

NO. 36374-70 II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LAKE UNION DRYDOCK COMPANY, INC.,
Plaintiff-Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,
Defendant-Respondent.

BRIEF OF APPELLANT
LAKE UNION DRYDOCK COMPANY, INC.

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STATE OF WASHINGTON
BY _____
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I. INTRODUCTION

By Constitutional writ of certiorari, Lake Union Drydock Company, Inc. (“LUDC”) challenges the State of Washington, Department of Natural Resources’ (“DNR”) decision to use an alternative upland tax parcel to calculate the rent for LUDC’s aquatic land lease in Lake Union, Seattle, for the lease periods 2003-2004, 2004-2005, and the four-year period beginning July 1, 2005. That decision was contrary to law, and arbitrary and capricious.

Specifically, DNR’s decision was contrary to law, because DNR deviated from the governing rule’s criteria for when an upland tax parcel’s assessed value is not consistent with the purposes of the lease, and thereby exceeded its statutory authority. Moreover, DNR knew its decision to use an alternate upland tax parcel was not authorized by the governing statute and regulation. Reasonable minds can reach only one conclusion: the governing regulation did not authorize DNR to use an alternate upland tax parcel. DNR proceeded with its decision in willful disregard of that conclusion. Therefore, DNR’s decision was also arbitrary and capricious.

In 2005, DNR conducted its four-year rent revaluation for the aquatic land LUDC leases from the State. RCW 79.90.480, RWC 79.90.540, and WAC 332-30-123 govern aquatic land rent

determinations.¹ According to the governing statute, rent is to be calculated based on the assessed value of the upland tax parcel as determined by the county assessor, unless there is no assessed value, or the assessed value is not consistent with the purposes of the lease, in which case the nearest comparable upland parcel shall be substituted. RCW 79.90.480(1)(a) and (4). Here, LUDC's land has an assessed \$1,000-value, which DNR does not dispute. Ex. 2 (II-00235). Therefore, the only legitimate basis DNR has for not using that value is that the county assessor's valuation is inconsistent with the purposes of the lease.

RCW 79.90 does not, however, define what constitutes an "assessed value not consistent with the purposes of the lease." Rather, the legislature directed DNR to adopt a rule to carry out the purpose of RCW 79.90.480(4), and expressly mandated that DNR adopt a rule "specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed and for

¹ RCW 79.90.480 and 79.90.540 were re-codified as RCW 79.105.240 and 79.105.360 after LUDC appealed DNR's decision. WAC 332-30-123 was amended in December 2005 to include one additional situation, relating to contamination, when DNR is authorized to use an alternate upland tax, and to state that the situations in the rule are "examples." DNR does not dispute that WAC 332-30-123 before it was amended governed its decision in this case. *See*, Ex. 1 (II-00142). For the sake of consistency, petitioner herein refers to the statutes as codified at the time DNR made its determination. Any reference to WAC 332-30-123 is to that rule before amendment. For the record, LUDC disputes that WAC 332-30-123(3) as amended complies with its governing statute.

determining the nearest comparable upland parcel used for water-dependent uses.” RCW 79.90.540.

WAC 332-30-123 defines those six specific situations when an assessment is considered inconsistent. This occurs when the: (a) upland tax parcel is not assessed; (b) official date of assessment is more than four years old; (c) “assessment” results from a special tax classification; (d) assessed valuation of the upland tax parcel to be used is under appeal; (e) majority of the upland tax parcel area is not used for a water-dependent purpose; and (f) the size of upland tax parcel is not known or its small size results in a nominal valuation.

Internal DNR memoranda dating back to 1992, and subsequent forms and memoranda related to the rule-making process to amend WAC 332-30-123, acknowledge DNR can only use an alternate parcel for valuation purposes if one of those six situations applies, and that deviating from this standard is contrary to law. Nevertheless, despite having an assessed value and with full knowledge that an alternate upland tax parcel could only be used if one of the six criteria identified in WAC 332-30-123 applied, DNR arbitrarily decided to use an alternate parcel to value the rent for the parcel in question based on what the DNR characterized as a

“devaluation by the King County Assessor.”² *See*, Ex. 2 (II-00236). That is not a permitted criterion stated in WAC 332-30-123.

