THE STATE OF NEW HAMPSHIRE

STRAFFORD, S.S. SUPERIOR COURT

David Schofield-Savo, et al

v.

Town of Barrington, et al.

Docket No. 219-2022-CV-350

TOWN OF BARRINGTON'S OBJECTION TO REQUEST FOR PRELIMINARY INJUNCTION

NOW COMES the Town of Barrington, by and through its attorneys, Mitchell Municipal Group, P.A., and in objecting to plaintiffs' request for a preliminary injunction against the town states as follows:

1. Plaintiffs seek a preliminary injunction against the Town of Barrington to require the town to maintain their private road during the 2022-2023 winter season. They allege that such an order is warranted because the town erred in not accepting the road as public, and because they claim they will be irreparably harmed without such an order with no adequate remedy at law.

2. As an initial matter, there is no irreparable harm here. Plaintiffs are not only capable of hiring an independent individual to plow the road, but the developer has offered to maintain the road this winter at a cost of $207 per household.

3. "Irreparable injury based on financial loss alone will only be found where the potential economic loss is so great as to threaten the existence of the plaintiff's business or when 'financial ruin' will result." If, however, "damages can compensate a moving party, a preliminary injunction is not appropriate." Meehan v. Gould, No. 218-2017-CV-1322 (N.H. Super. 2018)(quoting Anderson, et al v. Lagos, et al, 2013 WL 9883967 (N.H. Super. Jan. 18, 2013), aff'd 166 N.H. 752 (2014)), attached as

Exhibit A.

4. Even if plaintiffs could allege irreparable harm, they cannot demonstrate a likelihood of success on the merits.

5. Plaintiffs claim that the town represented that the road would be accepted as a public road if it was constructed to town specifications. See Complaint at §60.

6. It is not clear who plaintiffs claim made such a representation, but to the extent they claim that representation was made when the planning board approved the subdivision, that claim is contrary to New Hampshire law. See RSA 674:38; see also Neville v. Highfields Farm Inc., 144 N.H. 419 (1999); Beck v. Auburn, 121 N.H. 996 (1981). Moreover, the town made no such representation to the plaintiffs; the developer has admitted that it was the party that did so.

7. More importantly, the road was not constructed to town standards, and the developer was so informed *the day the road was paved*. See Exhibit B.

8. Discussions regarding the road's failings continued thereafter, over 27 months and two attorneys. See Exhibit C.

9. In fact, in response to the developer's claims that the road was constructed to town standards, the town retained a wholly independent third party engineer to drill borings into the road to determine whether it was constructed to town standards. See Exhibit D. When it was determined that it was not, the town attempted to call the bond. See Exhibit E.

10. While developer claims that it was "shocked" that the town refused to accept the road, and that the case of Wolfeboro Neck Property Owners Association v. Town of Wolfeboro, 146 N.H. 449 (2001) required the town to accept it, developer's claims fail upon an examination of the facts.

11. Wolfeboro Neck, supra at 453, held:

> In the case before us, consistent with its subdivision regulations, the town inspected the roads at various stages of construction to determine whether they would meet the town's highway standards. Indeed, the town's subdivision regulations, in order to protect members of the public from substandard roads, required a bond that the town could not release unless the roads met the town's standards.
>
> "A performance bond is intended to guarantee completion of the improvements it covers." *Board of Supervisors of Stafford County v. Safeco Insurance Company of America*, 226 Va. 329, 310 S.E.2d 445, 448–49 (1983) (emphasis added). Thus, the town established not only the procedure, but also the means to insure that town standards would be met. **As an obligee on the bond, the town's role was like that of a trustee "who was required, should the developer fail to make the secured improvements, to attempt to recover the funds from the bonding company and use them ultimately to complete improvements."** *Cox v. Utah*, 716 P.2d 783, 785 (Utah 1986) ; *see also Pacific County v. Sherwood Pacific, Inc.*, 17 Wash.App. 790, 567 P.2d 642, 648 (1977).

(emphasis added).

12. In this case, the town did exactly that–it attempted to call the bond. The developer objected to that attempt, see Exhibit F, and ultimately the bond company refused to pay on the bond.

13. It was at that point that the selectmen voted to not accept the road, and were then required to release the bond, which may only be held for public improvements. See RSA 674:36, III. There was no error in this decision.

14. It is also important to note that both RSA 231:59 and Part 2, Article 5 of the New Hampshire Constitution prohibit the town from spending public funds on this private road, and plaintiff's citation to Clapp v. Town of Jaffrey, 97 N.H. 456 (1952) is inapposite, as that case held that the town may use its equipment to work on private property if "the prices charged are sufficient to cover the cost so that no burden falls on taxpayers." No offer to reimburse the town for its services has been made here, and in fact, the request is specifically that the town plow the private road at the expense of the other taxpayers in town.

15. Because they cannot demonstrate irreparable harm, a lack of remedy at law, or a likelihood of success on the merits on their claims against the town, the preliminary injunction must be denied.

WHEREFORE, the Town of Barrington respectfully request that this Honorable Court:

A. Deny the requested preliminary injunction; and

B. Grant such other and further relief as the Court deems just and necessary.

Respectfully submitted,

TOWN OF BARRINGTON

By Its Attorneys
MITCHELL MUNICIPAL GROUP, P.A.

Date: January 18, 2023

Laura Spector-Morgan
Laura Spector-Morgan, Bar No. 13790
25 Beacon Street East
Laconia, New Hampshire 03246
(603) 524-3885

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served via the court's electronic service system to Jason B. Dennis, Esquire, Dean J. Wagner, Esquire, Steven S. Smith, Esquire, Paul Thomas Muniz, Esquire, and R. James Steiner, Esquire counsel of record.

Date: January 18, 2023

Laura Spector-Morgan
Laura Spector-Morgan

EXHIBIT A

John Meehan
v.
Jay Gould And Flatbread, Inc.

No. 218-2017-CV-1322

State of New Hampshire MERRIMACK, SS
SUPERIOR COURT

June 4, 2018

ORDER

The Plaintiff, John Meehan, brings this action against the Defendants, Jay Gould and Flatbread, Inc. (hereinafter "Gould" or "the Defendants"), seeking preliminary and permanent injunctive relief as well as monetary damages. Currently before the Court is Meehan's motion for preliminary injunctive relief, to which Gould objects. The Court held a hearing on the request for injunctive relief on April 25, 2018, at which Meehan, Gould, and Meehan's expert Wayne Geher, CPA, testified[1]. For the following reasons, Meehan's Motion for Preliminary Injunction is DENIED.

I

The following facts are taken from the hearing and relevant pleadings. These facts are found for the purposes of this Order only. Meehan and Gould are business partners who jointly own a chain of flatbread pizza restaurants, named The Flatbread Co. There are restaurant locations in New Hampshire, Maine, Massachusetts, Rhode Island, Hawaii, and British Columbia. Meehan and Gould opened the first restaurant in

Page 2

Amesbury, Massachusetts in 1998. Since the opening of the first restaurant, Meehan and Gould have incorporated another corporate entity, Flatbread, Inc., which serves as a management company for each of the individual Flatbread Co. restaurants. Meehan and Gould own 30% and 70% of Flatbread, Inc., respectively. They own seven of the nine Flatbread Co. restaurants with the same 70%/30% ownership structure. Together, they own 50% of the other two restaurants, in Hawaii and British Columbia[2], meaning that Meehan owns 15% of those two restaurants, and Gould owns 35%.

Initially, at the time that the parties opened the first location, both Meehan and Gould were fully employed elsewhere. Meehan began working full-time for Flatbread, Inc. before Gould left his prior full-time position outside of Flatbread, Inc. Meehan generally performed the day-to-day management of Flatbread, Inc. Gould, while also involved, focused more on bigger-picture decisions and management. Over time, Meehan took on the position of "de facto" president of Flatbread, Inc.

Neither Meehan nor Gould received salaries until 2002, at which time they agreed that the restaurants were profitable enough to allow them to begin taking salaries. Meehan asserts that he and Gould explicitly agreed that they would always receive equal salaries, "as consideration for their ownership interests and as a principal return on their investment, regardless of the services (or lack thereof) that each was providing in furtherance of the business." (Pl.'s Compl. ¶ 28.) Gould disputes the existence of such an agreement. Meehan disputes whether Gould performed any actual work during the time Meehan was providing day to day management. Neither dispute is material to the court's conclusion. Meehan and Gould received equal salaries from 2002

Page 3

until 2016. Those annual salaries began at $60,000, ultimately increasing to $250,000. Gould continues to receive a $250,000 annual salary.

