

Nov 10, 2016, 9:43 am

RECEIVED ELECTRONICALLY

NO. 93647-1

SUPREME COURT OF THE STATE OF WASHINGTON

SUN OUTDOOR ADVERTISING, LLC,
a Washington limited liability company,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

MATTHEW D. HUOT
Assistant Attorney General
WSBA No. 40606
P.O. Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 586-0641
OID No. 91028
Attorneys for Respondent Washington
State Department of Transportation

 ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....2

III. ISSUE PRESENTED4

IV. ARGUMENT5

 A. Standard of Review.....5

 B. The Decision Appropriately Defines Language Already
 Contained Within the Scenic Vistas Act.....5

 C. Okanogan County’s Zoning Authority Remains Intact8

V. CONCLUSION11

TABLE OF AUTHORITIES

Cases

Gradinaru v. Dep't of Soc. & Health Servs.,
181 Wn. App. 18, 325 P.3d 209 (2014)..... 7

Hart v. Dep't of Soc. & Health Servs.,
111 Wn.2d 445, 759 P.2d 1206 (1988)..... 8

Keller v. City of Bellingham,
92 Wn.2d 726, 600 P.2d 1276 (1979)..... 9

Statutes

23 U.S.C. § 131..... 6

RCW 7.48.020(9)..... 9

RCW 47.39.020(22)..... 2

RCW 47.42.010 2, 6

RCW 47.42.010-.920 2

RCW 47.42.020(9)..... 3, 4, 6

RCW 47.42.030 1, 2, 6

RCW 47.42.060 4, 6

Other Authorities

Okanogan County Code (OCC) 17.05.010..... 3, 7, 9

Webster's Third Int'l Dictionary 1786 (2002)..... 7

Rules

RAP 13.4..... 1, 5

RAP 13.4(b)(1)-(2)	5
RAP 13.4(b)(3)	9
RAP 13.4(b)(3)-(4)	5

I. INTRODUCTION

The Washington State Department of Transportation (WSDOT) denied Sun Outdoor Advertising, LLC (Sun Outdoor) a permit to erect a billboard along one of Washington's scenic highways based upon the limitations imposed by the Scenic Vistas Act, RCW 47.42.030. WSDOT's denial of the permit was a straightforward exercise in statutory construction. The question presented to the Court of Appeals was whether areas zoned by Okanogan County as a "Minimum Requirement District" (MRD) met an exception to the Scenic Vistas Act's prohibition of billboards along a designated scenic highway. The Court of Appeals affirmed WSDOT's decision, applying the settled principle of statutory construction, that a statute should be interpreted to adhere to the plain language of a statute. This does not support either basis asserted by Sun Outdoor for this Court's review: it does not raise a significant question of law under the U.S. or Washington Constitutions, nor does it involve an issue of substantial public interest. Accordingly, Sun Outdoor has failed to demonstrate that this case should be accepted for review under Rule of Appellate Procedure (RAP) 13.4. The Petition for Review should be denied.

II. STATEMENT OF THE CASE

In July 2014, Sun Outdoor submitted an application for a billboard permit to WSDOT. Administrative Record (AR) at 20000020. The proposed site of the billboard is on property adjacent to State Route (SR) 97. AR at 20000024. SR 97 has been designated by the Legislature as part of the scenic and recreational highway system. RCW 47.39.020(22).

The existence of a scenic highway invokes the Scenic Vistas Act, passed in 1971. RCW 47.42.010-.920. The stated purpose of the Scenic Vistas Act is to control the placement and location of signs adjacent to state highways, which is “necessary to promote the public health, safety, welfare, convenience and enjoyment of public travel,” as well as to promote tourism by conserving the natural beauty of scenic areas near state highways. RCW 47.42.010. The Scenic Vistas Act provides that “no person shall erect or maintain a sign which is visible from the main traveled way of . . . the scenic system,” unless a valid exception applies. RCW 47.42.030.

The definition of scenic system includes:

[A]ny state highway or portion thereof outside the boundaries of any incorporated city or town designated by the legislature as a part of the scenic and recreational highway system except for the sections of highways specifically excluded in RCW 47.42.025 *or located within*

areas zoned by the governing county for predominantly commercial and industrial uses, and having development visible to the highway, as determined by [WSDOT].

RCW 47.42.020(9) (emphasis added).

Sun Outdoor's proposed billboard location is situated within a zoning district identified by the County as a Minimum Requirement District. The Minimum Requirement District's explicit purpose is "to maintain broad controls in preserving natural character and protecting natural resources." Okanogan County Code (OCC) 17.05.010. The record below included an unofficial county zoning map, which shows that most of Okanogan County is zoned as a Minimum Requirement District. AR at 20000034. The Code includes a district use chart which identifies both permitted and conditional uses in a Minimum Requirement District, which was referred to by Sun Outdoor as a "MRD Use Matrix." AR at 20000035-43.

