STATE OF NEW HAMPSHIRE
SUPERIOR COURT

COÖS, SS. Docket No. 214-2018-CV-30

Louis Stearns, et al.

v.

Town of Gorham, et al.

DECREE ON DAMAGES

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, alleging several causes of action arising from the defendants' involvement in the opening and operation of off-highway recreational vehicle ("OHRV") trails in Gorham. The only remaining claim is the plaintiffs' inverse condemnation action, for which the court (*MacLeod*, J.) concluded that the defendants' decision to permit OHRV use in Gorham constituted inverse condemnation entitling the plaintiffs to just compensation. (Index #171 ("Order on Merits").) The court conducted a bench trial on damages on October 18 and 19, 2022. During the trial, the court heard evidence from the plaintiffs; the plaintiffs' expert, Peter Stanhope; and the defendants' expert, Marsha Campaniello. Thereafter, the defendants (Index #197) and the plaintiffs (Index #196) submitted trial memoranda. Upon consideration of the evidence presented, the parties' arguments, and the applicable law, the court finds and rules as follows.

The court's prior Order on the Merits of the plaintiffs' inverse condemnation claim sets forth the background of this case. As relevant for purposes of this Order, the

remaining plaintiffs in this lawsuit are Diane Holmes and Michael Pelchat, who are married; Sandra Lemire; Nancy and Bruce Neil; and Audrey and Rene Albert. (Order on Merits 4–5.) The respective homes of Diane Holmes, Michael Pelchat, and Sandra Lemire are situated along U.S. Route 2, also known as Lancaster Road, and do not abut the Presidential Rail Trail (the "PRT"), which is part of a larger network of recreational trails operated by the State. Nancy and Bruce Neil's home abuts both the PRT and Route 2. OHRVs are permitted on the portions of Route 2 that abut the plaintiffs' respective homes. Finally, Audrey and Rene Albert's home abuts the parking lot along Route 2 (the "Route 2 Parking Lot"), which formerly served as an entrance to the PRT.

The PRT opened for recreational use in the 1990s. Until 2011, the PRT was used for hiking, biking, cross-country skiing, and other similar recreational activities. Starting in 2011, the defendants permitted OHRVs to use the PRT as well as the Route 2 Parking Lot. 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 intersection of Route 2 and U.S. Route 16.

The plaintiffs brought this case against the defendants on March 22, 2018, arguing, in relevant part, that the defendants' decision to open the PRT and Route 2 to OHRV use gave rise to an ongoing taking of their property.[1] Since the start of this litigation, the nature of OHRV use in Gorham has changed. In 2020, NHDOT permitted OHRV use on Route 16 and added a new parking area off Route 16. The NHDOT also

[1] The original complaint alleged (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.) The only remaining claim is Count III, for which the court conducted a bench trial in October 2021. (Order on Merits.)

added a trail connector from the new parking area to access the PRT. In 2021, the NHDOT closed the Route 2 Parking Lot for OHRV trailers. At the trial on the merits, the plaintiffs agreed that the measures taken by the NHDOT since the plaintiffs brought this lawsuit in 2018 have reduced the level of noise and dust that impact the plaintiffs' quiet enjoyment of their homes. However, the plaintiffs continue to experience increased traffic, noise, and dust that they did not experience prior to the defendants permitting OHRVs to be used in Gorham.

At the trial on the merits, the court heard testimony from the plaintiffs as well as various 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 the defendants' noise expert, Jonathan Evans, who was the Noise Program Manager of NHDOT.

The court issued an order on February 15, 2022, concluding that the defendants' actions permitting OHRV use on the PRT, Route 2 Parking Lot, and Route 2 constituted an unconstitutional taking of the plaintiffs' land and that the plaintiffs are owed just compensation for that taking. (*See* Order on Merits.) At the latest bench trial in October 2022, the parties presented evidence regarding what, if any, damages are owed to the plaintiffs.

