

II. "Takings"

The plaintiffs argue that the planning board's decisions constituted "takings" in violation of the State and Federal Constitutions. See NH CONST. pt. I, art. 12; US CONST. amends. V, XIV.

We first address the plaintiffs' arguments under our State Constitution, using federal law only as an aid in our analysis. See *State v. Ball*, 124 NH 226, 231 (1983). Because the Federal Constitution affords the plaintiffs no greater protection than does the State Constitution, we do not undertake a separate federal analysis. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19 (1992); *Burrows v. City of Keene*, 121 NH 590, 596-98 (1981).

The Webster plaintiffs assert that the planning board's decision was a "taking" because it deprived them of "reasonable access" to their property. Sanderson asserts that the planning board's decision was a "taking" because it deprived her of "an economically viable use of the [p]roperty." Specifically, Sanderson argues that because of the planning board's decision, she may only build two single-family homes on the 260 acre parcel. Neither claim is viable.

While arbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his or her land may constitute a taking, *Dumont v. Town of Wolfeboro*, 137 NH 1, 9 (1993), the "failure to take discretionary affirmative action that would arguably have increased the value of [a landowner's] property" does not. *Rockhouse Mt. Property Owners Assoc. v. Town of Conway*, 127 NH 593, 601 (1986). In this case, the planning board's failure to permit the plaintiffs to remove trees from Libbee Road is in no sense a taking. *Id.*

Moreover, even if the planning board's failure to permit the plaintiffs to remove trees could somehow be viewed as a regulatory restriction, it would be constitutionally permissible.

Contrary to the Webster plaintiffs' assertions, their interest in changing the classification of Libbee Road from a class VI to a class V highway is not constitutionally protected. "A landowner's vested right of access consists only of access to the system of public highways not of a particular means of access." *Merit Oil of NH, Inc. v. State*, 123 NH 280, 281 (1983) (quotation omitted). The planning board's decision "neither deprived the [Webster] plaintiff[s] of access to the general system of highways nor physically changed the actual entranceways to the property." *Id.*

Similarly, even if, as Sanderson claims, the planning board's decision deprived her of the ability to build more than two single-family dwellings on her property, it did not substantially deprive her of the property's economically viable use. "Although [Sanderson] may not have made as complete use of [the] property as [she] could have wished, the value of [her] property was not substantially destroyed ..." *Funtown v. Town of Conway*, 127 NH 312, 318 (1985).