

## MEMORANDUM

**TO:** Senator Joe Benning, Senate Institutions Committee Chair  
Representative Alice Emmons, House Corrections and Institutions Committee Chair

**FROM:** Michael Snyder, FPR Commissioner

**DATE:** January 21, 2019

**SUBJ:** **Proposed Joint Resolution Pertaining to State Lands  
Okemo Resort Lease Amendment, Woodchuck Mountain Land Transfer;  
Rangers Road ROW Exchange, Potential Request; and  
Report on Alburgh Cemetery Land Transfer as per Section 23 of Act 190**

The Department submits the following proposal seeking General Assembly approval and authorization for the Commissioner to amend the ski area Lease for the Okemo Resort and to convey 110 +/- acres, located in the Town of Newbury, known as the Woodchuck Mountain parcel, acquired as a bequest from the Enrita Carlson estate, to the Upper Valley Land Trust, should the Town of Newbury decline to accept the parcel from the Department. Also included in this memorandum is the status of discussions with a landowner in the Town of Plymouth regarding a right-of-way exchange that may result in a request to amend Act No. 261 (J.R.S. 32) and the Department's response to a request by the Legislature included in Section 23 of Act No. 190 of the 2017-2018 Legislative Session.

### **Okemo Resort Lease Amendments**

The proposed Lease amendments were agreed to by the State and Vail prior to Vail's acquisition of Okemo's assets, including the Lease. These amendments are similar to the Lease amendments that were approved by the General Assembly last session via J.R.S. 26 for Stowe Mountain Resort.

The proposed Lease amendments include:

1. Article 6 of the Lease, in part, requires Okemo to pay a rental fee based upon a calculation as set forth in Article 6 using linear feet of lifts and gross lift ticket sales located on the leased premises and 2 ½% on all gross receipts from restaurants, sport shops and warming shelters constructed and operated by Lessee. The State and Okemo now agree to apply as an addition to the existing rental fee, a 5% rental fee to Lessee's gross receipts for access fees for any Additional Activities occurring, in whole or in part on the leased premises after the Effective Date. Additional Activities are Lessee's existing mountain biking activities and any new commercial recreational activities occurring on the leased premises. To the extent Additional Activities include use of lifts, the gross receipts for access fees shall be multiplied by the following ratio prior to applying the 5% rental fee: (linear feet of lifts on the leased premises used for the Additional Activity)/(total linear feet of all lifts used for the Additional Activity). The Lessee agrees, at no time shall the per cent determined by the linear feet of lifts on State land over the total linear feet of all lifts owned by Lessee be less than twenty per cent (20%). To the extent Additional Activities do not include use of the lifts, Lessee shall pay the 5% rental fee based upon the proportion of such Additional Activities occurring on the leased premises.

2. Okemo shall indemnify and hold harmless the State and shall provide a general liability insurance policy as follows:

- a. Unless an event arises solely out of the State's gross negligence or willful misconduct, Okemo shall defend, indemnify and save harmless the State, its agents, servants and officials, from any damages and any claims arising out of or related to the use, maintenance, or operation of lifts or the leased premises.
- b. Okemo shall carry general liability insurance in a policy or policies at all times with minimum coverage of at least \$10,000,000 per occurrence and \$20,000,000 in aggregate, naming the State and additional parties as noted in Article 9 of the Lease as additional insureds under such coverage. No more than once every five (5) years, the State may review required insurance amounts set forth in this paragraph and may increase such insurance amounts to amounts that are reasonably representative of the then current market for insurance amounts for similar operations as reasonably determined by the State.

3. Subject to the provisions of Section 14 of the Lease, Okemo shall provide access to the public to the leased premises, including for uphill travel on the ski trails located on the leased premises, subject to Okemo's right to impose restrictions on the public's access for uphill travel and other public access in accordance with Section 14 of the Lease. Okemo shall establish a written uphill travel policy consistent with these terms and shall provide a copy to the State and make the policy publicly available.

4. Other than a Permitted Transfer, Okemo (or following a Permitted Transfer, any Permitted Transferees) shall not assign the Lease or engage in a transaction by way of merger, consolidation or sale (singly or in combination) involving the transfer of equity securities constituting more than one-half of the total voting securities or interests of Okemo (or if applicable, its Permitted Transferees), without the prior written consent of the State. Notwithstanding the foregoing, an assignment of the Lease by Okemo to, or any transaction involving the transfer of equity securities of Okemo to any direct or indirect wholly owned subsidiary of Vail Holdings, Inc. shall be a "Permitted Transfer" provided that the Guaranty remains in full force and effect following such Permitted Transfer.

