IN THE SUPREME COURT OF THE STATE OF OREGON

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

OPENING BRIEF ON THE MERITS AND EXCERPT OF RECORD OF PLAINTIFFS-RESPONDENTS, PETITIONERS ON REVIEW

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

(continued next page)

MAY 2013

W. Michael Gillette, OSB# 660458
David Anderson, OSB# 092707
Schwabe, Williamson & Wyatt, P.C.
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone 503.222.9981
wmgillette@schwabe.com
danderson@schwabe.com

Russell L. Baldwin, OSB# 891890
Attorney at Law
P.O. Box 1242
Lincoln City, OR 97367
Telephone: (541) 994-6166
baldwin_atty@embarqmail.com

Of Attorneys for Plaintiffs-Respondents, Petitioners on Review

Ellen F. Rosenblum, OSB# 753239
Attorney General
Mary H. Williams, OSB# 911241
Solicitor General
Denise Fjordbeck OSB# 822578
Attorney-in-Charge
Civil/Administrative Appeals
Stephanie Striffler, OSB# 824053
Assistant Attorney General
Patrick M. Ebbett, OSB# 975013
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us
patrick.m.ebbett@doj.state.or.us
stephanie.striffler@doj.state.or.us

Attorneys for Defendant-Appellant, Respondent on Review

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATE CASES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

This is a "blight condemnation" case.[1] "Blight condemnation" is a specific category of inverse condemnation that requires proof that the government engaged in conduct that directly and substantially interfered with a landowner's use and enjoyment of the landowner's private property. Blight condemnation is to be contrasted with inverse condemnation by means of a "regulatory taking," in which the landowner must prove that a governmental statute or regulation has eliminated the entire economic value of the landowner's property. In this case, plaintiffs ("Viewcrest") alleged that the Oregon Department of Transportation (ODOT) directly and substantially interfered with Viewcrest's private property by means of malicious actions aimed at land locking the property and thereby significantly reducing its value. The trial court instructed the jury on the elements of Viewcrest's blight condemnation claim. A properly-instructed jury then found that ODOT in fact

[1] The nomenclature for that category of takings claim, which arises when government conduct substantially interferes with an owner's use and enjoyment of the subject property, is somewhat inconsistent. In *Lincoln Loan v. State Highway Comm.*, 274 Or 49, 51, 545 P2d 105 (1976), the claim is referred to as one for "condemnation blight"; but in *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 614 n 17, 581 P2d 50 (1978), the claim is referred to as one for "repeated nontrespassory invasions called 'nuisance.'" (Quotations and citations omitted.) Because the category is referred to most concisely, albeit inelegantly, as a "blight takings claim," Viewcrest uses various formulations of that term as a shorthand description in this petition of the conduct for which it seeks damages: non-regulatory, non-trespassory government conduct that directly and substantially interferes with use of an owner's property.

had directly, particularly, and substantially interfered with the Viewcrest property, and awarded Viewcrest over $3 million in damages.

On appeal, however, the Court of Appeals reversed the trial court's judgment, giving two reasons for doing so. *Hall v. ODOT*, 252 Or App 649, 654-56, 288 P3d 574 (2012). One reason was that, in the Court of Appeals' view, Viewcrest was required to prove, but did not prove, that ODOT had deprived Viewcrest of all economically viable use of its property. *Id.* at 656. The other reason advanced by the Court of Appeals turned on a novel idea—an idea that Viewcrest could not prove a compensable taking where it did not claim that ODOT's actions about which it complained were actions for the "public good." *Id.* at 655. In so holding, the Court of Appeals doubly erred: It applied the wrong burden of proof to Viewcrest's claim, thereby improperly overturning a valid jury verdict, and it interjected into the case its novel "public good" theory, which is not a part of Oregon inverse condemnation law.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented on Review

Does a plaintiff satisfy its burden of proof with respect to a blight takings claim by proving that a governmental taking directly, particularly, and substantially interferes with the plaintiff's property interest, or must such a plaintiff instead prove that the governmental taking deprived the plaintiff of all

economically viable use of the property?

First Proposed Rule of Law

A compensable taking of private property occurs when repeated government conduct, not based on lawful regulatory activity, directly, particularly, and substantially interferes with the owner's use and enjoyment of that private property.

Second Question Presented on Review

Does a plaintiff in an inverse condemnation case under Article I, section 18, of the Oregon Constitution, have to prove, not only that the government intended to take the property for "public use," but also that the government intended to take the property for the "public good"?

Second Proposed Rule of Law

A taking occurs under Article I, section 18, if the government takes property for public use, whether or not it also intends that doing so be for the public good.

Nature of the Action and Relief Sought

Viewcrest initiated this inverse condemnation action for "blight condemnation" against ODOT. A jury found that ODOT's direct and particular action substantially interfered with Viewcrest's property and the trial court entered a money award and judgment. The Court of Appeals reversed the trial

court's judgment. This Court granted Viewcrest's subsequent petition for review. Viewcrest asks this Court to reverse the judgment of the Court of Appeals and affirm the judgment of the trial court.

Statement of Facts and Procedural History

Viewcrest owns a 25-acre parcel of real property adjacent to Interstate Highway 5 in Linn County (the "Viewcrest property"). *Hall*, 252 Or App at 651. In fact, Viewcrest's predecessor reserved a sixty-foot easement benefitting the property when some of the land was conveyed to the Highway Department for the construction of Interstate Highway 5. (Tr. 254; Tr. 258). ODOT later conveyed an additional portion of the property to Viewcrest directly. (Tr 286). Ever since then, ODOT has interfered with Viewcrest's use of the Viewcrest property.

ODOT first interfered with Viewcrest's use of the property by flooding it, and then by maintaining a guardrail that blocked the very easement that ODOT had granted to Viewcrest's predecessor in interest. *See Hall*, 252 Or App at 651 (describing Viewcrest's lawsuit against ODOT for removal of a guardrail); (Tr. 466-75 (describing ODOT's conduct flooding the property)).

