

# Legal Research Digest 53

## LIABILITY ASPECTS OF BIKEWAYS

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney-at-Law, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

### Applications

State and local engineers, planners, administrators, and elected officials are concerned about incurring liability for injuries suffered by bicyclists riding on public roadways designated as bikeways, and those concerns may also result in hesitation to create additional marked bikeways. This concern has led to a variety of approaches, such as local legislation and the use of federal guidelines, in an effort to offer cycling as an alternative means of transportation. There is a need to provide general information regarding legal risks to transportation entities and officials associated with designating public bikeways or the use of roads for increased bicycle traffic.

This research project was prompted by the need to provide information on legal risks to transportation and other public entities having bikeways, or the authority to designate them, or bicycle use on shared roadways. However, the extent of a public entity's risk of tort liability differs because of differing interpretations of the

tort liability laws applicable to public entities from state to state.

The digest addresses the liability of public entities for bicycle accidents on bikeways as well as on streets and highways. As the American Association of State Highway and Transportation Officials' *Guide for the Development of Bicycle Facilities* states, "[t]he majority of bicycling will take place on ordinary roads with no dedicated space for bikes." Further, the report reviews the federal laws that encourage the designation and use of bikeways; the elements of a claim in tort against a public entity for a bicycle accident, whether on a public street or some type of bikeway; defenses to bikeway accidents under tort claims acts and applicable to public entities; immunity for bicycle claims under some state recreational use statutes that in a majority of states are applicable to public entities; and public entities' laws and policies on the accommodation of bicycles on streets and highways and the designation of bikeways. Some discussion is based on responses to a survey of public entities, including public entities that designate bikeways.

This report will be useful to attorneys, transportation officials, risk managers, planners, maintenance engineers, financial officers, policy makers, and all persons interested in the relative rights and responsibilities of motorists and bicyclists on shared roadways.

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## LIABILITY ASPECTS OF BIKEWAYS

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### INTRODUCTION

Since the 1970s there has been increased use of bicycles for commuting and other travel, including recreation, resulting in a greater response at all levels of government to accommodate bicycles as a mode of transportation. Public entities' concerns about tort liability for bicycle-related accidents may discourage projects to accommodate more bicycles on streets or highways or to designate more bicycle lanes and paths.<sup>1</sup> This digest, thus, is prompted by the need to provide information on legal risks to transportation and other public entities having bikeways or the authority to designate them.<sup>2</sup> However, the extent of a public entity's risk of tort liability differs because of differing interpretations of the tort liability laws applicable to public entities from state to state.

The digest addresses the liability of public entities for bicycle accidents on bikeways as well as on streets and highways. As the American Association of State Highway and Transportation Officials' (AASHTO) *Guide for the Development of Bicycle Facilities* states, "[t]he majority of bicycling will take place on ordinary roads with no dedicated space for bicyclists;"<sup>3</sup> consequently, "[a]ll highways, except those where cyclists are legally prohibited, should be designed and constructed under the assumption that they will be used by cyclists."<sup>4</sup>

According to AASHTO, and as used herein, the term bikeway means "any road, street, path or way which in some manner is specifically designated for bicycle travel, regardless of whether such facilities are designated for the exclusive use of bicycles or are to be shared with other transportation modes."<sup>5</sup> A shared roadway is one that "is open to both bicycle and motor vehicle travel. This may be an existing roadway, street

with wide curb lanes, or road with paved shoulders."<sup>6</sup> A shared use path is "[a] bikeway physically separated from motorized vehicular traffic by an open space or barrier and either within the highway right-of-way or within an independent right-of-way. Shared use paths may also be used by pedestrians, skaters, wheelchair users, joggers and other non-motorized users."<sup>7</sup> A signed shared roadway or signed bike route refers to "[a] shared roadway which has been designated by signing as a preferred route for bicycle use."<sup>8</sup> The states' classification of bikeways is discussed also in Section VIII.B, *infra*.

The digest discusses the federal laws that encourage the designation and use of bikeways; the elements of a claim in tort against a public entity for a bicycle accident whether on a public street or some type of bikeway; defenses to bikeway accidents under tort claims acts that are applicable to public entities; immunity for bicycle claims under some state recreational use statutes that in a majority of states are applicable to public entities; and public entities' laws and policies on the accommodation of bicycles on streets and highways and the designation of bikeways based on responses to a survey of public entities, including public entities that designate bikeways.

#### Guidance

*Although the digest discusses the principles of tort liability applicable to public entities having responsibility for bikeways, as defined for the purposes of the digest, the reader is cautioned that the courts' interpretations of the law differ from state to state. Thus, the nature of the legal issues relating to tort liability do not allow for definitive statements regarding the liability or the absence thereof of public entities responsible for bikeways. It is recommended that anyone relying on the digest should consult with counsel to confirm the standards for liability in his or her state.*

### SECTION 1. FEDERAL LAWS ENCOURAGING THE DESIGNATION AND USE OF BIKEWAYS

Although some states and local government agencies may be dissuaded from designating bikeways because of potential tort liability, federal laws encourage the development, construction, and designation of new bikeway facilities by providing funding and guidance

<sup>1</sup> See, e.g., Amy M. Cardwell, *The Hawaii Recreational Use Statute: A Practical Guide to Landowner Liability*, 22 HAWAII L. REV. 237, 248, 249-50, 252 (2000), hereinafter cited as "Cardwell" (stating that the principal reason for landowners not permitting their land to be used by recreational users is the owners' concerns about potential liability for accidents).

<sup>2</sup> See J.W. English, *Liability Aspects of Bikeway Designation* (1986) (a study commissioned by the Bicycle Federation of America, now the National Center for Bicycling and Walking).

<sup>3</sup> AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS, AASHTO GUIDE FOR THE DEVELOPMENT OF BICYCLE FACILITIES 1 (1999), available at <http://www.communitymobility.org/pdf/aashto.pdf>, last accessed on Oct. 27, 2009, hereinafter cited as "AASHTO Guide."

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

through several legislative initiatives.<sup>9</sup> The 2005 Safe, Accountable, Flexible, and Efficient Transportation Equity Act—A Legacy for Users Act (SAFETEA-LU)<sup>10</sup> advocates the designation of bikeways. Multimodal paths are encouraged and in some instances required. Bicycle transportation and pedestrian walkways are eligible for the National Highway System.<sup>11</sup> Under Transportation Improvement Programs, each metropolitan area is to provide for the development, integrated management, and operation of transportation systems and facilities that are part of accessible pedestrian walkways and bicycle transportation facilities that function as part of an intermodal transportation system.<sup>12</sup> Each metropolitan planning organization is to provide citizens and other interested parties with a reasonable opportunity to comment on a transportation plan.<sup>13</sup> The term “transportation enhancement activity” means any project or area to be served by select activities, including facilities for pedestrians and bicycles.<sup>14</sup> Abandoned railway corridors are preserved for future use while allowing interim use as pedestrian or bicycle trails.<sup>15</sup>

<sup>9</sup> For a list of federal funding sources regarding the establishment of bikeways, *see, e.g.*, 23 U.S.C. §§ 217 (2009). The following sections of the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU) contain provisions relating to bicycles and bicycle safety: § 1404 (Safe Routes to School Program) and § 1411 (Roadway Safety). *See* Department of Transportation, Federal Highway Administration, Bicycle and Pedestrian Provisions in (SAFETEA-LU) Not Codified in Title 23, available at <http://fhwa.dot.gov/environment/bikeped/legtealu.htm>, last accessed on Dec. 10, 2009; § 1401(a)(1), 119 Stat. 7219, amending 23 U.S.C. § 148 (Highway Safety Improvement Program); § 1109 (b)–(e), 119 Stat. 1168–1170, amending 23 U.S.C. § 206 (Recreational Trails); and § 1807, 119 Stat. 1460 (Nonmotorized Transportation Pilot Program) and § 1954, 119 Stat. 1515, amending 23 U.S.C. § 217 (Bicycle Transportation and Pedestrian Walkway). *See* U.S. Department of Transportation, Federal Highway Administration, Bicycle and Pedestrian Legislation in Title 23 United States Code (U.S.C.), available at <http://www.fhwa.dot.gov/environment/bikeped/sec217.htm>, last accessed on Dec. 10, 2009. *See also* Department of Transportation, Federal Highway Administration, Summary of Highway Safety Provisions in SAFETEA-LU, available at <http://www.fhwa.dot.gov/safetealu/summary.htm>, last accessed Dec. 10, 2009.

<sup>10</sup> Pub. L. No. 109-59, 119 Stat. 1144 (*codified* as amended in scattered sections of Title 23 of the U.S.C.). *See* 23 U.S.C. §§ 139, 325, and 326 (all references to 23 U.S.C. are to the 2009 supplement to the 2002 edition, unless otherwise noted).

<sup>11</sup> 23 U.S.C. § 103(b)(6)(k).

<sup>12</sup> *Id.* §§ 134(a)(2), (c).

<sup>13</sup> *Id.* § 134(i)(5)(A) (for example, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, and representatives of the disabled).

<sup>14</sup> *Id.* § 101(a)(35)(A).

<sup>15</sup> *Id.* § 101(a)(35)(H).

The Safe Routes to School Program provides funding for planning, designing, and constructing infrastructure-related projects that will improve substantially the ability of students to walk and bicycle to school, including sidewalk improvements, speed-reduction improvements, pedestrian and bicycle crossing improvements, on-street bicycle facilities, off-street bicycle and pedestrian facilities, secure bicycle parking facilities, and traffic diversion improvements in the vicinity of schools.<sup>16</sup> Infrastructure-related projects may be implemented for any public road or any bicycle or pedestrian pathway or trail in the vicinity of schools.<sup>17</sup> Funding may be used to encourage walking and bicycling to school.<sup>18</sup>

With respect to the National Park Service, under the service-wide regulations for vehicles and traffic safety in national park and forest property, “[t]he use of a bicycle is prohibited except on park roads, in parking areas and on routes designated for bicycle use.”<sup>19</sup> If a trail is not in a developed area or special-use zone, a park is required to adopt a special regulation to designate a route for bicycle use.<sup>20</sup>

The 1968 National Trails System Act<sup>21</sup> established a program to preserve railroad rights-of-way no longer being used for operational railroad lines to avoid abandonment of the rights-of-way and preserve them for use as recreational trails.<sup>22</sup>

Thus, federal laws and programs encourage the designation and use of bikeways.

## SECTION II. TORT CLAIMS AGAINST A PUBLIC ENTITY FOR BIKEWAY ACCIDENTS

### A. Introduction

Although federal and state laws support the use of bikeways, tort claims against public entities may arise as a result of accidents involving bikeways and possibly subject public entities to liability.

For a plaintiff to maintain a tort action against a public entity, the plaintiff must show that the public defendant owed a duty to him or her that the defendant negligently performed or failed to perform. The showing of both the existence of a duty and its breach are critical, because “[w]ithout duty, there can be no breach of duty, and without breach of duty there can be no liability.”<sup>23</sup> The plaintiff must establish that the public authority had an “obligation to conform to a particular standard of conduct toward another to which the law

<sup>16</sup> *Id.* § 402(f)(1)(A).

<sup>17</sup> *Id.* § 402(f)(1)(B).

<sup>18</sup> *Id.* § 402(f)(2)(A).

<sup>19</sup> 36 C.F.R. § 4.30(a) (2009).

<sup>20</sup> *Id.* § 4.30(b) (2009).

<sup>21</sup> 16 U.S.C. §§ 1241–1251.

<sup>22</sup> *Id.* § 1247(d).

<sup>23</sup> 79 N.Y. Jur. 2d, *Negligence* § 16.

will give recognition and effect.<sup>24</sup> Thus, two important issues in a tort case against a public entity for an accident on a bikeway is whether the public entity had any duty to the bicyclist and whether the public entity's alleged negligence was the proximate cause of the bicyclist's accident and injuries.

However, whether a public entity may be held liable in tort depends on the extent to which the legislature has waived the public entity's sovereign immunity to tort claims either by judicial decision or by a tort claims act applicable to public entities. In most states and localities, a tort claims act may permit a plaintiff to sue a public entity, subject to certain limitations and exceptions, for negligence. In addition to public entities having immunity for their actions that are discretionary in nature, a state's tort claims act may include other important exceptions to the liability of public entities.<sup>25</sup>

Tort claims acts that are applicable to public entities generally include a discretionary function exemption that immunizes public entities for alleged negligence when exercising their discretion. Thus, Sections V and VI of the digest discuss how the courts have construed the discretionary function exemption with respect to tort claims alleging negligence by a public entity in the design, construction, operation, or maintenance of bikeways. In addition, depending on the circumstances, in many states a public entity may be shielded from liability for negligence in connection with bikeway accidents based on the state's recreational use statute, except when a public defendant willfully and maliciously failed to warn of or guard against a known dangerous condition, or in some states when a public entity committed gross negligence or engaged in wanton and reckless conduct or willful, wanton, or reckless conduct.<sup>26</sup>

#### Guidance

*Most states and localities are subject to a tort claims act. Although a tort claims act may permit an action to be brought against a public entity for alleged negligence, tort claims acts typically include a provision that immunizes public entities for claims arising out of the exercise of their discretion, as well as include other defenses and limitations on the liability of public entities. In some instances, a state's recreational use statute may shield a public entity from liability for bicycle accidents on bikeways and trails except when the public entity willfully and maliciously failed to warn or guard against a known dangerous condition, or under some statutes except when the public entity was grossly negligent or its conduct was willful, wanton, or reckless.*

## B. Whether a Public Entity Has a Duty to a Bicyclist

Assuming that a public entity does not have immunity under a tort claims act or a recreational use statute,

for a plaintiff to establish that a public entity is liable for negligence the plaintiff must show that what caused the injury was in the care or custody of the public defendant, that a dangerous condition of a bikeway existed, that the defendant had actual or constructive knowledge of a dangerous condition, and that there had been a reasonable period of time between the time of notice of the condition and the occurrence of the accident within which the defendant could have corrected the condition or given adequate warning of it.<sup>27</sup>

Although a tort claims act or recreational use statute may shield a public entity from liability for a bikeway accident, in general a public entity has a duty of reasonable care to construct and maintain its public improvements such as highways and bikeways in a reasonably safe condition<sup>28</sup> or to provide adequate warning of any danger that is present to a motorist or bicyclist.<sup>29</sup> For example, "[a]fter a path is constructed, a city owes a duty to use reasonable care to maintain it and to warn invitees of concealed perils."<sup>30</sup> However, it has been held that a city does not have a duty to enforce a speed limit on a bikeway.<sup>31</sup> Similarly, it has been held that a public entity has no duty to a bicyclist injured while riding on a public street to maintain a hedge that in effect had served as a barrier between the street and an athletic field that had a tendency to distract motorists' attention from bicyclists.<sup>32</sup>

On the other hand, a county was held not to have governmental immunity for a bicycle accident in a county park where the asphalt surface had deteriorated and contained potholes<sup>33</sup> and there were no "signs, chains, or barriers to indicate that the pathway was not

<sup>27</sup> *Burgess v. Harley*, 934 S.W.2d 58, 63 (Tenn. Ct. App. 1996), *appeal denied* (Oct. 28, 1996).

<sup>28</sup> 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 388, at 163–64.

<sup>29</sup> *Taylor-Rice v. State*, 91 Haw. 60, 69, 70, 979 P.2d 1086, 1095–96 (1999); *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. Ct. App. 1993) ("The State has a duty to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways."); *Hash v. State*, 247 Mont. 497, 501, 807 P.2d 1363, 1365–66 (1991) ("The State's duty to keep its highways in a reasonably safe condition extends to the paved portion of the roadway, to the shoulders and the adjacent parts thereof, including guardrails....").

<sup>30</sup> *Dennis v. City of Tampa*, 581 So. 2d 1345, 1348 (Fla. 2d DCA 1991) (involving a plaintiff, struck from behind by a speeding bicyclist while walking on a bike path in a city-owned park, who claimed that the city was negligent for failing to enforce its posted bicycle speed limit and for assigning only one park official to enforce the limit), *review denied*, 591 So. 2d 181 (Fla. 1991).

<sup>31</sup> 581 So. 2d at 1348.

<sup>32</sup> *Lompoc Unified Sch. Dist. v. Superior Court*, 20 Cal. App. 4th 1688, 1691, 1694, 26 Cal. Rptr. 2d 122, 123, 125 (Cal. App. 2d Dist. 1993).

<sup>33</sup> *Vestal v. County of Suffolk*, 7 A.D. 3d 613, 614, 776 N.Y.S.2d 491 (N.Y. App. 2d Dep't 2004).

<sup>24</sup> See also 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 364, *et seq.*

<sup>25</sup> See discussion, *infra*, in § IV.

<sup>26</sup> See discussion, *infra*, in § VII.

suitable for bicycling.”<sup>34</sup> In affirming a trial court’s denial of the county’s motion for summary judgment, the court stated that “[a] municipality [that] extends to its citizens an invitation to enter and use recreational areas owes to those accepting that invitation a duty of reasonable and ordinary care against foreseeable dangers.”<sup>35</sup>

Although the law may vary from state to state regarding when there is a duty to a bicyclist, a public entity may have a duty to bicyclists to maintain a path in good condition such as when it opens a park for their use. However, certain governmental functions, particularly those involving the exercise of discretion, may not impose a duty on the public entity to the bicyclist. As seen, a public defendant may have no duty to a bicyclist to enforce a speed limit but may have a duty to keep a bikeway in good repair.

#### Guidance

*A public entity has a duty of reasonable care to construct and maintain its public improvements in a reasonably safe condition and to provide adequate warning to a motorist or bicyclist of a dangerous condition of which the public entity has notice or should have had notice. In general, a public entity has a duty to maintain the surface of a bikeway in a safe condition and free of defects or obstructions. Although not discussed in the digest, other principles of tort liability may apply in a given case such as contributory or comparative negligence because of a bicyclist’s own negligent conduct or inattention.*

### C. Whether a Public Entity’s Alleged Negligence Was the Proximate Cause of the Plaintiff’s Claim

A bicyclist may allege that an accident was caused by the condition of the pavement, by inadequate warning signs or signals, by shoulder conditions, or by a hazardous bridge. Regardless of the alleged cause of an accident, a plaintiff must prove causation in fact and proximate cause.<sup>36</sup>

First, the question of cause in fact may be tested by asking whether the injury would have occurred but for the defendant’s negligence.<sup>37</sup> One question for the court is whether the proof is sufficient. If an accident occurred on pavement that is alleged to have been defective, it must be shown that the defect was in fact the cause of the accident and the plaintiff’s injuries.<sup>38</sup> Causation in fact is not the same as the plaintiff’s burden to

establish that the alleged negligence was the proximate or legal cause of the accident.

Thus, the second question is whether the defendant’s negligence was the proximate cause of the plaintiff’s injuries. Usually the issue of proximate cause is a question of fact for the jury.<sup>39</sup> No liability will be imposed upon a public entity unless it is alleged and proved that its negligence was the proximate cause of the accident.<sup>40</sup> “Proximate cause’ is that cause, act or omission which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred, the injury being the natural and probable consequence of the wrongful act.”<sup>41</sup>

Although a jury is not bound to accept opinion testimony as conclusive, expert testimony may be essential in establishing causation.<sup>42</sup> When reasonable minds could reach only one conclusion, the existence of proximate cause is a question of law decided by the trial judge.

There may be more than one proximate cause of an accident.<sup>43</sup> The evidence must show that the plaintiff’s injury was a natural and probable consequence of conditions for which the public entity was responsible.<sup>44</sup> A public entity’s breach of its standard of care or its violation of a safety standard has been held to have been the proximate cause of a vehicle accident.<sup>45</sup> In other cases, a bicyclist’s inattention or other negligence could be held

<sup>39</sup> *Boyd v. Trent*, 262 A.D. 2d 260, 261, 690 N.Y.S.2d 732, 733 (N.Y. App. 2d Dep’t 1999) (stating that “it is well settled that the absence of a warning sign cannot be excluded as a proximate cause of an accident unless the driver’s awareness of the road condition would have led to the same course of conduct as had the sign been present” and that the court could not rule as a matter of law that the defendant’s “actions would have been the same had a speed reduction sign been present at the approach to the curve”) (citations omitted); *Grappe v. State*, Dep’t of Transp. & Dev., 462 So. 2d 1337, 1340 (La. App. 3d Cir. 1985) (“Causation is a question of fact as to which the trial court’s determinations are entitled great weight and should not be disturbed absent manifest error.”), *cert. denied*, 466 So. 2d 1302 (La. 1985).

<sup>40</sup> *Ring v. State*, 270 A.D. 2d 788, 789, 705 N.Y.S.2d 427, 428 (N.Y. App. 3d Dep’t 2000) (citations omitted).

<sup>41</sup> 65 C.J.S., *Negligence* § 188, at 519–20 (footnotes omitted).

<sup>42</sup> *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 182, 952 S.W.2d 658, 662 (1997) (citations omitted).

<sup>43</sup> *Tex. Dep’t of Transp. v. Olsen*, 980 S.W.2d 890, 893 (Tex. App. 1998).

<sup>44</sup> *Larkins v. Hayes*, 267 A.D. 2d 524, 525, 699 N.Y.S.2d 213, 214 (N.Y. 3d Dep’t 1999) (citation omitted). *Stahl v. Metro Dade County*, 438 So. 2d 14 (1983) (child killed by motorist when child rode bicycle off poorly maintained bike path and onto street).

<sup>45</sup> *Nevins v. Ohio Dep’t of Highways*, 132 Ohio App. 3d 6, 23, 25, 724 N.E.2d 433, 443, 445 (Ohio App. 10th Dist. 1998) (remanding the case because the trial court failed to state separately the amounts of individual compensatory damages, funeral and burial expenses, and survival claims as required).

<sup>34</sup> *Id.* at 614, 776 N.Y.S.2d at 491 (noting that although the county had “abandoned” the pathway, bicycle riding was permitted).

<sup>35</sup> *Id.* (holding that the county was not entitled to governmental immunity because its operation of a public park is not a governmental function) (citations omitted).

<sup>36</sup> *Estate of Day by Strosin v. Willis*, 897 P.2d 78, 81 (Alaska 1995).

<sup>37</sup> 2 HARPER & JAMES, *THE LAW OF TORTS* 2d § 20.2, at 91, hereinafter cited as “HARPER & JAMES.”

<sup>38</sup> *Id.* at 85–86; 4 SCHWEITZER & RASCH, *CYCLOPEDIA OF TRIAL PRACTICE* § 827, at 66 (2d ed.).

to be the proximate cause of an accident.<sup>46</sup> Thus, both motorists and bicyclists must be “vigilant in their observances and avoidances of defects and obstructions likely to be encountered.”<sup>47</sup>

There are cases involving bicycle accidents in which the public entity’s negligence was held not to have been the proximate cause of the bicyclist’s accident. In *Puhalski v. Brevard County*, the bicyclists had found a bicycle path built by the county along a state road in the county to be “so poorly maintained” that they had to ride “on the edge of the highway when they were struck and injured by a vehicle that wandered out of the lane of traffic.”<sup>48</sup> It was held that the county’s action or inaction was not the proximate cause of the accident. A concurring opinion stated that “[w]hatever duty Brevard County had to maintain the path once provided, the breach of that duty was limited to injuries directly and proximately caused to bicyclists by defects in the path resulting from improper maintenance.”<sup>49</sup> On the other hand, in *Stahl v. Metropolitan Dade County*,<sup>50</sup> in which a passing automobile struck a youthful bicyclist when he left a bicycle path to avoid an obstruction, the court held that “a reasonable jury on these facts could find that negligent maintenance of the bicycle path would likely force a young bicyclist such as Andrew Stahl off the path to avoid a spill...onto the street when he might be hit by a car.”<sup>51</sup>

In a New York case it was held that a public entity’s action was not the proximate cause of a motorcycle accident even though the plaintiff’s expert testified that the city should have painted the road in question as a four-lane rather than a two-lane road such that the plaintiff would not have attempted to pass a tractor trailer on the right side.<sup>52</sup> In *Shortridge v. Ohio Department of Public Safety*,<sup>53</sup> the court held that the defendant’s action was not the proximate cause of an accident even though a sign had not been replaced.<sup>54</sup> The

court held that the plaintiff’s failure “to look ahead of her vehicle” and observe traffic conditions was the proximate cause of the accident.<sup>55</sup>

In sum, causation in fact and proximate cause are important burdens that the plaintiff must meet before a public entity may be held liable for negligence.

#### Guidance

*If a public entity has failed to keep a bikeway in reasonably good repair, failed to remove a dangerous obstruction in or adjacent to the bikeway, or has violated a mandatory safety standard applicable to the bikeway, any one (or more) of which was the proximate cause of an accident, it appears that a court is more likely to hold the public entity liable. However, in a particular case a public entity’s violation of a nonmandatory standard or guideline could be admissible on the issue of the public entity’s liability.*

### SECTION III. DEFENSES TO BIKEWAY CLAIMS UNDER STATE TORT CLAIMS ACTS AND RECREATIONAL USE STATUTES

#### A. Interplay Between a Tort Claims Act and a Recreational Use Statute in Bikeway-Accident Claims Against Public Entities

In a claim against a public entity for alleged negligence for improper design, construction, or maintenance of a bikeway, a public entity may have defenses to the claim under the state’s tort claims act applicable to the public entity or, alternatively, under the state’s recreational use statute.<sup>56</sup> First, a state’s tort claims act may provide a defense to a bikeway claim when the state’s recreational use statute does not immunize a public entity, for example, because in some states the recreational use statute applies only to private landowners or because bicycling is not a covered activity under the statute. Second, a recreational use statute may immunize a public entity from a bikeway claim that ordinarily would exist under the state’s tort claims act. For example, if the recreational use statute applies both to public entities and to bikeways, the public entity will be liable only when it willfully or maliciously failed to give warning of or guard against a known dangerous condition or in some states when it commits gross negligence or has been guilty of willful, wanton, or reckless conduct.

In *Baggio v. Chicago Park District*,<sup>57</sup> the court addressed “the relationship between the Tort Immunity Act and the Recreational Use Statute.”<sup>58</sup> The court held that the two acts could be reconciled and that the “Tort Immunity Act provides protection for local public entities that is additional to those protections contained in

<sup>46</sup> *Barrish v. State, Dep’t of Transp.*, 509 So. 2d 340 (Fla. 3d DCA 1987) (concurring op.) (holding that overgrown foliage blocking a sidewalk that prompted the plaintiff to walk in the street was not the proximate cause of the plaintiff’s injuries but stating a different result if the plaintiff was a bicyclist, citing to *Stahl, supra*, n. 44), *reh’g denied* (July 29, 1987).

<sup>47</sup> *Finkelstein v. Brooks Paving Co.*, 107 So. 2d 205, 207 (Fla. 3d DCA 1958) (citations omitted).

<sup>48</sup> *Puhalski v. Brevard County*, 428 So. 2d 375, 376 (Fla. 5th DCA 1983) (*per curiam*). See discussion of the *Puhalski* case in Emily Hammond, *Note: Government Liability When Cyclists Hit the Road: Same Roads, Same Rights, Different Rules*, 35 GA. L. REV. 1051, 1065–66 (2001).

<sup>49</sup> *Puhalski*, 428 So. 2d at 376 (concurring op.).

<sup>50</sup> 438 So. 2d 14, 16, 22 (Fla. 3d DCA 1983) (reversing a summary judgment for the county).

<sup>51</sup> 438 So. 2d at 22.

<sup>52</sup> *Elmer v. Kratzer*, 249 A.D. 2d 899, 901, 672 N.Y.S.2d 584, 585 (N.Y. App. 4th Dep’t 1998), *appeal dismissed*, 92 N.Y.2d 921, 703 N.E.2d 274, 692 N.Y.S.2d 462 (1998).

<sup>53</sup> 90 Ohio Misc. 2d 50, 696 N.E.2d 679 (Ohio Ct. Cl. 1997).

<sup>54</sup> *Id.* at 53, 696 N.E.2d at 681.

<sup>55</sup> 90 Ohio Misc. 2d at 54, 696 N.E.2d at 682.

<sup>56</sup> *Cardwell, supra* note 1, at 244.

<sup>57</sup> 289 Ill. App. 3d 768, 682 N.E.2d 429 (Ill. App. 1st Dist. 1997).

<sup>58</sup> *Id.* at 771, 682 N.E.2d at 431.

the Recreational Use Act.<sup>59</sup> If the recreational use statute does not apply, for example, because a public entity charged a fee for entry onto or use of its property, there may be immunity nevertheless under the applicable tort claims act.<sup>60</sup>

In sum, it is possible that a public entity would not have a defense under one statute but would have a defense under the other. One article even states that a combination of a tort claims act and a recreational use statute may preclude virtually any actions against a public entity “even in cases of willful misconduct” by the public entity.<sup>61</sup>

## B. Immunity From Bikeway Claims Under Some Recreational Use Statutes

When there is a claim for which the public entity could be held liable under a state tort claims act, the state’s recreational use statute, nevertheless, may be applicable in over 30 states in which the statutes apply to public entities and immunize them for their action. In *Parent v. State*,<sup>62</sup> the young bicyclist was injured in a state park in Tennessee “after he was thrown from his bicycle when a steep portion of the paved bicycle trail culminated in a sharp turn.”<sup>63</sup> Relying on the State’s tort liability legislation, the plaintiffs alleged “that Tenn. Code Ann. § 9-8-307(a)(1)(C) and (a)(1)(I) remove immunity for a dangerous condition that has been negligently created or maintained on state-controlled property.”<sup>64</sup> The State argued, however, that it was immune under Tennessee’s recreational use statute.<sup>65</sup> The Supreme Court of Tennessee agreed with the State and held that the recreational use statute was also “an affirmative defense to other viable causes of action outside the recreational use statute.”<sup>66</sup>

Although the recreational use statute did not enumerate biking as a recreational activity, the court stated that bicycling is a recreational activity “comparable to the activities enumerated in § 102” of the recreational use statute.<sup>67</sup> The court held that the recreational use statute “provide[d] the State with an immunity-defense when injury occurs during bicycling

on a paved trail or state-owned land.”<sup>68</sup> Therefore, the State had the recreational use statute as a defense to causes of action that otherwise would have been permitted against the State under its tort claims act known as the Tennessee Claims Commission Act.<sup>69</sup> Nevertheless, the reversal of the dismissal of the plaintiff’s case was affirmed; because bicycling on a paved trail in the state park was a recreational use, the plaintiff was entitled to a factual development of the case before determining whether any of the exceptions to state immunity under the recreational use statute applied.

Another example of a defense under a recreational use statute when there was no defense under a tort claims act is *Stephen F. Austin State University v. Flynn*.<sup>70</sup> The Supreme Court of Texas agreed with an appellate court that Stephen F. Austin State University (SFA) did not have immunity under the tort claims act but disagreed with and reversed the appellate court’s ruling that SFA did not have immunity under the recreational use statute. SFA had granted an easement to the city of Nacogdoches for a trail that crossed SFA’s campus.<sup>71</sup> The plaintiff was injured while riding on the trail when she was knocked off her bicycle by one of the university’s lawn sprinklers.<sup>72</sup>

First, the court held, as did the appellate court, that SFA’s decisions regarding “where the water was to spray were operational- or maintenance-level decisions” rather than decisions involving the formulation of policy; thus, SFA was not protected from liability by the discretionary function exemption in the tort claims act.<sup>73</sup> Second, however, the court held that SFA had immunity under the recreational use statute. SFA was still the owner of the land and was entitled to immunity even though it had granted an easement to the city.<sup>74</sup> The court held “that a landowner who dedicates a public easement for recreational purpose is entitled to the protection of the recreational use statute.”<sup>75</sup> The court rejected the plaintiff’s claim that SFA could not claim immunity because its actions amounted to “gross negligence, malicious intent, or bad faith” under the recreational use statute.<sup>76</sup>

### Guidance

*In a tort claim case against a public entity for an accident involving a bikeway it is important to consider both the applicable tort claims act and the state’s recreational use statute that may be applicable to bikeways. Depending on the circumstances, a public entity could have immunity under one or both statutes. Sections IV–*

<sup>59</sup> *Id.*

<sup>60</sup> 289 Ill. App. 3d at 771, 682 N.E.2d at 432.