5. The fiscal year for Okemo ends on July 31st each calendar year. References in Section 6 of the Lease to fiscal year shall be amended to refer to July 31st.

6. Upon termination of the Lease, Okemo, its successors or assigns, may remove all of Okemo's tangible personal property, and if such tangible personal property is removed, Okemo, its successors or assigns, shall remove such tangible personal property so as to minimize disturbance or damage to the leased premises, except for any reasonable use and wear, damage by casualty or eminent domain or damage resulting from the actions of State and shall restore the area where the tangible personal property is removed so as to leave those area(s) of the leasehold in a safe, stable and acceptable condition to the State.

#### **Woodchuck Mountain Land Transfer: Newbury, VT**

In the 2001-2002 legislative session the Department received authorization to convey 110+/- acres to the Town of Newbury, subject to a grant of development rights and conservation easement held by the Upper Valley Land Trust, because the property is not adjacent to other state-owned land but is adjacent to other land conserved by the Upper Valley Land Trust. In the years since, the Department has attempted to follow through on this authorization, including working with the Town of Newbury to resolve boundary concerns, but the Town of Newbury has declined to accept the land. Given the Town's reluctance to acquire the land and the Department's desire to conserve this parcel for forestry, conservation and public

recreation purposes consistent with the bequeath from Enrita Carlson, the Upper Valley Land Trust offered to accept the Woodchuck Mountain property in 2017 in the event the Department wishes to seek an alternative option to Town ownership. Recently, the Vermont Land Trust worked to transfer Tucker Mountain Town Forest, which sits adjacent to the Woodchuck Mountain parcel, to the Town of Newbury. Representatives of the Vermont Land Trust are optimistic that the Town may now be open to accepting the Woodchuck Mountain parcel. The Upper Valley Land Trust is still willing to accept conveyance of a conservation easement on the property, or to own the property in fee. The Department is exploring options to convey the parcel to either the Town or Upper Valley Land Trust, with either deed restrictions or a conveyance of a conservation easement to another qualified conservation organization or municipal organization and will work to ensure that the parcel is permanently conserved for open space, forest management and public recreation purposes.

The Department requests General Assembly approval and authorization for the Commissioner to convey 110 +/- acres, located in the Town of Newbury, known as the Woodchuck Mountain parcel, acquired as a bequest from the Enrita Carlson estate, to the Upper Valley Land Trust, should the Town of Newbury decline to accept the parcel from the Department. The Department also requests authorization to convey a grant of development rights and conservation easement to another qualified conservation organization or municipality, or alternatively, to include deed restrictions in the deed to Upper Valley Land Trust restricting development rights and requiring that the use of the Woodchuck Mountain parcel be limited to forestry, conservation and public recreation purposes. The Department requests that the authorization set forth in Section 83(a)(3) of Act 149 of the Acts and Resolves of the General Assembly of the State of Vermont, 2002, that authorized the Department to convey the Woodchuck Mountain parcel to the Town of Newbury, subject to a grant of development rights and conservation easement to be simultaneously conveyed to the Upper Valley Land Trust, shall remain in full force and effect should the Town of Newbury accept conveyance of the Woodchuck Mountain parcel.

#### **Rangers Road ROW Exchange: Plymouth, VT**

The Commissioner of Forests, Parks and Recreation was authorized pursuant to Act No. R-261 (J.R.S. 32) of the 2009-2010 Legislative Session to exchange rights of way between the Department and owners living on or near a state forest highway (Rangers Road) at Coolidge State Forest in the Town of Plymouth. The exchange would allow adjacent landowners to access their property via the Rangers Road in exchange for certain development restrictions and other concessions that would protect the State's interest in Coolidge State Forest and Rangers Road and benefit the public. One of the owners has asked the Department to consider an alternative proposal to that which was approved by the General Assembly in 2009. The Department agreed to review a proposal to determine if sufficient public benefit is being offered in exchange for what is being requested by the owner. If the Department receives a proposal and finds that it contains sufficient public benefit, we will promptly submit a memo outlining a proposed amendment to Act No. 261.

#### **Report on Alburgh Cemetery; Land Transfer**

As per Section 23 of Act No. 190 of the 2017-2018 Legislative Session, the Department is reporting on the status of the Vermont Housing and Conservation Board (VHCB) and The Nature Conservancy's (TNC) consideration of whether to amend the conservation easement they co-hold on the portion of Alburgh Dunes State Park in order for the State of Vermont to convey a portion of Alburgh Dunes State Park to the Association for the purpose of expanding the cemetery.

