Weed Control: Legal Updates (General)

Mark Rauch, *General Counsel, CIS*
Steve Kraemer, *Hoffman, Hart & Wagner*

2010 CIS Annual Meeting & Risk Management Conference
February 3-5th, 2010 · Embassy Suites · Tigard, Oregon

Introductions

Mark Rauch, *General Counsel, CIS*
Steve Kraemer, *Hoffman Hart & Wagner*

- Program Overview (Kirk will cover employment issues in the next session)

Legislative & Judicial Update

- What the Legislators and Judges have done to us in the last year...

1. Tort Claims Act (SB 311)
   A. Tort Caps (ORS 30.272; 30.273) (See Ex. 1)
   B. Definition of "Public Body" (ORS 174.109) (See Ex. 2)
   C. Indemnification Issue: State/Local contracts

Legislative/Judicial Update, cont.

2. "Emergency Preparedness" Legislation (HB 3021): Impacts on tort liability and workers' comp for public bodies. (See Ex. 3)

Highlights: (See Ex. 4)

A. "Qualified Emergency Service Volunteers"

1. Definitions
2. Tort claims (covered as "agents")
3. Workers' Comp. (State if declared emergency)

Legislative/Judicial Update, cont.

- HB 3021 cont.

B. Emergency Health Care Services (Compensation issue is addressed)

Legislative/Judicial Update, cont.

- HB 3021, cont.

C. Search and Rescue (Big deal for county WC)

Highlights: (See Ex. 4)

1. Definitions
2. Tort liability. "Agent" of county
3. Workers' Comp. County "conclusively deemed" to have elected volunteer WC coverage.

Legislative/Judicial Update, cont.

3. Recreational Use Immunity (ORS 105.672, et seq.)

A. Legislative (HB 2003) (See Ex. 5)

Mostly adds "gardening" and paths, trails, roads, etc. while used to reach land for recreational use.

Legislative/Judicial Update, cont.

- Rec. Use Immunity, cont.

B. Judicial. *Coleman v Or. Parks & Rec.*, 2009 WL 3030352 (Or) (See Ex. 5)

- Fee or charge for one use, or use of part of the property eliminates the immunity for all use.
- Legislative response under consideration.

Legislative/Judicial Update

4. Pollution Liability (See Ex. 7)

A. The broad reach of CERCLA Liability.

- *Adobe Lumber v Hellman, et al*, 2009 WL 2913415 (E.D. Cal.). A city's strict liability as owner of the sewer pipe.

B. Oregon's state law equivalent

Asbestos claim

C. Broadly excluded.

D. CIS looking into some limited coverage in this area.

Legislative/Judicial Update, con't.

- Towing & Impound (The "other" Miranda warning; *Miranda v Cornelius, 429 F.3d 858*)) (See Ex. 8)
  - Impounds clearly authorized by ORS 809.720 (See Ex. 9) may be unconstitutional under federal law.
  - "Community caretaking standard" applies. (See Ex. 10, Article on this case)

Discretionary Immunity

- Practical (and hopefully effective) applications of discretionary immunity. (See Ex. 11)
  - What the statute (ORS 30.265(3)(c)) says.
  - The courts have not readily allowed this defense.

Discretionary Immunity, cont.

- When and how to use it effectively

  Example: Dangerous intersection
  - Public funds/competing alternatives
  - Policy level decision
  - Clear documentation

Legal Update

Questions?

Session Title: Legal Update

Date: Feb. 5, 2010

Time: 9:45 to 10:45 AM

Presenters: Mark Rauch, CIS General Counsel

Steve Kraemer, Attorney with Hoffman Hart & Wagner

Session Description:

This session will provide an update on legal developments (both legislative and judicial) related to public entity liability risk management, not including employment liability. A separate employment law update by Kirk Mylander will follow this session.

I. Legislative Update (Rauch)
   A. SB 311: OTCA changes
   B. HB 3021: Emergency Response/Search and Rescue (See handout—Memo from Mark Rauch re: HB 3021)
   C. HB 2003: Recreational Use Immunity
      1. HB 2003 Revisions to ORS 105.672 thru 696 (See handout—copy of HB 2003))
      2. *Coleman v Oregon Parks and Rec.* ("Charge for permission to use the land" clarified). (See handout—copy of case)

II. Pollution Liability (Rauch) (See handouts—copy of *Adobe Lumber v Hellman, et al* and related Memo from Mark Rauch)

III. Litigation update with Steve Kraemer

   A. Towing and Impound: Refresher on *Miranda v Cornelius*
   B. Attorney fee recoveries
   C. Discretionary Immunity update (See Memo: "Discretionary Immunity: Making it Work")

IV. Q and A

(d) $1.8 million, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $1.9 million, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $2 million, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.

(3) The liability of the state, and the liability of the state's officers, employees and agents acting within the scope of their employment or duties, to all claimants for claims described in subsection (1) of this section may not exceed:

(a) $3 million, for causes of action arising on or after December 28, 2007, and before July 1, 2010.

(b) $3.2 million, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $3.4 million, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $3.6 million, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $3.8 million, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $4 million, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.

(4) Beginning in 2015, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court Administrator shall adjust the limitations imposed under subsections (2) and (3) of this section for the following calendar year by multiplying the limitation amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The adjustment may not exceed three percent for any year. The State Court Administrator shall round the adjusted limitation amount to the nearest $100, but the unrounded amount shall be used to calculate the adjustments to the limitations in subsequent calendar years. The adjusted limitation becomes effective on July 1 of the year in which the adjustment is made, and applies to all causes of action arising on or after July 1 of that year and before July 1 of the subsequent year.

(5) The limitations imposed by this section apply to claims against Oregon Health and Science University. [2009 c.67 §3]

Note: Section 3a, chapter 67, Oregon Laws 2009, provides:

Sec. 3a. Section 3 of this 2009 Act [30.271] applies only to causes of action arising on or after December 28, 2007. Any cause of action that arose before December 28, 2007, shall continue to be governed by ORS 30.270, as that statute was in effect immediately before the effective date of this 2009 Act [July 1, 2009]. [2009 c.67 §3a]

Note: See note under 30.269.

30.272 Limitations on liability of local public bodies for personal injury and death. (1) The limitations imposed by this section apply to claims that:

(a) Are subject to ORS 30.260 to 30.300;

(b) Are made against a local public body, or against an officer, employee or agent of a local public body acting within the person's scope of employment or duties;

(c) Arise out of a single accident or occurrence; and

(d) Are not claims for damage to or destruction of property.

(2) The liability of a local public body, and the liability of the public body's officers, employees and agents acting within the scope of their employment or duties, to any single claimant for claims described in subsection (1) of this section may not exceed:

(a) $500,000, for causes of action arising on or after July 1, 2009, and before July 1, 2010.

(b) $533,300, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $566,700, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $600,000, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $633,300, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $666,700, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.

(3) The liability of a local public body, and the liability of the public body's officers, employees and agents acting within the scope of their employment or duties, to all claimants for claims described in subsection (1) of this section may not exceed:

(a) $1 million, for causes of action arising on or after July 1, 2009, and before July 1, 2010.

(b) $1,066,700, for causes of action arising on or after July 1, 2010, and before July 1, 2011.

(c) $1,133,300, for causes of action arising on or after July 1, 2011, and before July 1, 2012.

(d) $1,200,000, for causes of action arising on or after July 1, 2012, and before July 1, 2013.

(e) $1,266,700, for causes of action arising on or after July 1, 2013, and before July 1, 2014.

(f) $1,333,300, for causes of action arising on or after July 1, 2014, and before July 1, 2015.

(g) The adjusted limitation provided by subsection (4) of this section, for causes of action arising on or after July 1, 2015.

(4) Beginning in 2015, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court Administrator shall adjust the limitations imposed under subsections (2) and (3) of this section for the following calendar year by multiplying the limitation amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The adjustment may not exceed three percent for any year. The State Court Administrator shall round the adjusted limitation amount to the nearest $100, but the unrounded amount shall be used to calculate the adjustments to the limitations in subsequent calendar years. The adjusted limitation becomes effective on July 1 of the year in which the adjustment is made, and applies to all causes of action arising on or after July 1 of that year and before July 1 of the subsequent year.

(5) The limitations imposed by this section do not apply to claims against Oregon Health and Science University. [2009 c.67 §4]

Note: Section 4a, chapter 67, Oregon Laws 2009, provides:

Sec. 4a. Section 4 of this 2009 Act [30.272] applies only to causes of action arising on or after July 1, 2009. Any cause of action that arose before July 1, 2009, shall continue to be governed by ORS 30.270, as that statute was in effect immediately before the effective date of this 2009 Act [July 1, 2009]. [2009 c.67 §4a]

Note: See note under 30.269.

30.273 Limitations on liability of public bodies for property damage or destruction. (1) The limitations imposed by this section apply to claims that:

(a) Are subject to ORS 30.260 to 30.300;

(b) Are made against a public body, or against a public body's officers, employees and agents acting within the scope of their employment or duties;

(c) Arise out of a single accident or occurrence; and

(d) Are claims for damage to or destruction of property, including consequential damages.

(2) The liability of a public body, and the liability of the public body's officers, employees and agents acting within the scope of their employment or duties, for claims described in subsection (1) of this section may not exceed:

(a) $100,000, or the adjusted limitation provided by subsection (3) of this section, to any single claimant.

(b) $500,000, or the adjusted limitation provided by subsection (3) of this section, to all claimants.

(3) Beginning in 2010, and every year thereafter, the State Court Administrator shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on changes in the Portland-Salem, OR-WA Consumer Price Index for All Urban Consumers for All Items as published by the Bureau of Labor Statistics of the United States Department of Labor. On or before July 1 of the year in which the State Court Administrator makes the determination required by this subsection, the State Court Administrator shall adjust the limitations imposed under subsection (2) of this section for the following calendar year by multiplying the limitation amounts applicable to the calendar year in which the adjustment is made by the percentage amount determined under this subsection. The adjustment may not exceed three percent for any year. The State Court Administrator shall round the adjusted limitation amount to the nearest $100, but the unrounded amount shall be used to calculate the ad-

Exhibit 2

(9) "United States" includes territories, outlying possessions and the District of Columbia.

(10) "Violate" includes failure to comply. [Amended by 1953 c.145 §2; 1957 c.360 §1; 1963 c.213 §1; 1965 c.518 §1; 1967 c.409 §1; 1983 c.327 §1; 1993 c.73 §1; 1995 c.93 §30; 2001 c.671 §1; 2007 c.100 §1]

174.102 "Agricultural commodity," "agricultural product" defined; harvesting or baling of straw as farming practice. As used in the statute laws of this state and in any administrative rule adopted pursuant thereto unless the context or a specifically applicable definition requires otherwise:

(1) The term "agricultural commodity" or "agricultural product" includes straw.

(2) The harvesting or baling of straw is a farming practice. [1995 c.601 §1]

174.103 [1987 c.162 §§1,2; 1989 c.264 §1; 2001 c.90 §1; repealed by 2003 c.242 §7]

174.104 "Public notice" defined. As used in the statute laws of this state, unless the context or a specially applicable definition requires otherwise, "public notice" means any legal publication which requires an affidavit of publication as required in ORS 193.070, or is required by law to be published. [Formerly subsection (1) of 193.010]

174.105 [1967 c.409 §2; 2005 c.22 §122; repealed by 2009 c.41 §26]

174.106 [2001 c.783 §1; repealed by 2009 c.11 §15]

174.107 "Person with a disability" defined. (1) As used in the statute laws of this state, "person with a disability" means any person who:

(a) Has a physical or mental impairment which substantially limits one or more major life activities;

(b) Has a record of such an impairment; or

(c) Is regarded as having such an impairment.

(2) Specific types of disabilities shall be considered subcategories under the definition of person with a disability. [1989 c.224 §2a; 2003 c.14 §70; 2007 c.70 §39]

(Public Bodies)

174.108 Effect of definitions. (1) As used in the statutes of this state, a term defined in ORS 174.108 to 174.118 has the meaning provided by ORS 174.108 to 174.118 only if the statute using the term makes specific reference to the provision of ORS 174.108 to 174.118 that defines the term and indicates that the term has the meaning specified in that provision.

(2) Nothing in ORS 174.108 to 174.118 affects the meaning of any statute that uses one or more of the terms defined in ORS 174.108 to 174.118 and that is in effect on January 1, 2002. Nothing in ORS 174.108 to 174.118 affects the meaning of any statute that uses one or more of the terms defined in ORS 174.108 to 174.118 and that is enacted after January 1, 2002, unless the statute makes specific reference to the provision of ORS 174.108 to 174.118 that defines the term and indicates that the term has the meaning specified in that provision.

(3) None of the terms defined in ORS 174.108 to 174.118 includes the Oregon Health and Science University, the Oregon State Bar, any intergovernmental entity formed by a public body with another state or with a political subdivision of another state, or any intergovernmental entity formed by a public body with an agency of the federal government. [2001 c.74 §1]

174.109 "Public body" defined. Subject to ORS 174.108, as used in the statutes of this state "public body" means state government bodies, local government bodies and special government bodies. [2001 c.74 §2]

174.110 [Renumbered 174.127 in 2001]

174.111 "State government" defined. Subject to ORS 174.108, as used in the statutes of this state "state government" means the executive department, the judicial department and the legislative department. [2001 c.74 §3]

174.112 "Executive department" defined. (1) Subject to ORS 174.108, as used in the statutes of this state "executive department" means all statewide elected officers other than judges, and all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the executive department of government as described in section 1, Article III of the Oregon Constitution, and that are not:

(a) In the judicial department or the legislative department;

(b) Local governments; or

(c) Special government bodies.

(2) Subject to ORS 174.108, as used in the statutes of this state "executive department" includes:

(a) An entity created by statute for the purpose of giving advice only to the executive department and that does not have members who are officers or employees of the judicial department or legislative department;

(b) An entity created by the executive department for the purpose of giving advice to the executive department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the executive department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the executive department. [2001 c.74 §4]

174.113 "Judicial department" defined. (1) Subject to ORS 174.108, as used in the statutes of this state "judicial department" means the Supreme Court, the Court of Appeals, the Oregon Tax Court, the circuit courts and all administrative divisions of those courts, whether denominated as boards, commissions, committees or departments or by any other designation.

(2) Subject to ORS 174.108, as used in the statutes of this state "judicial department" includes:

(a) An entity created by statute for the purpose of giving advice only to the judicial department and that does not have members who are officers or employees of the executive department or legislative department;

(b) An entity created by the judicial department for the purpose of giving advice to the judicial department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the judicial department other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the judicial department. [2001 c.74 §5]

174.114 "Legislative department" defined. (1) Subject to ORS 174.108, as used in the statutes of this state "legislative department" means the Legislative Assembly, the committees of the Legislative Assembly and all administrative divisions of the Legislative Assembly and its committees, whether denominated as boards, commissions or departments or by any other designation.

(2) Subject to ORS 174.108, as used in the statutes of this state "legislative department" includes:

(a) An entity created by statute for the purpose of giving advice only to the legislative department and that does not have members who are officers or employees of the executive department or judicial department;

(b) An entity created by the legislative department for the purpose of giving advice to the legislative department, but that is not created by statute, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the legislative department by a document other than a statute and that is not an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the legislative department. [2001 c.74 §6]

174.115 [1979 c.391 §1; renumbered 174.129 in 2001]

174.116 "Local government" and "local service district" defined. (1)(a) Subject to ORS 174.108, as used in the statutes of this state "local government" means all cities, counties and local service districts located in this state, and all administrative subdivisions of those cities, counties and local service districts.

(b) Subject to ORS 174.108, as used in the statutes of this state "local government" includes:

(A) An entity created by statute, ordinance or resolution for the purpose of giving advice only to a local government;

(B) An entity created by local government for the purpose of giving advice to local government and that is not created by ordinance or resolution, if the document creating the entity indicates that the entity is a public body; and

(C) Any entity created by local government other than an entity described in subparagraph (B) of this paragraph, unless the ordinance, resolution or other document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by local government.

(2) Subject to ORS 174.108, as used in the statutes of this state "local service district" means:

(a) An economic improvement district created under ORS 223.112 to 223.132 or 223.141 to 223.161.

(b) A people's utility district organized under ORS chapter 261.

(c) A domestic water supply district organized under ORS chapter 264.

(d) A cemetery maintenance district organized under ORS chapter 265.

(e) A park and recreation district organized under ORS chapter 266.

(f) A mass transit district organized under ORS 267.010 to 267.390.

(g) A transportation district organized under ORS 267.510 to 267.650.

(h) A metropolitan service district organized under ORS chapter 268.

(i) A translator district organized under ORS 354.605 to 354.715.

(j) A library district organized under ORS 357.216 to 357.286.

(k) A county road district organized under ORS 371.055 to 371.110.

(L) A special road district organized under ORS 371.305 to 371.360.

(m) A road assessment district organized under ORS 371.405 to 371.535.

(n) A highway lighting district organized under ORS chapter 372.

(o) A 9-1-1 communications district organized under ORS 403.300 to 403.380.

(p) A health district organized under ORS 440.305 to 440.410.

(q) A sanitary district organized under ORS 450.005 to 450.245.

(r) A sanitary authority, water authority or joint water and sanitary authority organized under ORS 450.600 to 450.989.

(s) A county service district organized under ORS chapter 451.

(t) A vector control district organized under ORS 452.020 to 452.170.

(u) A rural fire protection district organized under ORS chapter 478.

(v) A geothermal heating district organized under ORS chapter 523.

(w) An irrigation district organized under ORS chapter 545.

(x) A drainage district organized under ORS chapter 547.

(y) A diking district organized under ORS chapter 551.

(z) A water improvement district organized under ORS chapter 552.

(aa) A water control district organized under ORS chapter 553.

(bb) A district improvement company or a district improvement corporation organized under ORS chapter 554.

(cc) A weather modification district organized under ORS 558.200 to 558.440.

(dd) A fair district formed under ORS chapter 565.

(ee) A soil and water conservation district organized under ORS 568.210 to 568.808 and 568.900 to 568.933.

(ff) A weed control district organized under ORS 569.350 to 569.450.

(gg) A port organized under ORS 777.005 to 777.725 and 777.915 to 777.953.

(hh) The Port of Portland created under

(ii) An airport district established under ORS chapter 838.

(jj) A heritage district organized under ORS 358.442 to 358.474.

(kk) A radio and data district organized under ORS 403.500 to 403.542. [2001 c.74 §7; 2003 c.802 §1; 2007 c.562 §18; 2009 c.584 §19]

174.117 "Special government body" defined. (1) Subject to ORS 174.108, as used in the statutes of this state "special government body" means any of the following:

(a) A public corporation created under a statute of this state and specifically designated as a public corporation.

(b) A school district.

(c) A public charter school established under ORS chapter 338.

(d) An education service district.

(e) A community college district or community college service district established under ORS chapter 341.

(f) An intergovernmental body formed by two or more public bodies.

(g) Any entity that is created by statute, ordinance or resolution that is not part of state government or local government.

(h) Any entity that is not otherwise described in this section that is:

(A) Not part of state government or local government;

(B) Created pursuant to authority granted by a statute, ordinance or resolution, but not directly created by that statute, ordinance or resolution; and

(C) Identified as a governmental entity by the statute, ordinance or resolution authorizing the creation of the entity, without regard to the specific terms used by the statute, ordinance or resolution.

(2) Subject to ORS 174.108, as used in the statutes of this state "special government body" includes:

(a) An entity created by statute for the purpose of giving advice only to a special government body;

(b) An entity created by a special government body for the purpose of giving advice to the special government body, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by a special government body described in subsection (1) of this section, other than an entity described in paragraph (b) of this subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the special government body. [2001 c.74 §8]

Exhibit 2a

H

Supreme Court of Oregon,
En Banc.
Cheryl **VAUGHN**, Petitioner on Review,
v.
FIRST TRANSIT, INC., a Delaware corporation; **First Transit** Transportation, LLC, a Delaware corporation; and Clara Zavoral, Respondents on Review,
and
Port of Portland, Intervenor.
(CC 0603-03099; CA A133676; SC S055981).

Argued and submitted Jan. 13, 2009.
Decided April 16, 2009.

Background: Passenger, who was injured while riding on an airport shuttle bus, filed negligence action against the shuttle bus driver and the driver's employer, a transportation company that provided shuttle bus service for the public body that owned and operated the airport. The trial court granted defendants' motion for summary judgment on basis that, under the Tort Claims Act, action had to be brought against the public body only. Passenger appealed. The Court of Appeals affirmed. Passenger petitioned for review.

Holdings: The Supreme Court, Balmer, J., held that:
(1) when the Act makes a public body liable for tort claims based on the conduct of an agent of the public body, it means only those tort claims for which the agent's principal would be liable under common-law standards of vicarious liability;
(2) transportation company was an agent of public body, in the common-law meaning of that term; but
(3) transportation company and its employee were not agents of public body within meaning of section of Act providing that the sole cause of action of a person injured by the tort of an agent of a public body acting within the scope of his employment or duties is an action against the public body only.

Decision of Court of Appeals reversed; judgment of Circuit Court reversed; case remanded.

West Headnotes

[1] Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
When reviewing a grant of summary judgment, appellate court views the facts and all reasonable inferences that may be drawn from those facts in the light most favorable to the nonmoving party.

[2] Municipal Corporations 268 ⚿745

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k745 k. Application of Principle of Agency to Municipalities. Most Cited Cases
Under the Tort Claims Act, public officers, employees, and agents of a public body are not subject to actions for torts committed while acting within the scope of their employment or duties, and the injured person must bring any claim based on their actions against the public body only. West's Or.Rev. Stat. Ann. § 30.265(1).

[3] Automobiles 48A ⚿193(8)

48A Automobiles
48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak183 Persons Liable
48Ak193 Owner's Liability for Acts of Servant or Agent
48Ak193(8) k. Scope of Employ-

ment. Most Cited Cases
Employer ordinarily would be liable for claims arising out of employee's allegedly negligent driving if employee was acting within the scope of her employment at the time of accident.

[4] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases
The principal's control over what the agent shall or shall not do is necessary for an agency relationship, but it is not, on its own, sufficient to create such a relationship.

[5] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases

Principal and Agent 308 ⚿3(2)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k3 Agency Distinguished from Other Relations
308k3(2) k. Contractor. Most Cited Cases
Agency does not result when an individual or entity simply agrees to provide services for another, even if the other person, through contract, is able to establish general standards for performance and in that way control the individual; that individual simply may be a contractor performing services for another, and not an agent at all.

[6] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases

Principal and Agent 308 ⚿8

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k7 Appointment of Agent
308k8 k. In General. Most Cited Cases
The ability to control in detail another's actions does not alone create an agency relationship; to qualify as an agent, one must also agree to act on another's behalf.

[7] Labor and Employment 231H ⚿27

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk27 k. Supervisor or Other Person as Employer. Most Cited Cases
A subordinate employee is not the agent of a supervisor simply because the supervisor has full control over the employee's work activities; instead, both the subordinate and the supervisor are agents of their common employer, on whose behalf they have agreed to work. Restatement (Third) of Agency at § 1.01 comment g.

[8] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases
To be an "agent," two requirements must be met: (1) the individual must be subject to another's control; and (2) the individual must act on behalf of the other person.

[9] Statutes 361 ⚿222

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k222 k. Construction with Reference to Common or Civil Law. Most Cited Cases

Statutes 361 ⚿223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases
When interpreting statutes, courts consider the context of the statutory provision, including the pre-existing common law and the statutory framework within which the statute was enacted.

[10] Municipal Corporations 268 ⚿723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Legislature enacted the Tort Claims Act to partially waive sovereign immunity, by permitting claims against public bodies for their own torts and, vicariously, for the torts of their officers, employees, and agents. West's Or.Rev. Stat. Ann. § 30.265(1).

[11] Labor and Employment 231H ⚿23

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk23 k. In General. Most Cited Cases

Principal and Agent 308 ⚿3(1)

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k3 Agency Distinguished from Other Relations
308k3(1) k. In General. Most Cited Cases
There are two types of agents: employees, who are referred to as servant agents, and agents who are not employees, who are sometimes referred to as nonservant agents.

[12] Labor and Employment 231H ⚿23

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk23 k. In General. Most Cited Cases

Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases
All servants are agents and all masters, principals; however, all principals and agents are not also masters and servants.

[13] Labor and Employment 231H ⚿23

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk23 k. In General. Most Cited Cases
An agent is an employee if the principal has the right to control the physical details of the work being performed by the agent; in other words, the principal directs not only the end result, but also controls how the employee performs the work.

[14] Principal and Agent 308 ⚿1

308 Principal and Agent
308I The Relation
308I(A) Creation and Existence
308k1 k. Nature of the Relation in General. Most Cited Cases

When an agent retains control over the details of the manner in which it performs its duties, that agent is a nonemployee agent.

[15] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
A principal's liability for the torts of its agents varies based upon the type of agent.

[16] Labor and Employment 231H ⚿3045

231H Labor and Employment
231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)1 In General
231Hk3044 Scope of Employment
231Hk3045 k. In General. Most Cited Cases
In general, a principal is liable for all torts committed by its employees while acting within the scope of their employment.

[17] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
A principal ordinarily is not liable in tort for physical injuries caused by the actions of its agents who are not employees.

[18] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
A principal is vicariously liable for an act of its nonemployee agent only if the principal intended or authorized the result or the manner of performance of that act.

[19] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
For a principal to be vicariously liable for the negligence of its nonemployee agents, there ordinarily must be a connection between the principal's right to control the agent's actions and the specific conduct giving rise to the tort claim.

[20] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
A principal that authorizes a nonemployee agent to act on the principal's behalf is not, for that reason alone, liable when the agent injures a third party because the agent was negligent in carrying out its authorized activities. Restatement (Second) of Agency at § 250 comment b.

[21] Principal and Agent 308 ⚿159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts

308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases
Only when the principal's control over the agent with respect to the actions of the agent that gave rise to the tort claim is similar to the control that an employer exercises over an employee will the principal be vicariously liable for the negligence of its nonemployee agent.

[22] Municipal Corporations 268 ⚿745

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k745 k. Application of Principle of Agency to Municipalities. Most Cited Cases
When the Tort Claims Act makes a public body liable for tort claims based on the conduct of an agent of the public body, it does not mean all tort claims involving any agent of a public body, but only those for which the agent's principal would be liable under common-law standards of vicarious liability. West's Or.Rev. Stat. Ann. § 30.265(1).

[23] Aviation 48B ⚿229

48B Aviation
48BV Airports and Services
48Bk229 k. Ground Transportation. Most Cited Cases

Carriers 70 ⚿306(1)

70 Carriers
70IV Carriage of Passengers
70IV(D) Personal Injuries
70k306 Companies or Persons Liable
70k306(1) k. In General. Most Cited Cases
Contract between public body that owned and operated airport and transportation company that provided shuttle bus service at the airport demonstrated that transportation company agreed to act on behalf of public body and gave public body substantial control over transportation company's operations, and thus transportation company was an "agent" of public body, in the common-law meaning of that term; contract gave public body authority to unilaterally adjust transportation company's annual operating budget and to take control of the shuttle buses in the event of an interruption in service.

[24] Aviation 48B ⚿229

48B Aviation
48BV Airports and Services
48Bk229 k. Ground Transportation. Most Cited Cases

Carriers 70 ⚿306(1)

70 Carriers
70IV Carriage of Passengers
70IV(D) Personal Injuries
70k306 Companies or Persons Liable
70k306(1) k. In General. Most Cited Cases
Contract between public body that owned and operated airport and transportation company that provided shuttle bus service at the airport did not provide that public body had the right to control the physical manner in which transportation company employees carried out their driving duties, as required for transportation company and its employee, who allegedly negligently caused a passenger injuries by unnecessarily, suddenly, and unexpectedly slamming on vehicle's brakes, to be "agents" of public body, within meaning of section of Tort Claims Act providing that the sole cause of action of a person injured by the tort of an agent of a public body acting within the scope of his employment or duties is an action against the public body only. West's Or.Rev. Stat. Ann. § 30.265(1).

****183** On review from the Court of Appeals.[FN*]

FN* Appeal from Multnomah County Circuit Court, Bruce Hamlin, Judge pro tem-

pore. 218 Or.App. 375, 180 P.3d 185 (2008).

Helen C. Tompkins, Law Office of Helen Tompkins, P.C., Lake Oswego, argued the cause and filed the brief for petitioner on review.

Thomas M. Christ, Cosgrave Vergeer Kester LLP, Portland, argued the cause and filed the briefs for respondents on review.

William F. Gary, Harrang Long Gary Rudnick, P.C., Portland, argued the cause and filed the brief for intervenor Port of Portland. With him on the brief were Sharon A. Rudnick and Susan D. Marmaduke.

Kathryn H. Clarke, Portland, filed a brief for amicus curiae Oregon Trial Lawyers Association.

C. Randall Tosh, Salem, filed a brief for amici curiae League of Oregon Cities, Association of Oregon Counties, Special Districts Association of Oregon, Multnomah County, Marion County, Deschutes County, Clackamas County, Metro, City of Portland, City of Eugene, City of Salem, City of Boardman, City County Insurance Services, Housing Authority of Portland, Oregon School Boards Association, and City of Hood River.

Karla H. Ferrall, Assistant Attorney General, filed a brief for amicus curiae State of Oregon. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

BALMER, J.

***131** This tort case requires us to determine the meaning of the word "agent" for purposes of the Oregon Tort Claims Act (OTCA). The OTCA permits tort claims against public bodies, with certain limitations, and provides that the sole cause of action for any tort committed by officers, employees, and agents of a public body who are acting within the scope of their employment or duties is one against the public body.[FN1] Plaintiff was injured while riding on ****184** an airport shuttle bus. She filed this action against the shuttle bus driver and the driver's employer, a transportation company that provides shuttle bus service for the Port of Portland (the Port) under a contract. Defendants claimed that, as "agents" of the Port, a public body, plaintiff did not have a cause of action against them, but only against the Port. The trial court agreed that plaintiff did not have a cause of action against defendants and granted their motion for summary judgment.[FN2] Plaintiff ***132** appealed, and the Court of Appeals affirmed without opinion. *Vaughn v. First Transit, Inc.*, 218 Or.App. 375, 180 P.3d 185 (2008). We allowed review and now reverse.

FN1. ORS 30.265(1), one of several statutes that together comprise the OTCA, provides, in part:

> "[E]very public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties * * *. *The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties* and eligible for representation and indemnification under ORS 30.285 or 30.287 *shall be an action against the public body only.* The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action or suit against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action or suit. No other form of civil action or suit shall be permitted. If an action or suit is filed against an officer, employee or agent of a public body, on appropriate motion the public body shall be substituted as the only defendant."

(Emphasis added.) Because the accident

> giving rise to the lawsuit in this case occurred in 2004, the version of the OTCA then in effect applies. That statute has since been amended in ways that do not affect our analysis. For ease of reference, we refer to the present version of the OTCA.

FN2. The trial court stated that the OTCA "immunizes" agents of public bodies from liability for torts committed within the scope of their agency, and the parties generally discuss the issue in this case as whether defendants have "immunity." However, the OTCA does not, by its terms, "immunize" those persons. The effect of the OTCA is to protect an officer, employee, or agent from tort liability in certain circumstances by providing that the sole cause of action of an injured person is one against the public body and that the public body "shall be substituted as the only defendant." ORS 30.265(1). The use of the term "immunity" to describe that protection should be avoided because the OTCA uses that term in a different context-and subsection-that is not involved in this case. *See* ORS 30.265(2) (providing that a public body is "immune" from liability for injuries caused by an officer, employee, or agent, if the officer, employee, or agent "is immune from liability").

