

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 OPENING BRIEF

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I. INTRODUCTION

The Washington State Department of Transportation ("WSDOT") regulates the placement of billboards and signage along interstate highways, National Highway System highways and Scenic Highways through the Scenic Vistas Act, found at Chapter 47.42 RCW (the "Scenic System" and "Act," respectively). With certain broad exemptions, signs may not be placed upon routes that are part of the Scenic System. One such exemption from the broad exclusion is to allow signs on property in a zone that permits predominantly commercial or industrial uses when there is also development visible to the highway. WSDOT abused its discretion when it refused to grant Sun Outdoor Advertising, LLC ("Sun Outdoor") a permit to place a sign in just such an area and zone.

Sun Outdoor sought a permit from the WSDOT to place a billboard on private property along State Highway 97 outside of Tonasket, Washington. The property was zoned by Okanogan County as "Minimum Requirement District," a zone designed for "broad controls" and permitting a wide array of commercial and industrial uses. The property is used for commercial purposes and surrounded by other

commercial uses.¹ WSDOT denied Sun Outdoor's permit application on the sole basis that Okanogan County's MRD zone did provide for *predominantly* commercial or industrial uses.

The property at issue fits squarely within the literal terms of this exemption, thus requiring the issuance of a permit for Sun Outdoor's sign. As to the first part of the test to determine whether the exception is met, the MRD zone provides for ninety-seven different uses, ninety-five of which are either commercial or industrial. WSDOT claims the very specific authorization of uses in the Okanogan County Code is negated by a generic purpose statement that describes the intent of the underlying zone. As to the second part of the exception under the Act, WSDOT does not dispute that the property is located in an area with commercial or industrial development visible to the highway. Despite Sun Outdoor's compliance with both prongs of the exception to the Act, WSDOT improperly denied the application.

In its denial, WSDOT exceeded its authority by going beyond application of the plain text of the Act and Okanogan County Code to the case at hand. It impermissibly substituted its judgment for that of the

¹ WSDOT refers to the "Minimum Requirement District" as the "MRD" zone, whereas Okanogan County refers to the district as the "MD" zone. For the sake of consistency with WSDOT's decision, Sun Outdoor will use the terminology employed by WSDOT.

legislature and ignored the specific words used within both the Act and Okanogan County's MRD use matrix. The legislature meant what it said when it adopted the Act and those are the confines under which WSDOT must operate when it reviews applications for exceptions under the Act. Okanogan County similarly meant what it said when it allowed for a broad range of commercial and industrial uses across the county in the MRD zone. WSDOT erred in denying Sun Outdoor's application and the Thurston County Superior Court erred in affirming that decision. WSDOT's decision should be reversed and Sun Outdoor's permit should be issued.

II. ASSIGNMENT OF ERROR / STATEMENT OF ISSUE

A. ASSIGNMENT OF ERROR.

1. The Thurston County Superior Court erred when it affirmed the decision of WSDOT denying Sun Outdoor's sign application on October 14, 2015.

B. STATEMENT OF ISSUE.

1. Sun Outdoor submitted an application for a billboard on property zoned by Okanogan County in a classification that overwhelmingly provides for both commercial and industrial uses. WSDOT asserts that that the "general intent" section of the Okanogan County Code controls over the specific use matrix within the code. Did

WSDOT err in denying Sun Outdoor's application when the underlying Okanogan County zone specifically provides for predominantly commercial and industrial uses?

III. 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 a double-sided 10 foot by 30-foot rectangular outdoor "billboard" sign visible to and from State Highway 97 on property commonly known as 132 Clarkson Mill Road, Tonasket, Washington (the "Property"). AR 20000020-23.² It is not disputed that State Highway 97 is a north-south highway that is designated as part of the Scenic System.