In 2012, the General Assembly approved a similar request from the Association which included the conveyance of land to the Department to be added to the State Park in exchange for the conveyance by the Department of approximately 1 acre of Alburgh Dunes State Park abutting the cemetery to the

Association. The transaction never took place as the land to be exchanged became unavailable. It has been the Department's and the General Assembly's custom to require receipt of equal or greater public benefit when considering requests of this nature. Additionally, in this situation, the co-holders of the conservation easement, VHCB and TNC, must approve an amendment of the conservation easement to enable the conveyance. The current proposal from the Association, a transfer of State Park land to the Association with nothing being conveyed to the Department, has not identified a public benefit which would offset the loss of state park land.

In September 2018, Department staff met with representatives from VHCB and TNC to discuss the request made by the South Alburgh Cemetery Association. VHCB and TNC were asked to evaluate the Association's current proposal using their policies regarding consideration of conservation easement amendments. In a written response from VHCB dated January 2, 2019, it was indicated that for VHCB to approve an amendment request, they must find that the amendment serves the public conservation interest, does not have a negative impact on the resource values of the protected property and is supported by the landowner and all other easement holders. In a written response from TNC dated January 8, 2019, it is stated that TNC's policies and standard operating procedures place strict limits on the conditions under which a conservation easement may be amended. Specifically, the following is listed in their letter:

- (a) the amendment must be consistent with the conservation easement purposes and must not diminish its overall goals and objectives;
- (b) the Conservancy must be compensated for any loss in value of its interest in the easement resulting from the amendment (with preference given to compensation in the form of additional conservation land); and
- (c) the amendment must comply with applicable state laws, including securing the approval or acquiescence of the relevant state authority and judicial approval, if required.

TNC's letter also indicates the request would be subject to internal review for which approval is unlikely unless there is a clear net conservation benefit arising from the amendment. Given the conditions outlined in TNC's letter, their position is to not approve of the proposed amendment as it currently stands.

Based on the responses from VHCB and TNC indicating that the current proposal does not meet the conditions under which an easement amendment would be approved, the Department will not be requesting approval by the General Assembly to transfer land to the Association.

However, there may be an alternative mechanism that the Association could pursue. In VHCB's letter, they did note that another option may exist for the Association through a right granted to cemetery associations by Chapter 121 of Title 18. Section 5482 of Title 18 authorizes towns and cemetery associations the right to acquire land for cemetery purposes through condemnation, subject to the restrictions and conditions of Chapter 121, namely to petition the Superior Court to allow them to take land from adjacent owners at a value to be determined by a commission established by the court. Under the terms of the conservation easement co-held by VHCB and TNC, a condemnation would require reimbursement of the loss of the conservation value of any land condemned. The Department is available to discuss this option, including funding for any reimbursement required, at your convenience.

Please let me know if you have any questions related to the proposals and Report on Alburgh Cemetery Association Land Transaction outlined in this memorandum. As always, we look forward to meeting with your respective Committees to discuss these proposals at your convenience.

Encl.

cc: Julie Moore, ANR Secretary  
Michael Chernick, Legislative Council  
Rebecca Wasserman, Legislative Council  
Heather Calderwood, Legislative Council  
Rebecca Baruzzi, Legislative Council  
Meghan Purvee  
Rebecca Washburn  
Danielle Fitzko

NOTE: This proposed Draft Joint Resolution has not been reviewed by Okemo/Vail or any other party. Although the proposed Okemo ski are lease amendments are substantively the same as what was agreed to by Vail and the State, slight editor changes were made for this document.

**Proposed Joint Resolution for Year 2019 Legislative Session:**

Whereas 10 V.S.A. §2606(b) authorizes the Commissioner of Forests, Parks and Recreation to sell, convey, exchange or lease land, or interests in land, or may amend deeds, leases and easement interests, with the approval of the General Assembly, and

Whereas the General Assembly considers the following actions to be in the best interest of the state, now therefore be it

Resolved by the Senate and House of Representatives:

Resolved:

- (a) The Commissioner of Forests, Parks and Recreation is authorized to amend the ski area Lease with Okemo as follows:

- (1) Section 6 of the Lease shall be amended to include a new subparagraph (c) as follows:

On Additional Activities, Lessee shall pay a rental fee of 5% of Lessee's gross receipts for access fees for any Additional Activities occurring, in whole or in part on the leased premises. Additional Activities are Lessee's existing mountain biking activities and any new commercial recreational activities occurring on the leased premises. To the extent Additional Activities include use of lifts, the gross receipts for access fees shall be multiplied by the following ratio prior to applying the 5% rental fee: (linear feet of lifts on the leased premises used for the Additional Activity)/(total linear feet of all lifts used for the Additional Activity). The Lessee agrees, at no time shall the per cent determined by the linear feet of lifts on State land over the total linear feet of all lifts owned by Lessee be less than twenty per cent (20%). To the extent Additional Activities do not include use of the lifts, Lessee shall pay the 5% rental fee based upon the proportion of such Additional Activities occurring on the leased premises.

