

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.**

KS

**REPLY BRIEF OF APPELLANT
LAKE UNION DRYDOCK COMPANY, INC.**

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A. DNR’s decision to use an alternate tax parcel for purposes of calculating LUDC’s rent is contrary to law, because DNR ignores the limit placed upon its authority by RCW 79.90.540.¹

DNR’s principal argument in response rests on a legal fallacy: that DNR may ignore the clear, statutory mandate in RCW 79.90.540. The fundamental rules of statutory construction, however, hold that all language must be given effect so that “no portion is rendered meaningless or superfluous.” *Friends of the Columbia Gorge, Inc. v. The Forest Practices Appeals Board*, 129 Wn. App. 35, 46-47, 118 P.3d 354 (2005). In fact, DNR’s alternative arguments in support of its illegal decision fail, because each argument does just that—DNR continues to ignore the clear, legislative mandate that it must base its determination when to use an alternate parcel under RCW 79.90.480(4) upon criteria specifically set forth pursuant to RCW 79.90.540. Consequently, DNR erroneously relies upon RCW 79.90.480(4) as authority for the proposition that it can use an alternate parcel any time it arbitrarily decides the upland parcel’s assessed value is inconsistent with the purpose of the lease.

¹ DNR also served its Response upon Appellant LUDC after the October 11, 2007 deadline, despite receiving a two week extension. DNR’s Response is therefore untimely, and LUDC objects to the entire Response on that basis.

- i. **RCW 79.90.540 requires DNR to base its decision to use an alternate tax parcel upon one of the situations DNR set forth in WAC 332-30-123(3).**

Any decision based on a situation not set forth in WAC 332-30-123(3) is *not* a determination under RCW 79.90.480(4) based on criteria set forth pursuant to RCW 79.90.540, and is, therefore, contrary to law. The mandate in RCW 79.90.540 restricts the legal scope of DNR's statutory authority to use an alternate parcel under RCW 79.90.480(4) by requiring that DNR set forth the criteria by which to determine when to use an alternate parcel. In response, DNR promulgated WAC 332-30-123(3), which set forth six situations when DNR will use an alternate parcel. DNR cannot now deviate from the six situations identified in WAC 332-30-123(3) without exceeding the authority provided under RCW 79.90.480(4) and RCW 79.90.540.

- ii. **DNR continues to proceed in total disregard of the statutory mandate in RCW 79.90.540 and the rules of statutory interpretation.**

DNR asserts, for example, that WAC 332-30-123(3) “plainly means ... the assessed value ... must be consistent ... regardless of whether the Consistent Assessment Rule expressly lists the situation in question.” *See, Response*, p. 18. In other words, DNR asserts it is not required to make its determination based upon any criteria set forth in its rule. Such an assertion, however, flies in the face of the RCW 79.90.540

mandate, which expressly requires the determination be based upon criteria set forth in DNR's rule. Moreover, such a position renders not only the mandate in RCW 79.90.540 meaningless, but also the agency's rule itself. A court will not defer to an agency determination which conflicts with the statute the agency purports to interpret. *Friends of the Columbia Gorge, Inc.*, 129 Wn. App. at 48, citing, *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

iii. DNR failed to determine inconsistency based upon the situations set forth in WAC 332-30-123(3).

DNR wrongly asserts RCW 79.90.540 does not limit its authority, because the statute does not contain the word “define” or direct DNR to define “inconsistency”. *See, Response*, pp. 19-20. Such a position is tenuous at best. The plain language of the statute undeniably directs DNR to set forth the criteria upon which it will make that determination—an exact definition of “inconsistency” is not required. That said, the criteria set forth in the rule will nevertheless “define” inconsistency. Indeed, WAC 332-30-123(3) states in relevant part: “the following situations will be considered inconsistent” (emphasis added). Certainly, as the drafters of WAC 332-30-123(3) recognized, “inconsistency” is not to be determined

according to a dictionary, *see, Response*, p. 14, but rather according to the specific criteria set forth in WAC 332-30-123(3), as mandated by RCW 79.90.540. *See, Brief of Appellant*, Ex. 9 (III-00374) (“intent was to list all of the situations”).

iv. “Contamination” or “devaluation” is not one of the six situations listed in WAC 332-30-123(3), and six wrongs do not make a right.

