FOURTH DIVISION
February 9, 2017

No. 1-15-3444

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JENNIFER KRAFT,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 13359
	)	
THE CITY OF CHICAGO, a municipal corporation, and THE CHICAGO PARK DISTRICT,	)	
	)	
	)	
Defendants-Appellees,	)	
	)	
and	)	
	)	
A & L, INC., a corporation,	)	Honorable
	)	Eileen Brewer,
Defendant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County granting the city and park district's motion to dismiss is affirmed; plaintiff, who was injured riding her bicycle on a lakefront revetment, was not owed a duty of care because bicycling was not an intended use of the property where plaintiff was injured.

¶ 2 Plaintiff, Jennifer Kraft, was seriously injured when she rode her bicycle off the top tier of a revetment, which is a man-made multi-tiered concrete structure installed to protect the artificial shoreline of the city of Chicago (city) from erosion by Lake Michigan. Defendant the Chicago Park District (District) owns the revetment, which is located within the city. Defendant A & L, Inc. (A & L) designed and constructed the revetment for the District. Plaintiff filed a 5-count complaint in negligence against the District, the city, and A & L. The District filed a motion to dismiss plaintiff's complaint based on governmental immunity, in which the city joined. The trial court granted the District and the city's motion and dismissed plaintiff's complaint against them with prejudice. The complaint against A & L remained pending. The court found there was no just reason to delay enforcement or appeal of the judgment granting the District and city's motion to dismiss. For the following reasons, we affirm the judgment granting the motion to dismiss plaintiff's complaint against the District and the city with prejudice.

¶ 3 BACKGROUND

¶ 4 Plaintiff alleged that on or about April 25, 2014, she was riding her bicycle northbound on the Chicago Lakefront Bicycle Trail beginning at approximately 52nd street in Chicago. Plaintiff's path on the day of her accident took her through three distinct areas: the Lakefront Trail, what was described as a secondary trail, and onto the lakefront revetment. A video recording of plaintiff's path on the day of her accident shows that plaintiff left the Lakefront Trail, turned right onto the "secondary trail," and then turned left onto the upper tier of the revetment. The complaint alleges that as plaintiff continued northbound on the revetment plaintiff fell approximately 9 feet from what plaintiff contends is part of the Lakefront Trail. Plaintiff alleged that she continued riding on the "trail" northbound in the area of 37th Street until the "trail" abruptly ended, causing her to fall approximately 9 feet onto the concrete ground

below. Plaintiff alleged that a concrete path led to the portion of the "trail" plaintiff was riding on when she fell. She alleged no signs indicated that portion of the "trail" was not to be used by bicyclists, that the District and the city knew or should have known that area was used by bicyclists, and that the District and the city knew or should have known that cyclists would use that portion of the "trail" during the nighttime. She also alleged that the District and the city knew that that portion of the "trail" "came to an abrupt end at or near East 37th Street, dropping approximately nine feet on to the concrete ground below."

¶ 5 In sum, plaintiff accused the District and the city of negligence in operating the "trail" with an unsafe path that did not permit riders to decipher its edge, which includes a "raised lip" that may propel riders, prior to a 9-foot drop-off; failing to warn users that the "trail" dead-ends at a 9-foot drop-off; failing to properly illuminate the "trail;" and allowing the "trail" to "become and remain in an unreasonably unsafe and/or dangerous condition for its users." Plaintiff also accused the District and the city of willfully and wantonly (1) operating the trail with an unsafe path, which included a "zigzag" path and curvature that did not permit users such as plaintiff to decipher whether the trail ended or continued, (2) operating the trail with a raised lip that could propel riders off the edge at the 9-foot drop-off, (3) failing to warn trail users with signage at the entrance to the trail or at the end of the trail that the trail ends at a 9-foot drop-off, (4) failing to illuminate the trail, (5) failing to install railings or other protections, and (6) allowing and permitting the trail to become and remain in a dangerous condition for its users and failing to maintain safe premises.

¶ 6 The District filed a motion to dismiss plaintiff's complaint against it on the grounds (1) plaintiff was not an intended and permitted user of the lakefront revetment where the accident occurred, therefore the District owed her no duty of care, and, additionally, negligence claims are not allowed against public recreational properties; and (2) the District is immune from liability

for any initial failure to install warning signs or devices. In support of its motion to dismiss, plaintiff attached an affidavit by Robert Foster, a senior project manager for the District in the District's Department of Planning and Development. Foster averred he is familiar with the location of plaintiff's accident. Foster stated that plaintiff was not riding on the designated bicycle path that is part of the Lakefront Trail[1] but on the tiered concrete revetment that protects the shoreline from Lake Michigan. Plaintiff deposed Foster. In his deposition, Foster described the Lakefront Trail (Trail) as follows:

> "The lakefront trail *** is a twenty-foot wide trail, fourteen feet of asphalt or paved, hard paved material with a three-foot shoulder.
>
> Generally the shoulder is made up of what we call lakefront screenings, and those are whether it be limestone or granite screenings. It's along the edge of the trail so runners like to use this. ***
>
> [T]he [width][2] of the trail is in most places twenty feet.
>
> [T]he lakefront trail is also striped. We have a line in the middle which *** divides each section approximately seven feet on each side. *** [A]nd about six inches from the edge we have a solid white line and that marks the edge of the trail just to give people a reference."

Foster also described what he called "secondary trails."

> "[A] secondary trail is pretty much anything that is not the lakefront trail. So a secondary trail will come into the lakefront trail at an angle so whether it be

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[1] The District's motion to dismiss states "there is a multi-use 'Lakefront Trail' but not a 'Chicago Lakefront Bicycle Trail.' " The issue in this case is whether the revetment is part of the designated trail, and the name by which such trail is called is immaterial to our disposition.

[2] Foster mistakenly said "length."

a ninety-degree angle, *** or forty degree, but there is a separation that you can tell between the lakefront trail and the other trail.

So it could be from a parking lot providing access to the trail, or it could be from an amenity such as a golf course or beach leading to the lakefront trail."

He testified that bicyclists are allowed and permitted to use secondary trails "if they're going to a destination." When asked how the public knew secondary trails were intended to be used to access lakefront amenities, Foster testified as follows:

"[T]he intent of the lakefront trail is to *** stripe it so we have striping *** with the center stripe and the *** striping on the outside.

