

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

716 WEST FOURTH AVENUE, LLC,

Appellant,

vs.

LEGISLATIVE COUNCIL,

Appellee.

Case No. 3AN-16-10821 CI

**ORDER REGARDING 716 WEST FOURTH AVENUE'S ADMINISTRATIVE
APPEAL FROM DECISION OF LEGISLATIVE COUNCIL**

I. INTRODUCTION

This case arises from a lease dispute between 716 West Fourth Avenue, LLC ("716"), appellant and landlord, the Legislative Affairs Agency ("LAA"), tenant, and the Legislative Council, appellee. LAA entered into a complex lease agreement with 716 involving the remodel and occupancy of the building at 716 West Fourth Avenue in Anchorage. LAA later vacated the premises under contentious circumstances leading to the current dispute between the parties. In response, 716 pursued an equitable estoppel claim through administrative proceedings. The Legislative Council ("LC") acting as administrative adjudicator denied the claim, and 716 filed this appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

716 West Fourth Avenue, LLC is the owner of the building at 716 West Fourth Avenue in Anchorage. LAA acts as the "vehicle for execution of
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Legislative Council policy and the carrying out of other statutory and rule assignments made by the Legislature." <http://akleg.gov/legaffairs.php> (2015). The Legislative Council is directed to "adopt and publish procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch." AS 36.30.020.

In 2003, LAA entered into a lease with 716 to occupy the building at 716 West Fourth Avenue in Anchorage ("the building"). Administrative Record ("AR") 69-82. On September 19, 2013, the two parties entered into a new lease agreement. AR 421-40. This second lease required 716 to substantially renovate the building before LAA would occupy it. *Id.* Like all leases with the State of Alaska ("State"), the lease contained a non-appropriation clause conditioning the continuing validity of the lease on the state legislature appropriating funds to pay rent each year. AR 424, 436-37. Specifically, section 1.2 of the lease states:

In addition to any other right of the Lessee under this Lease to terminate the Lease, if, in the judgment of the Legislative Affairs Agency Executive Director, sufficient funds are not appropriated in an amount adequate to pay the then annual lease payments and expenses, the Lease will be terminated by the Lessee as of the date appropriated funds are exhausted, or will be amended by mutual agreement of the Parties. To terminate under this section, the Lessee shall provide not less than 90 days advance written notice of the termination to the Lessor.

AR 424. Section 43 states:

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

terminate under this section, the Lessee shall provide written notice of the termination to the Lessor. The Executive Director will include a budget request to cover the obligations of Lessee in the proposed budget as presented to the Legislative Council for each lease year as a component of Lessee's normal annual budget request and approval process.

AR 436–37. The second lease required LAA to pay \$7.5 million for the renovations upon completion and increased the rent to \$281,638 per month. AR 27–28. 716 completed the renovations, and the legislature re-occupied the building in January 2015. *Id.*

Shortly after the legislature re-occupied the building, a neighboring building owner brought suit against both 716 and LAA alleging the second lease violated statutory procurement requirements.¹ AR 8. The Superior Court ultimately ruled that the second lease violated AS 36.30.083(a) and was thus invalid on March 24, 2016. AR 43.

In December 2015, while that litigation was ongoing, the Legislative Council voted to recommend the legislature not appropriate funds for the lease for the upcoming fiscal year unless certain conditions were met. AR 810–11. On February 11, 2016, the conditions set by the Legislative Council had not been met so the Legislative Council again voted to recommend the legislature not appropriate funds for the lease. AR 939, 946. Pam Varni, LAA's executive director, did, however, submit a budget request to fully appropriate funds for the 716 West Fourth Avenue lease as required by Section 43 of the lease. *Id.* The legislature followed the Legislative Council's recommendation and did not

¹ *Alaska Building, Inc. v. 716 West Fourth Avenue, LLC*, Case No. 3AN-15-05969 CI.
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appropriate sufficient funds for the lease in the fiscal year 2017 budget.² AR 959, 961–62. This budget passed into law on June 28, 2016. *Id.*

Ms. Varni provided 716 with written notice of the legislature's decision to not appropriate funds for the lease on July 18, 2016. AR 962. The legislature then vacated the building on October 16, 2016. AR 994.

