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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, acting by and through its Department of Transportation, Plaintiff-Respondent, Respondent on Review, v. ALDERWOODS (OREGON), INC., an Oregon corporation, successor by merger with 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

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.

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QUESTIONS PRESENTED

This Court has indicated on several occasions that properties on a state highway or county road enjoy abutting rights of access that cannot be extinguished without compensation. Does this remain a correct statement of Oregon law? What is the nature of such a right? Is it an "appurtenant easement" that contemplates some right of abutting access between the property and the road or highway-or nothing more than a right not to be landlocked?

PROPOSED RULES OF LAW

The dissenting opinion in the Court of Appeals offers a sufficient basis for reversal, but petitioner believes a broader view of its rights is warranted:

First, the owner of property abutting a county road or state highway holds an appurtenant easement for access to that roadway-a distinct property interest that is subject to regulation but may not be extinguished without compensation.

Second, when such rights are taken-by condemnation or regulation-the compensation due and the reasonableness and adequacy of any remaining access are questions of fact for a jury to decide in light of the highest and best use of the property.

NATURE OF THE ACTION AND JUDGMENT

This case arises from a condemnation action brought by the State of Oregon, acting through its Department of Transportation ("ODOT" or "state") (TCF 1).[1] Petitioner on review Alderwoods (Oregon), Inc., defendant-appellant below, owns property abutting Highway 99W in Tigard. The complaint alleged

[1] Record references are to the trial court file (TCF); trial exhibits (Ex); transcript (Tr); and appellant's excerpt of record (ER) (also attached here).

the taking of land for a temporary construction easement and the taking of all of defendant's abutting rights of access to the highway *(id.;* ER 2, 4). The project included improvement of an existing sidewalk along the length of the property's highway frontage and physical closure of all existing curb cuts abutting the highway *(id.;* TCF 41 at 1).

Before trial, ODOT moved in limine to exclude evidence of just compensation for the taking of access, arguing that such taking is not compensable if the property retains indirect access from a side street (TCF 49). The circuit court granted ODOT's motion (Tr 103-104), after which the parties stipulated to the evidence concerning compensation for the temporary construction easement, while reserving Alderwoods' right to challenge on appeal the ruling excluding evidence of just compensation for the taking of access (TCF 71; ER 13-15). The court entered judgment based on that stipulation (TCF 76; ER 8-15), and Alderwoods appealed.

After argument, the case was resubmitted en bane and affirmed by an equally divided Court of Appeals. This Court granted review.

STATEMENT OF FACTS

A. The Property.

Alderwoods' property, currently the site of a funeral home, is a rectangular parcel in the northwest quadrant of the Highway 217 and Highway 99W interchange in Tigard (Exs 101-102; ER 29-30). Before the condemnation, the property had two entrances on Highway 99W, and two on SW Warner Avenue, a dead-end street (Exs 101, 102, 105, and 140 at 12; ER 29-31). Tigard code requirements (Ex 139 at 1233) locate the SW Warner

entrances near the back of the property, away from Highway 99W: one entrance, at the back property line, accesses the funeral home's garage (Ex 104 at 2); the other "entrance"-actually designated as a point of egress only-is located behind the front comer of the funeral home building and, were ingress permitted, would require an angled tum from SW Warner of greater than 90 degrees (Exs 121, 123; ER 38-39).

While the property had been used as a funeral home since at least the 1960s, current appraisals indicate that a more intensive commercial use would be its highest and best use (Ex 140 at 1). The property's zoning permits a fast-food restaurant or, conditionally, a gas station *(id.* at 15 and Addendum A). In the opinion of defendant's experts, preserving direct access from the highway would be critical for such commercial uses (Tr 132-136; ER 22-26).

B. The Proceedings.

The state filed its action in September 2008 and took possession of the property described therein less than a week later (TCF 1; Ex 125; ER 40). The property acquired was described as follows:

> All abutter's rights of access, if any, between the property described in the Exhibit A attached hereto and the Pacific Highway West.
>
> A temporary easement across the property described as Parcel 2 in the Exhibit A attached hereto, for the purpose of a work area.

(TCF 1 at 2, 4). The same description appears in the judgment (TCF 76).

On October 16, 2008, three weeks after filing the action and two weeks after taking possession, ODOT wrote to the funeral home manager that it had "come to the [agency's] attention" that the funeral home had an unpermitted

approach, which would "be removed from the state highway right-of-way as part of an upcoming ODOT sidewalk upgrade project" (TCF 50). The letter advised that the manager could "submit an application for the approach or provide proof that the approach was in existence prior to 1949." *(Id.)* The letter was not directed to Alderwoods' counsel, who had by then accepted service in the case, and did not become part of the record until ODOT filed motions in limine nearly a year later, on the date of the first trial setting in the case *(id.).*

Trial was reset twice, ultimately to June 22, 2010, at which time the court granted ODOT's "First Motion in Limine Regarding Compensation for Closure of Abutter's Rights of Access on Highway 99W" (TCF 49). The court did not reach or hear argument on any other motions-including the motion based on the letter to the funeral home manager (Tr 35-37, 103-109).

As noted above, the motion the court granted sought to exclude any evidence of just compensation for Alderwoods' loss of access on Highway 99 (TCF 49). In response, Alderwoods (among other things) made an offer of proof showing the lack of any prior restriction of access, and that loss of all direct access would diminish the property's highest and best use and market value:

- Photographic evidence was submitted showing that the property had enjoyed highway access at roughly the same physical locations since at least 1936 (Tr 131-132; ER21-22, 44-48)
- Alan Brickley, counsel for a title insurance company, would have testified that before ODOT's complaint was filed, his company would

have insured the property's access to Highway 99W based on the absence ofrestrictions in the chain oftitle (Tr 129-131; ER 19-21).

- George Macoubray, a real estate broker who represents buyers and sellers of commercial properties on Highway 99W in Tigard, would have testified that before the taking of access, the property could have been effectively marketed for development of a fast food restaurant or service station (Tr 132-134; ER 22-24), but that after the takings, buyers would be unwilling to risk the required investment, and the property would instead be limited to a less valuable office or similar destination use *(id.)*.
- A second broker experienced with the development of highway commercial would have testified that he shared Macoubray's opinion (Tr 134; ER 24), and an appraiser would have opined that just compensation for the takings was $127,000, of which more than $115,000 was attributable to the loss of access (Ex 140 at 32-37; Tr 134-136; ER 24-26).

Nonetheless, the trial court granted the state's motion in limine and entered judgment on the parties' stipulation as to compensation for the temporary construction easement alone (TCF 76). Alderwoods appealed.

C. The Court of Appeals' Opinions.

In affirming by an equally divided court, 265 Or App 572, 336 P3d 1047 (2014), twelve Court of Appeals judges joined in three different opinions: (1) four judges joined a concurring opinion authored by Judge Armstrong; (2) Judge Sercombe submitted a separate concurrence; and (3) Judge Wollheim

issued a dissent in which the Chief Judge and four other judges joined. The diverging views are summarized below.

1. The Armstrong concurrence. Judge Armstrong began his opinion with a review of "Oregon law on access to public roads from abutting property," in which he acknowledged that "[o]wners of real property in Oregon have a common-law right of access to public roads that abut their property" and that denying access "can constitute a taking of that right for which compensation would be owed under Article I, section 18, of the Oregon Constitution." 265 Or App at 576 *(citing Sweet v. Irrigation Canal Co.,* 198 Or 166, 254 P2d 700, *reh'g den,* 256 P2d 252 (1953)).

In *Sweet,* the Court held that construction of an irrigation ditch that blocked an owner's access to a county road was a "use of the highway for other than legitimate highway purposes" that constituted "a taking within the meaning of the constitution." 198 Or at 191. The Armstrong concurrence, however, distinguished taking an owner's "right of way of the road for a purpose *other than* a road purpose"-as in *Sweet-from* taking such access "for road purposes." 265 Or App at 576-77 (emphasis in original).