Specifically, the defendants presented evidence from their expert, Marsha Campaniello, who is a certified real estate appraiser. She produced a report on the diminution of value of the plaintiffs' properties (Defs.' Exs. K, M, N, P) as well as a

review of the plaintiffs' expert's, Peter Stanhope, diminution in value study and appraisal reports. (Defs.' Exs. S and T.) The plaintiffs testified as to the amount of damages they believed they have sustained and presented evidence from Stanhope, who is also a certified real estate appraiser. Stanhope conducted an evaluation of the plaintiffs' properties and submitted a diminution report that concluded, as of March 12, 2019, the OHRV usage resulted in a twelve percent decrease in the value of the plaintiffs' respective homes. (Pls.' Ex. 62A.) Stanhope applied his conclusion in the diminution report to his appraisal reports for each of the plaintiffs' homes. (*Id.*; Pls.' Exs. 62B–62E (showing appraisal reports for each of the plaintiffs' respective properties).)

The plaintiffs ask the court to order the defendants to pay the following amounts to each plaintiff: $947,958.32 to Nancy and Bruce Neil; $817,647.17 to Audrey and Rene Albert; $692,954.24 to Sandra Lemire; and $681,799.81 to Diane Holmes and Michael Pelchat. (Pls.' Tr. Mem. ¶¶30–33.) The plaintiffs also ask the court to order the defendants to pay $422,443.37 in attorney's fees and costs. (*Id.* ¶ 36.)

"[W]hen a governmental body takes property in fact but does not formally exercise the power of eminent domain," as in this case, "the governmental body has committed an unconstitutional taking" by inverse condemnation "and the property owner has a cause of action for compensation." *J.K.S. Realty, LLC v. City of Nashua*, 164 N.H. 228, 234 (2012); *Sundell v. Town of New London*, 119 N.H. 839, 845 (1979). The compensation owed to a property owner in an inverse condemnation action is the "diminution in the property's value as measured by the difference in the fair market value of the property immediately before and immediately after the taking of the property." 29A C.J.S. *Eminent Domain* § 570. The taking of the property is determined based on a valuation date, or the date of taking, which is determined by "date of the

government's entry." 11A McQuillin Mun. Corp. *Remedies—Inverse condemnation—Damages* § 32:169, (3d ed.); *Calmat of Arizona v. State ex rel. Miller*, 859 P.2d 1323, 1327 (Ariz. 1993) (explaining the date of valuation).

As an initial matter, the defendants moved at the outset of the damages trial to reconsider the court's prior Order on their motion *in limine* to exclude Peter Stanhope's testimony.[2] (Index #190.) By way of clarification, the court stated in that Order that it would reserve ruling on whether Stanhope would be permitted to testify until it heard evidence regarding the date of taking. (*Id.* at 5.) At the damages trial, the defendants reasserted the arguments they made with respect to their motion *in limine*, claiming that the very last possible date of taking for the plaintiffs would be March 22, 2018, the date on which they filed their complaint. Based on this last possible date, they maintained that Stanhope should have been precluded from testifying because he used March 12, 2019 as the date on which he conducted his study of the plaintiffs' properties,[3] which was about one year after the plaintiffs filed their complaint.

Although framed as a motion to reconsider the court's prior Order, the court acknowledges that it reserved ruling on the issue of whether Stanhope would be permitted to testify until trial with the assumption that the parties would present arguments as to the date of taking from which damages should be measured. However,

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[2] The defendants also raised the arguments they asserted in their sixth motion *in limine* (Index #189), to which the plaintiffs objected. (Index #191.) In that motion, the defendants sought to preclude evidence pertaining to the plaintiffs' request for damages based on a theory of constructive eviction, which was an alternative theory to that presented at the trial. The defendants also sought to exclude any argument or evidence that the plaintiffs' damages were abatable. At the trial, the court advised the parties that it would take the motion under advisement. For the reasons set forth in this Order, the defendants' motion is moot.

[3] Stanhope does not use the term "date of taking" for purposes of his report. (*See* Pls.' Ex. 62A.) The plaintiffs argued that the date of taking was abatable and continued to accrue as OHRVs were permitted in Gorham. For purposes of this Order, the court construes Stanhope's report date of March 12, 2019 to be his proposed date of taking.

neither party offered an argument as to the date of taking. The date of taking is ultimately a question for the trier of fact. *See Perry v. Grand River Dam Auth.*, 344 P.3d 1, 6 n.9 (Okla. Civ. App. 2013) (explaining that "the date of taking, is a question of fact for the trier of fact"); *Merkur Steel Supply Inc. v. City of Detroit*, 680 N.W.2d 485, 498–99 (Mich. App. 2004) (noting that determining "the date of taking and the ascertainment of value is a question of fact" for the trier or fact). As stated, the defendants claim the date of taking was, at the very last possible date, the date on which the plaintiffs filed their complaint. The plaintiffs, on the other hand, do not claim that there is a specific date of taking, but rather, they argue that the damages owed to them were abatable and should be awarded on an ongoing basis. The court finds neither argument persuasive.

