IN THE SUPREME COURT OF THE STATE OF OREGON

ROGUE ADVOCATES, an Oregon nonprofit 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 14CV11928

Court of Appeals A158485

S064105

RESPONDENT MOUNTAIN VIEW PAVING INC.'S ANSWERING BRIEF ON MERITS

Lynn R. Stafford, OSB No. 821246

David J. Hunnicutt, OSB No. 923426

Oregonians In Action Legal Center

PO Box 230637

Tigard, OR 97281

Tel: 503-620-0258

E: mail: lynnrstafford@gmail.com

dave@oia.org

Of Attorneys for Respondent Mountain View Paving Inc.

Brett A. Baumann, OSB No. 085947

Jackson County Counsel

10 S. Oakdale, Room 214

Medford, OR 97501

Tel: 541-774-6160

Email: baumanba@jacksonounty.org

Of Attoneys for Respondent Board of Commissioners of Jackson County

Maura c. Fahey, OSB No. 133549

Crag Law Center

917 SW Oak, Suite 417

Portland, OR 97205

Tel: 503-525-2722

Email: marua@crag.org

Of Attorneys for Petitioners on Review

January, 2017

TABLE OF CONTENTS

I. INTRODUCTION 1

II. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW 3

A. Questions Presented 3

B. Proposed Rule of Law 3

III. LEGAL FRAMEWORK 3

IV. NATURE OF PROCEEDING AND MATERIAL FACTS 4

A. Nature of Action and Relief Sought 4

B. Circuit Court Judgment. 4

C. Material Facts 4

D. Court of Appeals Decision 5

V. SUMMARY OF MOUTAIN VIEW'S ARGUMENT 5

VI. ARGUMENT 7

A. Circuit Court Jurisdiction does not exist as long as there is a land use matter pending 9

1. The process to bring a nonconforming use into relative compliance with local land use regulations. 11

a. Nonconforming uses are permissible under Oregon's land use system 12

b. Verification of nonconforming use 14

2. Rogue Advocates misinterprets the Court of Appeals Decision . .17

3. The Court of Appeals did not add an exhaustion requirement to ORS 197.825(3). 20

4. The court of Appeals did not consider the doctrine of primary jurisdiction in making its decision 22

B. The Circuit Court retains jurisdiction under ORS 197.825(3) only for enforcement proceedings 23

C. The policy underlying the statutory scheme or separate jurisdiction is support by the Court of Appeals decision 25

VII. CONCLUSION 26

TABLE OF AUTHORITIES

Cases	**Page(s)**
Bergford v. Clackamas County, 15 Or App 362, 367, 515 P2d 1345 (1973)	13, 16, 24
Campbell v Bd of County Comm'rs, 107 Or App 611, 615, 813 P2d 1074 (1991)	11, 16
Doney v Clatsop County, 142 Or App 497, 921 P2d 1346 (1996)	9
Doughton v. Douglas County, 90 Or App 49, 52, 750 P2d 1174 (1988)	18, 25
Flight Shop, Inc. v Leading Edge Aviation, Inc., 277 Or App 638, 373 P3d 177(2016)	1, 18, 21
Mar-Dene Corp. v. City of Woodburn, 149 Or App 509, 515, 944 P2d 976 ((1997)	18
Medford Assembly of God v City of Medford, 297 Or 138, 140, 681 P2d 790 (1984)	14
Rogue Advocates v. Bd of Comm'rs of Jackson County, 277 Or App 651, 372 P3d 589 (2016)	*passim*
Rogue Advocates v Jackson County, 69 Or LUBA 271 (2014)(*"Rogue I")*	15, 16
Rogue Advocates v. Jackson County, __Or LUBA ___ (LUBA No. 20140015, August 26, 2014) (*"Rogue II")*	15

Simon v. Bd of Comm'rs,
91 Or App 487, 490, 755 P2d 741 (1988) 25

Statutes

ORS 197.015(10) 7, 9, 10, 18
ORS 197.105(10)(b) 9, 10
ORS 197.175(2)(d) 21
ORS 197.320 6
ORS 197.763 21
ORS 197.825 *passim*
ORS 215.130 12, 13
ORAP 5.40 1