The Property is adjacent to the highway and is located within the "Minimum Requirement District" ("MRD") zone. The MRD zone is an all-inclusive zone [providing for all uses not otherwise prohibited]. The Property's existing use, and that of the contiguous property (which is also located in an MRD zone), is commercial. While Okanogan 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

² "AR" denotes the citation to the administrative record certified to the Court by WSDOT on January 22, 2015, and provided to the Court pursuant to RAP 9.7(c). CP 30-31.

commercial uses, all of which are also in an MRD zone. It is contiguous to two mini-storage facilities. AR 20000024; 20000048. Adjacent to the mini storage facility to the north 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 visible from the highway.

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, these commercial and industrial uses total 95 of the 97 specifically identified uses within an extensive use matrix contained within the Okanogan County Code ("MRD Use Matrix") AR 20000025-43. By sheer number alone, *the MRD zone provides for* predominantly commercial or industrial uses.

The Property fits within the confines of allowable uses in the MRD zone and, contrary to the position taken by WSDOT, these uses are

all commercial in nature. None "preserve the rural character and protect natural resources" of the surrounding area and properties. AR 2000001. Okanogan County unambiguously allows a plethora of uses, most of which are not "rural" in nature. By approving construction and operation of a building supply store, an equipment rental store, and mini-storage units on the Property and on contiguous properties, Okanogan County has clearly concluded that commercial and industrial activity is permitted in an MRD Zone.

C. WSDOT'S DECISION DEFIES THE MRD USE MATRIX.

On November 25, 2014, WSDOT denied Sun Outdoor's application (the "Decision"). In the 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). WSDOT's sole justification for the denial of Sun Outdoor's application shows that it has 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 95 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. WSDOT's conclusion would replace the word "predominantly" with the phrase "exclusively permits". In doing so, it defies its obligation to examine more than a general purpose statement of a land use ordinance and examine the actual allowable uses within the underlying zone. When 95 of the 97 identified commercial or industrial uses are allowed, it is erroneous for WSDOT to conclude that the MRD zone does not predominantly allow commercial or industrial

uses because it directly contradicts the MRD Use Matrix. It has also improperly applied its interpretation of the MRD zone to the Act, which does not require, for the exemption to apply, that the properties in the area of the proposed sign in fact be used for commercial or industrial purposes but, rather, that such uses are predominantly allowed. The MRD Use Matrix conclusively shows that such uses are allowed, and by sheer numbers, "predominantly allowed", in an MRD zone.

D. SUN OUTDOOR CHALLENGED THE DECISION IN THURSTON COUNTY SUPERIOR COURT.

Sun Outdoor commenced this action to challenge the Decision by WSDOT 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 Decision and dismissed Sun Outdoor's action. CP 74-75.

IV. SUMMARY OF THE ARGUMENT

The State of Washington regulates the placement of billboards and signs along the Scenic System. Certain broad exceptions to the general rule exist, including when the application is for a sign on property zoned for predominantly commercial or industrial uses with visible development to the highway. Sun Outdoor applied to WSDOT for a sign on property

zoned "MRD," a zone which provides for all uses permitted in Okanogan County's commercial or industrial zones, on property containing a commercial or industrial use visible to the Scenic System. WSDOT denied Sun Outdoor's application based upon its interpretation that the MRD zone was designed to preserve the rural character of Okanogan County. This is contrary to the express text of Okanogan County's use matrix and a not a standard that WSDOT can unilateral read into the Okanogan County Code. As a result of WSDOT's erroneous interpretation of the Okanogan County Code, WSDOT's decision should be reversed.

V. ARGUMENT

A. STANDARD OF REVIEW.

This appeal is governed by the Administrative Procedures Act (Chapter 34.05 RCW) and RCW 47.42.060. The standard of review is well known to the Court and is defined in RCW 34.05.570(3) and the Court reviews the Decision upon the same standards under which the trial court reviewed the Decision. *Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus.*, 112 Wn.App. 291, 296, 49 P.3d 135 (2002). The standard is measured against the record before WSDOT upon which the Decision was based. *Nguyen v. Dep't of Soc. & Health Servs.*, 99 Wn.App. 96, 101, 994 P.2d 216 (1999), *review granted*, 141 Wash.2d 1001, 10 P.3d 404 (2000).

