IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, acting by and through its Department of Transportation, Plaintiff-Respondent, Respondent on Review, v. ALDERWOODS (OREGON), INC., an Oregon corporation, successor by merger with Youngs Funeral Home, Inc., an Oregon corporation, Defendant-Appellant, Petitioner on Review, and BANK OF AMERICA, N.A., a national association, as administrative agent, Defendant.	Washington County Circuit Court No. C085449CV CA No. A146317 SC No. S062766

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW ALDERWOODS (OREGON), INC.

On the Petition for Review of the Decision of the
Court of Appeals on Appeal from a Judgment of the
Washington County Circuit Court

Honorable Thomas W. Kohl, Judge

Decision Filed: September 17, 2014
Concurring: Armstrong, J., joined by Ortega, Duncan, DeVore, and Garrett, JJ.
Concurring: Sercombe, J.
Dissenting: Wollheim, J., joined by Haselton, C.J., Nakamoto, Egan, and Tookey, JJ., and Schuman, S.J.

[Counsel listed on next page]

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Charles F. Hudson, OSB No. 830494
Thomas W. Sondag, OSB No. 844201
Lane Powell PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2100
hudsonc@lanepowell.com
sondagt@lanepowell.com

Attorneys for Petitioner on Review Alderwoods (Oregon), Inc.

Denise G. Fjordbeck, OSB No. 822578
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301-4096
Telephone: 503.378.4402
denise.fjordbeck@doj.state.or.us

Attorneys for Respondent on Review State of Oregon

Brian Trevor Hodges, OSB No. 092040
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue WA 98004
Telephone: 425.576.0484
bth@pacificlegal.org

Attorneys for Amici Curiae National Federation of Independent Businesses / Pacific Legal Foundation

Jordan R. Silk, OSB No. 105031
Schwabe Williamson & Wyatt PC
1211 SW Fifth Avenue, Suite 1900
Portland OR 97204
Telephone: 503.222.9981
jsilk@schwabe.com

Attorneys for Amici Curiae Central Oregon Builders Association / Oregonians In Action / Owners' Counsel of America

Denis M. Vannier, OSB No. 044406
Portland Office of City Attorney
1221 SW Fourth Avenue, Suite 430
Portland OR 97204
Telephone: 503.823.4047
denis.vannier@portlandoregon.gov

Attorneys for Amicus Curiae League of Oregon Cities

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REPLY ON THE FACTS

Without citing the record, ODOT says it is "undisputed" that Alderwoods' direct access to Highway 99 was "was a hazard to traffic entering and travelling on Highway 99" (Resp Br 3). In fact, that point *could* be disputed, but the motivation for eliminating Alderwoods' access is irrelevant. The issue is whether Alderwoods should be compensated for that elimination. Nonetheless, ODOT's policy assertions should be put in context.

On the issue of safety, for example, one can readily conceive of measures regulating Alderwoods' access that would fall short of extinguishing it—consolidating and relocating the access, for example, or placing a refuge or deceleration lane on the property. A compromise permitting a "softer" turn from the highway also might improve on the situation post-closure, as the sharper 90 degree turn onto the side street immediately *after* the furthest former driveway is still well within the 750 feet "from a highway interchange" that ODOT points out is mandated by OAR 735-051-0125 (Resp Br 3).

Entirely distinct from safety concerns, ODOT also might deem it advantageous to eliminate abutting rights of access (and adjacent commercial development) to protect the road's functionality for through traffic. Either way, however, if private property rights are extinguished, compensation is due, so that the burden of achieving the "public purpose" is shared by all rather than imposed on the individual.

SUMMARY OF ARGUMENT

While purporting to acknowledge that abutting rights of access are property rights "historically recognized at common law," ODOT describes them

as "limited," "subservient" to the public's right to use a highway, and not "an unqualified right to access an abutting highway at a particular point, like an appurtenant access easement" (Resp Br 4). From this, ODOT argues, the "closure of access to an adjacent highway for highway purposes provides no basis for compensation unless it removes *all* access—*i.e.*, when the property is effectively landlocked" (Resp Br 5) (emphasis in original).

