



# City of Bandon

555 Hwy 101, PO Box 67  
Bandon, OR 97411  
(541) 347-2437

*Bandon by the Sea*

## AGENDA REPORT

**TO:** Honorable Mayor and Members of the City Council

**FROM:**

**INITIATED BY:** Torrey Contreras, City Manager *TC*

**DATE:** Shala Kudlac, City Attorney  
January 9, 2024

**SUBJECT:**

**BACKGROUND:** **4.3 INFORMATIONAL REPORT ON RECREATIONAL IMMUNITY**

In response to the opinion issued by the Oregon Court of Appeals on July 6, 2023, relative to recreational immunity for improved trails, local municipalities have been advised by its insurance provider, City/County Insurance Services (CIS) Oregon, to close City-owned and maintained improved trails as a precaution and to avoid potential liability. This position stems from an injury that occurred to a pedestrian while crossing a bridge that was owned and maintained by the City of Newport. According to reports, the pedestrian slipped and broke her leg on a wet footbridge causing her to sue the City for failing to maintain the bridge in a safe manner. The City sought the protections of recreational immunity, which under Oregon law protects landowners from liability stemming from injury, death, or property damage resulting from the use of land for recreational purposes.

As a result of the Court's opinion and the recommendation issued by CIS, a handful of cities have elected to proactively close trails as a precaution. However, such actions are considered by some legal experts and government agencies to be an overreaction. In light of the growing confusion, government agencies are calling for the State to issue further clarification with the hopes of maintaining the protections provided by recreational immunity.

Due to the fluid nature of the situation, City Attorney, Shala Kudlac, will be providing an informational report to the City Council regarding the matter.

### RECOMMENDATION

It is recommended that the City Council receive and file this report.

Informational Report on Recreation Immunity

January 9, 2024

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Attachments:

1. Real-Time Risk – CIS (November 2023)
2. Recreational Immunity FAQ – CIS (November 2023)
3. Coastal Cities Scrambling to Examine – or Close – Their Trails Following Oregon Appeals Court Decision in Newport – Yachats News (November 30, 2023)



## Recreational Immunity FAQ

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### MEMBERS QUESTIONS AND CIS ANSWERS ABOUT THE RECENT CHANGES TO RECREATIONAL IMMUNITY

## 2023 Changes to Recreational Immunity & Liability

### **Q: What happened to the recreational immunity defense regarding paths and trails, and what are the legal implications?**

On July 6, the Oregon Court of Appeals issued an opinion in the *Fields v. City of Newport* case, effectively ending recreational immunity for improved trails and striking it down as an “immunity” that protects public and private landowners from lawsuits. The City of Newport asked the Oregon Supreme Court to overrule the Court of Appeals and restore the portions of recreational immunity that were lost. On October 5, 2023, the Oregon Supreme Court officially declined to review the Court of Appeals’ decision in *Fields*. This action, called “review denied” functions as a de facto endorsement by the Oregon Supreme Court of the Oregon Court of Appeals’ decision striking down recreational immunity for paths to recreational areas. Read more about this case in our Nov. 2023 issue of Real-Time Risk (<https://www.cisoregon.org/dl/Xuc7ZVcp>).

### **Q: What does the change with recreational immunity mean to local government?**

Unless the Legislature steps in, from now on when a person suing the city claims that their subjective intent was not primarily to recreate, then recreational immunity does not apply at the beginning of a suit. Instead, the municipality (or private landowner) will have to defend the lawsuit all the way through a jury trial so the jury can decide what the plaintiff was thinking about their “primary intent.”

We encourage our members to reach out to their legislators and ask that they step in and restore this protection.

### **Q: Why is CIS recommending local government close trails? This will be unpopular and seems impossible.**

CIS understands this recommendation will not be popular. Weighing many factors and with a focus on the solvency of the trust and our members, this recommendation was determined to be the best course of action.

The tasks required to close access ways to recreation areas might seem daunting. Once the Oregon Supreme Court’s decision was made, it was determined that less aggressive measures would fail to meet the goal of protecting the trust and our members.

