IN THE SUPREME COURT OF THE STATE OF OREGON

TWIST ARCHITECTURE & DESIGN, INC., a Washington Professional Corporation, DAVID HANSEN, an individual, and KIRK CALLISON, an individual, Petitioners, Respondents on Review, v. OREGON BOARD OF ARCHITECT EXAMINERS, Respondent, Petitioner on Review.	Board of Architect Examiners No.: 10035 Court of Appeals No.: A152929 Supreme Court No.: S064048

BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF ARCHITECTURAL REGISTRATION BOARDS IN SUPPORT OF PETITION FOR REVIEW OF THE OREGON BOARD OF ARCHITECT EXAMINERS

Petition for review of the decision of the Court of Appeals on appeal from the final order of the Oregon Board of Architect Examiners

Date of Opinion: February 24, 2016
Before Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge.

If review is allowed, NCARB intends to file a brief on the merits.

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I. INTRODUCTION

Although each state regulates the practice of architecture within its own boundaries, the state licensing boards work closely with one another, particularly through their membership in the National Council of Architectural Registration Boards ("NCARB"), to establish consistent criteria and requirements for licensure and to facilitate the movement of architects between states. NCARB's members include the state architectural licensing boards from all 50 states—including Oregon—and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. In 2015, NCARB issued certificates to more than 39,000 architects nationwide, which allows those architects to apply for reciprocal licensing in other jurisdictions using a simple and streamlined system.

NCARB's mission is to protect the public health, safety, and welfare by leading the regulation of the practice of architecture through the development and application of standards for licensure and credentialing of architects. Among many other initiatives, NCARB develops and recommends procedures and standards for architectural registration; develops and recommends standards for regulating the practice of architecture; provides member boards a process for certifying the qualifications of an architect for registration; represents the interests of member boards before public and private agencies; and develops and administers the test required for licensure, known as the Architectural

Registration Examination. It establishes educational standards for prospective architects, including internship requirements, so that future architects have hands-on learning experiences. NCARB also issues certificates to architects who wish to practice in multiple jurisdictions and provides a simple way for architects to apply for reciprocity between states.

To fulfill its mission, NCARB has developed model legislation to help the states adopt similar standards for what constitutes the "practice of architecture." Although each state's laws vary, NCARB's model legislation defines the "practice of architecture" to include preliminary plans and feasibility studies. That way, work that requires a licensed architect in one state will also require a licensed architect in another state.

The Court of Appeals decision in this case, which addresses an important issue of first impression in this Court, creates uncertainty both within Oregon and across NCARB's member jurisdictions in the standard and scope of the practice of architecture. NCARB submits this brief *amicus curiae* to provide the Court with information about how state architectural licensing issues affect consumers and architects across the country and how this case plays an important role in the development of that nationwide system.

II. ARGUMENT

This Court should allow the Board's Petition for Review of the Court of Appeals decision, which narrowly interprets the phrase "practice of

architecture." The Court of Appeals did not clearly articulate what activities are encompassed within that phrase, but concluded that the activities at issue in this case did not constitute the "practice of architecture" because the preliminary designs were not prepared in contemplation of obtaining permits and constructing buildings. *Twist Architecture & Design, Inc. v. Or. Bd. of Architect Exam'rs*, 276 Or App 557, 568, __ P3d __ (2016). The distinctions that the Court of Appeals drew to reach that conclusion introduce more uncertainty, not less, into the statutory licensing scheme for architects.

This Court should allow review for three reasons. First, the interpretation of the phrase "practice of architecture," which is defined in ORS 671.010(6) (2013),[1] goes to the essence of what is and is not regulated under state law. This will have a tremendous impact on a wide range of consumers and businesses in Oregon. Second, the decision creates confusion and ambiguity among current appellate decisions interpreting the phrase "practice of

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[1] The statute at issue in this case was re-codified in 2013. Consistent with the decision of the Court of Appeals and the Board's Petition for Review, all references herein are to the pre-2013 statute, which was in effect at the time of the conduct at issue. That version defined "practice of architecture" as the "planning, designing or *supervising* of the erection, enlargement or alteration of any building . . . ." ORS 671.010(6)(2013) (emphasis added). The changes that were made in 2013 had the effect of replacing the word "supervising" with the word "observing." Or Laws 2013, ch 196, § 1. That change does not affect the outcome of this case, however. Moreover, the change does not affect the impact that this case has on individuals currently engaged in the "practice of architecture," because the activities at issue in this case—that is, "planning" and "designing"—remain within the scope of conduct regulated as the "practice of architecture" under state law.

architecture." Allowing review will provide this Court an opportunity to resolve those ambiguities and establish consistent rules that will be readily understood by architectural professionals and easily enforced by the Board. Third, the Court of Appeals decision departs from the consensus approach and places Oregon outside of the national trend, which defines the "practice architecture" to include preliminary work.

