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,

and

WESTEK PROPERTIES, LLC,

Intervenor.

Linn County Circuit Court
No. 081164

CA A146386

SC S060879

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STATE OF OREGON BY AND THROUGH THE OREGON DEPARTMENT OF TRANSPORTATION

Appeal from the Judgment of the Circuit Court
for Linn County
Honorable JOHN A. MCCORMICK, Judge

Opinion Filed: October 10, 2012
Author of Opinion: Schuman, P.J.
Concurring Judges: Wollheim and Nakamoto

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW STATE OF OREGON BY AND THROUGH THE OREGON DEPARTMENT OF TRANSPORTATION

STATEMENT OF THE CASE

The issue in this case is whether the Oregon Department of Transportation's public discussion of highway planning was a taking of property owned by plaintiffs Fred Hall and Viewcrest Investments, LLC (Viewcrest) under Article I, section 18, of the Oregon Constitution. The Oregon Department of Transportation (ODOT) proposed a plan that would eventually include removal of the interchange at Viewcrest's property on I-5 near Albany. That removal would necessitate acquiring Viewcrest's property through condemnation. As is often the case with such planning efforts, the uncertainty surrounding the potential removal reduced Viewcrest's property value. Viewcrest alleged that ODOT's activities resulted in a taking under Article I, section 18. There was no taking.

A taking cannot result from the reduction of property value caused by non-invasive planning when economically viable use remains. Government planning for potential condemnation results in compensation when the property is acquired through eminent domain. Only in exceptional circumstances – when government's activities involve trespass, nuisance that is in essence a trespass, or when those activities result in loss of all economically viable use –

may the constitution require that a landowner be compensated outside the normal course of condemnation. This is not such a case. Rather, ODOT has simply pursued public planning pursuant to state and federal law and honestly responded to inquiries about the status of that planning. Article I, section 18, of the Oregon Constitution does not require that ODOT's non-invasive pre-condemnation planning activities be compensated as a taking.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Are non-invasive government planning activities that include consideration of potential condemnation of property sufficient to support a takings claim under Article I, section 18, of the Oregon Constitution, when they result in loss in value but not loss of all economically viable use?

Proposed Rule of Law[1]

Pre-condemnation activities, including planning and consideration of potential condemnation, cannot give rise to a taking under Article I, section 18, of the Oregon Constitution, unless they physically interfere with the use of the property, or result in denial of all economically viable use of the property. Pre-condemnation planning that merely lowers a property's value is not a taking.

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[1] ODOT does not respond to Viewcrest's second proposed rule of law—which challenges the Court of Appeals' second alternative basis for its decision—because in ODOT's view the outcome is controlled by the analysis reflected in ODOT's proposed rule of law.

Summary of Argument

This court has recognized two categories of takings under Article I, section 18, of the Oregon Constitution: those cases that involve a physical occupation or actual trespass by the government, and those cases that rise to the level of a taking because the government's action denies the property owner all economically viable use. The first are compensable due to the physical transgression against the owner's property. However, the second category reflects this court's recognition that certain non-physical government actions can be equivalent to a taking when they deny the owner all economically viable use.

Viewcrest posits that this court's taking case law can be divided a different way: between regulatory takings, where a plaintiff must prove denial of all economically viable use, and non-regulatory activities that substantially interfere with and reduce the value of private property, such as Viewcrest alleged here. While regulatory takings are an example of cases in which the government has gone too far and has deprived the property owner of all economically viable use, they are not the only type of case where a taking results without physical trespass. ODOT's pre-condemnation planning activities in this case could also constitute a taking if Viewcrest showed that it was denied all economically viable use of its property. But here it is undisputed that the property retained substantial value.

Viewcrest's claim that the evidence demonstrates that ODOT's employees acted with improper motives does not alter the analysis. The motives of government employees are not relevant to whether property has been taken under Article I, section 18.

In short, in the absence of physical intrusion by the government, denial of all economically viable use is the essential element of a taking claim. Viewcrest did not prove a cognizable taking claim, and the verdict and judgment were properly reversed. This court should affirm the opinion of the Court of Appeals.

Summary of Facts[2]

A. Viewcrest purchases the property and tries to develop it.

The property at issue in this case is an approximately 25-acre parcel in Millersburg, Oregon, just west of Interstate Highway 5 (I-5), at the Viewcrest interchange. (Tr 255-56; Ex 1). The property is bordered by I-5 to the east, and railroad tracks to the west. (Ex 1 (Map)). Robert Harris, a real estate investor, and his business partner, Fred Hall, purchased the property in 1991. (Tr 255-57). The property was effectively landlocked by the railroad tracks to the west

[2] Viewcrest contends that the jury necessarily found that ODOT acted with improper motives; Viewcrest's summary of facts portrays the evidence in that light. ODOT disagrees with that legal proposition, as did the Court of Appeals, and accordingly provides its own factual statement.

and guardrails blocking access to the Viewcrest interchange with I-5 to the east. In 1993, Harris and Hall successfully sued ODOT, arguing that the original deed provided them a right of access to the Viewcrest interchange. (Tr 284-86; Ex 42 (Opinion of Circuit Court Judge Goode)). Harris then acquired from the state an adjacent 10-acre parcel in 1995. (Tr 286; Ex 120). The sales agreement included a provision noting ODOT's concerns about any possible future development of the site:

> NOTE: ODOT is concerned about any development of the property that will have a negative impact on the highway interchange. ODOT WILL BE INVOLVED WITH THE LAND USE PLANNING PROCESS!!

(Ex 120 at 1) (all capitals in original). Harris's initials are next to the note. *Id*.

In 2000, Harris and Hall began to try to increase development of the property. (Tr 297). They entered into an agreement with an investor to develop a warehouse project for the property. The investor paid Viewcrest $450,000 for that purpose in 2000 and 2001, but the project was abandoned when the investor died. (Tr 385-85, 429; Ex 117).

In September 2001, an ODOT planner received a call from Jackie Yarbrough, who had helped the now-deceased investor with financing for the warehouse project. The planner told Yarbrough that future removal of the interchange was a possibility. (Tr 568; Ex 11).

In the period between 2005 and 2007, Harris worked to sell the property or reach agreements to develop it, including discussions with a real estate broker. (Tr 302,449). Given the uncertainty about the potential widening of the freeway and possible removal of the interchange, the broker was unable to consummate the deal. (Tr 450-52).

B. ODOT commences planning activities to improve highway safety.

Because this case involves the effect of ODOT planning activities, it is helpful to place those activities in the context of ODOT's planning obligations. ODOT's planning activities are governed by policies adopted by the Oregon Transportation Commission. ORS 184.615(3); *see* ORS 184.618 ("primary duty" of the Oregon Transportation Commission is to "develop and maintain a state transportation policy and comprehensive long-range plan for a safe, multi-modal transportation system for the state which encompasses economic efficiency, orderly economic development and environmental quality") The Oregon Transportation Commission achieves that mission by adopting plans such as the Oregon Transportation Plan (2006) and the Highway Plan (1999).[3] The adoption of the Oregon Transportation Plan and Highway Plan are subject

[3] The Oregon Transportation Plan may be found at http://www.oregon.gov/ODOT/TD/TP/pages/otp.aspx; the Highway Plan may be found at http://www.oregon.gov/ODOT/TD/TP/pages/ohp_1999plan.aspx.

to statewide land use planning coordination and planning laws and must be approved by the Land Conservation and Development Commission. OAR 731-015-0055, and 0065; ORS 197.180(1)(a). The rules implementing Statewide Planning Goal 12 (Transportation) require, among other things, a transportation needs analysis and the identification of those transportation improvements necessary for a 20-year planning period. OAR 660-015-0000(12); OAR 660-012-0030.

