

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS.

Docket No. 214-2018-CV-00030

Lois Stearns, et al.

v.

Town of Gorham, et al.

ORDER on Motion for Partial Summary Judgment

The plaintiffs are thirteen individual property owners who live in Gorham, New Hampshire, who originally brought claims for mandamus (Count I), nuisance (Count II), and inverse condemnation (Count III) against the Town of Gorham (the “Town”) and the State of New Hampshire, acting through the Department of Transportation (“DOT”) and the Department of Natural and Cultural Resources (“DNCR”) (together, the “State”), for damages arising out of the placement of an off-highway recreational vehicle (“OHRV”) trail through the Town, adjacent to the plaintiffs’ properties. Presently before the court is the Town’s motion for partial summary judgment as to Count II, (Index #112), to which the plaintiffs object, (Index #114). The Town filed a Reply thereafter, (Index #116.) Because the court finds that a hearing will not aid in its analysis, the court acts on the basis of the parties’ pleadings and the record before it. *See Super. Ct. Civ. R. 13(b)*. Upon consideration of the evidence, arguments, and applicable law, the court finds and rules as follows.

The State, pursuant to RSA 215-A *et seq.*, is directed to create and maintain a OHRV trail system that is available and accessible to the public for recreational use. (Christopher Gamache Aff., Ex. C ¶ 17.) The Presidential Rail Trail (“PRT”) is a segment of the State’s

more than 1,300 miles of OHRV trails that runs through Gorham. (*Id.* ¶¶ 2, 3.) These trails are overseen by the Bureau of Trails, a division of the DNCR. (*Id.* ¶¶ 1, 2.) After a few years of preliminary discussions, (*see* Letters between the Town and State, Ex. H), the Town in 2011 eventually decided to support the State's addition of the portion of the PRT that is central to the parties' dispute. (Town's Memo. at 1, 3-5.)

In October 2011, the Bureau of Trails formally designated the PRT, a State-owned rail bed in Gorham, as open to public OHRV use. (Gamache Aff. ¶¶ 1, 3, 9.) At the same time, the Bureau of Trails opened a parking lot, located adjacent to U.S. Route 2, to serve as the PRT trailhead. (*Id.* ¶ 9.) Thereafter, in July 2013, DOT and the Department of Safety approved, with the Town's support, the on-highway use of OHRVs along a 2.7-mile segment of Route 2 in Gorham, which enabled OHRV's to travel between the PRT trailhead and local Gorham businesses. (*Id.* ¶¶ 7, 11; Town's Memo. at 4.) However, OHRV use on the PRT and Route 2 is only permitted on a seasonal basis, which runs from about May 23rd to November 1st each year. (*See* Gamache Aff. ¶¶ 9, 11.) It should also be noted that OHRV travelers on Route 2, just like other motorists, must comply with all applicable traffic laws. (*Id.* ¶ 14.)

The plaintiffs each own real property that is located in Gorham next to, or near, the PRT, Route 2, or both. (*See id.* ¶ 4, Ex. A.) The plaintiffs assert that the public use of OHRVs in Gorham since the PFT was opened in 2011 has deprived them, at least to some degree, of the use and enjoyment of their respective properties. (*See, e.g.*, Bruce Neil Aff., Ex. 1; Diane Holmes Aff., Ex. 2; Nancy Neil Aff., Ex. 3; Priscilla Bergeron Aff., Ex. 4; Albert Bergeron Aff., Ex. 5; Sandra Lemire Aff., Ex. 6; Rene Albert Aff., Ex. 7; Michael Pelchat Aff., Ex. 8; Aubrey Albert Aff., Ex. 9; Lois Stearns Aff., Ex. 10.) The plaintiffs claim that the loss of use and enjoyment of their properties has been caused by the invasion on said

properties of noise, exhaust fumes, and/or dust generated by heavy OHRV use along the PRT and Route 2. (*See, e.g.*, Bruce Neil Aff.; Diane Holmes Aff.; Nancy Neil Aff.; Priscilla Bergeron Aff.; Albert Bergeron Aff.; Sandra Lemire Aff.; Rene Albert Aff.; Michael Pelchat Aff.; Aubrey Albert Aff.; Lois Stearns Aff.) The plaintiffs also complained of unlawful, discourteous, and/or intimidating behavior by OHRV users. (*See, e.g.*, Lois Stearns Dep. at 10:21–13:15; Sandy Lemire Dep. at 23:20–24:19; Diane Holmes Dep. at 25:20–27:20; Michael Pelchat Dep. at 19:21–20:18; Bruce Neil Dep. at 20:7–12.)

As a result of continued opposition to the Route 2 trailhead and OHRV use in general, on February 4, 2020, the Town and the State held a public hearing on a proposed alternative trailhead and parking lot located adjacent to State Route 16 in Gorham. (Pl.’s Obj. at 7; *see* Diane Holmes Aff.) In September 2020, the new State Route 16 trail head and parking lot opened. (Pl.’s Obj. at 7–8; *see* Diane Holmes Aff.; Michael Pelchat Aff.)

The Town now moves for summary judgment as to Count II, arguing that the plaintiffs’ nuisance claim is barred by the doctrine of discretionary immunity.¹ (Town’s Mot. Summ. J. ¶¶ 3, 4; Town’s Memo at 6–9.) Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” RSA 491:8-a, III; *see Super. Ct. Civ. R. 12(g)*. “An issue of fact is ‘material’ for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law.” *VanDeMark v. McDonald’s Corp.*, 153 N.H. 753, 756 (2006) (cleaned up). The moving party bears the burden of proving its entitlement to summary judgment. *Concord Grp. Ins. Cos. v.*

¹ The doctrine is also referred to as discretionary function immunity.

