

IN THE SUPREME COURT OF THE STATE OF OREGON

ROGUE ADVOCATES, an Oregon
nonprofit membership corporation, and
CHRISTINE HUDSON, an individual,

Petitioners on Review,

v.

BOARD OF COMMISSIONERS OF
JACKSON COUNTY, an Oregon
municipal corporation, and,
MOUNTAIN VIEW PAVING, INC., an
Oregon corporation,

Respondents on Review.

Jackson County Circuit Court
Case No. 14CV11829

CA A158485

S064105

BRIEF ON MERITS – PETITIONERS ON REVIEW

Review of the Decision of the Court of Appeals
On Appeal from a Judgment of the Circuit Court for Jackson County,
Honorable Timothy C. Gerking, Judge.

Court of Appeals Opinion Filed: April 20, 2016
Author of Opinion: DeVore, Judge.
Concurring: Duncan, Judge, and Flynn, Judge

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	QUESTIONS PRESENTED AND PROPOSED RULES OF LAW.....	3
III.	LEGAL FRAMEWORK.....	4
IV.	NATURE OF PROCEEDING AND MATERIAL FACTS.....	8
	A. Nature of Action and Relief Sought.....	8
	B. Circuit Court Judgment.....	9
	C. Material Facts.....	10
	D. Court of Appeals Decision.....	15
V.	SUMMARY OF AGRUMENT.....	18
VI.	ARGUMENT.....	19
	A. Circuit Court Jurisdiction to Enforce Adopted Land Use Regulations Under ORS 197.825(3)(a) Exists “Notwithstanding” LUBA’s Exclusive Jurisdiction to Review Land Use Decisions.....	20
	i. ORS 197.825(3) does not include an exhaustion requirement.....	22
	ii. Consideration of the doctrine of primary jurisdiction is inappropriate under ORS 197.825(3).....	27
	B. ORS 197.825(3) Retains Circuit Court Jurisdiction to Resolve All Issues in a Properly Brought Enforcement Proceeding.....	31
	i. A circuit court has authority to resolve all issues in a properly brought enforcement action and does not render a “land use decision”.....	34
	ii. Equitable considerations regarding appropriate relief do not weigh on the circuit court’s subject matter jurisdiction.....	39
IV.	CONCLUSION.....	41

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Bither v. Baker Rock Crushing</i> , 249 Or 640, 438 P2d 988 (1968).....	40
<i>Boise Cascade Corp. v. Board of Forestry</i> , 325 Or 185, 935 P2d 411 (1997).....	27–28
<i>Campbell v. Bd. of County Comm’rs</i> , 107 Or App 611, 813 P2d 1074 (1992).....	24, 32
<i>City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.</i> , 206 Or App 292, 136 P3d 1160 (2006).....	39
<i>City of Oregon City v. Mill-Maple Properties, Inc.</i> , 98 Or App 238, 779 P2d 172 (1989).....	24, 32
<i>Clackamas County v. Gay</i> , 133 Or App 131, 890 P2d 444 (1995).....	39
<i>Clackamas County v. Marson</i> , 128 Or App 18, 874 P2d 110 (1994).....	21, 23, 27, 31–32
<i>DLCD v. Benton County</i> , 27 Or LUBA 49 (1994).....	37, 38
<i>Doney v. Clatsop County</i> , 142 Or App 497, 921 P2d 1346 (1996).....	16, 17, 28
<i>Doughton v. Douglas County</i> , 90 Or App 49, 750 P2d 1174 (1988).....	25, 30, 32
<i>Forman v. Clatsop County</i> , 63 Or App 617, 665 P2d 365 (1983).....	38–39
<i>Forman v. Clatsop County</i> , 297 Or 129, 681 P2d 786 (1984).....	6–7, 39

<i>Mar-Dene Corp. v. City of Woodburn,</i> 149 Or App 509, 944 P2d 976 (1997).....	32
<i>Mehring v. Arpke,</i> 65 Or App 747, 672 P2d 382 (1983).....	24
<i>Portland General Electric Co. v. Bureau of Labor and Industries,</i> 317 Or 606, 859 P2d 1143 (1993).....	21
<i>Reeves v. City of Wilsonville,</i> 35 Or LUBA 253 (1998).....	38
<i>Rogue Advocates v. Board of Comm’rs of Jackson County,</i> 14CV11829 (Jackson Co. Cir. Ct. Dec. 1, 2014).....	8
<i>Rogue Advocates, et al. v. Board of Comm’rs of Jackson County, et al.,</i> 277 Or App 651, ___ P3d ___ (2016).....	<i>Passim</i>
<i>Rogue Advocates v. Jackson County,</i> 69 Or LUBA 271 (2014) (“ <i>Rogue I</i> ”).....	13–14
<i>Rogue Advocates v. Jackson County,</i> ___ Or LUBA ___ (LUBA No. 2014-015, August 26, 2014) (“ <i>Rogue II</i> ”).....	14–15
<i>Ruhnke v. Cantrell,</i> 280 Or 297, 570 P2d 652 (1977).....	40
<i>Sauvie Island Agricultural v. GGS (Hawaii), Inc.,</i> 107 Or App 1, 810 P2d 856 (1991).....	25
<i>State v. Gaines,</i> 346 Or 160, 206 P3d 1041 (2009).....	21
<i>The Flight Shop, Inc., et al. v. Leading Edge Aviation, Inc.,</i> 277 Or App 638, ___ P3d ___ (2016).....	<i>Passim</i>
<i>Wright v. KECH-TV,</i> 300 Or 139, 707 P2d 1232 (1985).....	32–33

<i>Wygant v. Curry County</i> , 110 Or App 189, 821 P2d 1109 (1991).....	38
---	----

Statutes

ORS 28.010.....	8
ORS 174.010.....	21
ORS 174.020.....	21
ORS 197.015(2).....	5
ORS 197.015(4).....	5
ORS 197.015(10).....	6, 38
ORS 197.015(10)(a).....	5–6, 29–30, 37
ORS 197.015(10)(b).....	5, 6
ORS 197.015(12).....	6
ORS 197.015(13).....	6
ORS 197.015(19).....	6
ORS 197.805.....	20
ORS 197.810.....	4, 18
ORS 197.825.....	2, 4–5, 19, 20, 27, 33
ORS 197.825(1).....	2, 3, 18, 22, 27, 29, 32
ORS 197.825(2)(a).....	26, 30
ORS 197.825(3).....	2, 3, 8, 18, 20, 22, 31, 33, 36, 38, 39, 40
ORS 197.825(3)(a).....	3, 18, 19, 20, 21, 25–26, 31, 33, 39
ORS 215.130.....	12, 14
ORS 215.130(9).....	12
ORS 215.130(10)(a).....	12

ORS 215.185.....	32
------------------	----

Regulations

OAR 660-010-0010(3).....	30
--------------------------	----

Jackson County Land Use Regulations

LDO 1.8.1.....	10
LDO 7.2.2.....	35
LDO 7.2.2(C).....	10
LDO 11.1.2(A).....	11
LDO 11.8.1.....	12
LDO 11.8.1(A).....	12
LDO 11.8.1(B).....	12

Secondary Sources

Sullivan, Edward J. <i>From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulations in Oregon</i> , 10 Willamette L. Rev. 358 (1974).....	4
--	---

Sullivan, Edward J. <i>Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999</i> , 36 Willamette L. Rev. 441 (1999).....	4
--	---

I. INTRODUCTION

Since 2001, Defendant Mountain View Paving, Inc. (“Paving”) has operated an asphalt batching operation and associated activities on a residentially zoned property in Talent, Oregon and within a regulated flood hazard area in violation of Jackson County land use regulations. Paving first applied for required land use permits in 2011 after Jackson County issued a warning of violation. Plaintiffs Rogue Advocates and neighboring property owner Christine Hudson (collectively “Rogue Advocates”) participated in the local land use review process for Paving’s applications on behalf of residents in the neighboring Mountain View Estates senior living community. Rogue Advocates successfully challenged Jackson County’s approval of Paving’s applications before the Land Use Board of Appeals (“LUBA”). Following LUBA’s order, Jackson County initiated code enforcement and concluded that Paving did not have the requisite permits or approvals for its operations on the subject property.

