CHAPTER 2: COUNTY AUTHORITY
(This chapter was revised and updated in 2008 and updated in 2010 and 2012)

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CHAPTER 2: COUNTY AUTHORITY

2.000 COUNTY GENERAL POWERS. Legal authority to construct, operate and maintain county roads derives from a combination of state statutes and the general powers of county governments. State statutes of both mandatory and permissive effect are identified throughout this manual. This section presents a brief summary of the general powers of Oregon counties, and sections 2.100 and 2.130 explain the relations between general county powers and state statutory authority.

Legal Status of the County. The U.S. constitution makes no reference to local government of any type, so the powers reserved to the states under the 10th amendment include the power to create, abolish, define the powers and otherwise provide for any system of local government. All states have created local governments, and have granted them significant local discretionary powers to set local policies and manage their local affairs.

The term "home rule" refers generally to the extent to which a county or other local government may determine its own form of organization, functions, financial structure, and administrative systems. In Oregon, counties have home rule of two kinds—statutory and constitutional. Statutory home rule consists of powers delegated by the state legislature, which may be retracted or modified at any time by subsequent state legislation. Constitutional home rule consists of powers reserved directly to the people by the state constitution (Article VI, section 10) and vested in county government by adoption of a county charter. Constitutional or charter home rule powers may be retracted or modified only by charter or constitutional amendment. By the end of 1992, county charters had been adopted by the voters of nine Oregon counties—Lane (1962), Washington (1962), Hood River (1964), Multnomah (1966), Benton (1972), Jackson (1978), Josephine (1980), Clatsop (1988) and Umatilla (1992).

Statutory Home Rule. As mentioned above, many sections of Oregon statutes affect the way counties construct, operate and maintain county roads, and this manual makes an effort to identify those sections that are most relevant. The statute that conveys the broadest local discretion to counties is ORS 203.035, which says that any county "may by ordinance exercise authority within the county over matters of county concern." Originally adopted in 1973, this statute was intended to delegate to all counties local legislative powers previously enjoyed only by charter counties. Enactment of this statute laid the foundation for the 1981 general revision of county road laws that recognized the greater flexibility and local control counties now have over their road systems.

Constitutional Home Rule. The scope of a charter county's home rule powers depends in part on the wording of its charter. All nine Oregon charter counties have adopted, in one form or another, the "general grant of power," which permits the county to take whatever actions it could be allowed to take under the federal and state constitutions and laws. The general grant of powers allows maximum discretion for counties to decide for themselves, without further recourse to the state legislature, matters relating to their organization, powers, functions and finances.
An important caveat: as a practical matter, the scope of a county's home rule powers (whether statutory or constitutional) also depends in part on the way the courts interpret them. Legal interpretation of a county's home rule powers usually occurs when there is a conflict between a local enactment or action and some provision of state law. Under those circumstances, the Oregon Supreme Court ruled in 1978 that a general state law imposing "substantive social, economic, or other" regulations prevails over a conflicting local enactment, but if the state law deals only with the "structure and procedures of local agencies," the local enactment prevails over the state law. The court attached some important qualifications to this test, and attorneys have experienced great difficulty in trying to figure out exactly what it means (see Etter, Municipal Home Rule in Oregon, cited in section 2.015 below). Another complication as it relates to county roads is that the 1978 case interpreted the municipal home rule provisions of the state constitution (not the county home rule provisions), but legal authorities have generally regarded it as an authoritative guide to the interpretation of county home rule powers as well.

Difference between Statutory and Constitutional Home Rule Powers. The major difference between the powers of charter counties and those of general law (non-charter) counties is that charter home rule allows a county to change significant features of the county's organization structure (including converting certain county offices from elective to appointive status), while general law counties have very limited powers in that respect. For most purposes related to county road administration there is little or no difference between charter and general law counties. However, as noted above, the powers delegated by ORS 203.035 may be retracted or modified by the state legislature at any time, whereas the home rule powers reserved to the people by Article VI section 10 of the state constitution and vested in counties by a county charter can be retracted or modified only by amending either the state constitution or the county charter, which of course requires a vote of the people.

2.015 SPECIAL REFERENCES. The following are sources of information outside this manual that are particularly relevant to sections of this chapter, as noted.

Section 2.000

U.S. Advisory Commission on Intergovernmental Relations, Measuring Local Discretionary Authority (Washington DC., November 1981 (not available on web))

Association of Oregon Counties, Oregon County Government, County Home Rule Papers (Salem, 2005)


Bureau of Governmental Research and Service, University of Oregon, Model County Charter (Eugene, 1977). The Bureau's Model County Charter is out of print but may be available in public libraries.

Duncombe, Herbert S., Modern County Government (Washington DC., National Association of Counties, 1977)

Etter, Orval, *Municipal Home Rule in Oregon* (Eugene, University of Oregon School of Law, 1991)


Section 2.100

Association of Oregon Counties, "Road Width Laws from the 1840's Onward"

Section 2.200


Section 2.520


**2.100 ROAD AUTHORITY GENERALLY.** The broad scope of county authority is refined as it applies to roads by various statutes, primarily those contained in ORS Chapter 368. ORS 368.011 and 368.016 establish that a county ordinance can replace or supplement most statutory procedures for road authority both on and off the county road.
system. The definitions in ORS 368.001, the distinctive status of local access roads under ORS 368.031, and the general description of the duties of county road officials in ORS 368.046 round out the picture of broad county authority in the road field. Although it does not deal with roads, ORS 368.021 regarding trails is a related statute which further describes the broad authority available to the county. County jurisdiction as it relates to various classes of roads both inside and outside cities including jurisdictional transfers is discussed in more detail in chapter 8 (see sections 8.100 and 8.525). The county’s control of access to the right-of-way and the use of public rights-of-way are similarly covered in detail in chapter 10 (see section 10.200 for utilities’ use; sections 10.000, 10.200, 10.510 and 10.520 for control of access; and section 10.525 for county ordinance authority on the use of rights-of-way.)

