IN THE SUPREME COURT OF THE STATE OF OREGON

TWIST ARCHITECTURE & DESIGN, INC.; DAVID HANSEN; and KIRK CALLISON, Petitioners, Respondents on Review, v. OREGON BOARD OF ARCHITECT EXAMINERS, Respondent, Petitioner on Review.	Board of Architect Examiners No. 10035 CA A152929 SC S064048

REPLY BRIEF OF PETITIONER ON REVIEW, OREGON BOARD OF ARCHITECT EXAMINERS

Review of the Decision of the Court of Appeals
on Appeal from the Final Order of the Oregon Board of Architect Examiners

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Author: Sercombe, P.J.
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge.

Continued…

J. KEVIN SHUBA #914263
Garrett Hemann Robertson PC
1011 Commercial St. NE
Salem, OR 97301
Telephone: (503) 581-1501
Email: jkshuba@ghrlawyers.com

Attorney for Respondents on Review
Kirk Callison and Twist Architecture & Design Inc.

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
SUSAN YORKE #145580
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: susan.yorke@doj.state.or.us

Attorneys for Petitioner on Review

JOHN M. GROEN #931604
Attorney at Law
12210 Ski View Ln.
Leavenworth, WA 98826
Telephone: (425) 941-1606
Email: jmg@pacificlegal.org

ANASTASIA P. BODEN
Cal. Bar No. 281911
Pacific Legal Foundation
930 G St.
Sacramento, CA 95814
Telephone: (916) 419-7111
Email: apb@pacificlegal.org

Attorneys for Respondent on Review
David Hansen

STEVEN C. BERMAN #951769
NADIA DAHAB #125630
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204
Telephone: (503) 227-1600
Email: sberman@stollberne.com
Email: ndahab@stollberne.com

RONALD M. JACOBS
Venable LLP
575 7th Street NW
Washington, DC 20004
Telephone: (202) 344-8215
Email: rmjacobs@venable.com

Attorneys for *Amicus Curiae*

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INTRODUCTION

This case involves claims that Twist Architecture & Design, Inc., along with its principals, Kirk Callison and David Hansen, engaged in the unlicensed practice of architecture and improperly represented themselves as architects or as practicing architecture in Oregon. Petitioners dispute those allegations. In doing so, they offer a cramped interpretation of the relevant statutory provisions that confines the "practice of architecture" to the creation of permit- or construction-ready documents and allows unlicensed persons to make misleading representations. For the reasons that follow, however, petitioners' arguments fail.

ARGUMENT

A. Petitioners engaged in the unlicensed practice of architecture.

Under ORS 671.020(1), "a person may not engage in the practice of architecture" without a license. *See also* ORS 671.020(4) (providing that a person "may not practice or attempt to practice architecture" without a license). The "practice of architecture" is defined as "the planning, designing or supervising of the erection, enlargement, or alteration of any building or of any appurtenance thereto other than exempted buildings." ORS 671.010(6). Here,

contrary to petitioners' arguments, the work they performed on the three non-exempt Oregon projects qualified as the practice of architecture.

1. The feasibility studies depicted buildings.

Twist and Callison first argue that the feasibility studies they created for the three Oregon projects did not depict "buildings," as that term is defined by statute. They therefore assert that the creation of those studies could not constitute the practice of architecture. But petitioners are mistaken.

As an initial matter, the feasibility studies depicted buildings. Indeed, the drawings themselves labeled the shapes contained therein as "buildings." (*See, e.g.*, SER 6-37). In addition, the studies showed the square footages of those proposed buildings and their shapes and locations on the sites. Many of the proposed buildings were also graphically represented as three-dimensional by way of shading on the borders of the structures, indicating the presence of floors, walls, and roofs. And some of the diagrams included particular store names showing the kinds of retail stores that would occupy the structures—a detail that would not make sense if the structures were to be something other than buildings. Accordingly, the feasibility studies plainly depicted buildings, and the Court of Appeals correctly affirmed the Board's modification of the ALJ's findings on that question.