716 filed a contract claim with LAA's procurement officer on July 8, 2016 alleging a claim of equitable estoppel and claiming \$37 million in damages. AR 1–19. On October 6, 2016, the procurement officer denied 716's contract claim. See AR 731–51. The procurement officer's findings of fact included finding (1) that 716 had been heavily involved in the procurement analysis prior to both parties signing the second lease; (2) 716 had notice in 2013 that there was a potential challenge to the validity of the procurement process; and (3) the legislature had not appropriated funds for the lease for fiscal year 2017. AR 736–40. The procurement officer then held (1) that the legislature was acting within its constitutional authority when it did not appropriate funds for the lease in the fiscal year 2017 budget; (2) that the legislature's not appropriating funds for the lease terminated the lease pursuant to sections 1.2 and 43 of the lease; (3) that 716's estoppel claim failed because 716 had failed to prove reasonable reliance, prejudice, or prejudice to the public interest; and (4) that 716 had failed to prove its damages. AR 740–50. 716 appealed the procurement officer's decision to the

² The legislature appropriated \$844,900 to cover ninety days' of rent as section 1.2 of the lease required LAA to give 716 ninety days' notice of the termination of the lease after non-appropriation of funds. See AR 424, 961.

Legislative Council. See AR 974–1006. The Legislative Council adopted the procurement officer's findings without a hearing. AR 1024.

716 responded by filing this administrative appeal. 716 challenges all of the procurement officer's factual and legal findings. See Opening Brief of Appellant 1–2 [hereinafter Appellant's Br.].

III. LEGAL STANDARD

1. Agency Bias

"[A]dministrative officers are presumed to be honest and impartial until a party shows actual bias or prejudgment." *Calvert v. State, Dp't of Labor & Workforce Dev.*, 251 P.3d 990, 1006 (Alaska 2011) (internal quotations and citations omitted). "To show the bias of a hearing officer, a party must demonstrate that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence." *Id.* (internal quotations and citations omitted). "This is a demanding standard" and is not met where "a decisionmaker merely performs combined investigative and adjudicative functions." *Id.*

2. Standard of Review on Administrative Appeal

"When the superior court is acting as an intermediate court of appeal in an administrative matter . . . [w]e apply different standards of review to agency decisions depending on the subject of review." *Davis Wright Tremaine LLP v. State, Dep't of Admin.*, 324 P.3d 293, 298–99 (Alaska 2014) (internal quotations and citations omitted).

The court "review[s] an administrative agency's findings of fact for substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *White v. State, Dep't of Nat. Res.*, 984 P.2d 1122, 1125 (Alaska 1999) (internal quotations and citations omitted). The court "need only determine whether such evidence exists, and do[es] not choose between competing inferences." *McGlinchy v. State, Dep't of Nat. Res.*, 354 P.3d 1025, 1029 (Alaska 2015). The court also "do[es] not evaluate the strength of the evidence, but merely note[s] its presence." *Grimmett v. Univ. of Alaska*, 303 P.3d 482, 487 (Alaska 2013).

The court applies "the reasonable basis standard to questions of law involving agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions." *Davis Wright Tremaine LLP*, 324 P.3d at 299. When applying the reasonable basis test, the court "seek[s] to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if we may not agree with the agency's ultimate determination." *Id.*

The court applies "the substitution of judgment standard to questions of law where no agency expertise is involved." *Id.* Under the substitution of judgment standard, the court "may substitute [its] own judgment for that of the agency even if the agency's decision had a reasonable basis in law." *Id.*

3. *Equitable Estoppel*

"A party claiming equitable estoppel must prove four necessary elements:

(1) assertion of a position by conduct or word, (2) reasonable reliance thereon,

(3) resulting prejudice, and (4) the estoppel will be enforced only to the extent that justice so requires." *Ogar v. City of Haines*, 51 P.3d 333, 335 (Alaska 2002).

4. *Implied Covenant of Good Faith and Fair Dealing*

"An implied covenant of good faith and fair dealing exists in all at-will contracts." *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997). "The covenant has both subjective and objective elements." *Id.* "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." *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384 (Alaska 2004). However, "the covenant of good faith and fair dealing cannot add terms to a contract or prohibit what a contract explicitly permits." *Id.*

IV. DISCUSSION

1. *Agency Bias*

716 renews its arguments from its previous Motion for Hearing de Novo that the Legislative Council was biased as an administrative adjudicator, and the court should thus not give any deference to the Legislative Council's administrative decision.