Furthermore, ORS 373.110 to 373.130 provides that a county may provide a connecting road in a city as a county road when it is necessary to connect an existing county road with and existing state highway or, in a city of less than 2,500 population, to connect county roads. The procedure for establishment of a connecting road is as provided by law for establishment of county roads, including the power of eminent domain.

When a county constructs a bridge that is at least partially within a city, the county may also use any necessary city streets as an approach for the bridge. Approach portions of the streets are exclusively under county jurisdiction.

Although consent of the city is not required for the county to do these things, coordinated and mutual planning agreements foster smooth project implementation. See chapter 13 for a description of responsibility in cases involving a change in street grade due to a county road project.

2.110 STATUTES ON ROAD AUTHORITY

Chapter 368

County Roads

ORS 368.001 Definitions
ORS 368.011 County authority to supersede statutes; limitations
ORS 368.016 County authority over roads; limitations
ORS 368.021 County authority over trails
ORS 368.026 Withdrawal of county road status; report; notice; hearing
ORS 368.031 County jurisdiction over local access roads
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**Chapter 373**

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**Chapter 374**

_Approach Roads, Private Crossings and Other Facilities upon Right of Way_

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374.315 Construction under permits; maintenance after construction

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374.990 Penalty for violation of ORS 374.305 or rule adopted under ORS 374.309 or 374.310

Chapter 758

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758.010 Authority to construct lines and facilities; requirements and conditions

758.025 Relocation of utilities in highway right of way; required consultation; recovery of costs

Chapter 810

Road Authorities, Jurisdiction

810.010 Jurisdiction over highways; exception

810.180 Designation of maximum speeds; rules

2.120 CITATIONS ON ROAD AUTHORITY

35 Or. Att'y Gen. Op. 1230 (1972): ORS Chapter 92 (ORS 92.090) draws no distinction between charter and non-charter counties. Therefore, a non-charter county may prescribe the same standards for a private road within its jurisdiction as are set for public roads bearing in mind the intended use and the degree to which the road will
otherwise affect public safety and welfare.

34 Or. Att'y Gen. Op. 907 (1969): The county court is obligated to prevent obstruction of an open, dedicated public road, even though not expressly accepted as a county road, because of the county's authority over public highways within its jurisdiction. (Citing to ORS 368.551 now repealed. However, county jurisdiction has been preserved in ORS 368.016 and 368.031.)

34 Or. Att'y Gen. Op. 868 (1969): When public use and county maintenance of a road have continued for more than 10 years, the road can be considered part of the county road system. Such acts of the county as long, continued maintenance of and the exercise of authority over a road can constitute acceptance of the road without the formal adoption of a resolution. (Citing ORS 368.405, 368.546 and 368.551, now repealed. However, the opinion seems relevant in considering the application of ORS 368.016(3), particularly to factual conditions prior to 1981.)

31 Or. Att'y Gen. Op. 85 (1962): A county road official need not be a professional engineer unless called upon to do engineering work, in which case the county may engage an engineer from the state highway division to do engineering work.

2.130 COUNTY MODIFICATION OF STATUTORY PROCEDURES. In drafting the road laws a special effort was made to distinguish enabling legislation, which supplements county general powers, from preemptive legislation, which limits county powers. This is accomplished primarily by ORS 368.011, which expressly authorizes a county to enact ordinances to supersede any of the sections of ORS Chapter 368 except for the sections listed as not subject to being superseded. A county ordinance for this purpose could completely replace one or a group of statutes, or the ordinance could retain the statutes and serve as a supplement.

Illustrations are found elsewhere in this manual. See section 2.330 for an example of an ordinance to replace statutory notice provisions; see section 6.800 for an example of an ordinance to supplement statutory legalization provisions.

2.200 COUNTY ROADS AND TRANSPORTATION PLANNING. Today, the county road system (as well as other county programs) must respond to a very broad range of complicated social, economic and environmental concerns while it goes about doing its primary job of moving people and goods efficiently and safely among locations within the county. This growing responsibility in the 21st century requires planning on the part of the county, both land use planning and transportation planning. Because of the growing and expanding demands for land use and transportation planning, this chapter has been split into two chapters, Chapter 2, “County Authority”, and Chapter 2A, “County Roads and Planning.” (Sections 2.200 to 2.240 previously included in Chapter 2 have been moved, expanded and updated in Chapter 2A).

2.300 PRINCIPLES OF NOTICE. ORS 368.401 to 368.426 establish notice procedures which provide constitutional protections to those who may be subjected to a
taking of property as a result of county road activities. The courts insist upon a good faith effort on the part of a public agency to notify property owners if there is a potential issue involving property rights. The parties are thus afforded an opportunity to file objections to any impending action involving a public hearing.

The following uniform notice procedures are for use in a county action related to roads that require notice. It need not be limited to actions that could cause a taking of property. The procedures could be applicable in numerous instances, including the following covered in this manual:

- Assessing the cost of road work, chapter 3.
- Acquiring property for public road purposes (establishing a road), chapter 5.
- Legalizing a road, chapter 6.
- Vacating a road, chapter 7.
- Withdrawing a road from the county road system, chapter 8.
- Creating statutory ways of necessity, chapter 9.
- Assessing the cost of abatement of road hazards, chapter 10.

2.310 STATUTES ON NOTICE.

Chapter 368
County Roads

368.401 General notice provisions
368.406 Notice by service
368.411 Notice by posting
368.416 Notice by publication
368.421 Record of notice
368.426 Contents of notice

Chapter 308
Assessment of Property for Taxation
2.320  CITATIONS ON NOTICE.

Shoji v. Gleason, 420 F. Supp. 464 (1976): “Notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of an action. It also must reasonably convey the required information . . . . A notice which fails in either respect denies due process to interested parties . . . . We cannot conclude that the notice sent reasonably conveyed the required information. Instead, it obscured it. Its dry prose and legalistic phrases obscured both the imminence and the significance of the proceedings to follow. A reasonable recipient easily could conclude that it was a notice of an event of general public interest rather than an initial, crucial step in a proceeding which could impinge upon his property rights.”