While Flatbread, Inc. was in the initial stages of its expansion, Gould and Meehan made a practice of transferring funds from their more profitable restaurants to those in greater financial need. At the time, Meehan knew and approved of these transfers. Meehan asserts that such

transfers are no longer appropriate, however, due to the company's increased size and the fact that the restaurants are profitable and self-sufficient, highlighting the fact that there is nothing in writing permitting these transfers. Gould testified that such transfers could still be useful to the company and that they are common practice in the industry.

In early 2016, Gould and Meehan hired an advisor to review the company's finances. In response the financial advisor's recommendations, Gould instituted certain personnel changes, reportedly believing that the growing company would benefit from leadership with greater experience in the restaurant and corporate world. In May of 2016, Gould informed Meehan that he had begun searching for Meehan's replacement as de facto president of Flatbread, Inc., and that Meehan would be terminated as soon as Gould found a suitable replacement. Gould eventually hired Jason Lyon to replace Meehan as president, and Lyon officially took on the role as of October of 2016. Lyon had previously worked for The Common Man, another local, well-established restaurant chain, for several years. In addition to Meehan, Gould replaced Flatbread Inc.'s Construction Director and Controller, as well as its outside CPA. Gould asserts that these changes were made in order to fill those positions with individuals who were "experienced in the full service, multi-unit restaurant sector that could handle the company's size and growth." (Defs.' Obj. Req. Prelim. Inj. ¶ 12.) While testifying,

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Meehan conceded that Flatbread Inc.'s new employees are "restaurant professionals" and that Flatbread now has a "competent experienced team in place."

After he was replaced as president, Meehan's salary (as de facto president, not his salary for his services as a board member) was gradually phased out over one year, rather than immediately cut off. He received $4,807.69 weekly for six months, and then $1,923.07 for another six months. Currently, Meehan receives a $25,000 annual salary (plus health insurance) for his services as a Flatbread, Inc. board member. Meehan also continues to receive distributions from Flatbread, Inc. In 2017, Meehan received approximately $192,600 in distributions, more than in any previous year. Gould testified that Meehan will likely receive approximately the same amount in distributions in 2018. Meehan continues to enjoy the use of a company vehicle, attends quarterly ownership meetings, has access to company book-keeping records, and is reimbursed for various business-related expenses.

In 2016, Meehan and Gould discussed the possibility of Gould buying Meehan's interest in Flatbread, Inc. As part of those conversations, Meehan and Gould jointly commissioned a valuation of the business. This initial appraisal valued the company at $3.1 million. Meehan believed that this number was too low, and hired someone else to review the initial appraisal. Meehan's second appraisal valued the company at $7.2 million. The buyout discussions led nowhere, and Meehan now contends that Gould commissioned the initial appraisal intending to undervalue the company, thus inducing Meehan to sell his ownership interest to Gould "at significantly less than fair market value." (Pl.'s Compl. ¶ 66.)

Since Meehan has left managment, Gould has had access to a company credit card for business-related expenses. Meehan contends that Gould has abused that

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privilege, charging certain personal expenses to the credit card in addition to business-related charges. Meehan presented expert testimony through Wayne Geher, CPA, ("Geher") at the hearing regarding Gould's use of the company credit card. Geher testified that, after examining Gould's company credit card statements, he was able to identify several charges he believed to have been for Gould's personal expenses. He reached these conclusions, he testified, through reviewing the credit card statements with

Meehan, and having Meehan explain to him the various charges. Importantly, while Geher testified that he believed certain of Gould's expenses to be questionable, he did not believe that there were any IRS violations. Geher also testified that "to the best of [his] knowledge, [Flatbread, Inc.] is still profitable," and that there was no evidence that Flatbread would not remain profitable were it to continue in the status quo.

Meehan filed this suit on November 15, 2017. He alleges that:

> Gould has engaged in a systematic campaign to reduce and ultimately eliminate Meehan's employment, starve Meehan of any salary in consideration for his employment, and to reduce the frequency and regularity with which distributions are issued from Flatbread, Inc., and all the Flatbread restaurant entities.
>
> . . . Gould has acted in bad faith and arbitrarily, focusing on his own financial gain at the expense of Meehan and Flatbread, Inc. and in an effort calculated to induce Meehan to sell his 30% interest for significantly less than fair market value, allowing Gould to become the sole owner of Flatbread, Inc., and the Flatbread restaurant entities and exercise complete control over the venture and its profits.
>
> . . . Gould reduced Meehan's role and ultimately terminated him and eliminated Meehan's annual $250,000 salary, while maintaining his own annual salary at $250,000.
>
> . . . Gould began spending extravagantly on what he deemed 'business expenses,' including chartering flights to purported business appointments and for which he obtained reimbursement from Flatbread, Inc., while beginning to reject Meehan's routine requests for reimbursement based on business needs, in order to squeeze more money out of Flatbread, Inc. for his own benefit and away from Meehan.

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> . . . Gould has simultaneously authorized the issuance of distributions from Flatbread, Inc. and the Flatbread restaurant entities only based on his personal financial needs and in an effort to starve Meehan of cash and induce him to sell his ownership interests at a below-market value.

(Pl.'s Compl. ¶¶ 9-13.) Meehan asserts that Gould's actions constitute a "breach of [his] fiduciary duty to Meehan, breach of contract, breach of [the] implied covenant of good faith and fair dealing, and intentional interference with Meehan's employment agreement with Flatbread, Inc." (Id. ¶ 16.)

Meehan requests a preliminary injunction ordering: (1) the "immediate reinstatement" of his employment with Flatbread, Inc., and his $250,000 salary; (2) that Gould make no profit distributions until the resolution of this action, and place any net profits "into a separate interest-bearing account"; (3) that Gould order no further monetary transfers between or among the individual Flatbread restaurants; and (4) that Flatbread, Inc. may not make any expenditures "other than those expenses incurred in the ordinary course of business for the necessary, ordinary, and customary expenses of these Flatbread entities as were historically incurred prior to January 1, 2016." (Id. at 17.) Gould objects, arguing that Meehan has failed to meet the prerequisites for preliminary injunctive relief.

II.

"The issuance of injunctions, either temporary or permanent, has long been

considered an extraordinary remedy." New Hampshire Dep't of Envt'l. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) (citation omitted). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." Id. (citation omitted). In order to obtain preliminary injunctive relief, a party must demonstrate: (1) they are in "immediate danger of irreparable

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harm," (2) "there is no adequate remedy at law," and (3) "that [they] would likely succeed on the merits." Id. (citations omitted).

"Irreparable injury based on financial loss alone will only be found where the potential economic loss is so great as to threaten the existence of the plaintiff's business or when 'financial ruin' will result." Anderson, et al v. Lagos, et al, 2013 WL 9883967 (N.H. Super. Jan. 18, 2013), aff'd 166 N.H. 752 (2014) (citation omitted). If, however, "damages can compensate a moving party, a preliminary injunction is not appropriate." Id. (quotation omitted). See also, DeNovellis v. Shalala, 135 F.3d 58, 64 (1st Cir. 1998); Vera, Inc. v. Tug Dakota, 769 F.Supp. 451, 454 (E.D. N.Y. 1991). Injunctive relief is similarly "unwarranted where the harm will occur, if at all, only in the indefinite future." Bardsley v. Powell, et al., 916 F.Supp. 454, 458 (E.D. Pa. 1996).

Meehan argues that a preliminary injunction is necessary because he is in imminent danger of irreparable harm due to the loss of his income, and because Flatbread, Inc. is in danger of irreparable harm under the current leadership. Meehan argues that the reduction in his annual salary from $250,000 (as de facto president) to $25,000 (as a board member) constitutes irreparable harm. There is, however, no evidence that Meehan could not be compensated by damages if the Court ultimately rules in his favor on the merits. See Anderson, 2013 WL 9883967 (if "damages can compensate a moving party, a preliminary injunction is not appropriate").

