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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaskan corporation, Plaintiff, v. 716 WEST FOURTH AVENUE, LLC, and LEGISLATIVE AFFAIRS AGENCY, and CRITERION GENERAL, INC., Defendants.	Case No. 3AN-15-05969 CI

LEGISLATIVE AFFAIRS AGENCY'S MOTION TO CONSOLIDATE ACTIONS UNDER CIVIL RULE 42(a)

I. INTRODUCTION

Defendant Legislative Affairs Agency ("LAA") requests that the Court consolidate this proceeding with a recently-filed administrative appeal that involves numerous common essential questions of law and fact. The new case is *716 West Fourth Avenue, LLC v. Legislative Council*, Case No. 3AN-16-10821CI. It is essentially a continuation of this lawsuit because its claims wholly depend on orders from this Court

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as part of this suit, and in turn its outcome may affect the validity of this Court's prior orders in this suit. Both cases relate to LAA's former lease with 716 West Fourth Avenue, LLC ("716") for office space in Anchorage (the "Lease"). Consolidating these two cases will avoid inconsistent rulings, and promote efficiency and judicial economy. As explained below, it is vital that these two cases be litigated concurrently so as to avoid inconsistent rulings on dispositive factual and legal issues. Otherwise, one court could theoretically find that LAA faced no harm or prejudice from a ruling on the legality of the Lease, while another court could simultaneously find that LAA suffered more than $37 million in damages as a direct result of this Court's Lease legality ruling – as 716 now asserts in its administrative appeal. Consolidation will avoid this inconsistency.

Consolidation is appropriate and available here because this case is still live. Although this Court previously issued an order granting Plaintiff's summary judgment motion on the Lease's legality, no final judgment has been issued under Civil Rule 58.[1] Accordingly, this lawsuit remains pending before this Court to address future developments, including 716's administrative appeal based on this Court's prior orders in this case.

[1] "A decision granting a motion for summary judgment is not a final judgment under Civil Rule 58." Civil Rule 56(c); *see also* Civil Rule 58; *see, e.g., Schneider v. Pay'N Save Corp.*, 723 P.2d 619, 622 (Alaska 1986) (even where summary judgment order granted all requested relief and no further claims were pending, lawsuit remained pending for more than 13 months until final judgment was entered).

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Consolidation is critical because 716's recent claim depends on this Court's earlier rulings in this case, which themselves may no longer be based on accurate facts due to 716's recent claim. Beginning in February 2016, the Legislature took steps to exercise its right not to appropriate sufficient funds for the Lease, which would have the effect of terminating the Lease. In its administrative claim, however, 716 asserts that the Legislature lost its ability to exercise its constitutional (and contractual) non-appropriation authority when the Court ruled in March 2016 that the Lease is illegal and denied 716's motion for reconsideration in May 2016 ("Lease Extension Orders").[2] 716 claims that the Lease Extension Orders (1) automatically terminated the Lease, (2) prevented the Legislature from terminating the Lease through non-appropriation, and (3) entitle 716 to payment of more than $37 million of public funds.[3] But this Court's Lease Extension Orders were only possible because the Court denied LAA's earlier motion for summary judgment under the laches doctrine due, as the Court explained, to a perceived

[2] *See* Exhibit A, 716's Appeal of Procurement Officer's Decision on Contract Claim (Oct. 31, 2016) at 14 ("Even if, for the sake of argument, the insufficiency of appropriation would have served as a valid basis for termination . . . , the LAA cannot rely on the contract itself nor the act of non-appropriation to excuse its responsibilities under 716's estoppel theory. The Court decided that the lease was not valid based on the LAA's earlier procurement violation, and the Legislature cannot escape responsibility for 716's damages caused by LAA's procurement violation by claiming thereafter to have terminated the invalid Lease under authority of the Lease.").

[3] *See id.* ("Once the court had declared the Lease invalid for procurement reasons, there was no valid contract – the LAA is not free to pick and choose which clauses it will honor and which it will ignore. Nor can it deprive 716's right to seek redress simply by not appropriating one year's rent."). To be clear, LAA believes that 716's claim is fundamentally flawed for a number of reasons that will be addressed shortly.

lack of prejudice or harm to LAA from any ruling on the legality of the Lease. However, if 716's recent claim is found to have merit (and if 716 is found to be entitled to damages), then LAA will necessarily have been harmed by Plaintiff's undue delay in bringing suit.[4] This would constitute a key change in the factual underpinnings of this Court's January 2016 order denying summary judgment to LAA (the "Laches Order"): the basis for this Court's prior order denying application of the laches defense would disappear. If the laches defense is now applicable based on the presence of both undue delay and harm flowing from that delay, then the Court should vacate its Lease Extension Orders. This would automatically reinstate the Lease as of the March 24, 2016 date of the Lease Extension Order. Reinstating the Lease would in turn render meritless 716's argument that non-appropriation was not available to the Legislature since that argument depends on the Lease having been invalided.

Clearly, this Court's Laches Order and the Lease Extension Orders, as well as 716's recent administrative appeal – which both relies on and undermines those orders – are intricately interrelated. Because the outcomes of these various issues are so deeply

[4] The prejudice flowing from 716's administrative appeal would be tied to ABI's undue delay because this Court already ruled that ABI's delay was necessarily unreasonable if damages were being requested for the period when the construction was ongoing (i.e., the Fall of 2013 through the filing of this lawsuit) – which is precisely the time period for 716's $37 million claim for damages. LAA notes that, in the unlikely event that 716's claims in the administrative appeal are adjudged to have any merit, application of the laches doctrine would not result in LAA returning to the building. LAA terminated the Lease pursuant to its non-appropriation authority in October and has since relocated to other office space.

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intertwined and dependent on one another, consolidation would provide the most straightforward way for one court to make sense of all these issues, saving both judicial and legal resources. LAA is thus simultaneously filing a motion for relief from this Court's prior Lease Extension Orders and the Laches Order in hopes that this Court will address in tandem 716's administrative appeal and the legal consequences for this Court's prior orders that may flow from it. Without consolidation, not only does this Court risk insistent rulings, but it also risks having to revisit its prior orders piecemeal in response to LAA's motion for relief from them based on the changed circumstances that may result from 716's administrative appeal.

II. PROCEDURAL AND FACTUAL HISTORY

Plaintiff brought this lawsuit challenging the validity of the Lease on March 31, 2015.[5] LAA moved for summary judgment based on the laches doctrine because (1) Plaintiff waited an unreasonable length of time to bring the lawsuit, and (2) that delay caused harm or undue prejudice to LAA.[6] When ruling on the motion, the Court found that Mr. Gottstein (Plaintiff's owner and counsel) "was aware of the potential illegality of the contract within weeks of its announcement [in September 2013]. Yet he waited seventeen months and until the completion of the project to bring suit."[7] The Court ruled

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[5] Order Denying Motion for Summary Judgment re: Laches at 2 (dated Jan. 7, 2016) (Laches Order).

[6] *See id.* at 3. 716 joined LAA's motion.

[7] *Id.* at 6.

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that Plaintiff's delay in bringing the lawsuit "seems 'unreasonable'" and may justify application of the laches doctrine depending on the harm suffered by the Defendants.[8] The Court also noted that it would have found the delay unreasonable if damages were being sought for the period from the Fall of 2013 through early 2015.[9] This period matches almost exactly the construction period for the project,[10] which is the basis for 716's contract claim in its recently filed administrative appeal.

Despite the unreasonableness of Plaintiff's delay in bringing its lawsuit, the Court determined that laches would not yet apply because "there are material questions of fact as to the continuing harm suffered by the two defendants."[11] The Court concluded that summary judgment was not appropriate at that time based on its finding that "neither the LAA nor 716 have conclusively established that it will be harmed by a court ruling on the legality of the LAA/716 lease extension agreement."[12] The Court further noted that it would be inappropriate to grant summary judgment in favor of LAA because of "material questions pertaining to the extent of harm the LAA may suffer," including whether there would be any harm at all in light of the non-appropriation right under the Lease.[13]

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[8] *See id.* at 4, 6-7.

[9] *See id.* at 7.

[10] *See id.* at 1 (noting that construction began in December 2013 and was completed around January 9, 2015).

[11] *See id.* at 9.

[12] *Id.*

[13] *See id.* at 8.

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Accordingly, the Court found that the laches defense did not apply and went on to consider the validity of the Lease. On March 24, 2016, the Court ruled that the Lease failed to comply with the State Procurement Code.

On July 8, 2016, 716 submitted a "contract claim" as part of an administrative proceeding before the Legislature's Procurement Officer. 716 argued that the invalidity of the procurement for the Lease (as found by this Court) entitled 716 to payment of $37,016,021.[14] The Procurement Officer denied that claim for a variety of reasons, including that the Legislature had exercised its right not to appropriate funds for the Lease, thereby terminating LAA's obligations under the Lease. 716 appealed.[15] On November 20, the Legislative Council unanimously rejected 716's appeal. On December 20, 716 filed its administrative appeal in Superior Court. Among its points on appeal are that "[t]he Legislative Council erred in finding that it need not address a procurement claim based upon its flawed procurement process because of a subsequent legislative decision not to appropriate funds" and "[t]he Legislative Council erred in finding that the Alaska Constitution's appropriations clause or the non-appropriations clause of the Lease preclude any liability based upon estoppel for the flawed procurement process."[16]

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[14] A copy of 716's contract claim is available here: http://www.alaskajournal.com/sites/alaskajournal.com/files/files/716%20West%20Fourth%20Contract%20Claim(1).pdf.

[15] *See* Exh. A.

[16] *See* Exh. B, 716's Statement of Points on Appeal (Dec. 20, 2016), ¶¶ 6, 16.

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III. ARGUMENT

Where there is a common party and common issues of fact or law, "[a] motion for consolidation will usually be granted unless the party opposing it can show 'demonstrable prejudice.'"[17] "The court has broad discretion in determining whether consolidation is desirable."[18] Civil Rule 42(a), which provides for consolidation, should be invoked to "eliminate unnecessary repetition and confusion."[19] In deciding whether to grant consolidation, a court should consider:

> [W]hether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.[20]

No party will be prejudiced if these intertwined proceedings are consolidated because consolidation will guarantee consistent application of the law across the two cases. And, while the consolidated issues are complex, that pales in comparison to the confusion that would result if two different judges had to "ping-pong" these issues back and forth,

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[17] *Seguro de Servicio de Salud v. McAuto Sys. Group*, 878 F.2d 5, 8 (1st Cir. 1989).

[18] *Atlantic States Legal Foundation, Inc. v. Koch Refining Co.*, 681 F. Supp. 609, 615 (D. Minn. 1988) (citing C. Wright & A. Miller, Federal Practice and Procedure Civil: § 2382 (1971)).

[19] *Miller v. United States Postal Serv.*, 729 F.2d 1033, 1036 (5th Cir. 1984).

[20] *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)).

repeatedly adjusting their prior orders based on the other court's rulings. Consolidation should thus be granted for the reasons described below.

Here, there are common parties – 716 and LAA[21] – and there are essential common issues of fact and law, including:

- Whether LAA's exercise of its non-appropriation authority (either under the Alaska Constitution, the Lease, or both) effectively terminated the Lease, and whether it precludes any damages claim by 716 against LAA;
- Whether 716 can recover $37 million from LAA due to this Court's Lease Extension Orders, or whether 716's claim against LAA fails because it would significantly prejudice the public interest to pay a private contractor tens of millions of dollars for a building from which LAA no longer receives any benefits; and
- Whether LAA or 716 was, as a factual matter, harmed by this Court's Lease Extension Orders.

All of the above issues must be addressed in both the new administrative appeal and this lawsuit. 716's administrative appeal relies entirely upon its insistence that LAA must pay $37 million in damages as a direct result of this Court's Lease Extension Orders. If, in connection with the administrative appeal, a court determines that 716's claims have

[21] The nominal defendant in the new administrative appeal is the Legislative Council because that is the agency that ultimately denied 716's contract claim. The party being asked to pay more than $37 million is ultimately the Legislature, whether through the LAA or otherwise.