Mullane v. Century Hanover Bank and Trust Co., 70 S. Ct. 652 (1950): “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection. . . . The notice must be of such a nature as reasonably to convey the required information. . . . and it must afford a reasonable time for those interested to make their appearance. . . . But when notice is due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.”

2.330  MODIFICATION OF NOTICE PROCEDURES. The provisions of ORS 368.401 to 368.426 on notice apply to a number of county hearing procedures, unless modified by a county ordinance. If a county considers some modification of the statutory procedure for providing notice desirable, it can (1) adopt an ordinance replacing or supplementing the notice statutes; or (2) include modifying provisions in an ordinance addressing a specific type such as vacation or legalization. See section 2.130. The following is an example of provisions of an ordinance that would replace ORS 368.401 to 368.426.

SAMPLE ORDINANCE

Section 1. Ordinance Replaces Statutory Notice Procedure. This ordinance replaces the procedure for giving notice to certain persons under ORS 368.401 to 368.426. Where use of the statutory procedure is specified, the procedure of this ordinance shall be used for proceedings initiated after the effective date of this ordinance.

Section 2. Notice by Service. When the county is to give notice under this ordinance by service the procedure is as follows:

(1) The county official responsible for serving notice shall attempt to personally serve the notice but is not obligated to travel outside the county for
this purpose. The official shall prepare a notice to be mailed by certified mail, return receipt requested, at least 30 days before the date of the proceeding that is the subject of the notice. The notice shall be mailed to the address of persons who did not receive personal service before the mailing.

(2) The official shall accomplish notice that is personally served by obtaining a signed acknowledgement of receipt of notice from:

(a) The person being served; or

(b) A person 18 years of age or older who resides at the address of the person being served.

(3) A person's refusal to sign a receipt for notice that is personally served or mailed under this section is a waiver of any objection based on nonreceipt of the notice in any proceeding.

(4) Except where the county official has personal knowledge of a more appropriate address for the notice, the address to be used for notice personally served or mailed under this section is the address of the person to be served as shown on the tax rolls.

(5) If a receipt has not been received from a person who appears entitled to notice by service under section 2 of this ordinance by the 20th day before the proceeding that is the subject of notice, the county official shall post a notice at an entrance to the person's property that is expected to be affected by the proceeding. A notice posted under section 3 of this ordinance will substantially fulfill this requirement.

Section 3. Notice by Posting. When the county is to give notice under this ordinance by posting, the procedure is as follows:

(1) The county official responsible for posting notice shall post notices in no less than three places. The places where notice may be posted include any of the following:

(a) The property subject to the proceeding that is the subject of the notice; or

(b) Property within the vicinity of the property described in paragraph (a) of this subsection.

(2) Notice that is posted on property under this section must be plainly visible from a traveled public road.

(3) Notwithstanding subsection (1) of this section, the county official may post fewer than three notices if the small size of the property limits the value of the number of postings.

(4) The official shall post the notice at least 20 days before the date of
Section 4. Notice by Publication. When the county is to give notice under this ordinance by publication, the procedure is as follows:

(1) The county official responsible for providing notice shall have the notice published in a newspaper of general circulation in the county where the property that is the subject of the proceeding is located or may publish the notice in a newspaper of general circulation in the portion of the county containing the property.

(2) The official shall publish notice once at least 15 days before and once within 10 days of the date of the proceeding that is the subject of the notice.

Section 5. Record of Notice. The county official responsible for this ordinance shall complete and sign an affidavit containing a record of the procedure followed to provide notice under those sections. The official shall file the affidavit with the record of the proceedings for which the notice is required.

Section 6. Contents of Notice. Any notice under this ordinance shall include all of the following:

(1) A short plain statement of the subject matter of the proceeding that requires the notice.

(2) A statement of matters asserted or charged or action proposed to be taken at the proceeding.

(3) An explanation of how persons may obtain more detailed information about the proceeding.

(4) A statement of any right to hearing afforded any parties under law.

(5) The time and place of any proceeding that will take place.

(6) A reference to particular sections of statute, charter, ordinance or rule that provide the jurisdiction and process for the proceeding that is the subject of the notice.

Section 7. Supplemental Information. The county official responsible for serving notice under this ordinance may use other appropriate means in seeking to inform affected parties of a pending action.

2.500 JURISDICTION OVER ROADS. Oregon was granted statehood by Congress in 1859. At that time Congress required the new state to use 5 percent of the net proceeds from land sales for road building and other improvements. Territorial roads previously in existence became county roads at the time of statehood and were maintained
by these funds. Some of these county roads were later designated as state highways, either by the Oregon legislature or the state Highway Commission (now the state Transportation Commission).

Private individuals were authorized to build toll roads by the Oregon legislature in 1862. Most of these roads were eventually sold to the counties. Early in Oregon history, counties were required to establish and maintain these acquired roads and other roads already a part of a county road system. Reference to county roads in some of the old laws probably referred to all rural roads; however, over time, two groups of roads evolved.

Current statutes pertaining to county roads provide counties with greater discretion and alternatives as far as the management of roads is concerned. While counties are still required to maintain county roads, expenditures for road care may be made without placing a road on the county road system or creating a county obligation to maintain the road.

ORS 368.016 declares roads a matter of county concern. This erases any question that the general powers of ORS 203.035 and county charter powers are sources of general authority to address road-related matters. The primary significance of ORS 368.016 is the description of county authority when another governmental jurisdiction has an interest in a road. It establishes that a county has no authority over state highways. In the case of roads inside a city, county involvement is limited to that which receives city consent. However, a county needs no city consent to care for a county road inside a city.

Although a county has no road authority in the case of state highways, the county may participate in highway projects. The extensive ability to cooperate with the state Department of Transportation and other governmental entities is discussed in chapter 11.

