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 THE STATE OF OREGON

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
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Author of Opinions: Landau, P.J.
Joined by Armstrong, J. and Wollheim, J.

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INTEREST OF *AMICI CURIAE*

Amici -- all of which filed an *amicus* brief in support of the State of Oregon's Petition for Review in this case -- are municipalities and organizations whose members include local governments and local officials across 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 potentially subject to takings claims. *Amici* thus have a compelling interest in the continued uniformity, coherence, and fairness of regulatory takings law. Because this case raises the issue of whether Oregon courts will retain the whole parcel rule, and because rejection of that rule would put a broad range of land use controls and other community protections at risk, *amici* have a vital interest in this case.

The League of Oregon Cities (LOC) is a voluntary association of 239 incorporated cities throughout the State. Founded in 1925, 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; to 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 to 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 country's oldest and largest national organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 U.S. cities, villages, and towns, and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

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 decision below rejecting the whole parcel rule potentially subjects Oregon municipalities to huge, unprecedented takings awards for ordinary land use activities. Municipalities in Oregon and across the nation thus have a critical interest in the development of regulatory takings jurisprudence and ensuring continued adherence to the whole parcel rule.

ARGUMENT

The question presented by this case is not whether Oregon courts should *adopt* the whole parcel rule, but whether they should *retain* it. As shown in Section I below, the whole parcel rule is an established part of Oregon regulatory takings jurisprudence, and continued adherence to the rule is necessary to maintain stability and coherence in Oregon takings law. Section II demonstrates that the text and original understanding of both the Oregon and federal Takings Clauses strongly argue in favor of retaining the whole parcel rule.

In Section III, we demonstrate that the U.S. Supreme Court and state high courts across the nation consistently have applied the whole parcel rule, and that the court below seriously erred in suggesting that the U.S. Supreme Court has "wandered back and forth" in its adherence to the rule (189 Or. App. at 546). Finally, Section IV shows that the whole parcel rule is required to promote fundamental fairness and allow local officials to protect the public interest through reasonable land use regulations and other community protections.

I. This Court Should Retain the Whole Parcel Rule to Maintain Continuity and Coherence in Oregon Takings Jurisprudence.

To comprehend the role played by the whole parcel rule in Oregon regulatory takings law, it is necessary to understand that the rule has two applications, geographic and conceptual, both of which are an established part of Oregon jurisprudence. In its geographic application (the kind at issue here), the whole parcel rule prohibits a takings claimant from severing a geographic or physical portion of the property for purposes of evaluating the economic impact of the challenged regulation. Rather than focusing solely on the portion affected by the regulation, the whole parcel rule requires courts to gauge the economic impact of the regulation on the entire contiguous parcel owned by the claimant. As explained in the U.S. Supreme Court's landmark ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this rule against physical severance explains why setback requirements and other common land use controls that prohibit development of a portion of land are not takings. *Id.* at 327 (discussing how the whole parcel rule's prevention of physical severance preserves setback requirements from takings liability).

In its conceptual application, the whole parcel rule prevents a takings claimant from severing a prohibited use of property from other potential uses to argue that the prohibition of a single use works a compensable taking. In one example provided by the *Tahoe* court, the whole parcel rule explains why "a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking." *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)). The *Tahoe* court itself used a conceptual application of the whole parcel rule to reject an attempt by landowners to sever property temporally and argue that a temporary restriction on land use denies all economically viable use of that temporal component. *Id.* at 331 ("Petitioner's 'conceptual severance' argument is unavailing because it ignores [the] admonition that in regulatory takings cases we must focus on the 'parcel as a whole.'"); *accord*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981) (rejecting a facial takings challenge to federal mining restrictions because "[t]he Act does not purport to regulate alternative uses to which coal-bearing lands may be put."); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995) (in a takings challenge to hunting restrictions, the relevant parcel included not just the right to hunt but rather "the entire bundle of rights associated with the parcel of land.").[1]

The one principal exception to the ban on conceptual severance concerns the right to exclude others from private land. Because the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), a government-compelled

[1] Some courts and commentators further subdivide "conceptual severance" into temporal severance, functional severance, vertical severance, and other subcategories, but there is no need to explicate these labels here.

permanent physical occupation of land constitutes a *per se* taking regardless of the amount of the overall parcel impaired by the physical intrusion. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