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merit, then LAA will have been harmed as a result of the Lease Extension Orders. This would trigger application of the laches doctrine in this lawsuit to remove that harm. Application of the laches doctrine would ensure that LAA is not subject to two inconsistent findings – i.e., that this Court's Lease Extension Orders both did and did not cause any harm to LAA.

Further, consolidation will improve judicial economy and avoid unnecessary repetition. In the absence of consolidation, the parties will likely be forced to litigate the same issues listed in the bullet points above and described in the Introduction in two separate proceedings before two separate courts. Aside from the waste of judicial (and the parties') resources associated with such duplication, litigating these issues in two courts would create a significant risk of inconsistent adjudications of fact or law.

In particular, 716's claim for relief in the administrative proceeding depends upon a finding that LAA *was* prejudiced by the Court's Lease Extension Orders. 716 insists that it relied upon the validity of the Lease procurement when 716 invested more than $37 million in assorted renovations, and that the Court's Lease Extension Orders triggered 716's right to recover that $37 million from LAA and the State. Based on the state of the factual record a year ago, this Court was unable to determine whether such harm existed to warrant applying the laches doctrine. If 716's claim in the administrative appeal is valid (which LAA vigorously disputes), then such harm will have been established. 716's claim is that it spent more than $37 million in construction-related costs that it would not have spent but-for the procurement at issue, and those costs would have been

largely or wholly avoided if Plaintiff had promptly brought its lawsuit. In other words, a finding of liability in the administrative proceeding would constitute the "harm" necessary for the laches defense to apply in this lawsuit. If no consolidation and relief from the Laches Order is ordered, then there is a risk that there will be an adjudication of "harm" arising from the procurement in the administrative proceeding, but inconsistent adjudications on the same issue in this lawsuit. Any inconsistent ruling would need to be addressed on appeal and, in all likelihood, on remand to this Court. The Court can avoid this waste of time and resources by ensuring that common factual and legal issues are treated consistently in a single proceeding.

It is likely that consolidation will not require any additional proceedings here. If, for example, LAA prevails in its argument against 716 that LAA properly exercised its constitutional non-appropriation authority and that 716 received all payments that it was owed under the Lease, then neither LAA nor 716 would have been "harmed" by the Court's ruling on the legality of the Lease and the laches doctrine would not apply. The Court would then not need to revisit the laches defense or make any additional findings in this lawsuit. In sum, consolidation is unlikely to cause any risks of prejudice or confusion here, and it would avoid potentially inconsistent rulings on dispositive common factual and legal issues.

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IV. CONCLUSION

Pursuant to Civil Rule 42(a), LAA requests that the Court consolidate the new administrative appeal (Case No. 3AN-16-10821CI) with this lawsuit because the two actions involve common parties and essential common questions of law or fact.

DATED: January 17, 2017

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CERTIFICATE OF SERVICE

This certifies that on January 27, 2017, a true and correct copy of the foregoing was served via First Class Mail on:

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October 31, 2016

HAND-DELIVERED

Senator Gary Stevens
Chair
Alaska State Legislative Counsel
State Capitol 429
Juneau, AK 99801-1182

Re: Appeal of Procurement Officer's Decision on Contract Claim

Dear Senator Stevens,

Pursuant to Section 360 of the Alaska Legislative Procurement Procedures, 716 West Fourth Avenue, LLC ("716") appeals the Procurement Officer's decision (the "Decision") on 716's contract claim, which arose from the contract awarded to 716 by the Legislative Affairs Agency ("LAA") for the Anchorage Legislative Information Offices ("LIO") 2013 Lease Extension ("Lease").[1] This appeal is filed with you in your capacity as Chair of the Legislative Council.[2]

The Decision is based on a factual narrative that the Procurement Officer acknowledges bears little resemblance to the facts on which 716 bases its claim.[3] As discussed below, 716 disputes much of the Decision's factual narrative because it is not supported by a fair consideration of all of the relevant evidence. As a result, the Decision's legal conclusions based on the narrative are erroneous. To resolve the disputed factual issues presented by

[1] The Procurement Officer's Decision is attached as Exhibit 55, pursuant to Section 360(b). Exhibits referenced in this appeal refer either to those submitted with 716's contract claim (Exs. 1-54), those attached to the Procurement Officer's Decision (Exs. A-U), or are provided as attachments to the appeal (Exs. 55-73).

[2] In this instance, the application of the Alaska Legislative Procurement Procedures results in this appeal being lodged with the same individual who authored the underlying decision on 716's contract claim because the Chair of the Legislative Council was both the Procurement Officer for the contract at issue and is required to hear appeals under Section 360.

[3] Ex. 55 at 5-10.

the Decision and this appeal, 716 requests an evidentiary hearing, pursuant to Sections 360 and 450 of the Legislative Procurement Procedures, to ensure that the fact-finder on appeal has a full and fair record of all of the relevant evidence that bears on 716's claim.

716 notes that Senator Stevens, on behalf of the LAA and Legislative Council, has now (1) been involved in negotiations that led to the contract dispute at issue here; (2) led Legislative Council discussions (and exerted editorial control over which information was available to the Council) that resulted in the Council's recommendation to the Legislature to not appropriate funds for the Lease; (3) acted as the Procurement Officer rendering the initial decision on 716's contract claim; (4) may, as provided by the Legislative Procurement Procedures, sit as the hearing officer on the claim appeal; and (5) will be a material witness at the fact hearing in this matter. Given these multiple and conflicting roles, 716 respectfully requests that Senator Stevens recuse himself and appoint a hearing officer pursuant to Section 450(a) of the Legislative Procurement Procedures. Regardless of such a decision, 716 reserves all objections, constitutional and otherwise, it has to the procedures applied to its claim and the conduct of the LAA and Legislative Council more generally in this appeal.

Further, 716 requested a stay and an extension of time of either 90 days or three weeks for the filing of this brief. The LAA granted an extension of 11 days, and granted the extension only 24 hours before the brief was originally due. This minimal extension, provided at the eleventh hour, did not provide 716 a meaningful opportunity to gather additional evidence in support of its appeal. Thus, 716 is filing this brief based on the information to which it currently has access. The filing of the brief does not moot 716's request for a stay, however. 716 renews its request for additional time and an opportunity to supplement this brief for the reasons set forth here, as well as those articulated in its request for a stay and extension of time.

The Decision identifies four grounds for the denial of 716's claim:

(1) the Appropriations Clause of the Alaska Constitution (art. IX, § 13) excuses the LAA's abandonment of the Lease;

(2) the appropriations clause of the Lease itself excuses the LAA's abandonment of the Lease;

(3) 716's estoppel claim fails based on numerous factual assertions made by the Procurement Officer; and

(4) 716's claim for damages fails entirely because, based on the preceding three grounds for denial, "no damages are owed."[4]

Below, 716 addresses the factual errors in the Decision and the legal errors in each of the proffered grounds for the denial.

I. The Factual Errors in the Decision Require a Hearing.[5]

The Decision is premised on facts and assertions that were not raised or set forth in 716's original claim. Many of those facts are in dispute. Among the factual issues that are disputed and on which 716 would present additional relevant evidence at a hearing are the following:

A. Whether the LAA relied on the Superior Court's ruling as a basis for its decision to abandon the lease.

The Decision's proffered rationale that the LAA relied on both the appropriations clause of the Alaska Constitution and the non-appropriations clause of the Lease to abandon its commitments to 716 is incorrect and conflicts with the LAA's documented statements and representations in this matter. In effect, the Decision rewrites history, omits relevant facts, and all but ignores the basis for the claim filed by 716.

The Superior Court determined in *Alaska Building, Inc. v. 716 West Fourth Avenue LLC* (the "ABI Lawsuit") that the 2013 lease extension was invalid due to the LAA's failure to conform its award of the Lease Extension to the requirements of the State's procurement code.[6] The LAA's first clear statement that set forth its reasoning for abandoning its commitments to 716 occurred on May 16, 2016, when the LAA's outside counsel advised EverBank, 716's primary lender, that: "In the absence of a valid lease [because of the

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[4] Ex. 55 at 1-2.

[5] As a matter of due process, the Legislative Council should consider whether it can provide a fair hearing in this matter given its involvement in the dispute. *See* AS 44.62.750(b).

[6] Anchorage Superior Court Case No. 3AN-15-05969CI. Specifically, the Superior Court found the award failed to meet the requirements set forth in AS 36.30.083(a). The LAA's current reading of the Court's order as something other than final judgment in the matter is without legal basis. The order specifically stated, "The court further enters, as the final appealable order, a declaratory judgment that the lease is invalid based on the lease's non-compliance with AS 38.30.038(a)." Moreover, counsel for the LAA acknowledged on its behalf that the timeline for this claim ran from the date Judge Patrick McKay denied 716's Motion for Reconsideration. *See* Ex. 4.

court's rulings], LAA will have no choice but to vacate the property and to secure alternate premises in due course."[7]

Thus, while the Decision asserts that the LAA's motives were budgetary and longstanding, that claim is at odds with the LAA's own statements of record.[8] The Decision's alternate rationale, advanced for the first time, is based on references to: (1) ongoing discussions in the Legislature in 2015 regarding the possibility of not appropriating funds for the Lease ("members of the Legislature . . . reviewing the Lease and publicly assessing whether those costs were justifiable");[9] and (2) the Legislative budget and newspaper articles. Neither of these is as probative and conclusive as are the LAA's own statements of its position and of its reasons for abandoning its Lease commitments, communicated expressly by its counsel. The relationship between the Legislature and 716 was based upon a written contract. Reliance on legislators' informal statements to the press or even statements made during proceedings that did not result in legislative action do not rise to the same level or quality of notice as direct communications between the parties and their counsel.

With this appeal, 716 submits facts and information that directly contradict the narrative relied on by the Decision, as well as the LAA's own past statements that were previously provided with 716's claim.[10] This information is presented in the form of affidavits from 716's Principal, Mark Pfeffer; its outside counsel, Donald W. McClintock; Pfeffer Development's In-House Counsel, John Steiner; and 716's Property Manager, Shea Niebur. 716 will present this additional evidence through sworn testimony and cross-examination that expands on the facts set forth in the affidavits at an evidentiary hearing.

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[7] Ex. 6.

[8] This inconsistency is significant. As a fundamental matter, if the Lease was invalidated to such an extent that the LAA was no longer bound in contract to honor its obligations to 716 following the Superior Court's ruling, the LAA could not invoke select provisions of the defunct Lease after the Court's ruling (specifically, the non-appropriations clause) to excuse itself from its obligations to 716. The Decision's pivot to an appropriations argument is merely an attempt to sidestep 716's estoppel claim by resurrecting Lease provisions that it had already asserted were no longer in effect at the time the Legislature made its decision to abandon its commitments to 716. *See infra* at 14.

[9] Ex. 55 at 9.

[10] Such statements by the LAA should be dispositive on this issue, but to the extent the Decision attempts to disavow or ignore their legal significance, 716 should be provided an opportunity to fully develop the relevant facts through sworn testimony and cross-examination, and respond fully on this issue at a hearing.

B. Whether 716's Analysis of the Legislative Council's procurement process bears on the issue of 716's reliance argument and estoppel claim.

The Decision misapprehends and misstates the position of various agents of 716 about the procurement process carried out by the Legislative Council to secure the Lease. By selectively citing portions of several emails sent by Pfeffer Development's In-House Counsel, John Steiner, and 716's outside counsel, Donald W. McClintock, the Decision incorrectly asserts that both attorneys doubted the LAA's ability to enter a valid lease under the procedural avenue it chose and, based on the lawyers' engagement in the process, concludes that 716 did not rely on the Legislature's actions at all in entering the Lease. That conclusion, and the parsing of facts on which it is based, are incorrect.

