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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, acting by and through its Department of Transportation,

Plaintiff-Respondent,
Respondent on Review,

v.

ALDERWOODS (OREGON), INC., an Oregon corporation, successor by merger with Young's Funeral Home, Inc., an Oregon corporation,

Defendant-Appellant,
Petitioner on Review,

and

BANK OF AMERICA, N.A., a national association, as administrative agent,

Defendant.

Supreme Court No. S062766

Court of Appeals No. A146317

Washington County Circuit Court No. C085449CV

BRIEF ON THE MERITS OF *AMICI CURIAE* CENTRAL OREGON BUILDERS ASSOCIATION, OREGONIANS IN ACTION, AND OWNERS' COUNSEL OF AMERICA

On Review of the Opinion of the Court of Appeals
On an appeal from a judgment of the Circuit Court for Washington County
Honorable Thomas W. Kohl, Judge

Court of Appeals Opinion filed: September 17, 2014
Concurring Opinion by: Armstrong, J., joined by Ortega, Duncan, DeVore, and Garett, JJ.
Concurring Opinion by: Sercombe, J.
Dissenting Opinion by: Wollheim, J., joined by Haselton, C.J., Nakamoto, Egan, Tookey, JJ., and Schuman, S.J.

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BRIEF ON THE MERITS OF *AMICI CURIAE* CENTRAL OREGON BUILDERS ASSOCIATION, OREGONIANS IN ACTION, AND OWNERS' COUNSEL OF AMERICA

INTEREST OF *AMICI CURIAE*

Central Oregon Builders Association (COBA) is an industry trade organization with numerous members consisting of both commercial and residential builders and land developers who purchase, own, develop, and build on lands adjacent to public roads and highways. COBA's membership is vitally interested in alterations to the law governing property owners' rights of access to public roads and highways, including alterations to that law that jeopardize the substantial investments COBA's membership makes to complete development projects.

Oregonians In Action (OIA) is a non-profit lobbying organization that advocates in both the courts and before the legislature on behalf of private property rights throughout the State of Oregon. OIA has appeared in numerous condemnation actions involving both the direct use of the eminent domain power and regulatory takings, including representing the property owner in the precedent-setting case *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

Owners' Counsel of America (OCA) is a nationwide network of experienced condemnation attorneys in private practice from nearly every state

who focus upon representing property owners threatened with eminent domain proceedings. OCA has appeared as *amicus curiae* in numerous eminent domain and regulatory takings cases throughout the nation.

Amici curiae wish to be heard by this Court because all *amici* are critically interested in ensuring that private landowners are fully compensated when the government employs its eminent domain power to acquire private property interests for public use.

SUMMARY OF ARGUMENT[1]

For more than half a century, this Court has recognized that property owners enjoy a right of *direct* access to abutting highways that "cannot be extinguished without compensation." *Highway Com. v. Burk*, 200 Or 211, 228, 265 P2d 783 (1954). Under both the state and federal constitutions, such established property interests cannot simply be regulated out of existence, especially by a condemning agency during the course of its eminent domain lawsuit to take the property.

This case poses the question whether Defendant Alderwoods (Oregon), Inc., ("Alderwoods") possessed compensable property interests in two points of direct access from Alderwoods' property to Highway 99W (the "access points"), which undisputed evidence in the record shows had existed lawfully

[1] *Amici curiae* adopt defendant's questions presented and proposed rules of law.

since at least 1936. If Alderwoods did possess compensable property interests in those two access points, then defendant was entitled to have a jury determine whether the taking of those two access points diminished the value of defendant's property.

The Court of Appeals, sitting *en banc*, failed to reach agreement on that question and affirmed by an equally divided court. *ODOT v. Alderwoods (Oregon), Inc.*, 265 Or App 572, 336 P3d 1047 (2014). The court produced two concurring opinions which would have held that Alderwoods did not have compensable property interests in the two access points. *Id.* at 574 (Armstrong, J., concurring); *id.* at 584 (Sercombe, J., concurring). The concurring judges could not agree on a supporting rationale, however. *Id.*

