STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS. Docket No. 214-2018-CV-30

Louis Stearns, et al.

v.

Town of Gorham, et al.

ORDER ON THE MERITS

The plaintiffs, residents and homeowners in Gorham, New Hampshire, brought this case against the defendants, the State of New Hampshire—specifically, the Department of Transportation ("NHDOT") and the Department of Natural and Cultural Resources ("DNCR")—and the Town of Gorham (the "Town"). The only claim before the court is the plaintiffs' inverse condemnation claim, where the plaintiffs allege that the opening of the off-highway recreational vehicle ("OHRV") trails in Gorham is an unconstitutional taking of their respective properties. The court attended a view of the properties at issue and the surrounding areas of the OHRV trail on October 19, 2021. It then conducted a three-day bench trial on October 20–22, 2021, during which it took evidence as to the merits of the plaintiffs' inverse condemnation claims. During the trial, the court heard testimony from the various plaintiffs, as well as several state and city actors, including Christopher Gamache, the former Chief of DNCR's Bureau of Trails; William Lambert, the Administrator of NHDOT's Bureau of Traffic; Clinton Savage, DNCR's district supervisor of the OHRV trails in Gorham; PJ Cyr, the former Chief of the Gorham Police Department; and Paul Robitaille, a resident of, and former selectman for, the Town. The court also heard testimony from an expert, Jonathan Evans, who was

the Noise Program Manager of NHDOT. For the reasons stated in this order, the court finds and rules as follows.

The plaintiffs have all lived in Gorham, New Hampshire since at least 2011 and one plaintiff, Sandra Lemiere, has lived in Gorham her entire life. By way of providing an overview of the layout of Gorham for the purposes of this order, U.S. Route 2, also known as Lancaster Road, is one of two main roads running through the Town, serving as a major east-west highway in northern New England. The second main road is U.S. Rt. 16, which is also known as Main Street. The plaintiffs' homes are either located along, or are in close proximity to, Route 2. The Presidential Rail Trail (the "PRT") is part of a larger network of recreational trails operated by the State and runs just north of Route 2, abutting several of the plaintiffs' properties.

In terms of their geographic locations, the plaintiffs' homes are situated in three groups or locations in Gorham. The first group consists of plaintiffs whose homes do not abut the PRT but are located along Route 2. The plaintiffs that fall into this group are Diane Holmes and Michael Pelchat, who are married and live at the same address; and Sandra Lemire. (*See* Defs.' Ex. A-7.) The second group consist of the plaintiffs whose homes abut the PRT but are not located directly on Route 2, which includes Audrey and Rene Albert; Priscilla and Albert Bergeron; Mark and Heather Malia; and Lois Stearns.[1] (*Id.*) The Alberts, Bergerons, and Malias are separated from Route 2 by a parking lot (the "Route 2 Parking Lot") that serves as one entrance to the PRT. The third group is plaintiffs Bruce and Nancy Neil, whose home abuts both Route 2 and the PRT. (*Id.*)

[1] The late husband of Lois Stearns, Harry "Court" Stearns, was an initial party to the case but, since the beginning of the case, has passed away and is no longer a party.

Turning to the background of OHRV use in Gorham, when the PRT opened for recreational use in the 1990s, OHRVs were not permitted on the trail. That restriction was lifted in 2011, when the Town approved the DNCR's plans to open the PRT to public OHRV use and permitted OHRV trailers to park in the Route 2 Parking Lot. (Pls.' Ex. 5Q.) Around the same time, the defendants permitted the use of OHRVs on Smitty's Trail, also known as Corridor 19. This expanded access for OHRVs, permitting travel from the Route 2 Parking Lot, eastward on the PRT, and then north along Smitty's Trail. (Defs.' Ex. A-4 (noting Smitty's Trail in purple).) When the Town was in the process of approving OHRV use, it also approved a Town noise ordinance that prohibits the use of engine brakes by commercial trucks as they enter the Town, in an effort to limit noise from trucks traveling along Route 2. (*Compare* Pls.' Ex. 5P, *with* Pls.' Ex. 5Q (showing that the Town fielded input from residents regarding expanding permitted use of OHRVs in Gorham at the same time it fielded input about the noise ordinance).)