<sup>61</sup> *Interface Between the Recreation and Land Use Act and the Sovereign Immunity Act—Blanket Immunity for the Commonwealth in State Park Actions?*, 70 PA. BAR ASS’N QUARTERLY 112, 114–15 (1999). The article notes that the combination of a tort claims act and a recreational use statute may produce a “strange result” not intended by the legislature, because there could be cases in which the state, for example, “may be aware of a patently dangerous condition on its land, or even deliberately create the condition and still be immune under the Sovereign Immunities Act.” *Id.* at 112.

<sup>62</sup> 991 S.W.2d 240 (Tenn. 1999).

<sup>63</sup> *Id.* at 241.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 241–42 (citing TENN. CODE ANN. § 70-7-101, *et seq.*).

<sup>66</sup> *Id.* at 242.

<sup>67</sup> *Id.* at 243.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (citing TENN. CODE ANN. §§ 9-8-101, 9-8-301).

<sup>70</sup> 228 S.W.3d 653 (Tex. 2007).

<sup>71</sup> *Id.* at 655.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 658.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 659 (citations omitted).

<sup>76</sup> *Id.*



VI and VII, respectively, herein discuss bikeway claims under tort claims acts and recreational use statutes in more detail.

## SECTION IV. TORT CLAIMS ACTS AND TORT LIABILITY OF PUBLIC ENTITIES

### A. State Tort Claims Acts

Historically, public entities were not subject to liability in tort because of the doctrine of sovereign immunity. Municipal corporations usually were liable only for negligence in the performance of their proprietary functions—activities for which a fee was charged—but not for their governmental functions, such as providing and maintaining streets and highways. Because of sovereign immunity, public entities had complete freedom from suit or liability. However, by the 1960s and 1970s, most legislatures had enacted some form of tort claims act, sometimes in response to judicial abrogation of sovereign immunity.<sup>77</sup> The extent of a public entity's liability varies from state to state depending on the extent to which the state legislature has waived immunity in tort, as well as on the courts' interpretation of the applicable legislation.<sup>78</sup> A tort claims act may apply to the state and other public entities, such as counties and municipalities, or there may be separate legislation applicable to the liability of the state and of counties and municipalities.

Because a state's tort claims act waives sovereign immunity to some extent for negligence claims, such legislation is in derogation of the common law and therefore is construed strictly. An example of strict interpretation is *Nawrocki v. Macomb County Road Commission*,<sup>79</sup> in which the Supreme Court of Michigan held that “prior decisions of this Court...improperly broadened the scope of the highway exception” to governmental immunity and that the court “was duty bound to overrule past decisions that depart from a narrow construction and application of the highway exception.”<sup>80</sup> In reinterpreting the highway exception to immunity in the Michigan statute, the court ruled that a pedestrian stated a claim when alleging “that she was injured by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel.”<sup>81</sup> However, the highway exception did not mean that “the state or a county road commission [had] a duty to install, maintain, repair, or improve traffic con-

trol devices, including traffic signs.”<sup>82</sup> The court held that the highway exception did not give rise to duties even as to “integral parts of the highway” that are “outside the actual roadbed, paved or unpaved, designed for vehicular travel.”<sup>83</sup> The court held that “[t]raffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the improved portion of the highway designed for vehicular travel.”<sup>84</sup>

The court acknowledged, however, that there are other Michigan statutes that impose a duty “separate from the highway exception” for “the installation, maintenance, repair, or improvement of traffic signs.”<sup>85</sup> Nevertheless, the statutes provide that the state and local authorities are to perform these duties as they “deem necessary.”<sup>86</sup> For the court, “[t]his is the language of discretion, not the imposition of a duty, the breach of which subjects the agencies to tort liability—as opposed, perhaps, to political liability.”<sup>87</sup>

Besides showing that statutes waiving the immunity of public entities are strictly construed, the *Nawrocki* case illustrates several other principles of tort liability of public entities applicable to bikeways. Public entities are more likely to have immunity when making decisions that involve discretion, such as when to install traffic control devices, and public entities may be more likely to incur liability for alleged negligence involving the bikeway surface,<sup>88</sup> such as the failure to correct a known dangerous condition in or on a bikeway.<sup>89</sup>

Also, as illustrated by the *Nawrocki* case, even if a state legislature has consented to tort claims against the state or other public entities, the state's consent to suit does not mean necessarily that consent has been given to being held liable for the alleged wrong at issue. For instance, a statute may waive immunity for a dangerous condition caused by a pothole but not for one caused by the absence of a guardrail.<sup>90</sup> A public entity may have statutory immunity from liability for the failure to replace a missing sign if the tort claims act provides that the public entity is not liable “for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices.”<sup>91</sup>

<sup>82</sup> 463 Mich. at 173, 615 N.W.2d at 717.

<sup>83</sup> 463 Mich. at 176, 615 N.W.2d at 719.

<sup>84</sup> 463 Mich. at 183, 184, 615 N.W.2d at 723.

<sup>85</sup> 463 Mich. at 181, 615 N.W.2d at 721.

<sup>86</sup> *Id.* (emphasis in original).

<sup>87</sup> 463 Mich. at 181–82, 615 N.W.2d at 722 (footnote omitted).

<sup>88</sup> 463 Mich. at 184, 615 N.W.2d at 723.

<sup>89</sup> *Id.* (emphasis supplied).

<sup>90</sup> *See, e.g.*, 42 PA. CONS. STAT. § 8522(b)(5), setting forth conditions of explicit waiver of sovereign immunity regarding potholes as a dangerous condition of the highway and 42 PA. CONS. STAT. § 8542(b)(4) for trees, traffic controls, and street lighting.

<sup>91</sup> *Smith v. State, Dep't of Transp.*, 247 N.J. Super. 62, 588 A.2d 854 (1991), *cert. denied*, 130 N.J. 13, 611 A.2d 651 (1992), (*citing* N.J. STAT. ANN. 59:4-5). *See also* *Kosoff-Boda v. County*

<sup>77</sup> RICHARD JONES, RISK MANAGEMENT FOR TRANSPORTATION PROGRAMS EMPLOYING WRITTEN GUIDELINES AS DESIGN AND PERFORMANCE STANDARDS (NCHRP Legal Research Digest No. 38, 1997).

<sup>78</sup> *Id.* The digest concludes that the largest number of states fall into the category of having abrogated immunity in a substantial or general way.

<sup>79</sup> 463 Mich. 143, 615 N.W.2d 702 (Mich. 2000).

<sup>80</sup> 463 Mich. at 151, 615 N.W.2d at 707.

<sup>81</sup> 463 Mich. at 172, 615 N.W.2d at 717.

In *Bookman v. Bolt*,<sup>92</sup> the plaintiffs' decedent died as a result of an accident that occurred when he rode on a bicycle path that crossed a street.<sup>93</sup> The city at the time of the accident had two construction projects in progress and "planned to install a traffic signal at the intersection after construction was complete...."<sup>94</sup> Although there were posted warnings at the location of the accident, the city had not installed the planned traffic signal.<sup>95</sup> The city defended on the basis that it had sovereign immunity, because "it was not required by law to install a traffic signal, and any failure to install a traffic signal was the result of discretionary action.... The city also argued that sovereign immunity applied because the failure to initially install a traffic signal was the result of discretionary action."<sup>96</sup> The court agreed that the city had sovereign immunity and affirmed the trial court's grant of a summary judgment for the city.<sup>97</sup>

As illustrated by the *Bookman* case, a state legislature may have waived sovereign immunity in regard to some claims but not others against public entities. Moreover, as discussed in the next section, public entities typically have immunity for the exercise of discretion, such as when to install traffic signals, signs, or other traffic control devices.

## B. No General Duty to Install or Provide Highway Signs, Signals, or Pavement Markings

Highway warning signs, traffic lights, or pavement markings are important features of safe roads and highways, as well as bikeways. The courts have held, however, that in the absence of statute, a public entity responsible for highways or bikeways has no general duty to install or provide highway signs, lights, or markings. Numerous cases hold that the failure to provide such highway features is not actionable, particularly if a public entity had discretion regarding what

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of Wayne, 45 A.D. 3d 1337, 1338, 845 N.Y.S.2d 612, 613 (N.Y. App. 4th Dep't 2007) (holding that the defendant submitted evidence that its signs were installed in accordance with the *Manual on Uniform Traffic Control Devices* (MUTCD), that it conducted periodic reviews of traffic volume, that it had not received any written complaints concerning the intersection, and that there had been only one reported accident near the intersection in the 2 years prior to the plaintiff's accident); *Racalbuto v. Redmond*, 46 A.D. 3d 1051, 1052, 847 N.Y.S.2d 283, 285 (N.Y. App. 3d Dep't 2007) (holding that the county had qualified immunity when the county had reviewed the highway plan and placed signs near an intersection that alerted motorists of a curve and the upcoming intersection).

<sup>92</sup> 881 S.W.2d 771 (Tex. Ct. Civ. App. 1994) *writ denied*, (Nov. 3, 1994).

<sup>93</sup> 881 S.W.2d at 772.

<sup>94</sup> *Id.* at 773.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.056(1) & (2) (Vernon 1986) (discretionary powers) and § 101.061(a)(1) (Vernon 1986) (traffic and road-controlled devices)).

<sup>97</sup> *Id.* at 774, 775.

action or response was appropriate.<sup>98</sup> The reason that states have no general obligation to place signs or warnings is that such decisions are policy or planning level in nature and must be made by the legislative or executive branches of the government.<sup>99</sup> Nevertheless, after a decision is made to provide signs, signals, or markings, there is a duty to place and maintain them with reasonable care.<sup>100</sup> Furthermore, a duty may arise to install or provide them at the location of a dangerous condition of which the public entity had actual or constructive notice.<sup>101</sup> When a highway agency must maintain highways or bikeways free of hazards, its duty may include the proper maintenance of directional signs, traffic signals, or stop signs.<sup>102</sup>

Two sections of the California Government Code applicable to the liability of public entities illustrate that there is no general duty to provide certain highway warning or traffic control features or devices. For example, Section 830.4 of the California Government Code provides that

[a] condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

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<sup>98</sup> *French v. Johnson County*, 929 S.W.2d 614, 617 (Tex. App. 1996) (holding in a case involving an accident on a bridge built in 1943 that the county's failure to install guardrails, replace the bridge, or post warnings after the date of the tort claims act did not constitute an act or omission waiving immunity and that the decision not to post warning signs was discretionary); *Urow v. District of Columbia*, 316 F.2d 351 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 826, 84 S. Ct. 69, 11 L. Ed. 2d 59 (1963) (no liability for failure to exercise discretionary legislative powers to control traffic at an intersection).

<sup>99</sup> *Bickner v. Raymond Turnpike*, 2008 SD 27, \*P13, 747 N.W.2d 668, 672 (S.D. 2008) (holding that a town's decision to remove a warning sign and not replace it was discretionary and therefore immune from liability); *Weiss v. N.J. Transit*, 128 N.J. 376, 382, 608 A.2d 254, 257 (1992) (holding that the tort claims act's provision of an explicit grant of immunity for the failure to provide traffic signals prevailed even if there was a cause of action for other inaction, such as a delay in implementing a plan to install a traffic signal at a railroad crossing); *Metier v. Cooper Transport Co.*, 378 N.W.2d 907, 911 (Iowa 1985) (decision whether or not to post a warning sign at a particular highway location "was operational in character"); *Ufnal v. Cattaraugus County*, 93 A.D. 2d 521, 525, 463 N.Y.S.2d 342, 345 (N.Y. App. 4th Dep't 1983) (decision not to erect deer warning signs based on negative evidence tending to show a lack of need at a certain location was a "discretionary governmental decision"), *appeal denied*, 60 N.Y.2d 554 (N.Y. 1983).

<sup>100</sup> *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673, 677-78 (1973).

<sup>101</sup> See discussion, *infra*, in §§ IV.C, V, and VI.

<sup>102</sup> *Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 883 (2002) (construing Iowa Code § 668.10(1) to mean that when a regulatory device has been set up, "the state or municipality may be assigned a percentage of fault for its failure to maintain the device").

Section 830.8 of the California Government Code provides that “[n]either a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code.” However, a public entity is responsible “for an injury proximately caused by” the public entity’s failure to provide “a signal, sign, marking or device (other than one described in § 830.4) that was necessary to warn of a *dangerous condition* which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.”<sup>103</sup>

It may not be sufficient in some cases that a public entity has complied with the *Manual on Uniform Traffic Control Devices* (MUTCD). As one court has held, “the State’s failure to comply with the Manual is evidence of negligence, i.e., breach of duty,” but “compliance with the mandatory provisions of the Manual is not all that is needed for the State to meet its duty and...the State is still bound to exercise ordinary care in selecting the appropriate traffic control device for the circumstances.”<sup>104</sup>

The majority rule appears to be that, unless specifically required by statute, a public entity does not have a general duty with regard to highways or bikeways to install or provide highway or bikeway signs, traffic lights, or markings, because a public entity’s decisions regarding whether to provide them are decisions that are made at the planning or policy level and, thus, are discretionary in nature.

#### Guidance

*Although there may be no general duty to provide signs, signals, guardrails, and other traffic safety features, in most jurisdictions a public entity may be held liable for the failure to install or provide such features or devices after the public entity has actual or constructive notice of a dangerous condition of the highway or bikeway. Furthermore, after a public entity installs or provides such safety features, the public entity usually is held to a duty of maintaining them in good repair such that the highway or bikeway is reasonably safe for its intended use. Of particular importance is that a public entity must comply with any mandatory standards that are applicable to the installation or replacement of signs, traffic control devices, pavement markings, guardrails, or other safety features. A violation of a nonmandatory standard or guideline may be admissible as evidence of whether a public entity was negligent under the circumstances in regard to the condition of a street, highway or bikeway.*

<sup>103</sup> CAL. GOV’T CODE § 830.8 (2009) (emphasis supplied).

<sup>104</sup> Kirkwood v. State, 16 Neb. App. 459, at 483, 748 N.W.2d 83 at 105 (2008) (holding that the State was negligent in failing to comply with the MUTCD in placing stop signs and other warning devices at an intersection when the state failed to have a stop line at the intersection and placed a stop sign outside the driver’s line of vision) (citation omitted) (emphasis supplied).

## C. Whether a Public Entity Had Notice of a Dangerous Condition

A public entity’s duty to correct a dangerous condition<sup>105</sup> or otherwise take appropriate action arises when it acquires notice of the condition.<sup>106</sup> A public entity responsible for highways and bikeways has a duty to post signs warning of a dangerous condition when they are prescribed by law or when the location is inherently dangerous.<sup>107</sup> Not surprisingly, the courts have held that whether there is a duty to provide warning signs, traffic signals, or pavement markings depends on the nature and circumstances of the condition of the road or bikeway. A statutory exemption for discretionary acts ordinarily does not relieve a public entity of liability for failing to warn of a condition known to be dangerous to the traveling public.<sup>108</sup>

Although the duty to take action arises when a public entity has notice of a dangerous condition, actual notice is not always required as constructive notice may be sufficient.<sup>109</sup> A “plaintiff must show that a negligent or wrongful act or omission of a public employee created a dangerous condition, or that the public entity had notice of a dangerous condition a sufficient time prior to

<sup>105</sup> The term “dangerous condition” is defined as “condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” CAL. GOV’T CODE § 830(a).

<sup>106</sup> Diakite v. City of New York, 42 A.D. 3d 338, 339, 840 N.Y.S.2d 33, 34 (N.Y. App. 1st Dep’t 2007) (holding that the city was not liable for failure to inspect an iron fence built in the 1800s and for failure to maintain it when there was no history of similar accidents concerning the fence), *appeal denied*, 9 N.Y.3d 811, 877 N.E.2d 651, 846 N.Y.S.2d 601 (2007); Mickle v. N.Y. State Thruway Auth., 182 Misc. 2d 967, 975, 701 N.Y.S.2d 782, 788–89 (Ct. Cl. 1999) (stating that “prior accidents is only one method by which a claimant may prove notice that a dangerous condition existed and that the defendant had constructive notice of it” as “a claimant may prove that the defect was so obvious and had existed for such a period of time that a defendant should have discovered and corrected it”); Gregorio v. City of New York, 246 A.D. 2d 275, 677 N.Y.S.2d 119, 122 (N.Y. App. 1st Dep’t 1998) (holding that a city is not immune from liability when it had notice that a barrier was defective), *appeal dismissed*, 93 N.Y.2d 917, 713 N.E.2d 414, 691 N.Y.S.2d 380 (1999).

<sup>107</sup> Owen v. Burlington N. & Santa Fe R.R., 153 Wash. 2d 780, 788, 108 P.3d 1220, 1224 (2005).

<sup>108</sup> Snyder v. Curran Twp., 167 Ill. 2d 466, 657 N.E.2d 988 (1995) (discretionary immunity did not insulate township from liability for improper placement of a road sign).

<sup>109</sup> Hiland v. State, 879 N.E.2d 621, 627 (Ind. Ct. App. 2008); Woolen v. State, 256 Neb. 865, 879, 593 N.W.2d 729, 740 (1999) (a governmental entity has a duty to prevent injury where it has “actual or constructive notice of a dangerous condition”). Aetna Cas. & Sur. Co. v. State, 712 So. 2d 216 (La. Ct. App. 1st Cir. 1998); Harkness v. Hall, 684 N.E.2d 1156 (Ind. App. 1997); Templeton v. Hammond, 679 N.E.2d 1368 (Ind. Ct. App. 1997); Burgess v. Harley, 934 S.W.2d 58 (Tenn. Ct. App. 1996), *appeal denied* (Oct. 28, 1996).

the injury to have taken measures to protect against it.”<sup>110</sup> Because public entities are deemed to have knowledge of their own actions, it has been held that they do not have to have received notice of their own faulty design, construction, maintenance, or repair of their highways or bikeways.<sup>111</sup>

A state’s tort claims act legislation may provide in part, for example, that “a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that...the public entity had actual or constructive notice of the dangerous condition...a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”<sup>112</sup>

Thus, it has been held that when there is a dangerous condition of a highway or bikeway, the responsible agency must respond, such as by correcting the condition or providing adequate warning of it.<sup>113</sup> Usually it is a question of fact whether a public entity had actual notice or whether the condition had existed for a sufficient time that the public entity may be charged with notice.<sup>114</sup> Although the period of required notice may be prescribed by statute, in the absence of a statute there is no precise guidance on the required notice that a public entity must have before being held liable for failing to respond to a hazardous condition. It has been held that a 34-hour delay in detecting a large pothole on a major highway was sufficient to charge a public entity with notice of a dangerous condition.<sup>115</sup> In contrast, other cases have held that there was no basis for liability because the highway agency either acquired notice the same day of the accident or had taken action within

a few hours of having received notice of a dangerous condition.<sup>116</sup>

In *Langton v. Town of Westport*,<sup>117</sup> while the plaintiff was riding his bicycle on a public street in Westport, the front wheel of the bicycle fell into a grate located on the street.<sup>118</sup> The town prevailed in the action because there was no evidence that “the defect has existed long enough for the town to be charged with notice of it,”<sup>119</sup> no evidence that the “grate had changed after the date of its installation,”<sup>120</sup> and no “evidence of a negligent continuance by the town of the design defect after the town knew or should have known of it.”<sup>121</sup>

The majority rule in most jurisdictions appears to be that a public entity responsible for highways and bikeways has a duty to provide signs when they are required by law or when they are needed to warn of a dangerous condition of a highway or bikeway. Public entities are deemed to know of a dangerous condition created as a result of their own action.

#### *Guidance*

*Actual notice of a dangerous condition that gives rise to a public entity’s duty to provide an adequate warning under the circumstances may not be required. That is, if a dangerous condition has existed for a sufficient period of time, the length of time depending on the circumstances, notice of the condition may be imputed to the public entity.*

### **D. The Governmental/Proprietary Test Applicable to Municipal Corporations in Some States**

Before the enactment of tort claims acts, the governmental-proprietary distinction was important regarding functions for which a municipal corporation could be held liable for negligence. Typically, municipal corporations could be held liable for negligence in the performance of their proprietary functions, those for which the municipality charges a fee, but not for the performance of their governmental functions. In general, it was held that a public entity’s duties with respect to highways and bikeways are governmental in nature and immune from liability. The governmental-proprietary distinction still may be important in some

<sup>110</sup> *Chowdbury v. City of L.A.*, 38 Cal. App. 4th 1187 at 1194, 45 Cal. Rptr. 2d 657 at 661 (1995) (citing CAL. GOV’T CODE § 835).

<sup>111</sup> *Coakley v. State*, 26 Misc. 2d 431, 435, 211 N.Y.S.2d 658, 663 (1961), *aff’d*, 15 A.D. 2d 721, 222 N.Y.S.2d 1023 (1962); *Morales v. N.Y. State Thruway Auth.*, 47 Misc. 2d 153, 262 N.Y.S.2d 173 (1965).

<sup>112</sup> CAL. GOV’T CODE § 835 (2009).

<sup>113</sup> *Louisville Gas and Elec. Co. v. Roberson*, 212 S.W.3d 107, 109 (Ky. 2006).

In general, government is charged with a duty of ordinary care with respect to highway safety. This duty requires government to keep highways “in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. This includes the duty to erect warning signs and to erect and maintain barriers or guardrails at dangerous places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and others.”

(footnote omitted), *rehearing denied*, 2007 Ky. LEXIS 42 (Ky., Feb. 22, 2007). See also *Colovos v. Dep’t of Transp.*, 205 Mich. App. 524, 517 N.W.2d 803 (Mich. Ct. App. 1994) (holding that the state had no duty to erect signs or warning devices unless these were located on the improved portion of the road), *aff’d*, 450 Mich. 861, 539 N.W.2d 375 (1995), *recons. denied*, 544 N.W.2d 473 (Mich. 1996).

<sup>114</sup> See, e.g., 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 381, at 171–73; See also *Hiland v. State*, 879 N.E.2d 621.

<sup>115</sup> *Gaines v. Long Island State Park Comm’n*, 60 A.D. 2d 724, 725, 401 N.Y.S.2d 315, 317 (N.Y. App. 3d Dep’t 1977).

<sup>116</sup> *Lawson v. Estate of McDonald*, 524 S.W.2d 351 (Tex. Civ. App. 1975), *writ ref’d n.r.e.* (Oct. 8, 1975); *Tromblee v. State*, 52 A.D.2d 666, 381 N.Y.S.2d 707 (N.Y. App. 3d Dep’t 1976). See *Ferris v. County of Suffolk*, 174 A.D. 2d 70, 76, 579 N.Y.S.2d 436, 441 (N.Y. App. 2d Dep’t 1992) (stating that there was “no evidence that the condition, one loose plank out of many, was so patently defective that a town employee must have been put on notice of the potential danger”).

<sup>117</sup> 38 Conn. App. 14, 658 A.2d 602 (Conn. App. 1995).

<sup>118</sup> *Id.* at 15, 658 A.2d at 604.

<sup>119</sup> 38 Conn. App. at 19, 658 A.2d at 606. See also *DiDomizio v. Frankel*, 44 Conn. App. 597, 602, 691 A.2d 594, 597 (Conn. App. 1997) (stating that the plaintiffs failed to introduce sufficient evidence to establish that the defendant had constructive notice).

<sup>120</sup> 38 Conn. App. at 17, 658 A.2d at 605.

<sup>121</sup> *Id.*

jurisdictions that have not enacted tort claims acts applicable to municipalities.

In *Augustine v. City of West Memphis*,<sup>122</sup> the plaintiff was injured while riding her bicycle when city employees were cutting tree limbs, one of which fell and struck her. The plaintiff alleged that the employees were acting in a “proprietary capacity.”<sup>123</sup> The plaintiff alleged that

the defendants (a) failed to have warning devices in the area where the limbs were being cut, (b) failed to warn the plaintiff and other persons of the dangerous activities in and about the truck, (c) cut limbs that would fall in the traveled path of the street, and (d) failed to block off traffic in the area where the tree limbs would fall.<sup>124</sup>

The court agreed with the city that under the state’s former law the city had been “acting in a governmental capacity” at the time of the accident.<sup>125</sup> The court also observed that “the former distinction between governmental and proprietary actions was abolished by Act 165 of 1969, which declared the state’s public policy to be that municipal corporations and other political subdivisions shall be immune from liability in tort.”<sup>126</sup>

In *Hillerby v. Town of Colchester*,<sup>127</sup> the plaintiff was riding his bicycle across a grassy area in the town when a manhole cover that he was crossing collapsed.<sup>128</sup> The trial court “abandoned the established governmental/proprietary distinction in favor of the private-analog test, a test used to determine the liability of the State in tort actions.”<sup>129</sup> The Supreme Court of Vermont, in responding to questions certified to it regarding the issue of the proprietary/governmental distinction in municipal tort liability, held that whether the traditional governmental/proprietary approach should be abrogated was a matter for the legislature to decide.<sup>130</sup> The court stated, however, that the “courts have held municipalities liable only where the negligent act arises out of a duty that is proprietary in nature as opposed to governmental.”<sup>131</sup> The court, furthermore, observed that Vermont is in the minority of states that continue to follow the governmental/proprietary test of municipal liability<sup>132</sup> but stated that the decision whether to abandon or alter the law was a matter for the legislature, not the court, to decide.<sup>133</sup>

In sum, the clear trend is that municipal corporations are subject to tort claims legislation and the principles discussed herein rather than the former govern-

mental-proprietary test of tort liability of municipal corporations.

## SECTION V. IMMUNITY OF PUBLIC ENTITIES FOR THE EXERCISE OF THEIR DISCRETION

### A. The Meaning of the Discretionary Function Exemption

The primary defense to a public entity’s tort liability for negligent design, construction, and maintenance is based on the doctrine now codified in nearly all state tort claims acts: certain actions undertaken by governments are “discretionary” in nature, and, therefore, are immune from liability. Because judgment, choice, or discretion is present in virtually all human activity, the issue becomes one of trying to distinguish between discretionary and nondiscretionary actions within the meaning of the exemption from liability. Although the courts have attempted to provide guidance, they have had difficulty defining what qualifies as discretionary activity.<sup>134</sup>

The state courts tend to follow one of three approaches in construing their own public tort claims acts having a discretionary function exemption. The approaches are derived principally from the United States Supreme Court’s decisions in *Dalehite v. United States*,<sup>135</sup> *Indian Towing Co. v. United States*,<sup>136</sup> *United States v. Varig Air Lines*,<sup>137</sup> and *United States v. Gaubert*,<sup>138</sup> all of which involved claims asserted under the Federal Tort Claims Act (FTCA).

Even if a state tort claims act does not have an exemption for discretionary action, some courts have held that the state and its agencies are still immune for their decisions that are discretionary in nature, as long as the decision-making involves the evaluation of broad policy factors and considerations.<sup>139</sup>

<sup>134</sup> Federal cases are collected in “Claims Based on Construction and Maintenance of Public Property as within Provision of 28 U.S.C. 2680(a) Excepting from Federal Tort Claims Act Claims Involving ‘Discretionary Function or Duty,’” 37 A.L.R. Fed. 537.

<sup>135</sup> 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), *reh’g denied*, 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. Ed. 362, 386, *reh’g denied*, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954), *overruled as stated in* *Flax v. United States*, 847 F. Supp. 1183, 1188 N 5 (D. N.J. 1994).

<sup>136</sup> 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

<sup>137</sup> *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), *reh’g denied*, *United States v. United Scottish Ins. Co.*, 468 U.S. 1226, 105 S. Ct. 26, 82 L. Ed. 2d 919 (1984), *on remand*, *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States*, 744 F.2d 1387 (9th Cir. 1984).

<sup>138</sup> 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

<sup>139</sup> *Miotke v. Spokane*, 101 Wash. 2d 307, 335, 678 P.2d 803, 819 (1984) (stating that in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965), the

<sup>122</sup> 281 Ark. 162, 662 S.W.2d 813 (1984).

<sup>123</sup> *Id.* at 163, 662 S.W.2d at 814.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing ARK. STAT. ANN. § 12-2901 (Repl. 1979)).

<sup>127</sup> 167 Vt. 270, 706 A.2d 446 (1997).

<sup>128</sup> *Id.* at 272, 706 A.2d at 446.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 273, 706 A.2d at 447.

<sup>131</sup> *Id.* at 272, 706 A.2d at 447.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 274, 706 A.2d at 448.

In *Dalehite*, the Supreme Court held that government decisions that are made at a “planning rather than operational level” involve the exercise of discretion within the meaning of the discretionary function exemption and therefore are exempt from liability.<sup>140</sup>

In *Indian Towing*, the Court held that once the government makes a decision at the planning or policy level, the discretion is exhausted and any negligence thereafter in implementing the decision is not protected by the exemption.<sup>141</sup>

In *Varig Air Lines*, the Court rejected the argument that planning-level activities may take place only at the highest levels of government. However, for decisions at the planning level to qualify for the exemption from liability, the decisions had to have been grounded on considerations of “social, economic, and political policy.”<sup>142</sup> Nevertheless, the *Varig* decision reaffirmed *Dalehite*’s planning-operational test.<sup>143</sup>

In 1991, in *United States v. Gaubert*,<sup>144</sup> the Supreme Court held that there is no distinction between planning- and operational-level actions.<sup>145</sup> For example, if a government regulation allows a government employee to exercise discretion, then “the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.”<sup>146</sup> Moreover, the Court held that “it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”<sup>147</sup>

Under *Gaubert*, it is not the status or level of the governmental actor that determines whether the discretionary exemption applies; rather, it is the nature of the conduct or decision-making.

In *Gaubert*, the Court made it clear that the exercise of immune discretion is not confined to the so-called policy or planning level. The *Gaubert* Court expanded the area of discretionary immunity beyond that exercised at the so-called planning level. The Court reviewed its prior precedents in *Dalehite* and *Varig Air-*

*lines* and summarized by category when a federal employee’s actions are discretionary and therefore immune from liability, as well as when the employee’s actions do not involve the exercise of discretion and are not immune.

First, “[u]nder the applicable precedents...if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation....”<sup>148</sup>

Second, “[i]f the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.”<sup>149</sup>

Third, “if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.”<sup>150</sup>

In sum, since the *Gaubert* decision, the test under the FTCA for determining whether a decision is protected by the discretionary function exemption is not the level of the decision-maker but rather the discretionary nature of the decision itself.

## B. The Meaning of the Discretionary Function Exemption in State Tort Claims Acts

As discussed below, it appears that a majority of state courts follow the *Dalehite* approach, some follow the *Indian Towing* approach, and a smaller number of state courts have chosen to follow the *Gaubert* approach in construing a state tort claims act’s discretionary function exemption.<sup>151</sup>

In *Johnson v. State*,<sup>152</sup> a pre-*Gaubert* case, the California Supreme Court pointed out that a distinction between the words “discretionary” and “ministerial”

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court created a narrow exception to governmental immunity from tort liability in instances when officials engage in discretionary acts in accordance with a 4-part inquiry).

<sup>140</sup> 346 U.S. at 42, 73 S. Ct. at 971, 97 L. Ed. 1444.

<sup>141</sup> 350 U.S. at 69, 76 S. Ct. at 126, 100 L. Ed. at 56.

<sup>142</sup> 467 U.S. at 814, 104 S. Ct. at 2765, 81 L. Ed. 2d at 674.

<sup>143</sup> See *Ala. Elec. Coop., Inc. v. United States*, 769 F.2d 1523, 1527–28 (11th Cir. 1985) (stating that “*Varig Airlines* supports the planning/operational distinction developed by the lower courts in cases subsequent to *Dalehite*” and adding that planning level decisions are those that involve “the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy,” whereas operational level decisions are those involving “normal day-by-day operations of the government”).

<sup>144</sup> 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

<sup>145</sup> *Id.* at 324, 111 S. Ct. at 1274, 113 L. Ed. 2d at 347–48.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 324, 111 S. Ct. at 1274, 113 L. Ed. 2d at 348.