II. ASSIGNMENTS OF ERROR

1. DNR erred in its October 28, 2005 decision (Ex. 2) to use an alternative parcel by ignoring the statutory limitation upon its authority stated in RCW 79.90.540 and deviated from the six situations when an assessed value is inconsistent with the purposes of the lease set forth in WAC 332-30-123. Thus, DNR exceeded its statutory authority and violated the governing statute and rule, rendering its decision contrary to law.

2. DNR erred in its October 28, 2005 finding and conclusion that the assessed value of LUDC’s upland tax parcel was inconsistent with the purposes of the lease, as a “devaluation by the King County Assessor’s Office” is not one of the situations when an assessed value is deemed inconsistent with the purposes of the lease as expressly and specifically set forth in WAC 332-30-123 and none of the six situations apply to the assessed value of LUDC’s parcel.

3. DNR erred in its October 28, 2005 decision to use an alternative parcel for valuation purposes by proceeding contrary to, and in

² LUDC disputes that the county assessor’s assessed value is a “devaluation”, and further disputes any implication that the assessed value is not the fair market value.

complete disregard of, the conclusion stated in numerous internal DNR memoranda and indicated in the proposed rule-making forms that it is not authorized to deviate from the six criteria set forth in WAC 332-30-123. *See*, Ex. 9-14, 18, and 19. Thus, DNR's decision is contrary to the only conclusion that can be drawn from the language of the statute, DNR's own regulation, and to DNR's internal analysis, rendering its decision arbitrary and capricious.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

RCW 79.90.540 mandates that DNR adopt a rule "specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed."

Issue 1: *Does RCW 79.90.540 require that DNR base its assessed value determination upon the criteria required to be included in its adopted rule?* (Assignment of Error 1).

Issue 2: *Is DNR's authority under RCW 79.90.480 to use an alternative parcel thus limited by the criteria required to be set forth in its adopted rule?* (Assignment of Error 1).

The adopted rule, WAC 332-30-123, sets forth the mandated criteria in the form of six situations when an assessment of a parcel's value is considered inconsistent.

Issue 3: *Is DNR's authority to use an alternative parcel thus limited to the six situations listed in WAC 332-30-123? (Assignment of Error 1).*

DNR decided to use an alternative parcel based upon an alleged “devaluation by the King County Assessor’s Office,” which is not one of the six situations set forth in WAC 332-30-123.

Issue 4: *Did DNR's decision therefore violate its own rule and exceed DNR's statutory authority? (Assignment of Error 1).*

Issue 5: *Is DNR in fact precluded from finding LUDC's assessed value inconsistent, when it has not found any of the six situations set forth in WAC 332-30-123 applicable to LUDC's upland parcel? (Assignment of Error 2).*

Issue 6: *Is DNR precluded from finding LUDC's assessed value inconsistent based upon “devaluation by the King County Assessor’s Office,” when that is not one of the six criteria set forth in WAC 332-30-123? (Assignment of Error 2).*

Internal DNR memoranda clearly demonstrate that DNR intended to limit the use of alternative parcels to the specific six situations set forth in WAC 332-30-123 and that DNR employees believed the agency’s authority to use an alternative parcel was indeed limited to application of the six situations set forth in WAC 332-30-123.

Issue 7: *Does the fact that DNR proceeded in total disregard of this knowledge and its own independently reached conclusion render its decision to nevertheless use an alternative parcel based upon “devaluation by the King County Assessor’s Office” arbitrary and capricious? (Assignment of Error 3).*

IV. STATEMENT OF THE CASE

LUDC leases approximately 2.8 acres of state-owned aquatic lands located in Lake Union, Seattle, Washington, under Aquatic Land Lease No. 22-090028 (the “Lease”). Ex. 1 (II-00142). The aquatic land at issue is located several hundred feet from shore. Ex. 3 (I-00007); Ex. 4. LUDC’s property at 1515 Fairview Ave. E. is the partially submerged property located between that aquatic land and the Lake Union shore. *See, e.g.,* Ex. 3; Ex. 5 (II-00154); Ex. 6.

