June 14, 2024

Franklin County Office of Economic Development & Tourism
Attention: Bobbie Keenan
355 West Main Street, Suite 428
Malone, NY 12953
Exploreadirondackfrontier@franklincountyny.gov

Re: Public Comments on Draft Scoping Document for proposed Multi-Use Recreational Trail System, Franklin County

Dear Bobbie:

Protect the Adirondacks ("PROTECT") offers these comments for your consideration as the County prepares the Final Scope for the proposed, 500-mile Multi-Use Recreational Trail System in Franklin County ("Trail System"). The Trail System will be "for recreational use by off-road vehicle (ORV), foot, bicycle, horseback, dog sled, and other outdoor activities". We think that calling the proposal a multi-use trail system is misleading because we do not believe that people hiking, birdwatching and horseback riding or engaging in other nonmotorized recreational activities are going to do those activities on trails/routes that are designated and designed for, and used by, motor vehicles. The Trail System is really made up of proposed ORV routes and proposed bike routes.

The proposed Trail System involves an unknown number of miles of trails located on lands owned by the State of New York (which lands within Franklin County include Constitutionally protected Forest Preserve) and on lands owned by third parties, including the County, and the various local municipalities. The Trail System also proposes to use an unknown number of miles of roadways owned by the State, County, Towns and Village(s). The proposal indicates that the County would have responsibility for "authority and supervision, potential environmental impacts and public safety issues". Notably, the expectation is that this Trail System will be further expanded in the future.

Multi-Use Trails for ORVs Cause Significant Adverse Impacts

As the Franklin County Legislature clearly recognizes with its adoption of the positive declaration, the Trail System "will have a significant adverse environmental impact" that requires the preparation of a generic environmental impact statement ("GEIS"). We agree that the Trail System, in particular the proposed use of ORVs on trails over public lands, has the potential to cause significant adverse impacts to the natural resources of Franklin County.

We have documented and publicized the threats and impacts to the ecological integrity and public enjoyment of public lands from the use of motorized recreational vehicles on public lands. Our in-depth report entitled *Rutted and Ruined: ATV Damage on the Adirondack Forest Preserve* is available on our website at https://www.protectadks.org/wp-content/uploads/2013/03/RuttedRuinedATVreport-LOWRES.pdf.

The draft Scoping Document outlines that the draft GEIS will include a consideration of the following "environmental and ecological resources": Fish, Wildlife, Plants, and Ecologically Sensitive Areas; Significant Historical or Archaeological Resources; Surface Water Resources; Wetlands; Soils; Noise; Air Quality; Traffic; Recreational Activities; Growth and Character of the Community; and Community Services. Additional considerations should be included for these categories:

1. **Fish, Wildlife, Plants and Ecologically Sensitive Areas:** The Scoping Document needs to state that there will be an extensive discussion of the potential adverse impacts to the State Forest Preserve, an ecologically sensitive area, from all of the proposed uses (e.g., ORVs, mountain bikes, horses). With limited exceptions, the Forest Preserve includes all State-owned land within Franklin County, regardless of whether the land is inside or outside the Adirondack Park "Blue Line". As mentioned above, the Forest Preserve is protected by the NYS Constitution and is subject to the famed "Forever Wild" provision, which states that the Forest Preserve "shall be forever kept as wild forest lands".[1] The potential adverse impacts to the "Forever Wild" nature of the Forest Preserve must be evaluated in full. There must also be a clear recognition that the Department of Environmental Conservation does not permit the operation of ORVs on the Forest Preserve by the general public for recreational use.

   The statement that the impacts to wildlife, plants, and ecologically sensitive areas from ORVs on "existing roadways" do not need to be studied should be rejected. The impacts to wildlife (particularly rare, threatened and endangered species), plants, and ecologically sensitive areas from ORVs on roadways must be examined, and there should be a full discussion of the impacts of ORVs on road surfaces as well as on the shoulders of roads.

2. **Significant Historical or Archaeological Resources:** The State Forest Preserve is listed on the State and National Register of Historic Places, and the potential adverse impacts to the historic nature of the Forest Preserve must be evaluated in full.

[1] NYS Constitution Article 14, Section 1.

3. **Soils:** The Scoping Document should reflect that there will be an assessment of potential negative impacts of all potential uses (e.g., ORVs, mountain bikes, horses) upon soils, as well as an evaluation of methods to avoid, minimize and mitigate those potential impacts. The assessment of soil erosion should include an evaluation of the creation of mud pits from ORV use, and how all of the proposed uses may negatively wetlands.

   See *Rutted and Ruined: ATV Damage on the Adirondack Forest Preserve*, pages 7-10, available on our website at https://www.protectadks.org/wp-content/uploads/2013/03/RuttedRuinedATVreport-LOWRES.pdf. In addition, there needs to be an examination of the impacts on soils from ORVs riding on the shoulders of roads.

4. **Noise:** The Scoping Document should indicate that potential negative impacts on recreational users who are not using ORVs (e.g., hikers, hunters) will be evaluated, and that there will be an evaluation of methods to avoid, minimize and mitigate those potential impacts. Mitigation measures should include a discussion of allowing only fully electric ORVs.

5. **Air Quality:** In addition to odor and dust, the exhaust of ORVs also produces air emissions (e.g., fine particulate matter, nitrogen oxides, and sulfide) that should be evaluated in the GEIS.[2] The greenhouse gas emissions from ORVs should also be evaluated in the GEIS. There should also be an evaluation of methods to avoid, minimize and mitigate those potential air quality impacts. Mitigation measures should include a discussion of allowing only fully electric ORVs. In addition, the claim in the draft Scoping Document that "Dust generation is not anticipated to be substantial within forested areas" is inappropriate at this stage of review; dust generation from ORV use in forested areas may be substantial and the impacts of dust on the forest should be assessed.

