

Legal Arguments Against Sunapee Leasehold Expansion
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SUMMARY: Careful review of the laws enabling the lease of the ski area within Mount Sunapee State Park passed in 1996, 1997, and 1998 reveal that future expansion of the leasehold for any purpose was not clearly authorized by the Legislature. Examination of the legislative record suggests leasehold expansion for the purpose of facilitating private real estate development on the borders of the state park was contemplated and rejected by lawmakers as part of the approval process for the initial lease. The proposed leasehold expansion now under review by DRED may be unlawful given the controlling legislation and the executed lease.

LEGISLATIVE HISTORY OF SUNAPEE LEASE:

1995: After previous unsuccessful attempts at legislation to allow for leasing of Cannon and Sunapee, HB369 (Chapter 241, laws of 1995) passes. Summary of the law:

<http://www.gencourt.state.nh.us/legislation/1995/HB0369.html>

- “The general court finds that in order to address all of the issues and concerns relating to the lease of one or both state-owned ski areas a thorough study of this proposal is necessary.”
- “Section VIII. Future expansion of the ski areas with consideration given to oversight and approval of future actions.”

1996: After a year’s effort, the HB369 study committee is extended through passage of HB 1620 (Chapter 258, Laws of 1996.) HB1620 enables the leasing of the state-owned ski areas and extends the reporting date of the HB369 study committee. The law:

<http://www.gencourt.state.nh.us/legislation/1996/hb1620.htm>

258:1 New Section; Lease Agreement; Terms. Amend RSA 12-A by inserting after section 29 the following new section:

12-A:29-a Lease Agreement; Terms. The department of resources and economic development shall develop a lease agreement which shall include the following terms in the event that the state enters into an agreement to lease Cannon Mountain or Mount Sunapee ski area, or both:

- I. The terms of the lease, including length, fee structure, methods used to determine the fee structure and to measure the amount of fees to be paid, and default conditions.**
- II. The assets that would be included in the lease, i.e. what is included in the lease and what is not, how these assets would be transferred or sold to the lessee, determination of the value of the assets, and requirements to regularly value the assets.**

III. Investment requirements upon the lessee. The lease shall include provisions to ensure that the lessee shall prepare a master plan that fulfills an obligation to maintain and upgrade the assets on state land.

IV. Environmental regulations and controls including:

(a) Prototype regulations to preserve and protect state land which shall include but not be limited to:

- (1) Soils;
- (2) Water quality;
- (3) Wetlands;
- (4) Wildlife habitat;
- (5) Scenic and aesthetic qualities; and
- (6) Multi-seasonal recreational opportunities.

(b) Procedures to follow when the lessee requests a permit to replace major equipment (such as a lift) or **expand** the ski area, cut new trails, increase snowmaking, or alter master planning requirements.

V.(a) The role of the state in the on-going lease of the ski areas, including the state's regulatory authority and power.

(b) The establishment of a prototype commission to oversee and administer the lease.

(c) The operational responsibilities remaining with the state and how these responsibilities would interact with the lessee's responsibilities.

VI. The disposition of employees employed by the ski areas including:

(a) Transfers within the department or the state.

(b) Offering employees the option of being bought out.

258:2 Reporting Date and Sunset of Committee Extended. Amend 1995, 241:5 and 6 to read as follows:

241:5 Report. The committee shall submit a report of its findings, including recommendations for legislation, to the speaker of the house, the senate president, the house clerk, the senate clerk, the governor, and the state library, no later than [November 1, 1995] November 15, 1996.

241:6 Sunset of Committee. The committee shall terminate on November 1, [1995] 1996 or when the report is filed.

258:3 Consultant. To facilitate the preparation of the prototype lease, the department shall employ the services of a qualified consultant with demonstrated experience in ski area planning, development and appraisal.

258:4 Appropriation. The sum of \$15,000 for the fiscal year ending June 30, 1997 is hereby appropriated to the department of resources and economic development for the purpose of compensating the consultant pursuant to section 3 of this act. The governor is authorized to draw a warrant for said sum out of any money in the treasury not otherwise appropriated.

258:5 Funds. The department of resources and economic development is authorized to transfer existing funds, accept any gifts, grants, donations or any other moneys made available to the department for the purpose of offsetting any costs associated with the study authorized in 1995, 241.

258:6 Effective Date. This act shall take effect upon its passage.

HB1620 co-sponsor Representative David Boutin of Manchester testified before the Senate Fish & Game, Recreation Committee on March 27, 1996. Representative Boutin was a member of the 1995-6 study leasing committee. In his testimony in support of HB1620, Boutin says, quoting from the senate transcript:

“Basically, the way I understand it, this is not going to be leasing the whole mountain if we ever do a lease. What would happen is you would have the mountain and you would draw an imaginary line, if you will, which would encompass the ski area, so you’re limiting the area in which they’re going to work or have control over via the lease. You’re not going to say you have the whole mountain.”

“... And [HB1620] goes on in the subsections to talk about where there is any expansion of ski areas... then they’d have to go through the process with the state and receive an [sic] environmental approvals and so forth...”