The rationales set out in the Court of Appeals' concurring opinions do not withstand scrutiny. Judge Armstrong concluded that ODOT's decision to administratively close the two access points—made only after ODOT initiated condemnation proceedings and took possession of the property—deprived Alderwoods of its preexisting and long-recognized access rights, but without entitling Alderwoods to any compensation. *See id.* at 582-83 (Armstrong, J., concurring). In other words, Judge Armstrong held that, although Alderwoods may have had compensable property interests in the two access points at the time that ODOT initiated condemnation proceedings and took possession of the

property, Alderwoods lost those interests when ODOT—permissibly, in Judge Armstrong's view—regulated them out of existence. *Id.*

Judge Armstrong's concurrence runs afoul of constitutional law in at least three respects. First, Judge Armstrong's opinion ultimately holds that preexisting property rights permissibly may be extinguished administratively without payment of just compensation; in other words, Judge Armstrong's conclusion approves the taking of private property by legislative fiat without just compensation. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, __ US __, 133 S Ct 2586, 2598-99, 186 L Ed 2d 697 (2013) (government commits a "*per se* taking" if it "seize[s]" an existing property interest); *cf. also Thornburg v. Port of Portland*, 233 Or 178, 185, 376 P2d 100 (1962) (Article I, section 18, of the Oregon Constitution requires compensation when government action extinguishes preexisting property interest).

Second, in holding that Alderwoods lost its property rights *after* ODOT had initiated condemnation proceedings and taken possession of the property, Judge Armstrong's concurrence violates the principle of eminent domain law that condemned property is valued at the time that the condemner initiates a condemnation action or takes possession of the property, whichever occurs first. *State of Oregon v. Lundberg*, 312 Or 568, 574, 574 n 6, 825 P2d 641 (1992). Third, and finally, in holding that ODOT permissibly could administratively

extinguish Alderwoods' property interests in the two access points *after* initiating condemnation proceedings and taking possession of the property, Judge Armstrong's concurrence violates the federal constitutional principle prohibiting a condemner from actively diminishing the value of property after it has committed to the condemnation. *See United States v. Virginia Elec. Co.*, 365 US 624, 636, 81 S Ct 784, 5 L Ed 2d 838 (1961) (articulating that principle).

Judge Sercombe's concurring opinion also fails to withstand scrutiny. Judge Sercombe starts from the incorrect premise that property owners possess only a "generalized" right of access to public highways, rather than possessing a *direct* right of access when the property *directly* abuts a public highway. *See Alderwoods*, 265 Or App at 609 (Wollheim, J., dissenting) (explaining that "Judge Sercombe's position is contradicted by" the case law). From that flawed premise, Judge Sercombe concludes that Alderwoods has no compensable property interests in the two access points providing *direct* access to Highway 99W, because defendant also has *indirect* access to Highway 99W by way of SW Warner Avenue. Because Alderwoods had a long-recognized property interest in the ability to *directly* access Highway 99W, however, Judge Sercombe's concurrence also sanctions the unconstitutional taking of private property without compensation.

The fractured analyses in the Court of Appeals' concurring opinions fail to recognize long-established principles of Oregon and federal constitutional law and, if accepted by this Court, will jeopardize the rights of every property owner in Oregon. By contrast, Judge Wollheim and five other judges would have held that Alderwoods possessed a recognized and established property interest in direct access to Highway 99W, and that the jury should be permitted to determine the extent to which the loss of that property interest diminished the value of Alderwoods' remaining property. *Alderwoods*, 265 Or App at 592 (Wollheim, J., dissenting).

Amici respectfully submit that Judge Wollheim's dissenting opinion sets out the correct analysis. This Court should adopt the reasoning of the dissenting opinion, reverse the trial court's judgment, and remand the case to allow the jury to consider evidence of the impact of the loss of Alderwoods' two access points on the value of Alderwoods' remaining property.

STATEMENT OF MATERIAL FACTS

ODOT initiated this eminent domain proceeding with respect to property owned by Alderwoods abutting Highway 99W near the intersection of Highway 99W and Highway 217 in Tigard. Among other things, ODOT sought to condemn any and all rights that Alderwoods had to directly access Highway 99W—*i.e.*, the two access points—in connection with a construction project to

improve that highway. Undisputed evidence in the record shows that those two access points had existed since at least 1936. (Tr 131-32; ER 21-22, 45-48.)