Before making a decision, Pat O'Leary, head of the WSDOT Highway Advertising Control Program, reviewed Sun Outdoor's permit application, conducted a site visit, corresponded with and gathered information from Sun Outdoor, and reviewed relevant public records. AR at 2000001-54. WSDOT determined that SR 97 in the vicinity of the proposed billboard location is part of the scenic and recreational highway system. AR at 20000016.

WSDOT further determined that the proposed billboard location fell within the statutory definition of “scenic and recreational highway system” set forth in RCW 47.42.020(9) because the Minimum Requirement District’s purpose is to preserve rural character and protect natural resources. AR at 20000016. Thus, the area did not meet the exceptions within RCW 47.42.020(9) because it is not zoned for predominantly commercial and industrial uses, and the permit application was denied. *Id.*

Sun Outdoor sought judicial review of WSDOT’s determination in accordance with the Administrative Procedure Act and RCW 47.42.060. CP at 4-29. The superior court affirmed WSDOT’s decision. CP at 74-75. Sun Outdoor filed a timely appeal. After administrative transfer by Division Two, Division One unanimously affirmed the superior court’s decision on August 29, 2016 (Decision). Attached as Exhibit A to Petition for Review (Pet. for Rev.).

III. ISSUE PRESENTED

This case does not warrant this Court’s review, but, if review is granted, the issue is whether WSDOT properly enforced the Scenic Vistas Act by denying Sun Outdoor’s billboard permit because the proposed billboard location was not zoned by the County for predominantly commercial and industrial use and thus no exception to the Act applied.

IV. ARGUMENT

A. Standard of Review

Pursuant to the Rules of Appellate Procedure, this Court allows discretionary review of a decision terminating review in limited circumstances. RAP 13.4. Sun Outdoor does not allege that the Court of Appeals' decision is in conflict with a Supreme Court decision or another Court of Appeals' decision, so RAP 13.4(b)(1)-(2) do not apply. Thus, review should be granted only if a significant question of constitutional law is involved, or the petition presents an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(3)-(4). Neither circumstance applies here; therefore, this Court should deny review.

B. The Decision Appropriately Defines Language Already Contained Within the Scenic Vistas Act

Sun Outdoor claims the Decision involves an issue of substantial public importance because it injects uncertainty into how Washington residents seek approval from state regulators in order to conduct business within the state. Pet. for Rev. at 7. This argument is speculative and strained. The Court of Appeals correctly applied the law of statutory construction, and the Decision does nothing more than accurately set parameters for analyzing whether an area is zoned by a governing county

for “predominantly” commercial and industrial use under RCW 47.42.020(9).

The regulatory framework presented in this case is straightforward. WSDOT is required to control the erection and maintenance of signs along the state highway system and to adopt rules consistent with the Scenic Vistas Act’s terms and conditions as provided by both Congress and the Legislature. 23 U.S.C. § 131; RCW 47.42.060. As Sun Outdoor itself points out, the Scenic Vistas Act prohibits billboards from being erected along the scenic system. *See* Pet. for Rev. at 8 (citing RCW 47.42.030). The undisputed purpose of this prohibition is to preserve the natural beauty of areas adjacent to the scenic system. RCW 47.42.010.

However, billboards may be permitted in these areas in certain limited circumstances: if WSDOT determines that the area is zoned by the governing county for predominantly commercial and industrial use, and there is development visible from the highway, then that area is deemed outside the scenic system and a billboard may be permitted. RCW 47.42.020(9). While this is a conjunctive requirement, only the nature of Okanogan County’s zoning ordinance is at issue here.

Thus, the Court of Appeals was confronted with the same issue as WSDOT when it denied Sun Outdoor’s billboard permit: are areas zoned by Okanogan County as a Minimum Requirement District zoned for

predominantly commercial and industrial use? Since the Legislature did not explicitly define “predominantly” in the statute, the Court of Appeals properly accorded the term its ordinary meaning of “controlling, dominating, prevailing.” Decision at 4 (citing *Gradinaru v. Dep’t of Soc. & Health Servs.*, 181 Wn. App. 18, 22, 325 P.3d 209 (2014); *Webster’s Third Int’l Dictionary* 1786 (2002)). The Court of Appeals then correctly concluded that because the County permits (or conditionally permits) nearly every delineated use within a Minimum Requirement District zone, no one specific category of use predominates. Decision at 5-6. This is reinforced by the fact that the zoning ordinance specifically contains an objective to retain rural character. OCC 17.05.010 (providing that the stated purpose of a Minimum Requirement District is “to maintain broad controls in preserving natural character and protecting natural resources”). The Court of Appeals did not explicitly consider this point, but it supports the Court’s finding that the County did not intend for a single type of use to predominate in a Minimum Requirement District. The Decision by the Court of Appeals is a straightforward application of well-settled law, and does not warrant review by this Court.

