

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY

SUPERIOR COURT

HARRY STEARNS, et al.

v.

TOWN OF GORHAM

214-2018-CV-00030

**TOWN OF GORHAM'S MOTION TO DISMISS
PETITION FOR FAILURE TO STATE A CLAIM**

The Town of Gorham (“the Town”), by and through its attorneys, Boutin & Altieri, P.L.L.C., moves to dismiss the Petition for failure to state a claim upon which relief may be granted. In further support of this Motion, the Town states as follows:

I. Introduction

1. This motion seeks to dismiss the claims brought by the Petitioners against the Town for a writ of mandamus, injunctive relief, and monetary damages.

II. The Petition

2. The Petitioners allege the following facts in their Petition with respect to the Town. The Petitioners are the owners of 7 properties in the Town of Gorham, located on either Crestwood Drive or U.S. Route 2, also known as Lancaster Road. *See* Petition (“Pet.”) at ¶¶ 1, 11. The Petitioners’ properties abut or are near an off-road recreational vehicle (“OHRV”) trail network located within the Town. *Id.* at ¶11.

3. The OHRV trail system is operated by the State, through its Department of Natural and Cultural Resources. *See* Pet. at ¶6.

4. The OHRV trail system operates on State owned land that is part of a former rail system, and along a portion of U.S. Route 2, the use of which was authorized by the State’s

Department of Transportation. *See* Pet. at ¶¶ 3, 7, 9-10, 38. The OHRV trail system has been open to the public since 2011. *Id.* at ¶ 38.

5. The Petitioners contend they have suffered damages as a result of the noise and dust caused by the off-road vehicles using the OHRV trail system; and that the users of the OHRV trail system ignore posted speed limits and speed bumps, use the trails outside of permitted hours, trespass on their properties and otherwise interfere with the Petitioners' use and quiet enjoyment of their properties. *See* Pet. at ¶¶ 22-27.

6. The Petitioners have filed a petition against the Town and the State seeking damages and to enjoin the continued operation and use of the OHRV trail system.

7. More specifically, against the Town, the Petitioners seek: 1) a writ of mandamus compelling the Town to enforce its Zoning Ordinance and removal of the OHRV trailhead from the Petitioners' neighborhood; 2) an injunction barring the Town from sanctioning or operating the OHRV trail system in the Petitioners' neighborhood; and 3) damages for the alleged diminution in their property values caused by the OHRV trail system. *See* Pet. at ¶¶ 39, 41-44, 46-47.

8. As discussed in more detail below, the Town now moves to dismiss the petition for failure to state a claim upon which relief can be granted.

III. Standard Of Review

9. The standard of review for a motion to dismiss is "whether the facts as pled are sufficient under the law to constitute a cause of action." *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 450 (2002) (internal citations omitted). The Court must "rigorously scrutinize the complaint to determine, whether, on its face, it asserts a cause of action." *Id.*; *see also Provençal v. Vermont Mut. Ins. Co.*, 132 N.H. 742, 744-45 (1990). "What is

involved is a pre-trial, threshold inquiry that tests the facts in the complaint against the applicable law.” *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 45 (1987).

IV. Legal Analysis

A. The Petitioners’ Mandamus Claim Fails As A Matter Of Law Because Zoning Enforcement Is Discretionary And Because The Town Cannot Enforce Its Zoning Regulations Against The State.

10. “Mandamus is an extraordinary writ that may be addressed to a public official, ordering him to take action, and it may be issued only when no other remedy is available and adequate.” *Rockhouse Mountain Prop. Owners Ass’n v. Conway*, 127 N.H. 593, 602 (1986).

“When an official is given discretion to decide how to resolve an issue before him, a mandamus order may require him to address the issue, but it cannot require a particular result.” *Id.* A mandamus will not issue to overturn the discretionary performance of an official function absent evidence of bad faith. *Id.* (citing *Guarracino v. Beaudry*, 118 N.H. 435, 437 (1978)).

11. The *Rockhouse* case is instructive. In that case, the plaintiffs petitioned the selectmen to lay out roads over existing rights of way within their subdivision. *Rockhouse*, 127 N.H. at 595. The selectmen denied the request because of the costs and because the existing ways did not meet the town’s specifications. *Id.* at 596. The plaintiffs then filed suit against the town seeking, among other relief, a writ of mandamus ordering the selectmen to lay out the roads. *Id.* at 595.

