

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioner on Review,

v.

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

Respondents on Review

Jackson County Circuit Court
Case No. 14CV11829

CA A158485

S064105

**BRIEF IN SUPPORT OF PETITION FOR REVIEW OF
ROGUE ADVOCATES AND CHRISTINE HUDSON**

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

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

(Counsel listed on inside cover)

June 2016

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I. Introduction

1000 Friends of Oregon is a statewide, nonprofit, membership-based organization founded in 1975 to monitor, improve, and participate in the implementation of Oregon's land use planning program. Our mission is to "work with Oregonians to enhance our quality of life by building livable urban and rural communities, protecting family farms and forests, and conserving natural areas."

1000 Friends offers this amicus brief in support of the petition to advise the Court on the importance of the issue on review.

II. Statement of Historical and Procedural Facts

1000 Friends of Oregon incorporates the Petitioners' statement of historical and procedural facts.

III. Questions Presented and Proposed Rules of Law

1000 Friends of Oregon incorporates the Petitioners' questions presented and proposed rules of law.

IV. Importance of Legal Questions Presented

This case presents an issue of first impression in this Court regarding the interpretation of ORS 197.825, regarding the respective jurisdiction of the Circuit Courts and the Land Use Board of Appeals (LUBA) over certain land use related matters.

The consequences of the decision are important to the public and arise often, in that it concerns whether the public and local governments have any recourse to enforce existing land use regulations.

V. Argument

The decision of the Court of Appeals effectively means there is no ability for members of the public or local governments to take an action to stop the commencement or ongoing operation of a land use activity that is occurring in violation of existing land use law, if there is a pending or possible land use decision-making process. The ability of Oregonians to seek enforcement of Oregon's land use laws has been an integral and intentional component of the system since its inception, reflected in the land use Goals, statutes, and rules allowing broad participation at every stage of the land use process – including through judicial enforcement. *See, e.g.,* Goal 1 (Citizen Participation), Goal 2 (Land Use Planning), ORS 197.225-253, 197.633, 197.763, 197.805-.860; ORS 215.060; ORS 227.010-.187; OAR ch. 660, divs. 01, 03, 18

ORS 197.825 is part of this integrated system; however, the Court of Appeals has confused the jurisdiction of LUBA – which is over appeals of local land use *decisions* – and the jurisdiction of the circuit courts – which is over enforcement of existing *laws*, as reflected in a local comprehensive plan or zoning code.

ORS 197.825 provides:

“(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 or limited 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 brought to enforce the provisions of an adopted comprehensive plan or land use regulations....”

The Court of Appeals’ decision would negate the meaning of ORS 197.823(3)(a), thereby removing the ability of Oregonians to seek enforcement in any forum against a land use activity that is proceeding in violation of existing law since, as described in the petition for review, the law is clear that LUBA does not have such enforcement jurisdiction.

Here, the facts are undisputed: the respondent on review, Mountain View Paving, is operating industrial development in a mapped flood hazard area and Area of Special Flood Hazard; development in a flood hazard area requires a local floodplain development permit from Jackson County; Mountain View Paving does not have the required flood development permit. *Rogue Advocates v. Board of Comm. of Jackson County*, 277 Or App 651, 653, ___ P.3d ___ (2016).

Contrary to the statement of the Court of Appeals, the circuit court was not being asked to determine the “scope and nature of the legal nonconforming batch plant;” that is the decision that is properly before Jackson County and LUBA. *Rogue Advocates*, 277 Or App at 662. The land use *decision* of Jackson County that has

been appealed to and remanded from LUBA is whether or not Mountain View Paving *qualifies* for a permit to operate an asphalt batch plant in this flood hazard area and if so, under what conditions. That it needs a permit is undisputed. And it is also undisputed that it is operating without a required permit. That is precisely the situation for which circuit court enforcement action is specified in ORS 197.823(3)(a). Circuit court enforcement action would not “decide land use actions that were pending before the county.” *Rogue Advocates*, 227 Or App at 660.

The underlying matter is no different, then, than the many activities for which an applicant might qualify to engage, in various land use zones, if the applicant meets the required legal criteria, which could also be subject to locally-imposed conditions to meet the criteria. These all require those proposing the activity or use to submit an application for approval, and require the local jurisdiction to make a determination of whether and under what conditions the proposed use or activity could be allowed. Just a few examples of possible uses in various resource lands zones, all with standards and restrictions, include private camp grounds, certain home occupations, a living history museum, private schools, a variety of agri-tourism and other events, and destination resorts. ORS 215.283(2)(c), (i), (x), (aa); ORS 215.283(4); ORS 197.435-.467.

Over the years, individuals, organizations including 1000 Friends of Oregon, businesses, and state agencies have made many appeals to LUBA from local

government decisions of whether or not an applicant meets the criteria for a permit in these and other land use activities. The Legislative Assembly established LUBA in recognition that having a specialized land use appeals body would result in more consistent and efficient land use decision-making. ORS 197.805. However, the Legislature did not provide LUBA the ability to “grant declaratory, injunctive or mandatory relief,” as that is an expertise of circuit courts and therefore left to them in ORS 197.825(3)(a). Thus, where a person initiates a land use without first submitting an application or obtaining final approval, there is no land use *decision* over which LUBA has jurisdiction; only the circuit courts could review such a matter.

If the Court of Appeals decision stands, this statutory provision would have no meaning, and an integral part of the ability of Oregonians to participate fully in the land use program – including though seeking enforcement – would be gone.

VI. Conclusion

The Supreme Court should grant the petition for review in this matter of first impression regarding the respective jurisdiction of the Circuit Courts and the Land Use Board of Appeals over certain land use related matters.

Dated this 6th of June, 2016.

Respectfully submitted,

Mary Kyle McCurdy, OSB #88353 |
Attorneys for Petitioners

CERTIFICATE OF FILING AND SERVICE

I certify that on June 6th, 2016, I filed the original of this PETITION FOR REVIEW OF ROGUE ADVOCATES AND CHRISTINE HUDSON with the Appellate Court Administrator by the eFiling system, I further certify that on June 6th, 2016, I served two copies of this PETITION FOR REVIEW OF ROGUE ADVOCATES AND CHRISTINE HUDSON on the following parties by the United States Postal Service, first-class mail, at the following address:

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