1997: Legislature passes HB628 (Chapter 119, Laws of 1997) which further authorizes DRED to begin an RFP process for leasing both Cannon and Sunapee, and establishes a 14 member legislative oversight committee to aid DRED Commissioner Robb Thomson in reviewing the RFP and proposals. The law:

<http://www.gencourt.state.nh.us/legislation/1997/HB0628.html>

119:1 Mount Sunapee and Cannon Mountain; Request for Proposals.

I. Notwithstanding any other provision of law, the commissioner of the department of resources and economic development shall, in consultation with the committee established in section 2 of this act, develop and issue a request for proposals to include but not be limited to a lease, concession agreement, or management contract for the Mount Sunapee or Cannon Mountain ski area operations or both.

II. The request for proposals shall include but not be limited to the following terms, conditions, and provisions:

- (a) Length of the agreement.**
- (b) Assets to be included.**
- (c) Outline of master plan.**
- (d) Environmental regulation and controls including but not limited to:**
 - (1) Soils,**
 - (2) Water quality,**
 - (3) Wetlands,**
 - (4) Wildlife habitat,**
 - (5) Scenic and aesthetic qualities,**
 - (6) Multi-seasonal recreational opportunities,**
 - (7) Forestry issues.**

(e) Expansion limitations.

- (f) State and local regulatory authority.
- (g) Operational responsibilities remaining with the state.
- (h) Requirement of performance bonds.
- (i) Past practices and agreements.
- (j) Repurchase.
- (k) Federal agency requirements, conditions, and regulations.
- (l) Consideration of state employees.

III. All responses to a request for proposals developed under this act shall be reviewed by the committee established in section 2 of this act in cooperation with the commissioner of resources and economic development.

119:2 Committee Established. There is established a committee for the purpose of advising the commissioner of resources and economic development, pursuant to section 1 of this act, on the creation of a request for proposals and the review of any responses to a request for proposals.

I. The committee shall consist of the following members:

(a) Ten members of the house of representatives, at least 3 of whom shall be members of the minority party, and at least 8 of whom shall be members of the resources, recreation, and development committee, appointed by the speaker of the house.

(b) Four members of the senate, at least 1 of whom shall be a member of the minority party, appointed by the president of the senate.

II. The members of the committee shall elect a chairperson from among its members. Members shall receive mileage at the legislative rate when attending to the duties of the committee.

119:3 Review by Capital Budget Overview Committee; Public Comments. Any agreement or contract recommended pursuant to this act shall be submitted to the capital budget overview committee established in RSA 17-J for review and approval. No agreement or contract shall take effect until such approval is obtained. The capital budget overview committee shall receive written public comments submitted prior to the time the committee votes on a recommended agreement or contract.

119:4 Report on Future Status of Ski Area Employees. The commissioner of the department of resources and economic development shall provide along with any agreement or contract submitted under section 3 of this act, a report on the disposition of employees of the ski areas at Mount Sunapee or Cannon Mountain, or both.

119:5 Effective Date. This act shall take effect 60 days after its passage

During a legislative hearing on HB628, the following discussion is recorded:

2/20/97, House Resources, Recreation, and Development Committee Hearing. Representative David Boutin of Manchester, a member of the 1995-6 study committee and a sponsor of HB628, testified again. Quoting from the committee's hearing notes, **Representative MaryAnn Blanchard asks, "Will residential development be permitted?" Representative Boutin responds: "Categorically, no."**

Fourteen RFP Committee Members named in June 1997:

House Members:

Charlie Royce (Jaffrey)
Mike Whalley (Alton)
Will Williams (Franconia)
Rudy Adler (Lempster)
David Lawton (Meredith)
Peter Crowell (New London)
Deborah Merritt (Durham)
Paula Bradley (Randolph)
Ed "Smokey" Smith (Hindsdale)
Paul McGuirk (Walpole)

Senate Members:

Rick Russman (Exeter)
Allen Whipple (Claremont)
Amy Patenaude (Henniker)
Fred King (Colebrook)

Over the summer and fall of 1997, Commissioner Thomson and the 14 member RFP committee developed an RFP that was released on January 15th, 1998.

The RFP adheres closely to the requirements of HB628, and asks each applicant to certify that they have read all state and federal statutes relative to the leasing, including HB628. The RFP also asked each applicant to include "its proposal for the development and expansion of the Mount Sunapee Ski Area."

Unfortunately the RFP did not meet all the legislated requirements of HB628, which included Section E, "Expansion Limitations." While this author could not find specific reference to this subsection in any legislative testimony from 1997, the inclusion of these two words suggest that the bill's sponsors (Reps. Ed Smith, David Boutin, Gene Chandler, Bill Williams, and Senators Jim Rubens and Carl Johnson) or members of the committees reviewing HB628 through amendment, contemplated the need for limits on expansion. By requiring applicants to read and follow Chapter 119, Laws of 1997, it could be argued that all respondents were responsible for including a description of "Expansion limitations" in their RFP. (However, it could be better argued that the state of NH through DRED is the entity most responsible for establishing limits on expansion.)

In April of 1998, DRED Commissioner Thomson made the announcement that his preferred solution to the ski area leasing debate was to lease Sunapee and use the income to capitalize improvements at Cannon. This scheme was enabled by HB1291 (Chapter 134, Laws of 1998).

<http://www.gencourt.state.nh.us/legislation/1998/HB1291.html>

HB1291 re-affirmed the legislature's desire to lease Mount Sunapee, while also clarifying a number of statutory issues relative to the previous ski area management structure within DRED.