6. **Traffic:** See discussion below regarding ORVs on roads.

7. **Recreational Activities:** While the draft Scoping Document states that there will be a discussion of negative "perception" impacts (we suggest that these impacts include examples such as disturbance, annoyance, fear) to non-motorized recreational users, the Scoping Document should include a discussion of the physical negative impacts to those recreational users, such as the speed of ORVs passing or overtaking non-motorized recreational users creating safety risks.

8. **Growth and Character of the Community:** There should be a discussion of the possible adverse impacts to the character of the community as a result of changes to the community from an increase in retail businesses and short term rentals resulting from "a surge" in ORV tourist riders drawn to the Trail System in Franklin County. There should also be a discussion of the potential economic loss caused by the loss of quality of life and loss of quality outdoor experiences for residents and for visitors/second home owners

[2] https://www.biologicaldiversity.org/publications/papers/Fuel_to_Burn_for_Web.pdf

who will be negatively impacted by the use of ORVs on roads and lands in the county. The Final Scope should recognize that the Town of Franklin has passed a resolution stating that the Trail System "is unlikely to bring significant economic benefits to the town", and that the "Town of Franklin does not support the proposed [Trail System] as proposed".

9. **Community Services:** We support the proposed review of the impacts caused by the increase in the "amount of time spent by law enforcement officials to monitor the trails and enforce regulations". This section should also include a discussion of the increase in time and costs to the Town/County Highway/Public Works Departments and to the Department of Environmental Conservation from monitoring/maintaining the conditions of roads/trails, and remedying the infrastructure problems caused by the use of ORVs on roads and lands. The Final Scope should recognize that the Town of Franklin has passed a resolution opposing the proposed Trail System because it "may burden the town budget with additional costs for road maintenance and enforcement".

In addition to the above categories, there needs to be a new category for the impact of the Trail System on aesthetic resources. According to the County's Environmental Assessment Form Part 2, the adverse "Impact on Aesthetic Resources" is identified as being potentially significant in several respects (e.g., visibility of the Trail System from publicly accessible vantage points, and by viewers engaged in travel and recreational or tourism-based activities), and due to the cumulative impact of the visibility of other similar projects.

The Final Scope must state that there will be a discussion of the adverse aesthetic impacts that were identified by the County Legislature, and an evaluation of methods to avoid, minimize and mitigate those potential aesthetic impacts.

Additionally, according to the County's Environmental Assessment Form Part 2, there are potentially significant adverse impacts resulting from lights shining onto adjoining properties. The Final Scope must state that there will be a discussion of the adverse light impacts that were identified by the County Legislature, and an evaluation of methods to avoid, minimize and mitigate those potential light impacts.

According to the County's Environmental Assessment Form Part 2, there are also potentially significant adverse impacts from the Trail System's proximity to site(s) used for the disposal of solid or hazardous waste, and to schools, hospitals, licensed day care centers, group homes, and/or retirement communities. The Final Scope must state that there will be a discussion of these adverse impacts that were identified by the County Legislature, and an evaluation of methods to avoid, minimize and mitigate those potential impacts. There should also be included in the Final Scope that there will be a discussion of the rules that apply to ORVs operating in close proximity to dwellings and persons who are not riding ORVs.

Impacts from ATVs Use is Markedly Different from other Outdoor Recreation

Protect the Adirondacks has monitored ATV abuse on public and private lands for years. Here are our observations:

1. ATV use destroys road and trail surfaces and Forest Preserve facilities, such as bridges, and cause soil and wetlands damage in ways that other motor vehicles do not. Impacts from ATV use is very different from hiking, mountain biking or snowmobiling.

2. ATV use creates deep ruts and mud pits on roads and trails that become impassable. It seems that ATVs are often ridden for the backwoods riding experience where one can make the mud fly and tear up an area. This damage makes a road difficult to travel for all other users.

3. Roads and trails are widened by ATV users to avoid a damaged, impassable area, which causes further damage to the corridor's natural resources and wild character. ATVs often create a parallel trails system alongside local roads irrespective of whether the land are residential or not. ATVs often travel far beyond the right of way.

4. The wild forest character and the Forest Preserve experience are damaged by ATV use. Non-motor vehicle users that use the roads and trails damaged by ATVs find their Forest Preserve experience diminished as the roads are unattractive, deeply rutted, widened, and mud-filled swamps.

5. ATVs regularly leave designated roads to illegally blaze new trails through the Forest Preserve. ATV bushwhacking off roads is very destructive. ATVs often leave local roads to travel in open fields or dirt roads.

6. ATVs regularly trespass around gates and boulders that are erected to control motor vehicle traffic. ATVs can blaze trails through the forest to circumvent barriers in ways that other motor vehicles cannot.

7. ATVs regularly drive through streams, creeks and wetlands for sport rather than use bridges that provide motor vehicles with access over a stream, creek or wetland. Rather than travel over a bridge on a local road, ATVs will choose to splash through a stream. Once one ATV track is down, others will follow.

8. ATVs regularly trespass on snowmobile trails, designated roads that prohibit ATV use, and footpaths that intersect with roads. In short, ATV operators often go where they want.

9. ATV use has led to vandalism of Forest Preserve and privately owned facilities, such as gates that control access.

These impacts are particular to ATVs. ATV damage remains widespread across the Forest Preserve and private lands where local roads have been opened due to illegal trespasses. In many Wild Forest units and rural areas illegal trespassing by ATVs is widespread and continues unabated. Enforcement of illegal operations of ATVs is wholly inadequate.

