Washington Supreme Court No. 93647-1
Court of Appeals No. 75231-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Petitioner/Appellant

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Defendant/Respondent,

PETITION FOR REVIEW
TO THE SUPREME COURT

MICHAEL D. CURRIN, WSBA #14603
NATHAN G. SMITH, WSBA #39699
Witherspoon Kelley
422 W. Riverside, Suite 1100
Spokane, WA 99201
(509) 624-5265
Fax (509) 458-2728
Attorneys for Petitioner
Sun Outdoor Advertising, LLC

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I. IDENTITY OF THE PETITIONER

Sun Outdoor Advertising LLC ("Sun Outdoor") is a Washington limited liability company engaged in the outdoor advertising business. Sun Outdoor sought, as required under Washington's Scenic Vistas Act, Chapter 47.42 RCW (the "Act"), a sign permit from the Washington State Department of Transportation ("WSDOT") to construct a billboard on property zoned by Okanogan County to allow nearly every conceivable use and which is in fact presently used as the site for a hardware and building supply store. WSDOT denied its application.

II. COURT OF APPEALS DECISION

Sun Outdoor respectfully asks the Court to review the August 29, 2016 decision of Division I of the Washington State Court of (the "Decision"). A true and correct copy of that decision is attached hereto as Exhibit "A."

III. ISSUE PRESENTED FOR REVIEW

Sun Outdoor submitted an application to locate a billboard on property zoned by Okanogan County in a classification that allows multiple uses, the overwhelming majority of which are commercial and industrial. The Court of Appeals concluded that, because the underlying zone provides for a wide array of commercial and industrial uses and prohibits very few, there was no "predominant" allowed use in the zone.

Doing so required the Court of Appeals to give meanings to the words used in both the Okanogan County Zoning Code and the Act which are contrary to their actual common meaning. It was a "results" driven Decision. It harms not only Sun Outdoor but also every other company and citizen who have the right to expect that the laws governing their conduct and activities be interpreted in a manner that can be easily understood and followed. This requires that the words used by the legislative body, whether the state legislature or the county commission, be given their plain meaning. That did not occur in this case.

The issue then, is whether the Court of Appeals usurped the constitutional power delegated to Okanogan County and erred in affirming the denial of Sun Outdoor's application when the underlying Okanogan County zone specifically provides for and allows predominantly commercial and industrial uses?

IV. STATEMENT OF THE CASE

A. SUN OUTDOOR APPLIED FOR A PERMIT TO CONSTRUCT A BILLBOARD ON PROPERTY USED FOR COMMERCIAL PURPOSES.

On July 24, 2014, Sun Outdoor applied for a permit from WSDOT to place an outdoor advertising sign on property located just outside the city limits of Tonasket, Washington. It is visible to and from

State Highway 97 (the "Property"). AR 20000020-23.[1] It is not disputed that State Highway 97 is a north-south highway that is a designated by the Act as part of the Scenic System, nor is it disputed that the Property is presently used for commercial purposes.

The Property is located within the "Minimum Requirement District" ("MRD") zone. Okanogan County Zoning Code Chapter 17.05. The MRD zone is an all-inclusive zone that allows a multitude of commercial and industrial uses. The Property's existing use, and that of the contiguous property (which is also located in an MRD zone), is commercial. While Okanagan County is replete with natural beauty, there is nothing particularly scenic about the Property. The Property includes a retail building supply and equipment rental store. AR 20000018-19. The Property is surrounded by other commercial uses, including several mini-storage facilities, all of which are also in an MRD zone. AR 20000024; 20000048. Adjacent to the mini storage facility is a vehicle and trailer sales facility. AR 20000024; 20000045-46. The Property and contiguous properties, and the commercial use to which they have been put, are all visible from Highway 97.

[1] "AR" denotes the citation to the administrative record certified to the Court of Appeals by WSDOT on January 22, 2015, and provided to the Court of Appeals pursuant to RAP 9.7(c). CP 30-31.

