

STATE OF NEW YORK  
SUPREME COURT COUNTY OF WARREN

THE STATE OF NEW YORK and  
ERIN M. CROTTY, COMMISSIONER  
OF THE NEW YORK STATE DEPARTMENT  
OF ENVIRONMENTAL CONSERVATION,

Plaintiffs,

-vs-

THE TOWN OF HORICON and THE  
TOWN BOARD OF THE TOWN OF  
HORICON,

Defendants.

DECISION

Index #42592  
RJI #56-1-04-0099

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On September 19, 2002, the defendant, Town of Horicon, adopted Local Law No. 2 of 2002. This Local Law was adopted pursuant to Vehicle and Traffic Law §2405. The Town passed the Local Law with the intention of allowing all-terrain vehicles to operate on certain designated Town highways within the Town of Horicon. The Local Law specifically designated eight different Town highways. These roadways were described as follows:

b) The Town highways and public highways by use to which this Local Law shall apply as follows:

- 1) A highway by use jeep trail from Padnarum Road to Long Pond;
- 2) A highway by use jeep trail from Padnarum Road to Trout Falls Road;
- 3) A highway by use jeep trail from Grassville Road to Round Pond;
- 4) A highway by use jeep trail from Camp Road to Round Pond;
- 5) A highway by use jeep trail from New York State Route 8 to Lily Pond (known as Lily Pond Road);

- 6) A highway by use jeep trail from the Round Pond jeep trail to the base of Buck's Camp Mt. As shown on the Warren County Highway Map of 1935;
- 7) A highway by use jeep trail from Beaver Pond Road to the Culver Field Parking Area;
- 8) Padnarum Road (Seasonal Use Section)

On October 17, 2002, the plaintiffs/petitioners (hereinafter referred to as the plaintiffs) instituted the within combined action/proceeding. The complaint contains six causes of action. The plaintiffs seek to nullify the Town's Local Law and to enjoin it from implementing its provisions as that law applies to property owned by the State of New York.

In essence, the plaintiffs allege that the defendants have no legal right to regulate and/or allow the use of all-terrain vehicles on lands owned by the plaintiffs. The defendant Town claims that all of the enumerated roads listed in its Local Law are Town highways by use, thus the Town is free to regulate and/or allow the use of all-terrain vehicles on roadways of the defendant, Town.

The parties have engaged in discovery and depositions have been conducted. The plaintiffs have now made a motion for summary judgment. The Court will not specifically list every document which the plaintiffs have submitted in support of their motion but the Court will describe in general terms some of the documents which the plaintiffs have included. The plaintiffs have submitted various affidavits from its representatives who are knowledgeable about the roadways depicted in the defendants' Local Law. The plaintiffs have submitted voluminous documents concerning plaintiffs' ownership rights to each of the roadways depicted in the defendants' Local Law. The plaintiffs have also submitted numerous maps pertaining to the area

where each of the roadways traverse the plaintiffs' property. The plaintiffs have also submitted the deposition testimony from the defendants' Town Supervisor, along with the defendants' Town Highway Superintendent. In addition to the foregoing, the plaintiffs submitted various other records and documents which relate to the enumerated list of roadways in the defendants' Local Law.

The plaintiffs have raised several different arguments in support of their motion for summary judgment. The plaintiffs' primary claim is that all of the alleged trails in the defendants' Local Law never became Town highways by use pursuant to Highway Law §189. The plaintiffs allege that none of the disputed trails ever became Town highways because the Town never actually controlled and maintained the disputed areas for the requisite ten year period. The plaintiffs also assert that once the underlying lands became forest preserve lands, they cannot later become highways by use.

The plaintiffs submit to the Court that there are no records of the defendants which indicate that the defendant Town has maintained the disputed roadways. The plaintiffs also assert that none of the disputed roadways are listed on the Town's inventory of highways. The plaintiffs further argue that even if a pertinent portion of one of the disputed roadways were ever deemed to be a Town highway, that particular portion was abandoned a long time ago.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

In the case at bar, the plaintiffs' submission clearly creates a prima facie case, thus shifting the burden to the Town to come forward with evidentiary proof in admissible form sufficient to

establish the existence of a material issue of fact.

The defendant Town alleges that all of the roadways in dispute are Town highways by use. Highway Law §189 states: "All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been clearly laid out and recorded as a highway....."

The burden of establishing a highway by use rests with the defendant Town. Katz v. Town of Brookhaven, 15 AD2d 534 (2<sup>nd</sup> Dept. 1961). In order to show that a road has become a public way by use, it is necessary to demonstrate not only use by the public, but also that the roadway was kept in repair or was taken in charge by public authorities. Stuart v. Town of Wells, 161 AD2d 1073, 1074 (3<sup>rd</sup> Dept. 1990); Whitton v. Thomas, \_\_\_\_\_ AD3d \_\_\_\_\_, 807 NYS2d 454, 455 (3<sup>rd</sup> Dept. 2006).

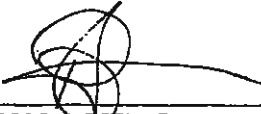
The defendant Town has submitted numerous affidavits from individuals who claim to have utilized the subject roadways in the past. The Town's submission fails to include sufficient evidentiary proof which would establish its control of the enumerated roadways for the requisite ten year period of time prior to the plaintiff's acquisition of the disputed property. "Mere public use, however, is not enough to establish a public Town highway; it must also be demonstrated that the roadway was kept in repair or taken charge by public authorities." Hillelson v. Grover, 105 AD2d 484, 485 (3<sup>rd</sup> Dept. 1984); Desotelle v. Town of Schuyler Falls, 301 AD2d 1003, 1003-1004 (3<sup>rd</sup> Dept. 2003).

In light of the foregoing, the Court will grant the plaintiffs' motion for summary judgment.

Plaintiffs to submit proposed Order/Judgment on notice to the defendants.

This writing constitutes the Decision of the Court.

Signed this 2<sup>nd</sup> day of May, 2006, at Johnstown, New York.

  
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HON. RICHARD T. AULISI  
Justice of the Supreme Court

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