Once you leave the lakefront trail, it should be visible to you that you're leaving the trail and so *** what we have, let's say a beach house. We have bike racks in front of the beach house because you're not allowed to bring bikes on the beach.

And so the access to that area *** if you're on a bike *** you use that as a means just to go there and lock up your bike and then use the beach or golf course ***."

¶ 7 Foster averred the District has never designated the upper revetment tier or any other part of the revetment for bicycle use. The District argued that plaintiff was not an intended or permitted user of the revetment because (1) bicycle riding was neither intended nor permitted on the revetment, and (2) plaintiff rode her bicycle on the revetment in violation of the Park District's Code where the revetment was not designated for bicycle use. The District argued that the absence of pavement markings and signs on the revetment suggests it was not intended for use by bicyclists. The District also argued that it is immune from negligence for a condition of

recreational property, and plaintiff's fall occurred on recreational property; and, it is absolutely immune from any failure to initially provide lighting, warning signs, or barriers.

¶ 8 The city filed a motion for leave to adopt and join the District's motion to dismiss, which the trial court allowed.

¶ 9 The District filed an amended motion to dismiss plaintiff's complaint and an amended affidavit by Foster. The District's amended motion to dismiss further argued that the District had designed, built, and marked the Trail to be consistent with guidelines for the construction of multi-use trails developed by the American Association of State Highway and Transportation Officials (AASHTO). The District asserted that the revetment on which plaintiff rode "lacks any of the detailed design requirements consistent with the ASSHTO Guidelines for multi-use trails." The District also argued that no map it has ever prepared showing where bicycle use is intended and permitted has ever shown such use was permitted on the 37th Street revetment where plaintiff's accident occurred. The trial court granted the city leave to adopt the District's amended motion to dismiss as to those counts asserted against the city.

¶ 10 Following complete briefing of the motion to dismiss, on November 6, 2015, the trial court entered an order granting the motion to dismiss all counts against the District and the city on the grounds they did not owe plaintiff a duty of care. The court found that plaintiff was not an intended and permitted user of the accident area and dismissed the complaint against the District and the city with prejudice. On November 13, 2015, the court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there is no just reason to delay enforcement or appeal of the court's order granting the motion to dismiss in favor of the District and the city.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 To state a claim for negligence or willful and wanton misconduct, a plaintiff must plead and prove "that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury." *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19. In this case, plaintiff claims the District or the city was negligent, or engaged in willful and wanton misconduct, or both, in how it designed and maintained the property where she was injured, and that their negligence or willful and wanton misconduct was the proximate cause of her injuries. Plaintiff alternatively alleged the District and the city owned, maintained, and controlled the property where her injury occurred. The city has argued it does not own the revetment, thus the trial court's judgment granting the motion to dismiss the claims against the city should be affirmed on that basis (and plaintiff has questioned whether that ground for affirmance is properly before this court). If plaintiff was not owed a duty, ownership of the revetment is irrelevant, and we will not expressly decide that issue. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10 (as a general rule courts of review in Illinois do not consider issues where the result will not be affected regardless of how those issues are decided). Therefore, unless it becomes necessary to draw a distinction between the District and the city, henceforth we will refer to each simultaneously simply as "defendant." The trial court dismissed plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)) on the grounds defendant did not owe plaintiff a duty of care because she was not an intended and permitted user of the revetment. In general, we review a motion to dismiss a complaint *de novo*. *Benbenek v. Chicago Park District*, 279 Ill. App. 3d 930, 932 (1996).

¶ 14 Legal Standards

¶ 15 Local public entities have a common law duty to exercise ordinary care to maintain public property in a reasonably safe condition. *Foust v. Forest Preserve District of Cook*

County, 2016 IL App (1st) 160873, ¶ 24. That duty has been codified in the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2014)). Section 3-102 of the Tort Immunity Act limits the duty of a local government entity to maintain its property. Section 3-102 reads, in pertinent part, as follows:

> "[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 would be used ***." 745 ILCS 10/3-102(a) (West 2014).

¶ 16 Under section 3-102(a), a local government entity is immune from liability for the failure to maintain its property in a reasonably safe condition unless the plaintiff was engaged in a use of the property that was both intended and permitted by the local government entity. See *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524-26 (1998). "Thus, according to the Act, a municipality owes a duty of care only to those who are both intended and permitted users of municipal property." *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 49. "The Illinois legislature has expressly limited the duty of a municipality with regard to maintaining its property to a duty of ordinary care to permitted and intended users of the property." *Vaughn v. City of W. Frankfort*, 166 Ill. 2d 155, 163 (1995). Further, "the duty of a municipality depends on whether the *use* of the property was a permitted and intended use." (Emphasis added.) *Boub*, 183 Ill. 2d at 526 (quoting *Vaughn*, 166 Ill. 2d at 162). Therefore, the question of whether defendant owed plaintiff a duty depends on whether defendant intended that plaintiff ride her bicycle on that part of the revetment where the injury occurred and permitted her to do so. See *Vaughn*, 166 Ill. 2d at 163.

¶ 17 Intended Use of Property

¶ 18 Plaintiff, relying on *Boub*, argues that to determine the government entity's intended use of property this court should look to the nature of the area, the historical use of the area, and any laws governing the area. Considering those factors, plaintiff argues that (1) the nature of the area "shows that all potential users were intended to be users of all parts" of the trail system, which she argues includes the upper tier of the revetment; (2) "bicyclists have historically used the main trail, the secondary trail, and the revetment ramp interchangeably; and (3) the District's Code is silent on where bicycles may or may not be ridden. Plaintiff then goes on to argue that *Boub* itself was wrongly decided and should not control the outcome in this case.

