IN THE SUPREME COURT OF THE STATE OF OREGON

S. FRED HALL; and VIEWCREST INVESTMENTS, LLC, an Oregon limited liability company, Plaintiffs-Respondents, Petitioners on Review v. STATE OF OREGON, by and through the Oregon Department of Transportation, Defendant-Appellant, Respondent on Review WESTEK PROPERTIES, LLC, Intervenor.	Linn County Circuit Court No. 081164 Court of Appeals No. A146386 Supreme Court No. S060879

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS, PETITIONERS ON REVIEW

Petition for Review of the Decision of the Oregon Court of Appeals
On Appeal from a judgment of the Circuit Court of Linn County
Honorable John A. McCormick, Judge
Opinion Filed: October 10, 2012
Author of Opinion: Schuman, P. J.
Joined By: Wollheim, J., Nakamoto, J.

(continued next page)

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INTRODUCTION

This is an inverse condemnation case. In their complaint and by their proof at trial, plaintiffs S. Fred Hall and Viewcrest Investments, LLC (collectively, "Viewcrest") contended that the Oregon Department of Transportation (ODOT) had directly and substantially interfered with Viewcrest's use and enjoyment of Viewcrest's private property located adjacent to Interstate Highway 5 near Millersburg, Oregon. Viewcrest's theory was that ODOT had committed a "blight" taking, as that concept has developed in Oregon inverse condemnation law. ODOT defended on the ground that its conduct was simply "planning," and therefore not actionable unless those activities caused Viewcrest to lose all viable economic value of its land.

A jury found for Viewcrest, and awarded substantial damages. Under the instructions that that trial court gave, the jury could only have made that award if it found that ODOT's repeated, particular, and direct conduct substantially interfered with Viewcrest's use and enjoyment of its private property, which is conduct that is neither planning nor regulatory in nature. On appeal, the Court of Appeals reversed the jury's verdict. This Court granted review.

In its opening brief in this Court, Viewcrest argues for reversal of the decision of the Court of Appeals and reinstatement of the judgment below on the grounds that Viewcrest properly alleged a "blight" inverse condemnation

theory, offered evidence to support that theory, tried the case before a jury that was properly instructed as to the elements of that theory, and received a verdict in its favor.

Surprisingly, however, ODOT has chosen not to address Viewcrest's arguments directly: its arguments first disregard the jury's factual findings and then, having dismissed that inconvenience, rewrite Oregon case law by claiming that Viewcrest failed to satisfy a legal test that is inapplicable to the category of inverse condemnation claim that Viewcrest alleged here.[1] Because ODOT failed to persuade the jury of the pivotal fact on which its argument is predicated—*viz.*, that it was merely engaged in "planning" in this case—and Oregon case law recognizes the "blight taking" claim that Viewcrest actually alleged and proved, the Court of Appeals' decision must be reversed.

[1] The parties, including Viewcrest, have referred to the issue of the proof required for Viewcrest's blight takings to be a question of the proper burden of proof. The proper burden of proof—a preponderance of evidence—is not at issue in this case. The issue in this case is the proper test for the blight takings claim Viewcrest alleged. Viewcrest uses that corrected terminology in this Reply.

ARGUMENT

A. The jury's verdict precludes ODOT's repeated factual claim that it merely engaged in planning in this case.

ODOT misstates the record when it repeatedly claims that it engaged in mere planning in this case.[2] Viewcrest argued to the jury that, far from "planning," ODOT targeted Viewcrest with the intent to blight the value of the parcel. As but one example, the parties' closing arguments expressly framed the "planning" factual issue with ODOT claiming that no taking occurred because it was merely planning, (Tr. 1305), and Viewcrest arguing that ODOT's conduct at issue was not planning, (Tr. 1308-09). The jury agreed with Viewcrest. And, because this case resulted in a jury verdict in Viewcrest's

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[2] ODOT's refusal to admit what the jury necessarily found begins in the first sentence of its brief:

> "The issue in this case is whether [ODOT's] *public discussion of highway planning was a taking of property* * * * under Article I, section 18, of the Oregon Constitution."