Furthermore, it is undisputed that Meehan continues to receive distributions from Flatbread, Inc. In 2017, he received nearly $200,000 in distributions. That was Flatbread, Inc.'s largest amount of distributions to date. Meehan is currently on track to receive approximately the same amount in distributions in 2018, if not more. Thus, while Meehan has certainly experienced a reduction in his income, the Court is hard

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pressed to find that while receiving over $200,000 annually (including the distributions and his salary as a board member), plus health insurance, Meehan is suffering "irreparable harm." Moreover, the fact that Meehan waited approximately one year[3] after his termination before filing the instant action suggests that Meehan's current financial situation is not nearly as dire as he would have the Court believe, thus militating against a finding of likely irreparable harm.

There is similarly no evidence that Flatbread, Inc. is in danger of irreparable harm. It is doubtless true that an injunction is proper to prevent destruction of a business. Engine Specialties, Inc. v. Bombardier Ltd., 454 F.2d 527 531 (1st Cir. 1972); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970). But while "the destruction of a business is an irreparable injury which can be appropriately remedied with injunctive relief," "[a] preliminary injunction is not an appropriate remedy in circumstances where the plaintiff will experience only a partial loss of business short of complete destruction." Augusta News Co. v. News Am. Pub. Inc., 750 F. Supp. 28, 32 (D. Me. 1990) (citations omitted). In Augusta News Co., the court found that a "ten percent loss of business cannot constitute irreparable injury justifying the radical remedy of a preliminary injunction." Id. at 33. Other courts have found that loss of business well excess of ten percent would not necessarily constitute irreparable harm. See Stendig Internat'l, Inc. v. B & B Italia, S.p.A., 633 F.Supp. 27, 28 n. 3 (S.D.N.Y. 1986) (holding that loss of

thirty percent of the plaintiff's business did not constitute irreparable harm justifying injunctive relief). Ultimately, the quantification can only be considered in the context of the particular business. As the Augusta News Co. court

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opined that "[e]ven a fifty percent loss of business . . . is insufficient to support the granting of a preliminary injunction in the absence of a clear showing by [the plaintiff] that it will thereby be destroyed." Augusta News Co., 750 F.Supp. at 33.

Here, Meehan presented no evidence that Flatbread, Inc. is in fact in danger of losing any percentage of its business or of being destroyed. Indeed, he presented no evidence that the company is in any financial distress at all. It is undisputed that in 2017, Flatbread, Inc. was able to make its largest ever disbursements, and that it is on track for to me similar disbursements in 2018. Meehan conceded at the hearing that Flatbread, Inc.'s new employees are "restaurant professionals" and that Flatbread now has a "competent experienced team in place." While Meehan's expert CPA Geher testified that that while some of Gould's use of his company credit card may have been questionable, he also testified that Gould's use did not rise to the level of an IRS violation. Geher also testified that he did not believe Flatbread, Inc. to be in any financial distress.

Furthermore, while Meehan claims that Flatbread's practice of comingling assets could prompt a creditor bank to call Flatbread's line of credit, this claim appears to be speculative at best. Meehan produced no evidence at the hearing that such an outcome was permitted by any loan documents or is at all likely. Moreover, he testified that commingling was common practice in the past and that his objection to its continuing was that such transfers were no longer needed. The Court cannot find, based on this evidence that Flatbread, Inc. is in danger of being "destroyed," and thus irreparably harmed, as a result of Gould's actions.

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III

The issuance of injunctions has long been considered an extraordinary remedy. Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). A preliminary injunction is a provisional remedy that should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief and no adequate remedy at law. ATV Watch v. Department of Resources and Economic Development, 155 N.H. 434, 437 (2007); New Hampshire Department of Envt'l. Servs. v. Mottolo, 155 N.H. at 63. Where a court finds that a party has failed to demonstrate a likelihood of immediate and irreparable harm in the absence of injunctive relief, the court need not address the other criteria for injunctive relief, whether the petitioner has an adequate remedy at law and whether the petitioner has established a likelihood of success on the merits: "[w]here, as here, there is an insufficient showing as to both imminence and harmfulness, the very reason for granting a preliminary injunction disappears". Augusta News Co. v. News America Publishing, Inc., 750 F. Supp. at 34.

It follows that Meehan's Motion for Preliminary Injunction must be DENIED.

SO ORDERED

6/4/18
DATE

s/Richard B. McNamara
Richard B. McNamara,
Presiding Justice

Footnotes:

1. The parties appropriately agreed to limited discovery prior to the evidentiary preliminary injunction hearing in order to make the hearing more meaningful.

2. The restaurant in British Columbia is named Creekbread.

3. Meehan was replaced as president by Mr. Lyon in October of 2016. He did not file this action until November of 2017. Gould first informed Meehan that he was searching for Meehan's replacement in May of 2016.

EXHIBIT B

Marcia Gasses

From: Scott Bourcier <sbourcier@dubois-king.com>
Sent: Friday, November 08, 2019 3:30 PM
To: 'Marcia Gasses'; 'Barbara Irvine'; Marc Moreau; Erin Paradis; 'Matthew Arel'; cliffack@yahoo.com
Subject: Barrington, NH - River's Peak Subdivision; Field Report 11/07/19
Attachments: FIELD_(19) 11-07.pdf

Team:

Please see attached field report dated 11/07/19.

If you have any questions or comments, please do not hesitate to contact me.

Thank you,

Scott

Scott M. Bourcier, PE
DuBois & King, Inc.
18 Constitution Drive, Suite 8
Bedford, New Hampshire 03110
(O) 603.637.1043
(C) 603.828.8788

DuBois & King inc.
18 Constitution Drive, Suite 8
Bedford, NH 03110
Tele: (603) 637-1043
Fax: (866) 783-7101
ENGINEERING • PLANNING • MANAGEMENT • DEVELOPMENT

FIELD OBSERVATION REPORT

PROJECT:	River's Peak Subdivision
PROJECT No.:	323138P
DATE:	November 7, 2019
CONTRACTOR:	Better Built Homes
LOCATION:	Barrington, NH
FIELD ENGINEER:	Scott Bourcier

TEMPERATURE:
30 °F at 5:50 a.m.
47 °F at 12:15 p.m.

SKY:
☐ CLEAR
☐ OVERCAST
☐ PRT CLOUDY
☒ CLOUDY
☐ OTHER

PRECIPITATION:
☐ MISTY
☐ DRIZZLE
☐ SPRINKLE
☐ RAIN
☐ SNOW
☐ OTHER: _____

EQUIPMENT ON-SITE:
(1) Volvo P4410B Paver
(1) Caterpilliar CB54B Tandem Drum Compactor
(1) Dynapac CC1300 Tandem Drum Compactor

PRESENT AT SITE:
Clifford Williams (Owner / Developer); GMI Asphalt LLC; Scott Bourcier (DuBois & King)

OBSERVATIONS:

1. Arrived at approximately 5:50am.

2. Recorded subdivision development roadway binder course pavement surface temperatures:

Time	Surface Temperature
6:00am	25 °F
7:00am	32 °F
8:00am	39 °F
9:00am	43 °F
10:00am	46 °F
11:00am	46 °F

3. At approximately 6:50am spoke with GMI Asphalt Superintendent to inquire if the project was proceeding forward with the placement of the wearing course pavement. The Superintendent reported that according to the Owner / Developer, the project is proceeding. I then spoke with Cliff about the placement requirements as identified in New Hampshire Department of Transportation (NHDOT – Section 401.3.10.6.3; dated 2010). I reiterated the surface temperature requirement of 50-degrees Fahrenheit for a 1-inch compacted placement and noted the weather forecasted today was to be a high of approximately 52-degrees around 2:00pm and cloudy with inclement weather moving in. I suggested that if the wearing course was placed at a 1.50-inch compacted depth, the surface temperature requirement would be reduced to 40-degrees Fahrenheit. After much discussion, Cliff decided to proceed with placing the wearing course pavement to the 1-inch compacted depth.

