

VERMONT TRANSPORTATION BOARD MEETING MAY 21, 2015

Board Members Present:

Nick Marro, Chairman, term expires 2/28/2016
William Tracy Carris, term expires 2/28/2017
Vanessa Kittell, term expires 2/28/2016
Tom Dailey, term expires 2/28/2016
Robin Stern, term expires 2/28/2015 (serving until replaced)
David Coen, term expires 2/28/18
Richard Bailey, term expires 2/28/18

Board Members Absent:

None

Others Present:

John Zicconi, Board Executive Secretary
Kevin Oddy, VTrans Legal Program Administrator
Caleb Stryffeler, Claimant
Alberta Stryffeler, Witness
Donald Stryffeler, Witness
Lisa Eastman, Claimant (via telephone)
Florence Smith, VTrans legal Assistant
Daniel Dutcher, Vermont Assistant Attorney General
Bruce Post, Chairman Vermont Library Board
Martha Reid, Vermont State Librarian

Call to Order:

Chairman Marro called the Thursday, May 21, 2015 meeting to order at 9:30 a.m., which was held at the Dewey Conference Room R235 on the National Life Campus, One National Life Drive, Montpelier, VT.

1. NEW BUSINESS

1.1 Greetings and Introduction of New Board Members

The Board welcomed two new members recently appointed by the Governor: David Coen of Shelburne, and Richard Bailey of Hyde Park.

1.2 Review/Approve Minutes of the March 19, 2015 Meeting

On a motion by Mr. Dailey seconded by Mr. Carris, the Board unanimously voted to approve the minutes of the March 19, 2015 Board meeting with corrections. Ms. Stern, Mr. Coen and Mr. Bailey abstained.

1.3 Summer/Fall Scheduling

The Board decided to hold future meetings and hearings on the following dates:

- June 18: Regular Meeting
- July 29: Regular Meeting plus J.P. Sicard hearing (TB-426)
- September 17 & 18: FairPoint Hearing (TB-422)
- October 19, 21 & 22: G. Stone Motors Hearing (TB-416)

The June 18 regular meeting will be held at 9:30 a.m. in Montpelier. Times and locations of the other meetings and hearings are to be determined.

1.4 *TB-425 Stryffeler Small Claim*

Caleb Stryffeler testified that on December 28, 2014 he was driving east along Route 15 in the Town of Walden when at around 7:30 p.m. the 2004 Honda Odyssey he was driving hit a pothole that destroyed both tires on the vehicle's driver's side as well as bent two alloy rims. The vehicle was rendered un-drivable, and needed to be towed.

Upon filing a claim with the Vermont Department of Risk Management, Mr. Stryffeler said he was told another motorists also filed a claim for hitting a pothole in a similar location at a time a day or two before him. Mr. Stryffeler said he went back to the location in March, nearly three months after his accident, and that the pothole was still visible.

Mr. Stryffeler said that he seeks payment of \$837.40, which is the cost of replacing the Honda Odyssey's tires and rims. He is not seeking to be reimbursed for the cost of towing and other expenses related to having to transport his handicapped mother home following the accident.

Mr. Stryffeler argued that the Agency of Transportation should be found negligent because even after he and another motorist suffered a loss after striking the pothole, VTrans nearly three months later still had not repaired the roadway defect.

Chairman Marro said that according to VTrans' opposition documents, the Agency claims to have filled a pothole in that location on December 28, 2014 again on December 29, 2014 and then again on January 5 2015. These timings indicate the Agency filled the hole after Mr. Stryffeler had his accident.

Mr. Stryffeler said he could not speak to those claims. He said when he drove by the same location on March 27, 2015, nearly three months after his accident, the pothole was still there. He passed around a photo of the pothole he said was taken on March 27. He said the pothole was the same size and had the same depth as the day of his accident.

Alberta Stryffeler, who was a passenger in the van the night it struck the pothole, testified that the pavement condition along Route 15 through Walden is in terrible condition, even today. On the night of the accident, she said another vehicle was pulled over to the side of the road because its tires were also damaged.

Ms. Stryffeler said that before coming upon the pothole, there was no way to know of its existence as there were no roadway signs or markers indicating there was a roadway hazard.

Donald Stryffeler, who was a passenger in the van when it hit the pothole, said that on the night of the accident he spoke to VTrans highway worker who was dispatched to the scene. Donald Stryffeler said that the highway worker, who he identified only as a District 7 employee, told him that he was aware of the pothole prior to his son's accident.

Caleb Stryffeler said he travels along Route 15 through Walden often to visit his mother, and that prior to the night of December 28, 2014 he had never noticed a pothole in that location. Alberta Stryffeler said it was raining hard the night of the accident, and that the pothole was located in the middle of the roadway.