Public Roads Are Not Meant for ORV Riding

The proposal involves using an unknown number of miles of roads. It is important to note that vehicles using public roads must be registered, and currently the State law limits registration of "off-highway" vehicles to those that do not exceed 70" in width or 1,000 pounds in weight.[3] That essentially narrows permissible off-highway vehicles to those that are considered an All Terrain Vehicle ("ATV"), and does not include ORVs such as "side-by-sides" or "utility task vehicles" ("UTVs") that may be operated on private lands. *See* New York State Vehicle and Traffic Law ("VTL") § 2281(a). These larger motor vehicles (side-by-sides and UTVs) are popular and widely sold. Any local law adopted by the Towns or the County for the purposes of the Trail System should be explicit that only legal motor vehicles, such as the smaller ATVs, are allowed to operate on roads.

Local government leaders in Adirondack counties have tried for years to expand the use of public roads for recreational use of ATVs. This has been controversial and has resulted in a series of legal challenges. Some municipalities withdrew their local ATV laws or had them annulled after legal challenges by affected property owners who sought to stop aggressive local governments from illegally opening public roads to ATV riding. The Town of Franklin has passed a resolution stating that it "will not approve the use of off-road vehicles on paved roads for which it has jurisdiction within the Township".

State law has strict limitations on the use of roadways for off-road vehicles. In order for a municipality to designate and post roads and streets under local jurisdiction as open to ATV use, the municipality must document that "it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the" roads and streets that are otherwise open for legal ATV use. VTL § 2405. The "burden" is on the municipality to make the statutorily mandated findings based upon specific facts meeting the impossibility standard. Hutchins v. Town of Colton, 8 M.3d 1020(A) (Sup. Ct. St. Lawrence Co. 2004). A copy of this court decision is enclosed for your reference.

Additionally, an opinion from the Office of the Attorney General to the Lewis County Attorney is instructive for understanding the municipality's legal obligations when determining whether to open roads to ATV use. A copy of this opinion (OAG Opinion No. 2005-21) is also enclosed for your reference. Any local law allowing ATVs on long stretches of road is likely subject to legal challenge as being in violation of VTL. However, allowing ATVs on designated portions of specific roads where "it is otherwise impossible for ATVs to gain access" to legal off-road riding opportunities would be more in line with the text of the statute and "the Legislature's clear intent that ATVs be used primarily off-highway". OAG Opinion No. 2005-21 page 8.[4]

Additionally, most rural roads are not built to handle ATV traffic, especially along the shoulders. It is unclear whether the proposed routes for ORVs use the surface of roads or the shoulders. More importantly, private and public lands along public roads that are opened to ATVs are susceptible to trespass and ecological damage. Communities that have roads opened to ATVs are also vulnerable to severe liability claims and high insurance rates; over 10,000 people have been

[3] https://dmv.ny.gov/brochure/atvs-information-owners-and-operators

[4] More background information on this topic is available on our website at https://www.protectadks.org/town-of-ohio-rescinds-atv-law-after-protect-filed-lawsuit/.

killed in ATV related accidents since 1985 and over 100,000 are injured annually. ATV safety advocates and the manufacturers also advocate against ATV use on roads, citing a lack protection for riders in collisions and unpredictability of operation at high speeds on paved surfaces. Additional VTL § 2405 requires a municipality to identify by signs or markers, "erected at the expense of the state or municipality," those portions of roads designated for use by ATVs.

The draft Scoping Document must include these resources as references, and the Scoping Document must include a thorough discussion of all of the negative environmental, infrastructure and municipal liability impacts of opening roads in Towns and Villages throughout the County to ATV use, and potentially to ORV use, despite the potential illegality of such use.

Additional Information Needed and Other Impacts Must be Included

The Final Scope needs to have much more detailed maps showing the exact locations of the trails and roads to be used in the Trail System. The maps must include information showing the ownership of each of parcel of land that the Trail System crosses. In particular, every instance of a trail or road crossing the State Forest Preserve must be specifically and precisely identified. Any applicable Unit Management Plans, Recreational Management Plans, State-owned Conservation Easements, or other management plans for lands where the State has an ownership interest must be included as reference documents.

According to 6 NYCRR § 617.8(e)(7), there must be a "brief description of the prominent issues" that have been considered and "determined to be neither relevant nor environmentally significant . . . and the reasons why those issues were not included in the final scope". The draft Scoping Document does not include this section. This section must be added to identify if there are any issues that are not being included, and if so, why.

According to 6 NYCRR § 617.10(e), the County must "address not only the site specific impacts of the individual project under consideration, but also, in more general or conceptual terms, the cumulative impacts on the environment . . . of projects that may be developed in the future". The draft Scoping Document does not include any discussion of cumulative impacts of the current proposed Trail System, or a discussion of the cumulative impacts of the current Trail System as it is expanded in the future. This section must be added to include a discussion of cumulative impacts of the proposed Trail System, the cumulative impacts of the expanded future Trail System, and the cumulative impacts of the proposed Trail System as it relates/connects to trails in adjoining counties.

The draft EIS does not provide much information on enforcement. What is the enforcement program for ATV use?

Finally, pursuant to 6 NYCRR § 617.12(b), we hereby request that you add PROTECT to the distribution list for all SEQRA-related documents, and we also request a copy of the Final Scope once it is approved. Complete copies of the Final Scope, and all of the reference materials, studies, maps and other materials relied upon by the County, should be made available online and at the local public libraries in the County.

On behalf of the Board of Directors of Protect the Adirondacks, we thank you for considering our comments regarding this matter.

