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Case No. 51677-2-II

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

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

Respondents,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS COLUMBIA RIVERKEEPER,
WASHINGTON ENVIRONMENTAL COUNCIL, AND SIERRA CLUB

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INTRODUCTION

The Washington Department of Natural Resources (“DNR”) reasonably denied Northwest Alloys’ request for consent to sublease state-owned aquatic lands to Millennium Bulk Terminals-Longview based on an extensive record that revealed a proposed subtenant with a troubling past, an unclear present, and a doubtful future. This was no off-the-cuff denial. Instead, the record shows that Millennium sullied its business reputation through its past misrepresentations to state and local decision makers about the size and scope of its proposed coal terminal. Millennium also refused to provide a complete picture of its financial condition and business plans—an ongoing concern to DNR. Northwest Alloys and Millennium added to the list of concerns when they failed to disclose to DNR that one of Millennium’s major investors declared bankruptcy, and that the aluminum smelter Millennium had purportedly been servicing was shuttered indefinitely. And all this took place against the backdrop of a worldwide coal market in steep decline.

The record shows that DNR considered all of these undisputed and objectively worrisome circumstances, and based its denial of consent to sublease on Northwest Alloys and Millennium’s failure to address DNR’s reasonable concerns by providing requested information regarding Millennium’s financial capability and business plan. Under the agreed upon terms of the Lease, it was Northwest Alloys’ responsibility to provide DNR with adequate information on which to judge the suitability

of a proposed subtenant, and Northwest Alloys failed in this regard. The superior court agreed that DNR had legitimate concerns and a right to seek financial information from Millennium. The superior court erred, however, in concluding that DNR's information requests were not relevant to addressing DNR's concerns. DNR gets the benefits of the bargained-for lease, including the right to consider "business reputation and experience, the nature of the proposed transferee's business" and any other factor that "may reasonably bear upon the suitability of Millennium as a tenant of the Property." DNR clearly conveyed its apprehensions to Northwest Alloys and Millennium and made broad information requests to address those concerns.

DNR reasonably denied consent to sublease to Millennium based on the record before the agency. This is particularly so considering DNR's statutory mandate to manage state-owned aquatic lands for the benefit of the public. Intervenors Columbia Riverkeeper, Washington Environmental Council, and Sierra Club (collectively "Intervenors" or "Riverkeeper") respectfully ask this Court to reverse and vacate the superior court's decision that DNR's denial was arbitrary and capricious.

ARGUMENT

I. DNR'S DENIAL WAS REASONABLE BASED ON THE TERMS OF THE LEASE AND THE RECORD BEFORE IT.

Pursuant to the terms of the Lease, CP 1891-92, AR 001546-47, DNR reasonably denied consent to sublease to Millennium based on a

record that revealed a spiraling coal market, a bankrupt corporate parent, a history of significant misrepresentations to state and local officials about the size and scope of the proposed project, the shuttering of the aluminum smelter that Millennium had ostensibly been servicing, and Millennium's own disregard for the clear terms of the Lease that allowed DNR to examine any proposed subtenant's financial capability and business plan. CP 1850-52, AR 001509-11 (DNR's January 2017 Denial Letter). DNR was also reasonably wary of consenting to a sublease to Millennium given Northwest Alloys' recent failure to ensure its prior subtenant's compliance with the Lease, which resulted in significant damage to the site. *Id.*; CP 280, AR 000132; CP 129, AR 000001.

The Lease provided that, in determining whether to consent to sublease, DNR could consider: (1) Millennium's financial condition, (2) Millennium's business reputation and experience, (3) the nature of Millennium's business, (4) the then-current value of the Property, and (5) such other factors as may reasonably bear upon the suitability of Millennium as a tenant of the Property. CP 1891-92, AR 001546-47. (emphasis added). In addition to specifically providing for consideration of Millennium's finances, business reputation, experience, and the nature of its business, the Lease's broad catch-all provision gave DNR great discretion to ask for and consider a wide variety of information regarding Millennium's suitability as a subtenant. *Id.* These are the terms that Northwest Alloys and DNR selected in entering into the Lease, and

Washington courts may not disregard contract language that the parties have chosen. *See Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980); *see also Robertson v. Waterman*, 123 Wash. 508, 515, 212 P. 1074 (1923) (“[t]he rights of the parties are to be measured by the terms of the lease, and if by the lease the appellant made a good bargain she is entitled to the benefit of that bargain.”).

