IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, OREGON BOARD OF ARCHITECT EXAMINERS

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

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Opinion Filed: February 24, 2016
Author: Sercombe, P.J.
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge.

Continued…

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW, OREGON BOARD OF ARCHITECT EXAMINERS

INTRODUCTION

Twist Architecture & Design, Inc., contracted with a development company to provide master planning services for three commercial projects in Oregon. Neither Twist nor its two principals (Kirk Callison and David Hansen) were licensed to practice architecture in Oregon. They nonetheless created plans and schemes for their Oregon client showing the placement of buildings on the site, square footages, parking spaces, and egress and ingress routes, with the goal of determining whether the desired development was feasible and attracting prelease commitments from potential lessees. Twist also used its logo, which featured the word "architecture," on the drawings and invoices for those projects. Finally, Callison and Hansen's biographies on Twist's website included the phrase "Licensed in the State of Oregon (Pending)," in conjunction with references to their work on large commercial Oregon projects.

The question presented in this case is whether Twist and its principals' (hereinafter "petitioners") conduct ran afoul of the statutory provisions governing the architectural profession. The answer to that question is yes, in two ways. First, petitioners' work on the three commercial projects in Oregon violated the statutory prohibition on the unlicensed practice of architecture. Second, petitioners' use of Twist's logo on the drawings and invoices for those

projects, as well as their misrepresentation of Callison and Hansen's licensure status on Twist's website, ran afoul of the statutory prohibition against representations that suggest that an unlicensed person is an architect or is practicing architecture in Oregon. Accordingly, this court should affirm the Board's decision and reverse in part the decision of the Court of Appeals.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Oregon law defines the "practice of architecture" as "the planning, designing or supervising of the erection, enlargement or alteration of any building * * * other than an exempted building." ORS 671.010. Does the "practice of architecture" include the creation of feasibility studies or master plans that show the locations and sizes of proposed buildings and are used to determine whether construction is possible and to attract funding?

First Proposed Rule of Law

Yes. Determining whether a given site can support buildings of a particular size and type is an essential step in planning and designing for the erection of those buildings. Accordingly, such work falls within the statutory definition of the "practice of architecture."

Second Question Presented

Oregon law prohibits unlicensed persons from "assum[ing] or us[ing] the title of 'Architect' or any title, sign, cards or device indicating, or tending to

indicate, that that the person is practicing architecture or is an architect or represent[ing] in any manner that the person is an architect." ORS 671.020(1); *see also* ORS 671.020(4) (a person may not "use in connection with the business of the person any words, letters or figures indicating the title of 'Architect'"). Does the use of a logo featuring the term "architecture" on what appear to be architectural drawings and on the invoices for the creation of those drawings, or the use of the phrase "Licensed in the State of Oregon (Pending)" on a website biography, in conjunction with references to Oregon projects, violate that prohibition?

Second Proposed Rule of Law

Yes. Oregon law prohibits representations that would suggest, to a reasonable person, that an unlicensed person is an architect or is practicing architecture in Oregon. A reasonable person who sees a logo featuring the term "architecture" or the phrase "Licensed in the State of Oregon (Pending)," used with reference to large commercial projects in Oregon, would conclude that the person using the logo or phrase is an architect or is practicing architecture in Oregon. That is so even if the representations were not made in the context of performing work that itself constituted the practice of architecture.

STATEMENT OF MATERIAL FACTS

This case involves statutory and rule violations arising from the conduct of a Washington architecture firm, Twist Architecture & Design, Inc., and its

two principals, Kirk Callison, a licensed Washington architect, and David Hansen, who was not a licensed architect in any state. (SSER 4).[1]

Twist contracted with a development company, Gramor, to create master plans for three large commercial developments in Oregon, the "172nd Project," the "Progress Ridge Project," and the "Sherwood Project." (SSER 4-8). In its letters of agreement for the 172nd and the Progress Ridge projects, Twist agreed to provide "concept master planning design services," including creating master plans showing "access points to and from the property, potential building sizes, development program and statistics." (SSER 4-6).

Twist ultimately produced detailed drawings and schemes for each of the three projects, which included plans showing the placement and square footages of buildings to be erected on the site, labels indicating program and identity (such as "Fred Meyer"), precise numbers of parking spaces, and egress and ingress routes. (SSER 4-8). For one of the projects, Twist also created renderings and street level views of the proposed development. (SSER 6-7). Twist described the services it rendered to Gramor variously as "architectural services" or "professional services." (SSER 6, 8, 19).

