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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTHWEST ALLOYS, INC., and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF
NATURAL RESOURCES, and THE HONORABLE HILARY S.
FRANZ, and COLUMBIA RIVERKEEPER, WASHINGTON
ENVIRONMENTAL COUNCIL, and SIERRA CLUB,

Appellants/Cross-Respondents.

RESPONSE TO APPELLANTS' OPENING BRIEFS

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I. INTRODUCTION

This case is about whether a decision by the Department of Natural Resources (“DNR”) to deny consent to a sublease was reasonable. The trial court found that DNR acted unreasonably, but the court failed to enter an order allowing the sublease to take effect as precedent required. This Court should affirm the trial court’s finding that DNR acted unreasonably and remand the case to the trial court for entry of an order declaring that the sublease may take effect.

In 2010, Northwest Alloys, Inc. (“NWA”) asked DNR to consent to a sublease of aquatic lands to Millennium Bulk Terminals-Longview, LLC (“MBT-Longview”). The head lease between DNR and NWA provides that NWA may sublease the aquatic lands with DNR’s prior written consent, “which shall not be unreasonably conditioned or withheld.” DNR took over six years to evaluate the sublease request. During that time, DNR issued multiple and ever-changing requests for information about MBT-Longview, in a sharp departure from the agency’s historical practice with respect to other prospective subtenants at other properties.

By January 2016, all parties had reached agreement on the terms of a sublease. DNR then met with environmental groups that have intervened in this case (collectively, “Riverkeeper”), without notice to NWA or MBT-Longview, and reversed course yet again. DNR abruptly refused to

execute the sublease agreement, instead issuing still more demands for still different information.

By this time DNR also publicly opposed MBT-Longview's proposed coal export terminal that would operate with docks over the aquatic lands. DNR's animus toward coal as a fuel source was the driving force behind its information requests, its shifting positions and delay tactics, and its ultimate refusal to consent to the sublease request, even though granting the sublease would not by itself have authorized MBT-Longview to build its proposed terminal.

DNR formally denied NWA's request for consent to sublease the aquatic lands to MBT-Longview by letter dated January 5, 2017. DNR stated that it denied consent based on MBT-Longview's failure to provide financial information DNR requested and other factors that it claimed allegedly bear on MBT-Longview's suitability as a subtenant.

NWA and MBT-Longview appealed DNR's denial of consent to the Superior Court of Cowlitz County pursuant to RCW 79.02.030. That statute provides a mechanism to appeal DNR's decisions with respect to the sale or lease of public lands. The statute provides for a "hearing and trial of said appeal in the superior court," which "shall be de novo before the court, without a jury, upon the pleadings and papers so certified" by DNR as the record of decision. RCW 79.02.030.

The trial court ruled against DNR on the merits, finding that DNR's denial of consent was unreasonable because it was based on arbitrary and capricious justifications. The trial court found that the

“documents sought and specifically noted by DNR in its decision would not be of any value of alleviating [DNR’s] expressed concerns.” The trial court further found that DNR’s reliance on a 2010 permitting issue to deny consent in 2017 was arbitrary because DNR had already indicated in 2015 that it was willing to sublease to MBT-Longview despite that issue. The trial court concluded that “DNR’s reasons for denial of the sublease as stated in the January 5, 2017 letter are not supported by the facts” and that “[d]enial of NWA’s request for consent to sublease to MBT-Longview was arbitrary and capricious.”

This Court should affirm the trial court’s ruling on the merits. The record is clear that DNR’s information requests were not tailored to address DNR’s purported concerns, and that its other stated bases for denying consent were unreasonable and unsupported by the record. DNR’s justifications for denying consent do not withstand scrutiny, and its unreasonable denial of consent violated the Lease, and deprived NWA of the benefits of its agreement with DNR.

Although the trial court correctly determined that DNR’s consent was unreasonably withheld, it erred on the remedy when it sent the sublease decision back to DNR for further consideration. The law is clear that when a landlord unreasonably denies consent contrary to the terms of a lease, the tenant’s requirement to obtain the landlord’s consent is waived. The trial court should have issued a judgment declaring that NWA may sublease to MBT-Longview.

The trial court also committed legal errors regarding the applicable standards to review and evaluate DNR's decision. The Court does not need to resolve those errors, however, if it affirms the trial court's decision on the merits. Despite improperly applying a deferential standard of review and injecting subjective factors into an objective test, the trial court nevertheless properly held that DNR's decision was "not supported by the facts" and was therefore "arbitrary and capricious." The trial court could not have reached a different conclusion had it applied the appropriate standards to DNR's decision. The Court therefore does not need to reach these issues if it affirms on the merits.

NWA and MBT-Longview respectfully urge the Court to affirm the trial court's ruling on the merits and remand for entry of an order declaring that NWA may sublease to MBT-Longview.

II. ASSIGNMENTS OF ERROR

1. After finding that DNR unreasonably denied consent to sublease, the trial court erred by denying NWA and MBT-Longview's Motion for Entry of Judgment declaring that NWA may sublease to MBT-Longview. CP 17815, ¶¶ 1–3 (January 31, 2018 Order).

2. The trial court erred by applying an "arbitrary and capricious" standard of review to DNR's decision to deny consent to sublease because de novo review was required under RCW 79.02.030. CP 17689, ¶¶ 3–4 (Order on the Merits).

3. The trial court erred in holding that "unique statutory mandates that apply to [DNR]" must be considered when evaluating the

reasonableness of DNR's decision to deny consent to sublease under the terms of a lease. CP 17690, ¶ 5 (Order on the Merits).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does RCW 79.02.030 authorize the trial court to send a decision back to the agency for further consideration after finding the agency's decision unlawful? CP 17815, ¶¶ 1–3 (January 31, 2018 Order) (Assignment of Error No. 1).

2. Does the well-settled rule in Washington, that the effect of a landlord's unreasonable denial of consent to sublease is a waiver of the tenant's requirement to obtain consent, apply to all leases regardless of the landlord's identity? CP 17815, ¶¶ 1–3 (January 31, 2018 Order) (Assignment of Error No. 1).

3. Where a state agency enters into a lease providing that its consent to a sublease cannot be unreasonably withheld, do principles of separation of powers prevent a court from declaring that the sublease may proceed upon finding that consent was unreasonably withheld? CP 17815, ¶¶ 1–3 (January 31, 2018 Order) (Assignment of Error No. 1).

4. Does RCW 79.02.030 authorize the trial court to order DNR to file "a new or amended pleading" after ruling against DNR on the merits? CP 17815, ¶¶ 1–3 (January 31, 2018 Order) (Assignment of Error No. 1).

5. Under RCW 79.02.030, does DNR's decision to deny consent to a sublease constitute a quasi-judicial action that must be reviewed de novo? CP 17690, ¶ 5 (Order on the Merits) (Assignment of Error No. 2).

6. Once DNR exercises its administrative discretion to execute a

lease, do its “unique statutory mandates” have any bearing on how that lease is subsequently enforced by courts? CP 17690, ¶ 5 (Order on the Merits) (Assignment of Error No. 3).

7. Does DNR’s status as an administrative agency with “unique statutory mandates” modify the objective standard used by Washington courts, under which a landlord’s denial of consent to an assignment is reviewed by examining whether a reasonably prudent person in the landlord’s position would have denied consent? CP 17690, ¶ 5 (Order on the Merits) (Assignment of Error No. 3).

IV. STATEMENT OF THE CASE

A. NWA’s Request to Sublease

NWA, a subsidiary of Alcoa Corporation (“Alcoa”), owns property located at 4029 Industrial Way in Longview, Washington (the “NWA Property”). AR000138.¹ Situated adjacent to the Columbia River navigation channel, the NWA Property’s value is tied to its location and water access. AR001242. Since purchasing the property decades ago, NWA has leased the state-owned aquatic lands adjacent to the NWA Property from DNR to use the dock and associated infrastructure on the aquatic lands for shipping alumina to Alcoa’s Wenatchee Works smelter in eastern Washington. *Id.*; AR000138; AR005832; AR000343; AR001525.

In 2008, DNR renewed its aquatic lands lease with NWA for an

¹ Citations to the Certified Administrative Record are designated “AR.” Citations to the Clerk’s Papers are designated “CP.” Citations to the Record of Proceedings are designated as “RP.”

additional 30-year term (the “Lease”). AR001525. Section 9 of the Lease allows NWA to sublease the aquatic lands with the “State’s prior written consent, which shall not be unreasonably conditioned or withheld.”

AR001546. In determining whether to consent to a sublease, DNR

may consider, among other items, the proposed transferee’s financial condition, business reputation and experience, the nature of the proposed transferee’s business, the then-current value of the Property, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the Property.

Id. (§ 9.1(a)).