In its Motion for Hearing de Novo, 716 argued (1) that there were various deficiencies in the administrative record; (2) that the procurement officer's weighing of the evidence was flawed; (3) that the procurement officer and Legislative Council were biased because of the Legislative Council's heavy involvement with the lease; (4) and that these various flaws in the administrative

proceeding amounted to a denial of due process. Motion for Hearing de Novo 18 – 30. The court denied the motion ruling that questions of law might well resolve this case and should be decided before any additional findings of fact were made. Order Denying 716 West Fourth Avenue, LLC's Motion for Hearing de Novo 3. The court also concluded that the administrative record was sufficient to resolve those questions of law. *Id.*

In its administrative appeal, 716 again complains that the Legislative Council was too involved in the lease agreement to impartially adjudicate 716's contract complaint. See Appellant's Br. 48–50. 716 also points to the fact that the procurement officer was also the Chair of the Legislative Council and the procurement officer's failure to attribute as much significance to evidence submitted by 716 as it would desire as examples of the Legislative Council's impermissible bias. See *id.*

The court begins by noting that it does not appreciate 716's incorporation by reference of a previous thirty-one-page motion as an end run around Alaska Rule of Appellate Procedure 212(c)(4)'s page limit. Alaska R. App. Proc. 212(c)(4). More substantively, the court sees no reason to incorporate the Motion for Hearing de Novo as there is nothing in the Motion for Hearing de Novo that is not already in the parties' briefing or the administrative record. For example, the motion's statement of facts generally mirrors that from 716's initial contract complaint which is already in the administrative record. Compare Motion for Trial de Novo 2–14 with AR 2–9. Further, many of the perceived factual errors in the administrative decision that 716 argued required trial de novo are raised again in

this appeal. *Compare* Motion for Trial de Novo 20–21 *with* Appellant's Br. 1–2. Similarly, the legal arguments raised in support of trial de novo appear in 716's Appellant's Brief and are fully addressed in this order. *Compare* Motion for Hearing de Novo 26–31 *with* Appellant's Br. 48–50.

716's allegations of agency bias are unconvincing. Proving agency bias is a "demanding standard." *Calvert*, 251 P.3d at 1006. For example, the Supreme Court has held that cases where the "adjudicator had a pecuniary interest in the outcome" or had been the "target of personal abuse or criticism from the party before him" were examples of when the "probability of actual bias [was] too high to be constitutionally tolerable." *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 58 (1975)). Further, 716's complaints are of the sort the Alaska Supreme Court has rejected before. In *Bruner*, the Alaska Supreme Court rejected the appellant's argument that the administrative officer was biased because, as the dean of the defendant university, she worked too closely with the defendant to remain unbiased. *Bruner*, 944 P.2d at 49. 716's argument that the procurement officer could not remain impartial because he was also a member of the Legislative Council is similarly unpersuasive. Further, in *Calvert*, the Alaska Supreme Court rejected the argument that a hearing officer's unfavorable selection of evidence to support her findings was sufficient to show bias. *Calvert*, 251 P.3d at 1006.

In light of *Bruner* and *Calvert*, it is apparent that 716's claims of agency bias are lacking any specific, concrete evidence of bias and are the sort of generalized complaints the Alaska Supreme Court has rejected in the past. 716 has failed to produce sufficient evidence to overcome the presumption that

administrative officers are impartial. Thus, 716's complaint about the procurement officer's treatment of the evidence 716 proffered must also fail.

716 also asserts that the Legislative council should have conducted an evidentiary hearing. Motion for Hearing de Novo 15. 716 also renews its motion that this court hold a trial de novo. Appellant's Br. 48–50. In its May 31, 2017 decision denying 716's Motion for Hearing de Novo, the court indicated that once the legal questions at issue in this administrative appeal were resolved, the court would determine if further evidentiary hearings were needed to determine unresolved factual issues. Order Denying 716 West Fourth Avenue, LLC's Motion for Hearing de Novo 3. But, as indicated in this decision, the court finds there is an adequate legal basis to resolve this matter and that further factual determinations are neither necessary nor warranted. The salient facts in this case are (1) that 716 is a sophisticated party represented by excellent attorneys; (2) that 716 was actively involved in the leasing process; (3) that 716 was aware that the validity of the lease was being challenged; (4) that Judge McKay found the lease was invalid; (5) that the legislature failed to appropriate funds for the lease; and (6) that the lease was subject to termination if this occurs. The administrative record was more than adequate to resolve these issues.

