IN THE SUPREME COURT OF THE STATE OF OREGON

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

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Washington County
Honorable THOMAS KOHL, Judge

Continued…

Opinion Filed: September 17, 2014
Affirmed by equally divided court
Before: Haselton, Chief Judge, and Armstrong, Wollheim, Ortega, Sercombe, Duncan, Nakamoto, Egan, DeVore, Tookey, and Garrett, Judges, and Schuman, Senior Judge
Armstrong, J., concurring.
Sercombe, J., concurring.
Wollheim, J., dissenting.

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

INTRODUCTION

As part of improvements to Highway 99 where it passes through Tigard, the Oregon Department of Transportation (ODOT) determined that two driveways leading from the highway to defendants' funeral home were so close to the off-ramps from Highway 217 as to create a traffic hazard. ODOT accordingly filed a condemnation proceeding in which it proposed to take a temporary easement across the front of the property to reconstruct the sidewalk and permanently eliminate the curb cuts for the driveway onto the highway. Defendants' property remains accessible by two other driveways leading from a city street that runs perpendicular to the highway and forms the western boundary of defendants' property. The question before this court is whether ODOT must compensate defendants for closing the driveways that opened directly onto Highway 99.

ODOT is not required to compensate defendants, because they did not take away any property interest belonging to defendants. As an abutting landowner, defendants had (and have) a qualified right to access Highway 99—but only to the extent that it does not interfere with the public's use of the highway. In light of ODOT's determination that the access driveways were not

safe, closure of those driveways was consistent with defendants' qualified access right and is not compensable. Where the state closes particular access points for safety reasons while other points of access remain readily available, the state has not taken anything belonging to the property owner and so no compensation is owed.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

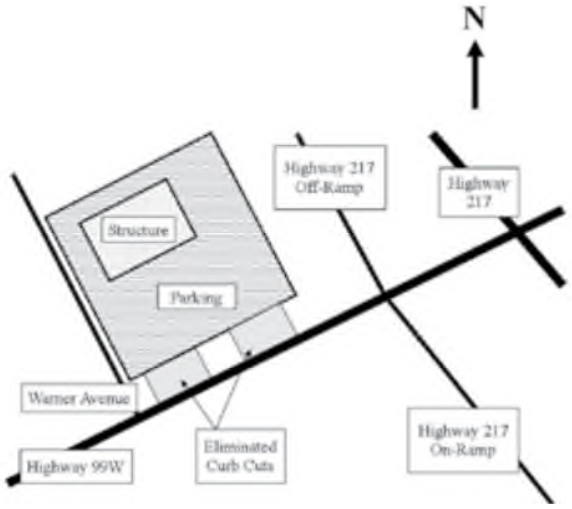
Question Presented: When the state closes direct access to a highway to promote public safety and convenience, but ensures that alternate access to a public road and thus to the highway is available, is the loss of direct access compensable in an eminent domain proceeding?

Proposed Rule of Law: No, for two reasons. An abutting land owner has only a qualified right of access and does not have a property right to any specific access to a state highway. Alternate access to the highway via a public road is all that is required. Further, the state has the authority, under its police power, to regulate access to improve highway safety. Compensation is required only when access to the property is entirely eliminated, thereby rendering the property economically valueless.

STATEMENT OF MATERIAL FACTS

This case concerns property that is located on Highway 99 just west of Highway 217 in Tigard. Since at least 1937, defendants' property has operated as a funeral home. Highway 99 runs roughly south of the property for a

distance of some 200 feet; an off-ramp for Highway 217 effectively forms the eastern boundary of the property, while Warner Road, a public city street, lies to its west. Warner Road is the western boundary of a segment of Highway 99 that is designated as a throughway, a limited access highway. The configuration of the property is thus as follows:



Appendix, *ODOT v. Alderwoods (Oregon), Inc.*, 265 Or App 572, 611, 336 P3d 1047 (2014).

As the diagram shows, there were two curb cuts allowing access directly to Highway 99 very close to the off-ramps from Highway 217. It is undisputed that this proximity was a hazard to traffic entering and travelling on Highway 99. While the minimum safe distance for a driveway from a highway interchange is 750 feet, the distance here was no more than 260 feet, less than five-hundredths of a mile, for the farther driveway. OAR 735-051-0125 (Table 5). The property also has two access points on Warner Road on the western

property boundary. Those access points continue to provide access to the property.