The whole parcel rule is an entrenched part of Oregon takings jurisprudence as articulated by this court and lower courts in both of its manifestations, physical and conceptual. As early as 1972, the Oregon Court of Appeals invoked the whole parcel rule to reject a regulatory takings challenge under Article I, § 18 of the Oregon Constitution to Multnomah County zoning laws that prohibited rock quarrying on land zoned agricultural-residential. *See Multnomah County v. Howell*, 9 Or. App. 374, 496 P.2d 235 (1972). The appeals court could not have been clearer in its insistence on evaluating the effect of the challenged regulation on the owner's whole parcel, not just the portion affected by the regulation: "The reasonableness of a zoning ordinance must be tested by its effect on the whole of [the owner's] contiguous property, not simply the effect on a portion thereof." *Id.* at 379-80, 496 P.2d at 238. The *Howell* court held the trial court erred in ruling that the zoning worked a taking of four of the nine platted lots comprising the property precisely because the trial court "fail[ed] to consider Mr. Howell's property as an entire contiguous unit." *Id.* at 380, 496 P.2d at 238.

More recently, this court implicitly rejected conceptual severance of various uses of property in a takings challenge under the Oregon Constitution to a forest zoning ordinance. In *Dodd v. Hood River County*, 317 Or. 172, 855 P.2d 608 (1993), the county denied permission to the claimants to build a residential dwelling on a forty-acre parcel in a forestry zone. The *Dodd* court rejected the claimants' regulatory takings claim, ruling that "[w]here a zoning designation allows a landowner *some substantial beneficial use* of

his property, the landowner is not deprived of his property nor is his property 'taken.'" *Id.* at 182, 855 P.2d at 614 (citation omitted). While not expressly invoking the whole parcel rule, the court's ruling necessarily turns on a rejection of any effort to sever the prohibited use of the land for a dwelling from the permissible use of the land for forestry. If this court had permitted conceptual severance, it would have found a taking of the right to build a house. Implicitly applying the whole parcel rule, the court rejected any such conceptual severance, looked to the claimants' entire bundle of property rights, and held that no taking occurred because the forestry zoning did not deprive the claimants' entire property all substantial beneficial use.

Similarly, in *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), this court implicitly endorsed the whole parcel rule's ban on conceptual severance in addressing challenges under both the Oregon and federal Takings Clauses. The *Stevens* court observed that under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a taking occurs where regulation denies all economically viable use of land unless the limitation is justified by background principles of state law. *See Stevens*, 317 Or. at 141-42, 854 P.2d at 455-56. The court relied on the Oregon common-law doctrine of custom as a background principle to reject the takings challenge. The *Stevens* court also went on to recognize that where regulations only restrict certain uses, a far different rule applies: "It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; 'as long recognized, some values are enjoyed under an implied limitation and must yield to the police power.'" *Id.* (quoting *Lucas* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922))). This

position necessarily assumes application of a whole parcel rule that precludes conceptual severance. The court then articulated an alternative basis for rejecting the claimants' facial challenge to the regulations at issue, namely that they allow "for certain economically viable uses" of the land at issue. *Id.* at 147-48, 854 P.2d at 459. The *Stevens* court thus recognized that a restriction on some, but not all, uses of property typically does not result in a taking, a position that rejects conceptual severance and entails consideration of all sticks in the bundle of property rights.

This court also applied the whole parcel rule to reject conceptual severance in a takings challenge to a municipal ordinance prohibiting transient occupancy. *See Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1083 (1993). The claimants argued that in evaluating whether the ordinance worked a taking, the court should look exclusively at their right to continue an existing legal use. The *Cope* court rejected this approach as "too narrow," invoking the whole parcel rule as articulated in *Andrus v. Allard*: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* at 346, 855 P.2d at 1087. Although the takings claim in *Cope* was brought under the federal Takings Clause, it would have been exceedingly odd for this court to leave unmentioned an obvious avenue of relief under the Oregon Constitution if Oregon courts had already jettisoned the whole parcel rule under state law.

In rejecting the whole parcel rule, the lower court relied on *Fifth Avenue Corp. v. Washington County,* 282 Or. 591, 581 P.2d 50 (1978), but this reliance is misplaced. As this court later observed in *Dodd*, the zoning decision at issue in *Fifth Avenue* was made "in contemplation of the eventual taking of private property for public use." *Dodd*, 317

Or. at 181, 855 P.2d at 614 (discussing *Fifth Avenue*). This contemplated physical taking of property renders *Fifth Avenue* inapposite to cases involving mere restrictions on land use. And even assuming *arguendo* that *Fifth Avenue* might be in tension with the whole parcel rule, this early ruling has been superceded by this court's modern precedents in *Dodd* and *Cope*.