Despite Rogue Advocates’ success before LUBA and the County’s finding of violations, Paving was allowed to continue its operations in violation of County land use regulations unabated while it proceeded through additional land use application and decision-making processes. With no remedy available to them through the county land use decision-making process, Rogue Advocates resorted to filing this land use enforcement action in the Jackson County Circuit Court

pursuant to ORS 197.825(3). Rogue Advocates sought enforcement of Jackson County's land use regulations and requested declaratory and injunctive relief against Paving's unlawful activities.

The circuit court dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Court of Appeals affirmed the decision of the circuit court, holding that the circuit court does not have subject matter jurisdiction over an action to enforce land use regulations where there is a pending, or potential, land use decisional process that may someday come within LUBA's exclusive jurisdiction under ORS 197.825(1). *Rogue Advocates v. Board of Commissioners of Jackson County*, 277 Or App 651, 661–62, ___ P3d ___ (2016) (“*Rogue Advocates*”). In its decision, the Court of Appeals relied heavily on its reasoning from another opinion issued on the same date, *The Flight Shop, Inc., et al. v. Leading Edge Aviation, Inc.*, 277 Or App 638, ___ P3d ___ (2016) (“*Flight Shop*”).

ORS 197.825 divides jurisdiction between the Land Use Board of Appeals and the circuit courts over review of land use decision-making and enforcement of land use laws, respectively. This case presents an issue of first impression in this Court regarding the interpretation of ORS 197.825(3), which “retains” jurisdiction in the circuit courts over actions to enforce adopted land use regulations “notwithstanding” LUBA's exclusive jurisdiction to review “land use decisions.”

The Court of Appeals decision conflicts with the plain use of the term “notwithstanding” in the statute and effectively forecloses circuit court jurisdiction in circumstances in which the legislature intended for the circuit court to retain jurisdiction to provide redress for present violations of the law. Therefore, the Court of Appeals decision should be reversed.

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. Questions Presented:

- i. Does ORS 197.825(3)(a) retain subject matter jurisdiction in the circuit courts over a claim for declaratory or injunctive relief alleging that a person is conducting development activities in violation of land use regulations?
- ii. If yes, does a pending land use application, or the mere possibility of one, that may resolve those violations and that may become subject to LUBA’s exclusive jurisdiction under ORS 197.825(1), divest a circuit court of jurisdiction otherwise retained under ORS 197.825(3)?

B. Proposed Rules of Law:

- i. Yes. Circuit courts have jurisdiction under ORS 197.825(3)(a) to determine whether a person is currently conducting a use of land in violation of land use regulations. The legislature retained a circuit court’s power to exercise their equitable authority to enforce compliance with comprehensive plans and land use regulations.
- ii. No. Circuit court jurisdiction over proceedings brought to enforce the provisions of a land use regulation exists “notwithstanding” LUBA’s exclusive jurisdiction to review land use decisions under ORS 197.825(1).

III. LEGAL FRAMEWORK

In the early years of Oregon's land use system, adjudication of land use disputes and application of land use policy fell to the state circuit courts. *See* Sullivan, Edward J. *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulations in Oregon*, 10 Willamette L. Rev. 358 (1974) (discussing evolution of standards and form of circuit court review of local agency land use decisions in first 50 years of Oregon's land use system). The circuit courts were largely relieved of this duty with the creation of the Land Use Board of Appeals in 1979. ORS 197.810. LUBA was established as an administrative body with particular expertise in land use matters in order to provide accuracy and consistency in the law and to streamline the review process. Sullivan, Edward J. *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 Willamette L. Rev. 441, 446-47 (1999). Although the legislature vested LUBA with "exclusive jurisdiction" over the review of "land use decisions," the legislature retained circuit court jurisdiction to enforce or provide relief under the land use laws through mandamus, declaratory judgment, or injunction. ORS 197.825.

ORS 197.825 provides, in relevant part,

"(1) Except as provided in * * * subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use

decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

* * * * *

- (3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:
- (a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and
 - (b) To enforce orders of the board^[1] in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order.”

(Emphases added). “Land use decision” is defined by statute to include,

- ”(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
- i. The goals;
 - ii. A comprehensive plan provision;
 - iii. A land use regulation; or
 - iv. A new land use regulation;
- (B) A final decision or determination of a state agency other than the commission^[2] with respect to which the agency is required to apply the goals; or

¹ “Board” means the Land Use Board of Appeals. ORS 197.015(2).

² “Commission” means the Land Conservation and Development Commission. ORS 197.015(4).

(C) A decision of a county planning commission made under ORS 443.763[.]”

ORS 197.015(10)(a) (Emphasis added); *see also* ORS 197.015(12) (definition of “limited land use decision”).³ “Local government” is defined as “any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use functions under ORS 195.025.” ORS 197.015(13); *see also* ORS 197.015(19) (definition of “special district”).

This is the basic statutory framework under which land use matters in Oregon have been reviewed for over 35 years. While the statutory language appears straightforward, the jurisdictional divide between LUBA and the circuit courts has been the subject of repeated litigation, resulting in a collection of decisions that leave the public, property owners, local governments and the circuit courts uncertain of where the division lies and when there is parallel jurisdiction. As Chief Justice Peterson noted in a 1984 decision regarding whether LUBA or the circuit courts had jurisdiction over a nonconforming use determination:

“If a person intended to create an inefficient, unpredictable, ineffective, unresponsive system for review of governmental acts, he or she would use the system we have in Oregon as a perfect model. Ours is senseless and cries for revision. We need an all-purpose writ.

Under our monstrous system, the most intelligent lawyer rarely can advise the client with any measure of confidence. The wealthy

³ ORS 197.015(10) also sets out a number of exceptions to the definition of “land use decision.” *See* ORS 197.015(10)(b), (c), (d), & (e). None of those exceptions are at issue in this case.

client risks his fortune by venturing into the morass of review of a public body's action. The middle class and the poor can't afford the risk. Any administrative or judicial procedure which is so complex that intelligent persons cannot know how to bring their claims or objections to the appropriate tribunal is more than suspect; it is incompatible with a system of effective government."

Forman v. Clatsop County, 297 Or 129, 133–34, 681 P2d 786 (1984) (Peterson, C.J. concurring). Under this system and a body of conflicted case law, the circuit courts often too quickly dismiss any case involving a land use issue out of fear of overstepping their jurisdictional bounds and treading into LUBA's jurisdictional territory.

