IN THE SUPREME COURT OF THE STATE OF OREGON

COAST RANGE CONIFERS, LLC, an Oregon Limited Liability Company, Plaintiff-Appellant, Respondent on Review, v. STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY, Defendant-Respondent, Petitioner on Review.	Supreme Court No. S51342 Appellate Court No. A117769 Lincoln County Circuit Court No. 011423

BRIEF OF *AMICI CURIAE* LEAGUE OF OREGON CITIES, MULTNOMAH COUNTY, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF STATE'S PETITION FOR REVIEW

AMICI ON REVIEW INTEND
TO FILE A BRIEF ON THE MERITS

On Petition to Review the Decision of the
Court of Appeals on Appeal from a Judgment of the District Court
for Lincoln County
Honorable ROBERT J. HUCKLEBERRY, Judge

Opinion Filed: September 24, 2003
Opinion on Reconsideration Filed: February 11, 2004
Author of Opinions: Landau, P.J.
Joined by Armstrong, J. and Wollheim, J.

May 2004

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INTRODUCTION

Prayer for Review

Amici curiae submit this brief in support of the State of Oregon's petition for review and reversal of the decision of the Oregon Court of Appeals in *Coast Range Conifers, LLC v. State*, 189 Or. App. 531, 76 P.3d 1148 (2003), *reconsideration allowed, opinion adhered to* 192 Or. App. 126, 83 P.3d 966 (2004). Through this submission, *amici* emphasize the severe threat to everyday municipal land use planning and other vital municipal interests posed by the appeals court's rejection of the whole parcel rule, a decision that plainly warrants review by this Court.

Interest of *Amici Curiae*

Amici are municipalities and organizations whose members include local governments and local officials in Oregon and throughout the United States. Cities and counties "have long engaged in the commendable task of land use planning." *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994). They also engage in many other activities designed to promote the public interest and enhance property values, activities that are potentially subject to takings claims. *Amici* thus have a compelling interest in the continued uniformity and fairness of regulatory takings law.

The League of Oregon Cities (LOC) is a voluntary association of 239 incorporated cities throughout the State. The League was founded in 1925 and is governed by a 15-member Board of Directors. LOC's core mission is to work for strong, livable communities, and its primary functions are to advocate, inform, and educate. LOC partners with its member cities to help local governments better serve the citizens of Oregon.

Multnomah County is located along the northern border of Oregon and contains about 20 percent of the State's population. It engages in land use planning and other activities to protect community values; promote its belief that maintaining the quality of life in the county's rural areas provides a social benefit that serves those on both sides of the urban growth boundary; and enhance fairness, equity, and balance in finding creative solutions that build community as well as benefit the public.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with State municipal leagues, NLC serves as a national resource to and an advocate for the more than 18,000 cities, villages, and towns it represents.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1,400 municipalities across the country. IMLA serves as the legal voice for the nation's local governments.

The appeals court's ruling rejecting the whole parcel rule potentially subjects Oregon municipalities to huge, unprecedented takings awards for ordinary land use planning activities. Municipalities in Oregon and across the nation have a critical interest in the development of regulatory takings jurisprudence and ensuring continued adherence to the whole parcel rule.

ARGUMENT

It is difficult to imagine a regulatory takings ruling more worthy of review by this Court than the appeals court's decision below not to apply the whole parcel rule to the facts of this case under Article I, § 18 of the Oregon Constitution.

The doctrine of regulatory takings always has been understood to apply to land use regulation only in "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Indeed, in the case that established the doctrine under the federal Takings Clause, the U.S. Supreme Court acknowledged that "government hardly could go on" if the doctrine were applied too casually. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As explained below, however, the appeals court ruling threatens to transform this limited doctrine into a virtual blank check for claimants to seek monetary redress for countless land use controls that have never been deemed to trigger takings liability. This expansive reading of Article I, § 18 finds no support in the text or original understanding of the state Constitution, and indeed the appeals court questioned whether the Oregon Constitution was originally understood to provide compensation for "regulatory takings" at all. *See Coast Range*, 189 Or. App. at 542-43, 76 P.3d at 1154 (citing authorities).

To avoid unnecessary duplication with the State's Petition for Review, this brief focuses on the implications of the appeals court's ruling for municipalities (Section I), the radical nature of the appeals court's ruling (Section II), and the fundamental fairness concerns raised by the case (Section III). *Amici* emphasize, however, that we concur with the State's analysis of the criteria for review under ORAP 9.07 as applied to this case. In particular, municipal *amici* agree that this case raises a tremendously significant issue of law involving a state constitutional provision that Oregon municipalities frequently face

during the course of their land use planning and other activities. Because it involves a constitutional issue, the serious harm threatened by the erroneous ruling below could not be effectively addressed by legislative action. As shown below, the whole parcel issue has extremely important implications not only for Oregon taxpayers (who are called upon to pay takings compensation awards), but every member of the public, each of whom benefits from the many community protections that could be challenged as takings under the ruling below.