From the initial RFP development discussions in the fall of 1997 through June 1998, local opposition to the proposed leasing began to gain strength. One of the core concerns of the various leasing opponents was the potential for a private operator to use the state park as an amenity for outside-the-park real estate development. Throughout the process, however, the public heard a consistent message from DRED, the Governor's office, legislative supporters for leasing, executive councilors, and the chosen lessee, Okemo: the lease would not lead to real estate development on Mount Sunapee.

As proof of this consistent set of promises, I offer the following sample of quotes from both state records and news reports. All underlining is this author's emphasis:

Senator **Fred King**, speaking in favor of the lease before the Capitol Budget Overview Committee, May 13th, 1998:

"I've been participating in the study of the ski areas in New Hampshire and whether they should be leased or not leased for as long as I've been in Concord, I believe, and sat on the most recent committee that met and developed a- working with the commissioner, developed a request for proposal to see if, in fact, any private sector companies were interested in leasing our ski areas, given the very restrictive covenants that we probably would put on them and have put on them; severely restricting the type of development that normally takes place at ski areas that people tell me is where they really make their money."

Senator **Fred King**, speaking in favor of HB1291 on the floor of the senate, May 21st, 1998:

"...So what we have got is a skiing infrastructure that is going downhill. Now the last committee that I sat on was a committee that spent a year putting together the RFP, to see if there were in fact, private firms who were interested in leasing the state's ski areas. A lot of thought was put into that. The portion of the ski area that is being leased is very small; it is just the skiing itself. There will be no honky-tonk at these state owned ski areas. There will be no condominiums. There won't be any all-night bars there. These will remain family ski areas..."

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DRED Commissioner **Robb Thomson**, quoted in the Union Leader, March 4th, 1998:

“For years people have said ‘you can’t sell the ski areas.’ Well, you can’t sell them. There has been talk of people putting condos up there. That’s not going to happen, either.”

DRED Commissioner **Robb Thomson**, described in the Concord Monitor, May 27th, 1998:

“The real estate sales referred to in the lease do not refer to property on Mount Sunapee. The wording ensured other Okemo-owned property would be under state jurisdiction. ‘There is no sale of real estate in the lease-hold area,’ Thomson said.”

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Executive Councilor **Ray Burton** concerning the potential leasing of Cannon Mountain, as described in the Union Leader, March 23rd, 1998:

“Burton said he has purposefully remained open-minded on the issue. However, he said, if a lease does come before the council to be approved for Cannon, he said he would look for protection of state employees and the state land surrounding the mountain so that it cannot be used for development of condos and the like, and he would want to see a serious proposal to open and operate Mittersill before he could support it.”

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Governor **Jeanne Shaheen**, as described in the in the Union Leader, May 31st 1998:

“...In an interview Thursday during the 22nd annual Governor's Conference on Tourism at the Mount Washington Hotel, Shaheen for the first time gave her reasons for supporting a proposal to lease the 50-year-old state ski area in Newbury to Okemo Resort of Ludlow, Vt., and her hopes for recapitalization of Cannon Mountain from the proceeds.

‘I am convinced that the commitment on the part of the Legislature to making the kinds of investments in the ski areas that we need to make to keep them operating in an efficient way that is of benefit to the public is not there, particularly given the other requirements for services from state government,’ Shaheen said.

...[The lease] is going to maintain public access to the point where people will still be able to use those lands and there won't be (residential or commercial) development on those lands; that is a requirement,’ Shaheen said.”

Governor **Jeanne Shaheen**, as described in the in the Union Leader, June 12, 1998:

“Okemo plans to spend roughly \$ 11 million on improvements in the next seven years at Mount Sunapee, and is required to develop a comprehensive master plan within the next two years. That plan will involve public oversight. Some residents of the Sunapee area are wary that such investment will lead to rampant development.

Gov. Jeanne Shaheen said the towns in the area are in the drivers seat on development issues and the state would not be dictating that at all.”

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Tim Mueller in the Valley News, May 2, 1998:

“The Muellers said they had no condominium development plans. ‘We have no intentions of buying anything,’ Tim Mueller said when one person asked about the couple’s designs on private land abutting the state park. ‘It’s important for us that Mount Sunapee and the region maintain its own identity.’”

Tim Mueller, as described in the Intertown Record, May 5th, 1998:

“We in no way want to say that what works at Okemo is going to work at Sunapee,” said Diane Mueller... The Muellers were questioned about the amount of development they had been involved in around Okemo, and if they intended to be involved in commercial development around Mt. Sunapee. Tim Mueller pointed out that Mt. Sunapee presently draws mostly “day trip” skiers, families coming to the mountain and returning to their homes the same day. At Okemo, he said, there is a bed-base issue. There skiers need a place to stay because they are well beyond the day trip range. ‘Here we don’t see that development taking place,’ he said, pointing out that the land around Mt. Sunapee is state-owned, unlike the Okemo setting.”

Tim Mueller, as described in the Newport News Leader, May 7th, 1998:

“Mueller said the comfortable capacity at Mount Sunapee is about 4,000 skiers and he would work to increase it to 6,000 while trying to keep everything in balance. He said he had no plans to purchase land surrounding the park for private development. Beds to house skiers overnight would be provided by the public sector, he said.”