B. OKANOGAN COUNTY'S MRD ZONE PROVIDES FOR PREDOMINANTLY COMMERCIAL OR INDUSTRIAL USES.

The MRD zone is Okanogan County's effort to "maintain ***broad controls*** in preserving rural character and protecting natural resources." Okanogan County Code 17.05.010; AR 20000025-28 (emphasis added). In furtherance of those broad controls, Okanogan County describes the uses permitted in an MRD zone, including those of a commercial or industrial nature, which may be either outright permitted or conditionally permitted. Numerically, commercial and industrial uses dominate an extensive use matrix contained within the Okanogan County Code ("MRD Use Matrix"). AR 20000025-43. The commercial or industrial uses also far exceed the total allowable commercial or industrial uses in either of Okanogan County's commercial or industrial zones. By sheer number alone, ***the MRD zone provides for*** predominantly commercial or industrial uses. WSDOT concedes that the commercial use to which the Property has been put fits within the uses allowed in the MRD zone. AR 2000001.

C. WSDOT'S DECISION DEFIES THE MRD USE MATRIX AND USURPS THE ZONING AUTHORITY OF OKANOGAN COUNTY.

On November 25, 2014, WSDOT denied Sun Outdoor's application (the "WSDOT Decision"). The sole basis for WSDOT's denial of Sun Outdoor's application is its interpretation of the generic

"purpose statement" of the MRD zone under the Okanogan County Code. In relevant part, WSDOT concluded as follows:

> Zoning is the first consideration for review of this permit application under the visible development rule... Reading in Chapter 17.05 of the Okanogan County zoning code, the MRD zone is in place to "*maintain broad controls in preserving rural character and protecting natural resources.*" AR 20000017 (emphasis in original).

Disregarded by WSDOT is the fact that there is nothing particularly "rural" about most of the uses expressly permitted in the MRD zone as enumerated in the MRD Zone Matrix. WSDOT's sole justification for the denial of Sun Outdoor's application shows that it has either ignored or completely misunderstood the MRD Use Matrix and its role in implementing the Act. While the MRD zone contains a generic use statement, the MRD Use Matrix also specifically identifies numerous commercial or industrial uses that are permitted, more in-line with the "broad controls" that Okanogan County sought to impose. In concluding that the MRD zone does not provide for *predominantly* commercial or industrial uses, WSDOT states:

> It is the department's finding that the MRD zone at the proposed location does not satisfy the zoning requirements stated in RCW 47.42.020(9). MRD is not a designation intended for predominantly commercial or industrial uses; rather its *purpose* is to preserve rural character and protect natural resources. Therefore, the permit application is denied because the *predominantly commercial or industrial zoning requirement* is not met. *Id.* (emphasis in original).

Thus, the sole basis articulated in the Decision for WSDOT's denial of Sun Outdoor's application is its determination that Okanogan County's MRD zone does not provide for predominantly commercial or industrial uses. The WSDOT Decision ignores the MRD Use Matrix which conclusively shows that such uses are allowed, and by sheer numbers, "predominantly allowed," in an MRD zone. By concluding to the contrary, WSDOT impermissibly intruded upon the zoning authority given by our state's Constitution to the Okanogan County Commission.

D. SUN OUTDOOR CHALLENGED THE WSDOT DECISION TO THURSTON COUNTY SUPERIOR COURT AND DIVISION I OF THE COURT OF APPEALS.

Sun Outdoor commenced this action to challenge the WSDOT Decision pursuant to RCW 47.42.060 and the Administrative Procedure Act, Chapter 34.05 RCW in Thurston County Superior Court on December 12, 2014. CP 4-29. On October 14, 2015, the Thurston County Superior Court affirmed the WSDOT Decision and dismissed Sun Outdoor's action. CP 74-75. After transfer by Division II, Division I of the Court of Appeals affirmed the decision of the Thurston County Superior Court on August 29, 2016.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. BASIS FOR SUPREME COURT REVIEW.

Sun Outdoor respectfully brings this petition pursuant to RAP 13.4. The Court should accept review of this matter because: (1) this Petition involves an issue of substantial public importance that should be determined by the State Supreme Court, ***and*** (2) the Decision of the Court of Appeals is in conflict with the Washington State Constitutional and Washington State Statues. RAP 13.4(b).