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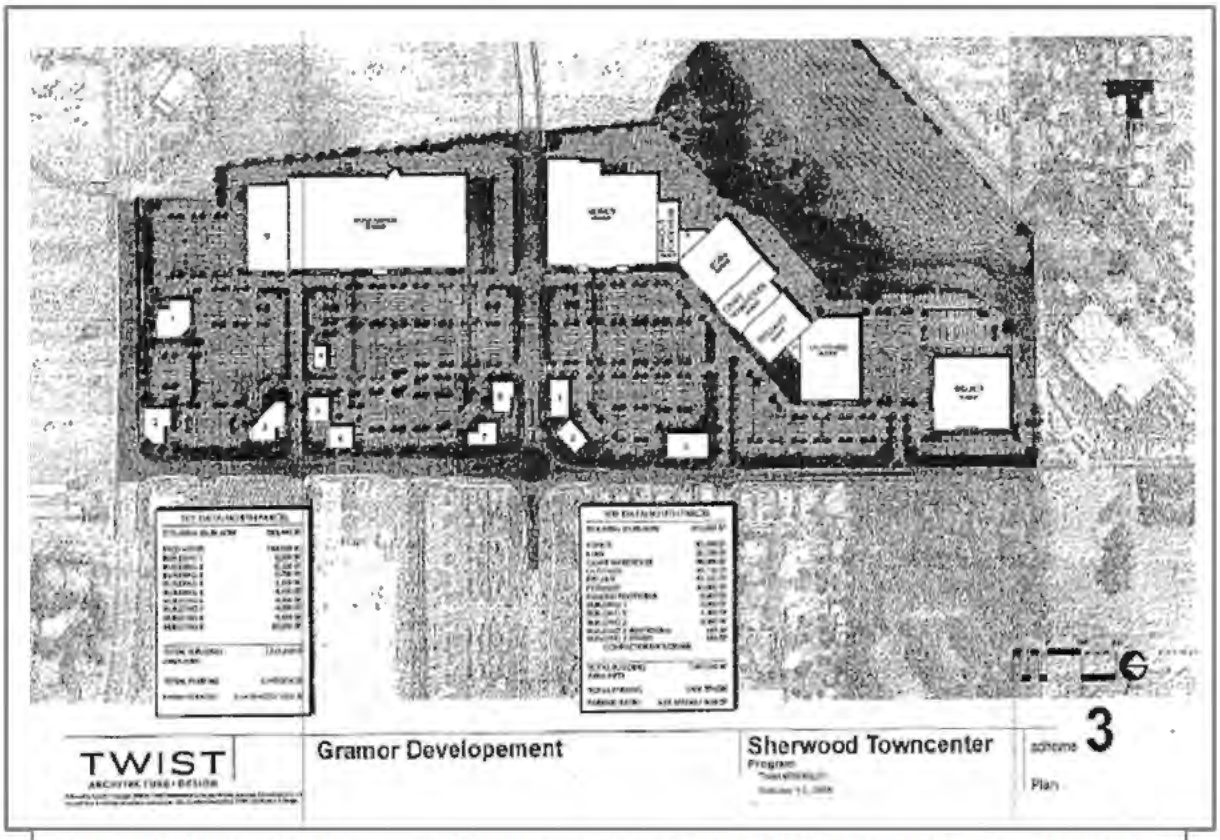
[1] The excerpt of record below did not contain a complete version of the Board's final order, so the Board has included one here.



One of the schemes petitioners produced, featuring Twist's logo in the bottom left corner. (SER 37).

Twist also used its logo, which contained the words "architecture" and "design" beneath the word "Twist," on the drawings and invoices for the three projects.[2] (SSER 4-8). And Twist's website featured photos of non-exempt commercial projects in Oregon—including the Sherwood project discussed above—with accompanying text indicating that Twist had provided "architectural design" and "master planning" services for those projects. (SSER 10-12, 22-23). Finally, Twist's website stated that both Callison and Hansen

[2] Although the font and appearance of Twist's logo changed from document to document, it always contained three words: "Twist," "architecture," and "design."

were "Licensed in the State of Oregon (Pending)," although neither of them had ever applied for licensure in Oregon. (SSER 9, 12-13, 24).

Based on that conduct, the Board issued a Notice of Intent to Impose Civil Penalty on Twist, Callison, and Hansen. (SER 1-5). The allegations ultimately broke down into two categories:

> (1) Twist and its principals engaged in the unlawful practice of architecture, in violation of ORS 671.020(1) and (4)[3], by rendering services on the three non-exempt commercial projects described above; and

[3] ORS 671.020 provides:

> (1) In order to safeguard health, safety and welfare and to eliminate unnecessary loss and waste in this state, a person may not engage in the practice of architecture or assume or use the title of "Architect" or any title, sign, cards or device indicating, or tending to indicate, that the person is practicing architecture or is an architect or represent in any manner that the person is an architect, without first qualifying before the State Board of Architect Examiners and obtaining a certificate of registration as provided by ORS 671.010 to 671.220.
>
> * * * * *
>
> (4) A person may not practice or attempt to practice the profession of architecture, or assume the title of "Architect," "Consulting Architect" or "Foreign Architect," or use in connection with the business of the person any words, letters or figures indicating the title of "Architect," "Consulting Architect" or "Foreign Architect" without first complying with ORS 671.010 to 671.220.

> (2) Twist and its principals improperly represented themselves as architects or as practicing architecture in Oregon, in violation of ORS 671.020(1), (4), and OAR 806-010-0037(7),[4] by:
>
> > (a) using Twist's logo on the drawings and invoices for the three projects;
> >
> > (b) featuring non-exempt Oregon projects on the website and describing the services rendered on those projects as architectural and master planning services; and
> >
> > (c) stating that Callison and Hansen were "Licensed in the State of Oregon (Pending)," when no such licensure was in fact pending.

(SER 1-5).

