

Exploring Municipal Regulation of ATVs and UTVs

Derek PUNCHES, Attorney, Stafford Rosenbaum LLP



Introduction

Off-road vehicles like all-terrain vehicles¹ (“ATVs”) and utility terrain vehicles² (“UTVs”) have a rich history in Wisconsin. Each year, tens of thousands of residents and nonresidents operate ATVs and UTVs for recreational, agricultural, and other purposes throughout the state, including on thousands of miles of trails and road routes designated for use by ATVs and UTVs.

Municipalities play an important role in permitting and regulating the operation of ATVs and UTVs within their boundaries. In doing so, municipalities should consider how to weigh the potential economic benefits and enhanced recreational opportunities that ATVs and UTVs may bring against competing concerns related to safety, enforcement, community compatibility, in addition to legal and regulatory issues. To help address these concerns, this article explores municipal regulation of ATVs and UTVs and discusses common concerns that might arise when considering whether to authorize the operation of ATVs and UTVs within the municipality.

Designating ATV Routes and Trails

Municipalities may seek to connect their communities with nearby trail systems by permitting the operation of ATVs and



UTVs within two distinct areas: all-terrain vehicle routes and trails. An all-terrain vehicle route (“ATV route”) is “a highway or sidewalk designated for use by ATV operators by the governmental agency having jurisdiction as authorized under [Wis. Stat. § 23.33].”³ In contrast, an all-terrain vehicle trail (“ATV trail”) is defined as “a marked corridor on public property, in a highway right-of-way, or on private lands subject to public easement or lease, designated for use by all-terrain vehicle operators by the governmental agency having jurisdiction, but excluding [certain] roadways of highways[.]”⁴

Routes. Municipalities may permit the operation of ATVs and UTVs on all or some of the highways under its jurisdiction by designating such highways as ATV routes by ordinance.⁵

Municipalities may only designate state trunk highways or connecting highways as ATV routes with the approval of the DOT.⁶ They may, however, enact an ordinance to authorize the operation of ATVs and UTVs on a highway that is not part of the national system of interstate and defense highways, that has a speed limit of 35 miles per hour or less, and that is located within the territorial boundaries of the municipality regardless of whether the municipality has jurisdiction over the highway.⁷ Unless it has been designated as an ATV route or trail, a person may not operate an ATV or UTV on the roadway portion of any highway except under limited circumstances, such as the incidental crossing of a roadway, bridge, culvert, or railroad right-of-way, among others.⁸

1. Wis. Stat. § 23.33(1)(b); Wis. Stat. § 340.01(2g).

2. Wis. Stat. § 23.33(1)(ng).

3. Wis. Stat. § 23.33(1)(c). The term “highway” is exceptionally broad and includes “the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel.” See Wis. Stat. § 340.01(22).

4. Wis. Stat. § 23.33(1)(d).

5. Wis. Stat. § 23.33(8)(b)1., 2.

6. Wis. Stat. § 23.33(8)(b)3.

7. Wis. Stat. § 23.33(11)(am)4.

8. Wis. Stat. § 23.33(4)(d).

Trails. Municipalities may also designate corridors through land that it owns or controls, or for which the municipality has obtained leases, easements, or permission for use as ATV trails by ordinance.⁹ Because property cannot be acquired by condemnation to establish or extend a “recreational trail,” municipalities likely cannot acquire the property interests needed to establish or extend an ATV trail through condemnation.¹⁰

A municipality may specify the period during which ATVs and UTVs may use designated ATV routes or ATV trails, or it may prohibit the operation of ATVs or UTVs on such routes or trails during certain periods of the year.¹¹ It may also designate ATV routes and ATV trails under their jurisdiction on which the use of UTVs is permitted or prohibited.¹² By default, no person may operate a UTV on any ATV route or trail unless the municipality has expressly permitted the operation of UTVs on that route or trail.¹³

Signing ATV Routes and Trails

If a municipality designates any highways under its jurisdiction as ATV routes, the municipality must install signage in accordance with certain statutory and administrative requirements, including requirements related to the location, position, shape, size, and contents of the signs.