Not only is transportation planning long-term, it is also public. *See* Statewide Planning Goal 1 (OAR 660-015-0000)(1) (requiring state agencies to "develop a citizen involvement program that insures the opportunity of citizens to be involved in all phases of the planning process"). Moreover, highway planning also must comply with the National Environmental Policy Act (NEPA), pursuant to which ODOT identifies and evaluates the environmental impacts of project alternatives. That process also requires public input and review. (Tr 664; Ex. 125).

In this case, in 2001, ODOT began planning to address a number of safety concerns along the I-5 corridor in the Millersburg and Albany area. (Ex 6; Ex 36 at 8). Regarding the Viewcrest interchange specifically, ODOT identified 16 different scenarios for addressing those safety problems. (Tr 727; Ex 60). Ultimately, ODOT proposed removal of the Viewcrest interchange and another interchange, to be replaced with a new interchange. (Ex 5 at 2). The

proposal noted that, given the railroad tracks to the west, removal would leave landlocked "a privately held parcel of land" to the west of the interchange—Viewcrest's property. (Ex 5 at 2). Although other options included the building of an auxiliary lane to provide access to the property or keeping access by leaving the overcrossing in place but eliminating the ramps, the proposal favored removal of the interchange and purchase of the Viewcrest property. (Ex 5 at 2). The proposal noted that, otherwise, development of the property would "put traffic into this interchange that ramp geometry, structure, width and interchange spacing are not equipped to handle." (Ex 5 at 2).

In early 2002, ODOT held a series of public meetings that included discussions about possible changes to several I-5 interchanges in the Albany-Millersburg area, including a proposal to modify one interchange and remove the Viewcrest and Murder Creek interchanges. (Tr 664-68; Ex 2 (press release); Ex 36 at 8-9 (refinement plan)). In response to the public's concerns, ODOT announced in May 2002 that the proposal would be revised to omit removal of the Viewcrest interchange within the following three years. (Ex 2 (press release); Ex 3 (public meeting announcement); Ex 4 (letter to property owners)).

C. ODOT continues to plan for highway safety improvements, including possible removal of the Viewcrest interchange.

Although removal of the Viewcrest interchange in the short term was no longer considered as an option, the planning process involving possible removal of the interchange continued. In March 2004, ODOT submitted a proposed Comprehensive Plan Amendment to Linn County. (Ex 35). The proposal first documented the traffic safety issues associated with the Viewcrest interchange and neighboring interchanges. (Ex 35 at 7-10). To address those issues, it recommended that additional travel lanes should be added to I-5 and that the Viewcrest interchange and a neighboring interchange be removed and replaced with a new interchange further south. (Ex 35 at 10). Linn County subsequently amended the county's comprehensive plan to reflect the proposal. (Tr 341, 693).

A 2006 planning document prepared by ODOT consultants CH2MHill addressed options for four interchanges along the Millersburg I-5 corridor, including three options for the Viewcrest interchange. (Ex 119 (Millerburg I-5 Corridor Refinement Plan; Ex 119 at 58). Those options included removal of the interchange ramps but leaving the overpass in place for access to the Viewcrest property, removal of the entire interchange, and retaining the existing interchange. (Ex 119 at 58-59).

The study also detailed the advantages and disadvantages of each option. (Ex 119 at 60-63 (Table), 100-02). While the least costly option was to retain the existing interchange, the plan noted that—given the potential for serious injuries or fatalities because of the interchange's flaws—the cost of such a "no-build" option could be much higher. (Ex 119 at 102). Ultimately, CH2MHill recommended removal of the interchange and purchase of the Viewcrest property. (Ex 119 at 102).

As of the date of the trial, the planning process was ongoing. ODOT had received funding to prepare an environmental assessment. (Tr 663). The Federal Highway Administration will ultimately decide whether to proceed with a project at the site. (Tr 696).

In the meantime, Viewcrest remained able to use the property for commercial purposes. Viewcrest sold "sign easements"—allowing for placement of, and access to, billboards on the property. (Tr 438-39; Ex 112). In 2003, Harris and Viewcrest sold two perpetual billboard easements for $46,000. (Tr 386-88; Ex 111, 112). In 2005, they sold another easement for $10,000. (Ex 112**;** Tr 388). The billboards on the property generate income. (Tr 798-803; Ex 140-41). While Viewcrest would have developed the property further, Viewcrest was unable to do so because Harris did not have the financial means. (Tr 445).

D. Proceedings in Linn County Circuit Court and the Court of Appeals

In 2008, Viewcrest filed this inverse condemnation suit, alleging that the state had taken the property for a public purpose, requiring just compensation under Article I, section 18, of the Oregon Constitution. (Pet BOM ER 8-18 (Complaint)). In particular, Viewcrest alleged that ODOT, by engaging in public planning activities—including informing public officials, the general public, and prospective purchasers that the state intended to eliminate Viewcrest's access to the property and planned to acquire the property by eminent domain—created a nuisance that substantially interfered with Viewcrest's property rights. (Pet BOM ER 10-12). At the close of Viewcrest's case and again at the close of the evidence, ODOT moved for a directed verdict on the ground that mere planning, even if it resulted in a reduction in value, did not constitute a taking, and that Viewcrest had failed to show a denial of all economically viable use. (Tr 751-52, 1090-94). The court denied the motion. (Tr 773, 1117-19).

Over ODOT's objections, the court instructed the jury that Viewcrest had to prove that ODOT's"actions have substantially and unreasonably interfered with [Viewcrest's] use and enjoyment of their land and that defendant's activities were sufficiently direct, particular, and of a magnitude to support a conclusion that the interference has reduced the fair market value of plaintiffs'

[land]."[4] (Tr 1317, 1331). The court also provided a verdict form that reflected that instruction, to which ODOT also objected. (Tr 1239, 1331, Pet BOM ER 19). After the jury found that those elements had been established, the jury was asked to determine the value of the property, assuming no unreasonable interference by the state. (Pet BOM ER 19). In response to that question, the jury found a value of $4,000,000. (Pet BOM ER 19). Finally, the jury was asked to determine the amount of the reduction in market value of the property. (Pet BOM ER 19). In response to that final question, the jury found a reduction in market value of $3,378,750. (Pet BOM ER 19). Necessarily, then, the jury found that the property had a present value of $621,250.

The court subsequently entered a judgment awarding Viewcrest $3,378,750. (Pet BOM ER 20-21).

The Court of Appeals reversed. The Court of Appeals concluded that the trial court should have granted ODOT's motion for directed verdict, because mere reduction in value did not establish a compensable taking in this case. *Hall/Viewcrest v. State of Oregon*, 252 Or App 649, 656, 288 P3d 574 (2012), *rev allowed*, 353 Or 428 (2013). Moreover, the court could not infer that the

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[4] Notably, the jury was not given an instruction on intent as an element of the takings claim, nor in any other context. Viewcrest asserts that ODOT did not "assign error to the giving of, or any refusal of, any instruction regarding ODOT's intent to take the Viewcrest property." (Pet BOM 6). But ODOT could not object because no such instruction was proposed or given.

jury had found ODOT acted with improper motive. 252 Or App at 654-55. Alternatively, even if the jury had made such a finding, then Viewcrest would not have shown that ODOT took the property for public use. *Id.* at 655-56.

ARGUMENT

At issue in this case is the loss in value that a property owner must show to establish "inverse condemnation" under Article I, section 18, based on non-invasive government planning activities. Must the property owner show that the government's activity has deprived the owner of all economically viable use, or can the property owner establish such a claim by showing "substantial interference" with use of the property resulting in reduction in value? As is explained in this brief, the owner must show the former. Viewcrest failed to do so.

