

FILED
COURT OF APPEALS
DIVISION II

2016 MAR 11 AM 11:11

STATE OF WASHINGTON

NO. 48236-3-II BY cm
DEPUTY

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

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

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

MATTHEW D. HUOT
Assistant Attorney General
WSBA #40606
P.O. Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 753-6126
OID #91028

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUE PRESENTED2

III. STATEMENT OF THE CASE2

IV. STANDARD OF REVIEW.....5

V. ARGUMENT6

 1. WSDOT Interpreted the County’s MRD Zone in the
 Proper Context and Reached a Valid Determination.....7

 2. Sun Outdoor’s Interpretation of the County’s MRD Zone
 is Inaccurate9

VI. CONCLUSION12

TABLE OF AUTHORITIES

Cases

City of Tacoma v. Welcker
65 Wn.2d 677, 399 P.2d 330 (1965)..... 6

Higbee v. Shorewood Osteopathic Hosp.
105 Wn.2d 33, 711 P.2d 306 (1985)..... 11

Nguyen v. Dep’t of Health
99 Wn. App. 96, 994 P.2d 216 (1999), *review granted*,
141 Wn.2d 1001, 10 P.3d 404 (2000)..... 6

Pannell v. Thompson
91 Wn.2d 591, 589 P.2d 1235 (1979)..... 11

*State ex rel. Evergreen Freedom Foundation v. Washington
Education Assoc.*
140 Wn.2d 615, 999 P.2d 602 (2000)..... 6

State v. Hall
168 Wn.2d 726, 230 P.3d 1048 (2010)..... 8

Statutes

RCW 34.05.010(1)..... 5

RCW 34.05.570 5

RCW 34.05.570(1)(a) 6

RCW 34.05.570(4)(c) 5

RCW 47.39.020(22)..... 3

RCW 47.42.010 3

RCW 47.42.010-.920 2

RCW 47.42.020(9)..... 1, 3, 7

RCW 47.42.030 3, 7

RCW 47.42.060 5

Other Authorities

Okanogan County Code 17.05.010..... 3

I. INTRODUCTION

State law prohibits placing signs that are visible from highways designated as scenic highways except “within areas zoned by the governing county for predominantly commercial and industrial uses.” RCW 47.42.020(9). Appellant Sun Outdoor Advertising, LLC (Sun Outdoor) boldly claims a right to erect a billboard within a zone that encompasses most of Okanogan County. Administrative Record (AR) at 20000034. The Washington State Department of Transportation (WSDOT) denied their application to comply with the Scenic Vistas Act and preclude billboards from marring the views along a scenic highway that traverses the entire length of rural Okanogan County.

WSDOT considered and rejected Sun Outdoor’s argument that the proposed billboard location falls outside the scenic system because the area is zoned by Okanogan County for predominantly commercial or industrial uses. The underlying area is zoned as a Minimum Requirement District (MRD) which permits broad controls to preserve rural character and protect natural resources, and encompasses most of the county. While many commercial and industrial uses are authorized in a MRD, the purpose of the MRD—conserving the natural beauty of scenic areas—belies Sun Outdoor’s claim that the area is or could ever be zoned for

predominantly commercial or industrial uses. The superior court agreed with WSDOT's determination, and this Court should affirm.

II. ISSUE PRESENTED

Did WSDOT correctly determine that Sun Outdoor's billboard permit did not comply with the Scenic Vistas Act?

III. STATEMENT OF THE CASE

In July 2014, Sun Outdoor submitted an application for a billboard permit to WSDOT. AR at 20000020. Sun Outdoor intended to build a 300-square foot rectangular "billboard" sign on property adjacent to State Route (SR) 97, which was owned by Midway Oroville Building Supply, Inc. (Midway). *Id.* The proposed billboard location is situated near the southwesterly corner of the property, immediately adjacent to Clarkston Mill Road, a frontage road parallel to SR 97 in Okanogan County. AR at 20000024. Midway operates a retail building supply and equipment rental store on the property. AR at 20000018-19. Adjacent parcels are used in a variety of ways, including mini-storage facilities, vehicle and trailer sales operations, residences, agricultural structures, and farmland. AR at 20000044. A substantial amount of the surrounding land is undeveloped. *Id.*

The State of Washington passed the Scenic Vistas Act (the "Act") in 1971. RCW 47.42.010-.920. In doing so, the Legislature declared that

controlling the placement and location of signs adjacent to state highways 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 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). SR 97 has been designated by the Legislature as part of the scenic and recreational highway system. RCW 47.39.020(22).

The proposed billboard location is situated within a zoning district identified by the County as a “Minimum Requirement District” (MRD). The MRD’s explicit purpose is “to maintain broad controls in preserving natural character and protecting natural resources.” Okanogan County Code (OCC) at 17.05.010. The record below included an unofficial

county zoning map, which shows that most of Okanogan County is zoned as a MRD. AR at 20000034. The Code includes a district use chart which identifies both permitted and conditional uses in a MRD, which was referred to by the Appellant 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 Appellant’s permit application, conducted a site visit, corresponded with and gathered information from the Appellant, 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. This determination is undisputed on appeal. Brief of Appellant (Br. App.) at 4.