<sup>148</sup> *Id.* at 324, 111 S. Ct. at 1274, 113 L. Ed. 2d at 347.

<sup>149</sup> *Id.* (emphasis supplied).

<sup>150</sup> *Id.*

<sup>151</sup> *Johnson v. Dep’t of Transp.*, 2004 UT App 284, \*P22 N 4, 98 P.3d 773, 780 N 4 (Utah App. 2004) (stating that a “decision to allow the lane adjacent to the cutouts to remain open at night was clearly not a discretionary function since the decision was made by a UDOT on-site inspector who acts at the operational level” and following *Trujillo v. Utah Dep’t of Transp.*, 1999 Utah App. 227, 986 P.2d 752, 760 N 2 (Utah 1999) (rejecting the *Gaubert* analysis, holding that the U.S. Supreme Court’s interpretation of the discretionary function exemption in the FTCA was not binding on Utah’s interpretation of its tort claims act, and ruling that the court would continue to follow the planning/operational dichotomy)).

<sup>152</sup> 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968). In *Johnson* the plaintiff sought damages from the State for its failure to give adequate warning of the homicidal tendencies of a 16-year-old youth who the State had placed in a foster home. In holding that the State was not immunized by the above provision of the statute, the court rejected a semantic approach to the applicability of the discretionary function exception.

based on linguistics or lexicography would not work, because virtually all ministerial activity involves the exercise of discretion. The court stated that the purpose of the statutory provision for discretionary immunity was to assure “judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government.”<sup>153</sup> The court held that the statutory provision for discretionary immunity related exclusively to determinations made by a coordinate branch of government that involve basic policy decisions, thus following the decisions in *Dalehite* and *Varig Airlines*.<sup>154</sup>

Although many state courts have not adopted the U.S. Supreme Court’s approach in *Gaubert*,<sup>155</sup> the District of Columbia Court of Appeals follows the *Gaubert* analysis concerning what kind of decision-making is discretionary. For example, in *Aguehoude v. District of Columbia*,<sup>156</sup> involving a claim by a pedestrian struck at an intersection controlled by a traffic signal, the court held that the setting of signal lights was an exercise of discretion. The Court of Appeals, citing prior precedent in the District of Columbia, observed that when “an employee fails to follow an established policy, because the existence of a set policy means that all discretion has been removed from the employee, ...the employee’s actions would...be ministerial.”<sup>157</sup> After “[f]inding that the setting of yellow intervals is a discretionary function,”<sup>158</sup> the court next turned to the question of whether there was a specific or mandatory directive for employees to follow in setting the timing interval.<sup>159</sup> The court, finding none, concluded that the employees were exercising discretion and that any alleged mismeasurement at the intersection by the District’s employees that may

<sup>153</sup> *Id.* at 793, 73 Cal. Rptr. at 360, 447 P.2d at 248 (emphasis in original).

<sup>154</sup> 69 Cal. 2d at 793, 795, 73 Cal. Rptr. at 360, 361, 447 P.2d at 248, 249. *See also* Fortenbacher v. Commonwealth, 72 Mass. App. Ct. 82, 89, 888 N.E.2d 377, 383 (Mass. App. Ct. 2008) (holding that the decision whether and how to erect guardrails was “the quintessential type of discretion for which [the Massachusetts Tort Claims Act] § 10(b)...Act provides immunity”); Willing v. Estate of Benz, 958 So. 2d 1240, 1251 (Miss. App. 2007) (holding that a city’s duty to warn of correct icy conditions involving a highway was the exercise of a discretionary function under the state’s torts claim act), *cert. denied*, 958 So. 2d 1232 (Miss., June 14, 2007).

<sup>155</sup> *Trujillo v. Utah Dep’t of Transp.*, 1999 Ut. App. 227, 986 P.2d 752 (1999); *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 90, 962 P.2d 344, 349 (1998); and *Rick v. State Dep’t of Transp. & Dev.*, 630 So. 2d 1271 (La. 1994), *overruled on other grounds*, *Long v. State*, 916 So. 2d 87, 101–02 (La. 2005).

<sup>156</sup> 666 A.2d 443 (D.C. App. 1995). *See also* Tucci v. District of Columbia, 956 A.2d 684, 691 (D.C. Ct. App. 2008) (stating that the court had previously rejected an “attempt to blur the distinction between discretionary and ministerial functions by ‘isolating each component of a decision’” and citing *Aguehoude*, *supra*.)

<sup>157</sup> 666 A.2d at 450.

<sup>158</sup> 666 A.2d at 451.

<sup>159</sup> *Id.*

have contributed to an improper traffic light setting was irrelevant.<sup>160</sup>

Some state courts continue to apply the planning-operational test of discretion, sometimes without even mentioning the later *Gaubert* case;<sup>161</sup> however, in *Trujillo v. Utah Dep’t of Transportation*,<sup>162</sup> the Supreme Court of Utah expressly declined to embrace the *Gaubert* decision. In *Trujillo*, the court ruled that the transportation department’s formulation of a traffic control plan to use barrels rather than barriers at an accident location was not a policy-level decision.<sup>163</sup> Moreover, the court held that the failures to reduce speed in a construction zone as called for in the construction plan, to investigate accidents, or to consider corrective action in response to notice of a dangerous condition were all operational-level activities.<sup>164</sup> Another court has stated that if the “work involved no marshaling of state resources, no prioritizing of competing needs, no planning, and no exercise of policy-level discretion,” then the activity is likely to be held to be operational in nature.<sup>165</sup> In *Tseu ex rel. Hobbs v. Jeyte*,<sup>166</sup> the court stated that it had never adopted the reasoning in *Gaubert*, and it would be “directly contrary to its previous holdings on the discretionary function exception under Hawaii law to do so.”<sup>167</sup>

#### Guidance

*It is widely held under tort claims acts that public entities are not liable for negligence committed in the exercise of their discretion. Although the rationale of the Supreme Court’s decision in United States v. Gaubert, supra, is more favorable to public entities and allows for immune discretion to be exercised at all levels of a public entity’s decision-making, including at the so-called operational level, the majority of courts appears to adhere to the rationale that the only exercise of discretion that is discretionary and therefore is immune from liability is that discretion that is exercised at the policy or planning level.*

<sup>160</sup> *Id.*

<sup>161</sup> *Taylor-Rice v. State*, 979 P.2d 1086, 1104 (Haw. 1999) (failure to replace a guardrail was operational-level act with no mention of *Gaubert*); *State v. Livengood*, 688 N.E.2d 189, 196 (Ind. App. 1st Dist. 1997) (design and installation of replacement of a portion of a guardrail to comply with a safety standard was operational-level task and not immune); and *Schroeder v. Minnesota*, 1998 Minn. App. LEXIS 1436 (1998) (Unrept.) (decision to patch pavement where it met a bridge was an operational-level activity).

<sup>162</sup> 1999 Ut. App. 227, 986 P.2d 752 (Utah 1999).

<sup>163</sup> *Id.* at \*P33, 986 P.2d at 762.

<sup>164</sup> *Id.* at \*P34, 986 P.2d at 762.

<sup>165</sup> *Defoor v. Evesque*, 694 So. 2d 1302, 1306 (Ala. 1997).

<sup>166</sup> *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 962 P.2d 344 (1998).

<sup>167</sup> *Id.* at 89, 962, P.2d at 348.

### C. The Discretionary Function Exemption and Bikeway Claims Against Public Entities

In regard to bicycle accidents and the effect of the discretionary function exemption, there are cases holding that the exemption applies, or that a trial is required to determine whether the exemption applies, or that the exemption does not apply. Some cases hold that a public entity, if challenged, must be able to prove that it exercised its discretion before making a decision, that the discretion it exercised involved policy considerations, or that the public entity consciously balanced the risks and benefits of the proposed decision.

For example, in *Hanson v. County of Vigo*,<sup>168</sup> a vehicle struck the young plaintiff while she was riding her bicycle in an intersection.<sup>169</sup> The county board had approved a plan for the placement and replacement of signs on county roads; however, the board approved the plan without deliberation.<sup>170</sup> In applying the Indiana Tort Claims Act, in particular the discretionary function exemption, IC–34.4-16.5-3, the court stated that it applied the “‘planning-operational’ standard.”<sup>171</sup> Hanson conceded that Vigo’s decision to place and replace signs at intersections was a discretionary function and therefore immune but argued that the county had been negligent in the implementation of the decision, in particular “for failing to prioritize placement at unmarked intersections prior to replacing signs at intersections which were currently unmarked.”<sup>172</sup> The county failed to introduce evidence “proving that implementation of the plan had been considered by the Board” or that the Board “consciously balance[d] risks and benefits of the Board’s decision.”<sup>173</sup> Rather, “it was the *county engineer* who decided how to implement the Board’s plan...but his *actions did not rise to the level of executive judgments* that should be afforded protection under the governmental immunity doctrine.”<sup>174</sup> The court remanded the case for a “determination of whether the Board engaged in a decision-making process regarding the implementation of the sign plan” and whether “the implementation decision resulted from a conscious balancing of risks and benefits.”<sup>175</sup>

In *Schmitz v. City of Dubuque*,<sup>176</sup> the plaintiff was injured when the front wheel of her bicycle caught the edge of an asphalt overlay on a designated bicycle and

walking trail in Dubuque.<sup>177</sup> The court reversed the trial court’s dismissal of the case on the basis that the city had immunity.<sup>178</sup> The plaintiff alleged that the city was negligent in the design, construction, and maintenance of the trail built in 1973 or 1974.<sup>179</sup> The city had overlaid the deteriorated surface of the trail with another layer of asphalt in 1991; however, the city did not raise the shoulders of the trail, the plaintiff’s principal claim of negligence.<sup>180</sup> Although AASHTO standards for the construction of such trails that discourage construction with a drop-off were not published when the trail was built originally, the AASHTO standards were in effect in 1991 when the asphalt overlay was added.<sup>181</sup>

The issue was whether the city’s action was protected by the discretionary function exemption in the Iowa Code that was applicable to the liability of cities.<sup>182</sup> The court held that the functions alleged to have been performed negligently in regard to the bike trail were entitled to immunity, because they involved “policy formation, as distinguished from the day-to-day activities of persons not engaged in determining the general nature of the Government’s business....”<sup>183</sup> The court observed that “[o]ur cases have held that liability under tort claims acts is the rule and immunity is the exception.”<sup>184</sup> However, “before immunity attaches there must be some form of considered decision, that is, one which balances risk and advantages.”<sup>185</sup> The court held that the city had not met its burden to establish that it had immunity, because “the city produced no evidence that the choice it made with respect to whether the overlay should be done with or without grading of the accompanying shoulders was the sort of decision that the discretionary function immunity intends to protect, *i.e.*, a decision weighing ‘social, economic, or political policies.’”<sup>186</sup> The court remanded the case, without regard to the city’s claim of immunity, for proceedings on the merits of the plaintiff’s claims.<sup>187</sup>

In *Angell v. Hennepin County Regional Rail Authority*,<sup>188</sup> the plaintiff, who veered off a paved public trail onto a dirt path that appeared to be well traveled, was injured when she biked off a loading dock at the end of the dirt path.<sup>189</sup> The court had to determine whether the discretionary function exemption of the Minnesota tort claims act applied to the authority, which was a local

<sup>168</sup> 659 N.E.2d 1123 (Ind. App. 4th Dist. 1996).

<sup>169</sup> *Id.*, 659 N.E.2d at 1125.

<sup>170</sup> *Id.* See also *Madden v. Ind. Dep’t of Transp.*, 832 N.E.2d 1122, 1128 (Ind. App. 3d Dist. 2005) (stating that “nor may we find discretionary function immunity based solely on testimony by a representative of the governmental entity that meetings were held, without written documentation of the meetings”).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1126.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (emphasis supplied) (citation omitted).

<sup>175</sup> *Id.* at 1127.

<sup>176</sup> 682 N.W.2d 70 (Iowa 2004).

<sup>177</sup> *Id.* at 71.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 73 (quoting *Downs v. United States*, 522 F.2d 990, 996 (6th Cir. 1975)).

<sup>184</sup> *Id.* at 74.

<sup>185</sup> *Id.* (citation omitted).

<sup>186</sup> *Id.* at 76 (citation omitted).

<sup>187</sup> *Id.*

<sup>188</sup> 578 N.W.2d 343 (Minn. 1998).

<sup>189</sup> *Id.* at 344.



governmental unit and a political subdivision of the state. The question was whether the authority was exercising discretion or was engaged only in operational activity when it “failed to restrict access to the Hopkins corridor and failed to block off the loading dock or to warn of its presence....”<sup>190</sup> The court held that the record did not show that the authority’s failures were based on “policy decisions involving economic, political, and social factors;”<sup>191</sup> but rather, because the authority’s failures were nothing more “than technical and professional evaluations” (discussed in the opinion), the authority was not entitled to immunity.<sup>192</sup>

In sum, a public entity should have immunity for alleged negligence committed at the planning level under either a *United States v. Dalehite* or a *United States v. Gaubert* type of analysis of the discretionary function exemption of a state’s or locality’s tort claims act.

#### Guidance

*Although a public entity usually is immune for alleged negligence committed in the exercise of its discretion at the policy or planning level, it is clear that some courts require that there be a showing that a public entity, in fact, exercised its discretion. In the Hanson case, supra, the court remanded the case for a determination of whether the public entity’s board had engaged in a decision-making process and consciously balanced the risks and benefits concerning a proposed plan for the placement and replacement of signs on county roads. Another appellate court deciding the issue may not have allowed the public entity a second chance to offer proof that it actually had exercised its discretion. It is suggested that public entities maintain records of their decision-making with respect to bikeways and their safety and condition, so that there will be evidence on the part of the public entity that there was an actual exercise of the entity’s discretion at the time of any decision-making.*

### D. Immunity for Negligent Design Based on a Statutory Exemption for Discretionary Activity

#### D1. Immunity for the Design of Highways and Bikeways

If there is one area of government activity that generally is considered to be immune as a protected exercise of discretion, it is the one of the design of highways and bikeways. Whether pre- or post-*Gaubert*, there are numerous examples of governmental actions that have been held to be discretionary, including the approval of designs and specifications,<sup>193</sup> the decision to adhere to a

former design during reconstruction,<sup>194</sup> and decisions whether to use barriers<sup>195</sup> or how to set speed limits.<sup>196</sup> The public entities that responded to the survey did not report any bikeway claims involving negligent design and thus did not report any instances when they had been held liable for the negligent design of a bikeway. No cases were located in which a public entity had been held liable for the negligent design of a bikeway.

With respect to liability for the negligent design of public improvements, the discretionary function exemption in the FTCA was held to preclude the liability of the United States for a bridge design in *Wright v. United States*.<sup>197</sup> Similarly, in *Summer v. Carpenter*,<sup>198</sup> the Supreme Court of South Carolina held that under South Carolina law, “[a]s for negligent design, the [South Carolina Tort Claims] Act provides absolute governmental immunity from liability for loss resulting from the design of highways and other public ways.”<sup>199</sup> In the *Summer* case, the court held that the department would be immune even if it had been on notice that the design of the intersection was dangerous.<sup>200</sup> Other cases have found that a public entity had design immunity for various reasons.<sup>201</sup> However, design immunity only ap-

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gerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966) (decision by the State not to design its overpasses with wire fences).

<sup>194</sup> *Richardson v. State*, Dep’t of Roads, 200 Neb. 225, 263 N.W.2d 442 (1978), *supp. op.*, 200 Neb. 781, 265 N.W.2d 457 (1978). *See also* *Mareh v. State*, 241 Neb. 496, 518, 489 N.W.2d 298, 314 (1992) (holding that design decisions are discretionary but that the “failure to warn would be actionable, as it embodies no discretionary functions, and the doctrine of state immunity does not apply”).

<sup>195</sup> *Alvarez v. State*, 79 Cal. App. 4th 720, 738–39, 95 Cal. Rptr. 2d 719, 732–33 (Cal. App. 5th Dist. 1999) (design immunity not lost because of an absent barrier, although approved for eventual installation because of higher traffic volume) and *Higgins v. State*, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459 (1997) (upheld immunity for a barrier because it was a design decision).

<sup>196</sup> *Fuller v. Dep’t of Transp.*, 89 Cal. App. 4th 1109, 107 Cal. Rptr. 2d 823 (Cal. App. 4th Dist. 2001), *review denied*, 2001 Cal. LEXIS 6287 (Cal. Sept. 12, 2001).

<sup>197</sup> 568 F.2d 153, 158 (10th Cir. 1977) (stating that the government “was engaged in a ‘discretionary function’ when it determined to aid and assist the State of Utah in the construction of the bridge and approach roads....”), *cert. denied*, 439 U.S. 824, 99 S. Ct. 94, 58 L. Ed. 2d 117 (1978).

<sup>198</sup> 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997), *reh’g denied* (Oct. 21, 1997).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1267, 78 Cal. Rptr. 3d 372, 393 (Cal. App. 4th Dist. 2008) (holding that with respect to the city’s placement of a luminaire too close to the roadway, summary judgment for the city was proper as the evidence established that the city had design immunity as a matter of law), *modified and rehearing denied*, 2008 Cal. App. LEXIS 995 (Cal. App. 4th Dist. July 7, 2008); *Florida Dep’t of Transp. v. Allen*, 768 So. 2d 496, 497 (Fla. 4th DCA 2000) (holding that denial of defendant’s motion for a summary judgment was error because before the government’s

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<sup>190</sup> *Id.* at 347.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 348.

<sup>193</sup> *Delgadillo v. Elledge*, 337 F. Supp. 827 (E.D. Ark. 1972) (approval of designs and specifications was discretionary and, therefore, immune); *Hughes v. County of Burlington*, 99 N.J. Super. 405, 240 A.2d 177 (1968) (decision to omit emergency shoulders), *cert. denied*, 51 N.J. 575, 242 A.2d 379 (1968); *Fitz-*

plies to “a design-caused” accident. Design immunity does not immunize decisions that were not made; “the injury-producing feature must have been a part of the plan approved by the governmental entity” for design immunity to be applicable.<sup>202</sup>

Only those aspects of design activity that involve broad policy considerations come within the ambit of the discretionary function exemption.<sup>203</sup> The Supreme Court of Washington has stated that discretionary immunity is “an extremely limited exception”<sup>204</sup> to the general withdrawal of state tort immunity by the legislature.<sup>205</sup> The court identified decisions that involve broad policy considerations that qualify for discretionary immunity, for example, the “decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, [and] the number of lanes....”<sup>206</sup> However, for a public entity to be immune, it must show “that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering practices and whatever else was appropriate.”<sup>207</sup> There are cases, moreover, in which the courts have held that public entities could not claim immunity because there was inadequate study of a plan or design or

because the approval of a plan or design was arbitrary or unreasonable.<sup>208</sup>

In sum, under either a *United States v. Dalehite* or a *United States v. Gaubert* type of analysis, the majority view is that the planning and designing of highways and bikeways come within the meaning of the discretionary function exemption of tort claims acts for which a public entity subject to the act has immunity for alleged negligence.

#### Guidance

As explained in the next sections, although alleged negligence in the planning and designing of highways and bikeways may be protected from liability as an exercise of discretion, there are still some exceptions to immunity of which a public entity should be aware.

### D2. Effect of Known Dangerous Conditions on Design Immunity

Although design immunity is recognized generally, some courts have held that there is an exception to design immunity if the public entity had notice<sup>209</sup> of a dangerous condition of a public improvement because of its design and failed to take appropriate action.<sup>210</sup> In such a case, the court may hold that the public entity had a duty to correct the dangerous condition or to give adequate notice of it to the traveling public.<sup>211</sup>

However, a state’s statute may exclude a public entity’s liability for inadequate design as illustrated by a Colorado case, *Swieckowski v. City of Fort Collins*, in-

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sovereign immunity is waived, “there must be a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap,” which the intersection in question was not), *review denied*, 789 So. 2d 343 (Fla. 2001); *Higgins v. State*, 54 Cal. App. 4th 177, 187–88, 62 Cal. Rptr. 2d 459, 465–66 (Cal. App. 4th Dist. 1997) (evidence established that the absence of a median barrier was a design choice made by the State and that there were no “changed circumstances” to defeat the State’s immunity); *Shand Mining, Inc. v. Clay County Bd. of Comm’rs*, 671 N.E.2d 477, 480 (Ind. App. 1st Dist. 1996) (holding that the county was entitled to immunity under a statutory provision dealing with a loss caused by the design of a highway if the loss occurs at least 20 years after the highway was designed when there was no evidence that the county had altered or redesigned the highway since then), *reh’g denied* (Feb. 13, 1997); and *Cygler v. Presjack*, 667 So. 2d 458, 461 (Fla. 4th DCA 1996) (affirming a summary judgment for the department and holding that the government was not liable for failing to provide a traffic regulating or separating device or barrier).

<sup>202</sup> *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940–41, 67 Cal. Rptr. 2d 454, 459 (2d Dist. 1997).

<sup>203</sup> *Breed v. Shaner*, 57 Haw. 656, 668, 562 P.2d 436, 443 (1977); *Stewart v. State*, 92 Wash. 2d 285, 597 P.2d 101 (1979) (involving alleged defective lighting and improper design of a bridge), *overruled in part on other grounds*, *Crossen v. Skagit County*, 100 Wash. 2d 355, 669 P.2d 1244 (1983).

<sup>204</sup> *Stewart v. State*, 92 Wash. 2d at 293, 597 P.2d at 106. See also *Ruff v. County of King*, 125 Wash. 2d 697, 887 P.2d 886 (1995) (reinstating a trial court’s grant of summary judgment in favor of the county).

<sup>205</sup> WASH. REV. CODE ANN. § 4.92.090.

<sup>206</sup> *Stewart v. State*, 92 Wash. 2d at 294, 597 P.2d at 106.

<sup>207</sup> *Id.*

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<sup>208</sup> *Romeo v. New York*, 1997 N.Y. Misc. LEXIS 576, at \*9 (N.Y. Ct. Cl. 1997) (Unrept.) (holding that the State failed to conduct an adequate study of an intersection); *but see Redcross v. State*, 241 A.D. 2d 787, 789–90, 660 N.Y.S.2d 211, 213–14 (N.Y. App. 3d Dep’t 1997) (holding that the placement of a pedestrian control button was not plainly inadequate or lacking a reasonable basis), *appeal denied*, 91 N.Y.2d 801, 669 N.E.2d 533, 689 N.E.2d 533, 666 N.Y.S.2d 563 (1997).

<sup>209</sup> If a dangerous condition was not of the State’s own making, it must have had actual or constructive notice and a reasonable opportunity to take remedial action with respect thereto; however, it has been held that when the dangerous condition was of the State’s own making, notice was not required. *Johnson v. State*, 636 P.2d 47, 52 (Alaska 1981).

<sup>210</sup> *Thompson v. Coates*, 694 So. 2d 599 (La. App. 2d Cir. 1997), *cert. denied*, 701 So. 2d 987 (La. 1997) (stating that the design of a highway causing hydroplaning may result in a dangerous condition). *Compare Compton v. City of Santee*, 12 Cal. App. 4th 591, 600, 15 Cal. Rptr. 2d 660, 665 (Cal. App. 4th Dist. 1993) (holding that the city that was entitled to design immunity for a bridge also could not be held liable for failing to warn that the design was dangerous) and *Alvarez v. State*, 79 Cal. App. 4th 720, 738, 95 Cal. Rptr. 2d 719, 732 (Cal. App. 5th Dist. 1999) (affirming a grant of a summary judgment for the State in a case involving the plaintiff’s claim that the absence of a median barrier constituted a dangerous condition).

<sup>211</sup> *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1086 (Fla. 1982); see also *Clarke v. Fla. Dep’t of Transp.*, 506 So. 2d 24 (Fla. 1st DCA 1987); *Greene v. State, Dep’t of Transp.*, 465 So. 2d 560 (Fla. 1st DCA 1985); and *State Dep’t of Transp. v. Brown*, 497 So. 2d 678 (Fla. 4th DCA 1986), *review denied*, 504 So. 2d 766 (Fla. 1987).

volving a bicycle accident but not on a bikeway.<sup>212</sup> The 15-year-old plaintiff, while riding his bicycle at night without a headlight against the flow of traffic on a newly widened section of a city road, tumbled into a ditch perpendicular to the road.<sup>213</sup> The ditch was located on private property at the boundary of the improved section of the road,<sup>214</sup> but there were no warnings or barriers that indicated the presence of the ditch.<sup>215</sup> Colorado's Governmental Immunity Act (GIA)<sup>216</sup>

provide[d] that a person injured because of the dangerous condition of a public roadway may not recover against the governmental agency that owns the roadway when the cause of the dangerous condition is not due to negligent maintenance or construction by the governmental agency. It also prohibits recovery when the danger to the public posed by the condition is due solely to inadequate design.<sup>217</sup>

The court held that the city was immune under the GIA.<sup>218</sup> First, the failure to "maintain" means only "a failure to restore a roadway to the state in which it was originally constructed."<sup>219</sup> Accordingly "[b]ecause the roadway remained unchanged, the City did not repair the roadway, and is immune from any claims of negligence for allowing the condition to exist."<sup>220</sup> Second, the city was immune under the GIA to claims for inadequate design, and "the danger posed by the roadway's abrupt transition at the ditch was attributable solely to design."<sup>221</sup> That is, the ditch was a physical feature that was part of the design of the improved roadway.<sup>222</sup> Although the court was critical of the city's failure to prevent a bicycle accident that "was readily predictable and could have been easily avoided," the city, nevertheless, had immunity under the GIA, even if the city were negligent in failing to consider the physical features in the design of the improved roadway.<sup>223</sup> The GIA also "preclude[d] liability for a public entity's failure to post signs on a public highway."<sup>224</sup> In sum, the court held that the city had immunity.<sup>225</sup>

<sup>212</sup> 934 P.2d 1380 (Colo. 1997).

<sup>213</sup> *Id.* at 1382.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1383.

<sup>216</sup> 10A COLO. REV. STAT. §§ 24-10-101-120 (1988).

<sup>217</sup> 934 P.2d at 1382.

<sup>218</sup> 10A COLO. REV. STAT. § 24-10-103(1).

<sup>219</sup> 934 P.2d at 1385.

<sup>220</sup> *Id.* at 1386.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1387.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>225</sup> See also *Estate of Grant v. State*, 181 P.3d 1202, 1207 (Colo. Ct. App. 2008) (stating that "[i]f the state undertakes an upgrade and follows a certain design, any inadequacies that may result from that design do not waive immunity simply because there previously may have been a safer design available"); *Medina v. State*, 35 P.3d 443, 448 (Colo. 2001) (holding

### D3. Design Immunity Statutes

In addition to a discretionary function exemption in their tort claims acts, a few states have a statutory provision granting immunity specifically for claims arising out of an approved plan or design of a public improvement. In California, for example, a public entity is immune from liability for an injury caused by the plan or design of a public project that was approved in advance by a public body or employee exercising discretionary authority to give approval if there were any substantial evidence upon which a reasonable employee or public body could have approved the plan or design.<sup>226</sup> For a public entity to have design immunity, it must establish that there was a causal relationship between the plan or design and the accident; that there was discretionary approval of the plan or design prior to construction; and that there was substantial evidence supporting the reasonableness of the adoption of the plan or design.<sup>227</sup> As for approval, it has been held that a detailed plan drawn up by a competent engineering firm and approved by the city engineer in the exercise of his discretionary authority is "persuasive evidence" of the element of prior approval.<sup>228</sup> Although the California statute invites the court to consider whether approval of the plan or design by the public body was reasonable, the New Jersey design immunity statute simply requires approval by one exercising discretionary authority to give such approval.<sup>229</sup>

Even in states having a design immunity statute, the statute may not provide necessarily for immunity in every situation involving an allegedly defectively designed project. It has been held that there may be an exception to design immunity if a public improvement in actual use has a design feature that was not approved in the overall plan or design.<sup>230</sup> Second, a state

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that in Colorado it is the development of a dangerous condition of a public highway, subsequent to the initial design and construction of the highway, that creates a duty on the part of the state to return the road to "the same general state of being, repair, or efficiency as initially constructed" (internal quotation marks omitted) (citation omitted)).

<sup>226</sup> CAL. GOV'T CODE § 830.6.

<sup>227</sup> *Cornette v. Dep't of Transp.*, 26 Cal. 4th 63, 66, 26 P.3d 332, 334 (Cal. 2001); *Higgins v. State*, 54 Cal. App. 4th 177, 184, 62 Cal. Rptr. 2d 459, 464 (Cal. App. 4th Dist. 1997).

<sup>228</sup> *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940, 67 Cal. Rptr. 2d 454, 459 (Cal. App. 2d Dist. 1997).

<sup>229</sup> N.J. STAT. ANN., tit. 59 § 4-6 (2009), stating:

Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

<sup>230</sup> In *Cameron v. State*, 7 Cal. 3d 318, 102 Cal. Rptr. 305, 326, 497 P.2d 777, 782 (Cal. 1972), the design plans contained no specification of the uneven super-elevation as the highway

may have a duty to improve or change an existing highway or bikeway when actual use or changed circumstances indicate later that the design is no longer satisfactory. Under the California design immunity statute, the state has a reasonable time within which to take action after having notice of such a dangerous condition.<sup>231</sup>

In *Juge v. County of Sacramento*,<sup>232</sup> the plaintiff alleged that he was injured when he lost control of his bicycle while rounding a curve on the county's negligently designed bike trail.<sup>233</sup> The county allegedly failed to use California's design criteria and uniform specifications as required by the California Bikeways Act.<sup>234</sup> However, the California Bikeways Act was not in effect when the bicycle trail was designed.<sup>235</sup> Although the opinion focuses almost exclusively on motion and summary judgment practice, the court affirmed the trial court's dismissal of the case on summary judgment, first, because the design of the bikeway was protected by design immunity under California Government Code Section 830.6 and was not subject to the statutory trap exception in Section 830.8.<sup>236</sup> Second, in doing so, the appellate court agreed with the trial court's ruling that "[t]he defendant negated an essential element of each theory of the plaintiff's claim, namely causation."<sup>237</sup>

#### Guidance

*A public entity ordinarily has immunity regarding the plan or design of bikeways or other public improvements because of a discretionary function exemption in a tort claims act, or in a few states by virtue of a specific design immunity statute, either or both of which may be applicable. However, depending on the jurisdiction and the circumstances, a public entity's immunity is not necessarily ironclad. In some jurisdictions, regardless of whether there is also a design immunity statute, a public entity may fail to have immunity if a plan or design that is the proximate cause of a bikeway-accident was not duly reviewed and approved by the governmental body having responsibility to review and approve such plans or designs. Furthermore, in some states there may not be immunity for a public entity that had notice of*

was actually constructed; "[t]herefore such super-elevation as was constructed did not result from the design or plan introduced into evidence and there was no basis for concluding that any liability for injuries caused by this uneven super-elevation was immunized by [Cal. Gov't Code] section 830.6."

<sup>231</sup> CAL. GOV'T CODE § 830.6 (2009) (stating in part that "the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work.").

<sup>232</sup> 12 Cal. App. 4th 59, 15 Cal. Rptr. 2d 598 (Cal. App. 3d Dist. 1993).

<sup>233</sup> *Id.* at 62, 15 Cal. Rptr. 2d at 600.

<sup>234</sup> *Id.* at 63, 15 Cal. Rptr. 2d at 600 (citing *Streets & Highway Code* §§ 2374–76).

<sup>235</sup> *Id.* at 63, 15 Cal. Rptr. 2d at 601.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 64, 15 Cal. Rptr. 2d at 601 (internal quotation marks omitted).

