The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

The Sunapee Difference, L.L.C.

v.

The State of New Hampshire
Docket No. 07-E-458

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The respondent, the State of New Hampshire ("State"), moves for summary judgment on all of the petitioner's claims. The petitioner, The Sunapee Difference, L.L.C. ("Sunapee"), objects.

Standard of Review

To prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2005). In considering a party's motion for summary judgment, the court examines the evidence submitted and makes all necessary inferences from the evidence in the light most favorable to the non-moving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002). When a motion for summary judgment is properly made and supported, "the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed to be admitted for purposes of this motion." N.H. Div. of Human

Servs. v. Allard, 141 N.H. 672, 674 (1997).

Although there are substantial facts in dispute in this case, the court finds that the disputed facts are not material, because, when resolving all of those disputes and construing all of the evidence in the petitioner's favor, the respondent is entitled to judgment as a matter of law.

A fact is "material" only if it affects the outcome of the litigation under the applicable substantive law. Weeks v. Co-Operative Ins. Co., 149 N.H. 190, 193 (2000); Palmer v. Nan King Rest., Inc., 147 N.H. 681, 683 (2002).

Facts

For purposes of resolving this motion for summary judgment, the court assumes the following facts. In June 1996, the New Hampshire legislature authorized the Department of Resources and Economic Development (DRED) to create a lease for the Mount Sunapee Ski Area. See RSA 12-A:29-a. The legislation provided, among other things, that the terms of the lease should include environmental regulations and controls, including procedures to follow when the lessee requests a permit to expand the ski area, cut new trails, increase snow making, or alter master plan requirements. RSA 12-A:29-a, IV(b).

Effective August 8, 1997, the legislature established a joint legislative committee to develop a request for proposals (RFP) and to review responses for the lease and operation of the Mount Sunapee Ski Area. Chapter 119, Laws of 1997 (HB 628). Chapter 119:1, II required that the RFP include, among other things, a requirement that any prospective ski area operator include in its proposal its master plan, environmental regulation and controls, and expansion limitations. Chapter 119:3 specified that no agreement or contract would be effective until approved by the Capital Budget Overview Committee established in RSA 17-j, which committee was required to receive written public comments prior to voting on whether to approve any agreement.

In October, 1997 a draft RFP was presented to the public, prospective operators and other interested parties for comments and questions. On November 12, 1997, representatives from Okemo Mountain Resort, Inc., Sunapee's predecessor, (hereinafter collectively referred to as "Sunapee") attended a public hearing on the draft RFP. A mandatory pre-submittal informational hearing was held with prospective operators on November 19, 1997, which Sunapee representatives also attended. The group included Timothy Mueller and Don MacAskill, the President and General Manager, respectively, of Okemo Mountain Resort, Inc. Mr. Muller and Mr. MacAskill were the main people who communicated with the State during the proposal and lease negotiation process.

On November 30, 1997, Don MacAskill wrote to Commissioner Thomson recommending that the final RFP outline the potential for expanding the leased land in the future, as well as an indication as to whether future expansion onto adjacent state land possible, and if so, the procedure to be followed. The RFP, however, was not changed to reflect these suggestions.

On January 15, 1998, the State issued its final Request for Proposals, which were due on April 1, 1998. The RFP required applicants to state their plans for development of the ski area and provide a detailed description of how the ski area would operate. Section 3.1 of the RFP set out six equally weighted criteria that would be considered by the State in evaluating the proposals, each of which could earn a prospective operator 20 points for a maximum of 120 points. One criterion pertained to the applicant's "Operations and Development Proposals."

Section 2.17 of the RFP read in pertinent part: "If the Commissioner recommends the award of a lease, concession agreement or management contract resulting from this RFP, it shall not be final or binding upon the State unless and until it is approved by the Capital Budget

Overview Committee and the Governor and Executive Council."

A sample Lease and Operating Agreement was attached to the RFP as Appendix A. Paragraph 1 of the sample Lease provided a line on which to specify the total acreage. The line was left blank. In addition, paragraph 1 referenced a Map of the Leased Premises and Property Description as appendices, neither of which was attached.

The only map provided with the RFP was a partial map of the state park that showed the ski area and designated by shading the property to be leased. Commissioner Thomson instructed his employees to draw the bounds of the leasehold interest as closely as possible to the edges of the existing ski area to minimize any feared opposition to leasing the ski area. The shaded map drawn to define the area as directed did not show the park borders.

On March 10, 1998, Mr. MacAskill wrote to Commissioner Thomson requesting the exact boundaries and arrearage of the leasehold. According to Sunapee, it was consistently assured by the Commissioner of DRED and others that the documents would be produced in accordance with their mutual understanding that the leased premises included all of the land up to the state park's northern and western borders before the Governor and Executive Council approved it.

Paragraph 27 of the sample Lease, entitled AMENDMENT, stated: "This agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire."