DNR is the State agency responsible for management of that Lease. *See*, RCW 79.02.010(1) and (5). The Lease provides for rent revaluation every four years. Ex. 7 (I-00040).

The rent is to be calculated based on the assessed value of the upland tax parcel used in conjunction with the leased area, as determined by the county assessor. RCW 79.90.480(1)(a). However, “if the upland parcel ... is not assessed or has an assessed value not consistent with the

purposes of the lease, the nearest comparable upland parcel used for similar purposes shall be substituted...” RCW 79.90.480(4).

RCW 79.90 does not define “assessed value not consistent with purpose of the lease.” Rather, the legislature directed DNR to adopt a rule to carry out the purpose of RCW 79.90.480(4), and expressly mandated DNR adopt a rule “specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed and for determining the nearest comparable upland parcel used for water-dependent uses.” RCW 79.90.540.

DNR adopted WAC 332-30-123, which provides in relevant part:

...the upland tax parcel’s assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent ...

- (a) The upland tax parcel is not assessed...;
- (b) Official date of assessment is more than four years old...;
- (c) The “assessment” results from a special tax classification not reflecting fair market value...;
- (d) If the assessed valuation of the upland tax parcel to be used is under appeal...;
- (e) The majority of the upland tax parcel area is not used for a water-dependent purpose...;
- (f) The size of upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation...

WAC 332-30-123(3); Ex. 8 (II-00215).

An internal DNR memorandum on the subject of “San Juan County ‘Spikes’ Issues” from 1992 authored by Todd Palzer and Garry Gideon acknowledged “that although the situations described in WAC 332-30-123(3) may not list every situation, the intent was to list all of the situations that would be considered.” Ex. 9 (III-00373-00374) (emphasis in original).

Another internal DNR memorandum on the “Use of Alternate Parcels to Alleviate Assessment ‘Spikes,’” authored by Rich Phipps and dated August 7, 2002, acknowledged that RCW 79.90.480 did not define “assessed value inconsistent with the purposes of the lease.” Ex. 10 (III-00383). “Rather, RCW 79.90.530 [*sic.*] *Adoption of rules* mandates that DNR develop rules for guidance specifically on the issue of determining when a parcel has been inconsistently assessed.” *Id.* That memorandum also acknowledged DNR has “acted outside the limits of the rule.” *Id.*

In another internal DNR memorandum dated April 25, 2003, on “Use of Alternate Parcels When the Upland Tax Parcel is Contaminated,” Mr. Phipps acknowledged that a circumstance involving an assessment lowered due to contamination was not clearly contemplated by either statute or rule. *See*, Ex. 11 (III-00386); WAC 332-30-123(3)(c) did not cover the contamination issue. *Id.* (III-00389). Moreover, Mr. Phipps concluded in part that “lacking a change to the current wording of WAC

332-30-123 ... we do not have adequate legal justification to reject the upland parcel and seek an alternate parcel.” *Id.* (II-00390); “[I]t seems clear that a necessary element to follow-up should be to revise WAC 332-30-123.” *Id.* (II-00392).

In late 2004 DNR “initiated preliminary rule-making activities ... to explore options to expand the range of circumstances under which an alternate upland parcel should be selected.” Ex. 12 (III-00437). DNR acknowledged that WAC 332-30-123(3) permitted it “to select an alternate upland parcel only in certain, limited situations.” *Id.*

The CR-101 filed with the Code Reviser’s Office on November 3, 2004 stated in part:

The DNR Aquatic Resources Division is exploring options to modify the alternate upland parcel selection criteria contained in Chapter 332-30-123 WAC, which imposes limitations on the selection of alternate upland parcels... Chapter 332-30-123 WAC narrows the upland parcel selection criteria established in RCW 79.90.480 and imposes limitations on the selection of alternate upland tax parcels for purposes of calculating lease rates...

Ex. 13 (III-00341).

A document titled “Upland extension rule-making: answers to potential questions from lessees and interested parties regarding our rule-making notification letter” authored by Matt Niles dated December 7, 2004 stated: “According to the existing rent calculation method, the DNR

may select an alternate parcel only in certain, limited situations.” Ex. 14 (III-00405).

