CHAPTER 5: ROAD RIGHT-OF-WAY
(This chapter was revised in 2008 and updated in 2010)

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CHAPTER 5: ROAD RIGHT-OF-WAY

5.000 INTRODUCTION. Most roads exist because someone provided the right-of-way. A person provides right-of-way to obtain a benefit, usually in the form of improved access to property the person is developing. These dedicated or deeded rights-of-way normally consist of easements over the land, which leave certain residual property rights with owners of abutting property. As indicated in chapter 7, extinguishing the easement for road purposes by vacation of the road usually reestablishes the abutting owners' control over the land within the road right-of-way.

When providing a road right-of-way the dedicator usually expects more than a place for vehicles to travel. Access to all portions of property along the road and use of the right-of-way for location of utility facilities are the primary additional functions served by most road rights-of-way.

As some of the quiet rural roads became busy thoroughfares, the benefit of the road to abutting property owners changed, and an increased general public benefit emerged. The road system of the county evolved into two parts. One part is made up of traffic-carrying routes; the other part consists of property access routes. Most routes serve part of both functions, but traffic-carrying routes work best if property access is minimized, and property access routes serve best if through traffic is minimized. Traffic-carrying routes make up the backbone of the county road system. Depending on individual county policy, some local access routes also may be part of the county road system, but most are local access roads as defined in ORS 368.001. See chapter 2.

In establishing new right-of-way for a traffic-carrying county road, access limitations increase the likelihood that the property owners involved will expect payment for the value of the property needed for the right-of-way. For this reason, counties must pay for much of the new county road right-of-way, and if it is not possible to negotiate the price, the county must be able to reach a fair compensation by other means. Local access roads continue to be established by dedication. In acquiring road right-of-way, relocation payments must be made to anyone displaced by the acquisition. The procedure for obtaining new road right-of-way includes the flexibility that the various acquisition options require.

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

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1 Right-of-way vs. right of way. Webster's Ninth New Collegiate Dictionary uses hyphens to separate these words. Black's Law Dictionary Fifth Edition does not use the hyphens and they do not appear in the Oregon Revised Statutes. The hyphens are used in the descriptive materials in this manual.
Section 5.000

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

Section 5.100

Oregon Law Institute, Oregon Government Law 2005: The Latest Chapters in Public Law, Ch. 3 "Streets and Roads: Obtaining Road Right-of-Way" 2005

Oregon Law Institute, Oregon Government Law 2004: New Chapters in Public Law, Ch. 3 "Takings and Condemnation" 2004

Section 5.504


Section 5.510

Oregon Department of Transportation, Right-of-Way Manual

Section 5.520

Oregon State Bar, Local Government (Oregon CLE, 1982), Ch. 11, "Eminent Domain"

Oregon Law Institute, Oregon Government Law 2004: New Chapters in Public Law, Ch. 3 "Takings and Condemnation" 2004

5.100 ACQUIRING PROPERTY FOR ROAD. ORS 368.073 to 368.111 provide a procedure by which title or a lesser interest in property, such as an easement, may be acquired for road purposes. This statutory procedure may be supplemented or modified by county ordinance. Under the statutes, one set of procedures is provided for all roads, whether or not the road is to be on the county road system. ORS 368.116 and 368.131 clarify county authority where railroad or federal property is involved.

Acquisition of property for roads may be initiated by a county governing body, by persons filing a petition, or by a written proposal to dedicate land for public road purposes. If initiated by petition, the petition must include a statement of the public necessity for the road, a description of the proposed road, a list of owners of the property to be acquired and of property abutting the proposed road, and the signatures of a majority of the owners of the abutting properties. The signature of an owner of property that is in multiple ownership is counted as a fraction of an owner signature for the property, in the same proportion as that owner's interest in the property bears to the interest of all other owners of the same property. Before completion of the road acquisition proceedings, any person signing the petition may withdraw their signature. After the petition has been filed, a hearing on the proposed road is conducted by the county governing body, with proper notice given before the hearing. Proceedings initiated without a petition follow requirements of other laws, such as the subdivision approval procedure or the procedure to purchase by county initiation.
When proceedings to acquire property for road purposes have been initiated, a county governing body may complete acquisition by several methods—dedication, purchase, condemnation, and the use of road viewers are all available to counties. Additionally, roads may be established by accepting grants of right-of-way over public lands from the federal government or by a court determination that the road exists because of prescriptive use.

Once acquired, the road is surveyed and recorded. Costs incurred by the county may be absorbed by the county or charged to the persons who benefit. Persons who benefit may be the petitioners, if acquisition proceedings were initiated by petition, or the persons who donate land, if land is offered by dedication or donation.

When the newly established road follows the general alignment of an existing public road, under ORS 368.126, the final order establishing the road may vacate obsolete portions of the old road merely by describing the portions to be vacated. However, the vacated portions will not be closed until the new road is open to travel.

5.105 FEDERAL RS 2477 RIGHTS-OF-WAY. Revised Statute 2477 (R.S. 2477), former 43 U.S.C. 932, was enacted as a part of the Mining Law of 1866 during a time when the federal government’s focus was on encouraging settlement and development of the West. Congress passed R.S. 2477 to ensure miners’ routes to their claims and cattlemen’s trail for their herds by granting rights of way over any federal land not otherwise set aside. Although Congress repealed the statute in 1976 with the Federal Land Policy and Management Act, it did not terminate rights-of-way in existence at that time. As part of the new law in 1976, Congress recognized all valid existing claims to these rights-of-way as of that date.

The Interior Department encouraged counties interested in an acknowledgement to submit proposed memorandums of agreement to the department for consideration. However, the process has been fraught with conflict and confusion and with less than satisfactory results for counties in the West. County officials assert that the federal government has set an unacceptably high standard for counties to meet to demonstrate the validity of an R.S. 2477 right-of-way. Counties that wish to maintain historical rights-of-way across federally managed lands face nearly impossible challenges under the current policy.

In 2000, Baker County passed a resolution establishing a county policy regarding RS 2477 rights-of-way and listing the RS 2477 rights of way in the county. The resolution declares that the county had previously accepted the grant offered under RS 2477 by the federal government, and that it therefore was the owner of, or had a perpetual easement in favor of the public, over rights-of-way accepted pursuant to the grant offered under RS 2477. The county’s authority over a right-of-way was challenged in court in Butchart v. Baker County, 214 Or. App. 61, 166 P.3d 537 (2007). Details on the case and the Court of Appeals decision are discussed in section 5.125.

At its 2008 annual conference, the National Association of Counties once again adopted a resolution advanced by its Public Lands Committee urging Congress to enact legislation and the Administration to adopt new policy for recognizing RS 2477 rights of way assertions for all federal land managing agencies uniformly. NACo contends that the federal government has set an unacceptably high standard for counties to meet to
demonstrate the validity of an RS 2477 right of way. Counties that wish to maintain historical rights of way across federally managed lands face nearly impossible challenges under the current policy.