In cooperation with the Department of Transportation, the Department of Natural Resources (DNR) has promulgated administrative rules that establish requirements for all ATV route signs. These rules expressly state that “all signing shall be done by or under the direction of and is the responsibility of

the unit of government which designates the all-terrain vehicle route.”¹⁴ In addition, all signs placed upon highways to regulate, warn, guide, or inform traffic must comply with the Wisconsin Manual of Uniform Traffic Control Devices (WMUTCD).¹⁵ Although private parties may pay the cost to purchase and install signs, municipalities should perform the installation and maintenance themselves to limit the risk of potential liability if the signs are not installed or maintained correctly.

Signs installed on ATV trails are subject to different regulations than those for ATV routes. If they are not placed in the highway right-of-way, such signs need not conform with the WMUTCD. DNR has promulgated administrative rules that establish requirements for signs and standards on ATV trails.¹⁶ DNR has also issued extensive guidelines for signing off-highway vehicle trails, including ATV trails.¹⁷

Municipal Regulation and Enforcement

In addition to designating ATV routes and trails, municipalities are authorized by statute to adopt ordinances that regulate the operation of ATVs and UTVs on ATV routes and ATV trails.¹⁸ Another provision, however, states that municipalities “may enact an ordinance that is in strict conformity with this section and rules promulgated by the department under [Wis. Stat. § 23.33] if the ordinance encompasses all aspects encompassed by [Wis. Stat. § 23.33],” subject to limited exception.¹⁹ Although the answer is not clear, this language suggests that municipalities may not impose more restrictive regulations than state law on those matters addressed

by Wis. Stat. § 23.33. But, even for those seeking to regulate the operation of ATVs and UTVs in a manner *not* contemplated by that section, there is tension between these provisions that is difficult to reconcile.

Of course, a municipality may adopt the applicable provisions of Wis. Stat. § 23.33 in its entirety. Wis. Stat. § 23.33 provides many “tools” that municipalities should consider to address safety, noise, and other concerns. This includes provisions related to registration, training, compliance with traffic and regulatory signs, protective headgear, and vehicle lighting and equipment requirements, in addition to others. Because questions related to age restrictions, speed limits, and the intoxicated operation of ATVs and UTVs are regularly raised, further discussion on these topics are set forth below.

Age Restrictions. No person under 16 years of age may operate an ATV on a designated ATV route unless the person is accompanied by a parent or guardian or someone who is at least 18 years old who is designated by the parent or guardian.²⁰ To be “accompanied,” that person must be “subject to continuous verbal direction or control.”²¹ Therefore, certified operators between 12 and 16 years of age may operate an ATV on designated ATV routes, including roadways, if so “accompanied.”²² Except under limited circumstances, no person under 12 years of age may operate an ATV on designated ATV trails.

The age restrictions applicable to UTVs are somewhat higher, in part because such vehicles are larger and can carry additional passengers. In general, no person under 16 years of age may operate a UTV on any ATV route or ATV trail.²³

9. Wis. Stat. § 23.33(8)(c).

10. See Wis. Stat. § 32.015.

11. Wis. Stat. § 23.33(8)(d).

12. Wis. Stat. § 23.33(1m)(b).

13. Wis. Stat. § 23.33(1m)(c).

14. Wis. Admin. Code § NR 64.12(7)(d).

15. Wis. Stat. § 349.065.

16. Wis. Admin. Code § NR 64.14(6)(c).

17. WIS. DEPT OF NAT. RES., TRAIL SIGNING HANDBOOK: GUIDELINES FOR SIGNING OFF-HIGHWAY VEHICLE TRAILS (2019).

18. Wis. Stat. § 23.33(11)(a).

19. Wis. Stat. § 23.33(11)(am)1.

20. Wis. Stat. § 23.33(5)(a)4.

21. Wis. Stat. § 23.33(1)(a).

22. Wis. Stat. § 23.33(5)(a)1.

23. Wis. Stat. § 23.33(5)(am).

Speed. In general, the operation of ATVs and UTVs on an ATV route is subject to the same posted speed limit applicable to regular vehicular traffic on that highway.²⁴ Because the law was previously unclear, the Legislature enacted 2021 Act 164 to clarify that local governments may indeed impose a speed limit for ATV and UTV traffic on all or part of any ATV route that is lower than the applicable speed limit for regular motor vehicles.²⁵ When deciding whether to designate a highway as an ATV route and whether to impose a reduced speed limit, municipalities should assess the type and amount of other traffic on that highway, as well as the applicable speed limit for regular vehicular traffic.

