MEMORANDUM

To: Verdetta Midori
From: Elizabeth Gastelum
Date: November 17, 2005
Re: City of Carbondale and Chris Thorburn; Client No. 99-999; Liability Under Illinois Local Governmental and Governmental Employees Tort Immunity Act

ISSUE

Whether, under Illinois law, the City of Carbondale is liable to Ms. Thorburn for injuries she sustained while riding a bicycle on a public street that was historically used by students as a connection to campus, when the City (1) has not posted signs or markings inviting bicyclists to use the street; and (2) took no action to convert part of the street for bicyclists.

BRIEF ANSWER

Probably not. The City is likely immunized from liability by the Illinois Local Governmental and Governmental Employees Tort Immunity Act because a local government in Illinois cannot be liable for injuries sustained on city property unless the injured person was an “intended” and “permitted” user of the property. Ms. Thorburn was not an intended or permitted user of Oakland Street when she rode her bicycle on the street because (1) the City posted no markings, signs, or other physical manifestations inviting cyclists onto the street; and (2) the historical use of the street by students is not a factor considered by courts in this district when determining municipal liability.

FACTS

Chris Thorburn, a student at Southern Illinois University, was riding her bike north on Oakland Street from the campus to student housing. Students from Southern Illinois University have historically bicycled along Oakland Street because it connects an entrance to the campus with many intersecting residential side streets where students rent housing. Ms. Thorburn was at the intersection of Oakland and Whitney when her front wheel wedged into a gap between two metal plates covering a hole in the street. The plates were placed in the street by the City, which was preparing the site to repair a broken water main. After the wheel wedged, Ms. Thorburn was thrown forward and sustained a tendon injury to her thumb requiring medical treatment. Her insurance paid for the treatment, but the injury prevented her from working for five weeks. Immediately before the incident, Ms. Thorburn saw construction on Oakland Street, but no workers were present at the work site. When Ms. Thorburn noticed the metal plates in the street, she looked to her left before attempting to move out of the way to pass them, but a Hummer SUV on her left side prevented her from avoiding the plates.

On each side of Oakland Street were two hazard warning signs facing in opposite directions immediately before and after the intersection of Grand and Oakland Streets and...
approximately one block from the spot where Ms. Thorburn was injured. The signs were identical: yellow and diamond-shaped with a picture of a bicycle. One sign faced north, and the other south. The south-facing sign, which could be seen by a cyclist traveling north (like Ms. Thorburn), was attached to a pole just above another sign that said “NO PARKING.” The north-facing yellow bicycle sign was above a sign attached separately to the pole that read “BIKE XING.”

The yellow bicycle signs on Oakland Street were identical to yellow signs that appeared at the time on the cover of the Carbondale Bikeway Map. These yellow diamond-shaped signs were also shown on the Illinois Secretary of State’s website. The Secretary of State’s website stated that yellow diamond-shaped signs warn of a hazard or potential hazard on or near the roadway. The back cover of the Carbondale Bikeway Map stated that Carbondale has a “system of recommended bicycle routes” and that green signs are in place along those routes. No green “bike route” signs were posted on Oakland Street. The map inside the Carbondale Bikeway Map showed that Grand Street was a bike route and Oakland Street was not. The Bikeway Map was published by the City.

The City has asked whether it can be held liable for Ms. Thorburn’s injuries.

**DISCUSSION**

The City is probably not liable to Ms. Thorburn because a local government in Illinois cannot be liable for injuries sustained on city property unless the injured person was an “intended” and “permitted” user of the property under the Local Governmental and Governmental Employees Tort Immunity Act, 745 Ill. Comp. Stat. § 10/3-102(a) (2007). Even if a local government has been negligent, this immunity is a complete defense because a local government owes a duty of care only to intended and permitted users of its property. **Id.** Ms. Thorburn was not an intended or permitted user of Oakland Street when she rode her bicycle on the street because the City did not erect any signs, markings, or other physical manifestations on the street inviting bicyclists to use the street. The historical use of the street by faculty and students of Southern Illinois University does not create liability for the City because the City took no action to convert any part of the street for bicycle use.