Mr. Oddy testified that Mr. Stryffeler failed to show that VTrans was negligent in how it maintained Route 15 through Walden.

Mr. Oddy said VTrans did repair a pothole at the location in question, but only after receiving a call from the Hardwick Police Department that Mr. Stryffeler's vehicle had been damaged. The Agency filled the hole again on the following day, December 29, 2014. Mr. Oddy said highway crews filled the pothole with a temporary patch on the night of December 28, 2014, and then returned on December 29, 2014 to administer a more permanent fix. The Agency returned again to repair the location on January 5, 2015, he said.

Mr. Oddy said he did not research Route 15's maintenance history beyond January 5, 2015, but he said "everyone knows that cold patch in the winter time in Vermont does not hold well, so it is very possible that the hole was back sometime in March, and I'm sure that it has been addressed since then."

Mr. Oddy said it is not unusual for cold patch to "come out" whenever VTrans plows over such a repair, or whenever the winter weather turns cold, requiring VTrans to return and re-patch the location. Mr. Oddy said that Mr. Stryffeler's statement that the pothole had not been addressed in three months is not correct.

Mr. Oddy said the pothole has been addressed numerous times throughout the winter and spring, and probably still is being addressed.

Mr. Oddy said the Agency does not dispute that Mr. Stryffeler's tires were damaged, but he argued that motorists, according to Vermont's motor-vehicle statutes, have an obligation to adjust their speed to what is reasonable and prudent for the conditions, and to drive with regard to potential hazards.

Mr. Oddy said that everybody who lives in Vermont knows that potholes appear in the winter, and that drivers have to proceed at a safe speed with that in mind. He said such behavior is codified in 23 V.S.A. § 1081, which states "no person shall drive on a highway at a speed greater than is reasonable and prudent under the conditions, having regard for the actual and potential hazards then existing. In every event speed shall be controlled as necessary to avoid colliding with any person, vehicle or other object on or adjacent to the highway."

Addressing Donald Stryffeler's claim that a VTrans highway worker at the scene told him that he knew prior to the accident that the pothole was there, Mr. Oddy said that is not the information that he received from officials at District 7. District officials reported that they received a call the night of December 28, 2014, and that they dispatched a crew to make repairs, he said.

Mr. Oddy said that VTrans was not aware of the pothole at the time of Mr. Stryffeler's accident. Mr. Oddy said VTrans employees, especially District employees, drive their local roads "all the time" and look for hazards, which if found they mark and report to their supervisors so that a repair crew can be dispatched. He said VTrans records indicate that Route 15 through Walden was inspected on December 26, 2014 and at that time no pothole existed in the location under question.

Mr. Oddy said that to prove negligence it is not sufficient for a claimant to merely show that a dangerous condition existed on a state highway. To establish liability under Vermont law, the claimant must show that highway authorities had actual knowledge of the highway defect and failed to take reasonable action, or that the defect existed so long that highway authorities should have known of its existence. Mr. Oddy said that under Vermont law, the Agency must use "reasonable diligence" to maintain its highways in a reasonably safe condition, and that highway authorities in this case had done that.

Mr. Oddy said that Mr. Stryffeler has put forth no evidence showing that VTrans knew about the hazard prior to his accident and that the Agency failed to take corrective action. Mr. Oddy said that VTrans first learned of the pothole from the Hardwick Police Department shortly after both Mr. Stryffeler and one other motorist had incurred damage as a result of hitting the pothole. Upon being notified, the Agency immediately dispatched a work crew to patch the pothole, he said.

The written record contains an email communication dated January 16, 2015 from Danielle Lewis, a liability claims adjuster for the Vermont Department of Risk Management, to District 7 officials Mellissa Lamont and Tom Lewis. In the email, they discuss a pothole collision along Route 15 that occurred on December 26, 2015 that also damaged a vehicle. In the email, Ms. Lewis states that she needs "to know who reported first; Stryffeler or" the other motorist who was damaged because she assumed the claim of whoever was damaged first "would be denied and the subsequent claim would be" paid.

The Board asked Mr. Oddy about this communication. He said the accident that took place on December 26, 2015 occurred at a different location along Route 15, and was not germane to Mr. Stryffeler's claim. Mr. Oddy said the two potholes were "close to each other," but that the two accidents were the result of different potholes that were located approximately a half a mile apart. Neither claim was paid, Mr. Oddy said.