Intoxicated Operation. Wis. Stat. ch. 346 regulates the “rules of the road” on all highways. Although some of the provisions of Wis. Stat. ch. 346 apply to ATVs and UTVs, the laws related to operating a motor vehicle under the influence of drugs and alcohol (OWI) are not applicable.²⁶

Instead, Wis. Stat. § 23.33 includes several provisions related to the intoxicated operation of an ATV or UTV that are analogous to the OWI provisions under Wis. Stat. ch. 346. For example, like Wis. Stat. § 346.63, Wis. Stat. § 23.33(4) prohibits the operation of an ATV or UTV while under the influence of an intoxicant or while the person has a restricted controlled substance in their blood or an alcohol concentration of 0.08 or more.²⁷ However, the penalties for violating the applicable provisions of Wis. Stat. § 23.33 are generally less severe than the penalties for OWI violations, even when those violations occur on roadways.²⁸ Violations of the ATV or UTV prohibitions do not count

towards the relevant number of OWI offenses for purposes of calculating the applicable penalty under Wis. Stat. § 346.65 nor vice versa. In addition, the prohibition against possessing an open alcohol beverage container under Wis. Stat. § 346.935(2) does not apply to the operation of ATVs and UTVs.²⁹

Enforcement. Upon the adoption of an ATV ordinance, the municipal clerk must immediately send a copy of the ordinance to the DNR, the State Patrol, and any law enforcement agency having jurisdiction over any of the highways to which the ordinance applies.³⁰ In addition to conservation wardens, State Patrol officers, and county sheriff deputies, local law enforcement has the authority and jurisdiction to enforce Wis. Stat. § 23.33 and municipal ordinances enacted in accordance with that section.³¹ As such, a municipality seeking to integrate ATVs and UTVs into its community may wish to consider the role of and potential impact to local law enforcement resources prior to enacting any ordinance.

Municipal Liability

One common question is whether the municipality could be liable for accidents that occur if the governing body permits the operation of ATVs and UTVs within the municipality. In general, a municipality will not be liable for such accidents under either of two potential theories of immunity: recreational immunity and governmental immunity.

Recreational Immunity. Municipalities are shielded by recreational immunity under certain circumstances. Wis. Stat. § 23.33(10) expressly states that recreational immunity applies to that section. Although a full discussion



is outside the scope of this article, recreational immunity protects an owner from liability for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner’s property under certain circumstances.³² The definition of “owner” includes “a governmental body... that owns, leases or occupies property.”³³ The definition of “recreational activity” expressly includes “operating an all-terrain vehicle or utility terrain vehicle.”³⁴ Therefore, municipalities should not be liable for injuries arising from the operation of ATVs and UTVs on ATV routes or ATV trails if they own, lease, or occupy such property. Because this immunity applies only to those duties owed that are enumerated in Wis. Stat. § 895.52(2)(a), however, recreational immunity may not apply in all cases.

Governmental Immunity. In general, municipalities are also shielded by governmental immunity, which protects them from liability arising from certain discretionary acts, including the exercise of the governing body’s legislative authority.³⁵ The decision by a local governing body to designate ATV routes and ATV trails is an exercise of

24. Wis. Stat. § 23.33(4)(d).

25. Wis. Stat. § 349.11(1).

26. See Wis. Stat. § 346.02(1).

27. Wis. Stat. § 23.33(4)(c).

28. Compare Wis. Stat. § 23.33(13)(b) with Wis. Stat. § 346.65(2)(am).

29. Wis. Stat. § 346.02(1).

30. Wis. Stat. § 23.33(11)(b).

31. Wis. Stat. § 23.33(12)(a).

32. Wis. Stat. § 895.52(2)(b).

33. Wis. Stat. § 895.52(1)(d).

34. Wis. Stat. § 895.52(1)(g); see also *WEA Prop. & Cas. Ins. Co. v. Krisik*, 2013 WI App 139, ¶ 19, 352 Wis. 2d 73 (holding that no additional analysis is necessary to determine whether an activity qualifies as “recreational” if that activity is specifically enumerated in the statute).

