



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG—3—11

Mr. Rian W. Radtke
Corporation Counsel
Trempealeau County
Post Office Box 67
Whitehall, WI 54773-0067

Dear Mr. Radtke:

¶ 1. Your predecessor advised that a fifty-member private All Terrain Vehicle (“ATV”) Club operating within Trempealeau County has requested the county board to designate three short sections of county trunk highways as ATV routes. Your predecessor was concerned that such designations would violate the public purpose doctrine.

BACKGROUND

¶ 2. The club has developed a number of trails on privately-owned land. Such trails can only be used by club members or their invitees. Other persons must pay the club a fee to use the club’s trails.

¶ 3. The club has persuaded at least two towns to designate certain sections of town roads as ATV routes and has also persuaded at least one city to designate certain sections of city streets as ATV routes. In each such case, the club indicated that the reason for requesting the municipal designations was that it had been unable to secure the permission of private landowners to connect the club’s off-road trails. The municipally-designated, publicly-owned ATV routes connect the club’s private off-road trails.

¶ 4. The club has made a similar request to the county to designate three short sections of county roads as ATV routes. The longest of these sections is 1.3 miles. The designated portions of the county roads would be open to the public as ATV routes. In response to a request for further information, you indicate that it is very unlikely that persons who are not members or invitees of the club would trailer their ATVs to the county highway segments for which designations have been sought and use their ATV’s on those segments because they are so short.

¶ 5. In response to the request for further information, you have also advised that insofar as you have been able to ascertain no county funds or resources would be expended in designating the trails or in maintaining the trails after they are designated. All signage and road approaches would be paid for and maintained by the club at its sole expense. The county highway

commissioner has advised you that ATV traffic on the county highway segments would not result in additional wear and tear upon the road segments such that additional county expenditures for maintenance or repair would be required.

¶ 6. A proposed county ordinance would permit the county board to grant the designations requested by the private club. Relevant sections of the proposed county ordinance provide as follows:

SECTION 1

. . . .

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).

. . . .

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 4

. . . .

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 periodic 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.

....

SECTION 5

- 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
- B. Sign Maintenance. The Highway Department will maintain the signage necessary for the route/crossing and bill the permittee for that maintenance. Should the permit[t]ee fail to pay for the maintenance then the route will be closed and sign[age] removed until such time as the removal costs, the sign maintenance costs, and the projected resigning costs are paid in full.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 7. I have reworded your predecessor's question, as follows: If the primary purpose of designating short county highway segments as ATV routes is to allow a private organization to enhance its system of trails that benefit club members and their invitees, would such designations violate the public purpose doctrine if no county resources are expended and no county expenditures occur as a result of those designations?

¶ 8. In my opinion, the answer is no. The proposed ordinance could be improved to assure that no county resources are expended and that no county expenditures occur as a result of the designations.

ANALYSIS

¶ 9. Wisconsin Stat. § 23.33(8)(b) provides explicit authority to counties to designate county roads as ATV routes: “*Routes*. A town, village, city or county may designate highways as all-terrain vehicle routes.” Wisconsin Stat. § 23.33(8)(a) provides that “[t]he department [of natural resources] may establish standards and procedures for certifying the designation of all-terrain vehicle routes and trails.” The standards referred to in Wis. Stat. § 23.33(8)(a) are found in Wis. Admin. Code § NR 64.12. Those standards are largely prohibitory. They provide no affirmative direction to municipalities as to what types or sections of streets, roads, or highways should be designated as ATV routes.

¶ 10. The public purpose doctrine is derived from the Wisconsin Constitution. *See Libertarian Party v. State*, 199 Wis. 2d 790, 809, 546 N.W.2d 424 (1996) (per curiam). It was thoroughly discussed in OAG 2-01 (February 14, 2001). It “prohibits the use of public funds, public equipment or public supplies to provide a benefit that is primarily private, rather than public, in nature.” OAG 2-01, at 1. *See* 76 Op. Att’y Gen. 69 (1987); *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683 (1967). “The essence of the doctrine, that public funds may be expended only for public purposes, rests on the theory that governmental power should be used for the benefit of the entire community.” *Bishop v. City of Burlington*, 2001 WI App 154, ¶ 10, 246 Wis. 2d 879, 631 N.W.2d 656; *Barczak*, 34 Wis. 2d at 62-63.

