

VERMONT TRANSPORTATION BOARD MEETING APRIL 21, 2016

Board Members Present:

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

Board Members Absent:

Vanessa Kittell, term expires 2/28/2019
Tom Dailey, term expires 2/28/2016

Others Present:

John Zicconi, Board Executive Secretary
Scott Fortney, VTrans Aviation Unit
Brian Pinsonault, VTrans Aviation Unit
Jim MacKay, MIO Aviation
Michael Kuranda, applicant (via telephone)
Kevin Oddy, VTrans Legal Division
Florence Smith, VTrans Legal Division
Bob Roos, claimant
Glen Button, Vermont Highway Safety Alliance
Bruce Nyquist, Vermont Highway Safety Alliance
John Flannigan, Vermont Highway Safety Alliance

Call to Order:

Chairman Marro called the Thursday, January 14, 2016 meeting to order at 9:30 a.m., which was held in Dewey Conference Room R235 at one National Life Drive in Montpelier, VT.

1. NEW BUSINESS

1.1 Review/Approve Minutes of the January 14, 2016 meeting

On a motion by Mr. Bruce seconded by Mr. Bailey, the Board voted to approve the minutes of the January 14, 2016 Board meeting with corrections.

1.2 TB-414 Certificate of Operation for Kuranda Private Landing Area

VTrans Aviation Specialist Brian Pinsonault informed the Board that he conducted a site visit of the Kuranda airstrip in Stamford, VT and concluded that it met all the conditions imposed by the Board in its Certificate of Approval that was issued in the fall of 2014. Mr. Pinsonault said that the airstrip meets all minimum safety standards required for ultra-light aircraft use. Also, Mr. Kuranda submitted the required FAA Determination Letter indicating that the private landing area will not interfere with nearby air traffic.

On a motion by Mr. Coen seconded by Mr. Bruce, the Board voted to issue Mr. Kuranda a Certificate of Operation.

1.3 *TB-449 Review of Application for a Private Landing Area in Lincoln*

Jim MacKay told the Board that his client, Martine Rothblatt, constructed a helipad at 736 Notch Road in Lincoln some three years ago and has been landing aircraft there on a regular basis. He apologized to the Board for not coming before it for a permit prior to use, but said he is here today to clean up the record and permit the facility.

Mr. MacKay said Ms. Rothblatt, who is a research scientist and has several residences, uses the helipad for both personal and business travel, and generally uses the helipad a maximum of eight times per month.

Mr. Zicconi told the Board that it must determine 1) if the application is complete and 2) if the application is complete what kind of hearing process the Board wishes to conduct, as well as what kind of warning process it wants the applicant to provide neighbors – the more formal notification process spelled out in 5 V.S.A. § 207(d) or does the Board want to waive the provisions of Section 207(d), which is allowed under 5 V.S.A. Section 207(g) for a private helipad.

Mr. MacKay said Ms. Rothblatt's property has no abutters other than the federal government because the property is surrounded by National Forest Land. Mr. Zicconi said the Board's usual practice is not to waive Section 207(d) unless the applicant has already gone through a local zoning or other similar permitting process that allows neighbors and other affected landowners the ability to attend public hearings. In this case, no such permitting process has been held. However, the town's Select Board, at a regularly warned meeting, did discuss the helipad and provided the Board with a letter recommending that the Board approve the application.

Scott Fortney said Vermont's Aviation Section has reviewed the location and finds that the existing helipad meets minimum safety standards. Mr. MacKay said the owner has never received any complaints about flying aircraft into the property. Mr. Zicconi said the Chair of the Lincoln Select Board, during a telephone conversation, said the town also has not received complaints.

Mr. Zicconi recommended that the Board hold a site visit and hearing in either May or June and invite both local first responders and affected landowners, but said it is up to the Board to determine whether to waive Section 207(d).

Mr. MacKay asked for an expedited hearing process given that the helipad has been in use for three years, that there have been no complaints, and that VTrans has found no safety issues. He also asked for tentative approval to use the helipad while the hearing process commences. Mr. Zicconi said given that the facility has not been vetted by the Board, he would not recommend that the Board provide the applicant permission to use the facility prior to holding a hearing and issuing a permit.

Mr. Fortney said he would want to first double check federal regulations, but given that the helipad has been in use for three years and that VTrans has inspected the facility and deemed it safe, he would not be troubled if the Board allowed the applicant to use the helipad prior to issuing a permit so long as federal guidelines said that was OK. Mr. Carris said under that rational anyone could build anything without a state permit and begin to use it, which is not a good message to send.

Mr. MacKay said federal guidelines allow helicopter landings at a specific location of up to 10 times a day for up to 12 months without having to go through a federal process. Mr. Zicconi pointed out that the helipad has exceeded that threshold as it has been in use for about three years.