The court agrees with the defendants that damages for inverse condemnation are not abatable and cannot be awarded on an ongoing basis. *See* 11A McQuillin Mun. Corp. *Remedies—Inverse condemnation—Damages* § 32:169, (3d ed.) (explaining that, for inverse condemnation, "just compensation is based on the value of the land at the time it is seized"). The plaintiffs rely on *Sundell* to support their argument that damages in an inverse condemnation action are abatable, yet *Sundell* does not define the proper award for damages in an inverse condemnation case. *See Sundell*, 119 N.H. at 843. Rather, the Court in *Sundell* only discussed the issue of damages with regard to the nuisance action that the plaintiffs brought in addition to their inverse condemnation claim. *Id.* at 843–49. (explaining that the plaintiffs brought an action for nuisance and inverse condemnation and that, in a nuisance action generally, damages may be awarded for all harm sustained, whether that harm was sustained in the past or is prospective harm). However, as the defendants argue, damages in an inverse condemnation action are

measured from the diminution in value to the property before and after the taking. 29A C.J.S. *Eminent Domain* § 570; *Calmat*, 859 P.2d at 1327. Although the plaintiffs in this case continue to experience noise, dust, and fumes from the OHRVs in Gorham, there is no basis for concluding that damages in an inverse condemnation action are abatable. *Sundell*, 119 N.H. at 843–49.

With respect to the defendants' argument as to the date of taking, the court understands that they maintain the latest possible date of taking is March 22, 2018 and, in turn, use that date as a basis by which the court should exclude Stanhope's testimony. In accordance with that belief, the defendants' expert, Marsha Campaniello, performed a before-and-after market analysis with the effective date being March 22, 2018. In other words, the defendants used March 22, 2018 as the date of taking. Yet, the date on which the plaintiffs filed their complaint "bears no relation to the date of the taking" and, in fact, "[w]hen an inverse condemnation action is filed, the condemning agency, by definition, has already taken the condemnee's property." *Calmat*, 859 P.2d at 1327. Moreover, if the court accepted the date of taking to be March 22, 2018, that would "unjustly enrich the property owner if the value of the property appreciated following the taking or, in the usual case, would unfairly penalize him if the property's value were diminishing as a result of condemnation blight." *Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 804 (Wis. 1980). The court need not remind the parties that this case, and particularly the facts of the case, has evolved over the span of four plus years since the plaintiffs filed their complaint. Given the changing nature of OHRV use in Gorham during and prior to the plaintiffs filing their complaint, it is difficult for the court to pinpoint the exact date of taking. However, based on the evidence presented

during the trial on the merits, the court concludes that the plaintiffs' properties had already been taken by the defendants by March 22, 2018.

For purposes of determining damages for an inverse condemnation action, "[t]iming is critical." *Calmat*, 859 P.2d at 1327. While some courts use the date of government entry as being the date of taking, the date of taking largely depends on the type of taking. *See* 11A McQuillin Mun. Corp. *Remedies—Inverse condemnation—Damages* § 32:169, (3d ed.) ("The damage formula for inverse condemnation actions adopts the date of the government's entry as the date of valuation."); *see also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (noting that in an inverse condemnation case, the owner has a right "to recover the value of the land on the date of the intrusion by the Government"); *but see Smart v. City of Los Angeles*, 169 Cal. Rptr. 174, 178 (Ct. App. 1980) ("Thus, while the 'date of stabilization' approach may be a sound method for determining a date of 'taking' in a case involving residential landowners, it does not fairly address the situation of the property owner who does not experience the impact of the governmental activity until sometime after that activity has peaked."); *Aaron v. City of Los Angeles*, 115 Cal. Rptr. 162, 176 (Ct. App. 1974) (explaining, in the context of whether the plaintiffs' case was barred by the relevant statute of limitations, the "plaintiffs were not required to sue as soon as the damaging flights began but were entitled to some extent to wait until the situation became stabilized").

