



STATE OF MICHIGAN

DEPARTMENT OF NATURAL RESOURCES
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

REBECCA A. HUMPHRIES
DIRECTOR

September 14, 2006

County Commission
County Road Commission
County Sheriffs

Dear County Official:

SUBJECT: Opening of County Road Systems to Off-Road Vehicles

The purpose of this letter is to provide you with some background on the subject referenced above, and to also provide you with the position on the subject held by the Department of Natural Resources (Department) and the Department of Attorney General (DAG).

In recent years, several counties opted to open all county roads within their jurisdiction to Off-Road Vehicle (ORV) use. The Department opposes this approach for several reasons. First, permitting the operation of ORVs, which for the most part are not designed or intended for on-road use, creates a significant concern for public safety, for both the ORV operator and the motorist who is legitimately operating on the road. Many ORVs come with factory-applied warnings that the machines are not designed for on-road use.

Second, the Department is concerned about the increased environmental damage that will occur on both public and private land as a result of this significant increase in access to those lands. Habitat degradation, erosion and trespass issues may increase dramatically as a result of uncontrolled access to both public and private lands.

Unlawful ORV use is a major management issue in the State of Michigan (State). The management of our state forests was recently evaluated under a Forest Certification Audit. One of the major findings of this audit was that an unacceptable amount of environmental damage was being caused by unlawful ORV use. This finding is so significant that the State could lose its "certified" status which could result in the loss of a market for the State's timber. The opening of an entire county road system compounds this problem.

NATURAL RESOURCES COMMISSION

Keith J. Charters, Chair • Mary Brown • Darnell Earley • Bob Garner • Gerald Hall • John Madigan • Frank Wheatlake

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Enclosed you will also find a briefing paper developed by the Department on the topic, and a letter dated April 28, 2006, from the DAG expressing the legal opinion on this matter.

A few counties have indicated the rationale for opening all county roads to ORV use was to stimulate tourism, and provide an economic value that might be gained by providing an opportunity for ORV riders to gain better access to lodging, food and fuel. The Department has developed a strategy on how to best provide local communities with additional riding opportunities and access to various services, without compromising public safety or expanding unlawful access to sensitive public and private lands.

The Department is willing to work with all counties to designate certain eligible county roads as ORV access routes, as the DAG indicates is the lawful approach provided in statute. These designated access routes could connect existing legal ORV riding opportunities, and also link trails with businesses that provide services for the ORV riding community. Designating specific ORV routes would be more efficient from both a law enforcement and land management perspective, and would still provide the economic benefits desired by local businesses.

Thanks for this opportunity to provide you with this information. If you would like to explore the options for lawfully expanding the ORV trail system in your county by designating specific county roads, or if you have questions regarding this letter or the enclosed documents, please contact Mr. James Radabaugh, State Trails Coordinator, Forest, Mineral and Fire Management, at 517-373-1276, or you may contact us.

Sincerely,



Lynne M. Boyd, Chief
Forest, Mineral and Fire Management
517-373-1246



Alan Marble, Chief
Law Enforcement
517-335-3427

Enclosures

cc/enc: Ms. Mindy Koch, Resource Management
Deputy, DNR
cc: Mr. Jim Radabaugh, DNR

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P. O. Box 30212
LANSING, MICHIGAN 48909

April 28, 2006

Honorable Joel Sheltroun
State Representative
The Capitol
Lansing, MI 48913

Dear Representative Sheltroun:

Attorney General Cox has asked me to respond to your letter inquiring whether a county may adopt a local ordinance declaring virtually all of its county roads to be "access routes" for off-road recreational vehicles (ORVs) under section 81131 of Part 811, Off-Road Recreation Vehicles, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.81131. Due to the subject matter of the request, I asked staff in the Environment, Natural Resources, and Agriculture Division to review your letter. The following represents their findings.

ORVs are comprehensively regulated by Part 811 of the NREPA. In relevant part, the statute requires the Department of Natural Resources (DNR) to manage ORV use on public lands and roads by creating a system of designated trails, routes, and areas – with these trails, routes, and areas being designated through implementation of an ORV plan. Section 81127 of Part 811¹ recognizes the previously created ORV system, stating in pertinent part:

(1) Under the comprehensive system previously approved and implemented under former section 16d of 1975 PA 319, all state owned land under the jurisdiction of the department shall be closed to ORV use except designated routes, designated trails, and designated areas. The commission [Natural Resources Commission] shall approve any subsequent revisions to the system and shall establish an effective date for the revisions. . . . [MCL 324.81127(1).]