### 5.110 STATUTES ON PROPERTY ACQUISITION

**Chapter 368**

**County Roads**

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### 5.120 CITATIONS ON PROPERTY ACQUISITION

State ex rel. DOT v. Schrock Farms, 140 Or. App. 140, 914 P.2d 1116 (1996): The Oregon Department of Transportation (ODOT) attempted to condemn a portion of the defendant’s property in order to build a highway. At the time, zoning and land use
regulations did not permit the building of a highway through the defendant’s property because it was zoned for Exclusive Farm Use (EFU). The lower court held that ODOT lacked authority to take the land by condemnation. The Court of Appeals reversed, holding that ODOT had authority to condemn the property on which it intended to build the highway, even if, at the time ODOT acted, applicable zoning and other land use regulations did not permit building the highway. The condemnation of the defendant’s property was justified because a precondition for seeking the regulatory changes that are necessary to make it available for highway use is ownership of the property.

Multnomah County v. Union Pacific Railroad, 297 Or. 341, 685 P.2d 988 (1984): County brought action for a declaration that it had a prescriptive easement for public pedestrian crossing over railroad right-of-way. The circuit court and the Court of Appeals held in favor of the county and Union Pacific sought review. The Oregon Supreme Court reversed, holding that a county cannot acquire a public easement across a railroad right-of-way by prescriptive use if the use interferes with railroad operations and imposes a danger to the public. ORS 763.013 states the Public Utility Commission, rather than a circuit court, has the responsibility to determine the appropriateness of grade pedestrian crossings at railroad tracks, and PUC had not done so in this case. [NOTE: ORS 763.013 has been renumbered ORS 824.202, and authority transferred from the PUC to the Oregon Department of Transportation]

Laudahl v. Polk County, 46 Or. App. 765 (1980): Plaintiff brought a claim seeking just compensation for the portion of their property they claimed had been incorporated into a county road, the center line of which allegedly formed a boundary of their property. The county maintained it had acquired all of the disputed area by prescription and claimed a right of way 60 feet wide or 30 feet from the center line. The Oregon Court of Appeals affirmed the trial court’s decision that the county had acquired a prescriptive easement only over that portion of plaintiff’s property that lay within an 8-foot wide strip, measured north from the road’s center line in areas where no ditches adjoined the road. The court stated that a prescriptive easement for road purposes that is dependent solely upon adverse and continuous uses by the general public has a width no greater than the extent of the uses.

Poe v. Department of Transportation, 42 Or. App. 493, 600 P.2d 939 (1979): Plaintiff brought suit seeking a declaratory judgment that a piece of property in the City of Gladstone, which had once been part of the Cascade Highway before that highway was relocated due to the construction of I-205, was a public road over which the plaintiffs had the right to travel. The state cross-claimed to quiet title and enjoin the plaintiff from asserting any adverse claims to the property, alleging that the road in question was abandoned and the roadway reverted to the abutting owner under common law, which in this instance was the state. The lower court held in favor of the plaintiff. The Court of Appeals affirmed, holding the portion of highway in question had not been properly abandoned by ODOT because statutory law, as opposed to common law, applied. ORS 366.300(3) requires ODOT to determine after the realignment of a state highway whether the eliminated sections are “needed or valuable for any public use” before title can revert back to abutting owner, which would have been the state in this case. ODOT did not make the determination called for in the statute, and therefore was enjoined from advertising for sale and selling the property in question as surplus property.

Colombo v. Hewitt, 221 Or. 121, 350 P.2d 893 (1960): Plaintiff sought an injunction restraining defendant property owners from obstructing a county road in a way that denied them use of the roadway. Defendant argued that the road was vacated in 1927
when a new road was constructed along a similar path and therefore the right of way on each side of the old road reverted to property owners on the respective sides of the road. The Oregon Supreme Court held in favor of plaintiff, stating that there was no valid order entered in 1927 establishing a new road following the general alignment of the old road, as required by ORS 368.540, and therefore the old road was never vacated. The court did not accept the defendant’s argument that an order entered by the county court in 1948 that granted the vacation based on its view of the intent of the 1927 county court was valid. Instead, it held that the final order had to be carried to a conclusion at the time the alteration was made and cannot be made 21 years later. [NOTE: The relevant language of ORS 368.540 can now be found at ORS 368.126 and 368.331]

Hendrickson v. City of Astoria, 127 Or. 1, 270 P. 924 (1928): Plaintiff filed an action to recover damages from injuries sustained while falling off a raised board sidewalk on Flavel Street in the City of Astoria. The plaintiff alleged the injuries resulted from the negligence of the defendant in failing to repair the handrail on the east side of the sidewalk, where it had fallen down. The trial court held in favor of the plaintiff and awarded $750 in damages. The city appealed, claiming that while Flavel Street was dedicated as a public street, the dedication was never accepted by the city authorities. The Supreme Court affirmed in favor of the plaintiff, holding that the city had accepted the dedication by undertaking important municipal acts such as sewer construction and maintaining the street lights. The court stated an offer of dedication may be expressly accepted by a municipality or impliedly accepted by an act showing the public body has assumed control and possession.

Bayard et al v. Standard Oil Co., 38 Or. 438, 63 P. 614 (1901): Adverse use of a road by the public for the period prescribed by statute will establish an easement in the public.

34 Or. Att'y Gen. Op. 868 (1969): If circumstances of public use and county maintenance of a road have continued for a period in excess of ten years, the road will be considered part of the county road system.

5.125 CITATIONS ON FEDERAL RS 2477 RIGHTS-OF-WAY

Butchart v. Baker County, 214 Or. App. 61, 166 P.3d 537 (2007): Plaintiff owned several parcels of land in rural Baker County that were granted to his predecessors pursuant to a federal mining permit in 1883. The dispute centered over whether the Connor Creek Road, which crossed plaintiff’s property, existed “over public lands” before the mining patent was granted to plaintiff’s predecessor in interest. If so, the road was to be considered an RS 2477 road, which was enacted as a part of the Mining Law of 1866 and granted rights-of-way over any federal land not otherwise reserved for public use. If the road was an RS 2477 road, it would not belong to the plaintiff. In 2000, Baker County passed a resolution establishing a county-wide policy regarding RS 2477 rights-of-way and declared Baker County had accepted the grant offered under RS 2477 by the federal government, and that it therefore was the owner of, or had a perpetual easement in favor of the public, over highway rights-of-way accepted pursuant to the grant offered under RS 2477.

The plaintiff argued that the current road was not in the same area as roads shown on the early maps, that it actually followed an old Indian trail, and that he therefore was entitled to exclude the public from using the road. He brought claims against the county
for declaratory and injunctive relief, and inverse condemnation. The trial court denied plaintiff relief on all claims. The Court of Appeals held that plaintiff was jurisdictionally precluded from seeking declaratory and injunctive relief because of his failure to timely pursue a remedy via “writ of review” statutes. They also held that while plaintiff was not jurisdictionally precluded from pursuing his inverse condemnation claim, sufficient historical evidence supported the trial court’s judgment dismissing the inverse condemnation claim.