After making detailed findings of fact and conclusions of law, the Board concluded that "Twist Architecture & Design Inc. and Hansen [are] in violation of ORS 671.020(1) and (4) for the work done [on] all the three projects and Callison is in violation for his work on the 172nd and Sherwood projects." (SSER 20). The Board also found that Twist had improperly represented itself as practicing architecture in Oregon through the use of its logo on documents related to the three projects and by featuring non-exempt Oregon projects on its website. (SSER 21-24). Finally, the Board found that Callison and Hansen had improperly represented themselves as practicing architecture in Oregon by

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[4] OAR 806-010-0037(7) provides:

> Except as provided in this rule, no title, sign, cards, or device may be used to indicate or tend to indicate that the person or firm or business using the title is practicing architecture or is an architect, or represents in any manner that the person or firm or business is an architect or architectural practice.

using the phrase "Licensed in the State of Oregon (Pending)" on their website biographies in conjunction with descriptions of Oregon projects. (SSER 24). The Board imposed penalties in the amount of $10,000 each on Twist, Callison, and Hansen. (SSER 24-25).

Petitioners appealed, and, in a written opinion, the Court of Appeals reversed in part. *Twist Architecture & Design, Inc.*, 276 Or App 557, 369 P3d 409 (2016). The court reversed the Board in three particular areas. First, it determined that the master planning work on the three projects did not constitute the "practice of architecture" under ORS 671.010 and 671.020 because the drawings produced were not intended to be used to obtain permits or actually construct the buildings. *Id.* at 568. Second, it concluded that the use of Twist's logo on the drawings and invoices for those projects did not tend to indicate that Twist was practicing architecture or was an architectural firm in Oregon because the projects themselves did not constitute the practice of architecture. *Id.* at 570-71. Third, the court concluded that the representation that Callison and Hansen's Oregon licensure was pending did not constitute a violation because it did not tend to indicate that they were *currently* licensed in Oregon. *Id.* at 571.[5] The Board petitioned for review, which this court granted.

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[5] The Court of Appeals affirmed the Board's conclusion that, by featuring non-exempt Oregon projects on its website, Twist improperly represented itself as practicing architecture in Oregon. *Id.* at 571-72.

Footnote continued…

SUMMARY OF ARGUMENT

1. Oregon law provides that "a person may not engage in the practice of architecture" without a license. ORS 671.020(1); *see also* ORS 671.020(4). The "practice of architecture," in turn, is defined as "the planning, designing or supervising of the erection, enlargement, or alteration of any building or of any appurtenance thereto other than exempted buildings." ORS 671.010(6).

Petitioners—all of whom were admittedly unlicensed in Oregon—violated those provisions by planning and designing for the erection of non-exempt buildings on three sites in Oregon. They contracted with a development company to provide master planning services for the development of the three sites, and they ultimately produced detailed plans showing the location and sizes of proposed buildings on the site, the number of parking spaces necessary to accommodate consumers and comply with city codes, and routes of egress and ingress. The plans were used to determine whether the erection of the desired buildings was feasible and to attract prelease commitments, which were needed to fund the projects. That work constituted the unlicensed practice of architecture.

2. Oregon law also prohibits unlicensed persons and entities from "assum[ing] or us[ing] the title of 'Architect' or any title, sign, cards or device

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(…continued)
Petitioners have not requested review of that conclusion, so it is not at issue here.

indicating, or tending to indicate, that that the person is practicing architecture or is an architect or represent[ing] in any manner that the person is an architect." ORS 671.020(1); *see also* ORS 671.020(4); OAR 806-010-0037(7). Those provisions are intended to prohibit representations that would suggest, to a reasonable person, that the person is an architect or is practicing architecture in Oregon.

Twist violated those provisions by using its logo—which featured the firm name, along with the words "architecture" and "design"—on the drawings and invoices for the three non-exempt Oregon projects described above. The use of Twist's logo on what appear to be architectural plans for large commercial projects in Oregon, as well as on invoices describing the services rendered as "professional," would suggest to a reasonable person that Twist was an architecture firm or that it was practicing architecture in Oregon.

Petitioners also violated those provisions by including the phrase "Licensed in the State of Oregon (Pending)" on Callison and Hansen's website biographies, in conjunction with references on the same page to work performed on non-exempt Oregon projects. A person viewing that webpage could reasonably conclude that Callison and Hansen were provisionally licensed in Oregon or, in any event, that they were in fact practicing architecture in Oregon.

ARGUMENT

The critical facts in this case are not in dispute.[6] The only question is whether those facts amount to violations of ORS 671.020. Accordingly, the outcome of this case depends upon the correct construction of that statute.

The paramount goal of statutory construction is to determine legislative intent. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). In determining legislative intent, this court engages in a two-step analysis. First, it looks to the text of the statute, viewed in context. *See Gaines*, 346 Or at 171. ("[T]ext and context remain primary, and must be given primary weight in the analysis."). The court may also consider legislative history at the first level of analysis if doing so "appears useful," but "the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine." *Id.* at 172. Second, if, after analyzing the text, context, and legislative history, the legislature's intent remains ambiguous, "the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

Applying the first level of that analytical framework here reveals that petitioners violated ORS 671.020(1) and (4) by engaging in the unlicensed

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[6] The Board modified the ALJ's factual findings in certain respects, most significantly by concluding, as a factual matter, that petitioners' drawings depicted buildings. Petitioners challenged those factual findings before the Court of Appeals, but the Court of Appeals affirmed the Board's modified findings. *Twist*, 276 Or App at 563-64.

practice of architecture and by representing that they were architects or were practicing architecture in Oregon. The court need not resort to maxims of construction in this case.

