VERMONT TRANSPORTATION BOARD MEETING
JANUARY 17, 2013

Board Members Present:
Timothy Hayward, term expires 2/28/2013
Robin Stern, term expires 2/28/2015 (by telephone)
Charles Bucknam Jr., term expires 2/28/2013
Wesley Hrydziusko, term expires 2/28/2015

Board Members Absent:
Maurice Germain, Chairman; term expires 2/28/2014
Nick Marro, term expires 2/28/2013
James Fitzgerald, term expires 2/28/2015

Others Present:
John Zicconi, Executive Secretary
Toni Clithero, Assistant Attorney General
Richard Gadbois, Esq
Shawn Teague, Property Owner
Kevin Oddy, VTrans Legal Program Administrator
Tracy Wood, VTrans Legal Staff
Jeff Blanchard, VTrans Right-of-Way Agent
Robert Hall, VTrans Utilities Project Supervisor
Craig Keller, VTrans Utility & Permits Division
Helena Gardner, Legislative Council
Dan Dutcher, Assistant Attorney General
Bill Rice, Assistant Attorney General
Theresa Gillman, VTrans Utilities and Permits
John Kalish, Rutland Commons
Blair Enman, Enman Kesselring Consulting Engineers

Call to Order:
Acting as Chair, Timothy Hayward called the Thursday, January 17, 2013 meeting to order at 9:30 a.m., which was held in the AOT 3nd Floor Conference Room at One National Life Drive Montpelier, VT.

1. NEW BUSINESS

1.1 Farm Crossing, Legislative Update from Helena Gardner

Ms. Gardner said she drafts legislation for lawmakers, but that she is not sure there will be legislation related to private railroad crossings this session. A number of problems have been identified, and lawmakers want to find a solution, but that does not necessarily have to entail legislation, she said.

Ms. Gardner said statute is different for public railroad crossings vs. private railroad crossings. In 2007, the Legislature created a study committee to look into issues related to so-called farm crossings. The statute was enacted in 1849, but it contains no actual definition of farm crossing. Many railroads built in the 1800 bisected farms. The 1849 statute crafted a limited right as a farm crossing, which was a way to mitigate damages railroads would have to provide farm owners.

Old case law dating to the late 1800s and early 1900s tend to say the right to receive a farm crossing exists as of the time the railroad is built. Such a law would allow a landowner to request a farm crossing, Ms. Gardner said. The Board has statutory authority as of 5 V.S.A. Section 3640 to step in when the "plan, manner or number" of farm crossings cannot be agreed upon by the railroad and land owner. What is unclear is whether the statute is

meant to rule only at the time a railroad is built, or whether it has implications years later as well. Ms. Gardner said she cannot provide advice on the distinction.

Mr. Hayward asked what the Legislature is trying to clean up now?

Ms. Gardner said she believed the 2007 study committee was put together after some landowners wanted the right to cross a railroad but their property currently does not have land that is in agriculture, but their deed contains only a farm crossing. The question, Ms. Gardner said, is what does that mean for them if the only way they can access their home is over a farm crossing?

There may also be landowners who do not have a farm crossing stated in their deed, but still need to cross a railroad to get to their property, as well as situations where land was once in agricultural use but now is a subdivision and the only access is over an old farm crossing. In this case, the railroad can make a case that the farm crossing is overburdened now, Ms. Gardner said.

Mr. Dutcher said this issue is complicated and likely has more questions than answers. Railroad practice has been to issue a license for people to cross the tracks, but a license is by nature revocable, which makes some people, including bankers and mortgage lenders, nervous.

Mr. Dutcher said one issue is if there is no longer a farm, but a subdivision instead, the land owner may have no right to cross based on either statute or what the railroad historically purchased. Railroads are a bit like limited access highways, he said. They don't want people going back and forth because it is difficult to run a railroad under those conditions. So if people cross at the pleasure of the railroad, the railroads tend to write the licenses in a very one-sided way.