[1] When reviewing a grant of summary judgment, we view the facts and all reasonable inferences that we may draw from those facts in the light most favorable to the nonmoving party-here, plaintiff. *See Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP,* 336 Or. 329, 332, 83 P.3d 322 (2004) (stating standard). Defendant First Transit, Inc., contracted with the Port, a public body that owns and operates Portland International Airport, to provide shuttle services between the airport terminal and three airport parking lots. Under that contract, the Port supplied office space, utilities, buses, radios, and fuel to First Transit and assumed responsibility for bus repair and licensing. First Transit provided the labor, along with any equipment and materials not provided by the Port. As a general matter, decisions regarding hiring and training new employees were left to First Transit. When hiring new employees, First Transit agreed to adhere to all state and federal laws, "ensure that all drivers are properly qualified and licensed," "research the driving record of each driver [and] ensure that appropriate safe driving history standards are met," implement a drug testing program including random drug tests, and subject each applicant to a criminal history check. First Transit also agreed to "establish a written employee training program," make a "good faith effort" to modify that program if the Port requested a modification, ensure appropriate training-including driver training, customer service training, and airport security training-and keep employee training records, making those records available to the Port upon the Port's request. First Transit also agreed to provide the Port with all "reasonable reports requested by the Port," including "a monthly report of hires and terminations during the previous month." The contract provided certain "appearance and behavior" standards for all employees, and the Port retained the right to require First Transit to "temporarily or permanently bar" any employee from performing the duties enumerated in the contract.

In the event of an accident, First Transit agreed to "immediately notify the Port Police," to "take photographs to document the circumstances and effects of any accident," and ***133** to provide those photographs to the ****185** Port. Additionally, First Transit agreed to maintain automobile liability insurance "covering liability for bodily injury and property damage arising from the use, loading, and unloading of the Port's buses," along with commercial general liability insurance "covering liability for personal injury, bodily injury, death, and damage to property (including loss of use thereof) arising from, or in any way related to," the shuttle system. The limits of those plans were to be not less than

$3,000,000 per incident. Finally, First Transit agreed to indemnify the Port against any claims arising out of the negligence of First Transit or its employees.

In 2004, plaintiff was injured while riding on a shuttle bus driven by defendant Zavoral, an employee of First Transit. Plaintiff sued defendants, alleging that Zavoral negligently had caused plaintiff's injuries when Zavoral "unnecessarily, suddenly and unexpectedly slammed on the vehicle's brakes to avoid a small rodent in the roadway," which caused plaintiff to be "thrown against a metal luggage rack, striking her shoulders and face." [FN3]

> FN3. In addition to Zavoral and First Transit, Inc., plaintiff sued First Transit Transportation, LLC. Defendants argued before the trial court and the Court of Appeals that First Transit Transportation, LLC, should not have been named as a defendant because it is not Zavoral's employer and is not a party to the contract between First Transit, Inc., and the Port. However, defendants never filed a motion to dismiss First Transit Transportation, LLC, and neither lower court addressed the issue. There is, therefore, no issue before this court with respect to the status of that defendant.

[2] Defendants moved for summary judgment, arguing that they were "agents" of the Port at the time of the accident and therefore, under the OTCA, any tort action must be brought against the Port only. ORS 30.265(1) provides that the "sole cause of action" of a person injured by the tort of an officer, employee, or agent of a public body acting within the scope of his or her employment or duties is "an action against the public body only." [FN4] Thus, under the OTCA, public officers, ***134** employees, and agents are not subject to actions for torts committed while acting within the scope of their employment or duties, and the injured person must bring any claim based on their actions against the public body only. Defendants argued that, based on the contract described above, they were "agents" of a public body under the meaning of the OTCA and that Zavoral had been acting within the scope of her employment-which was within the scope of First Transit's duties as an agent for the Port-when the accident occurred. Defendants contended that, as a result, "the sole cause of action" for Zavoral's negligence was one against the public body, the Port. As noted, the trial court agreed and granted defendants' motion for summary judgment. Plaintiff appealed, and the Court of Appeals affirmed without opinion.

> FN4. The "sole cause of action" aspect of ORS 30.265(1) applies only when the officer, employee, or agent is "eligible for representation and indemnification under ORS 30.285 or 30.287." Those statutes provide that the indemnification requirement does not apply "in case of malfeasance in office or willful or wanton neglect of duty" and also set out the procedures that officers, employees, and agents must follow to request that the public body defend a claim against them. The Port argues that defendants were not "eligible for representation and indemnification" and therefore did not fall within the terms of ORS 30.265 because they did not fulfill the procedural requirements in ORS 30.285 and ORS 30.287. Because we conclude that defendants were not "agents" for purposes of ORS 30.265(1), we do not reach the Port's argument.

[3] This case involves two alleged "agency" relationships: Zavoral as the agent of First Transit, and First Transit as the agent of the Port. It is undisputed that Zavoral was an agent of First Transit; more specifically, she was an employee of First Transit acting within the scope of her employment at the time of the accident. As Zavoral's employer, First Transit ordinarily would be liable for claims arising out of Zavoral's allegedly negligent driving.

See Minnis v. Oregon Mutual Ins. Co., 334 Or. 191, 201, 48 P.3d 137 (2002) (employer liable in tort for acts of employees when acting within the scope of employment). The issue in this case, however, is whether First Transit and Zavoral are "agents"-as that term is used in the OTCA-of the Port so as to be protected from tort claims by ORS 30.265.[FN5]

> FN5. If First Transit is an agent of the Port, then Zavoral-an employee who First Transit hired to aid in performing its duties for the Port-is also an agent of the Port. *See Restatement (Third) of Agency* § 3.15(1) (2006) ("A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency * * *.").

****186** We begin with an overview of the statutory scheme. In 1967, the legislature enacted the OTCA and abrogated, in ***135** part, the state's sovereign immunity. As originally enacted, the OTCA permitted claims against public bodies-with some limitations-for their own torts and for the torts committed by their "officers, employe[e]s and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." Or Laws 1967, ch 627, § 2. The original statute provided that the public body was permitted, but not required, to "defend, save harmless and indemnify any of its officers, employe[e]s and agents * * * against any tort claim or demand * * * arising out of an alleged act or omission occurring in the performance of duty." *Id.* at § 7. In 1975, the legislature amended the OTCA to provide for mandatory indemnification by the public body. Or Laws 1975, ch 609, § 16. Finally, in 1991, the legislature eliminated any tort claim against those officers, employees, and agents who are eligible for indemnification, making the sole cause of action one against the public body. Or Laws 1991, ch 861, § 1. *See generally Clarke v. OHSU,* 343 Or. 581, 588-90, 175 P.3d 418 (2007) (discussing history of OTCA, including effect of 1975 and 1991 amendments).

As noted, because First Transit does not claim to be an "officer" or "employee" of the Port, the question is whether it is an "agent" as that term is used in the OTCA. The OTCA does not contain a definition of agent, so we begin by looking to the well-established legal meaning of that term. *See McIntire v. Forbes,* 322 Or. 426, 431, 909 P.2d 846 (1996) ("Analysis of text also includes reference to well-established legal meanings for terms that the legislature has used.").

At common law, "agency" was defined as a relationship that "results from the manifestation of consent by one person to another that the other shall act *on behalf and subject to his control,* and consent by the other so to act." *Hampton Tree Farms, Inc. v. Jewett,* 320 Or. 599, 617, 892 P.2d 683 (1995) (emphasis added; internal quotation marks omitted). The "agent" is the person in that relationship who acts on behalf of the other, the "principal." *Restatement (Second) of Agency* § 1 (1958).

[4][5] We first consider how much control is required for an agency relationship to exist.

***136** "Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established."

Restatement (Third) of Agency § 1.01 comment f (2006). Thus, the principal's "control" over what the agent shall or shall not do is necessary for an agency relationship, but it is not, on its own, sufficient to create such a relationship. Agency does not result, for example, when an individual (or entity) simply agrees to provide services for another, even

if the other person-through contract-is able to establish general standards for performance and in that way "control" the individual. That individual simply may be a contractor performing services for another, and not an "agent" at all. Instead, "[t]he power to give *interim* instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." *Id.* (emphasis added).

[6][7][8] Even the ability to control in detail another's actions does not alone create an agency relationship; to qualify as an agent, one must also agree to act "on [another's] behalf." Thus, for example, a subordinate employee is not the agent of a supervisor simply because the supervisor has full control over the employee's work activities. Instead, both the subordinate and the supervisor are agents of their common employer, on whose behalf they have agreed to work. *See Restatement (Third) of Agency* at § 1.01 comment****187** g (giving examples). In sum, to be an "agent"-using the well-defined legal meaning of that term-two requirements must be met: (1) the individual must be subject to another's control; and (2) the individual must "act on behalf of" the other person.

[9][10] Our analysis does not end there, however. When interpreting statutes, we also consider the context of the statutory provision, including the pre-existing common law and the statutory framework within which the statute was enacted. *Matter of Marriage of Denton and Denton,* 326 Or. 236, 241, 951 P.2d 693 (1998). As noted, the legislature originally enacted the OTCA to partially waive sovereign immunity, by permitting claims against public bodies for their own torts and, vicariously, for ***137** the torts of their officers, employees, and agents. That is, the legislature allowed injured persons to assert-albeit with some limitations-the same tort claims against public bodies that they could, at common law, assert against other tortfeasors. Considering that context, we turn to a discussion of common-law principles of agency and vicarious liability.

[11][12][13][14] Understanding agency law in the context of vicarious liability requires an understanding of two types of agents: employees (or "servant" agents) and agents who are not employees (sometimes referred to as "nonservant" agents). [FN6] "All servants are agents and all masters, principals. However, all principals and agents are not also masters and servants." *Kowaleski v. Kowaleski,* 235 Or. 454, 457, 385 P.2d 611 (1963). The common law distinguishes between the two types of agents using a "right-to-control" test. An agent is an employee if the principal has the right to control the physical details of the work being performed by the agent; in other words, the principal directs not only the end result, but also controls *how* the employee performs the work. *Schaff v. Ray's Land & Sea Food Co., Inc.,* 334 Or. 94, 100, 45 P.3d 936 (2002). In contrast, when the agent retains control over the details of the manner in which it performs its duties, that agent is a nonemployee agent. *Restatement (Second) of Agency* at § 220 comment e.

> FN6. The *Restatement (Third) of Agency* eliminates the terms "master" and "servant," as well as variations such as "nonservant," *see id.* at § 2.04 comment a, but the prior editions and many cases continue to use those terms.

[15][16][17][18][19] Distinguishing between employees and agents who are not employees is important for vicarious liability purposes, because a principal's liability for the torts of its agents varies based upon the type of agent. In general, a principal is liable for all torts committed by its employees while acting within the scope of their employment. *Minnis,* 334 Or. at 201, 48 P.3d 137. But a principal ordinarily is *not* liable in tort for physical injuries caused by the actions of its agents who are not employees. *Jensen v. Medley,* 336 Or. 222, 230, 82 P.3d 149 (2003). Rather, a principal is vicariously liable for an act of its nonemployee agent only if the principal "intended" or "authorized the result [ ]or the manner of performance" of that act. *Restatement (Second) of Agency* at § 250; *see also* ***138**

Jensen, 336 Or. at 231, 82 P.3d 149 (principal liable for acts of nonservant agents only if those acts "within the actual or apparent authorization of the principal").[FN7] In other words, for a principal to be vicariously liable for the negligence of its nonemployee agents, there ordinarily must be a connection between the principal's "right to control" the agent's actions and the specific conduct giving rise to the tort claim.

> FN7. Of course, a principal may be directly liable for the tortious act of an agent if the principal had "a duty to have the act performed with due care," *Restatement (Second) of Agency* at §§ 214, 250, or if the principal itself was negligent in hiring, instructing, or supervising the agent. *Id.* at § 213.

This court applied those principles in *Jensen,* where the issue was whether an international union could be vicariously liable for the wrongful termination of an employee of an affiliated local union by the local union's manager. We explained that

> "whether one entity can be liable to a third party for the wrongful conduct of another entity in a context other than master-servant depends not only on whether the second entity is an 'agent' of the first for some purpose, but also on whether the principal authorized or intended the agent to act on ****188** its behalf *with respect to the conduct that gave rise to the third party's claim.*"

336 Or. at 237, 82 P.3d 149 (emphasis added). Applying that rule, we held that an instruction permitting the jury to find the international vicariously liable for the wrongful acts of the local simply because it had the "right to control" the local in the abstract was erroneous. That instruction was erroneous because it failed to ask whether the jury found that the "[l]ocal had been authorized to act for and had been subject to the control or right to control of [the international] *with respect to [the local's] hiring and firing of an employee.* " *Id.* at 238, 82 P.3d 149 (emphasis in original). We observed that, if a principal were liable for *all* the torts of an agent performed in furtherance of the principal's business, whenever the principal had a "right to control" the agent in *some* respects (which was necessary to create the agency in the first place), then the principal could face liability for conduct of the agent that the principal did not in fact control or have a right to control. "The law of agency," we stated, "does not extend that far." *Id.*

[20][21] ***139** The comments to the *Restatement* provision regarding liability for nonemployee agents expand on the requirement that, to be vicariously liable for the torts of such an agent, a principal must have a *right to control the physical details of the manner of performance of the conduct that is the basis for the tort claim:*

> "It is only when to the relation of principal and [nonservant] agent there is added that *right to control physical details as to the manner of performance* which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the *physical conduct* of the actor."

Restatement (Second) of Agency at § 250 comment a (emphasis added). Similarly, a principal that "authorizes" a nonemployee agent to act on the principal's behalf is not, for that reason alone, liable when the agent injures a third party because the agent was negligent in carrying out its authorized activities. *See id.* at comment b ("There is no inference that because a principal has authorized an act to be done which would be non-tortious if done carefully, he is liable for the act of a non-servant if the latter was negligent in his performance."). Put differently, only when the principal's control over the agent with respect to the actions of the agent that gave rise to the tort claim is similar to the control that an employer exercises over an employee will the principal be vicariously liable for the negligence of its nonemployee agent.

With that understanding of when, at common law, a principal may be vicariously liable for the negli-

gence of an agent who is not an employee, we return to the OTCA. The OTCA provides that the sole cause of action for a tort committed by a public body's "employees" *or* its "agents," when acting "within the scope of their employment or duties," is an action against the public body. ORS 30.265(1). Because the legislature used the word "agent" in addition to the word "employee," it apparently intended that statute to apply to at least some category of persons who are not subject to the kind of detailed control of performance by the public body so as to be employees, but who nevertheless act on behalf and under the control of the public body. But did the legislature intend to bring within the OTCA all torts of persons or entities that are "agents" under the common law?

[22] ***140** The purpose of the OTCA provides important context for considering that question. *See Restatement (Second) of Agency* at § 1 comment f ("Whether the word 'agent' as used in a statute corresponds to the [common-law] meaning * * * depends, with other factors, upon the purpose of the statute."). As discussed above, the legislature enacted the OTCA to abrogate sovereign immunity and make public bodies, with some limits, liable for their torts to the same extent as private persons and corporations. Given that purpose, it would not make sense to interpret the OTCA to bring *all* torts of a public body's common-law "agents" (when acting with the scope of their agency) within the statute. Such a definition would impose liability on the public body far beyond that imposed on private entities. As the discussion above demonstrates, principals ordinarily are vicariously liable for the torts of their ****189** nonemployee agents only when the principal had the right to control the physical details of the conduct of the agent that gave rise to the tort claim. In our view, when the legislature made public bodies vicariously liable for the torts of their "agents" through the OTCA, it intended to impose that same vicarious liability on public bodies for the torts of their nonemployee agents, subject of course to the specific procedural and other limitations of the OTCA. Thus, when the OTCA makes a public body liable for tort claims based on the conduct of an "agent" of the public body, it does not mean all tort claims involving *any* agent of a public body, but only those for which the agent's principal would be liable under common-law standards of vicarious liability.

[23] Returning to the facts of this case, we consider whether First Transit and Zavoral were agents of the Port for purposes of asserting that, because of the OTCA, plaintiff's sole cause of action for her injuries based on Zavoral's allegedly negligent driving is one against the Port. The only evidence before us is the contract between First Transit and the Port. As discussed above, that contract demonstrates that First Transit agreed to act on behalf of the Port by providing shuttle bus service at the airport, and it gives the Port substantial control over First Transit's operations, including the ability "to give interim instructions." *See Restatement (Third) of Agency* at § 1.01 comment f (explaining control in the context of agency). For example, the contract gives the Port the ***141** authority to "unilaterally adjust" First Transit's annual operating budget and to take control of the shuttle buses in the event of an interruption in service. Therefore, First Transit was an "agent" of the Port, in the common-law meaning of that term, because it agreed to act on behalf of and subject to the Port's control. It follows that, for the Port to be vicariously liable under the OTCA for First Transit's (or Zavoral's) negligence-and for plaintiffs to be limited to bringing an action against the Port only-defendants must be able to show that the Port had the right to control the physical details of the manner of performance of the conduct giving rise to the tort-Zavoral's driving.

[24] Defendants argue that the contract "leaves First Transit with very little discretion over how to [run the shuttle bus operation]" and point to several provisions in the contract that give the Port control over various aspects of the shuttle bus business. Plaintiff responds that the contract does not demonstrate that the Port maintained the right to control the physical details of the conduct giving rise to the

claim, namely, the driving of First Transit's employees. *See Jensen,* 336 Or. at 231, 236-38, 82 P.3d 149 (discussing principal's liability for actions of nonservant agents and focusing on specific allegedly wrongful conduct).

We agree with plaintiff. Although the Port retained the right to reject unilaterally any of First Transit's employees, including its operations manager, that provision is not equivalent to one expressly retaining the right to control the day-to-day performance of those employees. The contractual provision instead appears to be a way for the Port to protect its interests if First Transit hires (or, more likely, fails to fire) an employee whom the Port thinks is particularly incompetent. We recognize that the contract does provide other limits on First Transit's hiring; for example, First Transit was obligated to ensure that all its drivers were properly licensed. However, those general hiring standards do not serve to grant control to the Port over the day-to-day performance of First Transit's employees. The performance standards, as they relate to the drivers, are general requirements that First Transit "provide high quality customer service" and assure "the neat appearance, courtesy, efficiency, and conduct" of its employees. For the Port to be vicariously liable for ***142** the negligent driving of First Transit's employees, the Port would have to have the same right to control that driving as it would have over the driving of its own employees.

The contract itself does not provide that the Port has the right to control the physical manner in which First Transit employees carried out their driving duties. Thus, the contract does not support the conclusion that First Transit or its employees, including Zavoral, were acting as agents of the Port for purposes of imposing vicarious liability on ****190** the Port for the alleged negligence of First Transit's shuttle bus drivers. Accordingly, defendants have not demonstrated that they are "agents" of the Port for purposes of ORS 30.265(1) and that plaintiff's only permissible tort action is one against the Port. The trial court therefore erred in granting defendants' motion for summary judgment.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Or.,2009.
Vaughn v. First Transit, Inc.
346 Or. 128, 206 P.3d 181

END OF DOCUMENT

Exhibit 3

Enrolled
House Bill 3021

Sponsored by COMMITTEE ON VETERANS AND EMERGENCY SERVICES (at the request of Oregon Law Commission)

CHAPTER .....

AN ACT

Relating to emergencies; creating new provisions; amending ORS 18.348, 176.800, 190.156, 254.471, 401.015, 401.025, 401.035, 401.039, 401.065, 401.074, 401.085, 401.155, 401.257, 401.270, 401.272, 401.274, 401.275, 401.309, 401.315, 401.490, 401.550, 401.560, 401.570, 401.580, 401.590, 401.641, 401.657, 401.661, 401.667, 401.990, 453.322, 469.533, 469.535, 469.611, 480.347, 656.031 and 801.208 and section 2, chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311); and repealing ORS 401.355, 401.365, 401.375, 401.385, 401.395, 401.405, 401.415, 401.425, 401.435, 401.445, 401.455, 401.465 and 401.515.

Be It Enacted by the People of the State of Oregon:

QUALIFIED EMERGENCY SERVICE VOLUNTEERS

SECTION 1. Sections 2 to 5 of this 2009 Act are added to and made a part of ORS 401.015 to 401.039.

SECTION 2. Definitions. As used in sections 2 to 5 of this 2009 Act:

(1) "Emergency service activities" means:

(a) The provision of emergency services; and

(b) Engaging in training under the direction of a public body, whether by reason of the training being conducted or approved by a public body, for the purpose of preparing qualified emergency service volunteers to perform emergency services.

(2) "Qualified emergency service volunteer" means a person who is:

(a) Registered with the Office of Emergency Management or other public body to perform emergency service activities;

(b) Acknowledged in writing as a qualified emergency service volunteer, at the time the person offers to volunteer during an emergency, by the Office of Emergency Management or by another public body; or

(c) A member of the Oregon State Defense Force.

SECTION 3. Application. Sections 2 to 5 of this 2009 Act apply only to a qualified emergency service volunteer who is performing emergency service activities under the direction of a public body without compensation from the public body other than reimbursement for food, lodging, costs of transportation and other expenses.

SECTION 4. Coverage under Oregon Tort Claims Act. (1) A qualified emergency service volunteer is an agent of a public body under ORS 30.260 to 30.300 for the purpose of acts and

omissions of the volunteer that are within the course and scope of the volunteer's duties if the acts or omissions occur:

(a) While the volunteer is performing emergency service activities under the direction of the public body during a state of emergency declared under ORS 401.015 to 401.039, or during a state of public health emergency proclaimed under ORS 433.441; or

(b) While the volunteer is engaged in training being conducted or approved by a public body for the purpose of preparing the volunteer to perform emergency services.

(2) A public body shall defend, save harmless and indemnify a qualified emergency service volunteer as required by ORS 30.285 for any tort claim arising out of an act or omission described in subsection (1) of this section.

SECTION 5. Workers' compensation benefits. (1) The Office of Emergency Management shall provide workers' compensation coverage for qualified emergency service volunteers who are injured in the course and scope of performing emergency service activities under the direction of a public body if the injury occurs:

(a) While the volunteer is performing emergency service activities under the direction of the public body during a state of emergency declared under ORS 401.015 to 401.039, or during a state of public health emergency proclaimed under ORS 433.441; or

(b) While the volunteer is engaged in training being conducted or approved by a public body for the purpose of preparing the volunteer to perform emergency services.

(2) Workers' compensation coverage shall be provided under this section in the manner provided by ORS 656.039.

SECTION 6. ORS 401.355, 401.365, 401.375, 401.385, 401.395, 401.405, 401.415, 401.425, 401.435, 401.445, 401.455, 401.465 and 401.515 are repealed.

EMERGENCY HEALTH CARE SERVICES

SECTION 7. ORS 401.657 is amended to read:

401.657. (1) The Department of Human Services may designate all or part of a health care facility or other location as an emergency health care center. [*Upon*] **If** the Governor [*declaring*] **declares** a state of emergency under ORS 401.055, or [*proclaiming*] **proclaims** a state of public health emergency [*after determining that a threat to the public health is imminent and likely to be widespread, life-threatening and of a scope that requires immediate medical action to protect the public health*] **under ORS 433.441**, emergency health care centers may be used for:

(a) Evaluation and referral of individuals affected by the emergency;

(b) Provision of health care services; and

(c) Preparation of patients for transportation.

(2) The department may enter into cooperative agreements with local public health authorities that allow local public health authorities to designate emergency health care centers under this section.

(3) An emergency health care center designated under this section must have an emergency operations plan and a credentialing plan that governs the use of emergency health care providers registered under ORS 401.654 and other health care providers who volunteer to perform health care services at the center under ORS 401.651 to 401.670. The emergency operations plan and credentialing plan must comply with rules governing those plans adopted by the department.

SECTION 8. ORS 401.661 is amended to read:

401.661. [*Upon*] **If** the Governor [*declaring*] **declares** a state of emergency under ORS 401.055, or [*proclaiming*] **proclaims** a state of public health emergency [*after determining that a threat to the public health is imminent and likely to be widespread, life-threatening and of a scope that requires immediate medical action to protect the public health*] **under ORS 433.441**:

(1) The Department of Human Services may direct emergency health care providers registered under ORS 401.654 who are willing to provide health care services [*on a voluntary basis*] to proceed

to any place in this state where health care services are required by reason of the emergency or crisis; and

(2) Any emergency health care provider registered under ORS 401.654 or other health care provider may volunteer to perform health care services described in ORS 401.657 at any emergency health care center or health care facility in the manner provided by ORS 401.664.

SECTION 9. ORS 401.667 is amended to read:

401.667. (1) **If the Governor declares a state of emergency under ORS 401.055, or proclaims a state of public health emergency under ORS 433.441,** emergency health care providers registered under ORS 401.654 and other health care providers who volunteer to perform health care services [*without compensation*] under ORS 401.651 to 401.670 are agents of the state under ORS 30.260 to 30.300 for the purposes of any claims arising out of [*those*] services **that are provided under ORS 401.651 to 401.670 pursuant to directions from a public body and that are within the course and scope of the health care provider's duties, without regard to whether the health care provider is compensated for the services.**

(2) **If the Governor declares a state of emergency under ORS 401.055, or proclaims a state of public health emergency under ORS 433.441,** health care facilities **designated under ORS 401.657** and other persons operating emergency health care centers designated under ORS 401.657 are agents of the state under ORS 30.260 to 30.300 for the purposes of any claims arising out of services **that are** provided [*without compensation*] through those centers or facilities under ORS 401.651 to 401.670 **pursuant to directions from a public body and that are within the course and scope of the duties of the health care facility or other person, without regard to whether the health care facility or other person is compensated for the services.**

(3) An emergency health care provider registered under ORS 401.654 participating in training authorized by the Department of Human Services under ORS 401.651 to 401.670 is an agent of the state under ORS 30.260 to 30.300 for the purposes of any claims arising out of that training.

(4) The provisions of [*subsections (1) and*] **subsection** (2) of this section apply only to emergency health care centers or health care facilities that have adopted emergency operations plans and credentialing plans that govern the use of emergency health care providers registered under ORS 401.654 and other health care providers who volunteer to perform health care services under ORS 401.651 to 401.670. An emergency operations plan and a credentialing plan must comply with rules governing those plans adopted by the Department of Human Services.

SEARCH AND RESCUE

SECTION 10. Sections 11 to 14 of this 2009 Act are added to and made a part of ORS 401.550 to 401.590.

SECTION 11. Definitions. As used in sections 11 to 14 of this 2009 Act:

(1) "Qualified search and rescue volunteer" means a person who is:

(a) Registered with the Office of Emergency Management to conduct search and rescue activities;

(b) Registered with a sheriff to conduct search and rescue activities;

(c) A member of a designated search and rescue organization that is registered with a sheriff or the Office of Emergency Management; or

(d) Acknowledged in writing as a qualified search and rescue volunteer by the Office of Emergency Management, or by a sheriff, at the scene of a search or rescue.

(2) "Search and rescue activities" means:

(a) Searching for, rescuing or recovering any person who is missing, injured or deceased; and

(b) Training to perform the activities described in paragraph (a) of this subsection that is either conducted or approved by a public body.

SECTION 12. Application. Sections 11 to 14 of this 2009 Act apply only to a qualified search and rescue volunteer who is performing search and rescue activities without com-

pensation other than reimbursement for food, lodging, costs of transportation and other expenses.

SECTION 13. Coverage under Oregon Tort Claims Act. A qualified search and rescue volunteer is an agent of a county under ORS 30.260 to 30.300 for the purpose of acts and omissions of the volunteer that are within the course and scope of the volunteer's duties and that occur while the volunteer is performing search and rescue activities under the direction of the sheriff of the county or the designee of the sheriff, and the county shall defend, save harmless and indemnify the volunteer for any tort claim arising out of an alleged act or omission occurring in the performance of those activities as required by ORS 30.285.

SECTION 14. Workers' compensation coverage. (1) Any county in which a qualified search and rescue volunteer performs search and rescue activities under the direction of the sheriff of the county or the designee of the sheriff is conclusively deemed to have filed an election under ORS 656.031 to provide workers' compensation coverage for the qualified search and rescue volunteer.

(2) An insurer or self-insured employer may fix assumed wage rates for qualified search and rescue volunteers, which may be used only for purposes of computations under ORS chapter 656, and shall require the regular payment of premiums or assessments based on the hours of service by qualified search and rescue volunteers. A self-insured employer shall submit the assumed wage rates to the Director of the Department of Consumer and Business Services. If the director finds that the rates are unreasonable, the director may fix appropriate rates to be used for purposes of this section.

(3) A county that is a self-insured employer under ORS chapter 656 may apply to an insurer for workers' compensation coverage for qualified search and rescue volunteers only, while continuing to self-insure the other subject workers of the county. If an insurer decides not to provide workers' compensation coverage for qualified search and rescue volunteers of the county, coverage shall be provided through the assigned risk pool.

(4) Qualified search and rescue volunteers and their beneficiaries are not eligible for workers' compensation benefits under this section if the volunteer is performing search and rescue activities during an emergency and is provided with workers' compensation coverage under section 5 of this 2009 Act.

SECTION 14a. ORS 656.031 is amended to read:

656.031. (1) **Except as provided in section 14 of this 2009 Act,** all municipal personnel, other than those employed full-time, part-time, or substitutes therefor, shall, for the purpose of this chapter, be known as volunteer personnel and shall not be considered as workers unless the municipality has filed the election provided by this section.

(2) The county, city or other municipality utilizing volunteer personnel as specified in subsection (1) of this section may elect to have such personnel considered as subject workers for purposes of this chapter. Such election shall be made by filing a written application to the insurer, or in the case of a self-insured employer, the Director of the Department of Consumer and Business Services, that includes a resolution of the governing body declaring its intent to cover volunteer personnel as provided in subsection (1) of this section and a description of the work to be performed by such personnel. The application shall also state the estimated total number of volunteer personnel on a roster for each separate category for which coverage is elected. The county, city or other municipality shall notify the insurer, or in the case of self-insurers, the director, of changes in the estimated total number of volunteers.

(3) Upon receiving the written application the insurer or self-insured employer may fix assumed wage rates for the volunteer personnel, which may be used only for purposes of computations under this chapter, and shall require the regular payment of premiums or assessments based upon the estimated total numbers of such volunteers carried on the roster for each category being covered. The self-insured employer shall submit such assumed wage rates to the director. If the director finds that the rates are unreasonable, the director may fix appropriate rates to be used for purposes of this section.

(4) The county, city or municipality shall maintain separate official membership rosters for each category of volunteers. A certified copy of the official membership roster shall be furnished the insurer or director upon request. Persons covered under this section are entitled to the benefits of this chapter and they are entitled to such benefits if injured as provided in ORS 656.202 while performing any duties arising out of and in the course of their employment as volunteer personnel, if the duties being performed are among those:

(a) Described on the application of the county, city or municipality; and

(b) Required of similar full-time paid employees.

(5) The filing of claims for benefits under this section is the exclusive remedy of a volunteer or a beneficiary of the volunteer for injuries compensable under this chapter against the state, its political subdivisions, their officers, employees, or any employer, regardless of negligence.

OREGON TORT CLAIMS ACT

SECTION 15. Section 2, chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311), is amended to read:

Sec. 2. (1) Punitive damages may not be awarded on any claim subject to ORS 30.260 to 30.300.

(2) Claims subject to ORS 30.260 to 30.300 are not subject to the limitation imposed by ORS 31.710.

(3) A court may not apply the limitations imposed on recovery under sections 3, 4 and 5, **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311),** [*of this 2009 Act*] until after the entry of a verdict or a stipulation by the parties to the amount of the damages.