*and failed to respond appropriately to a design feature that resulted in a dangerous condition. Similarly, in some jurisdictions a public entity will not have immunity if it becomes aware of a defect in the plan or design as a result of changed circumstances and fails to take appropriate action. Hence, notwithstanding the general rule that a public entity has immunity for the planning and designing of highways and bikeways, a public agency should remain vigilant and be cognizant of the rules on plan or design immunity in its jurisdiction.*

## E. Application of the Discretionary Exemption to the Maintenance of Bikeways

It is not possible simply to categorize decisions involving construction or maintenance activities as purely operational in character and, therefore, not worthy of protection under the discretionary function exemption. The mere labeling of an activity as being either a design or a maintenance function has been rejected as an unsatisfactory test to determine whether an activity is immune from liability for negligence under the discretionary function exception.<sup>238</sup>

In states in which the courts follow the U.S. Supreme Court's interpretation in *Gaubert, supra*, of the FTCA's discretionary function exception, a state's employees may make decisions on a day-to-day basis at the so-called operational level that still may come within the protection of the discretionary function exception. However, it appears that a majority of state courts continue to follow the planning-operational dichotomy in *Dalehite, supra*, pursuant to which only discretion exercised at the planning level is likely to be immune from liability.<sup>239</sup> For example, in *State v. Abbott*,<sup>240</sup> the Supreme Court of Alaska stated that day-to-day "house-

<sup>238</sup> *Day v. City of Canby*, 143 Or. App. 341, 349, 922 P.2d 1269, 1274 (Or. Ct. App. 1996) (stating that "[i]n some cases, a determination of whether immunity applies is not possible until it is known how the particular decision was made" but that "[i]n other cases, a mere description of the decision in question will make it clear that governmental discretion was necessarily involved"); *Little v. Wimmer*, 303 Or. 580, 588, 739 P.2d 564, 569 (Or. 1987) (evidence of how the decision was made is necessary to establish the State's immunity); *Stevenson v. State Dep't of Transp.*, 290 Or. 3, 619 P.2d 247, 654 (Or. 1980) (reinstating a verdict for the plaintiff without regard to whether a dangerous condition was the result of a faulty design or of negligent maintenance as there was nothing "in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion").

<sup>239</sup> *See, e.g., Trujillo v. Utah Dep't of Transp.*, 1999 Utah App. 227, 986 P.2d 752 (1999); *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 962 P.2d 344 (1998); and *Rick v. State Dep't of Transp. & Dev.*, 630 So. 2d 1271 (La. 1994).

<sup>240</sup> 498 P.2d 712 (Alaska 1972). *See also Dep't of Transp. & Pub. Facilities v. Sanders*, 944 P.2d 453, 456 (Alaska 1997) (stating that the court identifies "'discretionary' acts or functions by examining whether the act or function can be described as 'planning' or 'operational,'" that a "planning decision is one that involves policy formulation," whereas "an operational decision involves policy execution or implementation").

keeping” functions (ministerial duties) are generally not discretionary.<sup>241</sup> However, since the *Gaubert* case, in some states so-called housekeeping functions, presumably meaning those performed at the operational level, nevertheless, may be protected from liability by the discretionary function exception.

In any case, the well-settled rule under both pre-*Gaubert* and post-*Gaubert* decisions appears to be that when a public entity has knowledge of a dangerous or hazardous condition, the public entity has a duty to correct the defective condition or to give adequate warning of it.<sup>242</sup> The discretionary function exception has not protected a public entity from liability for a failure to respond to a dangerous or hazardous condition.<sup>243</sup> A state’s tort claims act and judicial precedents must be reviewed to determine whether the state has immunized public entities for negligence in the performance of certain activities that generally are regarded as coming within the maintenance category.

The majority rule, thus, is that maintenance ordinarily is regarded by the courts applying a *United States v. Dalehite* type of analysis as operational-level activity that is not immune from liability by virtue of a discretionary function exemption in a tort claims act. Even under a *United States v. Gaubert* type of analysis, a public entity generally would not be protected from liability under a discretionary function exemption if the public entity violates a mandatory policy or standard applicable to a bikeway.

#### Guidance

*Some courts adhering to the planning-operational level dichotomy announced in United States v. Dalehite also state that when construing their state’s tort claims act they look to or follow the federal courts’ interpretation of the discretionary function exemption in the FTCA. If a maintenance policy adopted by a public entity allows for the exercise of discretion in the performance of maintenance tasks, such as the setting of priorities or allocation of personnel or resources, the public entity may want to research whether the involved state uses the Gaubert or some other test, and whether the discretionary function exemption also immunizes action taken pursuant to maintenance-level policies that require or allow the exercise of discretion.*

<sup>241</sup> 498 P.2d at 720.

<sup>242</sup> See discussion, *supra*, in §§ IV.C, V, and VI.

<sup>243</sup> See *Symmonds v. Chicago, M., S.P. & P.R. Co.*, 242 N.W.2d 262 (Iowa 1976) (holding that the existence of a hazardous highway condition alone was sufficient to give rise to the public agency’s duty to provide adequate warning). Cases holding that a public entity’s State’s failure to provide warning signs at a given location did not involve the exercise of discretion include *Metier v. Cooper Transport Co.*, 378 N.W.2d 907, 910–11 (Iowa 1985); *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972) and *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976). *But see Seiber v. State*, 211 N.W.2d 698 (Iowa 1973) (holding that a policy determination not to erect signs along state highways warning of deer involved the exercise of protected discretion).

## SECTION VI. ALLEGED NEGLIGENCE OF PUBLIC ENTITIES THAT MAY OR MAY NOT RESULT IN LIABILITY FOR BIKEWAY ACCIDENTS

### A. Warning Signs

Although a public entity is not compelled to place warning signs, for example, at every curve along a highway or bikeway, generally it must provide them at “dangerous places” or unusual places to enable users exercising ordinary care and prudence to avoid injury to themselves and others.<sup>244</sup> As one court has stated, a public entity is not “responsible for all injuries resulting from any risk posed by the roadway or its appurtenances, only those caused by an unreasonable risk of harm to others.”<sup>245</sup> Thus, under a state’s tort claims act, a public entity may have immunity as long as the signal, sign, marking, or device was not necessary to warn of a dangerous condition that would not have been reasonably apparent to and would not have been anticipated by a person exercising due care.<sup>246</sup> Of course, before the failure to post a warning will result in liability, it must be shown that the absence of a warning was the proximate cause of the accident.<sup>247</sup>

In some jurisdictions, however, the courts have held that whether a public entity is protected from liability by the discretionary function exemption decision must be decided on a case-by-case basis.<sup>248</sup>

<sup>244</sup> *Hensley v. Jackson County*, 227 S.W.3d 491 (Mo. 2007) (negligent maintenance or failure to repair a downed stop sign as constituting a dangerous condition); *Norman v. N.C. Dep’t of Transp.*, 161 N.C. App. 211, 218, 588 S.E.2d 42, 48 (N.C. Ct. App. 2003), *review dismissed*, 358 N.C. 235, 595 S.E.2d 153 (2004), *review denied*, 358 N.C. 235, 595 S.E.2d 153 (2004), *cert. denied*, 358 N.C. 545, 599 S.E.2d 404 (2004), *appeal after remand*, 2008 N.C. App. LEXIS 814 (N.C. Ct. App. May 6, 2008); *Commonwealth v. Babbitt*, 172 S.W.3d 786, 794 (2005) (holding that the State had “no duty to provide warning signs, guardrails, or barriers when an unusual or dangerous condition does not exist,” nor had a “duty to erect guardrails or barriers of sufficient strength to withstand any degree of force”).

<sup>245</sup> *Lee v. State ex rel. Dep’t of Transp. & Dev.*, 701 So. 2d 676, 678 (La. 1997) (stating that “[i]t is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public”).

<sup>246</sup> See, e.g., CAL. GOV’T CODE § 830.8.

<sup>247</sup> *Cianciola v. State*, 38 A.D. 3d 1296, 1297, 834 N.Y.S.2d 755, 756 (N.Y. App. 4th 2007); *Harkness v. Hall*, 684 N.E.2d 1156 (Ind. Ct. App. 1997) (holding that the failure of a county to maintain and sign a highway was the proximate cause of the accident); *Kennedy v. Ohio Dep’t of Transp.*, 63 Ohio Misc. 2d 328, 331, 629 N.E.2d 1101, 1103 (Ct. Cl. 1992) (holding that the transportation department established that the road’s traffic control devices conformed to the Ohio MUTCD and that the decedent, who was intoxicated, drove past three separate barricades closing the area where a machine was parked across the roadway).

<sup>248</sup> *Lee v. State*, 701 So. 2d at 679 (stating that “[i]n all situations, the decision to erect a warning sign is discretionary on the part of DOTD”).

Immunity may be established by government defendants who can show that the challenged decision was discretionary because it resulted from a policy oriented decision-making process. If the counties engaged in this decision-making process, the courts may not judge the wisdom of their decisions. That judgment is left to the political process.

The defendants here seek to establish the defense of immunity. Each bears the burden to show that a policy decision, consciously balancing risks and benefits, took place. Neither defendant county presented evidence to show that its decision regarding the warning signs was the result of such a process.<sup>249</sup>

As for warning signs and bicycle accidents, in jurisdictions that strictly follow the planning-operational dichotomy, a public entity's immunity may be limited to its initial decision to build or designate a bikeway or to place a sign on a bikeway. Although the bicycle accident occurred on a public road in *Johnson v. Alaska*,<sup>250</sup> the plaintiff was severely injured when she approached a railroad crossing and the front wheel of her bicycle "caught" in the tracks, "pitching her over the front of her bicycle."<sup>251</sup> Warning signs were in place at the time of the accident,<sup>252</sup> but the plaintiff alleged that the city was "negligent in the design, maintenance and 'signing' of the railroad crossing which caused her accident."<sup>253</sup> An issue on appeal was whether the State had discretionary function immunity under the Alaska Tort Claims Act.<sup>254</sup>

In remanding the case, the Supreme Court of Alaska reiterated that it followed the "planning-operational level test to determine whether a particular governmental function was within the ambit of the discretionary function exemption."<sup>255</sup> The court held that

[t]he decision of whether to have built the road or crossing was a planning decision involving a basic policy decision.... However, once the state made the decision to construct the road and crossing, the discretionary function immunity did not protect it from possible negligence liability in the operational carrying out of the basic policy-planning decision to build.<sup>256</sup>

The court noted that "there is no blanket design immunity in Alaska."<sup>257</sup> Thus, the State did not have immunity, because "the design decision made by the state in applying the reconstruction plans of the road and crossing were operational decisions...."<sup>258</sup> Likewise, "the decision to sign [was] operational and hence not im-

mune."<sup>259</sup> It should be noted that a court following the *Gaubert* approach could have decided the case differently by concluding that discretion may be exercised also at the so-called operational level.

## B. Traffic Control Devices

Although there is a split of authority regarding whether a public entity is liable for failure to erect traffic signals or other traffic control devices,<sup>260</sup> it appears that in most jurisdictions a public entity has immunity for the initial decision regarding whether to install them.<sup>261</sup> Cases have held that the state's decision-making concerning the providing or placing of such devices is within the sound discretion of the responsible public entity and is protected by the discretionary function exception.<sup>262</sup>

<sup>259</sup> *Id.* at 66. See also *Guerrero v. Alaska Hous. Fin. Corp.*, 123 P.3d 966, 981 (Alaska 2005) (stating that Alaska cases "have placed certain kinds of government actions on the operational side of the operational/planning balance," such as highway maintenance, the painting of lane markings on highways, and the posting of highway signs).

<sup>260</sup> Annotation, *Highways: Governmental Duty to Provide Curve Warnings or Markings*, 57 A.L.R. 4th 342, §§ 4, 5(a), (b).

<sup>261</sup> *Boub v. Township of Wayne*, 183 Ill. 2d 520, 536, 702 N.E.2d 535, 543 (1998) (stating that "[o]ur cases have found immunity under section 3-104 of the Tort Immunity Act...for the initial failure to provide specific warning devices"); see also *Weiss v. N.J. Transit*, 128 N.J. 376, 608 A.2d 254, 257 (1992) (holding that "the explicit grant of immunity for failure to provide traffic signals under N.J.S.A. 59:4-5 'will prevail over the liability provisions'" of the tort claims act in a case in which the plaintiff alleged that the public authorities were independently negligent in delaying the implementation of a plan to install a traffic signal at a railroad crossing) (citation omitted)). See *Pandya v. State, Dep't of Transp.*, 375 N.J. Super. 353, 370, 867 A.2d 1236, 1245 (2005) (stating that the court agreed with the plaintiffs that "the lane markings at issue here do not fall within the immunity of N.J.S.A. 59:4-5, because the issue here involved the State's action in affirmatively creating two allegedly dangerous lanes").

<sup>262</sup> *Kohl v. City of Phoenix*, 215 Ariz. 291, 295, 160 P.3d 170, 174 (Ariz. 2007) (holding that the city had absolute immunity in a wrongful death action involving a bicyclist when the city made a decision to use computer software to rank intersections requiring traffic signals and to establish other criteria); *City of Grapevine v. Sipes*, 195 S.W.3d 689 (Tex. 2006) (holding that the city had immunity after it decided to install a traffic signal and after a reasonable period of time still failed to do so); *McDuffie v. Roscoe*, 679 So. 2d 641, 645 (Ala. 1996) (stating that the court could "not agree that posting warning signs was a ministerial function"); *French v. Johnson County*, 929 S.W.2d 614, 617 (Tex. App. 1996) (stating that the decisions not to install guardrails, replace a bridge, or post warning signs were discretionary decisions and that the tort claims act did not waive governmental immunity for such decisions). *But see Jacobs v. Board of Comm'rs*, 652 N.E.2d 94, 100 (Ind. App. 1995) (reversing the grant of a summary judgment for the county and holding that the county failed to establish that it had engaged in a systematic process to determine when and where to place warning signs).

<sup>249</sup> *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 47-48 (Ind. 1988).

<sup>250</sup> 636 P.2d 47 (Alaska 1981).

<sup>251</sup> *Id.* at 50.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 63 (citing ALASKA STAT. 09.50.-250).

<sup>255</sup> *Id.* at 64.

<sup>256</sup> *Id.* at 65 (citations omitted).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

The issue of the discretionary function exemption and traffic control devices is relevant to potential claims against public entities for bikeway accidents. In *Bjorkquist v. City of Robbinsdale*,<sup>263</sup> a bicyclist, who was struck by an automobile in an intersection, claimed that the timing of the clearance interval between a change of traffic lights from red to green was unduly brief and that the improper timing of the light change was the proximate cause of the accident.<sup>264</sup> The plaintiff asserted that the timing of the change of the lights was a “ministerial” decision made at the operational level and, therefore, was not immune from judicial review.<sup>265</sup> The court noted that there was no history of accidents or of “unusually heavy bicycle traffic at the intersection.”<sup>266</sup>

The court held that “[t]here is no obligation to time the lights in a particular way. Rather, that decision is arrived at after weighing competing interests.”<sup>267</sup> Without explicitly saying so, the court rejected the plaintiff’s contention that “the lights at such intersections [as these] should be timed in reference to bicycles.”<sup>268</sup> The decision regarding the length of the clearance interval of the lights was part of the planning process and as such was a discretionary decision protected by the discretionary function exemption.<sup>269</sup>

As discussed elsewhere, however, it appears that in most jurisdictions a public entity may not be immune from liability if it has failed to respond to a known dangerous condition.<sup>270</sup> Moreover, it has been held that after

<sup>263</sup> 352 N.W.2d 817 (Minn. Ct. App. 1984). In *Bjorkquist* the court noted that “[t]ort immunity for municipalities was abolished by statute in 1963 subject to [a] few exceptions.” *Id.* at 818. See also *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996) (holding that the city’s determination as to the timing of traffic control signals was discretionary).

<sup>264</sup> *Id.*, 352 N.W.2d at 818. The plaintiff conceded that the decision whether to install a traffic control device at an intersection was discretionary in nature and was exempt from liability under the discretionary function exception of the Minnesota Tort Claims Act.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 819.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 818.

<sup>269</sup> *Id.* (citing MINN. STAT. § 466.03(6) (1982)).

<sup>270</sup> *Nawrocki v. Macomb County Road Comm’n*, 463 Mich. 143, at 180, 615 N.W.2d 702 at 721 (holding that the state or county road commissions have no duty to install, maintain, repair, or improve traffic control devices, including traffic signs, and that their liability is limited to the repair of dangerous or defective conditions within the actual roadway); *Starr v. Veneziano*, 560 Pa. 650, 659, 747 A.2d 867, 873 (2000) (stating that no evidence was presented that a traffic control device would have prevented the accident); *Harkness v. Hall*, 684 N.E.2d 1156, 1160 (Ind. App. 4th Dist. 1997) (holding that there is a duty to maintain signs or signals in good working order); and *Bendas v. Township of White Deer*, 531 Pa. 180, 185, 611 A.2d 1184, 1187 (Pa. 1992) (holding that the Commonwealth’s duty to make highways reasonably safe included erecting traffic control devices or otherwise correcting dangerous conditions).

a public entity decides to provide traffic control devices, there is a duty to maintain them in good working order.<sup>271</sup> Nevertheless, at least one case was located in which the court held that a municipality is not liable even for the failure to maintain a traffic light.<sup>272</sup> If there is no showing of a malfunction prior to the accident, a public entity may not be held liable because of the absence of any showing of actual or constructive notice.<sup>273</sup> After receipt of notice of a malfunction, a public entity has a reasonable time to take corrective action.<sup>274</sup>

### C. Stop Signs and Speed Limit Signs

The presence or lack thereof of STOP signs or speed limit signs is pertinent to potential accidents on bike-ways. It has been held that the decision whether to erect a STOP sign is a discretionary decision and immune from judicial review under the discretionary function exemption in a state tort claims act.<sup>275</sup> In *Gonzales v. Hollins*,<sup>276</sup> the question was whether the city’s action in changing a traffic control device to a static STOP sign was a discretionary activity within the meaning of

<sup>271</sup> *Montgomery County v. Voorhees*, 86 Md. App. 294, 303, 586 A.2d 769, 774 (Md. Ct. App. 1991) (alleged faulty traffic light); *Forest v. State*, 493 So. 2d 563 (La. 1986) (absence of amber flashing lights contributed to a finding of liability), *reh’g denied* (Oct. 9, 1986); *Robinson v. State, Dep’t of Transp.*, 465 So. 2d 1301 (Fla. 1st DCA 1985), *rev. denied*, 476 So. 2d 673 (1985); and *Stephen v. Denver*, 659 P.2d 666 (Colo. 1983). See also Annotation, *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection*, 34 A.L.R. 3d 1008, 1015 (“The strongest cases for recovery have been those in which the highway authority failed within a reasonable time to replace a traffic sign which had been removed by unauthorized persons, to re-erect or repair a sign which had fallen down or had been knocked down or bent over, or to replace a burned out bulb in an electric traffic signal.”).

<sup>272</sup> *Radosevich v. County Comm’rs of Whatcom County*, 3 Wash. App. 602, 476 P.2d 705 (Wash. Ct. App. 1970).

<sup>273</sup> *Zuniga v. Metro. Dade County*, 504 So. 2d 491, 492 (Fla. 3d DCA 1987) (holding that there was no showing of actual or constructive notice of a malfunction of a traffic control signal).

<sup>274</sup> *City of Atlanta v. Landmark Env’tl. Indus.*, 272 Ga. App. 732, 733, 613 S.E.2d 131, 135 (Ga. Ct. App. 2005) (citing *Bowman v. Gunnells*, 243 Ga. 809, 256 S.E.2d 782 (1979), *on remand*, 151 Ga. App. 229, 259 S.E.2d 211 (1979) (*per curiam*) (stating that there was nothing “in the record to show any like malfunction before the accident [and] there [was] no genuine issue of material fact as to the County’s actual or constructive notice”)).

<sup>275</sup> *Tell City v. Noble*, 489 N.E.2d 958 (Ind. App. 1st Dist. 1986) (holding that the decision of the city not to install a STOP sign or other form of traffic control at an intersection was discretionary and immune from judicial review under the Indiana Tort Claims Act).

<sup>276</sup> 386 N.W.2d 842 (Minn. App. 1986). See *Nguyen v. Nguyen*, 565 N.W.2d 721, 723 (Minn. Ct. App. 1997) (“Discretionary immunity applies in this case because the challenged conduct, the County’s decision to delay the intersection improvements, occurred at the planning level.”).

the discretionary function exemption in the Minnesota Tort Claims Act.<sup>277</sup> The court held that

[t]he City's decision to replace the semaphore with a stop sign and through street configuration was the result of a planning decision made after balancing various factors including safety testing, traffic patterns and budget concerns. Absent proof that the City had notice of a dangerous condition, the act was discretionary.<sup>278</sup>

Likewise, the decision to post a speed limit sign is a protected planning-level activity rather than an unprotected operational-level activity.<sup>279</sup> In *Kolitch v. Lindahl*,<sup>280</sup> the Supreme Court of New Jersey agreed with the state that "it cannot be a tort to communicate accurately a properly established speed limit" and "that the setting of the speed limit in the first instance is a discretionary function."<sup>281</sup> Furthermore, the court, in discussing the planning-operational test and whether discretion had been exercised under the discretionary function exemption, stated:

The posting of a sign is merely one form of acting on the decision to set a certain limit, a decision that is discretionary in nature and therefore entitled to immunity. Thus, both the decision and the act of implementation are one and the same for the purposes of the statute.<sup>282</sup>

The court also relied on New Jersey Statutes Annotated 59:4–5, which exonerates a public entity "for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices."<sup>283</sup>

In *Alexander v. Eldred*,<sup>284</sup> the city of Ithaca argued that its decision whether to install a stop sign was not "justiciable."<sup>285</sup> The New York Court of Appeals held that municipalities do not have absolute immunity when exercising their discretion.<sup>286</sup> Rather, a plaintiff may succeed "on proof that the plan either was evolved without adequate study or lacked [a] reasonable basis."<sup>287</sup> In *Alexander*, the plaintiff's evidence established that the city had failed to review traffic counts that were less than 18 years old for the intersection in question and that New York's MUTCD required a stop sign

at the intersection.<sup>288</sup> However, the "most critical evidence" was the city engineer's erroneous belief that "the city had no power to install a stop sign on a private road."<sup>289</sup> The court held that "[i]f the municipality proceeds in direct contravention, or ignorance, of all legitimate interpretations of the law, its plan of action is inherently unreasonable."<sup>290</sup>

In general, although there is some judicial authority to the contrary, after a public entity provides a warning sign or a traffic control device, the public entity has a duty to maintain it in good working order and its failure to do so is not protected by the discretionary function exemption.<sup>291</sup> As one appellate court held under the circumstances of that case, "[t]he posted advisory speed signs are not binding and were customarily ignored, which fact was known to the State.... [T]he State's failure to post mandatory speed limit signs at this dangerous intersection may be deemed a proximate cause of the accident."<sup>292</sup>

#### D. Pavement Markings

There are cases holding that a public entity has immunity for its decisions regarding pavement markings.<sup>293</sup> It has been held that special pavement markings may not be required at an intersection when the evidence does not establish that a hazardous or dangerous condition existed.<sup>294</sup> On the other hand, there are prece-

<sup>288</sup> *Id.* at 466, 472 N.E.2d at 998–99, 483 N.Y.S.2d at 171.

<sup>289</sup> *Id.* at 466, 472 N.E.2d at 999, 483 N.Y.S.2d at 171.

<sup>290</sup> *Id.* at 467, 472 N.E.2d at 999, 483 N.Y.S.2d at 171.

<sup>291</sup> *Dep't of Transp. v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991) (holding that the state and county were not liable because their "decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions"); *Bussard v. Ohio Dep't of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E.2d 1179 (Ct. Cl. 1986); *Shuttleworth v. Conti Constr. Co.*, 193 N.J. Super. 469, 474, 475 A.2d 48, 51 (1984) (holding that a jury question was presented regarding whether the county was guilty of "palpably unreasonable" conduct in allowing a sign to become obscured by vegetation after installation); *Bryant v. Jefferson City*, 701 S.W.2d 626 (Tenn. Ct. App. 1985); *Dep't of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982) (holding that the failure to maintain traffic control devices in proper working order once installed constituted negligence at the unprotected, operational level).

<sup>292</sup> *Scheemaker v. State*, 125 A.D. 2d 964, 510 N.Y.S.2d 359, 360 (N.Y. App. 4th Dep't 1986), *aff'd*, 70 N.Y.2d 985, 526 N.Y.S.2d 420, 521 N.E.2d 427 (1988).

<sup>293</sup> *Elmer v. Kratzer*, 249 A.D. 2d 899, 672 N.Y.S.2d 584 (N.Y. App. 4th Dep't 1998) (holding that the city was immune for its decision to classify a road as a truck route that the city had painted as two-lane rather than as a four-lane road); *State Dep't of Highways & Public Transp. v. Carson*, 599 S.W.2d 852, 854 (Tex. Civ. App. 1980) (holding that there was no liability for alleged faulty or misleading pavement markings), *writ refused n.r.e. and reh'g of writ of error overruled* (Nov. 12, 1980).

<sup>294</sup> *Stomelli v. State*, 11 A.D. 2d 1088, 206 N.Y.S.2d 823 (N.Y. App. 4th Dep't 1960), *appeal denied*, 9 N.Y.2d 609 (1961); *Egnoto v. State*, 11 A.D. 2d 1089, 206 N.Y.S.2d 824 (N.Y. App.

<sup>277</sup> 386 N.W.2d at 844 (*citing* MINN. STAT. § 466.03(6)).

<sup>278</sup> *Id.* at 846.

<sup>279</sup> *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 273–74 (Minn. Ct. App. 1996) (holding that an engineer's decision not to install a "distance plaque" on the approach to a curve was discretionary).

<sup>280</sup> 100 N.J. 485, 497 A.2d 183 (1985). *See also* *Coyne v. Dep't of Transp.*, 182 N.J. 481, 867 A.2d 1159 (2005) (remanding to the trial court in a case involving an accident when the department had stationed a truck with a flashing "Left Lane Closed Ahead" sign for a determination of whether the department's actions were "palpably unreasonable," a term not defined in the State's tort claims act).

<sup>281</sup> 100 N.J. at 494, 497 A.2d at 187.

<sup>282</sup> *Id.* at 495, 497 A.2d at 188.

<sup>283</sup> *Id.* at 496, 497 A.2d at 189.

<sup>284</sup> 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984).

<sup>285</sup> *Id.* at 465, 472 N.E.2d at 998, 483 N.Y.S.2d at 170.

<sup>286</sup> *Id.* at 466, 472 N.E.2d at 998, 483 N.Y.S.2d at 170.

<sup>287</sup> *Id.* (citation omitted).



dents holding a public defendant liable for improper, inadequate, or misleading pavement markings.<sup>295</sup> In addition, in some jurisdictions, the courts may regard decisions on pavement marking as operational-level activities that are not protected by the discretionary function exemption.<sup>296</sup>

### E. Defects in the Pavement Surface

Particularly relevant to bikeways is the issue of whether a public entity may be held liable for defects in the surface of the bikeway. A public entity's duty to observe defects in the surface is often an issue, particularly in the absence of a statute requiring that the state have prior written or other notice of such defects. The cases have considered various means of imputing notice of the pavement's condition to the responsible public authority. Although it has been held that a police officer's knowledge of a defect may be imputed to the state, the issue of notice may be satisfied by other evidence such as departmental records<sup>297</sup> or when it is shown that the defendant itself created the defect, in which case no notice is required.<sup>298</sup> There are cases in which a public entity was held not liable because it did not have notice of the defect in the pavement<sup>299</sup> or because the plaintiff did not give a pre-suit notice as required by statute.<sup>300</sup>

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4th Dep't 1960), *appeal denied*, 14 A.D. 2d 828, 218 N.Y.S.2d 534 (N.Y. App. 4th Dep't 1961).

<sup>295</sup> *Pandya v. State*, Dep't of Transp., 375 N.J. Super. 353, 370, 867 A.2d 1236 (N.J. Super. Ct. 2005) (reversing the grant of a summary judgment and agreeing with the plaintiffs that the lane markings at issue "do not fall within the immunity of N.J.S.A. 59:4-5, because the issue here involved the State's action in affirmatively creating two allegedly dangerous lanes"); *Fisher v. State*, 268 A.D. 2d 849, 702 N.Y.S.2d 418 (N.Y. App. 3d Dep't 2000) (holding that misleading pavement marking violated the MUTCD).

<sup>296</sup> *Rogers v. State*, 51 Haw. 293, 459 P.2d 378 (1969) and *State v. l'Anson*, 529 P.2d 188 (Alaska 1974) (both courts holding that pavement marking is operational level, maintenance activity that is not immune from liability).

<sup>297</sup> *Gallery v. City of New York*, 182 Misc. 2d 555, 699 N.Y.S.2d 266 (Sup. Ct. N.Y. Cnty. 1999) (holding that a map depicting a defect over 1 year prior to the accident was admissible on the issue of notice to the defendant of the defect in the sidewalk).

<sup>298</sup> *Bisulco v. City of New York*, 186 A.D. 2d 84, 588 N.Y.S.2d 26 (N.Y. App. 1st Dep't 1992) (holding in a case involving the "pothole law," N.Y. ADM. CODE § 7-201(c), that a lack of notice did not defeat a claim when the city was affirmatively negligent in causing or creating the defective condition).

<sup>299</sup> *Dupre v. Wolfe*, 424 So. 2d 465, 468 (La. App. 5th Cir. 1982) (reversing a trial court's judgment against the department in part because an "accident diagram" for a 1-year period showed that there was only one accident at the location of the crossing in question); *Doucet v. State*, Dep't of Highways, 309 So. 2d 382 (La. App. 3d Cir. 1975), *cert. denied*, 312 So. 2d 340 (1975); *Mistich v. Matthaei*, 277 So. 2d 239 (La. App. 4th Cir. 1973).

<sup>300</sup> *Cassuto v. City of New York*, 23 A.D. 3d 423, 424, 805 N.Y.S.2d 580, 581 (N.Y. App. 2d Dep't 2005) (prior written notice of a sidewalk claim was required as a condition prece-

In *Carroll v. County of Los Angeles*,<sup>301</sup> the plaintiff had been rollerblading on the 19.2-mi South Bay Bicycle Path along the coast from Santa Monica through Redondo Beach when she fell because of a crack where the path intersected a walkway.<sup>302</sup> The issue was whether the county had immunity because the paved bicycle path qualified as a "trail" under California Government Code Section 831.4. The court held that subsection (b) of the statute clearly "gives governmental immunity to '[a]ny trail...which provides access to...all types of vehicular riding, water sports, recreational or scenic areas...'"<sup>303</sup> Thus, because the terms "path" and "trail" were synonymous, the county was not liable.<sup>304</sup> The court, moreover, rejected the argument that the statute did not apply because the path did not provide access to anything; "subdivision (b) is not limited to 'access' trails, but extends to include a trail whose use itself is the object of the recreational activity."<sup>305</sup>

### F. Guardrails and Barriers

The discretionary-function exemption has been asserted successfully as a defense when a public entity was sued because of a decision not to install guardrails or barriers, because a decision whether to erect a guardrail or a barrier is a planning-level decision.<sup>306</sup> Thus, it has been held that the failure to erect a guardrail did not constitute a dangerous condition of commonwealth realty,<sup>307</sup> that the failure to erect a guardrail was not a "dangerous condition of the streets" for purposes of the "streets exception" to governmental immunity under tort claims act;<sup>308</sup> and that there was no liability for failing to provide a median barrier, particularly when there was no showing of changed conditions between the time of the reconstruction of the roadway and the accident.<sup>309</sup> Similarly, in *Helton v.*

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dent to a suit against the city); *David v. City of New York*, 267 A.D. 2d 419, 700 N.Y.S.2d 235 (N.Y. App. 2d Dep't 1999) (reversing a judgment for the plaintiff because the city did not have actual, prior written notice prior to the plaintiff's claim).

<sup>301</sup> 60 Cal. App. 4th 606, 70 Cal. Rptr. 2d 504 (Cal. App. 2d Dist. 1998).

<sup>302</sup> *Id.* at 608, 70 Cal. Rptr. 2d at 505.

