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.	Lincoln County Circuit No. 011423 Appellate Court No. A117769 Supreme Court No. S51342

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF *AMICI CURIAE* ON BEHALF OF 1000 FRIENDS OF OREGON, THE AMERICAN PLANNING ASSOCIATION AND ITS OREGON CHAPTER, IN SUPPORT OF STATE'S PETITION FOR REVIEW

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.

Continued on Inside Cover

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1000 Friends of Oregon ("1000 Friends"), the American Planning Association ("APA"), and its Oregon Chapter ("OAPA"), each respectfully move this court for an order granting them leave to file this joint *amicus curiae* brief in support of the State of Oregon's Petition for Review in this matter, and an additional brief on the merits of this matter should the court grant the petition. 1000 Friends, APA and OAPA intend to present a position as to the correct rule of law, as a matter of public interest.

This motion is filed pursuant to ORAP 8.15. Below is the brief sought to be filed by 1000 Friends, APA and OAPA at this stage of proceedings.

AMICUS CURIAE BRIEF ON BEHALF OF 1000 FRIENDS, THE AMERICAN PLANNING ASSOCIATION AND ITS OREGON CHAPTER

I.INTRODUCTION

A. Prayer for Review

Amici curiae respectfully submit this brief in support of the State of Oregon's petition for review and reversal of the Oregon Court of Appeals decision 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). 1000 Friends, the American Planning Association and its Oregon Chapter seek to demonstrate the danger posed by the Court of Appeals' interpretation of the takings clause in the Oregon Constitution (Article I, § 18) and its rejection of the "whole parcel" rule to state, regional and local land use planning and other vital municipal and community interests. The decision of the Court of Appeals clearly warrants review by this Court.

B. Interests of *Amici Curiae*

1000 Friends is an Oregon private non-profit corporation whose mission is to "protect Oregon's quality of life through the conservation of farm and forest lands, protection of natural and historic resources and promotion of more compact and livable cities." A principal organizational objective of 1000 Friends is to promote compact, livable communities by maintaining the validity and integrity of Urban Growth Boundaries (UGBs), which separate rural lands from urban and urbanizable lands and are a key to achieving that objective. Another principle objective of 1000 Friends is to support the statutory and regulatory scheme that protects farmland from uses that are inconsistent with and conflict with the agricultural use of that property.

1000 Friends represents more than 5,000 farmers, ranchers, and other citizens interested in planning for compact livable communities and the protection of farm and forest lands. In its capacity as an advocate for conserving farm and forest lands and promoting more compact and livable cities, 1000 Friends has participated as *amicus* in a significant number of cases including *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P2d 449 (1993), *Dodd v. Hood River County*, 317 Or. 172, 855 P2d 608 (1993), *McDonald v.*

Halvorson, 308 Ore. 340; 780 P.2d 714; (1989), *Ochoco Constr., Inc. v. Department of Land Conservation & Dev.*, 295 Ore. 422; 667 P.2d 499; (1983); *Neuberger v. Portland*, 288 Ore. 155; 603 P.2d 771; (1979), *Just v. City of Lebanon*, 2004 Ore. App. LEXIS 468, April 21, 2004. All of these cases raise important questions relating to the procedures that allow for public participation in the land use process and the proper interpretation of land use laws and the constitution.

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning - including physical, economic and social planning - at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 17 divisions devoted to specialized planning interests, including the City Planning and Management Division, the Economic Development Division, the New Urbanism Division, and the Urban Design and Preservation Division. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and rural planning issues. These members are involved in formulating and implementing planning policies and land-use regulations. The APA and its professional institute, the American Institute of Certified Planners, advance the art and science of planning to meet the needs of people and society more effectively. In its capacity as advocate for good urban and rural planning, the APA and its various chapters file "friend-of-the-court" briefs in state and federal courts in cases of importance to the planning profession and the public interest. It is in this capacity that the APA and its Oregon Chapter seek involvement in the present case, in support of the State of Oregon's position.