A. Petitioners engaged in the unlicensed practice of architecture.

Under ORS 671.020(1), "a person may not engage in the practice of architecture" without a license. *See also* ORS 671.020(4) (providing that a person "may not practice or attempt to practice architecture" without a license). Again, the "practice of architecture" is defined as "the planning, designing or supervising of the erection, enlargement, or alteration of any building or of any appurtenance thereto other than exempted buildings." ORS 671.010(6).[7] Here, the text, context, and legislative history of the relevant provisions establish that the work petitioners performed for Gramor qualified as the "practice of architecture."

1. The text of the provision defining the "practice of architecture" includes the work that petitioners performed here.

Turning first to the text of the statute, the "practice of architecture" is defined broadly to include, as relevant here, "planning" or "designing" for the

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[7] In 2013, this statute was renumbered as ORS 610.010(7), and the term "supervising" was replaced with the term "observing." Or Laws 2013, ch 196, § 1. That change was merely a clarification and, in any event, has no bearing on the analysis here because petitioners neither supervised nor observed the erection of the projects at issue. (HB 2268, Ex 14, Testimony by James Denno, February 6, 2013); *see also* (HB 2268, Ex 3, Testimony by James Denno, May 2, 2013 (describing HB 2268 as a "statutory housekeeping bill")).

erection of any non-exempt building. When interpreting statutory text, "words of common usage typically should be given their plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). And because the statute does not define "planning" or "designing," the dictionary definitions of those terms are pertinent. *See Jenkins v. Board of Parole*, 356 Or 186, 194, 335 P3d 828 (2014) ("Because the legislature has not expressly defined the words in the disputed phrase, dictionary definitions * * * can be useful.").

The version of Webster's Dictionary in effect in 1957—when the definition of "practice of architecture," which included references to both "planning" and "designing," was added to the statute—provides a good starting point. It defines "plan" as "[t]o form a plan of or for; to represent, as by a diagram * * * [t]o devise or project as a method or course of action; to prearrange the details of[.]" *Webster's New Int'l Dictionary* 1879 (unabridged 2d ed 1934). "Design," in turn, was defined to mean, as most relevant in this context, "[t]o plan mentally; to conceive of as a whole, completely or in outline; to organize a scheme of; to plot; — disting[uish] from *execute*; as, A *designed* this church, but B carried out his plans" or "[t]o conceive or execute a scheme or plan for the making of anything; to make a design or designs." *Id.* at 707. The definition of "design" as a noun included "[a] preliminary sketch; an

outline or pattern of the main features of something to be executed, as of a picture, a building, or a decoration; a delineation; a plan." *Id*. at 708.

To the extent that the disputed words are terms of art within the architectural profession, the Dictionary of Architecture and Construction provides additional insight. *See, e.g.*, *Comcast Corp. v. Dept. of Revenue*, 356 Or 281, 296, 337 P3d 768 (2014) (explaining that an exception to the ordinary meaning assumption "arises when the legislature uses technical terminology—so-called 'terms of art'—drawn from a specialized trade or field."). "Planning" is defined as "[t]he process of studying the layout of spaces within buildings *and of buildings and other facilities or installations in open spaces* in order to develop the general scheme of a building or group of buildings." *Dictionary of Architecture and Construction* 736 (4th ed 2006) (emphasis added). A "plan" is defined as a "two-dimensional graphic representation of the design, horizontal dimensions of a building, and location, as seen in a horizontal plane viewed from above." *Id.* at 734. And "design," in turn, is defined as "[t]o compose a plan for a building[;] [t]he architectural concept of a building as represented by plans, elevations, renderings, and other drawings[;] [a]ny visual concept of a man-made object, as of a work of art or a machine." *Id*. at 305.

The work petitioners did here fell within the dictionary definitions of "planning" and "design." Most clearly, petitioners engaged in "planning" for the erection of non-exempt buildings on the three sites. They did so by

"studying the layout of buildings and other facilities or installations in open spaces in order to develop the general scheme of a building or group of buildings." *Dictionary of Architecture and Construction* at 736; (SSER 15-20). They also corresponded with Gramor about the needs of potential lessees, city code requirements, property lines, and layout preferences. (SSER 16, 18-19). They then "form[ed] a plan" for how Gramor could achieve its development goals on the sites—where the buildings should be located on the sites, what sizes they should be, how many parking spaces would be required, how consumers would enter and exit the development, and even how fire trucks could access the sites. *Webster's* at 1879; (SSER 15-20). They also represented their proposed course of action "by diagram," through both drawings of the two-dimensional footprints of the buildings on the sites (which, themselves, qualified as plans), as well as, for one of the sites, perspectival renderings. *Webster's* at 1879; (SSER 15-20). Finally, petitioners described their services in the letters of agreement for two of the projects as "master planning." (SSER 16-17). Accordingly, under the plain meaning of the term "planning," petitioners' conduct here qualifies.