(4) The limitations imposed under sections 3 (2) and 4 (2), **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311),** [*of this 2009 Act*] on single claimants include damages claimed for loss of services or loss of support arising out of the same tort.

(5) If two or more claimants recover on a claim that arises out of a single accident or occurrence, and the recovery is subject to a limitation imposed by section 3 (3), 4 (3) or 5 (2)(b), **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311)** [*of this 2009 Act*], any party to the action in which the claim is made may apply to the court to apportion to each claimant the proper share of the amount allowed by section 3 (3), 4 (3) or 5 (2)(b), **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311)** [*of this 2009 Act*]. The share apportioned to each claimant shall be in the proportion that the ratio of the award or settlement made to the claimant bears to the aggregate awards and settlements for all claims arising out of the accident or occurrence.

(6) Liability of any public body and one or more of its officers, employees or agents, or two or more officers, employees or agents of a public body, on claims arising out of a single accident or occurrence, may not exceed in the aggregate the amounts allowed by sections 3, 4 and 5, **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311)** [*of this 2009 Act*].

(7) Sections 3, 4 and 5, **chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311),** [*of this 2009 Act*] do not apply to a claim arising in connection with a nuclear incident covered by an insurance or indemnity agreement under 42 U.S.C. 2210.

(8) For the purposes of the limitations imposed by sections 3, 4 and 5, chapter 67, Oregon Laws 2009 (Enrolled Senate Bill 311), events giving rise to a proclamation of a state of emergency under ORS 401.055, or a proclamation of a public health emergency under ORS 433.441, do not constitute a single accident or occurrence.

SERIES ADJUSTMENTS

SECTION 16. (1) ORS 401.039, 401.055, 401.095, 401.105, 401.115, 401.125, 401.135, 401.145 and 401.155 are added to and made a part of ORS 401.065 to 401.085.

(2) ORS 401.065 to 401.085, 401.106, 401.107, 401.108, 401.257, 401.259, 401.261, 401.263, 401.265, 401.267, 401.269, 401.270, 401.271, 401.272, 401.274, 401.275, 401.280, 401.300, 401.305, 401.309, 401.315, 401.325, 401.335, 401.337, 401.343, 401.345, 401.347, 401.353, 401.485, 401.505,

401.525, 401.535, 401.538, 401.543, 401.546, 401.638, 401.639, 401.641, 401.643, 401.645, 401.651 to 401.670 and 401.990 are added to and made a part of ORS 401.015 to 401.039.

DEFINITIONS

(Generally)

SECTION 17. ORS 401.025 is amended to read:

401.025. As used in ORS [*190.155 to 190.170, 401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584, unless the context requires otherwise*] **401.015 to 401.039**:

[*(1) "Abnormal disruption of the market" means any human created or natural event or circumstance that causes essential consumer goods or services to be not readily available.*]

[*(2) "Beneficiary" has the meaning given that term in ORS 656.005.*]

[*(3) "Commission" means the Seismic Safety Policy Advisory Commission established under ORS 401.337.*]

[*(4) "Emergency" means a human created or natural event or circumstance that causes or threatens widespread:*]

[*(a) Loss of life;*]

[*(b) Injury to person or property;*]

[*(c) Human suffering; or*]

[*(d) Financial loss.*]

(1) "Emergency" means a human created or natural event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering or financial loss, including but not limited to:

(a) Fire, explosion, flood, severe weather, landslides or mud slides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war; and

(b) A rapid influx of individuals from outside this state, a rapid migration of individuals from one part of this state to another or a rapid displacement of individuals if the influx, migration or displacement results from the type of event or circumstance described in paragraph (a) of this subsection.

[*(5) "Emergency management agency" means an organization created and authorized under ORS 401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584 by the state, county or city to provide for and ensure the conduct and coordination of functions for comprehensive emergency program management.*]

[*(6) "Emergency program management" includes all the tasks and activities necessary to provide, support and maintain the ability of the emergency services system to prevent or reduce the impact of emergency or disaster conditions which includes, but is not limited to, coordinating development of plans, procedures, policies, fiscal management, coordination with nongovernmental agencies and organizations, providing for a coordinated communications and alert and notification network and a public information system, personnel training and development and implementation of exercises to routinely test the emergency services system.*]

[*(7) "Emergency program manager" means the person administering the emergency management agency of a county or city.*]

[*(8)*] **(2)** "Emergency service agency" means an organization within a local government [*which*] **that** performs essential services for the public's benefit [*prior to*] **before**, during or [*following*] **after** an emergency[*. This includes, but is not limited to, organizational units within local governments*], such as law enforcement, fire control, health, medical and sanitation services, public works and engineering, public information and communications.

[*(9) "Emergency service worker" means an individual who, under the direction of an emergency service agency or emergency management agency, performs emergency services and:*]

[*(a) Is a registered volunteer or independently volunteers to serve without compensation and is accepted by the Office of Emergency Management or the emergency management agency of a county or city; or*]

[*(b) Is a member of the Oregon State Defense Force acting in support of the emergency services system.*]

[*(10)*] **(3)** "Emergency services" [*includes those*] **means** activities [*provided*] **engaged in** by state and local government agencies [*with emergency operational responsibilities*] to prepare for **an emergency** and [*carry out any activity*] to prevent, minimize, respond to or recover from an emergency[*. These activities include, without limitation*], **including but not limited to** coordination, preparedness planning, training, interagency liaison, fire fighting, oil or hazardous material spill or release cleanup as defined in ORS 466.605, law enforcement, medical, health and sanitation services, engineering and public works, search and rescue activities, warning and public information, damage assessment, administration and fiscal management, and those measures defined as "civil defense" in 50 U.S.C. app. 2252.

[*(11) "Emergency services system" means that system composed of all agencies and organizations involved in the coordinated delivery of emergency services.*]

[*(12) "Essential consumer goods or services" means goods or services that:*]

[*(a) Are or may be bought or acquired primarily for personal, family or household purposes, including but not limited to residential construction materials or labor, shelter for payment such as a hotel room, food, water or petroleum products such as gasoline or diesel fuel; and*]

[*(b) Are necessary for the health, safety or welfare of consumers.*]

[*(13) "Human created or natural event or circumstance" includes, but is not limited to:*]

[*(a) Fire, explosion, flood, severe weather, landslides or mud slides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war; and*]

[*(b) A rapid influx of individuals from outside this state, a rapid migration of individuals from one part of this state to another or a rapid displacement of individuals if the influx, migration or displacement results from the type of event or circumstance described in paragraph (a) of this subsection.*]

[*(14) "Injury" means any personal injury sustained by an emergency service worker by accident, disease or infection arising out of and in the course of emergency services or death resulting proximately from the performance of emergency services.*]

[*(15)*] **(4)** "Local government" [*means any governmental entity authorized by the laws of this state*] **has the meaning given that term in ORS 174.116**.

[*(16)*] **(5)** "Major disaster" means any event defined as a "major disaster" under 42 U.S.C. 5122(2).

[*(17) "Oregon emergency management plan" means the state emergency preparedness operations and management plan. The Office of Emergency Management is responsible for coordinating emergency planning with government agencies and private organizations, preparing the plan for the Governor's signature, and maintaining and updating the plan as necessary.*]

[*(18) "Search and rescue" means the acts of searching for, rescuing or recovering, by means of ground or marine activity, any person who is lost, injured or killed while out of doors. However, "search and rescue" does not include air activity in conflict with the activities carried out by the Oregon Department of Aviation.*]

[*(19) "Sheriff" means the chief law enforcement officer of a county.*]

SECTION 18. ORS 254.471 is amended to read:

254.471. (1) Notwithstanding ORS 171.185, 203.085, 221.230, 221.621, 254.056, 254.470, 254.655, 255.335, 255.345, 258.075, 545.135 and 568.520, the Governor by written proclamation may extend the deadline for returning ballots in any state, county, city or district election if the Governor receives a written request for the extension from the Secretary of State. The secretary may request the Governor to extend the deadline for returning ballots under this section if, after consultation with

affected county clerks, the secretary determines that it would be impossible or impracticable for electors to return ballots or for elections officials to tally ballots due to an emergency as defined in ORS 401.025 [*(4)*].

(2) The Governor may not extend the deadline for returning ballots in any state, county, city or district election under subsection (1) of this section for more than seven calendar days after the date of the election.

(3) The written proclamation required under subsection (1) of this section shall state:

(a) The determination of the Governor;

(b) The reason the deadline for returning ballots was extended; and

(c) The date and time by which ballots must be returned in the election.

(4) Notwithstanding any other provision of this chapter, if the Governor extends the deadline for returning ballots under subsection (1) of this section, a county clerk in any county in this state may not order a tally report from any vote tally machine in the election until the date and time set by the Governor by which ballots must be returned in the election.

(Abnormal Disruption of Market)

SECTION 19. Section 20 of this 2009 Act is added to and made a part of ORS 401.015 to 401.039.

SECTION 20. For the purposes of this section and ORS 401.106, 401.107 and 401.108:

(1) "Abnormal disruption of the market" means any emergency that prevents ready availability of essential consumer goods or services.

(2) "Essential consumer goods or services" means goods or services that:

(a) Are or may be bought or acquired primarily for personal, family or household purposes, including but not limited to residential construction materials or labor, shelter for payment such as a hotel room, food, water and petroleum products such as gasoline or diesel fuel; and

(b) Are necessary for the health, safety or welfare of consumers.

(Emergency Management Agency and Emergency Program Manager)

SECTION 21. ORS 401.560 is amended to read:

401.560. (1) The sheriff of each county has the responsibility for search and rescue activities within the county. The duty of a sheriff under this subsection may be delegated to a [*qualified*] deputy or [*emergency service worker*] **other qualified person**.

(2) If the sheriff does not accept the responsibility for search and rescue activities, the chief executive of the county shall [*designate*] **direct** the county emergency program manager **appointed under ORS 401.305** to perform the duties and responsibilities required under ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.550 to 401.590**.

(3) [*The*] **A** sheriff[,] or [*individual authorized under subsection (1) or (2) of this section, of each county*] **other person performing the duties of the sheriff under this section** shall notify the Office of Emergency Management of each search and rescue in the county and shall request the assignment of incident numbers [*therefor*] **for each search and rescue**.

(4) When search and rescue activities occur in a multicounty area:

(a) The sheriff **of one county**, or [*the authorized individual described in subsection (3) of this section*] **the other person performing the duties of the sheriff of one of the counties under this section**, [*of one county*] shall take charge**,** or the counties shall form a unified command, as outlined in the National Incident Management System Incident Command System established by Homeland Security Presidential Directive 5 of February 28, 2003; or

(b) If the appropriate sheriff or [*the authorized individual*] **other person** does not assume command as described in paragraph (a) of this subsection, the sheriff who received the initial call shall take charge of the multicounty search and rescue.

SECTION 22. ORS 401.570 is amended to read:

401.570. The sheriff of each county, the [*county emergency program manager*] **person** performing the sheriff's duties under ORS 401.560 or duly assigned military or state police personnel may restrict access to a specific search and rescue area. No unauthorized person shall then enter into a restricted area or interfere with a search and rescue. Provision shall be made for reasonable access by members of the media in the performance of newsgathering and reporting. Access shall be restricted for a reasonable period of time necessary to accomplish the search and rescue.

SECTION 23. ORS 453.322 is amended to read:

453.322. (1) The State Fire Marshal shall retain for at least five years the information provided by the employer under ORS 453.317.

(2) The State Fire Marshal shall provide copies of the information to each local public health authority, fire district and any public or private safety agency administering a 9-1-1 emergency reporting system pursuant to ORS 401.710 to 401.816 and, upon request, provide copies of the information to the following agencies located within the geographic jurisdiction of the fire district:

(a) Fire districts and other emergency service personnel responding to a hazardous substance incident;

(b) Health professionals;

(c) Law enforcement agencies; and

(d) Local emergency management agencies as [*defined in ORS 401.025*] **described in ORS 401.305**.

(3) The State Fire Marshal may distribute the information provided by an employer under ORS 453.317 to persons outside the jurisdiction of the fire district if the State Fire Marshal considers the information essential to the safe control of an emergency.

(4) In addition to the requirements of subsections (2) and (3) of this section, the State Fire Marshal shall provide, upon request, access to the information provided by employers under ORS 453.317 to any agency of this state.

(Emergency Services System)

SECTION 24. ORS 401.035 is amended to read:

401.035. (1) **The emergency services system is composed of all agencies and organizations involved in the coordinated delivery of emergency services.** The Governor is responsible for the emergency services system within the State of Oregon.

[*(2)*] The executive officer or governing body of each county or city of this state is responsible for the emergency services system within that jurisdiction.

[*(3)*] **(2)** In carrying out their responsibilities for emergency services systems, the Governor and the executive officers or governing bodies of the counties or cities may delegate any administrative or operative authority vested in them by ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039** and provide for the subdelegation of that authority.

(Emergency Service Worker)

SECTION 25. ORS 401.550 is amended to read:

401.550. The Director of the Office of Emergency Management shall appoint a Search and Rescue Coordinator to:

(1) Coordinate the search and rescue function of the Office of Emergency Management;

(2) Coordinate the activities of state and federal agencies involved in search and rescue;

(3) Establish liaison with the Oregon State Sheriffs' Association and other public and private organizations and agencies involved in search and rescue;

(4) Provide on-scene search and rescue coordination when requested by an authorized person;

(5) Coordinate and process requests for the use of [*emergency service workers*] **volunteers** and equipment;

(6) Assist in developing training and outdoor education programs;

(7) Gather statistics in search and rescue operations; and

(8) Gather and disseminate resource information of personnel, equipment and materials available for search and rescue.

SECTION 26. ORS 480.347 is amended to read:

480.347. Notwithstanding ORS 480.330 and 480.340, during an emergency as defined in ORS 401.025, the owner, operator or employee of a dispensing facility may permit nonretail customers, other than the owner, operator or employee, to use or manipulate at the dispensing facility a card activated or key activated device for dispensing Class 1 flammable liquids into the fuel tank of a vehicle or other container if:

(1) The owner or operator holds a current nonretail facility license issued by the State Fire Marshal under ORS 480.350;

(2) The fuel is dispensed to an emergency service agency as defined in ORS 401.025 or to an entity authorized by an emergency service agency to provide services during an emergency;

(3) The nonretail customer, other than the owner or operator, dispensing Class 1 flammable liquids is [*an emergency service worker*] **a qualified emergency service volunteer** as defined in [*ORS 401.025*] **section 2 of this 2009 Act** or an owner or employee of the entity authorized by the emergency service agency to provide services during an emergency and dispenses Class 1 flammable liquids only into the fuel tank of a vehicle or other container owned and used by the emergency service agency or the entity authorized by that agency to provide services during an emergency; and

(4) The nonretail customer, other than the owner, operator or employee, dispensing Class 1 flammable liquids satisfies safety training requirements in compliance with rules of the State Fire Marshal.

SECTION 27. ORS 801.208 is amended to read:

801.208. (1) "Commercial motor vehicle" means a motor vehicle or combination of motor vehicles that:

(a) Has a gross combination weight rating of 26,001 pounds or more, inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(b) Has a gross vehicle weight rating of 26,001 pounds or more;

(c) Is designed to transport 16 or more persons, including the driver; or

(d) Is of any size and is used in the transportation of hazardous materials.

(2) Notwithstanding subsection (1) of this section, the term "commercial motor vehicle" does not include the following:

(a) An emergency fire vehicle being operated by firefighters as defined in ORS 652.050;

(b) Emergency vehicles being operated by **qualified** emergency service [*workers*] **volunteers** as defined in [*ORS 401.025*] **section 2 of this 2009 Act**;

(c) A motor home used to transport or house, for nonbusiness purposes, the operator or the operator's family members or personal possessions;

(d) A vehicle that is owned or leased by, or operated under contract with, a mass transit district or a transportation district when the vehicle is actually being used to transport passengers for hire and is being operated by a volunteer driver, so long as the vehicle is not one described in subsection (1)(a) to (d) of this section; or

(e) A recreational vehicle that is operated solely for personal use.

(Public Body and Local Government)

SECTION 28. ORS 401.015 is amended to read:

401.015. (1) The general purpose of ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039** is to reduce the vulnerability of the State of Oregon to loss of life, injury to persons or property and human suffering and financial loss resulting from emergencies, and to provide for recovery and relief assistance for the victims of [*such occurrences*] **emergencies**.

(2) It is declared to be the policy and intent of the Legislative Assembly that preparations for emergencies and governmental responsibility for responding to emergencies be placed at the local [*government*] level. The state shall prepare for emergencies, but shall not assume authority or responsibility for responding to [*such an event*] **an emergency** unless the appropriate response is beyond the capability of the city and county in which [*it*] **the emergency** occurs, the city or county fails to act, or the emergency involves two or more counties.

SECTION 29. ORS 401.039 is amended to read:

401.039. (1) As used in this section, "unit of government" means any department or agency of the federal government[*, any state or any agency, office or department of a state, any city, county, district, commission, authority, entity, port or other public corporation organized and existing under statutory law or under a voter-approved charter and any intergovernmental entity created under ORS 190.003 to 190.130, 190.410 to 190.440 or 190.480 to 190.490*] **and any public body as defined by ORS 174.109**.

(2) Notwithstanding ORS [*401.065, 401.085, 401.095 and 401.115*] **401.065 to 401.085**, [*during a state of emergency declared under ORS 401.055,*] a unit of government may not seize a firearm from an individual who lawfully possesses the firearm **during a state of emergency declared under ORS 401.055**.

(3) If a unit of government seizes a firearm from an individual during a state of emergency in violation of this section, the individual may recover from the unit of government that seized the firearm all costs incurred in the recovery of the firearm, including attorney fees, court costs and any other costs incurred in the recovery of the firearm.

SECTION 30. ORS 401.272 is amended to read:

401.272. (1) As used in this section:

(a) "Companion animal" means a domestic animal commonly kept as a household pet.

(b) "Service animal" means an animal that assists or performs tasks for a person with a sensory, emotional, mental or physical disability.

(2) The Office of Emergency Management, in cooperation with the State Department of Agriculture and [*county and*] local governments, shall prepare a written animal emergency operations plan that provides for the evacuation, transport and temporary sheltering of companion animals and service animals during a major disaster or an emergency.

(3) The office, in developing the plan, shall emphasize the protection of human life and shall consider:

(a) Allowing owners of service animals to be evacuated, transported and sheltered with their service animals;

(b) Establishing a sufficient number of evacuation shelters equipped to temporarily shelter companion animals and service animals in close proximity to a human sheltering facility;

(c) Allowing owners and their companion animals to be evacuated together whenever possible;

(d) Establishing an identification system to ensure that owners who are separated from their companion animals or service animals during an evacuation are provided with all information necessary to locate and reclaim their animals;

(e) Transporting companion animals or service animals, in cages or carriers that safely and securely confine the animals, in an impending major disaster or emergency;

(f) Recommending that animal shelters, humane societies, veterinary offices, boarding kennels, breeders, grooming facilities, animal testing facilities and any other entity that normally houses companion animals or service animals create evacuation plans for the animals housed at their facilities;

(g) Establishing recommended minimum holding periods for companion animals or service animals that are sheltered during a major disaster or an emergency; and

(h) Creating and promoting an educational campaign for owners of companion animals or service animals that will:

(A) Encourage owners to plan for and incorporate their animals in the owners' personal plans in the event of a major disaster or an emergency; and

(B) Inform owners of companion animals or service animals about the animal emergency operations plan prepared under this section.

SECTION 31. ORS 401.274 is amended to read:

401.274. (1) As used in this section[*:*],

[*(a) "Emergency" has the meaning given that term in ORS 401.025.*]

[*(b)*] "livestock" means cattle, horses, sheep and any other animals designated by the State Department of Agriculture.

[*(c) "Major disaster" has the meaning given that term in ORS 401.025.*]

(2) The State Department of Agriculture, in cooperation with the Office of Emergency Management and [*county and*] local governments, shall prepare a written livestock emergency operations plan that provides for the evacuation, transport and temporary sheltering of livestock during a major disaster or an emergency.

(3) The department, in developing the plan, shall consider:

(a) Methods for providing adequate food and water for livestock during a major disaster or an emergency;

(b) Methods for providing livestock with adequate shelter or protection from harsh weather conditions during a major disaster or an emergency;

(c) Creating and promoting an educational campaign for owners of livestock that will:

(A) Encourage owners to plan for and incorporate their livestock in the owners' personal plans in the event of a major disaster or an emergency; and

(B) Inform owners of livestock about the livestock emergency operations plan prepared under this section; and

(d) Any other methods or arrangements that the department determines would protect livestock during a major disaster or an emergency.

SECTION 32. ORS 401.309 is amended to read:

401.309. **(1) The governing body of a city or county in this state may declare, by ordinance or resolution, that a state of emergency exists within the city or county. The ordinance or resolution must limit the duration of the state of emergency to the period of time during which the conditions giving rise to the declaration exist or are likely to remain in existence.**

[*(1)*] **(2)** [*Each county, city or other municipal corporation*] **A city or county** in this state may, by ordinance or resolution, establish procedures to prepare for and carry out any activity to prevent, minimize, respond to or recover from an emergency. The ordinance or resolution shall describe the conditions required for the declaration of a state of emergency within the jurisdiction [*and the agency or individual authorized to declare that a state of emergency exists*].

[*(2)*] **(3)** An ordinance or resolution adopted under **subsection (2) of** this section may designate the emergency management agency, if any, or any other agency or official of the [*county, city or municipal corporation*] **city or county** as the agency or official charged with carrying out emergency duties or functions under the ordinance.

[*(3)*] **(4)** A [*county, city or municipal corporation*] **city or county** may authorize an agency or official to order mandatory evacuations of residents and other individuals after a [*declaration of a*] state of emergency [*within the jurisdiction*] is declared **under this section**. An evacuation under an ordinance or resolution authorized [*by*] **under subsection (2) of** this section shall be ordered only when necessary for public safety or when necessary for the efficient conduct of activities that minimize or mitigate the effects of the emergency.

[*(4)*] **(5)** Nothing in this section shall be construed to affect or diminish the powers of the Governor during a state of emergency declared under ORS 401.055. The provisions of ORS [*401.015 to 401.107, 401.115 and 401.125 to 401.145*] **401.065 to 401.085** supersede the provisions of an ordinance or resolution authorized by this section when the Governor declares a state of emergency within any area in which such an ordinance or resolution applies.

[*(5) As used in this section, "emergency" has the meaning given that term in ORS 401.025.*]

SECTION 33. ORS 401.590 is amended to read:

401.590. (1) A public body **that has authority to conduct search and rescue activities** may collect an amount specified in this section as reimbursement for the cost of search and rescue activities when the public body conducts search and rescue activities for the benefit of hikers, climbers, hunters and other users of wilderness areas or unpopulated forested or mountainous recreational areas in this state.

(2) The public body may collect moneys as authorized by this section from each person for whose benefit search and rescue activities are conducted. The public body may not collect more than $500 from an individual under this section and may not collect more than the actual cost of the search and rescue activities from all of the individuals for whose benefit the activities are conducted.

(3) A public body may obtain reimbursement under this section only when:

(a) Reasonable care was not exercised by the individuals for whose benefit the search and rescue activities are conducted; or

(b) Applicable laws were violated by such individuals.

(4) Any individual who is charged a fee for reimbursement under this section may appeal the charge or the amount of the fee to the public body that charged the fee.

(5) For the purposes of subsection (3) of this section, evidence of reasonable care includes:

(a) The individuals possessed experience and used equipment that was appropriate for the known conditions of weather and terrain.

(b) The individuals used or attempted to use locating devices or cellular telephones when appropriate.

(c) The individuals notified responsible persons or organizations of the expected time of departure and the expected time of return and the planned location or route of activity.

(d) The individuals had maps and orienteering equipment and used trails or other routes that were appropriate for the conditions.

(6) As used in this section, "public body" [*means any unit of state or local government that conducts or has authority to conduct search and rescue activities*] **has the meaning given that term in ORS 174.109.**

SECTION 34. ORS 190.156 is amended to read:

190.156. As used in ORS 190.155 to 190.170:

(1) "Event" means an incident that overwhelms or may overwhelm the resources of a local government.

(2) "Local government" has the meaning given that term in ORS 174.116.

[*(2)*] **(3)** "Requesting local government" means a local government that requests assistance from other local governments.

[*(3)*] **(4)** "Resources" means employees, services, equipment and supplies of a responding local government.

[*(4)*] **(5)** "Responding local government" means a local government that has responded to a requesting local government by providing resources.

(Statewide Emergency Management Plan)

SECTION 35. ORS 401.257 is amended to read:

401.257. (1) The Office of Emergency Management is established in the Oregon Military Department.

(2) The office shall be responsible for:

(a) Coordinating and facilitating private sector and governmental efforts to prevent, prepare for, respond to and recover from emergencies; and

(b) Coordinating exercises and training, planning, preparedness, response, mitigation and recovery activities with state and local emergency services agencies and organizations.

(3) The office shall prepare a statewide emergency management plan and update the plan from time to time as necessary.

SECTION 36. ORS 401.275 is amended to read:

401.275. (1)(a) The Department of State Police shall maintain a system for the notification and interagency coordination of state resources in response to emergencies involving multijurisdictional cooperation between the various levels of government and private business entities.

(b) The department shall provide the Office of Emergency Management with a service level agreement that describes the continued daily operations and maintenance of the system, the services and supplies needed to maintain the system 24 hours a day, every day of the year, and the policies and procedures that support the overall notification system.

(2) The notification system shall be managed by the Office of Emergency Management as a continuously available communications network and a component of the state's emergency operations center.

(3) The notification system shall be the primary point of contact by which any public agency provides the state notification of an emergency or disaster, or requests access to state and federal resources.

(4) Each department of state government, and those agencies of state government identified in the [*Oregon*] **statewide** emergency management plan [*with*] **prepared under ORS 401.257 as having** emergency service or administrative responsibilities, shall appoint an emergency management coordinator as their representative to work with the Office **of Emergency Management** on the development and implementation of emergency plans and procedures.

(5) The Office of Emergency Management shall adopt rules relating to the planning, administration and operation of the notification system maintained under this section.

SECTION, SERIES AND CHAPTER REFERENCES

SECTION 37. ORS 18.348 is amended to read:

18.348. (1) All funds exempt from execution and other process under ORS 18.358, 18.385 (2) to (4), 238.445, 344.580, 348.863, [*401.405,*] 407.595, 411.760, 414.095, 655.530, 656.234, 657.855 and 748.207 and 38 U.S.C. 3101 and 42 U.S.C. 407 shall remain exempt when deposited in an account of a judgment debtor as long as the exempt funds are identifiable.

(2) Except as provided in subsection (3) of this section, the provisions of subsection (1) of this section do not apply to any accumulation of funds greater than $7,500.

(3) Subsection (2) of this section does not apply to funds exempt from execution or other process under 42 U.S.C. 407.

SECTION 38. ORS 176.800 is amended to read:

176.800. (1) Nothing in ORS 176.750 to 176.815 is intended as a delegation of legislative responsibility for the appropriation or authorization of expenditure of public funds, as provided in the Constitution and laws of this state.

(2) The powers vested in the Governor under ORS 176.750 to 176.815 are in addition to, and not in lieu of, emergency powers vested in the Governor under ORS [*401.015 to 401.580 and 401.990*] **401.015 to 401.039** or any other law of Oregon.

(3) It is the intent of the Legislative Assembly that if ORS 176.750 to 176.815 and 176.990 are held unconstitutional as applied to contracts executed before February 26, 1974, ORS 176.750 to 176.815 and 176.990 nevertheless are effective with respect to contracts executed on or after February 26, 1974, and with respect to renewals or extensions of existing contracts on or after February 26, 1974.

SECTION 39. ORS 401.065 is amended to read:

401.065. [*During a state of emergency, the Governor shall:*]

(1) [*Have*] **During a state of emergency, the Governor has** complete authority over all executive agencies of state government and the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039.**[*;*]

(2) [*Have*] **During a state of emergency, the Governor has** authority to suspend provisions of any order or rule of any state agency, if the Governor determines and declares that strict compliance with the provisions of the order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency[*; and*]**.**

(3) [*Have*] **During a state of emergency, the Governor has** authority to direct any agencies in the state government to utilize and employ state personnel, equipment and facilities for the performance of any activities designed to prevent or alleviate actual or threatened damage due to the emergency, and may direct the agencies to provide supplemental services and equipment to local governments to restore any services in order to provide for the health and safety of the citizens of the affected area.

SECTION 40. ORS 401.074 is amended to read:

401.074. Whenever the Governor has declared a state of emergency [*under ORS 401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] or the President of the United States has declared an emergency or a major disaster to exist in this state, the Governor, with the concurrence of the Joint Committee on Ways and Means or the Emergency Board, if the Legislative Assembly is not in session, is authorized:

(1) To enter into purchase, lease or other arrangements with any agency of the United States for temporary housing units to be occupied by disaster victims and to make the units available to local governments of the state.

(2) To assist any local government of this state which requires temporary housing for disaster victims following the declaration of a state of emergency to acquire and prepare a site to receive and utilize temporary housing units by:

(a) Advancing or lending funds available to the Governor from any appropriation made by the Legislative Assembly or from any other source; and

(b) Passing through funds made available by any public or private agency.

SECTION 41. ORS 401.085 is amended to read:

401.085. Whenever the Governor has declared a state of emergency [*under ORS 401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*], the Governor [*shall be authorized to*] **may** issue, amend and enforce rules and orders to:

(1) Control, restrict and regulate by rationing, freezing, use of quotas, prohibitions on shipments, price fixing, allocation or other means, the use, sale or distribution of food, feed, fuel, clothing and other commodities, materials, goods and services;

(2) Prescribe and direct activities in connection with use, conservation, salvage and prevention of waste of materials, services and facilities, including, but not limited to, production, transportation, power and communication facilities training, and supply of labor, utilization of industrial plants, health and medical care, nutrition, housing, rehabilitation, education, welfare, child care, recreation, consumer protection and other essential civil needs; and

(3) Take any other action that may be necessary for the management of resources following an emergency.

SECTION 42. ORS 401.270 is amended to read:

401.270. The Director of the Office of Emergency Management shall be responsible for coordinating and facilitating exercises and training, emergency planning, preparedness, response, mitigation and recovery activities with the state and local emergency services agencies and organizations, and shall, with the approval of the Adjutant General or as directed by the Governor:

(1) Make rules that are necessary and proper for the administration and implementation of ORS [*401.015 to 401.107, 401.257 to 401.325, 401.355 to 401.584 and 401.706*] **401.015 to 401.039**;

(2) Coordinate the activities of all public and private organizations specifically related to providing emergency services within this state;

(3) Maintain a cooperative liaison with emergency management agencies and organizations of local governments, other states and the federal government;

(4) Have such additional authority, duties and responsibilities authorized by ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039** or as may be directed by the Governor;

(5) Administer grants relating to emergency program management **under ORS 401.305**, seismic rehabilitation, emergency services for the state and the statewide 2-1-1 system as provided in ORS 401.294;

(6) Provide for and staff a State Emergency Operations Center to aid the Governor and the Office of Emergency Management in the performance of duties under ORS [*401.015 to 401.107, 401.257 to 401.325, 401.355 to 401.584 and 401.706*] **401.015 to 401.039**;

(7) Serve as the Governor's authorized representative for coordination of certain response activities and managing the recovery process;

(8) Establish training and professional standards for local emergency program management personnel;

(9) Establish task forces and advisory groups to assist the office in achieving mandated responsibilities;

(10) Enforce compliance requirements of federal and state agencies for receiving funds and conducting designated emergency functions;

(11) Oversee the design, implementation and support of a statewide 2-1-1 system as provided under ORS 401.288; and

(12) Coordinate the activities of state and local governments to enable state and local governments to work together during domestic incidents as provided in the National Incident Management System established by the Homeland Security Presidential Directive 5 of February 28, 2003.