¶ 19 *Boub* and the Standards for Determining Intended Use

¶ 20 The plaintiff in *Boub* was injured while riding a bicycle across a one-lane bridge. *Boub*, 183 Ill. 2d at 522. The surface of the bridge consisted of wood planking with asphalt patching between the planks. *Id.* Some time prior to the plaintiff's accident, the asphalt between the planks had been removed in preparation for the installation of a new bridge deck. *Id.* The plaintiff alleged that he was thrown from his bicycle when his front tire became stuck between two planks on the bridge. *Id.* The trial court granted summary judgment in favor of the defendants. *Id.* at 523. The plaintiff appealed the dismissal of the counts in his complaint that were based on negligence. *Id.* The appellate court found the defendants were immune from liability under section 3-102(a) of the Tort Immunity Act and rejected the plaintiff's argument that the defendants were liable for their failure to post or maintain warning signs. *Id.*

¶ 21 On appeal to our supreme court the plaintiff argued that the defendants owed him a duty and that the immunity provided by section 3-102(a) of the Tort Immunity Act did not apply. *Id.* at 524. The defendants responded that the plaintiff, "as a bicyclist, was not an intended user of the road and bridge, and that he was, at most, only a permitted user." *Id.* at 525. There was no dispute the plaintiff, as a bicyclist, was a permitted user of the bridge. The question for the court

was whether the plaintiff could be characterized as an intended user of the bridge. *Id.* In support of his argument he was an intended user, the plaintiff argued, in part, that bicyclists have traditionally used roads and highways without restriction, a state statute grants bicyclists the same rights and duties of drivers of vehicles, and bicyclists were not excluded from riding on the road where the accident occurred. *Id.* Our supreme court found that "[t]o resolve the plaintiff's status under section 3-102(a), it is appropriate to look at the property involved in determining whether the plaintiff may be considered an intended and permitted user of the road and bridge where the accident occurred. Whether a particular use of property was permitted and intended is determined by looking to the nature of the property itself. [Citation.]" (Internal quotation marks omitted.) *Id.* at 525.

¶ 22 Before turning to the nature of the property at issue in *Boub*, our supreme court noted three cases which demonstrate the scope of the inquiry into the nature of the property to determine if a party was an intended user. First, in *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417 (1992), the court held the decedent was not an intended user of the highway, where the decedent was crossing a highway in the middle of a block outside any marked pedestrian crosswalk. *Id.* at 526 (citing *Wojdyla*, 148 Ill. 2d at 417). The *Wojdyla* court held that "[t]o determine the intended use of the property involved here, we need look no further than the property itself." (Internal quotation marks omitted.) *Id.* at 526 (quoting *Wojdyla*, 148 Ill. 2d at 426). The *Wojdyla* court noted certain "indications of intended use," including road markings for the benefit of automobiles, parking lanes, and designated pedestrian walkways "designated by painted crosswalks by design, and by intersections by custom." *Id.* The *Wojdyla* court concluded that the fact "pedestrians may be permitted to cross the street mid-block does not mean that they should have unfettered access to cross the street at whatever time and under whatever circumstances they should so choose," and areas intended for the protection of

pedestrians crossing streets, where municipalities *are* charged with liability, "do not *** include a highway mid-block." (Emphasis added.) *Id.*

¶ 23 The *Boub* court found reasoning similar to that used in *Wojdyla* was employed in *Vaughn*. In *Vaughn*, the plaintiff was injured when she stepped in a hole while crossing a street mid-block. *Id.* (citing *Vaughn*, 166 Ill. 2d at 155). The *Boub* court noted that in *Vaughn*, "this court rejected the notion that the manner in which a particular injury occurs is relevant in determining the scope of a municipality's duty." *Id.* at 526. The *Vaughn* court cited *Wojdyla* for the proposition that "[w]hether a particular use of property was permitted and intended is determined by looking to the nature of the property itself." *Id.* at 526-27 (citing *Vaughn*, 166 Ill. 2d at 162-63 (citing *Wojdyla*, 148 Ill. 2d at 426)). "The *Vaughn* court concluded that the plaintiff was not an intended user of the street where the accident occurred because she crossed in the absence of any pavement markings or other designations." *Id.* at 527.

¶ 24 Finally, the *Boub* court relied on *Sisk v. Williamson County*, 167 Ill. 2d 343 (1995), where the plaintiff fell when he stepped off the edge of the pavement after getting out of his vehicle to investigate damage from striking a bridge. *Id.* The *Sisk* court found that the defendant did not owe the plaintiff a duty under section 3-102(a). The *Sisk* court reasoned that there were no manifestations to indicate that the defendant intended pedestrians to walk on its country roads, "much less the specific road and bridge complained of by [the] plaintiff" in *Sisk*. (Internal quotation marks omitted.) *Id.* (quoting *Sisk*, 167 Ill. 2d at 351-52). Such "manifestations" of the defendant's intent that pedestrians use the area in question may have included walkways or crosswalks. *Id.* The *Sisk* court also noted that many country roads are gravel and often have no shoulder. *Id.* The *Sisk* court found that the inference to be drawn from those facts, if any were to be drawn, was "municipalities do not intend that pedestrians walk on rural country roads." *Id.*

¶ 25 The *Boub* court was guided by *Wojdyla*, *Vaughn*, and *Sisk* in reaching its holding, despite the factual differences between the case before it and those cases. *Id.* at 528. In *Wojdyla*, *Vaughn*, and *Sisk*, the absence of signs and pavements markings associated with pedestrian use were facts which indicated or formed the basis of an inference that pedestrians were not intended users of those areas. Our supreme court recognized that the absence of pavement markings specifically indicating bicyclists were intended users of the bridge at issue in *Boub* presented a different factual circumstance. The court noted that "[b]icyclists, unlike pedestrians, are guided by some of the same signs and pavement markings that motorists observe." *Id.* at 528. The court found that,

> "[s]till, we believe that the same considerations present in our decisions in those cases are also relevant here in determining whether the plaintiff was an intended user-rather than simply a permitted user-of the road and bridge. In determining Wayne Township's intent, it is necessary to look at pavement markings, signs, and other physical manifestations of the intended use of the property. Just as the presence or absence of special pavement markings and signs is relevant in determining whether pedestrians are intended users of streets and highways, so too do we believe that the presence or absence of pavement markings and signs is relevant here in determining whether the plaintiff was an intended user of the road and bridge where the accident occurred." *Id.* at 528.