*We suggest our members use all avenues of communication to alert the community of changes with their paths and trails. Social media messaging will reach a broad community audience. Update entity website information about parks and trails with any changes you are making. Prioritize the installation of signs based on factors such as areas of higher risk, with the heaviest volume of users and where signs will have optimal visibility.*



## Discretionary Immunity

**Q: We expect a lot of pushback if we close paths and trails; this is a last resort. Is there any way discretionary immunity can close the gap?**

No, these are two distinctly different forms of protection, and discretionary immunity will not take the place of recreational immunity. Nevertheless, having your entity shore up its discretionary immunity position is always a prudent decision and may provide some shelter from liability claims. For effective use of discretionary immunity, we recommend an asset inventory, audit, a prioritized maintenance plan, activation of that plan, and periodic update and review of these steps. You can get started with the CIS Discretionary Maintenance Plan and Audit (<https://www.cisoregon.org/dl/x0tk2W4V>).

**Q: If the council doesn't explicitly approve a planned course of action, does discretionary immunity apply?**

Discretionary immunity applies most clearly to a course of action, such as a street or park maintenance plan, when a governing body votes to approve or adopt the plan. However, discretionary immunity can also apply to a policy decision made by a department head — especially when there's documented evidence that the department head is expressly authorized to make those policy decisions. If putting together a park maintenance plan is within the job duties of a public works director, for instance, then discretionary immunity should apply to any claim that the city or county should have adopted a different maintenance plan with different priorities.

**Q: Any suggestions for how to get policymakers to understand the importance of approving deferred maintenance in a plan when they're concerned about the political message it may send?**

We recommend educating your elected officials on this subject. It's understandable that elected officials are concerned about "the optics" of a maintenance plan that acknowledges there is not enough money to perform all the maintenance a city or county would like to get done. However, this plan could also be used to educate voters about where the maintenance dollars are being spent and demonstrate that additional revenues would be put to good use — keeping the community safe. There are positive "optics" to that message as well.

## Maintenance, Inspection, and Documentation

**Q: What constitutes an improvement? A bench? Cutting weeds?**

CIS recommends leaving natural areas alone. If an entity has made an improvement, such as a bench, it should be inspected and maintained. Weed control and insect control are not protected by recreational immunity; the member should follow their written programs.

**Q: What if the improvements were not done by the member but rather by the general public?**

If the member did not make the improvements and there is no expectation that the member will maintain the improvements, then there is no duty to inspect or maintain. Except with the recent change to paths and trails, recreational immunity should apply.

**Q: We contract the bulk of our maintenance. The parks department oversees the contract. How does this affect our liability?**

If you contract your maintenance and that contract has solid hold harmless, indemnity, and insurance provisions, this would be an excellent way to transfer your risk.

**Q: When we do inspections of equipment (playgrounds, swings, walkways, etc.), do we need to list everything and show what's good or bad, or can we list the equipment or structures that need maintenance?**

The more documentation the better. It would be preferable to list each piece of equipment in the park, facility, or structure and the key maintenance parts. As a best practice, each piece of equipment or part is inspected. Those parts not passing are repaired or closed until repairs are made. We recommend inspection of each risk point on a routine basis.

**Q: Our maintenance staff does not want to inspect or document in fear of being named in a lawsuit. Will not documenting inspection or maintenance avoid employees from being named in lawsuits?**

The reality is employees will be named in lawsuits regardless of whether issues are documented or not. In a lawsuit, depositions will be taken of supervisors and employees. Any known and undocumented maintenance will make the case less defensible. The best defense is to show a pattern of documented inspection and repair to demonstrate a reasonable maintenance program.

If the city/county is insured with CIS, then even though the city is legally obligated to defend its employee, CIS will cover the cost of that defense.

**Q: Must we enforce rules on signs?**

You are not required to have enforcement staff to ensure sign compliance. A best practice is to have elected officials make a policy decision not to attempt to enforce sign warnings to provide discretionary immunity defense.

## CIS Coverage

**Q: What kind of defense will CIS provide if the employee is found to be negligent?**

The CIS Liability Coverage Document provides defense coverage and pays any judgments for an employee's negligence. The Oregon Tort Claims Act requires public entities to defend and indemnify employees for the employee's negligence while acting in the course and scope of employment.