Viewcrest demanded that ODOT stop interfering with its use of the property. Far from doing so, however, ODOT's subsequent conduct was a calculated response aimed at preventing any development of that property.

Specifically, ODOT retaliated against Viewcrest's demands that ODOT not interfere with the Viewcrest property by announcing and publicizing its intention to land lock the Viewcrest property through the closure of a freeway interchange immediately adjacent to the property. To ensure that its message was broadcast effectively, ODOT announced those plans in declarations at public meetings, telephone conversations with interested potential buyers who contacted ODOT to determine the status of the access point, in the newspaper, and on the internet. (ER-45 (Ex 16); ER-33-37 (Ex 7); ER-39-44 (Ex 10-15); ER-46 (Ex 20)). Evidence at trial that the jury necessarily accepted showed that, taken collectively, ODOT's public statements caused the Viewcrest property to decline in value by $3,378,750. *Hall*, 252 Or App at 651.

Although ODOT's attempt to land lock the Viewcrest property faltered in the face of considerable public opposition to the idea of closing the interchange, ODOT continued to blight Viewcrest's land with additional public statements about its intention to land lock the property. *Id.* at 652 (referring to ODOT's public comments regarding the plan to land lock the Viewcrest property as "not popular" and stating that ODOT replaced an "immediate closure option with a more delayed process"). The evidence presented at trial (to which there was no objection or assignment of error), the jury's instructions, and Viewcrest's condemnation blight theory permitted the jury to conclude that ODOT did all of

the foregoing, and that its actions were not in fact quasi-legislative actions to broadly restrict or regulate the use of land in a zone that happened to include the Viewcrest property but were, instead, parcel-specific. (ER-12 (Viewcret's Complaint alleging that ODOT's conduct "had the effect of blighting plaintiff's land"); Tr 1152-1170 (colloquy between trial court and counsel for the parties clarifying that Viewcrest did not allege a regulatory taking but instead alleged a claim for blight condemnation)). (To the extent that the Court of Appeals found or assumed different facts—for example, that ODOT acted with a regulatory purpose—it was foreclosed from doing so by the jury's verdict in favor of Viewcrest.) ODOT appealed the resulting judgment.

On appeal, ODOT did not assign error to the admission of any evidence offered by Viewcrest; neither did it assign error to the giving of, or any refusal of, any instruction regarding ODOT's intent to take the Viewcrest property. However, ODOT did raise seven assignments of error, most of which constituted facets of a single legal theory, *viz.*, that ODOT was entitled to prevail as a matter of law because Viewcrest could not recover damages for inverse condemnation when Viewcrest did not prove a deprivation of all economically feasible use of the Viewcrest property. *Hall*, 252 Or App at 653. The case was fully briefed on that theory by both sides, and submitted after an oral argument.

The Court of Appeals held that the denial of ODOT's motion for a directed verdict required reversal of the trial court's judgment. *Id.* at 656. The Court offered two reasons for that conclusion: First, Viewcrest's evidence did not meet the standard for a *regulatory* takings claim—which was an odd holding, because the Court elsewhere specifically acknowledged that Viewcrest had alleged a *blight* takings claim. *Id.* at 652 ("Plaintiffs' complaint alleged that ODOT's widely published statements indicating plans to close the Viewcrest interchange, landlock plaintiffs' property, and then acquire it by condemnation, resulted in 'blighting plaintiffs' land[.]'"); *id.* at 656. Second, the court, advancing an argument of its own that ODOT had never raised, either in its briefing or at trial, held that a taking that is not for the public *good* is not, as a matter of law, a taking for public *use*, the latter concept being the touchstone of a "taking" under Article I, section 18, of the Oregon Constitution.[2] *Id.* at 655.[3] Based on both of its alternative reasons, the Court of Appeals then reversed the judgment for Viewcrest and remanded the case to the trial court for further proceedings. *Id.* at 656.

SUMMARY OF ARGUMENT

[2] Article I, section 18, of the Oregon Constitution, provides in part:"Private property shall not be taken for public use * * * without just compensation."

[3] Of course, that latter theory, being one never raised in ODOT's brief, was one that Viewcrest never had a chance to address.

The Court of Appeals incorrectly reversed the trial court's judgment in favor of Viewcrest for two equally nonmeritorious reasons: First, the Court of Appeals *sua sponte* introduced into Oregon inverse condemnation law the ill-advised and novel concept that a condemnation plaintiff must prove that the government defendant intended to take private property, not only for the "public use," but for the "public good" as well. Not only did ODOT fail to advance that argument at trial or on appeal, but such a rule that no compensable taking occurs unless the government acted for the "public good" is a dangerous departure from this Court's case law, which (as noted, and pursuant to the constitutional text) requires that a condemnation plaintiff prove that the government defendant took private property for "public use." Certainly, ODOT has never argued that Viewcrest failed to prove that ODOT took the Viewcrest property for "public use" (much less the "public good"). (Viewcrest assumes that ODOT will not now advance an argument to this Court that ODOT had no intention of acting for the public good, when to do so would raise at least two questions: Why is this issue only being raised now and, if ODOT was not acting for the "public good," what *was* the end it was pursuing?). This strange departure from existing condemnation law by the Court of Appeals needs to be totally disavowed.

As noted, the Court of Appeals also reasoned that Viewcrest had failed to

meet its burden of proof. However, the court was only able to reach that conclusion by applying the wrong burden of proof: The court applied the burden of proof which applies *to a regulatory takings claim, not* the burden that is applicable *to a blight takings claim*. The latter category of claim involves a lesser burden of proof. As Viewcrest will show, this Court's case law distinguishes between the two distinct categories of claims and there is no modern trend to change the well-established distinction between them. Not only did the Court of Appeals fail to recognize the distinction between condemnation blight cases and regulatory takings claims, that court ignored ODOT's own argument that Viewcrest's claims did not result from regulation but instead that ODOT simply communicated potential regulations that it may consider in the future. (Tr. 1305-08). In so stating, ODOT acknowledged that it did not act with any regulatory purpose that would invoke the standard of proof on which the Court relied. Because Viewcrest did not allege a regulatory takings claim, and because it affirmatively proved that ODOT's conduct was not driven by a regulatory purpose, the Court of Appeals incorrectly imposed on Viewcrest the burden of proof that applies to a regulatory takings claim.