At least one difficulty with ODOT's position—and one this Court has identified on more than one occasion—is that abutting rights *are* appurtenant easements for direct access to and from a highway. Although the easement is general and does not guarantee access at *all* points along abutting frontage, it is, nonetheless, an interest in land distinct from one shared with the public at large. And it has historically been treated as such by the legislature and ODOT itself. Such rights are certainly "qualified" in the sense that they are subject to *regulation* consistent with public use of the highway, but they may not be *extinguished* without compensation.

Similar to its failure to distinguish between legitimate regulation of abutting rights and their outright elimination, ODOT supports the second prong of its "limited rights" argument with a remarkably expansive reading of this Court's statements concerning the impairment of access for "legitimate highway purposes." Relying primarily on language from early cases involving impairment caused by changes in grade, ODOT argues that it may freely extinguish abutting rights, so long as it does so for a legitimate "highway purpose," and "access to a public street remains available" (Resp Br 13).

The rule that ODOT posits, however, misunderstands the cases on which it relies and overstates their holdings, precluding their reconciliation with later decisions. Its rule also cannot be harmonized with the legislature's policy as established by statutes governing access rights. It is clear from this Court's decisions in *Burk* and *Briggs*, and from the statutes that grant ODOT its authority to condemn and regulate, that the mere existence of *some* alternative access cannot avoid a jury's calculation of the loss caused by the taking of defendant's abutting rights.

REPLY ARGUMENT

A. An Abutting Right Is an Appurtenant Easement for Direct Access to and From the Highway.

1. An abutting right is an appurtenant easement.

ODOT concedes that an abutter's right of access "is a particular species of property right historically recognized at common law" (Resp Br 4), but then goes on to describe it as a "limited right" (*id.*).

> It is not, as it[s] name might suggest, an unqualified right to access an abutting highway at a particular point, *like an appurtenant access easement*.

Id. (emphasis added).

This much of ODOT's statement may be true: abutting rights do not necessarily create an unqualified right to access the highway at a particular location along the frontage. But ODOT's further claim that abutting rights are not an "appurtenant easement" is mistaken, as is its view that they may be extinguished without compensation. *See State Highway Com. v. Burk*, 200 Or 211, 228, 265 P2d 783 (1954) (describing an "easement of access appurtenant

to the abutting land"); *Holland v. Grant County*, 208 Or 50, 54, 298 P2d 832 (1956) (distinguishing between general rights to use of highway enjoyed by public and distinct property interests held by abutting owners). As this Court explained in *Burk*:

> When a conventional highway is established, there is attached to the abutting land an easement of access in, and to, the highway. Such easement is a property right which cannot be extinguished without compensation. This is clear, and it is conceded by the state. *Even where the fee of a conventional highway is in the state, it is subject to an easement of access appurtenant to the abutting land*.

200 Or at 228 (emphasis added); *see also id*. at 229 (referring to "an easement appurtenant"), 231 ("such rights * * * can be divested only by condemnation of the easement appurtenant to the abutting property"), 237 (describing "a 'taking' of the preexisting easement appurtenant").

The authorities cited by ODOT and *amicus* League of Oregon Cities do not reflect a different understanding. *See Barrett v. Union Bridge Company*, 117 Or 220, 223-24, 243 P 93 (1926) (*quoting* 1 Lewis, Eminent Domain (3d ed.) § 120) ("Numerous cases decided since the first edition of this work established beyond question the existence of these rights, or easements, of light, air and access, *as appurtenant to abutting lots*, and that they are as much property as the lots themselves.") (emphasis added); *see also Tate v. Ohio & Miss. R. Co.*, 7 Ind 479, 483-84 (1856) (1856 WL 3713 Ind) ("The right to use a street in a town adjoining a lot abutting upon it, is as much property as the lot itself; and the legislature has as little power to use the one as the other. * * * [B]esides the right of way which the public have in a street, there is a private right which passes to the purchaser of a lot upon the street as appurtenant to it,

which he holds by implied covenant that the street in front of his lot shall forever be kept open to its full width.") (*quoting Haynes v. Thomas*, 7 Ind 38, 44 (1855) (1855 WL 3730 Ind)).[1]

2. The easement is for direct access from and to the highway.

It is equally clear that the appurtenant easement at issue is one for direct ingress and egress from and to the highway. *See, e.g, Holland,* 208 Or at 54 ("[i]n rural areas an easement of access implies a reasonable right of ingress and egress *from and to the highway from the property*, and not at all points *along the highway*") (emphasis added). ODOT's contrary contention is exceedingly difficult to comprehend.