In 2013, NHDOT further expanded the permitted use of OHRVs in Gorham by allowing them to travel on the portion of Route 2 that runs from the Route 2 Parking Lot, traveling east past the homes of Diane Holmes, Michael Pelchat, and Sandra Lemire, to the point where Route 2 intersects with U.S. Route 16. (Defs.' Ex. A-4.) The State limits OHRVs use on the PRT to the period between May 23 and November 1, starting a half hour before sunrise and ending a half hour after sunset.

In 2020, NHDOT permitted OHRV use on Route 16 and added a new parking area off Route 16. The NHDOT also added a trail connector from the new parking area to access the PRT. In 2021, the NHDOT closed the Route 2 Parking Lot but only for OHRV trailering purposes.

The plaintiffs brought this case against the defendants on March 22, 2018, alleging: (1) mandamus against the Town (Count I); (2) nuisance against the Town and the State (Count II); and (3) inverse condemnation against the Town and the State (Count III). (Index #1.) On October 15, 2018, the court granted the State's motion to dismiss with respect to Count II, denied the motion with respect to Count III; and granted the Town's motion to dismiss with respect to Count I, but denied its motion with respect to Counts II and III. (Index #40.) On April 8, 2021, the court granted the Town's motion for partial summary judgement as to Count II. (Index #117.) The only remaining claim is Count III: inverse condemnation against the Town and the State. Shortly before the start of the bench trial, the court limited the issue presented at trial to whether the defendants' involvement in permitting OHRV use along the PRT and Route 2 constituted inverse condemnation.[2] (Index #159.)

At the trial, the court heard evidence from the plaintiffs about their experience since the defendants permitted the use of OHRVs through the Town. At the close of the plaintiffs' case, the defendants moved for a directed verdict as to plaintiffs Lois Stearns, Albert and Priscilla Bergeron, and Heather and Mark Malia, none of whom testified at trial.[3] (*See* Index #164.) The defendants argued that, because these plaintiffs did not present evidence at trial as to their specific claim for inverse condemnation, they have not satisfied their burden. The court granted the motion and, accordingly, will only address the remaining plaintiffs' claims for inverse condemnation. (*See* R., Day 3.) The

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[2] In the court's order shortly before trial, it explained that there is no right to a jury trial on the issue of whether the government's actions constitute inverse condemnation, reserving the calculation of damages for a jury. (Index #159 (citing *Whelton v. State*, 106 N.H. 362, 363 (1965); *V.S.H. Realty, Inc. v. City of Manchester*, 123 N.H. 505, 506 (1983)).)

[3] Mark Malia, since the start of the case, has also passed away and his wife, Heather, did not present any evidence with respect to their claim for inverse condemnation at their home.

remaining plaintiffs are: Diane Holmes and Michael Pelchat; Sandra Lemire; Audrey and Rene Albert; and Nancy and Bruce Neil.

The plaintiffs maintain that the defendants' actions permitting OHRV use on the PRT, Route 2 Parking Lot, and Route 2 constituted inverse condemnation because of the excessive noise, dust, and fumes that OHRV use has brought to their neighborhood. The defendants do not dispute that they, by a combination of state and municipal actors, permitted the use of OHRVs in Gorham. Rather, they maintain that the government action did not rise to the level of an unconstitutional taking.