The fact that DNR previously violated the law at least six times cannot be a defense to a seventh violation. *See, Response*, p. 5 and 18.² Contamination of the upland parcel was not one of the situations listed in WAC 332-30-123(3). Therefore, use of an alternate parcel due to contamination of the upland parcel was not authorized under WAC 332-30-123(3), and a decision to use an alternate parcel due to contamination is therefore a violation of the governing statute and the rule. Indeed, the April 25, 2003 Phipps memorandum acknowledged that a circumstance involving an assessment lowered due to contamination was not clearly contemplated by either statute or rule; WAC 332-30-123(3)(c) did not cover the contamination issue. *Brief of Appellant*, Exhibit 11 (III-00386 and III-00389). Thus, DNR’s contamination-related decisions simply reflect the improper imposition of DNR internal policy upon private

² *Response*, p. 5, fn. 4 is misleading. Todd Shipyards Corporation’s appeals, for example, were untimely—there was no basis for that tenant to further challenge the erroneous decision. *See, Response*, AR at IV-00544.

rights—internal policies that are not enforceable until adopted pursuant to the APA rule-making procedures. *See, Hillis v. State of Washington, Department of Ecology*, 131 Wn.2d 373, 397-400, 932 P.2d 139 (1997). Condoning DNR’s admitted practice of imposing internal policy, which has not been the subject of public comment as required by the APA, *see, Hillis*, 131 Wn.2d at 397-400, on private rights, is wrong and would be the height of inequity. More to the point, there is no evidence in the record that the assessed \$1,000 land value does not represent the Assessor’s determination of fair market value, or that this value is “inconsistent” with the condition of the public parcel at issue. Indeed, DNR does not address the probable contamination of the public aquatic lands. As suggested by RDAO Craig Partridge, if those lands are also contaminated, then an upland value based on contamination may in fact *not* be “inconsistent”. *See, Brief of Appellant*, Exhibit 18 (II-00241).

B. The Court should not defer to DNR’s determination of when it may use an alternate parcel, because its determination conflicts with the statute it purports to interpret.

DNR’s blatant misinterpretation of its statutory authority, cannot be based on “plain meaning”, and most certainly is not entitled to any deference by this Court. DNR’s interpretation that it is authorized to use an alternate parcel any time the upland parcel has an inconsistent assessed value conflicts with the governing statute. As stated above, a court will

not defer to an agency determination which conflicts with the statute the agency purports to interpret. *See, Section A*, pp. 3-4. Indeed, DNR admits it interpreted RCW 79.90.480(4) as providing authority to use an alternate parcel “regardless of” any criteria mandated by RCW 79.90.540. *See, Response*, p. 18. In construing a statute, however, *all* its language must be given effect so that “no portion is rendered meaningless or superfluous.” *Friends of the Columbia Gorge*, 129 Wn. App. at 46-47. A plain reading of the governing statute provides as follows:

As a general rule, rent is to be calculated based on the assessed value of the upland tax parcel. RCW 79.90.480(1)(a). However, “if the upland parcel ... 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). That determination shall be made by DNR based on a rule “specifically including criteria for determining under RCW 79.90.480(4) when an abutting upland parcel has been inappropriately assessed ...” RCW 79.90.540.

DNR would have the reader stop after “... for determining under RCW 79.90.480(4),” just short of the express restriction on DNR’s authority contained in RCW 79.90.540. Thus, DNR is peddling a conclusion based on only a partial reading of the statute. This leaves the incorrect impression that DNR has the broad statutory authority stated in

RCW 79.90.480(4), when in fact that authority is limited by the subsequent provision in RCW 79.90.540 that requires any determination under RCW 79.90.480(4) to be limited to certain identified criteria. Moreover, that interpretation does not give effect to all the statutory language, as it renders the most significant part of RCW 79.90.540 meaningless and superfluous—conveniently that portion which restricts DNR’s authority. Indeed, if the legislature had intended that the sole criteria be “inconsistency” under RCW 79.90.480(4), it would not have issued the mandate in RCW 79.90.540 for identification of specific criteria for determining when a parcel was inconsistent.

DNR clearly understood this mandate. DNR adopted a rule, which set out six specific situations when it would consider an assessed value inconsistent, *in addition* to the underlying, general statutory requirement of mere “inconsistency.”³ Indeed, the 1992 DNR memorandum cited in Appellant’s Brief acknowledged “that although the situations described in WAC 332-30-123(3) may not list every situation, the intent was to list all

³ Obviously one characteristic shared by each of the six situations in WAC 332-30-123(3) must be an inconsistent assessed value. *See, Response*, p. 22. That is after all the underlying statutory basis for using an alternate parcel. More significantly, the two categories of situations identified are not analogous to the circumstances at issue here: the six situations either 1) involve recognition of a specific *statutory exemption or classification*; or 2) provide for the *complete absence of a factor* required for application of the rule, such as an assessed value, water-dependent use, or size of the upland parcel.

of the situations that would be considered.” *Brief of Appellant*, Exhibit 9 (III-00374) (emphasis in original).

C. DNR’s interpretation of the governing statute and rule is not entitled to deference, because the statute is not ambiguous.

Despite admitting the statute is not ambiguous, DNR erroneously argues for deference to its interpretation. *See, Response*, p. 24. DNR’s interpretation, however, is entitled to no deference by the Court unless DNR has proven not only that the statute at issue is ambiguous, but also that DNR adopted and applied its interpretation as a matter of agency policy. *See, Friends of the Columbia Gorge*, 129 Wn. App. at 47, *citing, Cowiche*, 118 Wn.2d at 815. DNR cannot meet this burden—it admits the statute is *not* ambiguous.

i. Neither the statute nor the rule is ambiguous.