Jackson County Land Use Regulations

LDO 11.1.3 13
LDO 11.8.1 14
LDO 13.3(168) 13

I. Introduction[1]

Plaintiffs/Petitioners Rogue Advocates and Christine Hudson (collectively, "Rogue Advocates") sought an order from the circuit court seeking to enjoin Respondent/Defendant Mountain View Paving, Inc. ("Mountain View")[2] from continuing batching activity on its land pending a LUBA determination as to whether that activity was an impermissible nonconforming use. Citing ORS 197.825, the circuit court dismissed for lack of subject matter jurisdiction. Rogue Advocates appealed. Upon review, the Court of Appeals affirmed. *Rogue Advocates* v. *Bd of Comm'rs of Jackson County*, 277 Or App 651, 372 P3d 587 (2016).[3] Thereafter, Rogue Advocates petitioned for review, and this Court granted cert.

The essence of Rogue Advocates' argument is that the both the circuit court and the Court of Appeals read ORS 197.825, the statute applicable to subject matter

---

[1] Rogue Advocates didn't follow the outline specified for an opening brief in ORAP 5.40. Mountain View will try to respond to Rogue Advocates' brief in the same order that it was presented. Mountain View assumes that the Introduction in the Rogue Advocates brief is intended to be a Statement of the Case, with argument added.

[2] Rogue Advocates also brought suit against Jackson County alleging the county failed to enforce its own land use regulations.

[3] On the same day, the Court of Appeals also decided *Flight Shop, Inc. v Leading Edge Aviation, Inc.*, 277 Or App 638, 373 P3d 177(2016), a case with similar issues as *Rogue Advocates* for the same reasons.

jurisdiction, too expansively. Rogue Advocates insists that the Court of Appeals' holding is so broad that it effectively denies the circuit court jurisdiction whenever there is a "potential land use decisional process that may someday come within LUBA's exclusive jurisdiction." Rogue Advocates' Opening Brief at 2 ("RA Brief"), *citing Rogue Advocates*, 277 Or App at 661-62. However, the Court of Appeals only held, correctly, that the circuit court lacks subject matter jurisdiction over an action to enforce land use regulations where a land use decision is actually pending. The Court of Appeals did not hold that the circuit court lacks subject matter jurisdiction over an action to enforce land use regulations where the action is merely potential—because it did not need to address the latter issue in this case. This holding emphatically does not expand the scope of LUBA's exclusive jurisdiction or, conversely, narrow the scope of the circuit court's jurisdiction.

Also, contrary to Rogue Advocates' assertion, the Court of Appeals decision does not conflict with the statutory language of ORS 197.825. Rather, the decision in fact comports with the statutory scheme established by the legislature, which vests pending land use matters in the hands of local government and LUBA.

/ / / / /

/ / / / /

II. Questions presented and proposed rules of law

A. Questions Presented:

Mountain View accepts question (i). Mountain View does not accept question (ii) because whether the "mere possibility" of a land use application could divest the circuit court of jurisdiction was not addressed by the Court of Appeals and is not necessary for the determination of this case.

B. Proposed Rules of Law:

Mountain View does not accept either of Rogue Advocates proposed rules of law. Mountain View will respond to this section of Rogue Advocates' brief in the argument section of its brief below, *infra*, at Section VI.

III. Legal Framework

Mountain View does not accept several points described in the Legal Framework section of Rogue Advocate's brief. Mountain View will respond to this section of Rogue Advocates' brief in the argument in the argument section of its brief below, *infra* at Section VI.

/ / / / /

/ / / / /

/ / / / /

IV. Nature of Proceeding and Material Facts

A. Nature of Action and Relief Sought

Mountain View accepts the statement of the Nature of Action and Relief Sought described on pages 8 -10 of Rogue Advocates brief.

B. Circuit Court Judgment

Mountain View accepts Rogue Advocates' statement relating to the circuit court judgment. RA Brief at 9-10.