In *Sundell v. Town of New London*, 119 N.H. 839, 839 (1979), the New Hampshire Supreme Court overruled the holding in *Ferguson v. Keene*, 108 N.H. 409, 412 (1968), which held that that compensation for an inverse condemnation claim stemming from airplane noise was limited to recovery for "direct and immediate interference" caused by "frequent low-level overflights." The Court in *Ferguson* required a showing of "physical invasion of the plaintiff[s'] airspace by overflights" in order for the government's actions to give rise to an unconstitutional taking. *Sundell*, 119 N.H. 839, 845 (1979). However, the Court in *Sundell* rejected the requirement that there be a physical taking, concluding that "property refers to the right to use and enjoy a thing, and is not limited to the thing itself." *Sundell v. Town of New London*, 119 N.H. 839, 845 (1979) (quotations omitted) (citing *Eaton v. Bos., C. & M.R.R.*, 51 N.H. 504, 511 (1872)). Accordingly, the proper inquiry as to whether a government action constitutes inverse condemnation is whether that action "substantially interferes with, or deprives a person of, the use of his property in whole or in part, . . . even if the land itself is not taken." *Id. See also Allianz Glob. Risks U.S. Ins. Co. v. State*, 161 N.H. 121, 124 (2010) ("Inverse condemnation occurs when a governmental body takes property in fact but

does not formally exercise the power of eminent domain. Inverse condemnation may be effected through either physical act or regulation."); 27 Am. Jur. 2d *Eminent Domain* § 688 (explaining that, in an action for inverse condemnation, "the owner does not need to show a physical invasion that damages the property, but only an unlawful interference with the right to enjoy the land").

Therefore, noise from OHRV use in Gorham, even though it is not a physical taking, can amount to inverse condemnation, so long as the interference with the plaintiffs' property meets two requirements. First, the interference or deprivation must be the result of the government's intentional invasion of a protected property interest *or* be "the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Allianz Glob. Risks U.S. Ins. Co.*, 161 N.H. at 124. Second, the government's interference with or deprivation of the property right must be "substantial and frequent enough to rise to the level of a taking." *Id.* Following these requirements, the defendants allege that: (1) any interference with the plaintiffs' use of their property caused by permitting OHRV traffic in Gorham was not foreseeable, nor was this interference caused by government action; and (2) the plaintiffs failed to establish that the interference was substantial or frequent enough to amount to an unconstitutional taking.

I. Plaintiffs' Grievances being a Direct, Natural, or Probable Result of the Defendants' Actions

The plaintiffs maintain that the grievances they express are a direct, natural, or probable result of the defendants' decision to permit OHRV use in Gorham. The defendants generally argue that the interference with the plaintiffs' use and enjoyment of their land was merely an incidental or consequential injury and not caused by

government action. The court agrees with the plaintiffs for three reasons: (1) the interference with the plaintiffs' properties was probable or, seemingly, intentional; (2) the interference was a direct result of the defendants' actions; and (3) the interference was not merely an incidental injury of the defendants' actions.

First, regarding the foreseeability of the defendants' interference with the plaintiffs' property, although the plaintiffs do not contest that Route 2 is a busy highway, it is clear that the defendants' purpose for permitting OHRV use was to increase revenue in Gorham and attract OHRV riders to the area. Chris Gamache testified that allowing OHRVs to access the PRT was the only major option to permit riders to access businesses in Gorham. (*See* R., Day 1 Gamache Test.) Additionally, the defendants certainly approved the use of OHRVs in order to generate more revenue for local businesses. (*See* Pls. Ex. 5Q (discussing that the impact of opening the PRT to OHRVs would bring riders to the area, anticipating that it would be a "big revenue source for the businesses in town").) Given that the intent of approving OHRV use was to generate revenue, the amount of OHRV traffic in Gorham was foreseeable to the defendants and, as the court sees it, increased traffic was their goal and intention.

Second, the defendants' actions directly caused noise to interfere with plaintiffs' use and enjoyment of their land because, by permitting OHRV use in Gorham, the defendants welcomed in a great deal of traffic to the environment surrounding the plaintiffs' homes that would not have existed otherwise. The defendants introduced the testimony and study of their noise expert, Jonathan Edwards, at trial. Evans provided ample data about the noise levels in Gorham. (Defs.' Ex. J.) Tables 2 and 6 in Evans' report show the average peaks and lows of noise, as taken on six days, both before and after the OHRV season. (*Id.*) The data in those tables show that, on average, the noise

levels of the areas surrounding the plaintiffs did not exceed 66 decibels,[4] which is the national- and state-recognized standard for the maximum allowable level of noise in a residential area. (*See* R., Day 3. Edwards Test.)