(Emphasis supplied.) ODOT uses this same misleading label later in the same paragraph when it states, "As is often the case with *such planning efforts*, * * *." (Emphasis supplied.) The brief then goes on to make essentially this same misstatement of fact more than 50 times. In doing so, ODOT ignores the injunction of Article VII (amended), section 3, of the Oregon Constitution, against re-examining a jury verdict:

> "In actions at law, * * * the right to trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. * * *"*

(Emphasis supplied.)

favor, Oregon law requires that the evidence be viewed in the light most favorable to Viewcrest. *See*, *e.g.*, *Stuart v. Pittman*, 350 Or 410, 417, 255 P3d 482 (2011); *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 411, 69 P3d 710 (2003); *McCathern v. Toyota Motor Corp.*, 332 Or 59, 79, 23 P3d 320 (2001).

The jury here found that ODOT substantially and unreasonably interfered with Viewcrest's use and enjoyment of its property through conduct that was "sufficiently direct, particular, and of a magnitude to support a conclusion that the interference had reduced the fair market value of [Viewcrest's] land." (ER-19.) ODOT asks this Court to usurp the jury's role as fact finder and declare that ODOT was engaged in "mere planning."

This approach by ODOT notwithstanding, the following evidence in the record demonstrates the impropriety of ODOT's frontal attack on the jury's finding:

- ODOT officials stated that ODOT would never repurchase the Viewcrest property from plaintiff Harris even while acknowledging that it might be legally obligated to do so. (ER 40-42.)
- Internal ODOT emails admit that "ODOT has worked to stop any development" of the Viewcrest property. (ER 45.)
- ODOT broke its promise not to oppose annexation of the Viewcrest property to the City of Millersburg and directly opposed Viewcrest's

efforts to realize such annexation. (Tr 294-95.)

- ODOT's targeting of the Viewcrest property involved scheming to avoid "play[ing] into the hands of Mr. Harris[, one of Viewcrest's principals,] who could stir up significant bad press" in response to ODOT's conduct. (ER 46.)
- ODOT repeatedly flooded the Viewcrest property for approximately 25 years. (Tr. 466-75.)
- ODOT continuously made comments to the public in general and to potential investors that it would landlock the Viewcrest property. (Tr. 297-354.)

The foregoing conduct does not constitute planning. ODOT's conduct did not freeze the status of the Viewcrest property for the purpose of a future regulatory plan. ODOT flatly opposed development or purchase the Viewcrest property. It continually and specifically targeted the Viewcrest property by telling investors that the property would be effectively worthless, using the property for flooding, and interfering with Viewcrest's interest in being annexed by the City of Millersburg.

As summarized in *Suess Builders Co. v. City of Beaverton*, 294 Or 254, 260, 656 P2d 306 (1982)[3], government entities frequently "plan" for future land

[3] ODOT questions Viewcrest's choice not to cite *Suess Builders* in

use, adopting plans to do so. The government's plan is a pre-regulatory event that may or may not be fully enacted:

> "[A]doption of a plan could be the equivalent of taking the use of the property until the government decided to buy it or release it, if the full legal effect of the government's actions is to 'freeze' the status of the land for that purpose without any possibility of economic use."

Id. Therefore, inverse condemnation by planning occurs where the government freezes the status of property for some future regulatory purpose.

Viewcrest did not allege or argue that ODOT froze the Viewcrest property for some regulatory purpose. To the contrary, Viewcrest alleged and proved that ODOT engaged in a direct and particularized course of conduct aimed at the Viewcrest property which substantially interfered with Viewcrest's use and enjoyment of the property.

