

TREMPEALEAU COUNTY CORPORATION COUNSEL

36245 Main St. – P.O. Box 67
Whitehall, Wisconsin 54773-0067

Corporation Counsel
LaVerne Michalak

Telephone: (715) 538-2311
Fax: (715) 538-4776

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Attorney General Van Hollen
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Re: Request for Opinion Concerning the Designation of ATV Routes

Gentlemen:

Trempealeau County has been asked to designate parts of several County highways as an All Terrain Vehicle (ATV) route for the benefit of a private ATV Club.

My question is whether a County is permitted to allow ATV use on a County highway if the sole purpose of designating the highway as a route is to allow a private organization to enhance its system of trails for the benefit of its members and their invitees? I am inclined to believe that a County is not permitted to do this, mainly for reasons relating to the provisions of Section 23.33 Wis. Stats. and the Public Purpose Doctrine.

Background:

A privately organized, governed and financed ATV Club in our County with approximately 50 members has developed a number of off-road private trails on privately owned land to be used by ATVs operated by its members or their invitees. In addition to these off-road trails, the club has persuaded two towns and one city to designate certain town roads and city streets as ATV routes, presumably under the authority of Section 23.33(8)b. The road segments allow the off-road trails to be connected in those situations where the club says it has not been able to get landowner's permission for off-road connections of its trail network.

The County has now been approached by the club with a request to designate three sections of County Trunk Highway as an ATV route, the longest section being 1.3 miles.

By a three to two vote our Highway Committee has expressed an interest in granting the request and asked me to prepare an ordinance for the County Board's approval which would authorize the County to create ATV routes on County roads. I am enclosing a copy of the proposed ordinance. Section 1.D. of the ordinance would allow ATV routes to be created for the benefit of private groups. I have asked the County Board to set aside action on this ordinance pending a response from your office. I expect our Board will be pressed to reach a decision at its March 21, 2011 meeting so the ATV Club can have its trail system open by the April 15th starting date provided in the ordinance.

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Legal Analysis:

Wisconsin Statutes provide that generally ATVs are not allowed to operate on highways (Section 23.33(4)(b)). The statutes contain a number of exceptions, including 23.33(4)(d)4d which allows them on roadways designated as ATV routes. Section 23.33(8)(b) allows counties, among others, to designate a highway as an ATV route. Subsection (11) provides for local ordinances regulating ATVs on County designated routes.

Generally, counties only have such authority as is granted by the legislature in the statutes. Section 23.33(8)(c) provides that counties may designate corridors for use as all terrain vehicle trails on lands it has obtained by lease or easement. "All terrain vehicle trail" is defined at Section 23.33(1)(d) as marked corridors which are designated by the government for use by ATVs. There are no ATV trails designated by the County or any other unit of government anywhere near the short segments of County highway proposed as ATV routes. Consequently, these unconnected segments of County highways have no value as ATV routes to the public.

The only recreational value of these routes is to members of the club or their invitees who have the privilege of using the private off-road trails of the club, which are not ATV trails as defined in the statutes. No public areas are being connected or served by these "routes". When government sponsored activities are authorized by the statutes such activities or programs are generally limited to those which serve a public purpose. (Discussion of public purpose doctrine at 80 OP Atty. Gen. Wis. 341 (1992), 67 OP Atty. Gen. Wis. 304 (1978) and others).

Highway ATV routes are established under the authority and supervision of the County. As a result, I believe the County has exposure for liability in the event of accidents, especially if it is not authorized to establish such routes.

Even assuming Section 23.33 can be construed to give counties authority to create highway ATV routes where no off-road public ATV trails exist, I have been unable to find any case law or other authority that specifically addresses a County's authority to provide this type of private benefit in light of the public purpose doctrine. I would appreciate your legal opinion on this issue.

Sincerely yours,



LaVerne Michalak
Corporation Counsel

LM:sj

Ordinance No. _____

**Trempealeau County Ordinance
Establishment of ATV Highway Crossing or Route**

The County Board of Supervisors of the County of Trempealeau, does ordain as follows:

SECTION 1: AUTHORITY AND GENERAL

- A. State Traffic Laws Adopted. Except as otherwise specifically provided in this code, the statutory provisions in Chapter 23, 340 to 348, and 350 of the Wisconsin Statutes, establishing definitions and regulations with respect to all terrain vehicles (ATV's), and Chapter NR 64, All Terrain Vehicles, WDNR, exclusive of any provisions therein relating to penalties to be imposed and exclusive of any regulations for which the statutory penalty is a fine or term of imprisonment, are hereby adopted and by reference made a part of this chapter as if fully set forth herein. Unless otherwise provided in this ordinance, any act required to be performed or prohibited by any statute incorporated herein by reference is required or prohibited by this ordinance. Any future amendments, revisions or modifications of the statutes incorporated herein are made a part of this chapter in order to secure uniform statewide regulation of ATV's.
- B. Following due consideration of the recreational and economic value to connect trail opportunities and weighted against protecting the safety of motorists by maintaining the road edge, surface and integrity of the right-of-way, public safety, liability aspects, terrain involved, traffic density and history of automobile traffic, this ordinance has been created pursuant to County Board authority under Wis. Statutes 59.02, 23.33(11)(a) and (am), and 23.33(8).

The County Highway Department oversees the ATV Route/Crossing permit process.

- C. ATV routes and proposed routes on or across a highway shall be investigated and monitored to insure that they have been authorized and that they do not adversely affect the use of the highway or unreasonably interfere with the peaceful enjoyment of private or public property.
- D. Private trails. In addition to establishing ATV routes to connect ATV trails as defined in Section 23.33(1)(d), the County Highway Department may also establish routes for the purpose of connecting off-road trails established by private entities for the exclusive use of their members, their invitees or other persons paying a fee for use of the trail. However, the use of the route along the roadway may not be limited to those persons approved by or paying a fee to the private entity.

SECTION 2: DESIGNATING ALL-TERRAIN VEHICLE ROUTES

- A. ATV Routes. County trunk highways may be designated as ATV routes only with the approval of the Highway Committee. The Highway Committee shall approve any modification to a designated ATV route. A copy of those ATV routes, along with a map showing their location, shall be kept on file at the Highway Department. The County Highway Department shall retain the sole authority for the closure or termination of any ATV route on the County Trunk Highway System.

- (1) ATV Route On Roadway. All ATVs shall operate on the roadway and not on the shoulder, ditch or other parts of the highway right-of-way on a signed ATV route.
- (2) ATV Route Violations - Penalty. The penalty for operating an ATV off the roadway of a designated ATV route (i.e., the paved surface), other than for direct access from a trail to a roadway, or operating outside of permitted times for route use, or operating in excess of permitted speed, shall result in a forfeiture of not less than \$25.00 or more than \$250.00, plus court costs.

SECTION 3: PERMIT PROCESS

- A. Any municipality or organization, that desires a route along, or a crossing over, a County Highway may request a route or crossing permit. Anyone requesting a permit shall complete an application in compliance with this policy and the Wisconsin Statutes and file the application with the Highway Department. The Highway Department will review the application using the process in this ordinance. No person shall commence or continue using the County Highway, or request or allow others to commence or continue use of that County Highway, unless a permit has been issued and remains in effect.
- B. Procedure to follow in considering a permit for an ATV Route/Crossing:
 - (1) The Municipality or organized group may apply for a permit. The application shall be filled out completely, signed by a person authorized by the applicant, and returned to the Highway Department
 - (2) The permit application will be reviewed by the Highway Department for conformance with its policies, the ordinance and with all applicable state, federal, and local laws, regulations, and policies.
 - (3) At a minimum the application should include:
 - (a) A map showing the portion of the highway where the route is being requested.
 - (b) A map showing the trails which lead up to the proposed roadway route.
 - (c) A statement that the applicant has a lease or some other permission from landowners to use the trails shown on the map.
 - (d) A statement as to why the highway route is needed and efforts made to establish off-road alternatives, including the names of landowners contacted for that purpose.
 - (e) If the application is for the use of a road to connect private trails, then include the name of the organization applying, the names and addresses of its officers, the date when the organization was established or incorporated and the number of members.
 - (4) The County Highway Committee shall have the authority to approve applications for permits under this ordinance. The Highway Committee Chair shall indicate approval by signature before any permit may be issued. The Highway Department will retain a copy of the application on file.
- C. Before a highway segment can be considered for designation as an ATV route, the applicant shall demonstrate to the Department and Highway Committee, and the Department and Committee shall determine, that no other practical option as a trail exists. The most important route consideration is the safety of all users: ATV riders, pedestrians, bicyclists, motorcyclists, automobile operators, truck operators and others.