Paragraph 31, entitled APPROVAL CONTINGENCIES, stated: "This 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 and by the New

Hampshire Governor and Executive Council."

The RFP also included Appendices B, a part of which was labeled, "Map of the lease premises and property description of the leased premises." Attached was a partial map of the state park showing the existing ski area with the area to be leased designated by shading only. No written description or plan with metes and bounds was provided.

On April 1, 1998, Sunapee submitted its Proposal for the Operation of the Mount Sunapee Ski Area. On April 22, 1998, DRED Commissioner Robb Thomson notified Sunapee that the State had accepted Sunapee's proposal. Commissioner Thomson and Timothy Mueller thereafter began the process of finalizing the Lease. The sample Lease and the significant parts of the RFP had been drafted by Michael Walls, a Senior Assistant Attorney General. Attorney Walls was not, however, the lead negotiator for the State, but provided some legal advice to Commissioner Thomson before the Lease was finalized.

On April 30, 1998, Commissioner Thomson and Mr. Mueller signed the final Lease and Operating Agreement ("the Lease"). Pl. Ex. 2, Deposition Ex. 4. Commissioner Thomson indicated in a signed writing, dated April 24, 1998, that the final agreement was also conditioned on the State preparing "a meets and bounds survey" of the leased premises. Attorney Walls approved the Lease on May 4, 1998. Id. At the signing the State had still not appended a map with metes and bounds and a formal legal description of the leased premises, nor had either been seen reviewed by Sunapee. Relying on the representations of the State agents, Sunapee remained of the understanding at the time of signing that the northern and western borders of the leased premises were coterminous with the state park's northern and western borders.

The final Lease signed by the parties was consistent with the language of the sample lease and operating agreement in most regards with certain notable exceptions as follows. In

Paragraph 3, a clause was added at Sunapee's request that exempted "revenue from the sale or rental of real estate" in the calculation of the Operator's "gross revenue," 3% of which Sunapee would owe for part of its annual rent. At the time of the signing there was no real estate to rent or sell suggesting that the parties must have recognized the possibility of future real estate.

Paragraph 6 of the final Lease, reads:

6. MASTER DEVELOPMENT PLAN

> *The Operator shall prepare a Master Development Plan ("MPD") covering operations, facilities, site improvements and strategic plans by June 1, 2000. The operator's proposed MDP shall be submitted to DRED and shall be either approved as proposed or revised for resubmission. The MDP shall embody both the Operator's and the State's long term goals for the ski area* and shall include all major elements of the Operator's "Proposal for the Operation of the Mount Sunapee Ski Area" submitted on April 1, 1998. The MPD shall include but not be limited to plans for expanding the ski trail network, construction of new lifts, construction or renovation of lodges or other facilities, additional water withdrawals from Lake Sunapee to expand snow making capacity, upgrading or modifying infrastructure, including power, water, and sewer disposal systems and such other improvements or modifications that are appropriate for the recreational use of the Lease Premises. *The MDP shall be revised and updated every five (5) years.* (State's original language is italicized).

Paragraphs 27 and 33 were included in the final Lease as originally proposed.

On May 14, 1998, the Capital Budget Overview Committee approved the Lease. Sometime between May 14, 1998 and June 10, 1998, the State produced a Map of Lease Premises and Property Description of Lease Premises with the metes and bounds of the leased area, which had been prepared by employees of DRED at Commissioner Thomson's direction.

On June 10, 1998, Governor Jeanne Shaheen and the Executive Council approved the Lease and Operating Agreement with these documents attached. The Map of Lease Premises and Property Description of Lease Premises site the northern and western borders of the leasehold interest so that they are not coterminous with those of the state park, but rather leave a swath of land between.

After completing substantial improvements to the existing ski area, Sunapee turned its attention to expansion. In 2000, Jay Gamble, the General Manager who replaced Don MacAskill in 1998, reviewed the Map of Lease Premises and Property Description of Lease Premises attached to the Lease. As a result, Sunapee for the first time became aware that the western boundary of the leased premises, as defined by the Map and Property Description attached to the Lease, was not coterminous with the state park's northern and western boundaries.

Counsel for Sunapee, Attorney George Nostrand, contacted Attorney Walls, who concurred with Sunapee's understanding of the coterminous nature of the boundaries, agreed there was an error in the drafting, and suggested a lease amendment to correct the error. Richard McLeod, the Director of Parks, who was also involved in the RFP and Lease process, also agreed there was an error. Attorney Walls and Attorney Nostrand exchanged proposed lease amendments between January 2001 and April 2001, but none was ever executed.