In *Boub*, nothing suggested that the bridge was intended for use by bicycles. "No special pavement markings or signs indicated that bicyclists, like motorists, were intended to ride on the road or bridge, or that bicycles, rather than vehicles, were the intended users of the route. *Id.*

¶ 26 The plaintiff in *Boub* argued that certain state statutes applicable to bicyclists were relevant in determining the defendant's intent regarding the use of the road and bridge in that

case. *Id.* at 529. The court found that those statutes were irrelevant because they reflected the intent of another public body and regardless, those statutes failed to support the plaintiff's position. *Id.* The court concluded that the "provision cited by the plaintiff is entirely consistent with the conclusion that bicyclists are permitted, but not intended, users of the roads, in the absence of specific markings, signage, or further manifestation of the local entity's intent that would speak otherwise." *Id.* at 530.

¶ 27 Next, the *Boub* court addressed the argument that "bicyclists have customarily and traditionally used county roads such as the one involved in this case" and, therefore, bicyclists must be deemed both intended and permitted users of the road at issue. *Id.* at 531. That argument was based on the court's decision in *Marshall v. City of Centralia*, 143 Ill. 2d 1 (1991). The *Boub* court concluded that there were no affirmative manifestations that the defendant "intended—rather than simply permitted—bicyclists to use the road and bridge where the accident occurred." *Id.* at 535-36. The court has "no quarrel with the proposition that bicycle riders are permitted users of the road and bridge involved in this case." *Id.* at 536. The court did not believe, however, "that they must also be considered intended users of those facilities, within the scope of section 3-102(a) of the Tort Immunity Act." *Id.*

¶ 28 Application of "*Boub* Standard" to the Facts

¶ 29 Plaintiff asserts the basis of the court's decision in *Boub* was that, because the street signs and markings in *Boub* only addressed motor vehicle traffic, users "should therefore have known the road's only intended use was vehicular traffic." From that characterization of the holding in *Boub* plaintiff argues the bases for the *Boub* court's holding—namely "street markings for vehicular traffic and an obvious primary use by other than bicycles—are absent here;" therefore, *Boub* is not controlling. Plaintiff's argument is not persuasive because it misstates the basis of the court's holding in *Boub* and, consequently, fails to address the question that must be

addressed to determine whether plaintiff, as a bicyclist, was an intended user of the upper tier of the revetment. Our supreme court in *Boub* and courts since have been consistent in holding that "[w]hether a particular use of property was permitted and intended is determined by looking to the nature of the property itself." *Bowman*, 2014 IL App (1st) 132122, ¶ 50. In our view, *Boub* stands for the proposition that in examining the nature of the property, courts should look to manifestations of the governmental entity's intent regarding the property, and such manifestations include, but are not limited to, signs and pavement markings. See *Boub*, 183 Ill. 2d at 525-28. We also note that plaintiff's argument this court should reject the reasoning in Boub is not well-taken. Despite a dissent in the *Boub* decision, the majority opinion is still the controlling law for this court, and has been consistently followed since it was issued. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28 ("overruling a decision by the Illinois Supreme Court is an action the appellate court has no authority to take").

¶ 30 In this case, plaintiff cannot refute the fact no signs or pavement markings indicated that defendant intended bicyclists to use the upper tier of the revetment. Instead, plaintiff argues (1) the absence of markings permitting bicycle riding on the upper tier of the revetment is irrelevant to the determination of defendant's intent in this case; and (2) the absence of signs or marking prohibiting bicyclists from riding on the upper tier of the revetment is an indication that bicyclists were intended users of the revetment. The latter argument is premised on plaintiff's assertion that the nature of the upper tier of the revetment is such that defendant intended bicyclists to use it.

¶ 31 A. Signs and Pavement Markings as Manifestation of Defendant's Intent

¶ 32 Plaintiff first asserts that the revetment is an extension of the secondary trail, which is itself an extension of the Trail, and that "pedestrians, runners, bicyclists, and rollerbladers all move seamlessly from one segment of the trail to the next." Plaintiff argues bicyclists are

intended users of the "secondary trail," and there are no pavement markings on the secondary trail indicating it is intended for use by bicyclists, therefore "bicyclists would attach no significance to the presence or absence of such markings in terms of intended use." Thus, plaintiff argues, "one would readily and correctly conclude that the main trail's intended use extended to the [']trails['] [(including the revetment)] to which the main trail leads as users move from one area to another." Plaintiff asserts there was no way for her to know that defendant intended a different use of the revetment, no pavement markings tell users that the intended use of the "trail" changes as they move from one "section of the trail" to another, and the form of the trail may change "but in the eyes of the users, its function remains the same."

¶ 33 Plaintiff argues the situation presented by the transition from the secondary trail to the revetment is analogous to the situation presented in *Gustein v. City of Evanston*, 402 Ill. App. 3d 610 (2010). In *Gustein*, the plaintiff was injured when she fell due to the defendant's "negligent maintenance of an unimproved alley in back of [the] plaintiff's home." *Gustein*, 402 Ill. App. 3d at 611. The plaintiff went into the alley to place a piece of waste in a waste-disposal bin. *Id.* at 611-12. An ordinance in the plaintiff's city provided that "[i]f a resident's property abuts an alley, then the resident must place his or her garbage containers in the alley." *Id.* at 614. A jury returned a verdict in favor of the plaintiff, and the defendant appealed, arguing that the plaintiff was not an intended user of the alley and therefore it was entitled to a judgment *n.o.v.* *Id.* at 611. The only issue for the court was whether the plaintiff was an intended user of the alley. *Id.* at 617. The *Gustein* court held that "[w]hen the City enacted its ordinance directing plaintiff to place her yard waste, trash, and recycling containers in the alley, it created a safe harbor in which plaintiff could walk along the alley in order to reach the containers." *Id.* at 620. "Plaintiff complied with the City's ordinance and garbage pick-up policy when she placed her waste

containers in the alley and thus should fall within a safe harbor, where pedestrians are intended users of the alley when they walk in the alley only to access their waste containers." *Id.*