After initiating this condemnation action and taking possession of the subject property, ODOT separately notified Alderwoods that it had no record of any permit authorizing the two access points, and that ODOT had decided to administratively close those two access points in connection with the Highway 99W improvement project. (TCF 50, Ex. 1.) ODOT acknowledged in that notice that no permits would be required for the access points if they existed before 1949—as they had—because the access points would be considered "[g]randfathered approaches" if lawfully established before ODOT's permitting system was promulgated in 1949. OAR 734-051-0040(26).

Relatedly, however, ODOT regulations prohibit any highway approaches within 750 feet of a highway interchange. OAR 734-051-0125. Thus, even though Alderwoods' access points had lawfully been established before 1949, those two access points were no longer permissible under the terms of ODOT's later-enacted regulation. ODOT's notice to Alderwoods represents ODOT's decision, after initiating its condemnation action and taking possession of the property, to administratively close those access points pursuant to that regulation.

This Court has noted that a landowner, like Alderwoods, who owns property abutting a public highway has a right of *direct* access to that highway that "cannot be extinguished without compensation." *Burk*, 200 Or at 228. And, ordinarily, when a condemner seeks to take for public use only a partial property interest in a landowner's property, "the measure of damages is the fair market value of the property acquired plus any depreciation in the fair market value of the remaining property caused by the taking," *i.e.*, "severance damages." *State of Oregon v. Lundberg*, 312 Or 568, 574, 574 n 5, 825 P2d 641 (1992).

Consistently with those legal principles, Alderwoods intended to offer at trial evidence of the amount by which ODOT's elimination of the two access points diminished the value of Alderwoods' remaining property. For ODOT's part—having decided to administratively close Alderwoods' two access points *after* initiating an action to condemn those access rights and taking possession of the property—ODOT affirmatively moved to exclude that evidence. In support of that motion, ODOT argued that Alderwoods' diminished-value evidence was not relevant to any issue in the case because ODOT's decision to eliminate the two access points was not a taking of property for which compensation was required.[2]

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[2] As this Court noted in *Lundberg*, evidence is relevant to establish the

The trial court agreed with ODOT and granted its motion. After the trial court resolved the remaining issues in this case, Alderwoods appealed the trial court's judgment, assigning error to the trial court's exclusion of Alderwoods' diminished-value evidence.

As noted above, the Court of Appeals, sitting *en banc*, failed to produce a majority opinion on the issue posed on appeal; instead, the Court of Appeals affirmed the trial court's judgment by an equally divided court. Alderwoods then sought this Court's review, which this Court allowed.

Amici respectfully submit that, for the reasons stated in Alderwoods' brief on the merits, Judge Wollheim's opinion articulates the proper analysis for this case; *amici* accordingly urge this Court to reverse the trial court's judgment. *Amici* write separately to advise this Court of errors underlying the analyses set forth in the Court of Appeals' concurring opinions, including most

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fair market value of property if "it has any tendency to make" a property's asserted fair market value "more probable or less probable than it would be without the evidence," which is "a very low threshold that evidence must cross to be considered relevant." 312 Or at 574-75 (internal quotation marks omitted). "Fair market value" in the condemnation context "is defined as the amount of money the property would bring if it were offered for sale by one who desired, but was not obliged, to sell and was purchased by one who was willing, but not obliged, to buy." *Id.* at 574 (citing *Highway Com. v. Superbilt Mfg. Co.*, 204 Or 393, 412, 281 P2d 707 (1955)). This Court emphasized that, in the condemnation context, "'all considerations that might fairly be brought forward and reasonably be given substantial weight in negotiations between the owner and a prospective purchaser' should be taken into account" in determining fair market value. *Id.*

importantly constitutional infirmities in those analyses. *Amici* urge this Court to reject those analyses in resolving this case.