"It is by focusing on the impact of the governmental activity upon the property owner's actual use that the courts have determined a date of 'taking' in inverse condemnation actions." *Smart*, 169 Cal. Rptr. at 178. At the trial on the merits, the plaintiffs testified about the "Jericho Event" in the summer of 2016, which brought as

many as 4,173 OHRVs to Gorham over the span of one week. (Order on Merits 8–9.) The summer festivals, particularly those in 2016, seemed to be the apex of the damages experienced by the plaintiffs or the point at which the impact of the defendants' decision to permit OHRVs in Gorham became a taking. It was certainly not the end of their experiencing noise, dust, and fumes from the OHRVs, but the plaintiffs described 2016 in a way that signified that it marked the point at which the defendants' decision to permit OHRVs in Gorham constituted an unconstitutional taking of their properties. *See e.g., Jensen v. United States*, 305 F.2d 444, 447–48 (Ct. Cl. 1962) (explaining that a taking did not occur when B-47's began to fly over the plaintiffs' property, at which point the "tests of new aircraft were relatively infrequent," but the noise from the flights became a taking in 1953, when the flights became more frequent so as to cause a reduction in the value of the plaintiffs' property). Therefore, the court finds that by the end of the summer, or September 1, 2016, the defendants' decision to permit OHRVs in Gorham constituted a taking, making September 1, 2016 the date of taking by which damages should be measured.

Having concluded that the taking occurred in 2016, if the court adopted the defendants' argument that Stanhope's testimony should be excluded based on his report date of March 2019, the court would also have to exclude the testimony of the defendants' expert given that her report was dated March 2018, which was after the taking occurred. However, the court declines to adopt the defendants' argument that Stanhope's testimony should be excluded on that basis. Ultimately, the date of Stanhope's report, although after the plaintiffs filed their complaint and after the date of taking, goes to the weight and credibility of his testimony and not its admissibility. As the defendants' expert highlighted, real estate appraisal is not an exact science. Both

experts used a sales comparison approach. (Pls.' Ex. 62A at 6; *see, e.g.*, Defs.' Ex. K at 35.) The defendants' primary objections to Stanhope's report were that he used an incorrect date of taking and compared houses that were not comparable to the plaintiffs' properties. Stated another way, the defendants did not contest the appraisal method used by Stanhope, the sales comparison approach, but object to the way in which he utilized that methodology. New Hampshire Rule of Evidence 702, which governs the admissibility of expert testimony, "has been interpreted liberally in favor of the admission of expert testimony." *Stachulski v. Apple New England, LLC*, 171 N.H. 158, 164 (2018). The defendants had an opportunity to present a competing expert opinion and report and to cross-examine Stanhope during the damages trial, which highlighted their objection to certain aspects of his report and analysis. It is, therefore, left to the court to determine what weight, if any, it should give Stanhope's testimony and report. *State v. Langill*, 157 N.H. 77, 88 (2008) (noting that "the adversary process is available to highlight the errors and permit the fact-finder to assess the weight and credibility of the expert's conclusions"). Accordingly, Stanhope's testimony is not excluded from the record.

Turning to the merits of the trial on damages, the computation of damages, generally, need not be determined with "absolute certainty," but the requested damages must be reasonable. *New Hampshire Fish & Game Dep't v. Bacon*, 167 N.H. 591, 597 (2015). "[T]he method used to compute damages need not be more than an approximation." *Maloof v. Bonser*, 145 N.H. 650, 655 (2000).

At the damages trial, the plaintiffs presented evidence as to the damages they believed they have experienced. Each plaintiff presented testimony as to the diminution in the value of his or her home based on the Town's tax assessment for his or her

property. Michael Pelchat testified that he felt his home, as a result of the defendants' decision to permit OHRVs in Gorham, was now worth nothing. (Tr., Day 1 at 2:31–32.) He also stated that the tax assessment for his house is $100,000 and, based on that number, he feels as though he has lost $100,000 per year since OHRVs were permitted in Gorham starting in 2011. (*Id.*) Pelchat's wife, Diane Holmes, testified that this lawsuit has never been about money, but if she had to put a value on her loss, she would measure damages by adding up the full value of the tax assessment since the defendants permitted OHRV use in Gorham in 2011 until 2021. That value, she claimed, came to $1,307,700.00. (*Id.* at 2:40–41.) Holmes went on to explain that even if she tried to sell her house, the only people interested in purchasing it would be those who enjoy riding OHRVs. (*Id.* at 2:45–46.)