¶ 34 The decision in *Gustein* is not helpful to plaintiff's position. The basis of the holding in *Gustein* is that the plaintiff was an intended user of the property because when and how she did so was in compliance with the defendant's ordinance. Plaintiff's conduct was not in compliance with (and in fact was in violation of) defendant's Code regarding bicycling on the revetment. Plaintiff actually attempts to rely on the discussion in *Gustein* of one of the narrow exceptions to the rule that municipalities do not owe a duty to pedestrians walking in the street. *Id.* at 617. "One exception is where a municipality has designated areas for street parking. In those cases, pedestrians are intended and permitted users of the roadway for the narrow purpose of entering and exiting the parked vehicle. [Citations.]" *Id.* at 617 (citing *Torres v. City of Chicago*, 218 Ill. App. 3d 89, 94 (finding plaintiff an intended user of the roadway when he stepped back from the trunk of a legally parked vehicle: "use of the parking space logically entails pedestrian use of the adjacent areas in order to enter and exit the parked vehicle and such use of the street is therefore also intended and permitted and reasonably foreseeable")). The further discussion in *Gustein* of this narrow exception demonstrates the wrongness of plaintiff's argument. Plaintiff argues it was foreseeable that a bicyclist would continue onto the upper tier of the revetment. However, as stated in *Gustein*, the foreseeability of the use of the property is not the basis of the exception. "[A]n unnecessary use of the roadway where a legal alternative exists, such as a crosswalk, in order to access a vehicle does not qualify for this exception." *Id.* at 617. See also *Wojdyla*, 148 Ill. 2d at 428 ("Foreseeability alone, however, is not the standard for determining whether a duty of care exists here. Section 3-102(a) of the Tort Immunity Act does not base duty solely on foreseeable users, but upon intended and permitted foreseeable users.").

¶ 35 Plaintiff's arguments, based on a bicyclist's movement from the Trail, to a secondary trail, to the revetment, fail because they require that the intended use of the property be based on the user's intent for the use of the property, and that proposition is inconsistent with the Tort Immunity Act. The duty of care is determined by the municipality's intended use of a property, not the intent of the user. *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466, 468 (2001) (citing *Wojdyla*, 148 Ill. 2d at 425-26). In *Wojdyla*, the plaintiff's decedent was killed when struck by an automobile while crossing a six-lane highway mid-block, approximately one-half-mile from the nearest painted crosswalk. *Wojdyla*, 148 Ill. 2d at 420. The plaintiff argued, in part, that the decedent was an intended and permitted user of the street en route to his legally parked car. *Id.* at 421. Our supreme court has explained as follows:

> "Municipalities may have control over adjoining pieces of property which have different uses, such as sidewalks and streets. Were we to measure the duty of care by the intent of individuals traveling over these various properties, we would effectively negate section 3-102(a) of the Tort Immunity Act, for no longer would the intended use by the municipality be controlling. Instead, the intent of any particular individual would determine whether the municipality owed a duty of care. This argument is in direct conflict with the Tort Immunity Act, and thus is unavailing to the plaintiff." *Wojdyla*, 148 Ill. 2d at 425-26.

In applying this rationale to plaintiff's argument, we find the decision in *Peters v. Riggs*, 2015 IL App (4th) 140043, instructive. In *Riggs*, the plaintiff was struck by a vehicle while crossing "Chestnut Street between 18th and 20th Streets." (Internal quotation marks omitted.) *Riggs*, 2015 IL App (4th) 140043, ¶¶ 3-4. The plaintiff alleged that the defendants were negligent because they failed to adequately maintain streetlights to illuminate the street where she was injured. *Id.* ¶ 5. At issue in the case was whether the plaintiff was an intended user of the street

where the accident occurred, where she was attempting to cross the street outside of a marked crosswalk. *Id.* ¶ 12. The plaintiff argued that she was an intended user of the street while crossing outside of a marked cross walk in part because there were 12 pedestrian sidewalks which led from properties on either side of Chestnut Street to the curb of Chestnut Street, and those sidewalks "invited pedestrians into Chestnut Street between 18th Street and 20th Street." (Internal quotation marks omitted.) *Id.* ¶ 18. With regard to the sidewalks referred to in the plaintiff's argument, the trial court found that "there were 'various paved surfaces which [were] connected to the parallel sidewalk' and ran 'perpendicular to the street curb.' The [trial] court noted the portion of the curb that was connected to each perpendicular sidewalk had 'no curb cuts or sloped surfaces connecting the perpendicular, paved walkway to the surface of the adjacent street.' " *Id.* ¶ 20. The trial court found that the plaintiff was not an intended pedestrian user of Chestnut Street at the location of the accident. *Id.* ¶ 21.

¶ 36 On appeal the plaintiff argued that the 12 pedestrian sidewalks that "connect with Chestnut Street between 18th and 20th Streets midblock unequivocally establish [the City] intended for pedestrians to use Chestnut Street where [she] was hit." (Internal quotation marks omitted.) *Id.* ¶ 47. Although the plaintiff had forfeited the argument concerning the sidewalks, the *Riggs* court found, "as a matter of law, that even considering the 12 pedestrian sidewalks at issue, no duty was owed by the City to [the plaintiff.]" *Id.* ¶ 50. The court noted the absence of a painted crosswalk, or curb cuts or slopes, "which could indicate pedestrians were intended to access the street at those 12 locations." *Id.* ¶ 51. The court found that "while pedestrians may have been intended users of those perpendicular sidewalks, we find nothing which would evidence an intention by the City that pedestrians continue into and across the street at those locations." *Id.* ¶ 51. In a reply brief the plaintiff clarified her argument and asserted that the sidewalks were a physical manifestation that established that the defendant intended pedestrians

to utilize Chestnut Street. The court rejected that argument, stating as follows: "In the absence of physical manifestations demonstrating [the plaintiff] was an intended user of the traveled portion of a city street mid-block and not within a crosswalk, we find her pleading failed to establish the City owed her a duty." *Id.* ¶ 58.

¶ 37 In this case we find plaintiff's argument that the fact the Trail (including the secondary trail), which was intended for her use as a bicyclist, leads "seamlessly" to the revetment means "in the eyes of users, its function remains the same," is analogous to the plaintiff's argument in *Riggs* that the sidewalks leading to Chestnut Street invited pedestrians to continue onto and use the street to cross outside of the marked crosswalks. Plaintiff has argued there were no physical manifestations, in the form of prohibitive signs or pavement markings, of defendant's intent that the use of those two adjacent areas (the secondary trail and the revetment) was different. However, plaintiff has not pointed to physical manifestations demonstrating that plaintiff *was* an intended user of the upper tier of the revetment. Such affirmative physical manifestations are relevant regardless of the nature of the adjacent property. See *Id.* Accordingly, we reach a similar conclusion as the *Riggs* court and find that the pleading failed to establish that defendant owed plaintiff a duty with regard to bicycling on the upper tier of the revetment.

