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April 1, 2016

Governor Margaret Wood Hassan

Executive Council Members

Joseph D. Kenney, Colin Van Ostern, Christopher T. Sununu, Christopher C. Pappas and David K. Wheeler

107 North Main Street
Statehouse
Concord, New Hampshire 03301

Via hand delivery

Re: Mount Sunapee Plan

Dear Governor and Members of the Executive Council

I represent the Friends of Mount Sunapee (Friends). The Department of Resources and Economic Development (DRED) has approved a plan described as the West Bowl Expansion (“Project”) in Sunapee State Park (“Park”).

Environmental Consequences:

The project will require logging, excavation and heavy construction in an area of the Park that has been classified by the New Hampshire Natural Heritage Bureau as an “exemplary natural community”. The New Hampshire Native Plant Protection Act (“Act”) at RSA 217-A:7 does not allow avoidable state action that jeopardizes the continued existence of exemplary natural communities.¹ The project is a violation of the Act.

Governing Documents:

¹ A careful analysis of the RSA 217-A:7 consequences of the construction project was provided to Commissioner Rose of DRED, the Governor and Executive Council by Attorney Jason D. Reimers of BCM Environmental & Land Law, PLLC on June 1, 2015.

The Friends asked me to examine the legal and business aspects of the DRED documents governing the transaction, which include:

1. Lease and Operating Agreement (Lease) dated April 30, 1998, signed by Okemo Mountain, Inc. a Vermont corporation with its principal place of business in Ludlow, Vermont, as lessee.
2. Amendment to Lease and Operating Agreement dated March 11, 2016 (Amendment) signed by entities CLP Mount Sunapee, LLC, with a mailing address of 459 South Orange Avenue, Orlando, FL 3280; Sunapee Difference, LLC; and, Sunapee Land Holdings, LLC as lessees.²
3. An untitled document setting forth the terms and conditions of plan approval (Memorandum) signed by CLP Mount Sunapee, LLC; The Sunapee Difference, LLC; and, Sunapee Land Holdings, LLC.
4. Environmental Management Plan (2016-2020) dated December 1, 2015 (Environmental Plan). This document is unsigned.
5. Revised Five-Year Master Development Plan (2016-2020) dated December 1, 2015 (Master Plan). This document is unsigned.

The documents providing the legal foundation for the transaction are the Lease, the Amendment and the untitled Memorandum.³

First. The Lease remains in effect and is the controlling document except as modified by the Amendment.

Second. The Amendment requires careful analysis. It has many confusing and ambiguous paragraphs that favor the operator.

Some general observations:

1. The operator uses multiple entities as signatories to the controlling documents. The use of multiple entities creates legal confusion and makes supervision and enforcement of operator responsibilities difficult. For example, it will be difficult and expensive to audit the books and records of the multiple entities to ensure that the proper rent is being paid.

² The Amendment does not provide the state of organization of CLP Mount Sunapee LLC. The Amendment does not provide the state of organization or the principal place of business of The Sunapee Difference, LLC and Sunapee land Holdings LLC.

³ For ease of identification of the multiple parties to the controlling documents, I refer to them as “operator” throughout this analysis except when specifically identified.

2. The multiplicity of entities makes it difficult to determine the real identities of the parties and the financial capabilities of those parties.

Analysis of the Amendment^{4 5}:

The “Whereas” clauses:

The whereas clauses in the first, second, third paragraphs on page 2 of the Amendment describe various entities and sublease agreements, including first, second and third subleases.

It is not clear if DRED approved the multiple subleases. The language creates confusion and may engender lease and amendment enforcement difficulties for DRED.

The whereas clause in the fifth full paragraph on page 3 of the Amendment expressly provides that “...no assurances can be made at this time that the West Bowl Expansion Permits will be sought or obtained or that the West Bowl Expansion Improvements will be constructed.”

This language means that the operator has no duty whatever to proceed with the project that the Governor and Executive Council have been asked to approve. So why is DRED asking for approval of the project now?

The whereas clause in the first full paragraph on page 5 of the Amendment provides that the operator will convey the improvements to the “state”. The clause also provides that the operator shall “carve out” and reserve to operator, its successors and assigns, “perpetual necessary easements for parking areas, roads and other infrastructure built on the West Bowl Expansion Land and for utilities necessary for the development of the private land.”

This paragraph provides the basis for endless and expensive litigation. The language does not provide a metes and bounds description of land and appurtenant easements to be conveyed to the state. The language does not provide a metes and bounds description of the easements reserved to operator for the development of the private land or what improvements are necessary for the development of the private land. The possibility of property overlap and conflict of rights and duties between DRED and the operator is substantial. The possibility is

⁴ The Amendment contains 5 pages of “Whereas” clauses including some with substantive provisions. “Whereas” clauses describe what an agreement intends. They must not be used to provide substantive contractual duties. Otherwise, they are a fertile source of misunderstanding and litigation.

⁵ The untitled memo has many terms and conditions that confuse and contradict the terms of the lease and amendment. I will address some examples in the text. See for example the clauses in the memo that hold operator harmless from conduct that may be a breach of the lease and amendment.

substantial that the owner of the private property development will have no connection with the operator and will argue that it is not bound by the controlling documents.