Millennium does not dispute the contents of the record, but instead argues that “any reasonable landlord would have readily accepted” such a subtenant under these circumstances. Millennium Brief at 23.

Millennium attempts to support this shaky proposition by distracting from the objectively troublesome reality documented in the record, yet the record shows that DNR based its denial on Millennium’s steadfast refusal to address DNR’s many valid concerns and failure to provide a complete view of its financial condition.

A. DNR’s Requests For Information Were Reasonable Under the Terms of the Lease And In Light Of Millennium’s Undisclosed And Increasingly Troubled Circumstances.

The record demonstrates that many of DNR’s requests for information directly followed events that Millennium and Northwest Alloys neglected to disclose to DNR and that would give any reasonable landlord pause.¹ For instance, DNR requested additional information

¹ Millennium initially frames DNR’s information requests as motivated by meetings with environmental groups, Millennium Brief at 1-2, but never expands upon this unsupported conspiracy theory. As is appropriate for a public state agency, DNR met with and received information from

about Millennium’s business plan after the Department of Ecology shared a troubling memo it obtained in litigation from Ambre Energy, one of Millennium’s corporate parents.² CP 492-96, AR 000393-97. The internal Ambre Energy memo revealed how Millennium intentionally misrepresented the intended size and scope of its proposed coal terminal during review under the State Environmental Policy Act (“SEPA”). *Id.* DNR also asked for updated financial information after learning that Arch Coal, which owned a 38 percent stake in Millennium’s proposed project, had filed for bankruptcy. CP 1539, AR 001240 (“Based on Arch Coal’s ownership interest in Millennium, the bankruptcy filing raises questions regarding the financial condition of Millennium that DNR needs to have answered before it completes review of your request for its consent for a sublease.”). Any reasonable landlord would want an explanation following these significant revelations, and would likewise be concerned that their tenant and proposed subtenant failed to come forth with such

Intervenors and other community and conservation groups about Millennium’s proposed project; those meetings, in fact, provided DNR with information that Millennium refused to supply.

² In 2015, Ambre Energy sold its North American coal business to Resource Capital Funds, its largest creditor, for a fraction of what Ambre had previously claimed its coal assets were worth. CP 14048, AR 013612 (Dec. 18, 2014 Sightline Daily article, “What Ambre Says About Its Financial Collapse”). Ambre’s financial disclosures showed “that the firm was running out of money, laden with debt, and had no reasonable hope of raising capital before it defaulted on its loans from [Resource Capital Funds].” *Id.* Following the sale, Ambre Energy N.A. changed its name to Lighthouse Resources. CP 14057, AR 013619.

information themselves.

In another attempt to distract from its own reticence during the years of negotiations that took place between the parties, Millennium faults DNR for requesting more information from Northwest Alloys and Millennium than DNR had requested from other proposed assignees under unrelated leases in vastly different circumstances. Millennium Brief at 11. It makes sense, however, that DNR would request less information from a proposed assignee who intends to operate an existing marina, AR 13879, than it would request from a company that intends to build a 44-million-ton per year coal export terminal on the banks of the Columbia River, CP 6123, AR 005713, and has a history of deceptive business practices, CP 493-95, AR 000394-96.

Unsurprisingly, Millennium does not address whether the proposed assignments of different aquatic land leases raised as many red flags as Millennium's enormous and controversial project proposal did. *See* CP 1850-52, AR 001509-11 (in denying Northwest Alloys consent to sublease to Millennium, DNR considered the bankruptcy of one of Millennium's corporate parents, recent violations of the Lease by a prior subtenant resulting in environmental damage, Millennium's failure to provide relevant information after multiple requests, Millennium's recent history of significant misrepresentations to local and state decision makers, and historically poor market conditions for coal). Even still, the record shows that DNR did ask other proposed assignees similar questions to those

asked of Millennium and Northwest Alloys. *See* AR 013874, AR 013879. For instance, DNR asked a proposed assignee under a different lease for business information and assurances that the site will be “legally, safely, and fiscally operate[d],” and requested documentation of financial resources, that could include having DNR speak directly to the proposed assignee’s financial institution to assess existing assets and liabilities. *Id.* Likewise, DNR asked another proposed assignee for information regarding any changes in operations under the lease, any planned modifications or improvements to the site, and “documentation of [proposed assignee’s] financial condition and ability to fulfill the financial obligations of the lease.” AR 013874.