When the agency condemns "abutting rights of access"—as it did in this case—its complaint refers to the *taking* of the directly *abutting* access to and from the highway, and does not comment on any access available from a connecting street or roadway. ODOT's Highway Plan confirms the scope of such taking:

> In some cases, such as along Interstate Highways, ODOT purchases the right of access in its entirety and the property owner no longer has any common law right to access the highway. * * * In other cases, ODOT purchases access rights just along portions of properties. Gaps, called "reservations of access," may remain *along the property's frontage*. The reservation of access gives a property owner the common law right of access *to the state highway only at specific locations*. The property owner must still apply for a road approach permit at these locations.

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[1] The citation to Indiana authority responds to the claim of ODOT's *amicus* that its case law is instructive because Oregon's Takings Clause was modeled on the Indiana Constitution's (League of Oregon Cities Br 8-9). In fact, Indiana cases recognize a common law abutting right of direct access and a right to compensation if the abutting right is extinguished rather than regulated.

1999 Oregon Highway Plan (Policy Element) at 118 (Petitioner's Merits Br 36-37) (emphasis added); *see also* ORS 374.410 (ODOT to prescribe access rights of abutting property).

The deeds ODOT uses to acquire such property interests by voluntary purchase *also* show that abutting rights afford an easement for direct access. For example, a deed acquiring a right of way together with all abutting rights of access rights provides that

> [a]s a part of the consideration hereinabove stated, there is also bargained, sold, conveyed and relinquished to the Grantee all existing, future or potential common law or statutory abutter's *easements of access between the parcel herein described* and all of the Grantor's remaining real property.

ER 33 (emphasis added). Another deed acquiring right of way and reserving a limited abutting right of access provides:

> As an essential part of this transaction, we, the undersigned as owners in fee simple of the tract of land abutting on the McKenzie-Bend Highway, as described * * * sell, transfer, convey and relinquish to the State of Oregon, by and through its State Highway Commission * * * all easement of access and all rights of ingress, egress, and regress to, *from and between the property described * * * and the real property above described, including the highway* to be constructed thereon.
>
> EXCEPT, there is reserved the right of access *from said abutting land to said abutting highway* of a width not to exceed 25 feet * * * opposite Engineers' Station 130+60 * * *.

ER 35 (emphasis added). This understanding of abutting rights as interests in property that must be purchased or condemned is flatly at odds with ODOT's present contention that abutting owners have no rights as against the public unless they are landlocked.

B. Although Subject to Regulation, Abutting Rights May Not Be Extinguished Without Compensation.

The second prong of the argument advanced by ODOT and its supporting *amicus* rests on their dogged insistence that abutting rights may be eliminated without compensation whenever a restriction is for "legitimate highway purposes" and the owner's property is not left landlocked. ODOT and the *amicus* begin, as did the concurring opinions in the Court of Appeals, with this Court's early decisions, often involving grade changes or parking meters. The authorities cited do not begin to support ODOT's categorical assertions.