Petitioners' work also qualifies as "designing" for the erection of buildings. They made "preliminary sketch[es]," which "organized the scheme" for erecting buildings on Gramor's chosen sites in the manner that would best serve Gramor's development goals and comply with the relevant regulations.

Webster's at 707-08; (SSER 15-20). They also chose the basic design features of the buildings—shape, size, egress and ingress—and represented those features through drawings and renderings. (SSER 15-20). And they provided multiple schemes for each project to allow Gramor to choose which design would best serve the needs of its potential lessees. (SSER 16-18). Thus, although petitioners' work had not yet progressed to highly detailed design—which might include material and fixture choices, systems designs, and precise dimensions—it nonetheless constituted preliminary design work undertaken for the purpose of determining the feasibility and general layout of buildings to be erected on the site.

In sum, the dictionary (both common and professional) definitions of "planning" and "designing" support a broad reading of the "practice of architecture" that would include the creation of master plans or feasibility studies that determine whether a site can support buildings of a particular size and program, as well as the placement of those buildings on the site. Under the plain meaning of those statutory terms, then, petitioners' work for Gramor on the three Oregon projects constituted the "practice of architecture."

As a final matter, it is worth noting that the Court of Appeals' contrary conclusion is unsupportable from a textual perspective. Under the Court of Appeals' decision, the practice of architecture begins with the production of construction- or permit- ready drawings. *Twist*, 276 Or App at 567-68. But that

interpretation finds no support in the text of the statute. To the contrary, it writes—at a minimum—the word "planning" entirely out of the statute. That result cannot be squared with this court's basic tenets of statutory interpretation. *See* ORS 174.010 ("In the construction of a statute, the office of a judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted or to omit what has been inserted[.]"); *State v. Clemente-Perez*, 357 Or 745, 755, 359 P3d 232, 239 (2015) ("As a general rule, we also assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.").

Moreover, the Court of Appeals' interpretation appears to contemplate that the practice of architecture begins only once the building has—in effect—been completely designed. But the use of the suffix "-ing" denotes an "action or process." *Webster's Third Int'l Dictionary* at 1162 (unabridged ed 2002). That suffix therefore suggests that the practice of architecture occurs while the planning and designing is in process, not simply once the designs have been fully realized. The Court of Appeals' interpretation thus conflicts with the plain text of the statute.

2. The statutory context supports the conclusion that the "practice of architecture" includes the work that petitioners performed here.

The statutory context supports a broad reading of the "practice of architecture" that includes the kind of work that petitioners performed here. That is so for several reasons.

First, the goals of the regulatory scheme are broad. By its own words, the legislature sought, in preventing the unlicensed practice of architecture, "to safeguard health, safety and welfare and to eliminate unnecessary loss and waste in this state." ORS 161.020(1). A narrow interpretation of the "practice of architecture"—such as the one espoused by the court below—would not well serve those broad legislative goals.

The Court of Appeals suggested that the practice of architecture begins with the preparation of construction- and permit-ready documents. But that interpretation would allow unlicensed and unqualified persons to plan and design large-scale commercial projects, and for those designs to be used to attract lessees and investors, right up until the point that finished, permit- and construction- ready drawings are produced. By that point, developers and investors will likely have invested large amounts of resources in a project that may, once licensed professionals are consulted, turn out to be impossible. The Court of Appeals' narrow construction of the statute would therefore

contravene the legislature's explicit intent to "safeguard the health, safety, and welfare of the public and eliminate unnecessary loss and waste."

Second, viewing the regulatory scheme as a whole, the work petitioners performed here fits within the scope of conduct subject to regulation. For example, at the hearing before the Board, an expert testified that the creation of master plans "is a specific area architecture that is tested on the examination for licensure in Oregon." (SSER 20); *see also* ORS 671.060(1) (directing the Board to examine applicants for licensure). That fact—that the very work petitioners performed here is tested on architecture licensure exams in Oregon—supports the conclusion that it is part of the conduct that the statutory scheme was designed to regulate.

And third, the scope of the "practice of architecture" is not unduly broad, particularly when considered in light of other provisions of the statute. *See Force v. Dept. of Rev.*, 350 Or 179, 188, 252 P3d 306 (2011) ("'[C]ontext' includes, among other things, other parts of the statute at issue."). Indeed, ORS 671.030 exempts from the "practice of architecture" a wide swath of activities, including conduct related to the design and construction of single-family homes, appurtenances to those homes, buildings under 4,000 square feet in area and less than 20 feet high, farm buildings, and certain non-structural alterations, as well as work done under supervision of architects or by certain other classes of professionals. The legislature has thus reasonably chosen to define the

"practice of architecture" broadly, but to exclude from that definition smaller-scale or residential work that does not seriously threaten the welfare of the public or encourage loss and waste.