Similarly, the lower court's discussion of *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997), is deeply flawed. The *Boise Cascade* court did not even mention, much less repudiate, the whole parcel rule. *Id.* at 197-98, 935 P.2d at 419-20. The whole parcel issue evidently was not briefed, and thus the court had no reason to consider it. In fact, the court precluded the claimant from engaging in conceptual severance to reject a temporary takings claim, thereby implicitly applying the whole parcel rule. *Id.* at 198-200, 935 P.2d at 420-21.

Retention of the whole parcel rule is necessary to maintain not only stability in Oregon takings jurisprudence, but also coherence. A taking occurs under the Oregon Constitution where government regulation denies substantially all economically viable use of property. As stated in *Dodd*, no taking occurs where the challenged regulation allows "*some substantial beneficial use*" of the land. *Dodd*, 317 Or. at 182, 855 P.2d at 614 (quoting *Fifth Avenue*). But this bedrock proposition of Oregon takings law would have little meaning if takings claimants could sever their property interests to focus only on the portion or use affected by the challenged regulation. Such severance could result in a finding of a taking in nearly every case. The whole parcel rule thus keeps the entirety of Oregon takings law coherent and workable.

II. The Plain Text and Original Understanding of the State and Federal Takings Clauses Require Retention of the Whole Parcel Rule.

The whole parcel rule is compelled not only by precedent, but also by the text of the Takings Clause itself. The text of the Oregon Takings Clause, like the text of the parallel clause in the federal Constitution, is quite narrow. Although the Oregon Constitution does not define the term "take," that phrase most naturally refers to a physical appropriation of property. In other words, the text does not readily suggest application to mere restrictions on the *use* of property. *See* FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land."). To use an analogy found in the law reviews, if a parent tells a child not to play with a ball in the house, the parent has restricted the use of the ball, but has not taken the ball away.

This is not to say that the Oregon Takings Clause should now be limited to physical appropriation of property. It is well-settled that government regulation can effect a compensable taking under Oregon law. But the constitutional text does argue strongly in favor of limiting regulatory takings to those situations in which regulation constitutes the functional equivalent of a physical expropriation by denying the claimant substantially all viable use of the entire contiguous parcel of property.

Similarly, the context and history of the Oregon Takings Clause require a relatively circumscribed reading of that provision that would be thoroughly undermined by a rejection of the whole parcel rule. The State of Oregon's opening brief on the merits comprehensively sets outs this contextual and historical argument. Even the court below

observed that in the early nineteenth century, the prevailing view was that state takings clauses required compensation only for physical expropriations of property: "It is not until the late nineteenth century, long after the adoption of the Oregon Constitution, that courts began to entertain the idea that the takings clause might apply to something other than a physical acquisition." *See Coast Range,* 189 Or. App. at 542-43. The court below noted that a commentator very recently concluded that the Oregon Constitution as originally understood requires compensation only for physical expropriations of property, and fails altogether to incorporate regulatory takings. *See id.* (citing Derek O. Teaney, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory "Takings" Are Not Compensable under a Traditional Originalist View of Article I, Section 18 of the Oregon Constitution*, 40 Willamette L. Rev. 529 (2004)).

The State's analysis of the history and context of the Oregon Constitution need not be repeated here, but it is telling to observe that the original understanding of the federal Takings Clause was similarly narrow. *See, e.g.,* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995). In an opinion by Justice Antonin Scalia, a jurist generally regarded as sympathetic to takings claims, the U.S. Supreme Court in *Lucas* recognized that the founding generation and several succeeding generations read the Takings Clause as applying only to actual dispossessions of property. *Lucas,* 505 U.S. at 1014 ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it

was generally thought that the Takings Clause reached only a 'direct appropriation' of property * * * or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted); *id*. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

To be sure, in *Mahon* the U.S. Supreme Court held that the Takings Clause may apply to regulation. But the *Mahon* court was careful to stress that the law at issue effected a taking because it had "very nearly the same effect for constitutional purposes as appropriating" private property. *Mahon*, 260 U.S. at 414.