The state filed a motion in limine to exclude evidence that the value of the property was diminished by the loss of direct access. The trial court ruled that any reduction in value caused by the elimination of access directly to Highway 99 was not compensable as a matter of law, because alternate access to Warner Avenue remains available. On that basis it granted the state's motion in limine. The defendant appealed, and the judgment was affirmed by an equally divided Court of Appeals. *ODOT v. Alderwoods (Oregon), Inc.*, 265 Or App 572, 336 P3d 1047 (2014).

SUMMARY OF ARGUMENT

The legislature has authorized ODOT to establish and regulate throughways, and to condemn property for that purpose. ODOT is not required to pay compensation to affected property owners, however, unless the state takes a compensable property right.

An "abutters right of access"—that is, the right to access a highway abutting one's property—is a particular species of property right historically recognized at common law. However, it is a limited right. It is not, as it name might suggest, an unqualified right to access an abutting highway at a particular point, like an appurtenant access easement. Rather, this court has long recognized that an "abutter's right of access" to a highway is subservient to the

right of the public to use of the highway. As a result, the closure of an access point to an abutting highway is compensable only when it is done for some purpose *other* than providing for the safe and efficient use of the highway.

Because of the subservient nature of an "abutter's right of access," 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. But when—as here—the state closes a highway access point for traffic safety and that property remains readily accessible, no compensation is required.

ARGUMENT

The question in this case is whether closing a property owner's direct access to an adjacent public highway for traffic safety requires ODOT to pay compensation to the property owner if the property remains readily accessible from other access points. The answer to that question turns primarily on whether direct access to an adjacent public highway is itself a compensable property right. Common law—as reflected in many of this court's cases—does recognize the existence of an "abutter's right of access" to an adjacent public highway, but—as this court repeatedly has explained—that right is subservient to the public's use of the highway. As a result, the elimination of such access for a highway purpose is not compensable if the property remains otherwise accessible.

A. ODOT is required to pay compensation if its actions take a compensable property right.

Although eminent domain is an inherent power of the sovereign, its exercise by a particular agency requires legislative authority. *State Highway Com. v. Stumbo et al*, 222 Or 62, 68, 352 P2d 478 (1960). The legislature has empowered ODOT to establish and regulate throughways, and to condemn property for that purpose. ODOT is not required to pay compensation to affected property owners, however, unless the state's action physically invades the property, regulates in a way that deprives the owner of any substantial beneficial use,[1] or takes away a compensable property interest such as an easement. In this case, it is undisputed that neither of the first two of those things has occurred: ODOT has not invaded defendant's real property, so there is no compensable taking in that sense. Nor could any diminution in the value

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[1] When a state agency takes regulatory actions that affect property but the property owner retains substantial beneficial use of the property, there is no taking, and thus no basis for compensation. *Fifth Avenue Corp. v. Washington Co*, 282 Or 591, 609, 581 P2d 50 (1978). Oregon cases repeatedly use the phrase "*damnum absque injuria*" to describe the injury suffered when the police power is used to regulate private property and results in a loss of value, provided that the regulation leaves some economic benefit to the property owner. Such an injury, even if it does result in economic loss, is not a taking and is not compensable. For example, in *Cooke v. City of Portland*, 136 Or 233, 298 P 900 (1931), the city vacated a portion of a public street and turned it into a school playground. As a result, travel to and from the plaintiff's property was longer, more circuitous, and less convenient. Although the property was rendered less valuable, that consequence was *damnum absque injuria*. The plaintiff was not entitled to recover for that injury.

of defendants' property caused by the access closure be compensable as regulatory taking, because it also is undisputed that the closure has not deprived defendants of the beneficial use of its property, which remains readily accessible. The question, therefore, is simply whether defendants have a right to directly access Highway 99, which abuts their property, and if so, whether that right is itself a compensable property interest that ODOT's action took from defendants.

ODOT has broad statutory authority to issue "rules and regulations" governing the use of state highways and roads. ORS 314.310. Under ORS 374.310, ODOT may issue and cancel permits for access to state highways.[2] If ODOT exercises its authority to eliminate a particular access point, it must ensure "reasonable access" remains for property abutting the highway.[3] ORS 374.310(3) (authority "may not be exercised so as to deny any property abutting the highway reasonable access").

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[2] Because defendant's access points existed before 1949, they were not subject to cancellation merely because they are not under any permit.