DNR, however, did not follow the statute or administrative rule in assessing LUDC’s rent. In June 2005, DNR informed LUDC it owed back rent for the 2003-2004 and 2004-2005 lease years. Ex. 15 (I-00038).

Additionally, DNR had revalued LUDC’s projected rent for Aquatic Land Lease No. 22-090028 for the four-year period commencing July 1, 2005.

Ex. 7 (I-00040). DNR acknowledged the revaluation was conducted in accordance with Subsection 3.3 of LUDC’s aquatic land lease and was based on the rent calculation methods established in RCW 79.90. *Id.*

However, DNR stated “the assessed value of the property before reduction for contamination was used *in accordance with* WAC 332-30-123.” *Id.*

(emphasis added); *see*, Ex. 15 (I-00038). Thus, DNR wrongly attempted to use an assessed value before contamination to calculate back rent and future rent.

Clearly, WAC 332-30-123 does not provide for use of the assessed value *before contamination*. As stated above, this was the particular conclusion by DNR’s own Mr. Phipps. Ex. 11 (III-00386-00389).

Furthermore, as stated above, the governing statute, RCW 79.90.480, provides that the assessed land value “as determined by the county assessor” shall be used. RCW 79.90.480(1)(a). The county assessor’s

assessed land value for LUDC's upland tax parcel for 2005 was \$1,000. Ex. 16 (II-00246); Ex. 2 (II-00235). LUDC timely sought review of the revaluation by a DNR Rental Dispute Officer ("RDO").

Meanwhile, DNR proceeded with drafting administrative rule changes. On August 3, 2005 (two months after its letter to LUDC) DNR filed Proposed Rule Making form CR-102 stating it wanted to amend the rule to "give explicit directions in situations *not yet* specifically discussed in the rules..." Ex. 17 (III-00342) (emphasis added).

While the proposed rule was pending, the RDO issued her "final decision" on October 28, 2005. Ex. 2 (II-00234 – 237). The RDO agreed that the assessed value *before reduction for contamination* was an improper basis for the rent revaluation. *Id.* (II-00235).

RDO did not, however, correct the revaluation by then using the county assessor's assessed value. Rather, the RDO arbitrarily decided:

...the current property tax assessment of your upland parcel is inconsistent with the purposes of the lease due to devaluation by the King County Assessors Office. For this reason, I have decided that it is appropriate for the Department to select an alternate upland parcel...

Ex. 2 (II-00236).

The RDO's letter stated LUDC could appeal her decision to DNR's Rental Dispute Appeal Officer ("RDAO") Mr. Craig Partridge. LUDC appealed to the RDAO.

However, “devaluation by the King County Assessors Office” is not a situation identified in WAC 332-30-123(3) as inconsistent with the purposes of the lease. Indeed, DNR acknowledged this in late 2005. For example, an internal DNR memorandum dated December 13, 2005 (author unknown) acknowledged DNR’s contrary positions and arbitrary justifications: “previously we said ... we weren’t going to go to an alternate parcel. And the RDO conclusion is that we’re not going to use the pre-adjusted parcel value. Now we’re saying we are going to go to an alternate parcel.” Ex. 18 (II-00242).

Moreover, the RDAO file notes state a “[t]ax devaluation is not a basis for finding inconsistent assessment – still [fair market value].” Ex. 19 (II-00257) (emphasis in original). The author, presumably the RDAO, acknowledged WAC 332-30-123(3) and (4) did not apply; and that DNR was limited to the six “certain specific cases”. *Id.*

The RDAO never issued a decision, and instead sought to extend his review period. Ex. 20 (II-00239). However, WAC 332-30-128 only authorizes the *RDO* to extend her review period; there is no such provision for the RDAO. WAC 332-30-128. Accordingly, LUDC appealed to the Board of Natural Resources to preserve its rights. Ex. 21 (II-00254).

The Board of Natural Resources formally declined to review the matter, rendering the RDO's October 28, 2005 decision the DNR's final decision. Ex. 22.