This brief first examines the text and history of Article I, section 18, which demonstrates that this court has recognized inverse condemnation only where the government's activity is equivalent to physical appropriation. The brief then discusses case law interpreting Article I, section 18, particularly in the context of pre-condemnation activity, which applies the "denial of all economically viable use" standard. The brief goes on to discuss the two cases on which Viewcrest primarily relies, *Thornburg v. Port of Portland*, 233 Or 178, 376 P2d 100 (1963) (*Thornburg I*), and *Lincoln Loan v. State Highway Comm.*, 274 Or 49, 545 P2d 105 (1976), to show that those cases should not be

read to extend Article I, section 18, to non-invasive planning activities. Finally, this brief further explains that Viewcrest's attacks on ODOT employee motives are not relevant to determining whether a taking occurred under Article I, section 18.

As the Court of Appeals correctly found, the trial court should have granted a directed verdict in ODOT's favor, because Viewcrest showed only a reduction in value, not loss of all economically viable use.

A. The text, context, and history of Article I, section 18, and this court's case law interpreting it, demonstrate that Oregon's Takings Clause applies to physical appropriations or their equivalent.

A property owner may bring an action against the government in "inverse condemnation" under Article I, section 18, to recover the value of property that the government has taken without first exercising the power of eminent domain through condemnation. *See generally Vokoun v. City of Lake Oswego*, 335 Or 19, 26, 56 P3d 396 (2002) (describing condemnation and inverse condemnation); *Suess Builders v. City of Beaverton*, 294 Or 254, 258 n 3, 656 P2d 306 (1982) (same). As discussed below, the text and history of Article I, section 18, as well as the case law interpreting it, establish that to constitute a taking actionable in inverse condemnation, governmental activity must be equivalent to the exercise of eminent domain. It follows that a physical appropriation or trespass constitutes a taking of that portion of property. In addition to direct physical appropriations, this court has recognized that in

certain cases a government-created nuisance can constitute a taking when that invasion results in substantial interference with the landowner's use and enjoyment," rising to the level of an "invasion" or "easement." *Thornburg*, 233 Or at 198. In essence, such nuisances constitute a trespass. In the absence of such a trespass, "no taking occurs as long as the property retains some economically viable use." *See Coast Range Conifers v. State of Oregon*, 339 Or 136, 147, 117 P3d 990 (2005) (so holding as to government regulations); *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 614, 581 P2d 50 (1978) (using similar language with regard to designating property for condemnation). In sum, a taking arises from physical appropriation, *i.e.*, trespass, or activity that is equivalent to physical appropriation: denial of all economically viable use.

Viewcrest categorizes takings differently, based on its "blight condemnation," theory of Article I, section 18, taking, which it defines broadly to encompass any "non-regulatory, non-trespassory government conduct that directly and substantially interferes with use of an owner's property." (Pet BOM 1 n 1).[5] Under Viewcrest's takings categories, therefore, in the absence of trespass, only regulatory takings require a showing of denial of economically

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[5] Viewcrest's theory is broader than "condemnation blight." "Condemnation blight" is a theory of takings liability based on actions of the government before the actual formal condemnation of the property. *Dept. of Transportation v. Hewitt Professional Group,* 321 Or 118, 134, 895 P2d 755 (1995).

viable use. Viewcrest accordingly characterizes ODOT's activity as "non-regulatory," in an artificial attempt to distinguish it from the kind of activity that must result in denial of all viable use in order to constitute a taking. But that attempt fails. Viewcrest's new form of taking completely departs from the principle that a taking is tantamount to the exercise of eminent domain and it finds no basis in the text and history of Article I, section 18. Regardless of the cause of the claimed taking—whether regulatory or non-regulatory—if the taking is not the result of a trespass, the denial of all economically viable use standard applies.

1. The text of Article I, section 18, only supports its application to those pre-condemnation activities that constitute physical occupation or its equivalent.

Article I, section 18 (1857), provides in part:

> Private property shall not be taken for public use * * * without just compensation; nor except in the case of the state, without such compensation first assessed and tendered * * *.

Significantly, the text uses the word "taken." At the time that Article I, section 18, was enacted, "'take' meant '[i]n a general sense, to get hold or gain possession of a thing in almost any manner'" *Coast Range Conifers,* 339 Or at 142, (quoting Noah Webster, *An American Dictionary of the English Language* (1828)). The word "taken," therefore, refers to possession or its equivalent; it does not refer to activity that does not involve physical interference or that results in less than a total loss of value.

Moreover, comparison of the text of Oregon's takings clause to that of other states is revealing; the text of Oregon's clause is more limited than that of many other states. The Oregon clause applies only to property "taken," while many other states' clauses apply more broadly to property "taken or damaged."[6] This court has noted that, for that reason, the case law from those other states may be more "liberal" than the case law in Oregon. *Moeller v. Multnomah County*, 218 Or 413, 425-26, 345 P2d 813 (1959). As this court has explained, "the modern trend" to liberalize claims for takings, "was accomplished in many instances by changes in the constitutional provisions requiring compensation to be paid before the taking, and more generally by providing in the constitution that private property shall not be *taken or damaged.*" *Id.* (emphasis in original). Accordingly, this court has held that property is not "taken" if it is simply "damaged." *Hawkins v. City of La Grande*, 315 Or 57, 68, 843 P2d 400 (1992). Hence, careful attention to the text of Article I, section 18, counsels against extending its application to pre-condemnation planning activities that do not rise to the level of denying all economically viable use. Reduction in value, such as Viewcrest alleges here, may be "damage;" it is not a taking.

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[6] For example, Article I, section 19, of the California Constitution provides: "Private property may be taken or damaged for public use only when just compensation * * * has first been paid to, or into the court for, the owner."

2. The history of Article I, section 18, only supports its application to those pre-condemnation activities that involve physical appropriation or its equivalent.

This court recently considered in depth the history of Article I, section 18, in *Coast Range Conifers*, 339 Or at 142-46. After reviewing early state and federal case law, this court first concluded that a "classic taking" as the framers understood it occurs when the government physically occupies or appropriates property. *Coast Range Conifers*, 339 Or at 145. Indeed, most early state cases involved physical appropriation of property. *Id*. at 144 (citing William B. Stoebuck, *Nontrespassory Takings in Eminent Domain*, 16-18 (1977)).

This court next concluded that the framers would have been aware that "governmental actions that did not fit precisely within the classic paradigm of a taking," could still constitute a taking. Although there is no record of debates on Article I, section 18, early Oregon cases demonstrate that Article I, section 18, also applies to "actions that are equivalent to a taking." *Id.* at 145-46. Thus, while the history shows that Article I, section 18, is not limited to "classic" physical appropriations, this court's examination of the provision's history has only supported the additional application of Article I, section 18, when government activities were "tantamount" to such appropriations. *Id*. at 147.

3. This court's case law demonstrates that Article I, section 18, covers physical appropriation and its equivalent and does not extend to non-invasive pre-condemnation activities that do not take all economically viable use.

In addition to the text and history, this court's precedents reflect the principle that Article I, section 18, covers physical appropriation and its equivalent, and does not extend to non-invasive pre-condemnation planning activities that do not take all economically viable use.

a. The case law adhered to in *Coast Range Conifers* demonstrates that Article I, section 18, extends only to physical appropriation or its equivalent

As discussed above, in *Coast Range Conifers* this court considered the text, context, and history of Article I, section 18. To be sure, the issue before this court in *Coast Range Conifers* was whether Article I, section 18, applied to regulations and not just to physical appropriation. But this court's reasoning 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 of the property and are thus "tantamount to" appropriation. *Id*. at 145-46, 150.