Specifically, the concurrence said, "modification of a road for road purposes that denies a landowner access to the road does *not* give rise to a compensable taking of the owner's access right." *Id.* at 577 (emphasis in original). The concurrence claimed that a number of this Court's decisions supported that conclusion. *Id.* at 577-78 (citing *Oregon Investment Co. v. Schrunk,* 242 Or 63, 408 P2d 89 (1965) (closure of street access along one side of city block); *Barrett v. Union Bridge Company,* 117 Or 220, 243 P 93 (1926)

(changes in street grade for bridge approaches); *Brand v. Multnomah County,* 38 Or 79,60 P 390, *aff'd on reh'g,* 38 Or 79,62 P 209 (1900) (same)).

The concurrence next tried to reconcile its analysis with *State Highway Com. v. Burk,* 200 Or 211, 228,265 P2d 783 (1954), in which this Court explained that properties abutting a highway enjoy an appurtenant easement of access that is "a property right which cannot be extinguished without compensation." Acknowledging that that statement conflicted with the rule it had just announced, the Armstrong concurrence labeled the statement mere *dictum,* and explained that "[t]he implicit premise of the *Burk dictum* appears to be that the conversion of a conventional highway to a limited access highway is too great a change in the use," requiring that it be treated differently from other regulatory takings. 265 Or App at 579.

The Armstrong concurrence concluded that this "distinction implicit in the *Burk dictum"-a* "distinction" the concurrence itself had drawn-"cannot withstand examination" because it "simply does not make sense" and "cannot be squared with the analysis that applies to governmental regulations that affect land," which generally does not recognize a taking unless the owner is left with no economically viable use of the land. *!d.* at 579-80.

The concurrence next repudiated the analysis in *Douglas County v. Briggs,* 34 Or App 409,413, 578 P2d 1261 (1978), *aff'd on other grounds,* 286 Or 151, 593 P2d 1115 (1979), which held that extinguishing all abutting rights of access to a county road constituted a taking requiring a jury's determination of compensation. Noting that this Court had affirmed in *Briggs* without reaching the constitutional issue (because it found a statutory right to

compensation under ORS 374.420), the concurrence disclaimed the Court of Appeals' common law analysis in *Briggs,* attributing it a faulty reliance on "the *dictum* in *Burk."* 265 Or App at 582.

Having provided the foregoing "background," the Armstrong concurrence turned to the instant case, which it decided in short order. The concurrence first noted that if defendant's property *"would have* access to Highway 99W but for the condemnation of access to it," then compensation for that lost access would be appropriate. *!d.* at 582 (emphasis in original). But in the concurrence's view, defendant *did not have* access, "irrespective of whether the state condemned the access," because ODOT *also* had made a "regulatory decision to eliminate curb cuts and driveways to Highway 99W." *!d.* That regulatory decision caused a loss of access "for which compensation is *not* owed, *see, e.g., Schrunk* * * *." *!d.* (emphasis in original). Defendant, in other words, sought damages for "a loss of access *that it does not have." !d.* at 583 (emphasis in original).

2. The Sercombe concurrence. While joining in the result reached by the Armstrong concurrence, Judge Sercombe followed a different path, explaining that where Judge Armstrong found defendant's common law right of access lost through administrative closure, he would conclude that defendant "never had a real property interest to use its actual or any other specific, substitute driveways along its highway frontage." 265 Or App at 584. In Judge Sercombe's view, absent a specifically defined access, no property right exists to be taken, since "the only property interest in street access held by an abutter at common law is a general, unfixed, right to access the street * * * *either*

directly from the frontage of the property along the street *or indirectly* from a private or public approach that borders the property." *Id.* at 587 (emphasis added). "Unless a government takes that entire interest-both the direct and indirect access-no compensation is owed under Article I, section 18." *Id.*

Judge Sercombe also concluded that "neither ORS 374.035 (directly) nor ORS 374.405 (by implication) creates property rights for particular access to state highways," and "if defendant did obtain a discrete access right from the state for its driveways," such access would exist only by permission and the only remedy for closure would be an administrative claim for compensation. *Id.* at 589-90 & n 2.

3. The Wollheim dissent. Judge Wollheim's opinion for the six dissenters took the view that "[c]ontrary to Judge Sercombe's concurrence, it is well settled that, at common law, a landowner whose property abuts a public highway has a right of direct access to the highway from the property" that is "treated * * * as a property right analogous to an easement and cannot be extinguished through condemnation without compensation." *ld.* at 596. While recognizing that such rights may be subject to regulation, the dissent concluded that they may not be acquired in a condemnation action without a jury determination of just compensation.

The dissent found support for its conclusion in *Burk* and in the text and context of several provisions of ORS Chapter 374 addressing access rights to state highways. *Id.* at 598-99. While agreeing that *Burk's* construction of OCLA § 100-116 (predecessor to ORS 374.035(1)) was *dicta,* the dissent found it "persuasive *dicta* * * *." 265 Or App at 600, n 6. The dissent also rejected

"Judge Armstrong's attempted reconciliation of *Burk* and *Schrunk,"* finding it at odds "with a holistic view of the case law, which shows that there is a difference between eminent domain and regulation." *!d.* at 608-09.

The dissent similarly rejected the suggestion in the concurring opinions that ODOT's administrative closure of access could eliminate a right to compensation in the condemnation action. Pointing out that that was not an argument reached by the trial court or made by the state on appeal, the dissent explained that "the state did not purport merely to *regulate* defendant's access to Highway 99W," but "sought also to *acquire* defendant's abutter's right of access through eminent domain." *!d.* at 597 and n 4 (emphasis in original).

Finally, the dissent noted that the concurring opinions were in conflict with this Court's decision in *Briggs:*

> [I]n *Briggs,* * * *the court construed ORS 374.420, a statute similar to ORS 374.035, on which the state relies in this case as the source of its authority to condemn defendant's right of direct access and in which the court held that the county's authority to convert an existing road into a limited access road was conditioned on the county paying the abutting landowner for loss of access. Because I conclude that the state is similarly required to compensate defendant under ORS 374.035 and to permit defendant to introduce evidence of damages "by reason of deprivation of right of access" under ORS 374.055, I would not reach the conclusion that Judge Armstrong reaches in his concurring opinion that no compensation is required under the Oregon Constitution.

!d. at 609.

SUMMARY OF ARGUMENT

The owner of property abutting a county road or state highway holds an appurtenant easement for access that is a distinct property right. Such rights are subject to regulation, but may not be extinguished without compensation. This

historical understanding of abutting rights as easements for direct access to the highway or road is reflected in the prior decisions of this Court, in Oregon's statutory protection of such rights and, for several decades, in the approach to highway access taken by ODOT itself.

The contrary position advanced by ODOT and the Court of Appeals concurrences are founded primarily on cases involving the restriction of access to city streets-which are not subject to the same history or the same statutory protections as highways and county roads-and with *dicta* from more recent decisions involving the Court of Appeals' regulatory takings analysis of administrative access closures. Those precedents do not provide a sound basis to depart from the approach taken by this Court in *Burk* and *Briggs* (among other cases). ODOT attempts to distinguish *Briggs* and the provisions of ORS Chapter 374 without offering any persuasive reason why the very same language in state and county throughway laws should be construed differently, and without confronting other statutory provisions supporting defendant's right to a jury determination of just compensation.

Finally, the concurring opinions ignore the historical view of abutting rights as distinct property rights, and repudiate this Court's reasoning in *Burk* as *dictum* that "does not make sense" in a regulatory takings context. Further, the Armstrong concurrence rests on the conclusion-not reached by the trial court or advanced by the state on appeal-that the claimed administrative closure of access of itself eliminated defendant's right to compensation for the taking of its abutting rights. That conclusion is wrong for several reasons:

- it fails to recognize the distinction between the taking of property rights, without which there is nothing to regulate, and an administrative closure of physical access;
- defendant was entitled to a jury determination of the compensation due for the taking of those rights *as of the date the state's complaint was filed,* and any ensuing effort to effect an "administrative closure" was irrelevant to that determination;
- even if ODOT had chosen *not* to condemn its property interests, Alderwoods still would have been entitled to assert a jury claim for *inverse* condemnation, particularly when the physical access points preexisted any approach road permit requirements; and
- a regulatory takings analysis is in all events misplaced when ODOT acts, as here, to extinguish all abutting rights: because such rights are a distinct property interest, their elimination is akin to a physical taking for which compensation is due.