The record demonstrates that the quantity of information that DNR requested from Northwest Alloys and Millennium—and that Millennium now complains of—is due to Millennium’s unwavering resolve to avoid answering DNR’s straightforward requests for information under the terms of the Lease. *See, e.g.*, CP 337, AR 000181 (Dec. 2, 2010 Letter from Millennium to DNR, arguing that “the thought that Millennium has to demonstrate financial capability to DNR is misplaced”); CP 1561, AR 001257 (March 2016 Letter from Millennium to DNR, refusing to provide audited financial statements and arguing that the Washington Administrative Code did not describe a process for DNR to seek such information); *see also* CP 15569-570 (Millennium “withheld the audited financial statements that DNR had requested, on the basis that they were

confidential business information”) (citing CP 1598, AR 001291); CP 15559 (Millennium and Northwest Alloys admit that they “chose not to respond” to DNR’s later requests because they had “had enough”); CP 15570 (when DNR again requested audited financial statements in June 2016, Millennium “did not respond to the request, as it had become clear that submitting the information would have been futile”); Millennium Brief at 11 (alleging that DNR was not acting in good faith, Northwest Alloys and Millennium again admit that they “did not further respond to DNR’s requests”).

B. DNR Requested Information Relevant To Its Concerns About Millennium’s Finances, Business Reputation, Experience, and Suitability as a Subtenant.

The superior court correctly found that DNR had legitimate concerns about Millennium’s project, CP 17691-93 at ¶¶ 9, 13, and that under the terms of the Lease, DNR was allowed to ask how Millennium’s business would operate, CP 17692 at ¶ 11. The superior court erred, however, in concluding that DNR failed to “ask the key question related to financial viability of the coal terminal operation.” CP 17692 at ¶ 12. DNR made multiple requests for any information that Northwest Alloys or Millennium could provide to shed light on Millennium’s financial condition, CP 1741-42, CP 280; AR 001418-19, AR 000132, and these requests were broad enough to encompass information about Millennium’s corporate parents and their supposed willingness to continue dumping

hundreds of millions of dollars into a company that was “bleeding cash with no source of revenue, and [that] was reliant on essentially weekly or daily infusions of cash from its owner,” *see* CP 17692 at ¶ 11.

The Lease required Northwest Alloys and Millennium to provide DNR with adequate information to make a decision on the sublease request. CP 1891-92, AR 001546-47; *see also* *McKeon v. Williams*, 104 Or. App. 106, 110-11, 799 P.2d 198 (1990) (finding that requiring information about a proposed assignee’s financial responsibility before consenting to assignment was reasonable and landlord did not unreasonably refuse to consent when lessee did not provide requested information). If Millennium believed that its parent company’s ostensible commitment to the proposed project would have been the best evidence of Millennium’s financial condition, then Millennium should have provided DNR with documentation to that effect, but it chose not to.³ Instead, Millennium refused to provide DNR with requested financial statements

³ Rather than pointing to a business plan or internal reports, Millennium relies on conjecture and its CEO’s statements in two newspaper articles to assert that its remaining corporate parent would continue throwing millions of dollars at the project despite historically poor conditions in the worldwide coal market. Millennium Brief at 13 (citing AR 013794 and AR 013759). *See* AR 013794 (May 26, 2016 article in *The Daily News* that detailed Arch Coal’s bankruptcy and highlighted how “weak demand and plummeting prices made any new coal docks in the Northwest economically unviable”); AR 013759 (April 26, 2016 *E&E News* article where the research director for global thermal coal markets at Wood Mackenzie reiterated that coal terminals were “a riskier bet now than in the past” based on decreased demand in China).

citing “confidentiality concerns,” not supposed irrelevance. Millennium Brief at 10; CP 1561, AR 001257.