In addition, to qualify as the "practice of architecture," the planning or designing must be for the purpose of "the erection, enlargement, or alteration of any [non-exempt] building." ORS 671.010(6). In other words, as the Court of Appeals aptly put it in *Davis v. Board of Architect Examiners*, 222 Or App 370, 375, 193 P3d 1019 (2008), the work has to be done in contemplation of actually erecting the buildings planned or designed. And, again, that requirement makes sense in light of the fact that designing hypothetical projects does not involve the same risk of waste, loss, and danger posed by designing for the purpose of actually erecting buildings.

Accordingly, under the plain language of the statute as a whole, neither the landowner sketching plans for his future home nor the student designing a hypothetical skyscraper is engaging in the "practice of architecture." And the statutory exclusion of those who are designing smaller-scale and hypothetical projects supports the conclusion that the legislature intended to define the "practice of architecture" broadly, while carving out specific conduct that does not significantly implicate the legislature's goals of safeguarding the health, safety, and welfare of the public and eliminating unnecessary loss and waste.

Here, petitioner's work was neither small-scale nor hypothetical. Instead, the correspondence between petitioners and Gramor makes clear that petitioners' work was undertaken with the serious goal of determining the feasibility of erecting large commercial buildings on three Oregon sites and defining the basic characteristics of those buildings. Petitioners included highly specific details in the plans they produced, including precise square footages, shapes and placements of buildings, and even the names of prospective tenants. (SSER 4-8, 15-19). In some cases, they also altered the designs to conform to prospective lessees' needs and Gramor's preferences. (SSER 5-8, 16-19). Moreover, the drawings petitioners produced were used to attract lessees, whose prelease commitments were necessary to fund the project. (SSER 19). Gramor also used petitioners' advice about city code requirements and fire truck access at meetings with the City of Beaverton and the Fire Marshall regarding the Progress Ridge development. (SSER 16-17). Accordingly, although the developments were not ultimately constructed precisely to petitioners' specifications, it is clear that petitioners were actually planning and designing for the erection of those buildings.

3. To the extent that it is useful, the legislative history also supports the conclusion that the "practice of architecture" includes the work that petitioners performed here.

The legislative history of the relevant provisions appears to be largely unhelpful. There is scant evidence of legislative intent in the records from

1957, when the definition of the "practice of architecture" was added to the statute. Accordingly, the legislative history of the original enactment of the definition of "practice of architecture," which included the terms "planning" and "designing," adds little to the analysis.

Subsequent legislative history—although admittedly of less persuasive value—sheds some additional light on the matter. In 1979, in response to the impending sunset of the provisions at issue here, legislative researchers created a detailed report on the statutory scheme regulating the architectural profession. The 1979 report described the architectural profession as follows:

> To design a building, an architect prepares sketches showing how the spaces might be arranged and how the building will relate to its site; then, drawings showing floor plans and elevations and an outline of materials, finishes, and mechanical and electrical systems to be used; and finally, actual construction documents (working drawings and specifications) for use in bidding and securing building permits.

(1979 Legislative Report at 7). In other words, before deciding to reenact the provisions at issue here, the legislature appears to have recognized that the practice of architecture encompasses much more than simply the preparation of permit- and construction-ready documents; indeed, it apparently viewed the preparation of such documents as the *final* phase of design. Thus, at least some legislative history supports a broad construction of the "practice of architecture" that includes preliminary studies, such as those petitioners performed here.

Moreover, in analyzing whether—and in what form—to reenact the provisions at issue here, the 1979 report appeared to recognize that the Board had interpreted the statutory definition of the "practice of architecture" quite broadly. The Board's rule—adopted in response to the statutory directive to develop rules to implement the statutory provisions—explained that the "practice of architecture," as defined by statute, "includes all analysis, calculations, research, graphic presentation, literary expression, and advice essential to the preparation of necessary documents for the design and construction of buildings[.]" OAR 10-072 (1964). The 1979 report quoted that rule in full, but recommended no changes to the statutory definition. (1979 Legislative Report at 3).

Given that the legislature was, at least by 1979, aware of the agency's broad reading of the statutory provision, had it intended a narrower definition, it presumably would have amended the statute to provide one. *See State v Walker*, 356 Or 4, 22, 333 P3d 316, 327 (2014) ("Particularly where the legislative history demonstrates that the legislature was aware of the expansive nature of an enactment's text, yet chose not to narrow it, we are constrained to interpret the statute in a way that is consistent with that text, which is, in the end, the best indication of the legislature's intent."). But despite amending the statutory scheme governing architecture several times throughout the years—including making "housekeeping" changes to the precise provisions at issue

here—the legislature has never narrowed the definition of the "practice of architecture." *See, e.g.*, *Bonds v. Farmers Ins. Co.*, 349 Or 152, 158-59, 240 P3d 1086 (2010) (that legislature chose to amend particular provision "in one way but not another is an indication that the legislature consciously chose to continue" to intend the results of original provision); *but see Hilton v. MVD*, 308 Or 150, 156, 775 P2d 1378 (1989) ("[A] later legislature's failure to change a previously-enacted statute is not part of the legislative history of that statute[.]").