<sup>303</sup> *Id.* at 609, 70 Cal. Rptr. 2d at 506.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 610, 70 Cal. Rptr. 2d at 506.

<sup>306</sup> *State, Dep't of Transp. v. Vega*, 414 So. 2d 559, 560 (Fla. 3d DCA 1982) (holding that the DOT "enjoyed sovereign immunity in its decision not to erect a guardrail"), *petition denied*, 424 So. 2d 763 (Fla. 1983). *See also State v. San Miguel*, 2 S.W.3d 249, 251 (1999); *Cygler v. Presjack*, 667 So. 2d 458 (Fla. 4th DCA 1996); *Newsome v. Thompson*, 202 Ill. App. 3d 1074, 560 N.E.2d 974 (Ill. App. 1st Dist. 1990).

<sup>307</sup> *Dean v. Commonwealth, Dep't of Transp.*, 561 Pa. 503, 508, 751 A.2d 1130, 1134 (2000).

<sup>308</sup> *Lockwood v. Pittsburgh*, 561 Pa. 515, 751 A.2d 1136 (2000).

<sup>309</sup> *Sutton v. Golden Gate Bridge*, 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (Cal. App. 1st Dist. 1998), *review denied*, 1999 LEXIS 1346 (Cal., Mar. 9, 1999).

*Knox County*, the court held that “the decision not to install guardrails despite the recommendations of state inspectors falls within the discretionary function exception.”<sup>310</sup> On the other hand, a California court has held that a public entity may be liable for an injury caused by a dangerous condition of its property, such as the public entity’s failure to erect median barriers to prevent cross-median accidents.<sup>311</sup>

In *Dahl v. State of New York*,<sup>312</sup> the court held in a case in which the plaintiffs alleged that there should have been a guardrail between the roadway and a bicycle path that “the claimants failed to establish, through proof of prior similar accidents, violations of mandatory safety standards, or any other evidence, that the absence of guide rails in the vicinity of the accident lacked any reasonable basis.”<sup>313</sup>

### G. Shoulders and Adjacent Areas

Areas adjacent a bikeway may be involved when there is a bicycle accident and a claim that a public entity was negligent. The courts normally require no proof and take judicial notice of the fact that the shoulder of a roadway is not designed and constructed for the purposes of ordinary travel. Nevertheless, there is an issue whether the standard of care for the traveled portion of a roadway is or should be the same for the nontraveled portion, or, alternatively, whether because of the design, construction, and intended use of the shoulder there is a different standard of care applicable to accidents caused by defects on the shoulder.<sup>314</sup> Several Wis-

consin decisions have held that the shoulder is a part of the road for the purpose of statutes governing liability for damages caused by highway defects.<sup>315</sup> Several courts have held that a public entity’s duty may extend to repairing defects in the shoulder of the roadway such as a rut, ditch, hole, or other condition,<sup>316</sup> or the removal of obstacles,<sup>317</sup> and that the plaintiff does not have to prove justification or good cause for leaving the paved surface and traveling on the shoulder of the roadway.

In *State v. Municipality of Anchorage*,<sup>318</sup> the State owned and maintained a designated bike path at the time of an accident that resulted in the bicyclist’s death when he lost control and hit his head on a handrail near the path.<sup>319</sup> The theory of the case “was that the municipality had legal control of the pathway because it had posted and designated it as a bike path;<sup>320</sup> however, the court held that the designation was merely one circumstance and that the State was the entity that failed to maintain the path adequately.”<sup>321</sup>

In *Camillo v. Department of Transportation*,<sup>322</sup> while riding her bicycle on a sidewalk along US-1, the plaintiff had to swerve to avoid a child and a dog.<sup>323</sup> In doing so, her foot caught on three “eyebolts” that “extended approximately two inches into the path through the seawall...alongside the walkway.”<sup>324</sup> Although the trial judge granted a summary judgment to all three governmental defendants, the appellate court held that a jury question was presented regarding the State’s liability.<sup>325</sup> The court held that when a governmental agency as a landowner is responsible for an area, it has a duty “to maintain its streets and sidewalks free from an obstruction of which it knew or should have known, even though that obstruction may have been initially created

<sup>310</sup> 922 S.W.2d 877, 887 (Tenn. 1996) (noting that the decision-making process “included weighing economic factors.”).

<sup>311</sup> *Ducy v. Argo Sales Co.*, 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755, 760 (Cal. 1979) (holding that the language of CAL. GOV’T CODE § 835 “refute[d] the State’s argument that it [was] under no ‘duty’ to protect the public against dangers that are not created by physical defects in public property” and that under the circumstances in that case the State was liable for failure to provide an adequate median barrier).

<sup>312</sup> 45 A.D. 3d 803, 805, 846 N.Y.S.2d 329, 330 (N.Y. App. Div. 2d Dep’t 2007).

<sup>313</sup> *Id.*

<sup>314</sup> *Fagan v. Dep’t of Transp.*, 946 A.2d 1123 (Pa. Commw. Ct. 2008) (failing to decide whether the State had immunity for the condition of the shoulder of the highway but finding that the plaintiffs failed to prove why their vehicle left the paved portion of the highway and affirming a summary judgment for the department); *Aday v. State through Dep’t of Transp. & Dev.*, 950 So. 2d 928, 933 (La. App. 3d Cir. 2007) (holding that the department’s duty included “protecting a motorist who inadvertently strays from the highway to the shoulder”), *writ denied*, 958 So. 2d 1190 (La. 2007); *Graves v. Page*, 703 So. 2d 566 (La. 1997) (holding that a motorist has the right to assume that the highway shoulder is maintained in a reasonably safe condition), *reh’g denied* (Dec. 12, 1997)); *DiBenedetto v. Flora Township*, 153 Ill. 2d 66, 605 N.E.2d 571 (Ill. 1992) (holding that the defendant was not liable for the unused portions of the road); *Luceri v. Wayne County Bd. of Road Comm’rs*, 185 Mich. App. 82, 460 N.W.2d 566 (Mich. Ct. App. 1990) (holding that a duty to maintain a highway in a reasonably safe condition does

not include illuminating obstacles beyond the improved portion of the roadway).

<sup>315</sup> *Ellerman v. City of Manitowoc*, 267 Wis. 2d 480, 485, 671 N.W.2d 366, 368 (2003) (stating that the definition of a highway has been extended by the courts to include shoulders of the highway); *Morris v. Juneau County*, 219 Wis. 2d 543, 690, 696–97, 579 N.W.2d 690, 696–97 (Wis. 1998).

<sup>316</sup> *Brummerloh v. Fireman’s Ins.*, 377 So. 2d 1301, 1304 (La. App. 3d Cir. 1979). *See also* *Black v. County of Los Angeles*, 55 Cal. App. 3d 920, 127 Cal. Rptr. 916 (Cal. App. 2d Dist. 1976) (affirming a judgment for injuries sustained when an automobile collided with a car that crossed the road after being deflected off course by striking a hole in the shoulder of the road).

<sup>317</sup> *Arno v. State*, 20 Misc. 2d 995, 996 195 N.Y.S.2d 924, 927 (N.Y. Ct. Cl. 1960) (involving a rock pile 6- to 7-ft long and 4- to 5-ft high that obstructed 3 of the 4-ft of shoulder on the north side of the highway).

<sup>318</sup> 805 P.2d 971 (Alaska 1991).

<sup>319</sup> *Id.*, 805 P.2d at 972.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 975.

<sup>322</sup> 546 So. 2d 4 (Fla. 3d DCA 1988).

<sup>323</sup> *Id.* at 5.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

by some third person....<sup>326</sup> The court rejected the department's argument that the claim was barred by the defense of governmental immunity.<sup>327</sup>

*Predney v. The Village of Park Forest*<sup>328</sup> involved an 11-year-old boy who was severely and permanently injured in a bicycle accident, allegedly caused by bushes obstructing the view of an intersection.<sup>329</sup> The court held that "[a] municipality's duty to keep [its] streets, sidewalks, and parkways in a reasonably safe condition is not limited but extends to any part of portions immediate and adjacent thereto."<sup>330</sup> The court observed that under the Illinois Local Governmental and Governmental Employee Tort Immunity Act, a public entity is liable "if after execution of [a] plan or design it appears from its use that it has created a condition that is not reasonably safe."<sup>331</sup> It was "undisputed that the village owned the bicycle path up to the last 7 1/2 feet before the intersection, that 3.9 feet of the bushes extended over village property at the time of the accident," and that the village had several notices of the obstruction.<sup>332</sup> As part of the design the village "required the planting of the bushes and even constructed a ramp for easier access from the bicycle path to the service driveway."<sup>333</sup> The court held that the village owed a duty of ordinary care to the plaintiff even for an accident that occurred on adjacent property.<sup>334</sup>

In sum, in some jurisdictions a public entity may be held liable for conditions on shoulders and adjacent areas that pose an unreasonable danger to bicyclists.

## H. Requirement That Bicyclists Be Intended or Permitted Users

A public entity may not be held liable for dangerous conditions if by statute the area where the bicyclist was riding was not intended or permitted for the use of bicyclists. For example, in *Garcia v. City of Chicago*,<sup>335</sup> a 27-year-old plaintiff was injured while riding her bicycle on a city sidewalk. She alleged that the city was negligent in the maintenance of the sidewalk because at one end of the sidewalk there was a 6-in. drop-off in the pavement.<sup>336</sup> The court held, first, that Section 9-52-020(b) of the Municipal Code, which prohibited bicycle riding on sidewalks by persons over the age of 12 unless the sidewalk had been designated and marked as a bicycle route, did not violate the Equal Protection Clause of the

Constitution.<sup>337</sup> Second, under Section 3-102(a) of the Local Government and Governmental Employees Tort Immunity Act,<sup>338</sup>

[e]xcept as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it should be used....<sup>339</sup>

The court held that the city was not liable, because Garcia was not an "intended and permitted user under § 3-102(a) of the Tort Immunity Act."<sup>340</sup>

In *Lipper v. City of Chicago*,<sup>341</sup> the plaintiff argued that "a bicyclist is...an intended user of this particular sidewalk because one must use the sidewalk to reach the bicycle path on the other side of Lake Shore Drive."<sup>342</sup> The court held that an adult bicyclist was neither an intended nor a permitted user of a sidewalk on which he struck a raised portion of the sidewalk surrounding a manhole cover.<sup>343</sup> Thus, there is precedence to the effect that a public entity may not be liable to an injured cyclist for alleged negligence if the bicyclist was not an intended or permitted user of a sidewalk or roadway at the time of the accident.

The majority view is that public entities' decisions to provide warning signs, traffic control devices, STOP signs, speed limit signs, pavement markings, guardrails, or barriers are policy-level decisions that are immune from liability. Some states' statutes specifically exonerate public entities for failure to provide traffic signals, signs, markings, or similar controls or devices. However, the courts have held a public entity liable for an accident that was proximately caused by the public entity's failure to provide a traffic signal, sign, pavement markings, or other control or device as needed when the public entity had notice of a dangerous condition. After a public entity provides such safety features or devices, it is generally held that the public entity has a duty to maintain them in good and serviceable condition.

### Guidance

*Public entities have been held liable for the failure to maintain traffic control devices, for misleading pavement markings, for failure to replace warning signs, for defects in the pavement surface, and for obstructions in a bikeway, as well as for hazards and obstacles in an adjacent area. A public entity may be held liable for the violation of a mandatory provision of the MUTCD or*

<sup>326</sup> *Id.* (citations omitted).

<sup>327</sup> *Id.* at 6.

<sup>328</sup> 164 Ill. App. 3d 688, 518 N.E.2d 1243 (1987).

<sup>329</sup> *Id.* at 690, 518 N.E.2d at 1244.

<sup>330</sup> *Id.* at 697, 518 N.E.2d at 1249 (citation omitted).

<sup>331</sup> *Id.* at 698, 518 N.E.2d at 1250 (citing ILL. REV. STAT. 1985, c. 85, par. 3-103(a) (1985)).

<sup>332</sup> *Id.* at 697, 518 N.E.2d at 1249.

<sup>333</sup> *Id.* at 698, 518 N.E.2d at 1250.

<sup>334</sup> *Id.*

<sup>335</sup> 240 Ill. App. 3d 199, 608 N.E.2d 239 (Ill. App. 1st Dist. 1992).

<sup>336</sup> *Id.* at 200, 608 N.E.2d at 240.

<sup>337</sup> *Id.* at 200–01, 204, 608 N.E.2d at 240–41, 243.

<sup>338</sup> ILL. REV. STAT. 1989, ch. 85, par. 3-102(a).

<sup>339</sup> 240 Ill. App. 3d at 201, 608 N.E.2d at 241 (emphasis added).

<sup>340</sup> *Id.* at 204, 608 N.E.2d at 243.

<sup>341</sup> 233 Ill. App. 3d 834, 600 N.E.2d 18 (Ill. App. 1st Dist. 1992).

<sup>342</sup> *Id.* at 838, 600 N.E.2d at 21.

<sup>343</sup> *Id.* at 836, 600 N.E.2d at 19.

other applicable standard that is the proximate cause of a bikeway accident. It should be noted that in some jurisdictions it has been held that a public entity does not have a duty and, therefore, is not liable to a bicyclist for his or her injuries if the bicyclist as a matter of state or municipal law was not an intended or permitted user of the area where the bicycle accident occurred.

## SECTION VII. PUBLIC ENTITIES' IMMUNITY UNDER RECREATIONAL USE STATUTES FOR BIKEWAYS

### A. Overview of Recreational Use Statutes

Although a public entity may have immunity for alleged negligence regarding a decision, action, or inaction resulting in a bicycle accident on a roadway or bikeway under the state's tort claims act, a public entity also may have immunity for accidents on bikeways and other areas under the state's recreational use statute. Since Michigan's enactment of a recreational use statute in 1953, nearly every state has enacted recreational use legislation,<sup>344</sup> which typically "alter[s] the duty of care for recreational providers, including property owners, lessees, and the occupants of premises."<sup>345</sup> However, "most recreational use statutes...fail[] to adequately define the types of lands, users and activities that trigger the immunity provision...."<sup>346</sup>

Thus, depending on the circumstances, a recreational use statute may afford immunity to a public entity that designates bikeways. Moreover, as discussed in Section II, *supra*, a state tort claims act may immunize a public entity in those cases in which the recreational use statute does not protect the public entity from liability. In general, although the states' recreational use statutes differ, the state legislatures have granted statutory immunity to landowners against claims arising out of the opening of their property to the public for recreational use free of charge.<sup>347</sup> Recreational use statutes generally are strictly construed<sup>348</sup> and must be asserted by the defendant public entity as an affirmative defense.<sup>349</sup>

<sup>344</sup> Glen Rothstein, *Recreational Use Statutes and Private Landowner Liability: A Critical Examination of Ornelas v. Randolph*, 15 WHITTIER L. REV. 1123, 1125 (1994), hereinafter cited as "Rothstein."

<sup>345</sup> Terrence J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1 at \*12 (2000), hereinafter cited as "Centner."

<sup>346</sup> Rothstein, *supra* note 344, at 1125-126 (footnotes omitted).

<sup>347</sup> *Linville v. City of Janesville*, 184 Wis. 2d 705, 714, 516 N.W.2d 427, 430 (1994).

<sup>348</sup> *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693, 696 (S.D. 1994).

<sup>349</sup> *Hanley v. State*, 837 A.2d 707, 710 (R.I. 2003).

### A1. No Duty of the Landowner to Keep the Area Safe

Although the statutory language may vary, a fairly common provision in recreational use statutes is that an owner, lessee, or occupant of premises owes no duty of care to keep the premises safe for entry and use for recreational purposes or to give any warning of a hazardous (or under some state statutes a dangerous) condition.<sup>350</sup> The statutes usually state that an owner who permits recreational use does not extend any assurance that the land is safe for use for any purpose or assume any responsibility or liability for an injury to one using the land.<sup>351</sup> Recreational use statutes also may provide

<sup>350</sup> ALA. CODE § 35-15-1 (2009) (also providing in § 35-15-22 that there is no duty to inspect the land); *see also* ALA. CODE § 35-15-24(2)(3) (also providing that the statute does not limit legal liability that otherwise may exist when the owner has actual knowledge that a condition or activity exists that involves an unreasonable risk of death or serious bodily harm or actual knowledge that the condition or activity is not apparent to persons using the land) and ALA. CODE § 35-15-24 (excluding constructive knowledge as a basis for liability); ARK. CODE § 18-11-307 (2009); CAL. CIV. CODE § 846 (2009); CONN. GEN. STAT. § 52-557g (2009); DEL. CODE tit. 7 § 5903 (2009); GA. CODE § 51-3-22 (2009); HAW. REV. STAT. § 520-3 (2009); IDAHO STAT. § 36-1604.4(c) (2009); 745 ILL. COMP. STAT. 65/3 (2009) (stating "or to give warning of a natural or artificial dangerous condition"); IOWA CODE § 461C.3 (2009); KAN. STAT. § 58-3203 (2009); KY. REV. STAT. §§ 150.645(1) and 411.190(3) (2009); MD. CODE § 5-1103 (2009); MINN. STAT. §§ 604A.22 (1), (2) (2009); MO. STAT. § 527.346 (2009) (stating that there is "no duty to give any general or specific warning with respect to any natural or artificial condition"); MONT. CODE § 70-16-302(1) (2009); NEB. REV. STAT. § 37-731 (2009); NEV. REV. STAT. § 41.150(1) (2009); N.H. REV. STAT. § 212:34(I) (2009); N.J. STAT. ANN. 2A:42A-2(a) (2009); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (2009); N.D. CENTURY CODE § 53-08-02 (2009); PA. CONS. STAT. § 477-3 (2009); S.C. CODE § 27-3-30 (2009); UTAH CODE ANN. § 57-14-3 (2009); W. VA. CODE ANN. § 19-25-2 (2009) (applicable to a dangerous or hazardous condition); WYO. STAT. ANN. § 34-19-102 (2009).

<sup>351</sup> ALA. CODE § 35-15-23 (2009); ARK. CODE §§ 18-11-305, 307 (2009); CAL. CIV. CODE § 846 (2009); COLO. REV. STAT. § 33-41-103 (2009); CONN. GEN. STAT. §§ 52-557g(b)(1) and (3); DEL. CODE tit. 7 §§ 5903 and 5904(1) and (3) (2009); FLA. STAT. §§ 375.251(2)(a)(1) and (3) and 355.251(3)(a)(1)(2) (2009); GA. CODE §§ 51-3-23(1) and (3) (2009); HAW. REV. STAT. §§ 520-4(1) and (3) (2009); IDAHO STAT. §§ 36-1604.4(d)(1) and (3) (2009); ILL. COMP. STAT. 745 65/4(a) and (3) (2009); IND. CODE § 14-22-10-2(e) (2009); IOWA CODE §§ 461C.4(1) and (3) (2009); KAN. STAT. §§ 58-3204(a) and (c) (2009); LA. REV. STAT. § 9.2795(B)(1)(a) (2009); MD. CODE §§ 5-1104(1) and (3) (2009); MINN. STAT. §§ 604A.23(1) and (3) (2009); MO. STAT. §§ 537.347(1) and (3) (2009); NEB. REV. STAT. §§ 37-732(1) and (3) (2009); NEV. REV. STAT. § 41.510(2)(a) (2009); N.H. REV. STAT. §§ 212:34(II)(a) and (c) (2009); N.J. STAT. ANN. §§ 2A:42A-3(b)(1) and (3) (2009); N.M. STAT. ANN. §§ 17-4-7(A)(1-4) (2009); N.Y. GEN. OBLIG. LAW. §§ 9-103(1)(b)(1) and (3) (2009); N.C. GEN. STAT. §§ 53-08-03(1) and (3) (2009); N.D. CENT. CODE §§ 53-08-03(1) and (3) (2009); PA. CONS. STAT. §§ 477-4(1) and (3) (2009); R.I. GEN. LAWS §§ 32-6-3(1) and (3) (2009); S.C. CODE §§ 27-3-40(a) and (c) (2009); TENN. CODE ANN. §§ 70-7-103(1) and (3) (2009); UTAH CODE ANN. §§ 57-14-4(1) and (3) (2009); VT. STAT. ANN., tit. 12 § 5794(5) (2009); W. VA.

that an owner, lessee, occupant, or person in control of the land does not extend any assurances that the premises are safe for any recreational purpose.<sup>352</sup> The statutes often similarly provide that no duty of care or ground of liability is created for an injury to a person using the property for a recreational purpose.<sup>353</sup> Many of the recreational use statutes make it clear that a recreational user's status while on the property is not that of an invitee or, under some state statutes, a recreational user is neither an invitee nor a licensee.<sup>354</sup> Finally, many of the statutes provide that a recreational user must use due care when using the property.<sup>355</sup>

## A2. Owner's Liability Limited to Willful or Malicious Failure to Warn of or Guard Against a Known Dangerous Condition

Although recreational use statutes differ to some extent, they generally provide that they do not limit the

owner's liability that otherwise exists for willful or malicious failure to warn of or guard against a known dangerous condition or use of the property.<sup>356</sup> Thus, a majority of the recreational use statutes do stipulate that persons granting the public access to their property for recreational activities may be held liable for their "willful or malicious failure to guard or warn against a dangerous condition, use structure, or activity," or under some statutes for their "gross negligence," "willful or wanton conduct," or "willful, wanton or reckless conduct."<sup>357</sup>

One state's recreational use statute defines gross negligence as

an act or omission: (1) "which when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others;" and (2) "of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."<sup>358</sup>

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CODE ANN. §§ 19-25-2(a) and (c) (2009); WYO. STAT. ANN. §§ 34-19-103(a)(i) and (iii) (2009).

<sup>352</sup> ALA. CODE § 35-15-2 (2009); CAL. CIV. CODE § 846 (2009); CONN. GEN. STAT. § 5903 (2009).

<sup>353</sup> ALA. CODE § 35-15-4 (2009); DEL. CODE tit. 7 § 5907(1) (2009); GA. CODE § 51-3-26(1) (2009); HAW. REV. STAT. § 520-6(1) (2009); IDAHO STAT. § 36-1604(g)(1) (2009); 745 ILL. COMP. STAT. 65/7(a) (2009); IOWA CODE § 461C.7(1) (2009); KAN. STAT. § 58-3207(a) (2009); KY. REV. STAT. § 411.190(7)(a) (2009); MD. CODE § 5-1102(b)(1) (2009); NEB. REV. STAT. § 37-735 (2009); NEV. REV. STAT. § 41.150(3)(b) (2009); N.Y. GEN. OBLIG. LAW § 9-103(3) (2009); PA. CONS. STAT. § 477-7(1) (2009); R.I. GEN. LAWS § 32-6-6 (2009); S.C. CODE § 27-3-70 (2009); S.D. COD. LAWS § 20-9-17 (2009); W. VA. CODE ANN. § 19-25-4 (2009); WYO. STAT. ANN. § 34-19-106.

<sup>354</sup> ALA. CODE § 35-15-2 (2009); ARK. CODE § 18-11-305(2) (2009); CAL. CIV. CODE § 846 (2009); COLO. REV. STAT. § 33-41-103(1)(b) (2009); CONN. GEN. STAT. § 52-557g(2) (2009); DEL. CODE tit. 7 § 5904(2) (2009); GA. CODE § 51-3-23(2) (2009); HAW. REV. STAT. § 520-4(2) (2009); IDAHO STAT. § 36-1604(d)(2) (2009); 745 ILL. COMP. STAT. 65/4(b) (2009); IOWA CODE § 461C.4(2) (2009); KAN. STAT. § 58-3204(b) (2009); LA. REV. STAT. § 9.2795B(1)(b) (2009); MD. CODE § 5-1104(2) (2009); MINN. STAT. § 604A.23(2) (2009); NEB. REV. STAT. § 37-732(2) (2009); N.H. REV. STAT. § 212:34(II)(b) (2009); N.J. STAT. ANN. § 2A:42A-3(b)(2) (2009); N.Y. GEN. OBLIG. LAW § 9-103(1)(b)(2) (2009); N.D. CENTURY CODE § 53-08-03(2) (2009); PA. CONS. STAT. § 477-4(2) (2009); R.I. GEN. LAWS § 32-6-3(2) (2009); S.C. CODE § 27-3-40(b) (2009); S.D. COD. LAWS § 20-9-14(2) (2009); TENN. CODE ANN. § 70-7-103(2) (2009); UTAH CODE ANN. § 57-14-4(2) (2009); W. VA. CODE ANN. § 19-25-2(b) (2009); WYO. STAT. ANN. § 34-19-103(a)(ii) (2009).

<sup>355</sup> ALA. CODE § 35-15-25 (2009); ARK. CODE § 18-11-303(2) (2009); COLO. REV. STAT. § 33-41-105(1)(b) (2009); CONN. GEN. STAT. § 52-557i (2009); DEL. CODE tit. 7 § 5907(2) (2009); GA. CODE § 51-3-26(2) (2009); HAW. REV. STAT. § 520-6(2) (2009); IDAHO STAT. § 36.1604(g)(2) (2009); 745 ILL. COMP. STAT. 65/7(b) (2009); IOWA CODE § 461C.7(2) (2009); KAN. STAT. § 58-3207(b) (2009); KY. REV. STAT. § 411.190(7)(b) (2009); LA. REV. STAT. § 9.2795D (2009); MD. CODE § 5-1102(b)(2) (2009); MINN. STAT. § 604A.26 (2009); NEB. REV. STAT. § 37-736 (2009); N.D. CENTURY CODE § 53-08-06 (2009); VT. STAT. ANN. tit. 12 § 5794(a)(6) (2009); W.VA. CODE ANN. § 19-25-4 (2009).

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<sup>356</sup> ALA. CODE § 35-15-3 (2009); ARIZ. REV. STAT. § 33-1551 (2009) (stating that "a public or private owner is not liable except for willful, malicious or grossly negligent conduct"); ARK. CODE § 18-11-307 (2009) (stating that an owner's liability is not limited for "malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition...actually known to the owner to be dangerous"); CAL. CIV. CODE § 846 (2009); COLO. REV. STAT. §§ 33-41-104(1)(a) and 33-41-105(1)(a) (2009); CONN. GEN. STAT. § 52-557h (2009); DEL. CODE tit. 7 § 5906 (2009); FLA. STAT. § 375.251(4) (2009) (using the terms "deliberate, willful or malicious injury"); GA. CODE § 51-3-25(1) (2009); HAW. REV. STAT. § 520-5(1) (2009); 745 ILL. COMP. STAT. 65/6(a) (2009) (stating "willful or wanton failure to guard or warn against a dangerous condition"); IND. CODE § 14-22-10-2(g) (2009) (stating that an owner or occupant "is not excused for a malicious or illegal act causing injury"); IOWA CODE § 461C.6(1) (2009); KAN. STAT. § 58-3206 (2009); KY. REV. STAT. §§ 150.645(1) and 411.190(6)(a) (2009); LA. REV. STAT. § 9.2795(B)(1) (2009); MD. CODE § 5-1106 (2009); MASS. GEN. LAWS, tit. 21 § 17C (2009) (stating "absence of willful, wanton or reckless conduct"); MICH. COMP. LAWS § 324.73301 (2009) (stating "gross negligence or willful and wanton misconduct"); MINN. STAT. § 604A.22(1) (2009) (stating no duty "except to refrain from willfully taking action to cause injury"); MO. STAT. § 537.348 (2009) (providing for a different standard with respect to guarding or warning against a dangerous condition versus an ultra hazardous condition); MONT. CODE § 70-16-302(1) (2009); NEB. REV. STAT. § 37-734 (2009); NEV. REV. STAT. § 41.150(3)(a)(1) (2009); N.H. REV. STAT. § 212:34(III)(a) (2009); N.J. STAT. ANN. § 2A:42A-4(a) (2009); N.Y. GEN. OBLIG. LAW § 9-103(2) (2009); N.D. CENTURY CODE § 53-08-05(1) (2009); R.I. GEN. LAWS § 32-6-5 (2009); S.C. CODE § 27-3-60(a) (2009); TENN. CODE ANN. § 70-7-104(1) (2009); UTAH CODE ANN. § 57-14-6(1)(a) (2009); VT. STAT. ANN., tit. 12 § 5793(a) (2000) (willful or wanton misconduct of the owner); W. VA. CODE ANN. § 19-25-4 (2009) (stating "deliberate, willful or malicious infliction of injury"); WYO. STAT. ANN. § 34-19-105(a)(i) (2009).

<sup>357</sup> Centner, *supra* note 345, at \*13.

<sup>358</sup> Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, at 660 (*quoting* TEX. CIV. PRAC. & REM. CODE § 41.001(11)).

In *Dinelli v. County of Lake*,<sup>359</sup> the court noted that the willful-and-wanton-conduct exception to immunity under the Illinois recreational use statute meant a “course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.”<sup>360</sup> However, “[a] public entity may be found to have engaged in willful and wanton conduct only if it has been informed of a dangerous condition, knew others had been injured because of the condition, or if it intentionally removed a safety device or feature from property used for recreational purposes.”<sup>361</sup>

In *Dinelli*, the court ruled the trial court properly granted a summary judgment to the county on the plaintiffs’ claim that the county had negligently designed and maintained a midblock bicycle trail crosswalk. The court concluded that “the County’s ‘nonaction’ did not rise to the level of willful and wanton conduct showing an utter indifference to the safety of others,” nor did the “County’s failure to conduct traffic studies or utilize traffic control devices...rise to the level of willful and wanton conduct.”<sup>362</sup>

It has been held that a willful failure to guard or warn requires that “[a] defendant must have actual knowledge of the ‘specific dangers inherent in those conditions or activities.’”<sup>363</sup> In *Ali v. City of Boston*,<sup>364</sup> the court defined willful, wanton, or reckless conduct under the Massachusetts statute as that conduct involving

an intentional or unreasonable disregard of a risk that presents a high degree of probability that substantial harm will result to another.... The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant’s election to run that risk or of his failure reasonably to recognize it.<sup>365</sup>

In *Ali*, the court, which held that the plaintiff’s claim was barred by the recreational use statute, rejected the plaintiff’s alternative claim with respect to a bike trail in a city park “that the city’s conduct in erecting [a] gate without lights, signs, or other warnings constituted willful, wanton, or reckless conduct.”<sup>366</sup>

In states in which the courts are reluctant to grant a summary judgment, landowners, however, may be concerned that a “plaintiff need only allege willful or malicious conduct on the part of the landowner and the case

will go to trial.”<sup>367</sup> Indeed, the question of whether a landowner has committed willful misconduct is often a question of fact for the jury,<sup>368</sup> but, as another source points out, “[t]he defense provided by the recreational use statute means that causes of action in negligence can be dismissed, and in some cases, causes of action in gross negligence also may be dismissed.”<sup>369</sup>

Depending on the language of a particular recreational use statute, some courts have held that a public entity is not liable for a bikeway-related claim. In *Stephen F. Austin State University, supra*, the bicyclist who was knocked off her bicycle on a bike trail by the university’s water sprinkler alleged “that SFA knew that the use of the sprinkler in the manner and at the time of said use posed a risk of serious injury to others, including the Plaintiff, but that SFA was grossly negligent in ignoring and creating that risk.”<sup>370</sup> The court stated that the recreational use statute did “not foreclose premises defect claims, but rather limits the landowner’s liability by raising the plaintiff’s burden of proof to that of gross negligence, malicious intent, or bad faith.”<sup>371</sup>

The court held that Flynn’s allegations were conclusory and insufficient to rebut SFA’s motion to dismiss. Flynn’s allegations failed

to demonstrate either that the sprinkler presented an extreme risk, that SFA was aware of the risk, or that SFA was consciously indifferent to the sprinkler’s capacity to inflict serious injury. Moreover, Flynn concedes that she was aware of the sprinkler before she encountered it, and as we have already mentioned, *the recreational use statute does not obligate a landowner to warn of known conditions.*<sup>372</sup>

However, in other jurisdictions a public entity may not be immunized by a recreational use statute if “the injured person can show that the defendant knew that a dangerous condition existed.”<sup>373</sup> For example, in *Payne v. City of Bellevue*,<sup>374</sup> involving Washington’s recreational use statute, the plaintiff was injured when his bicycle hit a hole at the edge of a public trail owned and maintained by the city where the city had not posted a sign warning of the danger.<sup>375</sup> The court ruled that there was a factual question regarding whether the city knew

<sup>359</sup> 294 Ill. App. 3d 876, 691 N.E.2d 394 (Ill. App. 2d Dist. 1998).