Tim Mueller, as described in the Union Leader, May 7th, 1998:

“The owners of Okemo Mountain Resort in Ludlow, Vt., came to the State House yesterday to discuss their values and their vision for operating Mount Sunapee ski area.

Tim and Diane Mueller told legislators Mount Sunapee could become a premier ski destination in Southern New Hampshire with its own distinct character, separate from the Okemo experience. But Okemo's resources would be tapped to help raise Mount Sunapee up.

'Although it is not and will not be a destination resort,' with condos lining the mountainside, 'it has good potential for a day market with some people staying a weekend,' said Tim Mueller.

...The Muellers were asked if they planned to build condos around the mountain. They answered that they have not been looking at real estate in the area and noted that the 900-acre lease would preclude them from building on the mountain. The lease does not include the beach or even parcels of land owned by the state which are adjacent to the developed ski area.

Though there is significant slopeside development at Okemo, they noted that theirs is a market whose visitors come from three to five hour drives and they need a place to stay.

Tim Mueller said he anticipated there may be an increase in the bed base in the Sunapee area from the lease.”

Tim Mueller, as described in the Concord Monitor, May 12th, 1998

“Okemo would be restricted to the current footprint of the ski area. Although the company submitted a map in its proposal that marked future expansion, owners did so because they weren’t sure of the exact boundaries of the lease, Mueller said.”

Tim Mueller quoted in the May 13, 1998 Argus Champion editorial:

“[Muellers want] in their own words, ‘to operate a successful regional ski resort and to enhance year round activities, not to develop off-mountain real estate.’”

Tim Mueller in the Valley News, August 26, 2001, in response to a question asking if he had broken a promise:

“I was referring to the present tense and not necessarily indicating the possibility of never doing anything in the future... We always envisioned... looking for development opportunities should they come along. Things change in life, and I guess that’s what happens.”

Tim Mueller in the October, 2004 Vermont Business Magazine:

"What's going to drive the ski area's viability in the long term is the product," Tim said. "You've got to have good lifts, trails, snowmaking and lodges. A necessary way to get there is through real estate development. You need a bed base, and nobody's going to come in and

finance a hotel in ski country in New England. You can't finance a hotel and pay for its debt on basically six months of OK levels of occupancy. There's not a per se hotel in a ski area in Vermont. They're all condominiums. But you do make money in real estate, generally, if you're successful. We have."

"...According to the Herald, opponents say that the Muellers promised not to develop any real estate when they won the competitive lease. The Muellers say it was in their plans from the beginning.

"That's exactly what the RFP asked for," Diane said.

"That's exactly what the state authorized us to do," Tim said. "And that's what most other ski areas in the country are doing."

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More recent affirmation of the "promise:"

Former Representative **Deborah F. Merritt**, in an email to DRED Commissioner Sean O'Kane, October 28, 2004:

"I was a member of the original committee that reviewed the bids to lease Mt.Sunapee prior to submission to the then Commissioner, Robb Thomson. At the time of Okemo's proposal to lease, the Mueller's stated at that meeting that they had no intention of expanding the ski area beyond its original boundaries, only to enhance the existing facility. I voted "no" on leasing because I didn't think, from a business perspective, that it would be possible to achieve desired financial results with the existing facility. Needless to say, I was correct in my assessment, because here we are, several years later, facing a behavior that is all too prevalent today- I often feel that someone's word no longer stands for anything when you can get what you want at a later date. I urge you to reject the proposal."

Representative **Neal Kurk**, testifying before the House Resources, Recreation, and Development Committee, February 15, 2005, as quoted in the Concord Monitor:

"Neal Kurk, a representative of Goffstown and Weare, said the expansion deserves a look from the Legislature because its approval would represent a change to the original lease agreement.

'In no way was the Legislature informed or were we led to believe that the leasehold could be expanded to benefit a private entity,' he said."

CONCLUSIONS ON LEGALITY OF LEASEHOLD EXPANSION

While this author is not an attorney, it is his opinion that the people of New Hampshire, the Legislature, the Governor, and the Executive Council did not explicitly authorize any kind of leasehold expansion in 1998. **None of the various enabling laws or legislative history explicitly discusses or authorizes leasehold expansion.**

However, it is clear that the lease signed by DRED Commissioner Thomson, approved by the Capitol Budget Overview Committee, and approved by Governor and Council on June 10th, 1998 does provide for amendments to the lease. Quoting from the lease:

“This Agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after such approval of such amendment, waiver, or discharge by the Governor and Executive Council of the State of New Hampshire.”

Given this legislatively-approved lease language, it is incontestable that the Governor and Council have the right to make changes to the lease. However, what is unclear is *for what purpose* and *within what limits* such an amendment can take place. The over-arching legislative intent behind the initial leasing of the ski area within Mount Sunapee State Park was to improve the ski operations already in existence therein.

A leasehold expansion to allow for casino construction or to build a driveway for an abutter would surely be viewed as inconsistent with the legislative intent for this lease. Given the many pieces of evidence suggesting that private real estate development was not supposed to be a result of the lease, and given the exclusion of leasehold expansion from the legislation and lease itself, is leasehold expansion to directly facilitate and create access for real estate development lawful?

Expanding the leasehold area for any purpose is clearly not an obligation of the people of NH and their Governor and Council. Expanding the leasehold for the purpose of facilitating real estate development may not be lawful.