Next, Sandra Lemire testified that she has lost about $95,000.00 to $98,000.00 in the value of her house and explained her house is particularly sentimental to her because her father built it and it is almost 80 years old. (*Id.* at 2:50.)

Audrey Albert testified that, she agreed with the other plaintiffs that this lawsuit was never truly about the recovery of money, but she sought damages for the loss of personal value to her home, totaling $678,578.00. (*Id.* at 2:58–59.) Audrey came to that conclusion by dividing the value of her home by twelve, representing the time period during which OHRVs have been permitted in Gorham, subtracted the value of five of those months because she claimed her house is worth nothing five months out of the year when OHRV traffic is at its peak. (*Id.* at 2:59.) She also testified that her damages calculations went "hand in hand" with her personal loss for five months out of every year. (*Id.* at 2:59–3:00.) She also agreed that a person who enjoys riding OHRVs would love to own her house, but that a person who does not enjoy riding OHRVs would not

even consider purchasing it. (*Id.* at 3:03–04.) Audrey's husband, Rene, testified that the resolution he wants to see from this lawsuit is for the trails to be closed and agreed with his wife's damages figure of roughly $678,000.00. (*Id.* at 3:05–06.)

Finally, the court heard evidence about the Neils's property. Bruce Neil did not provide a specific number for the purpose of calculating his damages, but stressed that, if he had to provide a number, it would be in the millions of dollars. (*Id.* at 3:11.) Nancy Neil testified that, contrary to the other plaintiffs' testimony, closing the trails would not bring about an end to her problems because she is still experiencing depression and general sadness as a result of the lawsuit. (*Id.* at 3:14–3:15.) She also asked for damages in the amount of $1,655,500.00, but stated that amount would not fully compensate her. (*Id.* at 3:14–16.)

The plaintiffs' expert, Peter Stanhope, testified that the value of the plaintiffs' properties all decreased by twelve percent due to the defendants' decision to permit OHRV use in Gorham. Stanhope compared the plaintiffs' properties to other houses in the general area to determine by how much the plaintiffs' homes diminished in value. (Pls.' Ex. 62A at 33–35.) Marsha Campaniello, the defendants' expert, on the other hand, determined the plaintiffs' property values before and after the date on which they filed their complaint and reviewed market data for real estate in Gorham. She concluded that, while the access to OHRV trails may be a negative externality for some individuals, it also appears to be a draw for others. She noted that, in conducting her market research, the homes that had direct access to the PRT or OHRV trails were on the market for fewer days than those residences not on the trail. Ultimately, Campaniello found, to her surprise, there was no diminution in value to the plaintiffs' homes. She contributed the lack in diminution in value to the fact that OHRVs have brought

economic development to the North County, which, in turn, has drawn people to the area. For example, although after the date of her report, Campaniello noted that the Stearns property, the owners of which were originally plaintiffs in this lawsuit, which abuts the PRT and Route 2, was appraised at $270,000 in 2018 and sold for $380,000 in October 2020. Campaniello testified that the Stearns residence was listed in August 2020 and went under contract in October 2020, all of which would be during months in which OHRV use is permitted in Gorham. Campaniello explained that the fact that the Stearns property was able to sell during that time was an anecdotal indication that the OHRVs did not impact the value of real properties in the area.

When considering the testimony presented, the court is left with the defendants' expert who opined there was no diminution in value as to any of the plaintiffs' properties, the plaintiffs' expert who opined that the value of each residence decreased by twelve percent; and the plaintiffs who agree this case is not really about money but nevertheless claim damages that far exceed the opinion put forth by their own expert witness. While it is the court's duty as fact finder to award damages commensurate with the credible evidence, that task is made exceedingly difficult when the three sources of evidence from which the court must determine damages differ vastly. The court will address each source in turn.