B. THE DECISION ADDS LANGUAGE TO THE SCENIC VISTAS ACT THAT THE LEGISLATURE CHOSE NOT TO INCLUDE.

1. The Decision Denies Sun Outdoor and other Applicants Predictability and Certainty Under the Act.

The Decision involves an issue of substantial public importance under the Act and thus should be reviewed by the Court under RAP 13.4(b). Predictability and certainty in statutory construction is required to protect the rights of individuals in all facets of their lives. It is no less important for businesses to know what is expected of them and how those expectations can be met. The Act and the construction advanced by WSDOT has significant ramifications not just for the outdoor advertising industry, but also for all Washington residents that are required to ask for regulatory approval in order to conduct their business. To succeed in

business, just as in life, the regulatory framework must be known and clearly defined.

Under the Act, outdoor signs are universally prohibited on the "Scenic System." RCW 47.42.030. Notwithstanding the blanket prohibition, not every part of a designated highway falls within the Scenic System. Certain areas are specifically excluded from the scenic system when they are "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]." *Id.* (emphasis added). Whether or not a location is included or excluded from the Scenic System requires application of a two (2) prong test that WSDOT refers to as the "visible development exclusion to the Scenic System." AR20000016. WAC 468-66-010(28) defines "visible development area" to include a requirement that a location proposed location meet the zoning requirement. WAC 468-66-010(28). The Act expressly carves out from inclusion in the Scenic System that portion of a state highway that lies within an area ***zoned to allow*** predominantly commercial and industrial uses and that have existing commercial or industrial uses that are visible to the highway. When these two criteria are met, the area is no longer part of the "scenic system" and therefore outdoor signs are permitted as a matter of right.

The core function of WSDOT's required analysis under RCW 47.42.020(9) is to consider the uses provided for and allowed within the zone of the proposed location. RCW 47.42.020(9) directs WSDOT to do so. This requires a thorough review of the MRD Use Matrix to determine the actual uses allowed at the specific proposed location. The plain text of the Act does not provide WSDOT with any authority, when considering an application, to review the use matrix over the entirety of Okanogan County. *Decision,* p. 4, fn. 15.

The parties agree that the second prong of the visible development test has been met. However, they disagree on whether the first prong is satisfied, that is whether the Property is located in a zone that predominantly allows commercial or industrial uses. That disagreement frames the sole issue for which review is sought.

2. Sun Outdoor Should Not Have to Resort to Judicial Remedies to Enjoy Rights Clearly given by the Act.

The sole issue in this case is the definition of "predominantly" as used within the Act, i.e. what uses are predominantly allowed in the MRD Zone. The Court of Appeals' decision focuses the inquiry required by the term "predominantly" upon the relative extent to which one particular use dominates over another. *Decision,* p. 5. While the Court of Appeals properly concludes that review of the entirety of the use matrix is

necessary for determining what uses are "predominantly" allowed, it then separately and improperly concludes that counting the number of allowable uses is not the measure of determining what use "predominates." *Decision,* p. 6. Contrary to this view, there is no other objective or measurable way to do so.

This issue is problematic for those businesses that require certainty, which is all businesses, because Okanogan County permits a wide range of uses within the MRD zone. In effect, the Decision vests unlimited authority in WSDOT to make a determination as to what use can be considered to be "predominant," thus forcing any applicant under the Act to resort to a judicial remedy to challenge a decision. The Decision also leaves no appreciable standard for an applicant for a sign permit to rely upon. The Decision effectively allows WSDOT to "double down" on the ambiguity of the interpretation with no meaningful interpretation. Businesses, no less than citizens, have a right to expect more. Business cannot be conducted under such an amorphous standard.

WSDOT is not entitled to any deference to its interpretation when, as in this case, virtually no "technical knowledge" is required to discern the meaning of the words used by the legislature or by the Okanogan County Commission. *Utter v. Building Industry Association of Washington,* 182 Wn.2d 398, 421, 341 P.3d 953 (2015). There is nothing

technical about either RCW 47.42.020(9) or the Okanogan County Zoning Code. The words used should be given their plain meaning, and they should be interpreted to avoid resulting in unlikely, absurd, or strained consequences. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011).