County authority over roads is a broad authority applying to roads off the county road system as well as those on the system. County authority applies to private roads as well as public roads to the extent that private roads may be a matter of county concern. To help keep straight the various types of roads that may be of concern to a county, ORS 368.001 establishes definitions for various classes of roads. The word "road" used by itself applies to both public and private vehicle ways. This is consistent with the definition in ORS 92.010 of the subdivision laws. A bridge or culvert is part of a road. A "public road" is a road that is documented by a public record as existing for public use. A "county road" is one on the county road system. "Local access roads" are all the public roads that are not part of the county road system and are not state or federal roads. For purposes of identifying a county's role, note that city streets that are not part of the county road system are "local access roads." The fact that the word "local" is included in this term does not exclude city arterial and collector routes from the meaning of "local access roads." The fact that a state or federal road is not a local access road does not prevent county involvement in state or federal road projects. By not being local access roads, the special agreements of ORS 368.031 would not apply to county involvement in state or federal road projects. Chapter 8 details county jurisdiction over various types of roads and discusses related procedures.

2.520 OBLIGATIONS AND LIABILITIES. The following provides some information on county tort liability including key changes enacted by the 2009 Legislature. Torts are wrongs to private parties, in contrast to crimes, which are considered wrongs to
the public in general. The same conduct may constitute both a tort and a crime. A tort is a wrongful act (usually a negligent act) that results in damage to a person or to someone's property. For example, reckless driving resulting in an accident causing personal injury or property damage is a tort.

For both state and local government there is a long tradition of considerable immunity from tort liability. However, the enactment in 1967 of the Oregon Tort Claims Act (OTCA), ORS 30.260 to 30.300, generally makes the state and local governments liable for the torts of their officers, agents and employees if the torts are committed within the scope of their employment. In general, Oregon governments are liable like private individuals or entities for all types of torts--e.g., personal injury, property damage, wrongful entry, false arrest and detention, malicious prosecution, abuse of process, invasion of privacy, interference with contractual relations, and defamation. Liability for such torts exists when performing both governmental and proprietary functions.¹

The tort claim damage limits were increased by the 2009 Legislature. The per claim damage limits under the OTCA were increased from previous $200,000 to $1.5 million for the state of Oregon, and to $500,000 for local governments. The per occurrence damage limits were increased from $500,000 to $3 million for the state of Oregon, and to $1 million for local governments. For counties, the per claim limit will be raised by approximately $33,300 each year until 2015 and the per occurrence limit will be increased by approximately $66,600 each year until 2015. (See ORS 30.272 for the current limits for counties.) All property damage limits were increased from $50,000 per claim to $100,000 per claim, and to $500,000 per occurrence. After 2015, the tort limits will rise yearly based on the Consumer Price Index, with a maximum cap of 3 percent a year.

The statutes, while making tort liability the rule, also outline several exceptions which preserve important governmental immunities from liability. For example, there is no liability for injuries compensable by workers’ compensation. Nor are public bodies liable for injuries resulting from the acts of public employees who by law are privileged when acting in their official capacities, such as judges and legislators.

An additional exception to tort liability exists for faulty performance of or failure to perform a discretionary function, whether or not the discretion is abused. But this exception has been interpreted strictly by Oregon’s appellate courts. According to the Oregon Supreme Court, the term "discretionary" involves "room for policy judgment" when a political balancing of policy objectives must be made. Clues as to whether governmental discretion is exercised include the level of administration at which the decision was made and the level of technical expertise required to make the decision. The court has cautioned, however, that a mechanical approach cannot be taken when determining whether an act is discretionary. While in some instances the nature of the decision alone may be sufficient to establish immunity, in others no determination is possible until it is known how the particular decision was made.

In Stevenson v. State of Oregon, 290 Or. 3, 619 P.2d 247 (1980), the state was alleged to be negligent in failing to shield a highway light so as to prevent a misleading

¹ For additional information on managing liability claims see Chapter 3, “Tort Liability and Risk Management,” of Safety Handbook for Oregon’s Local Roads and Streets by Mojie Takallou, Ph.D., P.E., University of Portland, 2010.
effect on traffic approaching an intersection. The state argued in response that determining
the need for such equipment is a discretionary function and, therefore, under the provisions
of the Oregon Tort Claims Act, no liability should exist. However, the Oregon Supreme
Court found nothing in the record to indicate that employees of the highway division made a
policy decision when installing the highway lights at the intersection in question. Evidence
did indicate that the employees' engineering judgment was negligently exercised in relation
to standards adopted by the state Highway Division, which in this case were included in the
Manual on Uniform Traffic Control Devices. The court held that when the design arrange-
ment of roads or traffic control devices is not consistent with standards adopted by the
public agency for such activities, liability for negligence may be enforced.

More recently, the Oregon Supreme Court has further refined their interpretation of
discretionary immunity in a case involving a traffic accident created by vision obscured by
overgrown roadside vegetation. In Hughes v. Wilson, 345 Or. 491 (2008), Wasco County
was alleged to be negligent in failing to remove a large bush that obstructed the plaintiff’s
view and resulted in a collision with a car driven by the defendant. The county moved for
dismissal based on a policy that relied on private landowners to remove, or notify the
county, of brush that obstructed visibility. The Court reversed lower court rulings and held
the county was not entitled to discretionary immunity because there was not sufficient
evidence to demonstrate it had put its policy into effect by communicating it to landowners.

In another recent case involving vegetation management and a lack of warning
signs, the Oregon Court of Appeals ruled in favor of Washington County on discretionary
immunity grounds in a case also involving overgrown vegetation that caused an accident, Timberlake v. Washington County, 226 Or App 607. The plaintiff alleged the county was
negligent in failing to remove foliage that had grown at the site of the collision and blocked
visibility, however, the county stated its failure to maintain the site was the result of a policy
allocating limited maintenance resources to specifically identified areas. The Court held in
favor of Washington County, stating that although a local government cannot choose not to
exercise a particular duty of care, it does have discretion to choose how to carry out that
duty. Washington County had previously passed a board resolution adopting a road
maintenance policy that dictated how resources would be allocated. The county, on a yearly
basis, schedules maintenance activities based on a priority matrix determined by the
functional classification of roads. Two-thirds of the road maintenance funds are allocated
on this basis, and the other one-third is allocated responding to complaints. With respect to
the accident that was the subject of the court case, the road in question was not on the
scheduled maintenance list and no complaints had been received. Included in this section is
a link to both a past board order from Washington County adopting a road maintenance
work program and the road maintenance priority matrix.