2. Factual Findings

The court reviews "an administrative agency's findings of fact for substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *White*, 984 P.2d at 1125. The

Legislative Council's decision includes three findings of fact: 716 through its

counsel was involved in the analysis of the lease's compliance with Alaskan procurement statutes, 716 had notice of a legal challenge to the validity of the lease, and the legislature did not fully appropriate funds for the lease in the fiscal year 2017 budget. AR 735–40.

A. 716's Involvement with Analysis of the Lease's Compliance with Procurement Procedures

The Legislative Council's decision included the factual finding that 716 was involved with LAA regarding the analysis of whether the lease complied with procurement statutes. AR 736–37. The Legislative Council relied on a series of emails involving John Steiner, 716's in-house counsel, discussing whether the lease complied with Alaskan procurement rules. AR 736–37, 1108–10, 1111–17, 1118–19. Within these emails, there were two memoranda drafted by Steiner discussing the lease and its compliance with AS 36.30.083(a) dated July 13, 2013 and July 24, 2013. AR 1113–17, 1118–19. The existence of the memoranda and the inclusion of at least one state legislator³ in the email chain is sufficient evidence that a reasonable mind would conclude that 716 was involved in the procurement analysis.

B. 716's Notice of Impending Legal Challenge to the Validity of the Lease

The Legislative Council's decision further found that 716 had notice of a legal challenge to the validity of the lease shortly after the lease was signed. AR 737–38. Mr. Gottstein, the plaintiff in the aforementioned *Alaska Building, Inc.*

³ Mike Hawker
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lawsuit, testified in a deposition in that lawsuit that he approached Mr. McClintock, 716's counsel, about the illegality of the lease and potentially seeking injunctive relief. AR 1138. Mr. Gottstein provided matching testimony in response to an interrogatory in the *Alaska Building, Inc.* litigation. AR 1188. The court thus holds that there was sufficient evidence to support the decision's finding of fact.

C. The Legislature's Decision Not to appropriate Funds for the Lease

The Legislative Council's decision also found that 716 was aware of the non-appropriation clause of the lease and that the legislature triggered the non-appropriation clause by not appropriating sufficient funds for the lease in the fiscal year 2017 budget.

716 argues that it understood the lease to only allow the legislature to terminate the lease pursuant to the non-appropriation clause during the first year. Appellant's Br. 7–8. However the clear language of the lease belies this interpretation. AR 436–37 (“Funds are available in an appropriation to pay for the Lessee’s monetary obligations under the Lease through June 30, 2015. The availability of funds to pay for the Lessee’s monetary obligations under the Lease after June 30, 2015 is contingent upon appropriation of funds for the particular fiscal year involved.”). Further, there is sufficient evidence in the record to support the Legislative Council's finding that 716 understood the non-appropriation clause to allow non-appropriation at any point as Mr. Pfeffer, 716's representative, testified before the legislature that this was his understanding on

August 3, 2016. AR 1058–59 (“Mr. Pfeffer said that every government lease – city, state, federal – in every state has a subject to [sic] annual appropriation clause.”).

The finding that the legislature did not appropriate sufficient funds to pay the lease in fiscal year 2017 was also adequately supported by the administrative record. The lease called for annual payment of \$3,379,656,⁴ but the legislature only appropriated \$844,900 to pay the lease. AR 960–61. 716 argues that it in fact received \$1,227,817.32 in rent payments, and this discrepancy requires the court to further investigate the Legislative Council's finding that the legislature did not appropriate funds for the lease in the fiscal year 2017 budget. First, this argument misunderstands the standard of review. The court “need only determine whether such evidence exists, and do[es] not choose between competing inferences.” *McGlinchy*, 354 P.3d at 1029. It is enough that there is evidence supporting the Legislative Council's findings; the existence of competing evidence is inapposite in this administrative appeal. Further, LAA has explained the discrepancy as a result of an emergency appropriation to cover extra rent caused by a delay in delivering notice of termination and real estate tax payments appropriated in the fiscal year 2016 budget. Appellee's Br. 23–25. There is thus sufficient evidence in the record that a reasonable person could conclude the legislature had not appropriated sufficient funds to pay the lease for the full fiscal year 2017.