No special training or technical skill is needed to interpret the meaning of the words used in either the statute or the zoning code or RCW 47.42.020(9). To interpret the Act, irrespective of the fact that commercial and industrial uses dominate the zoning use matrix by sheer numbers, to mean that the "predominant use" prong of the visible development exclusion is nevertheless not met, is nonsensical and detrimental to the citizens and businesses of our state. The WSDOT Decision, and also its affirmation by the Court of Appeals, is "results driven". It is contrary to the plain meaning of the Act and, if allowed to stand, promotes disrespect of the rule of law which is contrary to the public interest.

When planning their affairs, business enterprises, no less than regular citizens, have the right to plan their conduct with "reasonable certainty of the legal consequences." *West Main Assoc. v. City of Bellevue,* 106 Wn.2d 47, 51, 720 P.2d 782 (1986) (citing The Federalist No. 44, at 301 (J. Madison) (J. Cooke ed. 1961); Hochman, *The Supreme*

Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960)); *see also State ex rel. Shannon v. Sponburgh,* 66 Wn.2d 135, 143, 401 P.2d 635 (1965) ("The conduct of government should always be scrupulously just in dealing with its citizens"). WSDOT gives offense to this basic principle of government and its relationship to its citizens.

The Decision erroneously affirms the Department's ability to rest upon a regulatory scheme that allows it to act as the sole arbiter as to whether a particular zone provides for "predominantly" commercial or industrial uses without any particular constraint and in disregard of the plain meaning of the Okanogan County Zoning Code and, for that matter, any other zoning code. The Decision also now allows WSDOT to look at those uses that are *not* permitted within an underlying zone as part of its inquiry on an application. *Decision*, p. 5. WSDOT has no authority within the plain text to consider the uses not permitted in the underlying zoning as part of its inquiry.

If the Decision stands, it allows WSDOT to disregard the statutory phrase "zoned predominantly for commercial or industrial uses" and construe it to mean "zoned exclusively" for such uses. Such a construction is clearly contrary to the plain meaning of the Act and amounts to an impermissible usurpation of power granted in our

Constitution to Okanogan County. In addition, to construe the word "predominant" to mean anything other than "the most" gives WSDOT the unrestrained ability to stray from an objective quantifiable standard to a subjective and uncertain standard that is subject to manipulation and whim. The arbitrary nature of such a standard is clear beyond doubt. To let the Decision stand is no less detrimental to Sun Outdoor than it is to citizens and anyone else seeking to do business with certainty in the State of Washington.

C. WSDOT USURPED THE ZONING AUTHORITY OF OKANOGAN COUNTY.

1. Local Jurisdictions are Constitutionally Vested with the Authority to Zone.

This case presents a constitutional issue that should be addressed by the Court. Land use regulation is a matter of local county authority under the Washington Constitution and the underlying zoning enabling acts for counties under Chapters 36.70 RCW and 36.70A RCW. The Decision allows WSDOT to engage in the construction of the Okanogan County Zoning Code in a fashion that is inconsistent with the plain and ordinary meaning of the actual words used. In effect, it allows WSDOT to act as a zoning authority, which it is not and cannot be. This violates the constitutional delegation of authority to local jurisdictions.

Under the Washington State Constitution, zoning is a local matter. WASH. CONST. ART. XI, § 11; *Nelson v. City of Seattle*, 64 Wn.2d 862, 865-66, 395 P.2d 82 (1964). It is Okanogan County that adopts and administers its zoning code and deference should be given to the plain language it used in its zoning code. *Keller v. Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979); *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). In this case, deference is owed solely to Okanogan County, not to WSDOT.

WSDOT has no authority to legislate or regulate zoning matters in Okanogan County or elsewhere. Its interpretation of the Okanogan County Code carries no weight. Okanogan County sought to impose "broad controls" in the MRD zone, not "concise and precise controls". Okanogan County, in plain and unambiguous language, clearly intended to permit, and in fact permits, a vast variety of commercial and industrial uses within the MRD zone. It is its prerogative to do so. These "broad controls" have been impermissibly undermined by WSDOT's strained interpretation that the MRD Use Matrix does not provide for predominantly commercial or industrial uses.