In sum, to the extent that the legislative history is helpful, it suggests that the legislature intended to define the "practice of architecture" broadly, and that it envisioned the practice as including preliminary work showing the sizes and placement of buildings on a site. Thus, under the plain meaning of the terms "planning" and "designing," read in context and in light of relevant legislative history, the work petitioners did for Gramor on the three non-exempt Oregon projects unambiguously qualifies as the "practice of architecture." The Board therefore correctly found petitioners in violation of ORS 671.020(1) and (4) for the work they performed on the 172nd Project, the Progress Ridge Project, and the Sherwood Project, and this court should affirm the Board's decision and reverse the Court of Appeals on those issues.

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

In addition to prohibiting the unlicensed practice of architecture, the statute also prohibits unlicensed persons from "assum[ing] or us[ing] the title of 'Architect' or any title, sign, cards or device indicating, or tending to indicate, that that the person is practicing architecture or is an architect or represent[ing] in any manner that the person is an architect." ORS 671.020(1); *see also* ORS 671.020(4) (a person may not "use in connection with the business of the person any words, letters or figures indicating the title of 'Architect'"). The applicable administrative rule similarly provides that "no title, sign, cards, or device may be used to indicate or to tend to indicate that the person or firm or business using the title is practicing architecture or is an architect, or represent[] in any manner that the person or firm or business is an architect or architectural practice." OAR 806-010-0037(7).

The questions presented here thus reduce to (1) whether Twist "indicat[ed] or tend[ed] to indicate * * * that is was practicing architecture" or was an architectural practice in Oregon by using its logo on the drawings and invoices for the three commercial Oregon projects discussed above and (2) whether Callison and Hansen "indicat[ed] or tend[ed] to indicate * * * that [they were] practicing architecture" or were architects in Oregon by using the phrase "Licensed in the State of Oregon (Pending)" on their website

biographies, in conjunction with references to their involvement in non-exempt Oregon projects. The answer to both of those questions is yes.

1. The statute prohibits representations that would suggest, to a reasonable person, that an unlicensed person was an architect or was practicing architecture in Oregon.

Oregon law has prohibited unlicensed persons from representing themselves as architects for longer than it has prohibited the unlicensed practice of architecture itself. (1979 Legislative Report at iii, 10). The chief concern animating this prohibition—which has been embodied in Oregon law since 1919—is the idea that persons should not be able to cloak themselves in the mantle of the architectural profession when, in fact, they are not licensed architects. *See, e.g.*, 1919 Board of Architect Examiners' Report (explaining that "it is the intention of this act to prevent others than architects registered under the provisions of this act from assuming the title of architect or from using in connection with their business any words, letters, or figures indicating said title architect"); *Ransburg v. Haase*, 224 Ill App 3d 681, 685, 586 NE2d 1295, 1298 (1992) (explaining that, as early as 1917, Illinois' similar provision had been held to serve the purpose of protecting the public). Thus, the legislative intent, embodied in ORS 671.020(1) and (4), is to prohibit misleading representations as to a person's licensure and qualifications.

The text of the provisions, viewed in context, clearly evinces that intent. It sweeps broadly, prohibiting persons from using "any title, sign, cards or

device indicating, or tending to indicate, that that the person is practicing architecture or is an architect[,] * * * represent[ing] in any manner that the person is an architect[,]" or using "use in connection with the business of the person any words, letters or figures indicating the title of 'Architect[.]'" ORS 671.020(1), (4). In other words, the text of the statute indicates that, no matter the manner, if a person represents himself as an architect or as practicing architecture in Oregon, without being duly licensed, he runs afoul of the statutory provision.

The text of the statute also requires an objective standard. The question is not whether the person to whom the representations were made subjectively believed the speaker to be a licensed architect—indeed, the provisions make no mention whatsoever of the effect on any recipient or viewer of the "title, sign, cards, * * * device, [or] represent[ation][.]" Instead, the pertinent question is whether the representation, to a reasonable person, would indicate or tend to indicate that the speaker was an architect or was practicing architecture. *See, e.g.*, *Missouri Bd. for Architects Prof'l Engineers & Land Surveyors v. Earth Res. Eng'g, Inc.*, 820 SW2d 505, 510–11 (Mo Ct App 1991) (so holding in the context of a similar statute prohibiting unlicensed persons from indicating that they are professional engineers).

Finally, the text, read in context, is clear that the question whether a person has actually practiced architecture is distinct from the question whether

the person has held himself out as an architect. *See* ORS 671.020(1) ("a person may not engage in the practice of architecture ***or*** assume or use the title of Architect or any title, sign, cards or device indicating, or tending to indicate, that the person is practicing architecture or is an architect or represent in any manner that the person is an architect," without being licensed (emphasis added)). One can occur without the other; either constitutes a statutory violation.

In sum, the unambiguous legislative intent of the provisions at issue here was to prohibit representations that would suggest, to a reasonable person, that an unlicensed person or business was an architect or was practicing architecture in Oregon.

2. Twist's use of its logo on documents related to Oregon projects would suggest to a reasonable person that Twist was an architecture firm or was practicing architecture in Oregon.

Twist's logo is comprised of the word "Twist" with the words "architecture" and "design" beneath it. Twist used that logo on its drawings and invoices for the three Oregon projects discussed above. In other words, Twist used a logo featuring the word "architecture" on detailed drawings "show[ing] the outline of the property, the surrounding streets, various building shapes and sizes, parking places and trees," and including labels for potential tenants, such as Fred Meyer, as well as square footages, numbers of parking spaces, and parking-to-square footage ratios. (SSER 16-19). It also used the

logo on the related invoices, which described the services rendered as "[p]rofessional services." (SSER 5, 7-8, 17-18).

