H. DRED Approval, Governor and Council Non-action, and Resulting Damage

Sunapee set out to complete all three tasks. A new five (5) year master development plan was developed at substantial expense and was published on June 1, 2004. (Gamble test., day 2,3)(Ex. 37). The plan incorporated plans for the West Bowl expansion. *Id.* (Ex. 37). Many public meetings and hearings were held. (Gamble test., day 2). Sunapee purchased more than enough land necessary for the greenway donation. *Id.*

In the spring of 2003, the landowners whose property had been "optioned" by Sunapee in anticipation of the West Bowl expansion refused to further extend closing on their property; in short, they insisted that Sunapee either purchase their property or they would seek other buyers. (Mueller, test., day 1; Gamble test., day 2). On June 20, 2003, Tim Mueller and Jay Gamble met with Commissioner Bald and Director McLeod to discuss the problem. (Gamble test., day 2). Mr. Mueller told Commissioner Bald that Sunapee either had to purchase the land or abandon the project. (Gamble test, day 2). Explaining that purchasing the land meant Sunapee was "all in", Mr. Mueller asked again whether Sunapee had Commissioner Bald's full support for the project. Commissioner Bald replied that Sunapee did have his full support. *Id.*

Bald himself never recommended the West Bowl expansion to the Governor and Council. He left office in May of 2004 and was replace by Sean O'Kane. (O'Kane test., day 2; Bald test., day 5). Commissioner O'Kane closely reviewed the proposal and determined that he would recommend approval with conditions he negotiated with Sunapee. (O'Kane test., day 2; Mueller test., day 1; Gamble test., day 2). Commissioner O'Kane endured strong opposition to the issuance of this recommendation from the

Governor and his staff. (O'Kane test., day 2). Nevertheless he issued his recommendation approving the West Bowl expansion on May 2, 2005. (O'Kane test., day 2) (Ex. 38). Because of the secret buffer zone created by Commissioner Thomson's misrepresentation, the West Bowl expansion proposal involved an amendment to the lease and thus required Governor and Council approval. (Ex. 39). Predictably, Governor Lynch refused to even put the amendment on the Council's agenda and neither the proposed lifts and trails nor the lease line realignment ever were implemented. .

Without the ability to expand, the value of any ski resort is greatly depreciated. (Mueller test., day 1; Hawks video test.). In this case, the Mount Sunapee Resort is worth 9.4 million dollars less because of the inability to expand. (Hawks' video test.) (Ex. 6). The private land acquired with the promise of state support has lost 3 million dollars in value. (Hawks' video testimony)(Ex. 7). Sunapee has lost the 13 million present value EBITDA dollars over the life of the lease because of the state's actions in this case. (Hawks' video test.) (Ex. 3).

Sunapee's has been damaged in fact and not simply in theory. In 2008 during the economic panic and debt crisis, in order to refinance, Sunapee entered into a sale and leaseback transaction with CNL Income Partners, LP and received nineteen (19) million dollars for the Resort. (Mueller test., day 1)(Ex. 40). This amount is the exact value assigned to the Resort by Brandon Hawks in its current state without the boundary line realignment and without the addition of the West Bowl. (Hawks video test.)(Ex. 6, 40). With the boundary as represented by Commissioner Thomson and with the West Bowl approved by Commissioner O'Kane, the amount paid to Sunapee under the sale and lease back arrangement would be nine million four hundred thousand (9.4) dollars greater.

Thomson rushed the lease execution with great success. He informed Okemo of its successful proposal on April 22, 1998, insisting that the lease be agreed by the end of the following day and threatening the loss of the leasehold to a phantom bidder should Mr. Mueller not comply. He did comply, but of course the lease had to be signed without the legal description and map. The rush was all necessary, according to Thomson, to prevent lawyers from getting involved and delaying or sidetracking the process. In fact, the rush was necessary to prevent Okemo from discovering that they were paying for a greatly reduced leasehold with many fewer opportunities to expand. Thomson did not even start the mapping process until well after the lease was signed. Sunapee reasonably relied upon the State's authorized misrepresentations and concealments and was damaged as a result.