SECTION 43. ORS 401.155 is amended to read:

401.155. The Governor is authorized to make rules and regulations [*as are*] necessary to carry out the purposes of ORS [*401.125 to 401.145 and 401.335*] **401.065 to 401.085**.

SECTION 44. ORS 401.315 is amended to read:

401.315. In carrying out the provisions of ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039**, counties or cities may enter into contracts and incur obligations necessary to mitigate, prepare for, respond to or recover from [*emergencies*] **an emergency** or major disaster. A county shall assess whether an emergency exists.

SECTION 45. ORS 401.490 is amended to read:

401.490. In carrying out the provisions of ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039**, the Governor and the executive officers or governing bodies of the counties and cities may request and utilize the services, equipment, supplies and facilities of existing departments, offices and agencies of the state and of local governments. The officers and personnel of all local government departments, offices and agencies may cooperate with, and extend such services and facilities to the Governor, to the Office of Emergency Management and to emergency management agencies and emergency service agencies upon request.

SECTION 46. ORS 401.580 is amended to read:

401.580. (1) An incident number shall be assigned to each search and rescue reported [*by an authorized person*] under ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.560**.

(2) The incident number assigned shall be referenced for:

(a) The payment of workers' compensation benefits for those persons participating in search and rescue activities; and

(b) The dispatch and request for state, federal and cooperative assistance resources.

SECTION 47. ORS 401.641 is amended to read:

401.641. (1) If county, city or district equipment is assigned and used under ORS 401.638 to respond to a structural collapse or threat of imminent structural collapse in another county, city or district, the state:

(a) Is liable for any resulting loss of, or damage to, the equipment.

(b) Shall pay any expense incurred by the responding county, city or district for transportation, performance or maintenance of the equipment.

(2) A claim for loss, damage or expense under subsection (1) of this section must be filed within 60 days after the loss, damage or expense is incurred, or within any extension of time for filing the claim granted by the Department of State Police. The claim must include an itemized notice of the claim, signed under oath, and be served by mail or personally upon the department. [*An accepted claim for loss, damage or expense shall be payable from moneys made available under ORS 401.355 to 401.465.*]

SECTION 48. ORS 401.990 is amended to read:

401.990. Any person knowingly violating any provision of ORS [*401.015 to 401.107, 401.257 to 401.325 and 401.355 to 401.584*] **401.015 to 401.039**, or any of the rules, regulations or orders adopted and promulgated under those sections, shall, upon conviction thereof, be guilty of a Class C misdemeanor.

SECTION 49. ORS 469.533 is amended to read:

469.533. Notwithstanding ORS [*chapter 401*] **401.015 to 401.039**, the State Department of Energy in cooperation with the Department of Human Services and the Office of Emergency Management shall establish rules for the protection of health and procedures for the evacuation of people and communities who would be affected by radiation in the event of an accident or a catastrophe in the operation of a nuclear power plant or nuclear installation.

SECTION 50. ORS 469.535 is amended to read:

469.535. Notwithstanding ORS [*chapter 401*] **401.015 to 401.039**, when an emergency exists because of an accident or catastrophe in the operation of a nuclear power plant or nuclear installation or in the transportation of radioactive material, the Governor, for the duration of the emergency, may:

(1) Assume complete control of all emergency operations in the area affected by the accident or catastrophe, direct all rescue and salvage work and do all things deemed advisable and necessary to alleviate the immediate conditions.

(2) Assume control of all police and law enforcement activities in such area, including the activities of all local police and peace officers.

(3) Close all roads and highways in such area to traffic or by order of the Director of the State Department of Energy limit the travel on such roads to such extent as the director deems necessary and expedient.

(4) Designate persons to coordinate the work of public and private relief agencies operating in such area and exclude from such area any person or agency refusing to cooperate with other agencies engaged in emergency work.

(5) Require the aid and assistance of any state or other public or quasi-public agencies in the performance of duties and work attendant upon the emergency conditions in such area.

SECTION 51. ORS 469.611 is amended to read:

469.611. Notwithstanding ORS [*chapter 401*] **401.015 to 401.039**:

(1) The Director of the State Department of Energy shall coordinate emergency preparedness and response with appropriate agencies of government at the local, state and national levels to ensure that the response to a radioactive material transportation accident is swift and appropriate to minimize damage to any person, property or wildlife. This program shall include the preparation of localized plans setting forth agency responsibilities for on-scene response.

(2) The director shall:

(a) Apply for federal funds as available to train, equip and maintain an appropriate response capability at the state and local level; and

(b) Request all available training and planning materials.

(3) The Department of Human Services shall maintain a trained and equipped radiation emergency response team available at all times for dispatch to any radiological emergency. Before arrival of the team at the scene of a radiological accident, the Director of the State Department of Energy may designate other technical advisors to work with the local response agencies.

(4) The Department of Human Services shall assist the Director of the State Department of Energy to ensure that all emergency services organizations along major transport routes for radioactive materials are offered training and retraining in the proper procedures for identifying and dealing with a radiological accident pending the arrival of persons with technical expertise. The Department of Human Services shall report annually to the Director of the State Department of Energy on training of emergency response personnel.

MISCELLANEOUS

SECTION 52. The unit and section captions used in this 2009 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2009 Act.

Passed by House May 4, 2009

Repassed by House June 17, 2009

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Chief Clerk of House

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Speaker of House

Passed by Senate June 16, 2009

.....
President of Senate

Received by Governor:

.....M.,....., 2009

Approved:

.....M.,....., 2009

.....
Governor

Filed in Office of Secretary of State:

.....M.,....., 2009

.....
Secretary of State

Exhibit 4

August 19, 2009

HB 3021. Recent "emergency preparedness" legislation affects volunteer liability and workers' compensation.

Mark Rauch, General Counsel, CIS

Recent events such as Hurricane Katrina and the December 2007 storms, as well as the prospect of a pandemic flu outbreak, have sharpened the focus on emergency preparedness. Governments are expected to respond to these situations, but the infrequency and unpredictability of such occurrences requires a heavy reliance on volunteers and other service providers who are not regular public employees. Two concerns raised by emergency service providers provided the impetus for this legislation: (a) the potential liability of such emergency service providers, and (b) covering the cost of injuries *to* such providers in the course of their emergency services.

ORS Chapter 401 addresses "Emergency Services and Communications". HB 3021 revises ORS Chapter 401 primarily in response to the above concerns. (The full bill, as passed, can be found at http://www.leg.state.or.us/09reg/measpdf/hb3000.dir/hb3021.en.pdf.) The approach is to address the relevant concerns in three separate areas: "Qualified Emergency Service Volunteers," "Emergency Health Care Services," and "Search and Rescue."

The revisions can be summarized as follows:

"Qualified Emergency Service Volunteers"

1. Adds new definitions of "emergency service activities" and "qualified emergency service volunteer" that establish clear criteria for eligibility for the liability and workers compensations provisions. (Section 2)
2. Addresses the liability concern by clarifying that such volunteers are "agents" of the public body. The new language provides that a *qualified emergency service volunteer* "is an *agent* of a public body under ORS 30.260 to 30.300 [the Oregon Tort Claims Act]." It further clarifies that acts or omissions of the volunteer are within the course and scope of the volunteer's duties if the acts or omissions occur "(a) While the volunteer is performing *emergency service activities* under the direction of the public body during a state of emergency declared under ORS 401,015 to 401 039, or during a state of public health emergency proclaimed under ORS 433.441; or (b) While the volunteer is engaged in training being conducted or approved by a public body for the purpose of preparing the volunteer to perform emergency services." The public body shall defend and indemnify such volunteers for any torts claims arising out of such service. (Section 4)
3. Addresses workers' compensation concern by providing "The Office of Emergency Management shall provide workers compensation coverage for qualified emergency service volunteers who are injured in the course and scope of performing emergency service activities under

the direction of a public body if the injury occurs: (a) While the volunteer is performing emergency service activities under the direction of the public body during a state of emergency declared under ORS 401.015 to 401.039, or during a state of public health emergency proclaimed under ORS 433.441; or (b) While the volunteer is engaged in training being conducted or approved by a public body for the purpose of preparing the volunteer to perform emergency services." (Section 5)

"Emergency Health Care Services"

This part (Sections 7 through 9) provides that during a Governor-declared emergency or Public Health Emergency, emergency health care providers registered under ORS 401 654, and other health care providers who perform health care services under ORS 401.651 to 401.670 are "agents" covered by the OTCA regardless of whether they receive compensation. Previously such indemnification was afforded only when the services were provided without compensation.

"Search and Rescue"

1. Adds new definitions of "qualified search and rescue volunteer" and "search and rescue activities."
2. Provides that a "qualified search and rescue volunteer is an *agent* of the county under ORS 30.260 to 30.300 for the purpose of acts and omissions of the volunteer that are within the course and scope of the volunteer's duties and that occur while the volunteer is performing search and rescue activities under the direction of the sheriff of the county or the designee of the sheriff, and the county shall defend, save harmless and indemnify the volunteer for any tort claim arising out of an alleged act or omission occurring in the performance of those activities as required by ORS 30.285".
3. As to workers' compensation, coverage provides that the county must provide workers' compensation coverage on these volunteers. More specifically, "(1) Any county in which a qualified search and rescue volunteer performs search and rescue activities under the direction of the sheriff of the county or the designee of the sheriff is conclusively deemed to have filed an election under ORS 656.031 to provide workers' compensation coverage for the qualified search and rescue volunteer. (2) An insurer or self-insured employer may fix assumed wage rates for qualified search and rescue volunteers, which may be used only for purposes of computations under ORS Chapter 656, and shall require the regular payment of premiums or assessments based on the hours of service by qualified search and rescue volunteers. A self-insured employer shall submit the assumed wage rates to the Director of the Department of Consumer and Business Services. If the director finds that the rates are unreasonable, the director may fix appropriate rates to be used for purposes of this section. (3) A county that is a self-insured employer under ORS chapter 656 may apply to an insurer for workers compensation coverage for qualified search and rescue volunteers only, while continuing to self-insure the other subject

workers of the county. If an insurer decides not to provide workers' compensation coverage for qualified search and rescue volunteers of the county, coverage shall be provided through the assigned risk pool. (4) Qualified search and rescue volunteers and their beneficiaries are not eligible for workers' compensation benefits under this section if the volunteer is performing search and rescue activities during an emergency and is provided with workers' compensation coverage under section 5 of this 2009 Act.

Finally, Section 17 adds a new and more detailed definition of "emergency" as follows:

"Emergency" means a human created or natural event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering or financial loss, including but not limited to:
(a) Fire, explosion, flood, severe weather, landslides or mud slides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, disease, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and war; and
(b) A rapid influx of individuals from outside this state, a rapid migration of individuals from one part of this state to another or a rapid displacement of individuals if the influx, migration or displacement results from the type of event or circumstance described in paragraph (a) of this subsection.

Exhibit 5

determined by the board by rule. [*Any*] **A** permit that is not renewed within 60 days after the close of the permit period for which it was issued or renewed [*shall lapse*] **lapses**. The board may restore a lapsed permit upon payment [*to it*] of all past unpaid renewal fees and the delinquent renewal fee. However, the board may restore a permit issued or renewed for a permit period that ended more than five years prior to the date of the application for restoration only upon demonstration satisfactory to the board that the applicant is qualified to engage in the practice of public accountancy.

(6) Notwithstanding subsection (3) of this section, the board may by rule prescribe a reduced fee for renewal of permits of those certified public accountants and public accountants who have reached the age of 65 years.

SECTION 13. ORS 673.220 is amended to read:

673.220. (1) The Oregon Board of Accountancy may grant inactive status to [*any*] **a** licensee who does not [*hold the licensee out*] **represent** to clients or the public [*as*] **that the licensee is** a certified public accountant or a public accountant and **who** does not engage in the practice of public accountancy, if the license is not suspended or revoked.

(2) A licensee granted inactive status by the board:

(a) Must pay [*any*] **a** fee:

(A) In the amount of $50 for becoming or remaining inactive; and

(B) In an amount determined by the board by rule for [*becoming or remaining inactive or*] becoming active.

(b) May not [*hold the licensee out*] **represent** to clients or the public [*as*] **that the licensee is** a certified public accountant or a public accountant or otherwise engage in the practice of public accountancy until restored to active status.

(3) The board by rule shall adopt procedures and requirements for granting and renewing inactive status and for restoring to active status any licensee on inactive status.

(4) The board may restore a lapsed permit to inactive status upon payment [*to it*] of all past unpaid renewal fees and the delinquent renewal fee as provided in ORS 673.150 (5).

(5) The board shall maintain a current roster of all licensees granted inactive status.

SECTION 14. The Oregon Board of Accountancy may take any action before the operative date specified in section 15 of this 2009 Act that is necessary for the board to exercise, on and after the operative date specified in section 15 of this 2009 Act, all of the duties, functions and powers conferred on the board by the amendments to ORS 673.010, 673.012, 673.150, 673.153, 673.160, 673.170, 673.185, 673.220, 673.320, 673.445 and 673.455 by sections 1 to 9, 12 and 13 of this 2009 Act.

SECTION 15. The amendments to ORS 673.010, 673.012, 673.150, 673.153, 673.160, 673.170, 673.185, 673.220, 673.320, 673.400, 673.445, 673.455 and 673.465 by sections 1 to 13 of this 2009 Act become operative on January 1, 2010.

SECTION 16. This 2009 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect on its passage.

Approved by the Governor June 24, 2009
Filed in the office of Secretary of State June 24, 2009
Effective date June 24, 2009

CHAPTER 532

AN ACT HB 2003

Relating to use of land; creating new provisions; and amending ORS 105.672, 105.676, 105.682, 105.688, 105.692 and 105.696.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 105.672 is amended to read:

105.672. As used in ORS 105.672 to 105.696:

(1) "Charge":

(a) Means the admission price or fee requested or expected by an owner in return for granting permission for a person to enter or go upon the owner's land.

(b) Does not mean any amount received from a public body in return for granting permission for the public to enter or go upon the owner's land.

(2) "Harvest" has that meaning given in ORS 164.813.

(3) "Land" includes all real property, whether publicly or privately owned.

(4) "Owner" means the possessor of any interest in any land, [*including but not limited to possession of a fee title. "Owner" includes*] **such as the holder of a fee title,** a tenant, **a** lessee, **an** occupant, **the holder of an easement, the holder of a right of way** or [*other*] **a** person in possession of the land.

(5) "Recreational purposes" includes, but is not limited to, outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project.

(6) "Special forest products" has that meaning given in ORS 164.813.

(7) "Woodcutting" means the cutting or removal of wood from land by an individual who has obtained permission from the owner of the land to cut or remove wood.

SECTION 2. ORS 105.688 is amended to read:

105.688. (1) Except as specifically provided in ORS 105.672 to 105.696, the immunities provided by ORS 105.682 apply to:

(a) All [*public and private lands*] **land**, including but not limited to [*lands*] **land** adjacent or contiguous to any bodies of water, watercourses or the ocean shore as defined by ORS 390.605;

(b) All roads, bodies of water, watercourses, rights of way, buildings, fixtures and structures on the [*lands*] **land** described in paragraph (a) of this subsection; [*and*]

(c) All paths, trails, roads, watercourses and other rights of way while being used by a person to reach land for recreational purposes, gardening, woodcutting or the harvest of special forest products, that are on land adjacent to the land that the person intends to use for recreational purposes, gardening, woodcutting or the harvest of special forest products, and that have not been improved, designed or maintained for the specific purpose of providing access for recreational purposes, gardening, woodcutting or the harvest of special forest products; and

[*(c)*] **(d)** All machinery or equipment on the [*lands*] **land** described in paragraph (a) of this subsection.

[*(2) The immunities provided by ORS 105.682 apply only if:*]

[*(a) The owner makes no charge for permission to use the land;*]

[*(b) The owner transfers an easement to a public body to use the land; or*]

[*(c) The owner charges no more than $75 per cord for permission to use the land for woodcutting.*]

(2) The immunities provided by ORS 105.682 for recreational purposes and for the harvest of special forest products apply only if:

(a) The owner transfers an easement to a public body to use the land; or

(b) The owner makes no charge for permission to use the land.

(3) The immunities provided by ORS 105.682 for gardening apply only if the owner charges no more than $25 per year for the use of the land for gardening.

(4) The immunities provided by ORS 105.682 for woodcutting apply only if the owner charges no more than $75 per cord for permission to use the land for woodcutting.

SECTION 3. ORS 105.676 is amended to read:

105.676. The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes, **for gardening,** for woodcutting and for the harvest of special forest products by limiting their liability toward persons entering thereon for such purposes and by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any right to use or continue the use of such land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products.

SECTION 4. ORS 105.682 is amended to read:

105.682. (1) Except as provided by subsection (2) of this section, and subject to the provisions of ORS 105.688, an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products when the owner of land either directly or indirectly permits any person to use the land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products. The limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes, **gardening,** woodcutting or the harvest of special forest products, and is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products.

(2) This section does not limit the liability of an owner of land for intentional injury or damage to a person coming onto land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products.

SECTION 5. ORS 105.692 is amended to read:

105.692. (1) An owner of land who either directly or indirectly permits any person to use the land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products does not give that person or any other person a right to continued use of the land for those purposes without the consent of the owner.

(2) The fact that an owner of land allows the public to use the land for recreational purposes, **gardening,** woodcutting or the harvest of special forest products without posting, fencing or otherwise restricting use of the land does not raise a presumption that the landowner intended to dedicate or otherwise give over to the public the right to continued use of the land.

(3) Nothing in this section shall be construed to diminish or divert any public right to use land for recreational purposes acquired by dedication, prescription, grant, custom or otherwise existing before October 5, 1973.

(4) Nothing in this section shall be construed to diminish or divert any public right to use land for woodcutting acquired by dedication, prescription, grant, custom or otherwise existing before October 3, 1979.

SECTION 6. ORS 105.696 is amended to read:

105.696. ORS 105.672 to 105.696 do not:

(1) Create a duty of care or basis for liability for personal injury, death or property damage resulting from the use of land for recreational purposes, **for gardening,** for woodcutting or for the harvest of special forest products.

(2) Relieve a person using the land of another for recreational purposes, **gardening,** woodcutting or the harvest of special forest products from any obli-

tion that the person has to exercise care in use the land in the activities of the person or from the al consequences of failure of the person to exere that care.

SECTION 7. The amendments to ORS .676, 105.682, 105.688, 105.692 and 105.696 by tions 2 to 6 of this 2009 Act apply only to ises of action that arise on or after the effitive date of this 2009 Act.

Approved by the Governor June 25, 2009
Filed in the office of Secretary of State June 25, 2009
Effective date January 1, 2010

CHAPTER 533

AN ACT HB 2005

ating to election petitions; creating new provisions; amending ORS 250.029, 250.045, 250.048, 250.052, 250.105, 260.262, 260.561, 260.563, 260.567, 260.665 and 260.995; and declaring an emergency.

It Enacted by the People of the State of Orn:

SECTION 1. ORS 250.045 is amended to read:

250.045. (1) Before circulating a petition to initior refer a state measure under section 1, Article Oregon Constitution, the petitioner shall file the Secretary of State a prospective petition. prospective petition for a state measure to be iated shall contain [*a statement of sponsorship ed by*] **the signatures of** at least 1,000 electors. [*statement of sponsorship shall*] **signature ets must** be attached to a full and correct copy he measure to be initiated.

(2) Before obtaining signatures on a proctive petition for a state measure to be initil, the chief petitioners shall file with the retary a statement declaring whether one or e persons will be paid money or other valu consideration for obtaining signatures of tors on the prospective petition. After a ement has been filed under this subsection, chief petitioners shall notify the secretary later than the 10th day after any of the chief tioners first has knowledge or should have knowledge that:

(a) Any person is being paid for obtaining atures, when the statement filed under this section declared that no such person would aid.

(b) No person is being paid for obtaining atures, when the statement filed under this section declared that one or more such per would be paid.

[*(2)*] **(3)** The secretary by rule shall establish edures for verifying whether [*the statement of sorship*] **a prospective petition for a state sure to be initiated** contains the required ber of signatures of electors.

[*(3)*] **(4)** The secretary shall date and time stamp the prospective petition and specify the form on which the initiative or referendum petition shall be printed for circulation as provided in ORS 250.052. The secretary shall retain the prospective petition.

[*(4)*] **(5)** The chief petitioner may amend the state measure to be initiated that has been filed with the secretary without filing another prospective petition, if:

(a) The Attorney General certifies to the secretary that the proposed amendment will not substantially change the substance of the measure; and

(b) The deadline for submitting written comments on the draft title has not passed.

[*(5)*] **(6)** The cover of an initiative or referendum petition shall designate the name and residence address of not more than three persons as chief petitioners and shall contain instructions for persons obtaining signatures of electors on the petition. The instructions shall be adopted by the secretary by rule. The cover of a referendum petition shall contain the final measure summary described in ORS 250.065 (1). If a petition seeking a different ballot title is not filed with the Supreme Court by the deadline for filing a petition under ORS 250.085, the cover of an initiative petition shall contain the latest ballot title certified by the Attorney General under ORS 250.067 (2). However, if the Supreme Court has reviewed the ballot title, the cover of the initiative petition shall contain the title certified by the court.

[*(6)*] **(7)** The chief petitioners shall include with the prospective petition a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the initiative or referendum petition. After the prospective petition is filed, the chief petitioners shall notify the filing officer not later than the 10th day after any of the chief petitioners first has knowledge or should have had knowledge that:

(a) Any person is being paid for obtaining signatures, when the statement included with the prospective petition declared that no such person would be paid.

(b) No person is being paid for obtaining signatures, when the statement included with the prospective petition declared that one or more such persons would be paid.

[*(7)(a)*] **(8)(a)** Each sheet of signatures on an initiative petition shall contain the caption of the ballot title. Each sheet of signatures on a referendum petition shall contain the subject expressed in the title of the Act to be referred.

(b) Each sheet of signatures on an initiative or referendum petition shall:

(A) Contain a notice describing the meaning of the color of the signature sheet in accordance with ORS 250.052; and

(B) If one or more persons will be paid for obtaining signatures of electors on the petition, contain a notice stating: "Some Circulators For This Petition Are Being Paid." The notice shall be in

--- P.3d ----, 2009 WL 3030352 (Or.)
(Cite as: 2009 WL 3030352 (Or.))

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Only the Westlaw citation is currently available.

Supreme Court of Oregon.
Bradley COLEMAN and Bonnie Coleman, husband and wife, Petitioners on Review,
v.
OREGON PARKS AND RECREATION DEPARTMENT, by and through the State of Oregon, and John Does 1-3, Respondents on Review.
(CC 05CV0272; CA A131472; SC S056563).

Argued and Submitted June 11, 2009.
Decided Sept. 24, 2009.

Background: Campers sued Parks and Recreation Department, by and through State, and others for camper's injuries sustained in bike-riding accident within state park. The Circuit Court, Coos County, Richard L. Barron, J., entered summary judgment in favor of State on grounds of **recreational immunity**, and campers appealed. The Court of Appeals, 221 Or.App. 484, 190 P.3d 487, affirmed.

Holding: On review, the Supreme Court, Walters, J., held that State was not entitled to **recreational immunity** for camper's injuries within state park.
Reversed and remanded to Court of Appeals for further proceedings.

Balmer, J., filed dissenting opinion in which Kistler and Linder, JJ., joined.

West Headnotes

Automobiles 48A ⚿252

48A Automobiles
48AVI Injuries from Defects or Obstructions in Highways and Other Public Places
48AVI(A) Nature and Grounds of Liability
48Ak252 k. In General. Most Cited Cases
State "charged" campers fee for permission to enter, or go upon park land, and thus, was not entitled to **recreational immunity** for camper's injuries when camper rode his bike off end of bridge, even if camper was not engaged in camping that was basis for fee when he suffered injury; payment of fee was required to use campsite within park, and use of campsite required entry upon land. West's Or.Rev. Stat. Ann. § 105.682.

On review from the Court of Appeals.[FN*]George W. Kelly, Eugene, argued the cause and filed the brief for petitioners on review.

David B. Thompson, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the brief were John R. Kroger, Attorney General, and Erika L. Hadlock, Acting Solicitor General.

W. Eugene Hallman, Hallman & Dretke, Pendleton, filed a brief for amicus curiae Oregon Trial Lawyers Association.

*1 WALTERS, J.

A landowner is immune from suit for injuries that arise out of the **recreational use** of its land when the owner "permits any person to use the land for recreational purposes[.]" ORS 105.682(1). However, that immunity applies only if the landowner "makes no charge for permission to use the land [.]" ORS 105.688(2)(a). In this action for injuries arising out of plaintiffs' use of a state park, the trial court granted summary judgment for the state, concluding that the state was entitled to **recreational immunity** under ORS 105.682. The Court of Appeals affirmed. We conclude that the state made a charge for permission to use the park and, thus, that the state was not entitled to summary judgment based on **recreational immunity**. We therefore reverse the decision of the Court of Appeals and remand the case to that court for further proceedings.

The uncontested facts that give rise to the issue before us are as follows. Plaintiffs Bradley and Bon-

nie Coleman were camping at William M. Tugman state park (Tugman Park) when Bradley rode his bike off the end of a bridge and suffered personal injuries. Plaintiffs filed a complaint in Coos County Circuit Court, alleging that the state negligently had failed to maintain a ramp at the end of the bridge and therefore was liable for Bradley's injuries and Bonnie's loss of consortium.

The state moved for summary judgment, arguing, among other things, that plaintiffs' claims were barred by **recreational immunity** under ORS 105.682(1). The state filed an affidavit and supporting documents explaining that the state did not charge a fee to enter the park; instead, the only fees that the state charged were "associated with using campsites" and "for using the gazebo facility" in the park. Otherwise, the state averred, "[i]ndividuals can enter the [park] and ride their bicycles on the trails for free." The state also argued that Bonnie Coleman had failed to provide timely notice of her tort claim as required by ORS 30.275.[FN1] The trial court agreed with both of the state's arguments and granted its summary judgment motion.[FN2]

The Court of Appeals also agreed with the state that it was entitled to **recreational immunity**. *Coleman v. Oregon Parks and Recreation Dept.,* 221 Or.App. 484, 491, 190 P.3d 487 (2008). The court concluded that the overnight camping fee imposed by the state was not a "charge" as that term is used in ORS 105.688(2)(a), and, accordingly, that the state had not forfeited its **recreational immunity**. *Id.* The court did not reach the state's argument regarding Bonnie Coleman's alleged failure to give notice of her tort claim. *Id.* at 487 n. 2, 190 P.3d 487. We allowed plaintiffs' petition for review.

Before further describing the parties' arguments, we set out the **recreational immunity** statutes in greater detail. ORS 105.676 declares that it is the state's public policy "to encourage owners of land to make their land available to the public for recreational purposes * * * by limiting their liability toward persons entering thereon for such purposes * * *." As mentioned earlier, ORS 105.682 grants immunity to landowners who open their land to the public for recreational purposes:

***2** "(1) Except as provided by subsection (2) of this section, and subject to the provisions of ORS 105.688, an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, woodcutting or the harvest of special forest products when the owner of land either directly or indirectly permits any person to use the land for recreational purposes, woodcutting or the harvest of special forest products. The limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes, woodcutting or the harvest of special forest products, and is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purposes, woodcutting or the harvest of special forest products.

"(2) This section does not limit the liability of an owner of land for intentional injury or damage to a person coming onto land for recreational purposes, woodcutting or the harvest of special forest products."

ORS 105.688(2)(a) limits the immunity provided in ORS 105.682:

"The immunities provided by ORS 105.682 apply only if * * * the owner makes no charge for permission to use the land[.]"

ORS 105.672 (2005) [FN3] offers definitions for terms used in the **recreational immunity** provisions:

"(1) 'Charge' means the admission price or fee asked by any owner in return for permission to enter or go upon the owner's land.

" * * * * * *

"(3) 'Land' includes all real property, whether pub-

licly or privately owned.

"* * * * * *

"(5) 'Recreational purposes' includes, but is not limited to, outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project."

Plaintiffs' position before the trial court, the Court of Appeals, and this court is that, because the state charged a fee for camping-a "recreational purpose" under ORS 105.672(5)-at Tugman Park, the state was not immune from liability for their damages. Plaintiffs contend that, "[w]hen a landowner charges a fee for any use of some aspect of the land (*e.g.,* for parking, for camping, for swimming, for docking a boat, etc.), the landowner has required a payment 'for permission to use the land' and 'to go upon the land' " and, therefore, is not immune from liability. Plaintiffs argue that that result is consistent with the stated policy of the **recreational immunity** provisions because, when the landowner imposes any charge to use the land, the landowner no longer is making its land available for the public's **recreational use** without payment.

The state's position before the trial court and the Court of Appeals was that the camping fee that it charged at Tugman Park did not meet the statutory definition of "charge" because it was not a fee "to enter or go upon the owner's land." ORS 105.672(1). The state argued that "charge," as used in ORS 105.688(2)(a) to preclude **recreational immunity** and as defined in ORS 105.672(1), refers to money that a landowner requires a person to pay before that person is allowed access to the land, not a fee that a landowner requires a person to pay to make a particular use of the land after the person has entered the land. According to the state, the camping fee that it imposed was not an entry or access fee and therefore did not meet the statutory definition of a "charge." Thus, the state argued, it was entitled to rely on the immunity provided by ORS 105.682.

***3** Before this court, however, the state focuses its arguments as to the meaning of ORS 105.688(2)(a) not on the word "charge," but on the words "the land." The state contends that a landowner is immune from suit if the landowner "makes no charge for permission to use *the land,*" ORS 105.688(2)(a) (emphasis added), *viz.,* the specific property on which the injury occurs. The state argues that, even if the fee associated with using a campsite meets the definition of a charge under ORS 105.672(1), that fee is a charge for permission to use only the campground and not the distinct part of "the land" on which Bradley was injured. According to the state, because Bradley was injured while using the biking trail at Tugman Park, which can be accessed by the public without charge, **recreational immunity** shields the state from liability for plaintiffs' injuries. If we accept that argument, the state urges, we need not consider whether the Court of Appeals correctly held that the park's camping fee was not a "charge" under ORS 105.672(1) (2005).

The issue before us is whether the state demonstrated on summary judgment that it qualified for **recreational immunity** as a landowner that permitted the public to use its land for recreational purposes under ORS 105.682 and that "[made] *no charge for permission to use the land,*" as that phrase is used in ORS 105.688(2)(a). It is the latter qualification that plaintiffs challenge and to which we now turn.

As noted, the state adduced evidence in support of its motion for summary judgment that the state required that campers pay a fee to camp at Tugman Park. To determine whether that fee is a "charge for permission to use the land," we examine the text and context of that statutory provision to discern the legislature's intent. *See State v. Gaines,* 346 Or. 160, 171-72, 206 P.3d 1042 (2009) (illustrating process).[FN4]

We begin with the word "charge." Charge is statutorily defined as "the admission price or fee asked by an owner in return for permission *to enter* or *go upon* the owner's land." ORS 105.672(1) (emphasis added). The parties agree, as do we, that that camping fee was not an "admission price" and was not "in return for permission to enter" the park. The question then is whether the camping fee is a fee to "go upon" the state's land. The Court of Appeals relied on the definition of "go" and "upon" and explained that those words mean "to move on a course over or in contact with the land." *Coleman,* 221 Or.App. at 490, 190 P.3d 487 (citing *Webster's Third New Int'l Dictionary* 971, 2517 (unabridged ed 2002)). The court concluded that the camping fee was not such a fee:

> "Payment of a fee is required to engage in a specific activity in those areas-that is, camping overnight-and presumably to exclude others from a particular campsite. But payment of a fee is not required to move on a course over and in contact with an area designated as a campsite. In other words, payment of the fee merely entitles a member of the public to do something on the land while moving about on the land that another may not do."