The use of Twist's logo—which features the word "architecture"—on what appear to be architectural drawings for non-exempt Oregon projects, as well as on invoices identifying the services rendered as "professional," would suggest to a reasonable person that Twist was an architecture firm or was practicing architecture in Oregon. Twist's use of its logo in this manner therefore violated ORS 671.020.

In reaching the contrary conclusion, the Court of Appeals improperly conflated the question whether the feasibility studies themselves constituted the practice of architecture with the question whether a reasonable person, upon seeing Twist's logo on plans for non-exempt projects in Oregon, would conclude that Twist was an architecture firm or was practicing architecture in Oregon. The answer to that latter question is "yes," regardless of whether the feasibility studies themselves technically constituted the practice of architecture. What matters is that a person—such as a potential lessee, or a city employee—who views plans for the development of a large commercial center on a particular plot of Oregon land, which are stamped with the logo of a firm that purports to practice architecture, could reasonably assume that that firm is in fact an architecture firm or is practicing architecture in Oregon. That is so

regardless of whether the act of creating of the drawings themselves precisely satisfied the statutory definition of the "practice of architecture."

Finally, in concluding that Twist's use of its logo did not constitute a statutory violation, the Court of Appeals relied on the presence of the word "design" in the logo. *Twist*, 276 Or App at 570-71. The court appeared to suggest that, because a person could reasonably conclude that Twist was practicing "design"—but not "architecture"—in Oregon, the use of Twist's logo was permissible. *Id.* That conclusion is wrong for at least two reasons. First, the fact that a representation is amenable to two interpretations does not mean that the representation does not indicate or tend to indicate one of those interpretations. In other words, even if Twist's use of its logo could be interpreted to suggest that it was doing design work, that does not mean that it could not also be reasonably interpreted to indicate that Twist was practicing architecture. And, second, particularly when viewed in conjunction with the invoices describing the services Twist rendered as "professional," the most reasonable and obvious implication is that Twist was an architecture firm or was practicing architecture in Oregon. Architecture is commonly considered to be a profession; design is not.

Accordingly, the Board correctly determined that Twist violated the relevant statutory provisions and administrative rule by using its logo on the drawings and invoices for the three non-exempt Oregon projects. This court

should therefore affirm the Board's decision and reverse the Court of Appeals on that issue.

3. Callison and Hansen's use of the phrase "Licensed in the State of Oregon (Pending)" in their website biographies would suggest to a reasonable person that they were architects or were practicing architecture in Oregon.

On Twist's website, Callison and Hansen identified themselves as the firm's principals and included the phrase "Licensed in the State of Oregon (Pending)" in each of their biographies. (SSER 9). On those same pages, each of them listed non-exempt Oregon projects.[8] (SSER 9). At the time, neither Callison nor Hansen had ever applied for Oregon licensure. (SSER 9).

Taken together, the use of the phrase "Licensed in the State of Oregon (Pending)," in conjunction with the references to work already performed on non-exempt projects in Oregon, would suggest to a reasonable person that Twist's principals were architects or were practicing architecture in Oregon. The use of the past-tense with respect to the word "Licensed" further supports that conclusion. Callison and Hansen therefore violated ORS 671.020.

The Court of Appeals erred in reaching the contrary conclusion. The court looked to the dictionary definition of the word "pending," which is "not yet decided : in continuance : in suspense" or "impending : imminent."

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[8] Hansen listed Progress Ridge Town Center, Sherwood Town Center, and Lake Oswego Library, and Callison listed Sherwood Town Center. (SSER 12-13).

Webster's at 1669. Relying on that definition, the court concluded that the disputed phrase could only be interpreted as communicating that Callison and Hansen were *not* presently licensed in Oregon. *Twist*, 276 Or App at 571. But, read in context, the phrase "Licensed in the State of Oregon (Pending)," in conjunction with references to work *already performed* in Oregon on non-exempt projects, suggests that Callison and Hansen had some form of provisional permission to practice architecture by virtue of their pending licensure or, in any event, that they were in fact practicing architecture in Oregon. And that is all that is required to make out a statutory violation. Accordingly, this court should affirm the Board's decision and reverse the Court of Appeals on that issue.

CONCLUSION

This court should affirm the Board's decision and reverse in part the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 5, 2016, I directed the original Brief on the Merits of Petitioner on Review, Oregon Board of Architect Examiners to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon J. Kevin Shuba, attorney for respondents on review Kirk Callison and Twist Architecture & Design, Inc.; and upon Steven C. Berman and Nadia Dahab, attorneys for amicus curiae, by using the electronic filing system.

I further certify that on October 5, 2016 I directed the Brief on the Merits of Petitioner on Review, Oregon Board of Architect Examiners to be served upon Ronald M. Jacobs, attorney for amicus curiae; and upon David Hansen, respondent on review, by mailing two copies, with postage prepaid, in an envelope addressed to:

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Continued…

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,246 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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