Finally, Viewcrest has conclusively proved that ODOT substantially interfered with the Viewcrest property (a jury found that fact and ODOT did not assign error to that finding or any instruction or lack thereof as to the meaning

of "substantially interfered"), which is the burden of proof applicable to this case. ODOT did not object and has not assigned error to the jury's finding of substantial interference or any instruction regarding substantial interference. Accordingly, Viewcrest requests this Court to reverse the Court of Appeals' judgment and affirm the trial court's judgment awarding Viewcrest damages for ODOT's substantial interference with the Viewcrest property.

ARGUMENT

A short summary of this Court's takings jurisprudence under Article I, section 18, of the Oregon Constitution, provides context that is helpful to understanding the Court of Appeals' errors in this case.

Article I, section 18, provides, in part, that "Private property shall not be taken for public use * * * without just compensation[.]" Over the years, this Court has recognized that there is more than one way that private property can be taken for public use within the meaning of Article I, section 18. For example, such takings can occur not only when the government intentionally authorizes a physical invasion of private property, but also through "inverse condemnation," which occurs when the government causes or creates some nuisance that affects the use of private property, regulates the use of private property to advance some public policy, or engages in a course of conduct that has the effect of blighting private property. *See Coast Range Conifers, LLC v.*

State of Oregon, 339 Or 136, 146 & nn 11-12, 117 P3d 990 (2005) (listing and describing the characteristics of those examples). Moreover, even those categories of takings claims are not exhaustive. *Id.* at 147 n 12.

The particular category of takings claim that a party asserts is significant, because the various categories carry different burdens of proof. Regulatory takings claims require proof that the owner's property has no remaining economically viable use. *Id.* at 146-47. By contrast, inverse condemnation takings claims based on government conduct that blights an owner's property (the "blight condemnation" category of cases) only require proof that the government "substantially interfered" with the owner's use and enjoyment of the owner's property. *See Lincoln Loan v. State Highway Comm.*, 274 Or 49, 56-57, 545 P2d 105 (1976) (stating burden of proof applicable to blight condemnation claim). By both its allegations and its proof, the present case is one in that latter category.

In addition, this Court has announced a rule that no compensatory taking occurs unless the government acts constituting the complained-of taking of private property were "done with the intent to take the property for a *public use*." *Vokoun v. City of Lake Oswego*, 335 Or 19, 27, 56 P3d 396 (2002) (emphasis added). Therefore, a condemnation claim is proved with evidence showing that the government intended to take the private property for public

use and that the taking was of a sufficient quality to satisfy the burden of proof that is applicable to the category of taking that occurred.

In this case, the parties' dispute centered on the applicable burden of proof to support Viewcrest's claim. The Court of Appeals decided *sua sponte*, however, that Viewcrest did not prove the government took the Viewcrest property for the "public good," which that court equated with the requirement stated in *Vokoun* that property be taken for public use.

Specifically, the Court of Appeals explained:

> "Further, even if plaintiffs could have persuaded us that their case against ODOT was grounded in the belief that ODOT was pursuing a vendetta instead of the *public good*, that argument would be self-defeating. If, as plaintiffs assert, the intent behind ODOT's actions was *not* to take plaintiff's property for public use, then those actions could not amount to a taking."

Hall, 252 Or App at 655 (first emphasis added; second emphasis in original.) In that remarkable paragraph, the court accepted the fact that Viewcrest had proved ODOT was pursuing a vendetta, but then characterized such an action as being "*instead of the public good.*" The court then stated that such evidence is "self-defeating," because ODOT's actions—engaging in a vendetta, instead of pursuing the public good—proves that ODOT did not intend to take the property for public use. There is no doubt that proof of a taking for public use is an element of a takings claim, as this Court has explained in *Vokoun.* But the Court of Appeals' decision assumes that, by pursuing a vendetta, ODOT did not

act for the public good, and that it necessarily follows that ODOT did not intend to take the Viewcrest property for public use. Put differently, the Court of Appeals decision establishes that takings which are not for the "public good" cannot be takings for public use.

That was error. The Court of Appeals further erred by applying the burden of proof that is applicable to a regulatory takings case to this condemnation blight case.

I. The Court of Appeals incorrectly required Viewcrest to prove that ODOT took the Viewcrest Property for the "public good"

As a preliminary matter, the "public good" issue raised *sua sponte* by the Court of Appeals was not properly before the court. At trial and on appeal, ODOT never claimed that Viewcrest failed to prove that ODOT intended to take the Viewcrest property for the public good or for public use. Indeed, the evidentiary record supports plaintiff's theory that ODOT's conduct was aimed at preventing development of the Viewcrest property for the purpose of making the property worthless so that ODOT could condemn the property without incurring significant costs. (Tr. 351-52 (ODOT estimated that the property could be worth up to $16 million if developed)); (Tr. 494-95 (land locking the property will drive the price down)); *Hall*, 252 Or App at 652 ("ODOT informed plaintiffs, the general public, and affected federal and local government entities of its plans, including the closure [of the interchange]

option [which would land lock the Viewcrest property.]").