The Board elected to end debate and discuss how to proceed in deliberative session later in the meeting pursuant to Title 1 § 313. Following the deliberative session, the Board announced that it would hold a site visit and hearing on May 26 and that the applicant must supply notification of the site visit and hearing pursuant to 5 V.S.A. § 207(d).

1.4 *TB-440 Roos Small Claim*

Mr. Roos said he was driving southbound on Route 5 in Barnet at about 9:30 p.m. on June 20, 2015 when the lights of an oncoming car made it hard to see and he hit a pothole located in the driving lane. Mr. Roos said the pothole was quite large and that others indicated to him that the road contained sizable potholes as far back as April, so he believes the hazard he struck existed for a substantial amount of time before he hit it. He supplied an affidavit signed by Ronald Noble that he witnessed the potholes in the area of Mr. Roos' accident the week of April 14, 2016.

Mr. Roos said hitting the pothole damaged two tires, which were replaced at a cost of \$239, but since the tires on his vehicle were used and had expended half their life he prorated his claim to \$119.97, which is the cost of only one tire.

Mr. Roos says he believes his claim meets the four-pronged legal test to show negligence: VTrans has a duty to keep the roads reasonably maintained, they breached that duty because the potholes existed for at least two months, he was damaged due to the breach of duty when the pothole damaged his tires, and the pothole was the proximate cause of the damage.

Mr. Roos said the pothole his car struck did not represent a sudden defect in the roadway because it had existed for months prior to his accident. He said VTrans was therefore negligent in not repairing the pothole prior to him striking it and damaging his vehicle.

Kevin Oddy said case law supports that the Agency is not the public's insurer when someone has an accident on a public highway, and that to receive compensation it is not sufficient that people simply show that a dangerous condition existed on a state highway. Under Vermont Law, Mr. Oddy said, the Agency does have the obligation to use reasonable diligence to main its roads in a reasonably safe condition, but historically the agency has not been found responsible for damage that occurs due to a "sudden defect" in a roadway. To establish liability, Mr. Roos needs to show that the Agency either

knew about the defect and ignore it, or that the defect existed long enough that the Agency should have known about it.

Mr. Oddy said that although Mr. Roos supplied an affidavit from someone confirming they noticed a pothole in April along Route 5 in the area of Mr. Roos' accident, there is no evidence that the pothole is the same pothole that damaged Mr. Roos' vehicle.

Mr. Oddy said that the accident report submitted by Mr. Roos indicates that the accident was reported on June 30, which is the same date that VTrans patched a stretch of Route five from Barnard to Rygate, using approximately nine tons of patch. Mr. Oddy said the Agency did this work at this time in response to receiving a complaint, which is how the Agency first learned that this stretch of road contained defects that required repair. Once the Agency was made aware of the road's condition, it immediately rectified the situation, Mr. Oddy said. The Agency was not aware of the road's condition prior to receiving the complaint, Mr. Oddy said.

Mr. Oddy said during the winter, VTrans often inspects its roadways daily. But during the summer, a span of two weeks or more can elapse without Agency personnel inspecting a roadway because staff is busy doing other things like road maintenance, picking trash, ditch cleaning, and painting roadway markings. As a result, the Agency depends on the public to report potential dangerous conditions because it is possible that a sudden defect can occur that the agency has not identified. "We depend on the public to notify us if they see an issue that they believe is unsafe incase we have not seen it," Mr. Oddy said.

Mr. Oddy said people who drive the highways are subject to rules including that the operator must adjust his or her speed to what is reasonable and prudent under the conditions, having regard for the actual and potential hazards then existing. And 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 pointed out that Mr. Roos in his affidavit states that he saw the pothole earlier in the day, so he was aware it was there. When driving that night in the same location, Mr. Roos had the duty to slow down and avoid the pothole. And while Mr. Roos claims there were oncoming headlights that marred his vision, he has to take situations like that into account when driving.

Mr. Oddy said that VTrans does not question that Mr. Roos struck a pothole on a state highway and damaged his tires. But Mr. Roos has failed to show that the pothole he struck existed in the form it was the night he struck it for a period of time long enough that VTrans should have known about it, he said. Mr. Roos also has not shown that the pothole he struck had been reported to VTrans, Mr. Oddy said.

It was his contention, Mr. Oddy said, that Mr. Roos did not drive in a way that was reasonable to be able to take action to avoid the danger, which he is required to do by law. Therefore VTrans did not breach its duty and was not the proximate cause of the damage to Mr. Roos's vehicle, he said.