**Q: Will contributions increase because of the loss of recreational immunity on paths and trails?**

CIS is evaluating this exposure, and no decisions on rate increases have been made. The Board will make decisions regarding future increases, and it will likely depend on the frequency and severity of claims.

## Additional Information

### Recreational Immunity for Parks, Best Practices and Signage

Recreational immunity is still a defense for parks and other recreation areas. It's best practice to have warning signs and an inspection and maintenance plan for parks. Having an inspection and maintenance plan approved provides a defense of discretionary immunity.

Appropriate signage is a best practice. Some phrases to consider:

- Oregon law (ORS 105) provides the landowner is not liable for injury, death, or property damage that arises out of the use of the land for recreational purposes (known as "recreational use immunity").
- Falls at this location could result in severe injury or death
- Rough surface
- Watch for falling rock
- Water is stagnant and not tested for hazardous conditions
- No lifeguard present
- Possible dangerous conditions
- *Entering a free recreational area*
- Enter at your own risk — be warned of potential injury or death
- List possible dangerous conditions

**Additional language for signs:**



Until further notice, all paths, walkways, stairs, and any other improved or unimproved access ways to recreation areas are closed. Use of these areas is not permitted, and anyone using these areas does so at their own risk. (Include a note where the recreator can find additional information.)

Additional information to post on your entity's website and/or on social media:

Oregon law (ORS 105 ([https://oregon.public.law/statutes/ors\\_105.682](https://oregon.public.law/statutes/ors_105.682)), known as recreational immunity) provides that a landowner is not liable for injury, death, or property damage when their land is used for recreational purposes at no charge. This statute provides some protection to owners of recreational land. Recent Court of Appeals and Oregon Supreme Court decisions have struck down some of the Legislature's recreational immunity statutes. Faced with the loss of this protection, recreational landowners have been forced to make difficult decisions. After seeking advice from professionals and considering different options, the (entity) has deemed it necessary to close paths and all other access ways to recreational areas. (Entity) resources are not available to physically close and block all access to recreational areas and enforce this notice. All users of (entity) must follow all posted rules.

We encourage everyone to contact their state representative (<https://www.house.gov/representatives/find-your-representative#:~:text=If%20you%20know%20who%20your,the%20U.S.%20House%20switchboard%20operator.>) and encourage legislative changes to restore recreational immunity.



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**MAIN**

PO Box 1469  
Lake Oswego OR 97035  
**Phone:** 503.763.3800  
**Toll Free:** 800.922.2684  
**Fax:** 503.763.3900

**CLAIMS**

PO Box 1469  
Lake Oswego OR 97035  
**Phone:** 503.763.3875  
**Fax:** 503.763.3901  
**Email:** [claimspl@cisoregon.org](mailto:claimspl@cisoregon.org) (<mailto:claimspl@cisoregon.org>)

**PRE-LOSS LEGAL DEPARTMENT**

**Phone:** 503.763.3848  
**Toll Free:** 800.922.2684 ext. 7  
**Email:** [PreLoss@cisoregon.org](mailto:PreLoss@cisoregon.org) (<mailto:PreLoss@cisoregon.org>)





TIMELY NEWS AND TIPS TO HELP REDUCE RISK

November 2023

## OREGON'S HIGHER COURTS END RECREATIONAL IMMUNITY FOR IMPROVED TRAILS

By Kirk Mylander, CIS General Counsel

On July 6, the Oregon Court of Appeals issued an opinion effectively ending recreational immunity for improved trails. Public and private landowners of improved trails are no longer protected from lawsuits. ([Fields v. City of Newport](#)).

### **Nicole Fields Falls While Walking With a Friend and their Dogs**

In *Fields v. Newport* a woman was walking with her friend and their dogs on the beach. She walked away from the beach on an improved trail which was owned and maintained by the city of Newport. The woman came to a wooden footbridge that was wet. She slipped and fell, then filed a lawsuit against the City.