The Court of Appeals decisions in *Rogue Advocates*, and the concurrently decided *Flight Shop* case, have further muddied the waters by constructing needless and unwritten barriers to circuit court jurisdiction under ORS 197.825(3) where "the land use decisional process is in progress." *Rogue Advocates*, 277 Or App at 660. However, the statute itself says nothing at all about limiting the jurisdiction of the circuit courts where there is a parallel land use decisional process. Without circuit court jurisdiction over enforcement of land use laws, property owners, local governments and interested members of the public are frustrated by a significant void in Oregon's law use system. The statutory language does not reflect a legislative intent to allow noncompliant uses of land to evade the system through deference to LUBA's "exclusive jurisdiction" over a

matter that is not yet ripe for its review. Oregon’s land use system demands clarity and this Court is now in the position to provide it.

IV. NATURE OF PROCEEDING AND MATERIAL FACTS

A. Nature of Action and Relief Sought

This action arises out of the Jackson County Circuit Court’s general judgment entered in *Rogue Advocates, et al. v. Board of Commissioners of Jackson County, et al.*, 14CV11829 (Dec. 1, 2014), based on the court’s November 12, 2014 order granting Defendants’ motions to dismiss for lack of subject matter jurisdiction and disposing of Plaintiffs’ claims. ER 40–41 (Order); ER 42–43 (General Judgment). Rogue Advocates brought this action pursuant to the declaratory judgment statute, ORS 28.010 *et seq.*, and ORS 197.825(3) against Defendants Board of Commissioners of Jackson County (“Jackson County” or the “County”) and Mountain View Paving, Inc. (“Paving”) to enforce provisions of the Jackson County Land Development Ordinance (“LDO”)—the County’s land use and zoning regulations. ER 24–39 (First Amended Complaint). Rogue Advocates’ First Amended Complaint included four separate claims for relief. ER 36–38.⁴

⁴ In the Petition for Review, Plaintiffs proposed limiting the Court’s review to only those issues relevant to the second claim for relief regarding Defendant Paving’s violations of Jackson County LDO Chapter 7—the Flood Hazard Overlay Ordinance. Pet. for Rev. at 4–5.

Rogue Advocates' complaint alleged that Paving was operating its industrial asphalt batching operation on a residentially zoned property in violation of the Jackson County LDO and that Paving lacked a required permit for its development activities within a flood hazard area. ER 35–36. Rogue Advocates sought a declaration that Paving was conducting development activities in violation of the Jackson County LDO and without the required floodplain development permit, and an injunction compelling Paving to cease its unlawful use of the subject property. ER 39. Rogue Advocates also sought declaratory and injunctive relief against Jackson County for its failure to enforce its land use regulations against Paving and for declaratory and injunctive relief regarding the County and Paving's failure to comply with orders of the Land Use Board of Appeals. *Id.*

B. Circuit Court Judgment

Jackson County moved to dismiss Rogue Advocates' complaint for lack of subject matter jurisdiction and for failure to state a claim against the County. Paving also moved to dismiss the complaint for lack of subject matter jurisdiction and also asserted that the action was untimely and that another action was pending between the same parties for the same cause. On November 12, 2014 the circuit court granted Defendants' motions to dismiss on the basis that the court lacked subject matter jurisdiction over Rogue Advocates' claims. ER 40–41. The court did not address Defendants' alternative bases for dismissal. *Id.* The circuit court

entered final judgment for Defendants on December 1, 2014. ER 42–43.

C. Material Facts

Paving began operating an asphalt batch plant on the subject property in 2001. ER 3. The subject property is located in Talent, Oregon and is zoned Rural Residential (RR-5). ER 2. Jackson County’s RR-5 zoning prohibits industrial uses such as asphalt batching operations. ER 3. The subject property is situated to the east of Bear Creek, a tributary of the Rogue River. ER 28. The entire property is located within the mapped flood hazard overlay and Area of Special Flood Hazard of Bear Creek. *Id.* The Jackson County LDO 7.2.2(C) requires a floodplain development permit “prior to initiating development activities in any Area of Special Flood Hazard.” Plaintiffs’ Opening Brief (hereinafter “Pltf. Op. Br.”), Appendix at 3.⁵ Paving has not obtained a floodplain development permit for any development activities on or uses of the subject property. ER 32–33, 34. The Jackson County LDO 1.8.1 provides that it is a violation of county law to:

- “B) Use land, construct, occupy, or place improvements * * * or conduct any activity on land, in any manner not in accordance with the standards set forth in this Ordinance * * *.
- C) Conduct without a permit any activity for which a permit is required by this Ordinance.”

Pltf. Op. Br., App. at 1; *see also* ER 28.

⁵ Relevant excerpts of the Jackson County LDO are included in the Appendix to Plaintiffs’ Opening Brief before the Court of Appeals.

Christine Hudson owns and manages Mountain View Estates, a residential community in Talent, Oregon, which is adjacent to the subject property where Paving conducts industrial activities. ER 25. Mountain View Estates is home to approximately 240 senior residents. *Id.* Rogue Advocates is an Oregon nonprofit corporation that advocates to preserve productive rural lands and to promote vibrant urban centers in southern Oregon’s Rogue Valley region. *Id.* Rogue Advocates’ members own homes and reside in the Mountain View Estates community. *Id.* Paving’s activities adversely affect Ms. Hudson’s and Rogue Advocates’ members’ rights to use and enjoy their private property.

The subject property has been zoned Rural Residential since 1982. ER 27. From 1973 to 1982, the property was zoned Open Space Development, which also does not allow industrial uses such as asphalt batching operations. *Id.* Prior to 1973 the property had no zoning. *Id.* The previous owner of the property used the property for aggregate mining and a concrete batch plant operation as far back as 1963 and until approximately 2000. ER 3. In 2001, Paving acquired the property and subsequently added the asphalt batching operations. *Id.*

The Jackson County LDO defines a “nonconforming use” as “[a] use that was lawfully established before the effective date of this Ordinance but which no longer conforms to the uses or dwelling density allowed in the zoning district in which it is located[.]” Pltf. Op. Br., App. at 4 (LDO 11.1.2(A)). The LDO enables

owners of nonconforming uses to seek “verification of lawful nonconforming status” by filing an application with the County. *Id.* at 6 (LDO 11.8.1). The County’s LDO Chapter 11 governing nonconformities implements and effectively mirrors the state statute relating to nonconforming uses. ORS 215.130(5)–(11). In order to obtain verification of a lawful nonconforming use, an applicant must present evidence that established the “existence, continuity, nature, and extent” of the use for the 10-year period preceding the application. ORS 215.130(10)(a); *Pltf. Op. Br., App.* at 6 (LDO 11.8.1(B)). Alterations to a lawful nonconforming use may be approved, provided the applicant demonstrates that there is “no greater adverse impact on the surrounding neighborhood.” ORS 215.130(9); *Pltf. Op. Br., App.* at 6 (LDO 11.8.1(A)).

Paving first applied for nonconforming use verification in 2011, but withdrew the application prior to a final decision by the County. ER 29. Jackson County later issued a code enforcement warning to Paving for its unpermitted asphalt batching operation which prompted Paving to file a second application for verification as a lawful nonconforming use in September 2012. ER 4. Paving also filed an application for a floodplain development permit at that time. *Id.* Jackson County planning staff administratively approved both applications and Rogue Advocates appealed the decisions to a Jackson County Hearings Officer. ER 4.

