

THE STATE OF NEW HAMPSHIRE

Coos, County SS: Coos Superior Court

Case No.

Harry and Lois Stearns, 104 Lancaster Road, Gorham, New Hampshire 03581;

Nancy and Bruce Neil, 90 Lancaster Road, Gorham, New Hampshire 03581;

Mark and Heather Malia, 74 Crestwood Drive, Gorham, New Hampshire 03581;

Audrey and Rene Albert, 70 Crestwood Drive, Gorham, New Hampshire 03581;

Albert and Priscilla Bergeron, 66 Crestwood Drive, Gorham, New Hampshire 03581;

Diane Holmes and Michael Pelchat, 75 Lancaster Road, Gorham, New Hampshire 03581;

Sandra Lemire, 71 Lancaster Road, Gorham, New Hampshire 03581

Plaintiffs

v.

The Town of Gorham, 20 Park Street, Gorham, NH 03581

and

The State of New Hampshire

By the Commissioner, Department of Transportation, 7 Hazen Drive, Concord, NH 03302

By the Commissioner, Department of Natural and Cultural Resources, formerly the Department of Resources and Economic Development, 172 Pembroke Road, Concord, NH 03301

Defendants

Complaint for Mandamus, Nuisance, Injunction, Inverse Condemnation Damage Award and Attorney Fees, Expert Fees and the Expenses of Litigation

Jury Demanded

Plaintiffs, for their Complaint, state that:

Parties

Plaintiffs

1. Plaintiffs Lois and Harry Stearns, Nancy and Bruce Neil, Mark and Heather Malia, Audrey and Rene Albert, Priscilla and Albert Bergeron , Sandra Lemire, Diane Holmes and Michael Pelchat are home owners in the Town of Gorham, New Hampshire (Town.)

Defendants

2. Defendant, State of New Hampshire (State), operates a trail system on public highways, abandoned rail beds and on private property that is utilized by motorized vehicles known as off-highway recreational vehicles (OHRVs.) A portion of the trail system is located in the defendant Town.
3. Defendant Town hosts a portion of the trail system.

Standing

4. The homes of plaintiffs Lois and Harry Stearns, Nancy and Bruce Neil, Mark and Heather Malia, Audrey and Rene Albert, and Albert and Priscilla Bergeron lie immediately adjacent to the OHRV trail situated on the abandoned rail bed. The homes of plaintiffs Sandra Lemire, Diane Holmes and Michael Pelchat lie immediately adjacent to the OHRV trail situated on Route 2. The home of Nancy and Bruce Neil is also immediately adjacent to the OHRV trail on Route 2.
5. Each plaintiff has been and will be substantially and adversely impacted by the operation of the OHRV trail.

Facts

6. The OHRV trail system is managed by the defendant State acting through the Commissioner, Department of Natural and Cultural Resources (DNCR.)
7. The defendant State, acting through the Department of Transportation (DOT), authorized OHRVs to travel public highways in the defendant Town.
8. The public highways provide OHRV access to a trail head located in plaintiffs' neighborhood.
9. From the trail head, the OHRV trail in plaintiffs' neighborhood traverses an abandoned railroad bed in an easterly direction before turning northwest across privately owned properties adjacent to plaintiffs' neighborhood.
10. The defendant State acquired the abandoned railroad bed by quitclaim deed from the New Hampshire and Vermont Railroad Company, a Florida corporation to DOT. The quitclaim deed was filed with the Coos County Register of Deeds on February 17,

1998. The railroad right of way was formerly owned by the Boston and Maine Corporation and was part of the railroad known as the “Berlin Branch.”