¶ 38 We recognize the difference between this case and *Riggs* in the "adjoining pieces of property." In *Riggs*, curb cuts to ease pedestrian access were missing, while in this case, there is no curb for bicyclists to traverse, permitting what plaintiff described as a "seamless transition" from the trail to the revetment. However, we will not infer intent that bicyclists use the revetment from the absence of a curb where the secondary trail meets the transition to the

revetment.[3] The *Riggs* court did not rely solely on the absence of curb cuts or slopes; it initially noted that it was "undisputed that no painted crosswalk existed on Chestnut Street between 18th and 20th Streets and Peters was not crossing Chestnut Street at an intersection." *Id.* ¶ 51. Further, in *Dunet v. Simmons*, 2013 IL App (1st) 120603, ¶ 29, which the *Riggs* court cited in support of its partial reliance on the absence of curb cuts, this court found that a decedent was not an intended user of a street where "evidence of the nature of the property shows that pedestrians, such as [the] decedent *** were not intended to cross the street where the accident occurred." *Dunet*, 2013 IL App (1st) 120603, ¶ 29. The *Dunet* court wrote that:

> "It is undisputed that there is not a marked crosswalk at the intersection. [Citation.] It was also shown that the curb bordering 95th Street was painted yellow, and was not cut out or sloped for pedestrian access to 95th Street. The nearby intersections of 95th Street and Cicero and 95th and Pulaski did have traffic signals with marked crosswalks for pedestrian crossings. Additionally, the evidence showed that 95th Street was a busy, high-volume street that contained six lanes of traffic. Therefore, we hold that *the nature of the property* itself strongly indicates that pedestrians, such as decedent in this case, were not intended users of 95th Street at its intersection with Kenton Avenue." (Emphasis added.) *Id.* ¶ 29.

¶ 39 The basis of the courts' holdings in *Riggs* and *Dunet* was not that pedestrians were not intended to use the street because they would have to step off the curb to do so. The dispositive fact in *Riggs* was the "absence of physical manifestations demonstrating [the plaintiff] was an intended user of the traveled portion of a city street mid-block and not within a crosswalk"

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[3] The absence of a curb is likely indicative of intent, indicated by Foster, that the revetment be accessible to wheelchair-bound pedestrians.

(*Riggs*, 2015 IL App (4th) 140043, ¶ 58), and *Dunet* instructs that the inquiry must be based on the nature of the property viewed in its totality and context (*Dunet*, 2013 IL App (1st) 120603, ¶ 29). In this case, plaintiff can point to no physical manifestations, other than perhaps the transition from trail to revetment, demonstrating defendant's intent that bicyclists are intended users of the upper tier of the revetment. Moreover, viewed in its entire context, the purpose of the secondary trail was to allow bicyclists to access the lakefront, not to continue riding along the revetment.

¶ 40 Regarding plaintiff's argument that there were no physical manifestations, in the form of prohibitive signs or pavement markings, of a change in defendant's intent between the Trail and the revetment, plaintiff argues this court should follow the reasoning in this court's decision in *Bowman*, 2014 IL App (1st) 132122. There, this court reversed the trial court's grant of summary judgment in favor of the defendant, which was granted solely on the basis that a 13-year-old girl was not an intended user of a slide in a park, where the defendant argued the 13-year-old girl "was not an intended user of the slide since she was 13-years old and the slide was intended for children aged under 12." *Bowman*, 2014 IL App (1st) 132122, ¶¶ 2, 62. Plaintiff argues this case is similar in that "nothing here showed bicycles were not intended to continue onto the paved path leading from the secondary trail to the upper section of the revetment."

¶ 41 In *Bowman*, the defendant argued the plaintiff was not an intended user and therefore it was immune from liability because the plaintiff violated its Code by using a park that was "designed" for younger children. *Id.* ¶ 51. However, the court noted that the defendant in that case had failed to "cite a case where a child was charged with the responsibility of knowing municipal ordinances, without a sign or notice." *Id.* ¶ 55. Further, nothing in the record showed that even adults had any way of knowing that the park at issue was designated for a certain age group. *Id.* ¶ 56. There were no signs indicating the playground was designated or designed for

children under 12 years old, and nothing in the record showed that the defendant took any measures to prevent children age 12 and older from using the park. *Id.* ¶ 57. Notably for purposes of this case, the *Bowman* court expressly noted that: "Playgrounds are designed for children. What would prompt a 13-year-old child to observe a slide and think, 'am I really the intended user of this slide?' " *Id.* The court later concluded that the "defendant failed to inform park users of any age, by any means, that this park and the slide were intended for children younger than age 12." *Id.* ¶ 64.

¶ 42 First, *Bowman* is instantly distinguishable because in this case, defendant is not relying solely on a violation of a code prohibiting bicycle riding on the revetment to establish that plaintiff was not an intended user of the upper tier of the revetment. Second, *Bowman* is distinguishable because whereas in that case it was clear playgrounds are designed for children and there was nothing in that case to indicate this particular playground was not intended for use by children of a certain age (*Bowman*, 2014 IL App (1st) 132122, ¶¶ 57, 64), here, it is not clear that the revetment was designed for use by bicyclists. We reject plaintiff's argument that the upper tier of the revetment vis-à-vis pedestrians vs. bicyclists is the same as a playground vis-à-vis children aged under 12 vs. children aged over 12. It is clear from plaintiff's video of the area in which the accident occurred that the revetment is narrower than the Trail, and the eastern edge of the upper tier of the revetment has a significant drop-off. Thus, whereas in *Bowman* some physical manifestation in the form of signage would be necessary to indicate that what clearly appeared to be intended for use by children was in fact only intended for use by children of a certain age, the upper tier of the revetment does not clearly appear to be intended for use by bicyclists, thus the holding in *Bowman* is inapplicable.