[3] Although ODOT did issue an order cancelling defendant's access points, it did so after it filed the condemnation complaint and took possession of the temporary easement on defendant's property. ODOT does not contend that the result in this case is impacted by defendant's failure to administratively contest the cancellation. If compensation was due, it was due as of the time when the complaint was filed.

ORS 374.035 provides the authority by which ODOT may eliminate access to a throughway:

> 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). That statute thus authorizes ODOT to purchase interests in real property when it is necessary for the construction of a throughway such as Highway 99, including purchasing "fee title" to "easements of * * * access." If ODOT's construction of a throughway requires it to obtain an "interest in real property," in other words, then the agency must pay for it. Consistently with that, ORS 374.055 allows, in an eminent domain proceeding, for the introduction of evidence related to "damages by *reason of deprivation of right of access* to any highway to be constructed, established or maintained as a throughway." (Emphasis added.)

Citing those statutes, defendants contend as owners of property abutting Highway 99, among the property interests they own is the right to direct access to the highway, and that ODOT's removal of the curb cuts onto the highway deprived them of that right. They thus assert as abutting landowners, their 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." (BOM 24).

Defendants are correct that as owners of property abutting Highway 99, they have a species of access right, known as an "abutter's right of access."[4] But, as explained in the next section, by regulating the access to Highway 99 in the manner that it did, ODOT did not take away that right—defendants' argument to contrary rests on a mistaken understanding of the nature of an "abutter's right of access."

B. An "abutter's right of access" is a qualified right of access and is not compensable if access is closed for a highway purpose and the property remains otherwise accessible.

An "abutter's right of access" is a species of property right long recognized at common law and by this court. Despite its name, it is not an unqualified right of a property owner to access any abutting highway like an ordinary easement. Instead—as this court repeatedly has recognized in the cases discussed below—an "abutter's right of access" to a highway is a "right" of access that is always subservient to the right of the public to use of the highway. It is, in other words, a conditional or qualified right of access—a right to access only insofar as it does not interfere with the use of the highway.

[4] In adopting the throughway statutes, the legislature has since clarified that no abutter's right of access to any new throughway exists. ORS 374.010. Defendants in this case, however, did have an existing abutter's right of access to Highway 99 which pre-dated that statutory change.

As a result, the closure of direct access to an abutting highway is not compensable when it is necessary to provide for the safe and efficient use of the highway so long as the property remains otherwise accessible.

1. The historical development of an abutter's right of access.

Oregon's road network has evolved over time from a system of private roads, to public highways, to throughways and freeways, and so has the applicable law. At early common law, title to the soil of a roadway was presumptively in the abutting landowner, and the public had a mere easement or right of passage over the road; that right did not extend to non-highway uses such as hunting. William Duhaime, *Limiting Access to Highways*, 33 Or L Rev 16, 19 (1953). The rights of the public were thus subservient to those of the landowner.

In colonial America, building roads was a private endeavor by farmers desiring a way into the nearest town; roads were located, constructed, and maintained by the private owner. The owner obviously had access wherever he pleased. When roadways were first constructed by the state, land and necessary materials were often simply taken without judicial sanction or compensation; because the landowner retained the fee title, and because no one challenged this method, it was deemed lawful. Duhaime at 20, citing to *State v. Dawson*, 3 Hill 100 (SC 1836).

Prior to 1917, to the extent that the Oregon road system was public, authority to site, assess charges, and maintain public roads lay with the counties. Bellinger and Cotton, *Codes and Statutes of Oregon,* §§ 4782-4812 (Salem 1932). The 1917 legislature created the state Highway Commission, 1917 Or Laws Ch 237, § 5, codifed at Olson, *Oregon Laws,* § 4432 (San Francisco 1920). The commission was vested with broad authority, including the authority to "designate, construct or cause to be constructed a system of state highways." *Id.* The commission was also authorized to acquire real property for rights of way "by donation, purchase, agreement, condemnation or through the power of eminent domain." 1917 Or Laws Ch 237, § 9; Olson at §§ 4436. Highway 99 was designated a state highway by the legislature itself. 1917 Or Laws Ch 423, §§ 6 and 7; Olson at §§ 4479 – 4480 (designating the Pacific Highway and Pacific Highway West).