11. The abandoned railroad bed is immediately adjacent to the homes and property of plaintiffs Harry and Lois Stearns, 104 Lancaster Road, Gorham, New Hampshire; Nancy and Bruce Neil, 90 Lancaster Road, Gorham, New Hampshire; Mark and Heather Malia, 74 Crestwood Drive, Gorham, New Hampshire; Audrey and Rene Albert, 70 Crestwood Drive, Gorham, New Hampshire; and, Albert and Priscilla Bergeron, 66 Crestwood Drive, Gorham, New Hampshire.
12. The defendant Town authorized the OHRV trail head and trail in the Town including in the Lancaster Road and Crestwood Drive neighborhood.
13. The OHRV trail head and trail in plaintiffs’ Lancaster Road and Crestwood Drive neighborhood has resulted in 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 personal behavior of trail users that has substantially and unreasonably interfered with plaintiffs’ right to the quiet enjoyment of their homes.
14. The use of the OHRV trail in plaintiffs’ neighborhood has substantially interfered with and deprived plaintiffs of the use and enjoyment of their homes that constitutes a taking of their homes.
15. In data compiled by North Country Listens, for 11/16/16 Community Conversation Discussion Guide, from North Country Council 07/18/16-8/8/16 traffic count tubes: the week ending Sunday July 24, 2016, saw 825 ATVs using the trail head; the week ending Sunday, July 31, 2016, saw 999 ATVs using the trail head; the Jericho event ending Sunday, August 7, 2016, saw 4,173 ATVs using the trail head. Peak hours use of the trail head range 9:00 AM to 2:00 PM from 13 ATVs to 72 ATVs (during events) per hour. Saturdays see the heaviest use (203-284-1511 ATVs) compared to week days (99-115-416 ATVs) in the weeks ending Sunday, July 24, 2016, Sunday July 31, 2016, and Sunday August 7, 2016 respectively.
16. The North Country Council published a 2016 On-Road OHRV Safety Report for Coos County (Report). The Report’s purpose was to provide data to provide an indication of the volume of potential conflicts possible between OHRVs crossing roads and traditional vehicles traveling along roads noting that as the numbers of riders crossing public roads increase the number of potential conflicts also arise.
17. The Report stated that from August 1, 2016, to August 8, 2016, the average daily OHRV use from the Gorham Pikes Pit intersection to Jericho State Park was 601

OHRVs with a peak count of 1,359 OHRVs on Saturday, August 6, 2016. This intersection is the beginning of the trail adjacent to the home of plaintiffs Lois and Harry Stearns.

18. The Report stated that from July 19, 2016, to August 7, 2016, the Rt. 2 trailhead parking area had average daily OHRV use of 290 with the peak count of 1,511 OHRVs on Saturday, August 6, 2016. The Rt. 2 parking area lies adjacent to plaintiffs' neighborhood.
19. In 2015, the Gorham Police Department logged 70 OHRV complaints; 59 stops; 2 summonses; and 57 warnings.
20. In 2016, the Gorham Police Department logged 197 OHRV complaints; 126 stops; 24 summonses; and, 102 warnings.
21. In 2017, the Gorham Police Department logged 244 complaints; 84 stops; 56 summonses; and, 28 warnings.
22. Many of the complaints regarding distinct OHRV incidents came from multiple sources, but the Gorham Police Department's practice is to log each incident as a single complaint, thus understating the significance of the incident.
23. On August 22, 2016, plaintiff Audrey Albert observed a trail user trespassing and urinating in her yard. When plaintiff asked him to get off her property, the man said: "If you don't like it why don't you move. I'm here to ride." Plaintiff Albert advised the Gorham Police that she was shaking and scared.
24. On September 10, 2017, plaintiffs Lois and Harry Stearns, of 104 Lancaster Road, Gorham, New Hampshire, reported to the Gorham Police Department that four OHRVs stopped across the brook from her home and stated: "See, that's the house"; revved their engines and took off, as if to target and threaten the plaintiffs Lois and Harry Stearns.
25. OHRVs have been observed racing over speed bumps constructed by a Gorham OHRV club. Speed limits, stop signs and signs posted to "respect our neighbors" are ignored.
26. Plaintiffs yards are within feet of the trail causing the loss of use and enjoyment of their yards.
27. Plaintiffs must close their windows to escape noise and dust caused by the OHRV use of the trail. The noise is inescapable even with windows closed.

28. The defendant State and defendant Town have acknowledged and admitted that the OHRV trail impacts in plaintiffs' neighborhood are significant but have failed and refused to correct the matter notwithstanding plaintiffs' requests.

Jurisdiction and Venue

29. Plaintiffs restate the allegations of paragraphs 1-28.

30. This Court has subject matter jurisdiction over this Complaint. The defendants exist and the acts complained of have occurred within the Town of Gorham, in Coos County and venue is properly laid in Coos Superior Court.

Claims for Relief

Mandamus Against the Town of Gorham for

Failure of Duty to Enforce Town of Gorham Zoning Ordinance

31. Plaintiffs restate the allegations of paragraphs 1-29.

32. The defendant Town adopted a zoning ordinance entitled Town of Gorham, New Hampshire Zoning Ordinance. (Zoning Ordinance.)

33. The Zoning Ordinance, at Article II, Purpose, page 1, states: "This Ordinance is designed to promote the health, safety and general welfare of the inhabitants of Gorham, to protect the value of property, to prevent the overcrowding of land, to avoid undue concentration of population, and to facilitate the adequate provisions of other public requirements."