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

The Appellant sought judicial review of WSDOT’s determination in accordance with the Administrative Procedure Act (APA) and

RCW 47.42.060. The superior court affirmed WSDOT's decision. Appellant filed a timely appeal. Clerk's Papers (CP) at 76.

IV. STANDARD OF REVIEW

The APA sets forth standards of judicial review of administrative agency actions. *See* RCW 34.05.570. WSDOT's denial of Sun Outdoor's billboard permit was not an "adjudicative proceeding" as defined by RCW 34.05.010(1); WSDOT's review was not a "proceeding before an agency in which an opportunity for hearing before that agency is required by statute" as the mechanism for review under the Scenic Vistas Act is by petition to Thurston County Superior Court. *Id.*; RCW 47.42.060. Consequently, Sun Outdoor is entitled to relief only if this Court determines WSDOT's denial of the billboard permit was a) unconstitutional; b) outside WSDOT's statutory authority; c) arbitrary or capricious; or d) taken by persons who were not properly constituted as agency officials lawfully entitled to take such action. RCW 34.05.570(4)(c). Sun Outdoor does not claim WSDOT's action was unconstitutional, outside its statutory authority, or taken by persons not properly constituted as agency officials. Sun Outdoor can only argue that WSDOT's action is arbitrary and capricious. "Arbitrary and capricious" conduct has been described as "willful and unreasoning action, without

consideration and regard for facts or circumstances.” *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965).

Sun Outdoor bears the burden of demonstrating that WSDOT’s action in this matter is invalid based on the record before WSDOT at the time its action was made. RCW 34.05.570(1)(a); *Nguyen v. Dep’t of Health*, 99 Wn. App. 96, 101, 994 P.2d 216 (1999), *review granted*, 141 Wn.2d 1001, 10 P.3d 404 (2000). An agency’s interpretation of an ambiguous statute is entitled to great weight when the agency is charged with the statute’s implementation and concerns matters within the agency’s expertise. *State ex rel. Evergreen Freedom Foundation v. Washington Education Assoc.*, 140 Wn.2d 615, 635-36, 999 P.2d 602 (2000).

V. ARGUMENT

WSDOT took a valid agency action in denying Sun Outdoor’s billboard application, and Sun Outdoor cannot satisfy its burden on appeal. The record clearly demonstrates that WSDOT appropriately interpreted the Scenic Vistas Act and the Okanogan County Code to determine that the proposed billboard location was located within the scenic and recreational highway system. Thus, this Court should affirm.

1. WSDOT Interpreted the County's MRD Zone in the Proper Context and Reached a Valid Determination

Sun Outdoor concedes that billboards or other outdoor signs are prohibited within the scenic system pursuant to RCW 47.42.030. Br. App. at 11. The area must be excluded from the scenic system in order for billboards to be allowed. RCW 47.42.020(9). An area is excluded if it satisfies a conjunctive two-part test: (1) the area must be zoned by the governing county for predominantly commercial and industrial uses, and (2) the area must have development visible from the highway. RCW 47.42.020(9). The first part of this test is before this Court on appeal.

During WSDOT's review, it was confronted with two critical facts it relied upon in making its decision. First, the MRD's stated purpose is "to maintain broad controls in preserving rural character and protecting natural resources." AR at 20000017, 20000025. Second, most of the county's unincorporated area is zoned MRD (AR at 20000034), and the county has enacted separate zoning classifications for commercial and industrial districts. AR at 20000017, 20000029-31. This makes it apparent that areas intended to be predominantly commercial or industrial are zoned different, while MRD zoning covers the bulk of the county's rural area. Taken together, these facts support the conclusion that the

county has authorized MRDs to allow flexibility in land use planning to provide for a variety of uses, while supporting the broader purpose of preserving the area's natural beauty, which is consistent with WSDOT's determination.

Additionally, Sun Outdoor's asserted interpretations of "areas" as envisioned by the Act is impermissibly narrow. The Court is bound to avoid interpretations of a statute that would lead to absurd results when it can do so "without doing violence to the words of the statute." *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010). Sun Outdoor is quick to point out that the properties in the immediate vicinity (or "contiguous") of the proposed billboard location are supporting commercial uses. Br. App. at 4-5. WSDOT correctly declined to take such a myopic view of the area. It is evident from the record that there is a substantial amount of undeveloped land, farmland, and single-family residential parcels in the area outside the Tonasket city limits, which are part of the same MRD as the proposed billboard location. AR at 20000034; 20000044. Thus, WSDOT validly interpreted the Act regarding "areas zoned by the governing county for predominantly commercial and industrial uses" and its denial of the billboard application must stand.