In arguing to the contrary, petitioners appear to believe that the drawings themselves must satisfy the statutory definition of a building—in other words,

that the drawings themselves must contain "foundations, floors, walls and roof, having footings, columns, posts, girders, beams, joists, rafters, bearing partitions, or a combination of any number of these parts." ORS 671.010(3). Of course, drawings, by their nature, do not physically contain any of those things. Nor do the drawings need to depict all of those things in order to qualify as work done for the "planning" or "designing" of the erection of buildings; the critical question is whether the drawings are made in contemplation of the erection of buildings, and, thus, whether the physical thing *contemplated* in fact satisfies the statutory definition of a building. ORS 671.010(6). In other words, the key question is whether the *object* of the drawings was the eventual creation of a building—as opposed to a bridge, sculpture, or some other type of non-building structure—not whether the drawings themselves contained depictions of every element of that building.

Here, there is no dispute that Gramor wanted to erect buildings on the three Oregon sites, and that petitioners' work was undertaken for the purpose of determining the feasibility of doing so. (*See, e.g.*, SSER 5-8, 20; Tr 38, 57, 77, 108). Nor has there ever been any assertion that the shapes depicted in the feasibility studies—and labeled as buildings—somehow represented something other than buildings. Thus, the Board and the Court of Appeals correctly determined that the feasibility studies depicted buildings.

2. The "practice of architecture" includes activities beyond the preparation of permit- or construction-ready documents.

Petitioners next contend that only the preparation of permit- or construction-ready documents, which will be used in the actual construction of buildings, constitutes the "practice of architecture." But for the reasons that follow—in addition to those already articulated in the Board's opening brief—this court should not limit the "practice of architecture" to the preparation of permit- or construction-ready documents.

a. The plain text of the statute includes more than the creation of permit- or construction-ready documents.

Under Oregon law, the "practice of architecture" is defined in relevant part as "planning" or "designing" for the erection of any non-exempt building. ORS 671.010(6). As discussed in greater detail in the Board's opening brief, nothing in the text, context, or legislative history of that provision suggests a legislative intent to limit that definition to the preparation of permit- or construction-ready documents.[1] To the contrary, doing so would write the word "planning" entirely out of the statute. It would also ignore the legislature's

[1] The term "architecture" was first defined by statute in 1935, and Twist and Callison are correct that, within that definition, the practice of architecture is described as the "planning, designing, or supervision of the erection [of any non-exempt building]." Oregon Laws, ch 260, §2, Sec. 68-304-a (1935). That distinction has no meaningful effect on the statutory analysis, however, because the dictionary definitions of the relevant terms are effectively the same and there is little or no helpful legislative history from either the 1935 or 1957 legislative sessions.

choice to use the suffix "-ing," which connotes that the practice of architecture includes the *process* of planning and designing. Indeed, under petitioners' understanding of the statute, the practice of architecture would *begin* only once the planning and designing of a building had been completed and construction could proceed. That interpretation cannot be squared with the statutory text.

b. Activities that can be undertaken in contemplation of erecting buildings include more than the creation of permit- or construction-ready documents.

Twist and Callison rely on a Court of Appeals decision, *Davis v. Board of Architect Examiners*, 222 Or App 370, 375, 193 P3d 1019 (2008), to argue that the definition of the practice of architecture should be construed more narrowly than the text suggests.[2] There, the Court of Appeals concluded that the practice of architecture includes activities "undertaken in contemplation of erecting buildings." *Id.*

Even assuming that the *Davis* court articulated the correct standard, however, that standard encompasses more than simply the preparation of

[2] Twist and Callison assert that *Davis* forms part of the context for interpreting ORS 671.010(6). (Twist and Callison BOM at 31-33). But because *Davis* was decided well after the legislature enacted the statutory definition of the "practice of architecture," it should not enter the contextual analysis. *See, e.g.*, *Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 282 (2004) ("Statutory context includes other provisions of the same statute and other related statutes, as well as the *preexisting* common law and the statutory framework within which the statute was enacted." (emphasis added)); *Weber and Weber*, 337 Or 55, 67, 91 P3d 706 (2004) ("[T]his court presumes that the legislature enacts statutes in light of *existing* judicial decisions that have a direct bearing upon those statutes." (emphasis added)).