As required by the State's RFP, Sunapee had included in its 1998 proposal its plans for expansion of the ski area. Its proposal detailed three phases of development of trails, the third phase being to the east and outside the shaded area designated on the map attached to the RFP. Sunapee's expansion proposal was similar to prior unrealized plans of the State, which were made available to prospective bidders prior to the RFP submission date. Sometime after Sunapee began operating the ski area, and around the time the first MDP was being considered, DRED foreclosed Sunapee from expanding the ski area to the east due to the location of Old Growth Forest in that area. Although there is no evidence that a western expansion was ever discussed prior to the execution of the Lease or during the proposal process, and indeed Mr. Mueller testified that the plan came up as an alternative plan, by eliminating expansion to the east, the only remaining viable option to expand the ski area is in the westerly direction.

In 2000, Sunapee acquired numerous options to purchase land contiguous to the western border of the park that would allow expansion of the ski area and real estate development by combining private and public land. However, because the boundaries of the leasehold and the park were not coterminous, based on the Map and Property Description attached to the Lease, the plan could not be accomplished without either reforming the Lease to correct the purported error or expanding the leasehold interest by amendment to the lease. If reformation of the contract succeeded, the approval of the Governor and Executive Council would not be required to expand within the leasehold. The latter approach, pursuant to Paragraph 27 of the Lease, required approval of the Governor and Council, which is the course Sunapee ultimately pursued.

In 2002, Sunapee formally sought approval from DRED to expand its operations outside the boundaries of its leasehold by way of a lease amendment. On February 27, 2002, George Bald, then Commissioner of DRED, outlined the requirements Sunapee would have to meet before he would recommend the lease amendment to the Governor and Executive Council.

While plans for expansion to the west were still being discussed, Sunapee alerted the State that its twelve months options to purchase the properties adjacent to the state park would lapse again and the sellers were not willing to extend. Commissioner Bald gave Sunapee his assurance that he was still in favor of the expansion plan as long as the conditions he outlined were met. Based on those assurances, Sunapee purchased the properties for 2.1 million dollars and continued to pursue the amendment to the lease.

Sunapee complied with all of Commissioner Bald's requirements. The amendment, however, was not presented to the Governor and Executive Council during the tenures of Governor Benson and Commissioner Bald, although Sunapee understood and proceeded under the understanding that both favored the expansion plans.

Sean O'Kane succeeded Commissioner Bald as Commissioner of DRED in 2004. Sunapee continued its discussion with Commissioner Kane and met all of the additional conditions he imposed to gain a favorable recommendation from DRED to the Governor and Executive Council.

In January 2005, Governor John Lynch assumed office. During his gubernatorial campaign, he publicly announced his strong opposition to Sunapee's expansion plan. After taking office, Governor Lynch encouraged and, according to Sunapee, exerted substantial pressure on Commissioner O'Kane to reject Sunapee's expansion plan. Nonetheless, in May 2005, Commissioner Kane sent a favorable written recommendation to the Governor and Executive Council concerning Sunapee's proposed lease amendment and expansion of the ski area.

Following receipt of the Commissioner's recommendation and Sunapee's proposal, Governor Lynch issued a press release stating that he opposed an expansion of the leasehold interest. Meetings between Governor Lynch and representatives from Sunapee occurred. Despite the efforts to convince Governor Lynch to change his view, Governor Lynch, exercising what the State contends falls within a governor's discretion under the State Constitution, has refused to place the amendment on the Executive Council agenda, thereby effectively thwarting any expansion of the ski area and prohibiting the private development of ski/ski out condominiums.

Sunapee asserts that it has a legal right under the terms of the Lease and an equitable right to be allowed to expand the ski area in some form and that the Governor's refusal to bring the lease amendment before the Governor and Executive Council constitutes a breach of the Lease. By rejecting Sunapee's only viable expansion option and refusing to allow the Executive Council

to consider the proposal, petitioner argues that Governor Lynch has effectively deprived it of a substantial and valuable benefit of the Lease, the opportunity for future expansion. Sunapee represents that it would not have entered into the Lease at all without this valuable benefit or, if it had contracted with the State to operate the ski area, it would have done so at a greatly reduced price. Since 1998, Sunapee has invested over $14 million in improvements in the Mount Sunapee Ski Area, which it asserts it did in reliance on future expansion opportunities and on the State's promise to consider lease amendments promptly.

Based on these allegations, Sunapee brought suit against the State alleging breach of contract, government/equitable estoppel, promissory estoppel, breach of implied covenant of good faith and fair dealing, reformation, and inverse condemnation.

Analysis

I. Breach of Contract

The State argues that it is entitled to summary judgment on Sunapee's breach of contract claim because the lease agreement clearly and unambiguously grants the Governor the discretion to decide whether to put a lease amendment on the Executive Council agenda and because the facts, even in the light most favorable to Sunapee, do not support the breach of contract claim.