Legal conclusions are reviewed *de novo*. The Court is not bound by the agency's interpretation of a statute. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998); *Verizon Northwest, Inc. v. Washington Employment Sec. Dept.*, 164 Wn.2d 909, 915, 194 P3d 255 (2008); *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998); *Washington State Liquor Control Board v. Washington State Personnel Board*, 88 Wn.2d 368, 379, 561 P.2d 195 (1977). If an agency's view of a statute conflicts with the statute itself, as in this case, it is entitled to no deference. *Theodoratus*, 135 Wn.2d at 589.

WSDOT erred in two respects when denying Sun Outdoor's application. It first failed to consider the actual uses permitted in the Okanogan County Code as required by RCW 47.42.020(9). Second, it ignored and failed to interpret the Okanogan County's MRD Zone as providing for predominantly commercial or industrial uses when 95 of the 97 identified uses allowed in the zone are commercial or industrial.

B. WSDOT FAILED TO CONSIDER THE USES PERMITTED IN THE OKANOGAN COUNTY MRD ZONE.

1. *Highways in Areas Zoned Predominantly for Commercial or Industrial Uses and With Visible Development are Excluded from the Scenic System, thus Allowing for the Placement of Signs.*

Under the Act, outdoor signs are 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 the department. *Id.* (emphasis added). WSDOT refers to this exception 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 that meets the zoning requirement. WAC 468-66-010(28). Thus, the Act expressly excludes from the Scenic System, that portion of a state highway that lies within an area zoned to permit predominantly commercial and industrial uses and containing visible commercial or industrial uses. When these two criteria are met, the area is no longer part of the "scenic system" and outdoor signs are permitted.

2. *The Plain Meaning of RCW 47.42.020(9) Requires WSDOT to Consider the Uses Permitted within the MRD Zone.*

WSDOT's review of Sun Outdoor's application failed to comply with the requirements of RCW 47.42.020(9). Its conclusion was solely limited to the scope of the general purpose and content of the MRD Zone provided for in Okanogan County Code section 17.05.010(9). The analysis contained in RCW 47.42.020(9) requires looking at the uses.

An agency is not entitled to any deference to its interpretation when, as in this case, a "limited amount of technical knowledge" is required to discern the meaning of the words used by the legislature. *Utter v. Building Industry Association of Washington*, 182 Wn.2d 398, 421, 341 P.3d 953 (2015). There is nothing technical about RCW 47.42.020(9). The words used should be given their plain meaning. No special training or technical skill is needed to interpret the meaning of the words used in either the statute or the zoning code, thus there is no deference afforded to WSDOT when it interprets RCW 47.42.020(9).

While WSDOT has been right in its conclusion that zoning is the first consideration, it got it wrong from there. When arriving at this conclusion, WSDOT interpreted RCW 47.42.020(9) in such a fashion to ignore the underlying uses applicable to a particular property and examine the actual matrix of allowable uses.

WSDOT's Decision appears to rest solely on the titles of the underlying zones in Okanogan County and the generalized purpose statement applicable to MRD zones, utterly ignoring the substantive provisions of the code itself. The text of RCW 47.42.020(9) does not state that *only* property that is specifically zoned commercial or industrial is excluded from the scenic system. By construing the statute to require that the Property be specifically zoned commercial or industrial, rather focusing on the predominant uses permitted in a zone, WSDOT inserts words into the Act that are not there and utterly disregards the words actually used, ignoring the substantive core of the zoning code. It is acting in a legislative rather than regulatory manner, reading requirements into the Act that do not exist and which, in effect, change the plain meaning of the Act. In doing so, it has acted in an arbitrary and capricious manner.

WSDOT's Decision disregards the plain meaning of RCW 47.42.020(9), which requires it to determine whether the scope of *uses* permitted within the underlying zone are predominantly commercial or industrial in nature. It was *de facto* incorrect for it to simply look at the general purpose and intent section of the Okanogan County Code without looking to the actual allowed uses. The Decision is clearly erroneous.