Regarding the plaintiffs' testimony, a homeowner is generally competent to testify as to the value of his or her own property. *N.H. R. Ev.* 701; *Joslin v. Pine River Dev. Corp.*, 116 N.H. 814, 818 (1976) (permitting lay opinion testimony as to value of real property); *Transmedia Rest. Co. v. Devereaux*, 149 N.H. 454, 460 (2003) (permitting lay testimony as to value of equipment). However, the plaintiffs' testimony at the damages trial was based on their claims that their respective homes no longer

have any value to them as residences. The plaintiffs, with the exception of Nancy Neil, agreed that money alone would not be sufficient compensation and, similar to their testimony at the trial on the merits, expressed that they still experience pain and suffering from the presence of OHRVs in Gorham. While the court acknowledges, as it did in its Order on the Merits, that the plaintiffs have experienced and continue to experience grievances from the defendants' decision to allow OHRVs in Gorham, the plaintiffs' testimony supports that they are seeking damages based on emotional distress or on a theory that damages are abatable. As the court has already explained, damages in an inverse condemnation case are not abatable. Additionally, damages in an inverse condemnation action "do not include recovery for annoyance or emotional distress." 11A McQuillin Mun. Corp. *Remedies—Inverse condemnation—Damages* § 32:169 (3d ed.). Therefore, the court declines to award damages in the amounts requested by the plaintiffs during their testimony.

Turning to Peter Stanhope's testimony, the court finds his theory of damages to be unpersuasive. The court did not preclude Stanhope's testimony on the basis that he used an improper date when calculating damages, but the court agrees with the defendants that his blanket approach to determining damages is not an accurate measure of injury or loss in this case. Stanhope concluded that the plaintiffs' properties equally decreased in value by twelve percent. While that could be true if all the plaintiffs' homes were equally close to the same section of the PRT, such are not the facts in this case. In the Order on the Merits, the court specifically broke the plaintiffs' homes into three groups based on their actual locations relative to the PRT and Route 2. (*See* Order on Merits 12–16.) On cross-examination, Stanhope agreed with the defendants that the plaintiffs' homes experience different exposure to the PRT and Route 2 but then

concluded nevertheless that they all sustained the same percentage of diminution in value. (Tr., Day 1 at 11:52–53.) Given the different ways in which the plaintiffs are impacted by OHRV use as a result of the specific locations of their respective properties, the court would expect that, at the very least, that the plaintiffs' expert would specifically consider and reflect such crucially distinctive facts in reaching his conclusions.

The court also finds Stanhope's testimony to be unpersuasive when compared to Marsha Campaniello's testimony. Campaniello testified that she, like Stanhope, expected the value of the plaintiffs' respective properties to have decreased. However, unlike Stanhope she contacted real estate agents in the area and found that the selling price of properties had actually increased. As the court addressed earlier in this Order, the date of taking was in 2016. Given that the parties did not address that issue, neither expert had the benefit of considering that date when formulating his and her opinion. Therefore, the court primarily relies on the general observations of each expert. With that in mind, the court still finds Campaniello's testimony to be more probative and her opinion of value to be closer in time to the actual date of taking. Based on her conversations with real estate agents and looking at comparable sales data, Campaniello found that there was no decrease in value as to any of the plaintiffs' properties. Instead, she anticipates that the potential selling prices of the the plaintiffs' homes have actually increased over time. She opined that OHRV use on the PRT has brought an economic boost to the Gorham area, making it generally a more desirable place to reside, and caused no diminution in value to the plaintiffs' respective properties.

Moreover, the court declines to use Peter Stanhope's calculation of damages when the plaintiffs, through their individual testimony and post-trial memorandum, do not adopt his calculation of damages. Stanhope concluded, based on a twelve percent