Over the past several decades, Oregon courts have increasingly limited the ability of
counties to rely on discretionary immunity. The two cases illustrated above demonstrate the
necessity to have a board adopted policy clearly communicating the road maintenance
priorities for the year. In light of the increase in tort claim limits for local governments, the
reluctance of courts to grant summary judgment on discretionary immunity grounds, and
ever shrinking county budgets, it is important that counties exercise sound risk management
and communicate priorities to the public. See section 2.525 for other case citations.

A few statutes outside of the Oregon Tort Claims Act also expressly limit the same
areas of potential liability. For example, a county is not liable for failure to maintain roads
that are not on the county road system (local access roads). However, a county liability remains for negligent performance of work on a local access road if the county chooses to act. The Act did not do away with preexisting non-tort law under which local government has been subject to damage suits. For example, public agencies have long been liable for creating nuisances and for affirmative wrongdoing that amounts to trespass or to taking property without compensation.

Under Oregon's Tort Claims Act, in order to collect on most claims, persons who seek damages from local government units on account of torts must file a notice of their claims with the units within 180 days after they knew, or should have known, the alleged torts were committed. Legal action based on an alleged tort generally must be commenced not later than two years after the accident or occurrence.

ORS 368.031, which was described previously, establishes that a county generally is not obligated to care for a local access road. Several of the citations in section 2.120 are particularly relevant to this ORS section.

2.523 STATUTES ON OBLIGATIONS AND LIABILITIES

Chapter 30

Tort Actions Against Public Bodies

30.260 Definitions for ORS 30.260 to 30.300

30.261 Limitation on applicability of ORS 30.260 to 30.300 to certain private, nonprofit organizations

30.265 Scope of liability of public body, officers, employees and agents; liability in nuclear incident

30.269 Limitations on awards under Oregon Tort Claims Act generally

30.271 Limitations on liability of state for personal injury and death

30.272 Limitations on liability of local public bodies for personal injury and death

30.273 Limitations on liability of public bodies for property damage or destruction

30.274 Direct appeal of constitutionality of limitations

30.275 Notice of claim; time of notice; time of action

30.278 Reporting notice of claim of professional negligence to licensing board

30.282 Local public body insurance; self-insurance program; action against
2.525 CITATIONS ON OBLIGATIONS AND LIABILITIES

Timberlake v. Washington County, 226 Or App 607 (2009): On June 3, 2005, Matthew Lyon was riding his motorcycle on SW Schools Ferry Road in Washington County when he was killed after being hit by a car that did not see his motorcycle approaching the intersection. Plaintiff, the personal representative of the decedent, alleged that the county was negligent in failing to remove foliage that had grown at the site of the collision and blocked visibility. The county moved for summary judgment on discretionary immunity grounds, stating that its failure to maintain the site was the result of a budget-driven policy decision about the allocation of its limited resources available for road maintenance. The trial court granted the motion. On appeal, the plaintiff contended that road maintenance is a ministerial duty imposed by law, and that a local government cannot avoid liability for negligence merely because of limited resources. The Court of Appeals upheld the trial court, stating that although a local government cannot simply choose not to exercise a particular duty of care, it has discretion to choose how to carry out that duty. In this case, the Washington County Board of Commissioners had passed a resolution adopting a road maintenance policy dictating how limited resources would be allocated. The policy provided that two-thirds of the county’s road maintenance funds would be allocated to scheduled maintenance based on a priority matrix determined by the functional classification of roads and the remaining third would be allocated responding to complaints. The road in question had not been scheduled for maintenance under the policy and the county had received no complaints of vision being impaired at the subject intersection.

Hughes v. Wilson, 345 Or. 491 (2008): Hughes brought a negligence claim against Wasco County, asserting the County was negligent in failing to remove a large bush that obstructed his view and resulted in his crashing his motorcycle into a car driven by Wilson. Hughes came around a corner at the same time that Wilson was pulling onto the road from a private driveway. The County moved for summary judgment on discretionary immunity grounds, relying on an adopted policy that relied on private landowners to remove, or notify the County, of brush that obstructed visibility between private driveways and county roads. The trial court agreed the County was entitled to discretionary immunity, and the Court of Appeals affirmed without opinion. The Oregon
Supreme Court reversed the lower courts, holding that the County could not rely on discretionary immunity because it did not demonstrate it had put its policy into effect by communicating it to those landowners. Merely weighing the costs and benefits and making a decision, even if that decision might qualify as a permissible discretionary decision, is not sufficient to entitle a government to immunity. The government must also demonstrate that it took the action necessary to effectuate that decision.

Lisa Ann John v. City of Gresham, 214 Or. App. 305 (2007): The plaintiff’s son was struck by a vehicle while crossing the street in a painted crosswalk. The City of Gresham and Multnomah County argued that the decision to paint the crosswalk, part of a traffic improvement project constructed by the city and county, was a discretionary decision subject to immunity under the Oregon Tort Claims Act. The Court of Appeals ruled against the city, stating that deference to the county’s recommendation to paint the crosswalk did not result in protection by discretionary immunity, as the decision must be a result of an exercise of judgment for discretionary immunity to apply. The court also held regarding the county, the fact that the decision to paint the crosswalk was part of the approval of the overall final design also did not result in protection by discretionary immunity, since the decision merely determined compliance with existing policies and did not involve a judgment about matters of public policy. In addition, the court did not accept the city’s argument that it was free from liability because it did not own the street where the accident occurred, stating that a city or county may be liable if the conduct caused a foreseeable harm to an interest protected against that kind of negligent invasion.

Weatherford v. County of Klamath, 201 Or. App. 601, 120 P.3d 530 (2005): The plaintiff alleged the county was negligent in failing to remove snow and ice from a parking lot, resulting in the plaintiff slipping and injuring herself. The county maintained that the ice melting product was not spread in the parking lot area where the plaintiff slipped because the county had a general policy against spreading the ice melting product in parking lot areas. Therefore, the county asserted it was entitled to immunity. The circuit court agreed. The Court of Appeals reversed, and determined that it was possible that the county employees responsible for spreading the ice melting product were authorized to act according to their best judgment, and not pursuant to any policy. In that event, their decision would not entitle the county to immunity.