As roads began to be developed at public expense and for general transportation purposes, the common law recognized a right of access for landowners whose property abutted public highways. Duhaime at 20. The nature of the abutter's right of access to a public street or highway is perhaps best set forth in *Oregon Investment Co. v. Schrunk,* 242 Or 63, 69, 408 P2d 89 (1965). The abutter's right is described as right of access to and from the highway. *Id.* But an abutter's right of access is not confined to any particular location, and—more importantly—the right is conditional: "The rights of

abutting proprietors to access to their premises are subservient to the primary rights of the public to the free use of the streets for the purposes of travel and incidental purposes." *Id.*, *quoting Hickey v. Riley*, 177 Or 321, 332, 162 P2d 371 (1945). This court has thus long recognized that an "abutter's right of access" is a qualified right of access, subservient to the public's interest in promoting streets for street purposes.

2. An abutter's right of access is not compensable when access is closed for a highway purpose.

Because an abutter's right of access is subservient to the public use of a street, whether the state is required to compensate a property owner for closing access to a highway depends on the purpose of the closure: no compensation was required when access was taken for highway purposes, but compensation may be required when the purpose of the taking was for other than highway purposes. *See Schrunk*, 242 Or at 69 (describing this longstanding distinction in the case law). This dichotomy has been repeatedly recognized by legal scholars and is reflected in this court's cases for more than a century. *Id.*

The principle that deprivation of an abutter's highway access was not compensable when it was necessary to ensure the public's use a highway is reflected in an authoritative legal treatises from the early twentieth century:

> John Lewis in his authoritative work on eminent domain, makes clear the principle established concurrently with the abutter's right of access that compensation need not be paid for the deprivation of

> his access when such deprivation was under public authority *and for highway purposes.*

Duhaime at 23-24, citing 1 Lewis, *Eminent Domain* 120 (3d ed., 1909) (emphasis added).

That fundamental principle has been reflected in this court's cases since that time. In *Schrunk*, for example, the court explained that the city's action in closing access on one abutting street to allow safe passage of pedestrians at a bus stop was clearly within the police power, and any resulting damages in the form of lower property value or lesser profits were *damnum absque injuria*, loss without injury. 242 Or at 71. The property owner is entitled to no compensation, provided that alternate access to another street was provided. 242 Or at 72-73.

Schrunk merely restates what had been the law in Oregon since the beginning of the twentieth century: compensation is not required for the loss of access for highway purposes, so long as access to a public street remains available. In *Brand v. Multnomah County*, 38 Or 79, 60 P 390 (1900), the court distinguished "servitudes" that may be placed on abutting landowners as a consequence of the public character of the highway, for which just compensation is not due, from losses incurred for the benefit of private or other non-roadway interests. Thus, no compensation was due when the building of

the public highway approach to the Hawthorne Bridge in Portland cut off access to Madison Street from plaintiffs' property.[5]

Similarly, in *Wilson v. City of Portland*, 132 Or 509, 285 P 1030 (1930), the court discussed the rights of a private property owner when a change in the grade of a roadway makes access to the roadway impossible, but access to other, less desirable roads remains. In the absence of a physical invasion of the property, the abutting owner had no right to compensation for loss of access. 132 Or at 514.

Finally, in *Highway Com. v. Central Paving Co.*, 240 Or 71, 399 P2d 1019 (1965), this court held that a landowner cannot recover compensation for a less convenient access created by the construction of a limited access highway.[6] The condemnee/defendant in *Central Paving* owned land between the Willamette River and a railroad right-of-way. The Salem-Willamina Highway (Highway 22) lay on the other side of the right-of-way, and defendant accessed

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[5] Cases involving access eliminated by a change in grade were superseded by the later adoption of ORS 373.040.

[6] Among the many arguments made by defendants is that the state's position on the compensability of access changed over time. Nothing could be further from the truth, as *Central Paving* itself illustrates. That case was decided in the very year in which defendant argues that the state's uniform position was that compensation was required when access was made more onerous. The brief in *Central Paving*, taking the opposite view, and with which this court agreed, was joined by the Attorney General and the Chief Counsel for the Oregon State Highway Commission.

the highway via a grade crossing over the right-of-way. The state condemned a strip of defendant's land along the right of way, eliminating that access. The state them constructed a frontage road from one end of the defendant's property to the highway itself, allowing unrestricted access to the highway from that point. 240 Or at 72-73.