Ms. Fields' suit alleged the City was negligent in maintaining the bridge and not putting up warning signs. Newport responded that it was immune from suit because Fields was using the Ocean to Bay Trail for a recreational purpose, walking with a friend and their dogs while they talked and socialized.

*Oregon's recreational immunity provided liability protection to landowners who open their property for recreational activities, shielding them from certain lawsuits and claims related to injuries or accidents that occur on their land.*



# Real-Time Risk

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## **The Trial Court Applied Recreational Immunity, Protecting Newport**

The trial court agreed with the City, ruling that recreational immunity protects landowners from a lawsuit when they open their property to the public for recreational purposes without a fee. Because of recreational immunity the trial court granted summary judgment, which ended the case early in favor of Newport .

The trial court determined “there are no genuine issues of material fact in dispute” and that under state law, the plaintiff was “using the trail for recreational purposes” by “walking her dog on a trail to the beach with a friend,” and thus the City was entitled to recreational immunity from any liability.

Plaintiff Fields appealed the trial court’s ruling, arguing that the trial court could not conclude that her “**principal purpose**” (as required under state law) in walking on the trail was recreational as long as she claimed that the subjective intent in her mind was something else.

## **The Oregon Court of Appeals Strikes Down Recreational Immunity**

The Oregon Court of Appeals decided that there is a factual dispute between Plaintiff Fields and the City as to whether her use of the trail was recreational, or whether her primary purpose was instead for “accessing the beach.” In other words, the Court of Appeals held that the trial court needed to hold a jury trial to determine whether the plaintiff’s principal purpose on the trail was accessing the beach, or to recreate while using the trail with a friend and their dogs while they “socialized.”

Either way, recreational immunity no longer stops a case at the beginning (an “immunity” from suit), because any plaintiff can claim their “principal purpose” was not to recreate.



# Real-Time Risk

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## Local Governments Requested that the Oregon Supreme Court Restore Recreational Immunity — But the Court Refused to Hear the Case

The City of Newport asked the Oregon Supreme Court to overrule the Court of Appeals and restore recreational immunity. Other members of the local government community in Oregon also asked the Oregon Supreme Court to review the *Fields* case and reverse the Court of Appeals. The City of Medford, the League of Oregon Cities, the Association of Oregon Counties, the Special Districts Association of Oregon, and the Oregon Recreation and Park Association all joined Newport in asking the Oregon Supreme Court to reverse the Court of Appeals:

*"A decision from the Oregon Supreme Court is necessary here. The Court of Appeals created an exception that swallows the rule by finding a question of fact exists on whether socializing with a friend, walking dogs, and enjoying a scenic trail to access the beach is recreational or not."*

The City asked the Supreme Court to reverse the Court of Appeals because of the damage the Court of Appeals opinion will have on the public's access to recreational land. If the Court of Appeals opinion were to stand, the City argued, then "Landowners must decide if making their land available for recreational purposes is worth the risk of effectively losing access to the immunity by having to litigate through trial whatever subjective beliefs an injured plaintiff asserts their principal purpose was."

Unfortunately, that is where things stand today. On Oct. 5, 2023, the Oregon Supreme Court officially declined to review the Court of Appeals' decision in *Fields*. This action, called "review denied" functions as a de facto endorsement by the Oregon Supreme Court of the Oregon Court of Appeals' decision striking down recreational immunity.

At the heart of the dispute is whether a trial court can decide at the beginning of a case whether or not a plaintiff's "primary purpose" when entering land was recreational or not recreational.

## Subjective Intent is Too Subjective for Recreational Immunity to Function as the Legislature Intended

The Court of Appeals did not base its decision on what *Fields* was actually doing on the City of Newport's trail. Instead, the Court of Appeals turned to a dictionary for assistance with the word "walking."

The Court of Appeals found that walking with a dog could sometimes be a recreational activity, but was not necessarily always a recreational activity. The Court of Appeals said that even when walking and socializing, *Fields*' "principal purpose" could have been "to go to and from the beach" which the Court did not consider to be recreational.



