STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COOS, SS. Docket No. 18-CV-030

Harry and Lois Stearns, et al.

v.

Town of Gorham &
State of New Hampshire

ORDER

The plaintiffs are thirteen individual property owners that reside in Gorham, New Hampshire, who have brought claims of 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 plaintiffs' properties. The plaintiffs now request a preliminary injunction against the Town and the State to cease operation of the OHRV trail in their neighborhood. The State and the Town have also each filed separate motions to dismiss the complaint. Upon consideration of the parties' arguments, pleadings, and the applicable law, the court finds and rules as follows.

Factual Background

For purposes of the present motions, the court assumes as true the following facts taken from the plaintiffs' complaint. The Town contains a segment of the State's OHRV trail system, which is managed by the State through DNCR. In the Town, portions of the OHRV trail are situated on a State-owned abandoned rail bed and on Route 2, a public

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CC: Atty's Cunningham; Fredericks Cook; Boutin; Wilson; Greenstein Edwards; Jepsen

highway. The State, through DOT, authorized OHRV's to travel on portions of public highways as part of the trail system. OHRV's use Route 2 to access the trails on the abandoned rail beds, which leads to trails traversing across privately-owned properties.

The plaintiffs own homes that lie adjacent to the OHRV trails on the abandoned rail bed and Route 2. As a result of the placement of the OHRV trails near plaintiffs' properties, they have experienced a "high volume of OHRV usage, reckless operation, speeding, illegal after hours use, noise, noxious exhaust fumes, dust, public urination, litter and obnoxious and threatening behavior of trail users[.]" (Compl. ¶ 13.) The plaintiffs' properties are located within feet of the trail and so they cannot enjoy the quiet use and enjoyment of their yards. They must keep their windows closed in order to escape the significant noise and dust caused by use of the OHRV trail. Many OHRV users also ignore posted speed limit signs and "race" over speed bumps, ignoring signs to "respect our neighbors." (Id. at ¶ 25.) Some plaintiffs have had personal experiences with OHRV users trespassing and urinating on their yards, or acting in a threatening way towards them. (Id. at ¶¶ 23–24.)

Data compiled from 2016 showed heavy use of the OHRV trail system, particularly during the summer months. On busy weeks during the summer, the trail system saw as many as 4,000 ATV's using the trails, with an average daily use of 290 ATV's during July and August 2016. (Id. at ¶¶ 15, 18.) Between 2015 and 2017, the Gorham Police Department logged over 500 complaints related to use of the OHRV trail and conducted over 270 stops of OHRV trail users. (Id. at ¶¶ 19–21.)

The plaintiffs filed a complaint against the defendants on March 22, 2018, bringing claims for mandamus (Count I), nuisance (Count II), and inverse condemnation (Count III), alleging generally that use of the OHRV trail in their

neighborhood has substantially and unreasonably interfered with their right to quiet enjoyment of their homes. The plaintiffs also seek preliminary and permanent injunctive relief. Gorham Area Merchants, LLC, which is comprised of local Town businesses such as motels, restaurants, and retail stores, was permitted to intervene in this matter. It claims that its member businesses would be directly and adversely affected by the removal of the OHRV trail because they rely on tourism revenue to conduct their businesses. See Doc. #18. The defendants now separately move to dismiss the plaintiffs' complaint. The court shall address the plaintiffs' request for a preliminary injunction and the motions to dismiss in turn.

Analysis

I. Preliminary Injunction

In their complaint, the plaintiffs seek a preliminary injunction to enjoin the Town and the State from continuing to operate the OHRV trails in the present locations adjacent to the plaintiffs' properties. At the hearing on June 21, 2018, plaintiff Diane Holmes testified that the introduction of the OHRV use has prevented the quiet use and enjoyment of her home, both inside and outside. She described having to keep the doors and windows closed at all times to keep dust out and lessen the noise and stated that the trails are used at all hours of the day. The plaintiffs contend that preliminary injunctive relief is warranted because of the "heavy," "incessant," and "obnoxious" use of the OHRV trails, which has caused significant harm to plaintiffs' right to enjoy their properties, and because they are entitled to restoration of the integrity of their neighborhood. The defendants each object to the plaintiffs' request for a preliminary injunction, arguing that the plaintiffs cannot satisfy the necessary elements to justify this relief. The intervenor also opposes the plaintiffs' request.