LUDC petitioned the Thurston County Superior Court for a writ of certiorari. The court has inherent authority under the State Constitution to determine whether DNR's decision to use an alternative upland tax parcel was, as a matter of law, arbitrary, capricious, or contrary to law. *See, Williams v. Seattle School District No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982), quoting, *Helland v. King Cy. Civil Serv. Comm'n*, 84 Wn.2d 858, 862, 529 P.2d 1058 (1975), and, *Reiger v. Seattle*, 57 Wn.2d 651, 653, 359 P.2d 151 (1961).

DNR does not dispute that this action should proceed under a Constitutional writ rather than the Administrative Procedures Act ("APA"). First, since an agency decision regarding an aquatic land lease on public lands is at issue here, the APA does not apply. *See*, RCW 34.05.010(3)(c). Second, a plaintiff is clearly allowed legal review of an adverse agency decision. *See*, RCW 79.105.320. Third, as the APA does not apply, legal review under a statutory writ of review is authorized. *See*, RCW 7.16.360. Fourth, where the alleged facts, if verified, would establish that the agency decision was illegal or arbitrary and capricious the superior court also has inherent power under the State Constitution to

review the administrative decisions under constitutional writ. *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292-93, 949 P.2d 370 (1998) (“citations omitted”). The trial court entered a stipulated agreed order to that effect, and the matter proceeded to the review hearing. The trial court upheld DNR’s decision.

V. ARGUMENT

A. Standard of Review.

The appellate court stands in the same position as the superior court in reviewing an administrative decision. *Wenatchee Sportsmen Assoc. v. Chelan Cy*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000), *citing*, *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). The trial court’s review by writ of certiorari of an administrative decision is limited to a review of the record before the agency and to a determination whether the decision was contrary to law or arbitrary and capricious. *Thomsen v. King County*, 39 Wn. App. 505, 514-15, 694 P.2d 40 (1985), *review denied*, 103 Wn.2d 1030, *citing*, *Bay Indus., Inc. v. Jefferson Cy.*, 33 Wn. App. 239, 240-41, 653 P.2d 1355 (1982). Thus, on appeal, the court of appeals makes a de novo review similar to that of the superior court to determine whether an administrative decision was contrary to law or arbitrary and capricious. *Id.*, *citing*, *Bay Indus., Inc.*, 33 Wn. App. at 241.

B. DNR’s decision to use an alternate upland tax parcel was contrary to law.

1. DNR exceeded its statutory authority and violated the governing statute and rule when it decided to base its determination to use an alternate upland tax parcel on criteria not specifically included in WAC 332-30-123(3).

DNR failed to confine its determination of whether to use an alternate upland tax parcel to the specific criteria listed in WAC 332-30-123(3).³ DNR’s statutory authority to use an alternate upland tax parcel is limited to those criteria. *See*, RCW 79.90.540 (“...specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed”). Actions of an agency deemed “contrary to law”, or tainted by “illegality”, refers to an agency’s jurisdiction and authority to perform an act. *Washington Public Employees Association v. The Washington Personnel Resources Board*, 91 Wn. App. 640, 657, 959 P.2d 143 (1998), *citing*, *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). Moreover, DNR violated its own rule when it made its decision to use an alternate upland tax parcel based on what DNR characterized as “devaluation [of LUDC’s upland parcel] by the King County Assessor’s Office.” Ex. 2 (II-

³ To date, DNR has not asserted one of the six situations in WAC 332-30-123 applies. However, for the record LUDC disputes that any of those situations apply.

00236).⁴ Devaluation by the King County Assessor's Office is not among the six situations specified in WAC 332-30-120(3). "An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law." *Pierce Cy. Sherriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983).

The only possible applicable exception to the general rule requiring DNR to use the assessed value of LUDC's upland tax parcel, is if the assessed value is not consistent with the purposes of the lease. RCW 79.90.480. The statute provides that only when there is no assessed value, or when the upland tax parcel has an assessed value inconsistent with the purposes of the lease, shall the nearest comparable upland parcel used for similar purposes be substituted. RCW 79.90.480(4). As stated in the Facts section, LUDC's upland tax parcel has an assessed value.