Indeed, in the trial court, ODOT understood that a factual issue in this case was whether it engaged in planning. ODOT argued in closing arguments to the jury that the evidence showed that it merely engaged in planning. (Tr. 1305.) Viewcrest responded that ODOT's direct and particularized conduct aimed specifically at the Viewcrest property most certainly was not planning. (Tr. 1308-09.) The jury agreed with Viewcrest, probably because even ODOT

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its opening brief. As stated in this Reply, *Suess Builders* is inapposite because it is based on government planning, a circumstance which is not present here. Despite ODOT's suggestion to the contrary, there is no need for Viewcrest to cite and distinguish each distinct category of takings case here.

admits that it had not actually adopted a relevant plan. (ODOT Br. at 35.) This is not a planning case. ODOT is foreclosed from asserting a factual claim the jury rejected and which rejection is supported by evidence in the record.

B. ODOT's novel argument that inverse condemnation requires conduct that is essentially a trespass has already been rejected by this Court.

The foregoing shows that ODOT is attempting to retry in this Court the factual issues that the jury permissibly resolved in Viewcrest's favor. But ODOT does not stop there. It also makes legal arguments aimed at rewriting Oregon condemnation law.

First, ODOT advances a theory that inverse condemnation occurs only upon government conduct that is in essence a trespass. But such an argument contradicts the holdings in *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100 (1962) (*Thornburg I*), *Thornburg v. Port of Portland*, 244 Or 69, 415 P2d 750 (1966) (*Thornburg II*), and *Lincoln Loan v. State*, 274 Or 49, 545 P2d 105 (1976). Second, ODOT suggests that the test in *Thornburg II* is somehow incorrect, but ignores the fact that this Court reapplied that test in *Lincoln Loan*. Third, ODOT invites this Court to limit all inverse condemnation claims to those claims that are for government conduct which is in essence a trespass. However, to do so, this Court must disregard its recognition in *Coast Range Conifers, LLC v. State*, 339 Or 136, 117 P3d 990 (2005) that there are numerous

categories of takings claims subject to different tests. Viewcrest elaborates on each of these points below.

First, ODOT incorrectly contends that *Thornburg* recognized a taking that was "in essence a physical trespass." (ODOT Br. at 28.) *Thornburg* involved a takings claim based on government-authorized overflights above and adjacent to the plaintiff's property. In *Thornburg I*, the Court rejected the trial court's conclusion that an actual trespass is required. *Id.* at 183, 198. The Court held that such non-invasive overflights could be a taking upon a showing of "nuisance," by which this Court meant "repeated *nontrespassory* invasions." *Id.* at 192 (emphasis supplied). Such a taking is shown by "proof that the activities of the government are unreasonably interfering with [the plantiff's] use of his property, and in so substantial a way as to deprive him of the practical enjoyment of his land," which was a question of fact for the jury to decide. *Id.* at 199-200. As to the sufficiency of the evidence presented by the plaintiff in *Thornburg I*, the Court explained that the plaintiff's evidence had been excluded and therefore, the issue was not before the Court. *Id.* Thus, *Thornburg I* carefully declined to state the test for the *amount or degree* of deprivation of property that must occur.

In *Thornburg II*, the parties returned to the Court to determine the proper amount of taking that must be shown to have been caused by the repeated

overflights in order for the plaintiff to prevail. The trial court had instructed the jury to take into account "the utility of the airport" in deciding whether the plaintiff's property had been depreciated the overflights. That was error. *Id.* at 74. Instead, the correct instruction (the Supreme Court specifically announced) required a factual finding of:

> "[W]hether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the individual's land by a sum certain in money."

Id. at 73. Thus, under *Thornburg II*, repeated nontrespassory invasions constitute a taking, *not* because they are in essence a trespass and *not* because the nontrespassory invasions carry less utility than they cost. Repeated nontrespassory invasions are compensable takings if they are particular to the private property and substantially reduce its fair market value.

