LAW OFFICES
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November 12, 2018

Governor and Executive Council, State of New Hampshire
107 North Main Street
State House, Room 107
Concord, NH 03301

Re: Vail Acquisition of Sunapee Mountain Resort

Via email and hand delivery

Dear Honorable Governor and Honorable Executive Council:

The Friends of Mount Sunapee (FOMS) have asked me to review the Vail acquisition of Mount Sunapee Resort (Resort.) at Mount Sunapee State Park.

I have reviewed the following documents[1]:

1. The Agreement (Agreement) dated September 26, 2018, between VR NE Holdings, LLC (Vail) and the Department of Natural and Cultural Resources. (DNCR.). The Agreement sets forth the terms and conditions of the amendment to the 1998 Lease and Operating Agreement that followed on October 8, 2018, as detailed at 2 below.

2. The Amendment to Lease and Operating Agreement (Amendment) dated October 8, 2018, between DNCR and The Sunapee Difference (TSD). The Amendment amends the 1998 Lease and Operating Agreement (Lease) and details the terms and conditions of the legal relationship between the State and Vail regarding the Resort.

**The State Is at Legal and Business Risk Because DNCR Approved the Governing Documents with Vail Including an Amendment to the 1998 Lease and Operating Agreement Before Approval by the Executive Council**

[1] My review is premised upon the enabling legislation for the lease of Mount Sunapee RSA 12-A:29-a and the April 30, 1998, Lease and Operating Agreement (Lease.) The RSA and the Lease govern the transaction.

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1. On or near September 26, 2018, DNCR approved the Och-Ziff/Mueller sale of the Resort to Vail without formal on record public process.[2] [3] The want of public process raises concerns about the transaction and its implications for the Park.

2. DNCR executed the September 26, 2018, Agreement with Vail without public review by the Executive Council as required by Section 31 of the Lease. This is an agreement to agree that may have adverse legal and business implications for the State.

3. DNCR executed the October 8, 2018, Amendment with Vail without public review by the Executive Council as required by Section 31 of the Lease. The DNCR execution of the Amendment before public review by the Executive Council means that the Executive Council is being asked to rubber stamp a legal *fait accompli*.[4] This premature DNCR conduct may have adverse legal and business risk for the State as explained herein at 6 below.

4. RSA 12-A:29-a requires the establishment of a commission to oversee and administer the Resort lease. That legislative requirement was not included in 1998 Lease but should have been. The creation of and inclusion of the commission in the Lease and subsequent amendments would have alleviated many of the FOMS concerns about public oversight and administration of the Resort.

5. Paragraph 19 of the Lease requires that the books and records of Resort operations be subject to an independent audit.[5] An audit has been commissioned, but the audit parameters and any findings have not been made public. The Vail acquisition of the Resort should not have been closed until after the audit was made available for public review.[6] The primary concern is that the audit would have disclosed whether or not the State was receiving all

[2] The public process must be subject to RSA 91-A and provide for appeal rights under RSA 541-A

[3] Section 22 of the 1998 Lease and Operating Agreement requires State approval of transfers or assignment of interests in the Resort leasehold.

[4] DNCR should have not executed the Amendment until after Executive Council review and approval.

[5] DRED, DNCR's predecessor, never commissioned an audit of Resort operations. This management failure was an unacceptable business practice given the millions of dollars in rent due the State under the Lease.

[6] The audit must be made publicly available before any Council action on the Vail deal.

the rent due under the Lease and if the Resort was complying with Lease operational requirements. If the audit revealed rent or operational deficiencies the rent should have been collected and deficiencies corrected before DNCR allowed Och-Ziff/ Muellers to close the deal with Vail. Delinquent rent would have been paid from the sale closing proceeds. DNCR should take immediate action on any adverse audit findings.

**FOMS Objects to the Amendment**

FOMS objects to the Amendment in the following particulars:

6. The Amendment proposes a change to Section 22 of the Lease. Section 22 governs assignment, delegation and subcontracts of leasehold interests and operating responsibility for the Resort. In the past, DNCR and its predecessor DRED approved multiple assignments of leasehold interests without any public process. The approvals were violative of Section 22 of the Lease and raised substantial concerns about potential impacts on the Park and the obligations due the State.