Vokoun v. City of Lake Oswego, 335 Or. 19, 56 P.3d 396 (2002): The plaintiffs bought property next to Tryon Creek State Park, which was part of the Red Hills subdivision. They brought an action for inverse condemnation and negligence against the city after their home was damaged in a landslide, which the plaintiffs alleged was caused by the city constructing a storm drain pipe in a manner that destabilized the soils on and adjacent to the plaintiffs’ property. The circuit court held in favor of the plaintiffs; however, the Court of Appeals reversed and granted the city immunity based on the fact that the city council had adopted a Capital Improvements Plan that didn’t include fixing the problem. The Supreme Court reversed the Court of Appeals, and held that the city was not entitled to discretionary immunity because evidence showed that city employees were making decisions in their routine, “day-to-day” activities about how to deal with the problem. Additionally, there was no evidence the city had considered the problem one way or another in its Capital Improvements Plan.

Garrison v. Deschutes County, 334 Or 264, 48 P3d 807 (2002): Plaintiff had backed his pickup to the edge of the dump, emptied it’s contents to a lower slab 14.5 feet
below, then fell from his pickup to the lower slab. He claimed, using negligence language, faulty design of the dumping area by the County. The Supreme Court, relying of affidavits of the County Public Works and Solid Waste Directors, found that the Commissioners had delegated the responsibility for design to them, and that they had thoughtfully weighed alternatives and compared design risks when choosing this design of the dumping area, and therefore held that their decisions were the kind intended to be given discretionary immunity.

**Ramirez v. Hawaii T & S Enterprises, Inc.**, 179 Or. App. 416, 39 P.3d 931 (2002): The plaintiff, who fell and fractured her ankle after stepping on a broken curb at a downtown intersection, sued the defendant owner of the adjacent property, as well as the City of Portland. The plaintiff based her claims against the city on the city’s failure to inspect, maintain, and repair the curb, despite a city policy calling for inspections every two years. The city argued it was immune from liability under the Oregon Tort Claims Act (OTCA). The circuit court granted judgment in favor of both defendants. The Court of Appeals affirmed the judgment in favor of the city, but reversed as to the property owner. The city was immune because the decision to divert city employees from sidewalk inspection duties to flood-related duties involved the exercise of discretion by the city council, which had the authority to make and delegate decisions regarding the allocation of city resources.

**McComb v. Tamlyn**, 173 Or. App. 6, 20 P.3d 237 (2001): Plaintiff alleged that the State Department of Transportation was negligent in designing the signal phases for the intersection where she was hit by a vehicle turning right as she rode her bicycle in a crosswalk. The Court of Appeals held that the state’s decision to adopt signal phases from the Manual on Uniform Traffic Control Devices (Manual) was not entitled to protection by discretionary immunity. Even if the state’s decision to adopt the Manual was a policy decision, the relevant parts of the Manual were merely descriptive and did not require the use of a particular signal when designing a particular intersection. The Manual stated that engineering judgment was required in the selection of traffic control devices, and the state had not met its burden of showing how the decision was made at this particular intersection.

**Mann v. McCullough**, 174 Or. App. 599, 26 P.3d 856 (2001): The personal representative of Mann, a passenger who died in a car accident, brought suit alleging that the City of Portland was negligent both in making its decisions regarding traffic management and control devices on Fremont Drive and in failing to warn the public of the dangers of speeding on the hill along Fremont Drive, specifically the possibility of a car becoming airborne if approaching the hill at an excessive speed. The Court of Appeals held that the city’s adoption of recommendations of traffic pattern changes were discretionary acts because, although the city council’s decisions were based on recommendations by the city’s Bureau of Traffic Management, those recommendations involved the sort of delegated responsibility and strategic choices that are hallmarks of the exercise of discretionary immunity.

**Draper v. Astoria Sch. Dist. No. 1C**, 995 F. Supp 1122 (D. Or. 1998): The statute of limitations for claims against public bodies within the scope of the Oregon Tort Claims Act is two years, notwithstanding any contrary law.

**City of Tualatin v. City-County Insurance Services Trust**, 321 Or. 164, 894 P.2d
1158 (1995): The city brought suit against its comprehensive general liability (CGL) insurer to recover the costs a municipal officer incurred in defending himself against an ethics complaint. The insurer maintained the insurance contract did not cover defense of the ethics complaint and that the municipality had no right to recover from the insurer the costs of defending the officer. The Court of Appeals held in favor of the insurer. The Supreme Court affirmed, holding that the insurer’s contract promised the company would pay “on behalf of the insured all sums which the insured shall be legally obligated to pay as ‘damages’ because of liability arising under ORS 30.260 to 30.300,” which comprise the Oregon Tort Claims Act (OTCA). The court stated that, read in the context of ORS 30.265 and ORS 30.285, the public body’s duty to defend extends only to tort claims and demands, and since the insurer was bound only to defend against claims under the OTCA it was not bound to defend against an ethics violation complaint.

Hall v. Dotter, 129 Or. App. 486, 879 P.2d 236 (1994): Hall was standing in the median of the Tualatin Valley Highway and was struck by a car driven by Dotter. Hall alleged that the state and Washington County were negligent in designing and maintaining the intersection. The trial court’s grant of summary judgment to the state and county based on discretionary immunity was reversed by the Court of Appeals. The immunity defense was premised on the argument that state traffic inspectors simply followed the Manual on Uniform Traffic Control Devices and had no discretion to deviate from the Manual. However, evidence showed the state installed warning signs at a time contradictory to the specifications of the Manual, which suggested that the Manual was not the type of explicit order that entitled an employee to immunity. The court also held that a county can be liable for harm that occurs on a state road, if the county’s conduct caused a foreseeable harm to an interest protected against that kind of negligent invasion. Additionally, it did not matter that the county had contracted away to the state its responsibility for providing signs or signals. If the county would otherwise be liable for negligence in maintaining its road, then the county remains liable for the negligence of its contractor, even if the contractor is the state.