⁴ See AR 27–28 (extrapolating yearly rent based on monthly rent of \$281,638).
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3. *Conclusions of Law*

A. *Legislature's Constitutional Authority to Not Appropriate Funds to Pay the Lease*

As an initial matter, the court holds that the substitution of judgment standard of review applies to the Legislative Council's conclusion that the legislature was constitutionally authorized not to appropriate funds for the lease. The Alaska Constitution gives the legislature the "power to legislate and appropriate," *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001), but interpreting the Alaska Constitution remains the purview of the judiciary. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) ("Under Alaska's constitutional structure of government, the judicial branch has the constitutionally mandated authority to ensure compliance with the provisions of the Alaska Constitution. . . ." (internal quotations and citations omitted)). Accordingly, the court "may substitute [its] own judgment for that of the agency even if the agency's decision had a reasonable basis in law." *Davis Wright Tremaine LLP*, 324 P.3d at 299.

The Legislative Council's decision concluded that the legislature acted within its constitutional authority by not appropriating funds to pay the lease AR 740–42. 716 does not and cannot argue against the general proposition that the legislature has the constitutional authority not to appropriate funds for a lease in the fiscal year 2017 budget. *Carr-Gottstein Props. v. State of Alaska*, 899 P.2d 136, 143 n.5 (Alaska 1995) (quoting *Schulz v. State*, 639 N.E.2d 1140, 1149 (N.Y. 1994)) ("Such spending plans are effectual only to the extent subsequent

legislatures indeed do 'give effect to them by providing the means of and directing their payment, but the discretion and responsibility is with them as if no former appropriations had been made. No duty or obligation is devolved upon them by the acts of their predecessors.'"). Instead, 716 argues that LAA used the legislature's non-appropriation of funds as an excuse to terminate the lease to escape an unfavorable court judgment. Appellant's Br. 36–43. 716 further argues that this amounts to bad faith, and the legislature cannot decide not to appropriate funds to effectuate their bad faith. *Id.*

716 fails to provide any legal support for this proposition. See *id.* The only other example of an unconstitutional use of the legislature's appropriation power 716 provides is a hypothetical racially discriminatory non-appropriation. *Id.* at 39. This hypothetical highlights the limits of judicial scrutiny of legislative appropriations – when those appropriations violate a constitutional right. See *South Dakota v. Dole*, 483 U.S. 203, 210–11 (“[A] grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress' broad spending power.”); *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) (affirming a grant of summary judgment because plaintiff had made “no viable claim that a constitutional right was violated when the governor vetoed the appropriation. . . .”). 716 does not claim that the legislature's decision not to appropriate funds for the lease violated any of its constitutional rights.⁵

⁵ 716 does complain of violation of its due process rights, but these complaints are in regard to alleged faults in the administrative adjudicatory procedure, not the legislature's appropriation decisions. See Appellant's Brief 43.

Accordingly, in the court's judgment, the legislature acted within its constitutional authority when it did not appropriate funds for the lease for fiscal year 2017.

B. Termination of the Lease Due to Non-Appropriation of Funds

The court first finds that the reasonable basis standard of review applies. The Legislative Council is tasked with managing legislative space. AS 24.20.060(2). Thus, the legal effect of the leases the legislature enters into is within the "scope of the agency's statutory functions." *Davis Wright Tremaine LLP*, 324 P.3d at 299. As such, the court will determine "whether the agency's decision is supported by the facts and has a reasonable basis in law, even if we may not agree with the agency's ultimate determination." *Id.*

The Legislative Council's decision concluded that the legislature's decision not to appropriate funds to pay rent on the lease terminated the lease under sections 1.2 and 43 of the lease. The decision also discussed whether LAA had performed under the lease, and the effect said performance would have on 716's damages. However, this goes to the issue of damages rather than whether the lease was actually terminated, and, for reasons discussed more fully in section IV.3.D below, the court does not need to address damages in this order.