Likewise, the Decision does not impact a substantial public interest. There is no impact here beyond the permit and location in question. At different locations, and under different zoning ordinances, the

same legal principles would apply but the outcome would be driven by different circumstances, e.g. location of the requested permit, area usage, etc. When evaluating whether a substantial public interest is at issue, the Court should consider the number of people whose expectations might be altered. If the decision will shift a vast number of people's regulatory expectations, a substantial public interest may exist. In contrast, if the decision will alter few parties' regulatory expectations, the public interest can hardly be deemed substantial. *Cf. Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988) ("The public interest exception [to mootness] has not been used in statutory or regulatory cases that are limited to their facts."). The issue before the Court in this case concerns one billboard in one county, and a single zoning category. It preserves scenic highways in areas zoned by a rural county that permits a wide array of residential, commercial, industrial, agricultural, and other issues to maintain its zoning flexibility. The Decision is not one that impacts a large segment of the state economy by any objective standard, and therefore review is inappropriate.

C. Okanogan County's Zoning Authority Remains Intact

WSDOT does not dispute Sun Outdoor's argument that zoning is a local matter. But, Sun Outdoor's claim that the Decision permits WSDOT's regulatory authority under the Scenic Vistas Act to encroach

upon the County's zoning power is baseless. The Decision does not raise constitutional issues that suggest this Court should grant review under RAP 13.4(b)(3). Review should be denied.

The Legislature authorized WSDOT to assess whether an area is zoned by a governing county for predominantly commercial and industrial use in order to determine whether a billboard may be permitted along the scenic system. RCW 7.48.020(9). In this case, that required WSDOT to review the County's zoning ordinance in light of the statutory requirements and policy objectives of the Scenic Vistas Act, which WSDOT did. Sun Outdoor repeatedly argues that WSDOT's interpretation of the County zoning code should be afforded no weight. *See* Pet. for Rev. at 14. But this argument ignores what this Court has previously held, that "[c]onsiderable judicial deference is given to the construction of legislation by those charged with its enforcement." *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). Moreover, Sun Outdoor's argument confuses the issue before the Court.

In reviewing the Okanogan County Code, WSDOT determined that the County had manifested its intent through its stated purpose for Minimum Requirement Districts, which is to preserve the rural character of the area and protecting natural resources. OCC 17.05.010. WSDOT's analysis afforded the County the deference Sun Outdoor alleges is lacking

by interpreting the character of Minimum Requirement Districts in harmony with the County's stated purpose for that type of zoning district. Regardless of the deference issue, review of the county zoning ordinance does not constitute a zoning action in itself or an override of the County's zoning activity as Sun Outdoor claims. WSDOT's review here does not supplant, override, or amend the County's designation of the area as a Minimum Requirement District. Rather, it is a valid exercise of WSDOT's regulatory authority in furtherance of the purposes and requirements of the Scenic Vistas Act.

Finally, Sun Outdoor continues to make the failed argument that the County's Minimum Requirement District zones must be deemed predominantly commercial or industrial because a majority of the permitted uses in a Minimum Requirement District zone are commercial or industrial. It also implies that because WSDOT agreed a majority of a Minimum Requirement District's permitted uses are commercial or industrial "in a strictly numerical sense", any disagreement with Sun Outdoor's conclusion on predominance is logically inconsistent and casts the entire regulatory framework into disarray. *See* Pet. for Rev. at 15-16. The Court of Appeals squarely addressed this argument in the Decision; as it pointed out, if every use is permitted, then no one particular category of

uses can predominate. Decision at 5. Addressing Sun Outdoor's "enumeration" argument head-on, the Court of Appeals held:

[c]ontrary to Sun Outdoor's argument, merely counting up the number of itemized permitted uses in the MRD that are commercial or industrial in nature is not a true measure of what uses predominate. For example, if instead of merely listing single-family dwellings and multifamily dwellings, the County itemized bungalows, huts, cottages, chalets, lodges, log cabins, duplexes, condominiums, and town houses as uses permitted in the MRD, the residential category of uses would not predominate to any greater extent.

Decision at 6 n.22.

Put another way, just because the County identified more potential commercial and industrial uses does not mean those uses should predominate. Sun Outdoor continues to disregard the obvious; Minimum Requirement Districts permit a wide variety of uses in order to leave the County flexibility in carrying out its zoning authority. This is within the County's authority to do; more importantly, WSDOT's agency action in this case leaves that authority undisturbed. The constitutional implications Sun Outdoor alludes to here are simply not present.

V. CONCLUSION

This case is about WSDOT taking a valid agency action in fulfillment of its duties under the Scenic Vistas Act. This case is also about a billboard advertiser disagreeing with that action. Sun Outdoor has

advanced the same argument over and over, to no avail. Its argument does not entitle Sun Outdoor to review, since no substantial public interest or question of constitutional law is raised by the Court of Appeals' decision. The Decision is a straightforward and logical exercise in statutory construction that appropriately dismisses Sun Outdoor's argument. Thus, review should be denied so that the Decision of the Court of Appeals stands.

RESPECTFULLY SUBMITTED this 10th day of November, 2016.

ROBERT W. FERGUSON
Attorney General



MATTHEW D. HUOT
Assistant Attorney General
WSBA No. 40606
Attorneys for Respondent Washington State
Department of Transportation