<sup>360</sup> *Id.* at 883, 691 N.E.2d at 399 (citing 745 ILL. COMP. STAT. ANN. 10/1—210 (West 1996)).

<sup>361</sup> *Id.* at 884, 691 N.E.2d at 399 (citation omitted).

<sup>362</sup> *Id.* at 885, 691 N.E.2d at 399 (citation omitted).

<sup>363</sup> *Blake v. United States*, 1998 U.S. Dist. LEXIS 1475, at \*23 (E.D. Pa. 1998) (Unrept.).

<sup>364</sup> 441 Mass. 233, 804 N.E.2d 927 (Mass. 2004).

<sup>365</sup> *Id.* at 238, 239, 804 N.E.2d at 932 (internal quotation marks omitted) (citation omitted).

<sup>366</sup> *Id.* at 238, 804 N.E.2d at 931.

<sup>367</sup> *Cardwell, supra* note 1, at 256–57.

<sup>368</sup> *Stokka v. Cass County Elec. Coop.*, 373 N.W.2d 911, 915–16 (N.D. 1985).

<sup>369</sup> *Centner, supra* note 345, at \*12–14.

<sup>370</sup> *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653 at 659 (internal quotation marks omitted).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 660 (emphasis supplied).

<sup>373</sup> Heather L. Foss, *Case Comment: Torts—Municipal Corporations: Immunity for Injuries Suffered on Any Municipalities’ Public Land Allowed by the North Dakota Supreme Court*, 79 N. DAK. L. REV. 529, 539.

<sup>374</sup> 1997 Wash. App. LEXIS 1401 (Wash. Ct. App. 1997) (Unrept.).

<sup>375</sup> *Id.*, 1997 Wash. App. LEXIS 1401 at \*1.

of a dangerous, artificial, and latent condition on its land but did not post a warning.<sup>376</sup>

It is possible that because of the nature of a bikeway or bike trail that the state recreational use statute does not apply to exonerate a public entity. In *Goodwin v. Carbondale Park District*,<sup>377</sup> the plaintiff's injury occurred as a result of colliding with a tree that had fallen across a designated bike path in a city park. The court held that the trial court properly dismissed the plaintiff's first count against the park district "because the property on which plaintiff was injured was 'intended or permitted to be used for recreational purposes.'"<sup>378</sup> However, the court held that the dismissal of the plaintiff's second count was improper. A provision of the tort immunity act, Section 3-107(b), "provide[d] for immunity for both ordinary negligence and willful and wanton misconduct 'for an injury caused by a condition of... (b) Any hiking, riding, fishing or hunting trail.'"<sup>379</sup> The court held that the trial court erred in dismissing the second count because "the paved bike path located in a developed city park" did not "constitute[] a 'riding trail'...."<sup>380</sup> Thus, the trial court "erred in dismissing count II of plaintiff's complaint sounding in willful and wanton negligence."<sup>381</sup>

In another case in which the plaintiff was injured in a bicycle accident on a designated bike path, *Graney v. Metropolitan District Commission*,<sup>382</sup> the district's maintenance employees occasionally had to leave vehicles or other items on the path while conducting maintenance or repairs.<sup>383</sup> The plaintiff used the path regularly because his bicycle was his principal mode of transportation.<sup>384</sup> The Massachusetts recreational use statute (General Laws, Chapter 21, Section 17C) protected only an "owner of land" and required that a plaintiff have used the land for recreational purposes.<sup>385</sup> The court held that the defendants had not sustained the burden needed for a summary judgment by showing that they were owners for purposes of the statute.<sup>386</sup> Moreover, the defendants had left a pile of mulch on the path for about a week prior to the accident that completely obstructed the path; at night the plaintiff could not see the pile, which was in the middle of the path.<sup>387</sup> The court held that even if the recreational use statute ap-

plied, it was by no means clear that the defendants were not liable for willful, wanton, or reckless conduct.<sup>388</sup> The basis for the plaintiff's claim was not the defendants' inaction but the defendants' affirmative conduct in leaving obstacles on the path.<sup>389</sup>

In sum, depending on the conditions and the applicable recreational use statute, a public entity may have immunity for accidents on bikeways and in other areas under the state's recreational use immunity statute. Although the statutes vary, a fairly common provision is that an owner, lessee, or occupant of premises owes no duty of care to keep the premises safe for entry and use for recreational purposes or to give any warning of a hazardous or dangerous condition. Another fairly common provision is that owners, lessees, and occupants may be liable only for a willful or malicious failure to warn or guard against a known dangerous condition or use of the property.

#### *Guidance*

*As discussed previously, if a recreational use statute is applicable it may provide a public entity with immunity for a bikeway-related claim that the public entity would not have had under an applicable tort claims act. As explained hereafter, a public entity may be able to rely on a recreational use statute even if the bicyclist was not engaged in a recreational use of the bikeway or area at the time of the accident giving rise to the claim against a public entity.*

### A3. Recovery of Attorney's Fees

One state's recreational use statute provides that the prevailing party in a civil action may recover reasonable attorney's fees.<sup>390</sup>

## B. Whether Public Entities Are Owners Under Recreational Use Statutes

A threshold issue is whether a recreational use statute applies and therefore immunizes the conduct of public entities when sued for alleged negligence for accidents on bikeways. Although a few statutes exclude governmental owners,<sup>391</sup> some of the statutes clearly provide that an owner includes any public entity, including any agency of the federal or state government or a political subdivision of the state.<sup>392</sup> Land also may

<sup>376</sup> *Id.* at \*12.

<sup>377</sup> 268 Ill. App. 3d 489, 644 N.E.2d 512 (Ill. App. 5th Dist. 1994).

<sup>378</sup> *Id.* at 491, 644 N.E.2d at 513 (citation omitted).

<sup>379</sup> *Id.* (quoting Local Government and Governmental Employees Tort Immunity Act § 3-107(b)).

<sup>380</sup> *Id.* at 492, 644 N.E.2d at 514.

<sup>381</sup> *Id.* at 494, 644 N.E.2d at 515.

<sup>382</sup> 2001 Mass. Super. LEXIS 352 (Mass. Super. Ct. 2001) (Unrept.).

<sup>383</sup> *Id.*, 2001 Mass. Super. LEXIS at \*4.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at \*12.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at \*4, 5.

<sup>388</sup> *Id.* at \*20.

<sup>389</sup> *Id.*

<sup>390</sup> COLO. REV. STAT. § 33-41-105.5 (2009).

<sup>391</sup> See, e.g., N.C. GEN. STAT. § 38A-2(4) (2009) (defining owner as an individual or nongovernmental entity); OHIO REV. CODE § 1533.181 (2009) (applicable to privately owned, non-residential premises); R.I. GEN. LAWS § 32-6-2(3) (2009) (applicable to a private owner).

<sup>392</sup> ALA. CODE § 35-15-21; ARK. CODE § 33-1551 (2009) ("public or private owner"); COLO. REV. STAT. § 33-41-102(4.5) (2009); FLA. STAT. § 375.251(2)(a) (2009) (refers only to an owner or lessee of a park area); 745 ILL. COMP. STAT. 65/2 (2009) (stating that the term "owner" includes the State and its political subdivisions); IND. CODE §§ 14-22-10-2(a) and (c) (2009) (defining governmental entity to include the United

be defined under the recreational use statutes to include roads.<sup>393</sup> Regardless of whether the term owner is defined specifically to include public entities, the statutes typically define an owner to include the possessor of a fee interest, a lessee, an occupant, or a person in control of the premises.<sup>394</sup>

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States, the State, counties, cities, towns, and townships having a fee interest in, being a tenant, lessee, or an occupant of or in control of a tract of land); LA. REV. STAT. § 2795E.(2)(a) (2009) (applying to public parks owned, leased, or managed by the State or its political subdivisions); MD. CODE § 1105.1(1) (2009) (stating that the provisions of §§ 5-1103 and 5-1104 are applicable to any unit of local government as an owner of land); MASS. GEN. LAWS, tit. 21 § 17C(b) (2009) (providing that the term person includes “any governmental body, agency, or instrumentality”); MO. STAT. § 537.345(3) (2009) (stating that an owner includes a governmental agency); MONT. CODE §§ 70-16-302(2)(c) and (d) (2009) (providing that a landowner includes a governmental or quasi-governmental entity and that property includes roads); N.H. REV. STAT. § 508:14(I) (2009) (including the state or any political subdivision); N.D. CENTURY CODE § 53-08-01(2) (2009) (public and private land); OR. REV. STAT. § 105.688 (2009) (all public and private land); TENN. CODE ANN. § 70-7-101(2)(A) (2009) (stating that “landowner” includes any governmental entity); TEX. CIV. PRAC. & REM. CODE § 75.003(e) (2009) (chapter applicable to governmental units); UTAH CODE ANN. § 57-14-2(2) (2009) (public or private land); WASH. REV. CODE § 4.24-210(1) and (2) (2009) (public or private owners).

<sup>393</sup> ARIZ. REV. STAT. § 33-1551(C)(3) (2009); ARK. CODE § 18-11-302(2) (2009); COLO. REV. STAT. § 33-41-102(2) (2009); CONN. GEN. STAT. § 52-557f(2) (2009); DEL. CODE tit. 7 § 5902(1) (2009); GA. CODE § 51-3-21(2) (2009); HAW. REV. STAT. § 520-2 (2009); IDAHO STAT. § 36-1604(b)(2) (2009); 745 ILL. COMP. STAT. 65/2(a) (2009); KAN. STAT. § 58-3202(a) (2009); KY. REV. STAT. § 411.190(1)(a) (2009); LA. REV. STAT. § 2795(A)(1) (2009); MD. CODE § 5-1101(d)(1) (2009); MINN. STAT. ANN. § 604A-21(3) (2009); MONT. CODE ANN. § 70-16-302(2)(d) (2009); NEB. STAT. ANN. § 37-729(1) (2009); N.D. CENT. CODE § 53-08-01(2) (2009); OR. REV. STAT. ANN. § 105.688(1)(b) (2009); PA. CONSOL. STAT. § 477-2(1) (2009); R.I. GEN. LAWS § 32-6-2(2) (2009); S.C. CODE § 27-3-20(a) (2009); TEX. CIV. PRAC. & REM. CODE § 75.001(2) (2009); UTAH CODE § 19-25-5(2) (2009); WYO. STAT. § 34-19-101(a)(i) (2009).

<sup>394</sup> ARK. CODE § 18-11-302(3) (2009); COLO. REV. STAT. § 33-41-102 (2009); CONN. GEN. STAT. § 52-557f (2009); GA. CODE § 51-3-21(3) (2009); HAW. REV. STAT. § 520-2 (2009); IDAHO STAT. § 36-1604(3) (2009); 745 ILL. COMP. STAT. 65/2(b) (2009) (owner includes the State and its political subdivisions); IND. CODE § 14-22-10-2(a)(c) (2009); IOWA CODE § 461C.2(2) (2009); KAN. STAT. § 58-3202(b) (2009); KY. REV. STAT. §§ 150.645(1) and 411.190 (2009); LA. REV. STAT. § 9.2795(2) (2009); MD. CODE §§ 5-1101(d)(1) and (2)(e) (2009) (providing that land includes roads, paths, and trails and that “owner” means the owner of any estate or other interest in real property); MASS. GEN. LAWS, tit. 21 § 17C(a) (2009) (statute applying to “any person having an interest in land”); MINN. STAT. § 604A.21(4) (2009); NEB. REV. STAT. § 37-729(2) (2009); N.J. STAT. ANN. § 2A:42A-3(a) (2009); N.M. Stat. Ann. § 17-4-7(A) (2009); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (2009); PA. CONS. STAT. § 477-2(1) (2009); R.I. GEN. LAWS § 32-6-2(3) (2009); S.D. COD. LAWS § 20-9-12(4) (2009); WYO. STAT. § 34-19-101(a)(ii) (2009).

Thus, by its terms the recreational use statute in at least 15 states applies to public entities.<sup>395</sup> However, in another 19 states the courts have construed the state recreational use statute to apply to public entities.<sup>396</sup> For example, in 2007 a California court held that a city is immune from accidents on a bikeway in a public park owned by the local municipality.<sup>397</sup> The court held that the plaintiff’s “claim that trail immunity does not apply because his accident occurred outside the confines of the bikeway is likewise without merit,” because a “gateway to or from a bike path is patently an integral part of the bike path.”<sup>398</sup>

As discussed in Section VII.C.3, *infra*, the courts generally are not concerned with how an injured party was using the property at the time of the injury.<sup>399</sup> In *Boaldin v. University of Kansas*,<sup>400</sup> the Kansas Supreme Court held that recreational use immunity protected the University of Kansas from a claim by a student who was injured while sledding on a part of university property.<sup>401</sup> First, the court held that “[u]nder the plain and unambiguous wording of the statute, a governmental entity which permits public property to be used as a park, playground, or open area for recreational purposes is immune from damages arising from negligence.”<sup>402</sup> Second, in response to the plaintiff’s argument that the recreational use statute only applied to municipalities, the court looked to the state’s tort claims act that defined a governmental entity to mean the state or a municipality.<sup>403</sup> Third, in response to the plaintiff’s argument that the university’s hill where sledding traditionally occurred was not a recreational area within the meaning of the recreational use statute, the court held that it was not necessary under the statute for the area to have been designated as a recreational area, only that it was open to recreational use.<sup>404</sup>

A local tort claims statute may include an exception from liability for governmental entities providing rec-

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<sup>395</sup> Alabama, Arkansas, Colorado, Illinois, Indiana, Maryland, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, Tennessee, Texas, Utah, and Washington.

<sup>396</sup> Arizona, California, Connecticut, Georgia, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, New Mexico, New York, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Virginia, and Wisconsin. Robin C. Miller, Annotation, *Effect of Statute Limiting Landowner’s Liability for Personal Injury to Recreational User*, 47 A.L.R. 4th 262 (1986) and 2009 Supp.

<sup>397</sup> *Prokop v. City of L.A.*, 150 Cal. App. 4th 1332, 59 Cal. Rptr. 3d 355 (Cal. App. 4th Dist. 2007), *review denied*, 2007 Cal. LEXIS 8791 (Cal., Aug. 15, 2007).

<sup>398</sup> *Id.* at 1342, 59 Cal. Rptr. 3d at 362.

<sup>399</sup> Will Wohlford, *Comment: The Recreational Use Immunity of the Kansas Tort Claims Act: An Exception or the Rule?*, 52 KAN. L. REV. 211, 230 (2003).

<sup>400</sup> 242 Kan. 288, 747 P.2d 811 (Kan. 1987).

<sup>401</sup> *Id.* at 288–89, 747 P.2d at 812.

<sup>402</sup> *Id.* at 291, 747 P.2d at 813.

<sup>403</sup> *Id.* at 291, 747 P.2d at 814.

<sup>404</sup> *Id.* at 290–91, 747 P.2d at 813.



reational areas. For instance, in Illinois, Section 3-106 of the tort immunity act provides for immunity for local public entities against negligence claims arising from “the existence of a condition of any public property intended or permitted to be used for recreational purposes.”<sup>405</sup> To determine the applicability of such a statute in a particular case, “[t]he relevant inquiry...is based on ‘the character of the property, rather than the injured party’s use of that property.’”<sup>406</sup>

However, some state courts have construed their state recreational use statute to “exclude governmental entities.”<sup>407</sup> In 1965, the Nebraska legislature enacted a Recreational Liability Act that granted immunity to landowners “who allowed recreational use of their property free of charge.”<sup>408</sup> Although the Nebraska Supreme Court had previously held that the state and its subdivisions qualified as landowners under the statute,<sup>409</sup> the court in 2006 in *Bronsen v. Dawes County*<sup>410</sup> overruled its prior precedent. It should be noted, however, that “states with judicial rulings excluding governmental entities from recreational use statutes have seen legislative amendments specifically including the State and its political subdivisions.”<sup>411</sup>

Elsewhere there are some states whose courts have held that public entities are not landowners within the meaning of the state’s recreational use statute. For instance, a federal court in Vermont held that the state’s recreational use statute does not protect municipalities that construct bike paths.<sup>412</sup> The Supreme Court of

North Dakota held that the City of Grand Forks could not claim immunity under the state’s recreational use statute for injuries suffered by an inline skater while skating on a city bike path.<sup>413</sup>

Finally, it may be noted that a state’s recreational use statute may provide the United States with immunity that it otherwise may not have had under the FTCA. In *Cagle v. United States*,<sup>414</sup> Tennessee’s recreational use statute protected the United States from liability for the plaintiff’s son’s injuries sustained while at Shiloh National Military Park, when a cannon fell on his thumb and knee. In *Umpleby v. United States*,<sup>415</sup> the Eighth Circuit held that North Dakota’s recreational use statute applied to the U.S. Army Corps of Engineers. In *Palmer v. United States*,<sup>416</sup> a district court in Hawaii held that the State’s recreational use statute applied and immunized the United States from liability for an injury on the stairs of a swimming pool of a government medical center.

In sum, in approximately 35 states a recreational use immunity statute applies to public entities either because of the statutory terms or judicial construction of the statute. Furthermore, for a recreational use statute to apply and immunize a public entity, it may not have been necessary for an area where a bicycle accident occurred to have been designated as a recreational area, only that the area was open to recreational use.

## C. Whether Bikeways Come Within the Meaning of Recreational Use Statutes

### C1. Whether Recreational Use Statutes Are Applicable to Bicycling

As one article states, “[r]eaders hoping for a succinct and precise definition [of recreational use] will be disappointed.”<sup>417</sup> As the Wisconsin Supreme Court has stated,

[t]he line between recreational and non-recreational activities is difficult to draw under Wis. Stat. § 895.52, and

1997) that granted immunity to landowners for injuries sustained on bicycle routes constructed on a landowner’s property did not protect municipalities that constructed bike paths but that the city was immune for the exercise of a governmental function).

<sup>413</sup> *Hovland v. City of Grand Forks*, 1997 ND 95, \*P10, 563 N.W.2d 384, 387 (N.D. 1997) (stating that the recreational use law was intended to encourage landowners to open their land to the public for recreational purposes and that when the law was enacted, public entities already had immunity from liability in all civil actions). *See also* *City of Bloomington v. Kuruzovich*, 517 N.E.2d 408, 414 (Ind. App. 4th Dist. 1987) (holding that “the Recreational User Statute does not apply to the state or its units”).

<sup>414</sup> 937 F.2d 1073 (6th Cir. 1991).

<sup>415</sup> 806 F.2d 812 (8th Cir. 1986).

<sup>416</sup> 742 F. Supp. 1068 (D.C. Haw. 1990).

<sup>417</sup> Stuart J. Ford, *Comment: Wisconsin’s Recreational Use Statute: Towards Sharpening the Picture at the Edges*, WIS. L. REV. 491 (1991), hereinafter cited as “Ford.”

<sup>405</sup> 745 ILL. COMP. STAT. 10/3-106.

<sup>406</sup> *Diamond v. Springfield Metro. Exposition Auditorium Auth.*, 44 F.3d 599, 602 (7th Cir. 1995) (affirming a district court’s entry of summary judgment based on the recreational use statute for the public entity that owned the convention center, used for a variety of purposes including recreational ones, where the plaintiff fell in an underground tunnel while attending a business conference) (citation omitted).

<sup>407</sup> Sean D. White, *Note, Governmental Liability for Recreational Uses of Public Land: Brosen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006), 87 NEB. L. REV. 569, 591 N 156, hereinafter cited as “White” (*citing* *Conway v. Town of Wilton*, 680 A.2d 242 (Conn. 1996); *Monteville v. Terrebonne Parish Consol. Gov’t*, 567 So. 2d 1097 (La. 1990); *Hovland v. City of Grand Forks*, 1997 ND 95, 563 N.W.2d 384 (N.D. 1997); *Stamper v. Kanawha County Bd. of Educ.*, 191 W. Va. 297, 445 S.E.2d 238 (W. Va. 1994)).

<sup>408</sup> White, *supra* note 407, at 570 (*citing* NEB. REV. STAT. §§ 37-729–37-736 (2006)).

<sup>409</sup> *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981).

<sup>410</sup> 272 Neb. 320, 329, 722 N.W.2d 17, 24 (2006) (holding that the term “owner of land” under the State’s recreational use statute could not be construed to include governmental entities).

<sup>411</sup> White, *supra* note 407, at 592 (*citing* LA. REV. STAT. §§ 9:2791, 9:2795 (2008) and N.D. CENT. CODE §§ 53008-01–53-08-06 (2005); *Olson v. Bismark Parks and Recreation Dist.*, 642 N.W.2d 864 (N.D. 2002)).

<sup>412</sup> *Gretkowski v. City of Burlington*, 50 F. Supp. 2d 292, 293 (D. Vt. 1998) (holding that VT. STAT. ANN. tit. 19, § 2309 (Supp.

the issue has been litigated with some frequency. We continue to be frustrated in our efforts to state a test that can be applied easily because of the seeming lack of basic underlying principles in the statute.<sup>418</sup>

Most recreational use statutes provide that a recreational use or purpose “includes, but is not limited, to” various recreational activities without specifically mentioning bicycling or biking.<sup>419</sup> However, as for what constitutes a recreational use or purpose, several of the recreational use statutes do include bicycling or biking.<sup>420</sup> Nearly all jurisdictions provide for an extensive list of recreational activities ranging from between “seven and twenty...with a catch-all clause such as ‘including but not limited to...’”<sup>421</sup> Wisconsin broadly defines “recreational activity” as “any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure including practice or instruction in such activity.”<sup>422</sup>

In *Scott v. Rockford Park District*,<sup>423</sup> the plaintiff was injured when his bicycle struck a crack in a bridge on a paved bike path that was open to the public for recreational use.<sup>424</sup> The bridge was owned and maintained by both the district and the city and provided access from the park’s corner for persons using the recreational path, as well as the facilities in the park.<sup>425</sup> The court found that, in Illinois, Section 3-107(a) of 745 Illinois Compiled Statutes 10/3-107 (West 1992) grants full immunity for access roads to fishing, hunting, primitive camping areas, recreational, and scenic areas, and affirmed the lower court’s summary judgment in favor of

<sup>418</sup> *Auman v. Sch. Dist. of Stanley-Boyd*, 248 Wis. 2d 548, 558, 635 N.W.2d 762, 767 (Wis. 2001) (footnote omitted).

<sup>419</sup> ALA. CODE § 35-15-21 (2009); ARIZ. REV. STAT. § 33-1551 (2009) (“ride...or engage in similar pursuits”); ARK. CODE § 18-11-302(N) (2009) (also states “any other activity undertaken for exercise, education, relaxation or pleasure”); CAL. CIV. CODE § 846 (2009) (“riding”); FLA. STAT. § 375.251(5) (2009) (“include, but not necessarily be limited to...”); HAW. REV. STAT. § 520-2 (2009); MD. CODE § 5-1101(f) (2009) (“any recreational pursuit”); N.M. STAT. ANN. § 17-4-7(A) (2009) (“any other recreational use”); PA. CONS. STAT. § 477-2(3) (2009); R.I. GEN. LAWS § 32-6-2 (2009); S.C. CODE § 27-3-20(c) (2009); UTAH CODE § 57-14-2(3) (2009); WYO. STAT. § 34-19-101(a)(iii) (2009).

<sup>420</sup> COLO. REV. STAT. §§ 33-41-102(5) and 33-41-103 (2009) (paths, trails, and bicycling); IDAHO STAT. § 36-3604.4(4) (2009); KY. REV. STAT. § 411.190(c) (2009); LA. REV. STAT. § 2795(A)(3) (2009); MINN. STAT. §§ 604A.21(5) and (6) (2009); MO. STAT. § 537.345(4) (2009); MONT. CODE § 70-16-301 (2009); NEV. REV. STAT. § 41.150(4)(h) (2009) (applies to “mountain bicycle”); N.J. STAT. ANN. § 2A:42A-2 (2009) (applies to “dirt bikes”); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (2009); R.I. GEN. LAWS § 32-6-2(4) (2009); S.D. COD. LAWS § 20-9-12(3) (2009); TEX. CIV. PR. & REM. CODE § 75.001(M) (2009); VT. STAT. ANN., tit. 12 § 5792(4) (2009); W. VA. CODE ANN. § 19-25-5(5) (2009); WASH. REV. CODE § 4.24.210(1) (2009).

<sup>421</sup> Ford, *supra* note 417, at 526–27 (citation omitted).

<sup>422</sup> Cardwell, *supra* note 1, at 267 (footnotes omitted).

<sup>423</sup> 263 Ill. App. 3d 853, 636 N.E.2d 1075 (Ill. App. 2d Dist. 1994), *appeal denied*, 157 Ill. 2d 522, 642 N.E.2d 1303 (1994).

<sup>424</sup> *Id.* at 854, 636 N.E.2d at 1076.

<sup>425</sup> *Id.*

the defendants.<sup>426</sup> In *Kern v. City of Sioux Falls*,<sup>427</sup> the plaintiffs were injured while rollerblading on a city-owned bike trail when they fell as a result of an uneven section of the trail.<sup>428</sup> The city had immunity because under the recreational use statute, South Dakota Codified Laws, Section 20-9-13, landowners have immunity when allowing their land to be used for outdoor recreational purposes.<sup>429</sup>

However, there are some cases in which the courts have held that a public entity did not have immunity with regard to a bikeway. For example, in *Walker v. City of Scottsdale*,<sup>430</sup> the plaintiff was injured in a fall that occurred on a designated bike path in a residential community.<sup>431</sup> Based on the language of the recreational use statute, the court concluded that the legislature did not intend to grant blanket immunity to all landowners without regard to the characteristics of the property.<sup>432</sup> The statutory immunity did not apply when the premises in question were not “agricultural, range, mining or forest lands, and any other similar lands.”<sup>433</sup>

Assuming that bicycling is either specifically enumerated in a recreational use statute or that the courts have construed or would construe the statute to apply to bicycling, at least two other issues are presented. One issue is whether the premises, for example a bikeway, must be primarily or exclusively for recreational use for the recreational use statute to apply. Another issue is whether a bicyclist must have been using the property for a recreational purpose at the time of the accident. Both issues are discussed in the next subsections.

## C2. Whether a Bikeway Must Be Primarily or Exclusively for Recreational Use

According to the holding in a majority of the cases, a bikeway does not have to be primarily or exclusively for recreational use for public entities to have recreational use immunity. The issue is illustrated by *Prokop v. City of Los Angeles*,<sup>434</sup> in which Prokop sought damages for injuries he sustained while bicycling along a bikeway designed by the city.<sup>435</sup> When he sought to exit a path through an opening for bicycles he collided with a chain link fence. He alleged that the city had created a dangerous condition and that the bikeway’s design was faulty.<sup>436</sup> In particular he maintained that the bicycle path was a Class I bikeway under the California Streets

<sup>426</sup> *Id.* at 857, 636 N.E.2d at 1078.

<sup>427</sup> 1997 S.D. 19, 560 N.W.2d 236 (1997).

<sup>428</sup> *Id.* at \*2, 560 N.W.2d at 237.

<sup>429</sup> *Id.* at \*7, 8, 560 N.W.2d at 238.

<sup>430</sup> 163 Ariz. 206, 786 P.2d 1057 (Ariz. Ct. App. 1989).

<sup>431</sup> *Id.* at 207, 786 P.2d at 1058.

<sup>432</sup> *Id.* at 214, 786 P.2d at 1064.

<sup>433</sup> *Id.* at 210, 786 P.2d at 1061.

<sup>434</sup> 150 Cal. App. 4th 1332, 59 Cal. Rptr. 3d 355 (Cal. App. 2d Dist. 2007).

<sup>435</sup> *Id.* at 1335, 59 Cal. Rptr. 3d at 356.

<sup>436</sup> *Id.*

and Highway Code Section 890.4, and that the city was required but had failed to conform the bikeway to Chapter 100 of the *California Highway Design Manual*, entitled “Bikeway Planning and Design.”<sup>437</sup>

The court held that a Class I bikeway is a trail within the meaning of California Government Code Section 831.4(b), which provides that “[a] public entity...is not liable for an injury caused by a condition of...[a]ny trail used” for the purposes described in the statute.<sup>438</sup> The plaintiff argued that the city had a mandatory duty under the California Bicycle Transportation Act to “utilize all minimum safety design criteria and uniform specifications and symbols for signs, markers, and uniform traffic control devices”; however, the court held that the city still had immunity under Section 831.4(b).<sup>439</sup>

Relying on prior California precedent,<sup>440</sup> the court held that a Class I bikeway, which by definition is not open to vehicular traffic, does not qualify as a street or highway and that the statute did not exempt from immunity “any trails that might be part of the street and highway system in general.”<sup>441</sup> Moreover, there was immunity for the bikeway accident regardless of whether the plaintiff alleged faulty design or maintenance of the bikeway.<sup>442</sup> Furthermore, any mandatory duty that the city had under the Streets and Highway Code was still subject to any immunity that the city had by statute.<sup>443</sup>

However, in *Prokop* the court also stated that

[b]ecause of the legislative blending of paved bike paths (which are used principally for recreation) into the bicycle transportation system (which the Legislature established to achieve functional commuting needs), it may be appropriate for the Legislature to reexamine the trail immunity statute and its application to class I bikeways in urban areas.<sup>444</sup>

In *Baggio v. Chicago Park District*,<sup>445</sup> the court also addressed the plaintiff’s claim that there was a factual question of whether the property where the accident occurred had “a solely recreational intended or permitted purpose.”<sup>446</sup> The court held, however, that immunity depends on the character of the property and “[t]he fact that the property may have both a recreational and

nonrecreational purpose would not defeat the applicability of the [recreational use] statute.”<sup>447</sup>

However, regarding the possibility that a bikeway may be used for more than one purpose, the court in *Hovland v. City of Grand Forks*<sup>448</sup> came to a different conclusion. The court held that the recreational use statute did not shield a public entity from liability for a rollerblading accident on a city bike path. The court stated that there was possible disparate treatment of users of the bike path depending on the purpose for which they used it, meaning that a public entity in effect may have a lower standard of care depending on whether a bikeway is being used by a recreational user rather than by a commuter.

If public lands were granted immunity for all recreational activities, Caroline could not recover for her injuries because she was using the bike path for a recreational use, but had she been using the bike path for a non-recreational use she would be allowed to recover. This interpretation allows the government to treat two classes of persons injured on public lands differently: it forbids recovery for personal injuries incurred during recreational activities, but permits recovery for personal injuries incurred during non-recreational activities. The recreational use immunity statute was created to encourage private landowners to permit public access to private lands. In the context of public access to private lands, the disparate treatment of recreational users seems to make sense. In the context of public access to public lands, the disparate treatment is much harder to understand.<sup>449</sup>

In holding that the recreational use statute did not apply to the city and in remanding the case, the court also observed that

because the City’s interpretation of the recreational use statute limits recovery for personal injury, we would examine the classification under an intermediate standard of review. Specifically, we would determine whether there is a “close correspondence between statutory classification and legislative goals.” The legislative history does not disclose any reason why a recreational user of public lands could not recover for personal injuries when a non-recreational user could. Without a close correspondence with legislative goals supporting this classification, the statute might well fail an equal protection challenge under an intermediate standard of review.<sup>450</sup>

No other case was located that suggested that such a *de facto* classification of users of the same bikeway could be unconstitutional.

Although the case did not involve a bikeway accident, similar issues were addressed in *Auman v. School Dist. of Stanley-Boyd*.<sup>451</sup> The plaintiff was a student, a minor, who was injured at school during recess while sliding down a snow pile on the school playground. In holding that the student had come to school for educa-

<sup>437</sup> *Id.* at 1335–36, 59 Cal. Rptr. 3d at 356.