Sincerely,

Claudia K. Braymer

Claudia K. Braymer
Deputy Director

enc.
cc: Members of the Franklin County Legislature
Members of the Adirondack Park Agency Board
Megan Phillips, Deputy Director for Planning, Adirondack Park Agency
David Plante, Deputy Director of Regulatory Programs, Adirondack Park Agency
Josh Clague, Adirondacks Coordinator, DEC
Erin Burns, Regional Permit Administrator, DEC Region 5
Kristofer A. Alberga, Supervisor of Natural Resources, DEC Region 5
Towns and Villages of Franklin County

Hutchins v. Town of Colton

Supreme Court of New York, St. Lawrence County

August 31, 2004, Decided

116349

Reporter
8 Misc. 3d 1020(A) *; 803 N.Y.S.2d 18 **; 2004 N.Y. Misc. LEXIS 3079 ***; 2004 NY Slip Op 51889(U) ****

[**1]** Ernest and Betty Hutchins, WILLIAM LYNCH, STEPHEN AND BETTY STOWE, WILLIAM AND HARRIET SPENCER, MARY LACOMB, RICHARD HAMMILL and RONALD AND DORIS WATSON, Petitioners/, Plaintiffs, against Town of Colton, SUNDAY ROCK ATV CLUB, Respondents/, Defendants.

Notice: [*1]** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE OFFICIAL REPORTS.

Core Terms

highway, trails, designated, municipality, adjacent, travel, local law, gain access, roads, impossibility, surfaces, motor vehicle, crossings, paved

Headnotes/Summary

Headnotes

[*1020A] [18]** Highways--Use of Highway--All Terrain ***Vehicles***. ***Vehicle*** and ***Traffic*** ***Law***--§ ***2405*** (Designation of highways and public lands for travel by ATV's).

Counsel: Conboy, McKay, Bachman & Kendall, LLP (Scott B. Goldie, Esq. of counsel), attorneys for Petitioners/Plaintiffs.

Cappello Linden & Ladouceur (Roger B. Linden, Esq., of counsel), attorneys for Respondent/Defendant Town of Colton.

Tobin and Dempf, LLP (William H. Reynolds, Esq., of counsel), attorneys for Respondent/Defendant Sunday Rock ATV Club.

Judges: DAVID DEMAREST, J.S.C.

Opinion by: DAVID DEMAREST

Opinion

David R. Demarest, J.

In this Article 78 special proceeding, Petitioners request an Order from the Court declaring Town of Colton Local Law No. 1 of 2004 (and its predecessor, Local Law No. 2 of 1999) null and void as violative of the provisions of the *New York* ***Vehicle*** *and* ***Traffic*** *Law* and the requirements of the *State Environmental Quality Review Act*. The relief is opposed by Respondents. The Court entertained oral arguments at its May 7, 2004, Special Term and has reviewed the parties' submissions.

The statute at issue is *New York* ***Vehicle*** *and* ***Traffic*** ***Law § 2405*** **[***2]** . Prior to the Legislature reclassifying the operating rules for all-terrain-vehicles (ATVs) in the ***Vehicle*** and ***Traffic*** Law (VTL) in 1986, they were codified at *Parks, Recreation and Historic Preservation Law* (PRHPL). In connection with the recodification legislation, the "Memorandum of State Department of Motor Vehicles" states: "With the exception of transfer from Office of Parks, Recreation and Historic Preservation to Department of Motor Vehicles involvement, there is no substantial change from Parks, Recreation and Historic Preservation provisions." However, Respondents argue the deletion of certain language -- referred to by them as the 'necessary travel clause' -- from the original PRHPL text is notable.

At issue in this lawsuit is the meaning of the language at subsection "1. Highways" of *VTL § 2405* which permits a municipality, either by local law or ordinance, to: **[****2]**

> "…designate and post any such public highway or portion thereof as open for travel by ATVs when in the determination of the [municipality] concerned, it is **otherwise *impossible* for ATVs to gain access**

to areas or trails adjacent to the highway. *** "

(Emphasis **[***3]** added)

Petitioners cite this Court's prior Decisions in another similar ATV case entitled *Brown v. Town of Pitcairn*, St. Lawrence County Index No. 114295 (August 2003), as well as a Franklin County Supreme Court Decision in *Santagate v. Franklin County*, Franklin County Index # 99-23 (1999), for the proposition that the municipality need first make a *determination* that it was otherwise ***impossible*** for ATVs to gain access to areas or trails adjacent to the highways. *Brown* is further cited by Petitioners in support of their position that the local law be premised upon the existence of a public trail, state trail or state forest trail:

> "….generic findings that an ATV 'area' and/or legally opened and approved trails exist in other townships, does not meet the statute's burden that it be '…otherwise ***impossible*** for ATVs to gain access to areas or trails adjacent to the highway'. Absent a finding of 'impossibility' and that the area or trail lies 'adjacent to the highway' there is no statutory basis for opening the road to such travel."

Brown v. Town of Pitcairn.

It is argued, then, that the opening of 34 of the municipality's 47 Town roads -- totaling **[***4]** 50 of 55 miles (or 90.9%) of road surface -- for ATV travel without any such factual finding is fatal.

To the contrary, Respondents argue Petitioners are precluded from arguing this issue in the present special proceeding since they did not exhaust their administrative remedies by raising this very issue during the public meetings which pre-dated the local law. Moreover, Respondents argue the Legislature deleted the 'necessary travel clause' when it reclassified the law from the PRHPL to the VTL. For this reason, Respondents take issue with the Court having imposed such a factual inquiry as in *Brown* since the law no longer qualifies the "impossibility of access" language with the 'necessary travel clause'. To this end, Respondents emphasize the difference between the above-cited VTL statutory language and its predecessor's statutory language:

> "ATVs may be operated on the following portions of [town roads] which have been designated and posted as access areas as provided in this section, **when necessary to travel from one off-highway trail or use area to another** when in the determination of the [municipality] it is otherwise ***impossible*** for ATVs to gain access **[***5]** to areas or trails adjacent to the highway."