DRED’S PUBLIC INVOLVEMENT AND LEASE OVERSIGHT POLICY: NOT A CONTROL, EITHER

Commissioner Thomson’s farewell act at DRED was the signing of the Public Involvement and Oversight Policy for Mount Sunapee Ski Area,” dated August 31, 1998. Unfortunately, given its non-APA approved status, this “policy” is not by any means a fully legal and controlling policy document. It can be changed, ignored, partially enforced, or eliminated at any time by any Commissioner. Indeed, Commissioners Bald and O’Kane have routinely ignored aspects of the policy, with no regard for its implied (but unenforceable) promises to the public and the leaseholder.

On the topic of leasehold expansion, the document reads:

H. Any amendment to the lease which would expand the leasehold area shall be publicly noticed and

submitted for public review and comment in accordance with the procedure outlined above for the MDP and EMP prior to submission to Governor and Council for approval.

Though not a legal obligation, this language does underscore again DRED's understanding that leasehold expansion is not a right of the lease, and can be approved (or denied) by Governor and Council.

DRED & OKEMO’S ARGUMENTS FOR LEASEHOLD EXPANSION: FAR FROM COMPELLING

Since the leasehold expansion plan was first revealed in February, 2001, both DRED and Okemo have suggested a variety of arguments for why the expansion of the leasehold is lawful, of public benefit, and in the case of Okemo’s advocacy, a promise the state must keep or risk being sued.

The first argument for leasehold expansion made by both DRED and Okemo was that the state had not clearly delineated the boundary of the leasehold area when completing the lease arrangements in 1998. The leasehold expansion was thus first couched as a “minor lot line adjustment” necessary because of confusion and ambiguity on the part of both the tenant and landlord. Subsequent research on the lease boundary revealed a very clear mandate from the Legislature to lease the existing ski area only. The current leasehold, which was also recorded on a map with the lease in two county registries of deeds before the lease took effect, is unambiguous in its boundaries, and reveals the cartographer’s close adherence to legislative intent. The boundary almost perfectly matches the existing footprint of the ski area, with a very small space for trail widening on the far outside edges of the existing trail network. As the Legislature intended, only the ski area portion of Mount Sunapee State Park, approximately 938 acres out of a total park of approximately 1,900 acres, was legally leased to Okemo. This “we didn’t know where the line was” argument was soon dropped by both DRED and Okemo.

However, their second argument, though equally unconvincing, continues to be their main thrust. Okemo argues that since the state asked for its expansion plans in the RFP, and since they included some language in the RFP about expansion in what is referred to as the East Bowl, then the state is obligated to allow for that expansion. However, because of the “discovery” of old-growth forest in the East Bowl, Okemo has graciously chosen to forgo those plans, and thus has only one direction to expand: to the West.

In its RFP proposal submitted in the winter of 1998, Okemo did include some language about leasehold expansion and subsequent development of the East Bowl. The RFP proposal refers to a very rough map of the park and labels two areas outside the proposed leasehold expansion as a “3. Future Planning and Improvement Area.” On page 69 of the RFP proposal, Okemo writes:

“3. Future planning and improvements to be made in peripheral areas surrounding the current lift, trails, and base area facilities.”

As the planning for improvements of the existing lifts, trails and base facilities proceeds, we will explore opportunities for expanding summer and winter recreation activities outside the existing area of lifts, trails and base facilities. We understand that thorough environmental and land capability analyses will need to be conducted prior to proposing expanded recreation improvements, and we anticipate working closely with the state in determining the scope of such expansion and delineating key resource protection areas. The improvement proposals will be included in the five year master plan.

LIFTS:

New Lift in the Sun Bowl area (east of the existing lift and trail network)

TRAILS

New Trail Network east of the Sun Bowl area

New Trail Network above the lower parking area and below the “Campground”

New Trail Network north and adjacent to the Province area

LODGES and STRUCTURES

New Sun Bowl Lodge...”

Okemo’s inclusion of these vague plans in the RFP submission accepted by DRED Commissioner Thomson by no means grants an automatic obligation by the people of NH to allow for this leasehold expansion, even without old growth forest getting in the way. Only the enabling legislation and the subsequent lease are controlling in this regard. Numerous other proposals for inappropriate summer activities such as a “Water slide/Water Park,” “Devil Carts,” “Fireworks,” as well as “Night skiing” were also included in the RFP submission. DRED denied several of these proposals in the 2000 Master Development Plan.

Apparently DRED Commissioners are not compelled to let the RFP submission obligate the state to any activity simply because it was proposed pre-lease. If the RFP submission were the guiding document for the future of Mount Sunapee State Park, why didn’t it contain any reference to expansion of the ski area across the park’s borders to facilitate a private real estate development?

The “discovery” of old-growth forest in the East Bowl in 1998 was actually a “re-discovery” of a very well-known fact, clearly known to DRED, the public, and Okemo for more than eighty years prior to 1998. This fact certainly was re-affirmed through various news reports on the front page of the Concord Monitor and Valley News in May of 1998, as well as through testimony delivered as part of the leasing debate, and did constitute just cause for DRED to re-evaluate potential ski area activities both within and outside the leasehold area. The appreciation for the importance of this natural resource has been a rare moment of good management by DRED over the past seven years.