The Decision improperly allows WSDOT to substitute its judgment for that of Okanogan County and completely disregards the vast number of commercial and industrial uses that are expressly allowed

under the MRD Use Matrix. It also ignores the actual commercial use to which the Property, and all the property surrounding it, all of which is in an MRD zone, has been put. Plainly, both in text and reality, the MRD zone provides for predominantly commercial and industrial uses. To conclude otherwise, as has WSDOT, is an impermissible usurpation of the zoning power given by our Constitution to the Okanogan County Commission.

WSDOT and the Court of Appeals interpreted the Act and Okanogan County Zoning Code as they wish the legislature and county commissioners had drafted them, not how they did. In doing so, they abrogated the obligations of Okanogan County and deprived the constitutional protections afforded Sun Outdoor and the citizens of Washington. Discretionary review should be accepted by this Court.

2. The Decision Ignores WSDOT's Admission that the Majority of Uses in the MRD Zone are in fact Commercial and Industrial.

The Decision contradicts WSDOT's admission that "commercial and industrial uses only constitute a majority of the uses set forth within the MRD zones in a strictly numerical sense." *Response Brief,* p. 10. It is difficult, if not impossible, to identify the functional difference between *majority* and *predominantly.* This indistinguishable difference renders an applicant unable to determine when, if ever, an application may be

approved. Concluding, as did the Court of Appeals in the Decision, that "predominantly," as used in the Act, means something different than it does in any other context, is an act of wishful thinking that is entitled to no deference.

WSDOT, but not the Court of Appeals, recognizes that the plain text of the Okanogan County Code provides for a "majority" of uses in an MRD zone that are either commercial or industrial. The practical consideration of the Decision is that it now nullifies the right of any property owner to make a meaningful application to WSDOT for a billboard in any location. Instead, the Decision now allows WSDOT to expressly agree that the majority of allowed uses in an underlying zone are commercial or industrial, yet still deny an application on the basis that they are not the "predominant" allowed uses in the zone. While this is a distinction without a difference, if allowed to remain the rule it will condone, and perhaps, promote, uncertainty and arbitrary regulatory action. This is harmful to Sun Outdoor and to business and citizens generally.

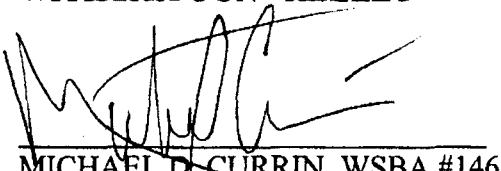
VI. CONCLUSION

This is a case about allowing regulated industries to rely upon the express language of a statute when requesting a permit to engage in an activity. It is also about WSDOT exercising zoning authority that properly

belongs, as a constitutional matter, with the Okanogan County Commission. By interpreting the Okanogan County Zoning Code in a manner that is clearly contrary to the plain language used, and then applying that interpretation to the Act, the Decision denies Sun Outdoor, and those individuals in the regulated outdoor advertising business, the meaningful right to submit an application and have it be based upon a predictable regulatory scheme. Based upon the foregoing, this Court should accept review of, and reverse, the Decision of Division I of the Court of Appeals.

Respectfully submitted this 21 day of September, 2016.

WITHERSPOON · KELLEY



MICHAEL D. CURRIN, WSBA #14603
NATHAN G. SMITH, WSBA #39699
422 W. Riverside Ave., Suite 1100
Spokane, Washington 99201
Tel: 509-624-5265
Attorneys for Petitioner
Sun Outdoor Advertising LLC

CERTIFICATE OF SERVICE

On the 27th day of September, 2016, I caused to be served a true and correct copy of the forgoing PETITION FOR REVIEW on all interested parties to this action as follows:

Matthew D. Hout
Assistant Attorney General
Office of the Attorney General of the State of Washington
Transportation & Public Construction Division
P.O. Box 40113
Olympia, WA 98504-0113