Sleeper, 135 N.H. 67, 69 (1991). In evaluating a motion for summary judgment, the court considers “the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.” *Id.*

Generally, under the discretion immunity doctrine, “[t]he State and its agencies are immune from liability for conduct that involves ‘the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of the state or any state agency or a state officer, employee, or official acting within the scope of his office or employment.’” *In re N.H. Dep’t of Transp.*, 159 N.H. 72, 74 (2009) (quoting RSA 541-B:19, I(c)). “Discretionary function immunity is premised upon the notion that certain essential, fundamental activities of government must remain immune from tort liability so that our government can govern.” *Ford v. N.H. Dep’t of Transp.*, 163 N.H. 284, 294–95 (2012) (cleaned up). “[I]t seeks to limit judicial interference with legislative and executive decision-making because to accept a jury’s verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations.” *Tarbell Adm’r, Inc. v. City of Concord*, 157 N.H. 678, 684 (2008) (cleaned up).

“In resolving discretionary immunity questions, [New Hampshire courts] distinguish between planning or discretionary functions and functions that are purely ministerial.” *Maryea v. Velardi*, 168 N.H. 633, 638 (2016) (citation omitted). “Planning or discretionary functions are functions that are characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.” *Id.* (cleaned up). “Ministerial functions, on the

other hand, are functions that are absolute, certain and imperative, involving merely the execution of a set task.” *Id.* (cleaned up).

The Town argues that the “Plaintiffs’ complaint is centered around the Town’s decision to support the State’s implementation of the statutorily proscribed and/or authorized implementation of an OHRV trail system or to seek NHDOT approval for OHRV travel on Rt. 2” and that this is exactly the type of activity protected by the discretionary immunity doctrine. (Town’s Mot. Summ. J. ¶¶ 3, 4; Town’s Memo at 6–9.) The court agrees.

“[I]n [the Supreme Court’s] analysis of the statutory discretionary function immunity for state agencies [the Supreme Court] drew a distinction between the decision to place or not to place a guardrail on a roadway, a protected discretionary decision, and the construction of that guardrail, an act of implementation that neither required nor contained any discretionary decision-making.” *Maryea*, 168 N.H. at 638 (cleaned up). Here, the Town’s decision to support the implementation of the PRT trail system in Gorham is akin to a decision whether to place a guardrail on a roadway, rather than the mere act of implantation in constructing the guardrail. *See id.*; *DiFruscia v. N.H. Dept. of Pub. Works & Highways*, 136 N.H. 202, 205 (1992). Such decisions “rest on the exercise of judgment and discretion and represent planning and policymaking. They fit squarely within the category of discretionary functions entitled to . . . immunity.” *See Sorenson v. City of Manchester*, 136 N.H. 692, 694, 621 A.2d 438 (1993); *see also Ford*, 163 N.H. at 295.

However, the plaintiffs argue that the “opening of the Route 16 trailhead and parking lot has completely ended any need for the [Route 2] trailhead, trails, and parking lot.” (Pl.’s Obj. at 8.) Yet, the opening of the State Route 16 trailhead and

parking lot is wholly inconsequential to the issue of discretionary immunity because “the discretionary immunity analysis does not concern the defendant’s duty to the plaintiff, but the threshold question of whether the defendant’s allegedly negligent act or omission is the type of discretionary conduct that discretionary function immunity protects.” *Maryea*, 168 N.H. at 639.

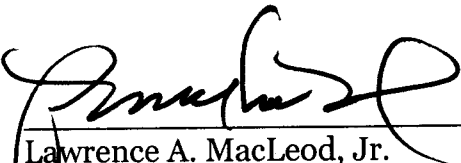
Thus, the court concludes that the Town’s decision to support the implementation of the PRT involved “weighing alternatives and making choices with respect to public policy,” such that the decision is protected by the discretionary immunity doctrine. *See Opinion of the Justices*, 126 N.H. 554, 563 (1985). This conclusion is consistent with the state of discretionary immunity jurisprudence in New Hampshire. *See, e.g., Appeal of N.H. Dep’t of Transp.*, 159 N.H. at 75 (finding that the DOT’s detour plan was protected by discretionary immunity because it involved weighing alternatives and making choices with respect to public policy); *Bergeron v. City of Manchester*, 140 N.H. 417, 422 (1995) (finding that the State’s decision as to whether to install a flashing beacon at a certain intersection is discretionary function entitled to immunity); *Sorenson*, 136 N.H. at 694 (finding that decisions regarding traffic control and parking regulations are discretionary functions entitled to immunity); *DiFruscia*, 136 N.H. at 205 (“We do not doubt that the decision to place or not to place a guardrail on a roadway is conduct characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning.” (quotation omitted)).²

² Because the Town’s motion for partial summary judgment is granted on discretionary immunity grounds, the court declines to address the Town’s remaining arguments.

Lastly, the court apologizes to the parties and their lawyers for the delay in issuing this order. Other demands on the undersigned justice's time coupled with an unforeseen medical emergency and extended recovery thereafter thwarted efforts to produce this order in a more timely fashion.

For the foregoing reasons, the Town's partial motion for summary judgment as to Count II is GRANTED.

SO ORDERED, this 8th day of April 2021.


Lawrence A. MacLeod, Jr.
Presiding Justice

CLERK'S NOTICE DATE

4-8-21

CC: A. Cunningham
C. Wilson
A. Edwards
A. Greenstein
J. Boutin