<sup>438</sup> *Id.* at 1336, 59 Cal. Rptr. 3d at 357.

<sup>439</sup> *Id.* at 1337, 59 Cal. Rptr. 3d at 357 (citing California Bicycle Transportation Act, CAL. STS. & HY. CODE § 891).

<sup>440</sup> *Farnham v. City of Los Angeles*, 68 Cal. App. 4th 1097, 80 Cal. Rptr. 2d 720 (Cal. App. 2d Dist. 1998), *review denied* (Apr. 14, 1999).

<sup>441</sup> *Prokop*, 150 Cal. App. 4th at 1340, 59 Cal. Rptr. 3d at 361.

<sup>442</sup> *Id.* at 1341–42, 59 Cal. Rptr. 3d at 362.

<sup>443</sup> *Id.* at 1341, 59 Cal. Rptr. 3d at 361.

<sup>444</sup> *Id.* at 1342–43, 59 Cal. Rptr. 3d at 362–63.

<sup>445</sup> 289 Ill. App. 3d 768, 682 N.E.2d 429 (Ill. App. 1st Dist. 1997).

<sup>446</sup> *Id.* at 772, 682 N.E.2d at 432.

<sup>447</sup> *Id.* (affirming the dismissal of the plaintiff’s claim because “at least one use of the harbor was recreational”).

<sup>448</sup> 1997 N.D. 95, 563 N.W.2d 384 (1997).

<sup>449</sup> *Id.* at P13, 563 N.W.2d at 388.

<sup>450</sup> *Id.* at P16, 563 N.W.2d at 388 (footnote omitted).

<sup>451</sup> 248 Wis. 2d 548, 558, 635 N.W.2d 762, 767 (Wis. 2001).

tional purposes and not to engage in recreational activity, the court identified some guidelines for determining whether an activity at the time of an accident is an activity within the meaning of the recreational use statute.

Although the injured person's subjective assessment of the activity is pertinent, it is not controlling. *A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity. A court should apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity.* Finally, a court should consider whether the activity in question was undertaken in circumstances substantially similar "to the circumstances of recreational activities set forth in the statute."<sup>452</sup>

The court concluded that the premises were primarily for educational activity, of which recreation was only an incidental part; hence, the recreational use statute did not apply.

When we apply the totality of the circumstances and the objectively reasonable person tests to determine whether Trista's activity is recreational under the statute, we conclude that the small part of Trista's school activity that could be considered "recreational" in ordinary parlance does not render her entering the school district's property as entering the property for the purposes of a recreational activity under the recreational immunity statute. Under the objective reasonable person test, not every outdoor activity is a recreational activity nor is every form of child's play a recreational activity under Wis. Stat. § 895.52.<sup>453</sup>

In contrast to the *Auman* case, in some states the issue for the courts is whether the property is intended or *permitted* to be used for recreational purposes. For example, in Kansas it has been held that "K.S.A. 75-6104(o) merely requires that the location be 'intended or permitted to be used...for recreational purposes.'... [T]he injury need not be the result of recreation. The minimum amount of recreational use must be something more than incidental."<sup>454</sup> In some jurisdictions, assuming the state recreational use statute applies to public entities as well as to bicycling, as long as the recreational use is more than merely incidental, a public entity may be protected from liability under the statute. Thus, "an injury need not occur during the course of a recreational activity for the recreational use exception to apply."<sup>455</sup> Furthermore, "a particular facil-

ity must be viewed collectively to determine whether it is used for recreational purposes."<sup>456</sup>

In *Lane v. Atchison Heritage Conference Center*, the Supreme Court of Kansas rejected a "primary purpose" test in determining whether the recreational use statute applied;<sup>457</sup> "the correct test...is 'whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.'"<sup>458</sup> The court quoted from the *Bubb*<sup>459</sup> decision by the Illinois Supreme Court that similarly rejected a "primary purpose" analysis: "Nothing in the statute requires an examination of the property's primary purpose."<sup>460</sup>

Other cases have held that a state's recreational use statute applies to a bikeway or trail owned and designated as such by a public entity. The South Dakota Supreme Court held that the state's recreational use statute entitled the city to immunity when a person was injured while rollerblading on a bike trail in a city park.<sup>461</sup> In California, in *Armenio v. County of San Mateo*,<sup>462</sup> the plaintiff alleged that he fell as the result of a dangerous condition created by the county's improper patching of a surfaced trail.<sup>463</sup> The court rejected his argument that California Government Section 831.4 grants immunity "only to roads or trails providing access to the recreational activities enumerated in subdivision (a), or to unimproved property, and not to trails on which the activity takes place."<sup>464</sup> The court held that under Section 831.4, "the nature of the trail's surface is irrelevant to question of immunity."<sup>465</sup>

Importantly, in *Farnham v. City of Los Angeles*,<sup>466</sup> the court held that even though the bikeway was part of the public streets and highways, a county bikeway on which a bicyclist was injured was a trail within the meaning of the statute granting public entities immunity for injuries on recreational trails. In *Farnham*, the plaintiff was injured on a Class I bikeway, which California Streets and Highway Code Section 890.4 defines as a facility used "primarily for bicycle travel."<sup>467</sup> A Class I bikeway such as a bike path "provide[s] a completely separated right-of-way designed for the exclusive use of bicycles and pedestrians with cross flows by

<sup>452</sup> *Id.* at 559, 635 N.W.2d at 767–68 (emphasis supplied) (footnotes omitted).

<sup>453</sup> *Id.* at 561, 635 N.W.2d at 768–69.

<sup>454</sup> *Jackson v. Unified Sch. Dist. No. 259*, 29 Kan. App. 2d 826, 831, 31 P.3d 989, 993 (Kan. Ct. App. 2001) (holding that the recreational use of the gymnasium was beyond an incidental use and qualified as recreational use under the statute) (some internal quotation marks omitted).

<sup>455</sup> *Lane v. Atchison Heritage Conference Center*, 283 Kan. 439, 445, 153 P.3d 541, 546 (2007).

<sup>456</sup> *Id.* at 445, 153 P.3d at 546.

<sup>457</sup> *Id.* at 447, 153 P.3d at 547 (emphasis in original).

<sup>458</sup> *Id.* (citation omitted).

<sup>459</sup> *Bubb v. Springfield Sch. Dist.*, 263 Ill. App. 3d 942, 636 N.E.2d 4 (1994).

<sup>460</sup> 283 Kan. at 450, 153 P.3d at 549 (emphasis in original) (citation omitted).

<sup>461</sup> *Kern v. City of Sioux Falls*, 1997 S.D. 19, at \*10, 560 N.W.2d 236, 239 (S.D. 1997).

<sup>462</sup> 28 Cal. App. 4th 413, 33 Cal. Rptr. 2d 631 (Cal. App. 1st Dist. 1994).

<sup>463</sup> *Id.* at 415, 33 Cal. Rptr. 2d at 633.

<sup>464</sup> *Id.* at 417, 33 Cal. Rptr. 2d at 634.

<sup>465</sup> *Id.* at 418, 33 Cal. Rptr. 2d at 635.

<sup>466</sup> 68 Cal. App. 4th 1097, 80 Cal. Rptr. 2d 720 (Cal. App. 2d Dist. 1998), *review denied* (Apr. 14, 1999).

<sup>467</sup> CAL. STS. & HY. CODE § 890.4.

motorists minimized.<sup>468</sup> A Class I bikeway thus has some segments that are “subject to either contiguous or cross-vehicular traffic,”<sup>469</sup> but such a bikeway “is not open to vehicular traffic.”<sup>470</sup>

The court held that, because the bikeway was a trail within the meaning of California Government Code Section 831.4(b), the city had immunity from the claim.<sup>471</sup> The court noted that the plaintiff had argued that “when a governmental entity undertakes to improve or create a paved trail in what is essentially an urban area, it should have the duty to reasonably maintain the condition thereof or face tort liability. He argues that his position is in line with traditional concepts of governmental tort liability.”<sup>472</sup>

The court’s response was that it is burdensome for public entities to inspect and repair bikeways, because they

are subject to changing irregularity of surface conditions due to seismic movement, natural settlement, or stress from traffic. Additionally, the weather can cause dirt or sand to be blown on a trail, creating an unsafe surface for almost any user. Rocks, tree branches and other debris often find their way onto a trail.<sup>473</sup>

According to the opinion, the cost to the governments from a “plethora of litigation...might well cause cities or counties to reconsider allowing the operation of a bicycle path, which, after all, produces no revenue.”<sup>474</sup> Thus, whether to amend Section 831.4 as interpreted by the courts was a matter for the legislature to decide.<sup>475</sup>

Other elements or appurtenances of bikeways may come within the protection of recreational use statutes. As held in *Dinelli v. County of Lake*,<sup>476</sup> a public entity has immunity based on the recreational use statute for a bicycle accident occurring on a “midblock bicycle trail crosswalk,”<sup>477</sup> because “the crosswalk was part of the [bicycle path] system which was designed and implemented for recreational purposes.”<sup>478</sup> Even if the crosswalk itself was not intended for recreational use, it increased the usefulness of the bikeway and therefore qualifies under the recreational use statute.<sup>479</sup> However,

a recreational use statute was held not to apply when a walkway was not appropriate for bicycle riding.<sup>480</sup>

In sum, the foregoing cases hold that a bikeway does not have to be devoted primarily or exclusively to recreational use for a public entity to have recreational use immunity. Of course, for there to be immunity a bikeway would have to be in a state in which the recreational use statute applies to public entities as well as to bicycles.

### C3. Whether a Bicyclist’s Purpose or Intent in Using a Bikeway Is Relevant

In some cases a bicyclist’s purpose or intent at the time of the accident in using property intended for recreational use was at issue. The Supreme Judicial Court of Massachusetts addressed the issue in *Ali v. City of Boston*.<sup>481</sup> The plaintiff collided with a gate and sustained injuries while riding his bicycle thorough a city park.<sup>482</sup> The plaintiff argued that “because he was injured while using the park for a nonrecreational purpose (that is, to ride home from the store),” the state recreational use statute did not apply.<sup>483</sup> The court held that “[t]he plaintiff’s contention that his subjective intent should govern the issue of landowner liability is illogical....”<sup>484</sup> “To condition a landowner’s liability on the recreational user’s subjective intent would only invite mischief and deceit. It matters not that the plaintiff’s purpose was transportation.... What matters is that [he was] engaging in recreational pursuits permitted in the park.”<sup>485</sup>

The trial court only needs to “determine whether the plaintiff is permitted to be in the park because he is engaged in an objectively recreational activity. The plaintiff, having entered the park on his bicycle, was clearly engaged in an objectively recreational activity....”<sup>486</sup> Thus, the plaintiff’s claim was barred by the recreational use statute.

In a number of other cases the courts also have held that recreational use immunity was available to a public entity even though at the time of the accident the user of the property intended for recreational use was not using the property for a recreational purpose.<sup>487</sup> In

<sup>468</sup> *Farnham*, 68 Cal. App. 4th at 1099, 80 Cal. Rptr. 2d at 721 (quoting CAL. STS. & HY. CODE § 890.4).

<sup>469</sup> *Id.* at 1099, 80 Cal. Rptr. 2d at 721.

<sup>470</sup> *Id.* at 1101, 80 Cal. Rptr. 2d at 723.

<sup>471</sup> *Id.* at 1100, 80 Cal. Rptr. 2d at 722.

<sup>472</sup> *Id.* at 1102, 80 Cal. Rptr. 2d at 723.

<sup>473</sup> *Id.* at 1103, 80 Cal. Rptr. 2d at 724.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> 294 Ill. App. 3d 876, 691 N.E.2d 394 (Ill. App. 2d Dist 1994) (plaintiffs alleging negligence in the design and maintenance of the crosswalk).

<sup>477</sup> *Id.* at 878, 691 N.E.2d at 395.

<sup>478</sup> *Id.* at 882, 691 N.E.2d at 398.

<sup>479</sup> *Id.* at 881, 691 N.E.2d at 397 (citing 745 ILL. COMP. STAT. 10/3-106).

<sup>480</sup> *Diaz v. N.Y. City Hous. Auth.*, 159 Misc. 2d 72, 75, 602 N.Y.S.2d 1019, 1021 (New York Sup. Ct. 1993).

<sup>481</sup> 441 Mass. 233, 804 N.E.2d 927 (2004).

<sup>482</sup> *Id.* at 233–34, 804 N.E.2d at 928–29.

<sup>483</sup> *Id.* at 233–34, 804 N.E.2d at 929.

<sup>484</sup> *Id.* at 238, 804 N.E.2d at 932.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.* at 238, 804 N.E.2d at 931.

<sup>487</sup> *Kayser v. Vill. of Warren*, 303 Ill. App. 3d 198, 203, 707 N.E.2d 285, 289 (Ill. App. 2d Dist. 1999) (holding that a community building was public property intended or permitted to be used for recreational purposes and the statute was not limited to sportive or active recreation), *appeal denied* (Ill., June 2, 1999); *Poston v. Unified Sch. Dist. No. 387*, 37 Kan. App. 2d 694, 696, 156 P.3d 685, 687 (Kan. Ct. App. 2007 (stating that the recreational use statute only requires that the property be intended or permitted to be used for recreational purposes, not

*Sylvester v. Chicago Park District*,<sup>488</sup> for example, the court held that the applicability of the recreational use statute did “not depend only on the plaintiff’s active engagement in a recreational activity at the time of the injury.”<sup>489</sup>

In the *Boaldin* case, *supra*, the plaintiff argued that the area in question had to be designated as recreational property. The plaintiff argued that if the recreational use statute “is applied to property other than that which has been expressly designated as recreational, then governmental entities would also escape liability for personal injuries arising on sidewalks or public streets, since such areas are sometimes used for recreational purposes.”<sup>490</sup> The court rejected the argument, stating that governmental entities had an independent duty “to maintain public streets and public sidewalks in a condition reasonably safe for use” and that a holding that the recreational use statute applied “in the present case will not affect or vary the responsibility of governmental entities to maintain public streets and public sidewalks....”<sup>491</sup>

#### D. Immunity When Recreational Use Is Restricted

A public authority may wish to limit the use of a designated bikeway in some manner. The courts have held that a landowner is not required to open its property to all persons;<sup>492</sup> that land open only to a particular class of the public is still within the recreational use statute;<sup>493</sup> and that a landowner may place reasonable restrictions on the use of its land.<sup>494</sup> In some jurisdictions a landowner still has immunity even if the landowner has prohibited recreational use<sup>495</sup> or has placed no trespass-

ing signs and barriers on the property.<sup>496</sup> However, there are cases from other jurisdictions holding that under these circumstances a landowner does not have the protection of the recreational use statute.<sup>497</sup>

The prevailing view appears to be that a recreational use immunity statute may apply to property that has both a recreational and a nonrecreational use or purpose. There is authority that a recreational use statute applies even without a property being primarily used for recreational purposes. Furthermore, a bicycle accident and injury may not have to be the result of recreation for the recreational use statute to apply and immunize a public entity for a bikeway claim. The majority view also appears to be that a bicyclist’s subjective intent (e.g., recreation or commuting) at the time of the accident is not relevant to the applicability of a recreational use statute.

#### Guidance

*A public entity in a state in which the state’s recreational use statute applies or has been held to apply to bicycles will want to determine whether its courts follow what appears to be the majority view that a bikeway does not have to be exclusively or even primarily for recreational use for a public entity to have recreational use immunity. Even the minority view appears to be that as long as a recreational use is more than merely incidental, a public entity may be protected from liability under a recreational use statute regardless of whether a plaintiff alleges faulty design or maintenance as the proximate cause of a bikeway accident.*

### SECTION VIII. LOCAL LAW AND POLICY REGARDING THE DESIGNATION OF BIKEWAYS

#### A. Localities’ Laws and Policies Regarding Bikeways

Although there appears to some commonality in the approach to the designation of bikeways, there are also some significant differences. This section discusses whether localities have laws and policies regarding the designation of bikeways; the types of bikeways; the public entities responsible for designating bikeways; design

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that the injury occur as the result of recreational activity), *aff’d*, 286 Kan. 809, 189 P.3d 517 (2008).

<sup>488</sup> 179 Ill. 2d 500, 689 N.E.2d 1119 (1997), *reh’g denied* (Feb. 2, 1998).

<sup>489</sup> *Id.* at 508, 689 N.E.2d at 1124.

<sup>490</sup> *Boaldin v. Univ. of Kan.*, 242 Kan. at 292, 747 P.2d at 814.

<sup>491</sup> *Id.*

<sup>492</sup> *Mansion v. United States*, 945 F.2d 1115, 1117 (9th Cir. 1991).

<sup>493</sup> *Herring v. Hauck*, 118 Ga. App. 623, 624, 165 S.E.2d 198, 199 (Ga. 1968) (stating that an owner may “permit the free use of his facilities or land by the public generally or by a particular class of the public”).

<sup>494</sup> *Scrapchansky v. Town of Plainfield*, 226 Conn. 446, 452, 627 A.2d 1329, 1332 (Conn. 1993).

<sup>495</sup> *Albright v. Metz*, 88 N.Y.2d 656, 663, 672 N.E.2d 584, 588, 649 N.Y.S.2d 359, 363 (N.Y. 1996) (holding that the recreational use statute applied because access regulations were targeted at unauthorized dumping in the facility rather than banning potential public recreational use); *Bloom v. Brady*, 171 A.D. 2d 910, 566 N.Y.S.2d 783 (N.Y. App. 3d Dep’t 1991); *Friedman v. Grand Cent. Sanitation, Inc.*, 524 Pa. 270, 271, 571 A.2d 373-373 (Pa. 1990) (holding that the recreational use statute immunized the owner from liability even though the land was posted with “No Trespassing” signs).

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<sup>496</sup> *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 629, 547 N.W.2d 602, 603 (1996) (no signs); *Larini v. Biomass Industries, Inc.*, 918 F.2d 1046, 1048, 1049 (2d Cir. 1990) (holding that the owner had immunity and that although the property was posted with “No Trespassing” signs and blocked by both a metal gate and a wall of snow, the landowner’s efforts were irrelevant “because the statute extends to landowners whose land is available for recreational pursuits”).

<sup>497</sup> *Hughes v. Quarve & Anderson Co.*, 338 N.W.2d 422, 427 (Minn. 1983) (holding that “the Recreational Use Statute has no application where the defendant landowner does not offer the quarry pond in question for public use and, indeed, claims here that it has discouraged the public from using the pond as a public facility”); *Ga. Power Co. v. McGruder*, 229 Ga. 811, 812, 194 S.E.2d 440, 441 (Ga. 1972) (holding that the recreational use statute did not apply when the owner had expressly denied use of the land by posting “keep out” signs in the area).

and maintenance guidance for bikeways; whether public entities have had litigation over their decisions whether to designate bikeways; public entities' experience with tort liability and bikeways; and public entities' recommendations for localities that are considering bikeways.

Some states have enacted a bikeway or bicycle transportation act.<sup>498</sup> In Illinois, the legislature has recognized that there is an "urgent need for safe bikeways" for both children and adults for transportation and for exercise and recreation," and a need "to coordinate plans for bikeways most effectively with those of the State and local governments" by way of "a single State agency, eligible to receive federal matching funds."<sup>499</sup> The Illinois Department of Transportation is responsible for developing and coordinating a state-wide bikeways program and officially designates bikeways throughout the state.<sup>500</sup>

In Maryland, the Department of Transportation has been involved through one of its modal administrations, the State Highway Administration,<sup>501</sup> in designating bikeways, including bicycle lanes on streets and highways.<sup>502</sup>

Massachusetts law requires the Massachusetts Highway Department to take all reasonable provisions for the accommodation of bicycle and pedestrian uses in the planning, design, construction, reconstruction, or maintenance of any projects it undertakes.<sup>503</sup> Massachusetts reports that each project funded by state or federal funds is subject to review by the Massachusetts Highway Department Bicycle and Pedestrian Accommodation Engineer.<sup>504</sup> It is the Engineer's responsibility to make certain that bicycles traveling on streets and highways are accommodated to the best extent possible. In 2009, 116 projects had been reviewed for bicycle accommodations. In 2008, 156 projects were reviewed for bicycle accommodations. Although projects consist of bike paths, shared use paths, and roadway or bridge projects, the majority of the projects were roadway and

bridge projects. All projects have the same review process as outlined in the *Project and Development Design Guide*. Final approval may be given at the 25 percent Design Stage; no further review is required unless there is a change in the scope of the project.

The Minnesota Department of Transportation (MnDOT) advised that in Minnesota a bicycle is a legally recognized vehicle and its use is restricted only in specific circumstances. MnDOT reported that it was unaware of the denial of any formal request for the designation of a bikeway.

North Carolina has laws and policies regarding the designation of bikeways<sup>505</sup> and has been involved in designating them.<sup>506</sup>

According to the Washington State Department of Transportation (WSDOT), most bicycle travel occurs on highways and streets without a bikeway designation. In Washington, the streets are considered to be adequate for safe and efficient bicycle travel; special signing and pavement markings for bicycles are deemed unnecessary.<sup>507</sup> However, in King County, Washington, the county has both approved and denied requests to designate bike lanes on its roadways.

In Boulder County, Colorado, on-street bikeways and road shoulders are an integral part of Boulder County's transportation system.<sup>508</sup> However, Boulder County does not designate bikeways or bicycle lanes on streets or highways, although it does provide a map of on-street bikeways and other information at [boulder-county.org/transportation/bikeways](http://boulder-county.org/transportation/bikeways). As a matter of policy, the Boulder County Transportation Department adds shoulders for bike use to all roads receiving a pavement overlay if that road has historically experienced significant bike use. The county currently has 43 mi of shoulder improvements and plans another 39 mi.

## B. Types of Bikeways

A bikeway is a generic term for any road or path that is specifically designated in some manner and open to bicycle travel, regardless of whether such facilities are for the exclusive use of bicycles.<sup>509</sup> A designated bikeway may be used for recreational or commuting purposes.

Legislation may classify bikeways; for example, in Illinois a bikeway is defined as

<sup>498</sup> See, e.g., Illinois (605 ILL. COMP. STAT. 30/0.01, *et seq.*) (Bikeway Act) and California (CAL. STS. & HW. CODE §§ 890–894.2) (California Bicycle Transportation Act).

<sup>499</sup> 605 ILL. COMP. STAT. 30/1.

<sup>500</sup> 605 ILL. COMP. STAT. 30/2(a).

<sup>501</sup> Information supplied by the Maryland Attorney General's Office.

<sup>502</sup> The Maryland Attorney General's Office advised that in Maryland the authority for designating bikeways and bicycle lanes includes: MD. CODE ANN. §§ 2-602 (transportation article) and 21-101(c), (d), and (e) (defining bicycle path, bicycle way, and bike lane); the Maryland Department of Transportation's 20-year Bicycle and Pedestrian Access Master Plan (Goal No. 1); 2007 Bicycle and Pedestrian Guidelines; and Performance Measure 16 of the State Highway Administration's Fiscal Year 2008–11 Business Plan (Objective 2.3).

<sup>503</sup> MASS. GEN. LAWS ch. 90 § 2A.

<sup>504</sup> Information supplied by the Executive Office of Transportation Public Works, Massachusetts Highway Department, Boston, Mass.

<sup>505</sup> [http://www.ncdot.org/transit/bicycle/laws/laws\\_bikewayact.html](http://www.ncdot.org/transit/bicycle/laws/laws_bikewayact.html); [http://www.ncdot.org/transit/bicycle/laws/laws\\_bikepolicy.html](http://www.ncdot.org/transit/bicycle/laws/laws_bikepolicy.html); [http://www.ncdot.org/transit/bicycle/laws/laws\\_resolution.html](http://www.ncdot.org/transit/bicycle/laws/laws_resolution.html); <http://www.fhwa.dot.gov/environment/bikeped/design.html>.

<sup>506</sup> Information supplied by the North Carolina Department of Transportation's Office of General Counsel. See [http://www.ncdot.org/transit/bicycle/projects/highlights/projects\\_highlights\\_intro.html](http://www.ncdot.org/transit/bicycle/projects/highlights/projects_highlights_intro.html).

<sup>507</sup> WASH. STATE DEP'T OF TRANSP., DESIGN MANUAL M 22-01, at 1020-4 (2001), available at <http://www.wsdot.wa.gov/fasc/EngineeringPublications>.

<sup>508</sup> Information supplied by the Boulder County Attorney's Office.

<sup>509</sup> AASHTO Guide, *supra* note 3.

(1) a shared facility whereby both vehicles and bicycles may operate on the through lanes, parking lanes or shoulders of a street or highway, (2) a pathway on a street or highway right-of-way, on public land other than a street or highway right-of-way, or on lands not owned by a municipality, local unit of government, county, or the State of Illinois or one of its agencies or authorities by agreement with the owner for a minimum duration of 20 years.<sup>510</sup>

In California the state transportation law defines a bikeway as all facilities that provide primarily for bicycle travel and establishes three categories of bikeways.

(a) Class I bikeways, such as a “bike path,” which provide a completely separated right-of-way designated for the exclusive use of bicycles and pedestrians with crossflows by motorists minimized.

(b) Class II bikeways, such as a “bike lane,” which provide a restricted right-of-way designated for the exclusive or semiexclusive use of bicycles with through travel by motor vehicles or pedestrians prohibited, but with vehicle parking and crossflows by pedestrians and motorists permitted.

(c) Class III bikeways, such as an onstreet or offstreet “bike route,” which provide a right-of-way designated by signs or permanent markings and shared with pedestrians or motorists.<sup>511</sup>

According to Minnesota’s *Bikeway Facility Design Manual*,

[b]ikeways include both on-road and off-road facilities, including bike lanes, paved shoulders, shared lanes, wide outside lanes, and shared use paths. Bike lanes, paved shoulders, and wide outside lanes allow bicyclists and motorists to operate parallel to each other in the roadway, maintaining a separation, without requiring motorists to change lanes to pass bicyclists.<sup>512</sup>

In sum, there are four basic types of bicycle facilities: shared roadways (no bikeway designation) on which there is bicycle use on the existing street system without signing or striping for said use;<sup>513</sup> signed, shared roadways, which are designated bicycle routes and provide continuity to other bicycle facilities (such as bicycle lanes), or the signage designates the preferred route through a transportation system; bike lanes, which may be striped; and shared use paths.<sup>514</sup>

<sup>510</sup> 605 ILL. COMP. STAT. 30/2(a).

<sup>511</sup> CAL. STS. & HY. CODE § 890.4 (2009).

<sup>512</sup> MINN. DEP’T OF TRANSP., BIKEWAY FACILITY DESIGN MANUAL, ch. 3 (General Design Factors), at 60, available at: <http://www.dot.state.mn.us/bike/pdfs/Chapter%203%20General%20Design%20Factors%20Bw.pdf>.

<sup>513</sup> Ohio Department of Transportation Design Guidance for Roadway-Based Bicycle Facilities (Oct. 2005), found through <http://www.dot.state.oh.us/Services/Pages/Bike.aspx>. According to the Ohio Department of Transportation, wide curb lanes perform well as shared roadways since motorists are able to pass bicyclists without crossing the center line.

<sup>514</sup> *Id.*

## C. Responsibility for Designating Bikeways

In California, local authorities, such as a city, county, or other local agency, may be expressly authorized by the state to establish bikeways and to acquire the land necessary to establish bikeways.<sup>515</sup> In addition, California

does not prohibit local authorities from establishing, by ordinance or resolution, bicycle lanes separated from any vehicular lanes upon highways, other than state highways as defined in Section 24 of the Streets and Highways Code and county highways established pursuant to Article 5 (commencing with Section 1720) of Chapter 9 of Division 2 of the Streets and Highways Code.<sup>516</sup>

By statute, California required that

[t]he Association of Bay Area Governments shall develop and adopt a plan and implementation program, including a financing plan, for a continuous recreational corridor which will extend around the perimeter of San Francisco and San Pablo Bays. The plan shall include a specific route of a bicycling and hiking trail, the relationship of the route to existing park and recreational facilities, and links to existing and proposed public transportation facilities.<sup>517</sup>

The California Department of Transportation cooperates with county and city governments to establish bikeways and to “establish minimum safety design criteria for the planning and construction of bikeways and roadways where bicycle travel is permitted.”<sup>518</sup> Minimum safety design criteria include “the design speed of the facility, minimum widths and clearances, grade, radius of curvature, pavement surface, actuation of automatic traffic control devices, drainage, and general safety.”<sup>519</sup> A city or county may prepare a bicycle transportation plan and submit it to the applicable county transportation authority.<sup>520</sup> The authority then may submit an approved plan to the state transportation department and also may seek matching funds from the state to develop a city or county bikeway.<sup>521</sup> The law requires that a city or county provide 10 percent of the project’s total cost.<sup>522</sup>

Under the Illinois Bikeway Act,<sup>523</sup> the state Department of Transportation, whose annual appropriation is to “include funds for the development of bicycle paths and a State-wide bikeways program,”<sup>524</sup> is principally responsible for designating bikeways in cooperation with units of local government.<sup>525</sup>

<sup>515</sup> CAL. STS. & HY. CODE § 891.8 (2009).

<sup>516</sup> CAL. VEH. CODE § 21207 (2009).

<sup>517</sup> CAL. PUB. RES. CODE § 5850 (2009).

<sup>518</sup> CAL. STS. & HY. CODE § 890.6 (2009).

<sup>519</sup> *Id.*

<sup>520</sup> *Id.* § 891.4(a) (2009).

<sup>521</sup> *Id.*

<sup>522</sup> *Id.* § 891.4(b) (2009).

<sup>523</sup> 605 ILL. COMP. STAT. 30/1 (2009).

<sup>524</sup> 605 ILL. COMP. STAT. 30/3 (2009).

<sup>525</sup> 605 ILL. COMP. STAT. 30/4 (2009).



In Georgia, the state Department of Transportation is tasked with designating bikeways that are publicly owned and maintained.<sup>526</sup> Bikeways are “paved paths, ways, or trails designated and signed as bicycle routes and located in urban, suburban, or rural areas.”<sup>527</sup> Local governing authorities determine bikeway routes within their jurisdiction, but the state transportation department must approve the routes.<sup>528</sup> As an alternative to determinations by local governing authorities, the transportation department is authorized to construct bikeways after a determination by the state’s Department of Natural Resources.<sup>529</sup> A local governing authority or private association may construct a bikeway in the state as long as property is not acquired by eminent domain.<sup>530</sup>

In Ohio, the responsibility for all on-road bicycle facilities belongs to the local public agency except for bike lanes on state highways in rural areas.<sup>531</sup>

As for cities and counties, Denver, Colorado, has a Bicycle Master Plan that provides an in-depth analysis, identification, and review of its local bikeways.<sup>532</sup> Denver’s bikeway policy is influenced by Denver’s Strategic Transportation Plan.<sup>533</sup> The Denver Planning Board undertakes the process for designating bikeways.<sup>534</sup> A 25-member Bicycling Advisory Committee meets monthly to “oversee the implementation of the Denver Bicycle Master Plan”; works with the city to develop engineering standards for street, roadway, and trail designs to accommodate bicycles; and reviews roadway and trail projects.<sup>535</sup>

Phoenix, Arizona, has a system of about 651 mi of bike routes and on-street bike lanes, as well as street designations on maps for bicycles.<sup>536</sup> Phoenix advised that rather than having laws and regulations applicable to bikeway designation, it has a *Traffic Operations Handbook* for the designation of bicycle facilities.

<sup>526</sup> GA. CODE ANN. § 12-3-114(1)(G) (2009).

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> *Id.* § 12-3-115(a) (2009).

<sup>530</sup> *Id.* § 12-3-115(b) (2009).

<sup>531</sup> WASH. STATE DEPT’ OF TRANSP., DESIGN MANUAL M 22-01, (2001), available at <http://www.wsdot.wa.gov/fasc/EngineeringPublications>.

<sup>532</sup> City of Denver—Bicycle Transportation, available at <http://www.denvergov.org/BicycleProgram/BicycleMasterPlanUpdate/tabid/378656/Default.aspx>.