**Signs, Markings, or Other Physical Manifestations**

Ms. Thorburn was not an intended or permitted user of Oakland Street because the City did not mark the street to invite cyclists to use it. The nature of the property together with any presence or absence of “pavement markings, signs, or other physical manifestations” indicates whether a local government intends or permits certain users on the roadways. **Boub v. Township of Wayne, 702 N.E.2d 535, 539 (1998).** The cyclist in Boub was injured when a tire became caught between two wooden planks on a bridge under repair. **Id.** He argued that he was an intended and permitted user because no sign suggested that bicycles were prohibited on the bridge, and because a bicycle, like any other vehicle, is permitted on a road unless prohibited. The court disagreed and held that, for the purposes of § 10/3-102(a), a cyclist is treated as a pedestrian, who is not intended or permitted in the street unless pavement markings or signs communicate otherwise. **Id.**

If a government has marked a portion of a street for bicycle use, it can be held liable for injuries to bicyclists on the street. **Cole v. City of East Peoria, 559 N.E.2d 769, 772 (1990).** For
example, a cyclist whose tire caught in a sewer grate prevailed because pavement markings demonstrated that the city had intended and permitted that cyclists travel exactly where the injury occurred. Id. The fact that “the City ordered a white line painted a distance from the curb” indicated that the City intended the area to be “used by others than those driving automobiles.” Id. at 773.

Here, there were no signs indicating that the City intended Oakland Street to be used by cyclists. Although there were two yellow, diamond-shaped signs warning of hazards for bicyclists and there were signs prohibiting parking on the street, the signs did not indicate that the street should be used by bicyclists. The signs were meant to warn motorists to be alert for the sudden emergence of a bicyclist crossing Oakland Street. In addition, there were no green “bike route” signs on Oakland Street, and the Carbondale Bikeway Map showed that Grand Street was a bike route and Oakland Street was not. A sign at Grand Street said “BIKE XING,” which more logically marked a bicycle crossing for the established bike route on Grand Street that crossed Oakland Street. Thus, the only intended and permitted use of Oakland Street was to cross Grand Street, which was not what Ms. Thorburn was doing when she was injured.

**Historical Use of Oakland Street**

Moreover, the historical practice of the Southern Illinois University students in using Oakland Street as a connection from campus to their housing does not create liability for the City. Historical practice without any action by a city to convert a street into a permitted and intended use will not create liability for a city. Deren v. City of Carbondale, 300 N.E.2d 550, 551 (Ill. App. 5th Dist. 1973). In Deren, the plaintiff was injured near Southern Illinois University while walking in a street that students and others had long used as a walkway because of the absence of a sidewalk. Id. The Appellate Court, Fifth District (the District that includes Carbondale City), rejected a theory that this history and the city’s apparent knowledge of it showed governmental intent and permission. “Plaintiff’s complaint does not charge that the city took any action to convert a portion of the street to a sidewalk.” Id. at 553 (italics added).

Deren controls in the district that contains Carbondale, even though a court in a different Illinois district has held that “historical practice” can be factor in demonstrating that a city has permitted and intended a certain use of a street. Brooks v. City of Peoria, 712 N.E.2d 387, 388 (Ill. App. 3d Dist. 1999). In Brooks, the court held that a child bicycling on a sidewalk was an intended user in part because of the city’s ability to foresee how the public would use the sidewalk. Id. at 390-92. The Appellate Court, Third District, held that “[h]istorical practice when considered in conjunction with other factors” can show that a city has permitted and intended that use. Id. at 392. That decision is in conflict with Deren. Furthermore, the Supreme Court held more recently in Boub that historical practice alone does not “make a particular use of public property an intended one.” Boub, 702 N.E.2d at 541.

Here, although the City could have foreseen the use of Oakland Street by student and faculty bicyclists because of the historical use, it took no action to convert any portion of the street for bicycle use. Therefore, the historical practice of the students in using Oakland Street will not create liability for the City.
CONCLUSION

Ms. Thorburn likely will not prevail in a lawsuit against the City because she was not an intended or permitted user of Oakland Street. The Local Governmental and Governmental Employees Tort Immunity Act, 745 Ill. Comp. Stat. § 10/3-102(a) (2007), immunizes a city from liability for injuries sustained on city property unless the injured person was an “intended” and “permitted” user of the property. Even though students historically have used Oakland Street as a connection to campus, the City should not be held liable for Ms. Thorburn’s injuries because it did not post any signs or other markings inviting bicyclists onto the street, and it took no action to convert the street for cyclists’ use.