**THE STATE OF NEW HAMPSHIRE**

**Coos, County SS: Coos Superior Court**

Case No. 214-2018-cv-00030

Lois and Harry Stearns, et. al

Plaintiffs

v.

The Town of Gorham,

and

The State of New Hampshire

Defendants

**Plaintiffs’ Objection to Town of Gorham’s Motion to Dismiss Petition for Failure to State a Claim**

Plaintiffs object to the Motion to Dismiss Petition filed by the Town of Gorham.

**Status of Case**

**Claims Against the Town of Gorham**

Plaintiffs Complaint asks the Court for a Writ of Mandamus against the Town for its failure to enforce the Town Zoning Ordinance and injunction barring OHRV use of the trailhead and trail in their neighborhood that has ruined the quiet enjoyment of their homes.

**Plaintiffs’ Complaint Alleges Facts Against Defendant Town Entitling Them to a Writ of Mandamus for the Town’s Failure to Enforce Its Zoning Ordinance**

The trailhead and trail in plaintiffs’ neighborhood traverses state highways, a state-owned railroad bed and private property. Complaint, paragraphs 8, 9 and 10.

Plaintiffs’ homes are located in an area of Gorham zoned residential that does not permit the operation of OHRVs. Complaint, paragraphs 32, 33, 34, 35 and 37.

On June 6, 2011, the Town Select Board authorized[[1]](#footnote-2) the state to establish the trailhead and trail in plaintiffs’ neighborhood in violation of the Town Zoning Ordinance. Complaint, paragraph 38.

The Town breached its clear legal duty to enforce its residential Zoning Ordinance entitling plaintiffs to a writ of mandamus. Complaint, paragraph 39.

**Plaintiffs’ Complaint Alleges Facts Against Defendant Town Entitling Them to an Injunction Barring the Nuisance in Their Neighborhood**

The OHRV use of the trailhead and trail in plaintiffs’ neighborhood has substantially and unreasonably interfered with plaintiffs right to the quiet enjoyment of their homes. Complaint, paragraph 41.

The operation of the OHRV trail and trailhead in plaintiffs’ neighborhood exceeds the customary interferences that plaintiffs must suffer in organized society and is an appreciable and tangible interference with their property rights. Complaint, paragraph 42.

The Town has sanctioned and promoted the trailhead and trail in plaintiffs’ neighborhood and that the OHRV use is an actionable nuisance for which plaintiffs have no adequate remedy at law, entitling them to injunctive relief. Complaint, paragraphs 41-44.

**Standard of Review**

The Court must assume that all well pleaded facts and the reasonable inferences drawn from those facts are true and can be proved and the Court will construe those allegations and inferences in the manner most favorable to plaintiffs. Wiebusch, New Hampshire Practice, Section 16.18.

**Memorandum of Law**

**Plaintiffs Are Entitled to a Writ of Mandamus Requiring the Town of Gorham to Enforce Its Residential Zoning Ordinance Against the OHRV Trailhead and Trail in Their Neighborhood**

Mandamus is an extraordinary writ that may be addressed to a public official for failure to perform his clear legal duty if no other remedy is available and adequate. Guarracino v. Beaudry, 114 NH 541 (1978); Brouillard v. Governor and Council, 114 NH 541 (1974).

Plaintiffs homes are located in a Town of Gorham residential zone. They enjoyed that legal protection until the Gorham Select Board, by fiat, decided that the OHRV trailhead and trail could be operated in plaintiffs’ neighborhood. The OHRV trailhead and trail are not permissible uses under the Gorham Zoning Ordinance.

The Select Board willfully and callously violated the integrity of its own Zoning Ordinance to the damage of its citizens under the influence of defendant State and OHRV promoters. Complaint, paragraphs 50, 51, 52 and 53.

Town citizens, including plaintiffs, thought that the residential zoning would protect them but the Zoning Ordinance was ignored. The bad faith of the Select Board, acting under pressure of OHRV promoters, ruined the quiet enjoyment of plaintiffs’ homes.

The Gorham Zoning Ordinance is explicit regarding the duty of the Select Board to enforce the Zoning Ordinance:

“Article VI, Administration, 6.01 Enforcement. It shall be the duty of the Board of Selectmen or their designees to administer this Ordinance.” (emphasis mine).

“6.03, Enforcement. The Board of Selectmen or their designee, upon well founded information of any violation, is hereby authorized to initiate immediate steps for enforcement of this Ordinance. Sanctions, fines or penalties for any violation shall be as provided in RSA 676:17 et seq. as the same may be amended from time to time.”