12. On appeal, the New Hampshire Supreme Court upheld dismissal of the request for mandamus because the decision to lay out roads is discretionary and therefore, “mandamus would be appropriate only if the selectmen had entirely failed or refused to address the plaintiffs’ requests for a layout,” which they did not. *Id.* at 602. The Court explained: “[t]he

plaintiffs do not claim the selectmen failed to address the issue They claim that the selectmen addressed the issue but reached the wrong result. Therefore they seek a writ of mandamus ordering the selectmen to reach the right result by laying out the desired roads. This is exactly what a mandamus order cannot require, and it would have been patent error to grant the plaintiffs' request to issue the writ." *Id.*

13. It is well-settled that zoning matters are discretionary, and a Town is not required to act merely because a party complains. *Bois v. Manchester*, 104 N.H. 5, 8 (1962) (upholding a dismissal by the trial court of the Petitioner's writ of mandamus and injunctive relief); *Carrick v. Langtry*, 99 N.H. 251, 253 (1954) [citations omitted] (holding that because an appeals process is provided in the zoning statute, the statute itself is "[a] further reason why mandamus must be denied" and "[w]henver the statutory remedy is plain and specific in its nature, and fully adequate to redress the grievance... mandamus will not lie.").

14. The basis of the Petitioners' request for a mandamus is not entirely clear. To the extent the Petitioners are seeking a mandamus to challenge the Town's June 6, 2011 decision to authorize establishment of the OHRV trailhead and trail system that claim is time-barred and should be dismissed. *See RSA 677:2 (2008)* (a party aggrieved by a zoning board decision must file for rehearing within 30 days).

15. To the extent the Petitioners are seeking a mandamus compelling the Town to respond to the Petitioners' complaints concerning use of the OHRV trail system that claim should also be dismissed because such response is discretionary and therefore inappropriate for mandamus relief. In any event, the Petitioners' own allegations demonstrate that the Town regularly responds to OHRV complaints and regularly enforces the OHRV regulations within its powers. *See Pet.* at ¶¶ 19-21.

16. Further, the Petitioners' claim for mandamus should be dismissed because the Town does not have the authority to enforce its zoning regulations against the State for the use of State-owned land. *See* RSA 215-A:43 (granting the New Hampshire Department of Natural and Cultural Resources the authority to designate land formerly used as rail beds for use in the OHRV system and exempting that decision from the standard process for new OHRV trails on other State-owned property); *Town of Lyndeborough v. Boisvert Props., LLC*, 150 N.H. 814, 821 (2004) (finding without deciding that RSA 215-A:43 preempts local control from OHRV trails on State-owned land); 674:54 (2008) (setting forth the requirements on the State for notifying the local authority of the proposed governmental use and stating that the Town "may issue *nonbinding* written comments relative to conformity or nonconformity of the proposal with normally applicable land use regulations to the sponsor of the governmental use with 30 days after the hearing) [emphasis supplied].

17. In short, the Petitioners have not alleged that the Town failed or refused to address the Petitioners' requests regarding the location of the OHRV trail system, and they have not claimed that the Town failed to perform a mandatory duty. *See Rockhouse*, 127 N.H. at 602; *Guarracino*, 118 N.H. at 438. The Petitioners moreover have not alleged that the Town acted in bad faith when, on June 6, 2011, it authorized the State to establish the OHRV trailhead and system, or in the manner in which it responds to complaints about use of the trail system. *Id.*; *see also* Pet. at ¶ 38. Furthermore, the Town simply does not have the authority to shut down a State owned and operated OHRV trail system, even if this Court were to issue a writ of mandamus. Therefore, this claim should be dismissed.

B. The Petitioners' Nuisance Claim Should Be Dismissed Because It Is Barred By The Statute Of Limitations.

18. As the Petitioners point out in their Petition, the Town authorized the trail system on June 6, 2011. *See* Pet. at ¶ 38. Any claim relating to or arising out of the use of the trail system should have been brought on or before June 6, 2014. *See* RSA 508:4, I (2010). The Petitioners' failure to do so is fatal and their nuisance claim against the Town should be dismissed.

19. Even assuming, for the sake of argument, that the Petitioners' nuisance claim is not time-barred, it should nevertheless be dismissed because the Town cannot be held liable for a nuisance (whether under a private or public nuisance theory) created by others on land it does not own, and on land that is exempt from its zoning ordinances. *Cf. Tarbell Adm'r, Inc. v. City of Concord*, 157 N.H. 678, 688 (2008).