Sunapee counters that the State breached its promises to: 1. allow some form of expansion, which the Governor has effectively prevented by refusing to place the lease amendment on the council agenda; 2. promptly consider expansion proposals, which he has failed to do by his refusal to place the amendment proposal on the Executive Council agenda and by trying to influence Commissioner Kane to reject Sunapee's plan; and 3. produce and adopt "a leasehold boundary coterminous with the park's northern and western boundary." Sunapee

argues that Paragraph 27 of the Lease is ambiguous and should be interpreted to require the Governor to place the lease amendment on the Executive Council agenda and to approve the expansion plan.

To state a claim for breach of contract, a plaintiff must show: (1) the existence of a valid, enforceable contract; (2) performance of the contract by the plaintiff; (3) a breach by the defendant; and (4) damages caused by the defendant's breach. Gore v. Indiana Ins. Co., 876 N.E.2d 156, 161 (Ill. 2007). A valid, enforceable contract exists where offer, acceptance, and consideration are present. Bel Air Assocs. v. N.H. Dept. of Health & Human Servs., 158 N.H. 104, 107 (2008) (quoting Behrens v. S.P. Constr. Co., 153 N.H. 498, 501 (2006)). "'In addition, there must be a meeting of the minds in order to form a valid contract.'" Bel Air Assocs., 158 N.H. at 107 (2008) (quoting Chisholm v. Ultima Nashua Indus. Corp., 150 N.H. 141, 144-45 (2003).[1]

Whether the State breached the lease agreement when the Governor refused to place Sunapee's lease amendment on the Executive Council agenda is first a matter of contract interpretation. See N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 139 (2001). The interpretation of a contract, including the preliminary question of whether a term is ambiguous, is question of law for the Court to decide. Butler v. Walker Power, 137 N.H. 432, 435 (1993); Foundation of Seacoast Health v. HCA Health Servs. of N.H., 157 N.H. at 501; N.A.P.P. Realty Trust, 147 N.H. at 139.

When construing a lease, the court focuses on the intent of the parties at the time of the agreement. Foundation of Seacoast Health, 157 N.H. 487, 501 (2008). "In interpreting a contract

[1] Neither party argues that there was not a meeting of the minds or was a mutual mistake warranting the voiding of the contract, although Sunapee's allegations could arguably support such a claim.

the court is to consider the written agreement, all its provisions, its subject matter, the situation of the parties at the time it was entered into and the object intended." (inner citations omitted). Commercial Union Assur. Co. v. Brown Co., 120 N.H. 620, 623 (1980).

"In the absence of ambiguity, the parties' intent will be determined from the plain meaning of the language used. The words and phrases used by the parties will be assigned their common meaning, and [the Court] will ascertain the intended purpose of the contract based upon the meaning that would be given to it by a reasonable person." N.A.P.P. Realty Trust, 147 N.H. at 139, quoting Greenhalgh v. Presstek, 152 N.H. 695, 698 (2005). In addition to giving the language its reasonable meaning, the court must read the contract as a whole and consider the circumstances and the context in which the agreement was negotiated. Ryan James Realty v. Villages at Chester Condo. Assoc., 153 N.H. 194, 197 (2006).

Applying these rules of construction and turning to Paragraph 27 of the lease agreement, the court finds that the clause is not ambiguous. The clause reads: "This Agreement may be amended . . . only by an instrument in writing signed by the parties hereto and only after approval of such amendment . . . by the Governor and Executive Council of the State of New Hampshire."[2]

The plain meaning of the word "approval" is "the act of approving." The American Heritage Dictionary of the English Language (William Morris ed., Houghton Mifflin Company 1979) (1969). The word "approve" is defined as "to regard favorably" or "to confirm or consent

[2] Relying on Paragraph 27 for their breach of contract claim, Sunapee equates expansion of the ski area with expansion of the leasehold interest, which the Court accepts for purposes of this motion, but does not necessarily agree is correct. If Sunapee's reformation claim were valid, the result would be the correction of the description of the leased property to reflect the parties' actual agreement that the western and northern boundaries of the leasehold and the state park were coterminous. In that event, an amendment to the lease and governor and council's approval would be unnecessary in order for Sunapee to expand its operations.

to officially." Id. Thus, the plain meaning of the phrase "only after approval of such amendment . . . by the Governor and Executive Council" and the use of the conjunction "and" to a layperson would mean that the consent of the Governor is required independently of that of the Executive Council.

To the extent one might argue that the phrase "Governor and Executive Council" has a legal definition different from its ordinary meaning, this argument is not convincing. A statutory definition of the phrase "Governor and Council" is set forth in RSA 21:31-a (2000). The phrase means "governor with the advice and consent of council." Id. There is nothing in the Lease to suggest that the Governor must take the futile step of presenting to the Executive Council a proposal which he knows he will not approve.