I. The Startling and Disturbing Implications of the Appeals Court's Ruling Warrant Review of this Case.

By concluding a regulatory taking occurred due to wildlife protections that applied to only nine acres of the claimant's 40-acre parcel, and by gauging the economic impact of the challenged regulation based solely on the affected portion of the overall parcel, the ruling below threatens common, workaday municipal land use planning across the board. There can be no doubt about the importance of parcel definition to takings jurisprudence. As noted by the U.S. Court of Appeals for the D.C. Circuit, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999).

The U.S. Supreme Court uses the whole parcel rule under the federal Takings Clause in large measure due to the great disruption to land use planning that would ensue from focusing only on the affected portion. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), for example, the Court stressed that without the whole parcel rule, "one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."

Id. at 498; *accord, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) ("This requirement that 'the aggregate must be viewed in its entirety' * * * clarifies why restrictions on the use of only limited portions of the parcel, such as set-back ordinances * * * were not considered regulatory takings."; citations omitted). Multnomah County's setback requirements for structures in commercial forest zones are typical of the kinds of everyday land use controls subject to challenge under the appeals court's ruling. *See* Multnomah County Code § 33.2060 (establishing a road frontage setback of 60 feet and side and rear yard setbacks of 130 feet for structures in the Commercial Forest Use zone).

The appeals court's categorical rejection of the whole parcel rule jeopardizes all manner of municipal land use planning and other community protections. Under this ruling, for example, a takings claimant could challenge a routine height restriction, arguing that it denies economically viable use of the restricted air rights, notwithstanding the claimant's ability to make profitable use of the balance of the parcel. In fact, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court rejected this precise argument in a challenge to historic preservation controls under the federal Takings Clause by applying the whole parcel rule. *Id.* at 131. But such claims would become commonplace under the appeals court ruling. In addition, countless other State and municipal community protections hang in the balance, including urban growth boundaries, open space requirements, State and local wetland protections, density or lot-size requirements (which might render a small portion of a large development project unbuildable), road and sidewalk design requirements, viewshed protections, requirements for public restrooms, and disabled access requirements.

This list is not an abstract parade of horribles. Landowners have not been shy about using expansive takings theories to claim compensation from the public fisc for laws that promote decent, livable communities. To cite but one extreme example, a California restaurant owner argued that a taking arose out of rules requiring public restrooms to be accessible to the disabled. He made these takings arguments as a defense to claims filed by a disabled man who was forced to remove himself from his wheelchair and crawl into the restaurant's narrow bathroom to use the toilet. The court rejected the takings defense, concluding that the owner could still make economically viable use of the entire parcel, notwithstanding his contention that enlargement of the bathroom would reduce table space. *See Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574, 587-88 (S.D. Cal. 1993). Under the appeals court's approach, however, a takings claimant could focus exclusively on the affected portion of the restaurant and argue that the accessibility requirements deny all economic use of the lost table space and thus constitute a compensable taking.

Municipal *amici* have every confidence that claimants would be similarly creative in challenging other community protections across the board. As noted by several courts, application of an affected portion standard to many government actions could result in a finding of a taking in virtually every case. *E.g., City of Annapolis v. Waterman*, 745 A.2d 1000, 1024-25 (Md. 2000) (application of affected portion standard to wetland protections "'would, ipso facto, constitute a taking in every case'") (quoting *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993)); *K & K Constr. Inc. v. Dep't of Natural Res*., 575 N.W.2d 531, 536 (Mich. 1998) (same).

Under the ruling below, municipalities would face a stark choice: submit themselves to endless litigation and budget-busting compensation awards, or forego land

use controls and community protections that promote public health and welfare. The breathtaking consequences of the ruling below call out for review by the Court.

II. The Radical Nature of the Appeals Court's Ruling Warrants Review of this Case.

The appeals court's rejection of the whole parcel rule is not only sweeping in its implications, but also far outside the mainstream. Oregon case law long has recognized the whole parcel rule. *See Multnomah County v. Howell*, 9 Or. App. 374, 379-80, 496 P.2d 235, 237 (1972) ("The reasonableness of a zoning ordinance must be tested by its effect on the whole of defendant's contiguous property, not simply the effect on a portion thereof. Therefore the mere fact that an ordinance prevents an owner from using a portion of his property for a nonconforming purpose would not constitute a taking."). And, as noted even by the appeals court below, this Court has never squarely disavowed the rule. *Coast Range,* 189 Or. App. at 549, 76 P.3d at 1157. The ruling in *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997), is not to the contrary because there the Court did not define the relevant parcel, but rather merely held that the claimant had properly stated takings claims under the federal and state Takings Clauses by alleging denial of all economically viable use of the property. 325 Or. at 198, 935 P.2d at 420.

