Possible Fix for Recreational Immunity Access

(Offered as "food for thought")

Background for legislation - Quotation 1:

> "ORS 105.688(1)(c) was the legislature's answer to *Liberty*. It extended immunity to trails and paths used to reach other land for recreational purposes. In doing so, it expressly limited its application to trails that "have not been improved, designed or maintained for the specific purpose of providing access for recreational purposes." To simplify, ORS 105.688(1)(c) extends recreational immunity to owners of unimproved, nonrecreational trails and other rights of way. The legislative history is devoid of discussion about why subsection (1)(c) is limited in that way, but the absence of discussion is not surprising given the clear language of the provision.
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> "ORS 105.688(1)(c) *extends* immunity to unimproved, nonrecreational access trails that, under *Liberty*, would not have qualified for recreational immunity. It is worth mentioning that limiting the immunity conferred by ORS 105.688(1)(c) to unimproved land is consistent with the *quid pro quo* exchange that justified recreational immunity in the first place—immunity conferred on the landowner in exchange for making land available for public recreational use. Once a landowner affirmatively undertakes to improve his property, the concepts of reasonable care and foreseeability shift, likely increasing the landowner's corresponding level of responsibility and increasing the value of immunity to that landowner. One might reasonably expect the legislature to revisit the *quid pro quo* arrangement when the value exchanged on either side changes in a meaningful way.

Fields v. City of Newport, 326 Or. App. 764, 774–75, 533 P.3d 384, 389–90, review denied, 371 Or. 476, 537 P.3d 939 (2023) (emphasis added).

Quotation 2:

> "The immunity conferred by ORS 105.682(1) is made expressly "subject to the provisions of ORS 105.688," which provides:
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> "Except as specifically provided in ORS 105.672 to 105.696, the immunities provided by ORS 105.682 apply to:
> "(a) All land, including but not limited to 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 land described in paragraph (a) of this subsection;

> "(c) All paths, trails, roads, watercourses and other rights of way while being used by a person to reach land for recreational purposes * * * that are on land adjacent to the land that the person intends to use for recreational purposes * * *, and that have not been improved, designed or maintained for the specific purpose of providing access for recreational purposes * * *; and
> "(d) All machinery or equipment on the land described in paragraph (a) of this subsection."

Fields v. City of Newport, 326 Or. App. at 769 (emphasis added).

Fix - amendment to delete *limitation* to access that is "not improved":

> "(c) All paths, trails, roads, watercourses and other rights of way while being used by a person to reach land for recreational purposes * * * that are on land adjacent to the land that the person intends to use for recreational purposes * * *, whether or not those paths, trails, roads, watercourses and other rights of way have been ~~and that have not been~~ improved, designed or maintained for the specific purpose of providing access for recreational purposes * * *;

Comment. Because the city, county, or state does not have immunity if it charges for access (access must be free to be immune), it makes sense that immunity would remain the trade-off (the *quid pro quo*) when access remains free, regardless whether the access is improved by a sidewalk, paving, or clearing a pathway. If, however, the public body charges, then its duty of care to avoid negligence applies, and no immunity is available. That's current law. This fix would achieve the same balance of public policy for improved or unimproved free access on private and public lands.

--JSD (as Lane County resident) (2/12/24)