Moreover, contrary to the petitioner's argument, the Governor cannot be forced to seek advice of the Executive Council when his mind is fully made up on an issue. The Governor is the supreme executive magistrate. N.H. Const., pt. 2, art. 41. The executive power of the State is vested in him. Id. To assist the Governor in carrying out his duties, the N.H. Constitution, pt. 2, art. 60 provides for the election of an Executive Council whose primary role is to "advis[e] the governor in the executive part of the government." This advisory role extends to the fiscal affairs of the State. N.H. Const., pt. 2, art. 56; see Opinion of the Justices, 113 N.H. 87, 88-89 (1973). In order to obtain the advice of the Executive Council, N.H. Const., pt. 2, art. 62 grants the Governor " . . . the power to convene the council, from time to time, at his discretion; . . . ." Implicit is the right of the Governor not to convene the council when its advice is not needed. Neither the Lease nor the law cited by petitioner divests the Governor of the power to control his executive agenda and grants it to in another person or entity. To the extent members of the public disagree with a Governor's agenda, the views may be expressed in the voting booth.

The court recognizes that there is substantial evidentiary support for a conclusion that all parties at the time the Lease was executed contemplated and even desired the future expansion of the ski area. It could be concluded that the possibility of expansion was a central consideration of Sunapee in deciding to submit a proposal. However, turning to the plain language of the Lease, no "right" to expand or "guarantee" of expansion of the ski area can be found in the language. In fact, there is no such right or guarantee even within the bounds of the leased property, let alone outside its bounds. Paragraph 6 allows DRED to reject a proposed MDP and to require resubmission of an alterative plan. Moreover, Paragraph 27 makes clear that any modification of the Lease, which necessarily includes the leasing of additional lands, must be approved by the Governor and Executive Council. To accept Sunapee's argument that some plan of expansion must be approved, regardless of whether it required the lease of additional state property, would render the words of Paragraph 27 meaningless.

The parties included no restriction on what the Governor could consider in making his decision to accept a lease amendment, nor did the parties include any conditional right to expand. Given the layers of approvals necessary for a contract modification and the uncertainties of the political process, the facts, taken in the light most favorable to Sunapee, do not suggest that Sunapee would be reasonable to believe that expansion of any kind was guaranteed. In fact, at the time the shaded map defining the leasehold was prepared, Commissioner Thomson instructed the drafters to draw the shaded area as closely as possible to include only the existing ski area. He did so because he recognized the opposition to the leasing of any portion of the park and sought to minimize it by drawing the boundaries of the leased premises as narrowly as possible.

Sunapee's second theory, that the Governor's action in "delaying" approval of its

proposed amendment constitutes a breach, is not logically sound. It assumes either that the Governor has approved Sunapee's plan and is delaying communicating that approval or that the Governor will approve Sunapee's plan in the future. Neither comports with the undisputed facts in this case. Governor Lynch has opposed Sunapee's proposed amendment from the start. He has had meetings with Commissioner Kane and Mr. Mueller. There are no facts to suggest that advice from his Executive Council would alter or affect his view. The Governor has communicated clearly that that he will not place the proposed lease amendment on the Council agenda, because he will not approve a plan that results in private profit from public lands.

Contrary to Sunapee's argument, Paragraph 6 of the Lease, which pertains to the five year Master Development Plan, does not afford Sunapee or imply any right to expand the ski operations outside the leasehold or any right to have a lease amendment considered by the Executive Council when the Governor will not approve. Although Sunapee assumed a duty to provide DRED with its "plans" to expand every five years, there is no concomitant duty on the part of the Commissioner of DRED to accept the expansion plans. Furthermore, DRED's authority to accept a MDP is necessarily limited to plans within the leasehold; otherwise Paragraph 27 would apply and require approval of a Lease amendment by Governor and Executive Counsel. Paragraph 6 and 27 are harmonious, and there is no language in Paragraph 6, express or implied, that would alter the constitutional discretion of the Governor to approve contracts involving state property, control his council's agenda, and seek the council's advice.

Sunapee's last allegation of breach, that the State did not do as it promised when DRED prepared the Map and Property Description attached to the Lease, rests on a duty that is not found in the language of the contract. The condition set out by Sunapee when it submitted its proposal, that a metes and bounds map and description be completed, was met. The shaded map, attached

to the RFP, and the metes and bounds map, attached to the Lease, in fact closely match, and neither map shows the park boundary on the west and north.

Assuming that Commissioner Thomson represented that the map and description to be prepared would detail the western and northern boundary of the leased property to be coterminous with the state park boundary, as discussed below, such a promise could not bind the State without approval by the Governor and Executive Council. Pursuant to Paragraph 31 of the Lease, without the approval of the Governor and Council, no effective contract could exist. There is no evidence presented from which one could conclude that the Governor and Executive Council intended to approve the lease of State land consistent with the larger area Sunapee alleges Commissioner Thomson promised or that any member of the Executive Council or Governor was aware of anything other that the final Map and Property Description that were attached and incorporated into the Lease. As more fully discussed below, the remedy, if the Governor and Council did intend to approve the Map and Property Description that Sunapee describes, would be reformation.