Yet, Jonathan Evans' report and testimony did not account for, as explained and demonstrated by the plaintiffs, the fact that OHRVs frequently travel in large groups and that, although the OHRV use is steady throughout the season, some weekends are busier than others. (*See, e.g.*, Pls.' Ex. 4A (showing groups of OHRVs riding together).) Table 5 of Edwards' report provided more specific data that more closely resembles the plaintiffs' interference. (Defs.' Ex. J.) That table indicates that two ATVs have the same L_{max} measurement as one heavy truck, meaning the highest sound level generated by two ATVs is the same as the highest sound level generated by one truck. (*Id.*) However, as Evans testified, he only measured 2 ATVs, instead of a group of ATVs, and did not conduct his study during some of the OHRV festivals. For example, at the 2016 "Jericho Event," as many as 4,173 ATVs were measured in Gorham in a single week. (Pls.' Ex. 10.) This event is just one of the festivals that takes place every year. Based on Evans' report, that maximum volume of these ATVs during that week would be the equivalent of roughly 2,000 heavy trucks at their maximum volume, all of which pass by the plaintiffs' respective homes. (Defs.' Ex. J.) Other counts of OHRV traffic in 2016 were not as high, but still showed that as many as 999 OHRVs drove through Gorham during one week. (*Id.*) The plaintiffs' more recent counts in 2021 show that as many as 184 OHRVs would pass by on a single summer day. (*See* R., Day 2 Audrey Albert Test.) Taken together, the

[4] As discussed at trial, there were two days in the study that produced a decibel level exceeding the recommended 66 decibels in a residential area. Jonathan Edwards explained that the primary cause of that increase, as compared to other days, was that those days were particularly windy, which will increase the level of noise. (*See* R., Day 3 Edwards Test.)

counts of OHRVs show that the plaintiffs have experienced a significant increase in traffic, irrespective of Route 2 being a busy highway.

Moreover, the defendants' traffic expert, William Lambert, produced a report, explaining that trucks do not make up majority of the traffic along Route 2. (Defs.' Ex. D.) Rather, in June 2017, heavy trucks only made up 6.1% of the total traffic and these trucks made up even less of a percentage of the traffic when measured over the span of an entire year in 2017 and 2016. (*Id.*) Accordingly, while Route 2 experiences truck traffic, the evidence presented demonstrated that the truck traffic does not make up a majority of the traffic in Gorham and, as a result of the defendants' actions, they exponentially increased the overall traffic level.

The plaintiffs also testified that the level of traffic has decreased since the start of the lawsuit. However, the fact remains that, at the time the plaintiffs brought suit in 2018, they were enduring a high volume of OHRV traffic every season since the defendants permitted OHRV use in Gorham, *in addition to* the high level of traffic in Gorham. Therefore, the court is not persuaded by the defendants' arguments that, given the preexisting high level of traffic on Route 2, the plaintiffs' grievances are not directly caused by the defendants' actions. Overall, the defendants' argument does not take into account the incredibly high volume of OHRV traffic, which can generate a maximum volume equivalent to the noise level of heavy trucks, which at times flooded Gorham after their decision to permit OHRV use in the Town.

Finally, the defendants contend that the grievances expressed by the plaintiffs stem from actions of private individuals, not of the government, and, therefore, are merely an indirect consequence of the defendants' decision. Specifically, the defendants point to the evidence at trial that many of the OHRV riders urinated on plaintiffs'

respective properties, blasted music, sped through Route 2 and the PRT despite posted speed limits, or otherwise exhibited indecent and obnoxious behaviors. However, as the court has already stated, the purpose of the defendants' decision to open the PRT and Route 2 to OHRV use was to attract riders to the area, without sufficient plans, or indeed any plan, in place to police rider behavior or even providing restroom facilities for riders. Simply put, the plaintiffs would not have endured the number of riders, or their behavior, if the defendants had not authorized OHRVs to use the PRT and Route 2. *See St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) ("In order to establish causation, a plaintiff must show that in the ordinary course of events, absent government action, plaintiffs would not have suffered the injury.").