4** *Id.* at 491, 190 P.3d 487 (footnote omitted). Simply stated, the Court of Appeals ruled that the legislature intended to preclude immunity for a landowner that exacts a *fee to enter* its land to use that land for a recreational purpose, but to grant immunity to a landowner that exacts a *fee for that* ***recreational use. For reasons that we will explain, we conclude that the legislature did not intend that result.

First, the legislature granted immunity to an owner of land that "permits any person to *use* the land for recreational purposes[.]" ORS 105.682(1) (emphasis added). Such landowners are immune from claims for damages that arise out of "the *use* of land for recreational purposes[.]" ORS 105.682(1) (emphasis added). Because it is the landowners' permission to use and the public's use that give rise to **recreational immunity**, it is illogical to suppose that the legislature disregarded fees that landowners exact for permission to use or for the public's use of their lands in imposing limitations on the application of **recreational immunity**.

Second, the words of the statute that follow the word "charge" are "for *permission to use.*" ORS 105.688(2)(a) (emphasis added). Unless the statutory definition of the word "charge" clearly excludes fees charged for permission to use land, which it does not, it appears from the text of the statute that the legislature intended the meaning of the word "charge" to include fees exacted for use of land as well as fees exacted for entry to land.

As noted, reference to the statutory and dictionary definitions of the word "charge" discloses that "charge" means a fee to move over or on land. A person moves over or on land when he or she enters the land, but a person also moves over or on land when he or she makes use of that land for recreational purposes. In our view, the legislature's use of the defined word "charge" and the phrase "for permission to use the land" are not inconsistent. "Charge" encompasses both fees to enter land and fees to use land as long as that use entails moving over or on the land for a recreational purpose.

Our interpretation of the word "charge" to encompass fees for **recreational use** of land is supported by the legislature's use of that same word in ORS 105.688(2)(c). That subsection provides that **recreational immunity** applies only if "[t]he owner *charges* no more than $75 per cord for permission to *use* the land for woodcutting." (Emphasis added.) In paragraph (c), the legislature used the defined term "charge" to mean a fee to *use* land for a particular purpose, woodcutting. ORS 105.688(2)(a) and (c) together require that, to qualify for immunity, a landowner must impose *no* fee to enter or use its land, except a fee of less than $75 per cord to use the land for woodcutting. Had the legislature wanted to extend immunity to landowners that impose minimal fees for uses of land other than wood-

cutting, such as camping, the legislature certainly could have done so.

***5** In this case, the state conceded that it charged a fee to camp at Tugman Park. A person moves over and on the land to camp on it, and camping is a recreational purpose. Therefore, the state made a charge for permission to use Tugman Park and thus forfeited **recreational immunity**. It does not matter that the use in which plaintiff was engaged at the time of his injury was not the precise use for which the state exacted a fee. ORS 105.682(1) provides that, if a landowner is entitled to immunity from injuries that arise out of the use of land for recreational purposes, immunity extends as long as the injured person's principal purpose for entry is recreational, even if the person was engaged in other nonrecreational activity at the time of injury. So, for instance, if a person enters a park to swim, but is injured while changing a truck tire, the landowner nevertheless is entitled to **recreational immunity**. We interpret ORS 105.688(2)(a) similarly. To be entitled to immunity, the landowner must make *no* charge for permission to use the land. If the landowner makes a charge for permission to use its land, immunity does not apply, even if the injured person is not engaged in the use that was the basis for the charge at the time of injury. So, as in this case, if the landowner makes a charge to use a park for camping, the landowner forfeits its immunity, even if a camper is injured while biking.

The state contends, however, that the statutory provision at issue contains two additional words that compel a different result: "the land." The state argues that, even if it made "a charge for permission to use" Tugman Park, that charge was only for permission to use the campsites in its park, not for permission to use the hiking/biking trails that were also located in the park, accessible by the public at no charge. Plaintiff was injured on those trails, and, the state asserts, there is no charge for permission to use that "land."

Like the word "charge," the word "land," as used in ORS 105.688(2)(a), is a defined term, meaning "all real property, whether publicly or privately owned." ORS 105.672(3). The state argues that "real property" includes both an entire parcel of land and any distinct, identifiable piece of land within that parcel, and that, by use of the article "the," the legislature conditioned immunity on a landowner's making no charge for use of "the" distinct part of the land on which the injury occurred. Why, queries the state, would the legislature preclude **recreational immunity** for the owner of a 100-acre property that charged to use an equestrian riding center located on 10 acres of that land, but made 90 acres available to the public for free, when the plaintiff was injured hiking on the separate and distinct 90 acres?

Although the state poses an interesting hypothetical question, we need not answer it in this case. The state charged a fee to camp at Tugman Park. As campers, plaintiffs were entitled to use all of Tugman Park, including its bike trails. As previously explained, having charged for "permission to use" its park, the state forfeited **recreational immunity** even though plaintiff was injured while engaged in a **recreational use**-bicycling-that was not the use that was the basis for the charge-camping.

***6** By so concluding, we do not necessarily reject the state's argument that "the land," as that phrase is used in ORS 105.688(2)(a), may refer to a specific, separate, and distinct piece of real property upon which a plaintiff is injured in circumstances other than those presented on summary judgment in this case. Instead, we emphasize that the state did not establish on summary judgment that it had divided Tugman Park into two separate pieces of land with distinct, identifiable boundaries, one of which could be used only by persons who paid a charge and one of which was open to the public for free.[FN5] The state also did not establish that, as a camper, plaintiffs' use was limited to the piece of land associated with the charge.

Because the state did not establish that it made "no charge for permission to use" Tugman Park, it did not establish that it was entitled to **recreational im-**

munity under ORS 105.682 or that it was "entitled to prevail as a matter of law." ORCP 47 C. The trial court therefore erred in granting summary judgment to the state on that basis. We remand to the Court of Appeals for consideration of the state's argument regarding Bonnie Coleman's failure to give notice of her tort claim, an issue that that court did not reach.

The decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further proceedings.

BALMER, J., filed a dissenting opinion in which KISTLER and LINDER, JJ., joined.
BALMER, J., dissenting.
The legislature has declared that it is the public policy of the State of Oregon "to encourage owners of land to make their land available to the public for recreational purposes * * *." ORS 105.676. To that end, the legislature has provided that such landowners are "not liable * * * for any personal injury, death or property damage that arises out of the use of the land for recreational purposes * * *." ORS 105.682(1). That immunity is available, however, only if "[t]he owner makes no charge for permission to use the land." ORS 105.688(2)(a). In this case, the majority holds that, if a landowner charges a fee for the use of one part of its land, the landowner may not assert **recreational use** immunity as to a user who pays the fee, even for injuries that occur on other land that is open for **recreational use** without any charge. In my view, that interpretation is not supported by the statutory wording and will significantly limit the immunity that the legislature intended to confer on landowners who make their land available to the public for recreational purposes. As a result, the legislature's policy choice will be thwarted. For those reasons, I respectfully dissent.

Although certain facts in this case are disputed, others are not, and-based on my analysis of the legal issues-the facts that are undisputed support the trial court's entry of summary judgment for the state. It is undisputed that plaintiffs and their friends visited Tugman State Park, that they intended to camp at one of the designated campsites at the campground there, and that plaintiffs (or their friends) paid the fee that is required to secure a campsite and were assigned campsite C22 in the campground. It also is undisputed that, although the state charges a fee for a campsite, the state charges no fee to enter the park or to use the park trails for hiking or biking. It is undisputed that, after arriving at Tugman State Park and drinking beer, plaintiff Bradley Coleman and a friend (as the complaint alleges) "decided to explore the amenities of the State Park on their mountain bikes." They "rode down a nice wood chip trial [*sic*] along the lake that was open without restriction." Along the trail, Coleman and his friend "came to a small wooden bridge that did not have a ramp on the end from which [they were] approaching." They "lifted their bikes onto the bridge and rode across" to the trail on the other side. After proceeding up the trail on the other side "about 1/4 mile" beyond the bridge, Coleman and his friend turned around, "descended back down the trail toward the bridge," and recrossed the bridge. Coleman rode his bike back across the bridge, but fell at the end, causing himself serious injury.

***7** Coleman and his wife sued the state, alleging that its negligence was the cause of his injuries. In its answer, the state asserted several affirmative defenses, including the so-called " **recreational use**" immunity at issue on review. As noted, ORS 105.682(1) provides that "an owner of land is not liable" for injuries that "arise[ ] out of the use of the land for recreational purposes * * *." However, that immunity is available only if "[t]he owner makes no charge for permission to use the land." ORS 105.688(2)(a). The majority concludes that, because "[t]he state charged plaintiffs a fee to use Tugman Park for camping," **recreational use** immunity does not apply. --- Or at ---- (slip op at 10). However, that conclusion is at odds with the text of the **recreational use** immunity statute and would produce inconsistent and anomalous results in many cases.

The majority first rejects the argument that the state relied on below and that the Court of Appeals accepted. That argument is that, because the charge that plaintiffs (or their friends) paid was not a charge to "*enter* or *go upon* the owner's land," *see* ORS 105.672(1)(a) (defining "charge" for purposes of ORS 105.672 to 105.696) (emphasis added), but rather was a charge to engage in the particular **recreational use** of "camping," the fact that the state charged the fee did not preclude it from asserting **recreational immunity**. I agree with the majority that, as used in this statute, the word "charge" includes both "fees to enter land and fees to use land as long as that use entails moving over or on the land for a recreational purpose." --- Or at ---- (slip op at 8).

However, the majority also rejects the argument that the state makes in this court: that, because the state's charge was for permission to use a campsite at the park, and the state does not charge a fee to enter or use the park or to hike or bike on the trails in the park, the state did not charge for permission to use "the land" where Coleman's injury occurred. For that reason, the state argues, it may assert **recreational immunity**. To me, that argument is persuasive.

The relevant statute provides immunity from liability for an injury "that arises out of the use of *the land* for recreational purposes, * * * when the owner of land either directly or indirectly permits any person to use *the land* for recreational purposes * * *." ORS 105.682(1) (emphasis added). That immunity applies only if "[t]he owner makes no charge for permission to use *the land*." ORS 105.688(2)(a) (emphasis added). As I read the statute, if a landowner imposes a charge for permission to use one part of its land, the immunity does not apply to an injury that arises from the **recreational use** of that land. However, if the landowner does not impose a charge for the **recreational use** of "the land" on which a user's injury arose, the landowner may assert **recreational use** immunity.

Plaintiffs' position is that if a landowner charges a fee to use *any* part of the owner's land, then the landowner may not assert **recreational use** immunity as to injuries that may have occurred anywhere on the landowner's land. However, that reading ignores the references in the statutes to "*the* land"-"*the* land" that the landowner permits any person to use for recreational purposes, ORS 105.682(1); "*the* land" that is being used principally for such purposes when an injury arises, *id.;* "*the* land" that the landowner permits any person to use without a charge. ORS 105.688(2)(a). The legislature's use of the definite article "the" suggests that the legislature did not intend the immunity (or lack of immunity) to apply to *all* land that may be owned by a landowner, but rather to some specific part of the landowner's land-and immunity (or lack of immunity) will depend on whether the landowner charges a fee for the use of that specific land. The most sensible reading of the statute is that it confers immunity on a landowner for injuries that occur on the *particular* land that the landowner has permitted the public to use for recreational purposes, but that immunity is not available if the landowner charges a fee for the use of that particular land.

***8** The majority cites the statutory definition of "land," for purposes of **recreational immunity**, ORS 105.672(3), which provides that " '[l]and' includes all real property, whether publicly or privately owned." That definition provides no assistance in this case. The definition makes clear that the statute applies to both public and private land and to what Oregon law includes within the term "real property"-including, for example, structures that come within the definition of real property. Here, however, no one argues that the statute does not apply because the accident occurred on property owned by the state or because it occurred on a constructed bridge, rather than on a trail. The statutory definition of "land" thus does not support the majority's position.

The majority concedes that, if the state "had divided Tugman Park into two pieces of land with

distinct, identifiable boundaries, one of which could be used only by persons who paid a charge and one of which was open to the public for free," --- Or at ---- (slip op at 11), then the state might be able to assert **recreational immunity** as to injuries that occur on the "free" land. [FN1] The majority concludes, however, that the state did not divide "the land" in a way that would permit it to assert immunity for Coleman's injury, which occurred on a bike trail that anyone could use for free, when it had charged him (or his friends) for the use of a campsite.

The majority's conclusion seems to rest upon one of two premises, neither of which is persuasive. First, the majority states that "[a]s campers, plaintiffs were entitled to use all of Tugman Park, including its bike trails," --- Or at ---- (slip op at 10), and concludes that **recreational use** immunity does not extend to a bike trail that those who pay camping fees are permitted to use. The majority's position ignores the fact that, although, as campers, plaintiffs were entitled to use the entire park, including the bike trails, they would have been entitled to use the bike trails (and all the rest of the park except the campsites and the separately rented yurts and gazebo) even if they had not been campers and *even without* paying any fee-like all other members of the public. Thus, under the majority's reasoning, *if* a person decides to rent a campsite (or to rent the gazebo), the state may *not* assert **recreational immunity** as to injuries suffered by that person while riding on a bike trail, but the state *may* assert such immunity as to a person who does not rent a campsite and who incurs an identical injury in an identical place on the land. For example, under the majority's theory, if a friend of Coleman's making a day visit to Tugman Park, for which there is no charge, had joined Coleman on his bike ride, and both had been injured on the same bridge, the state could assert **recreational immunity** as to Coleman, but not as to the friend. That anomalous result is inconsistent with the immunity statute and with the public policy underlying it.

***9** Alternatively, the majority opinion could be read to suggest that if the state had posted notices or otherwise clearly delineated "the land" for which a charge was imposed for **recreational uses** from "the land" for which no charge was imposed, then the state might be able to assert **recreational immunity** as to injuries that arose from recreational activities on the latter. The statute, of course, makes no reference to notices, signs, or fences. It simply states that, if there is no charge for **recreational use** of "the land," the immunity may be asserted as to injuries that occur on "the land." As I read the summary judgment record, Coleman's injury occurred when he was using "the land" for which the state makes no charge-that is, the bicycle trail in Tugman State Park that is described in the complaint. As noted, it is undisputed that the state makes no charge for the day use of the park or the use of the trails. It charges for campsites, extra vehicles at overnight campsites, and rental of yurts or the gazebo. Maps that are part of the summary judgment record show that the campsite where plaintiffs stayed is in a distinct location from the trail over Clear Creek where the accident occurred. Plaintiffs' campsite was in the "campground," a separate area with a registration booth at the entry point, showers, and restrooms. The complaint itself, quoted above, describes Coleman's ride away from the campground-down a wood chip trail along the lake, and across a bridge.

The summary judgment record demonstrates that Coleman's accident did not occur at the campsite for which he or his friends were charged a fee-or at the campground where the campsite was located. It did not occur on "the land" for which the state charges a fee for those who want to engage in recreational activities there. Rather, the accident occurred on a trail some distance away from the campsite. It occurred on "the land" that the state permits the public to use for recreational purposes without a fee. For that reason, the state may assert the **recreational immunity** defense available under ORS 105.682(1). I dissent from the majority's contrary conclusion.

KISTLER and LINDER, JJ., join in this opinion.

FN* Appeal from Coos County Circuit Court, Richard L. Barron, Judge. 221 Or.App. 484, 190 P.3d 487 (2008).

FN1. ORS 30.275, part of the Oregon Tort Claims Act, provides, in part:

"(1) No action arising from any act or omission of a public body * * * shall be maintained unless notice of claim is given as required by this section.

"(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

"(a) For wrongful death, within one year after the alleged loss or injury;

"(b) For all other claims, within 180 days after the alleged loss or injury."

FN2. The state also argued that it was entitled to discretionary immunity under ORS 30.265(3)(c), which provides that public bodies and their officers, employees, and agents are immune from liability for "[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." The trial court did not reach that issue.

FN3. Like the Court of Appeals, we cite the 2005 version of ORS 105.672 because, in 2007, the legislature amended the definition of "charge" to read:

"(1) 'Charge':

"(a) Means the admission price or fee requested or expected by an owner in return for granting permission for a person to enter or go upon the owner's land.

"(b) Does not mean any amount received from a public body in return for granting permission for the public to enter or go upon the owner's land."

ORS 105.672(1) (2007).

FN4. When the parties request that the court do so, the court also will consider legislative history and may utilize that history if the history is helpful to the court's analysis. *Gaines,* 346 Or. at 172, 206 P.3d 1042. In this case, the parties did not refer this court to relevant legislative history and the court does not deem it necessary to consult the legislative history of the statutes at issue.

FN5. The dissent argues that the campground was a distinct part of the park because it had an entry point, showers, and restrooms, but the record does not establish that the campground had identifiable boundaries.

FN1. Arguably, the state did just that. A person who fails to pay the fee for a campsite may not stay at the campground. As discussed in the text, the maps in the summary judgment record and the allegations in the complaint make clear that the campground is separate from the bike trail where Coleman was injured.

Or.,2009.
Coleman v. Oregon Parks and Recreation Dept. ex rel. State
--- P.3d ----, 2009 WL 3030352 (Or.)

END OF DOCUMENT

Exhibit 7

MEMO

November 23, 2009
Re: CERCLA "Superfund" Liability: *Adobe Lumber v Hellman, et al*

A liability exposure to local governments that typically is not covered by insurance is federal "CERCLA" (Superfund) liability (and the state law equivalents). The potential reach of this strict liability law, and the exposure it represents for cities and counties, was recently featured in a US District Court case out of California. In *Adobe Lumber, Inc. v Hellman, et al*, 2009 WL 2913415 (E.D.Cal.), the City of Woodland was a named defendant. Adobe Lumber had purchased property that included a shopping center. The shopping center housed a dry cleaning business that was hooked up to the city's sanitary sewer line. For years the dry cleaning business had illegally dumped the solvent "PCE" into its drain to the sewer. PCE is a "hazardous substance" under CERCLA. After buying the property, Adobe hired an environmental consultant to check for pollutants, and it was discovered the PCE had escaped from the city's aging and leaky sewer line. Adobe sued to recover cleanup costs. CERCLA imposes strict liability on *owners and operators* (including public bodies) of *facilities* at which hazardous substances were disposed. The statute provides for three affirmative defenses to liability: act of God; act of war; and certain acts of third parties ("innocent party defense"). The city filed this summary judgment motion claiming its sewer line was not a "facility" and alternatively that it was entitled to the "innocent party defense" since the contamination was caused by the illegal dumping of PCE by the business owner. The court ruled against the city on both counts. Based on the language of the statute and prior court interpretation, a public sewer line is a "facility" for this purpose. As to the "innocent party" defense, the court ruled it would not be available if the city knew (or should have known): (1) its sewer system had leaks; (2) disposal of PCE into public sewer lines by dry cleaners, even though illegal, is a common source of ground contamination; and (3)this dry cleaning business was connected to it's sewer. The city would have to prove one of those elements was missing to avail itself of this defense. This case illustrates how easily and innocently a city or county could find itself potentially liable in a big ticket pollution cleanup.

Mark Rauch
General Counsel

Exhibit 7a

--- F.Supp.2d ----, 2009 WL 2913415 (E.D.Cal.)
(Cite as: 2009 WL 2913415 (E.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
ADOBE LUMBER, INC., a California corporation, Plaintiff,
v.
F. Warren HELLMAN and Wells Fargo Bank, N.A., as Trustees of Trust A created by the Estate of Marco Hellman; F. Warren Hellman as Trustee of Trust B created by the Estate of Marco Hellman; The Estate of Marco Hellman, Deceased; Woodland Shopping Center, a limited partnership; Joseph Montalvo, an individual; Harold Taecker, an individual; Geraldine Taecker, an individual; Hoyt Corporation, a Massachusetts corporation; PPG Industries, Inc., a Pennsylvania corporation; Occidental Chemical Corporation, a New York corporation; City of Woodland; and Echco Sales & Equipment Co., Defendants,
and Related Counterclaims, Crossclaims, and Third-Party Complaints.
No. CIV. 05-1510 WBS EFB.

Sept. 8, 2009.

Background: Property owner brought action against city and others, alleging claims for cost recovery, declaratory relief, contribution, indemnity, nuisance, and trespass under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Hazardous Substance Account Act (HSAA), and California law. City moved for partial summary judgment on the CERCLA and HSAA claims.

Holdings: The District Court, William B. Shubb, J., held that:
(1) city sewer, into which dry cleaning business dumped wastewater containing a hazardous substance, was a "facility" within meaning of CERCLA section providing for a private cost recovery action;
(2) city sewer was a facility separate from shopping center site facility; and
(3) existence of genuine issue of material fact precluded summary judgment for city pursuant to the innocent-party defense.

Motion denied.

West Headnotes

[1] Environmental Law 149E 443

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek443 k. Facilities Covered. Most Cited Cases
City sewer, into which dry cleaning business dumped wastewater containing a hazardous substance, was a "facility" within meaning of CERCLA section providing for a private cost recovery action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(9), 42 U.S.C.A. § 9601(9).

[2] Environmental Law 149E 443

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek443 k. Facilities Covered. Most Cited Cases
In property owner's private cost recovery action under CERCLA, relevant area was properly divided into multiple parts, namely, shopping center site and city sewer into which dry cleaning business dumped wastewater containing a hazardous substance, where property owner's complaint alleged that city sewer was a facility separate from shopping center site, and finding that there were two facilities would not result in piecemeal litigation. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(1, 2), 42 U.S.C.A. § 9607(a)(1, 2).

[3] Environmental Law 149E ⚿445(1)

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek436 Response and Cleanup; Liability
149Ek445 Persons Responsible
149Ek445(1) k. In General. Most Cited Cases

Environmental Law 149E ⚿465

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek462 Evidence
149Ek465 k. Weight and Sufficiency. Most Cited Cases
To establish the innocent party defense to liability under CERCLA, a defendant must prove by a preponderance of the evidence that: (1) the release or threat of release of hazardous substances was caused solely by the acts of a third party, and (2) the defendant exercised due care with respect to the hazardous substances and took precautions against foreseeable third-party acts or omissions. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).

[4] Federal Civil Procedure 170A ⚿2498.3

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2498.3 k. Environmental Law, Cases Involving. Most Cited Cases
Genuine issue of material fact existed as to whether city was a cause of at least some of the contamination resulting from dry cleaning business's dumping of wastewater containing a hazardous substance into floor drain connected to city sewer, precluding summary judgment for city, pursuant to the innocent-party defense, in property owner's private cost recovery action under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).

[5] Federal Civil Procedure 170A ⚿2498.3

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2498.3 k. Environmental Law, Cases Involving. Most Cited Cases
Genuine issue of material fact existed as to whether city exercised due care and took appropriate precautions, precluding summary judgment for city, pursuant to the innocent-party defense, in property owner's private cost recovery action under CERCLA, arising out of dry cleaning business's dumping of wastewater containing a hazardous substance into floor drain connected to city sewer. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).
Howard L. Pearlman, Robert L. Wainess, Bartko, Zankel, Tarrant & Miller, San Francisco, CA, for Plaintiff.

Daniel Tadeusz Dobrygowski, David C. Kiernan, James L. Mink, Thomas M. Donnelly, Jones Day, Gary J. Smith, Jia-Yn Chen, Beveridge and Diamond PC, R. Morgan Gilhuly, Laura Sue Bernard, Donald Evan Sobelman, Barg Coffin Lewis & Trapp, LLP, Robert L. Wainess, Bartko Zankel Tarrant & Miller, San Francisco, CA, Jennifer Hartman King, Steven H. Goldberg, Downey Brand LLP, Bruce Leroy Shaffer, Joseph A. Salazar, Jr., Sean David Richmond, Yamin Thuzar Maung, Lewis Brisbois Bisgaard and Smith LLP, J. Scott Smith, John A. Whitesides, Angelo Kilday and Kilduff, Sacramento, CA, Robert M. Shannon, Universal Shannon and Wheeler LLP, Roseville, CA, Brian H. Phinney, PHV, Richard S. Baron, Foley Baron & Metzger, PLLC, Livonia, MI, Kurt F. Vote, Mandy Louise Jeffcoach, McCormick, Barstow, Sheppard, Wayte and Carruth, Fresno, CA, Probal Gerard Young, Archer Norris, Walnut Creek, CA, for Defendants.

MEMORANDUM AND ORDER RE: MOTION FOR PARTIAL SUMMARY JUDGMENT

WILLIAM B. SHUBB, District Judge.

***1** Plaintiff Adobe Lumber Inc. brought this action against several defendants for cost recovery, declaratory relief, contribution, indemnity, nuisance, and trespass pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675; the Hazardous Substance Account Act ("HSAA"), Cal. Health & Safety Code §§ 25300-25395; and California common law. Defendant City of Woodland ("City") now moves for partial summary judgment on plaintiff's CERCLA and HSAA claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. *Factual and Procedural Background*

In 1998, plaintiff purchased four parcels of land in Woodland, California, and on one of these parcels sits a commercial building and parking lot known as the Woodland Shopping Center. (*See* Riemann Decl. (Docket No. 356) ¶¶ 2-3.) Between 1974 and 2001, Suite K of the Woodland Shopping Center housed a dry cleaning business called "Sunshine Cleaners," which was operated by defendants Harold and Geraldine Taecker. (Pearlman Decl. Ex. H ("Taeckers' Resp. Req. Admis.") No. 2.)

Suite K of the Woodland Shopping Center is bordered on the west by a public alley called Academy Lane, beneath which runs a sewer owned by the City. (Pearlman Decl. Ex. G ("City's Resp. Req. Admis.") No. 3.) A floor drain in Suite K connects to the sewer through a lateral pipe. (Pearlman Decl. Ex. P at 8.) From 1974 until approximately 1991, the Taeckers used the floor drain to dispose of wastewater containing the dry cleaning solvent perchloroethylene ("PCE"), a volatile organic chemical that is considered a "hazardous substance" under CERCLA. (Pearlman Decl. Ex. M ("Taeckers' Supp. Resp. Req. Admis.") No. 6); *see* 40 C.F.R. § 302.4.

As alleged in the Third Amended Complaint ("TAC"), plaintiff retained an environmental consultant in August 2001 to conduct a limited subsurface investigation in the area around Suite K and determine whether the Taeckers' activities had affected the soil or groundwater. (TAC ¶ 34.) This investigation revealed the presence of volatile organic compounds, including PCE. (*Id.*) According to plaintiff, this subsurface contamination resulted from the leakage of PCE from the sewer beneath Academy Lane. (*Id.* ¶ 33.) Plaintiff contends that the sewer was "especially likely to leak due to ... its age, the large number of joints, grout (mortared) joints, and defects in the sewer system" and that the City's "management and maintenance of the sewer system was re-active, minimal[,] and inadequate." (Pl.'s Stmt. Disputed Facts Nos. 31-33.)

After several communications with the Taeckers and the California Regional Water Quality Control Board ("RWQCB"), plaintiff brought a lawsuit against the Taeckers in January 2002, and several other parties were later joined as third-party defendants. (*See* TAC ¶ 37.) That action was subsequently dismissed without prejudice when plaintiffs initiated the instant lawsuit on July 27, 2005. *See Adobe Lumber, Inc. v. Hellman,* 415 F.Supp.2d 1070, 1073 (E.D.Cal.2006).

***2** The defendants in this action include the City, the Taeckers, former owners of the Woodland Shopping Center, and the manufacturers and distributors of the dry cleaning solvent and equipment used at Suite K. (*See* TAC ¶¶ 3-18.) With respect to the City, plaintiff alleges claims of declaratory relief and cost recovery under CERCLA; declaratory relief, contribution, and indemnity under the HSAA; and nuisance and trespass under California common law. (*Id.* ¶¶ 53-106.) On October 2, 2008, 2008 WL 4539136, the court granted the City's motion to dismiss plaintiff's trespass claim. (*See* Docket No. 186.) The City now moves for partial summary judgment on plaintiff's CERCLA and HSAA claims pursuant to Federal Rule of Civil Procedure 56.

II. *Discussion*

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Id.* at 256, 106 S.Ct. 2505. On issues for which the ultimate burden of persuasion at trial lies with the nonmoving party, the moving party bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the nonmoving party's case or by demonstrating that the nonmoving party cannot produce evidence to support an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000).

Once the moving party carries its initial burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e); *accord Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Valandingham v. Bojorquez,* 866 F.2d 1135, 1137 (9th Cir.1989). On those issues for which it will bear the ultimate burden of persuasion at trial, the nonmoving party "must produce evidence to support its claim or defense." *Nissan Fire,* 210 F.3d at 1103.

In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court also may not engage in credibility determinations or weigh the evidence, for these are jury functions. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505.

A. *CERCLA and the HSAA*

CERCLA was enacted in 1980 as a broad remedial measure aimed at assuring "the prompt and effective cleanup of waste disposal sites" and ensuring that "parties responsible for hazardous substances bore the cost of remedying the conditions they created." *Mardan Corp. v. C.G.C. Music, Ltd.,* 804 F.2d 1454, 1455 (9th Cir.1986); *see* S.Rep. No. 96-848, at 13 (1980). The statute "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed," *3550 Stevens Creek Assocs. v. Barclays Bank of Cal.,* 915 F.2d 1355, 1357 (9th Cir.1990), and where the environmental harm is indivisible, liability is joint and several, *B.F. Goodrich Co. v. Murtha,* 958 F.2d 1192, 1198 (2d Cir.1992) (citing *O'Neil v. Picillo,* 883 F.2d 176, 178-79 (1st Cir.1989)).

***3** To further its purposes, CERCLA " 'authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation.' " *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 870 (9th Cir.2001) (en banc) (quoting *3550 Stevens,* 915 F.2d at 1357). To establish a prima facie case in a private cost recovery action under CERCLA, a plaintiff must demonstrate that

> (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, ... (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, ... (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," ... and (4) the defendant is within one of four

> classes of persons subject to the liability provisions of [42 U.S.C. § 9607(a)].

Id. at 870-71 (quoting *3550 Stevens,* 915 F.2d at 1358).

Even if a plaintiff establishes a prima facie case, however, a defendant can avoid liability through one of the affirmative defenses provided in 42 U.S.C. § 9607(b). These defenses refer to situations in which the release of hazardous substances "was caused solely by an act of God, an act of war, or certain acts or omissions of third parties other than those with whom a defendant has a contractual relationship." *Murtha,* 958 F.2d at 1198 (citing 42 U.S.C. § 9607(b)). The latter is variously referred to as the "innocent landowner," "third-party," or "innocent-party" defense. *See Carson Harbor,* 270 F.3d at 871; *United States v. Honeywell Int'l, Inc.,* 542 F.Supp.2d 1188, 1199 (E.D.Cal.2008) (England, J.).

Here, the City contends that plaintiff cannot satisfy either the first or fourth elements of its prima facie case. Specifically, the City argues that the sewer beneath Academy Lane is not a "facility" under CERCLA and that the City is not "within one of four classes of persons" subject to CERCLA liability. The City alternatively asserts that it is absolved from liability pursuant to CERCLA's innocent-party defense.