First, as Alderwoods noted in its opening brief (Petitioner's Merits Br 14-17), this line of cases yields varying results for both parties. *See McQuaid v. Portland & V. Ry. Co.,* 18 Or 237, 22 P 899 (1889) (publicly authorized improvements could not "use the highway in such a manner as will cut off access to it by the adjoining lot-owner"); *Willamette Iron Works v. Oregon Ry. & Nav. Co.*, 26 Or 224, 37 P 1016 (1894) (enjoining approach ramp for private toll bridge where grade change limited abutting access to street); *Brand v. Multnomah County*, 38 Or 79, 60 P 390, *aff'd on reh'g*, 38 Or 79, 62 P 209 (1900) (no compensation where bridge approach impaired physical access from abutting property); *Barrett v. Union Bridge Company*, 117 Or 220, 243 P 93 (1926); (same); *Ail v. City of Portland*, 136 Or 654, 299 P 306 (1931) (abutting owner entitled to compensation when city's placement of landscaping blocked direct access to reconstructed street); *Hickey v. Riley,* 177 Or 321, 332, 162 P2d 371 (1945) (parking meters did not unreasonably restrict owner's direct access); *Morris v. City of Salem*, 179 Or 666, 673, 174 P2d 192 (1946) (same).

It is admittedly a challenge to harmonize all those holdings, which appear to vary depending on the nature of the incidental use, the nature and extent of any invasion or obstruction of abutting access at the property line, and the characterization of the use as public or private. But to the extent ODOT and its *amicus* distinguish between private or "non-highway" uses and uses for legitimate highway purposes, the cases do *not* support their assertion that an elimination of all abutting rights of access—as opposed to regulation, restriction or "impairment" of such rights—can go uncompensated.

The "legitimate highway use" distinction was reiterated in *Sweet v. Irrigation Canal Co.*, 198 Or 166, 254 P2d 700, *reh'g den*, 256 P2d 252 (1953) (permitting enjoinder of irrigation ditch that would restrict abutting access along much of a property's frontage). Recognizing abutting access as a property right, the Court explained that "*any impairment* of this right *or interference with it* caused by the use of the highway for *other than legitimate highway purposes* is a taking within the meaning of the constitution * * *." 198 Or at 191 (emphasis added). *Sweet* discussed and distinguished the Court's earlier decisions in *Barrett* and *Brand*, but neither it nor either of those cases holds that abutting rights of access to a state highway may be *extinguished* without compensation. And if any argument of that kind had been possible, it vanished the very next year with this Court's decision in *Burk*.

Nor is it possible to harmonize ODOT's present position with this Court's later decisions concerning highways and county roads. In attempting to distinguish *Burk* and *Douglas County v. Briggs*, 286 Or 151, 593 P2d 1115 (1979), ODOT relies heavily on *Highway Com. v. Central Paving Co.*, 240 Or

71, 399 P2d 1019 (1965), but steadfastly ignores that the property owners in *Central Paving* never possessed an abutting right of access to begin with.

As the Court carefully explained, "none of [defendants'] property actually abutted upon the highway"; instead, they had "access to the highway by means of a grade crossing over the railroad right-of-way." 240 Or at 72. Accordingly "the interest which defendants have in a more direct contact with the throughway is not an interest in land. *Therefore, it is not within ORS 374.035.*" 240 Or at 75-76 (emphasis added; footnote omitted). Indeed, *Central Paving*'s holding *depends* on the absence of abutting rights. With the Court's indulgence, Alderwoods repeats here an excerpt from *Central Paving* that also appears in its opening brief—an excerpt that ODOT utterly ignores:

> *Defendants' access* to their property from the frontage road *is the same as it was prior to the construction of the throughway*. The construction of the throughway admittedly creates an impediment in travelling between defendants' land and the new highway. That impediment consists only of the inconvenience in being forced to travel a longer distance in going to and from the throughway. The inconvenience resulting from travelling a more circuitous route is the same kind of inconvenience the general public suffers when there is a modification of certain traffic regulations on existing streets and highways. Thus, the public is forced to travel a more circuitous route upon the adoption of no-left-turn regulations or one-way-street restrictions. *Defendants are not entitled to recover compensation for a loss unless they can show that the type of loss is peculiar to those owning land as distinct from the loss suffered by the general public.* This they are unable to do in the present case.

240 Or at 74-75 (emphasis added; footnote omitted). The defendants in *Central Paving* had no claim for compensation because they lacked an interest in land that had been taken—*because they lacked an abutting right*.