permit- or construction-ready documents. Indeed, the *Davis* court explicitly rejected petitioner's argument that the practice of architecture should include only plans and designs that are actually "used in the construction of a building." *Id.* Instead, the *Davis* court explained that a violation of ORS 671.020 "occurs at the time of planning or designing, if the plans or designs are executed for the purpose of erecting a building," and regardless of whether those "plans or designs ever come to fruition." *Id.* The court also acknowledged that its understanding of the "practice of architecture" could include activities that fell far short of the creation of permit- or construction-ready documents, but did not attempt to delineate a lower boundary because the facts presented—which did involve the preparation of permit-ready drawings—easily satisfied the statutory definition. *Id.* Accordingly, to the extent that this court finds *Davis*' reasoning persuasive, it supports the Board's position here.

c. The Board's interpretation serves the legislature's interests in regulating the architectural profession.

In arguing for a narrow interpretation of the "practice of architecture," Hansen takes a different approach. He focuses on the idea that only drawings that are intended to actually be used in construction implicate the legislature's interest in health and safety. Accordingly, Hansen argues, licensure requirements should extend only to the creation of permit-and construction-ready documents.

But Hansen overlooks two key facts. First, the legislature's interests are not limited to protecting health and safety. To the contrary, the legislature explicitly identified its goals in regulating the architecture profession as "to safeguard life, health and property *and to eliminate unnecessary loss and waste*." ORS 671.020(1) (emphasis added). Here, limiting the "practice of architecture" to the preparation of permit- or construction-ready documents would encourage economic loss and waste. By allowing unlicensed persons to plan and design for the erection of large-scale buildings—and for those plans and designs to be used to attract funding and prelease commitments—investors could end up losing large sums of money on projects that, once licensed professionals are finally consulted, turn out to be unfeasible. Petitioners' interpretation of the statute thus ignores—and in fact contravenes—the legislature's interest in eliminating unnecessary loss and waste. (*See* Hansen BOM at 13 (acknowledging that "[h]aving an architect earlier in the process of developing properties may help avoid waste")).

Second, activities short of preparing permit- or construction-ready documents can have health and safety implications. For example, here, Gramor used petitioners' advice at meetings with the City of Beaverton and the Fire Marshall concerning whether the proposed egress and ingress routes were sufficient to satisfy city code requirements and allow fire truck access. (SSER 7, 16-17; Tr 79-80, 93). Those kinds of considerations do implicate health and

safety concerns, and the legislature acts well within its power to require persons who are planning and designing large-scale developments to be properly licensed.

d. The Board's interpretation of the statute does not pose a constitutional problem.

Finally, petitioners contend that the Board's interpretation of the "practice of architecture" would render the statute unconstitutional. But petitioners are mistaken.

Twist and Callison contend, without explanation, that the Board's interpretation would "almost certainly violate Article I, Section 8 and Article I, Section 26 of the Oregon Constitution." (Twist and Callison BOM at 37). But because Twist and Callison fail to articulate any reasoned argument in support of that assertion, this court should decline to consider it. *See, e.g.*, *State v. Bonilla*, 358 Or 475, 493-94, 366 P3d 331 (2015) (declining to consider "insufficiently developed" argument); *Noble v. Dept. of Fish & Wildlife*, 355 Or 435, 459–60 & n 19, 326 P3d 589 (2014) (same). Moreover, the rights of free speech and assembly do not preclude the legislature from imposing reasonable restrictions on professional conduct.

Hansen takes a different tack, contending that the Board's interpretation would violate the Due Process Clause of the Fourteenth Amendment "because it would require people like Appellants to undergo training and satisfy licensing

requirements unrelated to their profession." (Hansen BOM at 15). But requiring architecture licenses for individuals who plan or design buildings falls well within the state's police power.