Notwithstanding the foregoing evidence, had ODOT claimed that Viewcrest did not prove that it intended to take the property for public use, Viewcrest could have further developed the record to establish that point with arguments highlighting the evidence it did present. But ODOT did not raise such a challenge at trial or on appeal. Instead, the Court of Appeals raised that issue at a juncture in this case at which Viewcrest did not have any opportunity to respond. Thus, the issue whether ODOT intended to take the property for public use was not preserved for appeal and the Court of Appeals erred by reaching it. *See Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2000) (explaining that "Preservation also ensures fairness to an opposing party, by permitting the opposing party to respond to a contention and by otherwise not taking the opposing party by surprise. * * * Finally, preservation fosters full development of the record, which aids the trial court in making a decision and the appellate court in reviewing it."). Applying the foregoing observation, to say that Viewcrest was "surprise[d]" by the Court of Appeals' gratuitous creation of this issue would be an understatement.

But even if the Court of Appeals correctly reached the "public use" issue, it incorrectly expanded the law by changing the "public use" requirement into a "public good" requirement. As stated in *Vokoun*, "a claim for inverse

condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." 335 Or at 27. *Vokoun* analyzed whether a takings claim can be based on an interference with property rights when the alleged taking is merely a consequence of negligent government conduct. It concluded that mere government negligence cannot constitute a taking, but that "the fact-finder may infer the intent-to-take element of a claim for inverse condemnation from the natural and ordinary consequences of the government's act." *Id.* at 28.

The Court of Appeals' decision in the present case saddles *Volkoun* (and the text of Article I, section 18) with more weight than they were intended to carry. Although a properly-instructed jury found that ODOT's conduct substantially interfered with the Viewcrest property, the Court of Appeals concluded that Viewcrest did not prove a compensable taking. It reasoned that Viewcrest implicitly had conceded that ODOT's conduct did not advance the "public good" and held, based on that apparent concession, that Viewcrest could not prove a taking. *Hall*, 252 Or App at 655 (citing *Vokoun* and reasoning that Viewcrest's argument on appeal that ODOT "was pursuing a vendetta instead of the *public good*," is self-defeating, because it means that "ODOT's actions [were] *not* to take plaintiff's property for public use" and those actions "could not amount to a taking" (first emphasis added, second

emphasis in original)). That is, the court's holding requires a condemnation plaintiff to prove not only that the government took property for *public use*, but also that the government did so for the *public good.*

Vokoun does not support the Court of Appeals construct. The case does, however, demonstrate what is meant by the concept of the government's "intent" to take property. In *Vokoun*, the plaintiffs alleged that a city had taken their property for public use "by constructing a storm drain pipe and outfall pipe in a manner that destabilized the soils on and adjacent to" the plaintiffs' property, causing a landslide. *Vokoun*, 335 Or at 23. Because the "city built the storm drain, it [was] undisputed that a storm drain is a public work, serving a public purpose." *Id.* at 30. The storm drain collected more than five times the amount of water that naturally flowed through the area, causing unnatural erosion, and a landslide that impacted the plaintiff's property. *Id.* On that evidence, the plaintiff proved that the city intended to take the property because "[o]ne reasonable inference from the foregoing evidence is that the landslide was the natural and ordinary (even inevitable) consequence of the city's construction of the storm drain in that manner." *Id.*

The undisputed facts in this case establish that ODOT intended to take the Viewcrest property by rendering it undevelopable through public statements calculated to prevent any investor from buying the property or lending any

money to plaintiffs to develop the property themselves. A natural and probable consequence of ODOT telling the public that the Viewcrest property would be undevelopable because it would be landlocked is that no investor or buyer would be willing to invest money in or buy the Viewcrest property. Evidence in the record shows that ODOT worked to ensure that result by targeting its message to potential investors or buyers. ODOT did not argue on appeal that it did not intend to take the property for public use. There is simply no issue in that regard. That issue emerged only when the Court of Appeals announced its novel requirement that a takings claimant must prove that the taking was for the "public good."

Whether ODOT's conduct reflects the "public good" is irrelevant to whether the taking is for a public use. At this stage in the proceedings, where ODOT has failed to raise in either the trial court or Court of Appeals any issue regarding whether ODOT intended to take the Viewcrest property for public use, Viewcrest doubts that ODOT now intends to assert an argument that it intended to take the Viewcrest property but did not intend to act for the public good. Principles of preservation preclude such an argument and, even if they did not, this Court's case law and the text of Article I, section 18, which make no mention of any "public good" criterion, defeat that specious argument by the Court of Appeals.

In sum, the Court of Appeals erred when it concluded that Viewcrest failed to prove a compensable taking because ODOT did not intend to take the Viewcrest property for the "public good." That is not the law. Moreover, and even if it were the law, ODOT never raised the issue. And even if ODOT had raised the issue of its intention to take the property for public use, evidence exists in the record that would permit a reasonable juror to find that ODOT did intend to take the property for public use. The Court of Appeals' "public good" approach is an aberration and should be rejected. Viewcrest turns to the Court of Appeals' additional reason for reversing the trial court—that Viewcrest failed to satisfy the burden of proof that is applicable to a regulatory takings claim.

II. This case was alleged and tried as a blight condemnation claim; Viewcrest met its burden of proof by proving that ODOT's conduct substantially interfered with Viewcrest's use of its property.

Viewcrest proved its blight condemnation claim by showing that ODOT's conduct substantially interfered with Viewcrest's use of the property. Indeed, a properly instructed jury found that the fair market value of the Viewcrest property was reduced by $3,378,750 following ODOT's conduct that was "'sufficiently direct, particular, and of a magnitude to support a conclusion that the interference has reduced the fair market value of plaintiffs' [land].'" *Hall*, 252 Or App at 654 (quoting jury instruction on Viewcrest's blight

condemnation claim). Accordingly, the Court of Appeals' conclusion that Viewcrest did not satisfy the burden of proof for a regulatory takings claim is a *non sequitur*: The burden of proof applicable to a regulatory takings claim is not applicable to the blight takings claims that Viewcrest actually alleged and proved.

A. This Court has continued to recognize that blight takings claims are subject to a different burden of proof than regulatory takings claims.