The last whereas clause on page 5 of the Amendment expressly states that the parties Sunapee Difference, LLC and Sunapee Land Holdings are not bound by the Lease.

This exculpatory language is problematic. The Amendment language relieves the operator Sunapee Difference, LLC of the obligations of the Lease including the Rent obligation based on its operations set forth in paragraph 3 of the Lease. The Lease, at paragraph 4, defines operations as year-round. The Amendment, at the last full paragraph of Item 2 of the Amendment, provides that Sunapee Difference, LLC, will be liable for only the revenue generated during the winter season and only on the improvements built on private land and “competitive” with services provided by the ski area and open to the public. The limited rental obligation in the Amendment ends when The Sunapee Difference LLC no longer operates the ski area. A further and very important Lease obligation is set forth in paragraph 8 of the Lease. This paragraph requires the operator to secure a construction performance bond to guarantee the completion of any construction project. If Sunapee Difference, LLC begins the expansion project but does not finish, DRED will be without remedy if The Sunapee Difference LLC is broke or defunct. The Amendment does not require the current lessee of the Lease CLP Mount Sunapee, LLC to post a construction bond to guarantee completion if The Sunapee Difference, LLC commences the project but does not finish.⁶

The numbered Lease Terms:

1. The property comprising the 260 acres to be conveyed to DRED prior to construction of the West Bowl Expansion is not described by metes and bounds but by drawing only.

This type of ambiguity caused the earlier litigation. The same is true regarding the 52 acre parcel to be conveyed with “deed restrictions”.⁷ There is no metes and bound description for this parcel.

2. This paragraph provides that the operator The Sunapee Difference, LLC can develop the West Bowl by adding a chairlift and other infrastructure such as snowmaking, water lines, sewage treatment and power lines. The language

⁶ Commissioner Rose, at his March 30, 2016, presentation to the Executive Council in response to a question about incomplete construction, stated that construction bonds are required for projects in state parks. Why isn't such reference in the Amendment and why would the bond obligation be excluded in any event?

⁷ The content of the deed restrictions is not described.

contemplates that some of the infrastructure may be constructed outside of the West Bowl on private land. The language provides that upon completion of the project, “TSD” and “SLH” will convey the improvements to DRED, including those on private land. The language further states that “TSD” will carve out and reserve for “TSD” its successors and assigns perpetual necessary easements for parking areas, roads and other infrastructure built on the West Bowl Expansion Land for the development of the private land.

This paragraph is unacceptable. As noted in my comments regarding the whereas clause, no metes and bound descriptions are provided of the property to be developed in West Bowl or on private land. The particulars of the development are vague. There is no provision requiring completion of the project once begun and no obligation to provide a construction bond guaranteeing completion. For example, if operator starts the project but does not finish, who finishes the project? If the operator walks away, goes bankrupt, or sells to a third party, will the third party finish or will that be a DRED responsibility? If the operator vanishes, who will convey the infrastructure on private property to DRED? Will a third party owning the private property infrastructure demand payment from DRED to finish and convey? In view of these concerns, why would DRED agree to “carve out” and convey West Bowl land to operator for parking areas, roads and other infrastructure for the development of private land?

Paragraph 2 also includes language requiring operator to pay 3% of revenue from improvements on private land related to the West Bowl expansion. The wording states that the services must be “competitive” with the services provide by the existing ski area and must be related to the winter season and open to the public.

The language qualifying what revenue is subject to the rent obligation is ambiguous. Neither “competitive” nor “winter season” is defined. The language allows operator to decide what revenues will be charged the 3% rent, allowing the operator to exclude summer event revenues and revenues relating to the development on private land, including housing, lodge retail sales, rentals and the like.⁸

Paragraph 2 closes with language that the 3% is payable “as long as TSD operates the ski area”. In other words, if The Sunapee Difference, LLC no longer operates the ski area, the 3% obligation vanishes. For example, assume operator builds a restaurant and retail facility on private land with food and drink, retail sales and rentals and ticket sales and lessons. The

⁸ In view of the very significant value operator has gained from the expansion of the West Bowl into pristine state park lands, why hasn’t DRED driven a harder bargain in terms of rentals? 3% is a very small amount given the value that operator will receive and why doesn’t the percentage apply to condominium and housing fees that will benefit operator? Operator would not enjoy those revenues without the expansion into the West Bowl.

Sunapee Difference, LLC need only assign its Amendment rights to another entity and the obligation to pay the 3% disappears. Assume further that operator closes down its restaurant and retail operations, ticket sales and lessons at the existing ski area and moves them to the operation on private land. What will be left of the 3%?

3. The language in this paragraph amends the Lease by extending the current Lease term until June 30, 2028, and grants options for 2 additional 10 year terms.

No language has been provided in the Amendment regarding assignment of the Lease to third parties, thus depriving DRED of approval authority to examine assignee management and financial capabilities.

4. The language in this paragraph releases operator from any responsibility if the “West Bowl Expansion Improvements are not completed”.