For all of the above reason, summary judgment on Sunapee's breach of contract claim is GRANTED in favor of the State.

II. Equitable Estoppel

The State argues that Sunapee's estoppel claim fails as a matter of law because: 1. it is barred by sovereign immunity; and 2. Sunapee cannot produce proof to meet the elements of the claim. Assuming without deciding that sovereign immunity does not bar the estoppel claim, the court finds summary judgment is proper because Sunapee has produced insufficient proof of two requisite elements of the claim, that a State official knowingly made a false representation or concealed material fact and that any reliance by Sunapee was reasonable.

To state a claim for government estoppel or equitable estoppel, "[a] plaintiff[] must show that the defendant made a false representation or a concealment of material facts; the representation must have been made with knowledge of the facts; the plaintiffs must have been ignorant of the truth of the matter; the representation must have been made with the intention that the plaintiffs should act upon it; and the plaintiffs must have been induced to act upon it to their prejudice." Turco v. Town of Barnstead, 136 N.H. 256, 261 (1992); See In re Carr, 156 N.H. 498, (2008) (listing the same elements with regard to equitable estoppel).

In addition, a plaintiff's reliance must be reasonable. Turco, 136 N.H. at 261. "Reliance is unreasonable when the party bringing the estoppel claim knew at the time of his reliance that the promisor did not have the authority to make the promise. Turco, 136 N.H. at 261; see Cradle Co. v. Bourgeois, 149 N.H. 410, 418 (2003) ("Reliance is unreasonable when the party bringing the estoppel claim, at the time of his or her reliance or at the time of the representation or concealment, knew or should have known that the conduct or representation was either improper, materially incorrect or misleading.")

Sunapee claims two misrepresentations were made, one regarding the right to expand and the second regarding the coterminous nature of the state park and leased premises boundaries. With regard to the first representation, the plain language contradicts it. As to the second, there is inadequate support for a finding that Commissioner Thomson or other State official knowingly made a false representation or concealed a material fact. The thrust of Sunapee's claims is that all of the people communicating during the RFP and Lease negotiation process agreed on where the western leasehold boundary laid. Estoppel forbids one from speaking against his own false representations made to a party who relied on those representations. See Turco, 136 N.H. at 290.

Even if Sunapee could show that a State official knowingly made a false representation or concealed a material fact, Sunapee cannot show it was reasonable in relying on any such representation made by Commissioner Thomson or other state agent. The draft and final RFP, the sample lease, Sunapee's proposed lease, and the final Lease all contain plain language that any increase in the leased premises, a material change in the terms of the contract, would require Governor and Executive Council approval. Sunapee knew after reading the lease agreement that neither DRED nor the Attorney General had the authority to bind the State to lease more state land to facilitate expansion. See also RSA 4:40, I (2003)(Governor and council approval required before state land is leased or sold.) Sunapee included all the relevant provisions in its proposed lease attached to its 1998 proposal. As such, Sunapee knew that neither DRED nor the Attorney General had the authority to bind the State by promises made during the lease negotiations or by a promise to enter into an amendment to increase the leasehold after the lease had been approved. Thus, Sunapee could not act in reasonable reliance on those promises. Consequently, summary judgment on Sunapee's equitable estoppel claim is GRANTED.

III. Promissory Estoppel

The State argues that Sunapee's promissory estoppel claim fails as a matter of law, first, because sovereign immunity bars it and, secondly, because an express contract exists and Sunapee's alleged reliance on any oral promises is unreasonable. Assuming without deciding that sovereign immunity does not bar Sunapee's promissory estoppel claim, the court agrees that summary judgment in favor of the State is warranted.

First, promissory estoppel applies only in the absence of an express contract. Great Lakes Aircraft Co. v. Claremont, 135 N.H. 270, 290 (1992). In this case, an express contract exists and the contract provisions, as discussed above, are inconsistent with Sunapee's claims.

Assuming that the existence of an express contract does not bar this estoppel claim, it still does not succeed. To state a claim for promissory estoppel, a plaintiff must show:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise.

Restatement (Second) of Contracts § 90; See Panto v. Moore Business Forms, Inc., 130 N.H. 730, 738 (1988). In addition, the promisee's reliance must be reasonable. Restatement (Second) of Contracts § 90, comment b.

For the same reasons stated earlier in the court's analysis of the claim, Sunapee could not have reasonably relied on any of the alleged promises it alleges DRED and the Attorney General made not only because the plain language of the contract contradicts the alleged statements, but also because Sunapee knew or should have known that they were unauthorized to bind the State to lease state land. As such, summary judgment on Sunapee's promissory estoppel claim likewise is GRANTED.