The Decision erroneously assumes that the LAA's ultimate conclusion that the Lease complied with AS 36.30.083 was the sole basis for 716's reliance on the LAA.[11] To bolster this assumption, the Decision focuses on discussions between counsel for the LAA and counsel for 716 regarding the meaning and application of AS 36.30.083. That statute ultimately provided the basis for the Superior Court's ruling that the Lease was invalid. However, AS 36.30.083 was not the only, nor even the primary, matter of concern for 716 during lease negotiations.[12] Moreover, the LAA's ultimate conclusion that the Lease complied with AS 36.30.083 was not the sole basis for 716's reliance on the LAA. There also was a long series of actions taken by the LAA, the Legislative Council, and the Legislature that were intended to assure 716 that the Lease was valid. The history of those discussions, events, and actions, which largely was ignored by the Decision, is set forth in detail in 716's claim and summarized above.[13]

Importantly, as described in the attached affidavits of the lawyers whose communications are the focus of the Decision, and as explained in 716's claim, 716 reasonably relied on the LAA as a contracting party to the Lease to support and defend its own procurement processes.[14] 716 had no reason to believe the LAA would not fulfill its obligations and

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[11] In this respect the Decision is non-responsive to 716's claim, as the Decision does not acknowledge or address the assertions and conduct of the LAA on which 716 asserts it relied on.
[12] McClintock Aff. ¶ ¶ 14-15; Steiner Aff. ¶ 2.
[13] Notwithstanding the Decision's assertion to the contrary (*see* Ex. 55 at 4 fn. 12), the factual history set forth in 716's claim is relevant and central to the reasonableness of its reliance on the LAA. One indication of the relevance of the history to 716's claim is the importance those same facts had to the Legislative Council. When the Legislature undertook consideration of the Lease, the Legislative Council asked Mark Pfeffer to attend its December 19, 2015 meeting to provide the background and factual history of the Lease to Council members. *See* Ex. A at 8-17.
[14] McClintock Aff. ¶¶ 9-10, 12; Steiner Aff. ¶¶ 6-8.

defend the Lease until May of 2016, when the agency suddenly shifted its position and litigation strategy in the ABI Lawsuit, and elected not to advance the sound legal argument and defense that its internal legislative processes were non-justiciable.[15] The LAA's decision not to advance this most basic argument allowed the Superior Court to review what should have been a non-justiciable controversy – the validity of the Legislature's internal processes – which then resulted in an avoidable adverse judicial decision that the LAA now claims as the post-hoc basis for its decision to abandon the Lease.[16]

C. The significance and content of the parties' negotiations regarding the non-appropriations clause of the Lease.

The Decision recounts negotiations between the LAA and 716 regarding payment for the first year of the Lease.[17] The Decision is mistaken as to the substance of those negotiations, as well as about 716's motivation in engaging in negotiations to secure the first year of rent on the Lease. As a result, the conclusion the Decision draws from those facts likewise is in error.

It always had been 716's belief and understanding that, for the Lease to be fully binding, the Legislature needed to appropriate the first year's rent pursuant to AS 36.030.080(c)(1).[18] However, the LAA signed the Lease when the Legislature was out of session and the first year's lease payment could not be appropriated until the spring of 2014. Accordingly, while not in an ideal position, 716 understood that it bore the risk that, after the notice required by the statute, the Legislature could elect not to appropriate funds, thereby invalidating the Lease. This resulted in a period of several months during

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[15] *Id.*

[16] The LAA's failure to defend its processes was material to the court's decision, which noted: "[d]espite 716's argument that the entire dispute is nonjusticiable, it would seem particularly inappropriate to fail to rule on the main issue in this dispute out of deference to a branch of government which is not asking for deference. It is this key fact that distinguishes this case from *Abood* or *Malone*." Ex. 1 at 10. The court ultimately concluded, "[b]ecause the legislature is not requesting such deference here, this court can review the lease's legality without concern that it is not showing due respect for an equal branch of government." Ex. 1 at 10-11. The Agency's refusal to ask for deference when it became politically expedient for it not to do so is in contrast to previous positions they took in the litigation. As early as June 29, 2015, the LAA argued, "Plaintiff also fails to address the Agency's adherence to the Alaska Procurement Procedures as provided by AS 36.30.020. Consistent with those procedures, the Procurement Officer made a written determination that material modifications were appropriate as part of the Lease Extension for a host of fact-specific reasons." Ex. 56 at 7.

[17] *See* Ex. 55 at Section III.B.3.

[18] Steiner Aff. ¶ 4; McClintock Aff. ¶ 15.

which 716 was required by the LAA to begin work at substantial cost to 716, without any guarantee that the Legislature would ultimately appropriate funds.[19]

Due to this uncertainty and risk, which the Lease placed entirely on 716, the parties negotiated a reimbursement clause that would have provided 716 less than its anticipated out of pocket expenses for that period, but provided at least a partial remedy had the Legislature chosen not to appropriate funds in support of the Lease.[20] However, 716 believed and understood that the first year's rent, once appropriated, constituted a clear commitment on the part of the Legislature to proceed with the project as agreed.[21] Certainly, had that appropriation not been made, and the Lease rendered ineffective before full performance by 716, the extent of 716's damages would have been substantially less than they are now.

The Legislative Council's meeting minutes from December 19, 2015 provide additional evidence corroborating 716's view of the non-appropriations clause.[22] At that meeting, 716 Principal Mark Pfeffer was asked to speak to the history of the Lease as well as his understanding of the non-appropriations clause.[23] Mr. Pfeffer explained that he was aware of the clause and its inclusion in many if not all government leases, but that there was an understanding among the investment and business community that it rarely, if ever is used, due to the impact it would have on future contracting with the State and the economics of most complex real estate transactions, which would be seriously impaired if government leases had to be viewed and negotiated as one-year agreements.[24] Who would or could enter into projects costing tens of millions of dollars if, despite the terms of agreement, the only certainty of performance was for a 12-month period?[25] And what would the added cost be to the State if each project had to be priced to account for the risk that a project intended to last a decade could be terminated after a year?

The existing record in this matter, and additional facts and testimony that will be presented at a hearing, reflect that the revised history on which the Decision's conclusions rest, and which offers the non-appropriations clause of the Lease as the LAA's basis for terminating the Lease, is incorrect. Moreover, the Legislative Council's own records indicate that such clauses are seldom utilized due to the negative policy

[19] McClintock Aff. ¶ 15.
[20] Steiner Aff. ¶ 4.
[21] Steiner Aff. ¶ 4; McClintock Aff. ¶ 15.
[22] Ex. A.
[23] *Id.* at 13.
[24] *See* Exs. 57-58.
[25] Ex. A at 13.

implications of the State abdicating its lessee responsibilities to a private party.[26] Indeed, the only example of the use of the non-appropriations clause identified and discussed by the Legislative Council resulted in the State paying the lessor for its damages.[27]

D. The extent and legal and factual significance of any "notice" to 716 provided by the owner of the adjoining property, James Gottstein.

The Decision wrongly concludes that notice provided by local attorney and adjoining property owner James Gottstein (who was not a party to the Lease) in the form of his threats to sue 716 over alleged damage to the common wall his commercial property shares with the LIO building further diminishes 716's estoppel claim.[28] As a matter of law, fact, and logic, a third party's threats to sue or his general opinion on the Lease cannot provide "notice" in any meaningful manner that would be relevant to 716's estoppel claim.[29] Indeed, the Decision cites no legal authority at all for this remarkable proposition. Further, the Decision is mistaken in its recounting of the facts on this issue.

Mr. Gottstein first approached 716 about concerns he had with the common wall between the two properties on or about October 10, 2013.[30] His contact was prompted by a request on behalf of 716 to address a gas meter connection between Mr. Gottstein's building and 716's property that arose on the prior day, on October 9, 2013.[31] Discussions with representatives and lawyers for 716 continued for some time regarding the scope of access Mr. Gottstein was willing to allow, the indemnity obligations 716 would owe him, and the status of the party wall between his building and the construction work to be done on the 716 property. These discussions continued on October 23, 2013, when his engineering representative contacted 716 project personnel to review construction drawings.[32] On the following day, October 24, Mr. Gottstein sent a revised agreement to 716 for review.[33] It was not until a subsequent meeting on Monday, October 28 with Donald W. McClintock, outside counsel for 716, that Mr. Gottstein first suggested that the lease was illegal, and attempted to use the threat of litigation of that

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[26] *See infra* at fn. 114.
[27] *Id.*
[28] Ex. 55 at 7-8.
[29] Certainly, the contract is the vehicle for such notice; otherwise, no contract could be enforced in the face of third party interference. Here, as a contractual matter, the LAA consistently expected 716 to meet its obligations in a timely manner.
[30] McClintock Aff. ¶ 6.
[31] Ex. 59.
[32] McClintock Aff. ¶ 7; Ex. 60.
[33] Ex. 61.

claim as leverage for his claims for compensation for potential damage to his building.[34] He later showed Mr. McClintock a draft of a letter to the Attorney General outlining his theories, but 716 does not believe the letter was ever delivered.

Mr. Gottstein's assertions about the legality of the Lease and any intent he had to sue the Legislature were discussed with 716 again on or about October 30, 2013. 716's response was clear and simple: 716 was willing to address any impacts of its construction on Mr. Gottstein's property, but it was not willing to negotiate the resolution of the claims for damage to his building in response to any threat he might make to initiate litigation over the Lease.[35] An Indemnity Agreement with Mr. Gottstein was signed on October 30, 2013, under which Mr. Gottstein was paid for agreed access and impacts to his property. Mr. Gottstein took no actions to pursue any claims involving the validity of the Lease until he filed his Complaint in Superior Court a year and a half later, on March 31, 2015, after 716's project was completed and the Legislature had taken occupancy of the building.

The Decision asserts that serious discussions about the validity of the Lease were held three weeks after the Lease was signed, in early October 2013. Although the Decision is mistaken in that assertion, even under the Decision's timeline by that time 716 already had closed on its purchase of the adjacent Anchor Pub property, as required by the Lease (on or about September 24, 2013). Thus, even under the Decision's inaccurate narrative, by the time Mr. Gottstein raised *any* claims about the validity of the Lease 716 already had committed $3,180,000 to the purchase price and closing costs of the project in reliance on the executed Lease.[36] Further, at the time of Mr. Gottstein's "notice" as alleged in the Decision, 716 already was contractually committed to a very tight schedule under the Lease with the risk of substantial liquidated damages for delay.[37]

It is notable that about this same time, public discontent over the LAA's decision to enter into the lease began to become apparent and a series of newspaper articles was published reporting on that issue. At no time did the LAA ever approach 716 to caution it that it had second thoughts about the validity of the process it had controlled and executed to enter into the Lease. Indeed, LAA remained steadfast in requiring that 716 continue to perform its Lease obligations on time. As would be expected, 716 responded to and relied on the LAA's actions and ongoing contractual relationship in fulfilling its continuing obligations under the Lease.

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[34] Gottstein's goal in the litigation was securing a $10 million payout for his property's proximity to the 716 project. *See* Ex. 62 at 89-90; (email from Gottstein – threat to go public?).
[35] McClintock Aff. ¶ 7.
[36] Ex.33; McClintock Aff. ¶ 3.
[37] McClintock Aff. ¶ 5.

E. The basis and significance of the Legislative Council's decision not to purchase the 716 Building.

The Decision misstates the facts surrounding the Legislature's potential purchase of the building in late 2015 and early 2016 on at least three points that are critical to the Decision's ultimate conclusion.