DNR may condition its consent to a sublease on “(1) changes in the terms and conditions of this Lease, including, but not limited to, the Annual rent,” and/or (2) on the agreement of NWA or the transferee to conduct hazardous substance testing on the property. AR001547 (§9.1(b)). A transfer to a subtenant does not affect NWA’s liability and obligations under the Lease, including liability for payment of rent and security. AR001547 (§9.1(c)); *see also* AR000369 (per DNR, “DNR has a lease agreement with [NWA], who is ultimately responsible for activities on the leased premises.”). In addition to NWA’s continuing liability under the Lease, any subtenant must assume “all obligations under [the] Lease, including the payment of rent.” AR001547 (§9.1(c)).

The Lease authorizes the construction of two additional docks and contemplates that “all three docks will be used for loading and offloading of various products,” which “will include but [are] not limited to steel products, pipe, lime, stone, crushed rock, coal, coke, silica sand, garbage,

cement clinker, potash, dry fertilizer, slag, wood chips, pulp bales, cement, alumina and other general bulk products.” AR001574; AR001532 (Lease, § 2); AR001571–75 (Plan of Development, Operations and Maintenance: Docks). Construction of the additional docks increases the amount of security required under the Lease from \$15,000 to \$300,000 for NWA and any subtenant. AR001552 (Lease, § 10.4(a)); AR001548 (Lease, § 9.3(11)).

In 2010, MBT-Longview entered into negotiations with NWA and its then-subtenant, Chinook Ventures, Inc. (“Chinook”), to take over Chinook’s bulk storage facility operations on the NWA Property. AR000149. At the time, Chinook owned the structures on the NWA Property and was leasing that property and subleasing the aquatic lands from NWA to support its bulk storage facility operations, which included shipping alumina to Alcoa’s Wenatchee Works smelter. *Id.*; AR000139; AR000134. MBT-Longview planned to continue the alumina handling operations at the site using the existing equipment and planned upgrades to accommodate the handling of coal and other products. AR000149–55. MBT-Longview’s ultimate objective was to obtain permits for and construct a coal export terminal on the site. AR005787–88.

On October 28, 2010, NWA requested permission to sublease the aquatic lands to MBT-Longview. AR000098. Over the next several years, DNR requested copious amounts of information and changed its position on the proposed sublease numerous times. *See* CP 15540–50 (Appellant’s Opening Brief on the Merits). At first, DNR stated it would not act on the

sublease request until MBT-Longview obtained all the necessary permits for its coal terminal. AR00362–63. Then DNR proposed amending the Lease in a way that would block MBT-Longview’s proposed terminal. AR000779. Later, DNR concluded that a lease amendment was actually not required and, in June 2014, DNR proposed a consent to sublease agreement. AR000980; AR000995-96; AR001060. Years of negotiations followed over the terms under which DNR would consent to the sublease to MBT-Longview. *See* AR001076; AR001093; AR001121; AR001136; AR001155; AR001171; AR001180.

In January 2016, the parties finally reached an agreement on the terms of a sublease. AR001191; AR001215 (email from NWA’s counsel stating that NWA and MBT-Longview are in agreement with DNR’s final changes to the sublease agreement and that, “From our standpoint, we believe these documents now to be final, and that all we need to do is ‘accept’ the changes in both and route for signature”); AR014126 (CEO of MBT-Longview responding to DNR that NWA had accepted final changes and stating “We’re done!”).

But DNR reversed course yet again after meeting with environmental groups on January 13, 2016, AR001205, and receiving a legal memorandum from an Earthjustice attorney outlining a strategy that would allow DNR to deny its consent in a manner that Earthjustice believed would survive appeal. *See* AR001234 (“[T]he terms of the lease provide DNR ample discretion to deny the requested sublease on the facts that exist today, and withstand judicial review.”).

In February 2016, DNR presented NWA with another list of requests that tracked the Earthjustice memorandum, seeking information about the bankruptcy filing by Arch Coal, Inc. (“Arch Coal”), one of MBT-Longview’s investors, and NWA’s recent curtailment of its Wenatchee Works smelter. *Compare* AR001240, *with* AR001235-38. DNR also expressed concerns about MBT-Longview’s financial condition due to the difficult market conditions in the coal industry, as well as the defaults of NWA’s prior subtenant, Chinook. AR001240–41. “To help answer the questions that these recent events have created regarding Millennium’s financial condition,” DNR requested copies of MBT-Longview’s audited financial statements. AR001241. MBT-Longview responded on March 9, 2016. AR001257; *see also* CP 15554–15558 (Appellants’ Opening Brief on the Merits) (describing responses to DNR’s requests). MBT-Longview did not provide the financial statements DNR requested, citing confidentiality concerns. AR001257.

On June 24, 2016, DNR requested even more information from NWA based on purported concerns about the Arch Coal bankruptcy, MBT-Longview’s obligations to NWA under the ground lease for the NWA Property, coal market conditions, and Chinook’s impacts on the leasehold. AR001418–19.

Just eleven days earlier DNR had submitted public comments in which it formally opposed construction of MBT-Longview’s proposed coal terminal, contending that it “is inconsistent with state policy to reduce fossil fuel dependence, promote clean energy technologies, and mitigate

the potential for catastrophic and irreversible impacts to natural resources.” AR001407. This “state policy” is not included in the Lease as a basis upon which DNR may deny consent. *See* AR001546. Public records requested by MBT-Longview also showed that DNR has not asked any other proposed subtenant to provide anything close to the extensive amounts of information DNR sought from NWA and MBT-Longview. *See* AR014152 (2016 public records request); AR013879–82 (DNR tells potential assignee in 2012 to “[p]rovide documentation showing you have the financial resources to maintain the facility,” but that he “do[es] not need to submit this in writing,” and that DNR “can talk to your banker/financial institution to determine whether you are solvent”); AR013939–40 (2013 assignment required only an application and letter “stipulating that the [assignee] has the financial means to perform under the lease i.e. they can afford the rent, security and insurance”); AR013874 (information request for 2016 assignment limited to “documentation of [assignee’s] financial condition and ability to fulfill the financial obligations of the lease” such as payment of rent, maintenance of pier and wharf, and satisfying bond and insurance requirements). Faced with DNR’s open opposition to MBT-Longview’s terminal, and DNR’s prior delays and shifting positions, it became clear to NWA and MBT-Longview that DNR was not proceeding in good faith; NWA did not further respond to DNR’s requests. CP 15559.

B. The Arch Coal Bankruptcy and Coal Market Conditions

MBT-Longview disclosed to DNR early on that it is a single-

purpose start-up entity funded by investors with an objective of realizing a return on their investments once the necessary permits for MBT-Longview's proposed coal export terminal are granted and it commences operation. *See* AR000141; AR013766; AR013759; AR013620.

In January of 2016, Arch Coal and numerous subsidiaries declared bankruptcy. *See* AR013765. One such subsidiary, Arch Coal West, LLC ("Arch Coal West"), held a 38% stake in MBT-Longview. AR013766. The other 62% was held by LHR Infrastructure, LLC, a wholly owned subsidiary of Lighthouse Resources, Inc. (collectively, "Lighthouse"²). *Id.* Arch Coal's bankruptcy filings indicated that Arch Coal West was contributing approximately \$200,000 per week to cover MBT-Longview's operating expenses in the 90 days leading up to its bankruptcy filing. *See* AR013795. Extrapolating this figure indicates that MBT-Longview's owners were covering its operating expenses totalling tens of millions of dollars per year. *See id.*

Arch Coal's bankruptcy filings further indicated that "cash calls" were periodically required of MBT-Longview's two owners to cover these costs. AR013766. After Arch Coal West declared bankruptcy, it had limited cash reserves to continue covering these cash calls. *See* AR013766-68. Under the terms of the joint venture agreement between Arch Coal West and Lighthouse, Lighthouse had the option of covering

² Lighthouse Resources, Inc. was previously Ambre Energy North America, Inc. In December of 2014, a private equity firm, Resource Capital Funds, acquired a 92% stake in Ambre Energy North America, Inc., and in April of 2015 changed the name to Lighthouse Resources, Inc. *See* AR013620; AR008599.

any cash shortfall from Arch Coal West, with the result being that Lighthouse's equity stake in MBT-Longview would proportionally increase. AR013766. Thus, if Arch Coal West had ceased contributing cash to cover these calls, an asset of that debtor in bankruptcy would have been eroded and eventually exhausted. *Id.*

To preserve the remaining value and avoid further cash expenditures in an effort to protect its creditors, Arch Coal West sold its 38% interest in MBT-Longview to Lighthouse in May of 2016 under the jurisdiction of the bankruptcy court, giving Lighthouse sole ownership of MBT-Longview. AR013767; AR013799; AR001510.