**Zoning Enforcement Is Not Discretionary**

Article VII, Board of Adjustment, 7.01 Board of Adjustment, provides for a 5- person Board of Adjustment that has the power to grant Special Exception or Variances.

No special exception or variance was sought or granted for the OHRV trailhead or trail in plaintiffs’ residential neighborhood.

The Gorham Zoning Ordinance does *not* grant the Select Board the authority to waive the provisions of the Zoning Ordinance at the behest of or under pressure from OHRV promoters.

Plaintiffs are entitled to a writ of mandamus requiring the Town of Gorham to enforce its Zoning Ordinance.

**The Decision of the Gorham Select Board to Waive Enforcement of its Own Zoning Ordinance at the Expense of Plaintiffs’ Neighborhood Was Motivated by the Political Pressure Exerted by OHRV Promoters and Was Arbitrary and Made in Bad Faith**

Defendant Town argues that its decision to allow OHRVs in a residential neighborhood in violation of the Zoning Ordinance was not a mandatory duty but was an act of “discretion”.

The conduct of the Town Select Board was not a discretionary act. It was a failure of integrity, a failure to enforce a duly adopted Town Zoning Ordinance enacted for the protection of the citizens of the Town.

First, the express language of Zoning Ordinance requires the Select Board to enforce the Ordinance.

Second, the Town excuses its conduct relying on the case Rockhouse Mountain Property Owners Association v. Town of Conway, 127 NH 593 (1986) for the argument that zoning enforcement is discretionary. The Rockhouse case is not a zoning case and has nothing whatever to do with enforcement of zoning laws. The case involved the refusal of the Town of Conway to lay out certain roads in a manner wanted by Rockhouse to enhance the value of its property. The Supreme Court denied the writ of mandamus. The Rockhouse Court, at page 600; “…In any event, the power to reach a reasonable accommodation of private and public interests in any controversial request for layout requires the exercise of a high enough order of discretion to justify legal immunity, even if the decision be regarded as the exercise of an executive or planning function.”

Rockhouse presents facts that are much different than a Select Board arbitrarily deciding to ignore its own Zoning Ordinance.

Other cases cited by the Town to excuse its arbitrary and bad faith conduct are Carrick v. Langtry, 99 NH 251 (1954) and Bois v. City of Manchester, 104 NH 5 (1962).

Carrick is distinguishable on the facts. The case involved a factual dispute about whether the zoning violation was non-conforming use that pre-dated the adoption of the zoning ordinance. There is no such factual dispute in the case at bar. The Gorham Select Board chose to violate its Zoning Ordinance.

Bois involved a City superintendent of buildings who had a complaint of a building code violation regarding the alteration of a building. The Court denied the writ of mandamus because there was no factual basis requiring the building superintendent to act. This is entirely distinguishable from a Select Board choosing to ignore its Zoning Ordinance on facts that indisputably are violations as in the case at bar.

Bois also sets forth the principle that a public official cannot act in bad faith or arbitrarily in enforcement decisions. Bois at page 9: “There is no allegation in the pleading that the defendant Cullity acted in bad faith or arbitrarily….”

Plaintiffs Complaint in the case at bar sets forth detailed allegations of bad faith and arbitrariness. Complaint, at Attorney Fees, Expert Fees and Expenses of Litigation, paragraphs 49, 50, 51, 52 and 53.

The plaintiffs’ claim for attorney fees and expenses is based on the bad faith conduct of the Town acting in collaboration with the defendant State because of pressure from OHRV promoters. The Town chose to ignore the zoning enacted to protect the homes of Town citizens such as plaintiffs to satisfy the demands of people and business entities with no stake whatever in the plaintiffs’ neighborhood.

Plaintiffs are entitled to a writ of mandamus requiring the Town of Gorham to enforce its Zoning Ordinance.

**The Town Excuses Its Bad Faith and Arbitrary Failure to Enforce the Zoning Ordinance Arguing That the Trailhead and Trail Are on State Land**

The defendant Town makes the frivolous and legally unsupported argument, that it cannot enforce its zoning regulations against the state for the use of state owned land. (Motion to Dismiss, paragraph 16)

Chapter 215-A is the enabling statute for the operation of OHRVs in New Hampshire.

RSA 215-A:15, I expressly states:

“With bylaws or ordinances city or town councils and boards of selectmen may regulate the operation of OHRVs within city or town limits, providing they do not conflict with provisions of this chapter.”

This language clearly illustrates the legislative intent that RSA 215-A does not preempt local control over all aspects of trail selection and approval.