First, the Decision fails to detail the purchase negotiations that took place between 716 and the LAA prior to December 2015. Prior to entering the Lease, in August of 2013, the Legislative Council met to consider the specific proposed lease terms in executive session. When they came out of executive session the minutes reflect that there was no objection to moving forward and the only "new" action that was taken was a motion by Representative Johnson that the Chair attempt to negotiate a purchase of the building from 716.[38]

In the spring of 2014 the LAA requested, and 716 provided, a proposal for the sale of the building. The LAA failed to act on that proposal. Over a year later, after taking occupancy of the building, in the fall of 2015, the LAA requested that 716 craft yet another written proposal for sale of the building. 716 agreed to do so on the condition that its proposal be acted upon in the form of a written motion that would be put before the Legislative Council for consideration. The LAA agreed in writing to that condition on October 22, 2015.[39] Without any further communication to 716, on November 25, 2015, the LAA ignored its commitment to submit a motion and instead circulated a report that it had drafted without any third party analysis, entitled "Anchorage Legislative Offices Cost Comparison" which concluded that it would be much less expensive to move to the Atwood building than to continue the current lease or purchase the 716 property.[40]

Without notice to 716 the report was disseminated by Senator Stevens' office in advance of a December 4, 2015 Legislative Council meeting, where it was planned that LAA Executive Director Pam Varni would walk the Council through the report's findings.[41] On December 3, 2015, after reviewing the report, Michael Buller, the primary AHFC official involved in the project for the Legislature, sent Director Varni an email stating:

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[38] Ex. 29.
[39] Ex. 63.
[40] Ex. 64.
[41] Ex. 65.

> Pam I've left messages on both your cell and work phones. I will not attend the Leg Council meeting tomorrow. Unfortunately I cannot support the analysis of the options presented in your report to the Council and a public discussion at this time will only embarrass everyone involved.[42]

Attached to the email were notes from Tim Lowe, the appraiser who had originally appraised the 716 property upon completion, explaining the many inaccuracies and errors in the LAA's report.[43]

Despite being on notice that the report not only was flawed, but was so misleading as to be "embarrassing," Director Varni presented it, without any disclosures as to its known errors and inaccuracies, at the December 4, 2015 Legislative Council Meeting.[44] Indeed, when Senator Kevin Meyers posed a question regarding what advice AHFC had provided in the past on the existing Lease, and then noted that "we don't hear much about Alaska Housing," Director Varni did not take the opportunity to inform the Legislative Council that AHFC was aware of the LAA's report and was adamantly opposed to the numbers and analysis that it contained as well as Director Varni's decision to provide the inaccurate information to the Council.[45] The decision to leave Council members in the dark about the views of their designated consultant, AHFC, is beyond baffling. Only in response to a request from State Representative Herron more than a month after Director Varni presented the report to the Legislative Council did she disclose the email from Mr. Buller.[46]

The council elected table the matter and to reconvene on December 19, 2015, to further deliberate on the matter. At the December 19 hearing the Department of Revenue and representatives of the Alaska Industrial Development and Export Authority testified that they believed the lease to be cost competitive with the Atwood Building.[47]

The Decision goes on to misrepresent the contents of the motion passed by the Legislative Council on December 19, 2015, framing it as one that recommended "the

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[42] Ex. 66.
[43] *Id.*
[44] Ex. 65.
[45] *Id.* at 56-57.
[46] Ex. 67; *see also* Ex. A (Director Varni's misrepresentations by omission continued throughout the December 19, 2015 Legislative Council meeting where the LAA's analysis and cost comparison was discussed at length. Given multiple opportunities to provide the information she had from Mr. Buller, Director Varni remained silent, choosing to withhold information relevant to Council members' questions.).
[47] Ex. A.

non-appropriation of funds for rent in the upcoming fiscal year unless 716 was able to present a more cost-competitive option within 45 days that could garner adequate support."[48] This is a partial and misleading description of the motion. Indeed, the full motion provided:

> Legislative Council advises the Legislature not to appropriate for the 716 W Fourth Avenue lease *pending the outcome of the currently pending litigation or* unless negotiations *between counsel for the Legislature and a State entity* within the next 45 days result in a competitive cost on a per square foot of usable space basis.[49]

The Decision incorrectly states that this motion put the onus on 716 to "present a more cost-competitive option within 45 days."[50] It goes on to state that 716 "attempted to do so."[51] These unquestionably are misstatements. 716 never was obligated or asked to come up with a "cost-competitive option" in order to compete with its own property and leasehold, nor did it provide such an option.

What 716 did submit, in January of 2016, was a request to Senator Stevens that an independent third party analysis be conducted regarding the cost competitiveness of the various options the Legislature was reviewing for LIO office spaces.[52] The LAA declined at that time to undertake such an analysis.[53]

The 45-day timeline established by the December 19, 2015 motion expired on February 2, 2016. At that time, at the request of Legislative Council Vice Chair, Representative Bob Herron, the Department of Revenue submitted its analysis, which concluded that the purchase of the 716 property was cost-competitive.[54] The LAA did not accept the Department of Revenue's analysis and instead chose to hire a third party, Navigant, to conduct further analysis (a month after initially refusing to do so). Navigant concluded that a purchase of the 716 property was cost-competitive at a price point of $35.6 million.[55] The LAA refused to accept Navigant's analysis and hired yet another third-

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[48] Ex. 55 at 9.
[49] Ex. A at 59 (emphasis added).
[50] Ex. 55 at 9.
[51] *Id.*
[52] Ex. 68.
[53] Ex. 69.
[54] Ex. 70.
[55] Exs. 49, 50.

party consultant to conduct a fourth review of the Legislature's options.[56] Finally, the Decision ignores the DOR analysis and focuses on and grossly mischaracterizes the Navigant economic analysis in a variety of ways.[57]

F. The extent to which budgetary concerns actually served as the rationale for the decision to terminate the Lease and vacate the building.

The Decision omits relevant information regarding the Legislature's verifiable ability to pay on the Lease through the end of this year in attempting to justify the Legislature's improper termination of the Lease.

The LAA purportedly relied on CCS HB 256 and its appropriation of $844,900 as its justification for determining that insufficient funds were appropriated and thus warranted termination of the Lease under Lease Sections 1.2 and 43.[58] That appropriation was equal to exactly three months' rent, which would have paid rent for July, August and September. However, the LAA also paid for rent for the first half of October 2016, and has provided additional reimbursement for real property taxes and downtown assessments due under the Lease.[59] This money most likely came from appropriations set forth in Section 30 of SB 138, or appropriated but undesignated funds that the Legislature could have used to pay its Lease obligations had it elected to do so. The existence of these funds calls into question the finding made by the Executive Director of the LAA that the Legislature had not appropriated sufficient funds to cover its rent obligations.[60] Certainly, on this core point relied upon by the Decision, it would be manifestly unfair to

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[56] 716 has never been provided a copy of this report, which the LAA ultimately relied on. The LAA has indicated, however, that the analysis was based on an appraisal of the 716 building as a vacant office space in downtown Anchorage, without taking into account its lease value. If this was indeed the approach taken in the analysis the LAA relied on, it was improper and resulted in producing an artificially low value for the property since the value 716 relied upon for its cash investment and which its lenders relied upon for providing financing was based upon the LAA's commitments in the lease.

[57] The Decision also fails to even acknowledge that the Legislative Council voted to purchase the building for $32.5 million on March 31, 2016, indicating that it did in fact find purchase of the 716 property to be "cost competitive." Ex. 71. The full scope of the Decision's misrepresentation on these points is best captured by the "summary of considerations" discussed by the Legislative Council in determining whether to purchase the building. The summary was circulated among members of the Legislature by Senator Stevens' office, and includes a point-by-point analysis of the purchase that is directly at odds with the Decision's version of events. Ex. 72.

[58] *See* Ex. 55, at Exs. S-T.

[59] Neibur Aff. ¶ 2.

[60] *See infra* at 26-27.

deny 716 a hearing to confront this determination by Director Varni and present evidence that further undermines this finding.

Furthermore, the Decision's reliance on budgetary concerns and non-appropriation to turn back 716's claim is fundamentally flawed. Even if, for the sake of argument, the insufficiency of appropriation ***would have*** served as a valid basis for termination, and even if, for the sake of argument, the failure to include an express line item ***would have*** been a qualifying failure to appropriate, the LAA cannot rely on the contract itself nor the act of non-appropriation to excuse its responsibilities under 716's estoppel theory. The Court decided the lease was not valid based on the LAA's earlier procurement violation, and the Legislature cannot escape responsibility for 716's damages caused by LAA's procurement violation by claiming thereafter to have terminated the invalid Lease under authority of the Lease. Whether the legislature had either the contractual authority or the fiscal motivation to decline to appropriate and terminate a valid lease for that reason, the legislature never faced that question. The cause of action and right to relief arises from the improper procurement process.

For one thing, as LAA counsel noted shortly after the court ruled, the ruling left the legislature with "no choice." Once the court had declared the Lease invalid for procurement reasons, there was no valid contract—the LAA is not free to pick and choose which clauses it will honor and which it will ignore. Nor can it deprive 716's right to seek redress simply by not appropriating one year's rent. [61]

In short, the legislature simply could not terminate the Lease under authority of contract terms that had already been deemed invalid by judicial action. The LAA cannot escape responsibility for 716's damages, incurred by its reliance on the LAA's flawed procurement, by referring to the contract itself or its actions in refusing to specifically appropriate rent under such contract.

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[61] The Legislature also had ample motivation to avoid termination of a valid lease for failure to appropriate just as they may have been motivated to reduce costs for budgetary reasons. The Legislature had been amply warned about the high future cost (risk premiums in future contracts) of setting a precedent of relying on the appropriation clause as a basis for termination. Indeed, it seems reasonable to infer that the LAA's willingness to waive justiciability and expose the procurement to judicial review may have reflected the assumption that if the Lease were invalidated, the Legislature could escape its cost without setting the precedent of termination based on failure to appropriate. In any event, it is completely speculative as to whether the Legislature would have declined to appropriate rent for a valid Lease for fiscal reasons, since the procurement ruling left no valid lease.

II. Legal Errors that Provide the Bases for this Appeal.

Working from a flawed and incomplete recitation of facts, the Decision sets forth several legal conclusions that also are in error. Indeed, none of the Decision's legal conclusions is accurate once the Decision's factual narrative is rejected and corrected.

A. The Decision's legal analysis of 716's estoppel claim is in error.

As a preliminary matter, the Decision fails to meaningfully address 716's estoppel claim or acknowledge the LAA's involvement in Lease negotiations. This failure necessarily short circuits *any* claim a contractor could lodge against the LAA. Further, the Decision avoids discussion of the LAA's actions in abandoning the Lease. Instead, the Decision shifts all of the consequences of the LAA's decision to abandon the Lease to 716. To support this result, the Decision relies on a self-serving, inaccurate, and incomplete narrative of what actually occurred during lease negotiations, of what occurred after the Lease was executed, and of what occurred following the Superior Court's ruling invalidating the Lease. More importantly from a legal perspective, the Decision misconstrues and confuses 716's estoppel claim for what it apparently and incorrectly perceives as a breach of contract claim.

1. 716 Reasonably relied on the LAA in performing under the Lease.

As articulated in 716's claim, the preliminary requirement of the estoppel analysis, whether the party to be estopped has asserted a position by word or conduct, is easily met in this case. In *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation*,[62] this requirement was met by the Department of Transportation's execution of the award. Similarly, here it is met by:

- The award of the lease extension and the Legislature's numerous assertions and certifications that the lease extension was (1) valid, (2) in effect, and (3) in compliance with applicable law;

- The multiple motions by the Legislative Council, detailed above, to proceed as the lease approval progressed;

- The findings of the procurement officer under section .040(d);

[62] 765 P.2d 1360 (Alaska 1988) (a full discussion of *Earthmovers* is set forth in 716's claim).