Similar to CERCLA, California's HSAA provides for civil actions for indemnity and contribution and expressly incorporates CERCLA's liability standards and defenses. *See Castaic Lake Water Agency v. Whittaker Corp.,* 272 F.Supp.2d 1053, 1084 (C.D.Cal.2003) ("HSAA 'create[s] a scheme that is identical to CERCLA with respect to who is liable.' " (quoting *City of Emeryville v. Elementis Pigments, Inc.,* No. 99-3719, 2001 WL 964230, at *11 (N.D.Cal. Mar. 6, 2001)) (alteration in original)); *Goe Eng'g Co., Inc. v. Physicians Formula Cosmetics, Inc.,* No. 94-3576, 1997 WL 889278, at *23 (C.D.Cal. June 4, 1997) ("California's [HSAA] imposes essentially the same standards of liability as CERCLA.").

Under the HSAA, the term "site" has the same meaning as "facility" defined in 42 U.S.C. § 9601(9); the terms "responsible party" or "liable person" refer to the four classes of persons defined in 42 U.S.C. § 9607(a); and the "defenses available to a responsible party or liable person" are those defenses specified in 42 U.S.C. § 9607(b), which include the innocent-party defense. Cal. Health & Safety Code §§ 25323.9, 25323.5. Thus, as the parties acknowledge, the City's arguments as to plaintiff's CERCLA claims apply with equal force to plaintiff's claims under the HSAA. (City's Mem. Supp. Mot. Summ. J. 7 n. 4; Pl.'s Mem. Supp. Opp'n Summ. J. 1:5-2:1.)

B. *"Facility"*

***4** [1] CERCLA defines the term "facility" as follows:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9). The conjunction "or" between subparts (A) and (B) establishes "two distinct definitions of what might constitute a facility." *Sierra Club v. Seaboard Farms Inc.,* 387 F.3d 1167, 1171 (10th Cir.2004). Thus, "[a]n area fulfilling the requirements of [subpart (A)] need not also meet the requirements of [subpart (B)] to be considered a 'facility,' and vice versa." *Id.* (quoting *United States v. Twp. of Brighton,* 153 F.3d 307, 322 (6th Cir.1998) (Moore, J., concurring)) (internal quotation marks omitted).

In light of the general language and disjunctive structure of § 9601(9), the Supreme Court and others have remarked that "the term 'facility' enjoys a broad and detailed definition." *United States v. Bestfoods,* 524 U.S. 51, 56, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998); *see, e.g., Seaboard Farms,* 387 F.3d at 1174 ("[C]ircuits that have applied the defined term "facility" have done so with a broad brush."); *Uniroyal Chem. Co., Inc. v. Deltech Corp.,* 160 F.3d 238, 245 (5th Cir.1998) ("[I]t is apparent that facility is defined in the broadest possible terms ...."); *3550 Stevens,* 915 F.2d at 1358 n. 10 ("[T]he term 'facility' has been broadly construed by the courts, such that 'in order to show that an area is a "facility," the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there.' " (quoting *United States v. Metate Asbestos Corp.,* 584 F.Supp. 1143, 1148 (D.Ariz.1984))). Indeed, one annotation recently noted that "it does not appear that any court has ever held that one or more of the defining terms in [42 U.S.C. § 9601(9)] was inapplicable in a particular case." William B. Johnson, Annotation, *What Constitutes "Facility" Within the Meaning of Section 101(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601(9)),* 147 A.L.R. Fed. 469 § 2(a) (1998 & Supp.2009) [hereinafter Johnson, *What Constitutes "Facility"*].

Despite CERCLA's expansive definition of "facility," the City contends that CERCLA's "express terms" exempt its sewer from this classification. (City's Mem. Supp. Mot. Summ. J. 8:5.) To support its argument, the City ascribes great significance to the parenthetical in subpart (A): "The term 'facility' means (A) any ... pipe or pipeline (*including any pipe into a sewer or publicly owned treatment works*) ...." 42 U.S.C. § 9601(9)(A) (emphasis added). The City suggests that by specifically mentioning "sewer" in this parenthetical and neglecting to include it in the preceding enumerated facilities, Congress "had sewers in mind" but deliberately kept them off the list. (City's Mem. Supp. Mot. Summ. J. 8:16-17.) Similarly, the City argues that the plain meaning of "pipe or pipeline" includes sewers; therefore, the parenthetical in subpart (A) explaining that pipes connected to sewers are facilities is redundant. (City's Mem. Supp. Summ. J. 8:22-9:10.) The only way to make this parenthetical functional, the City asserts, is to conceive of sewers as non-facilities; under this interpretation, the parenthetical clarifies that pipes remain facilities even if they are connected to non-facilities. (*Id.*)

***5** As the City acknowledges, several other courts have considered this argument and have rejected it. *See Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n,* 66 F.3d 669, 678-80 (4th Cir.1995); *United States v. Union Corp.,* 277 F.Supp.2d 478, 486-87 (E.D.Pa.2003); *see also United States v. Meyer,* 120 F.Supp.2d 635, 639 (W.D.Mich.1999); *City of Bangor v. Citizens Commc'ns Co.,* No. 02-183, 2004 WL 483201, at *11 (D.Me. Mar. 11, 2004) (Kravchuk, Mag. J.), *aff'd,* 2004 WL 2201217, at *1 (D.Me. May 5, 2004). Nonetheless, the City correctly notes that these decisions rely almost exclusively on the reasoning provided by the Fourth Circuit in *Westfarm,* and because these decisions are not binding on this court, the City argues that their "tortured construction of 'facility' " should be rejected. (City's Mem. Supp. Mot. Summ. J. 10:7-17.)

1. *The Westfarm Holding*

In *Westfarm,* a property owner brought a cost recovery action under CERCLA against the Washington Suburban Sanitary Commission ("WSSC"), a state agency that operated a sewer system. 66 F.3d at 674, 676. Like the instant case, *Westfarm* involved a dry cleaning operation that had contaminated the soil and groundwater on plaintiff's property by pouring PCE "down a sink drain into the connected sewer line." *Id.* at 674. Apparently, the PCE "was flowing [into plaintiff's property] through leaks in the sewer system." *Id.* at 673. WSSC moved for summary judgment, arguing in part that

"the language of the statute evinces a Congressional intent to exclude 'publicly owned treatment works,' or POTWs, such as WSSC's sewer, from the definition of 'facility.' " *Id.* at 678. Like the City in this case, WSSC specifically argued that "to conclude that a POTW is a 'facility' would be to render the parenthetical language above, 'including any pipe into a sewer or publicly owned treatment works' surplusage, contrary to traditional rules of statutory interpretation." *Id.*

While agreeing that the parenthetical appeared to be surplusage when viewed in isolation, the Fourth Circuit proceeding to hold:

> Reading CERCLA as a whole ... leads to the inescapable conclusion that Congress did not intend to exclude POTWs from liability. Congress expressly abrogated state sovereign immunity under CERCLA, thereby subjecting "facilities" owned and operated by state governments to liability. A narrow exception to the definition of "owner or operator," however, was carved to exclude state and local governments from liability when they have acquired ownership of a facility "involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title." ... [I]f Congress had intended to exclude state and local governments from liability in other situations ... Congress would have either: (a) excluded all state and local governments from the definition of "owner or operator," rather than limiting the exclusion to the involuntary acquisition situation; or (b) included POTWs in the list of entities excluded from the definition of "owner or operator."

***6** *Id.* at 678-89 (citations omitted). In order to explain the apparent surplusage in the parenthetical in subpart (A), the Fourth Circuit concluded that, "[i]n the context of the entire statute, it appears that Congress added [the parenthetical] to emphasize the point that pipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes, not the sewer or POTW." *Id.* at 679.

2. *Limiting the City's Proposed Interpretation*

Before weighing the merits of the City's arguments and examining the Fourth Circuit's rationale in *Westfarm,* the court first notes the self-imposed limitations on the City's interpretation of subpart (A). Specifically, the City "does not assert [that] public entities are or should be generally immune from CERCLA liability." (City's Mem. Supp. Mot. Summ. J. 14:27-15:1.) This qualification to the City's argument appears necessary, given that "CERCLA expressly includes municipalities, states, and other political subdivisions within its definition of persons who can incur ... liability under § 9607," and because the Supreme Court has held that a " 'cascade of plain language' clearly demonstrates Congress aimed to abrogate sovereign immunity for the states." *Murtha,* 958 F.2d at 1198 (quoting *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 7-13, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989)).

Having acknowledged that CERCLA does not generally distinguish between private and public parties for purposes of liability, the City proceeds to claim that, "regarding sewers and waste treatment plans, Congress decided to treat public entities differently by not including such places as facilities." (City's Mem. Supp. Mot. Summ. J. 14:27-15:1.) In so arguing, the City implies that its proffered exception to CERCLA's broad definition of "facility" would be cabined to "the basic civic function[ ] of having and maintaining a sewer system." (*Id.* at 15:4-5.)

Although the City attempts to limit the scope of its proposed exception to CERCLA's definition of "facility," this limitation finds little support in the text of the statute. Assuming the parenthetical in subpart (A) evinces Congress's intent to exempt sewers from the definition of facility, there is no express language to indicate that this exemption would cover only *public* sewers. Private sewers are common sources of environmental contamination, *see, e.g., Mead Corp. v. Browner,* 100 F.3d 152, 154 (D.C.Cir.1996); *State of Vermont v. Staco, Inc.,* 684 F.Supp. 822, 832-33 (D.Vt.1988), and it would

seem that the owner of a private sewer could similarly avail subpart (A)'s parenthetical as an exemption from CERCLA's definition of "facility."

Of course, applying the canon of statutory construction *noscitur a sociis,* the juxtaposition of "sewer" and "publicly owned treatment works" may suggest that only public sewers are contemplated by the word "sewer." *See James v. United States,* 550 U.S. 192, 222, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (" *[N]oscitur a sociis* is just an erudite (or some would say antiquated) way of saying what common sense tells us to be true: '[A] word is known by the company it keeps' " (quoting *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)) (second alteration in original)). However, because some sources define the term "publicly owned treatment works" to include public sewers, the word "sewer" could just as plausibly be read to refer to private sewers in order to avoid rendering "publicly owned treatment works" superfluous. *See, e.g.,* Me.Rev.Stat. Ann. tit. 38, § 414-B (" 'Publicly owned treatment works' includes sewers, pipes or other conveyances ...."); *Westfarm,* 66 F.3d at 678 (using the terms interchangeably).

***7** In sum, although the City attempts to limit its interpretation of subpart (A) to apply solely to public sewers, it is difficult to articulate a persuasive, textual basis for not also exempting private sewers, which both parties agree would be inconsistent with the aims of CERCLA. (*See* City's Mem. Supp. Mot. Summ. J. 14:27-15:8; Pl.'s Mem. Supp. Opp'n Summ. J. 11:7-8); *see also United States v. Meyer,* 120 F.Supp.2d 635, 639-40 (W.D.Mich.1999) (holding that a private sewer system that had contaminated the soil and groundwater with hexavalent chromium and other hazardous materials was a "facility" under CERCLA).

3. *Assessing the City's Interpretation*

As to the City's claim that the "absence of sewers from the definitional list" is "quite telling," both caselaw and CERCLA's legislative history demonstrate that the language defining facility was intended to be broad and inclusive, *see Uniroyal,* 160 F.3d at 246-47; The Envtl. Law. Inst., *Superfund: A Legislative History* xviii (Helen C. Needham & Mark Henefee eds., 1982); 126 Cong. Rec. S14964-65 (1980), and there is no dispute that sewers could easily be encompassed within the meaning of "structure," "equipment," "pipe," or "pipeline." Therefore, in this context, the failure to specifically single out a particular object or edifice does not indicate congressional intent to exclude it from the expansive meaning of "facility." *See, e.g., United States v. Iron Mountain Mines, Inc.,* 812 F.Supp. 1528, 1549 (E.D.Cal.1992) (Schwartz, J.) ("While [the defendant] is correct that Congress did not specifically identify mines in this provision, Congress also did not specifically identify factories, plants, laboratories, laundromats, warehouses, dumps, or quarries-any number of places from which hazardous wastes might be released.").

Furthermore, assuming that some justification may exist for exempting public sewers from CERCLA liability, it would be strange for Congress to do so through the artful placement of a parenthetical within CERCLA's definition of "facility." As the Fourth Circuit recognized in *Westfarm,* Congress unambiguously exempted local governments from CERCLA liability for facilities acquired " 'involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title.' " 66 F.3d at 678 (quoting 42 U.S.C. § 9601(20)(D)). By expressly exempting municipalities in this regard, the canon of statutory construction *expressio unius est exclusio alterius* would suggest that Congress did not intend an additional exemption for municipalities with respect to sewers. *Id.* at 678-79; *see Blausey v. U.S. Tr.,* 552 F.3d 1124, 1133 (9th Cir.2009) ("[T]he enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded."); *see also Murtha,* 958 F.2d at 1199 ("These express exceptions to liability are strong evidence that municipalities are otherwise subject

to CERCLA liability.").

***8** At a more fundamental level, the City also fails to explain why Congress would exempt public sewers from the definition of "facility" as opposed to, for example, publicly owned water mains or landfills. Under the City's proposed construction, municipalities would still be strictly liable for the release of hazardous substances from these facilities, *see, e.g., Transp. Leasing Co. v. State of Cal. (CalTrans),* 861 F.Supp. 931, 939 (C.D.Cal.1993) (holding municipalities liable for contamination from a landfill even though their conduct constituted a "non-contributory exercise of sovereign power"), yet they would have immunity for even deliberate environmental contamination via sewers, *see, e.g., Uniroyal Chem. Co., Inc. v. Deltech Corp.,* 160 F.3d 238, 244 (5th Cir.1998) ("CERCLA liability cannot be imposed unless the site in question constitutes a facility."). The City has provided no persuasive justification for inserting such inconsistency into CERCLA's treatment of public facilities. [FN1] *See generally Murtha,* 958 F.2d at 1199 ("To construe CERCLA as providing an exemption for municipalities arranging for the disposal of municipal solid waste that contains hazardous substances simply because the municipality undertakes such action in furtherance of its sovereign status would create an unwarranted break in the statutory chain of responsibility.").

While arguing that subpart (A) implicitly exempts public sewers from the definition of "facility," the City also neglects to consider the import of subpart (B), which further defines facility to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. 9601(9)(B). The City simply disregards this provision, asserting that it applies only to " *land* ... where pollutants migrate," as opposed to other objects or edifices beneath or affixed to the surface. (City's Mem. Supp. Mot. Summ. J. 8:8-9 (emphasis added); *see id.* at 12 n. 10.) This parsimonious view of subpart (B), however, is far from well-established. *See, e.g., Sierra Club, Inc. v. Tyson Foods, Inc.,* 299 F.Supp.2d 693, 708 (W.D.Ky.2003) (applying subpart (B) to include poultry houses and litter sheds); *Meyer,* 120 F.Supp.2d at 638-39 (applying subpart (B) to include private sewer lines); *Clear Lake Props. v. Rockwell Int'l Corp.,* 959 F.Supp. 763, 767-68 (S.D.Tex.1997) (applying subpart (B) to include an underground laboratory). *See generally Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F.2d 1146, 1151 (1st Cir.1989) (interpreting subpart (B) to encompass "every conceivable place where hazardous substances come to be located"); *Clear Lake,* 959 F.Supp. at 768 (stating that subpart (B) "is broad enough to encompass virtually any place at which hazardous wastes have been found to be located").

To be sure, subpart (B) may be inapplicable here because the final destination of the PCE appears to be the soil and groundwater near Suite K rather than the sewers themselves. *See United States v. Bliss,* 667 F.Supp. 1298, 1305 (E.D.Mo.1987) (explaining that subpart (A) refers to facilities that release hazardous substances, while subpart (B) refers to facilities where hazardous substances ultimately "come to be located"); (*see also* Pearlman Decl. Ex. I at 2-9, 21-23). Nonetheless, juxtaposing subpart (B) with the City's interpretation of subpart (A) illustrates a strange consequence of the City's construction of the latter; under the City's view, a sewer would not be a facility if it leaked a hazardous substance into the surrounding soil or groundwater, but it would be a facility if the hazardous substance came to remain within the sewer itself. *See Meyer,* 120 F.Supp.2d at 638-39 (finding private sewer lines to be facilities because hazardous substances were discovered therein); *see also Brookfield-N. Riverside Water Comm'n v. Martin Oil Mktg., Ltd.,* No. 90-5884, 1992 WL 63274, at *5 (N.D.Ill. Mar. 12, 1992) ("[N]ot only was the construction site a 'facility,' but after hazardous substances entered the water main, the water main too became a 'facility.' "). The City provides no justification as to why Congress would intend such asymmetry in the definition of "facility" as applied

to sewers.

4. *Whether the City's Interpretation Is Required to Avoid Surplusage*

***9** Having noted several weaknesses in the City's proposed interpretation of subpart (A), the court proceeds to address the City's contention that, absent this interpretation, the parenthetical in subpart (A) would be superfluous. It is well-established that courts should express a "deep reluctance to interpret a statutory provision as to render superfluous other provisions in the same enactment," *Pa. Dep't of Pub. Welfare v. Davenport,* 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); nonetheless, this maxim is not absolute and must yield to ensuring that the overall purposes of a statute are furthered, *see United States v. Atl. Research Corp.,* 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render [an] entire provision a nullity."); *Lamie v. U.S. Tr.,* 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (noting that surplusage does "not always produce ambiguity" and that the "preference for avoiding surplusage is not absolute").

As discussed previously, CERCLA is aimed at assuring "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S.Rep. No. 96-848, at 13 (1980); *accord Mardan Corp. v. C.G.C. Music, Ltd.,* 804 F.2d 1454, 1455 (9th Cir.1986). To interpret subpart (A)'s parenthetical to automatically exempt public sewers from CERCLA lawsuits-not withstanding the fault or "responsibility" of the owner or operator for any environmental harms-appears to conflict with CERCLA's comprehensive remedial purpose. It would seem, moreover, that a court should be tolerant of occasional redundancy and surplusage where, as here, the statute in question "has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage." *Rhodes v. County of Darlington, S.C.,* 833 F.Supp. 1163, 1174 (D.S.C.1992) (quoting *Artesian Water Co. v. Gov't of New Castle County,* 659 F.Supp. 1269, 1277 (D.Del.1987)); *see Uniroyal,* 160 F.3d at 246 ("Due to its hurried passage, it is widely recognized that many of CERCLA's provisions lack clarity and conciseness. A multitude of courts have roundly criticized the statute as vague [and] contradictory ...."); *La.-Pac. Corp. v. Beazer Materials & Servs., Inc.,* 811 F.Supp. 1421, 1428 (E.D.Cal.1993) (Karlton, J.) ("Given the haste in which [CERCLA] was drafted, it is not unreasonable to conclude that the critical comma was inadvertently omitted." (citations omitted)).

More importantly, *Westfarm* 's alternative, non-superfluous interpretation of subpart (A)'s parenthetical-while perhaps underdeveloped in that case-is by no means "Procrustean." (City's Mem. Supp. Summ. J. 10:2.) In *Westfarm,* the Fourth Circuit suggested that the parenthetical "emphasize[d] the point that pipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes, not the sewer or POTW." *Id.* at 679. A substantial body of caselaw has considered the issue to which the Fourth Circuit alluded, namely, how to delineate among several sites, structures, or items falling under CERCLA's definition of "facility" in order to determine the relevant owners, operators, and other responsible parties. *See, e.g., Sierra Club v. Seaboard Farms Inc.,* 387 F.3d 1167, 1170-71 (10th Cir.2004); *United States v. Twp. of Brighton,* 153 F.3d 307, 312-13 (6th Cir.1998).

***10** For example, in *Brighton,* a township sought to escape liability for response costs incurred by the federal government in cleaning up a "dumpsite" used by the township and other parties. 153 F.3d at 311-12. The township argued that the "facility" in question should not be defined to include the township's ownership interest because the township only used the southwest corner of the site, which was separate from the "hot zone" of the government's cleanup efforts. *Id.* at 313. The Sixth Circuit rejected this argument, however, concluding that "even

though township residents generally left their refuse in the southwest corner, it appears that the entire property was operated together as a dump." *Id.*

Pipes and pipelines present a unique aspect of this problem; because pipes are "long hollow cylinders ... used for conducting a fluid, gas, or finely divided solid," *Webster's Third International Dictionary* 1721 (1976), a court may be uncertain as to where these types of "facilities" begin or end. Indeed, as the Sixth Circuit noted in *Brighton,* the boundaries of a facility need not be coterminous with the contamination. *See id.* at 313 ("[A]n area that cannot be reasonably or naturally divided into multiple parts or functional units should be defined as a single 'facility,' even if it contains parts that are non-contaminated.").

Thus, in light of this uncertainty, the parenthetical in subpart (A) indicates that pipes and pipelines may be divided into specific ownership-segments for purposes of determining the relevant "facilities" under CERCLA. This interpretation has the serviceable result of enabling cost recovery actions against owners and operators of particular portions of a pipeline, rather than against all of the unaffiliated owners and operators involved in a network of pipes. Otherwise, every time a private pipeline leaked hazardous substances into the subsurface, the owners of sewers or treatment works would be implicated simply by having their equipment connected to the network. *See Westfarm,* 66 F.3d at 669 ("[P]ipes leading into sewers or POTWs are the responsibility of the owner or operator of the pipes, not the sewer or POTW."). Therefore, while the redundancy identified by the City does not necessarily require resolution, the court finds that the interpretation provided here and in *Westfarm* adequately addresses the issue in a manner more consistent with CERCLA's treatment of municipalities than the City's proposed construction.

5. *The Ninth Circuit and Westfarm*

In its criticism of *Westfarm,* the City also argues that the Fourth Circuit's analysis was questioned by the Ninth Circuit in *Fireman's Fund Insurance Co. v. City of Lodi, California,* 302 F.3d 928 (9th Cir.2002). In that case, the City of Lodi sought to enforce a municipal ordinance modeled after CERCLA and the HSAA to remedy contamination resulting from the disposal of PCE in municipal sewers. *See id.* at 934-37. To determine whether the municipal ordinance was preempted by CERCLA and the HSAA, the Ninth Circuit noted that the argument in favor of preemption was "rooted in the ... assumption that Lodi is a [Potentially Responsible Party ("PRP")]." *Id.* at 946. The Ninth Circuit continued:

> ***11** While we decline to decide whether Lodi is a PRP on the record before us, we note that it is doubtful whether Lodi may be considered a PRP merely as a result of operating its municipal sewer system. *See Lincoln Prop[s]., Ltd. v. Higgins,* 823 F.Supp. 1528, 1539-44 (E.D.Cal.1992) (holding that a municipal operator of a sewer system that leaked hazardous waste could rely on a third-party defense to avoid liability under CERCLA). *But see Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n,* 66 F.3d 669, 675-80 (4th Cir.1995) (holding that a municipal operator of a sewer system is liable for the acts of a third party that discharges hazardous waste into the system). *See also* Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs?,* 14 Stan. Envtl. L.J. 61 (1995) (criticizing the *Westfarm* decision and arguing that municipalities should not bear CERCLA liability for operating sewer systems because some leakage from sewers is unavoidable and the parties dumping chemicals into the sewer, not the operator of the sewer, is the responsible party). We remand to the district court the question of whether Lodi is a PRP.
>
> *Id.*

Although this dicta evinces some disagreement with *Westfarm,* this tension appears to center on the ap-

plication of the innocent-party defense rather than the interpretation of "facility." Indeed, the case favorably cited by the Ninth Circuit- *Lincoln Properties, Ltd. v. Higgins*-involved a county sewer operator that successfully asserted the innocent-party defense; the parties in *Lincoln Properties,* however, had expressly stipulated that the public sewer in question was a "facility" under CERCLA. 823 F.Supp. 1528, 1533 n. 2, 1539-44 (E.D.Cal.1992) (Levi, J.). The explanatory parentheticals for *Westfarm* and Frye's Note also do not reference any discussion of the term "facility" under CERCLA. *Fireman's Fund,* 302 F.3d at 946. On remand from the Ninth Circuit, moreover, neither the district court nor the parties in *Fireman's Fund* interpreted the Ninth Circuit to question whether a municipal sewer was a "facility" under CERCLA; instead, the district court concluded that the City of Lodi was in fact a PRP. *See Fireman's Fund Ins. Co. v. City of Lodi, Cal.,* 296 F.Supp.2d 1197, 1206-07 (E.D.Cal.2003) (Damrell, J.).

Accordingly, when the Ninth Circuit's reference to *Westfarm* is examined in context, there is no indication that the Ninth Circuit would interpret "facility" differently than the Fourth Circuit.

6. *The City's Policy Arguments*

The City finally proffers several policy arguments to support an exemption for its public sewer from CERCLA's definition of "facility." These policy arguments generally invoke the City's perception of the equities in this case, asserting that CERCLA's purpose "is thwarted by imposing liability on a city merely because the polluter uses the public sewer." (City's Mem. Supp. Mot. Summ. J. 13:4-5.) The City reiterates that it was "unaware of the contaminant's presence" and distinguishes *Westfarm* and its progeny on the grounds that they "involved *deliberate/knowing conduct* by the party responsible for the sewer." (*Id.* at 10:8-21; *see id.* at 14:13 ("[The City] derived no economic benefit from the disposal of PCE wastewater into the sewer."); *id.* at 14:13 ("[E]ven assuming the sewer did leak PCE, no evidence [suggests] the sewer was thus faulty in the sense of [its] intended function and foreseeable usage.").) These arguments, however, are unavailing. As courts have repeatedly explained,

***12** CERCLA is a strict liability statute, and liability can attach even when the generator has no idea how its waste came to be located at the facility from which there was a release. The three statutory defenses enumerated in § 9607(b), including defenses for "an act of God," "an act of war," or "an act or omission of a third party other than an employee or agent of the defendant," are "the only [defenses] available, and ... the traditional equitable defenses are not."

Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1078 (9th Cir.2006) (quoting *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.,* 358 F.3d 661, 672 (9th Cir.2004)) (citation omitted) (alteration in original); *see La.-Pac. Corp. v. Beazer Materials & Servs., Inc.,* 811 F.Supp. 1421, 1429 (E.D.Cal.1993) (Karlton, J.) ("The imposition of strict liability means that defendants may be required to contribute to a cleanup even though they were not responsible, in a culpability sense, for the creation of the condition.").

Therefore, although the City's policy arguments may lend support to its innocent-party defense, they do not comport with the strict-liability scheme underlying a prima facie case for cost recovery. To be sure, while a party's relative culpability may influence the applicability of the innocent-party defense in a particular case, it cannot dictate the meaning of the word "facility" to be applied in all cost recovery lawsuits.[FN2]

Accordingly, having considered the merits of the City's proposed interpretation exempting sewers from CERCLA's definition of "facility," including whether the exemption could be limited to public sewers, whether it would be consistent with other statutory provisions and CERCLA's policy goals, and whether it is supported by caselaw within and

beyond the Ninth Circuit, the court concludes that the sewer in this case is a "facility" for purposes of CERCLA.

C. *"Owner" or "Operator"*

[2] The fourth element of a prima facie case for cost recovery requires that the defendant be "within one of four classes of persons subject to the liability provisions of [42 U.S.C. § 9607(a)]." *3550 Stevens Creek Assocs. v. Barclays Bank of Cal.,* 915 F.2d 1355, 1357 (9th Cir.1990). Here, the parties agree that only two of the four classes allegedly apply to the City, namely, "the [present] owner and operator of a vessel or a facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(1)(2); (*see* City's Mem. Supp. Summ. J. 6:14-23; Pl.'s Mem. Supp. Opp'n Summ. J. 16:12-21:14; TAC ¶¶ 14, 30-31.)

The City further submits that, "[w]ithout question," it "owned and operated the sewer main." (City's Mem. Supp. Summ. J. 15:11.) Nonetheless, the City contends that "even if a municipal sewer is generally deemed a facility, it is not *the* facility by which owner or operator status is gauged" in this case. (*Id.* at 15:11-13.) The City suggests that "there are not *multiple* facilities here ... but rather one-the entire area of land to be remedied." (*Id.* at 15:22-23.) Therefore, because the City is not the owner or operator of the "entire area of land to be remedied," the City argues that plaintiff cannot satisfy the fourth element of its prima facie case.

***13** None of the cases cited by the City suggest that, when confronted with several facilities, a court must conceive of them as a single site to determine the relevant owners and operators. Rather, the cited authorities indicate that courts are simply permitted to so in appropriate cases. *See, e.g., Axel Johnson, Inc. v. Carroll Carolina Oil Co., Inc.,* 191 F.3d 409, 419 (4th Cir.1999) ("This is not to say that every widely contaminated property must be considered a single facility. But where, as here, the only arguments in favor of designating multiple facilities are weak in themselves and merely represent thinly-veiled attempts by a party to avoid responsibility for contamination, designation of the property as a single facility is appropriate."); *Cytec Indus., Inc. v. B.F. Goodrich Co.,* 232 F.Supp.2d 821, 836 (S.D.Ohio 2002) ("This court concludes that usually, although perhaps not always, the definition of facility will be the entire site or area, including single or contiguous properties, where hazardous wastes have been deposited as part of the same operation or management.").

To be sure, courts and commentators have frequently observed that "there does not appear to be a limit to the number of 'facilities' that can be created by the migration of hazardous substances, even if hazardous substances 'come to be located' at several locations in a particular case." Johnson, *What Constitutes "Facility"* § 2(b); *see United States v. Meyer,* 120 F.Supp.2d 635, 639 (W.D.Mich.1999) ("Because hazardous substances may come to be located in several discrete locations in a given case, there may be several 'facilities' related to a single hazardous waste discharge or disposal."); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.,* No. 92-5068, 1995 WL 866395, at *4 (E.D.Cal. Nov. 15, 1995) (Wanger, J.) ("Contrary to Brown & Bryant's arguments, a single geographical location may contain multiple 'facilities.' 'Facilities' may even be contained within other 'facilities.' "); *Brookfield-N. Riverside Water Comm'n v. Martin Oil Mktg., Ltd.,* No. 90-5884, 1992 WL 63274, at *5 (N.D.Ill. Mar. 12, 1992) ("[N]ot only was the construction site a 'facility,' but after hazardous substances entered the water main, the water main too became a 'facility.' ").

Although certain considerations may counsel in favor of a single facility in some cases, *see Cytec,* 232 F.Supp.2d at 836, the primary source for determining the number of relevant facilities is the plaintiff's complaint, *see La.-Pac. Corp. v. Beazer Materials & Servs., Inc.,* 811 F.Supp. 1421, 1431

(E.D.Cal.1993) (Karlton, J.); *Burlington N. R.R. Co. v. Woods Indus., Inc.,* 815 F.Supp. 1384, 1389-90 (E.D.Wash.1993); *see also United States v. Atchison, Topeka & Santa Fe Ry. Co.,* Nos. 92-5068 et al., 2003 WL 25518047, at *47 (E.D.Cal. July 15, 2003) (Wanger, J.) ("If anything, courts defer to a plaintiff's definition of the facility because the plaintiff is the master of its claim and should be allowed to allege or conceptualize the facility in any manner to suit liability, as long as the asserted definition falls within the very broad statutory definition."), *rev'd on other grounds,* 479 F.3d 1113 (9th Cir.2007), *rev'd,* --- U.S. ----, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009).

***14** For example, in *Burlington* the defendant owned a "fruit drenching" business on a leasehold "immediately adjacent" to the plaintiff's property, and over several decades the defendant allowed hazardous pesticides to escape and seep into the soil on plaintiff's parcel. 815 F.Supp. at 1387. Although the defendant's leasehold and the plaintiff's parcel were situated on a contiguous area of land, the court looked to the theory of liability alleged in the complaint and concluded that "the drenching operation constitute[d] a separate CERCLA facility." *Id.* at 1390. Similarly, in *Beazer,* the court adopted the plaintiff's single-site theory of liability and rejected defendants' attempt to "parcel out [the] site into various 'facilities,' " noting that the plaintiff was the "master of its complaint" and had "the discretion to formulate the legal theories on which it would base its claim." 811 F.Supp. at 1431. Together, *Burlington* and *Beazer* illustrate that, absent unusual circumstances or obvious gamesmanship, the court should determine the appropriate number of facilities in light of plaintiff's theory of liability.

