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At a Term of the Supreme Court of the State of New York, held in and for the County of Lewis, on July 31, 2008

Present: Hon. Joseph D. McGuire, Justice

Bruce Krug, Deanna Leffingwell, Carol Sue Lustyik, and Lawrence Ennis

Plaintiffs,

vs.

Town of Leyden,

Defendant.

MEMORANDUM/ORDER

Index No. CA2008-00138
RJI No. S24 2008-0097

Joseph D. McGuire, J.

Plaintiffs have applied to the Court for an order awarding summary judgment (CPLR 3212) declaring the Town of Leyden Local Law No. 1 of 2002 null and void in violation of the New York State Constitution (Article IX, Section 2) and Vehicle and Traffic Law (Article 48-c). Defendant has cross moved for summary judgment of dismissal of the Complaint.

BACKGROUND

The Town of Leyden enacted Local Law Number 1 of 2002 in May 2002 opening all of its Town roads to use by all-terrain vehicles (ATVs). The Summons and Complaint in this matter was filed on March 17, 2008, with service being completed on May 5, 2008; Defendant's Answer is dated May 14, 2008.

The Plaintiffs are all residents on the Town of Leyden, with one (1) living on a County road, and two (2) living on a Town road. These three Plaintiffs have each submitted an Affidavit alleging specific injuries related to ATV use of Town roads. The fourth Plaintiff (Lawrence Ennis) did not submit an Affidavit.

The Defendant claims that the opening of its roads to ATV use "serves legitimate government functions in providing farmers with access to their fields and serving as connectors between ATV trails in the Western Adirondacks and the Tug Hill." The Defendant also claims that the Plaintiffs lack standing due to either a lack of injury, or to the claimed injury being no different in kind or degree than that of the public at large. Further, Defendant argues that the nature of the relief sought by Plaintiffs is properly brought as an Article 78 proceeding, making it untimely.

DISCUSSION

Vehicle and Traffic Law

The New York State Vehicle and Traffic Law provides, in pertinent part, as follows:

> "No person shall operate an ATV on a highway except as provided herein [with respect to crossing highways, or in accordance with highways designated and posted for ATV use]." (Vehicle and Traffic Law §2403[1].)
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> . . .
>
> "[A] governmental agency with respect to highways,

including bridge and culvert crossings, 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." (Vehicle and Traffic Law §2405[1].)

Standing

There is a two part test to determine if a moving party has standing to challenge an action by a governmental entity.

"First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." (*N.Y. State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004].)

Persons entitled to standing need to be evaluated by application of common law rules in the absence of language regarding same in the statute under review. (*see Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761 [1991]). "For generations,

New York courts have treated standing as a common-law concept, requiring that the litigant have something truly at stake in a genuine controversy." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003].)

Plaintiffs bear the burden of establishing standing, and "must demonstrate that they will suffer . . . injury in fact (i.e., an injury that is different from that of the public at large) and that the alleged injury falls within the zone of interest sought to be promoted or protected by the statute under which the governmental action was taken." (*Heritage Coalition v City of Ithaca Planning & Dev. Bd.*, 228 AD2d 862, 864 [1996] *lv denied* 88 NY2d 809; *see also McCartney v Dormitory Auth.*, 5 AD3d 1090 [4th Dept. 2004] *lv denied* 3 NY3d 603.) "The existence of an injury in fact -- an actual legal stake in the matter being adjudicated -- ensures that the party seeking review has some concrete interest in prosecuting the action" *(Soc'y of Plastics Indus.*, 77 NY2d 761, 772).

The Court first must decide if Plaintiffs have sustained an injury; and if so, then the Court must decide whether Plaintiffs are in the "zone of interest" the statute seeks to protect. (*Mahoney v Pataki*, 98 NY2d 45, 52 [2002].) Even though the standing test has been liberalized (*see Dairylea Cooperative, Inc. v Walkley*, 38 NY2d

6, 10-11 [1975]), it nonetheless remains an important issue that requires a definite showing of injury in fact (*see N.Y. State Ass'n of Nurse Anesthetists* , 2 NY3d 207, 214).

Although not every Plaintiff here has established standing, the Court is satisfied that at least one Plaintiff has scaled the hurdle by alleging that she: lives on a Town road; witnessed an ATV driver lose control and travel off the road and onto her lawn, nearly striking a tree; fears for her personal safety and the safety of her son due to ATV traffic on the road; and is aggrieved by noise and dust from ATV traffic on the road. These allegations fall within the zone of interest sought to be promoted or protected by the Vehicle and Traffic Law, which prohibits operation of ATVs on highways except under limited circumstances, and constitute an injury that is different from the public at large, thus establishing sufficient grounds for the matter to proceed on the merits. With one Plaintiff meeting the test, evaluation of the others is not necessary here.

Declaratory Judgment

Defendant's attempt to characterize this matter as one of procedural error and, therefore, a time barred Article 78 proceeding, is unavailing. Plaintiffs brought this action as one for a declaratory judgment that the local law is null and void due to violation of the

New York State Constitution and Article 48-C of the Vehicle and Traffic Law, and are entitled to do so. Despite the use of an Article 78 proceeding in another County (see *Hutchins v Town of Colton* (2004 NY Slip Op. 51889[u] [Sup Ct, St. Lawrence County, August 31, 2004, Demarest, J.]), "the proper procedural vehicle for challenging a legislative act is a declaratory judgment action." (*Wright v County of Cattaraugus*, 41 AD3d 1303, 1304 [4th Dept 2007].) Furthermore, courts may convert a matter from an Article 78 proceeding to a declaratory judgment action if necessary (see CPLR §103©; also *See, e.g., Tupper v City of Syracuse*, 46 AD3d 1343 [4th Dept 2007].) "[T]his [properly denominated] declaratory judgment action is not governed by the four-month statute of limitations period set forth in CPLR 217 and thus is not time-barred." (*Wright*, 41 AD3d 1303, 1304 [4th Dept 2007]).

Summary Judgment

A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the moving party to establish its entitlement to judgment as a matter of law at the pleading stage (*see Kimpland v*

Camillus Mall Associates, L.P., 37 AD3d 1128 [4th Dept 2007]). If Movant meets her or his burden, it then shifts to the opponent to establish the existence of material issues of fact which would require a trial of the action (*Zuckerman*, 49 NY2d 557; *see Alvarez v. Prospect Hospital, et al.*, 68 NY2d 320 [1986]).

A logical interpretation of Vehicle and Traffic Law §2405(1) is that it sets out two criteria for a governmental agency with jurisdiction over a highway to consider in order to designate a highway as open for travel by ATVs. First, the agency must determine that the use of the highway is necessary (i.e., it is "otherwise impossible") for ATVs to gain access to an area or trail open to ATV use. Second, the agency must determine that the area or trail open to ATV use is adjacent to the highway. Where these criteria were not considered, or such determinations not made or documented, similar local laws have been held invalid. (*See* 2005 Ops Atty Gen Informal Opinion No. 2005-21, *citing Brown v Town of Pitcairn*, Sup Ct, St. Lawrence County, August 19, 2003, David Demarest, J. Index No. 114295; *Brown v Town of Pitcairn*, Sup Ct, St. Lawrence County, March 13, 2003, David Demarest, J. Index No. 113023; *Hutchins v Town of Colton*, 2004 NY Slip Op. 51889[u] [Sup Ct, St. Lawrence County, August 31, 2004, Demarest, J.]; and