C. WSDOT'S INTERPRETATION OF THE OKANOGAN COUNTY CODE IGNORES THE MRD USE MATRIX.

Sun Outdoor accepts that deference should be given to the construction of a regulation by those charged with its enforcement. *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, with respect to the zoning aspect of the Decision, that deference should be given to Okanogan County and not to WSDOT. WSDOT has no authority to legislate zoning matters in Okanogan County, or elsewhere, which are purely local. Its interpretation of the Okanogan County Code should carry no weight.

In this case, that deferential authority rests solely with Okanogan County. 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. It is entitled to deference in matters of interpreting their zoning code. *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 218, 257 P.3d 641 (2011). There is no deference that should be given to WSDOT for its interpretation of the Okanogan County Code. And the words of the Okanogan County Code should be given their plain meaning.

The plain meaning of the words "commercial" or "industrial" employed in RCW 47.42.020(9) require no special interpretation to ascertain their meaning. "Commercial" means something or someone "occupied with or engaged in commerce or work intended for commerce..." Webster's New Collegiate Dictionary 265 (9th Ed. 1986). "Industrial" means "a company engaged in industrial production or service." *Id.* at 617 "Predominantly" means "for the most part: mainly." *Id.* at 927.

WSDOT improperly substituted its judgment for that of Okanogan County and completely disregarded the vast number of commercial and industrial uses that are expressly allowed in an MRD zone. It has also ignored 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.

WSDOT is required to analyze the range of available *uses* in the underlying zone. Doing so necessarily requires it to consider the uses permitted under the MRD Use Matrix. It has failed to do so. The Decision omits any discussion of the uses permitted in an MRD zone and specifically ignores the fact that the Property and adjacent properties all have present uses that are actually commercial or industrial in nature. If

the MRD zone did not allow for predominantly commercial or industrial uses, then there is no way the retail store on the Property could be built nor the adjacent properties developed with storage facilities and vehicle and trailer sales uses.

WSDOT erroneously failed to consider the MRD Use Matrix. WSDOT has separated the "zone" from the "uses" permitted in that zone. It cannot do so. That Okanogan County provides for both industrial and commercial zones is irrelevant. The MRD "zone" expressly permits, and in fact has, in the case of the Property, predominantly commercial and industrial "uses." Again, 95 of the 97 uses described in the MRD Use Matrix are plainly commercial or industrial in nature. And, in fact, 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.

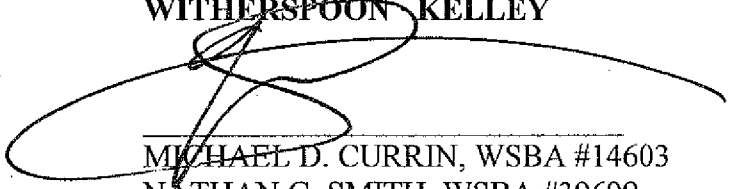
There is nothing within the Decision, nor could there be, supporting WSDOT's finding that the MRD zone does not provide for predominantly commercial or industrial uses. It is plainly inconsistent with the Act and its regulations. It is in error and should be reversed by this Court.

VI. CONCLUSION

WSDOT denied Sun Outdoor's application on the sole articulated basis that the MRD zone did not predominantly permit commercial or industrial uses. On this basis, it determined that the Property was part of the scenic system. In doing so, it failed to comply with RCW 47.42.020(9) and look at the actual uses. It also improperly usurped local zoning authority. It completely disregarded the Okanogan County zoning code which expressly provides, in plain, clear and unambiguous terms, that the uses allowed in an MRD zone are in fact predominantly commercial and industrial. Since the MRD zone allows for predominantly commercial and industrial uses, the sole basis supporting the Decision not to approve the application was incorrect WSDOT's Decision is in error. Sun Outdoor respectfully requests that the Court reverse the Decision and require WSDOT to approve the application.

Respectfully submitted this 25th day of January, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2016, I caused a copy of the foregoing to be served on the following by the method indicated:

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