4. Recorded the following:
   a. Tie-in at the intersection of Boulder Drive and all abutting driveways were previously milled 1-inch deep x 12-inch wide.
   b. The existing binder course pavement surface was previously swept.
   c. Tack coat was placed for all horizontal and vertical surfaces of the existing binder course pavement surface, tie-in of Boulder Drive, and tie-in of all abutting driveways prior to the placement of new pavement material in accordance with NHDOT Section 410.3.4.1.1 for an Oxidized Hot-Mixed Asphalt (HMA) category.

d. Placement of the wearing course pavement commenced at approximately 7:20am.
e. Delivery slips identified the material delivered to be 9.5mm, 75-gyration.
f. Pavement depths were recorded to be 1-1/4 to 1-1/2 inches loose and 1 to 1-1/4 inches compacted; meeting the 1-inch compacted requirement.
g. Pavement temperature was recorded to range between 300 to 330 °F; acceptable in accordance with NHDOT Section 401.3.6.2.1.
h. Pavement placement of the adjacent travel-lane centerline was performed by overlapping the joint approximately 2-inches (no luting), and compacting in accordance with NHDOT 401.3.13.2.
i. Observations of both placement and compaction procedures were reviewed and appeared to have been performed in a satisfactory manner.
j. The 24-foot wide, from Sta. 0+00 (intersection of Boulder Drive) to 30+54.85 (end), wearing course pavement was completed at approximately 12:15pm

5. Departed at 12:15pm.

OUTSTANDING ITEMS:

1. Complete remaining Project Punch List items.

PROJECT PHOTOGRAPHS:

Figure 1 – Tack coat

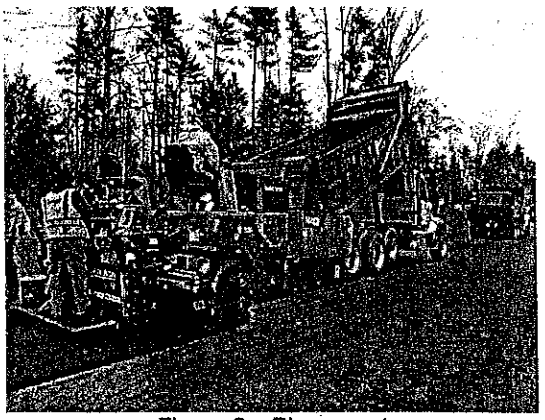

Figure 2 – Placement

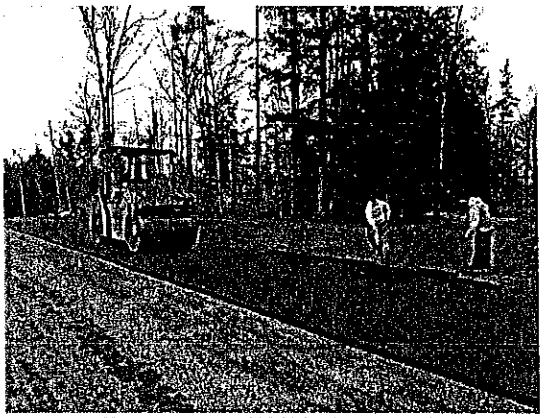

Figure 3 – 04/19/19 photograph

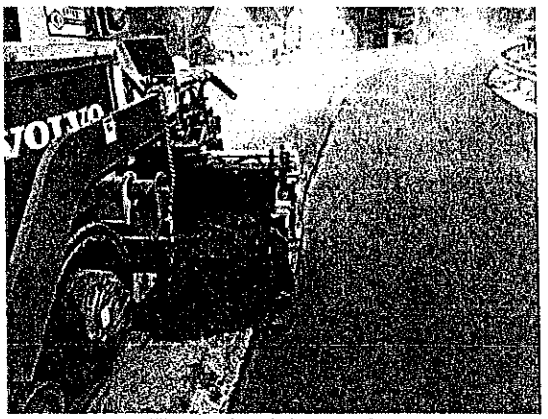

Figure 4 – Joint overlap

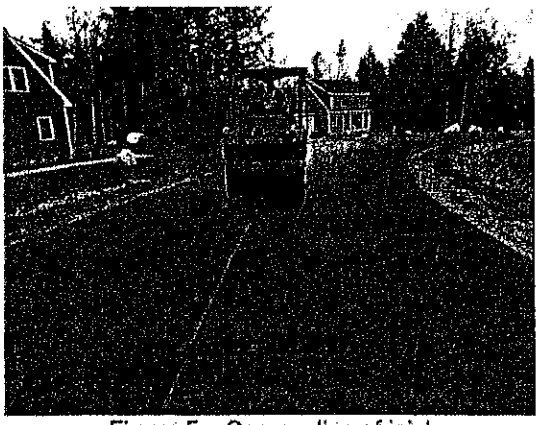

Figure 5 – Compaction of joint

END OF REPORT

DuBois & King inc.

ENGINEERING • PLANNING • DEVELOPMENT • MANAGEMENT

November 24, 2019

Ms. Marcia Gasses, Town Planner
Town of Barrington
P.O. Box 660
Barrington, New Hampshire 03825

Subject: River's Peak – Map 215 / Lot 1
Wearing Course Pavement Observations

Dear Ms. Gasses:

As requested, DuBois & King performed wearing course pavement observations of the above-referenced project's subdivision roadway from Boulder Drive to end (approx. Sta. 30+54.85). Observation for the wearing course pavement was performed on November 7, 2019, while confirmation of the shoulder leveling gravel placement was performed November 21, 2019. The following were comments recorded during the observations.

1. The wearing course pavement width met the 24-foot travel way and 1-inch compacted depth requirements.

2. Placement of the wearing course pavement met the New Hampshire Department of Transportation (NHDOT) Standard Specifications for Road and Bridge Construction (dated 2010) specifications, except for surface temperature requirement; please see Field Report dated 11/07/19.

3. The shoulder leveling gravel met the 4-foot width requirement; and,

4. There are some outstanding punch list items to be completed as of the date of this letter.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,
DuBOIS & KING, Inc.

Scott M. Bourcier, P.E.
Project Manager

SMB/smb

I:\3\323138P - Barrington - Rivers Peak Insp\Const\LETTER_Barrington (19) 11-24.doc

DuBois & King inc.

ENGINEERING • PLANNING • DEVELOPMENT • MANAGEMENT

December 11, 2019

Ms. Marcia Gasses, Town Planner
Town of Barrington
P.O. Box 660
Barrington, New Hampshire 03825

Subject: River's Peak – Map 215 / Lot 1
Wearing Course Pavement

Dear Ms. Gasses:

As the Planning Board is aware, DuBois & King performed a wearing course pavement observation of the above-referenced project's subdivision roadway (Overlook Drive) from Boulder Drive to end (approx. Sta. 30+54.85) on 11/07/19. DuBois & King submitted a detail account of this construction activity for the Board's review. We recommend the Board review the Field Report associated with the above-referenced project dated 11/07/19.

Summarized in our Milestone Letter dated 11/24/19, the placement of the wearing course pavement did not meet surface temperature requirements as specified within the New Hampshire Department of Transportation (NHDOT) Standard Specifications for Road and Bridge Construction; dated 2010. Meeting all pavement requirements detailed within the NHDOT specifications is important for proper placement and compaction to improve pavement stability and longevity. Not meeting the surface temperature requirement results in a faster heat transfer from the wearing course to the colder binder course; thus, significantly reducing the time of and uniform compaction. Results of shortened and non-uniform compaction could result in the following:

- Fissure Cracks – hairline cracks evident on the surface of the pavement course as a result of compaction activities when the lower portion of the pavement course is colder / stiffer than the top portion.
- Reduced Pavement Strength – inadequate uniform pavement density.
- Raveling – dislodgement of pavement aggregates as a result of water infiltration and freeze/thaw cycles due to poor compaction.
- Binder Aging – oxygen reaction to bituminous concrete within the pavement course due to poor compaction.

It is our understanding the Developer is requesting the Town of Barrington accept ownership / responsibility of Overlook Drive. We recommend that the Developer either

A. Mill, tack-coat, and pave a new 1-inch wearing course surface prior to the Town accepting ownership; or,
B. Post a surety bond in the amount of $232,000 (see attached) to be held for six (6) years at which if no defects are found as a result of this construction activity, the surety would be released in full.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,
DuBOIS & KING, Inc.

Scott M. Bourcier, P.E.
Project Manager

DuBois & King inc.