The “old growth got in the way” argument has been laid out by both Okemo and DRED on numerous occasions. It first appeared in the original leasehold expansion amendment in the spring of 2001. Drafted by then-AG office attorney Mike Walls, the draft amendment read, in part:

“Whereas, [Operator, meaning Okemo] recently acquired ninety-six (96) acres of land located in Goshen... [and] proposes to develop [the 96 acres] to provide residential housing convenient to members of the general public who may use the Mt. Sunapee Ski Area for outdoor recreation purposes; and

Whereas Okemo recently amended its Master Development Plan to recognize the ecological value of old growth at Mount Sunapee State Park and in fact has forgone further development in the East Bowl area of the Park and has further agreed to fund a detailed natural heritage inventory of sensitive ecological areas; and Whereas, the parties believe it to be in their mutual best interests to amend the Sunapee Lease... to facilitate access to, from, and between [Okemo’s recently-purchased holdings] and the Leased Premises; ...

...Therefore, the purpose of this Amendment is to redefine the North line and West line of the leasehold to facilitate legal access to, from and between the Leased Premises at Mt. Sunapee State Park and the Operator's adjacent property..."

Okemo uses this same logic in its proposed 5 Year Master Development Plan, which reads on page 7:

"with the findings of old growth forest characteristics in the East Bowl area of Mount Sunapee, in 2000 we agreed to abandon our plans for ski area expansion in the East Bowl, and focused on the western flank of Mount Sunapee instead. The West Bowl area, on which we are now seeking an expansion of the leasehold, is the only expansion of the leasehold boundary that is envisioned for the future."

The argument was recently made in a letter from DRED to the National Park Service, dated October 25th, 2004:

"As indicated in the MDP, [Okemo/MSR] has voluntarily relinquished any possibility of development or expansion in the East Bowl area of the mountain... the only place left to meet the Resort's commitment to develop the ski area as a premier outdoor recreation site is in the West Bowl."

DEBUNKING THE "CAN'T GO EAST BECAUSE OF OLD GROWTH, SO WE HAVE TO GO WEST" ARGUMENT

Here is a fact-based and logical argument countering the "can't go east because of old growth, so we have to go west" argument made by both DRED and Okemo:

1. The state of NH enabled a lease through legislation and approved a clearly defined leasehold area in 1998 based on the simple and unambiguous premise that the state wanted to lease the existing ski area only. Any future leasehold expansion would be at the pleasure and will of the people of NH through their Governor and Council, provided that such leasehold expansion is consistent with the legislative intent that enabled the original lease.

Okemo and DRED both acknowledge that leasehold expansion is not a legal obligation, even in the context of the RFP proposal and the "discovery" of old-growth. Indeed, the RFP submission map referred to above is clearly labeled with the following understanding by Okemo:

"3. Future Planning and Improvement Area.* (*improvements will depend upon environmental suitability, lease conditions, and approvals.)"

That Okemo understood that no leasehold expansion was guaranteed unless or until it received approval by Governor and Council is indisputable. **No matter what promises may have been made by the staff of DRED through letter agreement or other verbal exchanges, only our elected officials are empowered to amend the lease and allow for leasehold expansion.**

Because only the Governor and Council can approve a leasehold expansion, any proposal necessarily requires extensive public comment and agency review, and is thus subject to a political decision-making process to determine if expansion is in the public interest. Unrealistic plans drawn on a colorful map do not constitute an obligation on the part of the people of NH to accommodate further development and diminishment of any part of Mount Sunapee State Park. (It should also be noted that the same map gives no indication that Okemo envisioned or intended the West Bowl of Mount Sunapee to ever be considered for ski or lease expansion, underscoring the wisdom and appropriateness of the current leasehold boundary. No other reference to western expansion is included in any historical plans by the state of NH, or in any materials submitted in the public record by Okemo. The presence of the Summit Hiking Trail provides de facto evidence that the western edge of Mount Sunapee was meant to be maintained for passive recreation and other essential public values, and not for skiing.)

2. Knowledge of the presence of old-growth “primeval” forest in the East Bowl of Mount Sunapee dates at least to the first decade of the 20th century. Indeed, DRED’s Natural Heritage Inventory staff detailed the extensive historical record in both its 1999 and 2004 reports on old growth forest in Mount Sunapee State Park, reports paid for in part by Okemo. Additionally, the Society for the Protection of NH Forests historical records contain research about and appreciation of this globally-rare natural resource dating from at least 1911. With respect to Okemo’s awareness of old growth in the East Bowl, numerous news articles appeared in local and state papers in the spring of 1998, before the Legislature had even given final approval to the lease arrangement. A written report and subsequent testimony by forest ecologist Christopher Kane appeared in the public record well before the lease was approved by Governor and Council, with his testimony given directly to Tim Mueller at the June 8th, 1998 hearing in Concord, NH. To suggest that Okemo was unaware of the East Bowl old-growth forest before 2000, or even before signing the lease agreement, is disingenuous at best, and appears more tactical than truthful.
3. Okemo and DRED argue that because the state of NH had discussed expansion into the East Bowl in previous state master plans for Mount Sunapee, that notion sets a precedent that amounts to an expectation under the lease for the leaseholder to also attempt expansion there. We have established that there is no legal obligation under the enabling laws or the lease itself. However, common sense also points to the unrealistic nature of this assumed right. Potential for ski terrain development in the East Bowl is very low. By Okemo Manager Jay Gamble’s own admission, terrain in the East Bowl is steep, rocky, and wet. Ski runs would necessarily be short and western-facing, and would all converge at the bottom of a ravine not easily crossed. Lift placement would be difficult and expensive. Expansion in the East Bowl would provide little if any appropriate Intermediate ski terrain, and would cost an inordinate amount in engineering fees, helicopter hours, and earth moving. Local, state, and federal approvals for developing this part of the mountain would be difficult to obtain, with numerous water, air, wetlands, and hydrological challenges to overcome. Public concern over the potential destruction of ancient forest, as well as development’s encroachment on Lake Solitude, its numerous

