NO. 48236-3-II

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

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

Petitioner/Appellant

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Defendant/Respondent,

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Sun Outdoor Advertising, LLC's ("Sun Outdoor") application for a sign permit squarely fits within the exception to the Scenic Vistas Act ("Act") because (i) the underlying zone provides for predominantly commercial or industrial ***uses,*** and (ii) is located on property upon which commercial or industrial development is visible for 500 feet in either direction.

At the time it rendered its decision on Sun Outdoor's application, WSDOT stated the **sole** basis for its decision was its interpretation of the purpose and intent section of the Minimum Requirement District ("MRD") zone provided for in the Okanogan County Code. Changing course, WSDOT now argues, for the first time, that its decision was based upon its view that, because application of the MRD zone is countywide, and because the ***actual*** uses (as opposed to allowed uses) in the MRD zone are not in fact predominantly commercial and industrial, that the first part of the statutory exception is not satisfied. WSDOT concedes, as it must, that the "majority" of uses permitted in the MRD zone are commercial or industrial, but now argues that "majority" is distinguishable from "predominantly." It provides no justification for the difference.

WSDOT's new *post hoc* justifications cannot override the error in the decision. Its reliance upon the "purpose" section of the Okanogan County Code and its failure to recognize that the overwhelming number of uses expressly provided for in the MRD are commercial or industrial in nature is fatal to its defense of its decision. Sun Outdoor's application should have been granted because it squarely fits within the exception to the Act. First WSDOT, and then the Superior Court, were wrong to conclude otherwise.

II. ARGUMENT

A. STANDARD OF REVIEW.

There is no dispute that this case is governed by the Administrative Procedures Act (Chapter 34.05 RCW) and RCW 47.42.060. WSDOT, for the first time in this case, attempts to redirect the Court into the limited standard of review governed by RCW 34.05.570(4). WSDOT's assertion regarding the applicable standard of review is in error and inconsistent with its statements to the trial court.

Sun Outdoor maintained throughout the trial court and in its briefing to the Court of Appeals that the standard of review in this case is defined under RCW 34.05.570(3), which encompasses both the clearly erroneous and arbitrary and capricious standards of review. CP 36. WSDOT did not object to Sun Outdoor's assertion at the trial court.

CP 60. At the hearing on the merits before the trial court, WSDOT conceded that the error of law provision under RCW 34.05.570(3) applied:

> THE COURT: Well, when you frame it as did WSDOT make a valid determination, I'm interested in whether you see that as implicating any APA provision other than the error of law provision.
>
> MR. HUOT: No. I don't think it does, Your Honor. I think it -- regarding error of law or regarding -- there's also a review mechanism in the Scenic Vistas Act. And so I think that's a – those both apply.
>
> THE COURT: And I said error of law, but that's the standard. But the way the APA frames it is the agency has erroneously interpreted or applied the law. And so that's the standard we're looking at here.
>
> MR. HUOT: It is, Your Honor...

RP 23-24.

Notwithstanding Sun Outdoor's belief that the Decision was an arbitrary and capricious action on the part of WSDOT, it also maintains that the Decision was a clearly erroneous interpretation of RCW 47.42.020(9). Irrespective of which standard of review is utilized, Sun Outdoor prevails. WSDOT is barred from now asserting that the legal conclusions made by WSDOT in the Decision cannot be measured against the clearly erroneous standard of review.

B. WSDOT'S DECISION FOCUSES SOLELY UPON THE GENERIC TEXT OF THE PURPOSE STATEMENT OF THE OKANOGAN COUNTY CODE.

WSDOT's decision on Sun Outdoor's application is limited to the express terms of the decision as initially determined and communicated to Sun Outdoor. Its efforts to now rely upon new reasons to justify its decision are impermissible and ignore the core text of RCW 47.42.020(9).

Sun Outdoor recognizes that signs are universally prohibited on the "Scenic System." RCW 47.42.030. Notwithstanding the blanket prohibition, signs permits can be issued when "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." *Id.* When the exceptions are satisfied, as in this case, the location then falls outside the Scenic System and signs can be permitted.

The core function within the 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. The plain text does not provide WSDOT with the authority to review the actual application of the zoning to the entirety of the underlying jurisdiction to make a conclusion as to whether the jurisdiction elected to cast a rural or urban classification in a given area. The plain text of RCW 47.42.020(9) directs WSDOT to

specifically focus on the uses provided for within the underlying zone, presumably through review of a matrix adopted by a local jurisdiction.

It is plainly obvious that WSDOT engaged in no such inquiry of the actual uses. WSDOT may be entitled to some limited deference for its interpretation of RCW 47.42.020, but it is entitled to no deference in its interpretation of the Okanogan County Code. *Mellish v. Frog Mountain Pet Care,* 172 Wn.2d 208, 218, 257 P.3d 641 (2011).