States have broad authority to regulate professions and require licensure, but such regulations must be rationally related to some legitimate state interest. *Craigmiles v. Giles*, 312 F3d 220, 223 (6th Cir 2002). That standard is a lenient one, under which "a statute is subject to a 'strong presumption of validity'" and will be upheld if there is "any reasonably conceivable state of facts that could provide a rational basis." *Id.* at 224 (citation omitted). Indeed, "[e]ven foolish and misdirected provisions are generally valid if subject only to rational basis review." *Id.*

Here, adopting the Board's interpretation of the "practice of architecture" would not cause Oregon's architectural licensing scheme to run afoul of due process. As discussed in greater detail above and in the Board's brief on the merits, requiring persons to be licensed architects before they may plan or design largescale commercial projects is rationally related to the state's legitimate interests in protecting health and safety and eliminating loss and waste.

Moreover, unlike the rare cases in which courts have invalidated licensure requirements, here there was a significant overlap between the skill sets tested on the architecture licensure exam and those that petitioners used in

creating the feasibility studies. *Compare id.* (concluding that statute requiring casket retailers to become licensed undertakers lacked rational basis where retailers would never handle dead bodies), *with Merrifield v. Lockyer*, 547 F3d 978, 988 (9th Cir 2008) (concluding that licensing requirement for pest controllers satisfies rational basis review where some topics on examination were relevant to plaintiff's work but others were not). Indeed, at the Board hearing, an expert testified that the creation of master plans—such as those at issue here—"is a specific area of architecture that is tested on the examination for licensure in Oregon." (SSER 20; *see also* SER 11; Tr 88). And creating such plans requires specialized knowledge of code requirements concerning egress and ingress, parking spaces, and other concerns, as well an understanding of the aesthetic and practical issues related to situating buildings on a particular site—skills that are taught and tested in architecture programs. (*See, e.g.*, Tr 77, 79-80, 83-84, 87, 105-106, 167). Requiring licensure for the creation of feasibility studies or master plans thus easily survives rational basis review.[3] *See Merrifield*, 547 F3d at 989 ("The licensing statute does not fail because it is not tailored to each precise specialization within a field.").

[3] Nor has any party contended that petitioners here, as a general matter, strictly limit their professional activities to feasibility studies or other early-stage planning. Accordingly, as applied to these petitioners, requiring them to obtain licensure would clearly present no due process problem. *See also Couey v. Atkins*, 357 Or 460, 470, 355 P3d 866, 873 (2015) (general rule is that

Footnote continued…

In sum, interpreting the statutory definition of the "practice of architecture" to include more than the creation of permit- and construction-ready documents comports with the plain text of the statute, serves the legislature's interests, and does not create constitutional problems.

3. Petitioners' conduct satisfied the statutory definition of the "practice of architecture."

Finally, Hansen argues that even if the definition of the "practice of architecture" does include more than the creation of permit- or construction-ready documents, the work he performed here still would not qualify. He first argues that the creation of feasibility studies to determine whether buildings of a certain size and type could be erected on a particular parcel of land lacks any "nexus to construction." (Hansen BOM at 6, 8). But, to the extent that such a nexus were required, it exists here. Determining whether a particular site can support a particular building has a nexus to the construction of that building; indeed, it is the *essential* first step in constructing the building. (SSER 20; Tr 77, 87, 108, 137).

Hansen also argues that the work done here was, in essence, hypothetical, because the imagined buildings could not be constructed until more detailed

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(…continued)
a plaintiff may challenge a statute on the basis that it is unconstitutional in all possible applications (a facial challenge) or unconstitutional as applied to him (as-applied challenge), but not on the basis that it would be unconstitutional as applied to some hypothetical person not before the court).

plans were made. But Hansen conflates the concept of a hypothetical project—which is never intended to be constructed—with a project that has simply not yet been realized and requires additional work before it can be built. Here, all parties concerned intended that buildings—of the approximate size, shape, and location that petitioners designed—would be built on the parcels if doing so was possible. Accordingly, petitioners' work was undertaken in contemplation of the erection of buildings; indeed, it was an important step in that process.