Attorneys for Washington State Department of Transportation

☐ Hand Delivery
☒ U.S. Mail, postage prepaid
☐ Overnight Mail
☐ Facsimile Transmission
☒ Via Electronic Mail:
Matt Huot
MattH4@atg.wa.gov
TPC EF Mailbox
tpcef@atg.wa.gov
Jennah Williams
JennahW@atg.wa.gov
Melissa Calahan
MelissaE1@atg.wa.gov

Karina Hermanson
Karina Hermanson

EXHIBIT A

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

SUN OUTDOOR ADVERTISING, LLC, a Washington limited liability company, Appellant, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondent.	)	No. 75231-6-I PUBLISHED OPINION FILED: August 29, 2016

VERELLEN, C.J. — Sun Outdoor Advertising appeals the denial of a permit to erect a billboard along a designated scenic highway in Okanogan County. Under the Scenic Vistas Act, chapter 47.42 RCW, billboards are generally prohibited along scenic roads, but an exception applies if (1) the area is zoned by the county for *predominantly* commercial and industrial uses and (2) the area contains development which is visible from the highway.[1] Sun Outdoor argues that because a majority of the itemized permitted uses in the applicable zoning designation can be categorized as commercial or industrial in nature, those uses "predominate." But the plain meaning of "predominate" requires a comparison of equivalent categories of use. Because the applicable zoning designation allows broad categories of uses and prohibits very few categories of uses, no particular category of use predominates.

[1] Only the first prong of this test is at issue here.

Therefore, the Department of Transportation properly concluded the proposed billboard location was not an area zoned for predominantly commercial or industrial uses. We affirm.

FACTS

In 2014, Sun Outdoor sought a permit from the Department to erect a billboard in Okanogan County on property along State Route 97. It is undisputed that, absent an exception, the proposed billboard location is part of a designated "scenic system."[2] The proposed location is zoned by the County as a "Minimum Requirement District" (MRD).

The Department denied Sun Outdoors' application. The Department found that the proposed location was not zoned for "predominantly commercial or industrial uses," noting the stated purpose of the MRD zone is to "maintain broad controls in preserving rural character and protecting natural resources."[3]

Sun Outdoor sought judicial review of the Department's decision. The trial court affirmed the decision.

Sun Outdoor appeals.

ANALYSIS

Sun Outdoor argues the Department erroneously interpreted and applied the law in determining that the proposed billboard location was not zoned for "predominantly" commercial and industrial uses. We disagree.

Our review of this case is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW.[4] "The burden of demonstrating the invalidity of agency action is on

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[2] RCW 47.39.020(22).

[3] Clerk's Papers at 12.

[4] RCW 34.05.570(3).

the party asserting invalidity."[5] We will reverse if the Department "erroneously interpreted or applied the law."[6]

Interpretation of the statute defining exceptions to the general prohibition of billboards along scenic roads is a question of law.[7] We review questions of law de novo under the error of law standard.[8]

In determining the legislature's intent, we look first to the statute's plain language.[9] We examine "the language of the statute, other provisions of the same act, and related statutes to determine the plain meaning."[10] "If the plain language is unambiguous, we enforce the statute in accordance with its plain meaning."[11]

The Scenic Vistas Act was enacted "to promote the public health, safety, welfare, convenience and enjoyment of public travel . . . and to attract visitors to this state by conserving the natural beauty of areas adjacent to the interstate system, and of scenic areas adjacent to state highways."[12] The Act provides that "no person shall erect or

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[5] RCW 34.05.570(1)(a).

[6] RCW 34.05.570(3)(d).

[7] See id.; see also Gradinaru v. Dep't of Soc. & Health Servs., 181 Wn. App. 18, 21, 325 P.3d 209 (2014).

[8] Smith v. Emp't Sec. Dep't, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

[9] Life Care Ctrs. of Am., Inc. v. Dep't of Soc. & Health Servs., 162 Wn. App. 370, 375, 254 P.3d 919 (2011).

[10] Id.; accord City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002)).

[11] Life Care, 162 Wn. App. at 375.