The rule announced by both concurring opinions-that ODOT may file an action to condemn of all of defendant's abutting rights of access and then avoid a jury determination of just compensation-is a departure from existing law that should be rejected by this Court.

ARGUMENT

A. Abutting Rights of Access Are Distinct Property Interests Subject to Statutory and Constitutional Protection That May Not Be Extinguished Without Compensation.

This Court has said on many occasions that the owner of property abutting a county road or state highway holds an "appurtenant easement" for

access to that roadway that is subject to regulation but "cannot be extinguished without compensation." *See, e.g., Burk,* 200 Or at 228. This Court's decisions establish that such easements, while not necessarily at fixed locations, provide for direct access between a property and a highway-an understanding that is also reflected in Oregon's statutes. Although the existence of alternative indirect access might mitigate or, potentially, eliminate any loss occasioned by the taking of the abutting right, the determination of that issue is for a jury.

1. *Burk* and its antecedents.

Burk marked a watershed in this Court's definition of abutting rights of access. For the first time, the Court confronted a situation in which a new roadbed was condemned to construct a modem limited access highway on land where no roadway of any kind had previously existed. The *Burk* trial court instructed the jury that it was not to consider any loss or damage for the taking of access to the highway as the property had had none prior to condemnation. Defendants assigned error to the instruction.

The state was proceeding under a statute, OCLA § 100-116, that established its right to condemn land *and* rights of access. The *Burk* court began its analysis by observing that while the statute provided for the simultaneous condemnation of property and access, and "indicate[d] by implication, the view of the legislative body that the right of access may be a right for which compensation is to be paid * * * the statute does not apply exclusively to cases in which the state seeks to acquire new land in fee for a non-access highway." 200 Or at 227-28. Rather, the Court explained, "[t]he act is equally applicable to cases in which the state seeks to convert a

conventional highway into a non-access highway by condemning only an easement of access." To distinguish the first situation from the second, and thus to reach its ultimate holding that access rights did not attach to a newly created highway, the Court had to address the nature and origin of abutting rights as distinct property interests.[2] It was in that context that the Court provided the following oft-cited statement of Oregon law:

> 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.

a. *Burk's* common law origins.

As authority for its statement of Oregon law, which it regarded as "clear" and "conceded by the state," the *Burk* court cited a variety of earlier Oregon cases recognizing abutting rights of access as property rights distinct from the rights of passage shared in common by the public. *!d.* Several involved obstruction of access to or use of city streets, as the result of private roads or railways authorized by municipal authority. *See, e.g., Willamette Iron Works v. Oregon Ry. & Nav.* Co., 26 Or 224, 37 P 1016 (1894) (enjoining maintenance of approach ramp for private toll bridge where grade change would limit abutting property's access to street). Others involved obstructions to access created by a city or other governmental authority itself. *See Ail v. City of*

[2] As such, the concurrence's description of *Burk's* statement of abutting rights as *"dicta"* is dubious.

Portland, 136 Or 654,299 P 306 (1931) (abutting owner entitled to seek damages when city's placement of landscaping blocked direct access to reconstructed street); *Morris v. City of Salem,* 179 Or 666, 673, 174 P2d 192 (1946) (abutting owner could not enjoin placement of parking meter that caused some impairment, but did not unreasonably interfere with right of access).

The rule was "definitely settled," *Burk* concluded, in *Sweet v. Irrigation Canal* Co., 198 Or 166,254 P2d 700, 256 P2d 252 (1953), decided only the year before. In *Sweet,* construction of an irrigation ditch in a public road's right of way would have restricted access from the abutting property for much, but not all, of its frontage.[3] Finding that the ditch's placement could be enjoined, the Court summarized Oregon law as follows:

> It is established law in this state that an abutting owner is entitled to the use of the highway in front of his premises to its full width as a means of ingress and egress and for light and air, and this right is as much property as the soil within the boundaries of his lot; and, therefore, *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, whether the fee of the highway is in the owner or not.

198 or at 190-91 (emphasis added).

Thus, *Sweet,* like *Willamette Iron Works* before it, recognized the abutting owner held a distinct property right that was entitled to relatively unqualified protection against private encroachments. That said, the Court in both cases recognized that the equation was different when abutting rights were balanced against the public's use of the roadway *qua* roadway. For example, early cases had treated grade changes in a public roadway as the sort of road

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[3] The diagram in Sweet is appended (App 1).

improvement falling within the police power. *See Brand,* 38 Or 79 (grade adjustments for public bridge approach impaired physical access from abutting property to elevated highway without compensation); *Barrett,* 117 Or 220 (same).

At the same time, elimination of access by other government actions fell outside the police power and entitled the abutting owner to compensation. *See, e.g, Ail,* 136 Or at 665-66 (distinguishing *Brand* and *Barrett* on the ground that no compensation was due when the city graded a street but did not "invade abutting property"-in contrast to the physical severance of the *Ail* landowner's prior connection to the road).[4]

Acknowledging this tension between the police power and private property rights, the *Burk* court explained:

> Reduced to its simplest terms, our problem is to determine at what point we should hold that the police power ends and the power of eminent domain begins. * * * In general, the regulation of highway traffic is within the police power. This includes the establishment of one-way streets, the establishment of traffic lanes, regulations as to speeding and parking, regulations of abutting owners, along with the general traveling public involving circuity of travel, as where one living on a southbound divided street desires to go north, regulations limiting permissible 'U' turns, and changes in the highway system resulting in the reduction or increase of the volume of traffic on the highway fronting the property of an owner.

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[4] The distinction may seem odd today, as the practical impact on abutting access in the grade change cases was, if anything, more severe-that is, it appears the landowner in *Ail* could have reconnected to the street more easily than the landowners dealing with grade changes. The legislature may have agreed: by the time *Burk* was decided, it had provided for compensation in that context. *See* OCLA § 100-125 (Or Laws 1939, ch 529, § 25) (providing damages for change of grade). *See also* ORS 105.755.

200 Or at 230. The Court's discussion suggests that eliminating an abutting right is different in quality from the identified alterations or restrictions (which commonly occur away from the abutting property line) because the abutting right goes to the essence of the hypothetical bargain between the abutting property owner and the public that is implied when a road is created:

> One of the traditional and prime functions of the conventional street and highway is, and will remain, that of a 'land-service road' providing rights of ingress and egress to and from the property of abutting owners for the benefit of such owners, their invitees and the public. We have seen that where such rights have once become vested, it is almost universally held that they can be divested only by condemnation of the easement appurtenant to the abutting property.

200 Or at 231. The Court cited two articles that elaborated on the origin of abutting rights in the "land-service" function and the contrasting function of a throughway or limited access highway. *!d.* (citing Note, *Freeways and the Rights of Abutting Owners,* 3 Stanford L Rev 298 (1951); Clarke, *The Limited-Access Highway,* 27 Wash Bar Journal111 (1952)). The first article, which the Court found particularly helpful, described the origin of abutting rights of access this way:

> From earliest times, through the days of the horse and wagon and model-T Ford, highways were built and utilized primarily for the purpose of giving access to farms and homes and business establishments. This is the concept of the "land service road." Usually the landowner dedicated a portion of his land for the roadway and helped build it either through direct labor or assessments. Under such a state of affairs, each of the abutting landowners was considered to have the right of access to this road which was, after all, built to give him access. To deny this access would defeat the very purpose of the road. This land service road notion is reflected in those cases which give damages when a street is improved in a manner inconsistent with its use as a thoroughfare for abutting owners, but deny damages when access is not interfered with.