The state moved to strike expert testimony that attributed a loss in value of the property resulting from "the interposition of the frontage road and the consequent interference with defendants' direct access to the main highway." 240 Or at 73. Noting that there was disagreement among state courts regarding the compensability of "circuitry of route," this court sided with those courts that deny recovery. 240 Or at 74. The court explained that defendants were entitled to recover only if they showed a type of loss that is peculiar to those owning land as opposed to the travelling public in general; the inconvenience of travelling a longer, more circuitous route is the same kind of inconvenience the general public suffers when there is a modification of regulations applicable to traffic on existing streets and highways. Because there was no loss that is particular to the owner of the property, no compensation was due.

Cases like *Schrunk, Brand, Wilson,* and *Central Paving* thus demonstrate that closure of an abutter's access for highway purposes, as in this case, is not compensable if the property remains otherwise accessible.

3. The cases on which defendant relies are inapposite.

Defendants insist that their "abutter's right of access" is a compensable property right, but the cases on which they rely for that proposition are not on point because they involved instances in which access is closed for some purpose *other* than the safe use and maintenance of the highway.

Thus, in *Iron Works v. O. R. & N. Co.*, 26 Or 224, 37 P 1013 (1894), a portion of the public street was to be used as an approach to a privately owned toll bridge. The court described the work as "an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor," as well as to the public at large. 26 Or at 230. As a result, the defendant was required to acquire, by negotiation or condemnation, the easement for access.

Sweet et al. v. Irrigation Canal Co., 198 Or 166, 254 P2d 700 (1953), is another example of loss of access for non-roadway purposes. "Plaintiffs brought this suit as an abutting owner to obtain a decree enjoining the maintenance by the defendant of an irrigation ditch in a county road as an open ditch which interferes with the plaintiffs' right of ingress and egress to and from their land." After concluding that plaintiffs were in fact abutting landowners to the county road, and that the irrigation ditch was built in the road right of way and prevented entry and exit from plaintiffs' property, the court declared the

applicable legal principle: impairment of access for non-highway purposes requires compensation.

> 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 190-191 (emphasis added). Compensation was required in *Sweet* not because access was denied, but because the denial was not the result of legitimate regulation of the use of the road for purposes of public transportation.

Ail v. City of Portland, 136 Or 654, 299 P 306 (1930), is similar. In that case, this court held that compensation was required because the city's actions amounted to a nuisance. 136 Or at 668. Importantly, however, this court went out of its way to recognize the governing principle of non-payment when access is taken to promote public safety or convenience.

> It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking, within the meaning of the constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action.

136 Or at 662.

Defendants also rely on statements that this court made in *State Highway Com. v. Burk et al,* 200 Or 211, 265 P2d 783 (1954), but that case also is distinguishable. *Burk* concerned the relocation of Highway 22 in west Salem. The state proposed to take 8 ½ acres of land owned by defendants as part of a larger tract. No part of the new, relocated highway was to be within the boundaries of the old highway. In addition to the physical taking of a fee simple interest in the land, the state also sought to take any interest that might exist in access to the property. Although the defendants had access to the original highway, they would have no access to the realigned limited access throughway. The state argued that defendants were not entitled to damages for loss of access to the old highway. 200 Or 225-226. The issue was thus whether the property owner had a right of access to a newly constructed throughway where none existed before:

> [The] statutory provision authorizing compensation for rights of access [ORS 374.035] carries with it no implication that an easement of access, which never existed before, is created by filing an action to condemn a non-access highway, and then, *eo instanti*, extinguished by the bringing of the same action. The constitution requires compensation for the taking of an easement only if there is an easement to take. If there was none, then the statute which authorizes compensation for such easements does not apply. Whether there is any such property right in the nature of an easement, when new land is condemned for a non-access highway, is the question for determination.

200 Or at 229-230. This, the court noted, requires a determination of where the police power ends and where the power of eminent domain begins. 200 Or at 230.

The regulation of highway traffic, including regulation of abutting owners, is within the police power. *Id.* At the same time, the traditional function of a conventional street or highway is to provide access to and from the property of abutting owners. 200 Or 231. The court also noted the imperative that limited-access highways or freeways be established: "It is reliably reported that travel upon our inadequate highways results in 40 thousand deaths, a million-and-a-half injuries, and property damage of 2 billion dollars a year, and that these staggering losses have been materially reduced wherever modern nonaccess highways have been established." *Id.* The police power clearly allowed the state to take steps to reduce this carnage.