Based on this evidence, the court concludes that the interference with the plaintiffs' property, meaning the overwhelming amount of OHRV traffic, and the associated noise that traffic generates, in Gorham was "the direct, natural, or probable result of [the] authorized" OHRV use. *Allianz Glob. Risks U.S. Ins. Co.*, 161 N.H. at 124. Therefore, the plaintiffs have satisfied their first burden required to show the government's actions gave rise to an unconstitutional taking.

II. Substantial and Frequent Interference

The plaintiffs presented evidence that the interference with their respective properties satisfies the second requirement necessary for a government action to amount to an unconstitutional taking, which requires that the interference is "substantial and frequent enough to rise to the level of a taking." *Id.*

a. Frequent Interference

The defendants argue that, because the OHRV season only lasts for five months out of the year and use is effectively limited to daylight hours, the plaintiffs have failed

to meet their burden as to frequency. But, as the law in this state instructs, the interference need not occur constantly. The *Sundell* case is instructive. 119 N.H. at 843. In that case, the New Hampshire Supreme Court noted that the interference at issue was that the "defendant's effluent-spawned algae invaded [the plaintiffs'] waterspaces causing substantial interference with plaintiffs' use of this space for bathing, swimming, boating and other recreational purposes." *Id.* at 846.

Crucially, the interference in *Sundell* resulted from the defendants' dumping of chemicals, meaning that the plaintiffs could not swim in or otherwise enjoy the lake that their properties accessed. *Id.* By finding that the plaintiffs' inability to use or enjoy their lakefronts amounted to inverse condemnation, the New Hampshire Supreme Court imposed no requirement that an interference be constant or occur year-round and, nevertheless, concluded the government's actions constituted inverse condemnation. *Id.*

The defendants also maintain that, because they have mitigated the noise from OHRVs by changing the Route 2 Parking Lot and trailhead to the PRT, there is no longer an interference with the plaintiffs' property. However, the Supreme Court did not impose such requirement and even noted that the interference in *Sundell* was not necessarily permanent, but still constituted inverse condemnation. *See id.* at 843 (noting that if the discharge were stopped, the lake would clear itself in about ten years).

Moreover, since the defendants authorized the use of OHRVs on Route 2 and the PRT, the OHRV-induced traffic is not merely a "rare event." *Cf. Allianz Glob. Risks U.S. Ins. Co*, 161 N.H. at 125 (reasoning that the plaintiffs' inverse condemnation action failed because they "produced no evidence that the circumstances which caused the flood damage are inevitably recurring" and "the 2006 storm was a rare event"). "Generally speaking, property may be taken by the invasion of water where subjected to

intermittent, but *inevitably recurring*, inundation due to authorized Government action." *Id.* at 124 (emphasis added). It is inevitable that, each year from May through November, the plaintiffs will hear the constant OHRV traffic inundating their homes during the day. Accordingly, the court interprets the New Hampshire case law to, at the very least, be indicative of the strong preference to protect an individual's home from interference by government action, even if that interference is seasonal, so long as the interference is recurring and inevitable. Here, the plaintiffs testified credibly that the OHRV traffic occurs every year from May until November, which is sufficiently frequent to amount to inverse condemnation.

b. Substantial Interference

The remaining issue is whether the noise produced by the OHRV traffic is substantial enough to constitute inverse condemnation. *Allianz Glob. Risks U.S. Ins. Co.*, 161 N.H. at 124. As previously stated, the plaintiffs fall into three groups of geographical categories. With *Sundell* in mind, the court will use these categories in order to address the testimony and evidence presented at trial regarding whether the interference with the plaintiffs' quiet enjoyment of their respective homes is substantial and amounting to an unconstitutional taking.