Notwithstanding headwinds in coal market conditions at the time, Lighthouse elected to increase its investment in MBT-Longview, becoming solely liable for the substantial cash flow MBT-Longview needed to operate because it was convinced that its investments would pay off in the long term. *See* AR013794 (CEO of MBT-Longview stating this "ongoing commitment demonstrates the strength of our project's long-term fundamentals"); AR013759 (press article quoting CEO of MBT-Longview stating that "'short-term market fluctuations' didn't affect terminal advocates' confidence in the long-term viability of their \$680 million project"). Although the coal export market for steam coal had seen a decline in 2016, by the end of 2016, market indicators were showing

improvement. *Compare* AR013843, *with* AR013807 (stating coal prices set to increase in 2017).³

The sale of Arch Coal West's stake in MBT-Longview had another advantage in that it reduced the risk of NWA having to draw upon a \$10 million letter of credit issued by Arch Coal West to cover MBT-Longview's obligations to NWA. *See* AR000172; AR000141–42; AR000197; AR000181. This letter of credit was intended to secure performance of MBT-Longview's obligations under both the ground lease with NWA and also the proposed sublease of the aquatic lands. *See id.* That letter of credit remained in effect by January 2017 notwithstanding Arch Coal West's bankruptcy. *See* AR013767.

³ For example, the U.S. Energy Information Administration's ("EIA") *Short-Term Energy Outlook* published in December 2016 noted "recent increases in global coal prices." AR013807. But DNR unreasonably failed to examine coal prices as of the date it denied consent based, in part, on a purported concern about coal markets. Had DNR looked, it would have observed that spot prices for Powder River Basin coal increased 33% (from \$8.25 to \$11.00 per short ton) from the week ending October 7, 2016, to the week ending December 30, 2016, the last weekly report available before DNR issued its Decision Letter on January 5, 2017 (*see* <https://www.eia.gov/coal/markets/> (click "Archive")). These prices were publicly available information reported by a government agency, and thus acceptable for the Court to judicially notice. *See, e.g., State v. Jordan*, 186 N.C. App. 576, 583, 651 S.E.2d 917 (2007) (taking judicial notice of the time of sunset by reference to a schedule produced by the Naval Observatory). The EIA also stated that "[c]oal production is forecast to increase by 2% in 2017." AR013807. The EIA projected that steam coal production for export in particular would significantly increase, from 3.5 million short tons in the third quarter of 2016 to 6.0 short tons, a 71% increase, by the third quarter of 2017. AR013843. From the low point in 2016, the EIA projected that production of steam coal for export would be over 50% higher on average over the following five quarters through 2017. *See id.*

C. NWA and MBT-Longview Cured Chinook Ventures' Prior Lease Defaults

While waiting for DNR to make a decision on the sublease, MBT-Longview took over Chinook's operations on the site in January 2011. AR002351; AR013581. Before MBT-Longview took over, Chinook's⁴ actions at the site had resulted in a default under the Lease in May 2010. AR000025–26. NWA timely responded with plans to cure Chinook's defaults, AR000447–48, and following its transaction with Chinook, MBT-Longview assisted NWA in timely curing Chinook's defaults at its own cost. AR0000181; AR001257. In 2015, DNR had acknowledged that NWA and MBT-Longview's actions had cured the defaults caused by Chinook. AR001163. MBT-Longview also succeeded in doing what Chinook could not: It operated the facility without any Lease defaults. AR001291. In fact, by January 2017, MBT-Longview had been operating at the site without incident and in compliance with the terms of the Lease for six years. *Id.*

D. DNR's Denial of the Sublease

On January 5, 2017, Peter Goldmark, the then-Commissioner of Public Lands, notified NWA by letter that DNR had denied NWA's request to sublease to MBT-Longview. AR001509–11. Commissioner Goldmark stated: "DNR's decision is based on Northwest Alloys' failure to provide requested information regarding the financial condition and

⁴ NWA did not select Chinook as a subtenant—Chinook became NWA's involuntary subtenant as a result of a bankruptcy proceeding in 2004 over Alcoa's objection. AR000174–75.

business of [MBT-Longview] as well as other factors that bear on the suitability of [MBT-Longview] as a subtenant.” AR001509. Specifically, the Commissioner noted that NWA had not provided DNR with MBT-Longview’s audited financial statements or the ground lease between NWA and MBT-Longview for the upland property. AR001509–10.

The Commissioner asserted that DNR’s requests for these documents were reasonable, because (1) one of MBT-Longview’s owners, Arch Coal, filed for bankruptcy; (2) MBT-Longview had financial obligations to NWA under the ground lease; (3) market conditions in the coal industry were poor; (4) NWA’s prior subtenant, Chinook, had defaulted on its lease obligations; and (5) MBT-Longview did not have lengthy track record on which to judge performance. AR001511.

E. Proceedings Below

NWA and MBT-Longview timely appealed DNR’s denial decision under RCW 79.02.030, arguing that DNR had unreasonably withheld its consent in violation of the Lease. CP 1 (Notice of Appeal). Riverkeeper intervened. CP 14465–14467 (Order Granting Motion to Intervene). On October 27, 2017, the trial court held a hearing on the merits of the appeal and ruled that DNR’s denial of consent was arbitrary and capricious. RP 94-104. The court’s ruling was later memorialized in the November 29, 2017 Order on the Merits. CP 17687–17697.

In the Order on the Merits, the trial court began by emphasizing the nature of the dispute before it: “The extensive permitting process involved in MBT-Longview’s proposed coal export terminal is not before

the Court in this appeal. In this case, the Court is strictly concerned about rights under a lease between parties to that lease.” CP 17688, ¶ 1 (emphasis added). The trial court determined that the scope of its review was limited to reviewing the January 5, 2017 denial letter (the “Decision Letter”) for “whether the decision made in that letter comports with applicable law,” and that it could not consider reasons for denial not articulated in the Decision Letter. CP 17688–17689, ¶¶ 1–2.

Despite RCW 79.02.030’s direction to review the decision “de novo,” the trial court concluded that must instead assess “whether DNR’s actions were arbitrary, capricious, or contrary to law,” because “DNR was performing an administrative proprietary function, not a quasi-judicial function, in considering the request for sublease.” CP 17689, ¶ 4. The trial court further concluded that “the Court must evaluate the reasons given for denial from the standpoint of a reasonable landlord in the Commissioner’s position,” because there are “unique statutory mandates that apply to [DNR] that it has to consider” when dealing with state-owned aquatic lands. CP 17690, ¶ 5.

The trial court found that DNR had been ready to grant a sublease in February 2015 and that, at that time, “concerns raised in prior negotiations between the parties had been resolved to DNR’s satisfaction.” CP 17690–17691, ¶ 8. However, the court found that events taking place after February 2015, including the Arch Coal bankruptcy and the curtailment of Alcoa’s Wenatchee Works smelter, “raise[d] legitimate dollar concerns on the part of DNR.” CP 17691, ¶ 9.

The trial court found that, although “DNR had the ability to request information regarding finances,” DNR’s requests for copies of MBT-Longview’s financial statements and the ground lease between MBT-Longview and NWA would not contribute toward an understanding of DNR’s stated financial concerns. CP 17692, ¶ 11. Because “[e]verybody knew MBT-Longview was a single purpose startup entity, bleeding cash with no source of revenue, and it was reliant on essentially weekly or daily infusions of cash from its owner,” the court concluded “there was no useful information to be gained” from MBT-Longview’s audited financial statement. *Id.* The court also found that “MBT-Longview’s obligations under its contract for a separate lease do[] not have any value in addressing DNR’s stated concerns.” *Id.*

Accordingly, the trial court concluded that a landlord “has the right to know how a subtenant’s business is going to operate,” and that DNR had legitimate concerns about the financial viability of MBT-Longview’s proposal. CP 17692, ¶ 11. However, the court found that “DNR did not ask the key question related to financial viability of the coal terminal operation.” CP 17692, ¶ 12. “On this record,” the court concluded, “the legitimate concerns that DNR had were not converted into the requests for information that DNR made. The documents sought and specifically noted by DNR in its decision would not be of any value of alleviating the expressed concerns. DNR did not make requests for the information that would address those concerns.” CP 17693, ¶ 13. Therefore, “DNR’s

denial of the sublease based on the failure by NWA and MBT-Longview to provide irrelevant documents was arbitrary and capricious.” *Id.*

The trial court also concluded that DNR’s stated concerns about MBT-Longview’s business reputation related to its prior permitting actions in 2010 could not support a reasonable denial of the sublease request because DNR was prepared to grant a sublease in February 2015 despite those prior actions. CP 17693, ¶ 14. As a result, the court concluded that “DNR [could not] resurrect the historical permitting issue as a concern in January 2017 when it was not [an issue] just a short time before.” *Id.*

Because the court found that “DNR’s reasons for denial of the sublease as stated in the January 5, 2017 letter are not supported by the facts,” the court concluded that DNR’s “[d]enial of NWA’s request for consent to sublease to MBT-Longview was arbitrary and capricious.” CP 17693, ¶ 15. The court, however, reserved its ruling on the appropriate remedy. CP 17693, ¶ 16.