A few of the cases in which APA has participated as *amicus curiae* include: *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata*, 38 P.3d 59 (Colo. 2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

As the need arises, the APA develops policies that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In recent years, several policy guides have been adopted that highlight APA's concerns about the issues involved in the present case, including a Policy Guide on Planning for

Sustainability (April 2000), and a Policy Guide on Smart Growth (April 2002).[1] For example, the APA Policy Guide on Planning for Sustainability[2] sets out the APA's view of the importance of good planning in developing sustainable communities and resources to support them,[3] the value of democratization of the planning process,[4] and the dangers, *inter alia*, of suburban sprawl, traffic congestion and other adverse environmental and social effects caused by a short-sighted, rather than long-term and future-oriented, planning policy.[5]

The Oregon Chapter of APA is committed to these same goals, specifically in respect of land use planning and urban/rural communities in Oregon. The Oregon Chapter has over 800 members and its membership consists of professional planners, attorneys, officials, citizens and others concerned with the far-reaching impacts of the planning process. The Oregon Chapter has been involved in challenges to legislation that materially and adversely affects good community planning, such as Measure 7. The Oregon APA has also been involved as *amici* in cases that raise implications for the overall effectiveness of the Oregon land use planning system, such as *League of Oregon Cities v. State*, 334 Or 645, 56 P3d 892 (2002) and *Utsey v .Coos County*, 176 Or App 524, 32 P3d 933 (2001) *rev. dismissed* 335 Or 217, 65 P3d 1109 (2003), both of which raised important questions about public participation in the land use process and the proper interpretation and application of land use regulations. Like the APA itself, the Oregon Chapter creates a variety of policies to address critical planning issues, including, for example, a policy on the takings clause of the Oregon Constitution. *See* Oregon APA's Position on Takings at www.oregonapa.org/PositionPapers.htm#Takings.

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The American Planning Association and its various Chapters are committed to stable, coherent, policy-driven and long term future-oriented comprehensive planning so as to ensure that communities are good places to live, offering economic and other opportunities to their inhabitants. The Court of Appeals opinion below will foster a piecemeal, case-by-case approach to planning which is a recipe for urban sprawl, increased traffic and pollution, poor use of resources and gradual degradation of communities. Judicial interpretations of state and federal constitutional takings provisions go to the very heart of the APA's policies and objectives, as they have dramatic and far-reaching effects on the land planning and decision-making use process. Businesses, residents, local government and developers alike benefit from an approach

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[1] Each of these can be found at http://www.planning.org/policyguides/

[2] American Planning Association, *Policy Guide on Planning for Sustainability*, Adopted by Chapter Delegate Assembly on 16 April 2000, Ratified by Board of Directors on 17 April 2000, New York, NY; available on-line at www.planning.org/policyguides/ sustainability.htm.

[3] *Id* at Part III: Policy Positions

[4] *Id* at Part II: Framing the Issue and Policy Positions

[5] *Id* at "U.S. Indications of Community Unsustainability"; Part II: Framing the Issue; Part III: Policy Positions.

to planning that is clear, predictable and democratic in its scope. The decision below will undermine this objective.

1000 Friends of Oregon and The Oregon Chapter of the APA are concerned that the decision of the Court of Appeals in this matter has considerable implications for the entire Oregon land use process, and thus directly affects all aspects of 1000 Friends' and the Oregon Chapter's work. The Court of Appeals decision may significantly impede legitimate efforts by municipalities to regulate the use of land by any means whatsoever, disabling the forward-thinking approach currently employed by Oregon's land use system. 1000 Friends are concerned that this decision will impair its efforts at protecting farmland and forestland for rural uses. The nationwide APA is concerned to ensure progressive land use planning throughout the United States, and seeks involvement in any state or federal matter which affects that overall goal. Thus, 1000 Friends of Oregon, the APA and its Oregon Chapter respectfully ask permission to be joined as *amici* in this matter.

II.ANALYSIS

The decision of the Court of Appeals, rejecting the "whole parcel" rule, is a manifest departure from established practice amongst municipalities, and a great and unwelcome surprise to virtually all those working in the land use field in Oregon. The Court of Appeals relied solely upon, and misinterpreted, the Supreme Court's decisions in *Fifth Avenue Corp v. Washington* 282 Or 591, 581 P2d 50 (1978) and the Court of Appeals' decision in *Boise Cascade Corp. v. Board of Forestry*, 131 Or. App. 538; P.2d 1033 (1994) as "effectively reject[ing]"[6] the "whole parcel" rule. Both cases are clearly distinguishable from the instant case.