ARGUMENT

All but one of the Court of Appeals judges (the five judges joining Judge Armstrong's concurring opinion and the six dissenting judges) agreed that Alderwoods possessed a compensable property interest in the two access points at the time that ODOT initiated this condemnation proceeding. Those judges diverged on the question whether ODOT permissibly regulated those two access points out of existence after condemnation proceedings had commenced. In Judge Armstrong's view, *regulatory* takings analysis governed ODOT's liability for just compensation, and the question was whether ODOT's decision to administratively close the two access points deprived Alderwoods of all economically viable use of its entire property. As explained below, that analysis runs afoul of the Oregon and federal constitutions in at least three respects. *Amici* also address Judge Sercombe's lone concurring opinion, which incorrectly concluded that Alderwoods never possessed any property interests in direct access to Highway 99W.

A. Judge Armstrong's concurrence improperly conflates eminent domain proceedings and regulatory takings and also violates well-settled law establishing the date on which property is valued and prohibiting a condemner from actively diminishing the value of property after committing to the condemnation.

1. Regulatory takings analysis does not apply to this eminent domain case.

Judge Armstrong improperly conflated regulatory takings principles with those applicable to cases such as this one, an affirmative exercise of ODOT's eminent domain power. This Court recently observed the general rule applicable to regulatory takings: "[W]hen governmental regulation, rather than physical occupation, restricts a property owner's right of possession, enjoyment, and use, the test is whether the property retains some economically viable or substantial beneficial use." *Dunn v. City of Milwaukie*, 355 Or 339, 348, 328 P3d 1261 (2014). For example, when the Department of Forestry placed conditions on logging activity that a timber company claimed effectively denied it the ability to log its property, this Court held that the timber company stated a claim for a regulatory taking. *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 198, 935 P2d 411 (1997).

By contrast, this Court "has consistently found a taking when government has intentionally authorized a physical occupation of private property that substantially has interfered with the owner's rights of exclusive

possession and use." *Dunn*, 355 Or at 339. For example, this Court has held that governmental diversion of storm water onto private property could constitute a taking based on a physical occupation. *Morrison v. Clackamas County*, 141 Or 564, 568-69, 18 P2d 814 (1933). Similarly, the United States Supreme Court has held that even a minor but permanent physical occupation of property constitutes a taking under the Fifth Amendment to the United States Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 421, 438, 102 S Ct 3164, 73 L Ed 2d 868 (1982) (concluding that permanent installation of "a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of [a] building" constituted a *per se* taking under the Fifth Amendment). And, more broadly, both the United States Supreme Court and this state's appellate courts have explained that government acquisition of a preexisting property interest constitutes a "taking." *Koontz*, 133 S Ct at 2598-99 (seizure of an easement right is a taking requiring compensation); *ODOT v. Hanson*, 162 Or App 38, 43, 987 P2d 538 (1999), *rev den*, 330 Or 252 (2000) (same).

Within that broader dichotomy between governmental takings of preexisting private property rights and regulations that restrict the use of property, Judge Armstrong perceived an irreconcilable conflict between two of this Court's prior cases: *Burk*, 200 Or 211, and *Oregon Investment Co. v.*

Schrunk, 242 Or 63, 408 P2d 89 (1965). Specifically, Judge Armstrong acknowledged that this Court's decision in *Burk* states that a property owner abutting a public highway has a compensable property interest in direct access to that highway that can only be extinguished by just compensation. *Alderwoods*, 265 Or App at 579-80 (Armstrong, J., concurring) (discussing *Burk*); *see also Burk*, 200 Or at 228 (so stating).

Judge Armstrong had difficulty reconciling that statement with this Court's decision in *Schrunk*, however. In *Schrunk*, an owner of property abutting a public road claimed that he had been unconstitutionally deprived of property because a city zoning ordinance precluded the owner from *establishing* an access point on that public road. *Schrunk*, 242 Or at 65. This Court rejected that argument, concluding that "[t]he rights of abutting [property owners] to access to their premises are subservient to the primary rights of the public to the free use of the streets for the purposes of travel and incidental purposes." *Id.* at 69 (internal quotation marks omitted).

Judge Armstrong perceived in this Court's decision in *Schrunk* a broad holding that "a complete loss of access to a road is not a compensable taking of access when the loss is caused by the regulation or modification of the road for road purposes." *Alderwoods*, 265 Or App at 578. And that broad rule, in Judge Armstrong's view, required the conclusion in this case that ODOT's decision to

administratively close Alderwoods two access points was not a taking of property that required compensation. *See id.* at 582-83.