NWA and MBT-Longview moved the court for entry of judgment declaring that NWA may sublease the aquatic lands to MBT-Longview in accordance with Section 9.3(b) of the Lease. CP 17698–709 (Motion for Entry of Judgment); AR001547 (Lease, § 9.3 (setting forth “Terms of Sublease”)). In denying the motion, the trial court reasoned that principles of separation of powers prohibited it from entering the requested judgment. CP 17814–17, at 17817 (the “Remedy Order”). Nonetheless, the trial court recognized that merely “[r]emanding this matter to [DNR]

for a new decision could leave [NWA and MBT-Longview] without an effective means for obtaining relief, if [DNR] do[es] not make a timely and complete decision.” CP 17815. As a result, the trial court ordered DNR to “undertake further consideration” of the sublease request and to “file a new or amended pleading in this appeal indicating whether [DNR has] granted or denied Northwest Alloys’ sublease request with the Court within 60 days of the date of this Order.” CP 17815 (citing RCW 79.02.030).

DNR and Riverkeeper appealed both the Order on the Merits and the Remedy Order to this Court. CP 17743–56; CP 17761–74; CP 17818–24; CP 17830–36. NWA and MBT-Longview cross-appealed. CP 17784–97; CP 17843–49. DNR stayed the trial court’s Remedy Order pending this appeal. CP 17825–26.

V. STANDARD OF REVIEW

RCW 79.02.030 establishes the standard of review in this appeal. RCW 79.02.030 states that “[a]ny party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases.” (emphasis added). Although there are no Washington cases interpreting the underlined phrase in RCW 79.02.030, courts have held that the Legislature’s use of that phrase in another statute “results in a different role for [an appellate] court than is typical for appeals from administrative decisions.” *Hendrickson v. Dep’t of Labor & Indus.*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162, *review denied*, 2018 WL 3407657 (2018) (discussing review under RCW 51.52.140); *see also Groff v. Dep’t of Labor & Indus.*,

65 Wn.2d 35, 41, 395 P.2d 633 (1964) (review “as in other civil cases,’ [is] limited to an examination of the record to see whether there is substantial evidence to support the findings of the trial court made after the de novo trial in the superior court”). “Rather than sitting in the same position as the superior court,” this Court “review[s] only whether substantial evidence supports the trial court’s factual findings and then review[s], de novo, whether the trial court’s conclusions of law flow from the findings.” *Hendrickson*, 2 Wn. App. 2d at 351 (internal quotation marks omitted).

“Substantial evidence is evidence sufficient to persuade a rational, fair-minded person that the finding is true.” *Id.* (internal quotation marks omitted). The Court does not substitute its judgment for that of the trial court, or weigh the evidence or credibility of witnesses. *Id.* at 352. The Court reviews the record in the light most favorable to NWA and MBT-Longview, the parties who prevailed in the superior court. *Id.*

VI. ARGUMENT

A. **The trial court correctly held that DNR’s denial of consent was unreasonable.**

Section 9.1 of the Lease provides that NWA shall not sublet the property “without State’s prior written consent, which shall not be unreasonably conditioned or withheld.” AR001546. The trial court found that DNR’s reasons for denying consent to sublease were arbitrary and capricious, and thus did not comport with Section 9.1 of the Lease. CP 17693. Although the trial court applied the wrong legal standards, *see*

infra Section VI(C), it nevertheless reached the correct result and this Court should affirm.⁵

In Washington, a lease term that prohibits a landlord from “unreasonably” withholding consent requires a reviewing court to determine “whether a reasonably prudent person in the landlord’s position would have refused to consent...” *Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996); *see also Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 296, 391 P.2d 713 (1964) (same); *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 721, 281 P.3d 693 (2012) (“The reasonableness of a refusal of consent to an assignment is to be measured objectively by the action which would be taken by a reasonably prudent person in like circumstances.”). “Reason, fairness, and good faith must be the guide. Whim, caprice, or opportunism, however expedient the end, will not suffice.” *Robbins*, 64 Wn.2d at 296–97. The requirement that a landlord’s decision be objectively reasonable is consistent with “the strong policy against restraints on the alienation of property interests.” *Ernst*, 80 Wn. App. at 486.

A landlord’s refusal to consent must “relate to the landlord’s interest in preserving the leased property or in having the terms of prime lease performed...” *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp. Serv. Dist. No. 1*, 426 F.3d 738, 743 (5th Cir. 2005). Thus, a

⁵ Because DNR and Riverkeeper’s arguments are duplicative, NWA and MBT-Longview’s Response Brief is directed to both DNR and Riverkeeper’s Opening Briefs, except as specifically indicated herein.

“landlord has no reasonable basis for withholding consent if the landlord remains assured of all the benefits bargained for in the prime lease.” *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 210 (D.C. 1984). DNR is held to the same standard as other landlords. *See Metro. Park Dist. of Tacoma v. Dep’t of Nat. Res.*, 85 Wn.2d 821, 827–28, 539 P.2d 854 (1975) (where DNR acts in a proprietary capacity, it “will receive no better treatment than any two private individuals who bring their dispute before the courts for final resolution”); *see also infra* Section V(D)(2).

1. DNR was presented with a proposed subtenancy that any reasonable landlord would have readily accepted.

DNR’s denial of consent was unreasonable because the subtenancy would have assured DNR of all the benefits it bargained for in the prime lease and protected the subject property. *See Tenet*, 426 F.3d at 743; *1010 Potomac Assocs.*, 485 A.2d at 210. NWA and MBT-Longview presented a package of qualifications and financial assurances to DNR that any reasonable landlord would have accepted.

Both NWA and MBT-Longview would be liable for payment of rent and compliance with all other Lease terms. Section 9.1(c) of the Lease provides that any subtenant “shall assume all obligations under this Lease, including the payment of rent,” and that no sublease “shall release, discharge, or otherwise affect the liability of [NWA].” AR001547. Numerous courts have held that it is unreasonable for a landlord to deny consent to a sublease where, as here, both the tenant and subtenant remain liable for all lease obligations. *See, e.g., Caplan v. Latter & Blum, Inc.*,

468 So.2d 1188, 1191 (La. 1985) (holding that the proposed subtenant’s “financial status was immaterial because [tenant] would have remained bound for the rental”); *Adams, Harkness & Hill, Inc. v. Ne. Realty Corp.*, 361 Mass. 552, 557, 281 N.E.2d 262 (1972) (landlord “was arbitrary and unreasonable in its refusal” to consent, “particularly in view of the undisputed evidence that [tenant] had offered to guarantee the payment of rent by [subtenant] for the entire term of the lease”); *Ringwood Assocs., Ltd. v. Jack’s of Route 23, Inc.*, 153 N.J.Super. 294, 301–02, 379 A.2d 508 (1977) (“Whether the lessee-assignor is willing to guarantee payment of rent and the performance of all other tenant covenants under the lease is a substantial factor to be considered in determining the reasonableness of the lessor’s refusal of consent.”).

Both NWA and MBT-Longview were financially sound. NWA was a subsidiary of Alcoa, Inc., a publicly traded, multi-billion dollar corporation.⁶ The record reflects no concern by DNR with the financial qualifications of NWA. Similarly, MBT-Longview had a single corporate owner (Lighthouse) that had recently increased its ownership stake in MBT-Longview from 62% to 100%, and was investing tens of millions of dollars to develop a coal terminal on the subject property so it could realize long-term returns on that investment. AR013765–68. By these actions, MBT-Longview and its owner had demonstrated a commitment to a long-term presence in Longview; any default in Lease obligations would

⁶ As a result of a corporate reorganization in November 2016, NWA became a subsidiary of Alcoa Corporation, which is also a publicly traded, multi-billion dollar corporation.

risk stranding these multi-million dollar investments. *See, e.g.*, AR013766 (“development of the terminal is a long-term and capital intensive project”). Reasonable landlords seek out these types of tenants with sound financial support and investment-backed, long-term interests tied up with the landlord’s property. *See, e.g.*, 224 *Westlake*, 169 Wn. App. at 721 (“A reasonably prudent person in [the landlord’s] position, concerned primarily about the purchaser’s financial ability to close, should have been satisfied by [purchaser’s] significant expenditures.”).

DNR’s interests in the Lease were also protected in other ways. Multiple layers of security protected DNR’s interests. Both NWA and MBT-Longview must post bonds to secure their performance of lease obligations, and the Lease requires those bonds to increase from \$15,000 to \$300,000 as improvements are made to the property. *See* AR001552 (Lease, § 10.4(a)). MBT-Longview had also secured a \$10 million letter of credit in favor of NWA to cover its obligations to NWA under both the ground lease with NWA and the Lease with DNR. *See* AR000172; AR000141–42; AR000197; AR000181. The annual rent under the Lease is \$27,481.72. AR001535. The letter of credit was therefore worth over ten times the total rent payments under the 30-year Lease. The \$600,000 in performance bonds needed once MBT-Longview made improvements would also be sufficient to cover all remaining Lease payments through 2038.

DNR drafted the Lease to ensure the protection of the aquatic lands in other ways. For example, Section 8 is devoted entirely to

“Environmental Liability/Risk Allocation,” and proscribes release of hazardous substances and specifies monitoring and mitigation measures. AR001541–46. Section 19 addresses natural resource damages. AR001559–60. Section 10 specifies various types and levels of insurance coverage tenants (and subtenants) must have. AR001549–52. Sections 11 and 12 cover maintenance, repair, and damage to the property. AR001553–54. Sections 8, 14, 15, and 19 provide DNR with remedies.