PRHPL § 26.11 (emphasis added)

There is no blanket prohibition against ATVs using highways which have not been designated by local law pursuant to *VTL § 2405*. To this end, the law permits ATV **[****3]** operators to make direct right-angle crossings -- where they can be made safely -- over any highway (excepting interstate and controlled access highways) regardless of the fact they are not designated for ATV use by *VTL § 2405*. If the owner or lessee consents, ATV access between privately-owned parcels of land on opposite sides of a highway by safe, direct crossing thereof is also permitted. What is not permitted are unsafe direct crossings, indirect highway crossings, and direct highway crossings to access either public lands which have not been designated and posted for ATV travel, or private property with no owner or lessee's consent.

Arguing against Petitioners' objections to the Local Law conferring private benefits, Respondents must be able to demonstrate the Local Law's result is for the common good and is public in nature. Notably, *§ 2405(3)(a)*, *(b)* requires municipalities **[***6]** to erect signs or markers, at its own expense, on such designated highways (or designated lands). Seemingly, it would be an inappropriate use of the public fisc to benefit a private landowner's access from his private land to other noncontiguous private land lying on the opposite side of highway, without any proof that either access thereto is generally permitted to the general public, or, that all similarly situated private landowners are afforded the same rights.

Respondents contend that properly designated highways under *New York VTL § 2405* permit ATV operators to travel extensively the full length of such highways, regardless of whether they intend to access any public or private property permitting ATV use:

> "The removal of necessity of connecting trails as the touchstone for lawful designation of public roads for ATV use arguably allows local government to permit even unnecessary or gratuitous use. *** The Town of Colton could indeed designate public roads as ATV routes simply for the convenience, or even the caprice, of ATV users." [Respondent's counsel's Affidavit, sworn to April 29, 2004 at pars. 18-19].

Taken to its logical extreme, **[***7]** Respondents would urge this Court to hold that if adjoining municipalities throughout the State passed local laws permitting ATV use, a St. Lawrence County ATV operator could lawfully drive his/her ATV over such designated highways from the Town of Colton to such distant locales as, for example, Buffalo, New York, on sheer whim. For this reason, Respondents would contend the legislative intent was for designated paved highway surfaces to be substituted, in whole, for non-existent adjacent off-road trails. Respondents claim support for this interpretation can be found in *VTL § 2405(2)* wherein ATVs which are being operated on a highway are defined as "motor vehicles" and are subject to the rules of the road.

Any after-the-fact legislative interpretation which supports a reading of the statute which would provide municipalities with wholesale permission to designate the entirety of its paved highway surfaces for use in lieu of ATV trails/areas fails to address the fact that ATV manufacturers regularly warn against operation of these types of wheeled devices on paved surfaces. The fact that these vehicles are designed, primarily, for off-road use supports a **[***8]** reading of the statute which would limit their operation on paved surfaces to discrete areas/sections necessary to permit access to ATV-appropriate riding trails or areas.

It is important to note that while no statutory definition of ATV "areas and trails" exists, Respondents' expert provides an expansive definition therefor: "any linear or circuitous **[****4]** pathway or travelway of notable length, managed or used as a route along which ATVs are or may be ridden." [C. Alexander Ernst Affidavit, sworn to April 28, 2004, at par. 10]. Seemingly, the abundance of riding trails/areas tends to deflate Respondents' argument of the need to substitute paved highway surfaces for non-existent trails/areas. Regardless of the existence of "trails or areas," the Court notes that ATV operation on private property is prohibited unless done so with the owner's consent. It is on this basis that Respondents ascribe meaning to the statutory concept of impossibility of access:

> "…the impossibility of access to trails and areas adjacent to the public roads means nothing more than that there must not be an alternative off-road route available to the ATV operator.*** The true test is whether there **[***9]** exists areas or trails adjacent to the designated roads that would obviate use of those roads by ATVs."

Id. at pars. 32-33.

Relying on the express repeal of *PRHPL Article 26* and legislative history, Respondents urge the Court not to adopt Petitioner's narrow interpretation of *VTL § 2405*, but rather to adopt an interpretation which grants more relaxed discretion to municipalities permitting usage of public roads by ATVs. While citing to other language contained within the 1986 Session Laws legislative memorandum authored by the State Department of Motor Vehicles, Respondents fail to acknowledge the following language which specifically addresses the statute's re-codification from *PRHPL Article 26* to *VTL Article 48-C*:

> "With the exception of transfer from Office of Parks, Recreation and Historic Preservation to Department of Motor Vehicles involvement, there is no substantial change from Parks, Recreation and Historic provisions."

Were the Court so inclined to credit Respondent's broad construction of the impossibility of access terms contained within the statute, they still fail to proffer predicate proof of 'impossibility' in the first **[***10]** instance. Nor may Respondent municipality be heard to foist its statutorily-imposed duties onto the attendees of the public hearing by alleging Petitioners failed to exhaust their administrative remedies by not raising this issue during the hearing's public comment period. Respondent's citation to *Old Dock Associates v. Sullivan, 150 A.D.2d 695, 541 N.Y.S.2d 569 (2d Dep't 1989)*, and *Citizens for Hudson Valley v. NYS Board on Electric Generation Siting and Environment, 281 A.D.2d 89, 723 N.Y.S.2d 532 (3d Dep't 2001)*, are inapposite to the facts of this case which involved the passage of a local law in the context of a public hearing, not any formalized hearing process. Regardless of whether a narrow or broad construction is given to the statute, the burden -- in the first instance -- fell upon the municipality to determine that it was "..otherwise ***impossible*** for ATVs to gain access to areas or trails adjacent to the highway."