- The certification of Director Varni that the cost savings requirement had been met and that the Lease was in the best interests of the state; and,

- The approval of the Lease by the full Legislature by its appropriation to pay the first year's rent as required by AS 36.30.080(c)(1).[63]

The Decision fails to acknowledge or address any of these actions that assured 716 of the validity of the Lease and supported 716's reasonable reliance on those actions in entering into the Lease. Instead, the Decision summarily and dismissively concludes that 716 did not reasonably rely on the LAA's assertions. This conclusion is based on two flawed theories. First, the Decision concludes that 716 did not reasonably rely on the LAA's assertions because 716 participated in lease negotiations and used legal counsel, rendering the LAA's actions, assessments, and assurances irrelevant. The Decision wrongly implies that 716 was the party responsible for ensuring that the LAA's actions would withstand later judicial scrutiny. Second, the Decision concludes that 716 did not reasonably rely on the LAA's assertions because a third party (James Gottstein) expressed criticism of the Lease and that criticism constituted "notice" to 716 that it could not rely on the LAA's assertions and conduct regarding the validity of the Lease.

a. 716's participation in lease negotiations did not diminish its reliance on the LAA.

Section B.1. of the Decision relies on a series of correspondence and memoranda written during the course of Lease negotiations in 2013. As illustrated above and in the affidavits submitted with this appeal, the Decision's interpretation of this material is incorrect and the material relied on provides an incomplete record of the Lease negotiations – issues that 716 will further develop and present evidence on at the hearing in this matter. The Decision then draws the incorrect legal conclusion that an estoppel claim is unavailable to 716 because its participation in Lease negotiations allowed it only to rely on its own counsel, notwithstanding the actions and assurances of the LAA that culminated in its written findings, included in appendices to the Lease, certifying that the Legislature had complied with its procurement rules.

The Decision relies on two cases for the assertion that an estoppel claim is unavailable to 716 because "a person dealing with a government agency is bound to take notice of the

[63] This conduct and specific assertions made by the LAA are fully set forth in 716's Contract Claim and supported by the Exhibits submitted with the Claim, which consist in large part of the Legislative Council's own minutes and commitments reflecting the actions it took to enter the Lease.

legal limits of the agency's power and those of its agents."[64] Ironically, the two cases cited by the Decision set forth examples of situations in which private citizens succeeded in bringing estoppel claims against municipalities.[65] Moreover, one of the cases cited, *Municipality of Anchorage v. Schneider*, sets forth the precise reasoning for the availability of an estoppel claim against government entities.[66] Indeed, in *Schneider*, the Alaska Supreme Court first recognized the policy consideration that a governmental entity "acts for the good of its citizens rather than a narrow proprietary interest. Thus, the argument goes, it would be unjust to the public to enforce estoppel against a municipality."[67] The Court goes on to explain, however, that it does *not* believe a general rule denying estoppel is proper, instead asserting that such policy concerns "can be adequately served within the doctrine of estoppel."[68]

More significantly, in *Municipality of Anchorage* and in *Property Owners Association v. City of Ketchikan* the Court did not render any holding that supports the Decision's conclusion that the business acumen of 716's Principal or the involvement of 716's counsel in a complex real estate transaction involving forty-four million dollars[69] somehow limits the availability of an estoppel claim against the LAA, after the LAA entered into the Lease and performed for a period of time. In *Property Owners Association*, property owners relied on a statement made by Ketchikan's Finance Director regarding what he believed a future interest rate would be.[70] There was no question under the law that the city would set rates and repayments schedules for assessments after the final assessment roll was completed, and by the time that occurred the Ketchikan Municipal Code contained no limitation on interest rates.[71]

The Finance Director's statements were made prior to the final assessment and thus, the Court held, could not bind the city on an estoppel theory. The Court did note that the property owners alleging estoppel were sophisticated businessman, making their reliance on a clearly speculative statement by a city official especially unsympathetic.[72] However, and far more relevant to 716's claim, the Court made clear that *Property Owners*

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[64] Ex. 55 at 15.
[65] *See Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Alaska 1984); *Property Owners Ass'n v. City of Ketchikan*, 781 P.2d 567 (Alaska 1989).
[66] *See Municipality of Anchorage*, 685 at 97.
[67] *Id.* at 97.
[68] *Id.*
[69] The decision of the LAA to self-fund its own tenant improvements were made later in the decision making process; just one example of the complexity of these negotiations.
[70] *Property Owners Ass'n*, 781 P.2d at 573.
[71] *Id.* at 574.
[72] *Id.* at 573.

Association was "not analogous to *City of Kenai v. Filler*, 566 P.2d 670, 676 (Alaska 1977), where the city *accepted the benefits of a contract and then sought to be released from the contract for its failure to comply with its own ordinances.*"[73] 716's circumstances and its claim, are much more analogous to those in *City of Kenai v. Filler* (a decision ignored by the Decision), and are largely inapposite to those in the permitting cases that are cited and relied on by the Decision.[74]

Moreover, the Court pointed out that *Property Owners Association* did not involve any area of unsettled law, in which the "imposition of estoppel was necessary to prevent an unjust result."[75] In at least one respect, 716 believed itself to be confronted with a settled area of law in that the Legislature's internal processes always have been vociferously defended by the Legislative branch as non-justiciable.[76] The LAA's decision not to defend its own processes as non-justiciable led to the superior court deciding that it could review the Lease's compliance with AS 36.30.083.[77] The Decision now asserts that 716's reliance on the LAA was unreasonable, meaning 716, first, was responsible for policing the LAA's own internal procurement policies and procedures and, second, also was responsible for realizing during negotiations that the State not only would abandon the Lease, but also would decide not to defend its own contracting authority and processes, as it historically has done.716's principals may be experienced developers, but no one could have had a crystal ball with that kind of clarity.

Further, the LAA's position ignores the clear and unambiguous findings made by the Procurement Officer and Director Varni confirming compliance with its procurement rules. Such findings were included in the contract specifically for the purpose of providing assurances to the parties that the contract was properly entered into. These findings were prepared by the LAA's counsel and certified by its Director and Procurement Officer, not by 716.

Finally, as a practical matter, the basic precept that parties interacting with government must take note of the legal limits of the government's power is especially inapplicable under these circumstances. The LAA and the Legislative Council have the power under their own rules to expand or contract their authority by amending those rules. As noted above and more extensively in the attached affidavits, the focus of Lease negotiations was not the satisfaction of AS 36.30.083, but how the Legislative Council would amend its own procedures to ensure the Lease was valid. These are internal processes that were

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[73] *Id.* at 574 (emphasis added).
[74] Contract Claim at 14.
[75] *Id.* (citing *Tetlin Native Corp. v. State*, 759 P.2d 528, 535 (Alaska 1988)).
[76] Steiner Aff. ¶¶ 6-8; *see* Ex. 73.
[77] *Supra* at fn. 16.

ultimately sanctioned and certified by the Legislative Council. To say that 716 did not rely on the party that controlled the contracting process because it was represented by counsel is a position without legal support and, put plainly, lacking in common sense.

b. Third party criticism of the LAA and the ABI lawsuit did not provide 716 "notice" that made 716's reliance on the LAA unreasonable.

The Decision also concluded that the notice provided by local attorney James Gottstein (who was not a party to the Lease) in the form of his threats to sue 716 regarding alleged damage to the common wall his commercial property shares with the LIO building further diminishes 716's estoppel claim. As a factual matter, the Decision is mistaken in its recounting of the facts on this issue.[78] As stated above and in the affidavit of 716's counsel, Donald W. McClintock, Mr. Gottstein's claim regarding the legality of the Lease always was an obvious attempt to assert leverage to secure a more lucrative resolution of his property damage claim.[79] Mr. Gottstein's threats did not diminish 716's reliance on the executed contract it had with the LAA and on the LAA's multiple, clear assurances of its commitment to that contract. The suggestion implied by the Decision that 716 should have relied on and trusted Mr. Gottstein's comments about the Lease (made to obtain a larger settlement of his damage claim) more than the assurances and statements by the LAA is absurd.

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

2. 716 has suffered prejudice.

The Decision conflates the issue of prejudice with other assertions the Decision makes about damages and mitigation in this case. The fact that 716 has suffered prejudice in this matter is unassailable and well documented in its claim.[80] 716 arranged for the investment of $37 million dollars in debt and equity to renovate a building uniquely designed to the needs of the Legislature, which objectively has been recognized as a

[78] *Supra* at 8-9.
[79] *Id.*; McClintock Affidavit ¶ 7.
[80] Contract Claim at 12-14.

special use office building.[81] 716 now finds itself in default to its primary lender, EverBank. This prejudice is based almost wholly on the LAA's conduct. EverBank's Notice of Default is based on the Superior Court's ruling in the ABI Lawsuit, the State's decision to vacate the property, and the State's actual vacation of the property.[82] EverBank recognizes the LAA's decision to terminate the Lease was an agency decision based on the Superior Court's ruling.[83] Aside from these explicit actions taken by the LAA that lead to default, 716's ability to mitigate its damages or even react to the LAA's conduct has been severely limited by the LAA's erratic behavior and failure to communicate its intentions clearly since April of 2016.[84]

Indeed, the Legislature engaged in negotiations to buy the LIO building on multiple occasions, only to change course each time and then ultimately pursue space in another

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[81] Ex. 30. To the extent the Decision now questions the special use nature of the building or finds 716's claim speculative as to the high probability that any new tenant would require substantial improvements before leasing the building, the LAA's counsel previously has identified precisely the same points made and relied on by 716, and communicated those points to the Legislative Council. *See* Ex. A at 22 ("MR. GARDNER asked if the issue was for a higher value of a building like this. He said there are a lot of public spaces, a lot of large meeting rooms in this building; was the consideration to purchase a building like this that this kind of building might be worth more to the State than it might be to a private party. In other words, a business might not want to pay as much to be in here, but the Legislature asked for improvements and, ultimately, the building is more suited for a public use than it might be for a private space." The expert brought to Legislative Council to advise on the value of the 716 property confirmed that the building was indeed a "special purpose-type use building . . . noting it's the "cost of doing business" for state agencies with special office space needs.)

[82] Ex. 74 at 2.

[83] *Id.* ("The State announced its decision to consider the lease terminated as a result of the McKay Order, and vacated the Property earlier this month.").

[84] As an ongoing example of the LAA's unreliability, when 716 filed its contract claim in July, the LAA had committed that it would only occupy the building until September of 2016. Contract Claim at 13. Later, the LAA changed course and decided to stay until mid-October. The LAA's conduct throughout this matter has significantly limited 716's attempts to mitigate its damages. Moreover, the LAA utterly failed to communicate clearly with 716 subsequent to entering into the Lease. This led to significant dysfunction in the contracting relationship (e.g., 716 was not kept up to date on the Legislative Council's exploration of other office space in 2015). *See* Ex. A at 15-16. Even more telling, 716 Principal Mark Pfeffer was informed for the first time by Senate President Kevin Meyer, in front of the full Legislative Council, that Director Varni had "shared quite a laundry list of problems with the building" with the Council, yet Mr. Pfeffer, in his role as Landlord, never was informed of any of those issues. *See* Ex. A at 16-17. Director Varni's complaints, previously unvoiced to 716, were seen as additional support for her position that staying in the 716 property was not cost effective. *Id.*

office building in Anchorage, as noted in 716's claim.[85] Meanwhile, although LAA's counsel represented to EverBank prior to the filing of 716's claim that it had no choice but to vacate the premises, the Legislature only vacated this month, on October 16. Thus, the LAA disclaimed its intention to perform its obligations to 716 while at the same time continuing to occupy and tie up the property. The LAA's inconsistency and indecision left 716, for all intents and purposes, hamstrung and limited in its options.