¶ 43 Plaintiff argues that the claim that the absence of striping (a center line and edge stripes) is indicative of defendant's intent regarding the revetment lacks foundation because the use of

striping on portions of the Trail is inconsistent and thus "has no meaning" to users of the Trail and revetment. We do not rely exclusively on the absence of lane striping to find that defendant did not intend bicyclists to use the upper tier of the revetment. However, we do not find the absence of such striping insignificant. It is the nature of the property where the plaintiff was injured that determines whether a duty is owed under section 3-102. *Swain v. City of Chicago*, 2014 IL App (1st) 122769, ¶ 24 (citing *Vaughn*, 166 Ill. 2d at 162-63). Our inquiry is based on the upper tier of the revetment and any physical manifestations of defendant's intent with regard to use of the revetment on the subject property, not other property defendant owns or controls regardless of whether it is adjacent to the subject property. Plaintiff's argument that the use of lane markings is inconsistent presumes acceptance of the assertion that the Trail and revetment are part of a unified system, a proposition for which plaintiff has cited no legal or factual authority. Thus, the presence or absence of lane striping on the revetment is related to the intended use inquiry regardless of how striping is used on adjacent property. See *Wojdyla*, 148 Ill. 2d at 425-26; *Riggs*, 2015 IL App (4th) 140043, ¶ 58. The absence of striping for bicyclists supports finding that defendant did not intend the upper tier of the revetment for use by bicyclists.

¶ 44 Plaintiff also argues that the absence of striping would not send a message to *pedestrians* that they were not intended users of the revetment, so "there is no logical reason to conclude that the absence of striping would send a different specific message to *** bicyclists" to stop riding once they reached the revetment. But again, the question for this court is whether defendant manifested its intent with regard to the subject property. The determinative fact which supports our conclusion defendant did not intend the upper tier of the revetment for use by bicyclists is that there are no physical manifestations that defendant intended the upper tier of the revetment for use by bicyclists.

¶ 45 B. Historical Use of the Revetment

¶ 46 Plaintiff argues that "*Boub* added historical use as a factor to be considered in determining the intended use of public property." The *Boub* court found that *Marshall* did not establish that historical practice alone is sufficient to make a particular use of public property an intended use. *Boub*, 183 Ill. 2d at 531. "Rather than establish historical practice as the touchstone by which intended use must be measured, the *Marshall* court simply referred to historical practice in attempting to ascertain the intended use, if any, of [the property at issue in that case.]" *Id.* at 532. The *Boub* court did not go on to discuss the historical use of the road and bridge at issue in that case. The District argues "any historic use would only be relevant if the revetments were known to be used as bicycle paths prior to the Park District established [*sic*] its intent by designing and constructing the subject revetment."

¶ 47 In *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 765 (2009), the court held that "even if 'historical use' as a consideration for determining intent survives *Boub*, it survives" only for the purpose of determining whether a governmental entity is aware of a historical use of the property at the time it formed or manifested its intent. *Doria*, 397 Ill. App. 3d at 763. "Thus, a showing that a particular piece of property has been put to a particular use does not detail the type of 'historical use' that *Marshall* relied on to help elucidate the intent underlying the property. Further, were the actual use of a particular piece of property allowed to stand as evidence of intent, then the fact that a use was or is permitted would become evidence that it was intended in the first place, and the statutory distinction between 'permitted' and 'intended' uses would vanish." *Id.* Plaintiff argues *Doria* in inapposite because the revetment never existed as usable property prior to its construction for use by the public. Plaintiff argues that when the revetment was constructed in its current form, it was "designed to lead bicyclists onto the revetment."

¶ 48 Based on *Doria*, and given plaintiff's arguments, we believe historical use is irrelevant in this case. Plaintiff is not arguing that historical use of the revetment informed defendant's intent with regard to the revetment. *Id.* at 765. Rather, plaintiff is arguing that defendant formed and manifested its intent when the revetment was built, and that the revetment has been used in a certain way (by bicyclists) since that intent was formed. We find the following holding in *Doria* applicable here:

> "If we were to follow plaintiff's approach and expand 'historical use' in these ways, we would erase the statutory distinction between permitted and intended uses: under plaintiff's theory, once a use is permitted on a particular property, it would become the historical use of the property and thus would become intended. *** [W]e cannot under any reading of *Marshall*, *Sisk*, and *Boub* consider the actual uses of the particular [property] at issue in order to determine defendant's intent for the [property.]" *Id.* at 766.

We find that in this case, the historic use element, if viable, is inapplicable.

¶ 49 C. Statutes and Ordinances Governing the Revetment

¶ 50 Next, plaintiff argues courts "have also looked to laws governing the public area in question to determine its intended use." In this case, plaintiff argues the District's Code "shows the District intends all its various paths to be used by bicyclists because it does not distinguish among the paths." The District's Code reads, in pertinent part, as follows:

> "Persons may operate a bicycle only on paths, trails, roadways or other areas designated for bicycle use. Persons operating bicycles must ride on the right-hand side of such path, trail, roadway or other area designated for bicycle use ***."

However, plaintiff asserts, the District has "never designated any particular area or type of path along the lakefront for bicycle use, either by rule or signage." Therefore, plaintiff argues, "the

logical conclusion is that it intended bicyclists to use all the various paths unless such use was specifically barred at a particular location."

¶ 51 The District asserts that its "maps and the signage/markings along the [Trail] affirmatively designate that bicycle use is allowed on the [Trail.]" The District argues the "Code must expressly designate bicyclists as intended users of the revetment for it to serve as evidence of intended use." The District argues that the Code prohibits riding in areas not designated for bicycle riding, and the revetment is not designated for bicycle riding. In reply, plaintiff points out that the District's maps do not designate secondary trails for bicycle use, but Foster averred that secondary trails are designated for bicycle use. Plaintiff argues "it follows that just because maps do not show revetment sections does not mean riding was not intended there."