Bakr v. Elliott and City of Eugene, 125 Or. App. 1, 864 P.2d 1340 (1993): The estate of the decedent sued the city for alleged negligence in failing to inspect or perform any work on a tree that ended up falling and killing the decedent. The trial court held in favor of the city, stating that the city had no actual or constructive knowledge of the hazardous condition of the tree and that the decision not to inspect was an exercise of policy judgment for which it was immune from liability under ORS 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011). The Court of Appeals affirmed, holding that the city was entitled to make a discretionary policy decision not to do anything about trees that it believed to be in fair condition.

Hawkins v. City of La Grande and Wallender v. City of La Grande, 315 Or. 57, 843 P.2d 400 (1992): Simply choosing between available alternatives does not demonstrate the type of discretion that is entitled to immunity.

Mosley v. Portland School District No. 1J, 315 Or. 85, 843 P.2d 415 (1992), affirming in part and reversing in part 108 Or. App. 7, 813 P.2d 71 (1991): This case is cited often in subsequent discretionary immunity cases as a good statement of the law on the subject. Plaintiff sued the school district for injuries suffered in a knife fight on school grounds during lunch period. Among other claims, plaintiff alleged that the
school principal should have had better security and supervision. The Supreme Court, after a lengthy analysis, determined the principal's decisions were immune from liability because they were discretionary under the Court's precedents interpreting ORS 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011).

Tozer v. City of Eugene, 115 Or. App. 464, 838 P.2d 1104 (1992): The plaintiff brought an action against the city, alleging that the driver who collided with her was unable to see a stop sign, and failed to stop, resulting in an injury. The circuit court held that the city was entitled to discretionary immunity under 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011) because the city’s traffic sign inspection and maintenance program was developed through an exercise of policy judgment. The Court of Appeals reversed in favor of the plaintiff, stating that even if the city was immune from claims based on the development of the city’s program, any negligence in the implementation of the program or in the performance of particular maintenance activities is not sheltered by discretionary immunity.

Lowrimore v. Dimmit, 310 Or. 291, 797 P.2d 1027 (1990): Innocent third party, injured when a vehicle being pursued by the deputy sheriff struck her vehicle, sued both the driver of the pursued vehicle and the county. The circuit court entered a default judgment against the driver and ruled the county was not liable. The Court of Appeals affirmed. The Supreme Court reversed, holding that the officer’s decision to pursue the vehicle did not qualify the officer to statutory immunity. Discretionary immunity will apply to decisions involving the making of policy, but not to routine decisions made by employees in the course of their day to day activities, even though the decision involves the choice among two or more courses of action.

Pritchard v. City of Portland, 310 Or 235, 796 P.2d 1184 (1990): The city passed an ordinance putting responsibility for making sure vegetation didn't obscure stop signs on adjoining landowners. Plaintiff, who failed to stop at the stop sign and collided with a pickup truck in the intersection because he claimed the sign was obscured by vegetation, alleged the city was negligent in not properly maintaining the stop sign. The Supreme Court said that since the city didn't specifically say in the ordinance that it was immune, and since the plaintiff was suing for negligent maintenance, not the act of adopting the ordinance (which may have been discretionary), the city could not claim it was immune either because of sovereign immunity or because of discretionary immunity under ORS 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011).

Egner v. City of Portland, 103 Or. App. 623, 798 P.2d 721 (1990): The plaintiff, personal representative of a pedestrian struck and killed while in a crosswalk, brought a wrongful death action against the city. The plaintiff alleged the city was negligent in its decision to change the crosswalk from a marked to an unmarked one, in removing some but not all of the surface material and lighting that marked the crosswalk, and in failing to warn pedestrians that the marked crosswalk had been removed. The circuit court held in favor of the city, and the plaintiff appealed. The Court of Appeals reversed, stating that a decision whether to do maintenance work in a particular manner because of financial constraints might in some circumstances be protected by discretionary immunity. However, negligence in doing the work does not share similar discretionary immunity. The court held that questions of fact existed regarding whether the work had been done negligently.
Clarke Electric Inc. v. State By and Through State Highway Division, 93 Or. App. 693, 763 P.2d 1199 (1988): The unsuccessful bidder on a contract to install traffic signals was not allowed to challenge the rejection of its bid under the Oregon Tort Claims Act since the defendant state agency’s alleged liability was premised on finding that the agency’s order rejecting the bid was improper.

Little v. Wimmer, 303 Or. 580, 739 P.2d 564 (1987): Little was injured when the vehicle she was traveling in collided with another vehicle because of alleged hazardous and negligent design and construction, specifically because the county did not erecting a warning sign that would have warned traffic traveling on the highway of other traffic entering the highway. The Supreme Court held that because there was an absence of evidence that the county’s decision not to install warning signs at the intersection was made as a policy judgment by a person or body with governmental discretion, the decision was not immune from liability.

Donaca v. Curry County, 303 Or. 30, 734 P.2d 1339 (1987): The Oregon Supreme Court reversed the Court of Appeal's blanket holding that a county does not have a common law duty to maintain visibility at intersections of public and private roads. The Supreme Court ruled that whether a county is liable at common law for a motor vehicle accident allegedly caused by county's failure to control vegetation obstructing the view at an intersection should be determined according to general negligence law -- namely, whether county's act or omission caused a foreseeable kind of harm to an interest protected against that kind of negligent invasion, and whether the conduct creating the risk of that kind of harm was unreasonable under the circumstances.

Ramsey v. City of Salem, 76 Or. App. 29, 707 P.2d 1295 (1985): The city’s failure to inspect the sidewalk on which the plaintiff fell was a discretionary act under ORS 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011). The city was therefore immune from liability for the fall.

Sager v. City of Portland, 68 Or. App. 808, 684 P.2d 600 (1984), rev. den. 298 Or. 37: The failure of the city to inspect and repair sidewalks is a discretionary act and immune from liability.