Moreover, while Millennium now insists that “[t]he Arch Coal bankruptcy enhanced the suitability of [Millennium] as a subtenant,” Millennium Brief at 26, the record does not indicate that Millennium ever presented this counterintuitive argument to DNR for consideration. DNR should not be faulted for concluding that the bankruptcy of Arch Coal, which owned a 38 percent stake in Millennium’s project, reflected poorly on Millennium’s financial condition. *See* CP 14210-16, AR 13765-71. Millennium also does not contend that it submitted coal market reports to DNR to support the company’s claims that market conditions were improving. Instead, Millennium argues that DNR should have independently analyzed coal market trends immediately prior to making a decision on the sublease request.⁴ Millennium Brief at 13-14, 26-27.

Nothing in the law or the Lease required DNR to go searching for facts

⁴ This Court should deny Millennium’s request to take judicial notice of a U.S. Energy Information Administration report that was not before DNR when it made its decision to deny consent to sublease. *See* Millennium Brief at 14; *see* RCW 79.02.030. The record, by definition, contains the information that was before DNR when it made the sublease decision. *See, e.g., Tucker v. Dep’t of Ret. Sys.*, 127 Wn. App. 700, 705, 113 P.3d 4 (2005) (“The party challenging an agency’s action must prove the decision’s invalidity; our review is limited to the record before the agency.”). Appellate courts sit in the same position as the superior court when reviewing an administrative decision and apply the appropriate standard of review directly to the administrative record. *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 617–18, 987 P.2d 103 (1999); *see also* RCW 79.02.030.

that might support Millennium's post hoc justifications for refusing to disclose its financial information. Nor was DNR obligated to accept Millennium's self-serving interpretation of the record, particularly given Millennium's negligence in providing DNR with properly requested, relevant information.

C. DNR Properly Considered Millennium's Past Misrepresentations When It Denied Consent to Sublease.

DNR properly considered Millennium's prior misrepresentations to state and local officials, and was reasonably troubled by the company's plan to circumvent SEPA review and dramatically expand the size and scope of the coal terminal after receiving permits for a much smaller proposal. *See* CP 492-96, AR 000393-97. The Lease allowed DNR to consider Millennium's business reputation in deciding whether to grant consent to sublease, CP 1891-92, AR 001546-47, and DNR cited Millennium's prior misrepresentations as one of many reasons why it needed Millennium to disclose a complete picture of its financial condition. CP 1852, AR 001511.

The superior court erred in finding that, as of February 2015, DNR was "satisfied" in regard to Millennium's conduct in withholding its true intentions for the site in 2010, and further erred in concluding that DNR could not "resurrect the historical permitting issue as a concern" in its January 2017 denial. CP 17693 at ¶ 14. Millennium was not entitled to a blank slate after February 2015. DNR remained reasonably concerned

about Millennium’s pattern of withholding information and misrepresenting its plans, particularly in the context of Millennium also failing to disclose the 2015 shuttering of the Wenatchee aluminum smelter and the 2016 bankruptcy of one of its corporate parents. *See id.*; *see also* Riverkeeper Opening Brief at 38-39. DNR could not blind itself to Millennium’s past conduct; instead, the agency reasonably considered the entire course of dealings with Northwest Alloys and Millennium in arriving at its denial decision.

D. DNR Properly Denied Consent Based On Millennium’s Unsuitability as a Subtenant Despite Northwest Alloys’ Continued Liability Under the Lease.

Despite conceding “that the Lease authorized DNR to request financial information,” Millennium Brief at 31, Millennium argues that its financial condition was of no consequence because Northwest Alloys remained liable under the Lease. Millennium Brief at 23-24; *but see* Lease Section 9.1(a) (authorizing DNR to consider Millennium’s financial condition). Millennium’s reliance on several out of state cases is misplaced—the specific terms of DNR’s lease with Northwest Alloys were not, of course, considered by any of those courts. *See* Millennium Brief at 23-24 (citing *Caplan v. Latter & Blum, Inc.*, 468 So.2d 1188, 1191 (La. 1985); *Adams, Harkness & Hill, Inc. v. Ne. Realty Corp.*, 361 Mass. 552, 557, 281 N.E.2d 262 (1972); *Ringwood Assocs. Ltd. v. Jack’s of Route 23, Inc.*, 153 N.J.Super. 294, 301-02, 379 A.2d 508 (1977)).