¶ 52 We find plaintiff's argument unpersuasive. The District's Code clearly states that bicycle riding is only permitted in designated areas. The Trail is designated for bicycle use. Foster testified that the Trail is identified on a "bike route map" maintained by the city and linked to the District's website. Therefore, contrary to plaintiff's argument, the District has designated a particular area along the lakefront for bicycle use: the Trail. Foster also testified that secondary trails are not identified as bike routes on the bike route map unless the secondary trail is coming from a street, and the District intends bicyclists to use secondary trails to get from the lakefront to some other area. We reject plaintiff's assertion that the map is irrelevant because it does not show secondary trails. First, plaintiff's assertion that "the map scale shows they were not designed to portray anything smaller than the main trail *** is presumably why none show anything other than the main trail" is pure speculation. We could equally presume that the bike route map only depicts the Trail because that is the only area designated for unrestricted use by bicyclists (which the secondary trails are not).

¶ 53 Second, the fact the District's maps do not depict all of the secondary trails, which are intended for use by bicyclists for the limited purpose of accessing the Trail and lakefront amenities, does not necessarily mean that the designation of the Trail for use by bicyclists is somehow ineffective or that every paved area on the lakefront not depicted on the bike route map *is* designated for use by bicyclists, which is what plaintiff's argument suggests. It only means that the District may have failed to specifically designate all of the areas it intends to be used by bicyclists. That fact does not help plaintiff. That the District may have failed to specifically designate all of the areas intended for bicycling does not lead us to the conclusion that the revetment was among them absent any other manifestation of that intent. In fact, given Foster's testimony as to the limited purpose for which the District intends bicyclists to use the secondary trails, it is consistent with the District's express intent that the secondary trails not be identified on the bike route map.

¶ 54 Courts may consider "the intent expressed by the local entity in its ordinances or *** codes." *Brooks v. City of Peoria*, 305 Ill. App. 3d 806, 810 (1999). Plaintiff cited *Brooks* in support of the argument the language of the District's Code "shows the District intends all its various paths to be used by bicyclists because it does not distinguish among the paths." *Brooks* does not support plaintiff's argument. In *Brooks*, the court found "statutory evidence that [the] plaintiff was an intended user of [a] sidewalk." (Emphasis omitted.) *Brooks*, 305 Ill. App. 3d at 812. There, the plaintiff was injured when he was seven years old and, due to an alleged deterioration of the sidewalk, he lost control of his bicycle and fell into an adjacent concrete drainage ditch. *Id.* at 807. At issue was whether the city of Peoria intended bicyclists to use the sidewalks. *Id.* at 808. The court found three statutory provisions that provided "sufficient evidence that the City intended for [the] plaintiff, an infant bicyclist, to use the sidewalk." *Id.* at 812. The court found that those statutes were "integral parts of a statutory scheme that makes

exceptions for diminutive bicycles." *Id.* In this case, plaintiff relies only on the absence of Code language or indications on the bike route map pertaining to use of the revetment, not a "statutory scheme" that bicyclists were intended users of the revetment or of all of the paved areas along the lakefront. Plaintiff has cited no authority that the Code's silence regarding the revetment is evidence of defendant's intent regarding the revetment. We do not believe defendant should be required to expressly prohibit bicycle use everywhere it is not expressly permitted. See *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 757 (1991) ("we do not think that a municipality must separately prohibit each and every potential foreseeable use of its property in order to assert that it owes no duty under section 3-102(a)"). We hold that consideration of the governmental unit's ordinances or codes governing the subject property leads to the conclusion that defendant did not intend bicyclists to use the upper tier of the revetment.

¶ 55 Finally, we reject plaintiff's argument defendant is estopped from claiming bicyclists are not intended users of the upper tier of the revetment. Plaintiff argues defendant "should not be allowed to encourage a use which it intended to change at some point without first notifying users of the change so they could adjust their behavior accordingly." Plaintiff's argument is premised on the assertion that bicyclists were encouraged to continue on the revetment by the fact the Trail leads to a secondary trail which leads to the revetment.

> "The doctrine of equitable estoppel is applicable to municipal bodies. [Citations.] However, courts do not favor applying the doctrine of equitable estoppel against a public body. [Citation.] When invoked against a governmental entity exercising its governmental functions, estoppel will only apply in extraordinary or compelling circumstances. [Citation.] Courts will only invoke equitable estoppel against a public body when it is necessary to prevent fraud and injustice. [Citation.] A court will apply equitable estoppel against a municipality if the

> aggrieved party can establish: (1) the municipality affirmatively acted; (2) the affirmative act induced substantial reliance; and (3) the aggrieved party substantially changed its position as a result of its justifiable reliance. [Citation.]" *Morgan Place of Chicago v. City of Chicago*, 2012 IL App (1st) 091240, ¶ 33.

¶ 56 Plaintiff asserts "bicyclists relied on the intended use of the trails when they entered the trail to continue as the intended use until the District communicated a change." We find no basis for finding that plaintiff relied on an affirmative act by defendant to induce her into relying on the Trail to continue to every area of the lakefront. The "affirmative act" asserted by plaintiff is the fact defendant "built and operated trails." We fail to see how providing a trail for use by, among others, bicyclists, induced plaintiff to rely on that trail to continue to all areas to which it was adjacent and accessible, particularly where the physical nature of the adjacent area at issue is distinct from the Trail. Defendant did not commit a fraud by building the Trail near the revetment or by providing a secondary trail to the revetment. The purpose of the secondary trail is to permit users of the Trail to access lakefront amenities like the revetment. We do not find that it provides an inducement to bicyclists to ride along the upper tier of the revetment. The transition from Trail to secondary trail to revetment is not as seamless as plaintiff suggests, but involves two 90-degree (approximately) turns into areas with successively different physical characteristics, the last of which is not conducive to use as a bicycle trail. Plaintiff's estoppel argument fails.

¶ 57 We find that plaintiff, as a bicyclist, was not an intended user of the upper tier of the revetment. Consequently, we find defendant did not owe a duty of care to plaintiff. Having found plaintiff was not owed a duty of care, we have no need to address the city's argument the complaint against it was properly dismissed because it does not own or maintain the property where plaintiff's injury occurred. We also have no need to address the alternative argument that

defendant is immune under section 3-104 of the Tort Immunity Act, or plaintiff's argument that section 3-104 does not apply.

¶ 58 CONCLUSION

¶ 59 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 60 Affirmed.