There is no evidence in the record that WSDOT looked beyond the "purpose" statement or the existence of a "commercial" or "industrial" zone in Okanogan County in making the decision. There is no analysis that WSDOT delved into the uses permitted within each of the zones. In fact, its conclusion that the "MRD is not a designation intended for predominantly commercial or industrial uses" is directly contrary to Okanogan County's use matrix based upon the sheer number of permitted commercial or industrial uses. AR 20000016. The scope of the allowable uses within the MRD use matrix is more extensive than either the commercial or industrial zones of Okanogan County combined. It defies reason to find, as has WSDOT, that the zone does not predominantly permit commercial and industrial uses. It does and WSDOT's conclusion to the contrary is an example of a regulatory

agency wishing that the common, clear and unambiguous words used by a legislative body meant something other than what they plainly do.

There is nothing within RCW 47.47.020(9) that excuses WSDOT from looking at the actual uses permitted in a zone by relying upon the existence of a purpose statement or the availability of alternative zones labeled "commercial" or "industrial." Would WSDOT's hands be tied in making a decision of Okanogan County's zones were labeled "business" and "manufacturing," thus forcing it to issue a permit to Sun Outdoor? Or what if the jurisdiction had no commercial or industrial zones? It is at best clearly erroneous for WSDOT to conclude as it has, and at worst arbitrary and capricious. Such enforcement of RCW 47.42.020(9) makes it susceptible to different interpretations depending upon the underlying jurisdiction's zoning labels. Reliance upon the actual uses permitted in a zone insulates application for WSDOT's arbitrary conduct. WSDOT's efforts to look solely at the titles of the zones and the purpose statement should not support its denial of Sun Outdoor's permit.

Business enterprises, like Sun Outdoor, no less than regular citizens, when planning their affairs have the right to be protected from the "fluctuating policy" of the legislature and 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's interpretation of the statute utterly ignores the plain meaning of the words of RCW 47.42.020(9). This is unjust and unfair to Sun Outdoor.

C. WSDOT CONCEDES THAT THE MAJORITY OF USES IN THE MRD ZONE ARE COMMERCIAL AND INDUSTRIAL.

WSDOT claims, from a numerical sense, that there is a distinction between "majority" and "predominantly." It provides no authority for this distinction. It concedes 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 claims that, irrespective of this concession, it is then permitted to make an individualized inquiry at the time of a permit application to determine how properties are *actually* being put to use within entirety of a zone within a jurisdiction, not just the site covered by an application, to determine whether they are "predominantly zoned for commercial and industrial uses." *Id.* It also now asserts that it can also review the extent

of the application of the underlying zone across an individual jurisdiction to draw a conclusion as to whether the underlying zone truly provides for commercial and industrial uses. Not only is this an erroneous interpretation of the law and the power of WSDOT, it is not what it did when denying the application and is not part of the decision being appealed.

WSDOT is not permitted to engage in *post hoc* rationalization to support its decision. "[A]gency action cannot be sustained on *post hoc* rationalizations supplied during judicial review." *Somer v. Woodhouse,* 28 Wn.App. 262, 272, 623 P.2d 1164 (1981).

WSDOT 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. In order to support its tenuous position that it is the "purpose" statement of the Okanogan County Code that controls, rather than the actual uses permitted inside the zone, WSDOT attempts to justify its denial on two additional basis. It claims now that the Court should consider the actual uses of property within the zone. In this instance, because the actual uses in the Okanogan County MRD zone are not predominantly commercial or industrial in nature, it argues that its decision was not in error. WSDOT also suggests that because Okanogan County spread the MRD zone to nearly the entirety of the jurisdictional

limits of the county that it cannot be zoned for predominantly commercial or industrial uses. WSDOT's new arguments ignore the words used in the Okanogan County Code, which addresses the uses which are allowed or provided for within the zone rather than how properties are being used at any particular point in time. It is without support in the record or decision and must be disregarded.

WSDOT's practical contention is also that a reversal of its decision opens nearly all portions of the scenic system in Okanogan County for signs. This argument is not supported by the plain text of RCW 47.42.020(9) because it completely ignores that sign applicants are required to satisfy **two** components: the use requirement **and** the visible development requirement. This built in check-and-balance within RCW 47.42.020(9) prohibits signs from being constructed in areas where commercial and industrial development have not already occurred. In Sun Outdoor's case, the commercial and industrial development on the actual property covered by its application has already occurred, thus making the property viable for a sign.

III. CONCLUSION

Okanogan County's regulatory scheme provides for both commercial and industrial uses nearly universally within its jurisdictional boundaries. While it is apparent that WSDOT cannot accept that these

"broad controls" govern the issuance of permits within their jurisdictional limits, it is the regulatory scheme under which they are required to interpret Sun Outdoor's sign application. WSDOT cannot wish them away.

WSDOT's position concedes that a "majority" of the uses permitted in the MRD zone are either commercial or industrial, yet it provides no justification as to how "majority" and "predominantly" are distinguishable, nor does it given any compelling reason that "provides for" should be construed to mean "actually used for". In either case, given the words plainly used by the legislature, and the wide variety of permitted uses allowed in the MRD zone, Sun Outdoor satisfied the first prong of RCW 47.42.020(9). Since this portion of the criteria has been satisfied, and WSDOT's agreed that the second prong was met, Sun Outdoor's sign permit should have been issued. Based upon the foregoing, Sun Outdoor respectfully requests that the decision of the trial court be reversed and the sign permit issued.

Respectfully submitted this 11th day of April, 2016.

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CERTIFICATE OF SERVICE

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