The State is involved in this discussion because Vermont owns some 300 mile of railroad, Mr. Dutcher said.

Ms. Gardner said there is federal law that could impact the suite of possible legislative options because the feds preempt certain safety issues and actions that can interfere with railroad operations. The feds look at these things on case-by-case basis, she said. In some cases, federal law allows the State to establish a railroad crossing, but in others the location can be deemed by the feds not to be OK due to specific issues determined to interfere with railroad operations.

Where the Board can get pulled into these issues is under 5 V.S.A. Section 3639, which states the Board can be petitioned by the railroad to close a farm crossing even if landowners disagree with the closing, Ms. Gardner said. Also, if a person is aggrieved by the closing of a farm crossing, a property owner can come to the Board for relief.

If a landowner refuses to enter into a license with the railroad, the railroad would first have to come to the Board to have the crossing closed, Mr. Dutcher said. This would have to happen before going to court or the railroad putting up barriers, he said.

Mr. Dutcher said the State is not aware of any case where a railroad has denied a land owner access, but such access may not always be where the landowner wants it. Also, the railroad dictates what is in a license, and may require a landowner to have insurance that names the railroad, and that State if owns the line, to indemnify the State and the railroad even if the State or railroad is negligent. So if there is an accident, neither the State nor the railroad can be held negligent.

Mr. Dutcher said on Homes Road in South Burlington someone did have trouble selling a house due to finance issues because they did not have a private crossing agreement with the railroad. The property owners sharing the crossing could not agree on things – such as cost of insurance, maintenance, etc. – so the property owner was stuck. But so far where there is a license, the banks and mortgage companies to date have been OK.

Ms. Gardner said since the licenses tend to be one-sided, and they can have clauses stating the license can be terminated at will by the railroad, they can make banks and mortgage companies nervous.

Mr. Dutcher said the State and legislative leaders met recently because VTrans wanted to get some clarification as to what a farm crossing is. Working with the railroads, there are situations where a crossing has become over burdened and people are refusing to sign a license. As statute reads now, the State or the railroad would have to come to the Transportation Board to have a crossing closed. So the State wants to know what the definition of a farm crossing is, as well as what the definition of a farm is for this purpose.

Mr. Dutcher said it is unlikely everyone would ever agree on what the definition of a farm is for the purpose of a farm crossing – is having a garden good enough? How about a one-tree orchard? – and that the Board may someday be asked to figure that out.

Also, Mr. Dutcher said there has been discussion about possibly having the railroad grant landowners an easement so that the crossing is permanent and the landowners have property rights that run with the land. This kind of agreement tends to be preferred by banks and lenders, but the State and the railroads don't tend to favor this approach.

Mr. Dutcher said the State has looked to other states and the federal government for guidance, but other states tend to have agreements between railroads and landowners that either went through formal condemnation or there was a land purchase in lieu of condemnation, and these agreements spell things out more clearly than does Vermont.

Mr. Dutcher said he would like to have the Legislature at least define a farm, but he does not believe that is likely to happen.

Mr. Dutcher said one question is would the State and the railroads be OK granting a license that looks like an easement which would run for 30+ years? This would put banks more at ease. And if this can be done, maybe legislation is not necessary. But this would require that the railroads give up some authority and power.

Ms. Gardner said that in Vermont there are 305 miles of state-owned railroad track and an additional 295 miles of private railroad track. Discussion so far has been only regarding state-owned track.

1.2 Approve the Meeting Minutes of December 6, 2012

On a motion by Mr. Hrydziusko seconded by Mr. Bucknam, the Board unanimously voted to approve the minutes of the December 6, 2012 meeting with minor changes.

1.3 TB-392 Teague Permit Appeal

Mr. Hayward reminded the Board that he and Mr. Zicconi conducted a site visit prior to the meeting.

Mr. Gadbois, attorney for the Teagues, said that the Teagues' complaint is based on the fact that some kind of easement by implication was found by the Hearing Examiner in favor of the State.