This court's discussion of other case law in *Coast Range Conifers* demonstrates which kinds of cases are to be considered "tantamount" to appropriation. This court adhered to its more recent decisions finding that "physically invasive actions, overflights, and regulations" could rise to the level

of a taking. *Id*. at 146. The decisions this court discussed and adhered to all involved either 1) the physical interference with use of the property; or 2) required denial of all economically viable use: *Morrison v. Clackamas County*, 141 Or 564, 18 P2d 814 (1933) ("physically invasive action" by floodwaters); *Thornburg I* (overflights creating an "easement" or "servitude"); *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 935 P2d 411 (1997), and *Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993) (no regulatory taking because "some substantial beneficial use" remained); *McQuaid v. Portland & V. R'y Co.*, 18 Or 237, 22 P 899 (1889) (physical taking of a common-law right of access).[7] None of the cases this court adhered to supports Viewcrest's contention that a non-invasive taking can arise from mere reduction in value. This court's discussion of the case law therefore reflects its understanding that non-invasive takings require a showing of denial of all economically viable use.

b. This court's pre-condemnation cases demonstrate that pre-condemnation activities are measured by the same standard as other claimed takings: denial of all economically viable use.

Not only does this court's takings case law generally support ODOT's view, but also this court's takings case law specifically addressing

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[7] Viewcrest asserts broadly that *Coast Range Conifers* demonstrates that where the state acts "other than legislatively," its non-trespassory acts can constitute a taking. (Pet BOM 21-22). But this court did not distinguish between legislative and non-legislative activities.

pre-condemnation activities demonstrates that such activities are measured by the same standard as other claimed takings. Logically, to constitute the equivalent of appropriation, pre-condemnation activities must be of such nature that the government has in essence already taken the property before formal condemnation. It follows that a claim of taking based on pre-condemnation activities should be based on the same tests that govern other non-invasive takings claims: whether the property owner has been denied all economically viable use. As discussed below, both *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978), and *Suess Builders v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982), demonstrate that, as with other takings, in the absence of trespass, pre-condemnation governmental activity does not constitute a taking unless it results in denial of all economically viable use.[8] The cases also demonstrate that– contrary to Viewcrest's contention – that is so even where the governmental activity is not "regulatory."

In *Fifth Avenue*, this court addressed whether a county comprehensive plan that designated portions of the plaintiff's property for eventual public use as a greenway area or transit station resulted in a taking of the property. 282 Or

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[8] In *Hewett Professional Group*, the plaintiff also alleged a taking under a "condemnation blight" theory, but this court summarily rejected the claim, holding that any "blight" the plaintiff suffered was due to its own actions, not the state's. 321 Or at 132-34.

at 593, 608-10. This court first observed that the "generally accepted rule" is that "mere plotting or planning in anticipation of public improvement does not constitute a taking." *Id.* at 610 (internal citation omitted). By contrast, the comprehensive plan designation in *Fifth Avenue* was permanent. *Id.* at 611. Ultimately, this court settled on the following test:

> In summary, even if planning or zoning designates land for a public use and thereby effects some diminution in value of his land, the owner is not entitled to compensation for inverse condemnation unless: (1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage.

Id. at 614. This court then concluded that the plaintiff failed to allege facts that would establish either of those elements. *Id.* at 614. The test described in *Fifth Avenue* reflects the general principle that in order to give rise to a taking, government activity must constitute physical occupation or its equivalent.[9]

Viewcrest attempts to dismiss *Fifth Avenue* as a regulatory takings case (Pet BOM 27), but *Suess Builders*—a case that Viewcrest notably fails to cite – – frustrates that attempt. In *Suess Builders*, this court applied a denial-of-all-

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[9] This court also noted that "[w]e do not wish to limit the second exception to trespassory encroachments only, since we have already extended it to 'repeated nontrespassory invasions called nuisance.' *Thornburg v. Port of Portland*, 233 Or 178, 192, 376 P2d 100 (1963), quoted in *Lincoln Loan v. State Hwy Comm.*, 274 Or 49, 56, 545 P2d 105 (1976)." *Fifth Avenue*, 282 Or at 614, n 17. *Thornburg*, and *Lincoln Loan*'s reliance on *Thornburg*, are discussed below, in part A(4)(a).

economically-viable-use standard to non-regulatory government activity. There, the majority of the plaintiff's property had been designated as a future public park in the city's comprehensive plan. 294 Or at 256. The plan, however, was ultimately abandoned. *Id.* at 260. The plaintiffs alleged, among other things, that after the city designated most of the property for park use it refused to condemn the property but instead "placed a cloud of condemnation over the property in order to acquire [p]laintiffs' land at less than its fair market value." *Id.* at 260-61 (internal quotations omitted).

Noting that "[t]he issue in this case does not arise from the regulation of the private use of property," this court applied the test described in *Fifth Avenue*, to hold that certain non-regulatory activities may have temporarily taken all viable use of the property. *Id.* at 258, 263. Specifically, this court concluded that the plaintiffs' allegations that the defendants had induced the plaintiffs to believe that their property would be acquired, to grant easements across the land for drainage and bike paths, and to refrain from submission of development applications, was sufficient to survive a motion to dismiss because those activities could conceivably have temporarily denied the plaintiffs all economic use of their property:

> The language is broad enough to encompass a hypothetical claim that defendants told plaintiffs that the property was certain to be acquired, that it would be useless to pursue any proposals for private development, and defendants began to acquire easements for certain facilities. If that were the case, the defendants later

> abandoned their plans, a court could find that [the defendants] had temporarily taken *all economic use* of plaintiffs' property.

Id. at 263 (emphasis added). In short, this court required a showing of a denial of all economic use for government activities that were not regulatory in nature.

Suess Builders thus demonstrates that Viewcrest's oft-repeated assertion that the "denial of all economically viable use standard" is reserved for takings claims based on regulatory activity is not correct. The appropriate dichotomy does not lie between regulatory and non-regulatory takings. Rather, the dichotomy lies between physical interferences and non-physically invasive activities, which to constitute takings must deprive the property of all economically viable use.

Finally, *Fifth Avenue* and *Suess Builders* also refute Viewcrest's attempt to distinguish this case from other takings cases in which the courts have required a showing of a denial of all economically viable use. According to Viewcrest, this case is different because ODOT's activities were "aimed" exclusively at Viewcrest's property. Viewcrest presumably advances that argument in support of its claim that ODOT's activities were "non-regulatory," and to meet the nuisance-based test under which the jury was instructed ("sufficiently direct, particular and of a magnitude to support a conclusion that the interference has reduced the fair market value * * *"). But in the cases discussed above, the Oregon courts require a showing of denial of all viable

economic use for activities aimed exclusively at particular parcels of property. *Fifth Avenue*, 282 Or App at 609-14; *Suess Builders*, 294 Or at 263.

In any event, ODOT's activities here were not in fact aimed exclusively at Viewcrest's property. Instead, they were part of a broad initiative involving the safety of I-5, the possible removal of two interchanges, and the construction of a third, affecting many landowners. (*E.g.,* Ex 36 (Millersburg I-5 corridor refinement plan)).

In sum, under the text of Article I, section 18, its history, and this court's case law, a remedy for a taking under Article I, section 18, is not an award of damages for injury suffered – reduction in value – but compensation for property *taken* by the government for public use. That is why an owner who suffers a permanent physical appropriation, no matter how minor, is entitled to compensation, *see, e.g., Ferguson v. City of Mill City*, 120 Or App 210, 213, 852 P2d 205 (1993) (recognizing that permanent physical occupation is a taking no matter how minimal the economic loss), yet the owner in *Fifth Avenue* had to show a far more substantial loss. An owner whose property is not physically appropriated has not suffered a taking unless that owner has suffered an equivalent loss, *i.e.*, a denial of all economically viable use.