A. The Court of Appeals Decision Negatively Affects Individuals, Families, Small Businesses, and Developers in Oregon.

This Court should allow the Petition for Review because many people in Oregon will be affected by the Court of Appeals decision. *See* ORAP 9.07(3). The construction of the phrase "practice of architecture," and whether and how individuals may hold themselves out as architects, affects many different providers and consumers of architectural services in the state. The architectural licensing statutes serve as consumer protection mechanisms to help consumers of architectural services know that they are hiring qualified professionals to assist with their building projects. *See* ORS 671.020(1) (requiring licensure "to safeguard health, safety and welfare and to eliminate unnecessary loss and waste"). Thus, the limitations imposed by those statutes, and the fact that certain services may be performed only by licensed architects, have important ramifications for the protections afforded to consumers. Moreover, how those architects represent their qualifications and credentials to the public also affects the level of understanding the public has that they are obtaining services from

professionals who the state has determined to be qualified to provide those services.

The services in this case were provided to a developer, who presumably had some sophistication and understanding of the skills needed for the project. *See Twist Architecture*, 276 Or App at 560-61. But that will not always, or even often, be the case. Many consumers of architectural services do not have this experience and rely on the state's licensing system to ensure that they are obtaining services from architects who are trained and licensed according to state law. From the neighborhood business planning to build a new store, to the family considering an addition to their home, there are many first-time—or even one-time—consumers of architectural services. Knowing that they can hire a licensed architect to produce all of the plans they need, or even to answer the question, "Can we build this addition?" is important to consumers.

In this case, that question was answered by the feasibility studies the individuals prepared, which included drawings conveying information to the consumer about the number of parking spaces, the square footage of the buildings, and the entrance points. *Twist Architecture*, 276 Or App at 560. Those facts were used to determine whether the project could go forward. *Id.* at 561. But determining those facts requires application of zoning laws, setback requirements, ground conditions, and myriad other factors requiring the skill, training, and credentials of a licensed architect. By finding that the production

of these drawings did not constitute the "practice of architecture," the Court of Appeals eliminated key consumer protections that state law has put in place. Accordingly, allowing the Court of Appeals decision to stand puts consumers at risk that unqualified individuals will be allowed to engage in activities that should be considered the "practice of architecture."

Because the decision affects consumers and business throughout the state, the Court should allow the Board's Petition for Review.

B. The Court of Appeals Decision Creates Ambiguity in the Definition of Phrase "Practice of Architecture."

The Court of Appeals decision draws distinctions between different phases of architectural work in a way that is confusing and potentially inconsistent with existing case law. The Court should allow review to resolve that inconsistency. *See* ORAP 9.07(9). This Court has not yet provided guidance on the scope of the phrase "practice of architecture" in ORS 671.010(6), and this case presents an appropriate vehicle to clarify the Court of Appeals decisions on this issue.

ORS 671.010(6) defines the "practice of architecture" 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). The Court of Appeals held the "practice of architecture necessitates the planning or preparing of work for use in actual construction, rather than planning for a building in the abstract," but concluded that, in this

case, "the board failed to draw a nexus between the work done by petitioners and the 'erection, enlargement, or alteration,' of any buildings." *Twist Architecture*, 276 Or App at 567. Yet the court went on to find that the work was done for the purpose of "determin[ing] if construction was even feasible, given, among other things, the layout of the properties, access to existing roads, and the ratio of parking spots to buildings." *Id.* The distinction the Court of Appeals appears to have drawn—between activities "for use in actual construction" and those for "determin[ing] if construction [is] feasible"—is simply unworkable.

The distinction is also inconsistent with earlier decisions from the Court of Appeals. In this case, the Court of Appeals cited an earlier decision from the court in which it held that "[o]ne plans the erection of a building or executes designs for it regardless of whether the plans or designs ever come to fruition." *Davis v. Bd. of Architect Exam'rs*, 222 Or App 370, 375, 193 P3d 1019 (2008). In *Davis*, the Court of Appeals went on to hold that one practices architecture "at the time of planning or designing, if the plans or designs are executed for the purpose of erecting a building." *Id.* The approach in *Davis* thus differs from the Court of Appeals decision here, which holds that "the planning or preparing of work" must be "for use in actual construction, rather than planning for a building in the abstract." *Twist Architecture*, 276 Or App at 567.