The injunctive relief sought by plaintiffs is an extraordinary remedy. *N.H. Dep't of Envtl. Servs. v. Mottolo*, 154 N.H. 57, 63 (2007) (citing *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (1982)). Courts will only grant preliminary injunctive relief if plaintiffs can prove the following five factors: (1) there is no adequate remedy at law; (2) they will suffer immediate irreparable harm if the injunctive relief is not granted; (3) there will be no hardship to defendants if the injunctive relief is granted, or the hardship to plaintiffs, if the injunctive relief is not granted, is greater; (4) they are likely to succeed on the merits; and (5) the public interest will not be adversely affected if the injunction is granted. Id. at 63; *see also UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987). "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dept.*, 167 N.H. 429, 434 (2015).

In this case, even assuming the plaintiffs have established a likelihood of success on the merits, the court nevertheless finds they have failed to demonstrate they will suffer any immediate irreparable harm absent an injunction or that the public interest will not be adversely affected if an injunction is granted. While the plaintiffs' allegations certainly demonstrate they have suffered some adverse effects as a result of the OHRV trail being located adjacent to their properties, there are no allegations suggesting that, absent an injunction, any irreparable harm to the plaintiffs' properties will follow. Rather, denial of the preliminary injunction would place the plaintiffs in substantially the same position they are currently in and have been in since the OHRV trails at issue opened for public use in 2011. In fact, granting an injunction in this case would significantly alter the status quo pending final resolution of the plaintiffs' claims, which

weighs against the plaintiffs' request, particularly without a strong showing of immediate irreparable harm. *See Mottolo*, 155 N.H. at 63 ("A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.").

Moreover, the plaintiffs cannot show that the public interest would not be adversely affected if an injunction is granted. As explained by the State, the OHRV trails in the Town provide an access point to the statewide trail system and are an integral component of the trail network. (State's Obj., Ex. A; Gamache Aff. ¶ 17.) Given this, closure of the OHRV trails at issue would significantly impact and limit the public's access to the statewide OHRV trail system. (Id.) An injunction that would disrupt the normal operation of an established trail system is therefore contrary to the public interest, which is a second factor weighing against granting the plaintiffs' requested relief.

Given that both of these factors weigh against granting a preliminary injunction, the plaintiffs have not established an entitlement to their requested relief under the standard outlined above. Accordingly, the plaintiffs' request for a preliminary injunction is DENIED.

II. Motions to Dismiss

In ruling on a motion to dismiss, the court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002). In rendering such a determination, the court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." *Id.* The court need not, however, "assume the truth of statements in the pleadings that are

merely conclusions of law." *Ojo v. Lorenzo*, 164 N.H. 717, 721 (2013). The court then analyzes the well-plead facts contained on the face of the complaint to determine whether they assert a cause of action. *Williams v. O'Brien*, 140 N.H. 595, 597 (1995). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." *Graves v. Estabrook*, 149 N.H. 202, 203 (2003).

Both the State and the Town have filed separate motions to dismiss the plaintiffs' complaint. Given that the defendants raise several similar arguments in their respective motions, the court shall consider defendants' motions together and address each claim within the plaintiffs' complaint in turn. The court shall also address two additional arguments presented in the State's motion to dismiss regarding the dismissal of DOT and certain plaintiffs as parties to this action.

a. Count I – Mandamus

As an initial matter, based on the court's review of the complaint, it appears the plaintiffs' mandamus claim was directed solely at the Town and not the State. None of the allegations related to this claim in the plaintiffs' complaint involve any action by the State. (Compl. ¶¶ 31–39.) Moreover, the plaintiffs did not address the mandamus claim in their objection to the State's motion to dismiss. See Doc. #16. For these reasons, the court concludes that Count I was filed solely against the Town, and so the State's motion to dismiss with respect to this claim is therefore moot and need not be addressed.

The plaintiffs' mandamus claim alleges that the Town failed to enforce the zoning ordinance by allowing the operation of the OHRV trail in a residential district. In the Town's motion to dismiss, it argues that the plaintiffs' mandamus claim fails as a matter of law because zoning enforcement involves discretionary decision-making by Town officials and because the Town cannot enforce its zoning regulations against the State.