4. The cases on which Viewcrest relies are inapposite.

The cases on which Viewcrest relies, *Thornburg v. Port of Portland*, 233 Or 178 , 376 P2d 100 (1962) (*Thornburg I*) and *Lincoln Loan v. State Highway*

Comm., 274 Or 49, 545 P2d 105 (1976) do not support its attempt to extend Article I, section 18. To be sure, this court has recognized that a taking can result from government activity that extends beyond direct physical occupation to "non-trespassory invasion" that in effect ousts the property owner from the property. In such cases the court has applied the less stringent nuisance test—whether the activity substantially interferes with the use and enjoyment of the property—to determine if the activity is a taking. Viewcrest urges this court to adopt the same test here, for planning activities that reduce the value of property. But there is no basis for doing so. This court has never employed a nuisance-based test to find a taking where there has been no physical interference with use of the property.

a. *Thornburg* is inapposite because it involved a physical interference with land that was in essence a trespass.

The notion that a taking under Article I, section 18, can arise from a government-created nuisance originates with this court's decision in *Thornburg I*. *Thornburg I* broke new ground nationally by extending inverse condemnation to apply to circumstances involving nuisance as well as trespass. Stoebuck at 158. In *Thornburg I*, the Port owned and operated an airport, and had condemned significant property around the airport, but had stopped just short of the plaintiffs' property, which was near the end of a runway. 233 Or at 181. The plaintiffs complained that noise from jet aircraft that passed near the

plaintiffs' property but not directly over it made their property unusable. This court thus considered whether that interference could constitute a taking even though it was not the kind of airspace easement trespass that the United States Supreme Court had found compensable as a federal taking in *United States v. Causby*, 328 US 256, 66 S Ct 1062, 90 L Ed 1206 (1946) (holding that overflights created a flight easement compensable under the Fifth Amendment's Takings Clause because the airplanes trespassed in the plaintiff's airspace).

This court first noted that the noise constituted a nuisance, and that the court had previously rejected the idea that non-trespassory nuisances could give rise to a taking. *Thornburg I*, 233 Or at 190-91. This court went on to say, however, that it had not previously considered "a nuisance so aggravated as to amount to a complete ouster or deprivation of the beneficial use of property." 233 Or at 190. This court concluded that takings were not limited to activities that would technically constitute a trespass, but that "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.* The court described the impact of the jet noise as an "easement" or "servitude." 233 Or at 192. *See also Batten v. United States*, 306 F2d 580, 587 (10th Cir 1962), *cited in Thornburg I* ("the interference shown here was sufficiently substantial, direct

and peculiar *to impose a servitude* on the plaintiffs' homes * * *") (Murrah, J., dissenting) (emphasis added).

As the above discussion reflects, while this court applied Article I, section 18, to activities beyond strictly trespassory takings; it did so in a circumstance in which it found that the nuisance constituted an "invasion." Moreover, this court expressly described the line between the nuisance in that case and trespass as an exceedingly fine one:

> If we accept * * * that a noise can give rise to an easement, and that a noise coming straight down from above one's land can ripen into a taking if it is persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one's land can also be a taking even though the noise vector may come from some direction other than the perpendicular.

Thornburg I, 233 Or at 192. Thus, regardless of the terminology this court used, the overflights *Thornburg* recognized as a taking were a nuisance that was in essence a physical trespass.

Thornburg I's recognition does not extend, however, to non-invasive planning activities such as those at issue here. Here, Viewcrest contends that ODOT "blighted" its land with "statements." (Pet BOM 5). But statements in the course of public planning simply do not constitute the kind of nuisance described in *Thornburg I.* Nor do they constitute a nuisance as recognized at common law. *See generally Ampitheaters Inc. v. Portland Meadows*, 184 Or

336, 345-46, 198 P2d 847 (1948) (describing four categories of nuisance).[10] And in *Thornburg I* the nuisance only rose to the level of a taking because it involved "repeated nontrespassory invasions" amounting to a "servitude," or an "ouster."

The activities that occurred here simply do not constitute a nuisance, much less one actionable as a taking. There was no servitude or ouster here. There was no allegation or evidence that ODOT's planning activities caused any physical interference with Viewcrest's use of its property. ODOT simply engaged in ordinary planning activities and Viewcrest remained free to use its property.

b. *Lincoln Loan* should not be read to extend *Thornburg* to mere planning.

In addition to relying on *Thornburg*, Viewcrest relies on *Lincoln Loan* to support its view that a property owner may prevail on a lesser "reduction in value" burden of proof rather than being required to demonstrate denial of all

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[10] The four categories of nuisance were: "(1) Cases involving harm to human comfort, safety or health by reason of the maintenance by a defendant upon his land of noxious or dangerous instrumentalities causing damage to the plaintiff in respect to legally protected interests of the plaintiff in his land. (2) Cases involving illegal or immoral practices, most of them being public as distinct from private nuisances * * * bawdy houses, gambling, abortions, lotteries, illegal possession of liquor, and acts outraging public decency. (3) Cases involving obstructions to streets, public ways, common rights, access to property and the like. (4) Cases involving damage to the land itself, as by flooding." 184 Or at 345-46.

economically viable use. (*E.g.*, Pet BOM 11, 19). *Lincoln Loan*, which predated *Fifth Avenue* and *Suess Builders*, should not stretch that far, for three reasons. First, *Lincoln Loan* is best understood as a physical interference case like *Thornburg,* and unlike this case. Second, this court should reject a reading of *Lincoln Loan* that extends *Thornburg* to non-invasive activities, because such a reading would be inconsistent with the text and history of Article I, section 18. Third, in any event, the facts here are far different from those in *Lincoln Loan*.

i. *Lincoln Loan*, like *Thornburg*, involved government-created physical interference.

As an examination of *Lincoln Loan* shows, the case does not stand for the test Viewcrest urges, because it involved physical interference. In *Lincoln Loan*, the plaintiff alleged that the state adopted a formal condemnation resolution announcing that the property would be condemned and commenced condemnation proceedings. 274 Or at 51. According to the plaintiff, the state aggravated decay and desertion in the area by demolishing neighboring homes and buildings, causing noise, dust, and confusion. *Id.* at 51-52. Further, the complaint alleged that the state had announced that no compensation would be awarded for improvements to the property, notified tenants that they would need to vacate because the buildings would be taken, and offered to pay moving expenses for tenants who agreed to vacate. *Id*. Those acts, the plaintiff alleged,

made it impossible to keep tenants or to maintain the plaintiff's property. *Id*. at 52.

Relying on *Thornburg I*, this court held that the combination of acts alleged in the plaintiff's complaint sufficed to state an inverse condemnation claim. *Lincoln Loan*, 274 Or at 57. In doing so, this court quoted the nuisance test applied in *Thornburg I,* requiring a showing only of "substantial interference by the state with the use and enjoyment of its property." *Lincoln Loan*, 274 Or at 56-57.[11] The *Lincoln Loan* court also relied on earlier Oregon cases involving physical trespass, *Morrison v. Clackamas County*, 141 Or 564, 18 P2d 814 (1933) (jetty diverted water onto plaintiff's land washing away and

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[11] Viewcrest relies on the test described when the *Thornburg* case returned to the Oregon Supreme Court after remand. 244 Or 69, 413 P2d 750 (1966) (*Thornburg II*). But that test must be viewed in context. On review of the jury instructions, this court stated that "the proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether 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 plaintiff's land by a sum certain in money." 244 Or at 73. While the phrasing of the test had inexplicably changed since *Thornburg I*, the context remained: this court had determined that a nuisance in essence amounted to a "nontrespassory invasion" or "servitude." As the Court of Appeals has noted with respect to the test described in *Thornburg II*, the significance of *Thornburg* lies in its recognition that certain nontrespassory acts could implicate Article I, section 18, not the standard of harm required to show such a taking. *Mark v. Department of Fish and Wildlife,* 158 Or App 355, 369-71, 974 P2d 716, *rev den*, 329 Or 479 (1999).

rendering valueless the surface of the property); *Tomasek v. Oregon Highway Com'n*, 196 Or 120, 248 P2d 703 (1952) (bridge caused river to change course and cause erosion of plaintiff's land); *Moeller v. Multnomah County*, 218 Or 413, 345 P2d 813 (1959) (complaint concerning effects of quarry blasting operations stated cause of action but evidence insufficient); *Cereghino v. State Highway Commission*, 230 Or 439, 370 P2d 694 (1962) (collection of dirt and surface waters caused by highway relocation). Viewed in light of all of its facts and the Oregon precedents that *Lincoln Loan* expressly relied on, the case is best understood as a case involving physical interference with the plaintiff's use of its property. It does not apply here.

ii. *Lincoln Loan* should not be read to extend *Thornburg* to non-invasive planning activities.