5.200 USE OF ROAD VIEWERS. Selecting a road alignment and determining benefits and damages through the use of road viewers is a road establishment procedure that began many years ago. While it is not always suitable, some counties continue to find it useful. ORS 368.161 to 368.171. Its primary use occurs in situations where some property owners have a specific interest in establishing a new right-of-way but the right-of-way does not take land uniformly from all those involved.

The board of road viewers is established by the county governing body and consists of a county road official and two other persons. Persons with a special understanding of property values, or at least local conditions, usually are more effective. They must, of course, be persons who are not suspected of having a bias or a special interest in the road. The board investigates the proposed road right-of-way and submits a written report to the county, which includes the board's recommendation, a description of the proposed road, and an assessment of damages created by the proposed road.

If the board's recommendation is positive and the county wants to continue proceedings, a hearing concerning the proposed road is conducted by the county governing body after proper notice of the hearing is given. If the county determines a public need exists for the road, the county may designate the persons liable for costs and the persons entitled to payment of damages. Additionally, a survey of the road is made and recorded.

The most common recent use of road viewers probably has been with reference to way of necessity cases. See chapter 9 for a description of the current law on way of necessity. The specific reference to the use of road viewers under the way of necessity provisions is found in ORS 376.160(1)(b), which provides that the county governing body may appoint persons to investigate a proposed way of necessity.

5.210 STATUTES ON ROAD VIEWERS

Chapter 368

County Roads

368.161 Use of road viewers to establish road
368.166 Road viewer report; hearing; notice
368.171 Order, costs and damages under proceeding with road viewers
5.220  CITATIONS ON ROAD VIEWERS

Hewitt v. Lane County, 253 Or. 669, 456 P.2d 967 (1969): The plaintiffs challenged the damages offered by the county as compensation for property taken as a result of a new road being built. Originally, the county board of road viewers fixed damages at $8,325. The plaintiffs appealed to the circuit court, which awarded them $25,000 as well as $4,000 for attorney fees. The county appealed, asserting that because the board of viewers proceeded under the condemnation statute, which makes no provision for attorney fees to a landowner who prevails after appealing from an award fixed by road viewers, rather than the inverse condemnation statute which does, no attorney fees could be allowed. The Court of Appeals affirmed the award, holding that the inverse condemnation statute applied to the landowners because the intent of statute was to provide substantial equality to landowners whether their land was taken by condemnation or inverse condemnation. A county does not avoid liability for attorney fees when it loses a contest over just compensation concerning land taken for highway purposes, even though it proceeded under ORS Chapter 368 (condemnation) instead of Chapter 281 (inverse condemnation). [NOTE: ORS Chapter 281 has since been consolidated with and moved to ORS Chapter 35, however, the inverse condemnation statute ORS 20.085 calling for prevailing party attorney fees remains]

Morton v. Hood River County, 88 Or. 144, 171 P. 584 (1918): The county court or county commission is the final judge of a proposed road's public utility.

Feagin v. Wallowa County, 62 Or. 186, 123 P. 902 (1912): The county court or county commission cannot make a final order on a road if a remonstrance has not been disposed of.

Jones v. Polk County, 36 Or. 539, 60 P. 204 (1900): County commissioners are not bound by a board of viewers' recommendations but may set them aside and reappoint the same or a new board to reexamine the proposed road site.

5.300  ASSISTANCE TO DISPLACED PERSONS.  ORS 35.500 to 35.530 require relocation assistance to persons displaced by public property acquisition. ORS 368.121, which "permits" a county to make certain relocation payments, appears to add nothing to these requirements.

A relocation must be preceded by a written notice from the county at least 90 days before the move. Relocation payments are to be provided under the guidelines of the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The 1970 Act was amended extensively with the Uniform Relocation Act amendments of 1987. Excerpts of this law are included in Section 5.330. A new provision in the 1987 amendments allows the payment of certain relocation expenses for the relocation of a utility facility. The Federal Highway Administration has regulations (49 CFR 24) covering the requirements of the Act.

Under the Oregon statutes a county or other public entity is obligated to follow the relocation assistance requirements of the federal act even in those cases where federal funds are not utilized. ORS 35.510 (previously ORS 281.060) was adjusted by the 1989
legislature to recognize the changes in federal law related to this obligation. The section numbers from the Title 42 United States Code which correspond to the section numbers of the original federal act that are references in ORS 35.510 are as follows:

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See Section 5.330 for a direct link to 42 USC §§4601 through 4655.

5.310    STATUTES ON DISPLACED PERSONS

Chapter 35

Condemnation for Public Use; Relocation Assistance.

35.500    Definitions for ORS 35.500 to 35.530

35.505    Relocation within neighborhood; notice prior to move; costs and allowances

35.510    Duties of public entities acquiring real property

35.515    Required disclosures for business and farm operations

35.520    Decision on benefits; hearing; review

35.525    Construction

35.530    Federal law controls

Chapter 368

County Roads

368.121    Financial assistance to persons displaced by county road acquisition

5.320    CITATIONS ON DISPLACED PERSONS
The Oregon Department of Transportation (ODOT) initiated a suit in the circuit court to condemn property owned by the defendant. The defendant alleged that ODOT previously had stated they would not actually need to take the property. The defendant proceeded to demolish the building on the property in order to construct a new office facility. ODOT then notified the defendant of its intent to take the property. Among other allegations, the defendant alleged that ODOT had an affirmative statutory duty to notify of its plans to take the property and that ODOT manipulated the timing of the taking to deprive the defendant of the value of the building. The Supreme Court disagreed, holding that ODOT was not required by ORS 281.060 to notify the defendant of its plans to take property as Oregon looks to federal law to determine how an agency should go about taking land in certain eminent domain proceedings and the referenced federal law expressly states that its timing policy provisions do not create rights or liabilities. [NOTE: The relevant information of ORS 281.060 can now be found at ORS 35.510]

5.330 FEDERAL ACT ON PROPERTY ACQUISITION AND DISPLACED PERSONS

Excerpts from "Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs" as amended and revised current through P.L. 110-51, approved on July 31, 2007 are linked below. See Section 5.300 above for the section numbers from the Title 42 United States Code which corresponds to the section numbers of the original federal Act that are references in ORS 35.510.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 61. UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

5.400 ACQUIRING LAND ADJOINING ROAD. ORS 35.600 to 35.625 authorize the acquisition of property adjoining and within 100 feet of the proposed boundaries of a road to protect its full use and enjoyment by the public. A determination of necessity must be made by the county governing body before exercising this right. The county may subsequently sell the adjoining land it acquired with any restrictions considered necessary to protect the public "use and enjoyment" of the road.

5.410 STATUTES ON ACQUIRING ADJOINING LAND

Chapter 35

Condemnation of Property Adjoining Proposed Roadways

35.600 Application

35.605 Authorization to acquire adjoining property for roadways
5.500 DEDICATED ESTABLISHMENT. As indicated in section 5.000, a road becomes established by dedication usually because a property owner sees a benefit from the road that exceeds the value of the land to be dedicated. Ordinarily, a dedication does not pass absolute title in the property to the public; a dedication is an appropriation of land to the public for a particular use and is accepted by the public for such use only.