3. The public interest supports 716's estoppel claim.

The Decision presents the novel possibility, not put forward anywhere in 716's claim, that 716 could be awarded $37 million in damages based on its estoppel claim, yet still maintain ownership of the 716 property.[86] The Decision then spends considerable effort to knock down this strawman. Regardless of any dispute over the final amount of 716's damages, as stated in its claim, 716 will not be able to maintain ownership of the building.[87]

The Decision's conclusion that 716's estoppel claim is an affront to the public interest is built on a narrative that does not acknowledge the LAA's involvement in or responsibility for not only its procurement process, but its subsequent conduct and statements. The LAA clearly communicated to 716 that it was terminating the Lease based on Judge McKay's ruling in a letter from LAA counsel dated May 16, 2016.[88] This fact is nowhere mentioned in the Decision, probably because it conflicts with the Decision's recitation of the "facts" (however inaccurate) necessary to shift blame from the State to 716.

It is precisely this course of conduct that the Alaska Supreme Court has held allows for the application of the doctrine of estoppel to government actions. Indeed, the Court repeatedly has recognized "that treating contractors honestly and fairly serves the public interest."[89] The Court noted in *Earthmovers* that it was necessary to balance concern for the public purse with concern for those negatively impacted by government misconduct.[90] It is significant that the Court in *Earthmovers* distinguished the facts in that case from those in *City of Kenai v. Filler*, "where a public entity accepted the benefits of work

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[85] Contract Claim at 9.
[86] Ex. 55 at 17-18.
[87] Contract claim at 15 ("as a result of the State's abrogation of its lease responsibilities, 716 will lose title to the property through foreclosure."); *see also* Ex. 72.
[88] Ex. 6.
[89] *Earthmovers*, 765 P.2d at 1370 (citing King v. Alaska State Housing Authority, 633 p.2d 256, 262 (Alaska 1981)).
[90] *Id.*

performed and then tried to avoid paying for them. On those facts, justice required that the contract be enforced."[91] The conditions present here mirror those in *City of Kenai*. 716 fully performed its end of the bargain, the legislature took occupancy and partially performed, and justice requires that the reliance expectancies be honored through 716's estoppel claim.

To reiterate, the Lease was signed after the procurement findings were made, 716 then proceeded with design and construction, and take out financing closed in reliance on a Lease fully approved by the Legislature under AS 36.30.080(c)(1). Several banks extended credit based on those actions—debt and equity totaling $37 million were invested, based in part on an assignment of rents from this Lease—and the Legislature took possession and has enjoyed the use of the facility for more than a year. The negotiated agreement contemplated occupancy for ten years and the economics of the Lease were built around a tenancy of that duration – that is, the cost of the renovations and improvements required by the LAA cannot be amortized over a shorter period. When the Lease was called into question before the judiciary, the Legislature opted for political reasons not to argue and rely on the non-justiciability of its internal rulemaking processes, ultimately leaving the Lease open to second guessing by a separate branch of government. It will be a serious blow to the public interest if the State is permitted to cancel a lease and walk away after the other party has fully performed, based on a court ruling finding the Lease invalid because of errors by the Legislature in administering its own procurement process.[92]

II. The Decision's Proffered Reliance on the Legislature's Appropriations Power and the Non-Appropriations Clause of the Lease Does Not Defeat 716's Claim.

The Decision focuses heavily on the Legislature's decision not to appropriate funds for rent obligations for the building. But the Decision fails to address how or why this non-appropriation decision counters the elements of 716's estoppel claim. To the extent the Decision is premised on an assumption that the non-appropriation decision acts as a total defense to 716's claim, 716 addresses that erroneous assumption below.

The Decision cites two justifications for its termination of the Lease based on the Legislature's non-appropriation: first, it points to the non-appropriations clause of the Alaska Constitution. Second, it relies on the Lease itself, asserting that the LAA properly terminated its tenancy under Sections 1.2 and 43.

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[91] *Id.* at 1371.

[92] A process the Legislature chose not to defend on appeal even though the Court's ruling rejected the positions the Legislature asserted earlier in the same case.

As a threshold matter, the Decision's appropriations analysis is founded on the erroneous assumption that the LAA terminated the Lease because of the failure to appropriate. In fact, as discussed above and as will be established at the hearing in this matter, substantial evidence reflects that the decision to vacate the 716 property was made months before the Legislature allegedly made the decision not to appropriate, and was a direct result of the Superior Court decision invalidating the Lease. Extensive evidence from the spring of 2016, including statements made by LAA counsel[93] and by members of the Legislative Council, including Senator Stevens,[94] establishes that the LAA decided it was free to terminate the Lease because of the Court's determination that the Lease was invalid. This is a material issue that is disputed: it would violate public policy to allow the State to break its agreements, but evade liability in every instance by subsequently failing to appropriate funds. While the Procurement Officer disagrees with 716's version of the facts, more than sufficient conflicting evidence exists to require a hearing and sworn testimony to resolve the factual dispute.

A. The Alaska Constitution does not give the LAA a free pass to dismiss 716's claim on the merits.

The Decision asserts that any multi-year lease agreement entered into by the Legislature is automatically converted to a year-to-year lease by operation of the Alaska Constitution's appropriations clause, thereby destroying 716's claim. This conclusion is erroneous.

The Constitution's appropriations clause, as effectuated by AS 37.05.170, does not invalidate 716's claim.[95] The Alaska Supreme Court has addressed the issue of whether a claim is barred by the Constitution's limits on appropriations. In *Zerbetz v. Alaska Energy Center*, the Court addressed whether Zerbetz was barred from seeking to recover on a three-year employment contract with the State.[96] The State had argued that the three-year term of the contract was contrary to the Constitution's appropriations clause,

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[93] Ex. 6.

[94] Ex. 75 (Indeed, even after changing its narrative to respond to 716's claim, it appears the Legislative Council Chair still believes termination was based, at least in part, on Judge McKay's ruling: "Stevens said the Legislature in these tight times decided not to fund the lease, ending the contract, and anyway, Superior Court Judge Patrick McKay determined in March the contract was void, he said.").

[95] It is worth noting that a two-year obligation does not always operate to bind a future legislature to a previous legislature's decision. *See* Ex. 55 at 10 ("Generally speaking, the Alaska Constitution prohibits one legislative body from binding a future legislature to make certain expenditures."). Here, the same legislative body—the 29th Legislature—appropriated funds for the Lease for FY 2015, but failed to appropriate for FY 2016.

[96] 708 P.2d 1270 (Alaska 1985).

and that—moreover—there was currently no money appropriated to pay Zerbetz's claim.[97] The Court rejected both arguments. It approved the three-year term, finding that "the authority to employ necessarily includes the power to hire by means of a contract of employment."[98]
The Court found further that the unavailability of funds did not automatically bar the claim:

> even though no appropriation exists to cover the contract's obligations, Zerbetz is entitled to ask the State for payment pursuant to AS 09.50.270. Zerbetz properly relies upon a statute which gives him a specific, albeit uncertain, remedy: the chance to have his claim presented to the Legislature.[99]

The Court has not examined the specific situation of whether the power to improve and lease space necessarily includes the power to enter multi-year leases; but, in light of its ruling in *Zerbetz*, it is highly likely that such an analysis would be resolved in 716's favor.[100] As a result, the promises LAA made to 716 were not barred by the Alaska Constitution. And here, as in *Zerbetz*, 716 is entitled to have its claim heard and decided, without regard to the alleged availability of funds.

B. LAA did not properly terminate under Sections 1.2 and 43 of the Lease.

The Decision is internally inconsistent on the subject of the Lease: it characterizes the Lease as invalid, but then relies heavily on its technical provisions. 716 does not dispute that the Lease contained appropriations clauses that allowed the Legislature to terminate the Lease if funds could not be appropriated. But certain conditions were placed on this

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[97] *Zerbetz*, 708 P.2d at 1275-76, 1277.
[98] *Id.* at 1275-76.
[99] *Id.* at 1277.
[100] Moreover, the discussions of the Legislative Council on the topic of the Lease clearly reflect an understanding that the LAA was "breaking" its lease obligations if it did not appropriate. Senator Stevens tried to admonish the Council to remember not to use this language as it does not comport with his appropriations narrative, but his warning had little effect. Ex. A p. 3 (Senator Stevens chiding the Council, "There has been a consistent mistake made when we see it in the paper talking about 'breaking the lease.' He said that, if we do move, that wouldn't be breaking the lease, but rather taking advantage of a negotiated claim in the lease that went through a lot of discussion as two sides negotiated a contract."). *But see e.g.,* Ex. A at 48 ("REPRESENTATIVE LIZ VASQUEZ . . . if we *break the lease*, assuredly we will be in litigation . . . .); Ex. A at 50 ("REPRESENTATIVE MILLETT . . . nobody's talked about the option if we *break the lease*, what litigation looks like . . . .").

clause, and it—as with all provisions in the Lease—remained subject to the covenant of good faith and fair dealing.

"The covenant of good faith and fair dealing is implied in every contract in order to effectuate the reasonable expectations of the parties to the agreement, not to alter those expectations."[101] To satisfy the implied covenant, "[a] party must act in subjective good faith, meaning that it cannot act to deprive the other party of the explicit benefits of the contract, and in objective good faith, which consists of acting in a manner that a reasonable person would regard as fair."[102]

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

Section 43 of the Lease requires "[t]he Executive Director [to] 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." The implied covenant operates to require that this request be made in good faith, subjectively and objectively. This was a bargained-for term of the parties' agreement, and LAA's commitment to try—diligently and honestly—to appropriate rent funds gave 716 the degree of security necessary to justify its investment of tens of millions of dollars into the property.

Substantial evidence demonstrates that LAA's request for funds was not made in good faith. While Director Varni did go on to make a "recommendation" that the funds be appropriated, it was only nominally a recommendation. Evidence shows that Director Varni successfully undermined Lease appropriations or a purchase of the 716 property by providing information to the Legislative Council that she knew to be incorrect, incomplete, and misleading.[103] In fact, as discussed above, the analysis submitted by Director Varni to the Legislative Council in December of 2015 was so one-sided and inaccurate that Michael Buller, an AHFC official, refused to endorse it or attend the Legislative Council at which Director Varni presented it.[104] Director Varni later confirmed that Senator Stevens was also aware of Mr. Buller's criticisms at the time she presented the report, meaning that both Senator Stevens and Director Varni failed to alert the Legislative Council to the serious shortcomings of the report.[105] An accurate and ungenerous reading of these facts tells a story of sabotage—Director Varni, with the

[101] *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997).
[102] *Casey v. Semco Energy, Inc.*, 92 P.3d 379,384 (Alaska 2004).
[103] *Supra* at 10-13.
[104] *Id.*
[105] Ex. 76 at 3; Ex. 65; Ex. A.

assistance of others in the LAA and Senator Stevens and his staff, deliberately acted to undermine the agency's request to appropriate funds for the Lease.

In addition, the current record is unclear regarding the amounts actually appropriated and available for Lease payments. Sections 1.2 and 43 of the Lease allow for termination "if, in the judgment of the Legislative Affairs Agency Executive Director, sufficient funds are not appropriated[.]" The Decision makes much of LAA's purported inability to pay any amount of rent above the $844,900 appropriated through CCS HB 256. Indeed, it cites this as justification for the determination that insufficient funds had been appropriated, which it states in turn justified termination of the Lease.[106]

The Decision correctly notes that this appropriation was equal to exactly three months' rent, which would have paid rent for July, August and September. However, the Decision fails to mention that LAA went on to pay for rent for the first half of October 2016, as well as provide reimbursement for real property taxes and assessments due under the Lease.[107] These additional funds—representing significant expenditures over and above the $844,900 appropriated in CCS HB 256—came from somewhere. A review of contemporaneous legislation reveals that Section 30 of SB 138 in fact appropriates more than enough funds to pay rent for the remainder of 2016.[108] This fact casts significant doubt on the good faith of the Executive Director's determination that insufficient funds were available, and merits additional exploration at a hearing.