ENGINEERING • PLANNING • MANAGEMENT • DEVELOPMENT

Project: River's Peak Bond Estimate

Calculated By: DC Date: 12/8/2019

Checked By: SMB Date: 12/11/2019

NOTE: In providing opinions of probable construction costs, the Client understands that DuBois & King, Inc. has no control over the cost or availability of labor, equipment or materials, or over market conditions or the Contractor's methods of pricing, and that our Opinion of Probable Construction Costs are made on the basis of our professional judgment and experience. DuBois & King, Inc. makes no warranty, expressed or implied, that the bids or the negotiated costs of the Work will not vary from the Opinion of Probable Construction Cost provided herein.

OPINION OF PROBABLE CONSTRUCTION COST

UNIT NO.	DESCRIPTION	UNIT	QUANTITY	UNIT PRICE	AMOUNT
403.112	Hot Bitum. Pave., Machine Method, 9.5mm	TON	575	$75.00	$ 43,125.00
403.12	Hot Bituminous Pavement, Hand Method	TON	60	$110.00	$ 6,600.00
410.22	Asphalt Emulsion for Tack Coat	GAL	240	$5.00	$ 1,200.00
417	Cold Planing Surface	SY	9,540	$12.00	$ 114,480.00
692	Mobilization	U	1	$20,000.00	$ 20,000.00
				Sub-Total	$ 185,405.00
				25% Contigency	$ 46,351.25
				Sub-Total	**$ 231,756.25**

ESTIMATE $ 232,000.00

Marcia Gasses

From:	Scott Bourcier <sbourcier@dubois-king.com>
Sent:	Monday, January 13, 2020 9:16 PM
To:	Conner MacIver; Marc Moreau
Cc:	Marcia Gasses; Barbara Irvine; John Huckins
Subject:	RE: Barrington, NH - River's Peak Subdivision; Wearing Course Surety
Attachments:	Barrington, NH - River's Peak Subdivision; Field Report 11/07/19

Hi Conner and Marc,

I met with John Huckins to follow-up with how the Town was dealing with the Developer of River's Peak; specifically related to the wearing course. In response, John forwarded me the below email from Cliff Williams.

Attached is a copy of the email that includes the field report (dated 11/07/19) DuBois & King prepared as part of our site observations. I recommend reviewing Items 2, 3, 4.d, 4.f of the field report that respectively identifies the surface temperatures recorded, the discussion of temperature and pavement depth, the time placement began, and the pavement placement depths recorded throughout the day. I hope this helps in the Town's dispute with the Developer.

If there is anything you need from me, please do not hesitate to contact me.

Thank you,

Scott

Scott M. Bourcier, PE
DuBois & King, Inc.
18 Constitution Drive, Suite 8
Bedford, New Hampshire 03110
(O) 603.637.1043
(C) 603.828.8788

------Original Message------
From: John Huckins [mailto:jhuckins@barrington.nh.gov]
Sent: Monday, January 13, 2020 1:14 PM
To: Scott Bourcier
Subject: FW: Barrington, NH - River's Peak Subdivision; Wearing Course Surety

From: Clifford Williams <cliffack@yahoo.com>
Sent: Thursday, December 19, 2019 9:31 AM
To: John Huckins <jhuckins@barrington.nh.gov>
Cc: Matthew Arel <matt@bbhnh.com>
Subject: Re: Barrington, NH - River's Peak Subdivision; Wearing Course Surety

Hi John, thanks for this information. I am not sure why Scott is taking this position on the paving of the road. I spoke with Ron at GMI yesterday after receiving this email. He was under the impression that Scott was pleased with the job, as he was there inspecting the pavement from the beginning, until completion. The only difference we had from the beginning was the fact that Scotts Temp gun was reading 6 or 7 degree's different than the one I had. I work for the Federal Government and had my personal temp gun from work, my temperature gun is required to be Calibrated. I ask Scott if

his was, he did not give me an answer. At no time was the surface temp 25 degrees, the day before the road temp was 55 degree and at the time we started paving it was 40 degree's, by Noon, it was 50 degree's. We did talk about the compact depth required for 40 degree's Vs. 50 degree's and I had spoken with Ron from GMI days before and he assured be they were going to add more tonnage to the job. I have attached a photo of my finger up against the compacted asphalt and the email sent by Scott with the requirements for paving in the 40 degree range. Scott was also asked throughout the day if everything was good as he did his measurements etc... I know we used more asphalt and put down extra Tack at the request of Scott, I also believe the road agent from the Town stopped by to check the temperature of the asphalt coming out of the truck. I am putting together the pictures and information I have. Let me know what direction we need to go from here ?

On Tuesday, December 17, 2019, 12:40:18 PM EST, John Huckins <jhuckins@barrington.nh.gov> wrote:

From: Barbara Irvine <birvine@barrington.nh.gov>
Sent: Wednesday, December 11, 2019 2:46 PM
To: Marc Moreau <mmoreau@barrington.nh.gov>
Cc: John Huckins <jhuckins@barrington.nh.gov>
Subject: FW: Barrington, NH - River's Peak Subdivision; Wearing Course Surety
Importance: High

Marc,

Marcia is out of the office, so I am forwarding to you and John Huckins.

Barbara

From: Scott Bourcier <sbourcier@dubois-king.com>
Sent: Wednesday, December 11, 2019 2:43 PM
To: Marcia Gasses <mgasses@barrington.nh.gov>
Cc: Barbara Irvine <birvine@barrington.nh.gov>
Subject: Barrington, NH - River's Peak Subdivision; Wearing Course Surety
Importance: High

Hi Barbara,

Please see the attached letter. I would recommend having Marc Moreau review to ensure that Public Works is in agreement with our recommendation.

If you have any questions or comments, please do not hesitate to contact me.

Thank you and Happy Holidays!

Scott

Scott M. Bourcier, PE

DuBois & King, Inc.

18 Constitution Drive, Suite 8

Bedford, New Hampshire 03110

(O) 603.637.1043

(C) 603.828.8788

EXHIBIT C

Laura Spector-Morgan

From: Kevin Collimore <kcollimore@cullencollimore.com>
Sent: Thursday, June 25, 2020 12:30 PM
To: Laura Spector-Morgan
Subject: RE: Barrington, NH - River's Peak Subdivision; Intersection radius

Laura: can you please provide us with a written proposal of precisely what the Town is proposing be done, by whom, and the specifications to be used in the analysis? Please also advise who at the Town is requiring the testing be performed and who will coordinate the review?

Thank you, Kevin

Kevin G. Collimore

CullenCollimore, PLLC | Partner
10 East Pearl St. | Nashua, NH 03060
T: 603.881.5500
kcollimore@cullencollimore.com
www.CullenCollimore.com
www.Facebook.com/cullencollimore
www.millyardbpr.com

From: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Sent: Friday, June 19, 2020 11:00 AM
To: Kevin Collimore <kcollimore@cullencollimore.com>
Subject: RE: Barrington, NH - River's Peak Subdivision; Intersection radius

Kevin:

The town is not willing to accept a bond in lieu of borings. I'm afraid if your client wants the road accepted as a public road, the town is going to require borings to confirm the depth of the wearing course. I am told that this is not an unusual request.

Please let me know when the town may proceed. Thank you.

Laura

Laura Spector-Morgan, Esquire
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246

(603) 524-3885
fax (603) 524-0745
www.mitchellmunicipalgroup.com

From: Laura Spector-Morgan
Sent: Thursday, June 18, 2020 11:47 AM
To: Kevin Collimore <kcollimore@cullencollimore.com>
Subject: FW: Barrington, NH - River's Peak Subdivision; Intersection radius

Hi Kevin. I'm following up on our conversation yesterday about the radius/flairs going in and out of the subdivision. Please see the below and the attached. Apparently, the radius is so tight that you have to go into the opposite lane when you turn onto the road. It also fails to comply with the plans.

I'm following up with the town about our idea of a maintenance bond in lieu of road borings—I'll let you know what they say.

Do you have the Field Observation Report from 11-7-19 (the day the top coat was laid down)? If not, I can send it to you.

Thanks!