Typically, a property owner, rather than the county, will initiate such proceedings. The owner of land must perform an act that clearly shows the intention to dedicate a part of his or her land to the public for use as a street. A declaratory intent may be expressed by the owner of land in various types of written instruments, such as a deed or a recorded plat upon which designated areas are marked as roads. No dedication becomes conclusive and binding on either the property owner or the county until it is accepted by the county. Acceptance in this context does not mean acceptance of responsibility for the construction or maintenance of a roadway. It does mean the county has approved the dedication subject to the fulfillment of the required procedures. For example, the dedication of land for road purposes in a subdivision plat is not complete until the plat is recorded, and it cannot be recorded until approval has been provided under county subdivision approval procedures.

5.502 DEDICATION BY DEED. When a deed is used to accomplish a dedication, the intent to dedicate either an easement in the land for use as a road or an absolute conveyance of title must appear clearly on the face of the instrument. The deed must dedicate the property interest to the county governing body specifically rather than to the public in general. A survey is usually necessary to obtain an accurate description of the land being deeded. Before the deed may be accepted for recording it must contain specific evidence of its approval by the county. ORS 92.014(2)

5.504 DEDICATION BY PLAT. Most road dedication occurs as part of a subdivision or partitioning of land. A county may require dedication of land for road purposes to be a part of these procedures. Land division regulations may provide clarification in this regard. The following is an illustration.

Section 19. Creation of a Public Street Outside a Subdivision.

(1) Creation of a public street and the resultant separate land parcels shall be in conformance with requirements for subdivision, except the [planning commission] shall approve creation of a public street to be established by deed without full compliance with the regulations applicable to subdivisions if one of the following conditions exists.
(a) Establishment of the public street is initiated by the county governing body and is declared essential for general traffic circulation, and the partitioning of land is an incidental effect rather than the primary objective of the street.

(b) The tract in which the street is to be dedicated is a major partition within an isolated ownership of either not over one acre or of such size and characteristics as to make it impossible to develop building sites for more than three dwelling units and remain consistent with the comprehensive plan.

(2) When approval of a public street is to be without full compliance with the regulations applicable to subdivision, a copy of a tentative plan and the proposed deed shall be submitted to the [county planning office] at least five days before the [planning commission] meeting at which consideration is desired. The plan, deed and such information as may be submitted shall be reviewed by the [planning commission] and, if not in conflict with the standards of these regulations for streets, shall be approved with conditions necessary to preserve these standards and otherwise comply with this ordinance.

Section 20. Creation of a Private Street Outside a Subdivision. A street that is created to allow the partitioning of land for the purpose of transfer of ownership or building development, whether immediate or future, shall be in the form of a street in a subdivision or as provided in section 19 of these regulations, except that a private street to be established by deed without full compliance with the regulations for public streets shall be approved by the [planning commission] if it is the only reasonable method by which a portion of a land parcel without direct access to a public street can be provided access when partitioned into [two parcels/not over three parcels]. A copy of the tentative plan to create the street and partition the tract shall be submitted to the [county planning office] at least five days before the [planning commission] meeting at which consideration is desired. The document and such information as may be submitted shall be reviewed by the [planning commission] and, if assurance of adequate utility and vehicular access is indicated, shall be approved.

As mentioned in 5.502, state law requires evidence of county approval before a dedication can be recorded. Additionally, ORS 92.014(1) provides that "A person may not create a street or road for the purpose of subdividing or partitioning an area or tract of land without the approval of the city or county having jurisdiction over the area or tract of land to be subdivided or partitioned."

Because approval of subdivision and partitioning proposals are a major source of new road right-of-way, county guidance in the establishment of these roads will assure access and minimize future problems as expansion of the road system occurs. The county

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2 Partitioning off the rear portion of a land parcel to create only one new parcel creates what is commonly called a "flag" or "panhandle" lot. In that case, the language in the ordinance example now ensures that the driveway from the public street is a part of the newly created parcel and the partitioning constitutes minor partitioning. If the roadway from the public street serves more than one parcel and is not a public road, it is a private street. It is then subject to the special requirements that apply to private streets and do not apply to individual driveways.
road official has a key role in reviewing subdivision proposals to assure adequate width and suitable alignment of road right-of-way. The road official also will likely be involved in monitoring road improvement work for compliance with the road standards of the county. When a new subdivision connects to a county road or when a county road needs extension through a new subdivision, the county regulations may require the subdivider to be responsible for that construction. Streets are usually the subject of the most extensive standards found in a regulation to control land division. The following example of general street standards is an excerpt from chapter 5 of the Bureau's 1983 publication entitled Model Development Standards Documents: Basic Abbreviated Form. The major purpose for inserting this example in the manual is to identify the kind of standards that may be appropriate, rather than to suggest that the specific standards be used.

CHAPTER 5. FUNCTIONAL STANDARDS FOR PUBLIC FACILITIES

S5.010. General Standards for Streets.

(1) The location, width and grade of streets shall be considered in relation to existing and planned streets, to topographical conditions, and to the proposed use of land to be served by the streets. The street system shall assure an adequate traffic circulation that is convenient and safe. Intersection angles, grades, tangents and curves shall be appropriate for the traffic to be carried, considering the terrain.

(2) The arrangement of streets to create blocks shall not cause the distance between cross streets to exceed [1,000] feet unless the topography or the location of adjoining streets justifies an exception or the street is an arterial. The block length along an arterial may be [1,800] feet or more. Blocks and streets shall be arranged to avoid creation of through lots, except where through lots serve to achieve one of the following:

(a) Separate development from a major traffic artery.
(b) Separate residential development from nonresidential activities
(c) Overcome specific disadvantages of topography and orientation.

(3) To the extent feasible, streets that provide access to building sites shall have an east-west orientation to improve solar access potential.

(4) When location is not shown in the comprehensive plan or in a transportation or street plan, the arrangement of streets shall provide for the continuation or appropriate projection of existing principal streets in surrounding areas, except for deviations to meet a particular situation where topographical or other conditions make continuance or conformance to existing streets impractical.

S5.012. Minimum Right-of-Way and Roadway Width. Unless otherwise indicated on the comprehensive plan or on a separately approved future street plan, public street right-of-way and roadway widths shall not be less than the minimum width in feet shown in the following table.
<table>
<thead>
<tr>
<th>Type of Public Street</th>
<th>Minimum Right-of-way Width</th>
<th>Minimum Roadway Width</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arterial</td>
<td>[80-120] feet</td>
<td>[40-52] feet</td>
</tr>
<tr>
<td>Collector Street</td>
<td>[60-80] feet</td>
<td>[36-48] feet</td>
</tr>
<tr>
<td>Continuous minor street</td>
<td>[60] feet</td>
<td>[36] feet</td>
</tr>
<tr>
<td>Minor street less than 2,400 feet in length which cannot</td>
<td>[50] feet</td>
<td>[28] feet</td>
</tr>
<tr>
<td>not be extended</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Radius for turnaround at end of cul-de-sac</td>
<td>[50] feet</td>
<td>[40] feet</td>
</tr>
</tbody>
</table>

Where conditions, particularly topography or the size and shape of the tract, make it impractical to otherwise provide buildable sites, narrower right-of-way may be accepted, ordinarily not less than [50] feet. If necessary, slope easements may be required.