3 Stanford L Rev at 300. This understanding of the evolution of abutting rights at common law is repeated in many treatises of the era, including an Oregon Law Review article published the year before *Burk* was decided. That article described the same land-service origins of the early roadways and the contributions of abutting owners, and observed that

> [u]nder such circumstances, it would have been inconceivable to urge that the abutting owner did not have a right of access to the highway after it was built, since the purpose of building the road was to give him such access.

Duhaime, *Limiting Access to Highways,* 33 Or L Rev 16, 34 (1953).[5]

Based on its analysis of abutting rights as preexisting appurtenant easements of access "in and to" the abutting highway, the Court concluded that the statute at issue, OCLA § 100-116, should not be read to create a compensable right of access in the newly created highway where the property had enjoyed no right of access before.[6]

Because it failed to understand the nature of the property interest at stake, the Armstrong concurrence dismissed *Burk's* analysis of abutting rights as *"dictum"* resting on an implicit distinction that "cannot withstand examination" 265 Or App at 579. The concurrence framed that "distinction" thusly:

> The implicit premise of the *Burk dictum* appears to be that the conversion of a conventional highway to a limited-access highway

[5] It is not clear whether the *Burk* court was aware of this article. While the court plainly shared the author's view as to the origins of abutting rights, it rejected his view that eliminating such rights to create a limited access highway should be treated the same as grade changes or other measures contributing to the development of the highway for public use.

[6] The same result is mandated for highways constructed on new roadbeds after May 12, 1951. *See* ORS 374.405. The land at issue in *Burkhad* apparently been taken and the highway constructed in 1950. 200 Or at 223.

> is too great a change in the use of the highway to be included among the changes to which the access rights of abutting landowners can be understood to be subservient. In other words, landowners can expect their access to a conventional highway to be subject to impairment as a result of governmental decisions to regulate or modify the highway to better serve the public use of the highway as a highway, including impairment to the point of a denial of all access to the highway, *see, e.g., Schrunk,* 242 Or at 71, so long as the impairment does not result from a decision to convert a conventional highway to limited access highway and thereby to eliminate "the land-service function" of the highway.

!d. That misunderstands *Burk's* premise, which did *not* start from a categorical "special rule" for limited access highways, but from the proposition, embedded in the common law (and, by then, in Oregon statutes as well) that property abutting a road or highway enjoys an appurtenant easement for access to and from that road, which is a property right subject to regulation, but which cannot be extinguished without compensation. *Burk's* conclusion was that no compensation is owed a landowner who lacks abutting rights of access in the first place, but the Court's starting point was that compensation is *always* owed when abutting rights exist and are extinguished, whether by reason of conversion to a limited access highway or any other denial of access.

The Armstrong concurrence's narrow reading of *Burk* contrasts with its expansive reading of other cases involving the "impairment" of access for road or highway purposes under the police power. 265 Or App at 577, 579 (citing *Schrunk, Brand,* and *Barrett).* Like ODOT and the trial court, the concurrence focused particularly on *Schrunk,* 242 Or 63, which it cited as support for the proposition that "access to a conventional highway" is otherwise subject to "impairment to the point of a denial of all access to the highway" so long as the impairment serves the public use of the highway as highway.

Schrunk, however, involved a *city street,* not a highway, and the property retained access around the corner of the same downtown city block, and so it is hardly a compelling example of a "denial of all access to the highway." Furthermore, the expectations of rural landowners who create service roads abutting their property are plainly different from those of landowners who purchase lots within a city plat. To be sure, the rights of owners abutting city streets have not received the same statutory protection afforded to properties with abutting access to state highways or county roads.

b. *Burk's* interpretation of Oregon statutes.

As the dissent correctly appreciated, *Burk* interpreted common law precedents *and* Oregon statutes. *See* 265 Or App at 600, n 6. Rejecting the Armstrong concurrence's claim that *Burk* was based solely on constitutional principles, the dissent noted that "the court's discussion was in the context of its interpretation ofOCLA section 100-116[.]" *!d.* That statute, as *Burknoted,* provided

> for the condemnation of such interests as such owner or owners may have in said real property, *including any and all right of access if the real property to be acquired is for right of way purposes,* and for determining the compensation to be paid therefor, and the damages, if any there be, for the taking thereof.

Burk, 200 Or at 227 (quoting OCLA § 100-116 (emphasis added)). Although that statute had been amended in 1947, the quoted language was the same in 1951 as when it was enacted in 1939, well before enactment of the first throughway laws in 1947.[7] Relying on the nature ofthe preexisting rights

[7] While the dissent describes OCLA §100-116 as a "predecessor statute to ORS 374.035(1)," a more direct predecessor is§ 100-1a07, (Or Laws 1947,

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recognized by that statute, the *Burk* court concluded that it did not create compensable property rights where none had existed before.

At the same time, the Court reasoned that the defendant landowners in *Burk* should be able to show the extent to which the new highway's restrictions on access contributed to the more complete severance of their property into two parcels that were now isolated from each other, and any resulting diminution in the value of each. 200 Or at 236. Here, the Court considered a second statute, OCLA § 100-1a16 (Or Laws 1947, ch 226, § 16), recodified as ORS 374.055), which provided that in a condemnation proceeding the "entire plan of improvement shall be admissible" to determine the "(1) [v]alue of property taken; (2) all damages by reason of deprivation of right of access * * * and (3) the damages" resulting from the property's "severance" and the "construction of the improvement in the manner proposed." 200 Or at 237 (quoting statute). It was in the context of interpreting that statute (another provision of the throughway law) that the Court observed:

> If the state should take the entire property, no question as to deprivation of right of access could arise. However, item (2) was appropriately inserted in the statute to cover cases in which an old conventional highway is "established" as a throughway *and in which case, as we have held, there would be a "taking" of the preexisting easement appurtenant to the land not taken.*

!d. (emphasis added).

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ch 226, § 7), which was one of the throughway provisions later recodified in ORS Chapter 374.

2. The Court's later highway decisions.

Burk provides a particularly comprehensive discussion of abutting rights as a distinct property interest, but it is hardly an aberration; the same understanding is reflected in too many of this Court's decisions to be rejected as nothing more than *"dictum."*

In *Holland v. Grant County,* 208 Or 50, 54, 298 P2d 832 (1956), decided two years after *Burk,* the Court explained that "[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." The case arose following the re-routing of a state highway to cross a newly constructed bridge (see diagram at App 1). A portion ofthe former route, including the old bridge, was abandoned to the county. The plaintiffs sought to enjoin the county from removing the old bridge, and this Court's analysis of their claim turned on whether they had suffered harm to any right distinct from those of the general public.

The Court noted that the plaintiffs shared in common with the public the right to travel along the highway and over the bridge, but also, "[s]eparate and distinct from the public use," the plaintiffs had "an easement of access" as abutting landowners. That distinct easement of access, however, had not been disturbed:

> The plaintiffs have the same means of ingress and egress from the highway to their property as they have always enjoyed; they are simply required to travel a little further to reach these points.

208 Or at 54-55. *Holland's* holding was entirely consistent with the distinction drawn in *Burk* between extinguishment of an appurtenant easement and

"regulations of abutting owners, along with the general traveling public involving circuity of travel, as where one living on a southbound divided street desires to go north, regulations limiting permissible 'U' turns, and changes in the highway system* * *." 200 Or at 230.

Not until the 1990s did the state begin to question its obligation to pay compensation for taking abutting rights of access. That is why earlier decisions that mention the issue turned, like *Burk,* on whether the landowner possessed an abutting right in the first place. The Court's analysis in those cases nonetheless consistently demonstrates its understanding that if abutting rights *were* taken, compensation for a resulting loss of value would be due. *See State 1-!ighway Com. v. Bailey,* 212 Or 261,276-77,305,319 P2d 906 (1957) *(likeBurk,* involving the severance of defendant's property by a new throughway; Court assumes compensation would be required if access rights were taken (citing *Burk* and ORS 374.055)); *Highway Com. v. Central Paving* Co., 240 Or 71, 399 P2d 1019 (1965) (where prior access to highway was via railroad crossing over third party's land, no compensation owed for increased circuity of access absent abutting right); *Highway Com. v. Ralston,* 226 Or 143, 359 P2d 529 (1961) (no compensable taking when defendant did not have abutting right of access either before or after condemnation)).[8]

[8] The Court of Appeals applied the same rule in its early decisions. *See, e.g., State Highway Comm. v. Hazapis,* 3 Or App 282, 472 P2d 831 (1970) (road closure that left defendant on a cul-de-sac was not compensable because it did not alter any abutting right of access).