- D. The Highway Committee may establish a fee for each permit application which shall apply to all applications. The applicant shall pay to the Highway Department a fee for each permit application according to a fee schedule as established by the County Highway Committee.
- E. A permit is valid for construction of a route/crossing within one year of issuance. After one year has expired, the permit will no longer be valid and a new permit must be applied for and issued before construction may be commenced or continued.
- F. Permits are good only for the calendar year for which they are issued. Renewal applications must be submitted by March 1 to include any revised list of organization officers or other changes.
- G. If the application is approved a permit will be issued. The applicant shall construct any roadway approach or crossing utilizing a pre-approved plan and traffic control procedure explained by an authorized Highway Department employee. Each permit will be valid for one route or crossing location only. The Highway Department shall inspect the site of each route/crossing before and during construction to ensure compliance with requirements.
- H. If the application is denied, the Highway Department shall notify the applicant in writing and explain the reason for denial.

SECTION 4: MAINTENANCE AND OTHER RESTRICTIONS OR REQUIREMENTS

- A. Time of operation. ATV's shall not be operated on an approved ATV route other than between one half hour before sunrise and one half hour after sunset from April 15th through November 15th.
- B. Speed Limits. An ATV shall be operated on a route at a safe speed not to exceed 25 miles per hour unless a reduced speed is otherwise required by State Statute.
- C. The permittee shall furnish all materials, do all work, and pay all costs in connection with the construction or maintenance of the approach or crossing and its appurtenances within the right-of-way. The County shall not give, sell, or otherwise provide any equipment, labor or materials for the project.
- D. Maintenance of approaches or crossings is the responsibility of the organization and /or the person signing the permit application. The Highway Department will monitor the approaches/crossings on a periodic basis. The results of these reviews may indicate a need for maintenance. In such case the Highway Department will notify the person signing the application of those needs and the permittee will have 10 days to complete the maintenance or the route/crossing may be closed until such time as the maintenance is done and approved by the Department.
- E. No revisions or additions shall be made to the route/crossing or its appurtenances on the right-of-way without the written permission of the Highway Committee.
- F. The permit shall contain a statement, and be subject to the condition, that all construction and maintenance shall be done subject to the rules and regulations prescribed by the Highway Department and be performed and completed to the Highway Department's satisfaction.

- G. Removal of Obstructions. All obstructions in the right-of-way that will impede the safe use of the route are the responsibility of the permittee for removal, including, but not limited to, trees, woody vegetation and rocks.

SECTION 5: ROUTE/CROSSING SIGNAGE

- A. Initial Installation. During the Highway Department review of the route or crossing, the Department will determine the necessary signage on the route or crossing. At such time as the permit is approved the Highway Department shall install the necessary signage. The projected costs for signage and installation shall be paid by the permittee prior to commencing construction on the approach or crossing. A route is not open to use until signs are installed.
- B. Sign Maintenance. The Highway Department will maintain the signage necessary for the route/crossing and bill the permittee for that maintenance. Should the permittee fail to pay for the maintenance then the route will be closed and signed removed until such time as the removal costs, the sign maintenance costs, and the projected resigning costs are paid in full.

SECTION 6: REVIEW OF DENIAL OF PERMIT

- A. If the Highway Department denies a request for a permit under this policy or revokes a permit issued under this policy, the County Highway Committee shall, upon written request by the applicant within 30 days after the denial, review the Highway Department's decision. A written request shall be deemed made when it is received at the Highway Department office.
- B. The County Highway Committee shall schedule a hearing at which it will consider such a request, such hearing to be held within 45 days after receipt of the request. The person making the request shall be given notice of that hearing, and at the hearing shall have the opportunity to present evidence to the committee concerning the reasons for the request.
- C. Within 30 days after the hearing the County Highway Committee shall make its decision regarding the request. It may reverse, confirm, or modify the decision of the Highway Department. The Highway Department shall thereafter take action in conformance with the committee's decision.

SECTION 7: PENALTIES AND REMEDIES

- A. Any person who violates any section of this ordinance or statutes adopted by reference, other than Sec. 2A(1) and (2), and Sec. 4A and 4B of this ordinance, shall pay a forfeiture of not less than \$50.00 nor more than \$500.00 for each offense. In case of a continuing violation, each day that the violation continues may be considered a separate violation.
- B. If it can not readily be determined which individual is directly responsible for a violation of a construction, maintenance or other permit requirement, the person having signed the permit application shall be deemed responsible and cited for violations. A statement to that effect shall appear on the application above the signature line. A failure to pay such forfeiture may form a basis for revocation of a permit.