The only language found in RSA 215-A that may support the Town’ sweeping claim that it is preempted from enforcing the Zoning Ordinance is RSA 215-A:43, V. This section narrowly provides that state owned rail trails are not subject to the RSA 215-A:43 Evaluation process.[[2]](#footnote-3)

In Town of Lyndeborough v. Boisvert Properties, LLC, 150 NH 814 (2004), the Supreme Court examined the narrow question[[3]](#footnote-4) whether RSA 215-A preempted local control on private lands.

The Lyndeborough Court, at page 819: “… Given that the statute explicitly directs the bureau to consider site requirements, as well as local zoning and planning ordinances, when creating trails on State land, see RSA 215-A:43, II(a)-(cc), finding the chapter to be preemptive concerning private land would strain the bounds of logic. We find it more plausible that the legislature remained silent, not because it intended that private lands should escape review, but because it anticipated that local land use laws would properly fill that void….”

Plaintiffs are entitled to a writ of mandamus requiring the Town of Gorham to enforce its Zoning Ordinance.

**The Plaintiffs’ Nuisance Claim Is Not Time Barred**

The Town complains that plaintiffs’ nuisance claim is time barred because suit should have been filed pursuant to RSA 508:4, I, three years from the June 6, 2011, date the Select Board abdicated its responsibility to it citizens and approved the trailhead and trail.

The nuisance is not a singular event triggered by pusillanimous decision of the Town Select Board to ignore the Town Zoning Ordinance.

The trailhead and trail are an ongoing and incessant nuisance, hour by hour, day by day, week by week and month by month, daylight to dark and beyond during season.

Continuing trespasses and nuisances are not barred by a statute of limitations. Thorndike v. Thorndike, 154 NH 443, 446 (2006). Nordic Inn Condominium Owners’ Association, 151 NH 571, 581 (2002).

**The Town of Gorham Is Guilty of Approving, Sanctioning and Promoting the Nuisance That Has Ruined Plaintiffs’ Quiet Enjoyment of Their Homes**

The tort of nuisance caused by the trailhead and trail in plaintiffs’ neighborhood and its impacts on plaintiffs’ property rights is a distinct issue from the Town Select Board’s failure to enforce its Zoning Ordinance.

The New Hampshire law of nuisance is clear. Morrissey v. Town of Lyme, 162 NH 777 (2011), at page 781:

“’A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another’s property. *Cook v. Sullivan*, 149 NH 774, 829 A.2d 1059 (2003) (quotation omitted). ‘To constitute a nuisance, the defendant’s activity must cause harm that exceeds the customary interferences a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest’. *Dunlop v. Daigle*, 122 NH 295, 298, 444A. 2d 519 (1982). Thus, to survive a motion to dismiss, the petitioners needed to allege sufficient facts to demonstrate that the Town substantially and unreasonably interfered with the use and enjoyment of their property.”

Plaintiffs have alleged the required facts setting forth the tort of nuisance. Complaint, paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 22, 23, 24, 25, 26, 27, 28, 41, 42, 43, and 44.

**Wherefore**

Plaintiffs demand that the Town Motion to Dismiss be denied.

Arthur B. Cunningham

June 15, 2018

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Certificate

I certify that this filing was served of counsel for all parties of record, United States mail, first class, postage prepaid, this day of June, 2018.

June 15, 2018 Arthur B. Cunningham

1. The evidence at trial will show that the OHRV authorization was by vote of the Gorham Select Board. There was no adverse action by the Town Board of Adjustment which plaintiffs could have appealed, contrary to the argument found in paragraph 14 of the Town’s Motion to Dismiss. No member of the public applied to the Town Board of Adjustment for special exception or zoning variance to allow the OHRV trailhead and trail in plaintiffs residentially zoned neighborhood. No hearings were held, no Board of Adjustment Order issued and no appealable record exists upon which plaintiffs could have appealed the violation of the Town residential zoning in plaintiffs’ neighborhood. [↑](#footnote-ref-2)
2. A portion of the OHRV trailhead and trail in plaintiffs’ neighborhood is on a rail trail, but not all. A portion is on private land. The portion of the trail on private land are not exempted from the RSA 215-A-:43 evaluation process. [↑](#footnote-ref-3)
3. Defendant Town argues that the Lyndeborough Court found without deciding that RSA 215-A:43 preempts local control of OHRV trails on state land. (Motion, paragraph 16). The Court made no such finding. The Court examined RSA 215-A, 15 and stated, at page 82, in finding the state arguments that RSA 215-A, 15 bolsters the state preemption arguments unpersuasive, “that RSA 215-A;15 could be understood as an exception to preemption, delegating to towns the ability nonetheless to regulate the operation of OHRVs”. [↑](#footnote-ref-4)