This ambiguous language is unacceptable. If construction has been commenced, but not “completed”, the language leaves DRED without a remedy. In other words, if operator commences construction, damages or destroys precious parkland, but does not finish the project, the operator is held harmless from responsibility. Compounding the adverse consequences of this exculpatory language, paragraph 4 provides that operator may continue to own the lease until 2048 without liability. This will preclude DRED from seeking another operator.

5. The language in this paragraph amends the Lease and provides that if operator constructs a chair lift and trails accessed by the lift but refuses to convey the West Bowl land and improvements on or before June 28, 2028, operator shall be barred from the chairlift and trails.

This is very weak language. The described conduct should be a breach of the Amendment. Instead of lease default if operator refuse to convey the improvements, paragraph 5 goes on to expressly provide that such conduct will not be considered a breach of the Lease and Amendment. This will allow operator to continue usual operations in the existing ski area. Perhaps DRED plans to operate the West Bowl.

Analysis of the Memorandum that includes the terms and conditions of approval:

The untitled Memorandum provides terms and conditions relating to the Master Plan and Environmental Plan.⁹ The language in Memorandum describes the document as the DRED approval of the Environmental Plan and the Master Plan.

By numbered item:

1. The language provides that the RMDP Approval Letter and Lease Amendment are subject to approval of the Governor and Executive Council.
2. The language provides that the residential and commercial development on the private land abutting the West Bowl Expansion will require a zoning change in the Town of Goshen.

A review of the Town of Goshen zoning ordinance applicable to the private land reveals that operator need only obtain a variance to construct condominiums and residences. The area is designated "Recreational" and permission to construct housing and related infrastructure would not require a zoning change.

6. This provision provides that operators The Sunapee Difference, LLC and Sunapee Land Holdings, LLC will not request to expand the lease boundary into the area known as the East Bowl.

This language only binds The Sunapee Difference, LLC and Sunapee Land Holding, LLC. It does not bind successors and assigns. Further, the language of the Memorandum can be easily modified since it is not part of the Lease and Amendment. The provision does not protect the East Bowl from future development.

8. This provision affirms the 3% rental obligation of the Lease but only if the improvements built in the West Bowl are open to the public. This provision repeats the 3% rental provision contained in the Amendment item 2 for facilities built on private land.

The language includes the ambiguous qualifiers found in item 2 of the Amendment. Operator is only required to pay the 3% if the West Bowl Expansion is open to the public and if the services built on private land are "competitive" with the services provided in the existing ski area.¹⁰ No definition of "competitive" has been provided, thus rendering these revenues subject

⁹ The memo is described in the document itself as the RMDP Approval Letter.

¹⁰ Refer to footnote 8 regarding my comments about the adequacy of the 3 % and the include revenue base.

to the interpretation of operator. Does the language also allow operator to keep the West Bowl private?

9. This provision requires that if it transfers the private land to an “affiliated facility” that the “affiliated facility” will be bound by the Amendment.

This language allows operator to sell the private land to an unaffiliated third party free of the obligations of the Amendment, including the 3% rental. That sale may include food and retail, ticket sales and rentals. In other words, the entire revenue base that benefitted from the West Bowl expansion will be lost.

12. This paragraph provides that TSD, SLH and DRED agree that the cost of operation, repair, improvements, rebuilding, management and/or replacement of the ski and/or other recreational area infrastructure that is “also shared with any development on the Private Land shall be shared on a prorated basis based on usage rates”.

This provision makes no sense. Does it mean DRED shares the expenses? What does “usage rates” mean? Usage of what? Private land? West Bowl land?

14. This paragraph requires a 50 foot set back between the West Bowl Expansion boundary and the ski slopes. The provision prohibits the development of trails from private land that are not available to the public.

The provision has no practical effect. Skiers using residences and condos built along the ski slopes will step out their door and enter the trails. The private land developer will be able to market the housing as “ski in and ski out”.

15. This paragraph provides that the existing four seasons hiking trails will be protected and maintained through a “Cooperative Maintenance Agreement with the Sunapee-Ragged-Kearsarge Greenway Coalition.

The agreement has not been provided for review.

17. This paragraph holds operator harmless from its other lease obligations if the West Bowl expansion is not completed by June 30, 2028.

This release of operator from responsibility for not completing the West Bowl project is an unwise DRED concession. Why should operator have access to this valuable and pristine state park and leave it marred but unfinished?

21. This paragraph provides language that releases the lessee of the Lease CLP Mount Sunapee, LLC for any breaches of the Lease, Amendment of the Memorandum by The Sunapee Difference, LLC and Sunapee Land Holdings, LLC.

The release of the primary lessee for breaches and violations of the Lease, Amendment and Memorandum by the various operators acting under the rights and duties provided in the controlling documents is unacceptable. This exculpatory provision will leave DRED powerless to seek default and effective legal remedies against the owner of the Lease.

Please carefully review this letter and the concerns expressed.

The documents that govern the West Bowl Expansion are legally insufficient for a transaction of this significance.

Please contact me before the end of the business day Monday April 4, 2016, should you wish to discuss the matters raised.

Very truly yours,

Arthur B. Cunningham

cc: Friends