<sup>533</sup> *Id.*, available at <http://www.keepdenvermoving.com>.

<sup>534</sup> *Id.*, available at <http://www.denvergov.org/TabId/392084/default.aspx>.

<sup>535</sup> *Id.*, available at <http://www.denvergov.org/BoardsandCommissions/BoardsandCommissions4/tabid/378947/Default.aspx>.

<sup>536</sup> On-street marked bike lanes total 379 of these miles.

## D. Design and Maintenance Guidance for Bikeways

The AASHTO Guide, *supra*, provides an overview of the planning considerations for bicycles, discusses facility improvements and the factors to consider, provides guidelines for the construction or improvement of highways for the accommodation of bicycles or the construction or improvement of bicycle facilities, and makes recommendations for the operation and maintenance of bicycle facilities.<sup>537</sup> The AASHTO Guide states clearly that the guidelines are not intended to be “strict standards.”

This guide provides information to help accommodate bicycle traffic in most riding environments. It is not intended to set forth strict standards, but, rather, to present sound guidelines that will be valuable in attaining good design sensitive to the needs of both bicyclists and other highway users. However, in some sections of this guide, design criteria include suggested minimum guidelines. These are recommended only where further deviation from desirable values could result in unacceptable safety compromises.<sup>538</sup>

There may be special statutory provisions applicable to bikeways in a state’s motor vehicle or highway code.<sup>539</sup> For example, in California, three provisions in the Streets and Highway Code are applicable to grates and bicycles. Section 161 provides that “[o]n construction projects, the department shall install on the surface of state highways upon which the operation of bicycles is permitted only those types of grates which are not hazardous to bicycle riders.”<sup>540</sup> With respect to counties, the code provides that only those types of grates that are not hazardous to bicycle riders are to be installed on county highways on which bicycles are permitted.<sup>541</sup> A similar provision applies to cities.<sup>542</sup>

Massachusetts advises that its guidelines for bicycle accommodations are covered by the 2006 *Massachusetts Highway Department Project and Development Design Guide* and the 1999 AASHTO design guidelines for bicycle accommodation. In Massachusetts, the Bicycle and Pedestrian Accommodation Engineer is a member of the Design Exception Review Committee. This committee is composed of representatives from all sections of the Massachusetts Highway Department, with each member bringing his or her expertise to the committee. The committee reviews and makes recommendations for all projects that do not meet minimum design criteria or requirements.

<sup>537</sup> AASHTO Guide, *supra* note 3, at 1.

<sup>538</sup> AASHTO Guide, *supra* note 3, at 2.

<sup>539</sup> *See, e.g.*, CAL. VEH. CODE §§ 21200-21212.

<sup>540</sup> CAL. STS. & HY. CODE § 161.

<sup>541</sup> *Id.* § 906.5.

<sup>542</sup> *Id.* § 1805.5 (requiring that in construction contracts, “the legislative body of a city shall install on the surfaces of city streets upon which the operation of bicycles is permitted only those types of grates which are not hazardous to bicycle riders”).

In Minnesota, MnDOT's *Bikeway Facility Design Manual* covers such topics as bicycle network planning coordination, general design factors, on-road bikeways, shared use paths, traffic controls, and maintenance. The purpose of Minnesota's manual is "to provide engineers, planners, and designers with a primary source to implement...Mn/DOT's vision and mission for bicycle transportation in Minnesota" and to provide "citizens, developers, and others involved in the transportation planning process, guidance on the critical design and planning elements to promote bicycle safety, efficiency, and mobility."<sup>543</sup>

The Nevada Department of Transportation (NDOT) recommends that urban destinations be located directly on or within a short distance of bikeways to encourage the use of designated bikeways.<sup>544</sup> NDOT also states that designated bicycle facilities or shared roadways improve the safety of and provide convenience for bicyclists.<sup>545</sup>

The North Carolina Department of Transportation (NCDOT) advises that it has denied requests in North Carolina for designated bike lanes on some highway improvement projects because of concerns about substandard design for the proposed bikeway or incompatibility with overall traffic conditions on a given highway, for example, on a high-speed, high-volume, multilane arterial with complex interchanges or intersections.

The Ohio Department of Transportation (ODOT) advises that the designation of bikeways involves choosing a route and posting signs and being responsible for them and that a route should connect destinations. ODOT recommends that a map or plan be used to locate signed bike routes and further recommends that owner permission be obtained before posting signs.<sup>546</sup> ODOT's *Design Guidance for Roadway-Based Bicycle Facilities* covers maintenance of on-road bicycle facilities and states that the responsibility for all on-road bicycle facilities belongs to city and county agencies unless the bikeway is on a state highway in a rural area.<sup>547</sup> The manual identifies items that may require maintenance such as the removal of debris, filling of potholes or cracks, cutting of bushes, removal of gravel, and correction of drainage problems. The manual states that signs should be checked periodically to verify that they are still in place and are readable and that pavement markings should be checked for visibility.

<sup>543</sup> MINN. DEP'T OF TRANSP., *supra* note 512, at 17 (updated Apr. 2008), available at <http://www.dot.state.mn.us/bike/bikewaysdesignmanual.html>.

<sup>544</sup> Nevada State Bicycle Plan, for Nevada Department of Transportation, at VII-3 (2003), available at [http://www.bicyclenevada.com/pdf\\_bpc/nvbikeplan.pdf](http://www.bicyclenevada.com/pdf_bpc/nvbikeplan.pdf).

<sup>545</sup> *Id.*

<sup>546</sup> Ohio Department of Transportation, *supra* note 513, available at <http://www.dot.state.oh.us/Divisions/Local/Projects/bicycle/Design%20Guidelines/RoadwayBasedFacies.pdf>.

<sup>547</sup> WASH. STATE DEP'T OF TRANSP., *supra* note 531, at 1020-4.

As for cities and counties, although Boulder County, Colorado, has an on-line map of streets that have shoulders, the county does not place signs indicating bikeways or bicycle lanes. Boulder County advised that because the county does not have specific standards for constructing shoulders for bicycle use, the county does not want to convey the impression that one road is safer than another for bicycle use.

The policy in Phoenix is that all new arterial street cross-sections include space for on-street bike lanes and that bike lanes not be marked or signed unless a complete segment is provided. Phoenix also advises that the only times that bike lanes have not been established in recent years was when there was insufficient space or funds.

King County in the State of Washington advises that its policy and guidelines applicable to bikeways are set forth in the *King County Road Design and Construction Standards*, which refer also to WSDOT and AASHTO design guidelines and standards. King County cited a specific instance in which the county did not approve the inclusion of bikeways as part of a roadway improvement project because the reconfiguration of the roadway would result in the bikeways being substandard.

## E. Localities' Reported Litigation over Bikeway Designations

With respect to any litigation regarding the failure or refusal to designate a bikeway, only Massachusetts reported such a case. In Massachusetts a complaint was dismissed that had alleged that the Massachusetts Highway Department, *inter alia*, failed to provide all reasonable provisions that are authorized and required by Massachusetts law for the accommodation of bicycles and pedestrians in its reconstruction of a part of Massachusetts Avenue in Boston.<sup>548</sup> Massachusetts advised that the highway department declined to provide a bike lane on the Massachusetts Avenue project because of vehicle demand. Although the intention was to accommodate bicycles through the use of a shared right lane, turning lanes were needed to improve the level of service along the corridor. At the time of the filing of the complaint, the design of the project had been completed; citizens' concerns did not become apparent until the advertising of the project, when construction was about to begin.<sup>549</sup>

As for other jurisdictions, Georgia, where a designation must be included on the Georgia Bicycle and Pe-

<sup>548</sup> *Kruclaneyer v. Paiewonsky*, Mass. Super. Ct., Suffolk, Mass., CA \_\_, dismissed May 2009 (*citing* MGL, c. 90E § 2A).

<sup>549</sup> Massachusetts advises that one of the initial, important steps for a project is holding a public hearing at or near the 25 percent project design stage when all interested parties may voice their concerns. Massachusetts states that the Bicycle-Pedestrian Accommodation Engineer's opinion is that a timely and well conducted public hearing assists in reducing and resolving citizens' concerns about bicycle lanes and pedestrian pathways.

destrian Plan, Statewide Route Network,<sup>550</sup> reported one instance involving the denial of a request for a bikeway, because the request did not meet the requirements of the Georgia Bicycle and Pedestrian Plan or satisfy the required design guidance, but reported no litigation because of the denial.<sup>551</sup>

North Carolina reported that it has not been involved in any litigation regarding the agency's designation or refusal to designate a bikeway. The city of Phoenix also reported that in the past 24 years the city has not been involved in any litigation regarding its designation or refusal to designate a bikeway.

#### **F. Localities' Reported Tort Liability and Bikeway Accidents**

As for tort liability and bikeway accidents, the agencies that responded reported very few cases. Although Maryland reported that occasionally there has been some reluctance at the local and state levels regarding the designation of bikeways, liability concerns have been a "minor matter" on whether to designate bikeways. The NCDOT advised that it was not aware of any tort claims arising out of accidents on bikeways, including designated bicycle lanes on streets or highways. The North Carolina Attorney General's Office reported that it was not aware of such a claim since 2000.

Phoenix advised that potential tort liability would be a reason indirectly to deny establishment of an on-street bicycle facility when there are insufficient resources or insufficient space for a safe facility. Phoenix provided a list of cases that had been settled or otherwise resolved since 1996. Of six cases involving bikeway accidents, the city did not have to pay anything to a claimant in three cases; three cases settled for \$75,000, \$25,000, and \$8,000. The remaining 14 bicycle-related claims against the city since 1996 did not involve bikeways.

As for how to prevent or reduce tort claims for bikeway accidents, the principal recommendation by the agencies responding to the survey was that significant attention be devoted to maintenance. The NCDOT also advised that possible liability claims are a concern when engineering judgments do not comply with nationally accepted design guidelines and thus recommended that agencies follow accepted design guidelines for bikeways. Nevertheless, none of the survey respondents reported a bikeway-accident claim arising out of negligent design.

#### **G. Public Entities' Recommendations for Localities Considering Bikeways**

Maryland recommends that localities seek the assistance of concerned citizens, particularly of experienced

bicyclists and local advocacy groups, in the planning and development of bikeways; develop an overall bikeway plan and submit it for approval to the officials having responsibility for implementation; consult applicable manuals and guidelines, including the MUTCD and the AASHTO Guide for Bikeway Design; consult competent legal counsel to address any concerns about liability; document the reason (or reasons) for any departures from design guidelines and ensure that the documentation is retrievable if there is a lawsuit alleging faulty design; and have a proactive maintenance program.

Phoenix suggests that there is a need for adequate surveillance and maintenance of bikeways, as well as for an adequately trained staff to observe and report bikeway conditions. Phoenix states that it rarely has a claim involving poor design and that most claims arise because of motorist or bicyclist behavior. Phoenix recommends that attention be paid to adequate maintenance (*e.g.*, bike surface and landscaping encroachment) and to nighttime lighting.

#### **CONCLUSION**

Although federal and state laws encourage the designation and use of bikeways, public entities may be concerned by potential tort liability for bikeway accidents. However, most public entities have important defenses to tort claims for bikeways either under a tort claims statute applicable to public entities or the state's recreational use statute, also applicable to public entities in a clear majority of the states.

As discussed in this digest, many decisions that public entities make regarding bikeways (*e.g.*, the type or placement of a bikeway and its design) or related aspects (*e.g.*, use or placement of signs, signals, guardrails, or pavement markings) involve the exercise of discretion and are immune from liability under the discretionary function exemption in tort claims acts. The agencies responding to the survey either did not report any tort claims for the alleged negligent design of bikeways or stated that they had had few if any such claims.

Maintenance activity, such as the failure to replace or repair a sign or signal or remove an obstruction from or repair the surface of a bikeway, gives rise to most tort claims against public entities. Assuming it had an actual or constructive notice prior to an accident, a public entity may be held liable for the failure to correct a dangerous or hazardous condition of a bikeway or for the failure to give adequate warning of the condition. Several agencies responding to the survey stressed that a proactive maintenance program for bikeways is important to reduce the incidence of bikeway-related tort claims.

As noted, a public entity also may have immunity for bikeway claims based on the state's recreational use statute. Even if bicycling is not enumerated in a recreational use statute, most recreational use statutes are sufficiently broad to apply to bicycles and bikeways. If a

<sup>550</sup> Information supplied by the Georgia Department of Transportation, State Bicycle and Pedestrian Coordinator, Office of Planning, Atlanta, Ga.

<sup>551</sup> Georgia Department of Transportation Bike/Ped. Design Policy; 1997 Georgia Bicycle and Pedestrian Plan.

recreational use statute applies to a bikeway accident, the public entity will have immunity unless it willfully or maliciously failed to warn of or guard against a known dangerous condition or, in some states, committed “gross negligence” or engaged in “wanton and reckless conduct” or “willful, wanton, or reckless conduct.”

Assuming the state’s recreational use statute applies to a public entity sued for a bikeway accident, the cases hold almost without exception that a recreational use statute applies to a bikeway without it having to be primarily or exclusively for recreational use and regardless of a bicyclist’s purpose or intent when using the bikeway at the time of an accident. Thus, it appears that in virtually all jurisdictions in which the recreational use statute otherwise applies to a public entity and bikeways, the public entity will have immunity for bikeway accidents regardless of whether bicyclists are using the bikeway for commuting or for recreation.

Based on the responses to the survey and on information derived from statutes and Web sites for agencies having bikeways, public entities have laws and policies regarding the designation of bikeways. Only one public entity reported a case, later dismissed, alleging that the public entity failed to make accommodations required

by law for bikeways and bicycles in a highway project. Survey respondents indicated that they follow the AASHTO standards applicable to bikeways, as well as their own manuals on the design and maintenance of bikeways. However, as for tort claims, the survey respondents reported very few claims by bicyclists brought against them for accidents on bikeways, even for faulty maintenance. One respondent stated that tort liability concerns are a minor matter when deciding whether to designate a bikeway.

In sum, as discussed in the digest, although there have been some tort claims against public entities for bikeway accidents, the defendant public entities prevailed in nearly all cases. Although the report analyzes public entities’ tort liability with respect to bikeways, the reader is cautioned that tort claims acts, recreational use immunity statutes, and the courts’ interpretations of the law differ from state to state. The nature of the legal issues and principles discussed herein does not allow for definitive statements concerning public entities’ tort liability for bikeway claims. Accordingly, it is recommended that anyone relying on this digest should consult with counsel to confirm the rules and their interpretation in his or her state.

## APPENDIX A. SURVEY QUESTIONS

### NCHRP 20-6, Study Topic 15-04, Liability Aspects of Bikeway Designation

1. Please provide contact information for the person or persons responding to the survey on the above topic.

Name:

Title/position:

Agency:

E-mail:

2. Has your agency approved, denied or otherwise been involved in the designation of bikeways or bicycle lanes on streets or highways? If so, please provide details.

3. Please advise whether your jurisdiction has a statute, ordinance, regulations, guidelines or policies applicable to the designation of bikeways or bicycle lanes on streets or highways. If so, please provide a copy.

4. If your jurisdiction does not have already laws, regulations, policies or guidelines applicable to the designation of bikeways or bicycle lanes on streets or highways are there any proposals to do so? If so, please provide details and a copy of any pending action.

5. Has your agency been involved in any litigation regarding the agency's designation of or refusal to designate a bikeway or a bicycle lane on a street or highway? If so, please provide details.

6. If your agency has been requested to designate a bikeway or a bicycle lane on a street or highway and the agency declined to do so, what were the reasons for the agency's decision? Was potential tort liability one of the reasons?

7. Has your agency had tort claims arising out of accidents on bikeways or designated lanes for bicycles on streets or highways or on streets or highways lacking a designated lane for bicycles? If so, please provide details, including, if possible, the dates and amounts of any settlements or judgments.

8. Does your agency have a report or other information on the agency's experience with tort claims against the agency, for example, on the number of claims, type of claims, number of closed cases, number of pending cases and pre-suit claims or demands, and amount paid by or on behalf of the agency because of judgments or settlements? If so, please provide a copy for any years for which such information is available.

9. If your jurisdiction has had experience with the bikeways or bicycle lanes on streets or highways do you have any suggestions regarding the designation process and/or reducing the risk of litigation including tort claims?

**APPENDIX B. LIST OF AGENCIES RESPONDING TO SURVEY QUESTIONS**

Boulder County  
Boulder County Attorney's Office  
P.O. Box 471  
Boulder, CO 80306

City of Phoenix  
Office of the City Attorney  
220 West Washington Street  
Suite 1300  
Phoenix, AZ 85003

Commonwealth of Massachusetts  
Executive Office of Transportation  
Office of Deputy Chief Counsel  
Ten Park Plaza  
Boston, MA 02116

Georgia Department of Transportation  
Office of Deputy General Counsel  
600 West Peachtree Street  
Atlanta, GA 30308

King County Department of Transportation  
Office of Traffic Operations Supervisor  
Seattle, WA 98104

Maryland Department of Transportation  
Office of Attorney General  
7201 Corporate Center Drive  
Hanover, MD 21076

Maryland Department of Transportation  
Office of Director, Bicycle/Pedestrian Access  
7201 Corporate Center Drive  
Hanover, MD 21076

Minnesota Department of Transportation  
Bicycle and Pedestrian Section  
395 John Ireland Boulevard  
St. Paul, MN 55155

State of North Carolina  
Department of Transportation  
Office of General Counsel  
1501 Mail Service Center  
Raleigh, NC 27699

**APPENDIX C. STATE RECREATIONAL USE STATUTES**

Ala. Code § 35-15-1, *et seq.*

Ariz. Rev. Stat. § 33-1551, *et seq.*

Ark. Code § 18-11-301, *et seq.*

Cal. Civ. Code § 846

Colo. Rev. Stat. § 33-41-101, *et seq.*

Conn. Gen. Stat. § 52-557f, *et seq.*

Del. Code Tit. 7 § 5901, *et seq.*

Fla. Stat. §§ 375.251, 335.065

Ga. Code § 51-3-20, *et seq.*

Haw. Rev. Stat. § 520-1, *et seq.*

Idaho Code § 36-1604

Ill. Comp. Stat., 745 ILCS 65/1, *et seq.*

Ind. Code § 14-22-10-2

Iowa Code § 461C.1, *et seq.*

Kan. Stat. § 58-3201, *et seq.*

Ky. Rev. Stat. § 150.645, *et seq.*

La. Rev. Stat. § 9.2795

Me. Rev. Stat., tit. 14, § 159.A

Md. Code § 5-1101, *et seq.*

Mass. Gen. Laws, c. 21 § 17C

Mich. Comp. L. § 324.73301

Minn. Stat. § 604A.20, *et seq.*

Mo. Stat. § 537.345, *et seq.*

Mont. Code § 70-16-301, *et seq.*

Neb. Rev. Stat. § 37-729, *et seq.*



Nev. Rev. Stat. § 41.510  
N.H. Rev. Stat. § 212:34, *et seq.*  
N.J. S.A. § 2A:42A-2, *et seq.*  
N.M. Stat. § 17-4-7  
N.Y. Gen. Oblig. L. § 9-103  
N.C. Gen. Stat. § 38A-1, *et seq.*  
N.D. Cent. Code § 53-08-01, *et seq.*  
Ohio Rev. Code § 1533.181, *et seq.*  
Or. Rev. Stat. § 105.682, *et seq.*  
Pa. Cons. Stat. 68 § 477-1, *et seq.*  
R.I. Gen. L. § 32-6-1, *et seq.*  
S. C. Code § 27-3-10  
S.D. Cod. L. § 20-9-12, *et seq.*  
Tenn. Code § 70-7-101, *et seq.*  
Tex. Civ. Prac. & Rem. Code § 75.001, *et seq.*  
Utah Code § 57-14-1, *et seq.*  
Vt. Stat. Tit. 12 § 5791, *et seq.*  
Wash. Rev. Code § 4.24.200, *et seq.*  
W. Va. Code § 19-25-1, *et seq.*  
Wyo. Stat. § 34-19-101, *et seq.*

## APPENDIX D. CASE/ISSUE INDEX

### BIKEWAY AND OTHER RELEVANT BICYCLE-ACCIDENT CLAIMS AGAINST PUBLIC ENTITIES

CASE	ISSUE/CLAIM	HOLDING	RESULT/ACTION
<b>I. Duty to Bicyclist</b>			
<i>Dennis v. City of Tampa</i> , 581 So. 2d 1345 (Fla. 2d DCA 1991)	No duty to enforce speed limit on a bikeway	Public entity not liable; no duty to enforce a speed limit	Summary judgment for the city affirmed
<i>Lompoc Unified School Dist. v. Superior Court</i> , 20 Cal. App. 4th 1688, 1691, 26 Cal. Rptr. 2d 122 (Cal. App. 2d Dist. 1993)	No duty to maintain a hedge to shield a distraction from motorists who might strike bicyclists	Public entity not liable; no duty to maintain the existing hedge	Superior Court order denying summary judgment for the school district vacated
<b>II. Notice to Public Entity</b>			
<i>Langton v. Town of Westport</i> , 38 Conn. App. 14, 658 A.2d 602 (Conn. App. 1995)	Bicycle wheel fell into a grate on a public street	Public entity not liable; no prior notice of a defect	Superior Court's judgment for the town affirmed
<b>III. Proximate Cause</b>			
<i>Puhalski v. Brevard County</i> , 428 So. 2d 375 (Fla. 5th DCA 1983)	Negligent maintenance allegedly forced bicyclists from bike path onto the edge of the highway where they were injured	Public entity not liable; alleged negligence held not to be the proximate cause of the accident	Case dismissed
<b>IV. Design Immunity</b>			
<i>Johnson v. Alaska</i> , 636 P.2d 47 (Alaska 1981)	Bicycle wheel caught in a railroad track	Public entity did not have immunity; decisions regarding the railroad intersection were not policy-level decisions	Judgment for the state reversed; case remanded for new trial
<i>Juge v. County of Sacramento</i> , 12 Cal. App. 4th 59, 15 Cal. Rptr. 2d 598 (Cal. App. 3d Dist. 1993)	Alleged negligence in the design of a bike trail	Public entity not liable; county established that it had design immunity established under the California Design Immunity Statute, Cal.	Summary judgment for the county dismissing the case affirmed

		Gov't Code 830.6	
<i>Schmitz v. City of Dubuque</i> , 682 N.W.2d 70 (Iowa 2004)	Bicycle wheel caught on the asphalt overlay on a bicycle trail	Immunity denied; city failed to establish it exercised its discretion	Order dismissing the action reversed; case remanded

#### V. Discretionary Function Exemption and Immunity for Decisions on Guardrails, Traffic Control Devices, and Signs

<i>Alexander v. Eldred</i> , 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984)	Alleged failure to review traffic counts and install a stop sign at an intersection	City had no immunity; city's action held to be inherently unreasonable	Appellate court's affirmation of trial court's denial of the City of Ithaca's motion for judgment dismissing the complaint and to set aside the jury verdict affirmed
<i>Angell v. Hennepin County Regional Rail Authority</i> , 578 N.W.2d 343 (Minn. 1998)	Alleged failure to restrict access to a dirt path from a paved public trail	No immunity for the public entity; no evidence presented by defendant that it evaluated policy factors	Denial of the authority's motion for summary judgment affirmed; case remanded for trial
<i>Augustine v. City of West Memphis</i> , 281 Ark. 162, 662 S.W.2d 813 (1984)	Bicyclist struck by a limb while city employees were trimming trees; claim based in part on the absence of warning signs	Public entity not liable; municipalities have statutory immunity in Arkansas	Order granting city's motion to dismiss affirmed
<i>Bookman v. Bolt</i> , 881 S.W.2d 771 (Tex. Ct. Civ. App. 1994)	Alleged failure to install planned traffic signs where a bicycle path crossed a street	Public entity not liable; public entity exercised its discretion and was immune	Summary judgment for the city affirmed
<i>Bjorkquist v. City of Robbinsdale</i> , 352 N.W.2d 817 (Minn. Ct. App. 1984)	Bicyclist alleged negligence in the timing of the clearance interval in a traffic light at an intersection where accident occurred	Public entity not liable; immunity for the exercise of discretion	Summary judgment for defendants affirmed
<i>Dahl v. State of New York</i> , 45 A.D. 3d 803, 846 N.Y.S.2d 329 (N.Y. App. Div. 2d Dept. 2007)	Alleged that there should have been a guardrail between the roadway and the bicycle path	Public entity not liable; no proof of the state's violation of safety standards or of prior similar accidents	Judgments for the state after a nonjury trial affirmed
<i>Hanson v. Vigo County Bd. of Comm'rs</i> , 659 N.E.2d 1123 (Ind. App. 4th Dist. 1996)	Alleged failure to place or replace warning signs after plan approval to do so	No proof that the county exercised its discretion in approving the plan	Trial court's summary judgment for defendants reversed and remanded

**VI. Maintenance**

<i>Dinelli v. County of Lake</i> , 294 Ill. App. 3d 876, 691 N.E.2d 394 (Ill. App. 2d Dist. 1998)	Alleged negligence in the design and maintenance of a midblock bicycle trail crosswalk	Public entity not liable; county had recreational use immunity	Summary judgment for the county affirmed
<i>Garcia v. City of Chicago</i> , 240 Ill. App. 3d 199, 608 N.E.2d 239 (Ill. App. 1st Dist. 1992)	Alleged faulty maintenance of a sidewalk	Public entity not liable; bicyclist was not an intended or permitted user	Trial court judgment in favor of bicyclist reversed
<i>Stahl v. Metropolitan Dade County</i> , 438 So. 2d 14 (Fla. 3d DCA 1983)	Alleged negligent maintenance forcing young bicyclist from path onto the highway where he was injured	Jury question presented regarding the public entity's liability	Summary judgment for the county reversed; case remanded
<i>Lipper v. City of Chicago</i> , 233 Ill. App. 3d 834, 600 N.E.2d 18 (Ill. App. 1st Dist. 1992)	Use of a alleged defective sidewalk to reach a bicycle path by an adult bicyclist	Public entity not liable; bicyclist not an intended or permitted user	Summary judgment for the city affirmed
<i>Payne v. City of Bellevue</i> , 1997 Wash. App. LEXIS 1401 (Wash. Ct. App. 1997) (Unrept.)	Bicycle struck a hole at the edge of a public trail	Factual question whether under the recreational use statute applied if the city knew of a dangerous condition and failed to warn	Summary judgment for the city dismissing the action reversed
<i>Vestal v. County of Suffolk</i> , 7 A.D. 3d 613, 776 N.Y.S.2d 491 (N.Y. App. 2d Dept. 2004)	Potholes in the surface and no signs or other warnings	Public entity could be liable for surface condition and/or lack of signage	Denial of county's motion for summary judgment affirmed

**VII. Liability for Adjacent Areas**

<i>Camillo v. Department of Transportation</i> , 546 So. 2d 4 (Fla. 3d DCA 1988)	Accident on a sidewalk when bicyclist struck by eyebolts that extended from a seawall into the path of travel	Department of Transportation responsible for obstructions caused by third parties	Summary judgment for DOT reversed (liability was a jury question); summary judgment for county affirmed
<i>Predney v. Village of Park Forest</i> , 164 Ill. App. 3d 688, 518 N.E.2d 1243 (1987)	Bicycle accident caused by bushes obstructing view of intersection	Village could be held liable when it exercised control and maintained the accident area; village had a duty to correct the condition of streets, as well as adjacent areas	Summary judgment for village reversed

### VIII. Recreational Use Statutes and Immunity

<i>Ali v. City of Boston</i> , 441 Mass. 233, 804 N.E.2d 927 (2004)	Collision with a gate while bicycling on a path in a city park	Public entity not liable; city had recreational use immunity regardless of the bicyclist's purpose in being on the path	Trial court's summary judgment for the city affirmed
<i>Armenio v. County of San Mateo</i> , 28 Cal. App. 4th 413, 33 Cal. Rptr. 2d 631 (Cal. App. 1st Dist. 1994)	Fall caused by improper patching of a surfaced bicycle trail	Public entity not liable; county had recreational use immunity regardless of the type of surface of the trail	Summary judgment for the county affirmed
<i>Carroll v. County of Los Angeles</i> , 60 Cal. App. 4th 606, 70 Cal. Rptr. 2d 504 (Cal. App. 2d Dist. 1998)	Skater on a bicycle path fell because of a crack in the pavement	Public entity not liable; public entity had recreational use immunity	Summary judgment for county affirmed
<i>Farnham v. City of Los Angeles</i> , 68 Cal. App. 4th 1097, 80 Cal. Rptr. 2d 720 (Cal. App. 2d Dist. 1998)	Accident on a Class I bikeway as classified under a California statute	Public entity not liable; city's recreational use immunity did not depend on the trail being primarily for recreational use	Judgment on the pleadings for the city affirmed
<i>Goodwin v. Carbondale Park District</i> , 268 Ill. App. 3d 489, 644 N.E.2d 512 (Ill. App. 5th Dist. 1994)	Tree fell across a bicycle path	Issue whether under the recreational use statute the defendant's conduct amounted to willful or wanton negligence	Trial court's dismissal of rider's claim for ordinary negligence affirmed; trial court's order dismissing rider's claims for district's alleged wanton and willful negligence in maintaining the path reversed
<i>Graney v. Metropolitan District Commission</i> , 2001 Mass. Super. LEXIS 352 (Mass. Super. Ct. 2001) (Unrept.)	Obstacles left by the defendant's employees on the path	No immunity for the public entity; questionable whether recreational use statute applied, and even if it did, defendant's action constituted willful, wanton, or reckless conduct	Defendant's motion for summary judgment denied
<i>Hovland v. City of Grand Forks</i> , 1997 N.D. 95, 563 N.W.2d 384 (1997)	Injury to an inline skater caused by a crack in a city bike path	Public entity not immune; recreational use immunity in North Dakota not applicable to a municipality	Summary judgment for the city reversed
<i>Kern v. City of Sioux Falls</i> , 1997 S.D. 19, 560 N.W.2d 236 (1997)	Uneven section of bike trail causing skaters to fall	Public entity not liable; city had recreational use immunity	Summary judgment for the city affirmed
<i>Parents v. State</i> , 991 S.W.2d 240 (Tenn. 1999)	Steep portion of a bicycle trail in a park that culminated in a sharp turn	Although the state had a recreational use defense, plaintiff was entitled to have facts of the case developed before	Reversal of the dismissal of the plaintiff minor's claim affirmed

		determining whether any of the exceptions to immunity under the recreational use statute applied	
<i>Prokop v. City of Los Angeles</i> , 150 Cal. App. 4th 1332, 59 Cal. Rptr. 3d 355 (Cal. App. 2d Dist. 2007)	Collision with chain link fence while exiting a bikeway	Public entity not liable; city had recreational use immunity regardless of whether faulty design or maintenance was claimed	Summary judgment for the city affirmed
<i>Scott v. Rockford Park District</i> , 263 Ill. App. 3d 853, 636 N.E.2d 1075 (Ill. App. 2d Dist. 1994)	Bicycle struck a crack on a paved bike path	Public entity not liable; park district had recreational use immunity	Summary judgment for the city affirmed
<i>Stephen F. Austin State University v. Flynn</i> , 228 S.W.3d 653 (Tex. 2007)	Plaintiff knocked off her bicycle while riding on a bicycle trail by the university's lawn sprinkler	Public entity not liable; public entity had recreational use immunity	Reversal of the decision of intermediate appellate court; judgment rendered dismissing the case
<i>Walker v. City of Scottsdale</i> , 163 Ariz. 206, 786 P.2d 1057 (Ariz. Ct. App. 1989)	Fall on designated bike path	Public entity did not have immunity; recreational use statute not applicable because of limited applicability of the statute	Trial court's dismissal of bicyclist's action reversed and remanded

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JO ANNE ROBINSON provided liaison with the Federal Highway Administration, and CRAWFORD F. JENCKS represents the NCHRP staff.

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