Had the Legislature's intention been to the contrary, *VTL § 2405* need not have contained any language requiring the municipality (or governmental agency) to make a determination that "…it is otherwise ***impossible*** for ATVs to gain access **[***11]** to areas or trails adjacent to the highway." Instead, the statute would simply read that: municipalities may, by local law, and state

agencies may, by rule or regulation, designate and post its highways **[****5]** (excepting interstate or controlled access highways) as open for travel by ATVs.

While this particular issue has yet to be decided by any other Court, Justice Lahtinen in *Santagate v. Franklin County*, Franklin County Index # 99-23; RJI # 16-1-99-0008, held that promulgation of a similar local law was made in violation of lawful procedures insofar as the record failed to establish respondent made any determination that it "was otherwise ***impossible*** for ATVs to gain access to areas or trails adjacent to the highway." The Court finds no compelling reason to vary from or abandon the rationale employed in its holdings in *Brown v. Town of Pitcairn*, Index # 113023; RJI # 44-1-2002-0815 (March 2003), and *Brown v. Town of Pitcairn*, Index # 114295; RJI # 44-1-2003-0350 (August 2003).

Petitioner's relief is granted. Town of Colton Local Law No. 1 of the year 2004 and its predecessor, Town of Colton Local Law No. 2 of 1999 , are annulled as having been made in violation of lawful **[***12]** procedures which imposes an obligation upon the municipality to, preliminarily, make a determination that "…it is otherwise ***impossible*** for ATVs to gain access to areas or trails adjacent to the highway."

SO ORDERED

DATED: August 31, 2004, at Chambers, Canton, New York.

DAVID DEMAREST, J.S.C.

ENVIRONMENTAL CONSERVATION LAW, ART. 8; STATE FINANCE LAW § 92-o; VEHICLE AND TRAFFIC LAW, ART. 48-C, §§ 2280, 2281, 2282, 2291, 2400, 2402, 2403, 2405; 6 N.Y.C.R.R. 617; 15 N.Y.C.R.R. 103.7; L. 2005, CH. 59, Part D; L. 1990, CH. 190, §§ 323, 324; L. 1988, CH. 61; L. 1986, CH. 402; L. 1985, CH. 671.

Municipal highways may be designated for use by ATVs only when necessary to provide access to adjacent trails. Highways previously designated for use by ATVs do not qualify as "adjacent trails" for this purpose. Trails on private land that are open to the public for recreational ATV use may qualify as "adjacent trails."

September 7, 2005

Richard J. Graham, Esq.
Lewis County Attorney
7602 State Street
Lowville, New York 13367

Informal Opinion
No. 2005-21

Dear Mr. Graham:

You have raised several questions concerning the designation of highways for use by all terrain vehicles ("ATVs"). In 2001, Lewis County enacted a local law opening numerous county roads to ATV use. You are concerned that aspects of the local law may not be consistent with Vehicle and Traffic Law ("VTL") § 2405, which governs the designation of highways and public lands for ATV use. This provision permits a government agency by local law or ordinance to designate portions of a public highway under its jurisdiction open for ATV travel if ATVs cannot otherwise access "areas or trails adjacent to the highway."

Specifically, you have asked whether town highways previously designated for ATV use under the statute may be considered "trails adjacent to the highway" within the meaning of the statute, so as to permit the County to designate for ATV use county roads that connect to such town highways. You have also asked whether a municipality may designate a public highway open for ATV use in order for ATV users to access private trails and areas such as the parking lots of private commercial establishments.

Your inquiry focuses on the meaning of the terms "trail" and "area" as used in section 2405(1). We note that these terms are not defined in Article 48-C, or in any other provision of the Vehicle and Traffic Law. Nor are they defined in regulations of the Department of Motor Vehicles, which has jurisdiction over the

registration of ATVs. See VTL § 2280(1); see also id. § 2402(1) (authorizing Department of Motor Vehicles to adopt rules and regulations for the administration and enforcement of Article 48-C). Nor does the legislative history provide any clear evidence as to the intended meaning of these terms. Moreover, although the statute was enacted in 1986,[1] the statutory scheme has only recently received judicial treatment, and currently, the existing case law consists of unreported lower court decisions. These decisions and the overall purpose of the statutes governing ATV use guide us in answering your questions.

As explained below, we note that a local law opening designated highways to ATV use must be supported by a determination that "it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the highway" without use of the designated roads. Without such findings, the local law would be considered invalid. Further, we conclude that town highways may not be considered "trails" for purposes of Vehicle and Traffic Law § 2405(1), as this would be contrary to the State Legislature's intent to confine ATV use primarily to off-highway pathways. We also conclude that the statute does not preclude the designation of county highways for ATV use to gain access to private areas or trails, provided that such trails and areas are open to the general public for recreational ATV use.

ANALYSIS

A. Statutory Requirements for the Designation of Highways as Open for ATV Use

Article 48-C of the Vehicle and Traffic Law governs the operation of ATVs. Operation of ATVs on highways is prohibited, except as expressly provided for in Article 48-C. See VTL § 2403(1). ATVs are permitted to make a direct crossing on a highway (other than an interstate or controlled access highway) and may be operated on highways that have been designated as open for travel by ATVs pursuant to VTL § 2405(1). See VTL § 2403(1)(a) and (b).

---

[1] The ATV law was originally enacted in 1985, as part of the Parks and Historic Preservation Law. See Law 1985, ch. 671. It was repealed and re-enacted one year later as part of the Vehicle and Traffic Law. See Law 1986, ch. 402.