This theme -- regulatory takings as the functional equivalent of an appropriation -- is a mainstay of federal takings jurisprudence. For example, the U.S. Supreme Court has held that a *per se* taking might occur where regulation denies all economically viable use of land because such regulation is, "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. In *Loretto*, the court held that government-compelled occupations of private property are takings where they "'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" *Loretto*, 458 U.S. at 428 (citation omitted). In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the court stated that in regulatory takings cases, its task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199. Not surprisingly, it takes "extreme circumstances" for land use regulation to rise to this level. *United States v. Riverside Bayview Homes,* 474 U.S. 121, 126 (1985).

As noted above, we are not suggesting that this court go so far as to abandon the concept of a regulatory taking under the Oregon Constitution. But as is true under the federal Constitution, the narrow text, history, and context of the Oregon Constitution strongly argue in favor of limiting regulatory takings to land use controls that approximate the extreme situation of an outright appropriation, *i.e.*, that substantially destroy the value and use of the claimant's *entire* parcel.

III. The U.S. Supreme Court and State High Courts Have Consistently Applied the Whole Parcel Rule.

It should be common ground that although the Oregon and federal Takings Clauses are not identical in every jot and tittle, U.S. Supreme Court holdings under the federal Takings Clause are entitled to considerable respect. For this reason, *amici* believe it is important to correct the serious error made by the court below in suggesting that the U.S. Supreme Court has "wandered back and forth" in its application of the whole parcel rule (189 Or. App. at 546). For decades, the court consistently has invoked the whole parcel rule in both its physical and conceptual manifestations.

The U.S. Supreme Court expressly articulated the whole parcel rule more than twenty-five years ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). There, the City of New York applied historic preservation laws to deny the owners of Grand Central Terminal permission to build an office building atop the Terminal. The court rejected the owners' argument that takings analysis should focus solely on the air rights above the Terminal, stating:

> "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. In deciding whether a particular governmental action has effected a taking, this Court focuses rather * * *

> on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

Id. at 130-31. Because the owners could still operate the Terminal and the surrounding contiguous properties that they owned, the challenged regulation did not deny them all economically viable use of their entire parcel, and the court rejected the takings claim. *Id*. at 136-38. The court did not allow the claimants to sever or segment the regulated air rights from the rest of the parcel for purposes of takings analysis.

One year later, in *Andrus v. Allard*, 444 U.S. 51 (1979), the court rejected a claimant's attempt at conceptual severance. *Andrus* involved a takings challenge to a ban on the sale of artifacts made from the feathers of bald eagles and other federally protected birds. Although the ban extinguished the claimants' right to sell the artifacts, the court found no taking: "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. Because the claimants retained the right to possess, transport, donate, and devise the property, there was no taking, even though the ban prevented the most profitable use of the property. *Id.* at 66-67.

The court reaffirmed the whole parcel rule in both its physical and conceptual manifestations in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). There, coal companies challenged a Pennsylvania statute that required them to leave 27 million tons of coal in the ground to protect against subsidence. 480 U.S. at 498. The court rejected the coal companies' contention that it should focus exclusively on the coal required to be left in the ground, rejecting such physical severance by insisting that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Id*. at 498. The court also rejected the claimants' "conceptual severance"

argument that the relevant parcel consisted solely of their support estates, which Pennsylvania law recognizes as a separate property interest. *Id.* at 500-01. Applying the whole parcel rule, the court held that "takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id*. at 500. Instead, the court considered the economic impact of the regulations on the claimants' entire parcels, and it rejected the claim because the subsidence protections allowed mining of the unregulated coal and thus did not deprive the claimants of all economically viable use of their property. *Id*. at 498-502.

The U.S. Supreme Court again applied the whole parcel rule in 1993. *See Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-47 (1993). The claimant asked the court to consider only the affected portion of its property and conclude that the challenged regulation worked a "total taking" under *Lucas*. The court unanimously ruled that the claimant could not "shoehorn" its claim into a *Lucas*-type theory by unfairly manipulating its property interests:

> [W]e rejected this analysis years ago in *Penn Central* [] where we held that 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. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.

Id. at 643-44. Although *Concrete Pipe* involved a challenge to federal pension plan protections, it unanimously reaffirms *Penn Central* and other applications of the parcel-as-a-whole rule in the land use context.

Just two years ago, the court's landmark *Tahoe* ruling emphatically reaffirmed that in analyzing a regulatory takings claim, a court must consider the effect of the challenged regulation on the claimant's entire parcel. 535 U.S. at 326-27 ("[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*. at 327 (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.'").