IV. Breach of Implied Covenant of Good Faith and Fair Dealing

The State argues that Sunapee's breach of implied covenant of good faith and fair dealing claim fails as a matter of law because sovereign immunity bars it and because the lease does not confer any discretion upon the State, which in its bad faith exercise, could or has deprived Sunapee of a substantial portion of the lease's value. Assuming without deciding the sovereign immunity issue, the court concludes that this claim cannot prevail as a matter of law.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Harper v. Healthsource New Hampshire, 140 N.H. 770, 775 (1996) (quotation omitted). The New Hampshire Supreme Court has noted that "New Hampshire has not merely one rule of implied good faith duty but rather a series of doctrines,

each of them serving markedly different functions." Centronics Corp. v. Genicom Corp., 132 N.H. 133, 139 (1989). One of these doctrines states that there is an implied obligation of good faith to be reasonable in the exercise of discretion when a contract permits one party to exercise discretion in performance of the contract sufficient to deprive the other party of a substantial proportion of the contract's value. Centronics, 132 N.H. at 143. The court must potentially address four questions when a litigant claims that the implied covenant of good faith has been breached: 1. Does the contract allow the defendant to exercise discretion sufficient to deprive the plaintiff of a substantial proportion of the agreement's value? 2. Did the parties intend to make a legally enforceable contract? 3. Was the defendant's exercise of discretion reasonable? and 4. Did the defendant's abuse of discretion cause the plaintiff's damage? Id. at 143-144.

To meet the first factor, the agreement must "ostensibly allow to or confer upon the defendant a degree of discretion in performance tantamount to a power to deprive the plaintiff of a substantial proportion of the agreement's value." Centronics Corp. v. Genicom Corp., 132 N.H. 133, 144 (1989). "[G]ood faith in performance addresses the particular problem raised by a promise subject to such a degree of discretion that its practical benefit could seemingly be withheld." Id.

The third factor depends on identifying the "common purpose or purposes of the contract, against which the reasonableness of the complaining party's expectations may be measured, and in furtherance of which community standards of honesty, decency and reasonableness can be applied." Id.

Addressing the first question, the lease agreement does not confer upon the State a degree of discretion that gives rise to a claim of breach of an implied duty of good faith and fair dealing. The power to convene the Executive Council is conferred by the State Constitution. There is no

language in the Lease that alters that constitutional discretion or from which to imply that the parties intended to limit it. The discretion Sunapee complains of is the Governor's discretion to control his Executive Council agenda and to approve or disapprove a lease contract. Other than disagreeing with Sunapee and Commissioner Kane as to whether a joinder of state and private land as proposed is in the State's best interest, there are no facts to suggest that the Governor has been irresponsible in exercising any duty to consider the proposal and hear Sunapee and his Commissioner's reasons for the recommendation.

"[I]mplied covenants are qualified and restrained by any express covenants of a more limited character." Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 284 (1992) (quotation omitted). This means that, to the extent that an implied covenant is "inconsistent with those express covenants, or which might otherwise have implied an undertaking of a more enlarged character," the express terms of the contract are controlling. Id. Not only does the Governor have the authority to reject any proposal to lease state property pursuant to RSA 4:40, the power was retained under the Lease by the expressed provision that any amendment to the Lease will not be effective without the Governor's approval.

However, even if the lease agreement did confer such discretion, the exercise of that discretion does not deprive Sunapee of a substantial portion of the lease agreement's value. First, Sunapee has had the right to operate and make profit from the existing ski area. Secondly, Sunapee does not have an express or implied right to expand or a right to an automatic approval of its lease amendments.

The facts of this case can be distinguished from circumstances in which a bad faith lack of discretion has been found. Cf. Seaward Construction Company, Inc. v. City of Rochester, 118 N.H. 128 (1978). In Seaward, the plaintiff had a right to payment for its services only if the

defendant-city received money from HUD. The Court found that the city violated an implied duty of good faith by refusing to apply for federal money after a dispute broke out between the parties as to the amount owed, because the benefit of this bargain for Seaward was payment. Common sense dictates that a person would not agree to perform under a contract without some consideration. In contrast, Sunapee has no express or implied right or conditional right under the Lease to expand the ski operations beyond the leased property or to lease more state land.

Under Paragraph 27, all lease amendments must be in writing and signed by DRED before they can reach the Governor. The process of approval of an expansion of the ski area outside the bounds of the leasehold is not an uncomplicated one. First, any Master Development Plan and Environmental Management Plan must be considered by the Mount Sunapee Ski Advisory Committee with opportunity for public comment. See August 1, 1998 Public Involvement and Oversight Policy for Mt. Sunapee Ski Area. Thereafter, it must pass and receive an approval from DRED. Assuming that DRED approves the leasehold/ski area expansion plan, the next step is to have the Governor consider the proposal with or without the advice of the Executive Council. Even if the Governor were to approve it, the proposal still would require a majority vote of the councilors. Given the changes of the political winds experienced by all governments, and the ups and downs of the economy, and refocusing of state priorities and environmental concerns, there could be no benefit implied as Sunapee suggests. To the extent any "value" is afforded by Paragraph 27 by allowing Sunapee a process by which to seek approval for an amendment, making expansion a possibility, that value is greatly diminished by the contingencies attached to it and politics. In fact, given the controversy that existed about leasing public land when the Lease was signed, it cannot even be assumed that a Lease, as Sunapee now proposes, would have been approved by Governor Shaheen and her Executive

Council in 1998.