Based on the foregoing, ODOT's interpretation of the *Thornburg* cases as requiring "in essence a physical trespass," (ODOT Br. at 28), is surprising. And, even putting aside the focus in the *Thornburg* cases on conduct that simply was not a trespass, *Lincoln Loan* further contradicts ODOT's novel interpretation. In that case, the Court stated: "The *Thornburg* case was significant because it *expanded* the rule of inverse commendation *from purely trespassory actions* to actions based on nuisance." 274 Or at 56 (emphasis added).

Furthermore, that reference to *Thornburg* in *Lincoln Loan* is not made in passing. Rather, the facts in *Lincoln Loan* conflict with ODOT's new rule. The plaintiff in *Lincoln Loan* did not allege any trespass or facts that were "in essence a physical trespass" (as ODOT formulates its test). Instead, the *Lincoln Loan* plaintiff alleged pervasive government acts over ten years wherein the government targeted the plaintiff's renters, prevented investments, and caused the value of neighboring property to decline for lack of maintenance. *Id.* at 51-52, 57.

None of those actions alleged in *Lincoln Loan* resembles a trespass. The government did not in any way enter the private property. It entered other privately owned real property but directly affected the plaintiff's property only through its non-invasive conduct. Rather than require proof of government conduct that was "in essence a trespass," as ODOT would have it, *Lincoln Loan* requires proof of repeated government conduct that substantially interferes with the use and enjoyment of private property. *Lincoln Loan*, 274 Or at 57.

ODOT acknowledges that test from the *Thornburg II* and *Lincoln Loan*, but attempts to dismiss it as one that "inexplicably changed since *Thornburg I*[.]" (ODOT Br. at 31 n11.) But precisely what is it that has "changed"? As noted, *Thornburg I* announced no test, because the Court there recognized that to do so would be premature. And, when the reason to specify the applicable

test was presented in *Thornburg II*, the Court forthrightly set out what it was to be. *Lincoln Loan* followed that precedent directly. Put precisely: When it was needed, precedent was established. Once established, it was followed. At bottom, ODOT's problem is not that the development of the applicable test was "inexplicable"; its problem is that it doesn't like the test and wishes it would go away.

Thornburg and *Lincoln Loan* are pertinent here because they involved repeated government conduct which was particular and direct to the plaintiff's property, which resulted in a substantial deprivation of the plaintiff's use and enjoyment of private property, and for which deprivation the government was required to respond in damages. That is equally true in this case, and calls for the same outcome, as the jury decided.

Thornburg I also supplies a definition for nuisance taking that is significant in this case. ODOT asserts at one point that "Viewcrest's claim is really a tortious interference with business relations claim," (ODOT Br. at 39). The *Thornburg I* Court grappled specifically with this issue: In determining whether the government's conduct constituting a nuisance could also be a taking, the Court noted that not all torts committed by the government rise to the level of a taking; however, a nuisance or "blight" takings claim arises when governmental non-trespassory interferences are ***repeated***. *Thornburg I*,

233 Or at 191-92. **The Court stated,**

> **"The plaintiffs concede that single-instance torts, as torts, are not compensable [as a taking]. Inverse condemnation, however, provides the remedy * * * where the continued interference amounts to a taking for which the constitution demands a remedy. In summary, a taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance.'"**

Id. at 292.

Third, ODOT's argument conflicts with *Coast Range Conifers*. In that case, the state argued that regulatory takings were not compensable under the Oregon Constitution. *Coast Range Conifers*, 339 Or at 142. The Court readily dismissed that argument, noting that "the dictionary definition of property in 1828 was broad enough" to include property subjected to regulatory takings. *Id.* at 143-46. Similarly here, ODOT has provided no persuasive reason for this Court to abandon the blight takings category of claim that Viewcrest asserts which has been repeatedly recognized in *Thornburg* and *Lincoln Loan*.