DNR apparently had no concerns about renewing its lease with NWA in 2008, even though NWA had curtailed operations at the Wenatchee Works during the prior lease. The smelter had been previously curtailed between 2001 and 2005 only later to be reopened. AR001242. Moreover, DNR had observed MBT-Longview’s performance as a responsible operator on the site for six years, cleaning up the mess left by a prior subtenant along with NWA and having a flawless record of performance. *See* AR011456; AR001426; AR000998-99; AR006221.

DNR’s cited concerns about Arch Coal’s bankruptcy, coal market conditions, and the curtailment of the Wenatchee Works smelter were all unreasonable. The Arch Coal bankruptcy enhanced the suitability of MBT-Longview as a subtenant, because it left MBT-Longview with a single, solvent corporate owner that had covered MBT-Longview’s operating expenses for years and demonstrated a long-term commitment to the project through its investment-backed expectations. AR013767; AR013799; AR001510. The market for steam coal was showing signs of improvement as of the date DNR denied consent, AR013807, but DNR

ignored that current market information in favor of outdated information. *See* AR001510. With respect to Wenatchee Works, Alcoa notified DNR that the suspension was temporary and reminded DNR that Alcoa “do[es] this often with facilities when the price of aluminum falls below our production costs,” but stressing that “Longview will continue to be critical to the Wenatchee supply chain.” AR001203.

DNR was presented with dual, financially sound obligees with long-term financial interests at stake in the leased property, dual performance bonds, a substantial letter of credit, a history of responsible operations at the site, and a lease with numerous provisions to protect DNR’s property interests. Given that package, DNR had no reasonable basis to conclude that it would not obtain all the benefits of the Lease it negotiated with NWA. Yet DNR unreasonably determined that adding an additional tenant that would also be on the hook along with NWA for all Lease obligations would somehow make it less likely that DNR would be assured of obtaining all the benefits it bargained for under the Lease.

2. The reasons DNR gave for denying consent were arbitrary and unreasonable.

Although its interests in the Lease were adequately protected, DNR unreasonably denied consent to sublease. On appeal, DNR and Riverkeeper rehash the arguments they made before the trial court, but never grapple with the fundamental flaws the trial court identified with DNR’s justifications for denying consent to sublease.

a. The financial information DNR requested was not tailored to address DNR's purported concerns.

DNR denied consent to sublease in part because MBT-Longview did not provide DNR with audited financial statements and a copy of the ground lease with NWA. AR001510–11. The trial court found that changed circumstances in early 2016 involving MBT-Longview's ownership, coal markets, and the curtailment of the Wenatchee Works smelter were cause for legitimate financial concerns on DNR's part, but that the "documents sought and specifically noted by DNR in its decision would not be of any value in alleviating the expressed concerns." CP 17693, ¶ 13. Accordingly, "DNR's denial of the sublease based on the failure by NWA and MBT-Longview to provide irrelevant documents was arbitrary and capricious." *Id.* The record fully supports that determination and this Court should affirm.

As the trial court correctly observed, financial statements would only have shown what DNR already knew: that MBT-Longview was a single-purpose, start-up company that generated little revenue to cover its operating expenses, but with substantial backers investing millions of dollars into the company to cover its expenses in order to realize a long-term return on their investments once MBT-Longview obtained permits and began operating its coal terminal. *See* CP 17692, ¶ 11. DNR was fully aware that the financial statements of MBT-Longview would not have shown positive operating revenues sufficient to cover Lease obligations. *See* AR001509 (DNR's Decision Letter stating that Arch Coal's

bankruptcy filings “show that Millennium has significant ongoing obligations that require substantial capital contributions from its owners.”⁷

The salient point is that MBT-Longview had substantial operating expenses as a start-up company, but that those expenses were always covered by its owners for many years. A reasonable landlord would have concluded from these facts that MBT-Longview had sufficient financial resources to cover lease obligations. *See Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 1004, 498 N.E.2d 333 (1986), *review denied*, 113 Ill.2d 586 (1987) (denial of consent for an assignment to a start-up company was unreasonable where the start-up company would continue the business of the tenant, was incorporated with \$25,000 in cash, had a \$200,000 loan, and had also already tendered a security deposit, all of which showed it would be a “responsible tenant”).

Similarly, the ground lease between NWA and MBT-Longview was not relevant to DNR’s financial concerns. DNR was not a party to that

⁷ In a footnote, DNR objects to the characterization of MBT-Longview as a “startup entity” because it “was formed in 2010 and had been operating for over five years as a contractor for NWA.” DNR Opening Brief at 26, n.3. DNR is well aware that MBT-Longview does not have all the necessary permits to construct and operate its proposed coal terminal, and that whatever revenues it may have earned from existing operations at the site were insignificant compared to its operating expenses. DNR cited the Arch Coal bankruptcy documents in its Decision Letter, AR001510, which detail the substantial cash infusions MBT-Longview required of its parent companies to operate. *See* AR013766, ¶ 9; AR013795. The record debunks DNR’s belated attempt to mischaracterize MBT-Longview as a self-sustaining operation whose financial statements might have some probative value.

lease, and MBT-Longview's obligations to NWA under that lease were secured by a \$10 million letter of credit in favor of NWA. The trial court correctly concluded that MBT-Longview's obligations under "a separate lease do[] not have any value in addressing DNR's stated concerns." CP 17692, ¶ 11.

A reasonable inference from the facts is that DNR's information requests were not made in good faith as required, *see Robbins*, 64 Wn.2d at 296, but rather in search of a pretext to deny consent. In 2010, DNR requested information about MBT-Longview's "affiliates, owners, and partners," AR000132, presumably because DNR knew that those entities would be important parties in interest. MBT-Longview provided information, including audited financial statements, about its parent company (Ambre) at the time. AR000180-85; AR000216-342. DNR never requested such information in 2016, even though DNR knew that MBT-Longview was dependent on its parent for funding. DNR issued its last information request to MBT-Longview days after publicly opposing MBT-Longview's coal terminal. AR001392-416, at 407. The record shows DNR has never asked any other prospective subtenant or tenant *at any* DNR property to provide such information. *See* AR014152; AR013931; AR013975; AR013874.

b. DNR still fails to explain the relevance of its information requests.

In its opening brief, DNR offers no answer to the trial court's finding that DNR's information requests were irrelevant. Instead, DNR contends that without the audited financial statements it requested, "DNR

would not have been able to assess whether [MBT-Longview] had sufficient resources to meet the requirements of the Lease,” and that the trial court “fundamentally misunderstood the State’s interest as a landlord.” DNR Opening Brief (“DNR Br.”) at 23, 25.

DNR misses the point. The trial court recognized that audited financial statements of MBT-Longview would not have provided any indication about MBT-Longview’s resources to meet the requirements of the Lease, because MBT-Longview had little operating revenues, and its “capital intensive” operations, DNR Br. at 23, were being funded by its parent. CP 17692, ¶ 11. DNR already knew this information from the Arch Coal bankruptcy documents. *See* AR001509. A reasonable landlord legitimately concerned about a parent-funded start-up company’s ability to meet lease obligations would request financial information about the parent. DNR asked for information about MBT-Longview’s parent company in 2010, but failed to do so in 2016. There is no dispute that the Lease authorized DNR to request financial information. The problem is that DNR simply failed to request information that was probative of its purported concerns, and then turned around and denied consent for NWA’s failure to provide documents that were “irrelevant.” CP 17693, ¶ 13. Denial on that basis is unreasonable on its face.

DNR suggests that any refusal to provide information constitutes a reasonable basis to deny consent to sublease. DNR Br. at 28–29. DNR’s position is incorrect and would permit a landlord to act unreasonably in the face of a lease requiring reasonable conduct. The information a

landlord requests must be consequential. *See Parks v. Mengoni*, 100 A.D.2d 785, 785, 474 N.Y.S.2d 487 (1984) (landlord unreasonably denied consent based in part on failure of tenant to provide the home address of the assignee, which was “clearly inconsequential under the circumstances”); *see also Tucson Med. Ctr. v. Zoslow*, 147 Ariz. 612, 615, 712 P.2d 459 (1985) (“A reason for refusing consent, in order for it to be reasonable, must be objectively sensible and of some significance.”).

None of the cases DNR cites involve the situation here, where the requested information was “irrelevant.” CP 17693, ¶ 13. *See 200 Eighth Ave. Rest. Corp. v. Daytona Holding Corp.*, 293 A.D.2d 353, 353, 740 N.Y.S.2d 330 (2002) (information provided was insufficient to show that tenant would be financially responsible); *Fahrenwald v. LaBonte*, 103 Idaho 751, 757, 653 P.2d 806 (1982) (landlord was “given incomplete financial information and only a few days to make a decision” and was uncertain about whether guarantees would cover the assignee’s performance); *Evans v. Waldrop*, 220 So.3d 1066, 1072 (Ala. Civ. App. 2016) (landlord received no written materials and conflicting oral statements about the nature of the speculative business the subtenant proposed to open on the premises); *McKeon v. Williams*, 104 Or. App. 106, 108, 799 P.2d 198 (1990) (assignor provided no information at all to the landlord about the assignee). In each of these cases, unlike this case, the missing information was relevant to the landlord’s concerns.