C. Material Facts

There are several statements in Rogue Advocates Statement of Material Facts that Mountain View cannot accept because the statements have not been verified. Rogue Advocates simply cites to its own complaint.[4]

---

[4] Specifically, and without limitation, Mountain View objects to the following statements of fact made by Rogue Advocates. "The entire property is located within the mapped flood hazard overlay and Area of Special Flood Hazard of Bear Creek." RA 10. "Paving has not obtained a floodplain development permit for any development activities on or uses of the subject property." RA 10. "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." RA at 11. "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." RA at 15.

Other than those unverified statements, Mountain View accepts Rogue Advocates' Statement of Material Facts.

D. Court of Appeals decision.

Mountain View accepts the factual statements that Rogue Advocates makes in this section, but disputes the argument that it makes as well as some of the characterizations. Specifically, but not by way of limitation, Mountain View disagrees with the conclusion drawn by Rogue Advocates:

> "That 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." RA Brief 17-18.

Mountain View Paving will respond to this erroneous conclusion in the argument section of its brief.

V. Summary of Mountain View's Argument

ORS 197.825 gives LUBA exclusive jurisdiction to review any land use decision of a local government. The statute identifies only three specific circumstances where the circuit court retains jurisdiction. The Court of Appeals correctly understood that none of these circumstances arises here.

Mountain View had a lawful nonconforming use on the property. It had applied for verification of its nonconforming use and was properly allowed to continue its nonconforming use until the county had made a decision on verification. After the county decision, LUBA determined that Mountain View's operation of the batch plant was not the same nonconforming use as the batch plant previously on the property. As such, LUBA remanded the case to the Jackson County to determine the "nature and extent" of the alternation.

While the matter was on remand, Rogue Advocates attempted to short circuit the statutory process by filing a complaint in circuit court. Rogue Advocates is asking the circuit court to rule on whether Mountain View's use of the property is allowed; under ORS 197.825, jurisdiction lies solely with LUBA and the county for this determination.

The Court of Appeals properly held that until the county determines the nature of extent of the operation, it is impossible to know what part of Mountain View's operations are a lawful nonconforming use.

This Court should uphold the legislative created statutory scheme. It makes no sense, either legally or practically, for the two bodies to overlap when it comes to jurisdiction.

VI. Argument

The parties agree that this is a case of statutory interpretation. The statute at issue, ORS 197.825, provides in relevant part:

> (1) Except as provided in ORS 197.320 and 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 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 <u>enforce</u> the provisions of an adopted comprehensive plan or land use regulations; and
>
> (b) To <u>enforce</u> orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order. (emphases added)

Rogue Advocates brought this action against Jackson County and Mountain View in the circuit court of Jackson County for declaratory and injunctive relief, claiming that the circuit court should enjoin Mountain View from operating its batch plant on its property. Based on ORS 197.825, the circuit court dismissed the action because it lacked subject matter jurisdiction while there was a land use decision pending. The Court of Appeals affirmed.

Rogue Advocates raises two arguments in what appears to be, but is not identified, as a single assignment of error. First, Rogue Advocates claims that the Court of Appeals held that the circuit courts do not have jurisdiction "to redress an illegal use of land if there is a pending related land use decision-making process that may someday come before LUBA." RA Brief at 19.

Second, Rogue Advocates argues that the Court of Appeals 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. RA Brief at 20. ORS 197.825(3) retains circuit court jurisdiction to resolve all issues in a properly brought enforcement proceeding.

The essential flaw in Rogue Advocates' position is that it overstates the Court of Appeal's ruling. The Court of Appeals ruled only that the circuit court lacks jurisdiction over issues that are the "subject of an ongoing land use decisional process." *Rogue Advocates*, 277 Or App at 660. In other words, the circuit court lacks jurisdiction to resolve issues that are being resolved by the county and LUBA through an active, pending land use process. The Court of Appeals did not rule in

this case, as Rogue Advocates states, that the circuit court lacked jurisdiction even if the land use decision making process is merely "prospectively" available. [5]

A. Circuit Court jurisdiction does not exist as long as there is a land use matter pending.

ORS 197.825 provides that LUBA has jurisdiction over land use decisions. This is the operative statute which determines where jurisdiction lies.