2. Sun Outdoor's Interpretation of the County's MRD Zone is Inaccurate

Sun Outdoor also misinterprets the use of "zoned" within the Act. It repeatedly refers to the "MRD Use Matrix" ("Matrix") as positive proof that the county intended for MRDs to be zoned for predominantly commercial and industrial uses. It points out that "95 of the 97 uses described in the MRD Use Matrix are plainly commercial or industrial in nature." Br. App. at 16. This is an inaccurate representation of the Matrix.

While MRDs do permit ninety-five distinct uses, they include:

- Churches;
- Dairy farms;
- Single-family dwellings;
- Multi-family dwellings;
- Farms for raising all crops, feeding and caring for livestock, ranges, and pastures;
- Feedlots;
- Infrastructure, wastewater treatment plants, substations, pump stations;
- Emergency vehicle facilities, police, fire;
- Maintenance shops, warehouses;
- Hospital;
- Manufactured home parks;
- Medical/dental clinic;
- Schools; and
- Solid waste transfer station.

AR at 20000035-43.

Upon closer inspection, it appears Sun Outdoor's characterization of the Matrix is misleading. A more accurate description of the Matrix is

that it sets forth a wide variety of uses, including commercial, industrial, residential, and agricultural uses in a MRD zone, as well as uses that support government services, health care facilities, and places of worship. This is consistent with the county's stated purpose to utilize MRDs to maintain broad controls in preserving rural character and protecting natural resources, as well as WSDOT's determination that MRDs are not zoned for predominantly commercial and industrial purposes.

Commercial and industrial uses only constitute a majority of the uses set forth within MRD zones in a strictly numerical sense. Sun Outdoor falls back to the position that this fact alone supports its argument that MRDs are zoned predominantly for commercial or industrial uses. This position is flawed because what is permitted (or conditionally permitted) within a MRD zone does not necessarily (or in this instance) correlate with how the parcels located within the MRD are actually being used or may reasonably be anticipated to be used in the future.

For example, if a MRD zone contained one hundred parcels, it is equally plausible that the county would approve ninety-nine parcels for non-commercial use and one parcel for commercial use as opposed to ninety-nine parcels for commercial use and one parcel for non-commercial use. The difference is a MRD with ninety-nine parcels zoned for commercial use frustrates the county's stated intent of the MRD zone,

which is to preserve rural character and protect natural resources. WSDOT recognized this logical inconsistency in its decision and was correct in its determination that MRDs are not zoned predominantly for commercial and industrial uses.

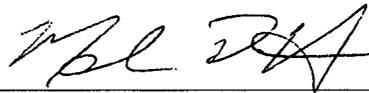
Finally, it is important to note that the Scenic Vistas Act specifically addresses signs and scenic vistas, whereas the zoning provisions relied upon by Sun Outdoor addresses a far more broad spectrum of uses. It is a rule of statutory construction that, where one statute deals with a subject in general terms and another deals with the same subject in a more detailed way, the two should be harmonized if possible and, if there is any conflict, the specific prevails over the general absent a contrary legislative intent. *Higbee v. Shorewood Osteopathic Hosp.*, 105 Wn.2d 33, 37, 711 P.2d 306 (1985); *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). It is evident that even in the presence of commercial and industrial uses (that are not predominant), limitations on signing may still be appropriate and necessary to preserve scenic highways. In light of this, WSDOT did not abuse its discretion in applying the Scenic Vistas Act and denying Sun Outdoor's permit for the proposed billboard beside the highway.

VI. CONCLUSION

WSDOT has a statutory mandate to enforce the Scenic Vistas Act and prohibit billboards within the scenic system. Its decision to deny Sun Outdoor's billboard permit was reasonable, supported by the record, and consistent with both the Act and the Okanogan County Code. It therefore constitutes a valid agency action and must not be overturned. Thus, based on the record as well as the arguments contained herein, WSDOT respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 10th day of March, 2016.

ROBERT W. FERGUSON
Attorney General



MATTHEW D. HUOT, WSBA #40606
Assistant Attorney General
Attorney for Respondent WSDOT

FILED
COURT OF APPEALS
DIVISION II
2016 MAR 11 AM 11:11
STATE OF WASHINGTON
BY Cam
DEPUTY

NO. 48236-3-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION,

Respondent,

v.

SUN OUTDOOR
ADVERTISING, LLC,

Petitioner.

CERTIFICATE OF
SERVICE

I, Lynn Jordan, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of the Respondent Washington State Department of Transportation's Responsive Brief and this Certificate of Service were served on the following party as indicated below:

Michael D. Currin
Nathan G. Smith
Witherspoon Kelley
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201-0300
NGS@witherspoonkelley.com

By:

- First Class U.S. Mail
 Certified U.S. Mail
 Legal Messenger
 Facsimile
 Federal Express

MDC@witherspoonkelley.com
erinh@witherspoonkelley.com
karinah@witherspoonkelley.com
Attorneys for Petitioner

Campus Mail
 Electronic Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of March, 2016, at Tumwater, Washington.



Lynn Jordan