Alderwoods will not repeat its prior analysis of ORS Chapter 374 and this Court's subsequent opinions (Petitioner's Merits Br 22-35)—which both ODOT and its *amicus* largely ignore—but will briefly comment on the League of Oregon Cities' effort to distinguish *Briggs* on the ground that the landowners there "appeared to have been left with no reasonable access to a county highway that had been converted to a throughway" (Amicus Br 20).

In short, the League is mistaken: the property in *Briggs* continued to enjoy the same access it had always had on a secondary road (and, based on the court's diagram, from that road to the new county throughway). *See Douglas County v. Briggs*, 34 Or App 409, 412, 578 P2d 1261 (1978), *aff'd on other grounds*, 286 Or 151, 593 P2d 1115 (1979) (*see also* Petitioner's Merits Br, App 2).[2] The League is thus wrong in asserting that "*Briggs* did not hold that the landowners would have been entitled to compensation if they had retained alternate access to the new throughway." (Amicus Br 20.) The landowners in *Briggs did* retain "alternate access" to the new throughway, but were still entitled to compensation.

C. Whether the Remaining Access Was Reasonable and Adequate Was an Issue for the Jury.

When abutting rights are taken, the existence of alternative access simply triggers a factual inquiry: whether such access is reasonable and adequate in light of the property's highest and best use. *See Briggs*, 286 Or at 157

[2] This connecting access via Valley View Drive and Kline Street is also confirmed by the parties' briefs in the Court of Appeals. *See* Oregon Briefs, 2423, Tab 409, Appellant's Brief at 2; Respondent's Brief at 1.

("questions of the highest and best use of particular property and whether its access to a public road for such use is adequate and reasonable or has been impaired are * * * questions of fact that relate to the question of value"). A similar inquiry would ensue if the restriction were administrative—although ODOT disclaims that such regulation occurred in this case.[3] *See former* ORS 374.310 ("access must be sufficient to allow the authorized uses for the property identified in the acknowledged local comprehensive plan").

ODOT's *amicus* nonetheless argues that "this Court has always decided the issue of access as a matter of law," but misreads both of the cases it cites for that view (Amicus Br 22 (citing *Holland* and *Oregon Investment Co. v. Schrunk*, 242 Or 63, 408 P2d 89 (1965)). The Court's decision in *Holland* rested first on its legal conclusion that the property owners had suffered no alteration of their abutting right to the roadway (an acknowledged interest in land), but only a rerouting of the highway that affected their ease of travel *after* entering the roadway (not an interest in land but an interest shared with the public). 208 Or at 54-55.

In *Schrunk*, the Court simply rejected a property owner's claim for a declaration that a city's conditions of approval were *per se* invalid as a regulatory taking. 242 Or at 68, 71, 73 (plaintiffs failed to allege damage caused by access restriction, or facts indicating unreasonableness of city's

[3] ODOT concedes that no administrative closure could occur after it filed its condemnation complaint, and that "[i]f compensation was due, it was due as of the time when the complaint was filed." (Resp Br 7, n 3.)

regulation or remaining access). Neither *Holland* nor *Schrunk* provide a reason for this Court to abandon the rule it later articulated in *Briggs*.

CONCLUSION

This Court should reverse the Court of Appeals and remand the case for a jury trial to determine just compensation for the taking of Alderwoods' abutting rights of access.

Respectfully submitted,

LANE POWELL PC

By s/ Charles F. Hudson
Charles F. Hudson

Attorneys for Petitioner on Review
Alderwoods (Oregon), Inc.

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

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 3,241 words.

Type Size

I certify that the size of the type in this brief, for both text and footnotes, is not smaller than 14 point, as required by ORAP 5.05(4)(g).

s/ Charles F. Hudson
Charles F. Hudson

Of Attorneys for Petitioner on Review
Alderwoods (Oregon), Inc.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing reply brief of petitioner on review Alderwoods (Oregon), Inc. by causing it to be electronically filed with the Appellate Court Administrator on May 26, 2015, through the appellate eFiling system.

I further certify that, through the use of the electronic service function of the appellate eFiling system on May 26, 2015, I served the foregoing document on the following:

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Denis M. Vannier

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Charles F. Hudson

Of Attorneys for Petitioner on Review
Alderwoods (Oregon), Inc.