Washington courts interpret contracts “according to the intent of the parties as manifested by the words used therein.” *Pub. Employees Mut. Ins. v. Sellen Const. Co.*, 48 Wn. App. 792, 795-96, 740 P.2d 913 (1987).

DNR and Northwest Alloys specifically agreed that DNR could consider a proposed subtenant’s financial condition—without regard to Northwest Alloys’ financial condition—in deciding whether to consent to a sublease request. Lease Section 9.1(a); *see also Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 484, 910 P.2d 486 (1996) (parties to a lease “are free to negotiate the standard by which a landlord’s failure to consent to an assignment will be considered”). DNR cannot be faulted for exercising its rights under the terms of the Lease as any reasonably prudent landlord would do in evaluating a potential subtenant. *See Robertson*, 123 Wash. at 515 (“[t]he rights of the parties are to be measured by the terms of the lease, and if by the lease the appellant made a good bargain she is entitled to the benefit of that bargain.”); *see also Ernst Home Ctr.*, 80 Wn. App. at 482 (reviewing courts examine whether a reasonably prudent person in the landlord’s position would have withheld consent to sublease).

Moreover, DNR was explicit in its concerns that Millennium itself be able to perform, particularly in light of the substantial damage caused at the site by prior subtenant Chinook Ventures, and requested information to address those concerns. *See, e.g.*, CP 280, CP 1539, CP 1741; AR 000132, AR 001240, AR 001418. Indeed, given DNR’s concerns “about whether NW Alloys should continue as a lessee of the site” after

Northwest Alloys failed to ensure Chinook Ventures' compliance with the Lease, CP 280, AR 000132, DNR was reasonably wary of Millennium's overreliance on Northwest Alloys' continued liability under the Lease. As the superior court noted, DNR had "the object lesson of Chinook Ventures in terms of what a bad subtenant can do at the property." CP 17691 at ¶ 10. Millennium argues that DNR's "property interests" were adequately protected because Millennium and Northwest Alloys would both "be on the hook" under the Lease in the event that the state-owned aquatic lands again required years of clean up following default by an irresponsible subtenant. *See* Millennium Brief at 27. But DNR's concerns were not limited to who would foot the bill for damage; rather, DNR had an obligation to ensure that such damage did not occur in the first place. *See infra*, Argument Section II; *see also* CP 17690 at ¶ 5 (Washington's aquatic lands "are defined by the Legislature as being finite and irreplaceable") (citing RCW 79.105.010).

II. DNR MUST MANAGE STATE-OWNED AQUATIC LANDS FOR THE BENEFIT OF THE PUBLIC, INCLUDING DECISIONS TO SUBLEASE THOSE LANDS.

The superior court correctly found that DNR does not occupy the same position as a private landlord because, by statute, the agency "must strive to balance public benefits of all citizens of the state" when making land use decisions. CP 17690 at ¶ 5 (citing RCW 79.105.030). DNR's lease with Northwest Alloys is different from a lease between two private

parties in that its terms specify that “[t]his Lease is subject to...rights of the public under the Public Trust Doctrine.” CP 1876, AR 1531 (Lease Section 1.1(b). “DNR executes its leasing authority with a view toward the State’s duty to protect the public trust.” *Pope Res., LP v. Dep’t of Nat. Res.*, 190 Wn.2d 744, 755, 418 P.3d 90 (2018); *see also Wash. State Geoduck Harvest Ass’n v. Dep’t of Nat. Res.*, 124 Wn. App. 441, 450, 101 P.3d 891 (2004) (Where the state, and not a private party, owns navigable beds, “DNR has a continuing obligation under the public trust doctrine to manage the use of the resources on the land for the public interest.”).