20. The Town does not own or operate the OHRV trail system. The Petitioners have not alleged that the Town's use of the trail system in its official capacity is causing or is otherwise responsible for the conduct underlying their nuisance claim. To be sure, the Petitioners do not contend (and nor could they) that the Town is causing the noise or the dust or the litter, or that it has trespassed on the Petitioners' properties, or that it is otherwise interfered with the Petitioners' use and enjoyment of the properties. The Town cannot be held liable for nuisance under the facts as alleged in the Petition and as a result, this claim against the Town should be dismissed.

C. The Claim For Inverse Condemnation Fails And Should Be Dismissed Because No Taking Has Occurred.

21. "Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain." *J.K.S. Realty, LLC v. City of*

Nashua, 164 N.H. 228, 234 (2012) (citations omitted). “Governmental action which substantially interferes with, or deprives a person of, the use of his property in whole or in part, may ... constitute a taking, even if the land itself is not taken.” *J.K.S. Realty, LLC*, 164 N.H. at 234 (quoting *Sundell v. Town of New London*, 119 N.H. 839, 845 (1979)).

Importantly, “[T]he interference must be more than mere inconvenience or annoyance and must be sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires that the burden imposed be borne by the public and not by the individual alone.” *Sundell*, 119 N.H. at 845.

22. To find that a taking has occurred, the Court must also find that there is government intent to “invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.” *Allianz Global Risks U.S. Ins. Co. v. State of N.H.*, 161 N.H. 121, 124 (2010) (quoting *Ridge Line Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003)).

23. Here, the Petitioners allege that the Town and the State “both independently and collaboratively, approved, sanctioned and promoted the use of the trailhead and trail in the plaintiffs’ neighborhood conduct which substantially interfered with and deprived the plaintiffs of the use and enjoyment of their homes, a property right.” *See* Pet. at ¶ 46.

This, they baldly contend, constitutes a taking for which they are entitled to compensation. *Id.* at ¶ 47.

24. The interference cited in the Petition stems from noise, dust, and trespass. Even if the interference were enough to meet the substantial burden born by the Petitioners, these alleged

interferences are caused by the acts of private citizens, potentially acting in an unlawful manner, and not the actions of the Town.

25. Despite attempting to shoehorn government intent into its assertion that the State and Town “approved, sanctioned and promoted...the conduct” of which they allege has caused the harm, there are no facts pled which support the conclusion that the allegations in the complaint are the result of an intentional action by a government actor. In fact, the pleading states unambiguously that the Gorham Police Department routinely responds to calls made regarding illegal activity on the OHRV trail system.

26. Additionally, the OHRV trail system’s use is authorized by statute and exempt from the Town’s zoning ordinance; finding that the Town of Gorham has committed a taking, purely by virtue of being the Town in which these homes are located turns takings law on its head.

27. Like nuisance, if there is any claim of relief for the operation of the OHRV trail, it lies with actors other than the Town.

28. Finally, any claim for attorney’s fees, expert fees, and costs of litigation should be likewise dismissed as the basis for those claims only triggers if the Petitioners claims against the Town succeed.

WHEREFORE, the Town of Gorham requests the Court grant the following relief:

- A. Grant the Town’s Motion to Dismiss Petition for Failure to State a Claim;
- B. Dismiss the Petitioners’ claims against the Town;
- C. Hear this matter at the June 21, 2018 hearing as there are no novel arguments raised in this motion and the Petitioner has time to object; and

D. Grant such other and further relief as the Court deems just and equitable.

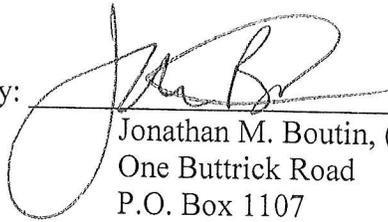
Respectfully Submitted,

TOWN OF GORHAM

By Its Attorneys,
BOUTIN & ALTIERI, P.L.L.C.

Date: June 8, 2018

By:

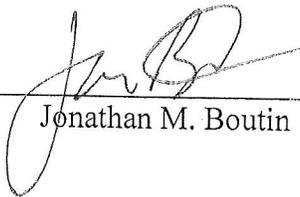


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CERTIFICATE OF SERVICE

I, Jonathan M. Boutin, Esquire, hereby certify that I made service of the foregoing Town of Gorham's Motion to Dismiss Petition for Failure to State a Claim by mailing a copy of the same, postage prepaid, to all counsel of record.

Date: June 8, 2018


Jonathan M. Boutin