S5.014. **Street Reserve Strips.** Reserve strips or street plugs to control access to public streets will not be approved unless necessary for the protection of the public welfare or of substantial property rights, and in these cases they may be required. Control and disposal of the land composing such strips shall be placed in the jurisdiction of the [city/county].

S5.016. **Street Alignment.** As far as is practical, each street that is not a minor street shall be in alignment with an existing street by a continuation of the center line of the existing street. Staggered street alignments that result in "T" intersections shall, wherever practical, leave a minimum distance of [200] feet between the center lines of streets running approximately the same direction and in any case shall be at least [100] feet.

S5.018. **Future Addition of Streets.**

1. When necessary to give access to or permit a satisfactory future division of adjoining land, a public street shall be extended to the boundary of the development, and the resulting dead-end street may be approved without a turnaround. A reserve strip or street plug may be required to preserve the objective of a street extension.

2. In spacing streets to divide tracts into large lots that are likely to be redivided, the [approving body] may require that the blocks be of such sizes and shapes, be so divided into building sites, and contain such site restrictions as will provide for extension and opening of streets at intervals that will permit a subsequent division of any tract into lots or parcels of smaller size.

S5.020. **Street Intersection Angles.** Streets shall be laid out to intersect at angles as near to right angles as practical except where topography requires a lesser angle, but in no case shall the angle be less than [80] degrees unless there is a special intersection design. An arterial or collector street that intersects with another street shall have at least [100] feet of tangent adjacent to the intersection unless topography requires a lesser distance. Other streets, except alleys, shall have at least [50] feet of tangent adjacent to the intersection unless topography requires a lesser distance. Intersections that contain an angle of less than [80] degrees or that include an arterial street shall have a minimum corner radius sufficient to allow for a roadway edge radius of [20] feet and maintain a uniform width.
between the roadway and the right-of-way line. Ordinarily, the intersection of more than two streets at any one point will not be approved.

S5.022. Existing Street Deficiency.
   (1) When an existing street that is adjacent to or within a proposed development is of inadequate width, additional right-of-way shall be provided.

   (2) A partial-width street, while generally not acceptable, may be approved when reasonably essential to the development, when in conformity with the other requirements of these standards, and when it will be practical to require the dedication of the other portion when the adjoining property is developed. When a partial street is adjacent to a tract to be developed, the other portion of the street shall be provided within such tract. Reserve strips and street plugs may be required to preserve the objectives of partial-width streets.

S5.024. Cul-de-sac. A cul-de-sac shall be as short as possible, shall have a maximum length of [400] feet, and shall serve building sites for not more than [18] dwelling units. A cul-de-sac shall terminate with a circular turnaround. Dead-end streets longer than [400] feet may be approved if no other means is available for development of the property and special provisions are made for public facilities, pedestrian and bicycle circulation, and emergency service access.

S5.026. Grades and Curves. Grades shall not exceed [6] percent on arterials, [10] percent on collector streets or [12] percent on other streets. Center line radii of curves shall not be less than [300] feet on major arterials, [200] feet on secondary arterials, or [100] feet on other streets, and shall be to an even 10 feet. When existing conditions, particularly the topography, make it otherwise impractical to provide buildable sites, steeper grades and sharper curves may be approved. In flat areas, allowance shall be made for finished street grades with a minimum slope, preferably of at least [0.5] percent.

S5.028. Street Adjacent to Railroad. When a proposed development contains or is adjacent to a railroad right-of-way, provision may be required for a street approximately parallel to and on each side of the railroad right-of-way at a distance suitable for the appropriate use of the land between each street and the railroad. The distance shall be determined with due consideration at each cross street of the minimum distance required for approach grades to a future grade separation and to provide sufficient depth to allow screen planting along the railroad right-of-way in nonindustrial areas.

S5.030. Protection from Arterial. When a development abuts or contains an existing or proposed arterial street, the development design shall provide adequate protection for residential properties and shall separate through any local traffic or, if separation is not feasible, shall minimize the traffic conflicts. The design requirements may include any of the following:

   (1) A parallel access street along the margin of the arterial.

   (2) Lots of suitable depth abutting the arterial with frontage along another street.

   (3) Screen planting at the rear or side property line to be contained in a nonaccess reservation along the arterial.
(4) Other treatment suitable to meet the objectives of this subsection.

S5.034. Private Street. When a private street is permitted under the development ordinance, provision shall be made to assure private responsibility for future maintenance. Unless otherwise specifically authorized as part of a street plan, a private street shall comply with the same standards as a public street. A street held for private use shall be distinguished from public streets and any reservations or restrictions related to the private street shall be described in land division documents and deed records.

S5.036. Street Improvement.

(1) Streets, including alleys, within a development and streets adjacent but only partially within a development shall be improved. Catch basins shall be installed and connected to drainage tile leading to storm sewers or drainage ways. On completion of the street improvement, monuments shall be reestablished and protected in monument boxes at every public street intersection and all points of curvature and points of tangency of their center lines.

(2) Street name signs containing the approved name or number shall be installed at street intersections.

(3) Street lights shall be installed and served from an underground source of supply unless other electrical lines are not underground.

S5.038. Noise Barriers. Noise barriers shall be installed along arterial streets adjacent to residential occupancies.

S5.040. Sidewalks. Sidewalks shall be installed on both sides of each public street and in any special pedestrian way within a development, with the following exceptions.

(1) In the case of an arterial street or a special type industrial district, a development without sidewalks may be approved if alternative pedestrian routes are available.

(2) In the case of a street that serves a residential area having a density of [2 1/2] or fewer dwelling units per gross acre, the requirement for sidewalks shall not apply, provided there is no evidence that the area development pattern will cause special pedestrian activity along the streets involved. If there is evidence of special pedestrian activity but a sidewalk on one side of the street will be adequate, property owner responsibility for sidewalk maintenance shall be described in the deed records.

S5.050. Bicycle Routes. If appropriate to the extension of a system of existing or planned bicycle routes, the installation of separate bicycle lanes within streets and separate bicycle paths [shall/may] be required.

As indicated, subdivision street improvement is an obligation commonly placed on a person dividing land. However, requiring a land divider to install road improvements may
be impractical in some partitionings. On the other hand, failure to apply the obligation to install improvements uniformly to all land dividers can create inequities and also result in unimproved roads. It may also stimulate some land dividers to contrive to escape road improvement costs. Agreements running with the land have been used under which the land divider and subsequent owners have consented to a local improvement project. The work would be done under the special assessment authority discussed in chapter 3 at any future time the county determined it was feasible. This practice is becoming increasingly common in Oregon cities as a way to overcome charter remonstrance rights and is equally available to counties. Its use assumes that, since it is based on contractual consent, any remonstrance right would not apply.