Ms. Kittell asked Mr. Oddy how he knew the two accidents involved different potholes. He stated that he spoke with Ms. Lewis, who told him further investigation showed that the locations were different. Ms. Kittell asked if there were documents that showed that. Mr. Oddy said he did not have any documents that would show that.

Alberta Stryffeler said that after hearing Mr. Oddy's testimony she now understands that the Claimant has to prove that the pothole was in existence for a reasonable period of time prior to their accident. She asked if they were able to get people who lived along or worked along the road to testify, via a signed affidavit, that the pothole existed for a reasonable period of time before their accident on December 28 if that information would be admissible. Caleb Stryffeler said he also knew of people that could potentially testify that the pothole existed for a long period of time before his vehicle struck it. He then asked for a continuance so that he could have the time to acquire such affidavits.

On a motion by Ms. Stern seconded by Ms. Kittell, the Board unanimously voted to recess the hearing until the Board next meets, which is June 18, 2015.

1.5 *TB-431 Eastman Small Claim Hearing*

Ms. Eastman said that on the morning of March 27, 2015 at about 7:30 a.m. the vehicle she was driving struck a pothole along Route 110 in the Town of Washington that had been in existence for at least 24 hours. To support this claim, Ms. Eastman introduced an affidavit from Tina Widmer stating that she hit the same pothole on March 26, 2015 at 7 a.m., and that the collision damaged her tire.

Ms. Eastman said that the Agency of Transportation has a duty to actively inspect Route 110 for potential hazards and fix any that exist before they cause damage to motorists. In this case, VTrans did not do that. Instead, the Agency relied on phone calls from citizens to alert them that a roadway hazard existed. This delay allowed vehicles, including her own, to collide with the hazard and incur damage.

Ms. Eastman said that she requested and received DWR (maintenance) reports from the Agency of Transportation for not only Route 110 through Washington, but also the surrounding area maintained by the District 6 Highway Maintenance District.

Ms. Eastman said that the DWR reports indicate that the VTrans Maintenance District responsible for Route 110 filled potholes along the roadway in Washington Village on March 24, 2015. The DWR reports also indicate that on March 25, 2015 the District filled potholes along Routes 2, 14 and 62; and on March 26, 2015 filled potholes along Route 302 in Berlin. On March 27, 2015, the day of Ms. Eastman's accident, the DWR reports indicate that the District filled potholes on Route 110 in Washington Village near Bridge 18, but only after she called to report the roadway hazard.

Ms. Eastman said that the DWR reports indicate that Agency personnel on March 24, 2015 did not notice a pothole in the location where she had her accident.

Ms. Eastman introduced an affidavit from Rick Lacroix, who works at Robert's Country Store, which is located along Route 110 in close proximity to where the pothole was located. According to Mr. Lacroix's affidavit, beginning on March 26, 2015, and prior to Ms. Eastman's accident, at least three other vehicles incurred flat tires after striking a hazard along Route 110 in Washington Village.

Ms. Eastman said that on or prior to March 27, 2015 there were no cones, barrels or warning signs along Route 110 in Washington Village indicating that a dangerous roadway condition existed, and that motorists should drive with caution or take evasive action to avoid damage.

Mr. Oddy said that VTrans does not dispute that Ms. Eastman suffered a financial loss by driving over a pothole along Route 110 in Washington Village. He said that to prove negligence, case law indicates that it is not sufficient for Ms. Eastman to show that a dangerous condition existed on a state highway. To prevail, Ms. Eastman must show that the Agency was negligent in how it dealt with the hazard.

Mr. Oddy said that VTrans patched potholes along Route 110 on March 25, 2015, and at that time there was no pothole in the location identified by Ms. Eastman. At about 7:30 a.m. on March 27, 2015, the Agency was notified of a pothole in Washington Village. The notification was the first report that the Agency received identifying such a hazard, Mr. Oddy said.

Mr. Oddy said that at 9:20 a.m. on March 27, 2015, a VTrans highway worker also reported the pothole, and at 9:30 a.m. the local maintenance garage dispatched a crew to repair the pothole.

Mr. Oddy said that as soon as the Agency was notified of the pothole, it dispatched a crew and removed the hazard. Addressing the affidavit of Tina Widmer stating that her tire was damaged when it hit the pothole more than 24 hours prior to Ms. Eastman's accident, Mr. Oddy said that no such accident was reported to VTrans.

Mr. Oddy said that the DWR maintenance reports from March 26, 2015 and March 27, 2015 indicate that local highway crews on those days were engaged in both plowing snow along Route 110 and cold-patching potholes along other roadways. Thus work forces were committed to "other things" during that two-day span of time, he said.