3. Oregon's statutory protection of abutting rights.

The provisions of ORS Chapter 374 reflect recognition of commonly acknowledged previously existing property rights *and* a legislative mandate that they be protected. Like the cases just discussed, ORS 374.035, .055 and .405 confirm that a right of access is an appurtenant easement attaching to abutting property, and that property owners must be compensated when, as here, the state takes that right in the course of constructing or improving a throughway.

ORS 374.035(1) provides:

> The Department of Transportation may, in the name of the state, *acquire by* agreement, donation or *exercise of the power of eminent domain,* fee title to or any interest in any real property, including *easements of* air, view, light and *access,* which in the opinion or judgment of the department is deemed necessary for the construction of any throughway, the establishment of any section of an existing state road or highway as a throughway or the construction of a service road. * * *

(Emphasis added). Similarly, ORS 374.055 provides:

> In any proceeding in eminent domain evidence of the entire plan of improvement is admissible for the purpose of determining:
>
> (1) Value of property taken.
>
> (2) *All damages by reason of deprivation of right of access to any highway to be constructed, established or maintained as a throughway.*
>
> (3) The damages which, if the property sought to be condemned constitutes a part of a larger parcel, will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement in the manner proposed.

ORS 374.055 (emphasis added). As noted in *Burk,* this statute distinguishes between damages for the deprivation of access rights and severance damage,

and expressly provides for the admissibility of evidence of each. 200 Or at 237 (construing same language in OCLA § 100-1a16).

Finally, while the legislature proscribed abutting rights of access for state highways constructed *after* May 12, 1951, it thereby acknowledged that abutters' rights were *protected* if any "part of the width" of the highway existed *before* then:

> No rights in or to any state highway, including what is known as rights of access, shall accrue to any real property abutting on any portion of any state highway constructed, relocated or reconstructed after May 12, 1951, upon right of way, no part of the width of which was acquired prior to May 12, 1951, for public use as a highway, by reason of the real property abutting upon the state highway.

ORS 374.405. Testifying in support of that statute, the chief counsel for the State Highway Commission (ODOT's predecessor) explained that unless expressly proscribed by statute, an abutter's rights of access to an existing highway *must* be acquired by agreement or condemnation:

> An abutting owner has and possesses access to an existing highway. That right of access is a property right which cannot be taken from him without payment by the public of just compensation. *In order to produce an access controlled highway by converting an existing highway into a throughway, the abutting owners [sic] right of access must be acquired. If it cannot be acquired by agreement, then it may be acquired by the exercise of the right of eminent domain. But in either event, just compensation must be paid to the abutting owner.*

Testimony, House Committee on Transportation, HB 619, Apr 25, 1951 (statement of J.M. Devers, Chief Counsel, Oregon State Highway Commission) (emphasis added). In 1951, at least, the state *conceded* that a landowner such as Alderwoods was entitled to compensation for the taking of its abutting right of access.

4. *Douglas County v. Briggs.*

This Court interpreted language virtually identical to ORS 374.035 in *Douglas County v. Briggs,* 286 Or 151, when it analyzed the related *county* throughway provision, ORS 374.420. In *Briggs,* the county argued that it was not required to compensate defendants for eliminating their abutting rights of access when a county road was converted to a throughway. One side of the defendants' property fronted on a four-lane commercial thoroughfare; another side fronted a smaller parallel road that the trial court found adequate for residential or farming uses, but not commercial development. *Briggs,* 34 Or App at 410 (diagram appended (App 2)). The property's only physical access had been on the smaller road; no physical access had ever been established on the commercial thoroughfare, although a location for one had been marked by the county. *!d.* at 412.

The circuit court held there was a compensable taking, and the Court of Appeals affirmed, finding that the defendants had a common law abutting right of access-one recognized by the legislature when it enacted the county throughway law, ORS 374.420-and were thus entitled to a jury determination of compensation. *!d.* at 413-15. On review, this Court affirmed based on that statute, and thus had no need to take a "position one way or the other whether Article I, section 18, of the Oregon Constitution mandates payment for loss of rights of access in a situation like the present."[9] 286 Or at 156.

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[9] Having said that, the Court then added the passing comment-without analysis of any of its precedents-that "[d]espite defendants' common law right of access, we believe the matter to be one of considerable doubt in situations in which the access is terminated for purposes which have to do with the use of the

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Instead, the Court held that the plaintiff was required to pay compensation based on ORS 374.420(1), which contains language virtually identical to the state throughway law, ORS 374.035 (quoted at p 24 above), on which it was based.

> The county court or board of county commissioners *may acquire by* purchase, agreement, donation or *exercise of the power of eminent domain,_* fee title or any interest in real property, including *easements of* air, view, light and *access,* which is necessary for the construction of a throughway or the establishment of a section of an existing county road as a throughway.

ORS 374.420 (emphasis added). The Court concluded that that text supported the defendants' argument that *"rights of access cannot be terminated except by payment unless they are donated to the county by the property owner."* 286 Or at 154 (emphasis added).

> The statute does not specifically provide that counties must compensate property owners whose rights of access to adjacent county roads are terminated. However, it provides limited means by which counties may extinguish easements of access upon establishment of a throughway. *The specified means of acquisition indicate that the property owner must agree to the termination of his rights of access unless the county acquires the right by condemnation.*

!d. (emphasis added).

The Court's analysis in *Briggs* disposes ofODOT's contentions here. Absent a voluntary transaction, ODOT cannot acquire defendant's abutting rights of access except by condemnation. Nonetheless, the Armstrong concurrence claimed that it could ignore *Briggs* because that case involved the

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county road as a public road." *!d.* at 156-57. This comment can fairly be labeled the *"dictum* in *Briggs."*

country throughway statute, enacted in 1965, while this case is governed by the *state* highway statute, enacted in 1947. 265 Or App at 583 n 4. What is more, the concurrence said, "[t]he court's construction in *Briggs* was very much driven by the legislative history behind the [1965] statute's enactment* * *." *!d.* Because there was no legislative history of the nearly identical1947 statute, the concurrence said, it had no cause to follow *Briggs.*

The concurrence's reasoning is misconceived. True, the *Briggs* court found that the text ofORS 374.420 was not without some ambiguity, 265 Or at 154, and it thus consulted legislative history-which left "no doubt about the legislative intent" that abutting owners be compensated, *id.* at 156, that history simply confirmed what the Court had already discerned from the text.

Moreover, in ignoring *Briggs's* interpretation ofORS 374.420, the Armstrong concurrence ignored the historical and statutory context surrounding ORS 374.035. Again, this Court found in *Burk* both a common law right to compensation *and* legislative recognition of that right in OCLA § 100-116 (providing for condemnation of access rights), a statute enacted in 1939 but still in force when OCLA § 100-1a07 (later ORS 374.035) was enacted in 1947.