5.506 RESPONDING TO PETITIONERS. The petitioning method of initiating consideration of a new road provides for some special procedures, including a hearing. Although petitioners are required to include a description of the proposed road in the petition, before preparing the notice of hearing, the description should be checked to be sure it is complete. The notice of hearing must provide sufficient information to reasonably convey the nature of the issue to the person having a right to notice. Highly technical legal descriptions of the proposed road location are less suitable than a simple description that provides an understanding of the location and width of the road. The notice should also explain how more detailed information can be obtained. This might be provided by having an overlay map on file showing the outer boundaries of the standard right-of-way with an explanation of the likely nature of additional encroachments that may be required to accommodate cuts and fills. Unless the county officials perceive a substantial general interest in the road, it may be inappropriate to invest in extensive survey and alignment design until after the county governing body has had its hearing and determined to proceed with the project. The right to petition and to receive a hearing only obligates the county governing body to consider the proposal. Its decision to proceed is a matter of discretion.

Each step in the procedure represents some expense. The county may place the cost on the petitioners and may require advance payment or posting of a bond by the petitioners. The statute does not set out these details; they are left for each county to develop within their own policies and circumstances.

5.510 PURCHASE. When the county wants to establish a road by purchase of right-of-way, it has a choice between purchasing absolute title to the land (which is the same as owning the land “in fee”) or obtaining only easement rights as in a dedication. There is usually no reduced cost for purchasing only an easement. In either case, the rights and duties of the county, the rights of abutting landowners, and the rights of the general public may be substantially the same. However, the differences are the reason for considering purchase in fee. For example, if the county owns absolute title, it should have established the right to retain the land for other public purposes once it is vacated and, if found surplus to public needs, the right to sell the land. If the county owns only an easement, the title will typically vest in the abutting landowners when the road is vacated.

By purchasing property for a road in fee, the county may eliminate or restrict any of the rights of abutting property owners that are traditional to right-of-way easements. This may be particularly desirable in the case of alignments that will become major traffic ways. For lesser roads, the merits of ownership in fee would need to be compared to the merits of
leaving certain rights with the abutting property owner, which may also leave certain responsibilities—for example, responsibility for sidewalk and street tree care is often placed on abutting property owners.

Normally, a county seeks to acquire land for road purposes by dedication. If that is not feasible, the county negotiates a purchase price. However, when no agreement can be reached with the landowner, condemnation is the usual procedure available for counties to obtain road right-of-way. The use of road viewers is also available, but is probably not appropriate in the case of roads intended to be part of the system of traffic-carrying county roads. A purchase agreement should expressly describe the nature of the interest in the land that is being acquired.

ORS 35.510 requires observance of the federal land acquisition policies under the "Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs" as amended and revised current through P.L. 110-51, approved on July 31, 2007, by the state, a county or another instrumentality of the state whenever any program or project is undertaken by a public entity which will result in the acquisition of real property. This will apply to county right-of-way acquisition for all road projects whether or not federal grant moneys are used. See section 5.330. For further information, see the agreement forms on federal-aid programs and the booklet entitled Right-of-Way Manual, published by the Oregon Department of Transportation.

5.520 CONDEMNATION. Condemnation is the name given the procedure by which the power of eminent domain is exercised. The exercise of this power for purposes of acquiring property for roads is authorized in ORS 368.096(1) (c) and ORS 203.135. See section 5.110. For acquisition of property adjoining the road, see section 5.400 and 5.521.

A county normally does not use condemnation to establish roads if it is possible to acquire the land by dedication or negotiated purchase, since condemnation not only requires judicial proceedings but often results in a higher cost to the county. Even if the award is no greater than the amount the county offered the owner, the cost of the proceedings are added expense.

ORS Chapter 35 is the General Condemnation Procedure Act. ORS 35.220 provides a standard procedure for the entry upon and examination, surveying, testing and sampling of real property before the commencement of condemnation action. A condemner may not enter upon any land under the provisions of this section without first attempting to provide actual notice to the owner or occupant of the property. If the condemner has not provided actual notice, written notice must be posted in a conspicuous place where the notice is most likely to be seen. The provisions of the section establish that some entry to the property could occur before selection of the particular property to be appropriated. The process for a county to use to appropriate property for a public road is found in ORS 368.073. This statute provides that "A county governing body may initiate proceedings to acquire title or a lesser interest in real property for public road purposes." It then lists three situations that would cause initiation, including initiation by the governing body's own action. In any case, ORS 35.220 provides authority to enter upon and survey land if the property is to be appropriated to public use. (The 2003 Legislature combined ORS Chapters 35 and 281 in order to set forth a single location in the statutes where Oregon’s eminent domain laws can be located.)
ORS 368.011 authorizes a county to supersede ORS 368.073 by enacting a general ordinance. An ordinance may be useful if a county finds it convenient to assign certain initial evaluation of road locations to the county road official or to otherwise expand upon the procedure to be followed in acquiring property for public uses, but ordinance provisions of this type would probably supplement rather than supersede the statutes.

A general rule of law found in the legal encyclopedia Corpus Juris Secundum, Volume 87 under Trespass, Section 54 (87 C.J.S Trespass ’54) is that going upon land while acting under valid authority of government is not a trespass if the method used to carry out the authority, the particular act done, and the way it was done were justified. However, a road official will want to receive legal counsel before entering private property without permission. The legal counsel will need to determine what constitutes "valid" authority in case of a property owner's objection.

Because the county must give just compensation for the public taking of private property, an appraisal of the value of the property must be made. Prior to making the appraisal, a 15-day written notice must be provided to the property owner by the condemning authority. At least 40 days before the filing of any action for condemnation of property, the condemning authority must make an initial written offer to the owner to pay just compensation. A copy of the written appraisal must accompany the offer for compensation. If it is determined that the amount of compensation is less than $20,000, the condemning authority may provide a written explanation of the valuation methodology in lieu of a written appraisal. The owner has up to 40 days to accept or reject the offer. Accepting the offer closes a transaction. If the owner rejects the offer and obtains a separate appraisal, the owner must provide the condemning authority a copy not less than 60 days prior to trial or arbitration. A rejection of the offer opens up two avenues for seeking resolution. One method is the mediation process where diplomacy and reason will hopefully resolve differences. The other method is arbitration where a panel will decide the issue of compensation. Arbitration will be binding up to $20,000 and non-binding up to $50,000 limits. If neither mediation nor arbitration results in an agreement, a condemnation trial is held to determine compensation due for property being acquired. In most cases, it may benefit the county to begin negotiations with a property owner as though the matter may go to condemnation. This will reduce the likelihood that some procedures may need to be duplicated. Because a county often wants to utilize federal grant money for road construction, land acquisition involving condemnation needs to be consistent with the federal land acquisition procedures discussed in section 5.510.

