



**DEPARTMENT OF JUSTICE**  
TRIAL DIVISION

**DATE:** February 24, 2017

**TO:** House Committee on Transportation Policy

**FROM:** J. Nicole DeFever  
Assistant Attorney-in-Charge, Trial Division, Oregon Department of Justice

**SUBJECT:** HB 2208 – Way of Necessity

**INTRODUCTION**

House Bill 2208 creates additional conditions under which a “way of necessity” can be granted by a county government when the existing access cannot be used to develop the property for its primary purpose. The bill has significant implications to the Oregon Department of Transportation and could reopen previously closed access control and land transactions.

**DISCUSSION**

Currently the way of necessity laws provide a process for a land-locked property owner to petition the county to obtain connections for utilities, storm sewer or road access across other privately or publicly owned land. The county or the circuit court acts as a facilitator to consider a petitioner’s request and affected property owner responses. Based on statutory criteria, the county or circuit court decides whether or not to grant a way of necessity. The full cost to facilitate the process, attorney fees for all affected parties and, where the way of necessity is granted, the cost for the easement across the public or private property is born by the petitioner.

HB 2208 makes a significant carve out to shift costs of this process to the local or state road authority when rights of access have been acquired by the state or local road authority and access for future development and use of the property is deemed insufficient by the property owner because rights of access were acquired by the state or local road authority. The state or local road authority is then responsible for the costs of the way of necessity procedure regardless of whether the way of necessity is granted. These fees include the cost of the county procedure, attorney fees for all affected parties and where the way of necessity is granted the costs for the easements across private or public property to accommodate the way of necessity.

## CONCERNS

- Road authorities acquire access rights through arms-length transactions, statutory application when new roads are constructed on new alignments and through condemnation. At the time the rights of access are acquired, the abutting property owner is compensated the fair market value of for those rights of access. This bill would allow those property owners or future owners of the property to reopen the negotiations to request additional rights to access across property multiple times and each time at the expense of the road authority.
- Highway trust funds have been used to purchase access rights across the state on all interstates, freeways, expressways and many state highways for over eighty years. All access controlled highways are subject to this bill's reopener provisions that would permit abutting property owners to seek a way of necessity to accommodate proposed development or changes that were not contemplated at the time the access rights were purchased. This substantially devalues the rights to access that were purchased with highway trust funds and requires the use of additional highway funds to pay for the cost of considering a way of necessity.
- Property owners that were previously compensated for access rights may subsequently rezone property or a new property owner may acquire the property at a discounted price because of the limited level of access to the parcel. This bill would allow property owners who seek to realize speculative development goals by requesting a way of necessity to accommodate the new uses.
- The bill shifts all costs of the way of necessity procedure, from the petitioner to the road authority regardless of whether the way of necessity is granted or not. Because the petitioning property owner bears none of the costs, the petitioning property owner may be incentivized to speculate on obtaining a way of necessity.
- The balance of considerations for providing a way of necessity for those parcels where the road authority has acquired access rights may be tipped in favor of the petitioning property owner over the considerations of the other property owners that may be required to provide an easement. This adds uncertainty to adjacent property owners who may be subject to a ruling to provide a way of necessity across its property to accommodate the development of the petitioning property owner.

## CONCLUSION

HB 2208 would have significant implications to the highway trust fund and the public's tax dollars. The bill would shift the burden of all costs to the public body who acquired access rights from the petitioner in a way of necessity case.