i. Group 1: Homes Located Along Route 2 and Do Not Abut the PRT (Holmes/Pelchat and Lemire)

Diane Holmes, Michael Pelchat, and Sandra Lemire all live off Route 2 and each testified credibly that the noise emanating from the OHRVs is substantial. Pelchat reported that he cannot hold a conversation outside. (*See* R., Day 1.) Holmes stated that permitting the use of OHRVs in Gorham has "destroyed a lifetime of happiness" (*Id.* at 3:24.) She also testified that she raised her complaints to the Gorham Police

Department but concluded that most, if not all, of the complaints remain unaddressed because, by the time the police arrive at the scene of the complaint, the offending OHRV rider is gone. The plaintiffs along Route 2 also testified regarding the dust levels generated by the OHRVs. Specifically, Sandra Lemire testified that she can see the dust coming over the trees. (*See* R., Day 2.)

The defendants broadly assert that these plaintiffs presented no evidence that the noise coming from the OHRVs interferes with the plaintiffs' use of their homes. However, based on the evidence, all three plaintiffs on Route 2, in addition to other evidence presented about the sheer number of OHRVs along Route 2, indicate that the traffic levels are substantial enough to make living in their home unbearable. *See Ferguson*, 108 N.H. at 413 (Grimes, J., dissenting) (finding facts were sufficient to state a claim for inverse condemnation where the plaintiffs, among other grievances, expressed that "the noise from the planes . . . ma[d]e such a great amount of noise that it is impossible for the people in the house to converse or talk on the telephone" and there was "no peace or quiet in their home and . . . life has become unbearable because of said noise"), *overruled by Sundell*, 119 N.H. at 839; *Argent v. United States*, 124 F.3d 1277, 1282 (Fed. Cir. 1997) (finding that the trial court erred in granting summary judgment when the plaintiffs "allege[d] that these flights are so noisy and so disruptive that they destroy, at least in part, the [plaintiffs'] ability to use and enjoy their property . . . even when the aircraft do[es] not fly directly over their land").

While Route 2 is a busy highway, the level of traffic from OHRVs has well exceeded any level of traffic present before the defendants permitted OHRV use in Gorham. *See Anchorage v. Sandberg*, 861 P.2d 554, 558 (Alaska 1993) ("Government actions become 'takings' under principles of inverse condemnation when a private land

owner is forced to bear an unreasonable burden as a result of the government's exercise of power in the public interest."). Given that the increase in traffic effectively destroyed the plaintiffs' enjoyment of their homes, the defendants' actions permitting OHRV traffic along Route 2 created a substantial interference with the Holmes/Pelchat and Lemire homes, amounting to an unconstitutional taking.

ii. Group 2: Home Abutting the PRT But Not Route 2 (Albert)

The second group, after the court granted the defendants' motion for directed verdict, consists only of the Alberts' home. The Alberts live just north of the Route 2 Parking Lot, which leads onto the PRT. Their main concern was the noise coming from the parking lot and rider behavior. Specifically, they presented a video depicting the noise coming from the parking lot and Rene Albert testified persuasively that the noise was tremendous. (Pls.' Ex. 7A; R., Day 2.) Audrey Albert went into more detail about the riders' behavior, stating that, on several occasions, OHRV riders would urinate and defecate near her property line and the police would not be able to apprehend the riders, meaning the indecent behavior continued. Even since the parking lot has closed, Mrs. Albert explained that the rail trail acts like a tunnel and they hear the noise from the OHRVs as riders travel through the PRT and up to Corridor 19. When the Alberts joined this lawsuit in 2018, the Route 2 Parking Lot was still being used for loading and unloading OHRVs and, as shown in their video, the OHRV riders would, starting early in the morning, park and begin revving their engines and making noise. (Pls.' Ex. 7A.)