DNR raises additional issues in support of its request for financial information about MBT-Longview. *See* DNR Br. at 31–38 (discussing

how the Lease is a “triple net lease” that requires more than payment of rent, the sensitive location of the property on the Columbia River, MBT-Longview’s plans to intensify use of the property, and problems caused by a prior subtenant). None of these post hoc rationalizations are found in DNR’s Decision Letter. More to the point, none of these rationalizations explain the relevance of MBT-Longview’s financial statements, which would only have shown that MBT-Longview had operating expenses that exceeded its operating revenues and so would have told DNR nothing it did not already know. To the extent DNR had legitimate concerns, the Lease authorized DNR to request additional rent or new terms to protect its interests. *See* AR001547 (Lease, § 9.1(b)). DNR did neither and instead denied consent to sublease.

c. DNR’s other purported concerns about MBT-Longview’s business reputation were resolved by 2015.

DNR and Riverkeeper also contend that a permitting error in 2010 provided a reasonable basis for DNR to deny consent to sublease in 2017 because it called into question MBT-Longview’s business reputation. *See* DNR Br. at 26; Riverkeeper Br. at 37–39.⁸ By 2015, however, DNR was prepared to enter into a sublease agreement with MBT-Longview despite this prior history. *See* AR001136–37. This indicated to the trial court that DNR “was satisfied with how that had worked out,” and that “DNR

⁸ The permitting error was made by an affiliate of MBT-Longview, MBT Logistics LLC, and neither its management nor investors involved are now affiliated with the MBT-Longview, as DNR is well aware. *See, e.g.*, AR001115.

cannot resurrect the historical permitting issue as a concern in January 2017 when it was not just a short time before.” CP 17693, ¶ 14. That conclusion logically flows from the facts in the record and should be upheld.

Riverkeeper concedes that DNR’s concerns “were allayed for a time,” but nevertheless contends that the permitting history “remained part of the context in which DNR ultimately made its decision.” Riverkeeper Br. at 38–39. In considering whether to consent to a sublease, however, “[r]eason, fairness, and good faith must be the guide. Whim, caprice, or opportunism, however expedient the end, will not suffice.” *Robbins*, 64 Wn.2d at 296–97. It was capricious, and thus unreasonable, for DNR to suddenly reverse course and resurrect a reason to deny consent to sublease that DNR had set aside a year earlier when it nearly executed a sublease agreement with MBT-Longview, and that is just how the trial court saw it. See AR001136-37; AR001215.

B. Whether the Lease allows for a coal terminal is not properly before the Court.

The trial court properly ruled that the scope of its review of DNR’s decision was limited to the reasons for denial stated in the Decision Letter. CP 17688, ¶ 2 (Order on the Merits).⁹ No party has challenged that ruling on appeal. Accordingly, that ruling is *res judicata* and this Court is without power to set it aside. *Clark Cty. v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013).

⁹ See also CP 15587, ¶ 5 (Order on Scope of Review).

In the Decision Letter, DNR did not state that it denied consent because MBT-Longview's terminal expansion plans exceeded the scope of the permitted uses under the Lease. The Decision Letter does not even reference the scope of permitted uses under the Lease. *See* AR001509–11. Thus, as DNR concedes, the issue of whether MBT-Longview's proposed coal terminal was permitted under the terms of the Lease was not before the trial court. DNR Br. at 39.

Despite that concession, DNR now asks this Court to rule on the issue of “[w]hether Millennium's proposed coal terminal expansion ... is beyond the scope of what is allowed under the Lease.” DNR Br. at 5. Specifically, DNR is asking this Court to construe the scope of permitted uses under the Lease. *See* DNR Br. at 41–50. The trial court did not do this and this Court should not either. The trial court merely observed the obvious after reviewing the plain language of the Lease, concluding that a “dedicated coal transshipment facility fits within the terms of the lease that DNR negotiated...” CP 17690, ¶ 6. DNR's argument to the contrary was and is totally baseless, as the trial court also recognized. *See* RP at 60–62; 77–78; 98.

At most, the trial court's finding related to the scope of the Lease was dictum because it was not relevant to the trial court's review of the specific reasons DNR gave for denying consent. *See ALLTEL Info. Servs., Inc. v. FDIC*, 194 F.3d 1036, 1044 (9th Cir. 1999) (dictum in trial court's decision was “irrelevant” to the court's holding, did not “rise to the level of an alternative holding,” and thus did not require reversal). The trial

court never undertook a detailed analysis to compare the terms of the Lease against MBT-Longview's proposed terminal, as DNR now invites this Court to do. The trial court made no findings about the square footage of proposed docks or the volume of material that would need to be dredged. *See* DNR Br. at 41, 45. There is simply nothing for this Court to review on these issues.¹⁰

What DNR seeks is an improper advisory ruling from the Court that will rewrite the terms of NWA's lease and that DNR can later use in its efforts to thwart MBT-Longview's proposed coal terminal. The Court should decline this invitation.

C. The trial court erred by failing to enter a judgment declaring that NWA may sublease to MBT-Longview.

The trial court committed reversible error under RCW 79.02.030 when it denied NWA and MBT-Longview's motion for entry of judgment and instead created an opportunity for DNR to reconsider the sublease request by filing new or amended pleadings. CP 17815 (Remedy Order). The Court should remand for entry of a judgment declaring that NWA may sublease to MBT-Longview without further consent by DNR.

1. RCW 79.02.030 does not authorize remand.

RCW 79.02.030 provides a limited remedy for an action filed under that statute:

¹⁰ Indeed, DNR concedes that there is a separate process in the Lease by which DNR evaluates tenant or subtenant construction proposals. *See* DNR Br. at 39, n.4 (noting that DNR reviewed MBT-Longview's plans and denied consent for construction without prejudice).

Unless appellate review of the judgment of the superior court is sought, the clerk of said court shall, on demand, certify, under the clerk's hand and the seal of the court, a true copy of the judgment, to ... the commissioner, which judgment shall thereupon have the same force and effect as if rendered by ... the commissioner.

Thus, the express terms of the statute limit the remedy to an entry of a judgment and do not authorize a superior court to take any other type of action. RCW 79.02.030 is, therefore, distinct from the Administrative Procedure Act ("APA"), which prescribes a number of remedies that a court is authorized to order, including remand. *See* RCW 34.05.574(1) (listing available remedies). It is undisputed that the APA does not apply in this case. *See* CP 15586, ¶ 2. Remand is simply not a remedy authorized by the Legislature in this case.

Nor does RCW 79.02.030 authorize a superior court to order the parties to file new or amended pleadings *after* it has ruled on the merits of the appeal. The statute merely allows a superior court to order new or amended pleadings as part of the hearing on the merits: "[T]rial of [the] appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers so certified, but the court may order the pleadings to be amended, or new and further pleadings to be filed." RCW 79.02.030. The authority to order new or amended pleadings is limited to the merits portion of the appeal, and no such authorization appears in the portion of the statute that relates to the judgment of the superior court. *See id.*

The cases adjudicated under RCW 79.02.030 support this interpretation. Courts do not remand decisions to agencies after ruling in an appellant's favor under RCW 79.02.030. Instead, as required by RCW 79.02.030, courts enter a judgment remedying the violation found. For example, in *Polson Logging Co. v. Martin*, 195 Wn. 179, 180–82, 80 P.2d 767 (1938), after ruling that the Commissioner of Public Lands had erred in concluding that a sale of land was conducted in violation of statutory requirements, the Supreme Court directed entry of a judgment “confirming the sale to” the purchaser.¹¹ Similarly, in *Town of Ilwaco v. Ilwaco Railway & Navigation Co.*, 17 Wn. 652, 653–54, 50 P. 572 (1897),¹² the Supreme Court held that the Board of State Land Commissioners had erred in determining that certain lands were not subject to sale. For the remedy, the Supreme Court affirmed the superior court's judgment that “direct[ed] the execution . . . of a deed conveying the tract in question.” *Id.* at 654.

2. The trial court should have followed Washington law by declaring that the sublease may proceed.

It is well settled in Washington that a landlord's unreasonable denial of consent waives the tenant's requirement to obtain consent. *See Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 513, 515, 413 P.2d 820 (1966); *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 716–18, 281 P.3d 693 (2012). That rule can be traced to the Supreme

¹¹ *Polson* was decided under the predecessor to RCW 79.02.030, codified at Laws of 1927, chapter 255, section 125.

¹² *Town of Ilwaco* was decided under a predecessor to RCW 79.02.030, codified at Laws of 1897, chapter 89, section 52.

