

# VERMONT TRANSPORTATION BOARD MEETING OCTOBER 18, 2012

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## **Board Members Present:**

Timothy Hayward, term expires 2/28/2013  
Nick Marro, term expires 2/28/2013  
Robin Stern, term expires 2/28/2015 (By phone)  
Charles Bucknam Jr., term expires 2/28/2013  
James Fitzgerald, term expires 2/28/2015  
Wesley Hrydziusko, term expires 2/28/2015

## **Board Members Absent:**

Maurice Germain, Chairman; term expires 2/28/2014

## **Others Present:**

John Zicconi, Executive Secretary  
Guy Rouelle, VTrans State Aeronautics Administrator  
Dan Dutcher, Assistant Attorney General  
David Coutu, Cavendish Homeowner  
Mark Hall, Attorney for David Coutu  
Toni Clithero, Assistant Attorney General  
John Dunleavy, Assistant Attorney General  
Kevin Oddy, VTrans Legal Program Administrator  
David Hoyne, VTrans Construction Engineer  
Darren Misenko, Attorney Fead Construction Law  
Sandy Fead, Fead Construction Law (By phone)  
Tom Viall, Transportation Board Consultant

## **Call to Order:**

Acting as Chair, Timothy Hayward called the Thursday, October 18, 2012 meeting to order at 9:30 a.m., which was held in the AOT 3<sup>rd</sup> Floor Conference Room at One National Life Drive Montpelier, VT.

## **1. NEW BUSINESS**

### ***1.1 Approve the Meeting Minutes of September 20, 2012***

**On a motion by Mr. Marro seconded by Mr. Fitzgerald, the Board unanimously voted to approve the minutes of the September 20, 2012 meeting with corrections.**

### ***1.2 Executive Secretary's Update***

Mr. Zicconi informed the Board that the Transportation Board office would be closed from October 31, 2012 to November 6, 2012 while he was out of town.

Mr. Zicconi informed the Board that Legislative Council is preparing a proposed bill for the upcoming Legislative Session regarding farm crossings. Since the Board has authority over farm crossings, Mr. Zicconi asked the Board if at a future meeting it would like a primer on its authority regarding farm crossings, as well as a presentation regarding the current issues that have prompted Legislative Council to draft a proposed bill. The Board agreed that this information would be helpful. Mr. Zicconi said he would schedule discussion at the Board's December meeting.

Mr. Zicconi said he was reviewing the statutes that govern the Board's authority regarding small claims and it came to his attention that Title 19 V.S.A. § 20 provides the Transportation Board authority to hear and determine small claims against the Agency of Transportation, and award damages up to \$2,000. This amount is outdated as the \$2,000 threshold is very low by today's small-claims standards. The judiciary a few years ago rose its small-claims threshold to \$5,000.

Mr. Zicconi said he spoke with Legislative Council, which annually prepares a draft Transportation Bill for the Legislature's consideration, and that Council said it would be willing to place a recommended increase to \$5,000 in the draft Transportation Bill if the Board so requested. Before making such a request, Mr. Zicconi recommended that the Board instruct him to contact the Agency of Transportation to discover if it supports increasing the small-claims limit. The Board agreed, and Mr. Zicconi said he would learn the Agency's position before the Board meets in December.

**1.3 TB 352 Coutu Helipad, request for operational Approval.**

*Ms. Stern joined the Board meeting via telephone.*

On July 23, 2012, the Board ruled that Mr. Coutu's application to operate a private helicopter landing area at his Cavendish home was administratively complete, and granted Mr. Coutu, subject to compliance with a VTrans' recommended tree cutting report dated June 29, 2011, a certificate of approval pursuant to 5 V.S.A. § 207. Prior to the start of operation, however, the Board determined that Mr. Coutu must obtain operational approval from the Board pursuant to Title 5 V.S.A. 207(f) and receive a Determination Letter from the Federal Aviation Administration.

Prior to today's hearing, Mr. Coutu received the Determination Letter and submitted it to the Board's office. At today's hearing, Mr. Coutu seeks operational approval pursuant to 5 V.S.A. 207(f).

Under 5 V.S.A. § 207(f), the Board must consider the recommendations of VTrans before granting operational approval. Mr. Rouelle said he reviewed Mr. Coutu's request for operational approval, including the FAA Determination Letter, and concluded that the landing area will not interfere with the safe operation of any public airport or with the safety of any state or federal airway.

Mr. Dutcher said that VTrans does not maintain an application form for operational approval of landing areas, but that he does believe that Mr. Coutu's submission of the FAA Determination Letter to VTrans is procedurally sufficient and that no additional paperwork is necessary. Therefore, Mr. Dutcher said, VTrans recommends that the Board grant Mr. Coutu's application for operational approval.

Mr. Coutu thanked the Board for its work regarding his helipad, and said he agreed with Mr. Dutcher's assessment. Mr. Dutcher submitted a draft order granting operational approval and a draft certificate of operation. Mr. Coutu said he supported the drafts as written.

**On a motion by Mr. Bucknam seconded by Mr. Fitzgerald, the Board unanimously voted to grant operational approval and sign both the draft order and certificate as written.**

*At this point in the meeting, it became clear that the meeting room's telecommunication system was not functioning properly and would not improve. Ms. Stern, who was participating by phone, left the meeting.*

**1.4 TB 383 Winterset, Contract dispute**

Winterset was the contractor on an East Montpelier Bridge project in 2010 that incurred both delays and additional work orders due to problems Winterset claims were the fault of “insufficient plans or specifications provided by VTrans.” Winterset is seeking close to \$400,000 for its additional time and efforts.