As explained below, *Lincoln Loan* should not be read as more than a physical interference case. To the extent that it may be read to extend nuisance doctrine and the nuisance "substantial interference" and "reduction in value" burden of proof to pre-condemnation activities that do not constitute a nuisance, that extension is based on inapplicable cases from other states and is not warranted under Article I, section 18.

The most-widely cited case referred to in *Lincoln Loan* is *Klopping v. City of Whittier*, 8 Cal 3d 39, 500 P2d 1345 (1972), based on the California constitution's takings clause. In *Klopping*, the city initiated and subsequently

withdrew condemnation proceedings while at the same time, declaring that it intended to acquire the plaintiff's property in the future. 500 P2d at 1357. The plaintiffs sued for inverse condemnation, contending that because of the "condemnation cloud hanging over their lands, they were unable to fully use their properties and that this damage, reflected in loss of rental income, should be recoverable." *Id*. at 1350-51. The court held that the plaintiffs had stated a claim under the California Constitution, which provides for compensation when property is "taken or damaged." *Id*. *Lincoln Loan* did not explain why *Klopping*'s interpretation of the California Constitution and its differently worded provision should have any bearing on the interpretation of Article I, section 18.

Nor did the other primary case *Lincoln Loan* relied on support a broad interpretation of Article I, section 18, *Conry-Prugh Glass Co. v. Commonwealth*, 456 Pa 384, 321 A2d 598 (1974). In *Conry-Prugh*, the plaintiff owned two industrial buildings. 321 A2d at 598. The state had announced plans to condemn the plaintiff's property to build a highway, and as a result, the landowner began to lose tenants such that the rental income did not cover taxes and operating expenses. *Id.* at 598-599. The court concluded that the landowner was "not simply a property owner whose property has declined in value due to the imminence of condemnation, [but] instead, one who *cannot use his property* and, in fact, stands to lose his property because of the

imminence of condemnation[.]" *Id.* at 601-02 (emphasis added). Accordingly, the court held that the landowner was entitled to compensation for the loss of its property because, to hold otherwise, "would be to deprive that property owner of his property without due process of law." *Id.* at 602.

The *Lincoln Loan* court did not explain why the Pennsylvania court's conclusion that the plaintiff had suffered a loss of all use of his property would support its conclusion that the *Lincoln Loan* plaintiff might recover by showing anything less.[12] More broadly, the court did not explain why either *Klopping or Conry –Prugh* supports applying a nuisance burden of proof to activities that did not involve trespass or nuisance. Finally, the court did not explain why it should adopt the Pennsylvania court's conflation of takings and due process.

In fact, adopting the analysis of those other jurisdictions would be inconsistent with the text and history of Article I, section 18, as this court has more recently considered in *Coast Range Conifers*. Article I, section 18, applies only to physical appropriations and their equivalent. Hence, under Article I, section 18, the nuisance-based "substantial interference" and

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[12] The *Lincoln Loan* court rejected a series of cases from other jurisdictions, holding that preliminary steps taken to exercise the power of eminent domain without a physical taking or invasion were not actionable. The leading case was *City of Buffalo v. J.W. Clement Co.*, 28 NY2d 241, 321 NYS2d 345, 269 NE 2d 895 (1971).

reduction in value test should not make a taking out of activities that do not involve physical interference with the use of property.

iii. Even under a broad reading of *Lincoln Loan*, it does not apply to the facts here.

Even if *Lincoln Loan* can be read to adopt the tests of other jurisdictions with different constitutional texts, it does not apply here, because the facts in this case differ significantly from those alleged in *Lincoln Loan*.

As an initial matter, in *Lincoln Loan*, the plaintiff alleged that the state had actively interfered with the plaintiff's current use of the property by, among other things, interfering with the plaintiff's tenants. By contrast, here, ODOT did not actively interfere with any current use of Viewcrest's property. Moreover, ODOT never formally designated Viewcrest's property for condemnation, much less commenced condemnation proceedings as in *Lincoln Loan*. Here, ODOT only engaged in preliminary planning. Indeed, the preliminary nature of the planning in this case is illustrated by the fact that when the public expressed concerns, the proposal changed to address those concerns. While ODOT informed the public of its proposal—and, when asked, potential purchasers or developers—it did not designate the property for condemnation or commence condemnation proceedings. In short, ODOT's planning activities indicated a proposal to possibly remove the interchange and

acquire the property at some point in the future. Whether the property ultimately will be taken for public use depends on unpredictable future events.[13]

Those differences between *Lincoln Loan* and this case are constitutionally significant. As noted above, the "generally accepted rule" is that planning that includes possible future condemnation, particularly when it is preliminary and subject to change, does not constitute a taking, even if owners are dissuaded from developing the property as they otherwise would. *Fifth Avenue,* 282 Or at 610-11. That is the situation here, unlike the condemnation process already underway in *Lincoln Loan.* Thus, even under a broad reading of *Lincoln Loan*, ODOT's activities in this case did not constitute a taking.

In sum, this court's precedents regarding pre-condemnation activities do not support Viewcrest's attempt to expand Article I, section 18, to establish a new takings category in which government may be liable for non-invasive pre-condemnation activities based on a mere reduction in value. As this court has stated in a related context, "[t]o be a 'taking,' governmental action must be

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[13] Before the proposal can be finalized, additional approvals are required, including the NEPA process. In addition, a proposed project cannot be implemented unless and until it is funded through the Oregon Transportation Commission's four-year State Transportation Improvement Program (STIP), which identifies the funding for, and scheduling of, transportation projects and programs. ORS 184.610(5). That program must be approved by the Federal Highway Works Administration. (Tr 696).

made of sterner stuff." *Boise Cascade Corp. v. Board of Forestry*, 325 Or 185, 200, 935 P2d 411 (1997).

5. Under the Fifth Amendment, pre-condemnation activity does not constitute a taking, so long as the property retains economically viable use.

The United States Supreme Court has also addressed takings claims based on pre-condemnation activities, holding that such activity does not constitute a taking under the Fifth Amendment to the United States Constitution as long as the landowner remains free to use or sell the land. While Viewcrest does not rely on the federal takings clause, federal case law is instructive. Not only do the two takings clauses share the same "basic thrust," *Suess Builders*, 294 Or at 259 n 5, but also the Fifth Amendment, like Article I, section 18, only addresses property "taken," rather than broadly assuring compensation for property "taken or damaged," as in some other state constitutions.

Particularly relevant is *Kirby Forest Industries v. United States*, 467 US 1, 104 S Ct 2187, 81 L Ed 2d 1 (1984), in which the Court held that no taking occurred due to pre-condemnation activity because, despite a substantial loss in value, the owner remained free to use or sell the land. 467 US at 14-15. In so holding, the Court concluded that the analysis for determining when pre-condemnation activity becomes a taking is the same as the analysis for determining when a regulation constitutes a taking:

> These considerations [for determining whether a regulation amounts to a taking] are as applicable to the problem of determining when in a condemnation proceeding the taking occurs as they are to the problem of ascertaining whether a taking has been effected by a putative exercise of the police power.

Id. at 14.