Tahoe rejects both physical and conceptual severance, emphasizing that in applying the parcel-as-a-whole rule, a court should take into account all contiguous property included within the claimant's metes and bounds, as well as the claimant's full temporal interest. *Id*. at 331-32 ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety."). In applying the parcel-as-a-whole rule to the facts before it, the court rejected the landowners' proposed conceptual severance, *i.e.*, their argument that the relevant parcel of property is their interest in using the land during the challenged 32-month moratorium:

> Petitioners seek to bring this case under the [per se] rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria. Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings. Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole." We have consistently rejected such an approach to the "denominator" question.

Id. at 331 (citations omitted).

The whole parcel rule has infused the court's takings jurisprudence since the turn of the century, well before the clear articulations of the rule in *Penn Central*, *Andrus*, *Keystone*, *Concrete Pipe*, and *Tahoe*. In 1915, the court rejected a takings challenge to a mining ban despite a 92.5% value loss. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). In 1926, it upheld a zoning ordinance despite a 75% value loss. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). In 1927, the court sustained a setback requirement that prohibited development on the affected portion of the parcel. *Gorieb v. Fox*, 274 U.S. 603 (1927). All of these rulings and many more are necessarily premised on a consideration of the claimant's entire parcel, not just the regulated portion.

The appeals below cited a single case, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), as evidence that the U.S. Supreme Court has sometimes "wandered" from the whole parcel rule. *Kaiser Aetna* is not a pure regulatory takings case, however, but a physical invasion case challenging the government's imposition of a public navigational servitude on a private marina. The court found a taking because the government action impaired the right to exclude, which the court deemed "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176. Just a few years later, the court confirmed that such a permanent physical occupation works a *per se* taking because the right to exclude is so highly valued. *See Loretto*, 458 U.S. at 433.

As the court explained in *Tahoe*, there is a longstanding distinction in takings law between government actions that regulate property and those that result in the physical invasion of property. *Tahoe*, 535 U.S. at 321, 325 (distinguishing *Penn Central*,

Keystone, and other regulatory takings cases from *Loretto* and other physical invasion cases). This distinction, which flows directly from the constitutional text (*id.* at 321-22), "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 323 (footnote omitted). Consequently, *Kaiser Aetna* does not constitute an aberrational "wandering" at all as suggested by the court below, but instead a carefully crafted rule for a unique category of cases that the court has fully integrated into its overall takings jurisprudence.

The claimants in the instant case might try to rely on dicta contained in a footnote in *Lucas*. In footnote 7 of *Lucas*, the U.S. Supreme Court had suggested that in some circumstances the proper approach to defining the relevant parcel might be "unclear." *Lucas*, 505 U.S. at 1016-17 n.7. As this court has observed, however, this footnote is dictum because the *Lucas* court concluded that it did not need to address the whole parcel issue given that the challenged regulation left the entirety of Mr. Lucas's parcel without economic value. *Dodd*, 317 Or. at 182-84, 855 P.2d at 614-15.

Moreover, the *Lucas* footnoted *dictum* was highly questionable, given the court's unequivocal holding in *Penn Central* that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. And just one year after *Lucas*, the U.S. Supreme Court unanimously reaffirmed the whole parcel rulings described in *Penn Central* and *Keystone*, holding that "a claimant's parcel of property could 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."

Concrete Pipe, 508 U.S. at 644. Although *Concrete Pipe* was not a land use case, it unanimously reaffirmed *Penn Central* and other applications of the whole parcel rule in the land use context. The highest courts of other states have relied on *Concrete Pipe* to override any contrary inference from the *Lucas* dictum. *See, e.g., Zealy v. City of Waukesha*, 548 N.W.2d 528, 532-33 (Wis. 1996).

Indeed, virtually every state high court that has addressed the issue has followed *Penn Central, Keystone*, and other precedents to hold that the relevant parcel for takings analysis consists of all of the claimant's contiguous property, not just the affected portion.[2] If this court were to abandon the whole parcel rule under the Oregon

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[2] *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 the Colorado Constitution); *Department of Natural Res. v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1004 (Ind. 1989) (applying the whole parcel rule to find no taking in a challenge to mining restrictions); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1022 (Md. 2000) ("[T]he property to be assessed for economically viable use is, as we have said, the entire tract of land."); *K & K Constr., Inc. v. Department of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis"); *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"); *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); *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."); *County of Clark v. Tien Fu Hsu*, No 38853, slip op. at 40 n.98 (Nev. Sept. 30, 2004) (reaffirming the whole parcel rule); *Machipongo Land & Coal Co., Inc. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002) (rejecting segmentation of property); *Sea Cabins on the 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

Constitution, Oregon takings jurisprudence undoubtedly would become the nation's radical outlier.