After conducting a hearing, the Hearings Officer issued two separate decisions. *Id.* The first related to the nonconforming use and concluded that a batch plant use on the property was a lawful nonconforming use, but that certain aspects of Paving's asphalt batching operation, as it stood in 2012, represented unapproved alterations or expansions of the lawful use. *Id.* While the hearings officer ultimately denied the application, the practical effect of the decision was that a limited batch plant operation was verified as a lawful nonconforming use. *Id.* The second decision denied Paving's floodplain permit application because it was predicated on Paving's operation as it existed in 2012, including the unapproved alterations or expansions. ER 4–5. Rogue Advocates appealed both decisions to LUBA on October 17, 2013. ER 5, 17. Shortly after Rogue Advocates filed the appeal, Paving submitted, and the County approved, a second floodplain permit application. ER 31. Rogue Advocates appealed that decision to LUBA on February 13, 2014, while the initial appeal was still pending. ER 19.

The facts that followed Rogue Advocates' appeal to LUBA are accurately recited in the Court of Appeals opinion, which, for convenience, is reproduced here in relevant part:

“In April 2014, LUBA issued an opinion, *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (LUBA Nos. 2013-102 and 2013-103, April 22, 2014) (*Rogue I*), that dealt with the hearings officer's decision on the nonconforming use. LUBA observed, “We understand [plaintiff] to argue that replacing one kind of batch plant use with the other kind represents an ‘alteration’ of the original use

that must be approved as such, and that absent such approval the alteration cannot be verified as part of the original nonconforming use.” *Id.* at 281. LUBA agreed that the hearings officer was incorrect when he concluded “that replacing a concrete batch plant with an asphalt batch plant has no significance in verifying the nature and extent of the nonconforming use.” *Id.* at 283. LUBA concluded, instead, that “[u]nder ORS 215.130(5) through (11), the only changes to a nonconforming use that do not require review and approval as alterations are (1) repairs or maintenance to the nonconforming use, or (2) restoration or replacement of the use after a fire or natural disaster.” *Id.* LUBA found that neither of those situations applied to Mountain View’s application and that, therefore, the asphalt batch plant that Mountain View constructed “is lawful only if it qualifies and is approved as an alteration of the nonconforming concrete batch plant.” *Id.* LUBA remanded the application “for the hearings officer to verify the nature and extent of the lawful nonconforming batch plant use, without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992.” *Id.* at 286.

In August 2014, LUBA issued another opinion, *Rogue Advocates v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2014-015, August 26, 2014) (*Rogue II*), that overturned Mountain View’s floodplain development permit. LUBA explained that, because the county had improperly determined the scope and nature of the legal nonconforming use on Mountain View’s property, the floodplain development permit may have allowed “structures that may have been added in 2001 when the then-existing concrete batch plant was converted to an asphalt batch plant or thereafter.” In *Rogue II* LUBA clarified that its “decision in *Rogue I* concludes that the nonconforming use only includes the *concrete* batch plant, and any related structures, [that] were on the property in 1992, and that the conversion to an *asphalt* batch plant in 2001 can be approved only as an alteration of the lawful nonconforming *concrete* batch plant use.” (Emphasis in original). LUBA indicated what would have to be done before the county could issue a floodplain development permit:

“ ‘Once the county has identified the scope and nature of the nonconforming batch plant that existed on the property prior to its conversion to an asphalt batch

plant in 2001, it will be in a position to grant floodplain development permits for the verified nonconforming use. If [Mountain View] desires[s] a floodplain development permit for the current asphalt batch plant, [it] will first need to seek approval for any alterations to the nonconforming concrete batch plant that have occurred since 1992, particularly those alterations made in 2001 or thereafter that were made to convert that concrete batch plant to the current asphalt batch plant.’ ”

Rogue Advocates, 277 Or App at 656–57 (brackets in original, underscore emphasis added).

Paving initiated remand proceedings following the *Rogue I* decision on July 31, 2014. ER 33. The Jackson County Hearings Officer held the remand hearing on August 25, 2014, which was limited to determining the nature and extent of the prior concrete batch plant use as it existed in 1992. ER 33–34. Plaintiffs’ filed their First Amended Complaint in the Jackson County Circuit Court on September 12, 2014. ER 24. At the time Plaintiffs initiated the circuit court action there were no pending applications seeking approval for Paving’s ongoing, unpermitted alteration of the nonconforming use for addition of an asphalt batch plant operation or for a floodplain development permit. ER 34.

D. Court of Appeals Decision

The Court of Appeals affirmed the decision of the circuit court that it lacked subject matter jurisdiction over Plaintiffs’ claims. *Rogue Advocates*, 277 Or App

651.⁶ The Court of Appeals referred to the pending remand proceeding following LUBA’s decision in *Rogue I*, which was limited to verifying the nature and extent of the historic nonconforming concrete batch plant use, to conclude that, in order for the circuit court to grant Plaintiffs’ requested relief, “the court would decide land use issues that were pending before the county.” 277 Or App at 660. Despite the fact that there were no pending applications for Paving’s alteration of a nonconforming use or floodplain permit, the Court of Appeals concluded:

“At the time that plaintiff filed their enforcement action, the land use decisional process had yet to determine, as to both permits, which activities were unlawful alterations of a lawful nonconforming use and which of the structures were unlawful for want of a floodplain development permit.

* * * * *

That uncertainty is why the circuit court lacks jurisdiction to grant relief as to plaintiff’s first and second claims.”

Id. at 661. The court relied on its decision in *Doney v. Clatsop County*, 142 Or App 497, 502, 921 P2d 1346 (1996), to hold that “whether the land use decisional process has reached the stage of a LUBA appeal, * * * or is simply prospectively

⁶ Paving did not reassert its alternative bases for dismissal before the Court of Appeals. See Mt. View Paving Answering Brief. Jackson County did reassert its failure to state a claim argument before the Court of Appeals. See Jackson County Answering Brief at 10–14. However, the Court of Appeals affirmed dismissal of all four of Rogue Advocates’ claims on the same basis, that the circuit court lacked subject matter jurisdiction. *Rogue Advocates*, 277 Or App at 662–64.

available as the forum for resolving land use issues, the process is exclusive.”

Rogue Advocates, 277 Or App at 659 (ellipsis in original).

In reaching its determination, the Court of Appeals also relied on its decision in *Flight Shop*, 277 Or App 683, issued on the same date as the decision in this case. See *Rogue Advocates*, 277 Or App at 660, 662–63. The plaintiffs in *Flight Shop* sought circuit court enforcement against the defendant’s ongoing use of a refueling station after LUBA had held the county’s approval of the defendant’s site plan for the refueling station was in error and remanded the decision to the county. *Flight Shop*, 277 Or App at 642–43. The circuit court dismissed the action for lack of subject matter jurisdiction and the Court of Appeals affirmed because, “the central dispute over defendant’s tanks and refueling station was then pending before the local body and could again be appealed to LUBA.” *Flight Shop*, 277 Or App at 646. Similarly relying on its decision *Doney*, the Court of Appeals held,

“[I]t matters little whether a land use decision is on its way up on appeal to LUBA or on its way down after remand from LUBA for further local proceedings, because there is no circuit court jurisdiction over what may again be a matter for LUBA review.”

Id. at 645.

The Court of Appeals adopted the reasoning of *Flight Shop* in its *Rogue Advocates* decision. See *Rogue Advocates*, 277 Or App at 660, 662. The court’s decisions stand for the proposition that once a land use decision-making process begins, or is even prospectively available, the circuit courts are completely

divested of the jurisdiction reserved under ORS 197.825(3) to provide redress to affected neighbors and local governments for ongoing land use violations.