That same understanding of abutting rights was reflected in 1951, four years after the enactment of ORS 374.035, when the Chief Counsel for the State Highway Commission testified in support of ORS 374.405 (p 25 above). And in 1965, the legislature confirmed that ORS 374.035 *and374.420* had the same meaning, as it consciously incorporated ORS 374.035's language in ORS 374.420. *See* Minutes, Senate Committee on Local Government, April13, 1965, at 3 ("Much of [the] language, as it appears now in the engrossed bill,

was taken from the Highway Department's section [ORS 374.035] * * *."). Indeed, the State Highway Commission helped draft the bill. *See* Comments of Rep Bedingfield, House Floor Debate, March 25, 1965, tape 20, side 2. Representative Bedingfield explained during the House floor debate that the State Highway Commission was *required* to compensate for loss of access, a requirement the legislature intended to mirror at the county level:

> "(Rep. Bedingfield): '* * * The purpose of [the statute] is to permit condemnation by the counties of access and other rights pertaining to real property on which these specialized highways need to be built. *There is complete payment for any right taken, including the right of access, similar to highways that are now constructed by the State Highway Commission.*
>
> "'If the* * * county is granted authority under this (bill), they can completely block access, but they must pay for it. *They also, of course, can eliminate or reduce the * * * expense problem by providing other access, as the Highway Commission does.'*
>
> "(Rep. Bateson): 'But they may not extinguish this right of access without full payment and full compensation for knocking out that right?
>
> "(Rep. Bedingfield): *'That's right. But they can minimize it by providing substitute access.'"*

Briggs, 286 Or at 155 (quoting House Floor Debate, Mar 25, 1965, tape 20, side 2) (emphasis added).

Given the parallel language and the context provided by other statutes enacted before and since, the dearth of legislative history concerning ORS 374.035 obviously should not prevent that statute from being read in harmony with ORS 374.420.

> By referring to other similar legislation, a court is able to learn the purpose and course of legislation in general, and by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, the court not only is able to give effect to the

> probable intent of the legislature, but also to establish a more uniform and harmonious system of law.

Norman J. Singer, *Sutherland Statutory Construction§* 53.03. *See* ORS 174.010 ("[W]here there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."); *State v. Langdon,* 151 Or App 640, 950 P2d 410 (1997), *aff'd* 330 Or 72 (2000) (courts "must construe statutes on the same subject as consistent and in harmony with one another.").

Nonetheless, despite the nearly identical language of the two statutes, the Armstrong concurrence dismissed *Briggs* on the ground that (a) the county throughway law came later and (b) the legislative history with respect to the first statute, ORS 374.035, was "silent." That reasoning cannot be accepted. It Ignores

- the meaning apparent from the statute's plain text;
- this Court's interpretation of that text in *Briggs;*
- the Court's earlier interpretation of similar statutory references to access rights in *Burk;* and
- the legislative purpose evident in a related statute, ORS 374.405 (discussed above), as to which both the text and legislative history (provided by the agency) are clear.

5. ODOT's prior policy and its transformation.

As shown, ODOT itself has historically recognized that abutting rights must be acquired by purchase or condemnation. The taking of access was routinely described in condemnation complaints and judgments, and in deeds. Unless all access was acquired, such descriptions would also reserve access at

specified locations. *See* ORS 374.410. Examples of such deeds were submitted in response to ODOT's motion in limine (TCF 55 at Exs 4, 5; ER 33, 35). The process, and the significance of the resulting delineation of the property right in the chain of title, was a part of the testimony defendant proffered in its offer of proof(Tr 129-131; ER 19-21).

As suggested by Representative Bedingfield in his comments concerning State Highway Commission practices, one effect of such reservations was to minimize the compensation a jury might award through mitigation of impacts on the remaining property. Consistent with *Briggs,* the jury would consider the reservations when it determined the reasonableness and adequacy of the remaining access in light of the "entire plan of improvement." *See* ORS 374.055; *see also* Uniform Civil Jury Instruction 60.01 ("Taking ofLand and Access").

Notwithstanding the agency's historic practice, ODOT policy changed during the 1990s. The shift was not the result of any legislative mandate: the applicable law did not change in any material way. Rather, ODOT's new approach reflected a unilateral policy change by the agency itself, rationalized by a sweeping reconsideration of the scope of the police power in a 1993 informal Attorney General opinion. Letter of Advice dated Apr 30, 1993, to ODOT Deputy Director William Anhorn (OP-6457).

Adopting an analysis similar to that proposed by the concurrences below, the informal opinion concluded that at common law, abutting rights of access could be restricted *or even eliminated-without* compensation-when a highway was improved for "legitimate highway purposes." *Id.* at 3. The

opinion cited *Burk* solely for the proposition that the government could qualify or restrict abutting access in the interests of public safety or convenience. *!d.* at 4. And, like the concurrence, the opinion equated restrictions of access with a regulatory takings analysis, so that "the constitutional question becomes one of determining when a restriction of access denies all economically beneficial or productive use of the land, so as to amount to a 'taking.'" *!d.*

In this formulation, and in its repeated emphasis on the lack of compensation for mere "circuity of travel," the opinion (like the concurrences below) ignored or misunderstood this Court's distinction between an abutting right as an appurtenant property interest and those rights shared by the general public. *See Burk,* 200 Or at 228; *Holland,* 208 Or at 54-55; *Central Paving,* 240 Or at 74-75. The informal opinion's profound misunderstanding of *Central Paving* illustrates the point.

According to the opinion, this Court in *Central Paving* "considered a condemnation action in which defendants claimed under both common law and ORS 374.035 that they were entitled to compensation for the increased travel distance that resulted *when the abutting road* became a limited access highway." Letter of Advice at 4 (emphasis added). The opinion later described this Court's interpretation ofORS 374.035 as follows:

> Interpreting this statue, the Supreme Court, in *Highway Com. v. Central Paving Co., supra,* 240 Or at 76, held that loss of direct access to a highway, due to its designation as a throughway, "is not an interest in land" and, therefore, is not within the scope of ORS 374.035.

!d. at 11.

As the dissent recognized, that is simply wrong. 265 Or App at 607. The *Central Paving* Court held that it did not need to consider the application of ORS 374.035 *because the property had no abutting right or direct access to highway in the first place:* the Court expressly noted that "none of [defendants'] property actually abutted upon the highway" and that "the defendants had previously enjoyed access to the highway by means of a grade crossing over the railroad right-of-way.'240 Or at 72. It was in this context that the Court said that "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). As in cases before and after *Central Paving,* the absence of abutting rights was critical:

> Defendantsaccess 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 defendantsland 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-tum regulations or oneway-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). *Compare Holland,* 208 Or at 54-55 (making same distinction in rejecting claims based on circuity absent alteration of abutting right appurtenant to the land).

Over the past two decades, this misunderstanding of *Central Paving* has had significant consequences for ODOT's policy, and for the position it has advanced in the courts (and in this case). As the informal opinion acknowledged:

> But for this holding in *Highway Com.* v. *Central Paving Co., supra,* 240 Or at 76, we would give greater weight to *Douglas County* v. *Briggs, supra,* 286 Or 151.

Letter of Advice at 16 n 16.

By minimizing the significance of abutting rights as property interests, and interpreting the throughway statutes applicable to highways as permissive only, ODOT ultimately arrives at the position it took in this case: absent some point of access specifically located in a prior deed or judgment, the taking of abutting highway access-even all access-is not compensable unless it leaves the property landlocked. *Any* remaining access-even indirect, non-abutting access-is "reasonable and adequate" as a matter of law. The difficulty with this position is that it is contrary to this Court's decisions. Nor was it supported by the cases ODOT cited below.

6. ODOT's position below.

In addition to cases already discussed *(Brand, Sweet,* and *Schrunk),* ODOT claimed support for its position could be found in *City of Salem* v. *Merritt Truax,* 70 Or App 138, 688 P2d 120 (1984) (TCF 49 at 3). There, as part of a street widening project, the city closed one of three driveways used by a corner service station. The court concluded that that *partial* loss of abutting access did not constitute a compensable taking. The same analysis applied in *Schrunk* (TCF 49 at 2-3), in which the city closed plaintiffs access to a city

street on one side of its property because it interfered with a bus stop. Significantly, in these and other city street access cases, the courts were not called upon to apply ORS Chapter 374.

The same is true of another decision ODOT cited, which did involve a state highway. In *Dept. a/Transportation v. DuPree,* 154 Or App 181, 961 P2d 232, *rev den,* 327 Or 621 (1998), *cert den,* 526 US 1019 (1999), the Court of Appeals reversed because the trial court refused to instruct the jury that it was not to consider the effect of access restriction in determining just compensation for ODOT's condemnation of a portion of the defendants' property. In addition to the taking of land, ODOT closed one of two access points on the highway, diminishing but *not* extinguishing defendant's abutting access. The Court of Appeals took care to note that "Defendant did not argue at trial or on appeal that any statutes require an award of compensation to her in this case, so we decide the case solely under Article I, section 18." 154 Or App at 186 n 3.