716 renews its arguments from section IV.2.B *supra*, namely that it understood the non-appropriation clause to apply only to the first year of the lease and that LAA did not terminate the lease when appropriated funds had been exhausted. These arguments remain unpersuasive. The plain language of section 43 of the lease states that non-appropriation can terminate the lease at

any time. AR 436–37 (“Funds are available in an appropriation to pay for the Lessee’s monetary obligations under the Lease through June 30, 2015. The availability of funds to pay for the Lessee’s monetary obligations under the Lease after June 30, 2015 is contingent upon appropriation of funds for the particular fiscal year involved.”). The Legislative Council thus had a reasonable basis in law for interpreting the language of the lease in accordance with its plain meaning.

Similarly, the lease called for \$3,379,656 in rent payments for fiscal year 2017. The legislature only appropriated \$844,900 to pay rent under the lease in the fiscal year 2017 budget. AR 960–61. Even assuming arguendo that the legislature appropriated \$1,227,817.32 as 716 claims, the legislature still did not appropriate sufficient funds to pay out the lease for the whole of fiscal year 2017.⁶ Accordingly, the Legislative Council had a reasonable basis in law and fact to conclude that LAA could terminate the lease under the non-appropriation clause due to the legislature’s non-appropriation of funds.

The court also notes that the above holdings are dispositive of 716’s estoppel claim. 716’s damages flow from the legislature’s departure from the property and the ensuing loss of rent payments. Based on the discussion above and in section IV.3.C.b below, LAA’s representations regarding the lease’s compliance with procurement regulations and the lease’s compliance or noncompliance with procurement rules are wholly irrelevant to the damages 716

⁶ To the extent 716 is arguing it was inappropriate for the legislature to vacate the building in October because the legislature had appropriated more than \$844,900 to pay rent on the lease, that is a question of damages and does not affect the court’s finding that LAA properly terminated the lease under the non-appropriation clause. Further, the court is satisfied that LAA has sufficiently explained such discrepancies. See *supra* section IV.2.C; Appellee’s Br. 22–25. Order Re: 716 West Fourth Avenue LLC’s Administrative Appeal 716 West Fourth Avenue LLC v. Legislative Council Case No. 3AN-16-10821 CI Page 17 of 25

claims. 716's damages flow from the legislature's decision not to appropriate funds under the lease which, as discussed above, was both a constitutionally and contractually valid decision. To the extent 716 argues the non-appropriation was a pretext to escape from Superior Court's March 2016 decision invalidating the lease, the possibility of non-appropriation was raised, and the recommendation not to appropriate was made well before the Superior Court issued its March 24, 2016 decision declaring the lease invalid.

Nonetheless, the court will discuss the Legislative Council's legal findings regarding 716's estoppel claim for the sake of completeness.

C. Equitable Estoppel

The court finds that the substitution of judgment standard of review applies to the Legislative Council's decision that 716 was not entitled to relief under equitable estoppel. As discussed above, the Legislative Council is tasked with exercising "control and direction over all legislative space" AS 24.20.060(2), (5). Applying the common law doctrine of equitable estoppel has nothing to do with directing legislative spaces. Accordingly, the court may "substitute [its] own judgment for that of the agency even if the agency's decision had a reasonable basis in law."

A party claiming equitable estoppel must show: (1) an assertion, (2) reasonable reliance on that assertion, (3) that they suffered prejudice because they reasonably relied on that assertion, and (4) the public interest will not be prejudiced by a finding of equitable estoppel. See *Ogar*, 51 P.3d at 335.

716 alleges that (1) LAA asserted the second lease complied with applicable procurement statutes, (2) that they reasonably relied on this assertion, (3) that they lost \$37 million because of this reliance, and (4) the public would be prejudiced by the various harms that would result if the state is allowed to just walk away from contracts by asserting the non-appropriation clauses in such contracts. AR 11–15.