Washington law is clear that a landlord’s position is relevant in determining the reasonableness of denying consent to sublease. *See, e.g., Ernst Home Ctr., Inc.*, 80 Wn. App. at 486 (“where 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”) (emphasis added); *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.”) (emphasis added). Millennium argues that DNR should receive no “special treatment” as an administrative agency, Millennium Brief at 41, and DNR has received no special treatment—under Washington case law and the statutes directing DNR’s actions, the superior court was correct to evaluate

“the reasons given for denial from the standpoint of a reasonable landlord in the Commissioner’s position,” CP 17690 at ¶ 5.⁵

III. THIS COURT STANDS IN THE SAME POSITION AS THE SUPERIOR COURT IN REVIEWING DNR’S DECISION.

Appellate courts stand in the same position as superior courts when reviewing an administrative decision. *Lake Union Drydock Co. v. Dep’t of Nat. Res.*, 143 Wn. App. 644, 651, 179 P.3d 844 (2008) (applying *de novo* review to DNR’s calculation of rent for state-owned aquatic lands). The fact that Millennium chose to appeal DNR’s decision under RCW 79.02.030, a statute that provides for court review of a decision by the Board of Natural Resources or the Commissioner of Public Lands concerning the sale or lease of public lands, does not change this well-established standard of review. *See id.*; *see also Echo Bay Cmty. Ass’n v. Dep’t of Nat. Res.*, 139 Wn. App. 321, 326, 160 P.3d 1083 (2007) (applying *de novo* review following appeal brought under RCW 79.02.030). This Court sits in the same position as the superior court in reviewing the Commissioner’s decision to deny consent to sublease and

⁵ Millennium’s reliance on *Metro. Park Dist. of Tacoma v. Dep’t of Nat. Res.*, 85 Wn.2d 821, 539 P.2d 854 (1975) in the context of this case is inapposite. *See* Millennium Brief at 23, 41, 49. *Metro. Park* specifically involved application of a claim of equitable estoppel when the state tried to retract a deed issued years before; it was not a case involving review upon the record of the reasonableness of an agency decision. Moreover, regardless of whether DNR was acting in its proprietary capacity, the Court must still consider reasonableness from the landlord’s position. *See Ernst Home Ctr., Inc.*, 80 Wn. App. at 486.

applies a *de novo* standard of review to the underlying administrative record. *See* RCW 79.02.030.

Intervenors agree with DNR that this Court's *de novo* review of DNR's decision should be under the arbitrary and capricious standard. *See* DNR's Opening Brief at Section IV. Standard of Review; CP 17689 at ¶¶ 3-4; *see also Haynes v. Seattle Sch. Dist. No. 1*, 111 Wn.2d 250, 254, 758 P.2d 7 (1988), *cert. denied*, 489 U.S. 1015, 109 S. Ct. 1129, 103 L. Ed. 2d 191 (1989) (*de novo* review of agency decision ordinarily limited to whether agency acted arbitrarily, capriciously, or contrary to law). DNR's decision was also reasonable under the "reasonable person" standard articulated in Washington landlord-tenant case law. *See, e.g., Ernst Home Ctr., Inc.*, 80 Wn. App. at 486 ("where 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") (emphasis added); *see also* Riverkeeper Opening Brief at 25-26, 29-42.

Despite longstanding case law that dictates the appropriate standard of review in appeals of administrative decisions, Millennium has fashioned a new theory to limit this Court's review to the more limited standard used in appeals brought under the Industrial Insurance Act, Title 51 RCW. Millennium Brief at 21 (citing *Hendrickson v. Dep't of Labor and Indus.*, 2 Wn. App. 2d 343, 351-52, 409 P.3d 1162, *review denied*, 2018 WL 3407657 (2018) (noting that under the Industrial Insurance Act,

appellate courts apply a “substantial evidence” standard of review)). This argument is a distraction.

Appeal procedures under the Industrial Insurance Act are significantly different from appeals under RCW 79.02.030—industrial insurance claims are first appealed to an industrial appeals judge who holds a hearing and takes testimony and other evidence, *Hendrickson*, 2 Wn. App. 2d at 346-49; RCW 51.52.102, while appeals of land use decisions under RCW 79.02.030 are heard first by the superior court and decided solely on the pleadings and the certified administrative record.⁶ Given the vast differences in these statutory schemes and the issues they each address, this Court should reject Millennium’s invitation to break with precedent by applying a narrower scope of review.