In sum, petitioners created feasibility studies or master plans that laid out buildings on a site, defined the shapes and sizes of those buildings, egress and ingress routes, and parking spaces, and were used to determine whether construction was possible and to attract funding. That work qualifies as planning or designing for the erection of buildings. Petitioners therefore engaged in the unlicensed practice of architecture, in violation of ORS 671.020, and this court should affirm the Board's decision and reverse the Court of Appeals on this issue.

B. Petitioners improperly represented themselves as architects or as practicing architecture in Oregon.

Oregon law prohibits unlicensed persons from "assum[ing] or us[ing] the title of 'Architect' or any title, sign, cards or device indicating, or tending to indicate, that that the person is practicing architecture or is an architect or represent[ing] in any manner that the person is an architect." ORS 671.020(1);

see also ORS 671.020(4) (a person may not "use in connection with the business of the person any words, letters or figures indicating the title of 'Architect'"). In its brief on the merits, the Board argued that those provisions function to prohibit "representations that would suggest, to a reasonable person, that an unlicensed person is an architect or is practicing architecture in Oregon." (Board BOM at 3, 10, 26-28).

Petitioners do not appear to challenge the Board's understanding of the law. Instead, Twist and Callison argue that the Board's decision, although not necessarily incorrect, simply lacked substantial reason. Hansen, in contrast, disputes that use of the phrase "Licensed in the State of Oregon (Pending)" could ever constitute a violation of ORS 671.020. But for the reasons that follow, petitioners' arguments fail.

1. Substantial reason supported the Board's order.

Twist and Callison argue that the Court of Appeals never, in fact, determined that their use of their logo and of the phrase "Licensed in the State of Oregon (Pending)" did not violate ORS 671.020. (Twist and Callison BOM at 40). Instead, they argue, the Court of Appeals simply reversed on the ground that the Board's order, as written, lacked sufficient reasoning.[4] (Twist and

[4] In their briefing before the Court of Appeals, the parties do not appear to have framed the issue as a question of whether the Board's order was supported by substantial reason.

Callison BOM at 41). The Court of Appeals' reasoning is difficult to square with that interpretation because the opinion seems to suggest that petitioners' conduct simply does not constitute a statutory violation. But the court's conclusions and disposition of the case suggest that Twist and Callison may be correct.[5] *See Twist Architecture & Design*, 276 Or App 557, 571, 369 P3d 409 (2016) (concluding that the Board's order with respect to the logo and licensure pending violations lacked substantial reason and reversing and remanding for reconsideration).

In any event, the Board's order was supported by substantial reason. The substantial reason requirement is satisfied if the Board's final order "provides 'some kind of an explanation connecting the facts of the case (which would include the facts found, if any) and the result reached.'" *Jenkins v. Bd. of Parole & Post-Prison Supervision*, 356 Or 186, 200, 335 P3d 828 (2014) (emphasis and citation omitted). That minimal requirement was satisfied here.

In concluding that petitioners' use of the Twist logo violated ORS 671.020, the Board provided an explanation connecting the facts of the case to the results reached. The Board found that petitioners had used Twist's logo, which included the word "architecture," on the plans and invoices for work

[5] If this court concludes that the Court of Appeals determined that the Board's order lacked substantial reason and agrees with that disposition, it should make clear that the Board is not precluded from restating the same violations and penalties on remand if it explains its reasoning more fully.

performed on largescale commercial developments in Oregon.[6] (SSER 4-8, 13, 21-22). And it concluded that the use of the logo in that matter indicated or tended to indicate that the firm was practicing architecture and represented that the firm was an architectural practice. (SSER 22). The Board thus connected its factual findings to its understanding of the statutory requirements and explained why those findings constituted a violation of ORS 671.020.