Having rejected the state's argument in *Coast Range Conifers* to retract years of case law recognizing regulatory takings, the Court turned to the plaintiff's argument for a unified theory of takings, which is echoed by ODOT's argument here for a consolidated theory of inverse condemnation claims. *Compare Coast Range Conifers*, 339 Or at 142 ("[The plaintiff] advances a

unified theory of state takings law that attempts to draw a single set of principles from the *separate strands* of this Court's takings cases." (Emphasis added.)) *with* ODOT Br. at 19 ("[T]his court's reasoning [in *Coast Range Conifers*] also applies generally to the question of when activities that are not physical appropriation may be recognized as takings: when they deny an owner all economically viable use and are thus 'tantamount to' appropriation.")) But this Court in *Coast Range Conifers* rejected that unified theory for the same reason that ODOT's theory fails here:

The Court explained that it "consistently has distinguished among takings claims depending on the nature of the government action that gives rise to the claim *and has applied different tests to different categories of government action*." *Coast Range Conifers*, 339 Or at 146. To drive that point home, the Court provided examples of different categories of government action which were subject to different tests:

> "For example, when the government intentionally has authorized a physical invasion of private property, the court has asked whether the invasion substantially interfered with the owner's use and enjoyment of that property. *See Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002) (applying that test to claim that government intentionally diverted water onto private property); *Morrison* [*v. Clackamas County*], 141 Or [564,] 568-69[, 18 P2d 814 (1933)] (same). By contrast, when government regulates the use of land to advance a public policy, this court has held that no taking occurs as long as the property retains some economically viable use. *Boise Cascade Corp.*[*v. Board of Forestry*], 325 Or [185,] 198[, 935 P2d 411 (1997)]; *Dodd v. Hood River County*,

317 Or [172,] 182, [855 P2d 608 (1993)]."

Id. at 146-47 (footnotes omitted). And, having recognized "separate strands" to takings under the Oregon Constitution, the Court noted the "substantial interference test" applies to "some government authorized nuisances," citing *Thornburg*, meaning nuisances that are repeated. *Id.* at 147 n11. It further noted that "other categories of takings claims exist. *See, e.g. Dodd*, 317 Or at 181-82 (recognizing condemnation blight cases as a discrete category of takings cases)."

Thus, there are numerous categories of takings claims with different tests. Not recognizing that explicit statement in *Coast Range Conifers*, ODOT claims that *Suess Builders* is somehow controlling of this case, because "the issue in [*Suess Builders*] does not arise from regulation of the private use of property." (ODOT Br at 23.) *Suess Builders* is not a regulatory takings case. *Suess Builders* identifies itself as a planning case by explaining the test applicable to a planning taking case. Under that test, "adoption of a plan could be the equivalent of a taking" if the defendants' action "freeze[s] the status of land for that purpose without any possibility of economic use." *Suess Builders*, 294 Or at 260.

It was the existence of an adopted plan in *Suess Builders* that made that case a planning case. *See Suess Builders*, 294 Or at 256, 263 (holding that the

plaintiff's allegation of temporary deprivation of the value of the property because of the city's comprehensive land use plan stated an inverse condemnation claim). But ODOT concedes that it had not adopted any plan with respect to the Viewcrest property. (ODOT Br. at 35.) For its part, Viewcrest did not sue ODOT for planning (and the jury rejected ODOT's planning argument); it sued ODOT for its direct and particularized conduct aimed at the Viewcrest property which had the result of substantially reducing Viewcrest's use and enjoyment of its property.

C. This case is indistinguishable from *Lincoln Loan.*

In *Lincoln Loan*, the plaintiff sufficiently alleged an inverse condemnation claim with facts that the state gave notices to potential investors and renters that the plaintiff's property would be condemned and used other property in a way that affected the value of the plaintiff's property. *Lincoln Loan*, 274 Or at 51. Similarly here, ODOT reported to potential investors that the Viewcrest property would be landlocked and have no value. ODOT contends that its conduct was mere "planning" (despite the jury's verdict to the contrary), but it does not explain how the state's equivalent conduct in *Lincoln Loan* was not merely planning as well. Instead, ODOT contends that, "in *Lincoln Loan*, the plaintiff alleged that the state had actively interfered with the plaintiff's current use of the property * * *. By contrast, here, ODOT did not

actively interfere with any current use of Viewcrest's property." (ODOT Br. at 35.) The jury verdict, which found that ODOT substantially interfered with Viewcrest's "use and enjoyment" of its land (ER 19), forecloses that distinction.