35. Wis. Stat. § 893.80(4).

legislative authority that is protected by governmental immunity.

This immunity is not absolute. There is no immunity against liability associated with the performance of a “ministerial” (or nondiscretionary) duty imposed by law or a “known and compelling danger” that gives rise to a ministerial duty.³⁶ A “ministerial” duty is one that “is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.”³⁷ Certain provisions in Wis. Stat. § 23.33 arguably impose ministerial duties on municipalities. For example, as discussed above, the statutes require that municipalities that designate an

ATV route perform certain actions, including installing and maintaining ATV-related signs in accordance with statutory and regulatory requirements. These requirements could be considered a “ministerial” duty for which immunity does not apply.

Because of the highly fact-intensive nature of immunity defenses, municipalities should consult with their legal counsel and insurance provider to evaluate the risk of liability in specific circumstances.

Conclusion

Designating ATV routes and trails and permitting the operation of ATVs and UTVs can provide communities with economic benefits and enhanced recreational opportunities. Municipalities,

however, must weigh these benefits against questions related to safety, enforcement, and other local concerns. If the municipality desires to open the community to ATVs and UTVs, there are a number of tools and strategies available to help address these concerns.

Streets and Alleys 650

About the Author:

Derek PUNCHES is an attorney in the Madison office of Stafford Rosenbaum LLP where he practices municipal and environmental law. Derek worked in the State Legislature for more than 10 years where he focused on issues relating to local government and transportation policy, amongst others. Contact Derek at dpunches@staffordlaw.com

36. *Lodl v. Progressive Northern Insurance Co.*, 2002 WI 71, ¶ 24, 253 Wis. 2d 323 (citation omitted).

37. *Lister v. Board of Regents*, 72 Wis. 2d 282, 299, 240 N.W.2d 610 (1976).

MUNICIPAL ENGINEERING | FUNDING & GRANT ASSISTANCE
LAND SURVEYING | CONSTRUCTION MANAGEMENT

Batterman Beloit | Elkhorn
www.rhbatterman.com
engineers surveyors planners   608-365-4464

Cedar CORPORATION BUILDING TRUST
YOUR PROJECT · OUR PASSION

Community Infrastructure · Architecture · Environmental Services
www.cedarcorp.com

Crack Filling Service Corp.
Pioneers in crack routing and rubberized sealants

1-800-732-4379
Jeff Herrling Jim Herrling Scott Herrling Greg Herrling
4033 Barlow Rd., Cross Plains, WI 53528

JEWELL associates engineers, inc.
Engineers - Architects - Surveyors

Spring Green 608-588-7484
Wisconsin Rapids 715-424-2424
Madison 608-690-6060
Eau Claire 715-900-2662
www.jewellassoc.com

Providing Wisconsin municipalities with professional engineering, architecture, and land surveying services since 1993.

Partnering with Communities to help them THRIVE

- Municipal Engineering
- Transportation
- Water Resources
- Environment & Ecology
- Parks & Recreation
- Site Development
- Land Surveying
- GIS Development / Mapping
- Architecture
- Water & Wastewater
- Structural Engineering
- Electrical / HVAC / Plumbing
- Public & Emergency Management / Security Services
- Public Management / Building Inspections
- Construction Services
- Innovative Project Delivery Methods
- Funding Strategies / Grant Assistance

SERVICE INSPIRED SINCE 1909

McMAHON
ENGINEERS ARCHITECTS

2023 ENR TOP 500 DESIGN FIRM

920.751.4200 | MCMGRP.COM WISCONSIN ILLINOIS INDIANA