5. Sunapee Suffered Damage as a Result of the State's Conduct.

Damage in estoppel cases is measured by the value of the promise. See *Jason v. Morse*, 152 NH 48, 52 (2005). Estoppel "operates to put the party entitled to its benefit in the same position as if the thing represented were true". *Turco v. Barnstead*, 136 NH 256, 264 (1992). Thomson represented falsely that Sunapee was leasing 175 acres more than it actually was. At a minimum, Sunapee has overpaid for its leasehold. Sunapee in fact leased 850 acres (Ex. 21A, p. 1185), but should have leased 1025 acres (850 acres plus 175 acres). Sunapee's leasehold was 17% less than represented. Sunapee paid DRED rent through December 31, 2013 of $7,239,302. (Ex. 43). Its 17% overpayment results in a refund due from the State of $1,230,681.

But Sunapee has suffered considerably more damage than that represented by a rent overpayment. Thomson created a buffer zone preventing expansion on the north and

west without approval of the Governor and Council. Had the lease line been as promised, no amendment to the lease was necessary and Sean O'Kane's approval was the only one needed. Sunapee lost its expansion to the West Bowl because of Thomson's misrepresentation. This loss had drastic consequences.

As Brandon Hawk's demonstrated, the resort value without the right to expand, the current situation, is $19,000,000. The resort value with the right to expand to the West Bowl is $28,400,000. Instead of receiving the latter amount in the sale/leaseback transaction in 2008, Sunapee received $19,000,000. Sunapee lost 9.4 million dollars in 2008 because of Thomson's misrepresentations and concealments.

Further, the difference in the present value of stabilized EBITDA over the lifetime of the lease equals $13,232,451. The present value calculation was done in 2008. Sunapee has suffered this damage and will suffer it over the life of the lease. To date, the loss of present value EBITDA equals $3,693,874. (Hawks video test.)(Ex. 3).

But this is not all. Nearly five years elapsed between the time the misrepresentation was discovered and the time Commissioner O'Kane approved the West Bowl expansion. During that time DRED and Commissioner Bald expressed their support for the project and were kept informed of the private land acquisitions upon which the expansion was based. Indeed, Tim Mueller suggested that DRED acquire the property and expand the Park. George Bald refused, but urged Sunapee to make the purchases.[11] Sunapee did, having previously closed on the Pasquerrella parcel relying on the State's assurance that the boundary would be "fixed". All told, Sunapee spent $1,200,000 on the adjoining property. Had it been developed as planned and approved

[11] Bald could not recall these exchanges. Indeed, his memory was so faulty that he could not recall the East Bowl expansion proposal, the very proposal he vetoed in the fall of 2000.

by Commissioner O'Kane, it would be worth $4,650,000 instead of the $1,600,000 it was worth in 2008 after allowing for the effect of inflation. (Hawks video test.)(Ex. 7). Sunapee lost $3,050,000 on its private land holdings as a result of Thomson's misrepresentations and concealments.

The State moved to exclude portions of Mr. Hawk's testimony on damages and, in the end, moved to exclude it all. (Hawk's video test., Ex 56 id, p. 85). These motions are baseless and should be denied. Mr. Hawks opined that the damages suffered as a result of the State's misconduct totaled $12,450,000 when calculated by considering the value of the Resort and private land "as is" and "as if complete", that is in its current state on March 1, 2008 and developed in the West Bowl with the lease line realigned on the same date. *Id.*, p. 31. He also calculated damage by comparing the present value of the difference in stabilized earnings before interest, taxes, depreciation and amortization (EBITDA) for both the "As is" and "As if complete" situations during the remainder of the lease. *Id.*, pp. 31-32. The result is damages of $13,232,451. *Id.*(Ex. 3). The latter calculation offers a yearly running total of Sunapee's damages. For the six fiscal operating years to date, Sunapee has lost $4,393,874. (Ex. 3).