This Court's case law readily distinguishes between regulatory takings claims and blight takings claims, imposing different burdens of proof for the distinct claims. *Compare Lincoln Loan*, 274 Or at 56-57 (holding that the "[p]laintiff has alleged adequate facts which indicate a substantial interference by the state with the use and enjoyment of its property," where the plaintiff alleged pervasive interference arising out of a combination of the government's acts and the duration of those acts), *with Fifth Avenue Corp. v. Washington County*, 282 Or 591, 614, 581 P2d 50 (1978) ("[E]ven if planning or zoning designates land for a public use and thereby effects some diminution in value of his land, the owner is not entitled to compensation for inverse condemnation unless: (1) he is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such government intrusion as to inflict virtually irreversible damage.") and *id.* at 614 n 17

(stating, "We do not wish to limit the second exception to trespassory encroachments only, since we have already extended it to 'repeated nontrespassory invasions called 'nuisance.'" *Thornburg v. Port of Portland*, 233 Or 178, 192 P2d 100 (1963), quoted in *Lincoln Loan*[,] 274 Or [at] 56 * * *."). There is no principled reason to merge those two distinct categories of takings claim. The Oregon Constitution does not contemplate a dichotomy whereby any challenged government act absent physical occupation must be regarded as regulatory in nature, as this Court recognized in its more recent decision, *Coast Range Conifers*.

Relying primarily on *Coast Range Conifers*, ODOT argued on appeal that there is a modern trend which requires that, in the absence of physical occupation, the state can only be liable for a regulatory taking, which in turn imposes on the landowner a duty to show that all economically viable use has been taken. That argument is wrong. The Court of Appeals did not even bother to discuss it.

As an initial matter, ODOT's reliance on *Coast Range Conifers* is misplaced because the state agency in that case had engaged in regulatory activity, *viz.*, rulemaking. As this Court described:

> "A state wildlife regulation [OAR 629-605-0170(1)(d)] prevents plaintiff from logging approximately nine acres of a 40-acre parcel that it owns. Plaintiff brought this action claiming that the regulation amounted to a 'taking' of its property without just

compensation in violation of the state and federal constitutions." *Coast Range Conifers*, 339 Or at 139. The regulation had the indirect effect of allowing an owner of real property to log some, but not all, of a parcel of timberland. The landowner brought an action on a theory of inverse condemnation. On appeal, this Court held that the regulation did not amount to a taking because the *rule* did not take all economically viable use of the remaining thirty-one acres of the parcel in question. *Id.* at 151.

In coming to its decision, this Court construed Article I, section 18, under the text, history, and case methodology set forth in *Priest v. Pearce,* 314 Or 411, 415-16, 840 P2d 65 (1992). It first noted that Oregon cases construing that constitutional provision do not strictly limit recovery to "classic" takings by physical occupation or appropriation. *Id.* at 145. Moreover, a subsequent statement in that opinion demonstrates that ODOT's position (that conduct which is not physical occupation can only be a regulatory taking) is without merit:

> "Approximately 30 years after the adoption of the Oregon Constitution, this court held that the government took private property within the meaning of Article I, section 18, when it placed a railway in a public street, denying the property owner access to the street. *McQuaid v. Portland & V. R'y Co.,* 18 Or 237, 22 P. 899 (1889); *accord Iron Works v. O.R. & N. Co.,* 26 Or 224, 228-29, 37 P. 1016 (1894) (explaining and applying *McQuaid*). The court based that holding on the theory that the owner had a right of access that the railway obstructed even though the government did not physically invade or occupy the

owner's property. *McQuaid*, 18 Or at 247-48, 252.

> "Similarly, this court has held that government takes property when it intentionally floods private property, *Morrison v. Clackamas County,* 141 Or 564, 18 P2d 814 (1933), and when government-authorized overflights deny an owner the use and enjoyment of his or her property, ***even in the absence of a trespass***, *Thornburg v. Port of Portland,* 233 Or 178, 192, 376 P2d 100 (1962). ***Additionally***, the court has recognized that ***regulations*** that deny an owner the ability to put his or her property to any economically viable use will result in a taking and entitle the owner to compensation. *Boise Cascade Corp. v. Board of Forestry,* 325 Or 185, 198, 935 P2d 411 (1997); *see Dodd v. Hood River County,* 317 Or 172, 182, 855 P2d 608 (1993) (phrasing test as whether property retains "some substantial beneficial use")."

Coast Range Conifers, 339 Or at 145 (emphasis added).

Thus, as citation in *Coast Range Conifers* to cases like *McQuaid*, *Iron Works*, *Morrison*, and *Thornburg* demonstrate, Oregon continues to adhere to the view that, where the state acts other than legislatively (or quasi-legislatively, through rulemaking), its non-trespassory acts nonetheless may constitute actionable inverse condemnation.

The Court of Appeals also did not rely on *Boise Cascade v. Board of Forestry,* 325 Or 185, 935 P2d 411 (1997) in its opinion, despite ODOT's reliance on that opinion on appeal, and for good reason. In the event that ODOT again relies on *Boise Cascade*, it seems sufficient to note that: (1) the state was proceeding in that case pursuant to a duly promulgated regulation; and (2) *Boise Cascade* cites directly and with apparent approval to *Lincoln Loan*

and *Thornburg,* both of which are blight condemnation cases in which the plaintiff did not suffer loss of the entire value of his land. *See Boise Cascade*, 325 Or at 188 n 1. The *Lincoln Loan* case, in turn, repeated the following definitive statement made on the appeal of the retrial of the *Thornburg* case:

> The proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone.

Lincoln Loan, 274 Or at 56 (citing *Thornburg*, 244 Or at 74). Certainly, there was no indication of any intention by this Court in *Boise Cascade* to overrule or depart from that longstanding precedent holding that Article I, section 18, of the Oregon Constitution does not require physical occupation or a complete deprivation of all economic value for an action for inverse condemnation to lie.

B. Here, the Court of Appeals conflated the burden of proof applicable to a regulatory takings claim with the burden of proof applicable to a regulatory takings claim.