- (2) Section 6 of the Lease shall be amended as follows: The fiscal year for Okemo ends on July 31st each calendar year. References in Section 6 of the Lease to fiscal year shall be amended to refer to July 31st.

- (3) Section 9 of the lease shall be deleted in its entirety and replaced with the following language:

Okemo shall indemnify and hold harmless the State and shall provide a general liability insurance policy as follows:

- a. Unless an event arises solely out of the State's gross negligence or willful misconduct, Okemo shall defend, indemnify and save harmless the State, its agents, servants and officials, from any damages and any claims arising out of or related to the use, maintenance, or operation of lifts or the leased premises.
- b. Okemo shall carry general liability insurance in a policy or policies at all times with minimum coverage of at least \$10,000,000 per occurrence and \$20,000,000 in aggregate,

naming the State and additional parties as noted in Article 9 of the Lease as additional insureds under such coverage. No more than once every five (5) years, the State may review required insurance amounts set forth in this paragraph and may increase such insurance amounts to amounts that are reasonably representative of the then current market for insurance amounts for similar operations as reasonably determined by the State.

- (4) Section 14 of the Lease shall be amended to include the following language:

Subject to the provisions of this Section 14 of the Lease, Okemo shall provide access to the public to the leased premises, including for uphill travel on the ski trails located on the leased premises, subject to Okemo's right to impose restrictions on the public's access for uphill travel and other public access in accordance with Section 14 of the Lease. Okemo shall establish a written uphill travel policy consistent with these terms and shall provide a copy to the State and make the policy publicly available.

- (5) A new Section 23 shall be added as follows:

Other than a Permitted Transfer, Okemo (or following a Permitted Transfer, any Permitted Transferees) shall not assign the Lease or engage in a transaction by way of merger, consolidation or sale (singly or in combination) involving the transfer of equity securities constituting more than one-half of the total voting securities or interests of Okemo (or if applicable, its Permitted Transferees), without the prior written consent of the State. Notwithstanding the foregoing, an assignment of the Lease by Okemo to, or any transaction involving the transfer of equity securities of Okemo to any direct or indirect wholly owned subsidiary of Vail Holdings, Inc. shall be a "Permitted Transfer" provided that the Guaranty remains in full force and effect following such Permitted Transfer.

- (6) A new Section 24 shall be added as follows:

Upon termination of the Lease, Okemo, its successors or assigns, may remove all of Okemo's tangible personal property, and if such tangible personal property is removed, Okemo, its successors or assigns, shall remove such tangible personal property so as to minimize disturbance or damage to the leased premises, except for any reasonable use and wear, damage by casualty or eminent domain or damage resulting from the actions of State and shall restore the area where the tangible personal property is removed so as to leave those area(s) of the leasehold in a safe, stable and acceptable condition to the State.

- (b) The Commissioner of Forests, Parks and Recreation is authorized to convey a parcel of land in the Town of Newbury as follows:

The Commissioner of Forests, Parks and Recreation is authorized to convey 110 +/- acres, located in the Town of Newbury, known as the Woodchuck Mountain parcel, acquired as a bequest from the Enrita Carlson estate, to the Upper Valley Land Trust, should the Town of Newbury decline to accept the parcel from the Department. The Commissioner is also authorized to convey a grant of development rights and conservation easement to another qualified conservation organization or municipality, or alternatively, to include deed restrictions in the deed to Upper Valley Land Trust restricting development rights and requiring that the use of the Woodchuck Mountain parcel be limited to forestry, conservation and public recreation purposes. The authorization set forth in Section 83(a)(3) of Act 149 of the Acts and Resolves

of the General Assembly of the State of Vermont, 2002, that authorized the Commissioner to convey the Woodchuck Mountain parcel to the Town of Newbury, subject to a grant of development rights and conservation easement to be simultaneously conveyed to the Upper Valley Land Trust, shall remain in full force and effect should the Town of Newbury accept conveyance of the Woodchuck Mountain parcel.