ODOT suggests that another distinction from *Lincoln Loan* is that the state had already designated the plaintiff's real property for condemnation in *Lincoln Loan,* but it has not done that here. If controlling, that distinction would put *Lincoln Loan* in conflict with *Suess Builders*, where the Court held that the plaintiff had to prove that the planning had the effect of freezing the status of the land without any possibility of economic use. But *Suess Builders* and *Lincoln Loan* are consistent with each other. Under *Suess Builders*, a planning takings claim does not require proof of repeated government conduct. Planning that freezes the status of private property depriving it of all economically viable use is enough. But for a blight takings claim under *Lincoln Loan*, the plaintiff must prove repeated government conduct.

D. ODOT concedes that Viewcrest need not prove why ODOT repeatedly targeted the Viewcrest property.

Finally, ODOT avoids any attempt to defend the Court of Appeals' alternative, "public good" requirement, and for good reason. *See Hall v. ODOT*, 252 Or App 649, 655, 288 P3d 574 (2012) (stating that Viewcrest had to prove not only that the taking effected by ODOT was done for "public use" but also for the "public good"); ODOT Br. at 2 n1 42-45 (stating that ODOT

will not address "public good" question on review and arguing that the maliciousness of its conduct is not relevant).[4] That is a sound choice. The public good requirement discovered by the Court of Appeals has no basis in Article I, section 18, or case law interpreting that provision. Further, *Thornburg II* rejects a public good requirement by identifying as error the trial court's jury instruction "to consider the utility of the airport in deciding whether the plaintiff's property had been depreciated in value by the defendant's activities." *Thornburg II*, 244 Or at 74.

CONCLUSION

ODOT's argument is structured around a factual assertion that its conduct constituted planning, which the jury rejected. The jury verdict alone forecloses ODOT's arguments on review. Moreover, ODOT disregards this Court's explicit holdings in *Thornburg* and *Lincoln Loan* to argue that a party must show conduct which is essentially a trespass to prove a claim for inverse condemnation. Those cases, however, focus on repeated government conduct that substantially interferes with the use and enjoyment of private property—not trespass. ODOT's repeated conduct directed at the Viewcrest property constitutes a taking under Oregon law, because it substantially interfered with

[4] Both ODOT and *amicus* attempt to distance the malicious conduct by ODOT employees from ODOT. *Amicus* even claims that such conduct did not bind ODOT under agency principles. Such arguments—even if they were well taken—are not properly preserved.

Viewcrest's use and enjoyment of its property. The Court of Appeals' decision depriving Viewcrest of compensation for that taking must therefore be reversed.

DATED this 12th day of September, 2013.

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Certificate of Compliance with ORAP 5.02(2)(d)

Brief Length

I certify that this petition complies with the 4,000 word limit for opening briefs in the Supreme Court and that the word count of this brief (as described in ORAP 5.05 (2)(a) is 3,998 words.

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/s/ W. Michael Gillette
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CERTIFICATE OF FILING AND SERVICE

I certify that on the 12th day of September, 2013, I filed this REPLY BRIEF OF PLAINTIFFS-RESPONDENTS, PETITIONERS ON REVIEW with the State Appellate Court Administrator by the eFiling System.

I further certify that on May 9, 2013, I caused true copies of the REPLY BRIEF OF PLAINTIFFS-RESPONDENTS, PETITIONERS ON REVIEW to be served on the following parties by the eFiling System:

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