Subsection (1) of ORS 197.825 states:

> (1) Except as provided in ORS 197.320 and 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, * * *

This means that LUBA has exclusive jurisdiction over land use decisions. The legislature has determined that a land use decision includes "a final decision or determination made by a local government . . . that concerns the adoption, amendment or application of, among other things, a land use regulation. ORS 197.015(10)(a). Conversely, the legislature has outlined several situations that do not constitute a land use decision, including a decision of a local government '[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A).

---

[5] The Court of Appeals cited to its earlier decision in *Doney v Clatsop County*, 142 Or App 497, 921 P2d 1346 (1996) for that proposition, but did not make that holding in this case. *Rogue Advocates*, 277 Or App at 659.

Subsection (3) of ORS. 197.825 gives the circuit court jurisdiction in three specific circumstances:

> (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(1)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; . . .
>
> (b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order.

The first circumstance occurs when the proceedings arise from decisions described in ORS 197.015(10)(b). As stated above, these are not land use decisions at all. The second circumstance occurs when there are proceedings brought to enforce a local government regulation or provision of a local government regulation. The third circumstance occurs when the court is asked to enforce a final order of LUBA.

None of these circumstances arise in this case. First, no one disputes that a land use decision exists in this case; LUBA has exercised jurisdiction several times. Second, the court is not being asked to enforce a land use regulation. (see discussion below). Third, the court is not being asked to enforce a final order of LUBA; there is no final order.

The operative word in ORS 197.825(3) is "enforce." Where an active land use application is still pending, or where the complaining party asks the circuit court to interpret land use regulations and apply them to a property, then the circuit court lacks jurisdiction under ORS 197.825, precisely because there is no request to "enforce" the land use regulations. In other words, "enforce" does not include "interpret," and the statute makes no provision for the circuit court to intervene in a pending LUBA decision. However, once the land use issues have been resolved by county and/or LUBA decision, then the circuit court has jurisdiction to enforce that decision if the property owner is ignoring it.

The Court of Appeals has recognized the plain meaning of the statute. The circuit retains jurisdiction in specific and limited circumstances to enforce completed land use decisions. A complaining party, such as Rogue Advocates, is not able to "ask the circuit court to disrupt the land use decision process by asking the court to make a land use decision 'under the guise of a circuit court enforcement proceeding.'" *Rogue Advocates,* 277 Or App at 659, *quoting Campbell v Bd of County Commsrs,* 107 Or App 611, 615, 813 P2d 1074 (1991).

1. The process to bring a nonconforming use into relative compliance with local land use regulations.

The analysis in this case starts with a lawful use of the property. In 2001, Mountain View bought the property in question with an operating concrete batch

plant. The concrete batch plant was first established when there was no zoning. In 1973 and thereafter, under new zoning regulations, batch plants were not a permitted use on the property. From 1973 through 2000, the various owners on the property all operated a concrete batch plant – the nonconforming use being lawful because it was grandfathered in. That was the status when Mountain View acquired the property. After 2001 Mountain View converted the concrete batch plant to an asphalt batch plant and added a crusher and accessory buildings. Mountain View believed the asphalt batch plant on the property was essentially a continuing lawful nonconforming use.

a. Nonconforming Uses are Permissible under Oregon's land use system.

Oregon recognizes nonconforming uses as part of its land use system. A nonconforming use violates present land use regulations by definition. However, an owner of land with a verifiable nonconforming use has a right to use land in contravention of land use zoning regulations.

ORS 215.130(5) provides in part:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued."

A use under ORS 215.130(5) is commonly referred to as a nonconforming use, though that term is not defined in ORS Chapter 215. Jackson County has defined

nonconforming use in its Land Development Ordinance ("LDO" 13.3(168)) as follows:

> "NONCONFORMING: Something that was established (lawfully or otherwise) prior to adoption of a zoning regulation that would not prevent it. A building, structure, lot, parcel or use may be rendered nonconforming by subsequent adoption of zoning regulations. Supp App 2.[6]

LDO Chapter 11 implements ORS 215.130 and provides in part:

> "11.1.3 Policies
>
> A) General Policy
>
> The County recognizes the interests of property owners in continuing to use their property. It is the general policy of the County to allow nonconformities to continue to exist and be put to productive use, while bring as many aspects of the use or structure into conformance with this Ordinance as is reasonably practicable.
>
> B) Authority to Continue
>
> Nonconformities will be allowed to continue in accordance with the regulations of this Chapter. Structures designed for a specific use that is not currently allowed in the zoning district may continue to house the use the structure was designed to accommodate (e.g., gas station in a residential zone)." App at 4-5.