At times, the manner in which a case is tried is a key to the merit of a party's position. Considering the State's approach to Mr. Hawks' testimony is instructive in this regard. Counsel objected and moved to strike Mr. Hawks' reason's for concluding 155 residential units could be constructed on the private land. (Ex. 56 id, p. 29). Mr. Hawks looked at the Goshen zoning ordinance, the acreage to be dedicated to open space, and had a telephone conversation with the Goshen Planning Board Chairman in reaching his conclusion. *Id.* The basis of the objection was hearsay and lack of foundation.

Without question Mr. Hawks, who has appraised and consulted with just about all of the major ski resorts in North America (Ex. 1), is an expert whose testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue...". Rule 702, NHRE. A fact relied upon by an expert in forming his opinion may be part of his pretrial investigation and need not be admissible in evidence. Rule 703, NHRE. Indeed, it is doubtful that facts gleaned from the Planning Board chair, Mr. Howe "to gain an understanding of the probability of acceptance...of a project...of this magnitude" is hearsay at all. (Ex. 56 id, p. 82-83); Rule 801 (c), NHRE. Hence Mr. Hawks justifiably consulted Mr. Howe and the local zoning ordinance in formulating his opinion and in determining that the proposed project probably would be approved. Defendant's objection should be overruled and its motion denied.

The State objected to the Discounted Cash Flow Analysis (Ex. 3) and Mr. Hawks' conclusions concerning it. (Ex. 56 id, p. 32-33).[12] The State apparently felt on deposition that the Plaintiff was required to select a particular computation of damages. The basis for this feeling is unknown. Perhaps the State has confused the doctrine of election of *remedies* with the notion articulated by counsel. The bottom line is that there is no such election required.

The State objected to admission of Brandon Hawks' primary report on several vague and general grounds. The evidence is relevant and will aid the Court in analyzing damages. While the State's argument to exclude might hold some weight in a jury trial as possibly being subject to misinterpretation in the jury room, no such problem exists in

[12] On deposition, the State objected to the admission into evidence of Exhibit 3, but at trial it is a full exhibit.

this issues to court case. Plaintiff requests that the Court admit Brandon Hawks' report (Ex. 2) into evidence and consider it for the information it supplies on damages.

The State moved to strike all of Mr. Hawks' testimony as speculative and beyond his stated expertise. The motion should be denied. Mr. Hawks' opinions were neither speculative nor beyond his obvious expertise. At most, the State's motion goes to the weight to be given to his evidence, not its admissibility. But, considering the evidence, great weight should be given to Mr. Hawks' testimony.

The State claimed that in 2008 a special exception was needed under the Goshen zoning ordinance before the West Bowl project could be implemented. While true at that time, the whole point of contacting the Planning board Chairman was to gauge the probability of success with the project as planned, and Mr. Hawks found based on his investigation that success was indeed probable. As demonstrated at trial, Goshen is indeed receptive to a West Bowl like expansion having passed a zoning amendment in 2014 which removes the need to obtain a special exception to the ordinance. (Gamble test., day 2)(Ex. 52).

The State also claimed that the 155 unit planned residential development was inflated by 20% because of the "bonus provision" the planning board granted for the maintenance of open space. The State does not contest that sufficient open space was part of the project to qualify it for the "bonus", but rather note that the "bonus" is a discretionary decision by the planning board. Again, the call to Mr. Howe supported the notion that the bonus would be awarded.

Finally the State proclaims mysteriously that "a failure to obtain state approval" was not taken into account. One doesn't quite know where to go with that one. Certainly

in 2005 Governor Lynch thwarted the West Bowl expansion plan after an expensive five year effort by Sunapee following discovery of Thomson's boundary misrepresentation. But another arm of State government, DRED, approved the plan on May 2, 2005 (Ex. 38) with conditions and informed Sunapee of that fact on May 6, 2005. (Ex. 39). A lease amendment, and hence governor and counsel approval, was only necessary because of the Thomson created buffer zone. Had the boundary been where promised, the project would have been built with DRED approval in 2006 and 2007. No additional "state approval" was needed in 2005 had the boundary been as represented.