Holdner v. Columbia County, 51 Or. App. 605, 627 P2d 4 (1981): Maintenance of ditches is not a discretionary act, and the county may be held liable for negligence in maintaining them. Negligent maintenance may be a continuous tort, so notice may be given the governing body at any time during the continuation of the conduct or within 180 days after its conclusion.

Saracco v. Multnomah County, 50 Or. App. 145, 622 P.2d 1118 (1981): The plaintiff brought an action against the county to recover damages for personal injuries and property damages allegedly resulting from the plaintiff’s car skidding and colliding with a portion of the county’s bridge. The county contended it was immune from tort liability by virtue of the discretionary act exception provided in ORS 30.265(3)(c) (renumbered ORS 30.265(6)(c) in 2011). The circuit court held in favor of the county. The Court of Appeals reversed, stating the alleged negligence of the county’s employees in failing to inspect, maintain and repair the steel grid surface of the bridge was not a discretionary act that was immune from tort liability, even though technical expertise may have been required.
Stevenson v. State ex rel Dept. of Transportation, 290 Or. 3, 619 P.2d 247 (1980): Stevenson was killed when the car she was in came on to the highway from a side road and was hit by a truck traveling through an apparent green light on the highway. Her estate claimed that the driver of her vehicle was misled by the green light for the highway because the State had not provided light “shields” to prevent this misleading effect. The State argued it was not liable because the decision on how to shield the lights was a policy decision entitled to discretionary immunity.

The Oregon Supreme Court rejected the simple rule it had previously developed that “state employees are generally immune from liability for alleged negligence in planning and designing highways.” The Supreme Court adopted a new rule that the government could claim “discretionary immunity” only if the government function or duty was:

1) The result of a choice or exercise of judgment;
2) That choice must involve public policy, as opposed to the routine day-to-day activities of public officials; and
3) The public policy choice must be exercised by a body or person that has, either directly or by delegation, the responsibility to make it.

The Court held that there was nothing in the record to suggest the responsible employees made any policy decision.

2.530 ROAD-RELATED REGULATIONS. The authority to adopt ordinances on matters of county concern includes the authority to regulate those things affecting roads. Counties do not need to look for express statutory authority on a specific subject, but will need to be aware of various statutory restraints and preemptions to the county's broad authority. For example, a county: (a) has authority to regulate traffic, but not if in conflict with the state's traffic laws (see chapter 14); (b) can control placement of utilities in the road right-of-way, but not prohibit their installation (see chapter 10); and (c) may establish standards for roads in a subdivision if the subdivision standards are consistent with the county's adopted comprehensive plan. When there is a need, the county can consider adopting an ordinance to deal with the need. County regulations are discussed in various chapters as they apply to specific issues.

2.540 ORGANIZATION OPTIONS. Organization within the county government to conduct road work is a matter for local determination. In fact different Oregon counties have a number of different organizational arrangements for county road work. For example:

- Responsibilities assigned to the county road official\(^2\) may be limited to roads or they may include such additional functions as solid waste disposal, parks or building regulation.
- Similarly, a road official may be responsible only for road work but be

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\(^2\) ORS 368.001 defines "county road official" as "the roadmaster, engineer, road supervisor, public works director or other administrative officer designated by the county governing body as being responsible for administration of the road activities of the county."
located within a department that also has separate organization units for other functions such as planning and community development.

- The titles of persons exercising overall direction and supervision with respect to road activities tend to reflect these differences: the title is public works director in 19 counties, roadmaster in 9 counties, road supervisor in 2 counties, road foreman in one county, road department director in one county, transportation and development director in one county, roads and parks director in one county, land use and transportation director in one county and environmental services director in one county. In some counties the person responsible for overall direction and supervision of the road activity is qualified by virtue of formal education (e.g., a civil engineer), while in others he or she is qualified by virtue of practical experience.

The way in which the road department relates to the rest of county government depends on the county's overall form of government. ORS 368.046 does state that "A county road official shall work under the direction of the county governing body," but that statute is not mandatory. Three basic forms of county government are represented in Oregon:

1. **Commission Form:** In this form, both legislative and administrative powers and functions are exercised by an elective board. Oregon counties that have this form of government usually have a three-member governing body (designated as either the board of county commissioners or the county court), and the road department or the department in which the road program is located reports directly to the governing body. County road officials in this system need to keep in mind that they are accountable to the entire governing body, and they must make sure that policies and directives regarding road department operations have at least majority support from the board or county court.

2. **Commission-Administrator Form.** In the commission-administrator form of county government there is a division of administrative responsibility between the elective governing body and an administrator appointed by the governing body. The nature and scope of the division varies widely from county to county. In some counties the administrator is responsible mainly for internal staff functions such as budget, personnel, and purchasing plus other activities that primarily assist the governing body in carrying out its duties. In others, the administrator has general supervision over some or all county departments, including the power to hire and fire department heads. The legal basis of the division of labor also varies from county to county: in some counties it is based merely on understandings between the governing body and the administrator that may or may not be summarized in a written job description; in others the division is spelled out in a county ordinance (which may be amended or repealed by the governing body); and in still others the division is established in general terms by provisions of a county charter that can be changed only by a vote of the people.

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3 ORS 368.011 provides that with certain exceptions, "a county may supersede any provision in this chapter by enacting an ordinance pursuant to the charter of the county or under powers granted the county in ORS 203.030 to 203.075" which includes the power to determine organization matters locally.
About half of Oregon's counties have established some kind of county administrator position. Road officials in those counties need to be aware of the scope of the administrator's authority with respect to road matters. If either the governing body or a county charter has delegated general supervision over the road department to a county administrator, the road official will obviously be accountable directly to the administrator rather than to the governing body.

3. **Commission-Elected Executive Form.** In one Oregon county (Multnomah), central administrative responsibilities are vested in an elected official (the chair of the board of county commissioners). In counties with the commission-elected executive form, there is a legal separation between the legislative (policy making) function and the executive (administrative) function. In most matters affecting the operation of the county road department, however, the arrangement is similar to that in commission-administrator counties in which the administrator appoints and supervises the road official or a department head who in turn appoints and supervises the road official.