Viewcrest's property was reduced by $3,378,750 from a value of $4,000,000. In reversing the trial court's judgment, the Court of Appeals erred because it conflated the burden of proof applicable to a regulatory takings claim (which the present case is not) with the burden applicable to a condemnation

claim (which the present case is.) Viewcrest satisfied the correct burden of proof by showing that ODOT substantially interfered with the Viewcrest property. A plaintiff's complaint is sufficient to state facts constituting a cause of action for inverse condemnation when the plaintiff alleges a blight takings claim and facts that, if proved, show a "substantial interference with the use and enjoyment of its property." *Lincoln Loan*, 274 Or at 57.

In the present case, the Court of Appeals expressly acknowledged that ODOT publicized its plans that would have the result of land locking the Viewcrest property. *Hall*, 252 Or App at 652. It further recognized that Viewcrest had alleged a blight condemnation claim. *Id.* That court even identified and quoted "the relevant [jury] instruction":

> "Did the plaintiffs show that defendant's activities have substantially and unreasonably interfered with plaintiffs' use and enjoyment of their land and that defendant's activities were *sufficiently direct, particular*, and of a magnitude to support a conclusion that the interference has reduced the fair market value of plaintiffs' land?"

Id. at 654 (quoting the "relevant [jury] question") (emphasis added).) The jury answered that question in the affirmative, meaning that it found that ODOT's conduct was sufficiently direct and particular—aimed at Viewcrest and not the public generally—and that it substantially reduced the fair market value of the Viewcrest property. Such a finding of direct and particular activities shows that the jury found that ODOT did not act with any regulatory purpose.

As noted, the Court of Appeals acknowledged the foregoing instruction, but then ignored the jury's finding. Instead, that court, apparently without recognizing that it was taking a left turn in its analysis, rejected Viewcrest's claim, because it failed to satisfy the requirements of a *regulatory* takings claim. *Id.* at 656.

The Court of Appeals' decision incorrectly applies the burden of proof for a regulatory takings claim to Viewcrest's blight takings claim. The court acknowledged that "[i]t is true that plaintiffs' evidence established that ODOT's publicly announced plans regarding the Viewcrest interchange lowered the value of plaintiffs' property"; but the court then noted that Viewcrest failed to prove that ODOT's conduct eliminated *all* economic value in the Viewcrest property, and held that, "under *Fifth Avenue Corp.*, that evidence does not establish a compensable taking." *Hall*, 252 Or App at 656.[4]

---

[4] One particularly confounding component of the Court of Appeals' opinion is that it relies on *Vokoun* as authority for a requirement that the taking be for the "public good," when no such requirement can be found in *Vokoun*. At the same time, the court ignores what the *Vokoun* court *does* say about inverse condemnation:

> "To establish a taking by inverse condemnation, the plaintiff is not required to show that the governmental defendant deprived the plaintiff of all use and enjoyment of the property at issue. *See Morrison v. Clackamas County*, 141 Or 564, 568, 18 P2d 814 (12933 (any destruction, restriction, or interruption of common and necessary use and enjoyment of property constitutes taking). A 'substantial interference' with the use and enjoyment of property is sufficient. *Hawkins v. City of La Grande*, 315 Or 57, 68-69, 843

The court's citation to *Fifth Avenue Corp.* demonstrates ineluctably that the court incorrectly treated Viewcrest's claim as one for a regulatory taking. In *Fifth Avenue Corp.*, a county adopted a new comprehensive plan that eliminated several previously existing permissible uses. 282 Or at 593. The plaintiff then sued the county for the "down-zoning" of its land that occurred as a result of the county's adoption of the comprehensive plan. This Court first held that the plan had been validly enacted with adequate public input, due deliberation, and accountability. *Id.* at 608. That preliminary holding affected the plaintiff's burden of proof, because it caused plaintiff's takings claim to be properly categorized as a "regulatory" takings claim. *Id.* at 608-09. The distinction between that case and the present one is thus apparent: Viewcrest alleged and proved that ODOT's conduct was direct, particular, and substantially interfered with the Viewcrest property.

The Court of Appeals' misunderstanding of the applicable rule is further reflected in its strange statement that Viewcrest "argued to the jury, and presented evidence—*without objection, for some reason*—that ODOT was

---

P2d 400 (1992)."

335 Or at 26.

The Court of Appeals somehow added to *Vokoun* a requirement that was not stated in *Vokoun* (proof that a taking was for the "public good") and ignored what this Court did state in *Vokoun* (that an inverse condemnation claim may be proved with evidence of a substantial interference with the use and enjoyment of property).

engaged in a vendetta, [it] did not allege such a theory in [its] complaint." *Id.* at 654 (emphasis added).[5] That was error. As the court observed, the evidence was admitted without objection. ODOT did not object, because even it understood that the malice evidence was relevant to show that ODOT acted without the actual, ongoing intention of promulgating a rule or regulation. And, even more to the point, the malice evidence that the Court of Appeals disregarded (and, even worse, criticized) in fact was probative of the fact that this case is not a regulatory takings case.

Fifth Avenue Corp. states the burden of proof applicable to a *regulatory* taking case, *id.* at 614; Viewcrest here alleged a *blight takings* case. *Hall*, 252 Or App at 652. Thus, the burden of proof for cases controlled by *Fifth Avenue* is inapplicable to this case, which involves an entirely distinct category of takings claim, and the Court of Appeals erred in concluding otherwise.