In *Fifth Avenue* the Supreme Court considered different tracts under different criteria because those tracts were afforded different designations: either "commercial/residential" or "transit/greenway". However the "commercial/residential" classification was a specific zoning classification, while the "transit/greenway" classification was a mere identification of the area for eventual public acquisition for siting of public facilities, and thus concerned governmental powers of condemnation & appropriation. Zoning powers and condemnation powers are very different, and require different inquiries by the Court. Thus it was proper for the Court to deal with each "parcel" separately, though properly understood the case has no implications for the applicability of the "whole parcel" rule in an ordinary regulatory takings case.

In *Boise Cascade*, two claims were made by Boise Cascade Corp. in respect of different areas of the parcel – the first a physical takings claim, the second a regulatory takings claim in which the "whole parcel" rule does not apply under any interpretation of the takings clause – and thus the Supreme Court was forced to consider each separate claim on its own merits. More importantly, given that the Court was ruling on whether a motion to dismiss had properly been granted, it had to assume the truth of all the allegations made by Boise Cascade, including the allegation that Boise Cascade had been deprived of all economically viable use of their property, which the Court treated as an allegation of fact rather than of law. Again, properly understood, this case has no implications for the applicability of the "whole parcel" rule in Oregon.

The Court of Appeals in *Coast Range Conifers* acknowledged that the Supreme Court in

[6] Per Landau P.J. at 189 or App at 549.

neither *Fifth Avenue* nor *Boise Cascade* "…expressly label[ed] its decision as a rejection of the principle labeled the 'whole parcel rule.'"[7] It is thus surprising that either case is used as authority for such a sweeping proposition, that the Supreme Court has effectively rejected the "whole parcel" rule in Oregon. Moreover, the Court of Appeals failed to make reference to authorities such as *Multnomah County v. Howell* 9 Or. App. 374, 379-80, 496 P.2d 235, 237 (1972) where the "whole parcel" rule was specifically applied to land use matters in Oregon, and therefore achieved doctrinal acceptance in Oregonian jurisprudence. Thus, when measured against countervailing authorities, against the unfettered application of the "whole parcel" rule in Federal Takings cases,[8] and against accepted municipal practice that has been and continues to be extensively relied upon by citizens, developers and state & local government alike, the *Fifth Avenue Corp.* and *Boise Cascade* cases are scant authority for the proposition that the "whole parcel" rule has been rejected by the Oregon Supreme Court in any comprehensive manner.

It is essential that the Supreme Court review this case because it presents a significant question of constitutional law. This case represents a complete departure from this Court's precedent interpreting the takings clause in Article I, section 18 of the Oregon Constitution. Further, if the Court of Appeals decision in this case is allowed to stand, it will significantly impede legitimate efforts by municipalities to regulate the use of land for public purposes and impairing the forward-thinking proactive approach to land use planning employed in Oregon. For example, allowing compensation for a limitation of a use to one portion of a property without considering the whole parcel would require compensation for a host of regulatory tools used by municipalities to ensure for safety and livability such as set-back, open space, lot coverage limitations, minimum lot size requirements, or prohibiting development in environmentally sensitive areas.

For the purposes of this brief, 1000 Friends, the APA, and its Oregon Chapter respectfully adopt the points and analysis raised by the State of Oregon as petitioner for review, and by the Columbia River Gorge Commission, the League of Oregon Cities et. al., and the Audubon Society of Portland et. al. as *amici curiae*. Should the petition be granted, 1000 Friends, the APA and its Oregon Chapter intend to file an extensive supplemental brief on the merits of this matter, which will include these points, among others.

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III.CONCLUSION

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

DATED this 16 day of August, 2005.

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[7] Per Landau P.J. at 189 Or App at 549.

[8] E.g. see *Keystone Bituminous Coal Ass'n v. DeBenedectis*, 480 U.S. 470, 498 (1987); *Tahoe Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002).

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CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original and 12 copies of the enclosed PETITION FOR REVIEW with the:

State Court Administrator
Supreme Court Building
1163 State Street
Salem, Oregon 97301-2563

by first-class mail, postage prepaid. On the same date, I served two true and correct copies by first-class mail, postage prepaid, on the following parties:

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