Mr. Gadbois said it would be impossible for the Teagues to construct a driveway further south along Route 108 from where the State said it would approve a joint driveway because the terrain is "all ledge." He said they were looking for a curb cut in the middle: just about halfway between where the ledge exists and the current driveway is located.

Mr. Gadbois said the Teagues bought the property from its previous owner, Fred and Beverly Nichols, and granted them a life estate. They are both still alive, so the curb-cut issue has not yet risen to a "critical state." While Jay Nichols, son of Fred and Beverly Nichols, is willing to allow his parents to use the driveway across his land, he is unwilling to give anyone else a right-of-way over his land. He has not even legally given such a right to his parents, Mr. Gadbois said, but he allows them to use the road and driveway that currently exists.

Should Mr. Teague need occasional access, Jay Nichols would unlikely complain, Mr. Gadbois said. But he would not want too many vehicle trips to take place. Also, Jay Nichols is unwilling to share a newly located driveway in a different location to the one he has now even though VTrans has said it would allow a new, joint-use access so long as the existing access in front of Jay Nichols home was eliminated.

The Hearing Examiner found that the Teague's possess an implied easement over Jay Nichols property even though his parents did not reserve for themselves a right-of-way when they conveyed the property to their son back in 1997, and the Teagues do not have anything in their deed that shows they have such a right-of-way to use the existing driveway across Jay Nichols' property.

Mr. Gadbois said he found nothing in the laws of Vermont that condone a so-called implied easement in such cases. All of the cases he found involve a subdivision of one kind or another, he said. There is no question that the Supreme Court has extended the rights of those in a subdivision a right to use all the roads within that subdivision, especially those that are cited in the plat, Mr. Gadbois said. But all such cases involve roads spelled out in a plat, he said. In this case, there is no subdivision, and no plat. As a result, Jay Nichols does not believe he should have his land "taken" and be forced to share his driveway with the Teagaues.

Mr. Gadbois called the Teagues' request for a second driveway "not dangerous."

Mr. Gadbois said the last two paragraphs of the Hearing Examiners report, which discusses the implied easement, are conjecture. No such testimony was put into evidence, he said, and that the Hearing Examiner had no right to rely on this conjecture in the manner in which he did. He only had the right to rely on the evidence that was presented by either party, he said.

Mr. Hayward asked when the Teagues bought the property if they also acquired whatever "rights" ran with the property and land? Mr. Gadbois said he assumed so, taking into account the life estate.

Mr. Hayward asked when Jay Nichols bought the property from his parents if there were any requirements that there always be access to what is now the Teagues' property so that the land would not be land locked, and if there were any State or the municipal requirements to do so? Mr. Gadbois said no permits required Jay Nichols to ensure right-of-way to the Teague property. Mr. Hayward then asked if there was a presumed right-of-way using the driveway? Mr. Gadbois said there is no such right-of-way in the deed.

Mr. Bucknam asked if the Teagues own other property to the south of the property they bought from Fred and Beverly Nichols? Shawn Teague answered yes, and explained that he owns the property adjacent to the south, where he has a house.

Ms. Clithero said VTrans discussed the possible creation of a new, shared driveway with the Teagues constructed at the location where they applied for a second driveway, but that Jay Nichols objected as he did not want to grass over his current driveway. The Agency, as a result, was unable to issue an 1111 permit for the new, second driveway because it did not meet the safety guidelines spell out in the Agency's access-management guidelines which call for 425 feet between driveways if a road has a posted speed limit of 50 mph.

The newly proposed driveway is too close to the existing driveway – only about 224 feet – and that was the basis for the Agency denying the Teagues' application, Ms. Clithero said. The Teagues appealed, she said.