Ballot Measure 39 (2006). Kelo v. City of New London, 545 U.S. 469 (2005), was a case decided by the Supreme Court of the United States involving the use of eminent domain to transfer land from one private owner to another to further economic development. The case arose from the condemnation by New London, Connecticut, of privately owned real property so that it could be used as part of a comprehensive redevelopment plan. The Court held in a 5-4 decision that the general benefits a community enjoyed from economic growth qualified such redevelopment plans as a permissible "public

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3 The 2009 Legislature in ORS 35.300 changed the method of awarding attorney fees in condemnation proceedings by requiring government to pay attorney fees and costs if the judgment exceeds the highest offer rather than the initial offer and ensures that a property owner will receive attorney fees and costs incurred on or before an offer of compromise if the owner accepts the offer of compromise, or the owner rejects offer and does not achieve a better result.
use" under the Takings Clause of the Fifth Amendment.

The decision was widely discussed by politicians and the general public alike many of whom viewed the outcome as a violation of property rights and as a misinterpretation of the Fifth Amendment.

On November 7, 2006, the voters of Oregon in response to the Kelo case approved an initiative measure, Ballot Measure 39\(^4\), which prohibits a public body from condemning private real property if it intends to convey all or part of the property to a private party. It excludes property condemned as dangerous to health and safety, materials or fixtures that can be removed from the property, property to be used for transportation or utility services, or property acquired by a new owner after the public body has published notice of its intends to consider condemning the property. The Measure does allow governmental entities to lease condemned property for accessory retail uses. It requires a court to decide whether the public body unlawfully intended to convey the property to another private person. An owner’s rights to attorney fees and costs are authorized if the court prohibits the condemnation or if compensation awarded is more than the condemning authority’s initial offer.

5.521 STATUTES ON CONDEMNATION PROCEDURES

Chapter 35

Limitations on Condemnation Powers

35.015 Prohibition on condemnation of certain properties with intent to convey property to private party; exceptions

35.018 Severability

Eminent Domain Procedure

35.205 Short title

35.215 Definitions for chapter

35.220 Precondemnation entry on real property

35.235 Agreement for compensation; status of resolution or ordinance of public condemner; status of action of private condemner; agreement effort not prerequisite

35.245 Commencement of action; jurisdiction; parties

35.255 Content of complaint

\(^4\) Ballot Measure 39 was enacted as Chapter 1, Oregon Laws 2007 and codified as ORS 35.015 and ORS 35.018 with amendments to ORS 35.346.
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<th>Section</th>
<th>Description</th>
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<td>35.275</td>
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<td>Change in period of use; notice; effect of failure to agree on change; review by court</td>
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<tr>
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<td>Designation of person to exercise right of repurchase; effect of failure to designate; offer to repurchase; acceptance; notice; determination of price</td>
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Designation of person to exercise right of repurchase by multiple owners

Right to contest change in public purpose use; notice of proposed change

Application of ORS 35.385 to 35.415

Condemnation of Property Adjoining Proposed Roadways

Application

Authorization to acquire adjoining property for roadways

Ordinance or resolution required

Restrictions on future use of property acquired adjacent to roadway

Acquisition of land adjoining road boundaries declared necessary

Procedure to ascertain compensation and damages

Chapter 203

General County Condemnation Authority

Exercise of eminent domain power by county governing body for road, park and other public purposes

Chapter 368

County Roads

Alternative methods to acquire property for roads

5.522 CITATIONS ON CONDEMNATION PROCEDURES

State ex rel. DOT v. Stallcup, 341 Or. 93, 138 P.3d 9 (2005): The state filed a complaint in condemnation (after the parties were unable to agree on compensation) to acquire a portion of Stallcup’s property adjacent to a road in connection with a road improvement project. Stallcup had received, but did not disclose, a draft appraisal that estimated the value of the property at $355,082, which was the amount that he used in filing his answer to the condemnation action. ORS 35.346(5)(b) requires each party in a condemnation proceeding to provide to the other party a copy of every appraisal obtained. The issue was whether the draft appraisal was required to be disclosed. The trial court held in favor of Stallcup, stating the statute did not require disclosure of draft appraisals. The Court of Appeals reversed, stating that legislative history supported using a broad definition of appraisal that included “any written opinion by a qualified person regarding valuation” and that the undisclosed opinion fell within the scope. The Supreme Court reversed and
affirmed the trial court, holding that the Court of Appeals failed to look at the context provided by other subsections of ORS 35.346. Subsection 35.346 (2) allows for a “written explanation” in lieu of an appraisal when the amount at stake is less than $20,000. If the Court of Appeals interpretation had been followed, the written explanation itself would be considered an appraisal, which would negate the effect of the section of the statute.

Wiard Memorial Park District v. Wiard Community Pool, Inc., 183 Or. App. 448, 52 P.3d 1080 (2002): The park district sought condemnation of the defendant’s property in order to provide additional park facilities. The circuit court granted the district’s petition and the defendant appealed, arguing that the decision did not satisfy the requirement of ORS 35.235(2) that a proposed project be most compatible with the greatest public good and the least private injury. The Court of Appeals affirmed the circuit court, holding that a public condemner’s determination that a proposed project satisfies 35.235 (2) is presumed valid in the absence of fraud, bad faith, or an abuse of discretion. Here, the defendant’s intended use of the property was to build a pool, however, the property had sat empty for 15 years. An immediate public need for additional park facilities was shown; while the defendant did not provide evidence it would be able to raise the funds to construct a pool in the future.

Powder Valley Water Control District v. Hart Estate Inv. Co., 146 Or. App. 327, 932 P.2d 101 (1997): The Water Control District filed a complaint to condemn an easement across the landowner’s property. The circuit court entered a judgment in favor of the district. The landowner appealed, claiming that the district’s complaint failed to state facts sufficient to constitute a condemnation claim because the condemnation resolution contained no description of the property to be condemned. The Court of Appeals affirmed the circuit court, holding that while the complaint itself must describe the property sought to be condemned, there is no requirement in ORS 35.255 that the complaint allege a resolution, much less a resolution that describes the property.

State ex rel. DOT v. Schrock Farms, 140 Or. App. 140, 914 P.2d 1116 (1996): The Oregon Department of Transportation (ODOT) attempted to condemn a portion of the defendant’s property in order to build a highway. At the time, zoning and land use regulations did not permit the building of a highway through the defendant’s property because it was zoned for Exclusive Farm Use (EFU). The lower court held that ODOT lacked authority to take the land by condemnation. The Court of Appeals reversed, holding that ODOT had authority to condemn the property on which it intended to build the highway, even if, at the time ODOT acted, applicable zoning and other land use regulations did not permit building the highway. The condemnation of the defendant’s property was justified because a precondition for seeking the regulatory changes that are necessary to make it available for highway use is ownership of the property.