The defendants, again focusing on the mitigation efforts, contend that the noise the Alberts experience is a mere annoyance, isolated to a few instances. However, the Alberts testified convincingly that the noise is tremendous and that they still hear noise from the OHRVs every day during the OHRV season. It is clear that they, like the first

group along Route 2, would not be enduring the noise, nor the inappropriate behavior by the riders, if the defendants had not permitted OHRV use in Gorham. The Alberts' situation is similar to that experienced by the plaintiffs in *Sundell*, where "foul odors caused by the algae blooms, together with dead fish cast ashore, drifted across plaintiffs' upland, diminishing their enjoyment of [their land]." *Sundell*, 119 N.H. at 846. The primary focus in that case was that the plaintiffs no longer enjoyed the use of their property from the smell of the toxins in the lake as well as the "defendant's effluent-spawned algae," which amounted to an unconstitutional taking. *Id.* The Alberts are not merely alleging that the defendants have compromised their living situation, or made it annoying. *Cf. Morrissey v. Town of Lyme*, 162 N.H. 777, 783 (2011) (third and fourth brackets in original) (concluding there was no unconstitutional taking where the plaintiffs "[m]erely alleg[ed] that the Town lowered the water level so as to 'compromis[e] [their] access to water'"); *Argent*, 124 F.3d at 1279 (finding no unconstitutional taking where one group of plaintiffs said flights above their property were an "annoyance but tolerable"). Rather, the Alberts, like the *Sundell* plaintiffs, credibly described the ways in which the defendants made the environment around their house intolerable. Following the precedent in *Sundell*, the defendants' decision to permit OHRVs in Gorham substantially interfered with the Alberts' enjoyment of their home amounts to an unconstitutional taking.

iii. Group 3: Home Abutting Route 2 and the PRT (Neil)

With respect to the third group, the Neils, who abut both Route 2 and the PRT, the defendants claim that the plaintiffs' grievances are the result of "heightened expectations" of a peaceful existence. (Defs.' Post-Trial Mem. 20.) Yet, the defendants simultaneously recognize that Nancy Neil said she cannot eat meals in her backyard, nor

can she host family gatherings because of the noise, dust, and fumes. Bruce Neil testified that the traffic, and, consequently, the noise has become "unbearable." (R., Day 2 Bruce Neil Test. at 1:52.) Mrs. Neil said her home has become miserable. (*See* R., Day 2.) The court finds the Neils' testimony to be believable and persuasive.

The dissent in *Ferguson* was persuaded that there was an unconstitutional taking because the plaintiffs could not talk inside their house and that living in their house had become "unbearable" because of the noise of planes. *Ferguson*, 108 N.H. at 413 (Grimes, J., dissenting), *overruled by Sundell*, 119 N.H. at 839. It has long been the case in this state that a property owners' "right to use and enjoy" their property means that they should not be put in an unbearable living situation, including that they should not be forced to endure a surrounding environment of noise, dust, and fumes without compensation. *Sundell*, 119 N.H. at 845; *see Brown v. United States*, 73 F.3d 1100, 1104 (Fed. Cir. 1996) (brackets in original) ("[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."). However, with respect to the Neils, the defendants have created an unbearable environment by permitting OHRV use in Gorham, which amounts to a substantial interference with the use and enjoyment of their property. The court concludes that, like the other plaintiffs, the defendants' decisions in Gorham that created an unbearable environment is an unconstitutional taking of the Neils' home.

CONCLUSION

In conclusion, the defendants' decision to permit OHRV use in Gorham constitutes an unconstitutional taking of the plaintiffs' properties by inverse condemnation, pursuant to which each plaintiff homeowner is entitled to just compensation as damages. The court's findings of fact and rulings of law are set forth

in narrative form in this order. *See Harrington v. Town of Warner*, 152 N.H. 74, 86 (2005). Insofar as the parties' requests for findings of fact and rulings of law are consistent with this order, they are granted; otherwise they are denied or determined to be unnecessary in the determination of this matter.

SO ORDERED, this 15th day of February 2022.

Lawrence A. MacLeod, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/15/2022