The Court of Appeals has recognized that the right to continue a nonconforming use is not discretionary with the local government; rather, it is akin to a property right. *Bergford v. Clackamas County,* 15 Or App 362, 367, 515 P2d 1345 (1973)(explaining that "a nonconforming use is, by its very nature, a use

[6] The Supplemental Appendix is attached to Mountain View's brief before the Court of Appeals. The Excerpt of Record and Appendix are attached to Rogue Advocates' brief before the Court of Appeals.

which has been determined to be contrary to the zoning plan, and one which is allowed only because to eliminate it forthwith upon adoption of a zoning plan would constitute a taking without compensation" (footnote omitted)).

b. Verification of a nonconforming use.

Jackson County has adopted standards and procedures which basically permit existing nonconforming uses to continue (see LDO at App 4-7) as long as any changes to the use of the land or structures thereon result in "no greater adverse impact to the neighborhood " ORS 215.130(5), (9)(a). Jackson County's ordinances establish a process where a property owner can obtain a "verification of lawful nonconforming status." LDO 11.8.1; App at 7.

Verification of a nonconforming use requires local government first to examine whether and what nonconforming use existed on the property, and thence to determine what use the property owner has a right to continue. The process can be initiated either by the property owner or at the insistence of the county. A nonconforming use may continue regardless of whether it has been verified. The county has exclusive jurisdiction to determine whether a landowner has a right to pursue a use of land not in conformity with the county's land use regulations, and LUBA has exclusive jurisdiction to review the county's decision. *Medford Assembly of God v City of Medford,* 297 Or 138, 140, 681 P2d 790 (1984).

In this case, Mountain View's nonconforming use has not yet been verified. Mountain View applied for verification, and LUBA determined that the asphalt batch plant operated by Mountain View was not the same nonconforming use as the concrete batch plant previously on the property. As such, and because Mountain View had not applied for verification before altering the concrete batch plant to an asphalt one, LUBA remanded the case to the county to determine the "nature and extent" of the alteration. *Rogue Advocates v Jackson County*, 69 Or LUBA 271 (2014)(*"Rogue I")* Obviously, LUBA's remand did not conclude the process of determination of the issue. On the contrary, the issue remained a pending matter – to be resolved by the county. Buttressing this conclusion is the fact that LUBA found separately that it could not grant a flood plain permit until the scope of the batch plant operation was determined. *Rogue Advocates v. Jackson County*, __Or LUBA ___ (LUBA No. 20140015, August 26, 2014)(*"Rogue II").*

In Rogue Advocates' view, only verified nonconforming uses have a right to noncompliance and continued operation. There is simply no statutory or case law support for plaintiff's contention. Nothing in Oregon statutes or in Jackson County ordinances requires that a nonconforming use be verified <u>immediately</u> upon enactment of regulations that cause a lawfully established use to become nonconforming. Moreover, the statutes envision a process of application and

review that effectively obviates a requirement to cease a nonconforming the instant a law changes. Case law offers even less support to plaintiff. The owner of a nonconforming use has a right to continue regardless of whether it has been verified. *Bergford*, 15 Or App at 365 and n. 7 (to take away the right of a landowner to continue to use his nonconforming property would constitute a taking without compensation.)

It is true that when a property owner asserts a right to a non-conforming use, it may be required to undergo the verification process to continue the non-conforming use. In such instances, the county has exclusive jurisdiction to determine whether a property owner has a right to pursue a land use not in conformity the county's land use regulations, and LUBA has exclusive jurisdiction to review the county's decision.

It is important to note that this is a decisional scheme over which the circuit court exercises no jurisdiction. It was this process that was underway in this case. And, according to both the Circuit Court and the Court of Appeals, Rogue Advocates' attempt to short circuit the statutory process foundered precisely because the courts lacked the requisite jurisdiction.