Mr. Oddy rhetorically asked if highway forces "should have known" about the pothole sooner? He argued that when plowing snow, work forces are "looking at other things," including surrounding traffic and other issues of safety concern to a plow driver. He acknowledged that it is possible that while plowing, an operator could have "missed" a pothole in the location identified by Ms. Eastman because snow could have "packed into the hole."

Since VTrans responded to the first report of the pothole it received within a short period of time (two hours from the first telephone call, and within 10 minutes of having the hole verified by a VTrans worker) Mr. Oddy argued that VTrans' behavior does not rise to the level of negligence.

Mr. Oddy said that VTrans has a finite number of maintenance employees to accomplish all of the work that is required along the state-highway system. As a result, the Agency often depends on citizens to notify the Agency's maintenance districts of the hazards that exist along state roadways. Mr. Oddy also said that aside from citizen reports, VTrans employees on their own drive state roadways and look for roadway hazards. VTrans employees do not, however, actively seek out communication with locals or local business owners to discuss roadway conditions, he said.

Mr. Oddy said that Vermont's motor-vehicle statutes place an affirmative obligation on the operator to adjust her speed to what is reasonable and prudent for the conditions, and with regard to potential hazards. When one has a Vermont Driver's license, Mr. Oddy said that it represents a contract with the State of Vermont that as a driver you will obey the rules that govern such a license. One of those rules is 23 V.S.A. § 1081, which states the following:

No person shall drive on a highway at a speed greater than is reasonable and prudent under the conditions, having regard for the actual and potential hazards then existing. In every event speed shall be controlled as necessary to avoid colliding with any person, vehicle or other object on or adjacent to the highway.

Mr. Oddy said that the sudden appearance of potholes is a common and well-known phenomenon in Vermont during the late winter and early spring. When potholes form, VTrans cannot be considered negligent in repairing them when they respond to notification as quickly as it did in this case.

Ms. Eastman said that she was driving within the speed limit when she struck the pothole. She argued that when driving in the area of the pothole, she could not perform an evasive maneuver because the roadway is narrow and there was oncoming traffic.

Ms. Eastman said that the DWRs indicate that plowing was done on March 27, but not March 26. The hazard that both Ms. Widmer and Mr. Lacroix identified in their affidavits existed before the snowfall, thus the pothole was apparent and not filled with snow. She said that VTrans is negligent for not addressing the pothole prior to her accident because there is proof that the pothole was damaging vehicles as much as 24 hours before it damaged hers.

Ms. Eastman said that the DWR work reports indicate that prior to her loss, highway crews last worked on Route 110 on March 24, 2015, which is three days prior to the time of her accident. Despite there being a significant problem as early as 7 a.m. on March 26, 2015, no crews returned to work on Route 110 in Washington Village until after 7:30 a.m. on March 27, 2015, which is after she called to report her accident.

Ms. Eastman acknowledged that potholes along Vermont state roadways in late March are “a given.” As a result, she argued that VTrans should be inspecting all state roads every day to identify those that are dangerous enough to cause accidents, and to immediately repair them. Instead, the DWR reports indicate that VTrans may not have inspected Route 110 at any time during the three-day stretch between March 24, 2015 and March 27, 2015.

Mr. Oddy said that DWR reports only log actual work that was performed by VTrans crews. The DWRs would not indicate whether Agency personnel drove over or visually inspected Route 110 during the time between March 24, 2015 and March 27, 2015 because the Agency does not log the times or dates of visual inspections. As a result, Mr. Oddy said that the DWR reports cannot be used to show that no VTrans employee drove along or visual inspected Route 110 during that timeframe.

Mr. Oddy said that he did not know if any VTrans employee drove over or inspected Route 110 through Washington Village in between the dates of March 24, 2015 and March 27, 2015.

Mr. Marro closed the hearing at 11 a.m. Mr. Zicconi said the Board would deliberate in private later in the meeting, and likely issue a written decision in early June.

After conducting the rest of the day’s business, which is outlined below, and at 12:45 p.m., the Board on a motion by Mr. Dailey seconded by Mr. Coen entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-431 Eastman Small Claim.

Mr. Zicconi was invited to attend the deliberative session.

At 1:45 p.m. the Board exited deliberative session.

1.6 *Naming of Transportation Facilities*

The Vermont Legislature as part of the 2015 Transportation Bill provided the Board a new duty: the authority to name State owned, operated and maintained transportation facilities. The bill charges the

Board with adopting rules through the State's formal rulemaking process, and taking on the duty to name facilities as of March 1, 2016. Currently, the Vermont Library Board has this duty, but it does not have formally adopted rules.