hiking trails, and Native American sacred sites in the East Bowl and surrounding area, would have proven formidable. The involvement and possible opposition of Newbury's planning, zoning, conservation, and select boards, as well as conservation organizations like SPNHF, Sunapee-Ragged-Kearsarge Greenway Alliance, Monadnock-Sunapee Greenway group, New Hampshire Sierra Club, Lake Sunapee Protective Association, numerous national and international ancient forest preservation groups, and the pre-existing local citizens group (all of whom expressed concern about the initial lease on environmental grounds) would have heightened public concern and regulatory hurdles. Indeed, the fact that the state of NH abandoned its own vague and un-funded proposals for East Bowl expansion is perhaps the most obvious indication that Okemo hopes were entirely unrealistic.

4. Most importantly, expensive ski and lift development in the East Bowl would provide zero opportunity to cash in on the prime motivator for ski area expansion in the past twenty years: lucrative real estate development. Entirely surrounded by protected public land, miles from any available and developable private parcels, situated high and deep in the heart of a protected public mountain park, East Bowl ski development provides no pot of gold at the bottom of the ski lifts and trails, no ski-in, ski-out condominiums, no vehicular access to gargantuan multi-million dollar ski chalets, and no guaranteed pay-off for the tens of millions of capital investment dollars needed to justify expensive ski infrastructure built in such a difficult and inappropriate location. Tim Mueller admits this fact in the October 2004 Vermont Business Magazine:

"What's going to drive the ski area's viability in the long term is the product," Tim said. "You've got to have good lifts, trails, snowmaking and lodges. A necessary way to get there is through real estate development. You need a bed base, and nobody's going to come in and finance a hotel in ski country in New England. You can't finance a hotel and pay for its debt on basically six months of OK levels of occupancy. There's not a per se hotel in a ski area in Vermont. They're all condominiums. But you do make money in real estate, generally, if you're successful. We have."

“BUT GEORGE BALD SAID WE COULD EXPAND IF WE MET THE THREE CONDITIONS!”

Another argument used by both DRED and Okemo is that former DRED Commissioner George Bald promised an approval of the leasehold expansion once Okemo had satisfied the requirements he laid out for them in his February, 2002 statement concerning leasehold expansion. That document reads:

STATEMENT BY GEORGE BALD TO THE MT SUNAPEE ADVISORY COMMITTEE FEBRUARY 27, 2002

As you know, in July 2001, Okemo requested that the state consider an expansion of their lease boundary on the Westerly side of Mt. Sunapee Ski area. Pursuant to the authority vested in me by Chapter 134, Laws 1998, I would now like to explain how I intend to proceed with this request.

The State and Okemo have enjoyed a good working relationship to date. When we faced issues of concern in the creation of the original Master Development Plan required by the terms of the lease, we were able to arrive at solutions that protected the environmental integrity of the old growth forest present on the leasehold while allowing Okemo to make the changes and investments they believed necessary to ensure the ski area's economic success.

As a result of Okemo's request for an expansion of the lease boundary, I have heard from local citizens, municipal officials, economic development entities, environmental interests, and of course you, the Advisory Committee. I believe we again have a situation in which a careful balancing of interests is needed, and sufficient time for a thoughtful process to unfold.

Therefore, today I am announcing that I will make my recommendation on the expansion of the lease boundary, to the Governor & Council, only after the following items are completed:

1) Okemo will reopen the Master Development Plan or create a new 5-Year Master Development Plan that will include plans for the use of the additional land in the area created by the expansion of the lease boundary. The proposed plan will encompass all proposed development activity associated with their management of the ski area, and any adjacent land Okemo intends to develop. The new or revised plan must then be reviewed and approved through the process required by the Lease and Operating Agreement.

2) Okemo will involve local citizens, businesses, the Planning Boards of Goshen and Newbury, all abutters, as well as the Regional Planning Commission, in their preparation of the new or revised Master Development Plan. Public involvement will further be sought in accordance with the Public Involvement and Oversight Policy, adopted August 31, 1998.

3) Okemo will identify a parcel of land adjacent to the Mt Sunapee/Pillsbury Greenway of at least 100 acres. The property will be acquired by Okemo and donated to the State of New Hampshire for inclusion in the Greenway. As I stated when I approved the original Master Development Plan in the fall of 2000, the Department is committed to expanding the boundaries of Mount Sunapee State Park by purchasing adjacent properties. This process presents an opportunity to move forward with that vision.

I would like to thank the members of the Mt. Sunapee Advisory Committee for their thoughtful suggestions and helpful advice on how we should proceed.