To the extent plaintiffs allege the Town had a mandatory duty to deny authorization of the OHRV trail in a residential zoning district, the court disagrees.

"A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." *In re Cigna Healthcare, Inc.*, 146 N.H. 683, 687 (2001). "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 Mt. 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 cannot require a particular result." *Id.*

While the Town's zoning ordinance may state that the Board of Selectman has a general duty to administer the ordinance, there is no indication that it eliminates any degree of discretion in determining whether to allow a proposed use in the residential zoning district. (See Pls.' Obj., Ex. B.) Therefore, as a determination subject to reasonable discretion by Town officials, the plaintiffs can only maintain a mandamus action with evidence that the Town official's acted in bad faith. *See Conway*, 127 N.H. at 602 (absent evidence of bad faith, mandamus will not issue to overturn the discretionary performance of a government official). Here, there are no allegations of bad faith conduct in plaintiffs' complaint and the plaintiffs provided only conclusory allegations in support of this claim, which are insufficient to survive a motion to dismiss.

The plaintiffs also cannot claim that the Town failed or refused to address whether to authorize the OHRV trail in the residential zoning district, as it is undisputed that the Board of Selectman held a vote in 2011 to authorize the use. The plaintiffs

merely disagree with the Town's ultimate determination because they contend that the zoning ordinance mandated a different result. As a remedy, the plaintiffs seek a court order for the Town to "permanently remove" the OHRV trail system from their neighborhood. However, such an order would essentially be the court requiring a specific outcome to the Town's decision, which is impermissible in a mandamus order. *See Conway*, 127 N.H. at 602 (explaining that mandamus orders "cannot require a particular result."). Even an order specifying the relocation of the OHRV trail would impermissibly direct the outcome of a discretionary decision by a Town official and would therefore be an unlawful use of a mandamus order. *See id.*

For these reasons, the court concludes that the plaintiffs' mandamus claim fails as a matter of law. The Town's motion to dismiss Count I is therefore GRANTED.

b. Count II – Nuisance

The State argues, *inter alia*, that the plaintiffs' nuisance claim is barred by sovereign immunity because there is no statute authorizing a nuisance action against the State. The Town argues that the plaintiffs' nuisance claim is barred by the statute of limitations because the action complained of—the Town's 2011 decision authorizing the OHRV trail—occurred outside the statutory period of three years and there has been no action by the Town since that time to continue the alleged nuisance.

The court shall first address the State's argument that the plaintiffs' nuisance claim is barred by sovereign immunity. "The State is immune from suit in its courts without its consent." *XTL-NH, Inc. v. N.H. State Liquor Commission*, 183 A.3d 897, 900 (N.H. 2018). As state agencies, both DNCR and DOT are "cloaked with the State's sovereign immunity" and cannot be sued without an "applicable statute waiving immunity." *Id.* "A statute can waive immunity either expressly or by reasonable

implication." *Chase Home for Children v. N.H. Div. for Children, Youth, and Families*, 162 N.H. 720, 731 (2011). "Such waivers, however, are strictly construed" and there must be a "clear intent to grant a right to sue the state." *Id.* "Any statutory waiver is limited to that which is articulated by the legislature; thus, New Hampshire courts lack subject matter jurisdiction over an action against the State unless the legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *XTL-NH, Inc.*, 183 A.3d at 900.

The relevant statute in this case is RSA 215-A, the enabling legislation that formally authorized the establishment of an OHRV trail network in New Hampshire. The plaintiffs argue that the mere enactment of this legislation constitutes a waiver of sovereign immunity, arguing that because the statute sets forth "carefully crafted standards" regarding the operation of the OHRV trail network, the State cannot be immune from liability from the "tortious consequences" of its oversight of the OHRV trails. The court disagrees.

