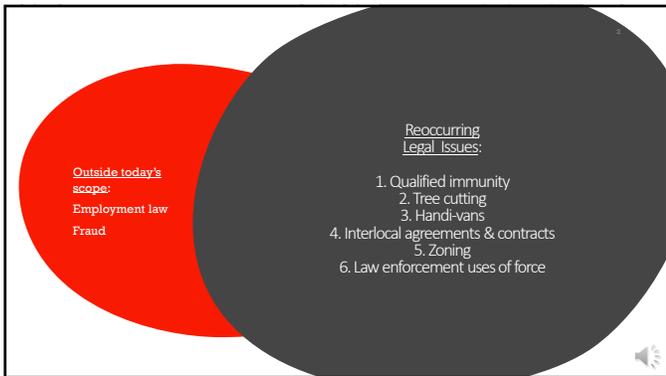




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- The doctrine is endangered
- It is a judicial doctrine, not legislation
- Attacks seeking reform or abolishment are loud and increasing – and come from both political parties
 - Liberal views that expanded availability of civil money liability best promotes accountability for wrongdoing
 - Conservatives views favoring smaller government, strict interpretations of the law

4

5

Arguments for and Against Qualified Immunity

- **Critics:**
 - "Plain words" should control
 - "judicial activism" should be rolled back
 - If "bad actors" escape a money penalty, they won't be deterred
 - As the doctrine has been interpreted, it protects too many
- **Proponents:**
 - We can't recruit/retain quality public officials if they have to live in fear of being sued
 - Civil litigation is burdensome and hinders officials from doing their important jobs
 - The law is often not clear-cut - officials can't be expected to be familiar with cases decided by Judges all over the U.S., and should have some breathing room for good faith mistakes in gray areas

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6

What could happen to qualified immunity, and how likely is it?

- U.S. Supreme Court could decide a case that would eliminate or change it
 - It held about a dozen cases in 2019-2020 for potential review, but ultimately declined to accept any of them
 - New Supreme Court Justice
- Congress could pass legislation to eliminate or change it
 - 4 bills are now pending
 - Each has limitations: only law enforcement, only federal employees, etc.
- States could pass legislation to gut the doctrine
 - Colorado (June 2020) – adopted a state law analog to federal section 1983, guarantees indemnification of official unless not in good faith, also imposes cap on individual liability

6

Why it matters to you - the consequences of changes/elimination of the doctrine for local governments

- Eighth Circuit is currently still strong on applying qualified immunity - we'd feel the impact of a change most here
- Greater numbers of civil lawsuits would be filed, and potentially more frivolous litigation
- More cases would go to jury trial (no summary judgment), litigation would last longer, be more expensive
- Perhaps, more officers would be held liable- meaning more money damages paid by local governments (taxpayers), but likely not hitting the pocketbooks of individual public officials
- Would justify even more emphasis on deterrence of bad police behavior, might prompt shifts in indemnity statutes, insurance

7

Tree-cutting

- Road Departments clear trees adjacent to county roads for safety and to appease constituents - to cure sight distance issues, to allow farm equipment to pass
- Good deeds can still carry risks:
 - Landowner disagrees or changes his mind - thinks those trees are worth a fortune, or they have sentimental value
 - Inverse condemnation claims
 - Negligence claims
 - Due process claims
 - Tree stumps left behind can be an ongoing hazard

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Russell v. Franklin Co., 306 Neb. 546 (July 24, 2020)

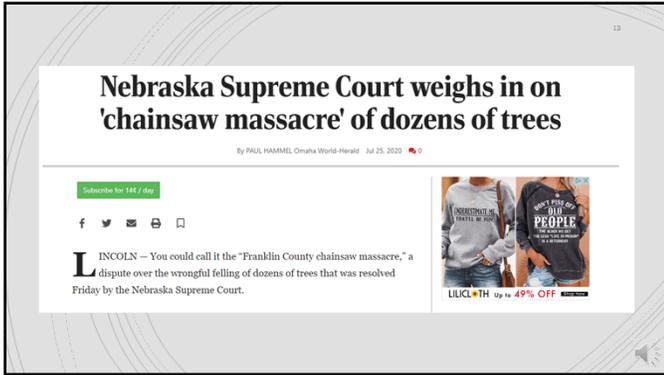
- Highway Superintendent approached landowners and sought permission to remove trees
- Landowners gave permission to cut in one area, but roads crew recognized the need was in a different area, and cut there instead
- Landowners objected, work ceased, suit filed – but only inverse condemnation, not negligence
- Demand was for approximately \$150,000
 - County Court appraisers came back at about \$32,000
 - Appeal to District Court Judge, reduced to \$200
 - Measure of damages: not replacement cost, diminution in market value
 - Upheld in Court of Appeals and NE Supreme Court