1.5 TB-446 Petition to Name Rte 103 “The Desert Storm Veterans Memorial Highway”

Mr. Zicconi informed the Board that it received a petition signed by nearly 800 people requesting that the Board name Route 103 The Desert Storm Veterans Memorial Highway. Chairman Marro more than two weeks ago deemed the petition administratively complete, so now the Board has to schedule a public hearing in a county where the road runs. Given that Board rules require parties to the process be given 30-days notice of a hearing, the Board scheduled a public hearing for June 16 in Ludlow. Mr. Zicconi was instructed to work out the details.

1.6 Spring/Summer/Fall Scheduling

Scheduling for many issues was discussed as part of those agenda items. The Board also chose August 11, 2016 as a possible date for a hearing in TB-441 Pike Contractor Claim. Mr. Zicconi was instructed to see if that date worked for the parties.

1.7 Executive Secretary’s Report

CCRPC/VTrans MOU: Mr. Zicconi informed the Board that the Chittenden County Regional Planning Commission and VTrans were negotiating an updated Memorandum of Understanding that spells out the working relationship between the two organizations. The current MOU, which was negotiated in 2002, calls for disputes between the two organizations to be adjudicated before the Board. VTrans has asked that the new MOU require disputes to be settled in Superior Court. Mr. Zicconi said this runs counter to his understanding of statute, which vests quasi-judicial authority with the Board, and specifically calls for transportation-related contract disputes to be settled by the Board. VTrans, however, disagrees. To verify his opinion, Mr. Zicconi said he consulted with Chairman Marro and they agreed to hire the law firm of Diamond and Robson to review statute and offer an independent legal opinion. The CCRPC has agreed not to sign the MOU until the opinion is rendered.

TB-416 G. Stone vs. General Motors: Mr. Zicconi informed the Board that he and Mr. Dailey, who is the Board-appointed hearing officer, met with the parties earlier in the month and worked out a prehearing schedule that calls for the case to be ready for hearing in October.

TB-443 Shultz Contractor Claim: Mr. Zicconi informed the Board that he and Mr. Carris, who is the Board-appointed hearing officer, met with the parties earlier in the month and worked out a prehearing schedule that calls for the case to be ready for hearing in November.

TB-445 Winterset Contractor Claim: Mr. Zicconi informed the Board that he and Ms Kittell, who is the Board-appointed hearing officer, met with the parties in March and worked out a prehearing schedule that calls for the case to be ready for hearing in February 2017.

Office Closure: Mr. Zicconi informed the Board that he would be away celebrating his 25th anniversary from May 2-13 and that the Board’s office would be closed during that time.

1.8 Vermont Highway Safety Alliance Presentation

Three members of the Vermont Highway Safety Alliance Board of Directors – Glen Button, Bruce Nyquist and John Flannigan – gave the Board a presentation on the Alliance, its mission and its work. The presentation lasted about an hour and was recorded. Copies of the recording can be obtained by contacting the Board's office.

2. OLD BUSINESS

2.1 TB-387 Route 7 Rutland Town Break in Limited Access

After a nearly two-year delay, Rutland Town in January submitted to VTrans a traffic analysis regarding its request for a break in limited access along Route 7 at Farrell Road. VTrans believes its analysis will be complete by early May, and barring the need for revisions the case could be ready for Board review in June. The Board scheduled July 16 as a tentative hearing date.

Mr. Zicconi reminded the Board that it held the statutorily-required public hearing on the application two years ago in Rutland, and asked the Board if it believed enough time had passed where it would be wise to conduct a new public hearing even though doing so was not required by law. Mr. Zicconi said he asked the Rutland Regional Planning Commission for its opinion on this, and that RPC Transportation Planner Susan Schreibman advised that she did not believe another public hearing is necessary because the project has not substantially changed. The Board agreed.

2.2 TB-422 Dismiss FairPoint Appeal

On April 12, the parties informed the Board that they had executed a settlement and filed a stipulated written request asking the Board to dismiss the case with prejudice.

The Board on a motion by Mr. Carris seconded by Mr. Bruce unanimously voted to dismiss TB-422 FairPoint Appeal with prejudice.

2.3 TB-441 Pike Contractor Claim

At 12:15 p.m. the Board on a motion by Mr. Bailey seconded by Mr. Bruce entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-441 Pike Contractor Claim, TB-440 Roos Small Claim and TB-449 Rothblatt Private Landing Area.

Mr. Zicconi was invited to join the deliberative session.

The Board exited deliberative session at 12:50 p.m.

3. OTHER BUSINESS

3.1 *Round Table*

No one had any issues to discuss

4. ADJOURN

On a motion by Mr. Bruce seconded by Mr. Bailey, the Board unanimously voted to adjourn at 12:52 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary

Next Board Meeting: May 26 at 9:30 a.m.