While the plaintiffs rely on *Chase Home for Children* in support of their argument, this case does not stand for the proposition that the enactment of legislation is a *per se* waiver of sovereign immunity with respect to the State's actions in carrying out the terms of a law. In fact, *Chase Home for Children* involved an action brought pursuant to RSA 491:8, a statute that explicitly provides for a limited waiver of sovereign immunity in contract disputes. 162 N.H. at 731. Not only is RSA 491:8 not applicable here because this case does not involve a contract dispute between the plaintiffs and the State, there is also no dispute that RSA 215-A—unlike RSA 491:8—does not explicitly waive sovereign immunity for claims challenging the State's actions under the statute. The holding in *Chase Home for Children* therefore has no bearing on

whether sovereign immunity bars the plaintiffs' nuisance claim. Moreover, the court is also not aware of any other statute that expressly waives the State's sovereign immunity for nuisance actions, nor have the plaintiffs provided any such authority. As such, without an express waiver of immunity, the plaintiffs' nuisance claim can only survive if the State implicitly waived sovereign immunity with respect to this type of action.

A waiver by implication must be expressed with "such reasonable clarity that the courts need not strain the words of a statute to reach a conclusion." *Claremont Sch. Dist. v. Governor,* 144 N.H. 590, 593 (1999) (quoting *Ranger v. N.H. Youth Dev. Center*, 118 N.H. 163, 165 (1978)). Here, there is nothing in RSA 215-A from which this court could infer, with reasonable clarity, that the State intended to waive sovereign immunity with respect to nuisance actions arising out of the State's management of the OHRV trail network. Accordingly, the court finds that the plaintiffs' nuisance claim against the State is barred by sovereign immunity. The State's motion to dismiss Count II is therefore GRANTED.

The court shall next address the Town's argument that the plaintiffs' nuisance claim is barred by the statute of limitations. The Town's primary position is that any claim arising out of its 2011 decision to authorize the OHRV trail should have been brought within three years of that 2011 decision, and that the plaintiffs' failure to do so is fatal to their claim. While it is true that the statute of limitations provides that "all personal actions . . . may be brought only within [three] years of the act or omission complained of," see RSA 508:4, I, there is an exception to this general rule when the act complained of is a "continuing harm." Pursuant to the continuing harm doctrine, "[w]hen a tort is of a continuing nature, although the initial tortious act may have occurred longer than the statutory period prior to the filing of an action, an action will

not be barred if it can be based upon the continuation of that tort within that period." *Thorndike v. Thorndike*, 154 N.H. 443, 446 (2006). This doctrine is particularly applicable in the context of nuisance claims. *Id.* (collecting cases).

Here, the plaintiffs allege that use of the OHRV trails in their neighborhoods has caused excessive noise and dust, as well as reckless driving and inappropriate behavior by OHRV users, which inhibits their ability to use and enjoy their properties. The plaintiffs further allege that the Town's "initial tortious act" occurred in 2011 when it voted to authorize the OHRV trail, which led to the circumstances underlying their nuisance claim. Although the Town argues its 2011 decision cannot be the basis of a nuisance claim, to the contrary, "[m]unicipalities have long been held liable" for claims such as nuisance. *See Tarbell Adm'r, Inc. v. City of Concord*, 157 N.H. 678, 688 (2008). "[W]hile a municipality enjoys immunity for its exercise of discretion and judgment in the development of a plan, such immunity does not protect it from liability for the creation of a nuisance or actual trespass." *Id.* (ellipses omitted). Here, the facts alleged are that the Town's 2011 decision led to the creation of a nuisance in the plaintiffs' neighborhood from OHRV trail users, which has been ongoing since that time. At this stage, when assuming the plaintiffs' factual allegations as true and construing all reasonable inferences in their favor, this is sufficient to state a claim for nuisance against the Town. Moreover, given the continuation of the alleged nuisance, the court finds that the statute of limitations does not bar plaintiffs' claim. Therefore, the Town's motion to dismiss Count II is DENIED.

c. Count III – Inverse Condemnation

Both the State and the Town contend that The plaintiffs fail to state a claim for inverse condemnation, arguing that there has been no taking of the plaintiffs' properties

because there is no evidence of government action to invade their protected property interests. The defendants also argue that there is no evidence supporting any intentional act by the government that is sufficiently direct and of a sufficient magnitude to constitute an unlawful taking of their properties.

"Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain." *Sundell v. Town of New London*, 119 N.H. 839, 845 (1979). In this context, "property" can refer to "the right to 'use and enjoy' a thing, and is not limited to the thing itself." *Id.* "Governmental action which substantially interferes with, or deprives a person of, the use of his property in whole or in part, may therefore constitute a taking, even if the land itself is not taken." *Id.* "[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 the individual alone." *Id.* (ellipses omitted). Courts look to the individual circumstances of each case to determine whether there is an unconstitutional taking. *Allianz Global Risks U.S. Ins. Co. v. State of N.H.*, 161 N.H. 121, 124 (2010).