IV. Retention of the Whole Parcel Rule Will Promote Fundamental Fairness and Allow Municipalities to Protect the Public Interest Through Reasonable Land Use Controls and Other Community Protections.

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).

In articulating its whole parcel rule, the U.S. Supreme Court has relied heavily on early rulings upholding municipal land use controls. For example, in *Penn Central*, the court based its whole parcel rule in part on cases that upheld height limitations, setback requirements, and other municipal land use controls. *Penn Central*, 438 U.S. at 130 (citing *Welch v. Swasey*, 214 U.S. 91 (1909) (height limits), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (mining ban), and *Gorieb v. Fox*, 274 U.S. 603 (1927) (setback requirement)). Likewise, in *Keystone*, the court reaffirmed its whole parcel rule by stressing that under an affected-portion standard, zoning ordinances and other common municipal land use controls might constitute a taking:

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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."); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) (relevant parcel included about 8.2 acres zoned as wetlands and 2.1 acres of contiguous property zoned for residential and commercial development).

> The 27 million tons of coal [required to be left in the ground by the challenged subsidence protections] do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory 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. Cf. *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding validity of setback ordinance) (Sutherland, J.). There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Keystone, 480 U.S. at 498.

Applied to municipal land use planning, the lower court's affected portion analysis would wreak constitutional havoc throughout the entire state. At a minimum, affirmance of the ruling below would engender massive litigation. The threat of countless lawsuits seeking budget-busting compensation awards under the Takings Clause would have a severe chilling effect on the ability of local officials to address a broad range of local land use issues, including routine zoning classifications, wetland protections needed to prevent flooding and despoliation of lakes and streams, and smart-growth initiatives designed to combat sprawl. 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. Countless other State and municipal community protections hang in the balance, including urban growth boundaries, open space requirements, 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.

Municipal *amici* have every confidence that claimants would be 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 at 1024-25 (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. Department of Natural Res*., 575 N.W.2d 531, 536 (Mich. 1998) (same).

In short, 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. This potential chilling effect is not idle speculation but a hard reality, particularly for small municipalities.[3] If local officials still proceeded with regulation in the face of litigation threats, the taxpayer would be forced to foot the bill for the many compensation judgments that could result from an affected-portion standard.

The U.S. Supreme Court has expressly rejected takings theories that "would effectively compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. at 65 (emphasis in original). Indeed, in the case giving birth to regulatory takings, Justice Holmes recognized that the court should be cautious in its approach to determining when

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[3] *E.g.*, *Hearing on H.R. 2372 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999) (Statement of Diane S. Shea, Associate Legislative Director, National Association of Counties) (*available at* http://www.house.gov/judiciary/shea0915.htm) (discussing the chilling effect that the threat of takings litigation has on small municipalities at the expense of neighboring property owners and the public interest).

a regulation requires compensation. "Government hardly could go on," Justice Holmes explained, "if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. As a functional matter, the lower court's suggestion that the takings inquiry should examine only those portions of land affected by regulations would raise precisely the danger recognized by Justice Holmes.

Overturning the whole parcel rule also would create unintended adverse consequences for property owners because municipalities would be discouraged from implementing land use regulations like open space requirements and occupancy and use restrictions that help increase the economic value of property. The resulting chill on municipal land use regulations portends a decline in property values, creating a downward spiral in property tax revenues collected by municipalities necessary to fund public services such as good public schools, sufficient police and fire services, inviting neighborhood parks, and attractive community centers.

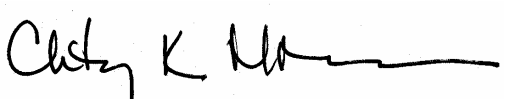
Moreover, as explained in an influential article by Harvard Law School Professor Frank Michelman, to achieve fairness in takings law courts should "forge a link between compensability and one's ability to sustain uncompensated burdens." Frank Michelman, *Property, Utility, and Fairness: Comments on the 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 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 and twenty copies to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, via first-class mail through the U.S. Postal Service on November 4, 2004.

I further certify that I directed the municipal *amici curiae* brief to be served upon counsel for the parties on November 4, 2004, by mailing two copies, with first-class postage prepaid, through the U.S. Postal Service in envelopes addressed to:

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