Section 2405 authorizes, but does not require, governmental agencies to permit ATV use on highways under their jurisdiction under limited circumstances. It provides:

> Except with respect to interstate highways or controlled access highways . . . any . . . governmental agency with respect to highways . . . under its jurisdiction may designate and post any such public highway or portion thereof as open for travel by ATVs when in the determination of the governmental agency concerned, it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the highway. Such designations . . . by any municipality other than a state agency shall be by local law or ordinance.

VTL § 2405(1).[2]

By its express language, this provision requires the government agency to make two findings in order to designate a highway for ATV use: that use of the highway is necessary to provide access to an area or trail, and that such area or trail is adjacent to the highway. See Brown v. Pitcairn, Index No. 114295 (Sup. Ct. St. Lawrence Co. August 19, 2003) (Demarest, J.), at 8 ("Absent a finding of 'impossibility' and that the area or trail lies 'adjacent to the highway,' there is no statutory basis for opening the road to [ATV] travel."). Courts have invalidated local laws designating highways as open to ATV use where the designations were not supported by these required findings. See Hutchins v. Town of Colton, Index. No. 116349 (Sup. Ct. St. Lawrence Co. Aug. 31, 2004) (Demarest, J.); Brown v. Town of Pitcairn, Index No. 114295 (Sup. Ct. St. Lawrence Co. Aug. 19, 2003) (Demarest, J.); Brown v. Town of Pitcairn, Index No. 113023 (Sup. Ct. St. Lawrence Co. March 13, 2003) (Demarest, J.); Santagate v. Franklin County, Index No. 99-23 (Sup. Ct. Franklin Co. Jan. 28, 1999) (Lahtinen, J.).[3]

---

[2] Designated highways must be posted as such with appropriate highway signs. See VTL § 2405(3); 15 N.Y.C.R.R. 103.7.

[3] In addition, the Department of Environmental Conservation has taken the position that when adopting legislation permitting the use of ATVs on public lands, local governments must take into account the requirements of the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law art. 8, and

B. Town Highways Are Not "Trails" as that Term is Used in VTL § 2405(1)

Your first question is whether town highways previously designated as open to ATV use by the appropriate town boards may be considered "trails" within the meaning of VTL § 2405(1). This interpretation would permit the County to designate its highways as open to ATV use where their use is necessary to gain access to town highways that have been opened to ATV use, regardless of whether any off-road paths or areas adjacent to the county highways are open to the public use of ATVs. We conclude that town highways designated as open to ATV use cannot be considered adjacent "trails" for purposes of section 2405.

As noted above, the Vehicle and Traffic Law does not expressly define the term "trail." Several factors indicate that the State Legislature intended the term to refer to off-road paths, rather than roads intended for normal vehicular traffic.

First, the words of a statute should be construed according to their ordinary meaning. Sega v. State of New York, 60 N.Y.2d 183, 190-191 (1983). A "trail" is defined as a "marked or beaten path, as through woods or wilderness," The American Heritage Dictionary (3d ed. 1992) at 1898, connoting an off-road passageway.

Second, the original statute governing the operation of ATVs on public highways stated that

> ATVs may be operated on the following portions of highways other than the thruway, interstate highways or controlled access state highways, which have been designated and posted as access areas . . . when necessary to travel from one off-highway trail or use area to another when in the determination of the governmental agency concerned it is otherwise impossible for ATVs to gain access to areas or trails adjacent to the highway.

Law 1985, ch. 671, § 6, codified at former Parks, Recreation and Historic Preservation Law § 26.11(1) (emphasis added).

---

its implementing regulations, 6 N.Y.C.R.R. 617 et seq., which require a determination whether proposed action might have or result in a significant adverse environmental impact.

Legislative history indicates that when the responsibility for ATV regulation was transferred from the Department of Parks and Recreation to the Department of Motor Vehicles, "no substantive change" was intended to be effected in the transfer of this provision to Vehicle and Traffic Law § 2405. Memorandum of the State Department of Motor Vehicles, reprinted in 1986 McKinney's Session Laws of New York 2921, 2923.

Third, the definition of "ATV" in the Vehicle and Traffic Law suggests that ATVs are not ordinarily to be used on highways, but rather on "off-highway trails." "ATV" is defined as "any self-propelled vehicle which is manufactured for sale for operation primarily on off-highway trails or off-highway competitions and only incidentally operated on public highways." VTL § 2281(1)(a) (emphasis added). Accordingly, ATVs are generally prohibited from operating on highways, see VTL § 2403, unless the highway is specifically designated and posted for travel in accordance with the requirements of Vehicle and Traffic Law § 2405(1). As discussed above, that law does not permit the designation of a highway to allow ATVs to reach another highway, only to reach otherwise unreachable adjacent "trails and areas." Treating a town highway as a "trail" for purposes of ATV use would thus be in tension with the statutory framework.

Thus, when read together, the statutes regulating ATV use indicate that the Legislature did not intend ATVs to regularly travel on highways and, accordingly, did not intend highways or roads meant for ordinary vehicular traffic to be considered "trails" as that term is used in VTL § 2405(1). A contrary conclusion could result in the opening of a substantial number of municipal highways to ATV use, thus eviscerating the Legislature's intent that ATVs be primarily operated off-highway.