¹ Formerly section 16d of 1991 PA 17, MCL 257.1616d

Section 81123² requires the development of the comprehensive ORV management plan, stating in pertinent part:

(1) The department [DNR] shall, by October 1, 1991, develop a comprehensive plan for the management of ORV use of areas, routes, and trails maintained by or under the jurisdiction of the department or a local unit of government pursuant to section 81131. The plan shall, as a minimum, set forth the following methods and timetable:

(a) The inventorying, by appropriate means, of all areas, forest roads, and forest trails used by or suitable for use by ORVs

(b) The identification and evaluation of the suitability of areas, forest roads, and forest trails to sustain ORV use

(c) The designation of areas, forest roads, and forest trails for ORV use, including use by persons with disabilities.

(d) The development of resource management plans to maintain areas, forest roads, or forest trails and to restore or reconstruct damaged areas, forest roads, or forest trails. The plans shall include consideration of the social, economic, and environmental impact of ORV use.

(e) Specifications for trails and areas. [MCL 324.81123(1)]

Thus, through development of the management plan by DNR under section 81123, the ORV system has been generally restricted to designated areas, trails, and routes within lands under state jurisdiction.³ This framework provides properly managed opportunities to use ORVs on state lands.⁴

ORV use on public highways, streets, or right-of-ways is governed by section 81122. That section prohibits ORV use on public roads with limited exceptions:

(1) A person shall not operate an ORV that is not registered under the code upon a public highway, street, or right-of-way of a public highway or street, *except as provided in section 81131* or under the following conditions and circumstances:

² Formerly section 16 of 1975 PA 319

³ Draft Michigan Off-Road Vehicle (ORV) Plan 2005, pp 18-20, available at http://www.michigan.gov/documents/ORVFullPlan_133074_7.pdf

⁴ Pursuant to section 81126 of Part 811, the limitation on the use of ORVs to the system of designated routes, trails, and areas under section 81127 does not apply to the Upper Peninsula MCL 324.81127

(a) The operator of a vehicle may cross a public highway, other than a limited access highway, at right angles, for the purpose of getting from 1 area to another, if the operation can be done in safety. The operator shall bring the vehicle to a complete stop before proceeding across a public highway, and shall yield the right-of-way to oncoming traffic

(b) A vehicle may be operated on a street or highway for a special event of limited duration and conducted according to a prearranged schedule only under permit from the governmental unit having jurisdiction. A special event involving ORVs may be conducted on the frozen surface of public waters only under permit from the department.

(c) A farmer, employee of a farmer, or family member of a farmer who is at least 16 years of age may operate an ORV on the extreme right side of a roadway or highway right-of-way when it is not practicable to operate off that roadway or highway right-of-way. Such operation shall be limited to traveling to or from the farmer's residence or work location or field during the course of farming operations. . . . [MCL 324.81122; emphasis added.]

Further, under subsection (2) of section 81122, if the operator of an ORV is involved in a collision with a licensed vehicle on a highway, the Legislature has declared the ORV operator "prima facie negligent" in any court action. MCL 324.81122(2)

Your question implicates the first of the exceptions (emphasized above) to the general prohibition on ORV use in road right-of-ways – the use permitted on "access routes" designated by local ordinances adopted under section 81131, which states:

(1) A local unit of government may pass an ordinance establishing access routes along streets and highways under its jurisdiction, if those access routes do not involve state or federal highways, and if they meet the requirements of the plan developed pursuant to section 81127 [MCL 324.81127]. If necessary, consent of a state or federal land management agency shall be obtained for the location of the route. [MCL 324.81131(1).]

Your specific question – whether a county may adopt an ordinance declaring virtually all county roads as "access routes" – must be evaluated through interpretation of the statutory provisions cited above. There are several relevant rules of statutory construction that apply.