The trouble with Judge Armstrong's opinion is that it fails to address *Burk* and *Schrunk* as they apply in the specific factual context of this case—*i.e.*, where it is undisputed that defendant's two access points had existed since at least 1936 and, as a result, were lawfully establishing preexisting access points before ODOT decided to administratively close them. In light of that specific factual context, this Court need not resolve whether any abstract tension exists between *Burk* and *Schrunk*—in determining whether ODOT must pay just compensation when it extinguishes a lawfully established preexisting property right, those cases are not in conflict.

A careful reading of *Schrunk* shows that, like most regulatory takings cases, the question was whether government regulation that limited a future prospective use of property violated the property owners' constitutional rights. *See* 242 Or at 66 (noting that case arose from city's denial of a permit *to establish* a new access point on a public street). Thus, this Court in *Schrunk* had no occasion to consider whether compensation would be required if the city had passed and sought to enforce an ordinance that purported to extinguish a lawfully established preexisting property interest. *See id.*

Similarly, when this Court stated in *Burk* that the government "cannot [] extinguish[] without compensation" a property owners' established access right to a public highway, this Court was careful to draw a distinction between lawfully established preexisting property rights and limitations on potential future uses of property. *See Burk*, 200 Or at 228-30, 235. Specifically, this Court noted that the statute at issue in that case "may be employed, either to extinguish conceded and existing easements in a conventional highway, or to take new land for a nonaccess highway." *Id.* Ultimately, this Court concluded that no compensation need be paid when *new* land is taken for a non-access highway—*i.e.*, land which had no preexisting access right to take. *Id.*

Thus, *Burk* and *Schrunk* are in accord in holding that limitations on the prospective future use of property may not, in certain circumstances, result in a compensable taking of property. Neither of those cases, however, sets out any holding that precludes the conclusion that a compensable taking occurs where, as here, the government extinguishes a lawfully established preexisting property interest. Instead, only this Court's decision in *Burk* speaks to that issue, in its highly persuasive statement—consistent with the general principles applicable to the constitutional takings analysis discussed above—that the government must pay compensation when it extinguishes lawfully established preexisting property rights.

In reaching a contrary conclusion, Judge Armstrong ignores the fact that Alderwoods possessed lawfully established preexisting rights to directly access Highway 99W. And, in doing so, Judge Armstrong appears to announce a novel legal rule under which subsequently enacted legislation or administrative regulations permissibly may be invoked to extinguish preexisting property interests with no requirement of compensation. In short, Judge Armstrong's analysis appears to authorize takings of private property by legislative fiat without compensation—a clear violation of both the state and federal constitutions. *See Koontz*, 133 S Ct at 2598-99 (seizure of an easement right is a taking requiring compensation); *Hanson*, 162 Or App at 43 (stating the same proposition and citing in support of it *Thornburg v. Port of Portland*, 233 Or 178, 185, 376 P2d 100 (1962)). This Court should reject the analysis articulated in Judge Armstrong's concurring opinion.

2. Taken property is valued at the time the government initiates condemnation proceedings or takes possession of the property, whichever occurs first.

Judge Armstrong's concurrence also should be rejected because it violates a well-settled principle of condemnation law fixing the value of the property taken "as of the date the condemnation action is commenced or the date the condemnor enters on and appropriates the property, whichever first occurs." *Lundberg*, 312 Or at 574 n 6 (stating proposition and citing cases).

Here, as noted above, Judge Armstrong concluded that Alderwoods lost its compensable property interests in the two access points when ODOT regulated those access points out of existence. *Alderwoods*, 265 Or App at 582-83 (Armstrong, J., concurring). But ODOT's decision to administratively close the two access points occurred *after* ODOT already had initiated condemnation proceedings and taken possession of the property. *See id.*; *see also id.* at 584 (Sercombe, J., concurring) (noting that "Judge Armstrong's concurrence concludes that [Alderwoods] did have a located common-law right of access in and to the highway that the state could acquire in eminent domain" but that "by the time of the condemnation trial," Alderwoods lost that property right "by administrative actions of the state that closed the driveways to highway traffic").