The Oregon Supreme Court Building,  
Gary Halvorson/Oregon State Archives



# Real-Time Risk

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If, the Court reasoned, Fields was thinking that her “principal purpose” was to “access” the beach where she would begin to “recreate” with her dog and her friend, then recreational immunity does not protect the City (or any landowner). The key, according to the Oregon Court of Appeals, is the plaintiff’s subjective intent **not her objective activities at the time**.

Unless the Legislature steps in, from now on when a person using the city’s path claims that their subjective intent was not primarily to recreate, then recreational immunity does not apply at the beginning of a suit. Instead, the municipality (or private landowner) will have to defend the lawsuit all the way through a jury trial, so the jury can decide what the plaintiff was thinking about their “primary intent.”

Legally, this transforms recreational “immunity” from a legal rule that stops a lawsuit at the outset, and turns it into a defense that a city, county, school district, or private landowner can only try to use at trial. Recreational immunity is no longer a true immunity.

## **Is Anything Left of Recreational Immunity?**

The protection from lawsuits that landowners relied on in deciding to open their land to the public is now likely gone for all trails. It may be gone for any property that someone can claim they “were just passing through”.

The Oregon Court of Appeals and Oregon Supreme Court have repeatedly issued rulings that have the effect of striking down some, or all, of the Legislature’s recreational immunity statute. The good news, though, is that the Oregon Legislature has repeatedly stood behind Oregon’s policy of encouraging private and public landowners to open their property to the public for recreational activities like hiking, mountain biking, kayaking, hunting, fishing, rock climbing, and accessing the beautiful coastline.

Once again, the League of Oregon Cities and the Association of Oregon Counties are ready to bring a bill to the Legislature in 2024 to restore recreational immunity. But the support of individuals and local governments is needed. The people of Oregon who enjoy recreational access to a wide range of properties, especially including trails to access climbing areas, the coast, rivers, streams and lakes, need to contact their local legislator and their local city or county officials to express their desire to restore recreational immunity.

Your CIS risk management consultant is available to assist you as you plan, evaluate, and mitigate the heightened risk as a result of the *Fields v. City of Newport* ruling.

*For more information, visit CIS’  
Recreational Immunity FAQ at  
[cisoregon.org/Reclmmunity](https://cisoregon.org/Reclmmunity).*





# Real-Time Risk

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## RECOMMENDATIONS FOR CITIES AND COUNTIES

1. **Improved trails that are used to access a recreational area should be closed.** This especially includes trails, walkways and stairs used to access bodies of water, such as the ocean, lakes, rivers, streams and reservoirs.
2. **Consider closing unimproved trails,** because the subjective intent of the user can now nullify recreational immunity, which means if someone is injured on an unimproved trail, the city or county may find itself facing a costly jury trial to determine the injured person's intent in using the trail.
3. **Speak with your City Attorney or County Counsel** about how *Fields v. Newport* could negatively affect your other recreational offerings to the public. For instance, someone who trips in a park can now say their primary purpose in using the park was not recreation, but rather they were simply passing through the park to access some other area in your jurisdiction.
4. **Download and utilize this audit** for property you decide to leave open because it is not conducive to a claim from someone "just passing through", to ensure your facility is protected as much as possible from liability claims.
  - a. Consider requiring people to sign a form affirming they are using the property only for recreational purposes if your organization can afford to post someone at that location (at a skate park, for example).
5. **Contact your legislator** and any of the following organizations you are affiliated with: the League of Oregon Cities, the Association of Oregon Counties, the Special Districts Association of Oregon, or the Oregon Recreation and Park Association; express your desire to keep property free and open to everyone in Oregon for recreational activities.

If you have any questions, please contact your Risk Management Consultant:

### Northwest Oregon Coast and Columbia River Gorge

Margaret Ryan  
[mryan@cisoregon.org](mailto:mryan@cisoregon.org)

### Willamette Valley and Central Coast

Katie Durfee  
[kdurfee@cisoregon.org](mailto:kdurfee@cisoregon.org)

### Southern and Central Oregon

Laurie Olson  
[lolson@cisoregon.org](mailto:lolson@cisoregon.org)

### Eastern Oregon

Lisa Masters  
[lmasters@cisoregon.org](mailto:lmasters@cisoregon.org)