The foremost rule of statutory construction is to discern and give effect to the intent of the Legislature. *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Where the statutory language is clear, it should be applied as written and only where it is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. *Id.* Statutes should be read as a whole and words should be read in context. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). Undefined statutory terms should be

given their plain and ordinary meanings. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). To determine plain and ordinary meaning, it is appropriate to consult dictionary definitions. *Id*⁵ Finally, statutory exceptions, like those contained in section 81131, are to be given a limited, rather than expansive construction. *Rzepka v Farm Estates, Inc*, 83 Mich App 702, 706-707; 269 NW2d 270 (1978). See also *Michigan Tool Co v Michigan Employment Security Comm*, 346 Mich 673, 680; 78 NW2d 571 (1956).

Initially, some confusion is created by the requirement in section 81131 that access routes "meet the requirements of the *plan* developed pursuant to *section 81127*." This potential ambiguity arises because there is no plan developed under section 81127. Rather section 81123 provides for development of the *plan*, while section 81127 addresses approval and revision of the *system*. This appears to be simply an error in citing to section 81127 instead of section 81123. It is the plan to be developed under section 81123 that expressly includes the access routes provided for in section 81131 and that contains substantive requirements for identifying, designating, and maintaining routes, trails, and areas to be used by ORVs.

This potential confusion is ultimately not critical in evaluating your question in any event. The provisions establishing the ORV system and providing for the development of a management plan, sections 81123 and 81127, clearly indicate the intent to establish comprehensive, state-wide management of ORV use on public lands and roads. Whether or not there would be any distinction between meeting the requirements of the system or the plan, the foremost question is what the term "access route" means in the context of the broader intent to create a unified system for ORV use.

No definition of "access route" is provided in Part 811. The word "access" is defined as "a way or means of approaching [some thing or place], getting, using, etc." *Webster's New World Dictionary, Third College Edition*, p 7 (1988). The term "access road" is defined as "[a] road that affords access to a *certain area*." *American Heritage Dictionary, Second College Edition* (1991) (emphasis added). Consistent with this interpretation, courts have used "access route" to describe a way or means of gaining access to a specific place. For example, in *Wood v Denton*, 53 Mich App 435, 436; 219 NW2d 798 (1974), the Court described the access route as follows:

The purpose [of] this strip of land running across the rear of defendant's property is to provide an access route *from* plaintiffs' property *to* the alley which runs along the southern boundary of defendants' property [Emphasis added]

See also *Birch Forest Club v Rose*, 23 Mich App 492, 497; 179 NW2d 39 (1970)

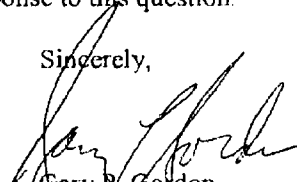
⁵ In addition, MCL 8 3a states that all words and phrases in statutes "shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

Thus, "access route" is commonly understood and has been interpreted to mean a way to get from a specific Point A to a specific Point B, such as in the case of a highway access road that is designed to give access to a particular highway. Whereas a route or road, without the qualifying term "access," is not commonly understood to be associated with or limited to gaining access to only a specific road or place, the addition of the word "access" must be given effect and does convey the more restrictive meaning of a route or way that leads to a *specific* place. In light of the other provisions creating a unified ORV system under the management of the DNR, which includes specifically designated routes, trails, or areas, the term access route must be construed to only allow the designation of routes to actually access these DNR designated routes, trails, or areas.

Accordingly, in answer to your question, a county may not adopt an ordinance that designates virtually all of its roads as "access routes." Instead, a county is only authorized to designate access routes consistent with the purpose of the statute – to provide for access to a specific DNR-approved trail, route, or area as an exception to the general rule against ORV use upon a public highway, street, or public right-of-way. Accordingly, an access route must have a designated beginning point and an ending point at a DNR-approved ORV trail, route, or area. If a proposed access route does not have an ending point that directly connects with a DNR-approved ORV trail, route, or area, MCL 324.81131(1) requires the county to obtain permission from the appropriate state or federal land management agency for the location of the portion of the access route that extends over land managed by that agency.

Thank you for your patience in awaiting our response to this question.

Sincerely,



Gary P. Gordon
Chief Deputy Attorney General

c: Arminda Koch, DNR
Stephen Kubisiak, DNR
Gary Rapp, Iosco County Prosecutor
Michael P. Schultz, Ogemaw County Road Commission

Department of Natural Resources
- Briefing Paper -
Counties Opening Roads to Off-Road Vehicles
May 18, 2006

Background

Montmorency, Cheboygan, Presque Isle and Ogemaw Counties have adopted local ordinances that open all county roads under their jurisdiction for use by Off-Road Vehicles (ORV's).