In interpreting the federal Takings Clause, the U.S. Supreme Court repeatedly has stressed the importance of considering the economic impact of the challenged government action on the claimant's entire parcel.[1] Just two years ago, in its landmark

[1] *E.g.*, *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) ("[A] claimant's parcel of property [may] not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."); *Keystone*, 480 U.S. at 498-502 (rejecting the claimants' contention that the Court should focus exclusively on the portion of the claimants' property affected by the challenged regulation); *Penn*

ruling in *Tahoe-Sierra*, the Court again reaffirmed the soundness and fairness of the whole parcel rule.[2] State courts across the country are virtually unanimous in having embraced the whole parcel rule in applying the takings clauses contained in their respective state constitutions.[3]

Central, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").

[2] *Tahoe-Sierra*, 535 U.S. at 327 ("[E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole.'"); *id*. (discussing the "requirement that 'the aggregate must be viewed in its entirety'"); *id*. at 331 ("[I]n regulatory takings cases we must focus on 'the parcel as a whole.'").

[3] *E.g. Bauer v. Waste Mgmt. of Conn., Inc*., 662 A.2d 1179, 1196-97 (Conn. 1995) (rejecting segmentation of property); *Central Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 347 (Colo. 1994) (applying whole parcel rule to takings determinations under article II, section 15, of the Colorado Constitution); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1024-25 (Md. 2000) (holding that trial court erred in failing to consider effect of regulation on whole parcel); *K & K Constr. Inc. v. Dep't of Natural Res*., 575 N.W.2d 531, 536 (Mich. 1998) (describing nonsegmentation principle as "one of the fundamental principles of taking jurisprudence"); *Quirk v. Town of New Boston*, 663 A.2d 1328, 1332-33 (N.H. 1995) (finding "no compelling reason to view the [regulated] perimeter as a discrete segment of the campground" despite state constitution's broader takings protections); *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 260-61 (N.J. 1991) ("takings jurisprudence focused on the nature and extent of interference with rights in the whole parcel, not discrete segments"); *Spears v. Berle*, 397 N.E.2d 1304, 1308 (N.Y. 1979) ("A petitioner who challenges land regulations must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use."); *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002) (rejecting segmentation of property); *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595, 603 (S.C. 2001) ("The 'whole parcel doctrine' applies where there is a regulatory taking."); *Presbytery of Seattle v. King County*, 787 P.2d 907, 914-15 (Wash. 1990) ("[N]either state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a *piece* of it has been taken or whether a due process violation has occurred with regard to a *piece* of regulated property. Rather, we have consistently viewed a parcel of regulated property in its *entirety*."); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 789 (Wis. 2001) (rejecting "an analysis that subdivides a contiguous property for purposes of determining whether a compensable taking has occurred.").

The appeals court's ruling below plainly stands as a radical outlier that warrants review by this Court.

III. Fundamental Fairness Warrants Review of this Case.

Finally, basic fairness also requires a grant of review. The whole parcel rule promotes fairness by striking an appropriate balance between the rights of landowners, neighboring property owners, and the public interest, and by ensuring that landowners do not exact compensation from the public for land-use restrictions that fall short of an appropriation of property.

As explained in an influential article by Harvard Law School Professor Frank Michelman, to achieve fairness in takings law courts should "forge a link between compensability and one's ability to sustain uncompensated burdens." Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of* "*Just Compensation*" *Law*, 80 Harv. L. Rev. 1165, 1192 (1967) ("Michelman"). By directing attention to the claimant's entire parcel of property, the whole parcel rule does just that. In reaffirming the rule, the U.S. Supreme Court has expressly relied on Professor Michelman's seminal piece that articulates the fairness rationale underlying the rule. *See Keystone*, 480 U.S. at 497 (citing Michelman).

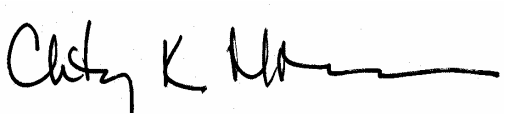
The appeals court's ruling undermines fairness and promotes manipulation by claimants, who will no doubt argue that use prohibitions on virtually any portion of their property, no matter how small the affected area, require taxpayers to pay them simply for following the law. As noted above, the doctrine of regulatory takings has always been understood to apply to land use regulation only in "extreme circumstances." *Riverside Bayview Homes*, 474 U.S. at 126. The ruling below would expand this limited doctrine into an invitation for claimants to seek compensation for innumerable public protections

never previously thought to constitute takings. Such unfairness at the public expense cannot be allowed to stand.

CONCLUSION

This court should review and reverse the decision of the Court of Appeals.

Respectfully submitted,



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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original municipal *amici curiae* brief to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on May 5, 2004.

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