The court then reached its primary holding in the case: that no taking of an easement of access had occurred when a new non-access highway is established by condemnation.[7] 200 Or 235. However, that issue is not the issue in this case, which does not involve the creation of a non-access highway.

Burk admittedly assumes that compensation would have been available had the alignment of the property not changed: "When a conventional highway

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[7] ORS 374.010 states just that.

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." 200 Or at 228.

That statement does not control the outcome of this case, however, because it was *dicta*. That issue was not necessary to the court's ultimate decision. In addition, the statement is unsupported by analysis or explanation. If access were eliminated with no alternative available, leaving the property landlocked, that would be tantamount to a physical taking and hence compensable. On the other hand, if access remained available, no property right has been taken and no compensation is owed. *Burk* does not address the distinction, which is critical to the analysis. More importantly, to the extent it suggests that compensation would be owed even if alternative access remained, it is incorrect and inconsistent with this court's later decision in *Central Paving.*

Burk does not overturn the principle of law that is the underlying theme running through the common law of access: if an abutting property owner retains a right of access to a highway, even a less direct or convenient access, no compensation is required.

Defendants also rely on *Douglas County v. Briggs*, 286 Or 151, 593 P2d 1115 (1979) but that reliance, too, is misplaced. Defendant argues that under Briggs, "an abuttter's right of access" to a throughway is a compensable

"interest in property" for purposes of ORS 374.035. But *Briggs* does not stand for that proposition.

Briggs involved the closure of an abutting landowner's access to a county road when the road was converted into a throughway; as in *Burk*, it is unclear from the opinion the extent to which the landowner's may have retained indirect access to the throughway. This court nonetheless held that ORS 374.420, which pertains to the conversion of county roads to non-access throughways, "requires the county to pay property owners for the loss of their rights of access when an established county road adjacent thereto is made into a throughway." This case, by contrast, involves the closure for safety purposes of direct access to a throughway from a property which remains indirectly accessible from a side street, and the extent to which ORS 374.035 requires compensation for that closure. At issue in *Briggs*, in other words, was a different factual scenario and different statute.

Notwithstanding those differences, defendant contends that ORS 374.420 is so similarly worded to ORS 374.035 and that this court's interpretation of the former statute must control this court's interpretation of ORS 374.035. (Pet BOM 28). Defendants are correct that the two statutes are worded very similarly. As relevant here, ORS 374.420 provides, "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." Although the two statutes are indeed similarly worded, defendants' argument that *Briggs* should control this court's construction of ORS 374.035 fails for two reasons.

First, this court's construction of ORS 374.420—which relied almost exclusively on the legislative history from the statute's enactment in 1965—cannot control the proper interpretation of ORS 374.035, a statute that was enacted nearly 20 years earlier in 1947. This court's goal in interpreting a statute is to determine the intent of the legislature that enacted it. What the 1965 legislature intended in enacting ORS 374.420 is not probative of what the 1947 legislature intended in enacting ORS 374.035. *Arken v. City of Portland*, 351 Or 113, 134 n15, 263 P3d 975 (2011). *Briggs'* construction of ORS 374.420 is especially unhelpful, because it is not rooted in an analysis of the *text* of the statute but in the legislative history and statements of legislators in 1965. Those statements have no relevance to the meaning of a statute enacted twenty years earlier. Furthermore, to the extent that *Briggs* is correct that statements in the 1965 legislative history shows that the legislature intended an "abutters right of access" to be compensable for purposes of ORS 374.420, that would mean the 1965 legislature was expressly deviating from the common law, and creating a statutory right to compensation where

common law, and this court, had long recognized there was no such right. But in the absence of any textual or historical evidence, there is no basis for assuming that the 1947 legislature also intended to fundamentally alter the nature of an abutter's right of access.

Second, *Briggs* did not specifically address the extent which compensation is required if, as in this case, the landowner is deprived of direct access but retains indirect access to the throughway. But *Central Paving Co.* did address that question, holding that a landowner is *not* entitled to compensation under ORS 374.035 under such circumstances. Further, unlike *Briggs*, *Central Paving* is specifically addressed the meaning of ORS 374.035. As noted above, this court specifically rejected the assertion that ORS 374.035 entitled a landowner to compensation for the closure of access to a throughway, "ORS 374.035 provides in part that the state may acquire 'any interest in real property, including easements of air, view, light and access.' * * * *[T]he interest which defendants have in a more direct contact with the throughway is not an interest in land*." Because *Central Paving* is on point, and *Briggs* is not, it is the former and not the latter which should control here.