DNR is not, however, given unfettered authorization to use an alternate upland tax parcel any time it concludes the assessed value is not consistent with the purposes of the lease. DNR's statutory authority to use an alternate upland tax parcel is limited to the criteria stated in DNR's own regulation, WAC 332-30-123. The legislature expressly and unambiguously mandated that DNR state the criteria for when an upland

⁴ As stated in the Facts section, footnote 2, LUDC disputes that the county assessor's assessed value is a "devaluation."

parcel is not consistent with the purposes of the lease: “The department shall adopt such rules...*specifically including criteria for determining* under RCW 79.60.480(4) when an abutting upland parcel has been inappropriately assessed...” RCW 79.90.540. “The use of the word ‘shall’ imposes a mandatory duty.” *Waste Management of Seattle, Inc. v. The Utilities and Transportation Commission*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994), *citing, Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wn.2d 439, 446, 842 P.2d 956 (1993). Thus, DNR was required to adopt a rule that specifically stated when an assessed value is inconsistent with the purposes of the lease.

Moreover, the clear intent of RCW 79.90.540 is that DNR base its determination of when an assessed value is inconsistent on the criteria specifically included in that rule. The criteria is to be included “for determining ... when an ... upland parcel has been inappropriately assessed.” *See, RCW 79.90.540*. “When the plain language of a statute is unambiguous – that is, when the statutory language has but one meaning – the legislative intent is clear, and the statute will not be interpreted otherwise.” *State v. Thompson*, 151 Wn.2d 793, 801, 92 P.3d 228 (2004), *citing, State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Furthermore, if the legislature intended to authorize DNR to use an alternate upland tax parcel at any time DNR arbitrarily decided the

assessed value was inconsistent, the legislature would not have mandated the inclusion of specific criteria for making that determination as it did in RCW 79.90.540. To conclude otherwise ignores the statutory mandate.

DNR adopted WAC 332-30-123. Subsection 3 of that rule re-states the statutory language contained in RCW 79.90.480(4), and then sets forth the specific criteria mandated by RCW 79.90.540 in the form of six specific situations when DNR will consider the assessed value inconsistent:

In addition to the criteria in subsection (2) ... the upland tax parcel's assessed value must be consistent with the purposes of the lease and method of rental establishment. On this basis, the following situations will be considered inconsistent and shall either require adjustment as specified, or selection of an alternative upland tax parcel under subsection ...

- (a) The upland tax parcel is not assessed...;
- (b) Official date of assessment is more than four years old...;
- (c) The "assessment" results from a special tax classification not reflecting fair market value...;
- (d) If the assessed valuation of the upland tax parcel to be used is under appeal...;
- (e) The majority of the upland tax parcel area is not used for a water-dependent purpose...;
- (f) The size of upland tax parcel in acres or square feet is not known or its small size results in a nominal valuation...

WAC 332-30-123(3) (emphasis added). Ex. 9 (II-00214).

The rule is clear: “the following situations will be considered inconsistent.” WAC 332-30-123(3). Absent ambiguity there is no need for an agency’s expertise in construing a statute. *Waste Management of Seattle, Inc. v. The Utilities and Transportation Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994), *citing*, *Pasco v. Public Empl. Relations Comm’n*, 119 Wn.2d 504, 509, 883 P.2d 381 (1992). Furthermore, a court will not defer to an agency determination which conflicts with the statute. *Id.*, *citing*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *Friends of the Columbia Gorge, Inc. v. The Forest Practices Appeals Board*, 129 Wn. App. 35, 48, 118 P.3d 354 (2005), *citing*, *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). These rules of statutory interpretation also apply to review of agency regulations. *See*, *State v. Reier*, 127 Wn. App. 753, 757-58, 112 P.3d 566 (2005), *review denied*, 156 Wn.2d 1019 (2006).

Thus, if DNR had decided to use an alternate upland parcel based on one of the six criteria set forth in WAC 332-30-123(3), it would have acted within its statutory authority. However, if its determination was not confined to those specific criteria, then DNR exceeded its authority and violated the statute and its own rule. That is what happened in this case. An alleged devaluation by the assessor is not one of the six situations stated in WAC 332-30-123. Consequently, DNR’s decision was not

confined to the criteria in the rule, and therefore exceeded the agency's authority. Furthermore, DNR directly violated its own rule by not abiding by the criteria in that rule. Therefore, DNR's decision was contrary to law.