To help the Board prepare for the rulemaking process, State Librarian Martha Reid, Vermont Library Board Chairman Bruce Post, and Assistant Attorney General Dan Dutcher attended an hour-long discussion. During the discussion, Ms. Reid and Mr. Post informed the Board about how the Library Board conducts its business regarding not only naming of transportation facilities, but also geographic naming of Vermont landmarks in general. Mr. Dutcher provided the Board an overview of the rulemaking process.

The discussion was recorded, and the recording is available by contacting the Transportation Board's office.

1.7 *TB-432 West Rutland Limited Access*

Prior to today's meeting, the Board had scheduled, but not yet warned, a public hearing for June 9 regarding West Rutland's application for a break in the Route 4 Limited Access. The Board also had scheduled, but not yet warned, a merits hearing to take place as part of its regularly-scheduled meeting on June 18.

Mr. Zicconi informed Board members that these two hearings have been cancelled due to the Applicant and VTrans needing more time to work out some preliminary issues. The hearings will be rescheduled when the Applicant is ready to move forward, possibly during the fall.

1.8 *Executive Secretary's Report*

TB-430 East Calais Helipad: Mr. Zicconi informed the Board that the Applicant requested that the site visit and hearing that had been scheduled for today be postponed. Neither had been officially warned, so postponing involved nothing more than removing the item from the Board's schedule. The site visit and hearing will be rescheduled if and when the Applicant is ready to proceed.

TB-423 Guggenberger Small Claim: Mr. Zicconi informed the Board that Josef Guggenberger, the claimant in TB-423, appealed the Board's denial of his small claim to Rutland Superior Court.

TB-408: Mr. Zicconi informed the Board that the Agency of Transportation changed its plans regarding the construction of the Middlebury train tunnel, and that the Legislature as part of the 2015 Transportation Bill allowed the Agency to move forward with its new design without having to return to the Transportation Board for permission to build the newly designed tunnel with a lower than 23-foot vertical clearance, which is the standard called for in 5 V.S.A. Section 3670. Mr. Zicconi said that he is not familiar with the tunnel's new design and how it differs from the previous design that the Board approved on July 8, 2014. Mr. Zicconi said that it is his understanding that the design change caused considerable delay in the project, which was expected to be under construction by now. Mr. Zicconi said

that the two bridges the tunnel will replace are in very poor condition, so VTrans asked the Legislature to streamline the permit process and eliminate the Board's involvement so that the Agency could move to construction as fast as possible.

T-Board Office Closure: Mr. Zicconi informed the Board that the Transportation Board's office at 14 Baldwin Street would be closed from July 10, 2015 through July 19, 2015 so that he could take a vacation.

1.9 *TB-383 Winterset (Motion to Dismiss)*

The Board on May 15, 2015 received a joint motion from the parties in TB-383 to have the case dismissed with prejudice pursuant to VRCP 41(a)(1). The Board had been aware since July of 2014 that the parties had reached a tentative settlement.

On a motion by Mr. Dailey seconded by Mr. Coen, the Board unanimously voted to dismiss TB-383 with prejudice.

1.10 *TB-428 Hall Small Claim*

1.11 *TB-433 Guggenberger Permit Appeal*

At 12:45 p.m., the Board on a motion by Mr. Dailey seconded by Mr. Coen entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-428 Hall Small Claim, TB-431 Eastman Small Claim, and TB-433 Guggenberger Permit Appeal.

Mr. Zicconi was invited to attend the deliberative session.

At 1:45 p.m. the Board exited deliberative session.

2. OLD BUSINESS

2.1 *None*

3. OTHER BUSINESS

3.1 Round Table – Kittell Issue

Ms. Kittell informed the Board that in her capacity as a private attorney that she raised a claim as counsel for plaintiffs in a case that involves a defendant who is represented by the law firm of Lynn, Lynn & Blackman, which also represents one of the parties in TB-426 J.P. Sicard Contractor Claim.

Ms. Kittell, who was appointed by Chairman Marro to be the hearing officer for all prehearing matters related to TB-426, said she did not believe her involvement with the private case represented a conflict, but that she wanted to provide the Board full disclosure. No Board member objected to Ms. Kittell continuing her involvement in TB-426, but all thought it wise that the Board send the parties a letter

disclosing the situation and asking if they objected to Ms. Kittell's continuance with the case. Mr. Zicconi said he would work with Ms. Kittell to draft such a letter.

4. ADJOURN

On a motion by Mr. Bailey seconded by Mr. Dailey, the Board unanimously voted to adjourn at 1:55 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary

**Next Board Meeting:
June 18, 2015 at 9:30 a.m.
Conference Room R235, Dewey Building, One National Life Drive, Montpelier, VT**