It is true that, for its part, ODOT argued the contrary proposition in support of its motion for directed verdict. But the trial court accurately determined that Viewcrest had not sued defendant for a regulatory taking. (Tr. 1048-52.) Nonetheless—and remarkably—ODOT was permitted to make that argument to the jury as a defense. It did so—unsuccessfully. (Tr. 1305.) On

---

[5] The emphasized part of the Court of Appeals' decision immediately preceded its misstatements of the applicable law, clearly illustrating the direct connection between that court's criticism of how the case was tried and the Court's ensuing legal error.

appeal, ODOT declined to renew that position by assigning error to the trial court's instructions based on a blight taking claim. ODOT instead argued that *all* inverse condemnation claims are subject to the burden of proof that is applicable to a regulatory taking claim. That argument is wrong as a matter of law. Viewcrest's blight condemnation claim instead required proof of a substantial interference with the use and enjoyment of the Viewcrest property. As the jury's verdict amply demonstrates, Viewcrest satisfied that burden of proof.

C. ODOT substantially and unreasonably interfered with Viewcrest's use and enjoyment of the Viewcrest property.

The issue that ODOT raised on appeal is which burden of proof applies to Viewcrest's blight condemnation claim. For the foregoing reasons, the answer to that question is well-established by this Court's case law. Viewcrest must prove that ODOT's conduct substantially interfered with Viewcrest's use and enjoyment of the Viewcrest property. The jury in this case was instructed to find whether Viewcrest satisfied that burden of proof. ODOT has not claimed that there is insufficient evidence to permit the jury to make that finding of fact and, in truth, there is significant evidence to demonstrate that ODOT's conduct substantially interfered with Viewcrest's use and enjoyment of the Viewcrest property. The following brief recitation makes the point.

ODOT's emails plainly demonstrate that it targeted the Viewcrest property in particular, and began to plot its defenses to avoid liability for inverse condemnation. (ER-47 (Ex. 22); ER-40 (Ex. 11); ER-41 (Ex. 12); ER-45 (Ex. 16)). As one exhibit tellingly reported:

> "Mr. Harris has tried to develop the property over the years and may be trying to develop again, if he is trying to deal with drainage issues. ODOT has worked to stop any development, since it would negatively impact I-5."

(ER-45 (Ex. 16)).

At trial, Mr. Harris testified that Viewcrest purchased the property for investment purposes, with a deeded access (from ODOT) to the public roadway. (Tr. 255-57; Tr. 359). At the time, the property had been landlocked by ODOT's guardrail, preventing access at the deeded point for approximately 20 years. (Tr. 257-59). Mr. Harris and his partners commenced an action against ODOT in 1992 to remove the guardrail, and they won. (Tr. 284-85; Tr. 363).

Later, Viewcrest purchased adjoining property from ODOT, at which time ODOT failed to disclose that it intended to land lock the property. That disclosure did not come until about a year and a half later. (Tr. 286). Among other actions directed at the property, ODOT objected to the real property being annexed or zoned in the City of Millersburg, despite a prior promise that it would not oppose annexation when ODOT it sold the land to Viewcrest. (Tr. 294-295). Notwithstanding ODOT's opposition, the property was annexed and

zoned "light industrial" by the City of Millersburg. (Tr. 296).

Viewcrest tried to develop the property between approximately 2005 and 2007, without success, using developers and investors. (Tr. 302-04). Viewcrest listed the property for sale in approximately 2005, but could not sell the property because of numerous documents ODOT published indicating that the overpass (the sole access point) would be removed. (Tr. 309). Among the published documents were Exhibits 2, 3, 4, 5, and 6. (ER-25-32). In fact, approximately 250 people received Exhibit 6, which explains that the access point might be removed sooner if the overpass continued to deteriorate. (Tr. 321). Under no circumstances would anyone commence developing a property that would lose its sole means of access. (Tr. 314-19).

ODOT called for the elimination of the access point as early as May 2000. (Tr. 324). ODOT published its intention to eliminate the access point in public meetings as early as December, 2001. (Tr. 324-25). ODOT estimated the then cost to purchase the Viewcrest property at $3.6 million. (Tr. 325).

In Exhibit 31, ODOT acknowledged that it may be required to buy back the property that it sold to Viewcrest after the Viewcrest land became landlocked. (Tr. 334). Exhibit 34 reflects that ODOT determined that the access would be removed and that it would repurchase the property. (Tr. 338). Exhibits 35 and 36 similarly illustrate ODOT's intention, disclosed in public

meetings and letters to many people (including businesses in the vicinity), to remove the sole means of access. (Tr. 342-47). At the time, Viewcrest was negotiating with Pacific Power and Light for a sale of the property. (Tr. 348). Mr. Harris testified that the publications left no question whether the access would be removed by ODOT; it was only a question of when. (Tr. 350). ODOT estimated the cost to purchase the property in 2000 was $4 million, and that if the property were further developed it could cost upwards of $16 million. (Tr. 351-52).

In conclusion, Mr. Harris testified that ODOT told the public that it intended to land lock the Viewcrest property by removing the sole means of access, making the property worthless. (Tr. 367). Mr. Moeller, a real estate broker who met with Mr. Harris about a prospective purchase of the Viewcrest property, testified that uncertainty about access and timing will negatively impact any proposed real estate transaction. (Tr. 448-50). Moeller had a prospective buyer for the land until he learned that ODOT might remove the overpass. (Tr. 451-52).

Wright, a licensed real estate appraiser, testified that he appraised the Viewcrest property in 2008 based upon two hypothetical conditions, the first that it has an unrestricted 60 foot wide access, and second that it has no access at all. (Tr. 486). The first condition, based upon the access that Viewcrest had

obtained through its 1992 action against ODOT, resulted in a value of $4,970,000.00. (Tr. 486-87). Without access, Wright appraised the Viewcrest property at $24,900.00. (Tr. 487). The substantial difference in appraised value was based upon available uses. (*Id.*) Land locking would cause the property to lose its value. (Tr. 494-95). Wright based his valuations on comparable sales, among them a transaction involving similar property less than a mile away. (Tr. 520-22).

By causing the public to believe that the Viewcrest property would be landlocked, ODOT effectively caused those members of the public that might buy or invest in the property to treat it as if it *were* landlocked. That conduct substantially interfered with Viewcrest's use of its property. ODOT did not object to any instruction regarding the jury's finding of substantial interference.