VTrans denied Winterset’s claim not because it lacked merit, but because the claim was filed late. According to VTrans, Winterset missed the contractual filing deadline to make such a financial claim. VTrans never actually ruled on the merits of Winterset’s claim. Instead, the Agency rejected the claim based on timing alone. Winterset rejects this, and on January 28, 2011 filed an appeal with the Board. The only issue currently before the Board is the timing issue. The Board has not (yet) been asked to review the merits of Winterset’s claim.

Winterset’s January 2011 appeal outlines nine issues (Questions a-i on pages 5 & 6) that Winterset believes the Board should consider in determining the timeliness issue. But these questions are not what is at issue at today’s hearing. What is at issue is that on September 17, 2012 Winterset request to amend its January 2011 appeal and add a 10th item (Question j) to its appeal. Winterset believes the amendment to include “Question (j)” is a simple matter of procedure to which it has a legal right, while VTrans opposes the amendment and believes it is untimely and should not be allowed. Whether to allow “Question (j)” is the sole issue before the Board at this time.

Winterset was represented by attorney Darren Misenko, while VTrans was represented by Assistant Attorney General Toni Clithero.

Mr. Misenko said Winterset wishes to include Question (j), which asks the Board to determine if Section 105.20 of VTrans Standard Specifications for Construction (*Standard Specifications*) applies to Winterset because it was adopted by the Agency without going through the formal rule-making process outlined in the Administrative Procedures Act. Mr. Misenko said that like a court, the Board should allow liberal amendment to its original appeal because adding Question (j) does not prejudice the Agency.

Mr. Misenko said courts routinely allow, and the Supreme Court has upheld, that amendments when there is no prejudice to the opposing party – and when the amendment is neither frivolous nor made in bad faith – must be allowed because it would be an abuse of discretion for the court not to allow such a motion to amend. The Agency has not identified any reason it would be prejudiced if the amendment were allowed, Mr. Misenko said.

Mr. Misenko said the proceeding before the Board qualifies as a “contested case,” and therefore Winterset has a Constitutional right to due process and a fair hearing before an unbiased tribunal. Since Winterset’s original appeal was heard and decided by the Agency of Transportation’s Director of Program Development, the original appeal was not adjudicated by an unbiased party because the Director works for VTrans, which is the same agency that holds Winterset’s contract. Because of this, Mr. Misenko said, the Board’s appeal hearing must be *de novo* because that is the only way Winterset can receive fair and unbiased due process.

Even though state transportation law defines the Board’s role as appellate review, it is the Board that must provide a fair hearing as an adjudicator required by the federal Constitution, Mr. Misenko said. Further supporting this notion is Title 12 Section 61, which disqualifies VTrans’ Director of Program Development, due to his inherent bias, from being the adjudicator of Winterset’s claim, Mr. Misenko said.

Ms. Clithero said that statute provides a template in Title 19 Section 5 on how the Board must handle contract disputes like this one, and that statute limits the Board's jurisdiction over an Agency's decision in construction-claim disputes to appellate review. When appellate review is conducted, the proceeding is "on the record," and not *de novo*, Ms Clithero said. Therefore, the Board's review is limited to issues that were raised during the original appeal. Since Question (j) was not raised when Winterset made its original appeal to the Agency's Director of Program Development, Winterset is barred from raising Question (j) before the Board, Ms. Clithero said.

Ms. Clithero said there is nothing in Title 19 Section 5 that allows for a *de novo* review. Section 5 only speaks of appellate review. Therefore, the review before the Board is presumed to be "on the record" and limited to reviewing the arguments made to the Agency's Director of Program Development and whether the decision he reached was "reasonable."

Ms. Clithero said Winterset is asking the Board to review and decide a "new" issue that was not raised with the Agency's Director of Program Development. Doing so would be outside the scope of appellate review, and beyond the statutory authority of the Board, she said. And even if the Board were to disagree, the request to add Question (j) is late as Winterset's motion to amend its appeal and add Question (j) was made outside the 30 days provided by Section 105.02 of the *Standard Specifications* to outline the appeal's "roadmap" before the Board, Ms. Clithero said.

**Following the hearing, which lasted about 50 minutes, on a motion by Mr. Marro seconded by Mr. Bucknam, the Board at 11:22 a.m. unanimously voted to enter into executive session to deliberate.**

Mr. Zicconi and Mr. Viall were invited to attend the executive session.

**At 11:56 a.m. the Board exited executive session.**

## **2. OLD BUSINESS**

### ***2.1 Review Status and Plan Assignments for Pending Cases***

The Board reviewed the pending case spreadsheet. No new or assignment changes were necessary.

### ***2.2 Fall Public Hearings***

The Board's six fall public hearings will begin on October 24 in Brattleboro and continue through November 15 in Montpelier. Two Board members have been scheduled to attend each hearing. Mr. Zicconi asked Board members that if they plan to attend any hearing for which they are not scheduled to please alert him in advance so that the Board does not begin the hearing without them.

## **3. OTHER BUSINESS**

### ***3.1 Round Table***

No Board members had anything to discuss.

## **4. ADJOURN**

**On a motion by Bucknam seconded by Mr. Marro, the Board unanimously voted to adjourn at 12:01 p.m.**

Respectfully submitted,

John Zicconi  
Executive Secretary

**Next Board Meeting:  
December 6, 2012 at 9:30 a.m.  
AOT 2<sup>rd</sup> Floor Conference Room**