Here, Mountain View's ability to obtain necessary land use permits was predicated on first obtaining a final nonconforming use determination. LUBA

stated that the County must determine the "nature and extent" of the original nonconforming use. LUBA remanded that issue to the county. *Rogue I* ER 13. Clearly, whether Mountain View's current land use is lawful is a question that requires exercise of factual or legal judgment that the county, and not the circuit court, must answer through a land use decision.

Nevertheless, it was after remand, but before any final decision by Jackson County, that Rogue Advocates brought this enforcement action in circuit court. The Court of Appeals properly held that:

> "Until the land use decisional process determines the "nature and extent" of the batch plant operations prior to 1992, it is impossible to know what portion of Mountain View's batch plan operations are a lawful nonconforming use ad what portions are potentially unlawful alterations of that nonconforming use. Similarly, the county lacks the authority to issue floodplain development permits . . . until the 'scope and nature" has been determined, the count will not know which structures are party of lawful nonconforming use . . .
>
> 277 Or App at 661.

The Court of Appeals correctly held that any enforcement action is not proper unless and until a nonconforming use verification and alteration decision are final.

2. Rogue Advocates misinterprets the Court of Appeals decision.

The Court of Appeals has been consistent in its interpretation of the statutory scheme to vest in the county and LUBA all final decisions with respect to land use

matters. In *Flight Shop*, decided the same day as *Rogue Advocates*, the Court of Appeals explained the legislature's purpose in creating a separate body to interpret land use decisions made by a county or other local governing body. LUBA's exclusive jurisdiction over the review of land use decisions is central to Oregon's statutorily created land use system. *Flight Shop, 277* Or at 644. The entire separate land use process was created so that there was a specific body devoted to ruling on the decisions made by a local government. *Id.*

The statutes create a distinct separate jurisdictional purview for courts and LUBA and the counties - contrary to Rogue Advocates' contention. The Court of Appeals has repeatedly stated that there is "no overlap in the subjects over which LUBA and the circuit court have jurisdiction. *Flight Shop,* 277 Or App at 644, *quoting Doughton v. Douglas County*, 90 Or App 49, 52, 750 P2d 1174 (1988). The land use statutes contemplate no overlap in jurisdiction. *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 515, 944 P2d 976 ((1997)("if LUBA lacks jurisdiction under ORS 197.015(10)(a), the matter comes within the circuit court's jurisdiction under ORS 197.825(3)(a)) "The jurisdictional line between the circuit courts and LUBA is a line between land use enforcement, on the other hand, and land use decision-making and administrative review, on the other hand." *Flight Shop,* 277 Or App at 644.

It is this jurisdictional line, created by the legislature, that Rogue Advocates seeks to overturn with this appeal. Rogue Advocates states that the

> "jurisdictional divide between LUBA and the circuit courts has been the subject of repeated litigation, resulting in a collection of decision that leave the public, property owners, local governments and the circuit courts uncertain of where the division lies and when there is parallel jurisdiction." (emphasis added) RA Brief at 6.
>
> ** * * *
>
> ". . . the statute itself [ORS 197.825(3)] itself says nothing at all about limiting the jurisdiction of the circuit courts where there is a parallel land use decisional process." (emphasis added) RA Brief at 8.

There is no parallel jurisdiction; nor is there any parallel land use decisional process under the statutory scheme set up by the legislature. To find otherwise would simply turn the legislature's framework on its head.

As a practical matter, both the trial court and local government would simultaneously be interpreting the same local government regulation. Clearly, such parallel jurisdiction would lead to inconsistent results with inconsistent appeals following. Surely, the legislature would not have created a system that would result not only with inconsistencies, but potential chaos.

/ / / / /

/ / / / /

/ / / / /

3. The Court of Appeals did not add an exhaustion requirement to ORS 197.825(3).

Rogue Advocates asserts that the Court of Appeals has unduly limited "the issues the circuit courts may consider in a properly brought enforcement action." It argues that 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—that may result in a land use decision subject to LUBA's exclusive jurisdiction under ORS 197.825 (1)." RA Brief at 22. By doing so, Rogue Advocates alleges that the Court of Appeals inappropriately incorporated principles of exhaustion and primary agency jurisdiction. Rogue Advocates further argues that the Court of Appeals has placed an exhaustion requirement on ORS 197.825(3) - that the Court of Appeals decision "places undue weight on the existence of a pending land use application and, in effect, imposes an administrative exhaustion requirements on a circuit court enforcement action." RA Brief at 23.