V. SUMMARY OF ARGUMENT

Before Oregon's comprehensive land use system was adopted, the circuit courts had jurisdiction over all land use issues, including review over quasi-judicial land use decisions made by local governments. When the Land Use Board of Appeals was created, exclusive jurisdiction over the review of "land use decisions" was entrusted to it. ORS 197.810; 197.825(1). However, the legislature did not empower LUBA to enforce or enjoin violations of land use laws. The legislature provided that Oregon circuit courts, "notwithstanding" LUBA's exclusive jurisdiction, were to "retain" parallel jurisdiction to enforce adopted land use laws. ORS 197.825(3)(a).

The Court of Appeals misconstrued the language of the statute and erroneously created a bar to circuit court jurisdiction and thereby effectively eliminated the ability of affected neighboring property owners and local government to seek redress in the circuit courts and enjoin illegal uses of land. Rogue Advocates seeks reversal of the Court of Appeals decision and a ruling consistent with the legislative direction.

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VI. ARGUMENT

ORS 197.825 provides, in relevant part,

“(1) Except as provided in * * * subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * * of a local government * * *.

* * * * *

(3) Notwithstanding subject (1) of this section, the circuit courts of this state retain jurisdiction:

(a) To grant declaratory, injunctive or mandatory relief in * * * proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]”

Rogue Advocates brought this action in the Jackson County Circuit Court pursuant to ORS 197.825(3)(a) to enforce provisions of Jackson County’s adopted land use regulations. In affirming the circuit court’s dismissal of Plaintiffs’ complaint for lack of subject matter jurisdiction, the Court of Appeals imposed several new limitations on circuit court jurisdiction that the statutory text does not support.

First, the Court of Appeals determined that once a land use decision-making process is initiated through the filing of a land use application, the circuit courts are divested of jurisdiction over any issue that relates to the use of land that is subject to the pending land use application. *Rogue Advocates*, 277 Or App at 660; *Flight Shop*, 277 Or App at 646. In other words, there can be no jurisdiction in the circuit courts to redress an illegal use of land if there is a pending related land use decision-making process that may someday come before LUBA.

Then, the Court of Appeals went even further and held that where the land use decision-making process is merely prospectively available, there is no jurisdiction in the circuit courts to redress an ongoing violation of land use laws. *Rogue Advocates*, 277 Or App at 659. In adopting that interpretation of the statutory reservation of circuit court jurisdiction, the Court of Appeals went further than any prior case addressing the jurisdictional division between the circuit courts and LUBA and, in so doing, essentially eliminated the circuit court's jurisdiction.

The Court of Appeals misconstrued the jurisdictional divide in ORS 197.825 and thus limited the scope of circuit court jurisdiction over a proper land use enforcement action. The court's decision is based on a misunderstanding of the nature of *Rogue Advocates'* land use enforcement action and an improper consideration of equity as part of the jurisdictional analysis.

A. Circuit Court Jurisdiction to Enforce Adopted Land Use Regulations Under ORS 197.825(3)(a) Exists “Notwithstanding” LUBA’s Exclusive Jurisdiction to Review Land Use Decisions.

The statute provides that circuit courts “retain” jurisdiction over land use enforcement actions “notwithstanding” LUBA’s exclusive jurisdiction to review “land use decisions.” ORS 197.825(3). In other words, while LUBA was created to provide consistency and expertise in the review of “land use decisions,” ORS 197.805, the legislature intended for the circuit courts to retain their long held authority over actions for enforcement of land use laws. The statute provides for

enforcement of land use laws in every circumstance, and retains in the circuit courts jurisdiction notwithstanding what the legislature has created for LUBA's review of land use decisions.

Analysis of the jurisdictional division created by ORS 197.825 is governed by this Court's decisions in *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009), and *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993). The first step in the analysis is examination of the text and context of the statute. *Gaines*, 346 Or at 171. Second, the court will look to any relevant legislative history, regardless of any ambiguity in the statute. *Id.* at 171–72; *see* ORS 174.020. Finally, if the legislative intent remains unclear, the court may resort to general maxims of statutory construction. *Id.* at 172. A court may not “insert what has been omitted, or [] omit what has been inserted” and, where there are several provisions, the court should, where possible, adopt a construction which gives effect to all. ORS 174.010. Additionally, words of common usage are to be given their plain and ordinary meaning. *See PGE*, 317 Or at 611.

The Court of Appeals has confirmed that “ORS 197.825(3)(a) places no limits on the types of issues the court may consider in [a proceeding to enforce a provision of a land use regulation].” *Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2d 110 (1994). However, in its decision in *Rogue Advocates*, the

court has now inhibited the ability of the public and local governments to enforce land use regulations by unduly limiting the issues the circuit courts may consider in a properly brought enforcement action. Specifically, the court created an exception to circuit court enforcement jurisdiction any time a land use application is pending on the same property, or is merely prospectively available—regardless of the scope of the application—that may result in a land use decision subject to LUBA’s exclusive jurisdiction under ORS 197.825(1). In doing so, the court of appeals inappropriately incorporated principles of exhaustion and primary agency jurisdiction into its consideration of subject matter jurisdiction and ignored the plain language of the statute. ORS 197.825(3) contains no such exceptions or limitations on circuit court jurisdiction. The Court of Appeals decision frustrates the purpose and text of ORS 197.825(3).

i. ORS 197.825(3) does not include an exhaustion requirement.

In *Rogue Advocates*, the Court of Appeals held that the circuit court lacks jurisdiction over Rogue Advocates’ claims because,

“At the time that plaintiff[s] filed their enforcement action, the land use decisional process had yet to determine * * * which activities were unlawful alterations of a lawful nonconforming use and which of the structures were unlawful for want of a floodplain development permit.”

277 Or App at 661. The court relied on the principles established in *Flight Shop* to conclude that Plaintiffs’ requested relief would require the circuit court to “decide

land use issues that were pending before the county.” 277 Or App at 660. The Court of Appeals decision places undue weight on the existence of a pending land use application and, in effect, imposes an administrative exhaustion requirement on a circuit court enforcement action. The statute is unambiguous, the circuit courts have jurisdiction over actions brought to enforce adopted and binding land use laws; there is no limitation on that jurisdiction, express or implied, where there is a related pending land use decisional process.

Beginning with dicta from its decision in *Marson*, the Court of Appeals in *Flight Shop* set this new limit on circuit court jurisdiction:

“A party may bring an enforcement action in circuit court when a violator engages in a land use contrary to a zoning ordinance and that violator ‘has filed no application to allow that use or have it declared permissible through a land use decision.’ ”

277 Or App at 644 (quoting *Marson*, 128 Or App at 22); *but see Marson*, 128 Or App at 24 (while noting that defendant had filed no application, the court stated, “we do not address what effect, if any, her doing so might have had on this proceeding.”). The court then focused on the fact that at the time the plaintiffs in *Rogue Advocates* and *Flight Shop* initiated their actions in circuit court, there was a land use decisional process pending before the local government.

In *Flight Shop* the court referred to the pending remand proceeding on the defendant’s site plan review,

“Plaintiff cannot deny that the central dispute over defendant’s tanks and refueling station was then pending before the local body and could again be appealed to LUBA. Those matters were not yet resolved through the land use process when plaintiff filed its complaint. Accordingly, those matters were matters for the hearings officer, the county board, or LUBA, but not the circuit court.”