Given the similarity of the text of the Oregon and federal takings clauses, and virtually identical historical and philosophical underpinnings, *Kirby Forest Industries* is persuasive authority for the proposition that ODOT's activities in this case did not constitute a taking under Article I, section 18.

B. Viewcrest's purported evidence of improper motives does not advance its claim under Article I, Section 18.

Viewcrest attempts to avoid its failure to show that it was denied economically viable use of its property by characterizing ODOT's public planning activities as retaliatory and based on improper motives. (*E.g.,* Pet BOM 4-5 (ODOT "retaliated against Viewcrest's demands that ODOT not interfere with the Viewcrest property by publicizing its plans[.]"). As discussed below, this court should reject that attempt, for three reasons. First, the motives of ODOT employees are irrelevant to a proper claim under Article I, Section 18. Second, neither the complaint nor the jury instructions addressed any such allegations. Finally, the evidence shows that ODOT's activities did not involve anything beyond ordinary public planning.

1. Whether ODOT's planning activities constituted a taking of Viewcrest's property does not turn on ODOT employee motives.

This court has never held that whether government officials acted with improper motives is relevant to the determination of whether a property owner has suffered a taking of property under Article I, section 18. Nor should it do so now. The owner of property affected by certain planning activities may be just as burdened as a neighboring owner affected by the same planning activities conducted by a government employee with an improper motive. It does not make sense to say that the second neighbor has suffered a taking while the first has not. At bottom, as has been stated with respect to the federal clause, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington,* 389 US 290, 298, 88 S Ct 438, 443, 19 L Ed 2d 530 (1967) (Stewart, J., concurring). *See also*, *Suess Builders*, 294 Or at 259 n 5 ("Nor have we regarded fairness and justice as a usable tool to draw a legal line between regulation and taking[.]").

Moreover, when a property owner alleges that government officials have acted inappropriately, such allegations are the stuff of tort rather than taking. For example, to the extent Viewcrest claims that ODOT employees deliberately and improperly interfered with its efforts to court investors and developers, Viewcrest's claim is really a tortious interference with business relations claim. *See Top Service Body Shop, Inc. v. Allstate Ins. Co*., 283 Or 201, 205-09, 582

P2d 1365 (1978) (describing tort).[14] Viewcrest's claim could also be understood as a substantive due process or class-of-one equal protection claim. *See, e.g., Shanks v. Dressel*, 540 F3d 1082, 1088 (9th Cir 2008) (in land use context "arbitrary" conduct "lacking any reasonable justification in the service of a legitimate governmental objective" cognizable as a substantive due process claim); *Village of Willowbrook v. Olech*, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) (affirming class-of-one equal protection claim where the plaintiff alleged that city's activities directed at her property were improperly aimed at her personally).[15] Although the evidence here would not support such claims, those causes of actions better fit Viewcrest's theory.

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[14] Indeed, some commentators have suggested that courts were willing to consider nuisance takings claims that were essentially tort claims as a way to provide relief for claimants whose tort claims were otherwise barred under the doctrine of sovereign immunity. *See* Stoebuck at 165 ("governmental immunity presents a hurdle to persons seeking relief from government nuisances, a hurdle that is got around under eminent-domain theory"). But such an ends-oriented basis for finding a constitutional taking is not only obsolete with the advent of tort claims acts, but of course is also irreconcilable with this court's framework for interpreting the Oregon Constitution, which focuses on its text and history.

[15] The temptation to blend the takings analysis with other legal doctrines has been increasingly criticized, as courts have renewed emphasis on the narrow scope of the takings inquiry. *Lingle v. Chevron*, 544 US 528, 125 S Ct 2074, 161 L Ed 2d 876 (2005), is perhaps the most widely cited example of the modern emphasis on limiting takings doctrine to its textual and historical roots. In *Lingle*, the court overruled its own precedent and held that whether or not the government acts illegitimately when its actions adversely impact

Footnote continued…

Simply put, whether government employees had improper motives comes into play in other legal doctrines but not in the determination of whether property has been taken. This court should reject Viewcrest's attempt to pound a square peg into the round hole of takings doctrine under Article I, section 18. Article I, section 18, assures compensation for appropriation of property, not for the motives of individual government employees.

2. The jury did not determine that ODOT employees had improper motives.

Even if motive was a relevant consideration, the record here fails to buttress Viewcrest's characterizations. That is because, as the Court of Appeals emphasized, Viewcrest's theory that the evidence established that ODOT acted with "malicious" and "retaliatory" motives was not reflected in Viewcrest's complaint or in any jury instruction. *Hall/Viewcrest*, 252 Or App at 654-55. Accordingly, there is no basis to assert that the jury reached any conclusion regarding the motives of any ODOT employees. *Id.* This court is not required to view the evidence through Viewcrest's distorted lens.

(…continued)
property is not part of the takings inquiry, because it "tells us nothing about the actual burden imposed on property rights[.]" *Lingle*, 544 US at 543.

3. The evidence does not support Viewcrest's claims of improper motives.

In any event, the evidence Viewcrest cites does not support its assertion that ODOT employees had improper motives. Although it is not clear what "undisputed facts" Viewcrest asserts prove that ODOT acted with improper motives, Viewcrest ultimately points to four emails that, according to Viewcrest, support its theory. (Pet BOM 28). Those emails are summarized as follows:

- An email exchange between ODOT employees discussing concerns that Viewcrest might file "an inverse condemnation lawsuit against ODOT, alleging the facility plan decreases the value of his property." (Pet BOM 29; ER-47). In response, another employee opines that such a lawsuit would not succeed because "impacts on properties from potential project announcements are not compensable." (Pet BOM 29; ER-47).

- An email exchange in which ODOT employees discuss a conversation with a prospective purchaser in which one employee told the potential buyer that removal of the interchange "is a possibility." (Pet BOM 29; ER-40). In response, the supervisor directs employees not to discuss purchase of the property with "Harris or anyone else" at that point because it might stir up bad press. The supervisor concludes that if "public input allows ODOT to proceed with the project and the property in question is needed, we will follow the normal acquisition process and secure it at fair market value or close to it." (Pet BOM 29; ER-40).

- An email in which an employee notes that in the public involvement process, "[a]cquiring the property is certainly going to come up, so forearmed with appropriate responses would certainly be best." (Pet BOM 29; ER-41).

- An email in which an employee notes that Harris has tried to develop the property over the years, and states that "ODOT has

> worked to stop any development, since it would negatively impact I-5." (Pet BOM 29; ER-45).

Viewcrest also points to testimony that "ODOT estimated that the property could be worth up to $16 million if developed." (Pet BOM 13, citing Tr 351-52). In addition, Viewcrest relies on ODOT's public discussion of the proposal to remove the interchange. (Pet BOM 13-14).

The evidence that Viewcrest cites does not support its assertion that ODOT engaged in a "malicious" and "retaliatory" campaign against Viewcrest by publicizing its planning activities. Rather, the evidence shows nothing more than that ODOT was simply engaging in a public planning process. The emails among ODOT employees only indicate that they did not want to buy the property until it was determined that the project would actually happen, that they were concerned that Harris might sue them based on their planning activities, and that they did not want to see the property developed because development would have a negative impact on I-5.

Moreover, the public planning studies make clear why ODOT had reservations about development of the property: the interchange was unsafe and the additional traffic from development would only aggravate the problem. (*see, e.g.*, Ex 5 (listing safety problems with the interchange); Ex 35 at 9 (noting safety deficiencies of interchange); Ex 119 at 102 ("The accident record has not

included large numbers of serious injuries or fatalities though the potential for that here is high.")).

And ODOT's concerns were not a surprise to Viewcrest. When ODOT sold Viewcrest an adjacent parcel in 1995, the sales agreement included a provision noting ODOT's concerns about any possible future development of the site, and noting that ODOT would be involved in the land use planning process regarding the property. (Ex 120 at 1). ODOT's involvement in the land use planning process, however, did not amount to any control over its use. In fact, ODOT's only effort to restrict development of the property was its unsuccessful opposition to the City of Millersburg's decision to annex and rezone the property for light-industrial use. (Tr 294-96).