If, as Judge Armstrong reasons, Alderwoods had a compensable property interest in the two access points at the time that ODOT initiated condemnation proceedings and took possession of the property, then Alderwoods must be compensated for ODOT's elimination of those access points for public use. *Lundberg*, 312 Or at 574 n 6. In concluding that Alderwoods need not be compensated for the loss of those interests, Judge Armstrong's analysis again countenances the taking of private property for public use without compensation and must be rejected.

3. Condemners may not administratively diminish the taken property's value after committing to condemnation proceedings.

Finally, Judge Armstrong's analysis runs afoul of constitutional law in a third way. Specifically, a federal constitutional doctrine applicable to eminent domain proceedings prohibits a condemner from taking action after "committ[ing]" to condemnation proceedings with the purpose of diminishing the value of the property taken. *Cf. United States v. Virginia Elec. Co.*, 365 US 624, 636, 81 S Ct 784, 5 L Ed 2d 838 (1961) (disallowing consideration of depreciation in a property's value after a condemner has committed to the condemnation).

This Court previously acknowledged that doctrine in *Lundberg*. There, the state initiated condemnation proceedings to acquire two parcels in Southeast Portland. 312 Or at 571. At trial, the state offered in evidence a city ordinance that required property owners to construct sidewalks on their street frontage as a condition to any development of the property itself. *Id.* The state offered that ordinance into evidence to show that the properties at issue were worth less than they would have been if the properties could be developed with no requirement of adding sidewalks. *See id.*

The owners of the property at issue in *Lundberg* claimed that "the city adopted the sidewalk dedication ordinance *in order to depress property values*

before the state undertook condemnation actions," therefore violating the principle in *Virginia Electric*. *Lundberg*, 312 Or at 579 (emphasis in original). This Court acknowledged that principle, explaining:

> "Under *U.S. v. Virginia Electric Co.*, *supra*, '[t]he court must exclude any depreciation in value caused by the prospective taking once the Government 'was committed' to the project.' 365 US at 636 (citing authorities). This rule is premised on the reasoning that '[i]t would be *manifestly unjust* to permit a public authority to depreciate property values by a threat * * * [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned.' *Id.* (quoting authority)."

Lundberg, 312 Or at 579 (emphasis added; ellipsis and alteration in original). This Court in *Lundberg* ultimately concluded that *Virginia Electric* was not violated in that case because the property owners had not "established the necessary link" showing that, in fact, the city ordinance "was promulgated in order to reduce the value of the property at a time when the state was committed to condemning the property[.]" *Id.* This Court took care to note, however, that evidence of the ordinance would have been inadmissible if the record permitted an inference that the ordinance had been promulgated with that purpose. *See id.* at 579 n 9.

Here, ODOT already had initiated condemnation proceedings and taken possession of the property when it decided to administratively close the two access points. That is, ODOT already had "committed" to the condemnation

when it decided to regulate the two access points out of existence. *Cf. id.* at 579. And here, unlike *Lundberg*, there can be no doubt that the record permits an inference that ODOT made the decision to administratively close those access points in order to reduce the amount of compensation that it would owe to Alderwoods: ODOT initiated condemnation proceedings seeking, in part, to acquire defendant's access rights by paying just compensation for them, and then it took action that, in its view, obviated its need to pay for those rights. *Cf. State v. Montez*, 309 Or 564, 598, 789 P2d 1352 (1990) (conduct is competent evidence from which a jury may infer motive).

B. Contrary to Judge Sercombe's concurring opinion, owners of property abutting a public highway have a right of direct access.

Judge Sercombe's lone concurring opinion also is inconsistent with this Court's prior case law and principles of state and federal constitutional law.[3]

[3] Judge Sercombe's concurrence also appears to misstate the law in suggesting that Oregon's appellate courts "have interpreted [the state] takings clause[] to have the same reach" as the federal takings clause. *Alderwoods*, 265 Or App at 572 n 1. That is not true. *Compare West Linn Corp. Park, LLC v. City of West Linn*, 349 Or 58, 93-94, 240 P3d 29 (2010) (holding that conditioning a development permit on construction of off-site improvements merely imposes a monetary obligation that does not give rise to a takings claim under Article I, section 18, of the Oregon Constitution) *with Koontz*, 133 S Ct at 2599 (reaching the opposite conclusion, and holding that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of" *Nollan v. Cal. Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987) and *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994)). Because of the important consequences that differences between