Ms. Clithero said that Mr. Gadbois prior to today's hearing admitted to all the findings submitted by the Agency, and since this case is an appeal of the Hearing Examiners report these admissions should put an end to the inquiry because this is an appellate review under 19 V.S.A. (5)d(7) and the Board in such an appeal must defer to a reasonable decision made by the Hearing Examiner. There is little debate as to whether the findings are reasonable since Mr. Gadbois admitted to them, she said.

Ms. Clithero called the Teagues' argument regarding an implied easement a "red hearing" because the question being raised as to whether or not there was basis in Vermont law for an implied easement is irrelevant. That issue fundamentally misconstrues the enabling statute in this case (19 V.S.A. Section 1111) which defines reasonable access, she said.

Ms. Clithero said the statute is a clear mandate from the Legislature that VTrans must limit the number of conflict points along the State Highway System, thus the Agency is required to have the minimum number of conflict points for the purpose of maintaining safety on the highway.

Ms. Clithero said subsection (f) of 19 V.S.A. Section 1111 states that as development occurs along a State Highway such as Route 108 that the Agency has specific authority to require landowners to share access and build frontage roads if a multiple-unit development were proposed.

The Agency has included this mandate in its access-management guidelines, which call for specific site distances between driveways, Mr. Clithero said. These standards are put in place to protect safety as well as to also provide landowners reasonable access to their property, she said.

Ms. Clithero said reasonable access means maintaining the minimum number of connections to the State Highway System – whether they are direct or indirect – that also provides landowners access and egress to their property. What the Teagues are trying to do, Ms. Clithero said, is define reasonable access as what is reasonable to them. Allowing this would not be a workable way of running a State Highway System, and is not the statutory definition of reasonable access, she said. So the key point for the Board to consider is that reasonable access is not defined as what is reasonable for the Teagues, or for anyone else along the state highway system. Instead, it means reasonable under the statute and guidelines. And the Hearing Examiners' report spells out that the site distances proposed do not comply with the guidelines for a 50 mph state highway, she said.

Ms. Clithero showed the Board an aerial photo from 1995 – a time before Beverly and Fred Nichols subdivided land to their son Jay Nichols – that showed the only access to Route 108 from both the current Jay Nichols property and the Teague property was through Jay Nichols property. Also, there was no Jay Nichols house at the time. She said that Mr. Gadbois was the attorney who represented all the Nichols, the Teagues and other property buyers (the Raymonds) who were involved in land transactions regarding property that was once owned by Fred and Beverly Nichols.

Everyone used the same lawyer – Mr. Gadbois – who drafted all the deeds, Ms. Clithero said. And the only deed which indicates a specific access was the deed to the Raymonds, who bought the northern most part of what once was a large tract of land owned by Fred and Beverly Nichols and who are not involved in this dispute. In that deed, Fred and Beverly Nichols reserved the right to do logging. But all deeds associated with property that once belonged to Fred and Beverly Nichols, including the Teague deed, contains a clause that states the property comes "with all the privileges and appurtenances thereof," Ms. Clithero said.

Ms. Clithero said the Agency's position as to whether there is an "easement by necessity" that runs with the Teague property goes back to this language. In other words, Jay Nichols did not acquire a right to exclude access to the Teague property, she said. Even though there was no conveyance of any particular right-of-way, whatever access were on the ground and were preexisting before Jay Nichols purchased his property remain unless there is something explicit in the deed that takes that access away. There is nothing in Vermont case law that would go against this, she said.

Ms. Clithero said that when Fred Nichols sold the parcel to the Teagues there was no basis to assume that he intended to land lock the parcel.

Despite this, the State believes the Hearing Examiners' decision is not really founded on an easement by necessity, Ms. Clithero said. The issue in this case is really about whether there is reasonable access from Route 108 to both the Jay Nichols and the Teague properties. What the Hearing Examiner found is that the need for access was obvious when Fred and Beverly Nichols sold the property to the Teagues, and that the access was preexisting because it was obvious that there was need for access to the highway.