As stated, a plain reading of the governing statute provides that DNR must set forth specific criteria upon which to base its determination of when it will use an alternate parcel. *Section B*, p. 6. Consequently, there is no ambiguity in the statute. Likewise, a plain reading of WAC 332-30-123(3) reveals no ambiguity.

WAC 332-30-123(3) states in relevant part:

...the upland parcel’s assessed value must be consistent with the purpose 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 (4)...

The operative language is: “the following situations will be considered inconsistent.” The only possible meaning of that language is that if one of the situations set forth below it is applicable, then the upland parcel’s assessed value is not consistent with the purpose of the lease, in which case DNR may use an alternative parcel. Therefore, the regulation is not ambiguous, and the Court should not defer to DNR’s flawed interpretation.

Any argument that the six situations set forth in WAC 332-30-123(3) are not an exclusive list must fail, as such a determination would conflict with the governing statute. *Section A*, pp. 1-2. Moreover, as the statute is not ambiguous, the rule-making-exception for agency policy interpretations of ambiguous statutes cited by DNR does not apply. *See, Friends of the Columbia Gorge*, 129 Wn. App. at 47, *citing, Cowiche*, 118 Wn.2d at 815. Consequently, DNR is prohibited from relying on internal policy as a basis for using an alternate parcel. *See Section A*, pp. 4-5. Indeed, at the time of LUDC’s appeal, DNR’s admitted internal policy of using alternate parcels when the upland parcel was contaminated had not been adopted pursuant to APA rule-making procedure. *See, e.g., Brief of Appellant*, Ex. 13, 14, and 17. A decision based on internal policy

required to be adopted by rule-making must be invalidated. *Hillis*, 131 Wn.2d at 399-400. Therefore, DNR's decision to use an alternate parcel, whether based on internal policy permitting use of an alternate parcel due to devaluation by the King County Assessor, or as DNR argues in its Response, due to contamination, is not based on a situation set forth in WAC 332-30-123(3) and adopted by rule making procedures under the APA, and is invalid.

D. DNR's decision to use an alternate parcel was arbitrary and capricious, because there is room for only one opinion: DNR is limited to the six situations set forth in the rule.

As stated, a plain reading of the governing statute provides that DNR must set forth specific criteria upon which to base its determination of when it will use an alternate parcel. *Section B*, p. 6. Further, a plain reading of WAC 332-30-123(3) provides that only when one of the six situations set forth in WAC 332-30-123(3) applies will DNR use an alternative parcel. *Section C*, pp. 8-9. Thus, as stated in Appellant's Brief, there is room for only one opinion, and where there is room for only one opinion, a contrary conclusion is arbitrary and capricious. *Brief of Appellant*, pp. 18-21.

DNR's decision to use an alternate parcel, however, deviated from this opinion—an opinion shared and expressed by its own employees. In its lower court pleadings DNR concedes this point. *See, Clerk's Paper*,

128-149 (p. 15, ll. 23-24 and p. 16, l. 9-17). Here, DNR attempts to characterize its employee's opinions as "confusion." *See, Response*, pp. 26-28. To the contrary, the opinion papers in the record do not reflect any "confusion," and DNR's Response thus represents a series of admissions that DNR in fact willfully disregarded the limitations upon its authority imposed by RCW 79.90.540. *Id.*, at 26-30. Indeed, the fact that DNR proceeded in disregard of its employees' warnings demonstrates not only that there is room only for one opinion, but also that DNR willfully violated its governing statute and rule.

DNR's reliance upon *Friends of the Columbia Gorge* is misplaced. *See, Response*, p. 31. Therein the Court of Appeals found that DNR employees expressed divergent views before a final decision was made. *Id.* That is not the case here. DNR employees have consistently expressed the opinion DNR's authority is limited to the six situations set forth in WAC 332-30-123(3), pursuant to the mandate in RCW 79.90.540.⁴

In short, LUDC simply asks that the written law be enforced. Any alleged "windfall" is off-set by the four-year revaluation period—LUDC's lease rate will be revalued again in 2009.

⁴ Contrary to DNR's Response, LUDC has not asserted that DNR's employees expressed competing views. *See, Response*, p. 31.

Therefore, this Court should reverse DNR's decision to base LUDC's rent revaluation on an alternate parcel, and require that any revaluation predating the amendment to WAC 332-30-123(3) be based on the assessed value of LUDC's upland parcel.

DATED at Seattle, Washington this 13th day of November, 2007.

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CERTIFICATE OF SERVICE

**The undersigned certifies on this day she caused to be served
by facsimile and delivery by messenger, a copy of the Reply Brief
of Appellant Lake Union Drydock Company, Inc., on the following:**

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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 13th day of November, 2007.**


**Diana L. Inscore
Signed at Seattle, Washington**