C. DNR's decision to use an alternate parcel was arbitrary and capricious.

As evidenced by DNR's internal memoranda and notes, DNR proceeded with its decision with full knowledge its decision was not authorized by the governing statute and regulation, and in total disregard of that conclusion. An arbitrary and capricious act refers to an unreasoning decision made without consideration and in disregard of the facts. *Pierce Cy. Sherriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983), quoting, *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980). Furthermore, as explained in the previous section, the only conclusion that can be drawn from the language of the statutes and regulation is that DNR's authority to select an alternate upland parcel is limited to the six situations listed in WAC 332-30-123(3). Where there is room for only one opinion, a contrary conclusion is arbitrary and capricious. *See, e.g., Id.*

DNR concluded it was not authorized to act outside the six specific situations stated in WAC 332-30-123(3) years before the LUDC revaluation in 2005. Internal DNR memoranda addressing DNR's

authority under WAC 332-30-123 dating back to 1992 conclude that acting on criteria outside of WAC 332-30-123(3) constitutes an unauthorized act. The 1992 Palzer/Gideon memorandum acknowledged “that although the situations described in WAC 332-30-123(3) may not list every situation, the intent was to list all of the situations that would be considered.” Ex. 9 (III-00374) (emphasis in original). The 2002 Phipps memorandum acknowledged DNR “acted outside the limits of the rule.” Ex. 10 (III-00383). The 2003 Phipps memorandum addressing the use of an alternate upland parcel in the case of contamination acknowledged that a circumstance involving an assessment lowered due to contamination was not clearly contemplated by either statute or rule. Ex. 11 (III-00386). WAC 332-30-123(3)(c) did not cover the contamination issue. *Id.* (III-00389). Moreover, Phipps concluded “lacking a change to the current wording of WAC 332-30-123 ... *we do not have adequate legal justification to reject the upland parcel and seek an alternate parcel.*” *Id.* (II-00390) (emphasis added).

In fact, a letter put out by DNR in late 2004 DNR informed lessees of State aquatic lands that WAC 332-30-123(3) authorized DNR “to select an alternate upland parcel only in certain, limited situations.” Ex. 12 (III-00437). The CR-101 filed with the Code Reviser’s Office on November 3, 2004 stated in part:

The DNR Aquatic Resources Division is exploring options to modify the alternate upland parcel selection criteria contained in Chapter 332-30-123 WAC, which imposes limitations on the selection of alternate upland parcels... Chapter 332-30-123 WAC narrows the upland parcel selection criteria established in RCW 79.90.480 and imposes limitations on the selection of alternate upland tax parcels for purposes of calculating lease rates...

Ex. 13 (III-00341).

The CR-102 Proposed Rule Making form filed August 3, 2005 acknowledged DNR wanted to amend the rule to “give explicit directions in situations *not yet* specifically discussed in the rules...” Ex. 17 (III-00342) (emphasis added).

Finally, even the RDAO in this case was of the opinion DNR is limited to the six “certain specific cases” stated in WAC 332-30-123(3). *See*, Ex. 19 (II-00257). Moreover, he specifically concluded that “[t]ax devaluation is not a basis for finding inconsistent assessment.” *Id.* (emphasis in original).

Thus, there is room for only one conclusion: the governing statutes and regulation did not authorize DNR to use an alternate upland tax parcel due to a perceived devaluation by the county assessor. Even more importantly, DNR proceeded with its decision with that knowledge and in total disregard of its own conclusion that its own regulation does not give DNR the authority to disregard the parcel’s assessed value.

Therefore, DNR's decision was not only contrary to law, but also arbitrary and capricious.

