

# VERMONT TRANSPORTATION BOARD MEETING OCTOBER 21, 2015

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## **Board Members Present:**

Nick Marro, Chairman, term expires 2/28/2016  
William Tracy Carris, term expires 2/28/2017  
Larry Bruce, term expires 2/28/2018  
David Coen, term expires 2/28/18  
Richard Bailey, term expires 2/28/18  
Vanessa Kittell, term expires 2/28/2016

## **Board Members Absent:**

Tom Dailey, term expires 2/28/2016

## **Others Present:**

John Zicconi, Board Executive Secretary  
Robin Stern, Esq  
Courtney Brassard, claimant (via telephone)  
Bill Rice, Assistant Attorney general

## **Call to Order:**

Chairman Marro called the Wednesday, October 21, 2015 meeting to order at 9:35 a.m., which was held in Davis Conference Room R206 on the National Life Campus, One National Life Drive, Montpelier, VT.

## **1. NEW BUSINESS**

### ***1.1 Review/Approve Minutes of the September 17, 2015 meeting***

**On a motion by Mr. Coen seconded by Mr. Bailey, the Board voted to approve the minutes of the September 17, 2015 Board meeting with corrections.**

### ***1.2 TB-442 Barkyoub Small Claim, Request Extension of Time***

Mr. Zicconi informed the Board that Mr. Barkyoub filed his claim beyond the 30-day allotted period. By rule, claimants have 30 days after the State denies their small claim to appeal to the Board. Mr. Barkyoub's initial claim was rejected on July 14, 2015 but his appeal to the Board was postmarked September 28, 2015, some 10 weeks following the denial.

Rule 4 of the Vermont Rules of Appellate Procedure contemplates an extension of time if "the relief is requested by motion and filed no later than 30 days after the expiration of" the original 30 days, and if the "party shows excusable neglect or good cause."

In an email to the Board, Mr. Barkyoub asked for the time extension stating that he is disabled and that the incident happened the day before he was to leave the state for an extended period of time. The email stated that while he was away, he incurred several health issues and was not in a condition where he could deal with the appeal.

Mr. Barkyoub also supplied the Board with an electronic letter from a physician stating that the claimant is disabled and takes chronic pain medication.

The Board deliberated, after which it denied Mr. Barkyoub's request because Rule 4 contemplates only a 30-day extension for cause beyond the initial 30-day timetable while Mr. Barkyoub's request exceeded this grace period by two weeks.

**On a motion by Ms. Kittell seconded by Mr. Bruce, the Board unanimously voted to deny Mr. Barkyoub's request for an extension of time to file a small claim.**

### *1.3 Executive Secretary's Report.*

- TB-414 Kuranda Private Landing Area: Mr. Zicconi informed the Board that Michael Kuranda on October 16 provided him an update as to the progress relating to his private landing area in Stamford, VT. Mr. Kuranda in an email informed Mr. Zicconi that he is still awaiting an FAA safety determination, and as a result has not yet conducted the Board required earth moving and tree clearing. Given that it is the end of the construction season, Mr. Kuranda said he will not seek a Certificate of Operation until Spring 2016 at the earliest.
- T-Board Office Closure: Mr. Zicconi informed the Board that he would be away from October 30 to November 7, and as a result the Transportation Board office would be closed during that time.

### *1.4 TB-434 Brassard Small Claim Hearing*

Mr. Marro excused himself from this hearing due to a conflict. Mr. Carris assumed the duties of Acting Chairman.

On March 10, 2015, Courtney Brassard parked her 2011 Nissan Juke SV on VTrans' property at its District 6 Office where she was employed. While the vehicle was unattended, it received \$1,518.66 worth of damage to its rear fender.

On March 24, 2015, Ms. Brassard filed a damage claim with the Department of Vermont Risk Management. Ms. Brassard claimed the state was liable because the vast majority of traffic within the parking lot is from vehicles driven by state employees, and since the damage was "high on the fender" it likely was caused by either a state-owned truck or state-owned utility vehicle. Risk Management denied the claim, and Ms. Brassard appealed to the Board.

Ms. Brassard testified that on March 10, 2015 she parked her car in a parking space adjacent to the District 6 Office building, just as she did every day she went to work. She said the parking lot is very small and that there is inadequate room to maneuver within the parking lot once its spaces are occupied.

Ms. Brassard said that the damage to her vehicle was 41 inches off the ground, making it too high to have been caused by a civilian passenger car. She said the parking lot is located a fair distance off the main road and is gated – although the gate was open – making it an area that is not often used by the

general public. She said that delivery trucks generally are too large to navigate the parking lot where her car was parked so they either use the aviation bay located in another area of the building or park well in front of the building without ever trying to navigate the parking area because the delivery vehicles are too large.