IV. IF THE SUPERIOR COURT’S DECISION IS UPHELD,
REMAND TO DNR IS THE APPROPRIATE REMEDY.

The superior court’s decision should be reversed for the reasons stated by Intervenors and DNR, but if this Court upholds the superior court’s decision, then remand to DNR is the appropriate remedy. The superior court correctly denied Millennium’s Motion for Entry of Judgment, finding that DNR “retain[ed] discretion under their lease with [] Northwest Alloys to condition their consent to a sublease in this matter,”

⁶ Millennium’s attempt to analogize the two statutes only goes so far, as Millennium neglects to mention that under the Industrial Insurance Act, the administrative board’s decision is “prima facie correct and the burden of proof is on the party challenging the decision.” *Id.* at 350-51.

and that the superior court was prohibited from entering a judgment deeming DNR's consent to sublease granted. CP 17815 (Remedy Order). Millennium submits that this Court should mandate the sublease to be immediately issued pursuant to the generic 2008 terms in Section 9.3 of the Lease, Millennium Brief at 42, despite the fact that Section 9.3(a) provides that Northwest Alloys "shall submit the terms of all subleases to State for approval." CP 1892-93, AR 1547-48. Millennium argues that neither submission nor approval are now necessary because DNR already agreed to the more general terms set forth in Section 9.3(b) when DNR originally negotiated the Lease terms with Northwest Alloys a decade ago. Millennium Brief at 42. Yet Section 9.3(b)(1) requires a sublease to be consistent with the terms of the Lease, CP 1892, AR 1547, incorporating the requirement of DNR approval and DNR's right to condition its consent on changes in the terms and condition of the Lease. CP 1891, AR 1546 (Lease Section 9.1(b)(1)). Any argument that the 2008 Lease terms themselves are enough writes the Section 9.1 terms out of existence and relegates DNR's approval to mere rubber-stamping, a role explicitly rejected by the statutes and regulations that govern the agency, as well as the 2008 Lease itself.

Not only does the 2008 Lease envision renegotiation over sublease terms, but DNR entered into the 2008 Lease before the violations, damage, and default caused by Northwest Alloys' prior sub-tenant, CP 129, CP 160, CP 280, AR 000001, AR 000025, AR 000132; before Millennium

attempted to mislead state regulators about the size and intent of its project, CP 492-96, AR 000393-97; before the Wenatchee aluminum smelter was closed, CP 1479, CP 1539, AR 001190, AR 001240; and before Millennium's co-owner, Arch Coal, filed for bankruptcy and sold its 38 percent stake in Millennium's proposed coal export terminal for nothing more than a release of its financial obligations to Millennium, CP 1651, AR 001334. This Court should not ignore all the process and concerns that occurred over six years of negotiations and order a sublease based on 2008 facts.⁷

CONCLUSION

Millennium and Northwest Alloys refused to fulfill DNR's clear and reasonable requests for information, as allowed for by the terms of the Lease, and this refusal alone supports a reasonable denial of consent. Millennium likewise failed to come forward with information that the company now asserts would demonstrate financial capability. Under the clear terms of the Lease, Northwest Alloys was obligated to provide DNR with information necessary to make a decision on whether to consent to a sublease request, yet Northwest Alloys failed to do so.

DNR gets the benefits of the bargained-for lease, including the right to consider any other factor that "may reasonably bear upon the

⁷ Intervenors join DNR's arguments with respect to the superior court's error in interpreting the Lease to allow Millennium's proposed coal terminal expansion, as that issue was not before the trial court. *See* DNR Opening Brief at 39-45.

suitability of Millennium as a tenant of the Property.” The record shows that every factor in the Lease—finances, business reputation, experience, type of new business—weighed against Millennium. DNR measured the suitability of Millennium as a sub-tenant against the factors outlined in the Lease, found that the evidence weighed against granting consent to sublease, and denied consent; any reasonable landlord would have done likewise under such circumstances.

Intervenors respectfully request that this Court reverse the superior court’s arbitrary and capricious finding and affirm DNR’s denial of consent to Northwest Alloy’s proposed sublease to Millennium.

Respectfully submitted this 5th day of September, 2018.



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DECLARATION OF SERVICE

Aanal Patel declares as follows:

1. I am over the age of 18 and am competent to testify herein.
2. I am a Litigation Assistant at Earthjustice.
3. On September 5, 2018, I caused the foregoing document to be filed electronically with the court, and also electronically served the following attorneys of record:

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