It is hard to reconcile the Court of Appeals decision in *Davis* with the Court of Appeals decision here, because the reasoning in the two cases is inconsistent. This Court should allow review to resolve that inconsistency and clarify the scope of the phrase "practice of architecture."

C. The Court of Appeals Decision Is Out of Step with the Laws in Many Other Jurisdictions.

The Court of Appeals narrow and confusing approach to exclude certain kinds of planning from the definition of the phrase "practice of architecture" is inconsistent with how most jurisdictions holistically approach the regulation of architecture to include preliminary planning. It is also inconsistent with how NCARB's model legislation, which serves as a guide to the states to help harmonize the practice, defines the practice of architecture.

1. State Laws Across the Country Include Pre-Design and Preliminary Work as the "Practice of Architecture."

NCARB represents the licensing boards in all 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Fifty-three of its member jurisdictions (all but Puerto Rico) have adopted a statutory definition of the phrase "practice of architecture." Twenty-three of those jurisdictions specifically include "preliminary studies" within their definition. California, for example, includes within its definition both "[i]nvestigation, evaluation, consultation, and advice," and also "[p]lanning, schematic and preliminary studies, designs, working drawings, and specifications." Cal. Bus. & Prof.

Code § 5500.1(b). Similarly, Washington specifies that the practice of architecture includes "predesign services, schematic design, design development, preparation of construction contract documents, and administration of the construction contract." Wash. Rev. Code § 18.08.320(12). Another four states include activities such as preparing, planning, and providing studies and conducting feasibility studies. A complete list of states that include "preliminary studies" and other preparatory or feasibility study work within their definition of the practice of architecture is found at Appendix 1 at the end of this brief.

The decision of the Court of Appeals is out of step with the trend of including preliminary studies and other planning work in the definition of the "practice of architecture." The Court has the opportunity to consider how to interpret the Oregon statute in light of this trend, which exists to help to protect consumers by including preliminary study and design work within the ambit of the "practice of architecture."

2. The NCARB Model Legislation Includes Preliminary Work Within the Scope of Practicing Architecture, in Order to Harmonize and Streamline National Practice.

Since 1970, NCARB has developed model guidelines for legislation for its member boards to consider. *See Legislative Guidelines and Model Law*, NCARB, at 4 (2014-2015), *available at* http://www.ncarb.org/Publications /~/media/Files/ PDF/Special-Paper/Legislative_Guidelines.pdf. The model law

and accompanying legislative guidelines leave "to the [member] boards flexibility and discretion to bring their states in line with the developing national standards for architectural registration and regulation." *Id.* at 5. In particular, NCARB's model law focuses on areas that "have implications beyond the boundaries of an individual state." *Id.* at 4.

The NCARB model law defines the practice of architecture to include "pre-design" services. *Id.* at 16. The NCARB commentary explains that the model law covers "a wide variety of services that architects currently furnish and that architects are specifically trained to provide and on which applicants for registration are examined." *Id.* at 6. NCARB encourages states to adopt its model law, or the underlying principles for a legislative framework, for two reasons.

First, consistent definitions protect consumers. They make it is easier for people to know what work may be done only by an architect in each state. Thus, a developer working in multiple states knows that he or she needs a licensed architect to provide a particular service regardless of the state in which the work is being done.

Second, consistent rules allow architects to move from one state to another and know what services they may perform in those states. When states have similar statutes, an architect in one state will know that he or she needs to become licensed in another state to do certain types of work for a client in that

other state. NCARB works to facilitate ease of reciprocity between states, and having consistent definitions from state to state makes it even easier for architects to have a multi-jurisdictional practice.

III. CONCLUSION

In sum, this Court should allow the Board's Petition for Review because this case presents an important issue that affects many people, it will help to clarify inconsistent Court of Appeals decisions, and it will allow the Supreme Court to consider whether Oregon's approach to the "practice of architecture" is consistent with that of other states, including its neighboring states.

For the forgoing reasons, NCARB urges the Court to allow the Board's Petition for Review. If review is allowed, NCARB intends to file a brief on the merits.

Respectfully submitted this 11th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

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 2,497 words.

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 in ORAP 5.05(2)(d).

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 11, 2016, I filed the original **BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF ARCHITECTURAL REGISTRATION BOARDS IN SUPPORT OF PETITION FOR REVIEW OF THE OREGON BOARD OF ARCHITECT EXAMINERS** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on May 11, 2016, I served a true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows if they are not already registered under the Oregon Appellate Court eFiling system:

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