Laura

Laura Spector-Morgan, Esquire
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
(603) 524-3885
fax (603) 524-0745
www.mitchellmunicipalgroup.com

From: Scott Bourcier <sbourcier@dubois-king.com>
Sent: Monday, January 13, 2020 8:47 PM
To: Conner MacIver <cmaciver@barrington.nh.gov>; Marc Moreau <mmoreau@barrington.nh.gov>; Marcia Gasses <mgasses@barrington.nh.gov>; Barbara Irvine <birvine@barrington.nh.gov>; John Huckins <jhuckins@barrington.nh.gov>
Subject: Barrington, NH - River's Peak Subdivision; Intersection radius

Hi Conner,

Marc and I made a site visit to River's Peak to evaluate the roadway radius at the intersection of Boulder Drive. According to the approved plans, the radius' are required to be thirty (30) feet. However, based on our site measurements, it is apparent the radius' are much smaller. The attached photographs show existing pavement radius and the required 30-foot radius (painted orange).

If there is anything else the Town needs, please let me know.

Thank you,

Scott

Scott M. Bourcier, PE
DuBois & King, Inc.
18 Constitution Drive, Suite 8
Bedford, New Hampshire 03110
(O) 603.637.1043
(C) 603.828.8788

Laura Spector-Morgan

From: Kevin Collimore <kcollimore@cullencollimore.com>
Sent: Tuesday, June 09, 2020 3:27 PM
To: Laura Spector-Morgan
Cc: Conner MacIver
Subject: RE: Barrington

Attorney Specter-Morgan: I am responding to the Town's request to drill holes and perform testing of Overlook Circle and its road bed in the River's Peak Development in Barrington, which was constructed by my client. My client respectfully requests that the Town provide its reasoning behind this request. That issue is a critical one in that the Town already approved each step of the road construction by its Road Agent, Jere Calef, the Town retained engineer (Dubois & King), and the Town Planner, Marcia Gasses. My client obviously reasonably relied on those approvals before proceeding to the next stage of the construction of the road, through to completion. Given the approvals we do not understand why the Town would now need to test the road and roadbed, having already approved them.

Moreover, it has been 4 years since the road bed was laid, and 7 months since the wear coat was installed. And during that time, not a single issue has arisen and the road looks perfect. See this drone video of the road taken last month: https://youtu.be/hyZ3-wtvHZc. Given these facts, please advise who is claiming that a drill test is required and what is the basis for this claim? What are his/her qualifications for now testing work that was already approved? Again, my client followed the requisite steps for constructing the road and was approved by the Town as he performed the work.

Finally, my client's principal, Cliff Williams, is a tax-paying Barrington resident, not an out-of-state developer. As such, he has taken special pride in this development. He is struggling to understand why the Town appears to be singling out this project for scrutiny even after it has already approved the construction of the road.

I would appreciate your feedback. Thank you

Kevin G. Collimore

CullenCollimore, PLLC | Partner
10 East Pearl St. | Nashua, NH 03060
T: 603.881.5500
kcollimore@cullencollimore.com
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www.Facebook.com/cullencollimore
www.millyardbpr.com

From: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Sent: Thursday, May 21, 2020 3:37 PM

To: Kevin Collimore <kcollimore@cullencollimore.com>
Cc: Conner MacIver <cmaciver@barrington.nh.gov>
Subject: RE: Barrington

Ask and you shall receive.

It looks like Hoyle Tanner is going to hire SW Cole to come out and take 8 borings. It is expected that these can be completed in one day. SW Cole will core the pavement, measure the pavement layering thickness, retain the cores, extract and collect samples of the aggregate base and subbase products, and patch the holes with backfill and hot mix asphalt. Depending on the findings, additional borings may be required at a later date.

Will your client assent to this work? Thanks.

Laura

Laura Spector-Morgan, Esquire
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
(603) 524-3885
fax (603) 524-0745
www.mitchellmunicipalgroup.com

From: Kevin Collimore
Sent: Monday, May 18, 2020 3:34 PM
To: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Subject: RE: Barrington

Hi, Laura: Any update please?

Thank you, Kevin

Kevin G. Collimore
CullenCollimore, PLLC | Partner
10 East Pearl St. | Nashua, NH 03060
T: 603.881.5500
kcollimore@cullencollimore.com
www.CullenCollimore.com
www.Facebook.com/cullencollimore

www.millyardbpr.com

From: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Sent: Monday, May 4, 2020 3:37 PM
To: Kevin Collimore <kcollimore@cullencollimore.com>
Subject: Barrington

Kevin:

I think I dropped the ball and didn't ask, but I've just sent an e-mail to try and get the information you were seeking. Thanks.

Laura

Laura Spector-Morgan, Esquire
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
(603) 524-3885
fax (603) 524-0745
www.mitchellmunicipalgroup.com

Laura Spector-Morgan

From: James Steiner <jim@jimsteinerlaw.com>
Sent: Wednesday, February 09, 2022 4:20 PM
To: Laura Spector-Morgan
Subject: RE: Ian James, LLC Barrington project

Thank you.

I am asking my client to figure out what is needed from the town (meaning you) so they will cancel/not renew.

Would it help if Cliff or I attended the meeting on the 28th?

Jim

-----Original Message-----
From: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Sent: Wednesday, February 9, 2022 4:18 PM
To: James Steiner <jim@jimsteinerlaw.com>
Subject: RE: Ian James, LLC Barrington project

Jim:

The town does not intend to pursue calling the bond, and it is willing to release the bond. Please let us know what, if any, steps must be taken to do so, or if your client will simply not renew it.

The Select Board will be holding a hearing on February 28 to consider the acceptance of Overlook Circle.

Thank you.

Laura

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Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
(603) 524-3885
fax (603) 524-0745
www.mitchellmunicipalgroup.com

-----Original Message-----

From: James Steiner
Sent: Wednesday, February 02, 2022 3:58 PM
To: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Subject: Ian James, LLC Barrington project

Laura,

I have done a detailed review of the issues surrounding acceptance of the road in the project.

At the present time Cliff Williams is losing an opportunity for a project because he cannot bond it with the current bond still in place for this project.
I note this because given the error in applying the correct standard, below, if we have to resort to the courts this will be an element of damages pursued by Cliff Williams.

Attached is the Standard Specifications for Road and Bridge Construction in New Hampshire, March 2016.
The road was paved in 2016 and the wearing course on November 24, 2019. The town representatives relied, Improperly, on the earlier 2010 specifications. See e.g. Letter by Dubois & King to Marcia Gasses, Nov 24, 2019, relying on 2010 standard, and Field Observation Report, Nov 8, 2019 (date of wear course installation). Both refer to the 2010 standard, not the applicable 2016 standard.

The updated specifications, attached, ,provide at section 401, paragraphs 3.10.7 Weather Limitations- that the material must have an exit temperature above 260 degrees. Paragraphs 3.10.7.2.
At 3.10.7.3 the standard provides that the underlying surface must be "dry and frost free." Both of these conditions were met. The temperature for the mix was between 300 and 330 degrees.
Nov 19 Field Report, at 4.g. The same Field Report makes no mention of frost, noting the weather as simply "cloudy."

Under the Town of Barrington Subdivision Regulations, para. 12.8.10 your representative is required to be present. Per the field report, he was present.

On Nov 24, 2019, your engineer emailed Cliff Williams to confirm that the only item to be completed was the gravel pit, assuming, as it had been, that the Access road from the gravel pit to the project site had been stabilized.

Accordingly, the evaluation completed, while recognizing it was unclear which standard applied, noted that the test pits, at 1", all met that standard, and relied erroneously, as did The town engineer, on the 2010 standard for placing the wear course.

I believe some monumentation may still be required. If so, that would be completed asap knowing the Town will now apply the correct NH standards from 2016.

Please confirm that the town is prepared to accept the road

Jim Steiner
Steiner Law Office, PLLC
www.jimsteinerlaw.com
603.345.6440

EXHIBIT D

Memorandum

HOYLE TANNER

To:	Conner MacIver, Town Administrator
From:	Heidi Marshall, PE, Stephen Haas, PE and Jacob Sparkowich, PE
cc:	Marc Moreau, Road Agent
Date:	September 27, 2021
Re:	Overlook Circle Deficiencies

Hoyle, Tanner & Associates, Inc. has been retained by the Town of Barrington to evaluate whether the subgrade and pavement construction materials (and depths) used to construct Overlook Circle, a private road, matched the approved design plans, such that the Town has appropriate facts for the Town's use in determining whether to accept ownership of the road.