Ms. Brassard said that the parking lot where her car was parked is so small and tight that users upon backing up often end up driving on a nearby grassy area. As a result, VTrans constantly has to maintain and repair the grassed area, which shows that VTrans is aware that the turning ratios within the parking lot are inadequate.

Ms. Brassard said that the District 6 office building on March 10, 2015 did not receive any deliveries or visits from members of the general public or employees of nearby municipalities. Thus the person who hit her car only could have been a state employee. Ms. Brassard said that although she could not view the parking lot from her work station and she did not see who or what damaged her car, she is certain that the building had no visitors other than state employees because her work station is close to the front door and she would have seen anyone who entered the building.

Ms. Brassard said that although it was possible that someone other than a state employee could have driven through the parking lot and not entered the building, such an event would be rare given the building's isolation and distance from the nearest road. She said that the only people she witnessed that day enter the building were VTrans employees, including members of the Agency's "bridge crew" who drive large trucks.

Ms. Brassard said that her car was insured but has not yet been repaired because her insurance company told her that before it would pay for the damage she first had to follow through with her claim against the State as the State could be responsible. But even if she were to make a claim with her insurance company, she would have to pay a \$500 policy deductible.

Mr. Rice said he was surprised by the reaction of Ms. Brassard's insurance company because the claim is for a hit-and-run situation, and in a hit-and-run situation her insurance automatically provides uninsured motorists coverage, which by statute (23 V.S.A. 941-943) limits the insurance company to charging a maximum deductible of \$150.

Ms. Brassard said her insurance company told her it would wave her \$500 deductible only if she filed a police report within 72 hours, but because she believed that the State could be liable she did not call the police and therefore no police report was filed.

Mr. Rice said that under the Vermont Tort Claims Act (12 V.S.A. Chapter 189) if the Claimant has another method of collecting for damages other than charging the State, the other method takes precedent. Mr. Rice said that although statute provides that VTrans is liable for damages caused by the negligence of its employees, such financial responsibility according to 12 V.S.A. § 5601(7) is not available to the Claimant if the claim can be remedied or is governed by another statutory enactment.

Mr. Rice said it is the State's position that it has no liability in this case because it has not waived its sovereign immunity when it comes to a situation where another statute provides relief.

Mr. Rice said should the Board wish to contemplate the merits of the claim, there is no proof that the damage to Ms. Brassard's vehicle was caused by the negligence of a State employee driving either a personal vehicle or a state vehicle. Nor is there proof that the damage was caused by a state employee while acting within the scope of his or her employment, as is contemplated in 12 V.S.A. § 5602.

As for Ms. Brassard's assertion that the parking lot was improperly designed, Mr. Rice said that Ms. Brassard did not produce a controlling design standard. Mr. Rice said she could not produce such a standard because no such state standard exists. While Ms. Brassard entered into evidence a document from the Virginia Asphalt Association to support her claim that the parking lot was designed improperly, Mr. Rice said that the document refers to specifications as only "guidelines," and those guidelines carry no weight within Vermont as the state did not adopt such guidance.

Mr. Rice said that with no adopted design standard to consider, the Board cannot find the Agency negligent due to the design of the parking lot. Should the Board look for the proximate cause of the damage, it must look to the negligence of the driver of the vehicle that hit Ms. Brassard's car, not to the design of the parking lot.

Mr. Rice said that there was no allegation that car damage within the parking lot was either common or had happened before because the facility has no history of being a place where such damage occurs.

Mr. Rice said that there is no certainty that Ms. Brassard's car was damaged by a large motor vehicle as Ms. Brassard asserts. He argued that small vehicles, should they have something such as a bicycle rack attached to their rear, could cause damage that is 41 inches off the ground.

Ms. Brassard said town zoning often includes standards for parking lots. Although she did not put forth evidence that the Town of Berlin had such standards, she said the nearby municipalities of Barre City and Montpelier both have zoning standards that call for parking lots to have larger turning areas than what is included in the VTrans parking lot.

Mr. Carris asked Ms. Brassard if she had introduced proof of these zoning standards. Ms. Brassard said she had not, but that she could if the Board wished. Mr. Carris said following the hearing that Ms. Brassard could submit such evidence to the Board's office.

Mr. Carris closed the hearing. Mr. Zicconi informed Ms. Brassard and Mr. Rice that the Board would deliberate and issue a decision in writing sometime likely in November.