C. Designation of County Roads for ATV Use to Provide Access to Trails on Private Land

You have also asked whether private trails and areas (such as commercial parking lots) may be considered "adjacent areas or trails" for purposes of section 2405.[4] Whether the Legislature intended the "trails" and "areas" referred to in VTL § 2405(1) to be solely public "trails" and "areas" is not clear from either the language of the statute or the legislative history. The one

---

[4] We are aware that there are ATV trails on private land in New York that are open to members of the general public for a fee.

court to have considered the issue has suggested that a county could not benefit a private landowner by designating a county road for ATV use in order to permit access to privately-owned trails. See Brown v. Pitcairn, Index No. 114295 (Sup. Ct. St. Lawrence Co. Aug. 19, 2003), at 8-9 ("By no means, however, may these markers [posting public roads for ATV use] serve to provide a route from private trails to public trails."). Many of the town roads at issue in that case were opened to ATV use to allow individuals to access trails from their private residences, and the court did not fully consider whether access to trails on private lands would be appropriate under any conditions.

We find additional guidance in the overall purpose and structure of the statutory scheme. On the one hand, there is evidence indicating that the Legislature may have permitted limited highway access under VTL § 2405 in order to facilitate use of ATV trails on public lands. The statute permits state agencies and local governments to designate public lands under their jurisdiction for ATV use, see VTL § 2405(2), and the creation of a public trail system was one of the stated purposes of the statute, see id. § 2400 (legislative purpose). Indeed, as originally enacted the statutory scheme provided for the creation of an ATV trail maintenance and development fund supported by ATV registration fees. See former State Finance Law § 92-o (added Law 1986, ch. 402, § 16 and repealed Law 1990, ch. 190, § 324).[5] As originally enacted, the fund was to be used by designated state agencies and local governments to develop and maintain a system of ATV trails on public lands under their jurisdiction. See former VTL § 2293 (enacted by Law 1986, ch. 402, § 8, repealed by Law 1988, ch. 61) and former Parks, Recreation, and Historic Preservation Law § 27.21 (enacted by Law 1988, ch. 61, repealed by Law 1990, ch. 190, § 323). Thus, because it was contemplated that a system of public ATV trails would be created in the State, it is at least arguable that the Legislature intended the limited highway use permitted under section 2405 to allow access from one such public trail to another where it was "otherwise impossible for ATVs to gain access," and thus that the terms "trail" and "area" refer to trails and areas on public lands.

---

[5] The statutes providing for the fund were repealed in 1990. New legislation was recently enacted creating an all terrain vehicle trail development, enforcement and stewardship fund supported by an additional $15.00 ATV registration fee. See Law 2005, ch. 59, Part D (adding new State Finance Law § 92-O and amending sections 2282 and 2291 of the VTL).

On the other hand, section 2405 refers to "areas or trails adjacent to the highway," and does not expressly preclude consideration of the need of the general public to access trails or areas on private land. See VTL § 2405(1); see also former Parks, Recreation and Historic Preservation Law § 26.11(1) (permitting ATV use on "access areas" of designated highways "when necessary to travel from one off-highway trail or use area to another"). Nor is there any evidence in the legislative history that the Legislature considered and rejected the idea that highway access be permitted for trail access on private lands. In the absence of any clear evidence in the language of Article 48-C or its legislative history that the terms "trail" and "area" were intended to refer only to trails and areas on public lands, we find no basis for concluding that section 2405 highway designations may not be used to provide public access to trails and areas on private land. However, any such private trail or area must be expressly open to ATV use. See VTL § 2403(3) ("No person shall operate an ATV on the private property of another without the consent of the owner or lessee thereof."). Moreover, under the statutory scheme, the county may not designate roads as open to ATV use merely in order to provide convenient access to private trails or areas open to public ATV use. The privately-owned trails or areas must be adjacent to the highway and "otherwise impossible to reach" except by use of the designated county highway.

The overall purpose of the statute confirms this interpretation. A primary purpose of Article 48-C was to promote the safe and proper off-highway recreational use of ATVs. See VTL § 2400. It therefore seems likely that, in enacting section 2405, the Legislature intended to permit highways to be used, where necessary, to access all ATV trails and areas that are open to members of the general public for recreational ATV use. Providing such necessary access to trails and use areas on private land that are open to members of the general public for recreational ATV use is consistent with the statutory purpose.

The question whether a local government may designate a highway as open to ATV use under section 2405 in order to allow access to an adjacent parking lot also finds no direct answer in the statute. We recognize that the statutory terms "adjacent area" do not clearly exclude commercial parking areas where the public use of ATVs is permitted.[6] We also recognize that one of

---

[6] However, the fact that the original statute governing ATV use on highways used the term "use area," see Law 1985, ch. 671, § 6 (discussed supra), provides some evidence that the term

the statutory purposes of Article 48-C was to promote "commerce," see VTL § 2400, and that the ability of ATV users to access commercial parking lots from ATV trails would not be inconsistent with this purpose. However, such a construction of section 2405 could potentially allow highways to be opened for ATV use at any point where they abut commercial parking lots, and would therefore effectively allow ATVs to be used as substitutes for on-road vehicles such as cars and bicycles. This consequence would be contrary to the Legislature's clear intent that ATVs be used primarily off-highway, with only incidental highway use permitted, see VTL §§ 2281(1)(a) and 2403, and leads us to conclude that section 2405 may not be used to allow designation of highways solely to provide ATV access to commercial parking lots.

CONCLUSION

We therefore conclude that municipal roads and highways open to ATV use are not "trails" as that term is used in Vehicle and Traffic Law § 2405(1) and that the statute does not preclude the designation of public highways for ATV use to provide necessary access by the general public to appropriate ATV trails and areas on private land.

The Attorney General renders formal opinions only to officers and departments of the state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

Very truly yours,

Laura Etlinger
Assistant Solicitor General
In Charge of Opinions

By: _____
Carol Fischer
Assistant Solicitor General

---

connotes an area where ATVs will be ridden, not just an area where they are permitted to be parked.