   The change to Section 22 as proposed is unacceptable because the proposed language poses a threat to the rent due the State under the Lease and may limit the required operational oversight.

   The proposed language allows Vail to manipulate its owned entities without State approval. The Vail counter-party to the Amendment with DNCR is The Sunapee Difference (TSD).[7]

   The Amendment provides that so long as TSD operates the Resort, and the West Bowl expansion is constructed, that all revenue from the improvements will be required to pay the 3% gross revenue to the State.

   The threat that the Amendment language poses to the Lease rent obligation is that if Vail changes its owned entity from TSD to another owned entity, the TSD rent obligation vanishes.

   For example, if Vail constructs a lodge, with lodging, food and beverage revenue on its privately-owned property west of the West Bowl expansion, will that revenue be subject to the Lease rent obligation? What about ski ticket sales? Ski and board rentals? Lessons? What about revenues derived from all non-winter

[7] TSD was the Mueller owned entity that acted as Resort operator. Vail now owns TSD.

activities and enterprises and activities that originate or are exclusive to and dependent upon the West Bowl expansion on leasehold and private properties?

The Amendment poses substantial legal and loss of rent risk to the State that can be avoided with clear and unambiguous language.

The Amendment also raises substantial concern about Resort compliance the Land and Water State Fund regulatory regime.

Section 22 of the Lease should be amended to read:

"The Operator may not sell, assign, transfer, mortgage or encumber any interest in the Resort Lease to any person or entity without the express written consent of the State after public process."

7. The Amendment proposes language to follow Section 31 that the "Mount Sunapee Advisory Commission, established pursuant to the State's Lease Oversight Policy advises the Commissioner… at the call of the Commissioner".

This language is inadequate. RSA 12-A:29-a, the enabling legislation for the Lease, requires an active commission to oversee and administer the Resort Lease.

The failure to establish a commission is a violation of RSA 12-A:29-a that has led to concerns about the Resort, Resort impacts on the Park and the Lease obligations due the State.

Section 31 of the Lease should be amended to read:

"This Lease and Operating Agreement and any sale, assignment, transfer, mortgage or encumbrance of any interest in the Lease and Operating Agreement shall not be final and binding upon the State until it is approved by the Capital Budget Overview Committee of the New Hampshire General Court, by the New Hampshire Governor and Executive Council and the Commission established pursuant to RSA 12-A:29-a."

A Section 32 should be added to the Amendment to read:

"The Commission established pursuant to RSA 12-A:29-a will conduct public meetings not less than quarterly to oversee and administer the Lease. The Operator and any successors and assigns of any interest in the Lease shall

submit monthly financial statements to the commission for review in such detail as requested by the commission. The Operator and any successors and assigns of any interest in the Lease shall submit its annual audited financial statements to the commission for review. The Operator and any successors and assigns of any interest in the Lease shall submit any and all Resort capital improvement plans to the commission for review and approval."

8. FOMS objects to the West Bowl expansion language in the Amendment. This entire portion of the Amendment is premature.

   Any consideration of the West Bowl expansion should not occur until such time as the plans and specifications[8] for the West Bowl expansion are complete. The plans and specifications must include any plans for development on the private property owned by Operator and any successors and assigns of any interest in the Lease adjoining leased property.

   Section 33 should be added to the Amendment to read:

   "In the event that Operator and any successors and assigns of any interest in the Lease intends to expand into the West Bowl, the plans and specifications of the West Bowl expansion, together with any improvements planned for the private property adjoining the leased property shall be presented to the Commission for public review and approval. The plans and specifications must be accompanied by the plan to finance the expansion. The Commission shall determine the terms and conditions of any West Bowl expansion and be subject to all local, state and federal law and regulations."

   Please do not hesitate to contact me with questions.

   Very truly yours,

   /s/ Arthur B. Cunningham
   Arthur B. Cunningham

   cc: Sarah Stewart, Commissioner DNCR
   Attorney General, Gordon MacDonald

[8] The plans and specifications must include legal descriptions and proposed land conveyancing instruments necessary to implement the expansion.