State ex rel. DOT v. Hewett Professional Group, 321 Or. 118, 895 P.2d 755 (1995): The Oregon Department of Transportation (ODOT) initiated a suit in the circuit court to condemn property owned by the defendant. The defendant alleged that ODOT previously had stated they would not actually need to take the property. The defendant proceeded to demolish the building on the property in order to construct a new office facility. ODOT then notified the defendant of its intent to take the property. Among other allegations, the defendant alleged that ODOT had an affirmative statutory duty to notify of its plans to take the property and that ODOT manipulated the timing of the taking to deprive the defendant of the value of the building. The Supreme Court disagreed, holding that ODOT was not required by ORS 281.060 to notify the defendant of its plans to take property as Oregon looks to federal law to determine how an agency should go about taking land in certain
eminent domain proceedings and the referenced federal law expressly states that its timing policy provisions do not create rights or liabilities. [NOTE: The relevant information of ORS 281.060 can now be found at ORS 35.510]

Emerald People’s Utility District v. Pacificorp, 100 Or. App. 79, 784 P.2d 1112 (1990): The plaintiff brought an action to condemn four hydroelectric generating plants owned by the defendant. The four plants were part of an integrated system of eight plants operated by the defendant. The circuit court dismissed the action because the condemnation was not “most compatible with the greatest public good and the least private injury,” as required by ORS 35.235 (2). The Court of Appeals affirmed, stating the people’s utility district already obtained hydroelectric power at favorable rates, while the defendant’s hydroelectric plants were its cheapest source of power generation and therefore the defendant would suffer a substantial economic detriment. Acquisitions by eminent domain are the subject of ORS Chapter 35 and the plans and locations referred to in ORS 35.235 (2) are for the public acquisition and use of private property. In applying ORS 35.235 (2), courts are required to consider economic benefits and harms.

Laudahl v. Polk County, 46 Or. App. 765 (1980): Plaintiff brought a claim seeking just compensation for the portion of their property they claimed had been incorporated into a county road, the center line of which allegedly formed a boundary of their property. The county maintained it had acquired all of the disputed area by prescription and claimed a right of way 60 feet wide or 30 feet from the center line. The Oregon Court of Appeals affirmed the trial court’s decision that the county had acquired a prescriptive easement only over that portion of plaintiff’s property that lay within an 8-foot wide strip, measured north from the road’s center line in areas where no ditches adjoined the road. The court stated that a prescriptive easement for road purposes that is dependent solely upon adverse and continuous uses by the general public has a width no greater than the extent of the uses.

City of Silverton v. Porter, 28 Or. App. 415, 559 P.2d 1297 (1977): The city commenced an action for condemnation of the defendant’s land and, pursuant to ORS 35.265, obtained a court order granting it immediate possession of the land. The city deposited $12,600 as estimated just compensation for the property, which the defendant withdrew and used for his own purposes. No judgment of condemnation was ever entered. Two years later, the city filed an election to abandon the condemnation action. The circuit court then entered an order allowing the abandonment and required the defendant to repay the city the $12,600 and denied defendant compensation for the loss of use of their property while in the possession of the city. The Court of Appeals reversed, holding that while the abandonment was proper, the circuit court erred in not allowing compensation for the defendant’s loss of use of the land. A condemner which takes prejudgment possession of property and subsequently elects to abandon its condemnation action is liable in damages to the condemnee for the loss of use of the land, as prejudgment possession is considered a property interest as defined in ORS 35.215 (5).

Hewitt v. Lane County, 253 Or. 669, 456 P.2d 967 (1969): The plaintiffs challenged the damages offered by the county as compensation for property taken as a result of a new road being built. Originally, the county board of road viewers fixed damages at $8,325. The plaintiffs appealed to the circuit court, which awarded them $25,000 as well as $4,000 for attorney fees. The county appealed, asserting that because the board of viewers proceeded under the condemnation statute, which makes no provision for attorney fees to a landowner who prevails after appealing from an award fixed by road viewers, rather than the inverse condemnation statute which does, no attorney fees could be allowed. The Court
of Appeals affirmed the award, holding that the inverse condemnation statute applied to the
landowners because the intent of statute was to provide substantial equality to landowners
whether their land was taken by condemnation or inverse condemnation. A county does not
avoid liability for attorney fees when it loses a contest over just compensation concerning
land taken for highway purposes, even though it proceeded under ORS Chapter 368
(condemnation) instead of Chapter 281 (inverse condemnation). [NOTE: ORS Chapter
281 has since been consolidated with and moved to ORS Chapter 35, however, the inverse
condemnation statute ORS 20.085 calling for prevailing party attorney fees remains]

5.525 ESTABLISHMENT BY PRESCRIPTIVE USE. A strip of land may
become a public road by prescription--a procedure that is independent of dedication or pur-
chase. A prescriptive road exists if the land has been used for road purposes by the public
for at least ten years, a circumstance sometimes referred to as adverse possession. The
public use must have been generally known (open and notorious) and must have been
outside the interests of the property owner. If a property owner specifically permits public
use of his or her private land, as evidenced by licensing the users or other periodic action to
grant permission, the land will not become a public road regardless of the length of time
public use was permitted. For example, a timber owner who permits hunters and
recreationists to use a private logging road has not lost control of the road just because
public use has been occurring for over ten years.

The interest in the land obtained by the public through prescriptive use is merely an
easement. The width of the easement is that which the factual history determines has had
public use. For example, a prescriptive right-of-way may be a trail rather than a road;
however, a pedestrian crossing in regular use over railroad tracks may not become a public
right-of-way. See section 5.120. When questions arise as to the width of the right-of-way
established by prescription, ORS 368.206 provides some guidance, but the courts look to
the facts of each case.

As in the case of dedicated roads, if a public road established by prescriptive use is
no longer needed and vacation proceedings are held, the former landowners or their
successors may retain their right to absolute title.

Although there may be a general belief that a prescriptive road exists, formal
proceedings are necessary before the public's rights can be certain. Under the definition of
"public road" in ORS 368.001, the public's rights must be a matter of public record. In
some cases the legalization procedure may serve to provide the public record. In other cases
specific court action is required.

5.530 RELOCATION OF RIGHT-OF-WAY. When a public road is
established generally along the alignment of a previous road, under ORS 368.126, vacation
of the obsolete portions may be accomplished as part of the proceedings to establish the
new alignment. However, when the existing road is to be relocated and will not follow the
old alignment, establishment of the new right-of-way and vacation of the old road need to
be accomplished separately. Some road projects need to be analyzed as to the suitability of
these alternatives.
5.540 FIXING RIGHT-OF-WAY BOUNDARIES. Today's land values and principles for fixing property lines increase the need for accurate surveying of rights-of-way. An initial survey will ensure that the legal description is consistent with the actual location contemplated and will permit relocation of proposed boundaries when necessary to fit conditions found in the field. When acquiring new right-of-way, a description that results from a centerline survey and a uniform width declaration seldom meets today's need for accuracy to determine the need for extra space for cut and fill slopes, flair at intersections, and numerous other conditions that may warrant investing in some road design steps in conjunction with making the right-of-way decisions. Once the boundaries have been decided, they need to be clearly and accurately identified. ORS 368.106 requires that the document establishing an interest in property for road purposes be recorded and that the road right-of-way be surveyed and monumented in compliance with ORS 209.250. This latter section requires a map and a written narrative of location to be filed with the county surveyor. The right-of-way boundaries are only part of the record of the road. A county may supplement the provisions of ORS 368.106 to designate an official to retain custody of the road records.