BACKGROUND

Overlook Circle is a private road serving a 20-house subdivision in Barrington, New Hampshire. Construction of the subdivision occurred over the span of several years. Most of the roadway construction, including preparation of subgrade, placing base and subbase layers, and paving the binder course, was started in fall 2015 and completed in spring 2016. The focus was then diverted away from the road while the houses within the subdivision were constructed from 2016 to 2019. Finally, the wearing course was paved in November of 2019.

DEFICIENCY EVALUATION

To determine the full scope of the pavement and subgrade deficiencies along Overlook Circle, Hoyle tanner retained the services of S.W. Cole (SWC) to collect boring samples and perform select testing. The boring locations were coordinated with the Town and can be seen on the figure included with the SWC document. SWC provided a letter summarizing their findings, which Hoyle Tanner then reviewed. As suspected, there are several deficiencies regarding the materials and depths.

The subbase material, per the approved plans, was to be a 12" lift of Gravel conforming to the NHDOT Specification for item 304.2. The base material was to be a 6" lift of Crushed Gravel conforming to the NHDOT specification for item 304.3. The SWC borings identify two distinct materials used for base and subbase. The subbase appears to be a bank run gravel (not crushed) with cobbles up to 5" in diameter, while the base also appears to be a bank run gravel (not crushed) with cobbles up to 1.5" in diameter. The subbase material from four of the boring locations was tested for conformance with NHDOT specification 304.2 and all four were found to meet the specification. The base material from four of the boring locations was tested for conformance with NHDOT Spec 304.3 and none were found to meet the

specification for two reasons. One, the material was not crushed and therefore did not have fractured, angular faces. Two, the material contained a higher percentage of fine material than the specification allows for. In addition, while all eight boring locations found a minimum 6" thickness of base material, there were two boring locations where the combined base and subbase depth was less than 18".

Similar to the base and subbase materials, there were several concerns with the pavement. The approved plans required a 2" binder course and a 1" wearing course. The binder course was paved over two operations, May 13th and June 16th of 2016. Reviewing the Field Reports of those days, the resident engineer (Engineer) reported there were sections of the road, totaling ~375 lf, where the compacted binder course was less than the 2" depth required. The Engineer's field report for the paving operation on May 13, 2016 noted there was lateral cracking in the binder course for a 50-foot length of the road the same day the pavement was placed. It was recommended by the Engineer that the depth and cracking be remedied prior to placement of wearing course; There is no documentation that these remedies were made.

The wearing course was placed on November 7, 2019; nearly 3.5 years after the binder course with construction vehicles utilizing the roadway during this time frame. Per NHDOT 2010 Standard Specifications for Road and Bridge Construction, a wearing course of 1" thickness should not be placed when surface temperatures are below 50 degrees. The same specification allows for surface temperatures as low as 40 degrees if the wearing course is 1.5" thick. There was discussion between the Engineer and the Contractor whether increasing the wearing course thickness for Overlook Circle to 1.5" would be acceptable once surface temperatures reached 40 degrees. The Engineer attests in the field report that the Contractor declined to increase the wearing course thickness and proceeded to place a 1" wearing course, regardless of the surface temperature. In an email chain from January of 2020 the Contractor contests that they did agree to the thicker wearing course placement and that additional pavement was placed due to the low surface temperatures. He further contests that his personal temperature gun which "is required to be calibrated", consistently read 6 to 7 degrees different than the Engineer's temperature gun, to the point the Contractor asserts there was no surface temperature below 40 degrees during the time asphalt was being placed.

The borings performed by SWC found that 6 of the 8 locations had less than 2" of binder depth, consistent with the remarks the Engineer made in the field report. In addition to measuring the depth, SWC also performed a test of the asphalt density relative to the Theoretical Maximum Specific Gravity (TMSG) at 4 of the locations. Although no specifications were cited in the approved plans for Overlook Circle, the industry standard is to achieve a density at least 92.0% of the TMSG, in line with NHDOT specifications. Of the 4 samples tested, 2 fell below the industry accepted 92.0%. These both coincided with locations that had less than 2" of binder asphalt.

It is unclear which depth the wearing course should have been, so the following evaluation references both. The SWC test of the wearing course found that all 8 locations had at least 1" of wearing course material, and 2 locations provided at least 1.5". The same density test was performed on the wearing course for 4 of the locations and only 1 was found to achieve the industry standard 92.0% of the TMSG. The SWC findings support the Engineer's field report as most locations were found to have less than 1.5"

of wearing course and the suspected cold surface temperatures would have made it difficult to achieve desirable compaction in the pavement surface, resulting in a sub-standard density. Lastly, looking at the combined pavement depth; though all 8 locations had the minimum 1" wearing course, there are 3 samples where the total depth of pavement (wearing plus binder) is less than the 3" required on the approved design plans.

POTENTIAL CONSEQUENCES OF DEFICIENCIES

The deficiencies noted above can be best summarized as insufficient structural strength and increased risk of deterioration from freeze-thaw cycles and vehicle loading, both of which contribute to a shortened life span for the road surface.

To provide a quantitative measure of the structural deficiency of Overlook Circle, a hypothetical pavement design was evaluated for the road as specified [1" Wearing, 2" Binder, 6" Crushed Gravel, 12" Bank Run gravel], and for the road as constructed which is best approximated as 1" Wearing, 1.75" Binder, 18" Bank Run Gravel. This hypothetical demonstrated the constructed road provides 10% less structural strength than the road specified in the approved plans. This lack of strength was further exacerbated during the nearly 3.5 years the road was used by construction vehicles with no wearing course and as little as 1.25" of binder. Following the same hypothetical, the constructed road with no wearing course provided just 75% of the structural strength of the approved road. Additionally, these hypotheticals only consider material thickness and do not factor in the reduced strength of the asphalt evidenced by the sub-standard density results. With insufficient strength, the pavement and base layers should be expected to deteriorate at a faster-than-usual rate with increased risk for rutting, cracking, and eventually complete pavement failure.

The increased susceptibility to deterioration from frost damage and vehicle loading is less quantifiable but is still significant. Starting with the base material, the lack of a crushed material with angular faces leads to pavement deformation and a condition known as cobble heave. What happens in cobble heave is the base layer flexes as it is loaded and as it returns to the unflexed position there is a tendency for smaller particles to fill voids first which prevents the larger cobbles from returning to the original position. Over the millions of loading cycles the road experiences in its lifetime the cobble continues to rise through the layer and eventually can surface through the pavement. This condition is far less prevalent with a crushed material as the angular faces allow the material to lock together, distributing the load more evenly and limiting pavement deformation and restricting the upward movement of large cobbles which is part of why the *AASHTO Guide for Design of Pavement Structures* notes the base course usually consists of crushed stone, crushed slag, crushed gravel and sand, or a combination of these materials. Also contributing to deterioration, the poor compaction of the asphalt layers leave the road more susceptible to frost damage. With sub-standard compaction, more water is able to infiltrate the asphalt which when it freezes, expands and can dislodge the aggregate within the pavement, slowly breaking down the surface.

OPTIONS FOR REMEDIATION

There are several options that could be used to provide varying levels of mitigation for the deficiencies. The most intensive and expensive option would be complete reconstruction of the base, binder, and wearing layers to fully comply with the depths and materials specified. This would entail excavating the existing pavement and part or all of the existing base layer, then placing the required 6" of crushed gravel, conforming to NHDOT item 304.3, and placing the 2" of binder pavement and 1" of wearing course pavement within acceptable temperature ranges. This option, while intensive in effort, fully eliminates both the structural strength, pavement deformation and cobble heave, and frost-susceptibility deficiencies and can be completed without changing the elevation of the road.

An option with an intermediate level of expense would be to reclaim the existing road, then compact and repave. As the existing base layer was not constructed with crushed aggregate, it would be recommended that if this option were pursued additional crushed stone must be introduced to the reclaimer during the reclaim process such that the resulting material is closer to conforming with NDHOT item 304.3. A 50/50 mix of pavement and underlying base material is the typical goal for NHDOT, so an approximate 6"-8" reclaim depth would be anticipated based on the measured pavement depths. With the reclaiming complete, new pavement could be placed as described above. This option would be expected to fully resolve all deficiencies so long as enough crushed material is introduced during the reclaim process. A downside of this option is that finished grade of the road would likely end up needing to be raised by several inches, affecting driveway matches to the road surface, requiring cooperation from abutters to smooth the matches. If this is not feasible, once reclaimed, additional excavation could be performed to lower the finished grade prior to paving. Once reclaimed, the reclaimed material would be evaluated to determine the magnitude of additives (such as crushed material or liquid asphalt) recommended to result in a durable base surface. A conceptual level estimate of the reclaim treatment, including crushed stone and liquid asphalt additives, results in a cost of $315,000 to repair the entire road, which works out to roughly $38 dollars per square yard.