The availability of additional funds and the use of a portion of those funds to ensure Lease obligations were met also places the LAA's appropriation argument in a tenuous position in light of a 1987 Alaska Attorney General's opinion.[109] The opinion was issued one of the few other times (perhaps the only time) the Legislature has attempted to terminate a lease based on a "subject to annual appropriation" clause.[110] The opinion addressed the question of whether "funds were appropriated to the Legislative Council from which the lease rental amount could have been paid" following the LAA

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[106] *See* Ex. 55 at Exs. S-T.
[107] Aff. of Shea Niebur ¶ 2.
[108] Section 30 of SB 138 appropriated $5.5 million to the Legislative Council. Within this Section, there is language earmarking $1.5 million for video surveillance upgrades. The balance, $4.5 million is "for renovation of, repair of, technology improvements to, and other necessary projects related to legislative buildings and facilities." SB 138 is available here: https://www.omb.alaska.gov/ombfiles/17_budget/PDFs/SB0138_With_Vetoes%20_6-28-16_New.pdf.
[109] File No. 661-87-02841987 WL 121076 (Alaska A.G. Mar. 24, 1987).
[110] *Id.* at 1.

termination of a lease pursuant to the annual appropriations clause.[111] The Attorney General was unequivocal in opining that:

> The specific allocations of appropriation items are not binding. Operating expenditures may be made through the shifting of amounts between allocations subject only to administrative constraints requiring approvals. To the extent that the existence of an appropriation providing a funding source for an expenditure is concerned, specific allocations do not have a determinative legal affect.[112]

Thus, despite the legislative intent to not appropriate for the lease, the Attorney General opined that "funds were appropriated to the Legislative Council from which the lease rental amount could have been paid."[113] In this case, there is no dispute over whether the funds can be used to meet Lease obligations, as it appears they already have been put to that purpose to some extent. Thus, the LAA appears to have acted in bad faith in exercising its discretion to determine that funds were not appropriated for the Lease.[114]

III. The Decision's Ruling on Damages Is Legally and Factually Incorrect.

The Decision alternatively denied 716's claim for failure to demonstrate that it has suffered damage as a result of the Legislature's actions. The Decision makes clear that the Procurement Officer disagrees with 716's claimed measure or computation of damages. But such disagreement is not grounds for denying that *any* damages exist or for dismissing 716's damage claim outright. Rather, it indicates that the amount of 716's damages is a fact in dispute that should be addressed at a hearing. As explained below,

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[111] *Id.*
[112] *Id.* at 2.
[113] *Id.* at 1.
[114] The Hearing Officer's opinion was given with regard to the LAA's lease with the B.M. Behrends Company. *Id.* at 1. This lease was discussed by the Legislative Council as the one previous example of the Legislature's invocation of the non-appropriations clause. The Legislative Council appears to have been made aware by LAA Counsel Doug Gardner that, although the Behrends case was settled, the State could very well be liable for the rent remaining due on the Lease if the Legislature were to terminate under the non-appropriations clause. *See* Ex. A at 55 ("Senator Micciche was right, the Legislature did pay was he believes was the very last year of the lease, we paid out the last piece of the lease in some settlement. He said it is a case worth noting and the answer is there are risks involved if the Legislatures non-appropriates; there are also ways to protect the Legislature.").

the Decision's denial of damages was legally erroneous, founded on incorrect or disputed facts, and premature.

A. The Decision's ruling that damages are unavailable to 716 misreads *Earthmovers*.

As justification for its ruling, the Decision discusses "the stark disconnect between the amounts claimed and the benefits delivered."[115] In so doing, it improperly focuses on LAA's "gain" from the Lease. This disregards the premise of 716's damage claim, which is based on a theory of reliance (which measures the loss to 716), not quantum meruit (which measures the benefit conferred on the LAA). The ruling is legally erroneous, as it is founded on a misinterpretation of *Earthmovers*.

The Decision attempts to distinguish *Earthmovers* on the grounds that in that case no benefit was conferred on the state; by contrast, here, LAA received—and paid for—the benefit of 22.5 months of tenancy in the Building. This distinction misses the point. In *Earthmovers*, the Alaska Supreme Court was presented with a choice between two means of calculating damages: reliance and quantum meruit. The Court rejected quantum meruit damages not because no benefit had been conferred on the state, but because a quantum meruit theory would leave the contractor with a zero-dollar recovery. This would violate the Court's prior rulings that "treating contractors honestly and fairly serves the public interest."[116] The Court therefore ruled that reliance damages were the appropriate measure, because they would allow the contractor to recover for the state's improper conduct.[117]

The situation presented here is similar. 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.

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[115] Ex. 55 at 19.

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

[117] *Earthmovers*, 765 P.2d at 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. Under these circumstances, it would be fair to both the public and to EM to reimburse EM for its actual out of pocket expenditures made in reasonable reliance on the April 27 award.").

B. The Decision's ruling that 716 suffered no damage is founded on incorrect factual assumptions that are disputed and require a hearing.

The Decision also rests on the factually incorrect and disputed conclusion that 716 has suffered *no* damage. This ruling is based on the assumption that "[t]he Building is a highly valuable commercial building that can be leased or sold."[118] In other words, the Decision wrongly assumes that because 716 continues to possess the Building, it cannot have suffered any loss.

At minimum, at the time of its claim 716 was aware it would most certainly suffer damages in the amount of $9 million.[119] This figure represents 716 Principals' equity in the project and land, which will not be recovered under either a workout or as part of a last-minute sale, as explained in 716's claim.[120]

At maximum, 716 may lose the entire value of the building. That result became more likely when EverBank issued a Notice of Default to 716 dated October 26, 2016, asserting:

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

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

The Decision's attempt to neutralize the possibility of 716's full accounting of damages by assuming, without any basis in fact, that 716 will continue to own the building unless it willingly sells it has now been demonstrated to have been both premature and wrong. As of the present date, the almost certain outcome is that 716 will be forced to forfeit the building to its lender.

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[118] Ex. 55 at 20.
[119] Pfeffer Aff. ¶ 10.
[120] *Id.*; *See* Contract Claim at 15-16.
[121] Ex. 74 at 3.
[122] *Id.*

C. The Decision's dismissal of 716's damage claim for failure to mitigate is premature, factually inaccurate, and constitutes a basis for assessing the amount of damages – not for concluding there were no damages.

The Decision also denied 716's damage claim because of its alleged failure to mitigate. Specifically the Decision concluded that "[b]ased on the facts presented in the Contract Claim . . . 716 failed to take reasonable steps to mitigate its alleged damages."[123]

Denial on this basis is procedurally improper, as it dismisses 716's damages for failure to mitigate even though 716 was not—in its initial claim—obligated to prove mitigation. Under Alaska law, while it is 716's duty to mitigate its damages, it is not its burden to prove mitigation—such evidence is necessary only if and when its mitigation is challenged.[124] 716 stands ready to submit its proof at a hearing on the issue of its efforts to mitigate. Suffice it to say that any suggestion that 716 has failed to explore every possible avenue by which the damages it has sustained as a result of the LAA's actions is false.

This finding also was factually inaccurate because 716 did in fact address mitigation in its Contract Claim. As of the date the Contract Claim was filed, 716 continued to attempt to reach agreement with the agency. The Contract Claim expressly identified these efforts and addressed the issue of mitigation.[125] The fact that 716 had not yet successfully been able to mitigate its damages is not dispositive. It is not even remarkable, given the very short timeline under which 716 had to file its claim.[126] As of the date of filing, LAA was still occupying the building. Now, three months later, there is ample evidence of 716's good-faith efforts to mitigate in the interim. As stated in the Affidavit of Mark Pfeffer,

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[123] Ex. 55 at 20.

[124] *Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 902–03 (Alaska 1984) (citing *West v. Whitney-Fidalgo Seafoods*, 628 P.2d 10, 18 (Alaska 1981)); *University of Alaska v. Chauvin*, 521 P.2d 1234, 1240 (Alaska 1974) ("The duty [to mitigate] rests on the party claiming damages but the burden of proving mitigation or failure to mitigate falls on the breaching party.").

[125] Contract Claim at 15.

[126] Counsel for the LAA has previously recognized that the Superior Court's denial of 716's Motion for Reconsideration in the ABI Lawsuit was indeed a final judgment in that case, which triggered the timeline found in AS 36.30.620. Ex. 4. The Decision erroneously relies on ABI's appeal of the Court's award of attorney fees pursuant to Alaska Civil Rules 11 and 82 as support for its assertion that "no final judgment has been issued in the case before the Superior Court." Ex. 55 at 3. The LAA is well aware that the deadline to appeal any portion of the Superior Court's ruling passed long ago. *See* Ex. 47. Any attempt to represent the ABI Lawsuit as unfinished for purposes of 716's claim is unfounded.

716 has actively sought—and continues to seek—other buyers for the Building.[127] The Decision's assumption that 716 has failed to mitigate is simply false.

D. Due process requires a stay to allow the evidence on damages to develop.

716 requested and due process requires a 90-day stay. A 90-day stay would be an appropriate amount of time to allow for further development on the issue of damages and the evidence that may be relevant to it. Events that have occurred in the past month since the Decision was issued illustrate this fact. 716 is now officially in default on its loan to EverBank. EverBank provided its Notice of Default last Thursday, October 27, and 716 is still evaluating the economic consequences of this significant development. In order to provide a detailed analysis of all of its damages at a hearing, including those stemming from the declaration of default, it is now even more imperative that 716 obtain a 90-day stay. Alaska has a strong policy—evident in its rules and case law—in favor of allowing a stay or continuance where the delay will enable a party to present full and fair evidence of its case.[128] The Decision's denial of 716's damages claim was premature, as it required 716 to present evidence of damages and mitigation before it was reasonably possible to do so. 716 is entitled to a reasonable opportunity to mitigate its damages and continue developing evidence in support of its claim.

To determine whether an administrative proceeding comports with due process requirements, the Alaska Supreme Court uses the three-part balancing test established in the United States Supreme Court's ruling in *Matthews v. Eldridge*:[129]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

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[127] Pfeffer Aff. ¶ 8.

[128] *See, e.g.*, *Azimi v. Johns*, 254 P.3d 1054, 1060 (Alaska 2011) ("We held in *Siggelkow v. Siggelkow* that the decision whether to grant a continuance must balance competing goals: prompt resolution of litigation on one hand, and a fair opportunity for all parties to present their cases on the other.") (citing 643 P.2d 985, 987 (Alaska 1982)); *Kessey v. Frontier Lodge, Inc.*, 42 P.3d 1060 (Alaska 2002) (noting that motions made pursuant to Alaska Rule of Civil Procedure 56(f) should be freely granted, and quoting the rule, "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.").

[129] 424 U.S. 319, 335 (1976).

> involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[130]

Here, all three factors weight in favor of granting a stay.

First, the private interest that will be affected is substantial: failure to grant a stay will affect 716's very right to vigorously assert its claim and its procedural due process right to have a fair hearing. As discussed above, even if the Procurement Officer disagrees with 716's proffered measure of damages, there can be no serious argument that 716 has not suffered substantial damage as a result of the LAA's actions.[131] 716 is now in default and will lose the building if it cannot find a buyer before the bank's workout is completed. Even if a buyer is found, 716 most likely will not be able to recoup its full damages, for all the reasons set forth in 716's claim.

Second, the risk of an erroneous deprivation without a stay is high. The Decision dismisses 716's claim outright because its damages are allegedly uncertain and because 716 has not proven mitigation. To the extent that 716's damages are uncertain at this time, this uncertainty is a product of the unusually short period of time within which 716's claim and appeal were required to be filed. As EverBank moves forward, asserting its rights under the financing agreement, uncertainty will give way to a more detailed picture of what 716's final damages will be. Because of the LAA's timeline in terminating the Lease, specifically that the agency only recently gave notice of its intent to terminate the Lease and then belatedly vacated the Building only two weeks ago, 716 has not had a meaningful period of time or opportunity to attempt to mitigate its damages.

It would be improper for the timeline set forth in the procurement code to effectively bar 716 from bringing a claim. The risk here of such an improper deprivation is high: as the second stage of this proceeding is being decided by the same individual, it is likely that the same ruling will issue on appeal if 716 is not granted a stay to develop additional evidence.