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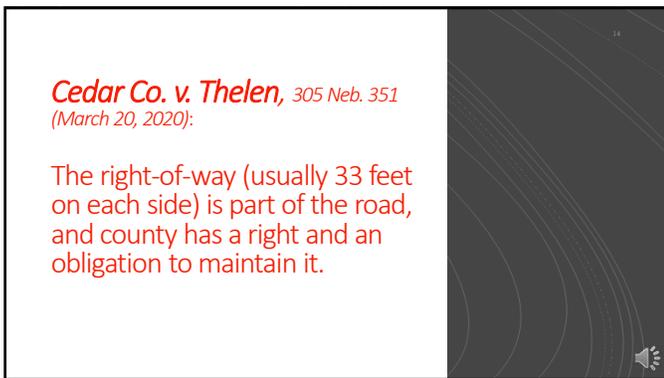
Impact of *Russell* decision – status of current law

- The logic – damages shouldn't be a windfall
- If trees are cut by a government entity, it may be a "taking or damage" that requires compensation under the NE Constitution
 - But this could be disputed in a different case, especially if statutory procedures are followed
- A separate negligence claim is always possible
 - Replacement/reproduction cost damages may be allowed, but cannot exceed the fair market value of affected land

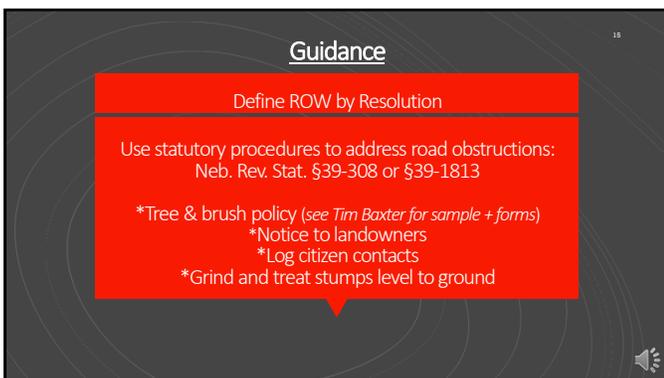
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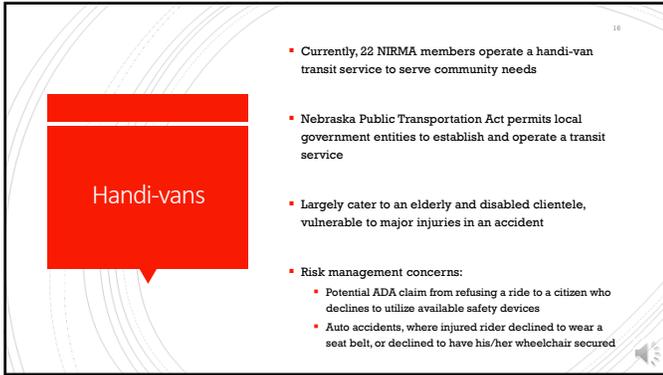
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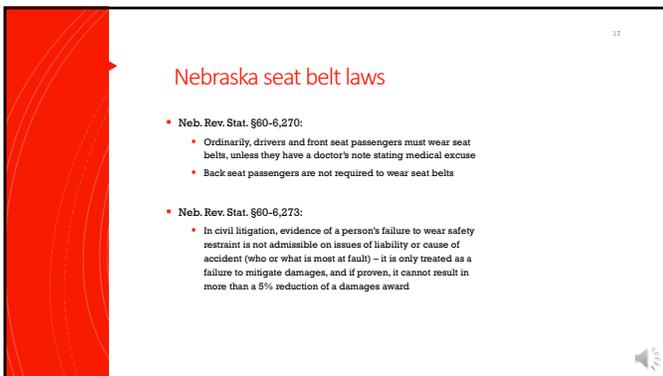
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Handi-vans

- Currently, 22 NIRMA members operate a handi-van transit service to serve community needs
- Nebraska Public Transportation Act permits local government entities to establish and operate a transit service
- Largely cater to an elderly and disabled clientele, vulnerable to major injuries in an accident
- Risk management concerns:
 - Potential ADA claim from refusing a ride to a citizen who declines to utilize available safety devices
 - Auto accidents, where injured rider declined to wear a seat belt, or declined to have his/her wheelchair secured