The plaintiffs allege they experience interference with the use and enjoyment of their properties because of the heavy use of the OHRV trails, the substantial noise and dust that results from this heavy use, and because some of these OHRV operators speed, drive recklessly, and disrespect plaintiffs and their property. While true that this alleged interference is not specifically caused by government actors, these circumstances arose as a direct result of the defendants' specific actions to authorize operation of the OHRV trail in these locations adjacent to the plaintiffs' properties. *See Allianz Global Risks*

U.S. Ins. Co., 161 N.H. at 124 (inverse condemnation claims apply in circumstances where "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"). In this context, the plaintiffs' allegations are sufficient to demonstrate that the alleged interference with their property rights was the direct, natural, or probable result of defendants' decisions to authorize OHRV activity in their neighborhood.

While the defendants argue that the plaintiffs cannot establish any intentional government action that is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to constitute inverse condemnation, the court notes that this argument involves factual determinations that go beyond the scope of a motion to dismiss. At this stage, the court makes no specific finding as to whether the plaintiffs can definitively prove that the alleged interference is substantial enough to succeed on their inverse condemnation claim. Rather, it is sufficient that the plaintiffs' allegations, if true, could constitute a substantial interference with their rights to use and enjoy their properties and that the actions of the defendants—both governmental actors—led to this substantial interference. For these reasons, the defendants' respective motions to dismiss Count III are DENIED.

d. Dismissal of certain parties to this action

As a final matter, the court shall address two arguments presented in the State's motion to dismiss. The State argues that defendant DOT and the plaintiffs who reside adjacent to Route 2 should be dismissed from this action.

More specifically, the State first contends that the plaintiffs fail to make specific allegations against the DOT to support a claim against it because the DOT's authorization of OHRV travel on Route 2 was within its authority under RSA 215-A. The

court disagrees. At this stage, it is sufficient that the plaintiffs allege the DOT had control over the decision to authorize the operation of OHRV trails on Route 2, which has contributed to the plaintiffs' allegations of interference with the use and enjoyment of their properties. Regardless of whether the DOT was legally permitted to make its decision, these allegations are sufficient for DOT to remain a party to the plaintiffs' remaining claims against the State.

The State further contends that the plaintiffs who reside adjacent to Route 2 should be dismissed because the OHRV use on Route 2 is lawful and intended for use in the same manner as other vehicles traveling the public highway. The court again disagrees. That the use of OHRV's on Route 2 is consistent with other vehicular use on the highway does not necessarily mean the plaintiffs who reside adjacent to Route 2 cannot sustain a claim of nuisance or inverse condemnation against the defendants. The disruptive nature of OHRV use on Route 2, and the relative severity of this use in comparison to other vehicles on the highway, both involve factual determinations that are premature to address at this time. For these reasons, the State's requests for dismissal of the DOT and the Route 2 plaintiffs from this action are DENIED.

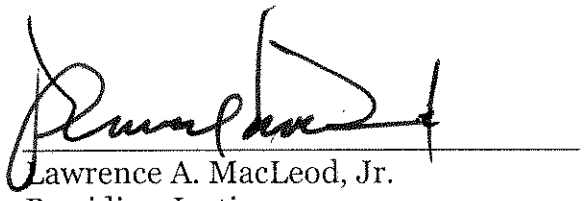
Conclusion

In sum, the court makes the following determinations. The plaintiffs' request for a preliminary injunction is DENIED. The State's motion to dismiss is MOOT with respect to Count I, GRANTED with respect to Count II, and DENIED with respect to Count III. The Town's motion to dismiss is GRANTED with respect to Count I, and DENIED with respect to Counts II and III.

Finally, the court apologizes to the parties and their counsel for the delay in issuing this order. The volume of the evidence and the complexity of the law associated

with this task coupled with the demands on the undersigned justice's time thwarted efforts to produce this order in a more timely fashion.

SO ORDERED, this 15th day of October 2018.



Lawrence A. MacLeod, Jr.
Presiding Justice