Judge Sercombe's concurring opinion is based on the erroneous premise that property owners possess only a "generalized" right of access to public highways, not a right of *direct* access, even if their property *directly* abuts a public highway. In Judge Sercombe's view, property owners have only a right of *indirect* access and, as long as ODOT did not land-lock Alderwoods' property by cutting it off entirely from access to any public road, the jury could not consider the extent to which ODOT's elimination of the two access points diminished the value of Alderwoods' remaining property. That view, however, cannot be reconciled with this Court's precedents and, accordingly, Judge Sercombe's analysis—like Judge Armstrong's—countenances the taking of private property for public use without just compensation.

Judge Sercombe's concurring opinion begins with the following proposition:

> "We start with a proposition to which we all agree: As a matter of eminent domain law, there is no right to compensation for a loss or restriction of access to an abutting street if access to the property is not completely eliminated by the project for which other property is being condemned."

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state and federal requirements may have in the condemnation context—including, for example, the requirement that property owners exhaust state-law remedies for obtaining just compensation, *see Williamson Reg. Planning Comm'n v. Hamilton Bank*, 473 US 172, 105 S Ct 3108, 87 L Ed 2d 126 (1985)—this Court should clarify that misstatement of Judge Sercombe's concurrence.

Alderwoods, 265 Or App at 586 (Sercombe, J., concurring). To the contrary, however, that is not a correct statement of law. As Judge Wollheim correctly noted, "[c]ontrary to Judge Sercombe's concurrence, 265 Or App at 587 (Sercombe, J., concurring), it is well settled that, at common law, a landowner whose property abuts a public highway has a right of direct access to the highway from the property." *Id.* at 596 (Wollheim, J., dissenting). This Court's rule that a property owner has a right of direct access is not, as suggested by Judge Sercombe, mere dictum, but is a "reasonable right of ingress and egress *from and to the highway from the property*[.]" *Holland v. Grant County*, 208 Or 50, 54, 298 P2d 832 (1956) (emphasis added).

Thus, the fact that Alderwoods' property may still be accessed circuitously via Southwest Warner Avenue is not relevant to the question whether ODOT must pay just compensation for its taking of the two access points that gave Alderwoods direct access to Highway 99W. Courts in other jurisdictions have similarly distinguished between direct and indirect access rights. *See, e.g.*, *Miller v. Preisser*, 295 Kan 356, 376, 284 P3d 290, 304 (2012) (distinguishing between the right of "direct access to abutting roadways, which creates a right of access that is compensable in an eminent domain action," and "indirect access to a nearby roadway, which relates to a regulation of traffic flow that is not compensable in an eminent domain action"); *Dep't of Trans. v.*

Harkey, 308 NC 148, 154, 301 SE2d 64, 68 (1983) (right of direct access which owner of land abutting a highway or street enjoys from his property to the traffic lanes of the highway is an easement appurtenant which cannot be damaged or taken from the owner without compensation); *Dep't of Pub. Works & Buildings v. Wilson & Co., Inc*., 62 Ill2d 131, 145, 340 NE2d 12, 19 (1975) (abutting property owner is owed just compensation for "material" impairment of access, even if other means of ingress and egress are available).

CONCLUSION

For the reasons set forth above and for the reasons set forth in defendant's brief on the merits, *amici curiae* respectfully request that this Court reverse the Court of Appeals' decision, reverse the trial court's judgment, and remand this case to the trial court to allow a jury to decide the extent to which

ODOT's elimination of Alderwoods' two access points has diminished the value of Alderwoods' remaining property.

DATED this 26th day of March, 2015.

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,139 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 26, 2015, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* CENTRAL OREGON BUILDERS ASSOCIATION, OREGONIANS IN ACTION, AND OWNERS' COUNSEL OF AMERICA with the State Court Administrator by the eFiling system.

I further certify that on March 26, 2015, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* CENTRAL OREGON BUILDERS ASSOCIATION, OREGONIANS IN ACTION, AND OWNERS' COUNSEL OF AMERICA on the following parties by electronic service via the eFiling system:

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