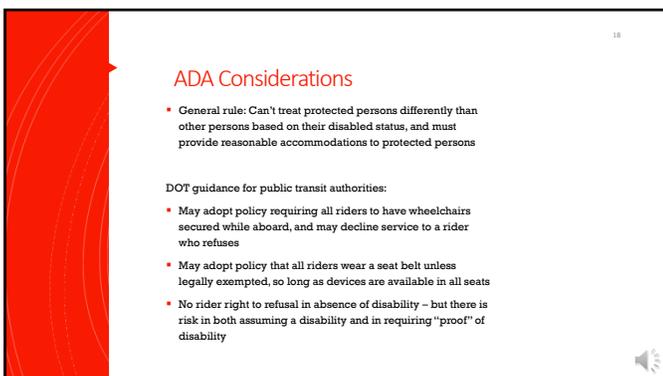
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Nebraska seat belt laws

- Neb. Rev. Stat. §60-6,270:
 - Ordinarily, drivers and front seat passengers must wear seat belts, unless they have a doctor's note stating medical excuse
 - Back seat passengers are not required to wear seat belts
- Neb. Rev. Stat. §60-6,273:
 - In civil litigation, evidence of a person's failure to wear safety restraint is not admissible on issues of liability or cause of accident (who or what is most at fault) – it is only treated as a failure to mitigate damages, and if proven, it cannot result in more than a 5% reduction of a damages award

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ADA Considerations

- General rule: Can't treat protected persons differently than other persons based on their disabled status, and must provide reasonable accommodations to protected persons

DOT guidance for public transit authorities:

- May adopt policy requiring all riders to have wheelchairs secured while aboard, and may decline service to a rider who refuses
- May adopt policy that all riders wear a seat belt unless legally exempted, so long as devices are available in all seats
- No rider right to refusal in absence of disability – but there is risk in both assuming a disability and in requiring "proof" of disability

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Would it help to make passengers sign a form before they ride?

State of Nebraska discontinued its form in approximately 2018

NOT PERMITTED UNDER ADA:

- Waiver of liability form
 - Agreement to release the driver/company from any liability
 - Can't condition a ride to an ADA protected person on giving up a substantial right

MAY BE PERMITTED UNDER ADA:

- Acknowledgement and informed consent form
 - Make passenger aware of risks, and confirm that they are taking them voluntarily
 - Would need to be presented to every rider, not only those who identify a need for an accommodation
- Effective? Open to debate - NE's mitigation statute likely minimizes benefits; but maybe it would have some impact on a judge, or encourage rider compliance

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Practical Guidance

- 1**
Develop sound written policies:
 - Require wheelchair securement
 - Require seat belt unless exempted
- 2**
Train drivers, enforce policies
 - State policy at start of ride
 - Ask reason for refusal
- 3**
Consider use of an appropriate consent form (not a waiver of liability form)
- 4**
Reevaluate practices on a continual basis to account for changes in the law

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Interlocal agreements

- Interlocal Cooperation Act**
 - Neb. Rev. Stat. §13-801 to 13-827
 - Has existed in some form since 1943
- Legislative purposes:** to let governmental units "make the most efficient use of their taxing authority and other powers" to gain "mutual advantages" in providing public services
- Examples of uses:** 1) shared road maintenance on county line roads, 2) solid waste, water, or public power management, 3) shared law enforcement services (see *NIRMA model agreement*)
- Statute is well-meaning, and important, but contains some traps for the unwary

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- Include all specific statutory requisites (Neb. Rev. Stat. §13-804(3) and (4)):
 - Duration
 - Financing/budget
 - Termination including disposition of property
 - Creating separate entity?
 - If not:
 - Administrator or joint board
 - How property will be handled
- Disclose to Auditor of Public Accounts (Neb. Rev. Stat. §13-813):
 - Annually before September 20
 - Up to \$2,000 fee if still delinquent after notice

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- Certain frequent topics of contracts entered into with vendors deserve careful attention
- Examples:
 - 1) jail medical contracts (*focus on avoiding liability for employment claims and avoiding trap of "non-delegable duty" language, including PREA, avoiding "pool dollars"*)
 - 2) housing of inmates from State of NE, other States, Federal government/ICE (*avoid agreeing to "standards" that your facility can't or won't satisfy*)
 - 3) use of county road by private contractor for hauling materials during a major construction project (*see NIRMA model developed by Tim Baxter and Jeff Kirkpatrick*)

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- Developed by Larry Pelan, underwriter
- Sample indemnity provisions
- Suggested insurance provisions for outside contractors
- Take advantage of help available to members – decisions belong to the Counties, but a second set of eyes always helps
- Assuming unacceptable risk by contract could potentially trigger coverage limitations – this is exceedingly rare and can be easily avoided