VI. CONCLUSION

DNR's decision to use an alternative parcel was illegal and arbitrary and capricious, and should be remanded for a re-assessment. RCW 79.90.540 mandated DNR adopt a rule for determining when an upland tax parcel's assessed value is inconsistent with the purposes of the lease, specifically including criteria upon which to base that determination. The clear intent of that statute was for DNR to limit the use of alternate upland tax parcels according to the criteria stated in that rule. WAC 332-30-123 is that rule. WAC 332-30-123(3) lists the six situations when DNR is authorized to use an alternate upland tax parcel. DNR's decision to use an alternate upland tax parcel in this case was not based on any one of those six situations. Therefore, DNR violated RCW 79.90.540's mandate and WAC 332-30-123(3) and exceeded its authority. Therefore, DNR's decision was contrary to law. DNR's decision was also arbitrary and capricious, because DNR has well-documented its conclusion that DNR's authority to use an alternate upland tax parcel is limited to the six situations stated in WAC 332-30-123(3). The record reveals that DNR has held that opinion since at least 1992. DNR recognized it did not have adequate legal justification to reject an upland

parcel and seek an alternate parcel in a circumstance not stated in WAC 332-30-123. *See*, Ex. 11 (III-00386). Thus, DNR proceeded in willful disregard of the facts, the law and its own regulation, rendering its decision arbitrary and capricious.

DATED at Seattle, Washington this 26th day of August 2007.

LE GROS, BUCHANAN & PAUL

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VI. APPENDIX

- Ex. 1 DNR's June 5, 2006 letter to LUDC, Bates number II-00142 – 146
- Ex. 2 DNR's October 28, 2005 letter to LUDC, Bates number II-00234 – 237
- Ex. 3 "PLANT LAYOUT", Bates number I-00007
- Ex. 4 Parcel Number 4088802780 Map
- Ex. 5 LUDC's February 3, 2006 letter to DNR with enclosure, Bates number II-00152 – 154
- Ex. 6 Parcel Number 4088802755 Map
- Ex. 7 DNR's June 2, 2005 letter to LUDC, Bates number I-00040 – 41
- Ex. 8 WAC 332-30-123, Bates number II-00214 – 217
- Ex. 9 Memorandum from Todd Palzer and Garry Gideon to Ann J. Morgan titled "Briefing for San Juan County 'Spikes' Issues, Bates number III-00370 – 377
- Ex. 10 August 7, 2002 memorandum from Rich Phipps to Loren Stern titled "Deer Harbor Rent Appeal – Use of Alternate Parcels to Alleviate Assessment 'Spikes'", Bates number III-00378 – 385

- Ex. 11 April 25, 2003 memorandum from Rich Phipps to Loren Stern titled “Use of alternate parcels when the upland tax parcel is contaminated”, Bates number III-00386 – 392
- Ex. 12 DNR’s November 19, 2004 to DNR “Water-Dependent Lessee”, Bates number III-00437
- Ex. 13 CR-101, Bates number III-00341
- Ex. 14 December 7, 2004 document titled “Upland extension rule-making: answers to potential questions from lessees and interested parties regarding our rule-making notification letter,” Bates number III-00405 – 406
- Ex. 15 DNR’s June 2, 2005 letter to LUDC, Bates number I-00038 – 39
- Ex. 16 LUDC’s 2005 King County Real Estate Tax statement, Bates number II-00246
- Ex. 17 CR-102, Bates number III-00342
- Ex. 18 December 13, 2005 document titled “Lake Union Drydock Appeal of RDO Decision,” Bates number II-00241 – 242
- Ex. 19 RDAO notes, Bates number II-00256 – 258
- Ex. 20 DNR’s December 7, 2005 letter to LUDC, Bates number II-00239

- Ex. 21 LUDC's December 15, 2005 letter to DNR's Rental
 Dispute Appeals Officer, Bates number II-00254
- Ex. 22 DNR's January 10, 2006 letter to LUDC

CERTIFICATE OF SERVICE

The undersigned certifies on this day she caused to be served by fax and by ABC Legal Messenger, a copy of Appellant's Opening Brief, on the following:

Janis Snoey
Assistant Attorney General
Attorney General of Washington
Natural Resources Division
1125 Washington Street SE
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 22nd day of August, 2007.

Kathryn Heacock
Kathryn Heacock
Signed at Seattle, Washington

CERTIFIED BY
STATE OF WASHINGTON
BY _____
DEPUTY