Rogue Advocates misinterprets both applicable law and the Court of Appeals decision. In the first place, Rogue Advocates' initial premise is incorrect: the Court of Appeals did not enact an exhaustion requirement. Completion of the land use process is part of the statutory scheme that the legislature enacted. Under ORS 197.175(2)(d), the legislature mandates that each city and county shall make

its own land use decisions, not the circuit court. Under ORS 197.763, the legislature set up a procedural process for local government undertaking quasi-judicial land use decisions as required by ORS 197.175(2). And then, under ORS 197.825(1) the legislature accords jurisdiction to LUBA over any appeals from those decisions. Beyond peradventure, when the legislature established the new land use system, it contemplated that the local governments would handle land use decisions, and any appeals would be to LUBA.

The statute goes on to specify the only instances where the circuit court retained its jurisdiction Subsection 3(a) deals with enforcement of a comprehensive plan or land use regulations. Subsection 3(b) deals with enforcement of orders of the board. In sum, the Court of Appeals did not impose an exhaustion requirement. It simply followed the statute the way the legislature set it up. Rogue Advocates' interpretation of the enforcement authority of the trial court is overbroad and inconsistent with the statutory scheme.

Rogue Advocates insists that it is not asking the court to supplant the land use decision process." RA Brief at 24. But that is the clear import of what the Circuit Court and the Court of Appeals found. In both the instant case and *Flight Shop*, the Court of Appeals recognized that the land use process was not resolved. And in each case the court refused to exercise jurisdiction absent that resolution precisely because only a resolution would afford the subject matter jurisdiction

to enforce a county/LUBA land use decision. LUBA remanded, with instructions to determine the nature and extent of the nonconforming use. The county has undertaken to resolve the scope. By leaping over from LUBA and the county, Rogue Advocates is asking the courts to do the same thing *ab initio* – first, determine the nature and extent of the non-conforming use – and only then order the county to enforce the court's unauthorized and extra jurisdictional determinations.[7]

4. The Court of Appeals did not consider the doctrine of primary jurisdiction in making its decision.

Rogue Advocates argues that the Court of Appeals 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." RA Brief at 29. This statement is incorrect in two respects.

First, it was the legislature and not the Court of Appeals that determined it would be in the best interests of the court and local government to bar trial courts

[7] Rogue Advocates claims that the Court of Appeals decision will "incentivize 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." RA Brief at 26. Who would do this? Why would anyone spend the time and effort to develop property knowing that they would have to file a land use application to get it approved, and tear it down if the land use permit was denied?

from deciding land use issues being resolved by the local government. This legislative policy choice underpins the entire LUBA statutory scheme.

Second, the Court of Appeals neither narrowed nor carved exceptions out of the circuit court's jurisdiction. It simply interpreted a statute according to its plain meaning. In other words, the statute provides that the circuit court has jurisdiction for the enforcement of land use regulations. The Court of Appeals did nothing to change that. It held only – and properly - that the land use decisional process must be final and completed before the parties can access the courts for enforcement proceedings of the sort Rogue Advocates instituted and for which it now advocates.

B. The Circuit Court retains jurisdiction under ORS 197.825(3) only for enforcement proceedings.[8]

Reasoning in the same vein applies to Rogue Advocates next contention. It asserts that its action in the Circuit Court was proper because an action in the circuit courts is *unrelated* to pending LUBA or county land use decisions. This singular proposition simply does not withstand analysis. Rogue Advocates correctly recognizes that the circuit courts have jurisdiction over actions to enforce provisions of adopted land use regulations. RA Brief at 32. That being so, how

[8] Subpart B of Rogue Advocates brief, pp 31 et seq, appears to contain the same arguments as Subpart A. As such, Mountain View will not reiterate its argument.

can the court's enforcement action be unrelated to the necessary underlying determination, especially, when jurisdiction to resolve the underlying issue lies in other hands? The court's authority to get involved is clearly contingent - perforce it cannot be unrelated.