Furthermore, to the extent that this court sees a need to resolve the tension between *Briggs* and *Central Paving*, and to interpret ORS 374.420 and ORS 374.035 in a unified manner, this court should affirm the holdings in *Schrunk* and *Central Paving* and disavow any suggestion in *Briggs* that an

"abutter's right of access" is a compensable when access is closed for highway purposes and the abutting property remains accessible. As noted, *Briggs* held that ORS 374.420 "requires the county to pay property owners for the *loss of their rights of access*." What that statement assumes is that the landowners in that case at least "lost" their abutter's right of access when their access to the county road was closed. But an abutters right of access is, as explained above, only a *qualified* right to access a roadway, subject to the public's safe use of that roadway. That is a point that this court did not acknowledge or address. If an abutting landowner's access is closed to allow for the public's use of a roadway, then the landowner has not "lost" the right of access. Instead, the public's superior right has taken precedence. To the extent that *Briggs* suggests otherwise, it is incorrect.

In sum, this court's cases construing the common law and explaining the nature of an "abutter's right of access," have long held that the abutter's right of access to a highway is subservient to the rights of the travelling public in the use of the highway. Cases holding otherwise involve elimination of highway access for private or non-highway use. Where access is eliminated for public safety and convenience and alternate access remains available, ODOT's actions do not take a property right belonging to the owner and are not compensable.

C. ODOT is not required to compensate defendants because it closed the access to Highway 99 for traffic safety and defendants' property remains readily accessible.

In this case, defendant had a pre-existing abutter's right of access to Highway 99, subservient to the needs of the travelling public. Defendant retains that right of access, albeit by a less direct route. No property right has been taken, and no compensation is required.

Defendant's arguments to contrary are without merit. Defendant contends that their "loss" of an abutter's right of access was compensable, and they rely primarily on *Sweet* and *Iron Works* for that proposition. For the reasons explained above, however, in those cases access was closed for a non-highway purpose. For that reason, they are readily distinguishable from this case. Indeed, the cases on which defendant relies in fact acknowledge, rather than diminish, the principle that no compensation is required when access is taken for highway purposes, provided that alternative access is available. The value of the property may be diminished, yet it retains its essential abutter's right of access.

For that reason, defendant's argument that statutes such as ORS 374.035 and ORS 374.055 demonstrate that they are entitled to compensation for the access closure is without merit. As noted above, ORS 374.035 authorizes ODOT to pay compensation if its action effectively takes away from a property owner a cognizable property right or interest, including an "easement for

access." But defendant's "abutter's right of access" —unlike a traditional appurtenant easement—was always subservient to the public use of the highway and therefore ODOT's action did not require it acquire anything from defendant at all. Similarly, ORS 374.055 pertains to the admissibility of evidence for "damages by reason of deprivation of right of access." Damages under that statute can arise when a defendant is deprived of a right of access pursuant to an easement, or where a defendant is deprived of any access. But no damages can arise where—as here—the defendant has only a subservient right of access to begin with and the defendant's property remains otherwise accessible. Defendant has not been deprived of its access right to the throughway; its access is merely less direct than formerly. In that circumstance, there has been no "deprivation of the right of access." In sum, there was no property interest belonging to defendant that ODOT needed to acquire in order to close the access to Highway 99, and neither ORS 374.035 or ORS 374.055 suggest otherwise. In short, ODOT lawfully exercised its regulatory authority by closing the curb cuts in order to protect public safety on Highway 99; it was not required to compensate defendants for doing so.

CONCLUSION

As an abutting property owner, defendant had a right of access to Highway 99. That right was not a true easement, however, and was not appurtenant to any particular location; in any event, the right was subservient to

the right of the public to safe travel on the state highway. When ODOT condemned that right for highway purposes, no compensation was due, because defendant retains access to the highway by a less direct route. This court has consistently held that to be the law, and should so hold here. The decision of the trial court and of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 5, 2015, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Charles F. Hudson and Thomas W. Sondag, attorneys for appellant, Brian T. Hodges, attorney for amicus curiae National Federation of Independent Businesses and Pacific Legal Foundation, and Jordan R. Silk, attorney for amicus curiae Central Oregon Builders Association, Oregonians in Action, and Owners' Counsel of America, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,459 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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