### ***1.5 VTrans Budget presentation***

This agenda item was tentative. No presentation was made.

### ***1.6 TB-444 Dover Helipad Application Review***

On October 14, 2015, the Agency of Transportation forwarded to the Board the application for a private helipad at Snow Vidda Loop in West Dover. The applicant is Brady Sullivan SV, which is a real estate development corporation. The Board unanimously considered the application complete.

The application included a court decision that placed limitations on how long and how often such a helipad could be used. Mr. Zicconi told the Board that prior to today's meeting that he had a phone discussion with Town of Dover attorney David Rugh, who told him that the court settlement came to be after the town tried to oppose the project, but the court ruled that the helipad is permissible under local zoning regulations. Ms. Stern, who represents the applicant, agreed.

Mr. Rugh told Mr. Zicconi that the town held a couple of zoning hearings regarding the helipad, which was attended by neighbors, but that the process was suspended due to the court proceeding and never restarted. Discussions between the town and the applicant to settle the court proceedings were not public, so no neighbors to the proposed helipad were involved in either discussions or the development of the eventual court order. Ms. Stern agreed.

Mr. Zicconi said that before the Board can hold a hearing, it must determine what kind of notification the applicant must provide neighbors. He said that 5 V.S.A. § 207(d) states that "the applicant shall give notice of the proceedings to all persons owning or interested in adjoining lands by delivery of a true copy of the application and order for hearing by registered or certified mail to the last known address of each of the persons; the notice to be mailed at least 12 days prior to the date of the hearing. Notice of the hearing and a general statement of the purpose shall be published at least once in a newspaper of common circulation in the town where the property described in the application is situated at least two days before the date of the hearing, and a similar notice shall be posted in a public place at least twelve days before the hearing."

Mr. Zicconi said, however, that 5 V.S.A. § 207 (g) provides an exemption to these hearing provisions for "helicopter landing areas, ultralight landing areas, and restricted landing areas designed for personal use" unless the Board determines otherwise.

Mr. Zicconi said that historically the Board has put applicants of private helipads through the notification process spelled out in 5 V.S.A. § 207(d) whenever the town did not have a local permit process in which neighbors could participate. In this case, he said, the town started such a process but ultimately the decision was made by the court without public involvement. As a result, he encouraged the Board to require the applicant to notify neighbors by registered or certified mail as is spelled out in 5 V.S.A. § 207(d).

Ms. Stern opposed this idea, arguing that the helipad was only for "personal use," which is exactly the kind of use contemplated by 5 V.S.A. § 207(g). As a result, the Board should not require such notification, she said.

After discussion, a majority of the Board concluded that the application was not for "personal use" as contemplated by 5 V.S.A. § 207(g) because the applicant is a corporation, not a private individual.

**On a motion by Mr. Bruce seconded by Ms. Kittell, the Board by a 4-2 margin voted to require the applicant to comply with the hearing notifications spelled out in 5 V.S.A. § 207(d). Mr. Bruce, Ms. Kittell, Mr. Carris and Mr. Marro voted in the affirmative, while Mr. Bailey and Mr. Coen opposed the motion.**

## **2. OLD BUSINESS**

### ***2.1 Naming of Transportation Facilities***

On October 12, 2015, Chairman Marro and Mr. Zicconi met with the State's Interagency Committee on Administrative Rules to discuss the Board's proposed rules for the naming of State owned, operated and maintained transportation facilities. Aside from taking written public comment, the Committee recommended that the Board schedule a public hearing and suggested that the public hearing could be conducted as part of a future, regularly-scheduled Board meeting. The Board agreed to conduct such a public hearing at 10 a.m. on December 3, 2015.

**2.2 TB-426 J.P. Sicard Contractor Claim**

**At 12:20 p.m. the Board on a motion by Ms. Kittell seconded by Mr. Coen entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-426 J.P. Sicard Contractor Claim as well as TB-434 Brassard Small Claim.**

Mr. Zicconi was invited to attend the Deliberative Session. Mr. Bruce left the Deliberative Session at 12:43 p.m.

**At 12:55 p.m. the Board exited Deliberative Session**

**3. OTHER BUSINESS**

**3.1 Round Table**

No one had any issues to discuss

**4. ADJOURN**

**On a motion by Mr. Coen seconded by Mr. Bailey, the Board unanimously voted to adjourn at 12:56 p.m.**

Respectfully submitted,

John Zicconi  
Executive Secretary

**Next Board Meeting:  
December 16, 2015 at 12:45 p.m.  
Deerfield South Meeting Room, Mt Snow Resort, 89 Grand Summit Way, West Dover, VT**