Here, plaintiff's TAC unambiguously alleges that the City's sewer is a facility separate from the Woodland Shopping Center site. (*See* TAC ¶ 55 ("The Site and the sewer main on Academy Lane ... are each a 'facility' within the meaning of CERCLA ....").) Unlike the cases cited by the City, permitting plaintiff to allege the existence of two facilities in this case is not analogous to the "ridiculous" proposition that "each barrel in a landfill is a separate facility." *Union Carbide Corp. v. Thiokol Corp.,* 890 F.Supp. 1035, 1043 (S.D.Ga.1994); *see Axel Johnson,* 191 F.3d at 417. Nor would plaintiff's theory result in "piecemeal litigation," such as where "each separate facility would give rise to a separate cause of action." *Cytec,* 232 F.Supp.2d at 836. Instead, the relevant area here can be "reasonably or naturally divided into multiple parts or functional units," namely, the Woodland Shopping Center and the sewer main owned by the City beneath Academy Lane. *United States v. Twp. of Brighton,* 153 F.3d 307, 313 (6th Cir.1998). Accordingly, because the City concedes that it is the owner and operator of the sewer beneath Academy Lane, [FN3] and because this sewer is a "facility" under CERCLA, plaintiff has satisfied the fourth prong of its prima facie case.

D. *Innocent-Party Defense*

"An otherwise liable party may avoid CERCLA liability only by establishing one of the three affirmative defenses set forth in 42 U.S.C. § 9607(b)." *Lincoln Props., Ltd. v. Higgins,* 823 F.Supp. 1528, 1539 (E.D.Cal.1992) (Levi, J.). "Because CERCLA is a strict liability statute with few defenses, [§] 9607(b) ... is narrowly construed." *United States v. Honeywell Int'l, Inc.,* 542 F.Supp.2d 1188, 1199 (E.D.Cal.2008) (Damrell, J.) (citing *Lincoln Props.,* 823 F.Supp. at 1537, 1539); *see Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 883 (9th Cir.2001) (en banc) ("[T]o be sure, Congress intended the defense to be very narrowly applicable, for fear that it might be subject to abuse.").

***15** [3] Here, the City contends that it is absolved from liability through § 9607(b)(3), the innocent-party defense. To establish this defense, a defendant must prove by a preponderance of the evidence that (1) the release or threat of release of hazardous substances was caused solely by the acts of a third party and (2) the defendant exercised due care with

respect to the hazardous substances and took precautions against foreseeable third-party acts or omissions.[FN4] *See Castaic Lake Water Agency v. Whittaker Corp.,* 272 F.Supp.2d 1053, 1079-80 (C.D.Cal.2003); *see also* 42 U.S.C. § 9607(b)(3).

As the text of § 9607(b)(3) makes plain, this provision is structured as an affirmative defense, and the City would have the burden of establishing it at trial. *See Carson Harbor,* 270 F.3d at 882-83; *United States v. Stringfellow,* 661 F.Supp. 1053, 1062 (C.D.Cal.1987); *see also* Rosemary J. Beless, *Superfund's "Innocent Landowner" Defense: Guilty until Proven Innocent,* 17 J. Land Resources & Envtl. L. 247, 249-50 (1997). Therefore, in order to grant the City's motion for partial summary judgment on the basis of this affirmative defense, the City "must make a showing sufficient for the court to hold that no reasonable trier of fact" could fail to find-by a preponderance of the evidence-that it satisfies the requirements of § 9607(b)(3). *Ctr. For Biological Diversity v. Abraham,* 218 F.Supp.2d 1143, 1153 (N.D.Cal.2002) (citing *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir.1986)); *see id.* at 1153-54 ("In such a case, the moving party 'must establish beyond peradventure *all* of the essential elements of its claim or defense to warrant judgment in [its] favor.' " (quoting *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir.1986)) (alteration in original)).

1. *Solely Caused by Third-Parties*

[4] In applying the "sole cause" requirement of § 9607(b)(3), the court in *Lincoln Properties* previously noted that it was "unclear whether Congress intended to make reference to established concepts of causation, and, if so, which ones." 823 F.Supp. at 1540. After a thorough examination of the CERCLA's text and legislative history, as well as extant caselaw and similar statutes, the court concluded that this element "incorporates the concept of proximate or legal cause." *Id.* at 1542.

Under this standard, "[i]f the defendant's release was not foreseeable, and if its conduct-including acts as well as omissions-was 'so indirect and insubstantial' in the chain of events leading to the release, then the defendant's conduct was not the proximate cause of the release and the third party defense may be available." *Id.* at 1542. The Eastern District of California has continued to apply this standard, and several courts in other districts have also adopted it. *See Honeywell,* 542 F.Supp.2d at 1199; *United States v. Iron Mountain Mines, Inc.,* 987 F.Supp. 1263, 1274 (E.D.Cal.1997) (Levi, J.); *see also Castaic Lake,* 272 F.Supp.2d at 1081; *Advanced Tech. Corp. v. Eliskim, Inc.,* 96 F.Supp.2d 715, 718 (N.D.Ohio 2000); *United States v. Meyer,* 120 F.Supp.2d 635, 640 (W.D.Mich.1999).

***16** The only evidence the City presents to negate proximate causation is the undisputed fact that the Taeckers poured PCE into a floor drain connected to the sewer and that this violated state and local laws. (Pl.'s Opp'n City's Stmt. Undisputed Facts Nos. 6, 8; *see* City's Reply 14:19-21; City's Mem. Supp. Summ. J. 22:16-18.) While it is undisputed that the Taeckers were *a* cause of the contamination, this fact alone does not demonstrate that they were the *sole* cause, i.e., that the Taecker's activities were unforeseeable. Indeed, the fact that the Taeckers' conduct violated state and local law-standing alone-does not render this conduct unforeseeable as a matter of law.[FN5] Restatement (Second) of Torts § 448 (1965); *see Benner v. Bell,* 236 Ill.App.3d 761, 767, 177 Ill.Dec. 1, 602 N.E.2d 896 (1992) ("[T]he negligent, or even criminal, act of a third party which is a cause of the injury, may not insulate a defendant from liability where that intervening cause is foreseeable."); *see also, e.g., Abdallah v. Caribbean Sec. Agency,* 557 F.2d 61 (3d Cir.1977) (holding that the negligent maintenance of a burglar alarm may be considered the proximate cause of a burglary, notwithstanding an intervening criminal act).

Although the City provides scant reason to conclude that the Taeckers' conduct was unforeseeable, plaintiff has adduced evidence suggesting the con-

trary. First, it is evident that the City was aware of the location of the sewer beneath Academy Lane, as its presence has been noted on public subdivision maps since 1928. (*See* Pearlman Decl. Ex. J. ("Dickson Report") at 4.) Building inspection records in the City's custody also indicate that it was aware of the dry cleaning operation next to Academy Lane and that the business had obtained permits to operate machinery that discharged dry cleaning solvents. (*See* Pearlman Decl. Ex. O.) City documents also suggest that the Sunshine Cleaners, as well as other dry cleaners in Woodland, were subject to inspection relating to the City's industrial wastewater pretreatment program in September 1991. (*See* Pearlman Decl. Ex. D1 at 15.) In March 1992, moreover, the RWQCB issued a report indicating that "leakage through the sewer lines is the major avenue through which PCE is introduced to the subsurface." Cal. Reg'l Water Quality Control Bd., *Dry Cleaners-A Major Source of PCE in Ground Water* 2 (1992) [hereinafter, RWQCB, *Dry Cleaners*], *available at* http://www.swrcb.ca.gov/rwqcb5/water_issues/site_cleanup/.[FN6] That report specifically stated:

> Based on site inspections, the majority of the cleaners had only one discharge point and that was to the sewer. Because of these discharges, staff investigated sewer lines as a possible discharge point for PCE to the soils. Samples taken from these lines indicated that liquids or sludges with high concentrations of PCE are lying on the bottom of the sewer.

Id. at 10.

Of course, plaintiff's evidence is by no means conclusive; for example, because the Taeckers' disposal of wastewater occurred between 1974 and 1991, plaintiff's evidence-particularly the RWQCB report issued in 1992-does not necessarily demonstrate that the City could have foreseen the Taeckers' activities from the outset. Nonetheless, it is undisputed that the City did not take steps to remedy the leaks in its sewer until 2004 (*see* Pearlman Decl. Ex. H ("City's Resp. Interrogs.") Nos. 3, 6, 11-13), and expert testimony suggests that PCE can continue to leak from sewers long after it is originally deposited therein (*see* Dickson Report 6); *see also* RWQCB, *Dry Cleaners* 10. Furthermore, defendant-not plaintiff-has the burden of establishing the innocent-party defense, and in light of the foregoing evidence, genuine issues of material fact remain as to whether the City was a proximate cause of a least some of the contamination.

2. *Due Care and Precautions Against Foreseeable Acts or Omissions*

***17** [5] The second aspect of the innocent-party defense-whether defendant "exercised due care" and took appropriate "precautions"-also involves the foreseeability of third-party conduct; therefore, while the City's failure to carry its burden on the "sole cause" element is fatal to its innocent-party defense, *see Honeywell,* 542 F.Supp.2d at 1200, a full discussion of both elements of the defense is often appropriate, *see Lincoln Props.,* 823 F.Supp. at 1542-44.

Although the City again bears the burden of demonstrating that it exercised due care and took appropriate precautions, the City asserts that "no evidence, human or documentary, pertaining to the sewer's construction, inspection[,] or repair until the early 1990's exists." (City's Reply 14:25-27.) Despite this dearth of evidence, the City nonetheless contends that it exercised due care and took appropriate precautions because the Taeckers' disposal of PCE into the sewer was unforeseeable. (*Id.* at 15:28-16:2 (arguing that the "critical inquiry" is "whether the presence of PCE in the sewer was foreseeable" and whether, "when that foreseeability arose, ... [the City] took reasonable steps to prevent [contamination].").)

In a sense, the City's argument is circular; although the City contends that no inspection or maintenance of the sewer was required because the disposal of PCE was unforeseeable, the disposal of PCE may very well have been unforeseeable because of the

City's failure to inspect or maintain the sewer. The innocent-party defense, however, "does not sanction ... willful or negligent blindness." *United States v. Monsanto Co.,* 858 F.2d 160, 169 (4th Cir.1988); *United States v. A & N Cleaners & Launderers, Inc.,* 854 F.Supp. 229, 243 (S.D.N.Y.1994) ("Willful or negligent ignorance about the presence of or threats associated with hazardous substances does not excuse a PRP's noncompliance with [the requirements of due care and appropriate precautions]."); *United States v. Bliss,* 667 F.Supp. 1298, 1304 n. 3 (E.D.Mo.1987) ("[W]illful ignorance of how a third party disposes of a hazardous substance would preclude use of [the innocent-party] defense.").

Here, the City provides no evidence to suggest that, even absent notice of the presence of PCE, its maintenance of the sewer was appropriate under the circumstances. In contrast, plaintiff has proffered the expert opinion of Bonneau Dickson, a professional sanitary engineer, which states:

> Documents disclosed by the City included no proactive sewer maintenance management system. There were no studies of leakage into the sewer system, no written maintenance program, no sewer master plan, and no prioritization of sewer maintenance. Things of these types are essential to proactive management of a sewage collection system.
>
> ...
>
> Such a reactive maintenance policy and program is inadequate to prioritize the ancient sewer line at the Woodland Shopping Center for study and maintenance or to determine that it was in poor condition and was leaking.

***18** (Dickson Report 6.) Dickson's report also indicates that there were "numerous defects in the existing sewer system" including "40 cracked areas and several separated joints, chipped joints, and/or sags." (*Id.* at 5.) Dickson further opined that "the rate of sewer system leakage inevitably tends to get worse as the sewers age" and that the City's sewer "is 78 years old and thus well past its expected service life." (*Id.* at 4-5.) Ultimately, the City does not dispute that it took no remedial action with respect to its sewer until May 2004, when, having been sued in connection with the contamination near the Woodland Shopping Center, the City "sleeved" the sewer line to prevent future leakage. (City's Resp. Interrogs. No. 3.)

In light of the record currently before the court, this case stands in stark relief to the cases upon which the City relies for its innocent-party defense. For example, in *Lincoln Properties,* defendant established that it had "exercised due care and taken reasonable precautions with respect to its sewer system" and that its "sewer lines were built and have been maintained in accordance with industry standards." 823 F.Supp. at 1544. Similarly, in *Castaic Lake,* the defendants "offer[ed] evidence that their wells were designed and installed in accordance with applicable construction standards at the time, including pollution prevention standards." 272 F.Supp.2d at 1083. The City, however, offers no such evidence here; instead, plaintiff has adduced evidence suggesting that the City practiced "willful or negligent blindness" in maintaining its sewer. Accordingly, having addressed the second aspect of the innocent-party defense, the court again finds that genuine issues of material fact preclude partial summary judgment in the City's favor.

III. *Conclusion*

In light of the expansive definition of "facility" under CERCLA and the flexibility plaintiff enjoys in structuring its theory of liability, the City cannot establish that its ownership of the sewer beneath Academy Lane eschews strict liability under CERCLA and the HSAA. Furthermore, because genuine issues of material fact remain as to whether the Taeckers were the sole cause of the contamination and whether the City exercised due care and took appropriate precautions, the City similarly fails to satisfy the innocent-party defense. Accordingly, the

court must deny the City's motion for partial summary judgment.

IT IS THEREFORE ORDERED that the City's motion for partial summary judgment be, and the same hereby is, DENIED.

FN1. In a footnote, the City refers to a Note from the Stanford Environmental Law Journal to suggest that "distinguishing treatment of sewers is consistent [with] the Resource Conservation and Recovery Act [("RCRA"), 42 U.S.C. §§ 6901-6992k] and ... the Clean Water Act [("CWA"), 33 U.S.C. §§ 1251-1387]." (City's Mem. Supp. Mot. Summ. J. 15 n. 13.) As that Note explains, however, the CWA simply "requires that industrial facilities substantially treat their waste prior to discharging it into a POTW," and the RCRA "stipulates that public sewage authorities are responsible for the management and treatment of domestic sewage." Robert M. Frye, Note, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable For Superfund Cleanup Costs?,* 14 Stan. Envtl. L.J. 61, 84 (1995). Therefore, insofar as these statutes relate to sewers, they are merely preventative in nature, not remedial. *See, e.g., United States v. Hartsell,* 127 F.3d 343, 350 (4th Cir.1997) (noting that the CWA "provides for the promulgation of regulations which will *limit or prohibit* the discharge of pollutants into POTWs." (citing 33 U.S.C. § 1317) (emphasis added)); *United States v. E.I. du Pont de Nemours & Co., Inc.,* 341 F.Supp.2d 215, 237 (W.D.N.Y.2004) ("RCRA was designed to address present and prospective threats."). Far from indicating that CERCLA should not apply to sewers, the RCRA and CWA imply that Congress recognized sewers as a potential source of environmental contamination and suggest that CERCLA has a complimentary role to play. *See, e.g., S.C. Dep't of Health & Envtl. Control v. Commerce & Indus. Ins. Co.,* 372 F.3d 245, 256 (4th Cir.2004) ("Although the aims of RCRA and CERCLA are related, each serves a separate and unique purpose .... Indeed, as the Supreme Court has observed, RCRA is *not* principally designed to 'compensate those who have attended to the remediation of environmental hazards.' " (quoting *Meghrig v. KFC W., Inc.,* 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996))).

FN2. While immaterial to the meaning of "facility," the City's arguments regarding the allocation of responsibility may also be pertinent to the contribution phase of this action. CERCLA specifically instructs that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Factors which may be considered include:

> (1) The ability of the parties to distinguish their contribution to the discharge, release, or disposal of hazardous waste;
>
> (2) The amount of the hazardous waste involved;
>
> (3) The degree of the toxicity of the hazardous waste involved;
>
> (4) The degree of care exercised by the parties with respect to the hazardous waste concerned; and
>
> (5) The degree of cooperation by the parties with government officials to prevent any harm to the public health or the environment.

Weyerhaeuser Co. v. Koppers Co., Inc., 771 F.Supp. 1420, 1426 (D.Md.1991).

> Other factors include a party's knowledge or acquiescence to the release of hazardous waste and whether a party has benefitted from the contamination. *Id.* "Thus, the contribution stage, and not the liability stage, is appropriate for considerations of the ... relative degree of fault." *Nw. Mut. Life Ins. Co. v. Atl. Research Corp.,* 847 F.Supp. 389, 396 (E.D.Va.1994).

FN3. At oral argument, the City qualified its concession by asserting that, although it owned and operated the sewer, it does not meet the definition of an owner or operator under CERCLA. In the court's view, however, the verity of this qualification requires conceiving of the entire contaminated site as a single facility, which the court declines to do.

FN4. The innocent-party defense also requires that "the third party was not an employee or agent of the defendant." *Castaic Lake,* 272 F.Supp.2d at 1079; *see* 42 U.S.C. § 9607(b)(3). That aspect of the defense, however, is undisputed in the instant case. (*See* Pl.'s Opp'n City's Stmt. Undisputed Facts No. 7; City's Mem. Supp. Mot. Summ. J. 22:16-18.)

FN5. In *Lincoln Properties,* the court asserted-without citation to legal authority-that "[t]he County cannot be expected to 'foresee' that its ordinance prohibiting the discharge of cleaning solvents will be violated." *Id.* at 1543 n. 25. The court later stated-again, without citation to legal authority-that "[v]iolations of the law are not 'foreseeable acts'; thus, the County did take reasonable precautions." *Id.* at 1544. Although the defendant in *Lincoln Properties* ultimately came forward with additional evidence to satisfy its burden on summary judgment, *see id.* at 1544, to the extent that *Lincoln Properties* suggests that a third-party's violation of the law is *per se* unforeseeable, the court must respectfully part ways with that decision, *see, e.g., Tolbert v. Tanner,* 180 Ga.App. 441, 444, 349 S.E.2d 463 (1986) ("We find that under the facts of this case, a jury could reasonably conclude that Brown's criminal action was foreseeable and that appellees were negligent .... The trial court, therefore, erred by granting summary judgment in favor of these appellees.").

FN6. Although this report was not submitted for purposes of the City's motion for partial summary judgment, the report is referenced in the TAC (*see* TAC ¶ 31), is relied upon by plaintiff's expert (*see* Dickson 3, 6), and is an official government publication. Accordingly, the court may properly take judicial notice of this document. *See, e.g., Corrie v. Caterpillar, Inc.,* 503 F.3d 974, 978 n. 2 (9th Cir.2007).

E.D.Cal.,2009.
Adobe Lumber, Inc. v. Hellman
--- F.Supp.2d ----, 2009 WL 2913415 (E.D.Cal.)

END OF DOCUMENT

Exhibit 8

Westlaw

429 F.3d 858
429 F.3d 858, 05 Cal. Daily Op. Serv. 9808, 2005 Daily Journal D.A.R. 13,393
(Cite as: 429 F.3d 858)

United States Court of Appeals,
Ninth Circuit.
Jorge **MIRANDA**; Irene **Miranda**, Plaintiffs-Appellants,
v.
CITY OF **CORNELIUS**; Acme Towing, Inc., Defendants-Appellees.
No. 04-35940.

Argued and Submitted Sept. 13, 2005.
Filed Nov. 17, 2005.

Background: Owners brought § 1983 action, challenging constitutionality of city's impoundment of their vehicle from their driveway. The United States District Court for the District of Oregon, Ann Aiken, J., 2004 WL 2009446, granted summary judgment for city, and owners appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:
(1) impoundment was not justified by community caretaking doctrine, and
(2) city's failure to provide post-deprivation hearing did not give rise to § 1983 liability.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Courts 170B 759.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk759 Theory and Grounds of Decision of Lower Court
170Bk759.1 k. In General. Most Cited Cases

Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's grant of summary judgment is reviewed de novo, and may be affirmed on any ground supported by record.

[2] Searches and Seizures 349 18

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k18 k. Vehicles. Most Cited Cases
(Formerly 35k68(4))
Impoundment of automobile is "seizure" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases
Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is invasion of privacy. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 192.1

349 Searches and Seizures
349VI Judicial Review or Determination
349k192 Presumptions and Burden of Proof
349k192.1 k. In General. Most Cited Cases
Burden is on government to persuade district court that seizure comes under one of few specifically es-

9 - 10

tablished exceptions to Fourth Amendment warrant requirement. U.S.C.A. Const.Amend. 4.

[5] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases
Probable cause to believe that driver committed traffic violation is not sufficient justification by itself to make impoundment of vehicle reasonable under Fourth Amendment. U.S.C.A. Const.Amend. 4.

[6] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases

Searches and Seizures 349 ⚿66

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases
Whether impoundment is warranted under "community caretaking doctrine" depends on location of vehicle and police officers' duty to prevent it from creating hazard to other drivers or being target for vandalism or theft.

[7] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases

Searches and Seizures 349 ⚿66

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases
Generally, "community caretaking doctrine" allows police to impound vehicles that jeopardize public safety and efficient movement of vehicular traffic.

[8] Automobiles 48A ⚿349(2.1)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases
Probable cause to believe there has been traffic violation is sufficient justification for police officers to seize vehicle for traffic stop. U.S.C.A. Const.Amend. 4.

[9] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses

48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases
Impoundment of vehicle from owners' driveway after police officer had observed husband teaching his unlicensed wife how to drive was unreasonable seizure not justified by "community caretaking doctrine"; police had no duty to protect vehicle parked on owners' property and there was no reason to believe that impoundment would prevent any threat to public safety from its unlawful operation. U.S.C.A. Const.Amends. 4, 14.

[10] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases
Violation of traffic regulation justifies impoundment of vehicle, under "community caretaking doctrine," if driver is unable to remove vehicle from public location without continuing its illegal operation.

[11] Automobiles 48A ⚿349.5(12)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry
48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection
48Ak349.5(12) k. Time and Place; Impoundment, Inventory, or Booking Search. Most Cited Cases

Searches and Seizures 349 ⚿66

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases
Need to deter driver's unlawful conduct is by itself insufficient to justify impoundment of vehicle, under "community caretaking doctrine."

[12] Constitutional Law 92 ⚿3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251)
Due process is assessed case-by-case based on total circumstances. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited
(Formerly 92k251.6)
Constitutional due process requires that party affected by government action be given opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ⚿3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.5)
Factors court considers when determining what process is due when party is affected by government action are: (1) private interest that will be affected by official action; (2) risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirement would entail. U.S.C.A. Const.Amend. 14.

[15] Civil Rights 78 ⚿1351(1)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
To establish municipal defendants' liability under § 1983, plaintiff must demonstrate that action pursuant to official municipal policy of some nature caused constitutional tort. 42 U.S.C.A. § 1983.

[16] Civil Rights 78 ⚿1352(1)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(1) k. In General. Most Cited Cases
To impose § 1983 liability based on municipal policy of deliberate inaction, plaintiff must establish that : (1) he or she possessed constitutional right of which he or she was deprived; (2) municipality had policy; (3) this policy amounts to deliberate indifference to plaintiff's constitutional right; and (4) policy was moving force behind constitutional violation. 42 U.S.C.A. § 1983.

[17] Civil Rights 78 ⚿1352(3)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(3) k. Property and Housing. Most Cited Cases
City incurred no § 1983 liability from its failure to accord post-deprivation hearing to impounded vehicle owner, where failure was inadvertent and not result of any deliberate inaction under city policy. 42 U.S.C.A. § 1983.

[18] Civil Rights 78 ⚿1351(1)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
In order for municipality to be liable for § 1983 violation, action alleged to be unconstitutional must implement policy officially adopted by municipality. 42 U.S.C.A. § 1983.

[19] Civil Rights 78 ⚿1352(3)

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Oth-

er Governmental Bodies
78k1352 Lack of Control, Training, or Supervision; Knowledge and Inaction
78k1352(3) k. Property and Housing. Most Cited Cases
City incurred no § 1983 liability from its failure to accord post-deprivation hearing to impounded vehicle owner, even if unidentified person at city hall told owner that he had no basis to complain about impoundment, where such comment was directly contrary to city's official policy of providing post-deprivation hearings upon request. 42 U.S.C.A. § 1983.

***860** Shelly Latin, Oregon Legal Services Corp., Pendleton, OR, (argued); Spencer M. Neal, Oregon Law Center, Portland, OR, for the plaintiffs-appellants.

Gerald L. Warren, Salem, OR, for the defendants-appellees.

Appeal from the United States District Court for the District of Oregon; Ann L. Aiken, District Judge, Presiding. D.C. No. CV-04-00241-AA.

Before: FISHER, GOULD, BEA, Circuit Judges.

GOULD, Circuit Judge:

We consider a constitutional challenge to the impoundment of a vehicle from the owners' driveway after a police officer observed the husband teaching his unlicensed wife how to drive. Plaintiffs Mr. Jorge and Mrs. Irene Miranda ("Plaintiffs") appeal the district court's grant of summary judgment for Defendants City of Cornelius (the "City") and Acme Towing, Inc. (collectively "Defendants") and the denial of Plaintiffs' motion for partial summary judgment on Plaintiffs' claim that Defendants' impoundment of their vehicle violated their constitutional rights under the Fourth and Fourteenth Amendments. Plaintiffs allege that the impoundment was an unreasonable seizure under the Fourth Amendment because it conflicts with the principles of the community caretaking doctrine. Generally, the community caretaking doctrine allows the police to impound where necessary to ensure that the location or operation of vehicles does not jeopardize the public safety. We hold that, under the special circumstances of this case, the impoundment of Plaintiffs' vehicle was an unreasonable seizure not justified by the community caretaking doctrine because the police have no duty to protect a vehicle parked on the owners' property and there was no reason to believe that impoundment would prevent any threat to public safety from its unlawful operation beyond the brief period during which the car was impounded. We reverse the district court's grant of summary judgment, and we remand for further proceedings.

I[FN1]

FN1. We review de novo the district court's grant of summary judgment and may affirm on any ground supported by the record. *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall,* 355 F.3d 1140, 1144 (9th Cir.2004). We must determine whether there is any genuine issue of material fact viewing all evidence in the light most favorable to the non-moving party. *Id.* The facts are largely undisputed, but to the extent any dispute exists, we credit the factual statements submitted by the Mirandas and any reasonable inferences thereon in our assessment of the appeal of the summary judgment granted to Defendants.

[1] On April 10, 2003, Mrs. Miranda slowly drove the Ford Aerostar van of her ***861** husband, Mr. Miranda, around the neighborhood as her husband taught her how to drive. Although Mr. Miranda is a licensed and insured driver with valid registration of the vehicle, Mrs. Miranda did not have a driver's

license. Officer John Calvert, a police officer with the City, noticed that Mrs. Miranda was driving poorly and at a speed of about ten miles per hour, and suspected that she was impaired or improperly licensed. Officer Calvert activated the overhead lights on his patrol car and followed the vehicle until Mrs. Miranda pulled into the driveway in front of the Mirandas' home.

After learning that Mrs. Miranda did not have a driver's license, Officer Calvert cited her for operating a vehicle without a license and also cited Mr. Miranda for permitting the operation of the vehicle by an unlicensed driver. Officer Calvert told the Mirandas that their vehicle would be impounded. In their declarations opposing summary judgment, Plaintiffs submitted evidence that they had trouble understanding Officer Calvert because they have limited English skills and did not know that their vehicle was to be impounded.

A city ordinance, authorized by state statute, allows an officer to tow a vehicle, without prior notice, if the officer has a reasonable belief that the driver is operating it without a valid operator's license. Cornelius City Code § 7.455; Or.Rev.Stat. § 809.720. Officer Calvert waited until the tow truck from Defendant Acme Towing, Inc. removed the vehicle from the Mirandas' driveway, which occurred about thirty minutes after the stop.

On the morning of the next day, April 11, Mr. Miranda appeared at the police station to pay an administrative fee. He retrieved his vehicle at the impoundment lot after paying additional towing charges and impound fees. Mr. Miranda stated in his declaration that he lost a day's pay from taking this time to retrieve his vehicle. Also on April 11, Ms. Dolley Mack, a police services aide with the City, mailed to Plaintiffs a Notice of Towed Vehicle report, which informed them of their right to contest the tow by mailing a request to the police department within ten days of the tow. On April 15, Mr. Miranda wrote a letter in Spanish to the police department complaining about the tow. The City submitted into evidence the declaration of Ms. Mack stating that "to the best of [her] knowledge, no request for hearing was ever received." Mr. Miranda then received the City's notice, but he did not respond to it. He later went to the City Hall and, as he described it, "spoke with a woman about the tow who told him that he had no basis to complain about the tow." On May 6, Plaintiffs appeared at municipal court and pled guilty to the traffic violations. Plaintiffs did not contest the impoundment during this hearing, and the court imposed no fines on them.

In their complaint brought under 42 U.S.C. § 1983, Plaintiffs alleged that the impoundment was an unreasonable seizure under the Fourth Amendment as incorporated in the Fourteenth Amendment and that they were deprived of due process under the Fourteenth Amendment. Plaintiffs also sought a declaratory judgment that the city ordinance, Cornelius City Code § 7.455, is unconstitutional. The district***862** court held that the seizure complied with the Fourth Amendment because Plaintiffs lacked a reasonable expectation of privacy in their parked car on their unenclosed driveway.[FN2] On the issue of due process, the district court held that Plaintiffs did not have a right to a hearing before the tow and that they were not denied an opportunity to contest the seizure in a post-tow hearing. The district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for partial summary judgment. Plaintiffs appeal this order. Plaintiffs request further that summary judgment be entered in their favor on the issues of unreasonable seizure and deprivation of due process, or, alternatively, that the case be remanded for a trial on the issue of whether they were improperly denied an opportunity for a timely post-deprivation hearing.

> FN2. The district court did not determine whether the impoundment itself was unreasonable. On appeal, Plaintiffs concede

that they lack a reasonable expectation of privacy but still allege that the impoundment was an unreasonable seizure.

II

[2][3] The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment. A seizure results if "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County,* 506 U.S. 56, 61, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). The Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy. *Id.* at 62-64, 113 S.Ct. 538 ("Although lacking a privacy component, the property rights in both instances nonetheless were not disregarded, but rather were afforded Fourth Amendment protection.").

[4] "A seizure conducted without a warrant is per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions. The burden is on the Government to persuade the district court that a seizure comes under one of a few specifically established exceptions to the warrant requirement." *United States v. Hawkins,* 249 F.3d 867, 872 (9th Cir.2001) (internal quotation marks and citations omitted).

Defendants acknowledge that the only exception applicable to this impoundment is the "community caretaking" doctrine, but they assert, in light of *Atwater v. City of Lago Vista,* 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), that we cannot second-guess an officer's decision to impound so long as the officer had probable cause to believe that the driver violated a vehicle regulation that authorizes the impoundment. Plaintiffs counter that the reasonableness of an impoundment requires more than just the existence of probable cause, but that the impoundment itself must comply with the principles of the "community caretaking" doctrine.

A

[5] In assessing these claims, we first determine whether probable cause to believe that the driver committed a traffic violation is sufficient justification by itself to make the impoundment of the vehicle reasonable under the Fourth Amendment.