Court's decision in *Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 296, 391 P.2d 713 (1964).

In *Robbins*, a sales agreement between two parties, Co-Ply and Harbor, provided that Harbor could not assign the agreement without the prior written consent of Co-Ply, ““which consent shall not unreasonably be withheld.”” 64 Wn.2d at 291 (quoting agreement). After Co-Ply withheld its consent to Harbor's proposed assignment, Harbor assigned the agreement to a third party without Co-Ply's consent. *Id.* at 292–93. The question before the Supreme Court was whether Co-Ply's express consent was necessary to effectuate the assignment after the court found that Co-Ply had unreasonably withheld its consent. *Id.* at 296.

The Supreme Court held that Co-Ply's unreasonable denial of consent ended the matter and relieved Harbor of the need to obtain Co-Ply's consent. *Id.* The Court explained that “[w]e have accepted and approved judicial reasoning which interprets a similarly qualified assignment-consent provision as having the effect of relieving the assignor of the consent requirement in the event of an unreasonable refusal of consent.” *Id.* (emphasis added). Accordingly, “Harbor's assignment of the agreement could become effective in one of two ways: (a) By Co-Ply giving its consent, or (b) by Co-Ply unreasonably withholding its consent.” *Id.* After upholding the trial court's finding that Co-Ply had unreasonably withheld its consent, the Supreme Court held that the assignment was thereby effective by operation of law. *Id.* at 297.

Since *Robbins*, Washington courts have consistently applied the same rule to reasonableness consent clauses in real property leases and agreements. See *Roundup Tavern, Inc.*, 68 Wn.2d at 515 (affirming trial court’s determination that consent to assignment of property was unreasonably withheld, and holding that the trial court’s “order directing the lessor-defendants to acknowledge the plaintiff as the rightful lessee was properly entered”); *224 Westlake, LLC*, 169 Wn. App. at 716–18 (citing *Robbins* and affirming trial court’s determination “that the assignment was valid, despite [defendant’s] lack of prior consent, because it was unreasonable for [defendant] to withhold consent”).

Under Washington law, a landlord who unreasonably denies consent does not get another bite at the apple. See *Robbins*, 64 Wn.2d at 296 (holding that a party’s express consent was not required to effectuate a transfer of an agreement after it unreasonably denied consent). A landlord gets one shot: the landlord can either consent, or reasonably deny consent, but it cannot unreasonably deny consent and then get another opportunity to reconsider the decision. See *id.*; see also *224 Westlake*, 169 Wn. App. at 716–722; *Roundup Tavern*, 68 Wn.2d at 515. This is because restraints on alienation, like a clause requiring a landlord’s consent to a transfer, are narrowly construed against the landlord. See Restatement (Second) of Prop.: Landlord & Tenant § 15.2 cmt. g (Am. Law Inst. 1977) (“If the landlord or the tenant withholds unreasonably his consent to a proposed transfer by the other party, the other party may proceed to make the transfer without regard to the terms of the restraint on alienation, because

the restraint is valid only to the extent the consent to a transfer is not withheld unreasonably.” (emphasis added)).

Here, under the well-established rule articulated in *Robbins*, *Roundup Tavern*, and *224 Westlake*, once the trial court determined that DNR unreasonably withheld consent to the sublease, NWA was relieved of the requirement to obtain DNR’s consent to sublease. *See Robbins*, 64 Wn.2d at 296. The only thing left for the court to do was to enter a judgment declaring that NWA may sublease to MBT-Longview. *Id.* Accordingly, the trial court’s decision to allow DNR to reconsider whether to grant or deny consent for NWA to sublease to MBT-Longview directly conflicts with the line of authority that governs this dispute “about rights under a lease between parties to that lease,” CP 17688, ¶ 1 (Order on the Merits), and should be reversed for that reason.

3. DNR’s status as an administrative agency does not change the remedy in this case.

Nor does DNR receive special treatment in this case because it is an administrative agency. *See Metro. Park*, 85 Wn.2d at 827–28 (when acting in proprietary capacity, DNR receives same treatment as private party). Because DNR was acting in a proprietary capacity, not a regulatory capacity, DNR must be treated like any other contracting party in Washington. *See id.*

The trial court’s concerns about separation of powers issues were misplaced. The trial court’s order states that DNR retains discretion under the Lease to condition its consent to a sublease and that drafting such conditions is an executive function, which the court is prohibited from

undertaking. CP 17815 (Remedy Order). However, entering a judgment declaring that the sublease may proceed—under the express terms for subleases DNR already negotiated for and signed off on in Section 9.3(b) of the Lease—would not constitute an exercise of executive power or deprive DNR from exercising its discretionary authority to condition the sublease. DNR had an opportunity to exercise its discretionary authority under the Lease when NWA requested the sublease and DNR proposed the consent to sublease agreement in 2015. *See* AR001136; AR001191–99. However, once DNR abandoned that agreement and denied consent, and the trial court held that such denial was unreasonable, DNR does not get another opportunity under the Lease to consider and/or condition the sublease. *See Robbins*, 64 Wn.2d at 296 (an unreasonable denial of consent relieves the assignor of the consent requirement). Accordingly, after holding that DNR’s denial of consent was unreasonable, the only appropriate remedy was for the trial court to declare that the sublease may proceed consistent with the Lease.

D. If this Court reverses the trial court’s ruling on the merits, then it must resolve two other legal issues.

The trial court reached the correct conclusion on the merits in this case by finding that DNR’s denial of consent was unreasonable. However, the trial court reached that correct conclusion by misapplying two legal standards. This Court does not need to reach these issues, however, unless the Court reverses the trial court’s ruling on the merits. *See State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (the Court of Appeals may

affirm on any grounds the record support, including those not explicitly articulated by the trial court).

1. The trial court should have applied a de novo standard of review.

The trial court applied the wrong standard of review. Under RCW 79.02.030, review by the superior court “shall be de novo.” Washington courts have construed statutes providing for de novo review of an agency action narrowly to avoid separation of powers issues. *See Household Fin. Corp. v. State*, 40 Wn.2d 451, 244 P.2d 260 (1952). Under such construction, de novo review does not violate separation of powers principles if the agency was performing an essentially judicial function. *Francisco v. Bd. of Dirs. of Bellevue Pub. Schs., Dist. No. 405*, 85 Wn.2d 575, 578–79 537 P.2d 789 (1975).

In *Francisco*, the Washington Supreme Court developed a four-step test to determine if an agency’s action was judicial in nature. *Id.* at 579. The test asks whether: (1) the court could have been charged in the first instance with the responsibility of making the decision; (2) the function the agency performed is one that courts have historically performed; (3) the agency performed a function of inquiry, investigation, declaration, and enforcement of liabilities as they stood on present or past facts under existing laws; and (4) the agency’s action is comparable to the ordinary business of courts. *Yaw v. Walla Walla Sch. Dist. No. 140*, 106 Wn.2d 408, 414, 722 P.2d 803 (1986).

When acting pursuant to a contract, an agency is exercising an essentially judicial function, for which de novo review is proper. *Yaw v.*

Walla Walla Sch. Dist. No. 140, 40 Wn. App. 36, 39, 696 P.2d 1250 (1985), *aff'd*, 106 Wn.2d 408, 722 P.2d 803 (1986) (“The resolution of factual and legal disputes arising pursuant to contract is clearly a judicial function,” for which de novo review is allowed); *Yaw*, 106 Wn.2d at 414 (in cases involving an agency’s determination of contract rights, which is a determination historically made by courts, the agency is acting in a quasi-judicial capacity justifying de novo review). Contracts fix the parties’ obligations to one another and eliminate the discretion inherent when an agency is exercising its regulatory authority. *Yaw*, 106 Wn.2d at 416–17 (holding that while an agency “could change the rules or reinterpret the existing rules,” an agency cannot “unilaterally change bargained for contractual terms” and that “[t]hese distinctions refute the contention that historically the enforcement of...contracts...are administrative rather than judicial functions”).

In *Yaw*, the Supreme Court held that de novo review was appropriate for a school district’s decision not to promote a custodian because that decision involved a determination of the custodian’s contract rights under a collective bargaining agreement. *Id.* at 414. Applying the four-step test from *Francisco*, the Supreme Court in *Yaw* held that the school district had acted in a quasi-judicial capacity, thereby justifying de novo review:

According to the 4-step *Francisco* test, the court could have decided the relevant facts and determined which of the employees to promote as it had a clear contractual standard on which to base its decision. The courts have historically resolved contract disputes with contested facts...

Furthermore, the District, in deciding who to promote, would be investigating, declaring and enforcing the rights and obligations of Yaw and the junior employee, which again resembles the ordinary business of courts.

Id. at 414–15 (internal quotation marks omitted).