The third, and most economical option is to not reconstruct or reclaim the road but to apply a pavement overlay to build up strength. The overlay could be completed with or without geotextile stabilization fabric and there are pros and cons to each. Placing geotextile between the existing pavement and the overlay will provide more strength than an overlay without the fabric, reducing the risk that cracks in the existing pavement will propagate into the overlay. Geotextile is also used to reducing the width of cracks that may reflect through to the new wearing surface. On the other hand, the presence of fabric means that any milling or reclaiming of the road in the future would be more complicated. This option does result in the grade of the road being raised by the thickness of the overlay which will require coordination with affected driveways to ensure a smooth match is achieved. This option has an estimated cost of approximately $24 dollars per square yard, resulting in a cost of approximately $200,000 to provide a reinforced overlay on the entire road. While it is the most economical option of the three, the overlay and paving fabric would not be expected to have the same longevity as the full reconstruction options.

SUMMARY

The evaluation of Overlook Circle has found several deficiencies and deviations from the design plans present in the roadway which reduce structural strength and may result in increased deterioration due to pavement deformation, cobble heave and frost susceptibility. Deficiencies may contribute to a shorter pavement lifespan and increased threat of property damage and/or injury to drivers. Several options are available to lessen or potentially fully mitigate the existing deficiencies including total reconstruction, reclaim and pave, or overlay with or without geotextile fabric.

EXHIBIT E

Town of Barrington
Code Enforcement/Building Department
P.O. Box 660
Barrington, NH 03825
603-664-5183

July 28,2020

Developers Surety and Indemnity Company
17771 Cowan Street
Irving, CA 92614

Re: Site Improvement Bond #506179S

To whom it may concern:

Pursuant to Condition #1 of the Site Improvement Bond issued on August 1, 2016 and Confirmed on July 9, 2019, the Town of Barrington hereby gives notice of acts or omissions that might involve a loss under the bond. These acts and/or omission include but are not necessary limited to:

1. The transition radii from Boulder Drive to Overlook was not constructed according to plan.

2. The wear course was placed at too cold of ambient air and/or surface temperature. Not only did the temperature require a 1.5 inch wear course, it has also resulted in other issues, such as the excessively high longitudinal joints, the tie in joints at the intersections are extremely poor, and there are numerous roller marks and roller stop bumps.

3. Required monumentation has not been installed.

The town has requested to take borings at various locations on the road to confirm the thickness of the wear course; however, Clifford Williams has refused to allow the town to do so. The other issues have not yet been addressed.

Please do not hesitate to contact me if you require additional information. Thank you.

Sincerely,

John Huckins, Building/Code Enforcement
PO Box 660 Barrington NH 03825
Email jhuckins@barrington.nh.gov

TOWN OF BARRINGTON
NEW HAMPSHIRE

April 12, 2021

Developers Surety and Indemnity Company
17771 Cowan Street
Irving, CA 92614

Re: Site Improvement Bond #506179S

To whom it may concern:

I write in follow up to my July 28, 2020 letter in which the Town of Barrington gave notice of acts or omissions that might involve a loss under the bond. These acts and/or omission include but are not necessarily limited to:

1. The transition radii from Boulder Drive to Overlook was not constructed according to plan.

2. The wear course was placed at too cold of ambient air and/or surface temperature. Not only did the temperature require a 1.5 inch wear course, it has also resulted in other issues, such as the excessively high longitudinal joints, the tie in joints at the intersections are extremely poor, and there are numerous roller marks and roller stop bumps.

3. Required monumentation has not been installed.

The town has requested to take borings at various locations on the road to confirm the thickness of the wear course; however, Clifford Williams has refused to allow the town to do so. The other issues have not yet been addressed. Therefore, the town asks that you remit payment in the full amount of the bond to allow it to take necessary repairs.

Please do not hesitate to contact me if you require additional information. Thank you.

Sincerely,

John Huckins, Building/Code Enforcement

cc: Ian James, LLC/Clifford J. Williams

EXHIBIT F

August 14, 2020

Ian James LLC
1062 Parker Mountain Rd
Strafford, NH 03884

Town of Barrington
Board of Selectmen
P.O. Box 660
Barrington, NH 03825

Re: Site Improvement Bond # 506179S & Letter written by the Town of Barrington, to the Developers Surety and Indemnity Co. Dated July 28, 2020.

Dear Sirs/Madams:

I am writing in regard to the letter that was sent to Bonding Company on July 28, 2020, that finally references the key points in completing the road at Overlook Circle. Again, I received this from the Bonding Company, not the Town of Barrington and I'm not sure why.

1. Transition Radii
2. Wear course placed at too cold of ambient air temp/ surface temperature, excessively high longitudinal joints and intersections are extremely poor with roller bumps and marks.
3. Required monumentation has not been installed

Since November 7, 2019, I have attempted to remove the Surety Bond, issued February 17, 2016 that covered the Scope of Work agreement at Overlook Circle. After meeting and exceeding the Specifications required by the Town and NHDOT, I have been unable to get a straight answer from the Town of Barrington. I have attached the documents that I sent to Jessica Hugh from Skillings & Associates, the Bonding agent. As I have stated in the attached documents, I hired a Lawyer with the hope of expediting the process after months of little to no response, but as a result of Town Counsel, Laura Spector-Morgan, it has been anything but that, as you will see in an email from her dated May 4, 2020, "I think I dropped the ball". That statement sums up what I have received from the Town of Barrington. This is why I am writing directly to you, The Board of Selectmen. I hope we can finally address the issues at hand. But first, before I address the three points in the letter, I need to know and maybe you can find out. 1) Who is behind this narrative. 2) What are their qualifications. 3) When did they become aware of these problems?

1. Transition Radii: We are open to addressing this issue, but find it hard to believe that after 4 years of being finished and inspected by the Town Planning and Highway Department, as well as the Engineer before and after the paving, that there is now a problem. Why wasn't this on the punch list from 2018?
2. Wear Course and Joints: You will find in the attached documents a clear explanation of the NHDOT Spec's for temperature requirements along with the attached 2016 NHDOT Documents

3.10.7, 3.10.7.2 and 3.10.7.3. The requirements for placing Asphalt in the NH are: The temperature of the asphalt has to be above 260 Fahrenheit coming out of the truck and the road must be dry and frost free. I'm not sure why Scott Bourcier is confused on this spec, but as I state in the attached documents, this was all verified through Eric Thibadeau, the Chief Pavement Manager for NHDOT. I paved the road at a greater expense, as a result of not just one inch, but 2 inches of asphalt, which can be seen with the naked eye in the attached pictures. With the additional expense for the asphalt and carrying the Bond for the last nine months, I am losing about two thousand dollars a month. We have always gone the extra mile to make River Peak the most beautiful piece property in Barrington. We would like to bring this to an end while maintaining the good relationship we have had over the past five years. I am not sure who is driving the narrative that the joints are bad? Scott Bourcier states in his November 7, 2019 Field Report 3. (H) and (I) that the lapping joints and compaction are to NHDOT Spec's. GMI paving guarantees their work and they are NHDOT qualified, that is why I hired them. Scott Bourcier stated in his field report dated; November 24, 2019, that the entire job was done to NHDOT spec's, "except for the temperature". The wear course was done to meet both the 2010 and 2016 spec's per the DOT and once you read the attach information, I think you will agree.

3. If there are missing monumentations, then we will put the missing ones in.

In conclusion, in the past five years, we have worked with Scott Bourcier from DuBois & King, John Huckins for the Building Department, Marcia Gasses from planning, these individuals could not have been more helpful and professional in their jobs. I'm not sure how things have become so mis-directed in the last nine months. We would appreciated it if you could look at the information provided and come to consensus on how we can resolve these concerns and move forward with accepting the road. We would like an official proposal of what is defective, who determined it, how to fix it, who will make the judgement that it's completed.

Sincerely,

Ian James LLC/
Clifford J. Williams