In *Atwater,* the Supreme Court held that an officer is deemed to act reasonably under the Fourth Amendment in making a warrantless arrest if the officer had probable cause to believe that the arrested person violated a criminal statute. *Id.* at 354, 121 S.Ct. 1536("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without ***863** violating the Fourth Amendment, arrest the offender."). The Supreme Court in *Atwater* relied on the historical discretion allowed a police officer to make a warrantless arrest when supported by probable cause to believe that the suspect committed a crime. *See id.* at 327-45, 121 S.Ct. 1536. In applying this bright-line rule, the Court distinguished other situations where the reasonableness of a search or seizure was determined by "balancing the need to search (or seize) against the invasion which the search (or seizure) entails." *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (citation and internal quotation marks omitted). "*Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of arrest) provides; but at least in the absence of 'extraordinary' circumstances, there is no comparable cause for finicking when police act with such justification." *Atwater,* 532 U.S. at 347, 121 S.Ct. 1536, n. 16 (citation omitted).

In sharp contrast to the broad discretion granted in *Atwater,* the Supreme Court in allowing the impoundment and search of vehicles under the community caretaking doctrine has limited the discre-

tion of the impounding officer and has taken a more finely tuned approach to determining reasonableness under the Fourth Amendment. In *Colorado v. Bertine,* the Court allowed "the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). A leading treatise declares that this language is "highlighting that while the Supreme Court was not prepared to mandate any particular rules as to when impoundment incident to arrest for a traffic violation was permissible, impoundment is *not* a matter which can simply be left to the discretion of the individual officer." 3 Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* § 7.3, at 624(4th ed.2004) (emphasis in original).

The police's authority to search and seize property when acting in its role as "community caretaker" has a different source than its authority to search and seize property to investigate criminal activity. The reasonableness of a seizure under the "caretaker" function differs from the bright-line rule concerning probable cause in the criminal context.[FN3] "The standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures. The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations." *South Dakota v. Opperman,* 428 U.S. 364, 371, 96 S.Ct. 3092, 49 L.Ed.2d 1000, n. 5 (1976).

> FN3. The statutory authority at issue here classifies driving without a license as a traffic violation and not as a traffic crime. *See*Or.Rev.Stat. § 807.010 (2003). Traffic violations, which were originally called traffic infractions, have been decriminalized in Oregon:
>
> > The legislature established a distinction between traffic offenses which it deemed serious enough to carry criminal penalties and those which should not. These latter offenses were defined as traffic infractions. The distinguishing features of the traffic infraction were the absence of incarceration as a possible penalty and the removal of the protections extended to individuals prosecuted for criminal offenses.
> >
> > *Oregon v. Porter,* 312 Or. 112, 817 P.2d 1306, 1309 (1991) (citations and internal quotation marks omitted).

***864** [6][7] In their "community caretaking" function, police officers may impound vehicles that "jeopardize public safety and the efficient movement of vehicular traffic." *Opperman,* 428 U.S. at 368-69, 96 S.Ct. 3092. Whether an impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and the police officers' duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft. *See United States v. Jensen,* 425 F.3d 698, 706(9th Cir.2005) ("Once the arrest was made, the doctrine allowed law enforcement officers to seize and remove any vehicle which may impede traffic, threaten public safety, or be subject to vandalism."); *Hallstrom v. City of Garden City,* 991 F.2d 1473, 1477, n. 4 (9th Cir.1993) (impoundment of arrestee's car from private parking lot "to protect the car from vandalism or theft" was reasonable under the community caretaking function). A driver's arrest, or citation for a non-criminal traffic violation as in this case, is not relevant except insofar as it affects the driver's ability to remove the vehicle from a location at which it jeopardizes the public safety or is at risk of loss. But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license.

[8] The reasonableness of an impoundment under the community caretaking function does not depend on whether the officer had probable cause to believe that there was a traffic violation, but on whether the impoundment fits within the "authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience ...." *Opperman,* 428 U.S. at 369, 96 S.Ct. 3092. We conclude that, in the circumstances of this case, probable cause to believe that there had been a traffic infraction or non-criminal violation was insufficient to justify an impoundment of a vehicle parked in the owner's driveway, in the absence of a valid caretaking purpose.[FN4]

> FN4. Probable cause to believe there has been a traffic violation is sufficient justification for police officers to seize a vehicle for a traffic stop. *See Whren v. United States,* 517 U.S. 806, 817, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). The Court in *Whren* recognized "that the foremost method of enforcing traffic and vehicle safety regulations is acting upon observed violations, which afford the quantum of individualized suspicion necessary to ensure that police discretion is sufficiently constrained." 517 U.S. at 817-18, 116 S.Ct. 1769(citations and internal quotation marks omitted). It held that a seizure following a traffic stop is always justified by probable cause because a traffic stop is a necessary requisite to the enforcement of traffic regulations. However, the impoundment of a legally-parked vehicle is not necessary to enforce traffic regulations and requires some additional justification, as is typically demonstrated by the community caretaking purpose.

B

[9] We consider next whether the seizure of the Mirandas' vehicle from their driveway is justified by the community caretaking doctrine. In assessing this question, we must examine whether this seizure is reasonable based on all of the facts presented. *See Cooper v. California,* 386 U.S. 58, 59, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) (The issue of "whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case....").

We begin with the premise, apparently not recognized by the Defendants, that the decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment, as applied to the states by the Fourteenth Amendment. ***865** "The question in this Court upon review of a state-approved search or seizure is not whether the search (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." *Sibron v. New York,* 392 U.S. 40, 61, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).[FN5]

> FN5. Accordingly, we do not make any conclusion as to the constitutionality of the city ordinance, but confine our analysis to the reasonableness of the seizure at issue here. *See Sibron,* 392 U.S. at 62, 88 S.Ct. 1889 ("Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.").

[10] An impoundment may be proper under the community caretaking doctrine if the driver's violation of a vehicle regulation prevents the driver from lawfully operating the vehicle, and also if it is necessary to remove the vehicle from an exposed or public location. *See United States v. Gutierrez,* 995

F.2d 169, 171 (9th Cir.1993) ("After determining that neither Gutierrez nor Cervantes possessed a valid driver's license, the officers advised them that they were free to go, but that they could not drive the Cadillac."); *United States v. Rodriguez-Morales,* 929 F.2d 780, 785 (1st Cir.1991) ("Upon ascertaining that neither occupant was properly licensed to drive, the decision not to let the vehicle continue on its journey was quintessentially reasonable."). The violation of a traffic regulation justifies impoundment of a vehicle if the driver is unable to remove the vehicle from a public location without continuing its illegal operation.

On the other hand, a decision to impound a vehicle that is not consistent with the police's role as "caretaker" of the streets may be unreasonable. *See United States v. Duguay,* 93 F.3d 346, 352 (7th Cir.1996). In *Duguay,* the court held that "impoundment based solely on an arrestee's status as a driver, owner, or passenger is irrational and inconsistent with 'caretaking' functions. Under [the police officers'] policies, towing is required any time the arrestee is carted off to jail, regardless of whether another person could have removed the car and readily eliminated any traffic congestion, parking violation, or road hazard." *Id.* at 353. "The policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets." *Id.*

The state has the right to allow the driver to drive away with the vehicle only if he or she is able to do so in compliance with all regulations intended to ensure the vehicle's safe operation.[FN6] However, the decision to impound a vehicle after the driver has violated a vehicle regulation must consider the location of the vehicle, and whether the vehicle was actually "impeding traffic or threatening public safety and convenience" on the streets, such that impoundment was warranted. *See Opperman,* 428 U.S. at 369, 96 S.Ct. 3092. While Officer Calvert may not have believed that the Mirandas would comply with all regulations in the future, when he issued citations and called for the vehicle to be impounded, the vehicle was already ***866** parked in the Mirandas' home driveway. Mr. Miranda was licensed to drive the car. Under these circumstances, the Mirandas' car was not creating any impediment to traffic or threatening public safety. An officer cannot reasonably order an impoundment in situations where the location of the vehicle does not create any need for the police to protect the vehicle or to avoid a hazard to other drivers. *See United States v. Squires,* 456 F.2d 967, 970 (2d Cir.1972) ("However, since the Cadillac was parked in the parking lot behind the apartment house in which appellant lived, which was an appropriate place for it to be, and appellant did not consent to its removal, the officers did not have a reasonable basis for concluding that it was necessary to take the Cadillac to the police station in order to protect it.").

> FN6. An impoundment is proper to prevent the immediate and continued unlawful operation of the vehicle or to remove a vehicle left in a public location where it creates a hazard. An officer, acting within the scope of his or her community caretaking function, is not required to consider "the existence of alternative less intrusive means" when the vehicle must in fact be moved to avoid the creation of a hazard or the continued unlawful operation of the vehicle. *See Bertine,* 479 U.S. at 374, 107 S.Ct. 738(internal quotation marks omit- ted).

Defendants have argued that the impoundment satisfied the "caretaking" function by deterring the Mirandas from repeating this illegal activity in the future. Such a rationale would expand the authority of the police to impound regardless of the violation, instead of limiting officers' discretion to ensure that they act consistently with their role of "caretaker of the streets." *See Duguay,* 93 F.3d at 352. The de-

cision to impound must be guided by conditions which "circumscribe the discretion of individual officers" in a way that furthers the caretaking purpose. *Bertine,* 479 U.S. at 376, 107 S.Ct. 738, n. 7.

[11] While the Supreme Court has accepted a deterrence rationale for civil forfeitures of vehicles that were used for criminal activity, *see Bennis v. Michigan,* 516 U.S. 442, 452, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), the deterrence rationale is incompatible with the principles of the community caretaking doctrine. Unlike in civil forfeitures, where the seizure of property penalizes someone who has been convicted of a crime, the purpose of the community caretaking function is to remove vehicles that are presently impeding traffic or creating a hazard. The need to deter a driver's unlawful conduct is by itself insufficient to justify a tow under the "caretaker" rationale.

The deterrence rationale is also not a sufficient justification here because of the negligible deterrent effect in this case. Mr. Miranda was at all relevant times licensed to drive. And because Mr. Miranda retrieved the car the next morning, its absence cannot be viewed as a significant deterrent to further unlicensed driving by Mrs. Miranda. In addition, the towing fees simply replaced the actual fines from the citations because the municipal judge who held the citation hearing waived any additional fine. Thus, the effect of any conceivable financial deterrent was neutralized. The City has not demonstrated in law or logic that deterrence is a sufficient purpose to justify the particular impoundment that occurred here.

III

Plaintiffs further claim that they were deprived of procedural due process in violation of the Fourteenth Amendment. They assert that they were entitled to notice and a hearing on the validity of the impoundment before their vehicle was seized and impounded. They also assert that they were denied a meaningful opportunity to contest the impoundment in a post-deprivation hearing.

A

[12][13][14] "We assess due process case-by-case based on the total circumstances." *California ex rel. Lockyer v. F.E.R.C.,* 329 F.3d 700, 711 (9th Cir.2003). "Constitutional due process requires that a party affected by government action be given 'the opportunity to be heard at a meaningful***867** time and in a meaningful manner.' " *Id.* at 708, n. 6 (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). In determining what process is due, we apply the factors specified by the Supreme Court in *Mathews v. Eldridge:*

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. 893.

Cases decided by us are cited by Defendants, and previously by the district court in its order, to support the proposition that procedural due process does not require pre-deprivation notice and a hearing before impoundments. *See, e.g., Soffer v. City of Costa Mesa,* 798 F.2d 361, 363(9th Cir.1986); *Goichman v. Rheuban Motors, Inc.,* 682 F.2d 1320, 1323-24 (9th Cir.1982); *Stypmann v. City and County of San Francisco,* 557 F.2d 1338, 1342 (9th Cir.1977). However, none of these cases is controlling in light of the unusual facts presented here. In these cases, the police clearly were acting within their legitimate caretaking functions. *See Goich-*

man, 682 F.2d at 1324(recognizing "the government's interest in efficient and inexpensive towage of illegally parked automobiles"); *Stypmann,* 557 F.2d at 1343 ("The public interest in removing vehicles from streets and highways in the circumstances specified in the traffic code is also substantial, though differing in the various situations in which removal is authorized.").

The crucial factual differences that we confront here, as explained above, are that the Mirandas' vehicle, when seized to be impounded, was safely and securely in the driveway of their home, and Mr. Miranda, at all relevant times, had a valid registration for the vehicle and a valid driver's license. Defendants have not provided a legitimate caretaking purpose for the impoundment here.

Impoundment of a vehicle left in a public place or a vehicle for which there is no licensed driver, although those circumstances are not presented here, presumably would not require pre-deprivation notice and a pre-seizure hearing because the burden of such procedures would vitiate the legitimate purposes of the impoundment. Impoundments in such cases are likely justified by the need to respond immediately to the hazard or public safety threat caused by the location of the vehicles, which would be incompatible with a requirement of notice and a hearing beforehand. However, the novel question, squarely presented in this case, of whether a pre-deprivation hearing is required for an impoundment from the driveway of the owners' home, cannot be resolved without more factual development and a more detailed analysis of the competing interests involved. Because Defendants have not provided us with a legitimate caretaking purpose in impounding the car, the question whether a pre-deprivation hearing was required for the Mirandas' case cannot be properly determined on the record before us.[FN7] Therefore, the district court should determine on remand whether any legitimate caretaking purpose offered by Defendants outweighs the affected private ***868** interest of the Mirandas in uninterrupted possession of their car and the risk of erroneous deprivation.

> FN7. As explained in the previous section, the Defendants' deterrence rationale is insufficient justification for the impoundment of the Mirandas' vehicle from the Mirandas' driveway.

B

Assuming that pre-deprivation notice and a hearing is not required, we do not find that any due process violation resulted from the absence of a post-deprivation hearing to contest the validity of the impoundment in light of the opportunity for such a hearing that was given to the Mirandas.

[15][16] To establish Defendants' liability under section 1983, Plaintiffs "must demonstrate that action pursuant to official municipal policy of some nature caused a constitutional tort." *Berry v. Baca,* 379 F.3d 764, 767 (9th Cir.2004). "In order to impose liability based on a policy of deliberate inaction, the plaintiff must establish: (1) that he [or she] possessed a constitutional right of which he [or she] was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and (4) that the policy was the moving force behind the constitutional violation." *Id.* (citations and internal quotation marks omitted).

The first question under this standard is whether the Mirandas were deprived of any constitutional right. In accord with the requirements of due process, the City has a policy of sending notices within forty-eight hours of an impound to the owners explaining their right to request a hearing to contest the impoundment. *See Scofield v. City of Hillsborough,* 862 F.2d 759, 764 (9th Cir.1988) (holding that these "procedures ensure that any erroneous deprivation of an owner's vehicle will be slight, and satisfies due process concerns"). Plaintiffs contend

that they requested a hearing in their letter to the City Hall, and that their request was ignored. The City presented evidence, by contrast, that it sent notice to the Mirandas of their right to a hearing, and that no request for a hearing was made. Further, the City submitted evidence that at the hearing on the traffic infractions, no issue was raised about the impoundment. The Mirandas replied that they did not submit a hearing request in response to the City's letter of notice because they felt that their prior Spanish-language letter made a request for a hearing. They also contended that Mr. Miranda later went to City Hall and "spoke with a woman about the tow who told him that he had no basis to complain about the tow." Possibly both sides acted in good faith and there was a misunderstanding because of language barriers.[FN8]

> FN8. We do not suggest that the City had a duty under the Constitution to interpret a Spanish language letter purportedly sent by the Mirandas and to ignore the lack of response by the Mirandas to the English language notice letter. We need not reach this question because we ground our opinion on the lack of evidence of a City policy contributing to denial of a hearing.

[17] Even assuming that the City did not respond to the requests for a hearing that the Mirandas made in a letter written in Spanish and made in person at City Hall, relief against the City cannot be granted in the absence of a policy of the City that caused or contributed to the assumed deprivation of a constitutional right. On this ground, the Plaintiffs' claim is defeated under the undisputed facts. Plaintiffs do not show that a municipal policy of deliberate inaction was the "moving force" behind the City's inaction towards the Mirandas' requests for a hearing. Rather, the absence of a hearing concerning the seizure on the undisputed ***869** facts was inadvertent and not as a result of a deliberate inaction under a City policy.

[18][19] "In order for a municipality to be liable for a section 1983 violation the action alleged to be unconstitutional must implement a policy officially adopted by the municipality." *Scofield,* 862 F.2d at 765. Based on Plaintiffs' statement of facts and all reasonable inferences thereon, there is no evidence that the lack of response to Plaintiffs' letter was the result of a policy officially adopted by Defendants. In addition, construing Mr. Miranda's statement that he "spoke with a woman about the tow" in the most favorable light, it does not provide a basis for liability under section 1983. Because a denial of a hearing would be directly contrary to the City's official policy, any comment by the woman was not sufficient to establish the existence of a policy contrary to the City's written policy. We conclude that there was no genuine issue of material fact precluding the district court's grant of summary judgment to Defendants on the due process claim.

On the record before us, we must conclude that there was no City policy to deprive Plaintiffs of a meaningful opportunity to contest the deprivation of their vehicle. Accordingly, the district court did not err in granting summary judgment on the issue of post-deprivation due process because the facts do not support a finding of liability even when they are viewed in a light most favorable to Plaintiffs.

IV

Viewing the evidence in the light most favorable to Plaintiffs in their appeal of the summary judgment granted to Defendants, the impoundment must be considered an unreasonable seizure because the impoundment did not satisfy any acceptable purpose under the community caretaking doctrine. On remand, the district court may consider whether Defendants can offer evidence of a legitimate government purpose for the impoundment sufficient to render the seizure reasonable and to permit a deprivation of the property without prior notice and a hearing. On the issue of post-deprivation due pro-

cess, we affirm the district court's summary judgment in favor of Defendants. We accordingly reverse in part the district court's judgment and remand for further proceedings consistent with this disposition. Costs will be awarded to the plaintiffs-appellants.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

C.A.9 (Or.),2005.
Miranda v. City of Cornelius
429 F.3d 858, 05 Cal. Daily Op. Serv. 9808, 2005 Daily Journal D.A.R. 13,393

END OF DOCUMENT

Exhibit 9

hearings officer in lieu of making a personal appearance at the hearing.

(4) If the hearings officer finds that the impoundment of the vehicle was proper, the hearings officer shall enter an order supporting the removal and shall find that the owner or person entitled to possession of the vehicle is liable for usual and customary towing and storage costs. The hearings officer may also find the owner or person entitled to possession of the vehicle liable for costs of the hearing.

(5) If the hearings officer finds that impoundment of the vehicle was improper, the hearings officer shall order the vehicle released to the person entitled to possession and shall enter a finding that the owner or person entitled to possession of the vehicle is not liable for any towing or storage costs resulting from the impoundment. If there is a lien on the vehicle for towing and storage charges, the hearings officer shall order it paid by the impounding police agency.

(6) A police agency may contract with another agency or entity to conduct hearings under this section. [Formerly 806.016; 1997 c.514 §4; 1999 c.1051 §284a; 2001 c.748 §3]

809.720 Impoundment for specified offenses; grounds; notice; release. (1) A police officer who has probable cause to believe that a person, at or just prior to the time the police officer stops the person, has committed an offense described in this subsection may, without prior notice, order the vehicle impounded until a person with right to possession of the vehicle complies with the conditions for release or the vehicle is ordered released by a hearings officer. This subsection applies to the following offenses:

(a) Driving while suspended or revoked in violation of ORS 811.175 or 811.182.

(b) Driving while under the influence of intoxicants in violation of ORS 813.010.

(c) Operating without driving privileges or in violation of license restrictions in violation of ORS 807.010.

(d) Driving uninsured in violation of ORS 806.010.

(2) Notice that the vehicle has been impounded shall be given to the same parties, in the same manner and within the same time limits as provided in ORS 819.180 for notice after removal of a vehicle.

(3) A vehicle impounded under subsection (1) of this section shall be released to a person entitled to lawful possession upon compliance with the following:

(a) Submission of proof that a person with valid driving privileges will be operating the vehicle;

(b) Submission of proof of compliance with financial responsibility requirements for the vehicle; and

(c) Payment to the police agency of an administrative fee determined by the agency to be sufficient to recover its actual administrative costs for the impoundment.

(4) Notwithstanding subsection (3) of this section, a person who holds a security interest in the impounded vehicle may obtain release of the vehicle by paying the administrative fee.

(5) When a person entitled to possession of the impounded vehicle has complied with the requirements of subsection (3) or (4) of this section, the impounding police agency shall authorize the person storing the vehicle to release it upon payment of any towing and storage costs.

(6) Notwithstanding subsection (3) of this section, the holder of a towing business certificate issued under ORS 822.205 may foreclose a lien created by ORS 87.152 for the towing and storage charges incurred in the impoundment of the vehicle, without payment of the administrative fee under subsection (3)(c) of this section.

(7) Nothing in this section or ORS 809.716 limits either the authority of a city or county to adopt ordinances dealing with impounding of uninsured vehicles or the contents of such ordinances except that cities and counties shall comply with the notice requirements of subsection (2) of this section and ORS 809.725.

(8) A police agency may not collect its fee under subsection (3)(c) of this section from a holder of a towing business certificate issued under ORS 822.205 unless the holder has first collected payment of any towing and storage charges associated with the impoundment. [1997 c.514 §2; 2001 c.748 §1]

809.725 Notice following impoundment under city or county ordinance. (1) When a motor vehicle is impounded under authority of a city or county ordinance, the city or county shall give notice of the impoundment to the owners of the motor vehicle and to any lessors or security interest holders as shown on the records of the Department of Transportation. The notice shall be given within 48 hours of impoundment.

(2) The notice required by subsection (1) of this section shall be given to the same parties, in the same manner and within the same time limits as provided in ORS 819.180 for notice after removal of a vehicle. [1997 c.514 §3]

809.730 Seizure of motor vehicle for civil forfeiture. (1) A motor vehicle may be seized and forfeited if the person operating the vehicle is arrested or issued a citation

Exhibit 10

CONSTITUTIONALITY OF LAW ENFORCEMENT TOWING POLICIES

Mark Rauch, CIS General Counsel

Current towing/impound policies and practices of many law enforcement agencies may be unconstitutional, potentially exposing those agencies to civil liability.

ORS 809.720 authorizes police officers to order vehicles impounded when the officer has probable cause to believe the driver has committed one or more of the following offenses:

(a) Driving while suspended or revoked.
(b) Driving under the influence.
(c) Operating without driving privileges or in violation of license restriction.
(d) Driving uninsured.

Under the federal court analysis discussed below, the exercise of that statutory authority, unless within the "community caretaking" exception, violates the U.S. Constitution.

In *Miranda v City of Cornelius,* 429 F3d 858, the Ninth Circuit Court of Appeals recently made it quite clear that impoundment of a vehicle is a seizure without a warrant within the meaning of the Fourth Amendment. Such an impound is therefore *per se* unreasonable unless it fits within the "community caretaking doctrine." In *Miranda,* a police officer observed an unlicensed driver, Mrs. Miranda, driving a car (her husband was in the passenger's seat teaching her to drive). The officer followed the Mirandas to their home, where they parked in the driveway. The officer ordered the vehicle impounded. Although the impound was clearly authorized by ORS 809.720, the 9th Circuit Court of Appeals nonetheless found it a violation of the Fourth Amendment because it did not fit within the "community caretaking" exception. The Court's ruling is best summarized in this excerpt:

> "In their 'community caretaking' function, police officers may impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic. Whether an impoundment is warranted under this community caretaking doctrine depends on the location of the vehicle and

> the police officer's duty to prevent it from creating a hazard to other drivers or being a target for vandalism or theft. A driver's arrest * * * is not relevant except insofar as it affects the driver's ability to remove the vehicle from a location at which it jeopardizes the public safety or is at risk of loss. But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license. The reasonableness of an impoundment under the community caretaking function * * * [depends on] whether the impoundment fits within the authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience." (p. 866)

Another recent case dealing with this question held that impoundment of a vehicle legally parked on a residential street, two houses away from the driver's residence, was likewise unconstitutional. *United States v Cesares*, 533 F3d 1064(9th Cir., 2008).

Other less recent, but still instructive, cases have reached similar conclusions, including the following:

- *United States v Duguay*, 93 F3d 346 (7th Cir 1996). (Impoundment based solely on arrestee's status as driver, owner, or passenger, without regard to whether any traffic congestion, parking violation, or road hazard exists or could be readily eliminated "is irrational and inconsistent with 'caretaking' functions.)
- *United States v Pappas,* 735 F2d 1232 (10th Cir 1984) (Impoundment was unconstitutional where defendant's car was legally parked on private property and defendant had friends with him who may have been able to take custody of the car.)
- *United States v Squires,* 456 F2d 967 (2nd Cir 1972) (Impoundment not justified where car was parked in parking lot behind apartment house in which in which arrestee lived, "which was an appropriate place for it to be," and police officers had no reasonable basis for concluding it was necessary to impound the car to protect it.)

Impoundment was found to be <u>justified under the community caretaking doctrine</u> in *Southwick*, 2008 WL 5111144 where the plaintiff (driver) was cited for driving

while suspended and uninsured, the vehicle was pulled to the side of a public road, and neither plaintiff nor anyone else could legally drive it.

As you can see from these cases, the vehicle impound statute can only be constitutionally enforced in circumstances where the fairly narrow community caretaking doctrine applies. We recommend towing/impound policies and practice be reviewed to be sure they are consistent with current case law. The following is an example of what would probably be a constitutionally enforceable policy:

> ***Vehicles are not to be towed and/or impounded under the authority of ORS 809.720 under any of the following circumstances:***
>
> - ***The vehicle is parked on private property on which the registered owner or operator is legally residing, or the property owner does not object to the vehicle being left in the parked location.***
> - ***The registered owner and/or a passenger present in the vehicle at the time of the stop have a valid driver's license and are willing and legally able to drive the vehicle at the time.***
> - ***The vehicle is legally parked at a time and place where the likelihood of it being subject to theft and/or vandalism is remote and traffic or public safety is not impeded.***

Your city attorney or county counsel can assist with further analysis of this issue. Please also feel free to contact one of the CIS staff attorneys if we can be of assistance.

Exhibit 11

6

Discretionary Immunity: Making it Work

Mark Rauch, CIS General Counsel
February 19, 2009 (Updated 10/13/09)

Too often cities and counties are missing out on an important defense against liability: **discretionary immunity**. This can be an especially important tool in tough economic times when local governments are simply unable to fund important maintenance and other projects or staffing that might reduce exposure to risk.

For example, (and these are actual facts from a CIS claim in which the public body was found liable for the damage) a small city, with a small budget, has a sanitary sewer system that was installed about 80 years ago. The system has a 4 inch main. The city does a reasonable job of ongoing maintenance of its sewer lines, but is well aware the lines are both undersized and in poor condition. As a result, the lines tend to become plugged. The city's "policy" and practice has been to repair the system as it breaks down. However, there is no evidence this "policy" been formally adopted by action of the city council. The city lacks the funds to upgrade to the system. When the line becomes plugged through normal and foreseeable usage and backs up into houses causing damage, is the city liable? Under these facts, probably yes. But they likely could have avoided liability with a few simple (and cost free) steps to establish discretionary immunity.

Whenever a public body becomes aware of a hazard or condition that could potentially cause harm, there is arguably a duty to remedy the problem or face liability for resulting injuries. Often, in fact, the "notice" to the entity of such hazards comes by way of written safety recommendations from CIS risk management consultants. But the city may lack the funds to fix the problem or may have other needs they give a higher priority. If the problem is not fixed and there is an injury and claim, the safety recommendation (possibly now in the hands of the injured party's attorney through a public record or litigation discovery request) could actually aggravate the liability picture. Does that mean we should avoid making recommendations for fear they won't be complied with promptly? Not necessarily. Again, the best approach when circumstances don't allow immediate implementation of the recommendations might be steps to implement discretionary immunity.

What **is** "discretionary immunity"?

Public bodies historically were immune from liability altogether under the legal doctrine of "sovereign immunity" ("The King can do no wrong"). Oregon, like most states, has waived much of its sovereign immunity by passing a "Tort Claims Act" (OTCA), which provides the means and method for pursuing tort claims against pubic bodies. The OTCA also sets important conditions and limitations on public body liability, such as the 180

day notice requirement, caps on liability, and certain immunities, including discretionary immunity. Specifically, public bodies are immune from liability for:

> "Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused."
> ORS 30.265(c).

In practice this immunity has not proved to be as sweeping as it might sound. Courts have been fairly strict in their interpretation. Nonetheless, the immunity is available and the published court decisions provide good counsel on what needs to be in place for the immunity to apply … and it need not be that difficult in most cases.

What the courts have said.

The following is a short list of legal principles from some of the key cases that pretty well define the current state of discretionary immunity: (Citations are included if you want to read more.)

1. Discretionary immunity defense requires evidence regarding actual consideration process by which decision was reached. Sande v City of Portland, 185 Or App 262 (2002).

2. A discretionary action requires the exercise of judgment involving public policy as opposed to the mere implementation of a judgment made by others. . Ramirez v Hawaii T and S Enterprises, Inc., 179 Or App 416 (2002).

3. Where a public body exercises consideration of alternative methods of fulfilling non-discretionary duty to act, the public body is immune from liability for failure to make discretionary choice among alternatives before injury occurred. Miller v Grants Pass Irrigation District, 297 Or 312 (1984).

4. Decisions such as the design, location, and installation of traffic signals, or the make up of programs such as tree and sidewalk maintenance at the policy level of government are typically immune from liability. Morris v Oregon State Transportation Comm., 38 Or App 331 (1979), Gallison v City of Portland, 37 Or App 135 (1978), Bakr v Elliott, 125 Or App 1 (1993).

5. However, where there is a failure to implement or perform established inspection or maintenance programs, discretionary immunity likely will NOT apply.
E.g., Tozer v City of Eugene, 115 Or App 464 (1992), Hughes v Wilson, 345 Or 491 (2008)

6. To qualify for discretionary immunity, public body must show that it made a decision involving the making of policy, as opposed to a routine decision made by employees in the course of their day-to-day activities. Vokoun v Lake Oswego, 335 Or 19 (2002).

7. "The decision *whether* to protect the public by taking preventative measures, or by warning of a danger, if legally required, is not discretionary; however, the government's choice of *means* for fulfilling that requirement may be discretionary." Garrison v Deschutes County, 334 Or, at 274.

Practical steps to make it work.

While there is no clear set of instructions guaranteed to establish discretionary immunity, the case law provides guidance on key elements that should be considered.

- Consider whether the matter involves the expenditure of public funds not already specifically budgeted. Consider also whether it involves a choice among competing alternatives, even if money is not the issue. (E.g., there are two types of warning devices available, each with its own advantages and disadvantages, and only one can be used.) If so, discretionary immunity should be available. In many sewer backup claims there is an allegation of failure to properly inspect and/or maintain the system. Setting a sewer maintenance protocol as a policy level (e.g., city council) action probably brings discretionary immunity into play, so long as the prescribed timelines and procedures are met.
- Be sure the decision is made at the proper policy-setting level. Typically this will be the council or commission level unless there has been a clear and demonstrable delegation of policy setting authority on certain matters to lower administrative levels. . Most likely it will be up to staff to recognize these situations and take them to the appropriate policymaking level for consideration.
- Be sure the action is clearly documented, such as through a resolution, and that the documentation can be readily located to assist defense council in establishing the defense. It is important the documentation cover the decision maker's consideration of alternatives and/or competing interests, etc. It would be a good practice to keep copies of this type of documentation, along with any staff reports, recommendations, studies, etc. related to discretionary immunity matters in a separate file or binder for ready reference.
- Check with legal counsel if unsure about the applicability of discretionary immunity or the proper steps to establish this defense.