony), they did not impact the Lease's validity. 716's *post hoc* insistence that it relied on these and other statements or actions cannot be squared with 716's independent analysis and conclusion that these statements and actions were irrelevant. 716 cannot manufacture "reliance" after the fact.[160]

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[156] *Id.*

[157] 716 Br. at 20–21.

[158] *See id.* at 21.

[159] *See id.* (noting that LAA's payments in early 2015 "were by then appropriated by the full legislature in the FY 2015 budget" (citing [R. 630])).

[160] 716 complains that LAA should have defended the Lease's legality differently and this would have resulted in a different outcome, but this argument fails for several reasons. First, 716 had every opportunity to defend the validity of the Lease and raise any argument it wished. For example, despite Mr. Steiner's insistence that compliance with

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716 also admits that, before nearly all of the construction costs at issue were incurred, a property owner—James Gottstein—threatened to sue and obtain a declaration that the Lease was invalid.[161] Despite having such notice (which aligned with concerns 716's in-house counsel had previously raised[162]), 716 took no further effort to establish the validity of the Lease. 716 complains that the Procurement Officer's decision improperly concluded that Mr. Gottstein had given this notice "prior to the Lease being finalized," but the decision clearly says that the notice was provided weeks *after* the Lease was signed.[163] 716 also objects that Mr. Gottstein only provided this notice in late October 2013, rather than in early October.[164] Leaving aside that Mr. Gottstein offered

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(. . . continued)
AS 30.30.080 obviated any procurement issues, 716 did not raise the issue until a motion for reconsideration and the argument was rejected by Judge McKay. *Compare* [R. 1015] (¶ 4) *with* [R. 46–47] & n.3. 716 never appealed that ruling. Second, Judge McKay disagreed with 716's position that LAA's procurement process was entirely non-justiciable, finding that he could rule on the application of AS 36.30.083. [R. 36]. 716 speculates that Judge McKay would have ruled differently if LAA had taken a more aggressive stance on the justiciability issue, but 716 may be wrong, just as it was about the impact of the procurement procedures. In any event, LAA reasonably elected not to take a position with questionable legal support. Third, 716 appears to argue, albeit with no support, that LAA could expand its authority through rulemaking in a way that would obviate compliance with the State Procurement Code. *See* 716 Br. at 25. 716 does not explain how it arrived at this odd conclusion. Regardless, 716 did not rely upon LAA's statements regarding the Lease's satisfaction of AS 36.30.083 because 716 independently determined that the procurement rules did not apply.

[161] 716 Br. at 26–27.

[162] *See* [R. 736] (citing [R. 819]).

[163] *Compare* 716 Br. at 26 *with* [R. 737] ("Within three weeks after the Lease was signed, 716 was on notice of a challenge to the Lease's validity yet 716 proceeded with construction.").

[164] *See* 716 Br. at 11.

sworn testimony as to the timeline,[165] it is immaterial whether notice was provided in early October or late October 2013. The point is that 716 was on notice of this anticipated legal challenge to the Lease's validity—which echoed some of 716's own concerns—and did nothing about it. 716 had the opportunity to obtain clarity on the validity of the Lease before it purportedly spent tens of millions of dollars on the Building, but did not do so. Insofar as 716 *now* claims that it believed satisfaction of AS 36.30.083 was required—which contradicts 716's contemporaneous position—then Mr. Gottstein's litigation threats about procurement issues should reasonably have prompted 716 to get confirmation about the Lease's validity.

F. The Legislative Council Properly Heard the Appeal.

Finally, 716 recycles its baseless claim that the Legislative Council was biased.[166] This argument was implicitly and correctly rejected when the Court denied 716's motion for hearing *de novo*. 716 has never shown, nor meaningfully attempted to show, that the Legislative Council had a predisposition to find against 716 or that any member of the Legislative Council had a financial interest in the case or was otherwise biased. 716 cannot meet the "demanding standard"[167] to establish bias. Notably, 716 does not argue

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[165] [R. 851].

[166] *See* 716 Br. at 48–50. The bullet-point list that comprises most of this section is taken verbatim from page 29 of 716's Motion for Hearing *De Novo*.

[167] *Calvert v. State Dep't of Labor & Workforce Dev.*, 251 P.3d 990, 1006 (Alaska 2011); *see also Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) ("[A]gency personnel and procedure are presumed to be honest and impartial until a petitioner makes a showing of actual bias or prejudgment.") (citing *Earth Res. Co. v. State, Dep't of Revenue*, 665 P.2d 960, 962 n.1 (Alaska 1983)); *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

here that it was deprived of due process, but just argues that the Court should review the matter "with fresh and critical eyes."[168] 716's unsupported and rejected claims of bias do not change the undisputed factual record here, nor do they change the controlling law. The Legislative Council properly heard the appeal and properly decided that 716's $37 million contract claim failed as a matter of law.

IV. CONCLUSION

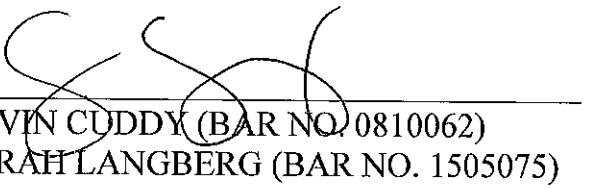
716's estoppel claim fails on multiple levels. The Legislature's non-appropriation triggered the termination of the Lease. 716 has already been paid all amounts owed under the Lease and cannot recover more based on an estoppel theory. Forcing the public to act as the guarantor of risks that 716 voluntarily incurred, and requiring payment of $37 million of public funds to 716, would significantly prejudice the public interest. 716 also failed to establish its damages here, and did not show that it reasonably relied on LAA's statements in light of 716's own independent assessments of the procurement process. For any and all of these reasons, the Legislative Council's decision must therefore be affirmed.

[168] 716 Br. at 50. Insofar as 716 claims that its oblique reference to due process issues when discussing the standard of review somehow incorporates any argument challenging the Legislative Council's review of the undisputed factual record, this is flatly improper under Appellate Rule 212(c)(4). *See id.* at 4 & n.13.

DATED: October 6, 2017

Respectfully submitted,

STOEL RIVES LLP



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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.	Appeal Case No.: 3AN-16-10821CI

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LEGISLATIVE COUNCIL'S APPELLEE'S BRIEF

In accordance with Alaska R. App. P. 605(a)(4), this certifies that on October 6, 2017, I caused to be filed with the Court via hand-delivery/courier service the original Brief of Appellee Legislative Council together with this original Certificate of Service and Font.

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