277 Or App at 646 (citing *Campbell v. Board of County Comm’rs.*, 107 Or App 611, 813 P2d 1074 (1991); *City of Oregon City v. Mill-Maple Properties, Inc.*, 98 Or App 238, 242–43, 779 P.2d 172; *Mehring v. Arpke*, 65 Or App 747, 752, 672 P2d 382 (1983)). In *Rogue Advocates* the court cited its decision in *Campbell*, for the principle that, “[a] party may not disrupt the land use decisional process by asking the court to make a land use decision ‘under the guise of circuit court enforcement.’” *Rogue Advocates*, 277 Or App at 659 (quoting *Campbell*, 107 Or App at 615). However, *Campbell* involved a circuit court mandamus action where the plaintiff sought to compel a particular outcome in a pending land use decision-making process. 107 Or App at 613. *Campbell* is inapposite; *Rogue Advocates* was not attempting to supplant the land use decisional process.⁷

In this case, and in *Flight Shop*, plaintiffs sought enforcement of adopted county land use regulations against ongoing, illegal uses of land. Although there

⁷ As the Court of Appeals noted, *Rogue Advocates* has participated in, and properly challenged, Jackson County’s land use decisions in a series of successful challenges before LUBA. 277 Or App at 655–57; *see also* Defendant Paving’s Counsel’s June 1, 2016 Letter to Court (discussing ongoing LUBA appeals related to Defendant’s land use activities).

was a pending land use decisional process before the county, Rogue Advocates' enforcement action did not seek to compel a particular outcome of that process.

Rogue Advocates, and the plaintiffs in *Flight Shop*, sought to “compel compliance with local land use legislation under circumstances where the non-compliance is not embodied in a discrete land use decision.” *Doughton v. Douglas County*, 90 Or App 49, 55, 750 P2d 1174 (1988). The Court of Appeals in *Rogue Advocates* attempted to distinguish the facts in *Doughton* from this case:

“There is a significant difference, however, between the plaintiffs' claim in *Doughton* and plaintiff's claim in this case. As we later observed, the claim in *Doughton* was that ‘the county was not requiring compliance with conditions that it had established as part of a land use decision that it had already made and that was not subject to any further automatic consideration by the county itself.’ *Sauvie Island Agricultural v. GGS (Hawaii), Inc.*, 107 Or App 1, 6, 810 P2d 856 (1991). In *Doughton*, the relevant land use decisional process had ended. Here, defendants' various land use applications were still pending when plaintiffs brought this enforcement action on issues related to those applications.”

Rogue Advocates, 277 Or App at 662. This is a distinction without a difference; Rogue Advocates seeks enforcement of final land use regulations that have been adopted by Jackson County and are “not subject to any further automatic consideration by the county.” *See id.* The plain language of ORS 197.825(3)(a) does not contain any requirement to exhaust local land use processes, the circuit court has jurisdiction “over proceedings brought to enforce provisions of an

adopted comprehensive plan or land use regulations.” (Emphasis added).⁸ There is no land use decisional process necessary in a properly brought enforcement proceeding.

By imposing a limit on circuit court jurisdiction where there is (or could be) a pending related land use proceeding, the Court of Appeals has created a system that incentivizes landowners to initiate development without first obtaining final land use approvals and then insulate their actions from an enforcement action by merely filing an application. As the Court of Appeals noted in its decision, following Jackson County’s initial code enforcement warning to Paving in 2011, “was a series of land use decisions that have yet to be resolved.” *Rogue Advocates*, 277 Or App at 653. As is the case with many land use review processes, it has taken several years for the land use decisional process to play out; and all the while Paving has continued its unpermitted use of land and Rogue Advocates’ members who own property in the adjacent Mountain View Estates community are forced to live with the impacts. The Court of Appeals’ interpretation of ORS 197.825 frustrates the purpose of the statute to enable circuit court enforcement of adopted

⁸ The legislature clearly understood how to impose an exhaustion requirement where it desired such a limit on jurisdiction; ORS 197.825(2)(a) limits LUBA jurisdiction to those cases where the petitioner has exhausted all available remedies.

land use regulations and encourages landowners to proceed with development activities, wait until challenged, and then apply for permission.

- ii. Consideration of the doctrine of primary jurisdiction is inappropriate under ORS 197.825(3).

The Court of Appeals decision also appears to hinge on principles of primary jurisdiction and the mistaken belief that ORS 197.825 prohibits parallel proceedings before a local government and the circuit courts. That interpretation disregards the words of the statute. As a result the court has exaggerated the reach of LUBA's exclusive jurisdiction under ORS 197.825(1) such that any valid enforcement action seeking to stop an illegal use of land, but involving issues that may be "susceptible to resolution through a land use decision," is outside the jurisdiction of the circuit courts. *Flight Shop*, 277 Or App at 644 (quoting *Marson*, 128 Or App at 22). This Court has described the doctrine of primary jurisdiction as follows:

"Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute fall within that agency's statutory authority. The purpose behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and courts.

* * * * *

Upon invoking the doctrine of primary jurisdiction, the disposition of the case depends on the nature of the parties' dispute and the scope of the agency's authority. If an agency has primary

jurisdiction over the entire dispute, the court action is dismissed. However, if an agency has primary jurisdiction over an issue in dispute, the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction.”

Boise Cascade Corp. v. Board of Forestry, 325 Or 185, 192–93, 935 P2d 411 (1997) (internal quotations and citations omitted).

The Court of Appeals decision turns on its belief that in order to grant the relief requested in plaintiffs’ enforcement actions, the circuit court would be required to “decide land use issues that were pending before the county.” *Rogue Advocates*, 277 Or App at 660; see *Flight Shop*, 277 Or App at 646. The court relied on its decision in *Doney v. Clatsop County*, 142 Or App at 502, a case that did not involve an action under ORS 197.825(3), to conclude, “whether the land use decisional process has reached the stage of a LUBA appeal, * * * or is simply prospectively available as the forum for resolving land use issues, the process is exclusive.” *Rogue Advocates*, 277 Or App at 659 (ellipsis in original). In *Flight Shop*, the court held,

“For all the same reasons, it matters little whether a land use decision is on its way up on appeal to LUBA or on its way down after remand from LUBA for further local proceedings, because there is no circuit court jurisdiction over what may again be a matter for LUBA review.”

Flight Shop, 277 Or App at 645.

In *Rogue Advocates*, the court relied on its holding in *Flight Shop* and went a step further to hold that circuit court jurisdiction is not only precluded by a pending land use decisional process, but also by the mere possibility of a future land use decisional process. It is undisputed that at the time *Rogue Advocates* initiated its enforcement action there was no pending land use decisional process that would have resolved Paving's ongoing violations of county land use regulations. It is also undisputed that Paving requires a floodplain development permit for its use of land and that it does not hold any such permit. 277 Or App at 653, 657.

The court has essentially created a new rule that LUBA has primary jurisdiction over all issues involving the use of land that may arise in a properly brought enforcement action such that circuit court jurisdiction is precluded. In doing so, the court has misconstrued the statute and the scope of LUBA's authority.

LUBA has exclusive jurisdiction to "review any land use decision * * * of a local government, special district or state agency * * *." ORS 197.825(1). Thus, in order for LUBA's jurisdiction to attach there must first be a "land use decision." "Land use decision" is defined to include "[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (i) the goals; (ii) a comprehensive plan provision; (iii) a land use

regulation; or (iv) a new land use regulation[.]” ORS 197.015(10)(a).⁹

Additionally, LUBA’s jurisdiction “is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]” ORS 197.825(2)(a).