Third, the State's interest will not be adversely affected. There is no harm to the LAA affording 716 the additional time requested. If anything, a stay would benefit the LAA as allowing 716 additional time to try and mitigate its damages may reduce the LAA's potential liability in this proceeding.

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[130] *Richard B. v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 71 P.3d 811, 829 (Alaska 2003) (quoting 424 U.S. 319, 335 (1976)).

[131] This argument lacked merit at the time 716's claim was filed, but is now entirely without support following EverBank's Notice of Default.

The Decision attempts to pivot away from the LAA's past statements providing its rationale for abandoning its commitments to 716, namely LAA counsel's statements that the Superior Court's ruling that the Lease was invalid left the Legislature "no choice" but to vacate the building. The new narrative, articulated in the Decision, asserts that the Lease was invalidated by the Court's ruling, however, the Legislature somehow maintained authority under the defunct Lease to invoke the non-appropriations clause of the Lease in order to terminate the Lease after it had been invalidated. As demonstrated above, the Gordian knot presented by the Decision is cut neatly by a full and fair review of the record. 716's estoppel claim remains not only viable, but a necessary remedy in light of the public's interest in accountable State government that is bound by its own assertions and conduct and recognizes its obligations to the private entities with whom it contracts.

Thus, 716 submits its notice of appeal and requests the opportunity of a hearing to present evidence and fully develop the record, which is in material dispute following the Decision.

Very best regards,

SUMMIT LAW GROUP PLLC

Jeffrey M. Feldman

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

716 WEST FOURTH AVENUE, LLC Appellant, vs. LEGISLATIVE COUNCIL, Appellee.	**3AN-16-_____ CI** Appeal of Legislative Council's Decision dated November 21, 2016 on Contract Claim Appeal of 716 West Fourth Avenue, LLC, dated October 31, 2016

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant 716 West Fourth Avenue, LLC ("716") appeals the Legislative Council's final decision ("the Decision") denying 716's appeal of its contract claim, originally lodged with the Procurement Officer for the Legislative Affairs Agency ("LAA").[1] 716's underlying claim arose from the contract awarded to 716 by the LAA for the Anchorage Legislative Information Offices ("LIO") 2013 Lease Extension ("Lease").

This Statement of Points on which Appellant Intends to Rely on Appeal is filed pursuant to Appellate Rule 602(c)(1)(A).

[1] The Legislative Council, pursuant to Section 370(b) of the Legislative Procurement Procedures, adopted the Legislative Affairs Agency's Procurement Officer's denial of 716's contract claim without a hearing. For purposes of this statement of points on appeal, Appellant refers to "the Decision" to mean the written decision of the Procurement Officer, now adopted in its original form by the Legislative Council as its final decision.

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1. The Legislative Council erred in refusing to grant an evidentiary hearing on disputed issues of material fact.

2. Despite the numerous and identified factual disputes and discrepancies that exist in the record between 716's claim and the Decision, no reasons were given to explain the refusal to grant a hearing on 716's administrative appeal; the order simply adopted the Decision denying 716's claim. This was error and precludes effective review.

3. For purposes of AS 44.62.570, under which this appeal proceeds, no "fair hearing" has been held in this matter because no hearing yet has been held at all.[2]

4. The Decision is not entitled to a deferential standard of review because the proceedings below violate core principles of procedural due process and the Alaska Administrative Procedures Act.

5. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence. The Decision's proffered rationale that the LAA relied on both the appropriations clause of the Alaska Constitution and the non-appropriations clause of the Lease to abandon its commitments to 716 is incorrect and conflicts with substantial evidence including the LAA's documented statements and representations in this matter. As a result, the legal conclusions that the

[2] 716's Motion for Hearing De Novo is forthcoming.

Decision draws from those facts are likewise in error.

6. The Legislative Council erred in finding that it need not address a procurement claim based upon its flawed procurement process because of a subsequent legislative decision not to appropriate funds. Such findings, as noted below are not supported by the evidence, and are legal error.

7. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence. The Decision erred by failing to adduce or address any evidence as to the positions taken by the agents and representatives of the Legislative Council as to the validity of its procurement process (which 716 participated in by invitation of the Legislative Council) and erred by ignoring and not discussing evidence presented by 716 on the procurement process. The Legislative Council erred in its findings as to the positions of various agents of 716 about the procurement process carried out by the Legislative Council to secure the Lease. As a result, the legal conclusions that the Decision draws from those facts are likewise in error.

8. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence. The Decision recounts negotiations between the LAA and 716 regarding payment for the first year of the Lease. The Decision erred in its findings as to the substance of those negotiations, as well as about 716's motivation in engaging in negotiations to secure the first year of rent on the

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Lease. As a result, the legal conclusions the Decision draws from those facts are likewise in error.

9. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence and lead to erroneous legal analysis and legal conclusions. The Decision erred in concluding that notice provided by local attorney and adjoining property owner James Gottstein (who was not a party to the Lease) in the form of his threats to sue 716 over alleged damage to the common wall his commercial property shares with the LIO building diminishes 716's estoppel claim. The Decision erred in its finding of the facts on this issue. Furthermore, the Decision is incorrect as a matter of law. A third party's threats to sue or his general opinion on the validity of the Lease cannot provide "notice" in any meaningful manner that would be relevant to 716's estoppel claim.

10. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence. The Decision misstates the facts surrounding the Legislature's potential purchase of the building in late 2015 and early 2016 on at least three points that are critical to the Decision's ultimate conclusion. As a result, the legal conclusions that the Decision draws from those facts are likewise in error. Further, it was error to reach a decision on the procurement process based upon unsuccessful sales negotiations that occurred after the lease was entered into to justify its

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decision to terminate the Lease.

11. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence. The Legislative Council erred by refusing to address relevant evidence regarding the Legislature's verifiable ability to pay on the Lease through the end of 2016 and its conclusion that funds were not available are not supported by the evidence. The legal conclusion that funds were not available to pay 2016 rent is likewise in error. Such a failure to address material facts is an abuse of discretion and as a result, the legal conclusions that the Decision draws from those facts are likewise in error.

12. The Legislative Council abused its discretion in rendering findings of fact in the Decision that are not supported by the evidence and thus cannot support the legal analysis and legal conclusions set forth in the Decision. The Legislative Council's legal analysis and legal conclusions regarding 716's estoppel claim are in error due to the Decision's failure to take into account any evidence of the LAA's participation in Lease negotiations, as well as the Decision's misstatement of the evidence that it does consider.

13. The Decision's findings that 716 did not meet the estoppel factors set forth by *Earthmovers of Fairbanks, Inc. v. State, Department of Transportation* are not supported by the evidence.

14. The Legislative Council abused its discretion and erred as a matter of a law

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by adopting that portion of the Decision that, as a matter of law, entirely misconstrued 716's estoppel claim by addressing it as a breach of contract claim.

15. The Decision erred as a matter of law in holding that a person dealing with a government agency is legally precluded from making as estoppel claim based upon the dictum that "a person dealing with a governmental agency is bound to take notice of the legal limits of the agency's power and those of its agents." The finding that the Legislative Council chairperson and LAA staff did not have authority to engage in this procurement process is not supported by the evidence and is in error as a matter of law.

16. The Legislative Council abused its discretion and erred as a matter of law by adopting that portion of the Decision that incorrectly asserts that any multi-year lease agreement entered into by the Legislature is automatically converted to a year-to-year lease by operation of the Alaska Constitution's appropriations clause, thereby invalidating 716's claim. The Legislative Council erred in finding that the Alaska Constitution's appropriations clause or the non-appropriations clause of the Lease preclude any liability based upon estoppel for the flawed procurement process. Further, the Decision's assertion that the Legislative Council relied on the Alaska Constitution's appropriations clause or the non-appropriations clause of the Lease is not supported by evidence, as discussed *supra*, paragraph 5 and is in error as a matter of law.

17. The Legislative Council abused its discretion and erred as a matter of law

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by relying on the "appropriation clause" lease provisions, when it itself accepted the superior court's determination that the lease was invalid and void.

18. The Legislative Council abused its discretion in finding that 716 was not prejudiced by the Council's termination of the Leases before two years had elapsed on the ten year term of the Lease; such a factual finding was in error and not supported by the evidence.

19. The Legislative Council abused its discretion and erred as a matter of law in finding that applying estoppel in a sole source procurement would prejudice the public interest; The Decision's finding would foreclose any reliance remedy to 716 for participating in the Councils' procurement effort and is legal error.

20. The Legislative Council abused its discretion in rendering findings in the Decision that are not supported by the evidence. The Decision rests on the factually incorrect conclusion that 716 has not suffered any damage. 716's claim contains substantial evidence of such damage, and 716 will present additional evidence in support of its damage claim, including evidence of damages that have continued to accrue, at a trial de novo in this matter.

21. The Legislative Council abused its discretion in not granting additional time to file its appeal despite evidence that the consequences of the lease termination and the resulting default on 716's loan were in flux and developing during the appeal period.

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The eleven days granted were insufficient to develop such evidence, which continues to be in flux and will need to be presented at an evidentiary hearing and hearing de novo to resolve the disputed issues of fact raised by this appeal.

22. The Legislative Council abused its discretion and erred as a matter of law by adopting that portion of the Decision that denied 716's claim on the grounds that 716 did not prove in its claim that it had mitigated its damages. Denial on this basis is procedurally improper and a departure from well-established law, as it dismisses 716's damages for failure to mitigate even though 716 was not—in its initial claim—obligated to prove mitigation. Under Alaska law, while it is 716's duty to mitigate its damages, it is not its burden to prove mitigation—such evidence is necessary only if and when its mitigation is challenged.[3] 716 stands ready to submit its proof at a hearing de novo on the issue of its substantial efforts to mitigate the damage caused by the Legislative Council's actions and the decisions of the Procurement Officer and the Legislative Council.

23. The Legislative Council's decision to adopt the Procurement Officer's Decision without hearing violates 716's due process rights because 716 to date has been deprived of a hearing on the issues raised by its claim, and has not been afforded the

[3] *Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 902–03 (Alaska 1984) (citing *West v. Whitney-Fidalgo Seafoods*, 628 P.2d 10, 18 (Alaska 1981)); *University of Alaska v. Chauvin*, 521 P.2d 1234, 1240 (Alaska 1974) ("The duty [to mitigate] rests on the party claiming damages but the burden of proving mitigation or failure to mitigate falls on the breaching party.").

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opportunity to challenge factual assertions on which the Decision is based, or present evidence that only could be offered at a hearing.[4] In addition, the Decision raises new arguments, defenses, and claims that were not raised in 716's contract claim, to which 716 has not been afforded a fair opportunity of response and rebuttal, and which largely are non-responsive to 716's contract claim. These arguments, defenses, and claims include not only the subject matter addressed above, but also an opportunity to present 716's damage claims which are necessarily in flux as the State's breach of the lease has caused 716 to default on its loan.

24. The Legislative Council erred as a matter of law in holding that the presentation of a procurement claim should be denied because it would force a future appropriation.

25. 716's due process rights have been violated by the application of the Legislative Procurement Procedures to its claim and appeal, as well as the conduct of the LAA and Legislative Council. These procedures, for the reasons set forth above have also denied 716 the opportunity to confront the agents and representatives of the Legislative Council through examination and instead have relied on newspaper articles and other evidence that lacks sufficient indicia of reliability.

[4] Given the unique procedural circumstances dictated by the Legislative Procurement Procedures, under which 716 was forced to appeal the denial of its claim to the same individual who had issued the denial, 716 argues that a trial de novo is the proper remedy for this violation of its constitutional rights. *See* Appellant's Mot. for Trial De Novo. Remand to the Legislative Council for a hearing under these circumstances would not result in a full and fair hearing on 716's claim.

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