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ZONING

Appeals of decisions regarding conditional use permits

Subdivision roads

Enforcement of violations

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Appeals of CUP decisions

- Trial *de novo* in District Court – *In Re Olmer* case
 - Procedure for docketing appeal is confusing
 - Means starting over from scratch
 - New evidence can be considered
- Standard of review/decision for District Court is unclear
 - A strong record to show basis for decision in the best defense, including evidentiary support and written findings of fact
 - We can hope for legislative changes
- Remedy is reversal of an incorrect decision, not money damages
- "Offshoot claims" under Open Meetings Act
 - Proper notices of meetings, detail in agenda
 - Allegations of non-quorum policymaking, rubber stamping
- Special coverage provision
 - 75/25 provision

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Hochstein v. Cedar Co. Board of Adjustment, 305 Neb. 321 (March 20, 2020)

- Residence on an acreage was not "non-farm" as would be precluded under regulations
- Takeaway: How judges must interpret zoning regulations
 - Questions of law, not fact
 - On appeal, reviewed anew
 - Same rules as statutory construction
 - Read provisions on same topic together in harmony
 - Words, unless defined, are given plain meaning
 - Purpose: determine intent of legislative body
 - Where doubt exists about legislative intent, construe in favor of property owner and against restriction
 - Restrictions in zoning regs should not be extended by implication beyond their plain words

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Subdivision roads

- Zoning regulations should specify that roads in a platted subdivision must be brought up to County design standards before they may be dedicated to public use in the plat record and maintained by County
 - Neb. Rev. Stat. §39-1501(5) (no County maintenance required unless dedicated and brought to standards)
 - Neb. Rev. Stat. §23-375 (county board may require dedication of roads within a subdivision if there are regulations)
- If no zoning regulations or dealing with a subdivision developed/approved before regulations are in place, must revert to arguing that dedication did not transfer fee simple ownership of road to county, but only a public easement, with no maintenance requirement



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Subdivision Roads

- If zoning regs don't address the roads, don't approve subdivision plats without covenants to address how roads will be handled
- County Attorneys should work with Road Departments in developing regulations
- County Assessor's taxation practices should match approach of county road departments as relates to roads
- If County is maintaining roads, formally approve them and report them to State DOT



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Enforcement of zoning regulations

- At least one notice of violation is required (see NPZA forms: <https://www.npza.org/docs/NebrPlanningHndbk.pdf>)
 - it should be both specific and comprehensive
 - facilitates correction of issue
 - Avoids due process claims
- Counties may pursue both prosecution of a criminal misdemeanor citation, AND "other remedies" (civil) to prevent, restrain, correct, or abate unlawful uses of property
 - Neb. Rev. Stat. §23-114.05 -- each day violation continues after notice to violator is a separate offense
 - Neb. Rev. Stat. §23-174
- Landowner may "race" to the courthouse to beat the County to a civil suit (Due Process, injunctive relief, but no money damages due to PSTCA exemption)



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The "catch-22" of enforcement efforts

- Particularly when civil/criminal proceedings are pending at the same time, violator may "plead the Fifth" and refuse to answer questions
 - The court "may" draw an adverse inference
 - This approach can hinder discovery, lengthen proceedings
- Cedar Co. v. Thelen* case (see slide 9), supports that a misdemeanor conviction that does not stop the landowner's activity, will justify a civil injunction to cease the activity. The County's strategy in this case may be the ideal approach.

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The use of force climate for law enforcement

- George Floyd incident's impact on law enforcement policies and litigation of use of force cases is undeniable
- As of earlier this month, NCSL reported 224 legislative bills related to use of force reform pending in 29 states
 - <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx>
- Terry Baxter's NIRMA model policy recent revisions:
 - All neck restraint (carotid or breath restrictions) permitted only when deadly force is allowed
 - Duty to intervene - made express
 - It has long existed in case law
 - De-escalation

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The use of force climate for law enforcement

- Areas of Heightened Concern/Attention for risk management and litigation contexts:
 - Neck restraints
 - Seizures at gunpoint
 - Active vs. passive resistance
 - Monitoring medical status after use of force
 - Train frequently and to policy
 - Internal reports on uses of force
 - Post-incident reviews of force
 - Grand juries

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The use of force climate for law enforcement

- LB 924 (adopted in July), requires law enforcement to take 2 hours of anti-bias and implicit bias training annually
- NIRMA offers LLRMI training video (96 minutes)
 - Suggest combining with review of existing agency racial profiling policy to satisfy full length of training requirement

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Let's chat!
We're here for you.

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