decrease in value, that the following damages should be awarded to the plaintiffs: $11,300 for Lemire (Pls.' Ex. 62B); $21,800 for the Neils (Pls.' Ex. 62C); $12,000 for Holmes and Pelchat (Pls.' Ex. 62D); and $24,000 for the Alberts (Pls.' Ex. 62E). The plaintiffs, on the other hand, request damages that grossly exceed the dollar amounts put forth by their own expert. (*See* Pls.' Tr. Mem. ¶¶30–33 (asking that the court award damages in excess of $680,000,00 for each home).) The plaintiffs calculated those damages by using the approach explained by Audrey Albert, meaning they did not accept or adopt the methodology Stanhope used when calculating damages. (*Compare* Pls.' Ex. 62A (applying a twelve percent decrease in property value for all plaintiffs), *with* Pls.' Tr. Mem. ¶ 29 (asserting that the damages "shall be calculated using the Town tax assessment for the period of take beginning in 2011 through 2022 multiplied by 5/12[ths] (5 months) plus interest" (footnote omitted)).) The plaintiffs bear the burden in proving the damages they claim have arisen as a result of the defendants' decision to permit OHRVs in Gorham. 11A McQuillin Mun. Corp. *Remedies—Inverse condemnation* § 32:164, (3d ed.) (explaining that the party alleging inverse condemnation "must establish" that the government's action constitutes inverse condemnation, including the damages owed). Yet, the plaintiffs have presented two different theories of damages, one of which is based essentially upon emotional distress and/or continuing damages for which the court cannot grant relief and the other is based on a theory that the plaintiffs themselves have in reality declined to adopt. Accordingly, the court declines to accept Stanhope's theory of damages.

Ultimately, the court is left to speculate as to what, if any damages, the plaintiffs have sustained as a result of the defendants' actions, which the court cannot do. *See Gen. Linen Servs. v. Smirnioudis*, 153 N.H. 441, 443 (2006) (explaining that while

mathematical certainty is not required in computing damages ("[t]he law does, however, require an indication that the award of damages was reasonable")).

Lastly, the plaintiffs ask that the court award attorney's fees and costs in the amount of $422,443.37. "[A]bsent statutorily or judicially created exceptions, parties pay their own attorney's fees." *Choquette v. Roy*, 167 N.H. 507, 517 (2015). However, "a citizen should not be compelled to bear the financial burden of protecting himself from unconstitutional abuses of power." *Arcidi v. Town of Rye*, 150 N.H. 694, 704 (2004) (quoting *Burrows v. City of Keene*, 121 N.H. 590, 601 (1981)); *Dugas v. Town of Conway*, 125 N.H. 175, 183 (1984). The court reiterates that it found in favor of the plaintiffs during the trial on the merits. That finding was necessarily conditioned as a matter of law upon proof of actual damages. *J.K.S. Realty, LLC*, 164 N.H. at 234 (defining inverse condemnation as being an unconstitutional taking without formally exercising the power of eminent domain and without just compensation). As the court stated, the plaintiffs have not successfully carried their burdens of proof relative to their damage claims, which is crucial to a showing of inverse condemnation. Therefore, the plaintiffs have not prevailed in their case-in-chief and, in turn, are not entitled to attorney's fees.

As an aside, the plaintiffs often repeated goal in bringing this lawsuit was to reverse the defendants' actions and prevent OHRVs from being operated in Gorham or at least in the immediate vicinity of their homes. (*See e.g.*, Tr., Day 1 at 2:31, 2:48–49, 3:05, 3:10–11 (plaintiffs testifying that the case would be over if the PRT was closed and OHRVs were not allowed in Gorham).) In contrast to the plaintiffs' request, the court's role in this case, particularly during the trial on the merits and the damages phase, was to determine whether the defendants' action constitutes inverse condemnation and

whether the plaintiffs sustained damages as a result. Based on the evidence presented, the plaintiffs have failed to demonstrate that they are owed just compensation for the defendants' decision to permit OHRVs to operate in Gorham. Ultimately, the court cannot grant the equitable relief sought by the plaintiffs, which would be to reverse the defendants' decision to permit OHRV use on the PRT and public ways of Gorham. 29A C.J.S. *Eminent Domain* § 570 ("Purely equitable relief is unavailable in an inverse condemnation proceeding."). The decision to close the trail and prohibit OHRVs from being used in Gorham is a political matter ultimately and therefore beyond the constitutional role of the court.

For the reasons hereinabove stated, the defendants owe no damages and no attorney's fees to the plaintiffs.

SO ORDERED, this 6th day of February 2023.

Lawrence A. MacLeod, Jr.
Presiding Justice

CLERK'S NOTICE DATE
2/8/23
CC: A. Cunningham
C. Wilson
M. Broadhead
E. Goering
A. Edwards
J. Bouton