The confusion evident in the State's position is clearly set out in the cross examination of Mr. Hawks. First inquiring whether a master plan was required for development of the West Bowl (Ex. 56 id, p. 59) and that plan needed state approval (*Id.*), the State asks whether its approval has been received for the West Bowl expansion. (Ex. 56 id, p. 60). Mixing apples and oranges, the State implies Governor and Council approval is needed for approval of a master plan (it isn't), and in fact the plan was approved with conditions by Commissioner O'Kane. The sole reason the plan had to go to the Governor and Council was the realignment of the leasehold boundaries which required an amendment. The needed realignment is the basis of this lawsuit. From the Plaintiff's perspective, no further state approval was needed.

Counsel for the State read a series of letters to Mr. Hawks' written in opposition to the West Bowl expansion at the time Commissioner O'Kane was considering the issue. As the letters did not result in denial of the project, but rather its approval, the examination only resulted in Mr. Hawks agreeing that a certain level of opposition existed which he took into account in setting his capitalization rate. (Ex. 56 id, p. 59).

The examination regarding the letter from Commissioner Carol Murray to Commissioner O'Kane was particularly interesting. Implying a problem emanating from the Department of Transportation concerning access to the base area of the West Bowl, the examination did not touch on Commissioner Murray's conclusion that reconstruction of Brook Road was not a prerequisite to a driveway permit. (Ex. 56 id, pp 54-56, 80). Particularly telling is the fact that these so-called opposition letters were marked for identification at trial by the State, but never offered. (Ex. JJ id, KK id, LL id, MM id).

The damage suffered by Sunapee is well established. The law does not require mathematical certainty in computing damages provided they are supported by the evidence. *Phillips v. Verax Corp.*, 138 NH 240 (1994). This court is vested with equitable powers which can and should be exercised to make Sunapee whole. *Turco, supra* at 264.

B.

The Contract Should be Reformed

Fraud in the procurement of a contract may be grounds for a number of remedies including reformation. Titan Ins. Co. v. Hyten, 817 N.W.2d 562, 569 (Mich., 2012). Reformation of a contract for mutual mistake requires proof by clear and convincing evidence that there was an agreement between the parties, there was an agreement to put that agreement in writing, and there was a variance between the prior agreement and the writing. *Sunapee, supra; Sommers v. Sommers*, 143 NH 686, 689-690 (1999). Fraud obviates the need to prove mutual mistake. *Sunapee, supra.* To prove fraud, Sunapee must establish a deliberate falsehood by Thomson made with knowledge of its falsity or with conscious indifference to its truth. Hall v. Merrimack Mut. Fire Ins. Co., 91 N.H. 6,

10 (1940). Additionally, Sunapee must demonstrate justifiable reliance on Thomson's fraudulent statements. Van Der Stok v. Van Voorhees, 151 N.H. 679, 682 (2005). In order to meet its burden, Sunapee may rely on parol evidence to establish the State's fraud or misprepresentation. Nashua Trust Co. v. Weisman, 122 N.H. 397, 400 (1982).

Commissioner Thomson's actions were fraudulent. As recited above in connection with the estoppel claim, Thomson repeatedly told Sunapee's officers that the leasehold boundary would be coterminous with the park's boundary. He made these statements knowing full well that he had instructed his staff to draw a lease line which was not coterminous with the Park boundary and that the leasehold would not share a boundary with the Park. Thomson deliberately told Sunapee the lease line was the Park boundary knowing it was not. He committed fraud.

Further, Commissioner Thomson committed fraud by concealing and delaying production of the documents showing the leasehold boundary. Thomson rushed the lease signing only producing the actual descriptive documents at the last minute before Governor and Council action. Even then, he recorded the complete lease without sending a copy to Okemo in spite of their numerous requests to do so.

Sunapee was justified in relying on Commissioner Thomson's fraudulent representations. Sunapee had negotiated only with Commissioner Thomson throughout the leasing process. He was a duly authorized representative of the State of New Hampshire. When Commissioner Thomson told Tim Mueller the leasehold boundaries were coterminous with the park's boundaries, Mr. Mueller had no reason to believe otherwise. The representation was reasonable. The Park and outer edge of the ski trails were proximate on the north and west. Avoiding a needless survey seemed eminently

reasonable. No document demonstrating the fraud even existed when the lease was signed.