Lastly, ODOT relied on a decision involving its own administrative proceedings. In *Curran v. ODOT,* 151 Or App 781, 951 P2d 183 (1997), property owners brought an *inverse* condemnation action against ODOT, asserting that the agency's placement of a guardrail blocked an existing point of access and deprived them of all reasonable access to the highway. The trial court granted summary judgment for the agency, and the Court of Appeals affirmed, holding that by failing to seek a permit for an alternative point of access, the owners had failed to exhaust their administrative remedies. As the dissent explained, *Curran* offered no support for ODOT's contention that it may *condemn* all abutting rights of access without compensation.

B. Alderwoods' Right to Compensation Was Not Affected by ODOT's Purported Administrative Closure of Physical Access.

1. Having chosen to condemn defendant's property rights, ODOT could not escape a jury determination of compensation based on subsequent regulatory action.

As the dissent observed, to the extent the concurrences relied on ODOT's letter concerning the anticipated administrative closure of access, they focused on an issue the trial court did not reach, and ODOT did not even advance on appeal. 265 Or App at 597 n 4, 608 n 8, 609. Indeed, the record contains no order reflecting the claimed "regulatory decision" to eliminate curb cuts and driveways to the highway. *See* 265 Or App at 582 (Armstrong, J., concurring).

Beyond that, however, as the dissent also noted, the concurrence's reliance on that "decision" failed to appreciate the distinction between the acquisition of property interests in condemnation and the administrative regulation of their use. 265 Or App at 597, 601. ODOT itself distinguishes acquisition of a landowner's property rights from their regulation:

> Since [1949] property owners adjacent to state highways have been required to obtain an approach road permit from ODOT even though they have a "common law" right of access to the state highway. *The common law right allows them to access the highway, and the permit process determines how and where the approach road can be safely constructed.* While the statue requires that owners be allowed to access their property, it does not ensure that they can have an approach road wherever they desire. For example, ODOT is not obligated to issue an approach road permit when reasonable access is available, such as to a city street or a county road.
>
> *ODOT has the authority to purchase the right of access from property owners where appropriate.* 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 this case, a statement in the*

> *property owner's chain of title will show that the right of access has been conveyed to ODOT.*
>
> 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.

1999 Oregon Highway Plan (Policy Element) at 118 (emphasis added).

In the present case, defendant had no administrative remedies to exhaust, because ODOT took all abutting rights of access in its condemnation complaint. Under ODOT's own regulations and statutory authority, there was nothing left to regulate: regardless ofthe contrary suggestion in its October 16, 2008 letter, the agency *could not* grant Alderwoods a permit for an approach road. *See* ORS 374.310(1) ("the department may not issue a permit for the construction of any approach road at a location where no rights of access exist between the highway and the abutting real property"). Absent amendment ofODOT's complaint to abandon the taking of access *(see* ORS 35.335), it would have been futile for Alderwoods to seek a permit or to establish in an administrative proceeding that the property's access existed prior to 1949,[10] because the underlying property right was already being condemned. After condemnation, a landowner must convince ODOT to sell it a new "Grant of Access." *See* OAR 734-051-0305 (requiring payment of appraised value to repurchase underlying property right from agency).

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[10] As noted, the property's physical access has existed at the same locations since at least 1936 (Tr 131-132; ER 21-22, 44-48).

Finally, under Oregon law, the property taken in a condemnation action is defined in the complaint, and valued as of the date oftaking, which is either the date of the complaint or upon the government taking possession, whichever occurs first. *See Dept. ofTrans. v. Lundberg,* 312 Or 568, 574, n 6, 825 P2d 641, *cert den,* 506 US 975 (1992). Here, the complaint was filed and ODOT took possession before sending its letter. Accordingly, any administrative action by ODOT would be irrelevant to the jury's determination of value and inadmissible in the condemnation action. *See also Boise Cascade Corp. v. Board of Forestry,* 325 Or 185, 196,935 P2d 411 (1997) (rejecting exclusive administrative jurisdiction where plaintiff raised an inverse condemnation claim); *cfformer* ORS 374.310(3) (ODOT's permit authority may not be exercised to deny abutting properties access reasonably adequate for uses allowed under a local comprehensive plan).

2. Even if the agency had not chosen to condemn defendant's property rights, ODOT's regulatory authority would not have permitted it to eliminate all abutting access without compensation.

While ODOT has in the past taken the position that it may close *all* points of access along the highway frontage by administrative decision without paying compensation, the Court of Appeal has rejected that position, at least when the access right to be extinguished is specifically located in a prior deed or judgment. Given the character of abutting rights as distinct property interests, the result should be no different when the agency closes all abutting points of access and thus extinguishes the landowner's appurtenant easement of direct access.

In *ODOTv. Hanson,* 162 Or App 38, 987 P2d 538 (1999), *rev den,* 330 Or 252 (2000), ODOT cited safety concerns to deny the landowners a permit for access at a location previously reserved by deed. 162 Or App at 41. The deed (Ex 116; ER 35) was the result of a prior purchase by the state highway department, and had included language taking all abutting rights of access *except* at the designated location. *ODOT v. Hanson,* 7004 Oregon Briefs, Appellant's Abstract ofRecord, pp A-10-11. ODOT argued that it could deny access without compensation as a matter of law because the landowners still had other alternative access. The trial court disagreed, and the Court of Appeals affirmed.

Writing for a unanimous court, Judge Landau rejected the state's arguments, explaining:

> Although nonpossessory, an easement is an interest in land. A "taking" may occur either by outright condemnation or by governmental regulation of use that has the effect of rendering an owner's property valueless. In this case, there is no dispute that the effect of the state's denial of plaintiffs' application for a permit to use their easement effectively renders the easement valueless. It necessarily follows that the state has taken the easement, a property right, and that the state and federal constitutions require that the state must pay compensation in consequence.

162 Or App at 43-44 (citations omitted). The court acknowledged that an abutting right of access "entitles the owner only to access generally, not access at a particular location," and that "when the state regulates access merely at a particular location, there has been no taking of the common-law right, because access remains available." 162 Or App at 44. "But," the court said,

> that is not what happened in this case. Plaintiffs reserved not a general common-law right of access, but an easement of access to a specific highway at a specific location. When the state denied

> them access at that location, there was a taking of precisely-and *entirely-what* had been reserved in the deed.

!d. (emphasis added).

Although *Hanson* focused on the existence of a specific reserved access, and rejected ODOT's contention that it could close even that last reserved abutting right without compensation, nowhere did the court hold that that is the *only* circumstance in which compensation is owed. Rather, *Hanson's* reasoning is consistent with prior Oregon case law-and particularly with the decisions of both this Court and the Court of Appeals in *Briggs.*

Like *Hanson, Briggs* also involved the taking by closure of *all* access abutting the county's throughway-a "four-lane paved highway"-that left the property with only indirect access via a side street and secondary road. 34 Or App at 412. At that time, the property was "used for residential and farming purposes, but the highest and best use, at least for that portion" abutting the thoroughfare, was "for commercial purposes." *!d.* The property's only constructed access, and the one it had historically used, was located on the secondary road, and that access was retained. Nonetheless, this Court affirmed the Court of Appeals' conclusion that the taking of all abutting access along the throughway was a compensable taking.

A moment's reflection demonstrates the incongruity of ODOT's interpretation of *Hanson.* The deed at issue in that case conveyed abutting rights to the state, save for one reserved location. Obviously, the agency would have had to pay *more* if it had acquired all rights *without* that reservation. The same would be true of a jury verdict in an action condemning less than all of a property's abutting rights. Yet ODOT claims that *Hanson* supports its position

that while it must pay to acquire the right previously reserved, it can avoid any obligation to provide compensation simply by taking all abutting rights in the first instance.