34. The Zoning Ordinance, at Article IV, Districts and District Regulations, page 10, created zoning districts, including residential districts. The districts are shown on the "Gorham Zoning Map" that is incorporated into the ordinance.

35. The Zoning Ordinance, at Article IV, at 4.01 Residential A page 13 and Article IV, at 4.02, Residential B page 12 define the permitted uses in the residential districts. The residential classifications express the legislative intent that the "integrity of the districts be maintained."

36. The operation of a OHRV trailhead and trail are not permitted uses in the residential districts.

37. Plaintiffs' homes are located in the residential districts.

38. On June 6, 2011, the defendant Town authorized the defendant State to establish the OHRV trailhead and trail in plaintiffs' neighborhood in violation of the Zoning Ordinance.
39. The defendant Town breached its clear legal duty to enforce its Zoning Ordinance to plaintiffs' injury entitling plaintiffs to an Order of Mandamus requiring that the OHRV trailhead and trail be removed from their neighborhood.

Nuisance

40. Plaintiffs restate the allegations of paragraphs 1-39.
41. The OHRV trail head and trail in plaintiffs' neighborhood has resulted in a high volume of OHRV usage, reckless operation, speeding, noise, illegal after hours use, noxious exhaust fumes, dust, litter, public urination and obnoxious and threatening personal behavior of trail users that has substantially and unreasonably interfered with plaintiffs' right to the quiet enjoyment of their homes.
42. The use of the OHRV trail head and trail in plaintiffs' neighborhood as approved and sanctioned by the defendant Town and defendant State has caused plaintiffs harm that exceeds any customary interferences that plaintiffs must suffer in organized society and is an appreciable and tangible interference with their property rights.
43. The use of the OHRV trail head and trail in plaintiffs' neighborhood as approved and sanctioned by defendant Town and defendant State has been and will continue to be a nuisance for which plaintiffs have no adequate remedy at law.
44. The defendant Town and defendant State, both independently and collaboratively, approved, sanctioned and promoted the OHRV trail head and trail in plaintiffs' neighborhood which has been and will continue to be a nuisance for which plaintiffs have no adequate remedy at law.

Inverse Condemnation

45. Plaintiffs restate the allegations of paragraphs 1-44.
46. Defendant Town and defendant State, both independently and collaboratively, approved, sanctioned and promoted the use of the trailhead and trail in plaintiffs' neighborhood conduct which substantially interfered with and deprived plaintiffs of the use and enjoyment of their homes, a property right.
47. The conduct of defendant Town and defendant State constitutes a taking of plaintiffs' property for which they are entitled to monetary compensation.

Attorney Fees, Expert Fees and the Expenses of Litigation

48. Plaintiffs restate the allegations of paragraphs 1-47.
49. The defendant Town and defendant State, both independently and collaboratively, approved, sanctioned and promoted the use of the trail head and trail in plaintiffs' neighborhood well knowing and admitting that the impacts on residences was significant yet failed and refused to correct the situation.
50. The decision of the defendant Town and the defendant State to willfully and callously ignore the significant impacts on plaintiffs' neighborhood regarding the planning and operation of OHRV trails was deliberate and knowing, calculated to serve the defendants' political interests, rather than to abate the nuisance.
51. The defendant Town and defendant State, both independently and collaboratively, approved, sanctioned and promoted the use of the trail head and trail in plaintiffs' neighborhood in clear violation of the Town of Gorham Zoning Ordinance.
52. The decision of the defendant Town and the defendant State to willfully and callously ignore the Zoning Ordinance regarding the planning and operation of OHRV trails was deliberate and knowing, calculated to serve the defendants' political interests, rather than to enforce the laws enacted to protect citizens such as plaintiffs.
53. The unlawful conduct of defendant Town and defendant State in willful and callous disregard of plaintiffs' rights entitles plaintiffs to their attorney fees, expert fees and expenses of this litigation.

Claims for Relief

Plaintiffs respectfully request:

1. An Order of Mandamus requiring that defendant Town and defendant State permanently remove the OHRV trail head and trail from plaintiffs' neighborhood in compliance with defendants' clear legal duty under the law.
2. An injunction, preliminary and permanent, enjoining defendant Town and defendant State from sanctioning and operating the nuisance of the OHRV trail head and trail in plaintiffs' neighborhood.
3. An award to plaintiffs of inverse condemnation damages for the diminution of the fair market value of their homes.
4. An award of attorney fees, expert fees and expenses of litigation of this case.

5. Such other and further relief as appropriate.

March 21, 2018

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Jury Demand

Plaintiffs demand a jury.

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