Clearly there is a big difference between the leasehold as represented by Thomson and the leasehold actually delivered, namely 175 acres and a mandatory trip to the Governor and Council in the event of expansion.

C.

The Court Should Award Damages for Inverse Condemnation

Sunapee's final claim is for inverse condemnation. The State, secretly and without just compensation, deprived Sunapee of the value of its property by creating the buffer zone depriving Sunapee of 175 acres and thus requiring Governor and Council approval of every expansion proposal in the only direction available to Sunapee, namely west.

1. Sunapee is Entitled to Recover Damages for Inverse Condemnation.

Inverse condemnation occurs when a governmental body takes property but does not formally exercise the power of eminent domain. *Allianz Global Risks U.S. Ins. Co. v. State,* 161 NH 121, 124 (2010). Property refers to the right to 'use and enjoy' a thing, and is not limited to the thing itself. Su*ndell v. New London,* 119 NH 839, 845(1979). When the government substantially interferes with, or deprives a person of, the use of his property in whole or in part, the action may constitute a taking. Id. The State through Thomson's actions effectively took 175 acres from Sunapee's leasehold, and effectively burdened the rest of the resort with a cumbersome and politically charged procedure designed to prevent any westward expansion. The tactic achieved its goal; no expansion. The State must now pay Sunapee just compensation for the rights it has taken.

"The owner need not be deprived of all valuable use of his property, if the denial is substantial or especially onerous, then a taking occurs. *Burrows v Keene*, 121 NH 590, 598 (1981). Sunapee was victimized by the State's agent in this case. The denial is substantial and the conduct of the State unforgivable. On May 2, 2005, the State through Sean O'Kane gave Sunapee the only approval it really needed to expand into the West Bowl. But due to Thomson's buffer zone, Governor and Council approval was needed. This loss of rights cost Sunapee 9.4 million dollars on its resort investment and 3 million dollars on land held outside the Park. On a present value discounted cash flow basis, Sunapee has and will lose 13 million dollars over the life of the lease. To date, on the same basis, Sunapee has lost $3,693,874. This Court should compensate Sunapee for its loss.

2. Sunapee Should be Allowed to Proceed in Equity Both Constitutionally and by estoppel.

Sunapee herein incorporates by reference its arguments set out for the Court in its Objection to the State's Motion to Dismiss Count 4 dated September 9, 2013.

IV. Conclusion

Sunapee brought suit in this matter on October 11, 2007. Sunapee tried its case sixteen years after being fraudulently induced to enter into a lease by a State official. This is an equitable proceeding and Sunapee requests that the Court exercise its equitable powers to make it whole.

A. Sunapee requests that the Court enter an order estopping the State from denying that the north and west boundary of the leasehold is the Park boundary and award damages against the State for the harm Sunapee has suffered as follows:

1. Award Sunapee $13,232,451 representing the present value of the lost cash flow over the remaining life of the lease; or

2. Award Sunapee $9,400,000 representing the amount lost in the CNL sale/leaseback transaction in 2008 and $3,050,000 representing the amount lost on the privately held land.

B. Sunapee requests that the Court reform the lease to create a leasehold boundary coterminous with the Park boundary on the North and West;

C. Sunapee requests that the Court find that it has lost the use of 175 acres of land and valuable rights in the remainder of the leasehold through inverse condemnation and order the State to pay to Sunapee:

1. $13,232,451 as damages, or

2. $9,400,000 as damages to the Resort leasehold and $3,050,000 as damages to the private land held outside of the Park.

D. Sunapee requests that the Court award costs and reasonable attorneys' fees in its favor for having to bring this suit; and

E. Sunapee requests that the Court order such additional remedies as may be just and as may make the Plaintiff whole.

Respectfully submitted,

THE SUNAPEE DIFFERENCE, LLC

By its attorney,

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May 9, 2014

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CERTIFICATION

I certify that on May 9, 2014, I delivered a copy of this pleading to opposing counsel.

James E Higgins

James E. Higgins