[12] RCW 47.42.010. The Act dovetails with the Federal-Aid Highway Act, whose express purpose for controlling outdoor advertising is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C.A. § 131(a). Under the Federal-Aid Highway Act, signs "may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned

maintain a sign which is visible from the main traveled way of the interstate system, the primary system, or the scenic system."[13] 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 the department.*[14]

Thus, when this two-prong test is met, the area is no longer part of the "scenic system" and billboards are permitted. Only the first prong of this test is at issue.[15]

The term "predominantly" is not defined in the Act. "Undefined words in a statute are accorded their ordinary meanings."[16] The dictionary defines "predominant" as "having superior strength, influence, authority, or position: CONTROLLING, DOMINATING, PREVAILING."[17]

Sun Outdoor's premise is that to determine whether an area is predominantly zoned for any particular use turns on counting up the number of specific uses allowed in a particular zoning designation. It claims that because "95 of the 97" itemized permitted uses in the MRD zone can be categorized as "plainly commercial or industrial in nature," those uses predominate.[18]

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commercial or industrial areas as may be determined by agreement between the several States and the Secretary." 23 U.S.C.A. § 131(d).

[13] RCW 47.42.030.

[14] RCW 47.42.020(9)(c) (emphasis added).

[15] We agree with Sun Outdoor that the actual uses in place at the proposed billboard location are not part of the first prong analysis.

[16] Gradinaru, 181 Wn. App. at 22.

[17] WEBSTER'S THIRD NEW INT'L DICTIONARY 1786 (2002).

[18] Appellant's Br. at 16.

But the plain meaning of "predominant" requires a more carefully calibrated comparison of uses permitted. If every use is permitted, then no particular use predominates. Similarly, in analyzing whether a particular use predominates in a multi-use zone, we have to compare equivalent categories of uses.

Here, the proposed billboard location is not within an area zoned by the County as a specific commercial or industrial district. Rather, it is zoned to permit a wide variety of uses, including but not limited to commercial and industrial uses. For example, in addition to a long list of commercial and industrial uses, the MRD expressly permits agricultural (dairy farms, farms, ranges, pastures, nurseries, and orchards), residential (single-family and multifamily), governmental (fire and police facilities, maintenance shops, warehouses, and offices), and recreational (athletic fields) uses.[19] Other varied uses are allowed with a conditional use permit or a binding site plan (churches, manufactured home parks, schools, RV parks, and campgrounds).[20]

In this setting, broad categories such as "commercial and industrial" uses should be compared with equivalent broad categories of uses such as "agricultural, residential, governmental, and recreational." The question comes into focus if permitted uses are contrasted with prohibited uses in the MRD. The only prohibited uses appear to be "nightly rentals" and auto storage of more than five disabled automobiles.[21] Because the MRD allows such a broad range of uses and prohibits only a very few uses, there is

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[19] Okanogan County Code 17.05.020.

[20] Okanogan County Code 17.05.030.

[21] Okanogan County Code 17.05.050.

no particular category of use that predominates. Commercial and industrial uses do not predominate.[22]

Although the Department looked to the broad and general purpose for the MRD zoning designation in its decision, we do not find the statement of purpose helpful. Okanogan County Code 17.05.010 provides, "The purpose of the minimum requirement district is to maintain broad controls in preserving natural character and protecting natural resources." The broad statement of purpose does not reveal whether a particular use predominates. In this setting, the plain meaning of "predominantly" in RCW 47.42.020(9) is determinative.

Because Sun Outdoor fails to establish any error of law under the APA standards, we affirm.

WE CONCUR:

Cox, J.

[22] Contrary 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.

WITHERSPOON KELLEY DAVENPORT & TOOLE PS

September 27, 2016 - 4:14 PM

Transmittal Letter

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Case Name: Sun Outdoor Advertising, LLC v. Washington State Department of Transportation
Court of Appeals Case Number: 75231-6

Party Respresented: Sun Outdoor Advertising, LLC
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

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- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

Pursuant to the directions on this page, I will send the Supreme Court Clerk the filing fee of $200.

Sender Name: Janet Jackson - Email: karinah@witherspoonkelley.com

A copy of this document has been emailed to the following addresses:

MattH4@atg.wa.gov
tpcef@atg.wa.gov
JennahW@atg.wa.gov
MelissaE1@atg.wa.gov

ngs@witherspoonkelley.com
- mdc@witherspoonkelley.com