¶ 11. “Because the public purpose doctrine is a constitutional rule, it limits the authority conferred on counties and other municipalities by statute.” OAG 2-01, at 1-2. “Even where statutory authority for a county’s action exists, the county must be cautious not to exercise that authority in a way that contradicts the public purpose doctrine.” OAG 2-01, at 2. Nevertheless, “Wisconsin municipalities have traditionally been given wide discretion to determine whether a public expenditure is warranted due to public necessity, convenience, or welfare. As such, the public purpose doctrine has been broadly interpreted.” *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 30, 259 Wis. 2d 37, 657 N.W.2d 344 (footnote omitted).

¶ 12. To satisfy the public purpose doctrine, “the benefit to the public must be direct and not remote.” *Bishop*, 246 Wis. 2d 879, ¶ 10. *See Alexander v. City of Madison*, 2001 WI App 208, ¶ 7, 247 Wis. 2d 576, 634 N.W.2d 577. “If any public purpose can be conceived which might rationally justify the expenditure, the constitutional test is satisfied.” *Bishop*, 246 Wis. 2d 879, ¶ 11. “[N]o public purpose exists only if it is clear and palpable that there can be no benefit to the public.” *Id.*

¶ 13. Section 1.B. of the proposed ordinance indicates that the county board will engage in “due consideration of the recreational and economic value to connect trail opportunities” and that any proposed trail designation will be “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[.]” Courts are required to accord deference to this statement of public purpose because “local governments are often in

the best position to determine the needs of the public in that locality[.]” *Town of Beloit*, 259 Wis. 2d 37, ¶ 30.

¶ 14. “[A]nything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes.” *Libertarian Party*, 199 Wis. 2d at 820, quoting *Capen v. City of Portland*, 228 P. 105, 106 (Or. 1924). Designation of a county highway as an ATV route is not impermissible solely because the ATV route connects one or more private snowmobile trails. “The fact that a private entity receives direct benefit from an expenditure of public funds does not render the expenditure unconstitutional.” *Bishop*, 246 Wis. 2d 879, ¶ 10. The designation of ATV routes normally does serve an independent public purpose, which is to provide the general public with recreational opportunities.

¶ 15. Although you indicate that the recreational value of these designations to the general public would be slight, the mandate of the public purpose doctrine is that “public appropriations may not be used for other than public purposes.” *Town of Beloit*, 259 Wis. 2d 37, ¶ 27. *See* 74 Op. Att’y Gen. 25, 27 (1985): “Although the doctrine’s history is admittedly confused, its present day meaning is quite clear: public funds may be spent only for public purposes.” The proposed ordinance is intended to insure that no county resources are expended and that no county expenditures occur where designations connecting private trails are made. Your factual investigation indicates to you that that would be the case. You note that all signage and road approaches would be paid for and maintained by the club at its sole expense. The county highway commissioner also has advised you that ATV traffic on the county highway segments will not result in any county expenditures. Because the public purpose doctrine prohibits only the expenditure of public funds or resources by the county, the designations would not violate the public purpose doctrine if no such expenditures occur.

¶ 16. The proposed ordinance does not explicitly require reimbursement for the expenditure of staff time in all situations. Under the proposed ordinance, the county also assumes a risk of non-payment. *See, e.g.*, Proposed Ordinance, sec. 5.B. Even under the proposed ordinance, the resulting expenditure of county funds or county resources might be *de minimis* in most cases. *See Wisconsin Dep’t of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 231 (1992). Nevertheless, it may be preferable to amend the proposed ordinance to require the applicant or permittee to post a bond requiring indemnification of the county for all of the costs resulting from a particular designation, including but not limited to staff time. Requiring a bond to be posted would also avoid the risk of future non-payment and would minimize the possibility of legal challenges to any designations that might be made.

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CONCLUSION

¶ 17. I therefore conclude that even if the primary purpose of designating short county highway segments as ATV routes is to allow a private organization to enhance its system of trails that benefit club members and their invitees, such designations would not violate the public purpose doctrine if no county resources are expended and no county expenditures occur as a result of those designations.

Sincerely,

J.B. VAN HOLLEN
Attorney General

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