The Legislative Council denied 716's equitable estoppel claim for failing to prove reasonable reliance, prejudice, or prejudice to the public interest. AR 744–49. 716 challenges all three of these findings in this appeal. Appellant's Br. 2.

a. Reasonable Reliance

The Legislative Council determined that 716 did not reasonably rely on LAA's assertions about the validity of the procurement process for two reasons. AR 745–46. First, 716 is a sophisticated commercial actor that conducted its own analysis of the procurement process and thus did not rely on LAA's procurement analysis. AR 745. Second, 716 had notice of impending legal challenge to the validity of the procurement process, and it was thus unreasonable for 716 to proceed with performance in the face of this legal challenge. AR 745–46.

716 counters by pointing to the numerous instances where LAA represented to various parties that the lease complied with Alaskan procurement statutes and arguing that 716's analyses of the procurement process neither doubted LAA's ability to enter into a lease nor contemplated LAA abandoning its legal defense of the lease. Appellant's Br. 20–27. The Legislative Council

responds by echoing the arguments from the Legislative Council's decision. Appellee's Br. 43–49.

The court starts by noting that “a person dealing with a municipality is bound to take notice of the legal limits of its power and those of its agents.” *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 96 (Alaska 1984). The only exception to this rule the court can find is *Schneider* where the Alaska Supreme Court held that an average citizen reasonably relied on a settlement agreement reached with the municipality. *Id.* at 98. By contrast though, the Alaska Supreme Court has been much more reticent to find reasonable reliance when the plaintiff is a sophisticated commercial actor. See, e.g., *Property Owners Ass'n of the Highland Subdivision A Portion of USMS 769, Ketchikan, Alaska v. City of Ketchikan*, 781 P.2d 567, 573 (Alaska 1989) (“Elliott and Elberson appear to be sophisticated businessmen. We are thus not moved by the concerns we expressed in *Schneider*. . . .”) [hereinafter *Property Owners Ass'n of Ketchikan*]; *Messerli v. Dep't of Natural Res., State of Alaska*, 768 P.2d 1112, 1121 (Alaska 1989) (“Messerli was assisted by counsel and a land consultant, Dale Tubbs, a former deputy director of the division of lands. Thus Messerli's reliance on the Director's expansion of the area was unreasonable.”). Looking at these cases, the court finds that the instant case is more like *Messerli* and *Property Owners Ass'n of Ketchikan* than *Schneider*. 716 is a sophisticated commercial actor represented by both in-house and external counsel. Further, as discussed above, 716 was heavily involved in the analysis of whether the lease complied with Alaskan procurement rules. In fact, reading the chain of emails and the analysis

prepared by 716's counsel, it becomes apparent that 716 was doing more than a simple risk analysis; it was attempting to convince the legislature that the lease complied with Alaskan procurement statutes. Given that 716 not only independently investigated the lease's validity but actively tried to influence the legislature's analysis, 716 could not have reasonably relied on any representation by the legislature that the lease complied with procurement requirements.

In the court's judgment, 716's commercial sophistication, its independent investigation through in-house and external counsel, and its attempts to influence the legislature's analysis show that it did not reasonably rely on LAA's assertions that the lease complied with Alaskan procurement rules. If anything, the record indicates that 716 worked hard to convince LAA to proceed on the basis that it did.

b. Prejudice

The Legislative Council's decision concluded that 716 was not prejudiced by the termination of the lease under the non-appropriation clause because 716 had received the full benefit of its bargain. AR 746–47. In effect, the Legislative Council concluded that 716 had effectively bargained for a lease guaranteed through June 2015 followed by yearly options to renew pending the legislature's decision to appropriate funds. *See id.*

716 recounted its financial history relating to the building as proof that it had spent the \$37 million in investments it is claiming as damages. Appellant's Br. 27–31. 716 decried that their lender's attempts to repossess the building

further prove it has suffered \$37 million in damages. *Id.* 716 seems to assume the existence of damages proves prejudice. *See id.*

716's arguments are flawed because they fundamentally misunderstand the lease. 716 did not have a ten-year lease with the legislature as its tenant. *See AR 424, 436–37.* Section 1.2 and 43 of the lease make it clear that 716 effectively had a one-year lease with nine one-year options that the state legislature could choose to renew. *See id.*

With this in mind, the court affirms the Legislative Council's decision's conclusion that 716 was not prejudiced by LAA terminating the lease. As discussed above, the legislature had the authority to decide not to appropriate funds for the lease. *See supra* section IV.3.A. Once the legislature made that decision, LAA had the authority to and in fact did terminate the contract pursuant to the non-appropriation clause. *See supra* section IV.3.B. 716 may not have expected LAA to exercise its power to terminate under the non-appropriation clause, and it may have borrowed money under the assumption LAA would not exercise its right; however, neither of those facts mean that 716 suffered any legally cognizable prejudice when LAA exercised its rights under the lease.