Further, although Viewcrest asserts that ODOT was maliciously "broadcasting its message" by engaging in public planning, Viewcrest ignores the fact that ODOT is legally obligated to do so. As noted above, Statewide Planning Goal 1 requires state agencies to "insure the opportunity of citizens to be involved in all phases of the planning process"). OAR 660-015-0000(1). The evidence of ODOT's public discussions—such as an Open House notification (Pet BOM ER 27), or an Open House Summary (Ex 125)—does not suggest that ODOT was doing anything other than complying with its legal obligation to include the public in the planning process.

In sum, even if the evidence Viewcrest cites was relevant to the question of whether there was a taking under Article I, section 18, none of the evidence indicates, even in a light most favorable to Viewcrest, that ODOT's public planning was an effort to "retaliate" against Viewcrest or to "blight" the property to reduce ODOT's acquisition costs. And the cited evidence does not alter the fact that Viewcrest failed to demonstrate a taking under Article I, section 18.

C. The proper takings standard protects both the property owner and the public.

As explained above, because there was no physical interference with Viewcrest's property, Viewcrest needed to show a denial of all economically viable use to prove that ODOT took the property under Article I, section 18. That standard protects both the landowner and the public.

First, the standard still appropriately protects property owners like Viewcrest. If condemnation occurs, any reduction in value caused by project planning will be accounted for in the compensation paid to Viewcrest. That is because Article I, section 18, is implemented in part according to the statutory procedures by which the state exercises its power of eminent domain under ORS Chapter 35. As described below, those procedures take account of the impact of pre-condemnation activities on the value of the property to be condemned.

Before condemning property, the government shall be "guided by" the acquisition polices set forth in federal law for the acquisition of property by the federal government. ORS 35.510(3); ORS 35.500(2). Those laws require the government to disregard any decrease in value of the property caused by the public project before the date of valuation:

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that property would be acquired for such improvement * * * will be disregarded in determining the compensation for the property.

42 USC § 4651(3).

In other words, under Oregon law, the condemnor is to pay the value of the property as it stood before any reduction in value caused by the announcement of the project. That requirement reflects time-honored principles of valuation in condemnation cases. *See Dept. of Transp. v. Lundberg* 100 Or App 601, 605, 788 P.2d 456 (1990), *aff'd*, 312 Or 568, *cert den*, 506 US 975 (1992), *quoting United States v. Virginia E. & P. Co.*, 365 US 624, 635-36, 81 S Ct 784, 5 L Ed 2d 838 (1960) ("[I]t would be manifestly unjust to permit a public authority to depreciate property values by a threat [of construction of a government project] and then to take advantage of this depression in the price which it must pay for the property * * *."). Further, that valuation also takes into account potential development that was not pursued, because the valuation must be based on the "highest and best use" of the property, which is defined as

the most profitable likely use of the property. *Dept. of Transp. v. Lundberg*, 312 Or 568, 574, 825 P2d 641, *cert den*, 506 US 975 (1992).

Alternatively, if ODOT decides to pursue one of its other proposals for the area and the property is not condemned, the market will take that into account, and Viewcrest will not suffer any permanent loss. Indeed, in that event, if the trial court judgment in this case stands, Viewcrest will receive a windfall by retaining the full value of the property as well as compensation for a taking.

Moreover, especially given the protections for the landowner affected by planning, there is no need to saddle public planning activities with an overly liberal takings standard. To allow takings claims based on reduction in value caused by planning activities—rather than addressing that reduction through condemnation procedures—would unduly burden public planning.[16] As

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[16] Concerns that imposing pre-condemnation burdens on the state would interfere with its ability to efficiently and economically construct public works are nothing new. Article I, section 18, was patterned after the takings clause in the Indiana Constitution of 1850. *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 434, 60 P.3d 557 (2002) (citing Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (1926)). Debate at Indiana's 1850 constitutional convention centered largely on the addition of language requiring that compensation be paid before land was physically appropriated, Fowler and Brown, *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850* (Indiana Historical Collections Reprint 1935) at 353 *et seq*. (*Indiana Debates*). For example, one delegate argued that "[t]he power of the State, which is wielded solely for the

Footnote continued…

described above, Oregon transportation planning requires and depends on public participation. Under Viewcrest's theory, government could be discouraged from open discussion of proposals and potential plans, out of concern that such discussion—or mischaracterizations of such discussion—could become grist for a takings claim. The government would be encouraged to keep proposed projects secret and thus inhibit citizen review and debate concerning such proposals.

Simply stated, Article I, section 18, is not an insurance policy against downside risk for every landowner who suffers a reduction in value as a consequence of public planning activities. As Justice Holmes famously observed, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal v. Mahon*, 260 US 393, 413, 34 S Ct 158, 676 L Ed 322 (1922). Article I, section 18, should not be read to provide that public

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(…continued)
public welfare, ought not to be crippled by awaiting the slow process of the empanelment of a jury of freeholders, the assessment of damages, and the tender of the amount thereof, before it can proceed in a work of great public importance." *Id*. at 361. Accordingly, a compromise amendment was adopted, providing, as does Oregon's constitution, that "except in cases of the State" compensation for property taken for public use must be "first assessed and tendered to the owner." *Id.* at 414.

discussion of potential plans can give rise to claims of taking, before plans are finalized and without physical interference with use of the property.

D. Under the appropriate denial of all economically viable use standard, directed verdict for ODOT was required.

As demonstrated above, Viewcrest should have been required to show that it had been denied all economically viable use of its property. Even viewing the evidence in a light most favorable to Viewcrest, Viewcrest did not make that showing. Viewcrest does not contend otherwise.

At trial, the evidence showed that Viewcrest made commercial use of the property while ODOT was engaging in the activities plaintiff alleged constituted a taking of their property. Viewcrest sold billboard easements that generated annual profits. (Tr 798-804; Ex 140-41). Not only did the property continue to generate income, but Viewcrest also remained free to develop, alienate, and otherwise do with the property as it pleased. Indeed, Harris acknowledged that if he had the money he would go ahead and develop the property, irrespective of ODOT's planning activities. (Tr 445). And indeed, the jury's verdict itself—which reflects that the jury found that even in light of the state's activities the property still had a value of $621,250—demonstrates that Viewcrest was not denied all economically viable use of the property. As the Court of Appeals concluded, the trial court was therefore required to grant a directed verdict in ODOT's favor.

CONCLUSION[17]

Because Viewcrest did not show that it was denied all economically viable use of its property by ODOT's non-invasive planning activities, the trial court was required to direct a verdict in favor of ODOT. Accordingly, this court should affirm the Court of Appeals.

Respectfully submitted,

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[17] In the Court of Appeals, ODOT raised additional issues regarding the proof of damages and remedy, in addition to assigning error to the court's rulings related to the standard of proof for the takings claim. Those assignments of errors included claims that Viewcrest's evidence of market value was too speculative to submit to the jury (App Br 38-40); that if a taking was found, ODOT was entitled to the property (Sixth Assignment of Error, App Br 45-50). Because the Court of Appeals found that the trial court should have granted ODOT's motion for directed verdict, the Court of Appeals did not reach those other assignments of error. In the event this court disagrees with the Court of Appeals, this court should remand to the Court of Appeals for consideration of those issues. Should this court decide to address those matters rather than remand, ODOT adopts its Court of Appeals briefing.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 1, 2013, I directed the original Brief On the Merits of Respondent on Review State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon and David A. Anderson, W. Michael Gillette, and Russell L. Baldwin attorneys for respondents, by using the electronic filing system.

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 11,985 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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