Here, Plaintiffs seek enforcement of adopted land use regulations against ongoing development activities. “LUBA has jurisdiction to review land use decisions which involve [adopted land use] plans and regulations, but it has no authority or capacity to enforce their provisions.” *Doughton*, 90 Or App at 52. LUBA did not yet have jurisdiction over the land use issues that were pending or yet to come in *Rogue Advocates*; there was no “land use decision.” Therefore, LUBA did not have primary jurisdiction over the dispute or the issues that were before the circuit court.¹⁰

The Court of Appeals has acknowledged that the purpose of the statute’s reservation of jurisdiction in the circuit courts is “to enable local governments and members of the public to compel compliance with local land use legislation under circumstances where the non-compliance is not embodied in a discrete land use decision.” *Doughton*, 90 Or App at 55. In dismissing *Rogue Advocates*’ circuit

⁹ LUBA’s regulations further define its jurisdiction to review a “final decision”: “A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s)[.]” OAR 660-010-0010(3).

¹⁰ The same is true for *Flight Shop*, upon which the Court of Appeals relied.

court enforcement action based on a pending land use decisional process, the court misunderstood the scope of LUBA's exclusive jurisdiction and in turn limited the jurisdiction of the circuit courts. The Court of Appeals has essentially rewritten ORS 197.825(3) to provide that circuit court jurisdiction no longer exists "notwithstanding" LUBA's exclusive jurisdiction, but is now "subject to" LUBA's exclusive jurisdiction, such that the mere possibility of a land use decision on a related issue that may someday come before LUBA divests the circuit court of jurisdiction over a proper enforcement action. The court has created an exception to ORS 197.825(3)(a) that swallows the rule and allows violators to engage in illegal land uses and avoid circuit court enforcement while they attempt to resolve their ongoing violations through a land use decisional process. And where LUBA has no power to provide redress or enforce the laws in the interim. Nothing in the text of ORS 197.825(3) requires the circuit courts to defer to a pending or future land use process where a plaintiff properly seeks enforcement of adopted land use regulations.

B. ORS 197.825(3) Retains Circuit Court Jurisdiction to Resolve All Issues in a Properly Brought Enforcement Proceeding.

Since ORS 197.825 was enacted in 1983, the Court of Appeals has had several opportunities to define the jurisdictional line between LUBA and the circuit courts. However, this Court has never before had occasion to rule directly on the matter. Prior Court of Appeals decisions state the principle of law as, "[w]hat the

circuit court has authority to decide depends on the nature of the proceeding, not the nature of the question.” *Clackamas County v. Marson*, 128 Or App 18, 22, 874 P2d 110 (1994).

The circuit courts do not have jurisdiction to review issues that were raised and rejected in a prior land use decision. *Doughton*, 90 Or App at 52–53; *Mill-Maple Properties, Inc.*, 98 Or App at 243. The circuit courts do not have jurisdiction to compel a particular outcome in a pending land use proceeding. *Campbell*, 107 Or App at 613. Nor may a circuit court review any land use decision of a local government. ORS 197.825(1). The circuit courts do, however, have jurisdiction over actions to enforce provisions of adopted land use regulations or conditions of final land use approvals, and provide redress by enjoining illegal uses of land. *Doughton*, 90 Or App at 54; *Marson*, 128 Or App at 22; *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 516, 944 P2d 976 (1997).

This Court has only once come close to addressing circuit court jurisdiction over land use enforcement, in *Wright v. KECH-TV*, 300 Or 139, 707 P2d 1232 (1985), *cert den* 476 U.S. 1117 (1986). There the plaintiff sought injunctive relief against the defendant’s construction of a transmission tower that was approved by the county in a land use decision. The plaintiff argued that ORS 215.185 authorized the action for injunctive relief in circuit court. 300 Or at 146. The Court affirmed the decision of the Court of Appeals that the circuit court lacked

subject matter jurisdiction because the action challenged the county's issuance of permits and was thus within LUBA's exclusive jurisdiction. *Id.* at 147. Although the Court did not directly address ORS 197.825, it noted,

“If plaintiff's complaint alleged that defendants violated or proposed to violate the terms of the permits or the Marion County ordinance under which they were issued, perhaps the complaint would allege a claim for review cognizable in circuit court because no ‘land use decision’ made by a ‘local government’ would be at issue. LUBA would not be the correct forum.”

*Id.*¹¹ The same scenario is present here: Rogue Advocates alleged that Paving violated the Jackson County ordinance by engaging in uses of land without the required land use permits and no “land use decision” by a local government is at issue.

As discussed above, a related pending or potential land use decisional process that may someday come before LUBA does not divest a circuit court of jurisdiction over a land use enforcement action. Additionally, once a circuit court has jurisdiction over a proper land use enforcement action pursuant to ORS 197.825(3), it has authority to resolve all issues before it. The Court of Appeals erred in concluding that the circuit court does not have jurisdiction to resolve all

¹¹ The Court noted that ORS 197.825(3)(a) (then numbered ORS 197.825(4)(a)) “was enacted well after the plaintiff's complaint was dismissed by the circuit court, and is not relevant to the resolution of this case.” 300 Or at 144, n.8.

issues in a proper land use enforcement action. The court also improperly incorporated principles of equity into its statutory jurisdictional analysis.

- i. A circuit court has authority to resolve all issues in a properly brought enforcement action and does not render a “land use decision.”

Rogue Advocates seeks enforcement of adopted county land use regulations against ongoing development activities. However, the Court of Appeals concluded that the circuit court did not have jurisdiction to consider whether or not Paving’s ongoing development complies with adopted land use regulations. The court stated, “In order to enjoin [Paving’s] ‘illegal’ batching operations and its ‘illegal’ floodplain development, the circuit court would have to determine which of [Paving’s] operations and developments were, in fact, illegal.” *Rogue Advocates*, 277 Or App at 661–62. Similarly, in *Flight Shop* the court held the circuit court lacked jurisdiction because,

“In this case, the equities between the parties would have required prediction of a land use decision still pending before the county. If land use approval were pending and likely, a court would be unlikely to impose an injunction that would require defendant to remove the fuel tanks. Worse, the trial court would have been required to indirectly evaluate a land use proposal without benefit of the expertise of local land use staff or the judgment of local land use decision-makers.”

277 Or App at 646–47.

As an initial matter, the Court of Appeals misunderstood the determination that was required by the circuit court. The circuit court needed only to review the

adopted land use regulations and determine whether the defendant's activities were in violation of those regulations. The Court of Appeals improperly equated a determination of compliance with existing laws with the land use review and decision-making process undertaken by a local government upon the filing of a land use application. Rogue Advocates' complaint pled that Paving was conducting development activities without a required floodplain permit. ER 36. Rogue Advocates sought to enforce Jackson County LDO Chapter 7, which provides, "A Floodplain Development Permit will be required prior to initiating development activities in any Area of Special Flood Hazard[,]" where the "Area of Special Flood Hazard" includes the floodplain and floodway. ER 29; Pltf. Op. Br. App. at 3 (LDO 7.2.2) (emphasis added). The court noted that it is undisputed that "a substantial portion of [Paving's] property is within the 100-year floodplain of Bear Creek and some of the property is within the designated floodway of Bear Creek." *Rogue Advocates*, 277 Or App at 653. All that the circuit court needed to consider was first, whether Paving's use of land required a floodplain permit and second, whether Paving had the required permit.¹²

¹² Similarly, regarding Rogue Advocates' claim that Paving's asphalt batching operation violated the Jackson County LDO, LUBA had already determined that the asphalt plant constituted an unapproved alteration of a nonconforming use. ER 22. At the time Rogue Advocates filed their complaint in circuit court, Paving had not submitted any land use application seeking to alter or expand the use. LUBA

However, the court found that a determination of whether Paving’s use constituted unlawful floodplain development “would require the circuit court to first determine the scope and nature of the legal nonconforming batch plant[.]” *Id.* at 662. The Court of Appeals improperly conflated the analysis required by Jackson County in issuing Paving’s land use permits with the straightforward determination required by the circuit court in an action to enforce adopted land use regulations. In this case, the issue to be resolved by the circuit court—whether Paving is currently conducting development activities in violation of adopted land use regulations—is not the same issue that was pending before the county—whether Paving meets the criteria within the land use regulations to obtain required permits.¹³ The court erred in misconstruing the nature of the issues raised in this properly brought enforcement proceeding.