The Hearing Examiner also found that even if there were some exceptional concerns here – which there are not – that would justify a second access, the safety concerns expressed by VTrans were enough to deny approval of the permit, Ms. Clithero said.

Ms. Stern asked if there is any other access available – reasonable or unreasonable – besides this shared driveway? Ms. Clithero said there is no other roadway other then a logging road that traverses a considerable distance around the back of the property.

Ms. Stern asked if the State takes into consideration whether a parcel is land locked, or does it simply look at the requested entrance? Mr. Keller said the State does look at the entire situation that surrounds the parcel and other potential access in lieu of access to the State Highway.

Ms. Stern said Fred and Beverly Nichols have been using the existing access for over 15 years (since 1997) over the Jay Nichols property. What would happen and how does the Agency deal with a situation where the landowner tried to work things out, even went to court, but there is no other access? Ms. Clithero said the question is speculative. But with respect to this situation, there are circumstances on the ground that point to the fact that Jay Nichols acquired a shared drive, not a private one. And since the Teagues own contiguous property and have a right-of-way along a logging road, they could build a driveway elsewhere. Regardless, the proposed access is some 200 feet shy of the State's minimum required distance away from an existing driveway for safety along Route 108 in this location, Ms .Clithero said.

Mr. Hayward asked if the Agency can require Jay Nichols to agree to share a curb cut with the Teagues? Mr. Clithero said she did not believe that is the case. She said statute allows the Agency to require as a condition of a development permit a shared access. This would happen at the time the landowner applies for a development and must obtain a 19 V.S.A. Section 1111 permit.

Here, Ms. Clithero said, what was once the entirety of the Fred and Beverly Nichols property is very old and probably predated Section 1111, while the Jay Nichols access is also pre-existing. If Fred and Beverly Nichols had come to VTrans before subdividing their land – which they probably should have – the Agency could have required the shared access. But no one approached the Agency, Ms. Clithero said, which does not have the power to police every land sale that occurs.

What the Agency can do, Ms. Clithero said, is not grant a permit for a new curb cut, which it has done in this case. The onus is then on the private landowners to figure out between themselves how access will work – even if that process involves going to court. The Agency cannot take on the private-property disputes of all the private landowner along the State Highway System, she said.

Mr. Hayward asked what would happen if the landowners went to court and the court says no, there is no shared access? Would the Agency then be in a different situation? Mr. Clithero said no. The Agency still has to work within its guidelines for safety. The public interest in having safe travel along the State Highway System takes precedence over whether someone has to drive the long way around, she said. "Reasonable" is defined by what is safe for the traveling public, she said.

Ms. Clithero said the landowner's cause of action may be to file suit against the attorney for drawing up a deed that land locks them, or against each other for buying property that they thought has a right-of-way interest. The State, she said, does not get involved in these kinds of property disputes.

Mr. Bucknam asked if an access could be constructed on the Teagues' other land, which runs contiguous to the land they purchased from Fred and Beverly Nichols? Shawn Teague said both wetlands and ledge prevent building a driveway on his other plot of land.

Mr. Gadbois said the property is not landlocked. It may be access locked, he said. But it is not land locked as it contains hundreds of feet of frontage along Route 108.

Section 1111 has been in effect since 1958, Ms. Clithero said.

Mr. Hayward thanked the parties for attending, closed the hearing, and told the parties the Board would issue a written decision in the near future.

1.4 TB-325 Rutland commons, Route 7 Limited Access

Blair Enman and John Kalish, who represent Rutland Commons, told the Board that they were here because the January 2011 permit the Board issued the Town of Rutland that allows a break in limited access along Route 7 for the use of Rutland Commons is due to expire on January 26, 2013.

Mr. Kalish told the Board that the recent downturn in the economy made it financially unreasonable to construct the Rutland Commons development within the timetable he originally planned, but now that the economy is recovering his company plans to construct the development within the next year or two.