Similarly, the Board's order with respect to the phrase "Licensed in the State of Oregon (Pending)" was supported by substantial reason. The Board explained that that the "word 'licensed' was in past tense'" and that the "word 'pending' indicated that licensure was imminent." (SSER 24). The Board further explained that "the use of the phrase, in conjunction with the description of Oregon projects, * * * represente[ed], indicat[ed], and tend[ed] to indicate, that Hansen and Callison were practicing architecture in Oregon and therefore in violation of ORS 671.020[.]." (SSER 24). Again, the Board's order connected its findings of fact with its understanding of the law and provided a

[6] It does not matter, for the present purposes, whether the work petitioners performed on those projects technically constituted the "practice of architecture." What matters is that the logo was used in the context of what would appear—to a reasonable person—to be some kind of professional architectural work in Oregon.

reasoned basis for its conclusion that the facts it found constituted a violation of that law.[7]

2. The phrase "Licensed in the State of Oregon (Pending)," read in context, could suggest to a reasonable person that petitioners were practicing architecture in Oregon.

Hansen argues that his use of the phrase "Licensed in the State of Oregon (Pending)" could not run afoul of ORS 671.020 because the most straight-forward reading of that phrase "is that the speaker is *not yet* licensed." (Hansen BOM at 18). But Hansen overlooks that the Board did not find that the use of the phrase indicated that Hansen was *licensed* in Oregon. Instead, the Board found that the phrase—used in conjunction with discussion of work performed on non-exempt projects in Oregon—indicated that Hansen was *practicing* architecture in Oregon, regardless of whether he was technically licensed to do so. That is a reasonable interpretation of the phrase in the context it was used, and the Board therefore properly found a violation of ORS 671.020.

Hansen attempts to argue that the Board's reasoning would somehow mean that disclaimers, such as the word "pending," would have "no value," and that that interpretation would therefore run afoul of Oregon and federal free speech protections. But the Board's interpretation does not categorically render

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[7] In addition, Twist and Callison argue that this court should alter the scope of the Court of Appeals' remand to require the Board to remedy or explain any inconsistency in the penalties it imposed. (Twist and Callison BOM at 47-50). But because petitioners did not petition for review on that issue, it is not properly before this court.

disclaimers meaningless. Instead, the Board simply concluded that, under the facts presented here, use of the word "pending" did not prevent the overall representation, in the context in which it was made, from suggesting to a reasonable person that Hansen was already practicing architecture in Oregon. In other words, individuals are free to use disclaimers so long as those disclaimers are sufficient to prevent reasonable persons from being misled. But the word "pending" failed to do so here.

CONCLUSION

For the foregoing reasons—in addition to those already discussed in the Board's opening brief on the merits—this court should reverse in part the decision of the Court of Appeals.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Susan Yorke

SUSAN YORKE #145580
Assistant Attorney General
susan.yorke@doj.state.or.us

Attorneys for Petitioner on Review
Oregon Board of Architect Examiners

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 20, 2016, I directed the original Reply Brief of Petitioner on Review, Oregon Board of Architect Examiners to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon J. Kevin Shuba, attorney for respondents on review Kirk Callison and Twist Architecture & Design, Inc.; and upon Steven C. Berman and Nadia Dahab, attorneys for amicus curiae; and upon John M. Groen, attorney for respondent on review David Hansen, by using the electronic filing system.

I further certify that on December 20, 2016 I directed the Reply Brief of Petitioner on Review, Oregon Board of Architect Examiners to be served upon Ronald M. Jacobs, attorney for amicus curiae; and upon Anastasia P Boden, attorney for respondent on review David Hansen, by mailing two copies, with postage prepaid, in an envelope addressed to:

Ronald M. Jacobs
Venable LLP
575 7th Street NW
Washington, DC 20004

Anastasia P Boden
Pacific Legal Foundation
930 G St.
Sacramento, CA 95814

Continued…

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,903 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Susan Yorke

SUSAN YORKE #145580
Assistant Attorney General
susan.yorke@doj.state.or.us

Attorneys for Petitioner on Review
Oregon Board of Architect Examiners

SR8:aft/7932962