Why the 2002 Bald Statement is not a relevant or controlling document:

1. Never placed on letterhead or signed by Commissioner Bald, this document is not a legally binding promise of any kind, and is not worth the paper it was written on. Unfortunately, the Supreme Court has ruled that even when on letterhead and signed, such policy statements are not binding or enforceable. With no APA-guided rulemaking and no law to back this statement up, it does not lawfully control the expansion debate. Commissioner O’Kane is not bound to these conditions, nor are the citizens of NH or our elected officials.
2. Bald’s statement is a prized specimen in political artfulness. Nothing in the statement suggests that by meeting the three requirements vaguely laid out herein, DRED is obligated to do anything more than consider the proposed leasehold expansion further. Media accounts following the release of this statement publicly pondered for more than a week exactly what Bald intended by this statement, as did members of the Advisory Committee, Okemo, conservation groups, and the public. For his part, Bald refused to offer any clarification in interviews or in writing. If Okemo feels that Bald made them a promise either in person or in writing to approve leasehold expansion by meeting the now famous “three requirements,” they were misled by a master political operator. Such a “promise,” never made publicly in writing or in quotes, would not have been legally controlling in any event. Again, only Governor and Council can obligate the state to new lease terms.
3. None of the three conditions have yet been met:

Bald: “The proposed plan will encompass all proposed development activity associated with their management of the ski area, and any adjacent land Okemo intends to develop.”

The current proposed MDP does not explain in any concrete way the proposed development activity. In a document of more than 400 pages, the proposed real estate development is addressed in less than a paragraph, and is suggested to be taking place on less than 5% of all the private land now owned or controlled by Okemo. For a concise explanation for how this condition has not been met, see the town of Goshen’s various letters to DRED, Governor Benson, and recent testimony delivered by a Goshen Selectperson at the Feb. 15th legislative hearing on the two Sunapee expansion pending bills.

Bald: “Okemo will involve local citizens, businesses, the Planning Boards of Goshen and Newbury, all abutters, as well as the Regional Planning Commission, in their preparation of the new or revised Master Development Plan. Public involvement will further be sought in accordance with the Public Involvement and Oversight Policy, adopted August 31, 1998.”

Again, for a concise explanation for why this condition is far from being met, see Goshen's various letters and correspondence from the Upper Valley/Lake Sunapee Regional Planning Commission throughout 2004.

Bald: "Okemo will identify a parcel of land adjacent to the Mt Sunapee/Pillsbury Greenway of at least 100 acres. The property will be acquired by Okemo and donated to the State of New Hampshire for inclusion in the Greenway..."

Okemo has purchased a piece of land under zero threat of development and already protected by the State of NH through an expensive 1991 easement using very rare state-raised LCIP dollars. See various news articles (Concord Monitor, September 13th, 2004, and others) explaining why this land purchase does not satisfy the need to protect the Greenway, does not create a legal obligation for the state to approve leasehold expansion, and is a terrible precedent to set concerning the much-vaunted "easements instead of full fee to maintain a working forest" land protection philosophy now supported annually with millions of federal, state, and private dollars.

CONCLUSION: PROMISES, PROMISES, PROMISES

The evidence leaves the author to decisively conclude that the state of New Hampshire is under no obligation to approve any leasehold expansion for any reason, in any direction, at any time. While it is clear that the lease does allow for amendments, it is important for those potential amendments to remain true to legislative intent. The Legislature may not have intended for leasehold expansion to facilitate real estate development to be a part of the initial or future terms. A compelling case can be made that this type of leasehold expansion was purposefully not intended, was rejected during legislative review, and thus is not lawful.

The leasehold expansion debate has often been a discussion of promises, some documented, some rumored, some explicitly detailed in the controlling documents of the legislation and lease, and some made for political expediency by Okemo and DRED.

The only promises that matter legally are those made through legislation and the lease agreement approved by Governor and Council on June 10th, 1998. By this statement, Friends of Mount Sunapee acknowledges that the promises made by Tim and Diane Mueller and Robb Thomson do not control the current legal debate.

However, looking at the full context and history of this leasehold controversy, it seems irrefutable that the proposed leasehold expansion to facilitate sprawl on the border of a state park is an outrageous request, plainly wrong on principle, in violation of several solemn public promises and trusts, is based on dubious legal grounds, sets a dangerous precedent, and thus should have been denied by DRED at the very moment of its arrival.

Broken promises by a private corporation attempting to make a profit can at least be viewed with some limited understanding. Promises made by DRED Commissioners, Legislators, Governors, Executive Councilors, and other agents of the state are not so easily forgotten or broken.

DRED's lack of legislatively-guided rules, inconsistent public policy development, whimsical and czar-like leadership, consistent disregard for accountability or lawfulness, chronic inability to offer either the public or the leaseholder a consistent, lawful, and sensible decision-making process, its lack of criteria for openly and honestly upholding the public interest and its public trust responsibilities, and its "run government like a business" arrogance all speak to the need for major systemic reform of our public reserves management and the agency now responsible for our precious state parks and forests.

The ending of the 100% self-funding scheme is but one in a series of fundamental systemic changes that must take place immediately, lest the state of NH finds itself in this quagmire of broken promises, ignored laws, and demoralizing, time-consuming, and essentially inappropriate policy-making ever again.

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