To be sure, ODOT did object and assign error to the sufficiency of Viewcrest's evidence regarding the value of the Viewcrest property. *See Hall*, 252 Or App at 653 n 2 (declining to reach the issue of whether Viewcrest's evidence of the Viewcrest property's market value was too speculative to submit to the jury). ODOT specifically complained that Viewcrest's comparison of the property valued with access and the property valued without access was speculative, because Viewcrest had to instead show the property's actual value as reduced due to ODOT's activities at the time of the taking. The

simple answer to that argument is that ODOT's conduct was intended to, and the jury reasonably could have found it to have, caused prospective buyers to treat the property as though there were no access. (Tr. 451-53 (prospective buyer declined to buy the Viewcrest property because ODOT communicated that the Viewcrest property would have no access, meaning that the buyer decided it had to assume it would not have access); ER-45 (ODOT email stating: "ODOT has worked to stop any development, [because] it would negatively impact I-5.")). That is, otherwise willing buyers or investors evaluated the Viewcrest property as though it had no access because of ODOT's conduct. Therefore, ODOT's conduct caused the value of the Viewcrest property to decease in the same way and to the same extent as if the Viewcrest property no longer had access, and the comparison used by Viewcrest therefore was an entirely reasonable one.

The trial court correctly submitted the question of inverse condemnation to the jury. Viewing the evidence and all reasonable inferences in a light favorable to Viewcrest, the jury was entitled to determine that the acts complained of constituted a substantial, unreasonable interference with Viewcrest's use and enjoyment of its property, which interference was sufficiently direct and particular to justify an award of compensation.

D. Viewcrest requests that this Court reverse the Court of Appeals' judgment and reinstate the trial court's judgment.

A note about remedy: Because there is no factual issue in this case—ODOT did not object to or assign error to the trial court's ruling that ODOT did not act with a regulatory purpose, to the court's jury instructions, or to the jury's factual finding that ODOT substantially interfered with the Viewcrest property—Viewcrest requests that, if this Court finds Viewcrest's arguments on review to be well taken, the Court then proceed to reverse the judgment of the Court of Appeals and affirm the judgment of the trial court. It is true that there remain in the case two issues that the Court of Appeals did not address. But reversal here eliminates the significance of either of those issues:

1. ODOT argued in the Court of Appeals that the trial court erred in adopting and instructing the jury on the substantial interference standard. However, ODOT's objection to the instruction was to its appropriateness, not to its wording. Thus, if this Court rules that Viewcrest is correct in asserting that it was entitled to have this case treated and tried as a "blight" takings case, ODOT's assignment in this regard necessarily fails and it was appropriate to give an instruction under that theory.

2. ODOT also appealed from the failure of the trial court to award ODOT the Viewcrest property, or a proportion of it equal to the diminution in

value caused by ODOT's actions. However, ODOT is not entitled to take the property piecemeal—it is supposed to pay damages. Viewcrest respectfully urges this Court to review Viewcrest's answer to this assignment of error in the Court of Appeals, and then to rule that the issue is not sufficiently viable to justify a remand.

3. Finally, there is simply no merit to ODOT's argument regarding Viewcrest's evidence of the decrease in the value of the Viewcrest property. ODOT's conduct caused the public to view the Viewcrest property as having no access. ODOT acknowledges that Viewcrest presented evidence to show the value of the Viewcrest property if it had no access. Therefore, there was sufficient evidence to allow a jury to decide the amount of the decrease in the value of Viewcrest's property that was caused by ODOT's direct and particular conduct. Under such circumstances, this issue, too, does not merit a remand.

Conclusion

The Court of Appeals erred in reversing the trial court's judgment when the Court of Appeals introduced a wholly novel concept to condemnation law and disregarded the applicable, well-established theory of compensable takings on which Viewcrest relied. The Court of Appeals' new requirement that a condemnation plaintiff prove that the defendant took private property for the "public good" is not only divorced from any requirement under the Oregon

Constitution, it is also bad policy which would require courts to sort through what is "for" (or "against") the public good – an imponderable exercise. Additionally, the Court of Appeals' failure to recognize a distinction between regulatory takings claims and blight condemnation claims eliminates an entire category of inverse condemnation claims that this Court has routinely recognized.

DATED this 9th day of May, 2013.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ W. Michael Gillette
W. Michael Gillette, OSB #660458
wmgillette@schwabe.com
David Anderson
danderson@schwabe.com
Pacwest Center
1211 SW 5th Ave., Suite 1900
Portland, OR 97204
Telephone 503.222.9981
Fax 503.796.2900
Of Attorneys for Plaintiffs-Respondents

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

Brief Length

I certify that this petition complies with the 14,000 work limit for opening briefs in the Supreme Court and that the word count of this brief (as described in ORAP 5.05 (2)(a) is 8,507 words.

Type size

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(4)(g).

/s/ W. Michael Gillette
W. Michael Gillette, OSB #660458

CERTIFICATE OF FILING AND SERVICE

I certify that on the 9th day of May, 2013, I filed this OPENING BRIEF ON THE MERITS AND EXCERPT OF RECORD OF PLAINTIFFS-RESPONDENTS, PETITIONERS ON REVIEW with the State Appellate Court Administrator by the eFiling System.

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

Mary H. Williams, OSB# 911241
Solicitor General
Denise Fjordbeck OSB# 822578
Attorney-in-Charge
Civil/Administrative Appeals
Stephanie Striffler, OSB# 824053
Patrick M. Ebbett, OSB# 975013
1162 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us
patrick.m.ebbett@doj.state.or.us
stephanie.striffler@doj.state.or.us
Attorneys for Defendant- Appellant, Respondent on Review

/s/ W. Michael Gillette
W. Michael Gillette, OSB #660458
wmgillette@schwabe.com
David Anderson, OSB #092707
danderson@schwabe.com
Of Attorneys for Plaintiffs-Respondents