In this case, the matter that must be resolved by a land use decision as to the nature and extent of the nonconforming use. The county did not shut down Mountain View's operation while it sought the necessary land use approval, because the nature of a nonconforming use is such that it has the right to continue. *Bergford,* 15 Or App at 367, n. 7. Any court action must await – is *contingent upon* - the county's final decision as to approval. The nonconforming use decision – and only that decision - will have the direct effect of determining whether and to what extent Mountain View's current use may continue. Only then will Rogue Advocates have a potential action cognizable by the courts.

Therein lies the critical relationship between county and court action that Rogue Advocates would disavow. Here, under the guise of an enforcement action, Rogue Advocates seeks to have the circuit court render a decision on the same subject as the underlying land use proceeding.

/ / / / /

/ / / / /

C . The policy underlying the statutory scheme of separate jurisdiction is supported by the Court of Appeals decision.

The legislature knew what it was doing when it set up the statutory scheme for land use in Oregon. It did not intend for the local government and the circuit court to make duplicative or redundant land use decisions. *Simon v. Bd of Comm'rs*, 91 Or App 487, 490, 755 P2d 74 (1988)(trial court dismissed plaintiff's mandamus action, holding that county's decision on an application for partition was a land use decision within exclusive jurisdiction of LUBA); *Doughton,* 90 Or App at 51 (statute contemplates no overlap in the subjects over which LUBA and the circuit court have jurisdiction.)

As explained above, Rogue Advocates seeks to have the circuit court decide *ab initio* matters clearly placed by statute within the jurisdiction of the county and LUBA – whether Mountain View can continue a nonconforming use during the active verification process. Without a making that decision as a preliminary matter, the circuit court has no provision to "enforce." Not only does the circuit court not have jurisdiction to do so, any decision would be either duplicative or potentially inconsistent with the decisions of Jackson County and LUBA in related land use proceedings.

The policy underlying the statutory scheme of separate jurisdiction is served by the opinion of the Court of Appeals.

VI CONCLUSION

However sincere Rogue Advocates' belief that the current asphalt batch is an illegal use that will remain illegal and will not obtain nonconforming use verification, the fact remains that Rogue Advocates has attempted to short-circuit an established statutory scheme by which these matters are determined. Rogue Advocates clearly erred by prematurely bringing the matter the circuit court under an unwarranted, unjustified theory that attempts to expand the definition of the court's "enforcement" jurisdiction under the statute. Both the circuit court and the Court of Appeals rejected Rogue Advocates' action on the fully justified basis of lack of jurisdiction. Under no theory or rationale is Rogue Advocates' a proper enforcement action under the statute, and no specious reasoning or resort to casuistry justifies the conclusion that court action in this matter is unrelated to the pending and active underlying LUBA/county action.

The Court of Appeals did not err in holding that the circuit court lacks subject matter jurisdiction and dismissing Rogue Advocates' action on that basis. This Court should affirm.

OREGONIANS IN ACTION LEGAL CENTER
s/ Lynn R. Stafford

Lynn R. Stafford, OSB # 821246
David J. Hunnicutt, OSB #923426
Of Attorneys for Mountain View Paving, Inc.

CERTIFICATE OF FILING AND SERVICE

I certify that on January 17, 2017, I filed Mountain View Paving Inc.'s Answering Brief with the Supreme Court using the e-Filing system and I served copies of this Answering Brief through the e-filing system on:

Maura C. Fahey
maura@crag.org
Attorney for Petitioners/Appellants

Brett Baumann
baumanba@jacksoncounty.org
Of Attorneys for Board of Commissioners

s/ Lynn R. Stafford

Lynn R. Stafford

Oregonians In Action Legal Center

Of Attorneys for Mountain View Paving, Inc.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word count of Respondent Mountain View Paving, Inc.'s Answering Brief is 5949 words.

I certify that the size of the type in the Respondent Mountain View Paving, Inc.'s Answering Brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

s/ Lynn R. Stafford

Lynn R. Stafford

Oregonians In Action Legal Center

Of Attorneys for Mountain View Paving, Inc.