Even if the circuit court were required to make a determination regarding Paving’s nonconforming use claim, nothing in ORS 197.825(3) prohibits it from doing so. The court’s decision in *Rogue Advocates* seems to turn on the

had issued a binding decision finding that Paving’s use was outside the scope of any grandfathered nonconforming use and, therefore, an illegal use of land.

¹³ Similarly, the plaintiffs in *Flight Shop* sought enforcement against the defendant’s operation of its refueling station without final site plan approval where the county code required such approval. *Flight Shop*, 277 Or App at 640–42. There, the issue before the circuit court—whether the defendant was operating without required site plan approval—was not the issue before the county on remand from LUBA—whether the defendant’s site plan complies with the adopted land use regulations. 277 Or App at 646.

misunderstanding that resolution of Plaintiffs' claims would require the circuit court to make a "land use decision." *See Rogue Advocates*, 277 Or App at 663 (citing *DLCD v. Benton County*, 27 Or LUBA 49 (1994) for proposition that: "If the relief sought in a declaratory judgment proceeding requires that a land use decision be made, such relief is not available until the appropriate local government has rendered the required land use decision."). The Court of Appeals misconstrued the meaning of "land use decision" and erred in concluding that the circuit court could not resolve all issues in a properly brought enforcement action.

As discussed above, "land use decision" is defined by statute as:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- i. The goals;
- ii. A comprehensive plan provision;
- iii. A land use regulation; or
- iv. A new land use regulation[.]"

ORS 197.015(10)(a) (emphasis added). Here, the Court of Appeals misdirected its analysis and focused on the general nature of the issues (issues of land use), rather than the nature of the proceeding (enforcement of existing laws and decisions against an ongoing illegal use). Regardless of the complexity of the issues involved in a properly brought land use enforcement action, a circuit court does not make a "land use decision" because, by definition, a decision of the circuit court does not qualify as a "land use decision." The mere fact that enforcement of land

use regulations requires a determination of whether or not the use is in compliance with those regulations does not necessarily render a “land use decision.” *Wygant v. Curry County*, 110 Or App 189, 821 P2d 1109 (1991). “[C]ircuit courts do not make land use decisions; local governments, special districts and state agencies do.” *DLCD v. Benton County*, 27 Or LUBA at 57 (citing ORS 197.015(10)). “If the decision is properly viewed as a decision of the circuit court, then it is not a decision of the county and is not a land use decision.” *Id.*; *see also Reeves v. City of Wilsonville*, 35 Or LUBA 253 (1998) (circuit court injunction order issued pursuant to ORS 197.825(3) is not a “land use decision” appealable to LUBA).

Thus, regardless of the complexity of the issues before the circuit court in this land use enforcement action, ORS 197.825(3) “retains” circuit court jurisdiction to resolve those issues without rendering a “land use decision.” This is true even if the issue to be resolved requires a determination of whether the defendant has a lawful nonconforming use.

“Nothing in the legislation creating LUBA expressly or impliedly precludes the circuit courts from exercising original jurisdiction over declaratory judgment actions to decide vested rights issues raised initially in that forum. * * * The original vested right determination can be made by either the local government in the context of determining the application of a zoning ordinance or by the circuit court but not both.”

Forman v. Clatsop County, 63 Or App 617, 621, 665 P2d 365 (1983), *aff'd* 297 Or 129 (1984)¹⁴; *See Clackamas County v. Gay*, 133 Or App 131, 890 P2d 444 (1995) (circuit court adjudicated defendants' nonconforming use claim in action to enjoin operations in violation of county zoning); *City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.*, 206 Or App 292, 136 P3d 1160 (2006) (same). ORS 197.825(3) retains circuit court jurisdiction to resolve all issues in Rogue Advocates' land use enforcement action.

ii. Equitable considerations regarding appropriate relief do not weigh on the circuit court's subject matter jurisdiction.

ORS 197.825(3)(a) provides the circuit courts with jurisdiction to “grant declaratory, injunctive or mandatory relief” in a land use enforcement action. In *Rogue Advocates*, the Court of Appeals improperly based its consideration of subject matter jurisdiction on the scope of the plaintiffs' requested relief. Regarding Paving's floodplain violations, Rogue Advocates requested declaratory relief and “an injunction compelling Mountain View Paving to cease and desist illegal development within the area of special flood hazard.” ER 39. The court relied on Paving's nonconforming use claim and LUBA's statement that no floodplain permit could issue until the nonconforming use issue was resolved to

¹⁴ On review, this Court referred to the Court of Appeals' discussion of the circuit court's authority to make a nonconforming use determination as dicta. *See* 297 Or at 133.

conclude that the “uncertainty” over the legal status of Paving’s asphalt batching operation “is why the circuit court lacks jurisdiction to grant relief as to plaintiffs’ first and second claims.” *Rogue Advocates*, 277 Or App at 661; *see also Flight Shop*, 277 Or App at 646–47 (discussion of requested remedies as determinative of subject matter jurisdiction).

However, while equity may warrant some form of relief other than that specifically prayed for in the complaint, it has no bearing on whether a court has jurisdiction over the subject matter of the complaint. The court erred in incorporating equitable considerations—typically based on the facts and evidence developed in the record—into its jurisdictional analysis on a motion to dismiss. *See Bither v. Baker Rock Crushing*, 249 Or 640, 648, 438 P2d 988 (1968) (upholding trial court injunction of rock crushing operation based on evidence regarding character of the area, nature of the industry, and priority of occupation of respective lands); *see also Ruhnke v. Cantrell*, 280 Or 297, 302, 570 P2d 652 (1977) (directing form of injunction to be based on considerations of timing and reasonableness depending on facts in the record). ORS 197.825(3) leaves no room for consideration of equity in the jurisdictional analysis. *Rogue Advocates* acknowledge that, in light of Paving’s asserted nonconforming use defense, crafting appropriate relief here may require the circuit court to consider aspects of land use issues that are traditionally decided through the land use decisional

process. As discussed above, ORS 197.825(3) allows it to do so; the equitable considerations undertaken at the remedy stage do not divest the circuit court of subject matter jurisdiction.

VII. CONCLUSION

For all of the foregoing reasons, Rogue Advocates and Christine Hudson respectfully request that the Court reverse the decision of the Court of Appeals and remand the matter to the Jackson County Circuit Court for further proceedings consistent with this Court's order.

DATED this 5th day of December, 2016

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**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,108 words.

Type size

I 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(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 2016, I filed the original of this BRIEF ON THE MERITS – PETITIONERS ON REVIEW with the Appellate Court Administrator by the eFiling system.

I further certify that on December 5, 2016, I served a copy of the foregoing BRIEF ON THE MERITS – PETITIONERS ON REVIEW on the following parties by electronic service via the eFiling system.

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