Similar to *Yaw*, in this case the trial court could have decided the relevant facts and determined whether DNR could reasonably deny consent to the sublease, because Section 9.1 of the Lease provided a clear contractual standard by which to base its decision: “Tenant shall not... sublet...the Property without State’s prior written consent, which shall not be unreasonably conditioned or withheld.” AR001546 (emphasis added). Additionally, as in *Yaw*, courts have historically resolved this type of contract dispute. *See, e.g., Ernst*, 80 Wn. App. at 483–88 (determining if consent was unreasonably withheld under terms of lease). Finally, in determining whether DNR could deny consent to sublease under the terms of the Lease, DNR was investigating, declaring, and enforcing the rights of NWA and DNR under a contract, which is the type of determination that courts make on a daily basis.

Instead of asking whether courts are charged with reviewing a landlord’s decision to deny consent under a lease, the trial court asked whether it could have been charged with making the decision to consent in the first instance. CP 17689, ¶ 3. That analytical misstep created misperceptions about separation of powers issues that carried through the trial court’s analysis of the other steps of the *Francisco* test and led to the incorrect conclusion that DNR was acting in an administrative capacity.

Because the agency action involved in this case was judicial in nature, and because RCW 79.02.030 required de novo review, the trial court erred by applying an arbitrary and capricious standard of review.

The cases DNR cites are distinguishable on their facts. Both *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 381 P.3d 95 (2016), and *State ex rel. White v. Bd. of State Land Comm'rs*, 23 Wn. 700, 63 P. 532 (1901), are cases in which there was no existing contract and the disputes were about whether an agency should (or could) have entered into a contract in the first instance. *Household Fin. Corp.*, 40 Wn.2d 451, is inapposite because it involved licensing decisions, not contracts.

DNR has not cited a single case in which a Washington court has held that an agency's decision under an existing contract is administrative in nature. DNR's reliance on *Malmo v. Case*, 28 Wn.2d 828, 184 P.2d 40 (1947), does not close this gap. *Malmo* predates the Supreme Court's line of decisions distinguishing between administrative and judicial functions¹³ and so does not contain any analysis of whether the Commissioner's decision in that case was judicial or administrative in nature. Nor does *Malmo* contain an analysis of whether the trial court's application of the arbitrary and capricious standard was legally correct. Instead, the Supreme Court merely decided whether the Commissioner had authority to act under the contracts at issue. 40 Wn.2d at 835–36.

¹³ The Supreme Court first established this distinction four years after *Malmo*, in *Household Finance Corp. v. State*, 40 Wn.2d 451, 244 P.2d 260 (1952).

DNR's argument conflicts with the established rule that agency decisions under existing contracts are judicial in nature, not administrative. *See Yaw*, 106 Wn.2d at 414–15. Any discretion DNR had under the Lease to decide a sublease request was narrowly circumscribed by the bargained-for, unambiguous terms of the Lease, which compelled the reviewing court to apply an objective reasonableness standard to DNR's decision. *Cf. Malmo*, 28 Wn.2d at 833 (contracts in that case provided the Commissioner with an unconstrained right to grant or deny contract extensions). Courts do not defer to a landlord's decision to deny consent; instead, they determine whether that decision was objectively reasonable. *See Ernst*, 80 Wn. App. at 486 (“landlord's subjective concerns” must be “objectively reasonable”); *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 297 N.Y.S.2d 156, 159–60, 59 Misc.2d 31 (Sup. Ct. 1969) (applying objective factors to assess the reasonableness of a landlord's denial of consent).

In *Ernst*, the court expressly declined to substitute the term “arbitrary and capricious” with “unreasonable.” 80 Wn. App. at 484. “To do so could cause uncertainty with respect to lease provisions negotiated many years ago.” *Id.* Notwithstanding the harmless nature of the error, the trial court's use of an arbitrary and capricious standard to review the reasonableness of DNR's denial of consent in this case resulted in the outcome that *Ernst* sought to avoid.

2. The trial court should have applied an objective legal test to evaluate DNR's conduct.

The trial court also erred by modifying the applicable legal test for

evaluating the reasonableness of DNR's denial of consent to sublease. Instead of applying a "reasonably prudent person" test required by case law, the trial court held that there are "unique statutory mandates" that DNR "has to consider" as a landlord when faced with a sublease request. CP 17690, ¶ 5. Accordingly, the trial court determined that it "must evaluate the reasons given for denial from the standpoint of a reasonable landlord in [DNR's] position." *Id.* By taking into account DNR's "unique statutory mandates" when evaluating its denial of consent to sublease, the trial court converted the objective standard the parties agreed to by contract into a subjective standard and deprived NWA of a key benefit of its bargain with DNR.

"[W]here a lease prohibits a landlord from 'unreasonably' withholding consent to an assignment by the tenant, the court should evaluate whether a reasonably prudent person in the landlord's position would have refused to consent." *Ernst*, 80 Wn. App. at 486. This is an "objective standard," *id.* at 485, requiring consideration of "readily measurable criteria of a proposed subtenant's or assignee's acceptability, from the point of view of Any landlord." *Yeshiva*, 297 N.Y.S.2d at 160. The "needs or dislikes" of the specific landlord are subjective factors that are not relevant. *Id.* at 161. "Parties to a lease can negotiate for lease terms to which this standard may or may not apply, as they wish." *Ernst*, 80 Wn. App. at 487.

When DNR and NWA executed the Lease in 2008, they both agreed that DNR's written consent to a sublease "shall not be

unreasonably conditioned or withheld.” AR001546 (Lease, § 9.1). The Lease says nothing about DNR’s “unique statutory mandates.” A reviewing court may not change the meaning the parties intended. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (courts may not disregard contract language the parties have chosen). Taking into account DNR’s “unique statutory mandates” in assessing the reasonableness of its decision to deny consent interjects and gives relevance to the specific “needs” of DNR, which are subjective factors. *See Yeshiva*, 297 N.Y.S.2d at 161.

There is no dispute that DNR is a creature of statute with specific statutory mandates, but those mandates are discharged when DNR considers and then enters into a lease in the first instance. DNR itself has recognized that it “achieves this balancing of public benefits [in RCW 79.105.030] by engaging in a variety of proprietary activities,” including “leasing.” State Defs.’ Mot. and Mem. for Summ. J., *Bainbridge Citizens United v. Wash. Dep’t of Nat. Res.*, No. 05-2-00937-5, 2006 WL 6343123 (Wash. Sup. Ct. Sept. 8, 2006). But once DNR acts in its proprietary capacity to execute a lease, principles of contract law control from that point. *Metro. Park*, 85 Wn.2d at 827–28 (where DNR acts in a proprietary capacity, such as when it disposes of land by sale or lease, DNR “will receive no better treatment than any two private individuals who bring their dispute before the courts for final resolution”). There is simply no basis to alter the meaning of a contract term of art merely because DNR is a contracting party. *See id.*; *see also Chanslor-Western Oil & Dev. Co. v.*

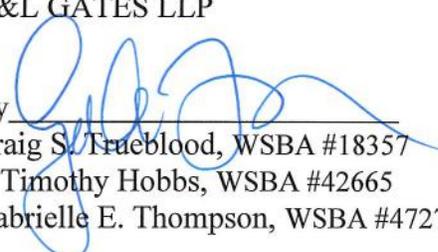
Metro. Sanitary Dist., 131 Ill. App. 2d 527, 529, 266 N.E.2d 405 (1970) (rejecting argument that lease with government body “must be viewed in light of the public interest which affects the character of the lease agreement” because a “municipal corporation stands upon the same footing as other corporations in regard to its property”). If the Court reverses the trial court’s decision on the merits, the proper legal test must then be applied to evaluate DNR’s denial of consent, without regard to subjective considerations like DNR’s “unique statutory mandates.”

VII. CONCLUSION

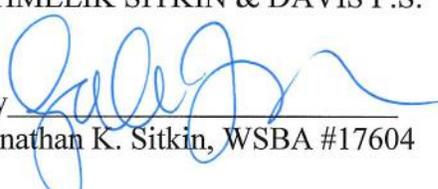
For the reasons set out above, the Court should affirm the trial court’s Order on the Merits, and remand for entry of a judgment declaring that NWA may sublease to MBT-Longview in accordance with Section 9.3(b) of the Lease.

Respectfully submitted this 6th day of August, 2018.

K&L GATES LLP

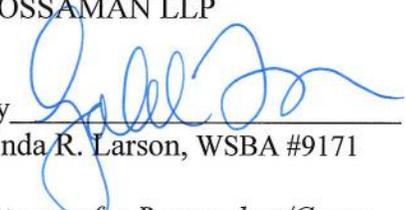
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DECLARATION OF SERVICE

Carol Bradford declares as follows:

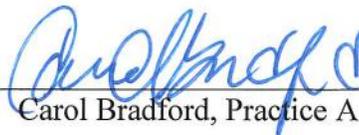
1. I am over the age of 18 and am competent to testify herein.
2. I am a practice assistant at the law firm of K&L GATES LLP.
3. On August 6, 2018, I caused the foregoing document to be filed electronically with the court and also to be served on the parties below through the Washington State Appellate Courts' eFiling Portal:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of August, 2018 at Seattle, Washington.



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