Mr. Kalish said he wanted to know how he could acquire an extension of the Board's permit for a break in limited access along Route 7 so that he could construct the Rutland Commons Development. Mr. Zicconi said the Town of Rutland, which by statute is the permit holder, must apply for an extension by January 26, 2013, and that the Board could then consider granting an extension.

Filing a request by this date would assure that the Board could grant an extension rather than have to issue a new permit, Mr. Zicconi said.

Mr. Kalish then asked representatives of VTrans if they had any issues with him asking for an extension? Mr. Keller said the Agency would have to review his application, but should the Agency find there have been no "significant changes" to the situation – such as traffic volume and safety concerns – along Route 7 that the Agency likely could support an extension.

Mr. Kalish and Mr. Enman thanked the Board for its time, and said they would discuss with Rutland Town the need to apply to the Board for a two-year extension before the January 26, 2013 deadline.

1.5 TB-399 Northeast Kingdom Byway

Mr. Bucknam informed the Board that he and Mr. Zicconi on January 7, 2013 held a public hearing at the Kingdom Café at Burke Mountain Resort to take testimony regarding the Vermont Byways Council's recommendation to designate Route 5 from St. Johnsbury north to Route 114, and Route 5A to Newport and Derby Line, as the Northeast Kingdom Byway.

Mr. Bucknam prepared a one-page report, but also told the Board that 10 people – including representatives from the Lyndon and St. Johnsbury chambers of commerce, the Northeastern Vermont Development Association, and the Northeast Kingdom Travel & Tourism Association – attended the hearing. All attendees were in favor of establishing the byway. No one spoke against it.

Mr. Bucknam, who acted as the public hearing officer, recommended that the Board approve the byway.

On a motion by Mr. Hrydziusko seconded by Mr. Bucknam, the Board unanimously voted to approve the byway and instructed Mr. Zicconi to write a letter to the Byways Council informing it of the Board's decision.

1.6 Executive Secretary Update

Mr. Zicconi reminded the Board that the terms of Board members – Mr. Bucknam, Mr. Marro and Mr. Hayward – expire in February and that these Board members, if they wish to be reappointed, must write a letter to the Governor requesting such reappointment.

Mr. Zicconi informed the Board that it has expended 65 percent of its budget for Fiscal Year 2013 even though 50 percent of the fiscal year remains. The Agency of Transportation is aware that it underfunded the Board in the budget, and has agreed to transfer the necessary funds to ensure the Board can function for the entirety of FY13.

Mr. Zicconi informed the Board that a transportation contractor – Luck Brothers, Inc. – had chosen to take a contract dispute with VTrans directly to Superior Court instead of to the Board, as is spelled out in statute. The Agency is opposing this legal maneuver, and has asked the court to dismiss the case. A court hearing is scheduled for January 22. Mr. Zicconi said he would attend the hearing and report back to the Board at a future time.

2. OLD BUSINESS

2.1 Review Status and Plan Assignments for Pending Cases

Mr. Zicconi informed the Board that VTrans has been unable to reach a compensation agreement with at least two landowners near the Morrisville/Stowe Airport, and that the Board must appoint hearing officers for a possible compensation hearing scheduled for March 15, 2013. Mr. Hayward said the Board would do that at its February meeting.

2.2 Fall Public Hearings, report discussion

The Board, via email prior to the meeting, approved the final draft of its annual report to the Legislature. Mr. Zicconi at the meeting presented the Board with a proposed layout and design for the Board's consideration. The Board approved the layout and design, and Mr. Zicconi told the Board he would format the approved copy into the layout in time to present the report to the Legislature on January 24.

3. OTHER BUSINESS

3.1 Round Table

No Board members had anything to discuss.

4. ADJOURN

On a motion by Mr. Bucknam seconded by Mr. Hrydziusko, the Board unanimously voted to adjourn at 12:10 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary

Next Board Meeting:
February 21, 2013 at 9:30 a.m.
AOT 3rd Floor Conference Room