As in *Hanson* and *Briggs,* ODOT has in this case taken defendant's abutting rights of access in their entirety. Even if ODOT had relied upon an administrative closure rather than filing a condemnation action (and even if defendant's existing physical driveways had not been established before 1949), defendant *still* would be entitled to a determination of compensation-and to have the issue of compensation and the reasonableness of its remaining non-abutting access submitted to the jury-by way of an action for inverse condemnation. *See Boise Cascade,* 325 Or at 196-97 (finding independent jurisdiction in circuit court for inverse condemnation claim). [11]

C. Just Compensation and the Reasonableness and Adequacy of Any Remaining Access Are Questions of Fact for the Jury.

This case presents the Court with an opportunity, perhaps long overdue, to clarify a number of points concerning Oregon law with respect to abutting rights of access. As the dissent observes, however, ultimately "the legal question is a narrow one: Is the defendant entitled to put on evidence to establish a right to compensation for the state's acquisition, through eminent domain, of its common-law abutter's right of direct access to Highway 99W?"

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[11] *But see Deupree v. ODOT,* 173 Or App 623,629,22 P3d 773 (2001) (applying regulatory takings analysis to dismiss inverse condemnation claim). Although unnecessary to decide this case, which involves the condemnation of defendant's property rights rather than their regulatory closure, for the reasons just discussed, petitioner submits that *Deupree* was wrongly decided-at least insofar as it addresses the administrative closure of all abutting access (the case also presents some distinct issues because it involved a change of grade).

This Court recognized in deciding *Briggs* that when restrictions on access are imposed, whether or not adequate access remains is a question of fact to be determined in light of the highest and best use of the affected property. 286 Or at 157 ("[T]he 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."). The compensation due may be great, small, or non-existent, depending on the taking's impact on the property's highest and best use, and the adequacy of any remaining access. That question is inherently factual and not, as ODOT argued to the trial court below, a question of law for the court.

To the extent value is determined in eminent domain-whether in a condemnation action initiated by the government, or a claim for inverse condemnation brought by the abutting owner-the owner (and the state) are entitled to a jury trial. *See State Dept. a/Transportation v. Schappert,* 82 Or App 311, 314, 728 P2d 80 (1986) (approving jury instruction that state could only restrict access to highway without compensation if landowner was left with "reasonable and adequate access to serve his property"); *see also Boise Cascade Corp,* 325 Or at 196 (rejecting exclusive agency jurisdiction where plaintiff had presented an inverse condemnation claim).

Although it is sometimes cited by ODOT to suggest that the existence of alternative access alone forecloses compensation, *Schappert* plainly supports defendant's position that the adequacy of alternative access is a fact question for a jury and not a legal matter for the court. In *Schappert,* the Court of Appeals sustained a jury instruction including the following language.

> The abutting owner is not entitled, as against the public, to access to his land *at all points.* It is sufficient if he has reasonable and adequate access to serve his property. Where the defendants' land abuts on two or more public roads *and one of these roads furnishes reasonable and adequate access to serve their property,* the State can completely restrict their access to the other road without payment of any compensation.

82 Or App at 314 (emphasis added). Holding that the instruction was not erroneous, the court explained:

> It did not tell the jury that there were two roads; rather it told them that the state could restrict access to the land *ifthe* landowner still retained *reasonable and adequate access* to serve their land. That rule is correct whether one, two or more roads border the land. *The instruction properly told the jury to consider the nature of the remaining access in assessing defendants' damages.* That was sufficient.

Id. (emphasis added). Thus, the holding was consistent with the rule that the Court of Appeals and this Court had earlier applied in *Briggs.*

The view that the adequacy and reasonableness of the remaining access must be determined in light of the property's highest and best use is also plainly consistent with state policy as expressed by the legislature. By statute, and under ODOT's own guidelines, reasonable access is not satisfied simply by the existence of some access, so that the property is not landlocked; rather, access must be reasonable for the anticipated and legally allowed uses of the property. *See, e.g.,* OAR 734-051-0040(51) ("'Reasonable Access' means the ability to access a property in a manner that meets the criteria under ORS 374.310(3)"). *Former* ORS 374.310(3), which was the source ofODOT's rulemaking authority and would have been binding on the agency even if not acknowledged in its own regulations, provided:

> The powers granted by this section and ORS 374.315 may not be exercised so as to deny any property adjoining the road or highway reasonable access. *In determining what is reasonable, the department* or county court or board of county commissioners *shall apply the following criteria:*
>
> (a) The access *must be sufficient to allow the authorized uses for the property identified in the acknowledged local comprehensive plan.*
>
> (b) The type, number, size and location of approaches must be adequate to serve the volume and type of traffic reasonably anticipated to enter and exit the property, *based on the planned uses for the property.*

See former ORS 374.310(3) (emphasis added). Thus, even ifODOT were exercising its administrative authority, rather than condemning defendant's access rights, it would be required to consider the reasonableness of access for the "authorized uses" of the property, and could not base its evaluation on the existence of some alternative access without evaluating, factually, whether that access was reasonable for the property's authorized uses. This regulatory standard mirrors the standard of highest and best use that must be applied in condemnation cases (like this one) as a matter of constitutional law. The position taken by ODOT in the trial court, however, was inconsistent with that standard, as were the instructions given to its appraisers.[12]

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[12] Notwithstanding its statutory and constitutional obligations, Section 4.480 ofODOT's Right of Way Manual instructs its appraisers to apply a different standard in assessing just compensation, providing in pertinent part:

> Loss of access is compensable only when an existing reservation or grant of access is closed, or when a property is left with no reasonable access. *Reasonable access for appraisal purposes is any access that allows some remaining economic use of the property, not necessarily the existing use or the existing highest and best use.*

(Emphasis added.) The application of this standard was one of defendant's objections to ODOT's appraisal in this case (TCF 65 at 12-14).

Notwithstanding the standards established by the legislature and by this Court, ODOT argued below that there could be no compensation for the taking of access in its complaint unless one of two very limited circumstances existed. Citing *Schrunk,* ODOT told the court:

> The Oregon Supreme Court's modern cases hold that there is no compensation due unless one of two exceptions are met: there is a complete taking of all access (i.e., the property is landlocked) or unless there is a taking of a reservation of access (which allows access at a particular point, such as in *State (ODOT) v. Hanson*
> * * *

(TCF 49 at 3.) ODOT argued that the trial court was required to make this initial determination of "whether there is reasonable access" and that the jury was limited to determining the amount of damages if and only if the court determined that no reasonable access existed *(id.* at 9).

Of course, there is no decision of this Court, modem or otherwise, that so holds. Certainly, *Schrunk* does not. *Schrunk,* decided a decade before *Briggs,* was a declaratory judgment action challenging a condition of approval. The landowner had constructed a downtown parking facility pursuant to a conditional use approval specifying that ingress and egress could not be located on the side of the block already occupied by a bus loading zone. The court simply rejected the claim that the city's conditions of approval were invalid as a regulatory taking *per se.* 242 Or at 68, 71, and 73 (noting that plaintiffs had failed to allege any damage resulting from the access restriction, or other circumstances indicating that either the remaining access or the city's regulation was unreasonable).

Here, defendant's evidence would have shown that the value of its property in its highest and best use was substantially diminished. Without further modification, the access remaining was unreasonable even for the property's existing use, and defendant was required to bear the expense of restoring its property following the closure of the highway access points and constructing a new access on SE Warner (Exs 117, 121, 123, 139; Ex 140 at 37).

Br granting ODOT's motion in limine, the trial court deprived Alderwoods of its right to have a jury determine just compensation for the taking of its abutting rights of access-a taking by the state that was expressly described in ODOT's complaint and consummated in the trial court's judgment (ER 2, 9).

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

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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 13,238 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).

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CERTIFICATE OF FILING AND SERVICE

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

I further certify that I served the foregoing document by causing by causing two true copies thereof to be mailed by first-class mail on March 26, 2015, to the following:

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