Several other counties are considering opening their roads for ORV use. One of the reasons these counties have opened roads for ORV use is the perceived economic value for tourism related businesses. In this theory, increased ORV access leads to more users and, therefore, more tourism for the local economy.

The Department of Natural Resources (Department) has several concerns with opening all county roads for ORV use in the areas of resource damage, law enforcement and public safety:

- In the Lower Peninsula, all state-owned land is closed to ORV's unless posted open. Opening county roads to ORV's would result in a significant increase in trespass on state owned land and encourage the creation of new unauthorized trails and the use of existing two-tracks that are not open to ORV's. This will result in increased resource damage, restoration costs, and management oversight by the Department on public lands.

In addition, a forest certification audit of Michigan's State Forests was completed within the last year and found that an unacceptable amount of environmental damage caused by illegal ORV use was already occurring. The Department has established a task force to develop new strategies for significantly reducing or eliminating illegal ORV use. The opening of all county roads will, in all likelihood, increase environmental damage and will certainly not reduce this damage.

- Allowing ORV use on county roads will increase the potential for accidents involving highway vehicles. The Michigan State Police Office of Highway Safety Planning reported that during the period of 1994 to 2003 there were 2,528 ORV/ATV accidents in Michigan, resulting in 77 fatalities. It is important to note that section 81122(2) of the Natural Resources and Environmental Protection Act, PA 451 of 1994, as amended, states that if a collision occurs on a public roadway between an ORV and a vehicle that is permitted to operate on a public roadway, the ORV is considered prima facie negligent.
- There is not enough law enforcement available to patrol this activity. The ORV Trail Improvement Fund Grants Program allows for limited trail enforcement and counties have limited extra resources to supply the additional needed enforcement. Conservation officer numbers are currently low and are relied upon for primary enforcement of ORV regulations both on and off the trail.
- Where ORV use on roads occurs, it results in erosion and damage to the roads, road shoulders, and the rights-of-way. Use of the ORV Trail Improvement Fund Grants Program would not be a priority for maintenance of county roads and shoulders that are not officially designated by the Department as part of the state ORV system, nor would they be a priority for law enforcement dollars.

- ORV use on all county roads will encourage and facilitate trespass onto adjacent private property which will result in additional safety concerns, property damage, and increased demands on law enforcement.
- It will be difficult for ORV operators to differentiate between seasonal county roads (which are open to ORV use) and two-tracks that are on State-owned land (which are closed to ORV use unless posted open). This will place the rider in circumstances that will increase the likelihood of their being issued a ticket.
- Access from county roads will increase illegal use and damage to nearby state forest campgrounds, lakes, and streams, and will heighten public safety concerns in these state forest campgrounds due to excessive speeds and reckless operation.

Finally, in response to a legislative request, the Department of Attorney General (DAG) recently evaluated the question of whether a county may adopt a local ordinance declaring virtually all of its county roads to be "access routes" for ORVs. The DAG completed a thorough evaluation of Part 811, Off-Road Recreation Vehicles, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.811 and related case law.

In conclusion, the DAG's position is that a county may not adopt an ordinance that designates virtually all of its roads as "access routes". Instead, a county is only authorized to designate access routes consistent with the purposes of the statute – to provide for access to a specific DNR approved trail, route, or area as an exception to the general rule against ORV use upon a public highway, street, or public right-of-way.

Recommendation

It is the DNR's belief and the DAG's opinion that counties are exceeding their jurisdiction and authority when opening all county roads to ORV use.

The Department will continue to encourage partnerships with local units of government to provide designated local ORV access routes along county and local roads to provide for planned access to the state designated ORV system and to local services. "Designated" for the purposes of this discussion, means posted open for ORV use with appropriate signs by the Department.

Proposals for local access routes may be initiated by trail advocates, the Department and/or local unit of government through the trail proposal process. Local ORV access routes should be mutually agreed upon by the local unit of government and the Department, consistent with applicable provisions of the Natural Resources and Environmental Protection Act, 451 of 1994, being sections MCL 324.81127 and 81131.

Approved access routes are eligible for funding consideration from the ORV Trail Improvement Fund Grants Program. Funding is available for signing, maintenance, and law enforcement.

Prepared by FMFM and LED.