It is not appropriate for this court to imply a duty that the parties did not negotiate and agree upon. A conditional right could have been included, but was not. At most it can be said that Sunapee has a right to have a proposed amendment and expansion plan considered by Governor Lynch, which he has done.

Finally, if the court were to interpret Paragraph 27 as Sunapee requests, then Sunapee could threaten to sue the Governor for breach of implied covenant of good faith and fair dealing every time he exercised his discretion not to place a lease amendment on the Executive Council agenda. As petitioner points out, this is a standard state contract clause. Such threats would allow Sunapee to coerce the Governor into not exercising his discretion, a result that would not be in the public's best interest.

For all of the above reasons, summary judgment on the breach of implied covenant of good faith and fair dealing is GRANTED.

IV. Reformation

The State argues that Sunapee's reformation claim fails as a matter of law because Sunapee lacks standing to assert it. Assuming without deciding that Sunapee has standing to assert its reformation claim, it fails as a matter of law, because Sunapee cannot show that Governor Shaheen and her Executive Council thought that the original leasehold boundaries were coterminous with the northern and western boundaries of the state park when they approved the lease agreement.

"Reformation of an instrument for mutual mistake of fact requires that the party seeking reformation 'demonstrate by clear and convincing evidence that (1) there was an actual agreement between the parties, (2) there was an agreement to put the agreement in writing and

(3) there is a variance between the prior agreement and the writing.'" Sommers v. Sommers, 143 N.H. 686, 689-90 (1999) (quoting A.J. Cameron Sod Farms v. Continental Ins. Co., 142 N.H. 275, 283 (1997)). "'The plaintiff's burden of proof in a reformation action is a heavy one.'" Id. (citation omitted). "While parol evidence generally cannot vary or contradict a writing, it may establish that the writing itself does not reflect the actual agreement reached by the parties." Id.

Sunapee cannot show by clear and convincing evidence that the parties had an actual agreement that the original leasehold boundaries were coterminous with the northern and western edges of the State Park. The parties to this contract are the State of New Hampshire and Okemo Mountain, Inc. Commissioner Thomson and the other state officials involved in the proposal and lease process are agents of the State, not parties to the contract. For a representation of an agent to reflect the intent of the contracting party that s/he serves and constitute proof of a meeting of the minds on contractual terms, the agent must be authorized to bind its employer.

Paragraph 31 explicitly provides that in order for the lease agreement to become legally binding upon the State, it must first be approved by DRED, the Attorney General, the Capital Budget Overview Committee, and the Governor and Executive Council. To prevail, Sunapee must prove that all five parties required to approve the terms of the contract have done so. What property is to be leased is a material term of the Lease, and Sunapee has not argued otherwise. Sunapee, therefore, must show not only that DRED understood that the original leasehold boundaries were coterminous with the northern and western edges of the state park, but also that Governor Shaheen and the Executive Council serving in 1998 did as well. There is no such evidence in the record. To the contrary, at the time Governor Shaheen and her Executive Council approved the Lease, the "erroneous" map and property description were attached. Consequently, considering the evidence in Sunapee's favor, Sunapee cannot prove that there was an actual

agreement to lease the premises as it describes, because such terms were never presented to Governor Shaheen and the Executive Council for approval. Summary judgment on Sunapee's reformation claim is GRANTED.

VI. Inverse Condemnation

Finally, consistent with the above rulings, Sunapee's inverse condemnation claim also fails as a matter of law. "Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain." Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). "When this occurs, the governmental body has committed an unconstitutional taking and the property owner has a cause of action for compensation." Id.

Absent a successful claim for reformation or proof that Sunapee has a right to some form of expansion beyond the leasehold, the court must analysis Sunapee's inverse condemnation claim based on the leased premises described in the existing Lease as written. The Governor's actions have not prohibited Sunapee from using the leased premises; its proposal is to use land outside its bounds. Sunapee has no valid right to use the land outside the bound, and therefore no right has been taken. Without a valid property right, Sunapee cannot maintain a cause of action for inverse condemnation. Summary judgment on the inverse condemnation claim is therefore GRANTED.

VII. Conclusion

For all of the above reasons, the State's motion for summary judgment is GRANTED.

So ORDERED

4/17/09
Date

Diane M. Nicolosi
Presiding Justice