Therefore, in the court's judgment, 716 was not prejudiced by LAA terminating the lease according to the non-appropriation clause in said lease.

c. Prejudice to the Public Interest

The court does not need to decide how or to what extent the public interest would be affected by affirming or overturning the Legislative Council's decision because 716's equitable estoppel claim fails as a matter of law for other

reasons, namely 716 did not reasonably rely on LAA's assertions and was not prejudiced by LAA terminating the lease. See *supra* sections IV.3.C.a, b. The court does note that balancing the benefits of budgetary savings against the costs of risking increased borrowing rates is the type of decision traditionally in the legislature's purview. A legislative decision presumably balances competing interests of the public and resolves them in a manner that the legislature has determined to be in the public interest. For the purpose of determining estoppel, the court does not believe it appropriate for the court to second guess whether a lawful legislative action was in the public interest.

In the court's judgment, 716 is not entitled to relief under equitable estoppel for the reasons discussed above.

D. Damages

As the court has determined that 716 is not entitled to any relief under equitable estoppel, the court need not decide whether the Legislative Council properly concluded that 716 had failed to prove its damages.

4. Implied Covenant of Good Faith and Fair Dealing

716 finally argues that LAA and Ms. Varni, LAA's executive director, failed to satisfy the implied covenant of good faith and fair dealing by relying on and presenting misleading cost analyses and thus intentionally misleading the legislature into voting not to appropriate funds for the lease. Appellant's Br. 44–45.

716 contends that LAA intentionally and in bad faith misled the legislature into not appropriating funds for the lease. Appellant's Br. 43–45. As proof, 716

relies on an email from a single Alaska Housing Finance Corporation (“AHFC”) analyst criticizing the economic analysis Ms. Varni presented at Legislative Council meetings, and Ms. Varni’s failure to mention this criticism. *Id.* But, third-party economic analysis of the legislature’s options regarding the lease reached the same conclusions as the in-house analysis presented by Ms. Varni at the December 4, 2015 Legislative Council meeting. See AR 687 (finding that relocating to the Atwood building would cost the State less than renting or buying the building at 716 West Fourth Avenue). This seriously undermines any argument that Ms. Varni was acting in bad faith when she ignored the dissent of a lone AHFC employee. Further, the court has read the transcripts of the December 4, 2015, AR 1402–1508, the December 19, 2015, AR 1047–1106, and the February 11, 2016, AR 936–942, Legislative Council meetings, and, at each meeting, there was a robust discussion about the merits of the various options before the legislature. Based on the transcripts, Ms. Varni responded candidly to questions asked, and multiple experts also testified as to the budgetary savings that could be achieved by vacating the building. As such, the court finds that Ms. Varni neither acted in bad faith nor intentionally misled the legislature by presenting LAA’s in-house economic analysis.

To the extent 716 is arguing that LAA violated the covenant of good faith by terminating the lease, the covenant of good faith cannot be interpreted to prohibit something explicitly allowed under the contract. *Ramsey v. City of Sand Point*, 935 P.2d 126, 133 (Alaska 1997) (“The covenant of good faith cannot be

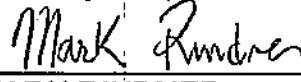
interpreted to prohibit what is expressly permitted by Ramsey's contract with the city.").

Accordingly, the court holds that LAA did not violate the covenant of good faith and fair dealing. LAA undeniably had the right to terminate the contract, and there is insufficient evidence in the administrative record that LAA acted in bad faith when recommending non-appropriation to the legislature.

V. CONCLUSION

The Legislative Council's administrative decision is affirmed for the reasons stated above.

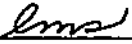
DATED at Anchorage, Alaska, this 6th day of April, 2018.



MARK RINDNER
Superior Court Judge

I certify that on 4/6/18 a true and correct copy of this order was sent to:

Feldman/Cuddy


Administrative Assistant